



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

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Judgment No. 2023-UNAT-1313

**John O'Brien**  
**(Appellant and Respondent on Cross-Appeal)**

**v.**

**Secretary-General of the United Nations**  
**(Respondent and Appellant on Cross-Appeal)**

**JUDGMENT**

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Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Gao Xiaoli
Case No.:	2022-1670
Date of Decision:	24 March 2023
Date of Publication:	28 March 2023
Registrar:	Juliet Johnson

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Counsel for Mr. O'Brien: George Irving

Counsel for Secretary-General: Sylvia Schaefer

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

1. Mr. John O'Brien contested a decision not to launch an investigation into malicious reporting against him. By Judgment No. UNDT/2021/166<sup>1</sup>, the United Nations Dispute Tribunal (UNDT) dismissed the application (impugned Judgment). He filed an appeal with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) and the Secretary-General filed a cross-appeal. For the reasons set out below, the Appeals Tribunal dismisses the appeal and grants the cross-appeal.

**Facts and Procedure**

2. Mr. O'Brien was a Regional Technical Adviser on Climate Change Migration with the Bureau of Policy and Programme Support (BPPS) in the office of the Istanbul Regional Hub of the United Nations Development Programme (UNDP).<sup>2</sup>

3. On 27 March 2018, Mr. O'Brien attended a workshop hosted by the International Energy Agency (IEA) in Paris.<sup>3</sup> In the weeks following the workshop various staff members made allegations that Mr. O'Brien had viewed sexually explicit images on his smartphone during the workshop. Based on those allegations, the Office for Audit and Investigations (OAI) launched an investigation (Investigation IS/2018/0110) in terms of the UNDP Legal Framework for Addressing Non-compliance with the UN Standards of Conduct (the legal framework).

4. On 10 May 2018, Mr. O'Brien submitted a request for protection against retaliation (PAR) to the UNDP Ethics Office based on his having raised allegations of corruption with regard to the UNDP Global Environment Facility (GEF) Standards and Labels for Promoting Energy Efficiency in Russia project (S&L Project) in 2017.<sup>4</sup> Mr. O'Brien alleged retaliation by the former UNDP Global Environment Finance Executive Coordinator, who was involved in the S&L Project and claimed it was he who was behind the allegations against him that led to OAI's Investigation IS/2018/0110.

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<sup>1</sup> *O'Brien v. Secretary-General of the United Nations*, Judgment dated 30 December 2021.

<sup>2</sup> Appeal, para. 2; cross-appeal, para. 2.

<sup>3</sup> *Ibid.*, para. 4 and para. 3, respectively.

<sup>4</sup> Impugned Judgment, para. 4.

5. The UNDP Ethics Office determined that Mr. O'Brien had engaged in protected activities in 2017 by sending an e-mail to his supervisor, highlighting corruption concerns in relation to the S&L Project and by cooperating as a witness in OAI's investigation into the S&L Project.<sup>5</sup> However, on 4 June 2018, the Director of the UNDP Ethics Office informed Mr. O'Brien that the documentation and information provided with regard to his PAR request did not support a *prima facie* case of retaliation.<sup>6</sup> On 17 December 2018, Mr. O'Brien requested the Chairperson of the Ethics Panel of the United Nations (EPUN) to review the UNDP Ethics Office determination of 4 June 2018. On 4 March 2019, the Chairperson of EPUN upheld the UNDP Ethics Office determination.

6. On 25 March 2019, OAI provided Mr. O'Brien with its draft investigation report and requested him to submit his comments and countervailing evidence.<sup>7</sup> He provided comments on 7 April 2019 and on 12 April 2019. On 8 May 2019, OAI issued its investigation report in which it found that three anonymous IEA witnesses with no direct links to Mr. O'Brien were credible and reliable witnesses, and that the allegations against him had been substantiated. It thus recommended disciplinary action.

7. On 18 October 2019, after reviewing OAI's investigation report, the Assistant Administrator and Director, Bureau for Management Services (BMS), UNDP, wrote to Mr. O'Brien informing him that the photos of him provided by the witnesses, who had been interviewed in the process of the Investigation IS/2018/0110, and who wished to remain anonymous, were not clear enough to ascertain the specific image he had viewed on his smartphone and consequently there was insufficient evidence to charge him with misconduct.<sup>8</sup>

8. On 31 October 2019, Mr. O'Brien contacted OAI and requested an independent review of Investigation IS/2018/0110, claiming that such investigation had not been carried out in accordance with the OAI Investigation Guidelines.<sup>9</sup> In his letter he stated:

In conclusion, I am convinced that this 18 months investigation into myself from 20 April 2018 to 18 October 2019 has been improperly motivated, that it has not been carried out in accordance with OAI guidelines or under the presumption of innocence

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<sup>5</sup> Ethics Office letter of 4 June 2018 (Attachment 4 to the application).

<sup>6</sup> Impugned Judgment, para. 5.

<sup>7</sup> Investigation report (Annex R/1 to the reply on the merits), para. 6.

<sup>8</sup> Impugned Judgment, para. 11; BMS letter of 18 October 2019 (Attachment 11 to the application).

<sup>9</sup> Impugned Judgment, para. 12; Mr. O'Brien's complaint of 31 October 2019 (Attachment 12 to the application).

until proven guilty and that for this reason an independent review is required. I am therefore requesting that an independent inquiry be undertaken looking into whether or not this investigation was carried out in an objective and impartial manner and in accordance with the OAI guidelines, that this review looks into malicious reporting and that such a review should hold those parties involved accountable for any misconduct, and I kindly request to be able to speak to the person carrying out this independent inquiry at the appropriate time.

9. On 6 January 2020, the Director, OAI, responded to Mr. O'Brien's claims regarding the conduct of Investigation IS/2018/0110, and notified him that his claims did not warrant an independent review.<sup>10</sup> It is this decision that is the contested decision in the appeal before us. On 4 March 2020, Mr. O'Brien requested a management evaluation of the contested decision.

10. In addition, on 30 December 2019, Mr. O'Brien requested that OAI launch an investigation into the alleged wrongdoing of three UNDP staff members, who he alleged had planned a "malicious" complaint of sexual harassment against him by anonymous IEA staff members.<sup>11</sup> OAI notified him in April 2020 that an investigation of his allegations of wrongdoing against the three UNDP staff members was not warranted and closed the case. Mr. O'Brien did not request a management evaluation of OAI's decision not to investigate his allegations of wrongdoing against the three UNDP staff members.

11. On 14 May 2020, the Assistant Administrator and Director, BMS, informed Mr. O'Brien that the contested decision had been upheld in the management evaluation.<sup>12</sup>

12. On 7 August 2020, Mr. O'Brien filed an application before the UNDT challenging the contested decision.<sup>13</sup> On 9 September 2020, the Secretary-General filed his Reply requesting the UNDT to determine the receivability of the application as a preliminary matter. On 11 November 2021, the UNDT held that the application was receivable and directed the Secretary-General to file his submission on the merits. The UNDT identified the contested administrative decision at issue in the case as the decision contained in the letter of 6 January 2020 letter from the Director, OAI, rejecting the request to conduct an independent review of Investigation IS/2018/0110. On 10 December 2021, after having reviewed the

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<sup>10</sup> Impugned Judgment, para. 13; OAI memorandum of 6 January 2020 (Attachment 14 to the application).

<sup>11</sup> Mr. O'Brien's e-mail of 30 December 2019 (Annex R/3 to the reply).

<sup>12</sup> Impugned Judgment, para. 16.

<sup>13</sup> *Ibid.*, para. 17.

submissions and evidence on record, the UNDT found that the matter could be determined on the papers without holding a hearing.

*The Impugned Judgment*

13. The UNDT held that the application challenging the contested decision was receivable on the following basis<sup>14</sup>:

The Applicant had complained of malicious reporting and the letter from the Director of OAI had concluded that there was no evidence of malicious reporting against him, which implied that there may have been some truth in the view of the investigators that the complaints against him were credible. Such a decision could adversely affect the Applicant's employment record and reputation. Consequently, the Applicant would have a right to dispute it.

14. In relation to the merits, the UNDT concluded that Investigation IS/2018/0110 had "followed all the required procedures and regulations", and consequently dismissed the application.<sup>15</sup>

15. On 24 February 2022, Mr. O'Brien filed an appeal with the UNAT, challenging the judgment of the UNDT. On 23 May 2022, the Secretary-General filed its answer on the merits and a cross-appeal contending that the UNDT had erred on a question of law and exceeded its competence in finding that the contested decision constituted an administrative decision and that the application was receivable. Mr. O'Brien filed his answer on 21 July 2022.

**Submissions**

**Mr. O'Brien's Appeal and Answer to the Cross-Appeal**

16. Mr. O'Brien submits that the UNDT erred in not holding a hearing and refusing to admit certain evidence and thus denied him a proper opportunity to present his case.

17. While Mr. O'Brien accepts that the Organization retains discretionary authority over the conduct of its investigations, he argues that such authority is not unfettered and that the decision not to conduct a review was unreasonable.

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<sup>14</sup> *Ibid.*, para. 30.

<sup>15</sup> *Ibid.*, para. 35.

18. Mr. O'Brien further submits that the evidence establishes that OAI was improperly motivated to cover up the retaliatory actions against him.

19. Mr. O'Brien requests the UNAT to reject the cross-appeal and to uphold the receivability of the application.

### **The Secretary-General's Cross-Appeal and Answer to the Appeal**

20. The Secretary-General submits that the UNDT erred in finding that the contested decision constituted an administrative decision. He maintains that the contested decision had no direct, legal or adverse impact on Mr. O'Brien and accordingly was not an administrative decision, with the consequence that the application was not receivable.

21. The Secretary-General further argues that the UNDT did not err in concluding that Investigation IS/2018/0110 had followed all the required procedures and regulations and in dismissing the application on that basis.

### **Considerations**

22. Mr. O'Brien has requested a hearing. Since the decisive issue in this case is straightforward, there is no need for a hearing as such would not assist in the expeditious and fair disposal of the appeal.

23. The UNDT erred in its finding that the application was receivable.

24. It would appear to be common cause that the recommendation of OAI (in its investigation report of 8 May 2019) that disciplinary action should be taken against Mr. O'Brien, on the basis that the allegations had been substantiated, did not constitute an administrative decision. A recommendation to institute disciplinary action normally will not be an administrative decision because it may lack immediacy or finality and thus would not have a direct effect. A decision is only an administrative decision if it is of an administrative nature, adversely affects the contractual rights of a staff member and has a direct, external legal effect.<sup>16</sup> Where a decision requires several steps to be taken by different functionaries, only the last of which is directed at the staff member, the previous decisions or actions of the administration lack direct effect, and only the final decision is appealable or reviewable.

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<sup>16</sup> *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para 50.

Preparatory or intermediate decisions are not reviewable. The rationale for this principle is the idea that judicial review should concentrate pragmatically on consequential decisions of a final nature. The recommendation of OAI was moreover not a “decision”. It was an intermediate recommendation and thus did not have a direct, legal or adverse effect for that reason also.<sup>17</sup>

25. Likewise, the decision of the Assistant Administrator and Director, BMS, UNDP, taken on 18 October 2019, that there was insufficient evidence to charge Mr. O’Brien with misconduct did not constitute an administrative decision because it did not have an adverse impact on his rights.

26. In addition, OAI’s refusal in April 2020 of Mr. O’Brien’s request to launch an investigation into the alleged wrongdoing of three UNDP staff members, who he alleged had planned a “malicious” complaint of sexual harassment against him, did not constitute an administrative decision because it too lacked direct effect. Any challenge to it would have been not receivable also because he lacked the direct and substantial interest in the decision necessary to confer standing (since disciplinary decisions fall exclusively within the managerial prerogative), and most pertinently in this instance because he did not request management evaluation of the decision not to investigate.

27. And finally, there is no challenge before us to the decisions of the Director of the UNDP Ethics Office and the Chairperson of EPUN that Mr. O’Brien failed to establish a *prima facie* case of retaliation.

28. Hence, the decisive preliminary question in this appeal, as both parties and the UNDT understood, is whether the contested decision in the letter of OAI, dated 6 January 2020, constituted an administrative decision. That decision was taken in response to the complaint by Mr. O’Brien, dated 31 October 2019, requesting OIA to conduct an independent review of Investigation IS/2018/0110 on the basis that such investigation had not been carried out in accordance with the OAI Investigation Guidelines.

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<sup>17</sup> However, a decision to institute disciplinary action on the basis of a procedurally flawed investigation (which did not happen in this case), depending on the circumstances, could be reviewable, but even then an argument might be made that such would be better deferred to the review of a final decision to impose discipline after a further process which might have cured earlier procedural defects in relation to the intermediate decision.

29. In essence, Mr. O'Brien seeks review of an investigation that produced an intermediate recommendation (without direct effect) that was not implemented (hence without external, legal effect) and thus did not directly and adversely impact his contractual employment rights. The UNDT determined that despite the absence of these effects, the decision still constituted an administrative decision because the conclusion of OAI that "there was no evidence of malicious reporting (...) implied that there may have been some truth in the view of the investigators that the complaints against him were credible" and such a decision could affect Mr. O'Brien's employment record and reputation.

30. While there is an apparent logic in the reasoning of the UNDT, it loses sight of the jurisdictional precondition of an immediate, direct, and adverse impact. In terms of Article 2(1)(a) and Article 8(1)(a) of the UNDT Statute, the UNDT is competent to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in "non-compliance with the terms of appointment or the contract of employment." Before an administrative decision can be held to be in non-compliance with the contract of employment of a staff member, it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. The impact or consequences of a disputed decision must be based on objective elements that both parties can accurately determine.<sup>18</sup> Speculation about potential future possible consequences for a staff member's employment record or his reputation is an insufficient basis to conclude that a decision has had (not "may have") a direct and adverse impact such as to be "in non-compliance with the terms of appointment or contract of employment" as contemplated in Article 2(1)(a) of the UNDT Statute. There is no evidence that the refusal to review the investigation had any adverse impact on Mr. O'Brien. On the contrary, the entire process led to a final decision exonerating Mr. O'Brien.

31. Staff members do not have any right under the governing legal framework to an independent review of an investigation by OAI, which is the independent investigative branch of UNDP, providing internal, objective oversight and investigation services and which has operational independence in terms of UNDP Financial Regulation 4.01 and the OAI Charter. OAI bears the functional responsibility to provide management with the means to exercise its disciplinary prerogative.

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<sup>18</sup> *Collas v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-473, para. 41.



32. Moreover, it is important to note that we do not have here an alleged breach of due process rights that has led to an unfair decision to take disciplinary action. If there had been a disciplinary process, any disciplinary measure imposed at the conclusion of an unfair process by OAI could have been challenged before the UNDT. But in this case, no such decision was taken, and there was therefore no reviewable administrative decision. In the premises, the Administration's decision not to launch an independent review of Investigation IS/2018/O110 did not produce direct legal consequences affecting Mr. O'Brien's rights under the contract of employment.

33. In so far as Mr. O'Brien has concerns about the impact the unfounded allegations and the OAI investigation may have on future decisions bearing upon his employment rights and expectations, any improper reliance upon or undue consideration of them will affect the reasonableness and legality of such decisions if and when they are taken. At the moment, the matter is hypothetical and not ripe for determination.

34. In the premises, the contested decision not being an administrative decision, the application was not receivable and the UNDT erred in holding otherwise. The cross-appeal must be granted, the appeal must be dismissed and there is no need to determine the other issues raised in Mr. O'Brien's appeal.

**Judgment**

35. The appeal is dismissed, the cross-appeal is granted and Judgment No. UNDT/2021/166 is hereby affirmed on different grounds.

Original and Authoritative Version: English

Dated this 24<sup>th</sup> day of March 2023 in New York, United States.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Colgan

*(Signed)*

Judge Gao

Judgment published and entered into the Register on this 28<sup>th</sup> day of March 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar