UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-498

Nagayoshi

(Appellant)

v.

Registrar
of the International Tribunal
for the Law of the Sea

(Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Richard Lussick Judge Inés Weinberg de Roca
Case No.:	2014-567
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Ms. Nagayoshi:	George G. Irving
Counsel for Registrar:	Philippe Gautier

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Noriko Nagayoshi against the decision of the Registrar of the International Tribunal for the Law of the Sea (Registrar and ITLOS, respectively) on 30 October 2013 to accept the recommendations of the Joint Appeals Board of ITLOS (JAB). Ms. Nagayoshi appealed on 21 January 2014, and the Registrar answered on 22 March 2014.

Facts and Procedure

2. Ms. Nagayoshi joined ITLOS as Chief of Administration (COA) in March 2008.

3. At the beginning of 2011, ITLOS experienced delays in the processing of invoices, which led to the imposition of penalties by American Express on the ITLOS business travel account due to delayed payments by ITLOS.

4. In a memorandum dated 11 March 2011 to Ms. Nagayoshi, the Registrar referred to the penalties charged by American Express. He asked Ms. Nagayoshi to prepare a report "in accordance with the applicable Administrative Instruction", "explain[ing] how the matter was handled by [the] Administration and Budget and Finance Department and the reasons for the non-settlement of this invoice" as well as "the responsibility attached thereto". The memorandum was copied to ITLOS' President, the Deputy Registrar, the Head of Budget and Finance and the Conference/Documentation Assistant/ITLOS, who had earlier sent a memorandum to Ms. Nagayoshi, with a copy to the Registrar, in which she had listed a number of American Express statements indicating arrears for which penalties had been charged, and her responses to those statements.

5. In a memorandum dated 22 March 2011 to the Registrar, Ms. Nagayoshi provided her explanations for the delays in the invoice payment and identified the Conference/Documentation Assistant and another ITLOS staff member as being responsible for the delays and penalties. Ms. Nagayoshi copied her memorandum to ITLOS' President, the Deputy Registrar, the Head of Budget and Finance, as well as members of the Committee on Staff and Administration and members of the Committee on Budget and Finance. ITLOS Judges serve on these two oversight committees.

6. In a memorandum dated 25 March 2011 to Ms. Nagayoshi, the Registrar noted that her memorandum of 22 March 2011 had been copied to members of the two committees "without prior consultation with [him] and without [his] authorization". In his view, this "constitute[d] a serious breach of the procedure ... and could also cause undue prejudice to the reputation of the staff member who is identified in the said memorandum".

7. Ms. Nagayoshi responded on 28 March 2011. She explained that she had circulated her 22 March 2011 memorandum to the Judges who served on the two committees and identified staff members responsible for the delayed payments because there was a "direct request by Tribunal's members for information" and also "due to the strong insistence by the committee members to identify the individual or office responsible for the problems". In her view, "communication between the judges and staff members is a common practice" at ITLOS, and "it is misleading to state there is a 'serious breach of procedure' to supply information to committee members who have asked for them".

8. In a memorandum dated 31 March 2011, the Registrar informed Ms. Nagayoshi that he had decided to give her a written reprimand for "[her] failure to seek the prior permission of the Registrar before circulating a memorandum to the Judges of the Tribunal and for [her] failure to comply with the procedure applicable to an on-going investigation within the Registry". The Registrar stated that he was disappointed by her response of 28 March, as she "[did] not express any regret and invoke[d] unconvincing justification for [her] action". The Registrar noted that "the Committee [on Staff and Administration] did not request [Ms. Nagayoshi] to submit a report on the issue of responsibility" in connection with the financial penalties imposed by American Express. He maintained his view that "[t]here [was] simply no justification for circulating such a memorandum to Judges without [his] authorization and without [his] knowledge", and that "[t]he circulation of the memorandum constitute[d] a serious breach of the procedure in an on-going investigation". The Registrar concluded by asking Ms. Nagayoshi to withdraw copies of her 22 March 2011 memorandum that had been sent to the ITLOS Judges. The Registrar's memorandum was copied to ITLOS' President, the Deputy Registrar, as well as the Chairmen of the Committee on Staff and Administration and the Committee on Budget and Finance.

9. On 12 April 2011, Ms. Nagayoshi submitted to the Registrar a request for "administrative review of the decision contained in [his] Interoffice Memorandum dated 31 March 2011" and "specifically ask[ed] [for the] withdrawal of the decision to impose a written reprimand". Ms. Nagayoshi also requested that the administrative review not be undertaken by the Registrar "[i]n light of the obvious conflict of interest" and that ITLOS' President, the Chairmen of the Committee on Staff and Administration and the Committee on Budget and Finance, and the Deputy Registrar receive a copy of her request for administrative review.

10. In a memorandum dated 16 May 2011, the Registrar informed Ms. Nagayoshi of his decision to maintain the written reprimand against her.

11. On 18 May 2011, Ms. Nagayoshi filed a complaint with ITLOS' Conciliation Committee "over a decision of the Registrar to issue a written reprimand ... for having breached the procedures of the Tribunal by distributing copies of a memorandum to members of the Committee [on] Budget and Finance and [the] Committee [on] Staff and Administration".

12. Ms. Nagayoshi resigned from ITLOS on 31 August 2011 in order to join the United Nations Interim Force in Lebanon.

13. The conciliation was not successful. On 25 February 2013, Ms. Nagayoshi filed an application with the JAB seeking rescission of the Registrar's decision to maintain the written reprimand against her.

14. On 15 October 2013, the JAB adopted its report, in which it unanimously recommended that Ms. Nagayoshi's application be dismissed. On procedure, the JAB noted that Ms. Nagayoshi had presented the harassment claims for the first time in her appeal to the JAB and accordingly, decided to limit the scope of its review to the written reprimand of 31 March 2011. On the merits, the JAB found that the Registrar had the competence to issue a reprimand to staff members. In the present case, the JAB concluded that the requirements of due process were met as the Registrar's 25 March 2011 memorandum "gave sufficient opportunity to [Ms. Nagayoshi] to be heard and to express her views on the allegations made against her". The JAB further found that Ms. Nagayoshi's circulation of the memorandum to the Judges was not covered by any directives, rules or practice of ITLOS. As a result,

Ms. Nagayoshi "failed to comply with her obligations under the relevant administrative instruction" and "her actions [could] therefore be qualified even as misconduct". The JAB considered that the written reprimand was not disproportionate in relation to Ms. Nagayoshi's actions. However, the JAB believed that the written reprimand should not have been copied to the Chairmen of the two committees "since disciplinary and measures alike have a restricted purpose, [and] they should be placed in the staff member's file and only the officials concerned should be informed thereof". While upholding the issuance of the written reprimand, the JAB unanimously recommended that the Registrar inform the Chairmen of the two committees that his 31 March 2011 memorandum had been erroneously copied to them and ask them to remove it from their official files.

15. By letter dated 30 October 2013, the Registrar informed Ms. Nagayoshi of his decision to accept the JAB's recommendation and to follow the course of action contained therein.

16. Ms. Nagayoshi appeals the Registrar's decision of 30 October 2013.

Submissions

Ms. Nagayoshi's Appeal

17. The JAB erred on questions of law and fact, resulting in a manifestly unreasonable decision. Its conclusions were based on an incomplete or incorrect understanding of the facts surrounding the contested decision, or on the wrong conclusions drawn from the facts.

18. Contrary to the JAB's fact-finding, there was no formal investigation. There was only a preliminary fact finding exercise. The JAB was mistaken when it concluded that the circulation of Ms. Nagayoshi's 22 March 2011 memorandum to the Chairmen of the two committees seemed contrary to ITLOS' practice and could even be qualified as misconduct. It failed to establish the legal grounds for finding that the reprimand was based on the established practice of ITLOS and for assuming that she had been derelict in her obligations. No source or authority was cited other than the assertion of the Registrar. In Ms. Nagayoshi's view, her memorandum of 22 March 2011 was "copied judiciously pursuant to the Directives of the President issued in 2001", which she interpreted to mean that "information containing policy matters could not be restricted to the Registrar and had to be shared by those making policy decisions".

