Judgment No. 2022-UNAT-1231

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case Nos.:	2021-1520
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Noam Wiener & André Luiz Pereira de Oliveira

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Sergio Baltazar Arvizú Trevino (the Appellant) against Judgment No. UNDT/2020/211[1], rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 18 December 2020 (the Impugned Judgment). The Impugned Judgment dismissed his application challenging the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC), dated 16 January 2020, not to convene an investigation panel to investigate his harassment complaint filed on 24 July 2019 (the contested decision).

2. For the reasons set out below, we grant the appeal in part.

3. Mr. Arvizú Trevino served with the United Nations from 1 January 2006 as the Deputy Chief Executive Officer (CEO)/Deputy Secretary of the United Nations Joint Pension Board (UNJSPB) and elected to serve as the CEO/Secretary of UNJSPB as of 1 January 2013. He was reappointed to his second term as CEO/Secretary of UNJSPB on 1 January 2018.

4. On 5 November 2018, the Appellant was notified of the decision of the Secretary-General to terminate his contract on health grounds.

5. On 7 January 2019, he separated from service.

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...

In your complaint of 24 July 2019, you allege that the staff members identified in your complaint have subjected you to harassment, "which is on-going, resulted in your

17. Upon the USG/DMSPC's review, she found seven of the named staff members whose conduct was

is a member organisation of the UNJSPF, where the Appellant served as its CEO and Secretary to the Pension Board, and ILO's internal audit function is fully independent and may conduct a transparent, predictable, accountable and objective investigation as the General Assembly requires in resolutions 62/228 and 62/247. As compensation, Appellant requests 2 years' net base salary for harm and damages suffered (which are still ongoing), as supported by his medical report.

22. The UNDT erred in finding the contested decision lawful. No investigation was conducted by OIOS, by the EOSG or by the USG/DMSPC of any of the difference incidents reported. The USG/DMSPC's one paragraph explanation of her decision lacked any reference to due diligence and did not provide any evidence that the individuals were staff union representatives, nor that the statements and conduct of the alleged offenders were related to the staff welfare issues. Further, her presumption without any investigation or corroboration that all perpetrators, including others who might have participated in the alleged wrongdoing but have not yet been identified, were staff representatives was highly prejudicial and unlawful. Neither the Appellant nor any of the witnesses or third parties identified in the complaint were contacted, interviewed, or asked to provide information. Her review was fundamentally flawed, contrary to the facts and in breach of the policy. The UNDT accepted as fact the Administration's submissions as well as its claims without any verification or substantiation when it indicated the statements and conduct of the offenders "appear to be in relation not the Applicant's conduct in his role as CEO/UNJSPF and therefore concerns workplace issues" and that it was "reasonable for the USG/DMSPC to determine that the status and management of the UNJSPF is a legitimate subject of concern to staff at large therefore comments made by staff representatives about the management of UNJaeo8 (o)-8.3 (nd)-6.1 ()-8.3 ((r)-7.1 (s)4.1 (o)94.5 (f)18.9 (e

evidence that two offenders

fact that two individuals attended the Pension Board's 64th session in 2017 in Vienna (but did not attend the plenary sessions of the Pension Board meetings in their capacity as elected representatives of UNJSPF) did not constitute harassment. The UNDT correctly found that the individuals identified in the complaint were acting as expected representatives of United Nations staff members. Any disputes regarding their election to such roles did not negate that they were acting in their capacity as representatives.

29. The Respondent submits that the UNDT correctly found there was a factual basis to make its decision as the entirety of the relevant evidence was presented by the parties. While the Appellant disagrees as to the legal significance of various facts, the facts are not in dispute, and thus the UNDT was able to draw legal conclusions without further investigation. In turn the UNDT did not err in not holding an oral hearing. The UNDT also correctly found that the staff engaged in speech that was addressing valid staff welfare issues and not defamation.

30. The Appellant fails to demonstrate how the attendance of two alleged "offenders" who attended a meeting of the Pension Board constituted harassment. Neither attended the plenary meetings of the Board's 64th session. They were present on the premises outside the meetings rooms. The Appellant has not demonstrated how their presence constituted misconduct. Contrary to the Appellant's claims, the UNAT did not forbid their attendance at the Pension Board meetings per UNAT Order Nos. 284 and 288[4]. UNAT held it had no competence to analyse the merits.

31. The Appellant fails to demonstrate that the UNDT erred when it found the contested decision was lawful as it was based on sufficient evidence. Nothing in the policies requires an investigation to be opened. Rather Section 5.14 of ST/SGB/2008/5 provides that upon receipt of a complaint the responsible official will promptly review the complaint or report to assess whether there are sufficient grounds to warrant a formal fact-finding investigation. In the instant case, the Administration followed this process and transparently informed the Appellant. It lawfully discharged its duty under the policy.

32. The UNDT correctly found the speech was protected from censure by the Administration. The statements were indisputably made in relation to the discussion of matters that related to the status and management of the UNJSPF. Staff Rule 8.1 affords protections to staff representatives in staff unions and applies to the elected representatives of

[4] See *supra*, footnote 3.

staff participants to the Pension Board and is reasonable and lawful that they are not censured for speaking on staff-related welfare matters.

33. The Appellant failed to dem53.6 216 (e)-145toil i Ê6 JÈÖ12 79 687.12 Tm[fa.74.5 (nlo72 (l)P.16 453C)

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37. The case raises interesting, delicately balanced, legal issues pertaining to conflict between the freedoms and rights of the staff members of international organisations, as well as to obligations of the latter towards them. It involves the Organisation's duty to provide a safe and secure work environment, to protect a staff member's good name and reputation, and to ensure that their facilities are not abused and its rules and regulations are respected.[6] Additionally, and most importantly, the present case concerns freedom of association and the degree of freedom of speech to which bodies and persons representing staff in international organisations are entitled.

Applicable legal framework

38. There is a commitment that all international organisations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. This is especially true for the United Nations, as such behaviours or conduct is contrary to the spirit

40. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, paragraph 2.1 of ST/SGB/2008/5 provides that: "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

41. Section 2.2 of ST/SGB/2008/5 adds that "[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed".

42. Section 5.3 of ST/SGB/2008/5 establishes that:

> Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

43. Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

> 5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.
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> 5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may inc2e- all o b3.3 (c)-7m (e)1.1 (1 (s)-1.h(i)3.8 (1 (s)-1)t.7 (3

44. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and, in Section 5.17, the final report of those proceedings is referred to as follows:

> The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence [...]. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

45. Section 5.18(a)-

47. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organisation itself, and it is not legally possible to compel the Administration to take disciplinary action. The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to under-4.9 (1 (91r(u)-5 (

52. As we have stated in *Obdeijn*[16]:

> the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

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53. Hence, in compliance with the above stated principles of judicial review, an administrative decision which adversely impacts on a staff member's status must be reasoned in order for the Tribunals to have the ability to h 4 (i)2.5 (ty)3.4 t3.26lommfs.7 (a)2do1t1.5 (o)-vec

- 22 July 2015: Cartoon entitled "Sergio stay on your side" published on a blog, the author/administrator of whom is a former staff member, according to the Appellant.[18]

- 29 July 2015: Blog entry on Pension Board meeting which states as follows: "Given the dire state of staff-management relations in the Fund, support was needed to prevent retaliation against whistleblowers, which, he stressed, was prohibited by the UN. He called for the Fund management to be held accountable, brought 'back in line, to ensure regulations are upheld, oversight reinforced, violations stopped, honesty restored, labour regulations respected and whistleblowers protected.'"[19]

- 29 July 2015 : Blog entry entitled "[Coordinating Committee for International Staff Unions and Associations (CCISUA)] message at UNd f

56. On 16 January 2020, the Under Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) responded to the Appellant's complaint with a letter, which reads as follows:

> Dear Mr. A.,
>
> I refer to your letter of 29 November 2019 and to the letter of your counsel, [...] of 2 October 2019. In your complaint of 24 July 2019, you allege that the staff members identified in your complaint have subjected you to harassment, "which is on-going, resulted in significant reputational and career harm as well as in severe deterioration in [your] health and eventual disability."
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> After a thorough review of your complaint and related materials, it is apparent that the statements and comments were made by those staff members in their capacity as staff representatives. Accordingly, any assessment of their statements and comments must take into account the latitude afforded staff members acting as staff representatives, as well as the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives. Under these circumstances, pursuit of the matter within the context of a disciplinary process would not be warranted.

59. The principle of freedom of association is one of the principles of law that must be observed by the organisations of the United Nations Common System.[26] One of its aspects consists in precluding interference by the Organisation in the affairs of its staff union or the organs of its staff union. A staff union must be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities. Further, the Organisation must remain neutral when differences of opinion emerge within a staff union: it must not fam.5 (n)69 Tw - (u)12.8r s 21 (i)(thf).8r13 6687tfOn5thf-th28i thfeiv[(c)0.5

making reference to it.[29]

63. Nevertheless, there must be an appropriate balance between the right to freedom of association and the right to freedom of expression in particular, and the need to protect an individual's reputation and dignity, widely recognised by international human rights instruments (see, for example, Article 8 of the European Convention on Human Rights) and the law in countries around the world, as one element of the right to respect for private life.[30]

64. Arguably, in a democratic society, freedom of speech (or expression) must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations. In this context, a staff association enjoys broad freedom of speech and the right to take to task the administration of the organisation whose employees it represents.[31] Thus, freedom of speech must be protected, particularly for officers of a staff association, so that they are not hampered in their task of representing the membership when in dispute with the Administration.

65. The existence of a freedom of discussion and debate, inherent in the freedom of associati

affairs of the staff association, the capacity of the allegedly defamed individual etc. For instance, persons acting in an official capacity are subject to wider limits of acceptable criticism than ordinary individuals.[37] Nonetheless, even these persons must enjoy public confidence in conditions free of undue perturbation if they are to ( )-00.6 (t)-1.8 (h66)-0.7 (t)9.1 (6)-0.6 (fru-3

for her decision cannot be considered reasonable, transparent or fair.

76. He further asserts that the UNDT did not canvass or make any assessment or analysis of the law; unethical and defamatory conduct is not protected staff union activity or an internal matter within the Staff Union; moreover, long established jurisprudence affirms that staff union representatives that illegally make public, false, slanderous and inflammatory allegations cannot be protected by the principles of freedom of association or free speech. The UNDT thus further erred on a question of law. i.e., whether any speech was protected by freedom of association.

77. In the present case, as discussed and set out above, the Administration was vested with the discretion as to how to address the Appellant's complaint of harassment and whether to begin an investigation in terms of the relevant allegations submitted by him. And it did so by denying the institution of a formal fact-finding investigation reasoning that "[...] the statements and comments were made by those staff members in their capacity as staff representatives.

thoughts and reasons about the specific set of the alleged facts and their seriousness for the interests of the Organisation, whether they involved any abuse of the freedom of speech and of association, or there were strong and legitimate views of the alleged offenders which gave them the right to criticise the Appellant even not in a entirely temperate or polite language, i.e. because of his engagement in the administration of the Fund, etc. Whether these relevant facts and standards were considered in the balancing equation is not clear and, as a consequence, we are unable to ascertain the answers to these questions.

81. Hence, this was not a duly motivated exercise of the administrative discretion. The failure to ascertain reasons from the challenged administrative decision makes it difficult to judicially review whether there is a "rational connection or suitable relationship" to the value judgment and the consideration of the specific range of factors by the Administration. Put it another way, the reasons for the exercise of the discretion when read together with the outcome serves the purpose of showing whether the exercise o

84. As the Appeals Tribunal held,[40] the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute.

85. Consequently, while it is true that the UNDT engaged in a fact-finding exercise of its own in the present case and based on the relevant record concluded that a) the status and management of the UNJSPF was a legitimate subject of concern to staff at large and therefore comments made by staff representatives about the management of UNJSPF concerned work-related issues, and b) it was reasonable for the USG/DMSPC to determine that the Appellant's complaint did not identify any statement or conduct that would constitute a gross abuse by staff representatives of their right to express themselves on workplace issues, noting that disagreement on work performance or on other work-related issues is normally not considered harassment, this was not a legitimate exercise of the UNDT's competence. The UNDT was not allowed to undertake the exercise of conducting such an investigation into the Appellant's complaint of harassment and substitute its own decision for that of the Administration by balancing the opposing interests and rights and providing its own reasoned assessment or value-judgment in terms of the outcome of said exercise. Let alone that this u

the Administration.[41]

90. Clearly then, the relief to which the Appellant is presently entitled, apart from an order setting aside the impugned UNDT decision, is an order of specific performance directing the Secretary-General to exercise his discretion on this issue.

Compensation

91. There is no compensation in lieu as the administrative decision does not concern "appointment, promotion or termination" as required in Article 9 of the UNAT Statute.

92. As per the Appeals Tribunal's jurisprudence, compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both.[42] It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.[43]

93. Further, per our jurisprudence, an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical or psychological report of h5 (i)2.5 (si)2r o7 (p)-2 .001 tsb w

is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.[44]

94. This Tribunal has consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and that the Appeals Tribunal will not interfere lightly as "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".[45]

95. The Appellant seeks compensation in the amount of tw0-year net base salary for damages suffered (and still ongoing) and provides to that effect a medical report, dated 6 October 2020.

96. In the present case, although the Appellant does not expressly state in his appeal that the harm for which he requests compensation constitutes "moral damages", it is evident, from the references, made in his statement of appeal, to his severe health harm due to the failure of the Administration to investigate his complaint of harassment and provide him with "a healthy and safe work environment", and notably from the kind of evidence he furnishes, that it comes to harm which falls within the realm of psychological harm. At any rate, the Appellant does not present any evidence showing that he suffered material damages as a result of the contested administrative decision and, consequently, there can be no award of such compensation in this respect.

97. With regard to the Appellant's request for damages on that basis (moral damages), the Appeals Tribunal notes that this was not simply an issue of lack of due diligence but also of failure by the Administration to follow its own rules and regulations and to ensure protection of the values and principles concerning rights and protection against harassment, enshrined in the Charter. However, we regret to find that, as the Secretary-General correctly claims, the Appellant should have made his case and presented the relevant evidence, i.e., the medical report, dated 6 October 2020, at the UNDT stage. That was not done, though there was sufficient opportunity for him either to make his case for moral damages there or then or, gathering that it was not the intention of the UNDT to have a further hearing, request that such further hearing be convened or time given for written submissions for the purpose of

[44] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 74.
[45] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para.75; *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 31: *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15.

affording him the opportunity to make his case for moral damages. His claim for moral damages is thus dismissed.

98. Having said that, however, we also take note that the issue of whether the Appellant was actually a victim of harassment and prohibited conduct remains to be determined, in view of the fact that we rescinded the decision of the Administration not to convene an investigation panel to investigate the Appellant's complaint and remanded the case to it for a renewed assessment of the Appellant's complaint of harassment and prohibited conduct. In these circumstances, the determination on the Appellant's claim for moral damages on account of the harassment and prohibited conduct he had allegedly suffered did not come within the purview of our review on appeal—as this matter has not yet been addressed by the Administration and has become pending before it per our Judgment—and, thus, the Appellant is not precluded from raising that claim and make his case in terms of it and present the relevant evidence, i.e., the above mentioned medical report, dated 6 October 2020 or other, at a later stage.

99. The appeal succeeds in part and Judgment No. UNDT/2020/211 is hereby vacated and modified as follows:

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