



Judgment No. 2022



JUDGE GRAEME COLGAN , PRESIDING .

1. Elmira Ela Banaj

THE TED AT A EA TR B A

Judgment No. 2022-UNAT-

THE TED AT A EA TR B A

THE TED AT A EA TR B A

28. The Secretary-General also submits that Ms. Banaj has failed to demonstrate that the RR's reassignment decision was unlawful or

THE TED

THE TED AT A EA TR B A

Judgment No. 2022-UNAT-

THE TED

48. The Agency's general power to assign duties to staff members set out in Staff Regulation 1.2(c) is, while broadly discretionary, not an unlimited power able to be resorted to irrespective of the circumstances. Among limitations on its exercise, it must be used for proper purposes and its application must not be wrongly motivated. In view of the existence of express powers (placement on administrative leave) (e)- Tdv -1.716 (g)1.1 (l)6.4 (y)10.1 ((s)11.1 (

25.

leave (presumably on pay) for that same period and having to advise those she dealt with that she was on leave from her job.

52. For the foregoing reasons, we conclude that the power purportedly invoked by the UNODC to re-assign Ms. Banaj's duties was neither the specific, conditional and limited power available under the Framework, nor a proper exercise of the general power undovwv1d (UN)Tj 0 T

56. Just as it was the UNDP's decision whether to place Ms. Banaj on administrative leave pending the investigation and to consider the alternative measure of duties' reallocation, decisions relating to what was to happen pending the investigation undertaken remained with the UNDP. While the UNDP could (and probably should) have consulted with the UNODC before it (UNDP) made such a decision, what happened in practice was the reverse of this: the UNODC consulted with the UNDP before it (UNODC) purported to re-assign Ms. Banaj's duties

57. Even if, therefore, the decision taken 1 (s.)1.3 (B)4.8P EMC 3Oo nisi 4 (o)-8.4 ((D))7.8 (r)22o i7o

undeDC00337 [(i)-](p)5 (n)7.1cucng65s-8onisuco(4 5s)n bo1sis7(s)d

legal professional (or attorney-client) privilege which may be either asserted by the client (the Agency), or waived so that it may be disclosed. But to purport to waive privilege in part in litigation so that while the Dispute Tribunal sees the documents the other party does not is wrong in principle and abhorant to ideals of transparent and even-handed justice between parties. Either privilege was asserted by the Secretary-General (in which case the privileged evidence should not have been seen or considered by the UNDT or by Ms Banaj) or, if waived by the Secretary-General as it must have been to have allowed its release to the UNDT, it should have been disclosed to Ms Banaj as well as to the UNDT. In those circumstances, the Appellant should have had an opportunity to address it in that forum.

61. The admission and consideration of this evidence also breaches the fundamental legal principle of natural justice known as , the obligation on a decision-maker, literally, to 'hear the other party' and includes the right of each party to a fair hearing and to respond to evidence against them.

62. We consider that the UNDT was not empowered either to so admit evidence or then to rely upon it in deciding the case before it. Article 18(4) of the UNDT's Rules of Procedure is the only provision of the UNDT's Statute or those Rules of Procedure that appears to touch on questions of such evidence. It provides:

... The Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

63. That is a rule that allows for the preservation of the confidentiality of evidence beyond the Tribunal and the parties to the case before it. It does not permit one party to adduce evidence to the Tribunal but to with hold that evidence from the other party. Further, the conditions for its exercise are set out and limited to instances of security or other exceptional circumstances. There is no suggestion that communications between the UNODC and the UNDP involved security issues warranting their secrecy from others. Privileged communications about legal advice and whether these should be disclosed are not exceptional circumstances, as they probably exist in most, if not all, such cases and can be dealt with under the provisions in the UNDT's Rules of Procedure relating to directions for the production of documents.⁶

⁶ Article 18(2) & (3) the UNDT Rules of Procedure.

THE TED AT A EA TR B A

Judgment No. 2022-UNAT-1202

Judgment

65. The appeal is allowed and Judgment No.UNDT/2021/030 is set aside As to remedies for the unlawful re-assignment of the Appellant's duties