19. The JAB failed to exercise the jurisdiction vested in it. It viewed the reprimand "in isolation" and failed to consider Ms. Nagayoshi's argument that the reprimand represented "the culmination of a pattern of behaviour aimed at retaliating against [her]" "in the context of a prolonged period of antagonism". The JAB considered that it was within the Registrar's discretion to reprimand a staff member, but failed to consider her real claim that the Registrar's authority had been improperly used as it was improperly motivated and lacked respect for due process. Moreover, while the JAB found the Registrar's circulation of the reprimand to the Chairmen of the two committees improper, it failed to address the harm this improper action caused her or to provide her with a suitable remedy.

20. The JAB may have been unduly influenced by the presence of the Registrar's legal advisor on the panel, whose prior task had been to defend the Registrar's decision on an unrelated matter.

21. Ms. Nagayoshi requests that the Appeals Tribunal set aside the findings of the JAB, find the reprimand unwarranted as a matter of fact and law, and award her two years' net base pay in damages.

The Registrar's Answer

22. The JAB was correct in its conclusion that Ms. Nagayoshi's allegations of harassment were not receivable, as they were made for the first time before the JAB. Equally, they are not receivable before this Tribunal, as they do not concern the contested decision, being the written reprimand taken on 31 March 2011.

23. Most of the arguments that Ms. Nagayoshi presented on appeal had already been submitted to the JAB. She alleged errors of fact, but failed to establish that such errors had been made, or that they had resulted in a manifestly unreasonable decision on the part of the JAB.

24. On the merits, the JAB correctly found that: (i) Ms. Nagayoshi had no authority to circulate her 22 March 2011 memorandum to the Judges of ITLOS as it was an internal document; (ii) it was part of the investigation conducted by the Registrar; and (iii) the Chairman on the Committee of Staff and Administration had not requested that the memorandum be circulated to the members of that committee.

25. It is not unusual for the head of an institution to require a legal officer to give a legal opinion on a legal issue. The fact that the legal officer had written an opinion which did not support Ms. Nagayoshi's position on an unrelated personnel matter is not in itself a reason for contesting the integrity and impartiality of the same legal officer while serving on the JAB. Furthermore, the composition of the JAB was publicly announced within the Registry and Ms. Nagayoshi could have expressed her concern as to the composition of the JAB at the time.

26. The Registrar requests that this Tribunal declare the present appeal not receivable in respect of the allegations of harassment and abuse of authority, and that it dismiss the remainder of the appeal in so far as it is receivable.

Considerations

27. The appeal emanating from the ITLOS JAB is the first submitted to the Appeals Tribunal in accordance with Article 2 of the Agreement between the United Nations and ITLOS dated 13 July 2010.[1]

28. Staff Rule 11.5(a)(i) of ITLOS provides:

> (a) In accordance with article 2, paragraph 1, of the Agreement between the United Nations and the International Tribunal for the Law of the Sea on access to the UN internal justice system, the United Nations Appeals Tribunal shall be competent to hear and pass judgement on an application filed by staff members of the Registry of the International Tribunal or any other individual referred to in staff regulation 11.2 (c):
>
> (i) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment o[r] the contract of employment[.]

[1] Article 2(1) of the United Nations-ITLOS Agreement reads: "The Appeals Tribunal shall be competent to hear and pass judgment on an application filed by staff members of the Registry of the International Tribunal or any other individual referred to in Staff Regulation 11.2, paragraph (c) of the International Tribunal: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance; (b) To appeal an administrative decision imposing a disciplinary measure."

Staff Regulation 11.2(b)(i) of ITLOS provides:

> The function of the Board is to consider applications against (i) an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

Staff Regulation 11.2(d) of ITLOS provides:

> Applications to the Board may only be made in case of failure to achieve conciliation through the Conciliation Committee.

Paragraph 1 of Annex V to ITLOS' Staff Regulations provides:

> A staff member of the Registry who wishes to lodge a complaint under regulation 11[.1], paragraph (e), shall first address a letter to the Registrar requesting review of the administrative decision or disciplinary action complained of. The letter must be sent within 30 days of the date on which the staff member received notification or became aware of the decision or action.[2]

29. Ms. Nagayoshi seeks reversal of the Registrar's decision of 30 October 2013, accepting recommendations of the JAB in its report adopted on 15 October 2013. The JAB had dismissed Ms. Nagayoshi's application of 25 February 2013 challenging the decision of the Registrar to issue a written reprimand against her, but found the manner in which the written reprimand had been communicated was flawed.

30. Ms. Nagayoshi appeals on two main grounds:

i. the JAB failed to exercise the jurisdiction vested in it; and

ii. the JAB erred on questions of law and fact resulting in a manifestly unreasonable decision.

[2] ITLOS' Staff Regulation 11.1(e) states:
A staff member of the Registry may lodge a complaint with the Conciliation Committee:
(i) against an administrative decision alleging non-observance of that member's contract or of that member's terms of employment, the words "contract" and "terms of employment" comprising all provisions of these Regulations, and of the texts referred to therein, as may have been in force at the time of the alleged non-observance; or
(ii) against any disciplinary actions taken against that member.

Failure to exercise jurisdiction

31. Ms. Nagayoshi submits, at paragraph 31 of her brief:

> The ITLOS JAB has failed to exercise the jurisdiction invested in it by neglecting to consider [her] argument that the reprimand was not an isolated act but rather the culmination of a pattern of behavior aimed at retaliating against the Appellant. The JAB found it improper that the Registrar disseminated the reprimand publicly, but failed to draw any conclusion from this or to question his motivation for doing so. Throughout the process, it was the Registrar who sought to make this a public matter.

32. She argues further that she gave a chronology of a continuous pattern of harassment and abuse of authority which led to the incident. She claims that the JAB was the only available forum for her to make a claim of harassment. She criticises the JAB for excluding her claims of harassment and abuse of authority from the scope of its review.

33. The Registrar responds that the JAB was correct in its conclusion that Ms. Nagayoshi's allegations of harassment were not receivable, as they were made for the first time before the JAB. They are similarly not receivable before this Tribunal, as they do not concern the contested decision, being the written reprimand of 31 March 2011.

34. Under the Staff Regulations of ITLOS, the jurisdiction of the JAB can be invoked only if a contested decision has been previously submitted for administrative review followed by proceedings before ITLOS' Conciliation Committee.

35. These Rules are similar to Article 8(1)(c) of the UNDT Statute under which the jurisdiction of the UNDT can only be invoked if a contested administrative decision has been previously submitted for management evaluation.

36. This Tribunal has held that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary and that for this goal to be met it is essential to clearly identify the administrative decision the staff member disputes.[3]

[3] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-381, para. 37, quoting *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 42.

37. The remedy sought by Ms. Nagayoshi, in her request for administrative review dated 12 April 2011 as well as her complaint filed with the Conciliation Committee on 18 May 2011, was the rescission of the written reprimand.

38. The various allegations of harassment and abuse of authority were put before the JAB. However, they were not the subject of a request for administrative review and were therefore not receivable.

39. Accordingly, the JAB did not err in limiting the scope of Ms. Nagayoshi's application to the written reprimand issued by the Registrar on 31 March 2011.

40. This ground of appeal is dismissed.

Merits

41. On the merits, Ms. Nagayoshi submits that the JAB erred on questions of law and fact, resulting in a manifestly unreasonable decision.

42. She contends that the JAB based its conclusions on an incomplete or incorrect understanding of the facts surrounding the contested decision or on the wrong conclusions drawn from the facts. She argues that contrary to the JAB's finding, there was no formal investigation but only a preliminary fact-finding exercise.

43. We do not find any merit in this submission. Assuming the on-going investigation was only a preliminary fact-finding exercise concerning the processing of the invoices, we are of the view that Ms. Nagayoshi's memorandum of 22 March 2011 should have been limited to the Registrar as head of the Registry so as to assist him in making a decision on her fact-finding report.

44. Ms. Nagayoshi submits further:

> The JAB made a critical error of fact in its assertion that the circulation of her memorandum to the judges "seems contrary to the practice of the Tribunal whose channel of communication is through the Registrar." Neither the JAB nor the Registrar cited any authority for this assertion, which appears to contradict the established written practice in the President's directive.

Contrary to Ms. Nagayoshi's assertion that neither the JAB nor the Registrar cited any authority, we find that reference was made to the President's Directives of 20 February 2001 in paragraph 45 of the JAB Report and also to paragraph 10 of ITLOS' Administrative Instruction AI/01/08 of 9 January 2008. The ITLOS President's Directives to the Registry state:

> ii) In respect of communications from professional staff
>
> a) Copies of important communications addressed to the Registrar from professional staff members recommending action to be taken should invariably be sent to my office at the same time as they are sent to the Registrar. Such communications shall clearly indicate that they were copied to the President.
>
> b) Action, if any taken, by the Registrar in respect of such communications shall be communicated to the President.

45. In Ms. Nagayoshi's view, her memorandum of 22 March 2011 "was copied judiciously pursuant to the Directives of the President issued in 2001", which she interpreted "to mean that information containing policy matters could not be restricted to the Registrar and had to be shared by those making policy decisions".

46. We consider the interpretation by Ms. Nagayoshi to be misplaced. The President's Directives did not permit Ms. Nagayoshi to copy her memorandum of 22 March 2011 to the Judges of ITLOS other than the President.

47. We do not think the Registry or any other administrative body could function properly if an individual staff member on her or his own initiative circulates documents within or outside the body without authorization from the President's Directives or permission from the Registrar in this case.

48. We further note Ms. Nagayoshi canvassed these same submissions before the JAB. The JAB duly considered them and correctly concluded, in paragraph 46:

> The report contained in [Ms. Nagayoshi's] memorandum of 22 March 2011 was prepared in response to a request made by the Registrar pursuant to *paragraph 10 of Administrative Instruction AI/01/08 of 9 January 2008*, which provides that "[I]f penalties are levied for delayed payment, the Chief of Administration shall prepare a report and transmit it to the Registrar with an appropriate recommendation regarding any responsibility attached to an official." It is clear that this administrative

> instruction does not authorize the Applicant to circulate her report to judges of the Tribunal.[4]

49. Ms. Nagayoshi has not been able to establish any errors of fact that resulted in a manifestly unreasonable decision on the part of the JAB.

50. This ground of appeal fails.

51. Next, Ms. Nagayoshi submits that the JAB may have been unduly influenced by the presence of the Registrar's legal advisor on the panel, whose prior task had been to defend the Registrar's decision.

52. We do not find any merit in this submission. The JAB panel is a tripartite body composed of a Chairperson (a non-ITLOS staff member), a Member appointed by the Registrar and a Member elected by the Staff. Ms. Nagayoshi should have raised this objection at the time of her appeal, as the JAB composition was public knowledge within ITLOS. However, she failed to do so and fully participated in the proceedings before the JAB. Moreover, she failed to produce any evidence to buttress her allegation of undue influence by the Registrar-appointed JAB Member.

53. From the foregoing, the appeal fails on this ground.

54. Ms. Nagayoshi submits further that while the JAB found the Registrar's circulation of the reprimand to the Chairmen of the two committees improper, it failed to address the harm this improper action has caused her or to provide a suitable remedy. She is therefore seeking an award of two years' net base salary in damages.

55. Contrary to the assertion by Ms. Nagayoshi, the JAB addressed the issue, at paragraph 50 of its Report:

> Thus, while the JAB has concluded that, in substance, the written reprimand is valid it wishes to point out that the manner in which the written reprimand was communicated is flawed.

[4] Emphasis added.

The remedy recommended by the JAB was:

> That the Registrar informs the Chairman of the Committee on Staff and Administration and the Chairman of the Committee on Budget and Finance that the administrative decision contained in the interoffice memorandum of 31 March 2011 has been erroneously copied to them and ask them to remove it from their official files.

56. We note that the Registrar has followed the JAB recommendations and that is sufficient. We do not think the circulation of the letter of reprimand warrants an award of damages.

57. From the foregoing, we do not find any error on questions of law and fact that would result in a manifestly unreasonable decision.

58. Accordingly, the appeal is without merit and fails in its entirety.

Judgment

59. The appeal is dismissed. The decision of the Registrar of ITLOS accepting the recommendation of the JAB is affirmed.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Adinyira, Presiding	Judge Lussick	Judge Weinberg de Roca

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar