



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

Judgment No. 2022-UNAT-1212

**Lillian Ular
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1528
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Irene Kashindi
Counsel for Respondent:	Maryam Kamali

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. In an application to the United Nations Dispute Tribunal (Dispute Tribunal or UNDT), the Appellant, a staff member who served as an Administrative Assistant at the FS-4 level with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in Kinshasa, made the following claims: (i) she had been the victim of harassment, unfair treatment, and abuse of authority; (ii) she was not selected for a position that she had applied for at MONUSCO, and (iii) the Administration mishandled a complaint of sexual harassment that she had made four years prior.

2. In Judgment No. UNDT/2020/221,¹ the Dispute Tribunal dismissed the first two claims but found the Administration abused its authority in mishandling the sexual harassment complaint. The Dispute Tribunal ordered the Administration to provide the Appellant with a clear explanation for not pursuing her sexual harassment complaint but denied any other remedy.

3. The Appellant appeals and requests an award in damages for mishandling her sexual harassment complaint as well as damages for harassment, unfair treatment and abuse of authority, and an immediate promotion to a post at the FS-5 level or *in lieu* compensation.

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

Facts and Procedure

5. The Appellant, who was serving as an Administrative Assistant on a Fixed Term Appointment (FTA) with MONUSCO, claims she was sexually harassed by a female colleague on 8 July 2015. The accused colleague was at the time a staff member at MONUSCO who had been seconded from United Nations Development Programme (UNDP). She reported the matter in an email to her supervisor on the same day. In that e-mail, she also complained about “kisses and un-wanted hugs from female staff members,” which she did not believe “should be tolerated, despite ‘diversity’ at work place” and despite her not having a “problem in accepting all types of people and their orientation”.

¹ *Ular v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/221 dated 31 December 2020 (Impugned Judgment).

6. Separate from the above, almost a year later, on 5 and 6 June 2016, the Appellant reported verbal harassment and abuse from the same colleague.

7. On 20 August 2017, the Appellant reported the alleged sexual abuse to the Office of Internal Oversight Services (OIOS). She then followed up with a management evaluation request on 17 November 2017 on the following matters:

1. Unconducive work environment created by FRO [First Reporting Officer].
2. Breach of staff rules and regulations by FRO.
3. Cover-up by FRO of SEA [sexual exploitation and abuse] case in favor of a female staffer against me (ongoing with OIOS).
4. Corrupt practices; FRO recruited her friend to a FSS post, the latter did not meet with the required credentials (b) FRO barred me from being fairly considered against the very post.
5. Malicious act by FRO misguiding HR on a well recorded and informed medical absence which almost led to me being served with a letter for 'abandonment of work'.
6. Abuse of power and authority by FRO asking me to run personal domestic errands, orders me to always make coffee for her and her friends ir-regardless of prevailing workload.
7. Verbal attack and 'Firing' Orders by FRO to me in the open plan office witnessed by all colleagues upon my resumption of duty after long illness. She did not follow the laid down rules and procedure.
8. Biased evaluation of my work performance and over-ruling the SRO/DSRSG's [Second Reporting Officer/Deputy Special Representative of the Secretary-General] evaluation of my performance (ongoing case with HR for evaluation).
9. Refusal by FRO to include a SRO for my Epas which is a standard requirement for all Staff.
10. FRO continues to ask colleagues to remove me from internal mailing lists and not to allow me to receive information or work documents. CCX are now being directed to a UNV [United Nations Volunteer] sm who has no authority according to the UN Protocol to handle Code Cables.

8. On 28 November 2017, the Management Evaluation Unit (MEU) said that none of the above encompassed an administrative decision, and as such, her request for a management evaluation was not receivable.

9. On 27 November 2017, the Appellant applied for an Administrative Assistant post (Job Opening 81515) at the FS-5 level (FS-5 Post). The Human Resources Section screened 92 applicants and invited the Appellant to take a written assessment, but she did not take the test.

10. On 22 August 2018, OIOS completed its investigation and submitted the investigation report to UNDP. The investigation report concluded that the complaint of sexual abuse was substantiated.

11. On 14 March 2019, the Appellant filed a second management evaluation request, including a review of the decision not to select her for the FS-5 Post. The MEU explained many of the issues raised did not constitute administrative decisions that were subject to management evaluation.

12. On 15 April 2019, UNDP informed OIOS that there was insufficient evidence that the accused staff member had engaged in misconduct against the Appellant, and therefore, the case had been closed.

13. On 3 May 2019, the Appellant filed an application with the UNDT. She made the following allegations:

- a. Continued harassment, unfair treatment and abuse of authority. The harassment and unfair treatment cannot be classified as one single decision, but they constitute continuing actions and decisions which have continued to violate my rights as an employee.
- b. Breach of several rules and regulations.
- c. Not being considered and bypassed for promotion on several occasions resting with a decision made on 22nd January 2019.
- d. Not being compensation for work performed at higher level.
- e. Failure to address claim for sexual harassment and abuse.

14. On 13 May 2019, OIOS informed the Appellant of the UNDP decision to close the case against her colleague on the basis that there was insufficient evidence that the latter had engaged in sexual harassment against her.

The UNDT Judgment

15. In the Impugned Judgment, the Dispute Tribunal held the application pertaining to harassment and abuse of authority was not receivable as the allegation “lacks clarity, points to no specific perpetrator, administrative decision or history of steps taken and assessments of impact on the Applicant’s work”.

16. As for the application challenging the Appellant’s non-selection for the FS-5 Post, the Dispute Tribunal dismissed the application as the Appellant was invited to take the written assessment but did not, and she could not adequately explain why the Administration was to be blamed for her failure to participate in the assessment.

17. However, as for the application challenging the handling of the sexual harassment complaint, the Dispute Tribunal noted the inordinate amount of time it took the Administration to respond to the Appellant. She first complained about the incident in July 2015 to her supervisor. She filed a complaint to OIOS two years later in August 2017, and although OIOS completed its investigation in August 2018 and transmitted its report to UNDP, it was not until May 2019 that OIOS informed Ms. Ular of the UNDP decision to close the case against her colleague due to insufficient evidence.

18. The Dispute Tribunal took issue with the fact that Ms. Ular was not properly informed throughout the process and suggested that she should have been afforded the opportunity to assess the report of OIOS and the reasons given by UNDP for not pursuing the case against her colleague.

19. In light of the actions of the UNDP to close the case on account of insufficient evidence, without engaging with the Appellant, the tribunal determined that such action constituted an abuse of authority. As such, it ordered the Administration to provide Ms. Ular with a clear explanation for the decision not to pursue her complaint within one month. The Appellant’s request for moral damages was denied in the absence of supporting evidence.

Submissions

Ms. Ular's Appeal

20. The Appellant attempts to set out a number of different grounds of appeal. She first submits that the UNDT failed to exercise jurisdiction vested in it by failing to impose sanctions and award damages upon its finding that the Administration had mishandled her sexual harassment complaint.

21. Second, Ms. Ular says the UNDT erred on a question of fact as it failed to find that she had been performing roles at the FS5 level without receiving any compensation or consideration for promotion.

22. Third, Ms. Ular submits the UNDT erred on questions of fact concerning her non-selection for the FS-5 Post. She argues she should have been offered the post because she was already in service of the Organization, and she was on the roster for a position at the FS-5 level. Additionally, she also submits she was unwell on the test date.

23. Fourth, Ms. Ular contends the UNDT erred in finding that her claims regarding harassment, unfair treatment and abuse of authority were not receivable, and it also erred when it failed to award damages for these claims.

24. Finally, Ms. Ular also submits the UNDT erred when it failed consider and rule on her motion dated 30 October 2020, seeking to admit additional documents.

25. Ms. Ular asks that her appeal be allowed with costs and that the Impugned Judgment be modified with an order of the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) issuing sanctions to the Administration and granting an award of damages as the Administration had mishandled her sexual harassment complaint. She also asks that her claims of harassment, unfair treatment and abuse of authority be found receivable and that she be awarded moral damages for such. Finally, she asks an immediate promotion to the FS-5 Post or *in lieu* compensation.

The Secretary-General's Answer

26. The Secretary-General first submits that Ms. Ular has not supported her claims of how the UNDT erred. The Secretary-General notes Ms. Ular merely disagrees with the dismissal of her claims, and she then reiterates them before this Tribunal. As such, she has not articulated how the UNDT erred in law or fact, exceeded or failed to exercise its competence or jurisdiction.

27. Second, the Secretary-General notes Ms. Ular has been informed by OIOS of the decision not to proceed with her sexual harassment complaint in May 2019. Additionally, following the Impugned Judgment, UNDP also provided the Appellant with the reasoning for not pursuing her complaint. In an e-mail on 9 March 2021, the Chief Legal Officer of UNDP wrote:

I am writing to inform you of the outcome of your complaint of sexual harassment against a UNDP staff member.

Please be advised that your allegations were carefully considered and all the relevant evidence assessed. Further to our review, the evidence was not found sufficient for the standard required to proceed and the case was closed. In your particular case, it was necessary to take note of the fact that the allegations you made did not appear to have remained consistent over time, and the evidence to corroborate the allegations was insufficient. Overall the evidence was not sufficient to constitute “clear and convincing” evidence.

We do regret the frustration this case has brought you.

28. In his answer, the Secretary-General concludes by saying that OIOS conducted a thorough investigation, which included interviews of Ms. Ular, the accused and other witnesses, even though the alleged conduct was reported almost two years later. The UNDP reviewed the investigation report but found insufficient evidence to pursue charges of sexual harassment against the accused. Pursuant to Section 5.18 of Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), the manager has discretion after receiving the investigation report to decide how to handle the matter.

29. Based on the foregoing, the Secretary-General asks the UNAT to dismiss the appeal in its entirety.

Considerations

Request for oral hearing

30. We decline the Appellant's request for an oral hearing before the Appeals Tribunal.
31. Under Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure, the Appeals Tribunal may grant an oral hearing if it would "assist in the expeditious and fair disposal of the case".
32. The Appellant makes the request for an oral hearing "to enable her [to] efficiently present her appeal and demonstrate to the Tribunal the impact and effects of the continued harassment, unfair treatment and abuse of authority that she has been subjected to overtime [sic], including her health".
33. However, the Appeals Tribunal has consistently held that an appeal before the Appeals Tribunal is not a rehearing of the matter but an opportunity for the parties to appeal on narrow bases, such as errors of law, fact and jurisdiction of the UNDT, and not to decide the matter itself. We find that an oral hearing would not assist in expeditiously and fairly resolving the issues in this appeal.

Merits

34. The starting point for any appeal to the Appeals Tribunal is Article 2(1) of the Statute, which provides the limited grounds for review of a judgment rendered by the Dispute Tribunal, including whether the Dispute Tribunal exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law or procedure, or erred on a question of fact, resulting in a manifestly unreasonable decision.

Appeal of non-selection decision

35. Ms. Ular submits the UNDT erred on a question of fact concerning her non-selection for the FS-5 Post, and she also points to the Dispute Tribunal's failure to find that she had been performing roles at the FS5 level without receiving any compensation or any consideration for promotion. She, however, does not indicate what error of fact the Dispute Tribunal committed and whether it led to a manifestly unreasonable decision, as required by Article 2 of the Statute.

36. The Dispute Tribunal correctly reviewed the jurisprudence that there is a presumption that official acts have been regularly performed.² This is called the presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

37. The Dispute Tribunal reviewed the process and the evidence and held the Appellant did not rebut the presumption that the selection decision and process was regularly performed, pursuant to the applicable Staff Regulations and Rules. The Appellant was invited to participate in an assessment, but she did not. We find no merit in her argument that she should have been offered the post because she was already in service of the Organization and was on the roster for a position at the FS-5 level. In her appeal, she also argues that she was unwell on the date of the assessment but provides no evidence of an attempt on her part to reschedule the assessment. She then argues that the written test was not "necessary" as she was already on the FS-5 roster. By making this argument, she seems to incorrectly suggest that she did not need to take the assessment. The Administration invited her to participate in the next step of the selection process (the written assessment), but she did not take that step and provided no reasonable explanation for doing so. This was not the failure of the Administration.

38. Therefore, we agree with the Dispute Tribunal that the Appellant has not explained why she failed to take the test "in any terms which show the Administration must take responsibility for this failure".³ The Appellant has consequently not provided sufficient evidence to show that she was denied a fair chance of selection or that her candidature was not given full and fair consideration.

Allegations of harassment, unfair treatment and abuse of authority

39. The Dispute Tribunal held that the nature of the Appellant's allegations lacked "clarity, points to no specific perpetrator, administrative decision or history of steps taken and the assessments of impact on the Applicant's work" and therefore it was impossible to address the allegations as expressed.⁴

² See *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

³ Impugned Judgment, para. 41

⁴ *Ibid.*, para. 35

40. The Appellant argues the Dispute Tribunal erred in finding that her allegations of “continued harassment, unfair treatment and abuse of authority to which the Applicant fell victim over a period of time” were not receivable. Other than this statement in her appeal brief, she provides no further submission or argument on this.

41. She does not explain what error the Dispute Tribunal made in finding that the legal framework does not allow for a “generalized complaint alleging harassment, unfair treatment and abuse of authority”.⁵ Rather, she continues to provide a generalized complaint in her appeal to this Tribunal as well.⁶

42. Article 2(1)(a) of the Dispute Tribunal Statute (UNDT Statute) provides that the Dispute Tribunal has jurisdiction to review appeals of “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. Previous Appeals Tribunal judgments have defined an “administrative decision” as a “unilateral decision taken by the Administration in a precise individual case, which produces direct legal consequences to the legal order”.⁷ It is well settled jurisprudence that only a decision which carries adverse consequences for a staff member’s legal rights and obligations is receivable by the Dispute Tribunal.⁸ Furthermore, it is the applicant who has the burden to establish that there was an administrative decision that had direct legal consequences on his or her terms of employment. Such burden cannot be met where the applicant cannot, on a preliminary basis, identify an administrative decision capable of being reviewed.⁹

43. In the present case, the Appellant did not meet that burden, and as such, the Dispute Tribunal correctly determined her application on this question to be not receivable.

44. The Dispute Tribunal then attempted to consider the application as a “unified whole in which dissatisfaction with non-selection, and the response of the Respondent to the allegation of sexual harassment [were] seen as a pattern of behaviour which [] had an impact on the Applicant”.

⁵ *Ibid.*, para. 36.

⁶ See *Reid v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-419, para. 18; *Selim v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-581, paras. 26 – 27.

⁷ *Abu Ayyash v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-543, para. 16.

⁸ *Maloof v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-806, para. 34.

⁹ *Selim* Judgment, *op. cit.*

45. Regarding the handling of the harassment complaint, the Appellant says that the UNDT failed to exercise jurisdiction vested in it by failing to impose sanctions and award damages upon its finding that the Administration had mishandled her sexual harassment complaint.

46. The Appellant does not explain what jurisdiction the Dispute Tribunal failed to exercise. In the Impugned Judgment, the Dispute Tribunal held the Respondent abused its authority in its handling of the Appellant's complaint.¹⁰ This is not disputed, but the Appellant seeks compensation and damages. The Dispute Tribunal rejected this claim on the basis that the Appellant did not provide the required evidence to support the imposition of moral damages.¹¹

47. However, the failure to award moral damages is related to an issue of procedural error on the part of the Dispute Tribunal, which we review below.

Appeal on an error of procedure

48. The Appellant says that the Dispute Tribunal failed to consider and rule on her motion of 30 October 2020 seeking to admit additional documents. The additional evidence the Appellant sought to introduce were documents related to her e-PAS performance evaluations, her access to e-PAS, and medical evidence and reports. As for the e-PAS performance evaluations and access to e-PAS, it is unclear how they are relevant to the three areas of dispute identified in the Impugned Judgment, namely the allegation of harassment, which was held to be non-receivable, the non-selection decision, and the handling of the sexual harassment complaint, which application was granted in part.

49. However, the medical evidence and reports are relevant to the question of compensation or damages. They specifically address the Appellant's health status and at least one medical letter dated 20 January 2020 references her state on "going back to work".

50. Article 2(1)(d) of the Statute provides that the Appeals Tribunal can review whether the Dispute Tribunal "[c]ommitted an error in procedure, such as to affect the decision of the case".

51. It appears that the Dispute Tribunal did not specifically and expressly rule on the motion by way of issuing a prehearing ruling or a ruling in the Impugned Judgment, which the Dispute Tribunal should have done. However, pursuant to Article 2(1) of the Statute, for an

¹⁰ Impugned Judgment, para. 56.

¹¹ *Ibid.* para. 58.

appeal to be successful at the Appeals Tribunal, it is not enough for there to be an error in procedure, but it must also “affect the decision of the case”.

52. Given the lack of clarity on the relevance of the e-PAS evaluations and the access to e-PAS, we find the Dispute Tribunal’s error in not ruling on the motion did not affect the outcome of the case.

53. However, as indicated above, the medical evidence and reports are directly relevant to the issue of moral damages. Therefore, the Dispute Tribunal’s failure to rule on the motion to admit this additional evidence did affect its decision on compensation for moral harm when it particularly determined that the Appellant had not provided the “required evidence” to support that claim.

54. We note the Dispute Tribunal continued case management after the motion was filed on 30 October 2020, including a case management discussion between the parties on 16 November 2020. The motion may have been discussed, but we do not know. On 10 December 2020, the Dispute Tribunal ruled that the application was suitable for determination by written submissions and directed the parties to file their closing submissions. However, the Dispute Tribunal did not address the Appellant’s pending motion. In the Impugned Judgment, the Dispute Tribunal dismissed the request for moral damages on the ground the Appellant did not provide “the required evidence” in support, but it does not provide reasons why the medical evidence presented in the motion was not accepted or considered. If the Dispute Tribunal did have relevant medical evidence before it, it had an obligation to consider it as relevant evidence or provide reasons as to why it was not considered and relied upon in its decision. This was not done, and as such, it erred in dismissing the claim for moral damages.

55. Because the failure of the Dispute Tribunal to expressly rule on the motion was an error of procedure that affected the decision of the case as it related to Ms. Ular’s claim for moral damages, we remand the issue of compensation for harm to the Dispute Tribunal. We provide no opinion on whether compensation should be granted. Rather, we remand the matter to remedy the procedural error committed by the Dispute Tribunal and to ensure the Dispute Tribunal considers the medical evidence included in the motion in its determination on compensation for harm.

Judgment

56. Ms. Ular's appeal is granted in part, and the issue of compensation for harm is remanded to the Dispute Tribunal for reconsideration.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 3rd day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar