



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

Judgment No. 2023-UNAT-1336

**Felix Ross
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case No.:	2022-1697
Date of Decision:	24 March 2023
Date of Publication:	2 May 2023
Registrar:	Juliet Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Rupa Mitra

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Felix Ross contested the decision by the United Nations High Commissioner for Refugees (UNHCR) he alleged failed to provide him with an effective remedy to a harassment, abuse of authority and retaliation complaint. In Judgment No. UNDT/2022/031 (impugned Judgment), the UNDT found the application not receivable *ratione personae* and *ratione materiae*.
2. Mr. Ross filed an appeal before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
3. For the following reasons, we dismiss the appeal.

Facts and Procedure

4. This is an appeal against the Judgment of the UNDT dismissing the application of Mr. Ross, a former staff member of the Office of the UNHCR, contesting a decision by UNHCR which he alleged failed to provide him with an effective remedy to a harassment, abuse of authority and retaliation complaint.
5. The UNHCR Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4) (the Policy) aims at ensuring *inter alia* that “all UNHCR staff members are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority” (Paragraph 1 of the Policy). Paragraph 4.6.1.1 of the Policy provides that any aggrieved individual including former personnel may file a formal complaint with the Inspector General’s Office (IGO) alleging discrimination, harassment or abuse of power. Paragraph 4.6.2.1 provides that the IGO will determine whether the allegation can be established based on the facts of the case. If the facts disclose prohibited behaviour, the IGO is obliged to refer an investigation report to the Director, Division of Human Resources Management (DHRM), who may initiate disciplinary proceedings (Paragraph 4.6.2.2).
6. Mr. Ross has been engaged in serial litigation against UNCHR since he separated from UNCHR on 31 March 2016, when his fixed-term contract expired. He has consistently and repeatedly complained that the termination of his employment with UNHCR was done in

retaliation for his having challenged the outcome of two processes in relation to positions for which he was not selected. In this appeal, Mr. Ross contests the decision of the IGO, communicated to him on 22 October 2020, declining to investigate any aspects of his complaints, not to pursue the matter further and to consider it closed.

7. In his application to the UNDT dated 14 March 2021, forming the basis of the present appeal, Mr. Ross described the contested administrative decision as “[t]he decision of the Respondent not to provide the Applicant with an effective remedy to a harassment, abuse of authority and retaliation complaint” – being the aforementioned decision of the IGO, communicated to him, on 22 October 2020. Later in his application, he formulated his cause of action as follows:

... The Applicant challenges the fact that UNHCR has until today failed to carry out an investigation into his complaint that his separation from UNHCR was done in retaliation for him having challenged the outcome of two selection processes and that he was subsequently blacklisted by the very same people who had decided to separate him.

... The Respondent has done everything to avoid an investigation into the Applicant’s complaint despite the fact that the blacklisting in two instances is evident to anyone at first glance. Numerous senior UN officials at all levels have ignored the evident blacklisting in a concerted effort to protect the perpetrators in high level positions and the organization from the consequences.

8. In the impugned Judgment, the UNDT sets out the facts in relevant part as follows:¹

... The Applicant joined UNHCR in November 2008. He initially served as a Legal Officer (Human Resources) in Geneva, at the P-3 level. In January 2012, he was reassigned to Sudan as a Senior Protection Officer, and in January 2013 he moved to Nairobi where he worked as a Legal Officer, Private Sector Fundraising. He then went on Special Leave Without Pay (“SLWOP”) from 1 July 2013 to 1 July 2015. Upon his return from SLWOP, the Applicant took up a temporary assignment in Rabat, Morocco as a Senior Protection Officer.

... Following his non-selection, on a fixed-term basis, for the post that he was temporarily encumbering, the Applicant filed a request for management evaluation and formally complained about the Hiring Manager, and his then supervisor. He rejected a subsequent offer by UNHCR to be reconsidered for the post when the selected candidate

¹ Impugned Judgment, paras. 2-27.

declined the appointment. Ultimately, without another assignment, his fixed-term contract expired on 31 March 2016, and he separated from UNHCR.

... The Applicant filed management evaluation requests contesting his non-selection in various recruitments processes, the non-renewal of his contract effective 31 March 2016 and the placement of an annotation in UNHCR's HR management system ("MSRP") on 11 October 2016. These matters were brought before [the UNDT] and, in most cases, appealed to the Appeals Tribunal.

... On 24 January 2019, the Applicant submitted a complaint to ... High Commissioner ... alleging misconduct and retaliation against him by several senior staff members. In this complaint, the Applicant claimed that he was retaliated against for having challenged two selection processes before his separation and that, once separated, he was the victim of a conspiracy to "blacklist" him from further rehire.

... On 28 January 2019, the Office of the [IGO], UNHCR, referred the Applicant's complaint to the Office of Internal Oversight Services ("OIOS") of the UN Secretariat per sec. 3.1.1 of the Memorandum of Understanding between UNHCR and OIOS on Investigations and Inspections ("MOU") since the complaint involved members of UNHCR's Executive Office and in line with the Applicant's request in his complaint.

... On 22 February 2019, the Applicant sent OIOS additional information.

... On 25 February 2019, the Applicant was informed that OIOS had declined to investigate the matter.

... On 27 February 2019, upon query from the Applicant, the High Commissioner's Chef de Cabinet shared the MOU with the Applicant. It was suggested to the Applicant seeking further clarification from the "Head of OIOS, Investigation Division".

... On 28 February 2019, the Head of OIOS indicated to the Applicant that OIOS would not investigate the complaint, *inter alia*, noting that the Applicant had "a case or cases before the Tribunal, experience dictates that it is not a good idea for [OIOS] to start investigating when the same issues are possibly being considered by [it]. If issues of misconduct are identified by the Tribunal, [it] will highlight them and refer them back."

... On 4 March 2019, the Applicant requested management evaluation of OIOS' decision not to investigate his complaint.

... By letter of 29 March 2019, the Management Evaluation Unit informed the Applicant that his request for management evaluation of OIOS' decision was not receivable.

... On 8 June 2019, the Applicant filed an application before the Tribunal contesting OIOS' decision not to investigate his complaint. This case was registered under Case No. UNDT/NBI/2019/061.

... On 10 July 2019, the Tribunal issued Judgment *Ross* UNDT/2019/126 disposing of three applications submitted by the Applicant, namely:

- a. Case No. UNDT/NBI/2016/054 against the decision not to renew his fixed-term appointment and to separate him from service;
- b. Case No. UNDT/NBI/2018/040 against the decision to insert adverse material into his Official Status File (“OSF”); and
- c. Case No. UNDT/NBI/2018/083 against the decision to appoint another candidate to the position of Senior Protection Officer in Tunis.

... The Tribunal dismissed Case No. UNDT/NBI/2016/054 finding that the Applicant had failed to substantiate his claims of a flawed process and improper motives leading to his separation from service. With respect to Case No. UNDT/NBI/2018/040, the Tribunal found that the Administration had failed to follow the proper procedures for the placement of adverse material in the Applicant’s OSF and ordered the immediate removal of the annotation contained therein. In relation to the non-selection decision (Case No. UNDT/NBI/2018/083), the Tribunal determined that the decision to exclude the Applicant from the selection process at an early stage had been tainted by procedural error and had been unlawful. The Tribunal awarded the Applicant USD2,000 for moral harm for this error.

... On 6 September 2019, the Applicant filed an appeal against [the UNDT’s] judgment in *Ross*, challenging its decision regarding the non-renewal of his fixed-term appointment.

... On 9 September 2019, the Secretary-General appealed against [the UNDT’s] judgment in *Ross* contesting its decision in connection with the Applicant’s non-selection for the post in Tunis.

... On 30 September 2020, the [Dispute] Tribunal issued Judgment *Ross* UNDT/2020/173 (Case No. UNDT/NBI/2019/061), finding not receivable the Applicant’s appeal of OIOS’ decision to not investigate his complaint. The Applicant did not appeal this Judgment.

... In Judgment *Ross* 2020-UNAT-1000 dated 27 March 2020, the Appeals Tribunal confirmed the [Dispute] Tribunal’s finding and found no illegality or ill-intent in the Applicant’s separation from service. However, it granted the Secretary-General’s appeal and vacated the [Dispute] Tribunal’s Judgment concerning its finding on the Applicant’s non-selection as it deemed that the challenge of the Applicant’s non-selection was-time barred.

... On 1 October 2020, the Applicant wrote to the Head of OIOS to renew his request that OIOS investigate his complaint given that the Appeals Tribunal had “recently rendered its final decision on the separation and the blacklisting, see UNAT decision number 2020-UNAT-1000”.

... On 12 October 2020, the Head of OIOS replied that the issuance of the judgments did not change OIOS' decision not to proceed with a formal investigation of the matters raised in the Applicant's complaint. In his email, he, *inter alia*, summarized the findings of this Tribunal and of the Appeals Tribunal in the Applicant's cases, and concluded that:

(a) [His] original decision not to investigate [the Applicant's] complaint was based on a well-founded belief in the difficulties and impracticability[ie]'s of investigating a matter which is also before the Tribunal and is essentially based on the consideration of the same facts was vindicated by the UNDT (sic).

(b) Neither Tribunal made any mention of misconduct, or possible misconduct by any UNHCR staff members, or recommended accountability measures, which of course had they done so would have required [him] to re-visit [his] earlier decision.

(c) [The Applicant has] 'obtained relief' with respect to the ill-judged comment appended to [his] official status file and been paid compensation.

[...] OIOS will not be investigating any aspect of [the Applicant's] complaints.

... On 16 October 2020, the Applicant wrote to the High Commissioner and requested that the High Commissioner provide him with "an effective remedy", concluding by stating that "because of the overwhelming evidence you may alternatively decide to recognize that I have been separated and blacklisted in retaliation for having sought justice. In this case you should decide to reinstate and compensate me for the irreparable harm I have sustained."

... On 22 October 2020, the IGO's Head of Investigation Service responded that he had "taken note of the UNDT/UNAT judgments pertaining to the matter as well as the decision by the Head of the OIOS Investigations Division of 12 October [2020] declining to investigate any aspect of [the Applicant's] complaints and wish to inform [the Applicant] that the IGO will not pursue the matter further and hence considers the matter closed."

... On 30 October 2020, the Applicant filed a request for management evaluation of the contested decision mentioned in para. 1 above and, *inter alia*, requested that the Deputy High Commissioner ("DHC") of UNHCR be recused from acting as the decision-maker.

... On 19 November 2020, the Applicant was informed that his request for recusal of the DHC had been considered and that the Assistant High Commissioner for Protection ("AHCP") would be the decision-maker in connection with his request for management evaluation. He was also asked to file the documents that he had withheld from his management evaluation request, which he did on the same day.

... By letter dated 4 January 2021, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision.

... On 14 March 2021, the Applicant filed [an] application ... request[ing] the [Dispute] Tribunal to hear the former and the current Heads of the Investigation Service of UNHCR in determining whether the decision to close his case constitutes abuse of authority.

9. On 29 March 2022, the UNDT issued Judgment No. UNDT/2022/031, dismissing the application. The UNDT held that the application was not receivable *ratione personae* because none of the matters raised in the complaint could be construed as a breach of Mr. Ross' rights as a former staff member, and there was insufficient nexus between his former employment and the impugned decision. It also held that the application was not receivable *ratione materiae* because the decision did not have a direct impact on Mr. Ross' terms of appointment or contract of employment and thus did not constitute an administrative decision.

10. Mr. Ross filed his appeal against the impugned Judgment on 30 May 2022. The Secretary-General filed an answer on 1 August 2022.

Submissions

Mr. Ross' Appeal

11. Mr. Ross submits that the UNDT erred in holding that the application was not receivable. He contends that there was a sufficient nexus with his former employment and that the contested decision was an administrative decision in that it adversely affected his rights.

12. He reiterates many of the arguments he made before the UNDT and in earlier litigation that he was the victim of abuse of authority because he challenged the selection processes in which he had been unsuccessful.

13. Mr. Ross asks that the Appeals Tribunal rescind the contested decision and refer the cases to the Secretary-General for possible action to enforce accountability.

The Secretary-General's Answer

14. The Secretary-General supports the reasoning of the UNDT on the question of receivability and maintains that the UNDT did not err in finding the application not receivable.

15. The Secretary-General submits on the merits that Mr. Ross has persistently failed to discharge the burden of proving improper motives and failed to present any evidence showing that his separation from service was a result of retaliation. The real reason for Mr. Ross' separation was his refusal of an offer of extension of his fixed-term appointment. Mr. Ross' separation from service arose from the expiry of his fixed-term contract and therefore could not constitute prohibited conduct. Consequently, the refusal by the IGO to investigate further was lawful and reasonable.

16. He accordingly requests the appeal to be dismissed.

Considerations

17. The UNDT erred in finding that the application was not receivable *ratione personae* and *ratione materiae*.

18. In terms of Article 2 of the Statute of the UNDT, the UNDT is competent, and thus has jurisdiction, to hear and pass judgment on an application appealing an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment. An administrative decision is a decision which adversely affects the rights of a staff member and which has a direct, external, legal effect.

19. The contested decision was one related to a complaint filed by Mr. Ross on 24 January 2019 alleging retaliation. The complaint was filed in terms of Paragraph 4.6.1.1 of the Policy. The IGO, acting pursuant to Paragraph 4.6.2.1 of the Policy, determined that the allegations were insufficiently established by the evidence and opted not to investigate the complaint further. This was communicated to Mr. Ross on 28 February 2019, by the Head of OIOS who indicated that OIOS would not investigate the complaint, *inter alia*, because it was not a good idea for OIOS to start investigating issues that were before the UNDT (in the cases involving his separation from service) which might refer allegations of misconduct back for further investigation. On 8 June 2019, Mr. Ross filed an application with the UNDT contesting OIOS' decision not to investigate his complaint.

20. On 30 September 2020, the UNDT, although dealing with the merits of the complaint, and for reasons that are not entirely clear, held that the application was not receivable. It stated that it would "be pointless for OIOS to be pursuing an investigation which may be rendered

moot by a decision of the Tribunal or UNAT”² and dismissed the application essentially on that basis. Mr. Ross did not lodge an appeal against this Judgment.

21. Instead, on 1 October 2020, he wrote to the Head of OIOS to renew his request that OIOS investigate his complaint on the basis that the Appeals Tribunal, six months earlier, in March 2020, had rendered its final decision on his separation and blacklisting claims. The Appeals Tribunal, it will be recalled, had found no improper motive or illegality in relation to Mr. Ross’ separation from service. Mr. Ross’ renewed request was thus predicated on the assumption that as the UNAT had ruled on the various issues regarding the separation from service that were subject of his other application, the impediments to a determination had fallen away and his request for an investigation was then ripe.

22. On 22 October 2020, the IGO took the contested decision that it would not pursue the matter further and considered the matter closed.

23. Paragraph 4.6 of the Policy confers a right upon staff members, specifically including former staff members, to file with the IGO a formal complaint alleging discrimination, harassment and abuse of power. That right, and the efficacy of the Policy, would be meaningless if it did not include the right or expectation to a proper and reasonable consideration of the complaint for the purpose of determining whether to produce an investigation report for furtherance to the Director, DHRM. It is clear from the language of Paragraph 4.6.2.1 of the Policy that the IGO has a discretion to decide whether to investigate the alleged prohibited conduct on the basis of the information at its disposal. It is required to exercise that discretion legally and rationally. There must be a rational basis for its decision to investigate and report to the Director, DHRM, or, on the contrary, to refuse to investigate further as happened in this case.

24. The UNDT held that the refusal to investigate further did not adversely impact Mr. Ross’ rights and was insufficiently connected to his former employment and thus the application not receivable. It is hard to imagine in general how a decision not to investigate an allegation of illegal retaliation against a staff member, in the form of an alleged improper termination of employment, would not be sufficiently connected to or adversely affect his or her contract of employment. While the decision not to investigate may not deprive the staff member of any specific employment rights, especially if a fixed-term contract has expired

² *Ross v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/173, para. 26.

through the effluxion of time, it nonetheless would determine adversely the allegation of abuse of authority – vicariously a breach of contract. That is an adverse impact and given that in this case the purported abuse is alleged to have been the improper rationale for the separation from service of Mr. Ross, as a former staff member, it is sufficiently connected to his employment to confer jurisdiction *ratione personae*. Indeed, footnote 2 of Paragraph 4.6.1.1 of the Policy clearly contemplates former staff members in the situation of Mr. Ross making complaints about abusive acts of authority leading to their separation from service. In the premises, the application was receivable and the UNDT erred in holding otherwise.

25. It is accordingly necessary to consider the merits of the contested decision.

26. In reaching its conclusion that Mr. Ross' complaint required no further investigation, the IGO was influenced by the outcome of the prior litigation brought by Mr. Ross.

27. In the appeal adjudicated in 2020,³ the Appeals Tribunal did not find any illegality or ill-intent in the separation of Mr. Ross from service. Both the UNDT and the Appeals Tribunal accepted that Mr. Ross' fixed-term contract expired naturally under Staff Rule 9.4 following his refusal to accept an extension of his temporary assignment on 31 March 2016 and an offer to be recommended for a regular position in Rabat for which he had previously applied. Rather than retaliation or abuse of authority, there had been an attempt to accommodate Mr. Ross and to keep him on the payroll. Mr. Ross accordingly did not discharge the burden of proving improper motives and failed to present any evidence showing that his separation from service was a result of retaliation and thus there was no illegality in Mr. Ross' separation from service. The real reason for the separation was his continued persistence in refusing the offers of extension of his fixed-term appointment. Therefore, Mr. Ross' separation from service arising from the expiry of his fixed-term contract could not constitute prohibited conduct.

28. Moreover, Mr. Ross had requested the Tribunals to make referrals for accountability of senior officials whom he named. The Tribunals rejected his request on the basis that he had failed to substantiate any of his underlying claims or to make out a proper case for referral. These findings thus discounted a finding of retaliation or impropriety on the part of the persons accused by Mr. Ross.

³ *Ross v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1000.

29. In the light of these authoritative pronouncements by the Appeals Tribunal, it was entirely rational and justifiable for the IGO to decline to investigate Mr. Ross' complaint further. Mr. Ross had a fair opportunity to ventilate the principal issues. Consequently, the IGO was entitled within its discretion to decline to investigate further, if only in the interests of preserving its limited resources. The contested decision was thus lawful and reasonable.

30. In the result, the appeal must be dismissed.

Judgment

31. The appeal is dismissed and Judgment No. UNDT/2022/031 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 2nd day of May 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar