
**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

**Auda
(Respondent/Appellant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Sabine Knierim
Case Nos.:	2017-1068 & 2017-1070
Date:	27 October 2017
Registrar:	Weicheng Lin

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York issued Judgment No. UNDT/2017/006 in the case of Auda v. Secretary-General of the United Nations on 1 February 2017.
2. On 3 April 2017, the Secretary-General filed an appeal of the above-referenced Judgment. This case is registered as Case No. UNAT-2017-1068. On 5 June 2017, Mr. Hesham A. Auda filed an answer.
3. Separately on 3 April 2017, Mr. Auda filed an appeal of Judgment No. UNDT/2017/006, to which the Secretary-General filed an answer on 5 June 2017. This case is registered as Case No. UNAT-2017-1070.

Facts and Procedure

4. At the material time, Mr. Auda was a Principal Officer at the D-1 level with the Department for General Assembly and Conference Management (DGACM). The facts as found by the Dispute Tribunal read as follows:¹

... The Applicant submitted a complaint by email dated 19 April 2012 to Mr. Shaaban [then Under-Secretary-General (USG), DGACM], alleging that Mr. Baumann [then Assistant Secretary-General (ASG), DGACM] had engaged in prohibited conduct under [Secretary-General's Bulletin] ST/SGB/2008/5 [Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority]. Specifically, the Applicant submitted the following allegations:

- a. In a meeting held on 29 September 2011, Mr. Baumann stated that a comment made by the Applicant was "ridiculous";
- b. In an email dated 22 November 2011, Mr. Baumann referred to the Applicant as "difficult";
- c. Mr. Baumann sent an email to the Applicant on 15 April 2012, copying Mr. Shaaban and other staff members, referring to the Applicant's alleged "contrariness," "divisiveness" and "deceptiveness";
- d. Mr. Baumann acted in bad faith and with the intent to obscure the status and official functions of the Applicant by instructing or directing that his name and title be omitted from a DGACM organizational chart; and

¹ Impugned Judgment, paras. 5-26.

e. Mr. Baumann referred to other staff members as being involved in a “racket” in relation to alleged misuse of overtime procedures.

Appointment of the first [Fact-Finding Panel (FFP)] in 2012

... On 27 April 2012, Mr. Shaaban, as the then USG/DGACM and responsible officer receiving the complaint, appointed the first FFP to investigate the allegations, which was comprised of two investigators, Ms. MN and Mr. GK, and a note taker.

template should have been amended to reflect the correct position that the investigation was being conducted under the auspices of DGACM and not OHRM.

Mr. Auda's filing of a ST/SGB/2008/5 complaint on 19 April 2012 and Mr. Gettu's decision of 8 September 2015; it found this delay to be a violation of the promptness requirement of ST/SGB/2008/5 and Mr. Auda's right to be informed of the status of the first FFP. The UNDT determined that the harm that the long delay caused to Mr. Auda's reputation and his general well-being, including the stress and anxiety that Mr. Auda suffered were "plainly evidenced" by his statements to that effect and by his demeanor and body language at the hearing. Consequently, there was "no need for verification of such psychological impact by a psychiatrist or psychiatric therapist".² The Dispute Tribunal awarded Mr. Auda USD 15,000 as compensation for the harm that he suffered as a result of the breaches of his fundamental due process rights and human rights.

7. Both parties appeal Judgment No. UNDT/2017/006.

Submissions

Case No. 2017-1068

The Secretary-General's Appeal

8. The Secretary-General submits that the Dispute Tribunal erred by issuing separate judgments following consolidated proceedings and awarding compensation twice for the same alleged harm. The Dispute Tribunal erred in law in concluding that Mr. Auda's application was receivable. There was no administrative decision on which the UNDT was competent to pass

9. Alternatively, if the Appeals Tribunal considers Mr. Auda's application to the

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24. In the challenged Judgment, the UNDT ruled that:⁶

... Section 5.17 of ST/SGB/2008/5 requires the report of a fact-finding panel to be submitted to the responsible official normally no later than three months from the date of the submission of the complaint. The Applicant has a contractual right to have his complaint addressed timeously and properly. If the [Dispute] Tribunal were to accept the proposition that a staff member is unable to challenge the delay in resolving claims under ST/SGB/2008/5 until an outcome of the complaint is finalized, this could result in further delays and an unacceptable barrier to justice. Precluding staff members to challenge inordinate delays into their complaints of prohibited conduct would foster impunity and allow the Organization to run the clock on an investigation as a possible means to intimidate or tire complainants, as well as contribute to the depletion of the memory of witnesses and the preservation of evidence.

The first instance Judge went on to state:⁷

... In light of the cited jurisprudence, the [Dispute] Tribunal finds that the failure of the first FFP to timely conclude its investigation and its failure to render a report, as well as the Organization's failure to promptly conclude the formal process, is a contestable administrative decision and the application is therefore receivable.

25. The UNDT had clearly a false understanding of our jurisprudence. The Appeals Tribunal recalls that:⁸

... the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce direct legal consequences' affecting a staff member's connection of appointment with the Organization.

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29. However, this is not a case where the Administration altogether failed to respond to Mr. Auda's request; rather, it did respond, although with inordinate delay that presents a sorrowful picture of functioning on the part of the Administration. Specifically, on 27 April 2012, the former USG/DGACM appointed the first FFP to investigate his complaint, which interviewed Mr. Auda and other witnesses. Later on 18 December 2014, following a series of problems regarding the composition of the FFP and personnel matters, DGACM informed Mr. Auda that the first FFP was unable to conclude its report and on 13 March 2015 appointed a second FFP to continue the investigation. Finally, on 26 June 2015, the second FFP submitted its report to the USG/DGACM, who subsequently on 8 September 2015 informed Mr. Auda that he had closed the case, because, after having reviewed this report and the supporting information, he had concluded that the former ASG/DGACM's "conduct in the context of [Mr. Auda's] complaints [did] not violate the provisions of ST/SGB/2008/5".

30. Therefore, such a step is preliminary in nature and irregularities in connection with that decision, including alleged delay in reaching that decision, may only be challenged in the context of an appeal after the conclusion of the entire process.¹² This final administrative decision that concludes the compound administrative process in administering the staff member's complaint is the only challengeable one and absorbs all the previous preliminary steps.

31. In a similar vein, the Appeals Tribunal has ruled that even an initial decision not to respond to a staff member's complaint, or not to constitute a fact-finding panel under ST/SGB/2008/5 "is rendered moot by the constitution of said panel",¹³ ĩr when he/she is notified of the outcome of its preliminary review of his/her complaint.¹⁴

Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2011-UNAT-177 (finding that the absence of a response by that Agency to the staff member's request for hazard pay constituted an appealable administrative decision as it was an implied unilateral decision with direct legal consequences).

¹² *Birya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-562, para. 47; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 36. See also *Masyllkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18.

¹³ *Masyllkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18.

¹⁴ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-294, para. 19.

32. The point at issue in the present appeal, that is, Mr. Auda's challenge to the decision of the first FFP to "delay, withhold, and not submit its report on the investigation and the records of the investigation", ceased to exist when the USG/DGACM on 8 September 2015 notified him of the outcome of the second FFP's preliminary review of his complaint.

33. From the foregoing, we hold that the Dispute Tribunal's conclusion that Mr. Auda's application regarding the first FFP was receivable is without a legal basis, as is its consequent award of compensation based on this finding. The Dispute Tribunal erred on a question of law and exceeded its competence in accepting Mr. Auda's application as receivable.

34. This does not mean that Mr. Auda is without remedy. In fact, his claim for damages and compensation allegedly caused by past illegalities was the matter before the UNDT in another case (Case No. UNDT/NY/2015/062), and his appeal related to that case was addressed by the Appeals Tribunal during the 2017 Fall Session.¹⁵

35. Indeed, such issues, including the delay and irregularities in the preliminary stage of the process as well as the grievances Mr. Auda asserts in respect of alleged due process breaches, relate to Case No. UNDT/NY/2015/062 rather than the instant case, which was limited to the decision of the first FFP to "delay, withhold, and not submit its report on the investigation and the records of the investigation". Ultimately, once the investigation has been concluded, its outcome and administrative consequences, as well as any related acts or omissions, can be challenged in their own right via management evaluation and before the Dispute and Appeals Tribunals.

¹⁵ Auda v. Secretary-General of the United Nations , Judgment No. 2017-UNAT-787.

Judgment

36. The Secretary-General's appeal is granted and Judgment No. UNDT/2017/006 is vacated.
37. Mr. Auda's appeal is dismissed.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)