



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

Judgment No. 2022-UNAT-1305

**Gudrun Fosse
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case No.:	2022-1644
Date of Decision:	28 October 2022
Date of Publication:	29 December 2022
Registrar:	Juliet Johnson

Counsel for Ms. Fosse: George G. Irving

Counsel for Secretary-General: Rupa Mitra/Amanda Stoltz

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Ms. Gudrun Fosse, a staff member of the United Nations Environment Programme (UNEP) contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision of the Chef de Cabinet accepting the Ethics Office's determination that there was no merit in Ms. Fosse's claim of retaliation. In Judgment No. UNDT/2021/124, the UNDT granted her application in part and awarded compensation for the violation of her right to have her complaint of retaliation properly handled and the harm caused by the unlawful administrative decision.
2. The Secretary-General appealed the UNDT Judgment to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
3. For the reasons given below, we grant the appeal and reverse the UNDT Judgment.

Facts and Procedure

4. Ms. Fosse is the Head of Administration, Finance and Conference Services of the Secretariat of the Convention on Biological Diversity (SCBD), UNEP. On 7 June 2019, she submitted to the Ethics Office a request for protection against retaliation (in terms of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)).
5. In the request Ms. Fosse alleged that the then Executive Secretary of the SCBD (the Executive Secretary) had retaliated against her after she had cooperated with a fact-finding panel investigation appointed by the Assistant Secretary-General for the Office of Human Resources (the ASG/OHR) to investigate allegations of misconduct against the Executive Secretary. It is not disputed that Ms. Fosse's cooperation constitutes a protected activity in terms of Section 2 of ST/SGB/2017/2/Rev.1.
6. According to Ms. Fosse the alleged retaliation was comprised of three elements: i) the Executive Secretary informed colleagues that she wanted Ms. Fosse out of the SCBD; ii) the Executive Secretary changed Ms. Fosse's reporting line to effectively strip her of her responsibilities; and iii) Ms. Fosse was subjected to "an increasing level of harassment and abuse of authority" by the Executive Secretary.

7. About two weeks after submitting her retaliation request to the Ethics Office, on 18 June 2019, Ms. Fosse filed a separate complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) referring to many of the same incidents identified as retaliation in her 7 June 2019 complaint.

8. On 27 August 2019, the Ethics Office notified Ms. Fosse that it had found a *prima facie* case of retaliation only with respect to some of the allegations and had referred the matter to the Office of Internal Oversight Services (OIOS) for investigation in terms of Section 8.1 of ST/SGB/2017/2/Rev.1. On 30 August 2019, about 80 days after the retaliation complaint was made, and following consultation with Ms. Fosse, the Ethics Office, pursuant to Section 8.3 of ST/SGB/2017/2/Rev.1, recommended to the Secretary-General, as an interim protection measure, that the Executive Secretary be removed from Ms. Fosse's reporting line and be replaced. This recommendation was implemented.

9. The reason for the Ethics Office limiting the investigation is set out fully in its written determination of 19 November 2020, handed down in terms of Section 8.4 of ST/SGB/2017/2/Rev.1.

10. In relation to the allegation that the Executive Secretary had stated to others that she wanted Ms. Fosse "out of the SCBD" the Ethics Office pointed out that Ms. Fosse had provided no evidence of any kind in support of the allegation. The Ethics Office noted furthermore that when it had requested Ms. Fosse for permission to contact the relevant staff members who had told her of the comment (hearsay), Ms. Fosse declined to consent to the Ethics Office contacting one staff member and was unable to secure the cooperation of the other to corroborate her allegation. For that reason, there was no *prima facie* case established and this allegation was not referred to OIOS for investigation.

11. Likewise, the Ethics Office concluded there was no *prima facie* case of retaliation established in relation to the allegation that the Executive Secretary had changed Ms. Fosse's reporting line to strip her of her function. In 2018-2019 the Executive Secretary had served as both the First Reporting Officer (FRO) and the Second Reporting Officer (SRO). The change involved the appointment of two persons other than the Executive Secretary to these roles. Ms. Fosse challenged the change in a request for management evaluation. The MEU held that the changes were for performance management purposes and were legitimate operational decisions which had not produced adverse legal consequences on her terms of appointment or

contract of employment. After further independent investigation, the Ethics Office concluded that there was not sufficient evidence establishing a *prima facie* case that the change involved any retaliatory motive or constituted detrimental action that adversely affected Ms. Fosse's terms and conditions of employment. Hence, the Ethics Office did not refer this aspect of the retaliation complaint to OIOS for investigation.

12. Ms. Fosse's third allegation of retaliation was that she had been subjected to an increasing level of harassment and abuse of authority by the Executive Secretary. She complained that certain e-mails were demeaning and contained undue criticism and threatening language. Most pertinently, Ms. Fosse alleged that after she had cooperated with the fact-finding panel, the Executive Secretary displayed "more anger" towards her and referred to a meeting held on 1 May 2019 where the Executive Secretary allegedly behaved inappropriately towards several staff members, including Ms. Fosse. With the consent of Ms. Fosse, the Ethics Office contacted two other staff members who had attended the meeting, reviewed certain e-mail exchanges between Ms. Fosse and the Executive Secretary and spoke to members of the fact-finding panel and determined that there was a *prima facie* case that Ms. Fosse's cooperation with the fact-finding panel may have been a contributing factor in causing an increase in alleged harassment and abuse of authority. Hence, the Ethics Office decided to refer only this aspect of the retaliation complaint to OIOS for investigation.

13. On 18 September 2019, OIOS informed the Ethics Office that a fact-finding panel had been convened to investigate Ms. Fosse's harassment complaint. OIOS stated that given the overlap between the inquiries into the harassment complaint and the retaliation complaint, OIOS had decided to temporarily suspend the investigation into the retaliation complaint pending the outcome of the fact-finding panel investigation. On 3 October 2019, the Ethics Office informed OIOS that in its view a suspension of the retaliation investigation was not warranted.

14. On 30 November 2019, after further investigation of the harassment complaint, the Executive Secretary separated from the Organization.

15. On 6 January 2020, OIOS advised the Ethics Office that since the Executive Secretary had separated from the Organization in November 2019, Ms. Fosse no longer faced any retaliation concerns and did not require the benefit of the protective measures contemplated

in ST/SGB/2017/2/Rev.1. OIOS also noted that no disciplinary action would be possible against the Executive Secretary following her separation.

16. On 20 January 2020, the Ethics Office requested OIOS to complete its investigation into the retaliation complaint to enable the Ethics Office to make a final determination of whether retaliation had been established in accordance with Section 8 of ST/SGB/2017/2/Rev.1.

17. Ten months later, in late October 2020, OIOS forwarded its investigation report and supporting documents to the Ethics Office.

18. The OIOS report recorded that the fact-finding panel had found that the Executive Secretary's language was often unnecessarily harsh and demoralizing but was not personal being directed rather towards work performance and process issues. However, it was often communicated in a public way so that the impact was humiliating. Other staff members had provided testimony of a working environment that was fraught with tension and, in some cases, fear. Moreover, the Executive Secretary's abrasive management style and tendency to publicly criticize staff put everyone on guard and drained morale. However, the evidence further showed that Ms. Fosse seemed to have failed to perform her responsibility to produce budgetary documents for the COP14 at the requisite standard and that this had led to considerable tension between Ms. Fosse and the Executive Secretary and the deterioration of their relationship to the extent that they were no longer speaking to each other.

19. OIOS concluded on the basis of the various reports and testimony of other staff members that the Executive Secretary was "a driven and committed leader, whose difficult personality and management style clashed" with staff in the SCBD, including Ms. Fosse. However, the Executive Secretary's treatment of Ms. Fosse stemmed from perceived performance issues in the preparation of the budget for the COP 14 in November 2018 and her behaviour towards Ms. Fosse was consistent with her entrenched management style. The available evidence did not suggest that there was increasing harassment directed towards Ms. Fosse because of her cooperation with the fact-finding panel. The negative attitude of the Executive Secretary was recurring, ongoing and the specific incident referred to by Ms. Fosse was consistent with past behaviour and probably did not amount to retaliation.

20. The Ethics Office, pursuant to Section 8.4 of ST/SGB/2017/2/Rev.1, then conducted an independent review of the findings of the OIOS report and supporting documents to determine whether there had been retaliation. After its independent review, the Ethics Office issued its written determination of the retaliation complaint, as required by Section 8.4 of ST/SGB/2017/2/Rev.1, on 19 November 2020. It found specifically that the evidence demonstrated that: i) the relationship between Ms. Fosse and the Executive Secretary had deteriorated prior to Ms. Fosse's engagement in the protected activity; ii) the Executive Secretary's behaviour was directed at numerous staff and did not appear to target Ms. Fosse because of her cooperation with the fact-finding panel; and iii) the relationship between Ms. Fosse and the Executive Secretary deteriorated because of perceived performance issues in her preparation of the budget, and her failure at COP 14 to achieve the objectives set by the Executive Secretary.

21. The Ethics Office accordingly concluded that retaliation had not been established in relation to any of the three allegations of retaliation made by Ms. Fosse and thus it chose to recommend that no further measures be taken by the Administration with respect to the retaliation complaint and recommended that the matter be closed. It noted moreover that the Executive Secretary had resigned, the original reporting lines had been restored and thus there was no continued need for the interim protective measures that had been implemented pending the outcome of the investigation.

22. The Ethics Office, however, recorded that in making the finding that there had been no retaliation, this did not mean that no misconduct had occurred; nor did it condone the behaviour of the Executive Secretary. It therefore recommended to the Secretary-General that he consider placing a note on the official status file of the Executive Secretary indicating that she separated from service during a retaliation investigation and that she did not cooperate with the OIOS investigation when contacted following her separation.

23. On 18 December 2020, the Chef de Cabinet accepted the Ethics Office's determination.

24. Ms. Fosse filed an application with the UNDT on 22 March 2021. In it she identified the contested administrative decision to be the decision that no retaliation had been established (based on an allegedly inaccurate and biased OIOS investigation).

25. In her application to the UNDT, Ms. Fosse and her counsel conflated her allegations of harassment with her claims of retaliation. She complained about the delay in the OIOS investigation, the fact that she was not kept abreast of the investigation, and the failure of OIOS to interview her and to share information with her. While she persisted with her view that the change of her reporting line was not an operational decision, she made only general and sweeping statements about the nature of the evidence OIOS relied upon and claimed that the statements of senior managers about the relationship were not checked for accuracy or verified. Ms. Fosse did not in her application address the finding of the Ethics Office that there was insufficient evidence to support the allegation that the Executive Secretary wanted her “out” or the finding that the harsh treatment of her was part of a persistent pattern of harassment and could not be causally related to her engaging in the protected activity.

26. The essence of Ms. Fosse’s claim before the UNDT was stated in her application to be:

In the instant case, there was an institutional failure in addition to the emotional stress entailed in the harassment. There was no preventative action taken against continuing retaliation even months after the Ethics Office had made a finding warranting a formal investigation. The fact that the [Executive Secretary] was the harasser, and there was more than one complaint, should have resulted in heightened scrutiny. Since any action against the harasser in this case is now rendered moot by [the Executive Secretary’s] resignation, the Applicant has been denied the moral satisfaction of a finding in her case let alone the publication of a decision or judgment in her favour, which is often seen as an important element of redressing the effects of harassment.

As a consequence, the Applicant, who is a career international civil servant with more than 30 years of excellent service to her credit, has suffered severe repercussions that continue to affect her emotional and physical well-being.

27. Besides equating the claim of harassment with that of retaliation, Ms. Fosse did not in her written application provide specific examples of the alleged “continuing retaliation” beyond the three specific allegations dealt with by the Ethics Office in its determination. Nor did she elaborate upon the specific nature of the “severe repercussions” that were causally attributable to the contested administrative decision taken on 18 December 2020.

28. Ms. Fosse requested the UNDT to rescind the contested administrative decision and to pay her compensation in the amount of two years’ net base salary for “failing or refusing to respond repeatedly to her requests for protection from harassment” and “to take action to prevent on-going acts of harassment and retaliation or to address the hostile working environment” in which she

had to work. Ms. Fosse did not precisely identify the on-going acts of harassment and retaliation to which she referred. She further requested moral damages for the “continued stress to which she was subjected”.

29. The UNDT handed down judgment on 27 October 2021. In its Judgment it did not analyze the evidence of the alleged acts or incidents of retaliation. However, it held that all the allegations concerning matters that the Ethics Office did not find to have raised a *prima facie* case of retaliation fell outside the scope of the application. It held furthermore that the allegations with respect to events prior to 14 January 2019 also fell outside the scope of the application and that the interim protective measures taken pending the investigation were not subject to review as their adequacy should have been challenged at the appropriate time. There is no cross-appeal against any of these findings.

30. Hence, the only instance of retaliation with which the UNDT was seized was Ms. Fosse’s third allegation that after she had cooperated with the fact-finding panel, the Executive Secretary displayed “more anger” towards her, especially in the meeting held on 1 May 2019 where the Executive Secretary allegedly behaved inappropriately towards several staff members, including Ms. Fosse. The Judgment contains no analysis of the evidence of this act of alleged retaliation or any other conduct that might be construed as retaliation.

31. However, the UNDT concluded that the delays of OIOS in completing the investigation were procedurally unfair. Section 8.1 of ST/SGB/2017/2/Rev.1 requires OIOS to “seek to complete its investigation and submit its report to the Ethics Office within 120 days”. Although the time limit was not mandatory, OIOS had not provided adequate justification for the delay and its attempts to terminate the investigation, after the Executive Secretary had left the Organization, evinced a measure of bad faith or negligence. This, the UNDT maintained, amounted to an egregious violation of ST/SGB/2017/2/Rev.1. It also held that the failure of OIOS and the Ethics Office to interview Ms. Fosse during and after the investigation, although not mandatory, and despite the Ethics Office having engaged with Ms. Fosse in the earlier stages of the process, was not in keeping with good practice and thus compounded the procedural unfairness. Additionally, the delay of the OIOS investigation meant that OIOS was unable to interview the alleged perpetrator of the retaliation as the Executive Secretary had resigned before the investigation got underway.

32. These procedural deficiencies led the UNDT to the conclusion that the Administration was unable to prove by clear and convincing evidence that no retaliation existed and thus the contested administrative decision was unlawful. The UNDT did not make any finding whether the conduct of the Executive Secretary, especially that during the meeting of 1 May 2019, constituted retaliation or was merely an instance of ongoing harassment as found by OIOS.

33. The UNDT awarded Ms. Fosse USD 5,000 for the “fatal procedural irregularities in this case”.¹ It declined to award Ms. Fosse moral damages for harm allegedly suffered to her reputation as supposedly evidenced by her being denied promotion. There is no cross-appeal against this finding. Two medical reports dated 2 June 2020 and 4 July 2020 (some six months before the contested administrative decision was taken in December 2020) submitted by Ms. Fosse in evidence indicated that she had suffered anxiety, stress and depression as a result of a “workplace harassment situation incurred by an authority figure”² in the preceding two years. The UNDT held that these medical reports confirmed that “the improper handling”³ caused Ms. Fosse distress and anxiety and awarded her USD 5,000 moral damages on this account.

34. The Secretary-General filed his appeal against the UNDT Judgment on 4 January 2022, and Ms. Fosse filed her answer on 3 February 2022.

Submissions

The Secretary-General’s Appeal

35. The Secretary-General submits that the UNDT erred in law in finding that the time taken by OIOS in completing its report constituted a procedural irregularity that rendered the contested decision unlawful. The time taken to issue the report in this instance was immaterial and had no impact on the outcome.

36. He submits further that there was no legitimate basis for the finding that OIOS or the Ethics Office were required to interview Ms. Fosse and the Executive Director and that the UNDT erred in concluding that the failure to do so amounted to a material procedural irregularity.

¹ Impugned Judgment, para. 61.

² *Ibid.*, para. 67.

³ *Ibid.*, para. 70.

37. He submits also that there was no legal basis to award compensation or moral damages as there was no evidence of harm arising from the alleged procedural irregularities or the contested decision as required by Article 10(5)(b) of the UNDT Statute.

38. The Secretary-General accordingly requests the appeal to be granted and for the Judgment of the UNDT to be reversed.

Ms. Fosse's Answer

39. Ms Fosse submits that the UNDT did not err in holding that the contested decision was vitiated by procedural irregularity. OIOS failed to justify the lengthy delay and the failure to interview Ms. Fosse and the Executive Secretary was fatal.

40. She argues that the contested decision was not only procedurally flawed but involved a fundamental failure by the Administration to apply its own regulatory framework for dealing with retaliation leading to the ultimate outcome being tainted with irrationality or unreasonableness.

41. She requests the Tribunal to dismiss the appeal and to award her costs of the appeal in the amount of USD 5,000.

Considerations

42. The purpose of ST/SGB/2017/2/Rev.1 is to afford staff members protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations. It provides that individuals who make such reports in good faith have the right to be protected against retaliation. The right to protection is thus a term of the contract of staff members of the Organization as constituted by the relevant administrative issuance.

43. Section 1.4 of ST/SGB/2017/2/Rev.1 defines retaliation to mean any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened, or taken for the purpose of punishing, intimidating or injuring an individual because that individual engaged in a protected activity. The contested decision of the Chef de Cabinet, based on the determination of the Ethics Office and the OIOS investigation, was to the effect that the detrimental action affecting Ms. Fosse's employment was not taken for the purpose of punishing, intimidating or injuring her because she engaged in a protected activity but was rather part of an ongoing

problematic relationship that may or may not have involved harassment. Whether the action was harassment is not a matter that this Tribunal is called to decide in this appeal. The essential point though is that the Chef de Cabinet accepted the finding of the Ethics Office that the evidence did not sufficiently establish a causal link between the detrimental action and Ms. Fosse's protected activity. The question for review was whether that administrative decision was reasonable or rational and therefore lawful.

44. It is important to note that Section 10 of ST/SGB/2017/2/Rev.1 provides that the recommendations of the Ethics Office (and by extension the recommendations of OIOS in its investigation report) do not constitute administrative decisions and thus are not subject to challenge before the UNDT. It is only the action, or non-action, of the Administration on a recommendation from the Ethics Office under Section 8 of ST/SGB/2017/2/Rev.1 that constitutes a contestable administrative decision provided it has direct legal consequences affecting the terms and conditions of appointment of the complainant.

45. In other words, the recommendations and investigation findings are intermediate in nature and thus, lacking the requisite finality, are not reviewable administrative decisions. However, any irrationality or procedural unfairness in the determination of the Ethics Office or the investigation, though not directly reviewable, may operate in certain instances to contaminate the final administrative decision, resulting in the latter being reviewable on grounds of unreasonableness or procedural unfairness.

46. As said, the ultimate question is whether the finding that there was no causal link between the protected activity of Ms. Fosse and the detrimental behaviour of the Executive Secretary was a finding that a reasonable administrator could make.

47. The conclusion that there was no causal link was based on the OIOS's investigation, its engagement with other staff, the documentary information evidencing the essentially undisputed problematic relationship between Ms. Fosse and the Executive Secretary, the perceived poor performance of Ms. Fosse in relation to the COP 14 budget, and Ms. Fosse's insistence on working only during working hours. All these problems were documented as having occurred before Ms. Fosse engaged in the protected activity. It is thus reasonably possibly true that other issues informed the detrimental action which came to a head in the meeting of 1 May 2019. This gives rise to more than a reasonable doubt that the link between the detrimental action and the protected activity existed.

48. It might have been better for OIOS to have engaged more with Ms. Fosse and the Executive Secretary, but it cannot be said that the failure to do so was fatal. The Ethics Office had engaged fully with Ms. Fosse and had attempted to enlist her aid in getting further relevant evidence. Moreover, it is unlikely that an interview with the departed Executive Secretary would have yielded much in the way of evidence that her detrimental behaviour was linked to the protected activity. The best evidence was the objective evidence that disclosed an ongoing problematic relationship to which both Ms. Fosse and the Executive Secretary probably contributed and that gave rise to significant doubt that the causal link between the detrimental action and the protected activity was highly probable. There was accordingly a rational relationship between the available information, the contested decision and the reasons given for it.

49. It follows that it was probable that the Executive Secretary would have taken the alleged detrimental action absent Ms. Fosse's protected activity or that it was not engaged in for the prohibited purposes. Consequently, in view of the standard of proof not being met, the Ethics Office, and by extension the Chef de Cabinet were obliged to find that retaliation had not occurred in accordance with the evidentiary standard required by Section 8.4 of ST/SGB/2017/2/Rev.1.

50. The contested administrative decision was accordingly made on a rational basis and was thus *prima facie* lawful.

51. This brings us to the issue of whether the decision was vitiated by procedural irregularity. The lengthy time delay was regrettable but not vitiating. In this regard, it must be kept in mind that Ms. Fosse's reporting line was altered shortly after the preliminary investigation was completed and the Executive Secretary resigned not much later. These protective measures, effected relatively early in the process, significantly decreased and later obviated all risk of further possible retaliation. The delay in the investigation and determination of the retaliation thus posed no direct harm and did not materially influence the outcome of the process as to invalidate the final decision. There being no harm caused by the alleged procedural irregularity (if that), there was consequently no basis to award compensation in terms of Article 10(5)(b) of the Statute of the UNDT.

52. Likewise, the UNDT erred in awarding moral damages for harm allegedly caused by the contested decision. The medical reports indicating that Ms. Fosse was distressed, anxious and depressed were issued six months before the contested administrative decision was taken. Thus, even if the contested administrative decision had been unlawful there was no causal nexus between it and the distress, anxiety and depression suffered by Ms. Fosse. It may or may not be true that Ms. Fosse suffered distress, anxiety and depression as a result of harassment, as the medical reports maintain, but the issue of any harm caused by harassment is not a matter for determination in this appeal which is concerned exclusively with the legality of the determination of the retaliation complaint. The anxiety, distress and depression experienced by Ms. Fosse were pre-existing at the time of the contested administrative decision, which was in any event a lawful decision. There can be no remedy granted to Ms. Fosse without any evident legal wrong or any causal link between a wrong (an unlawful decision) and the alleged harm.

53. The appeal must accordingly be granted, and there is no basis to make any award of costs in the appeal to Ms. Fosse.

Judgment

54. The appeal is granted, and Judgment No. UNDT/2021/124 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 29th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar