



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

REHMAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**SUMMARY JUDGMENT**

---

**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Miles Hastie, UNICEF

## **Introduction**

1. By application filed on 30 May 2016, the Applicant contests the decision in respect of a “[r]efusal to take action against staff members involved in fake/illegal payment on behalf of (sic) applicant”.

## **Facts**

2. The Applicant joined the United Nations International Children's Emergency Fund (“UNICEF”), Islamabad, Pakistan, on 1 January 2013 as a Program Assistant, GS-6 level, and was separated from service on 31 December 2015, upon the completion of her fixed term contract.

3. The Applicant asserts that she was the subject of humiliating and discriminatory behaviour from her Section Chief, who was her supervisor. This is not a matter before the Tribunal.

4. The Applicant alleges that in July 2015, to undermine her credibility, a scam was engineered to “taint [her] credibility and affect [her] professional career”. The allegation concerned the payment of a hotel account twice, once by the Applicant and once by UNICEF.

5. An inquiry was conducted by the Office of Internal Audit and Investigations (OIAI), UNICEF, of which the Applicant was notified on 23 July 2015.

6. On 13 October 2015, the Applicant was advised that the investigations had found no fault on her part in respect of the double payment of the hotel account. It was apparent that the Applicant had received daily subsistence allowance (“DSA”) for the hotel expenses, and other expenses, and that independently the hotel accommodation had also been paid for directly by UNICEF. The error had been recognised and UNICEF had received a refund of the payment it made. The Applicant was advised on 24 December 2015 in the following terms:

We have received the refund.

This case is closed: no further action is required from you or others.

Thank you. (the decision of 24 December 2015)

7. The Applicant alleges that there were a significant number of irregularities concerning the double payment and other matters. The Applicant also asserts that the email to her of 24 December 2015 constitutes a decision not to pursue an investigation or take disciplinary action against “those behind the conspiracy” and that this decision may be the subject of review by the Tribunal.

8. The Applicant, after separation from UNICEF, by email dated 26 January 2016 to OIAI, requested an inquiry into the matter of her allegations of fraud in respect of the double payment of a hotel account.

9. On 19 February 2016, the Applicant requested management evaluation of the decision of 24 December 2015. By letter of 8 March 2016, the Applicant was advised that the management evaluation was dismissed on the basis that the email of 24 December 2015 “does not constitute an administrative decision susceptible to management evaluation as it did not produce direct legal consequences nor would the failure of others to report to you believe (sic) amount to misconduct”.

10. As noted above, the application in this matter was filed on 30 May 2016. It was served on the Respondent on 31 May 2016.

11. By motion of 20 June 2016, the Respondent sought summary judgment in this matter, asserting that the application is not receivable as the decision of 24 December 2015 falls entirely within the unilateral and sole discretion of the Respondent and is not an administrative decision having direct legal consequences on the Applicant and thus not within the jurisdiction of the Tribunal to review.

12. On 7 July 2016, the Tribunal ordered the Applicant to file by 22 July 2016 comments, if any, on the Respondent’s motion to determine the receivability of the application as a preliminary matter.

13. On 20 July 2016 the Applicant filed her submissions in response to the Respondent’s motion. In her submissions she reasserts the matters raised in the

application. The Applicant recalls, as a heading in her submission, that “[s]taff members have a duty to report any breach of the Organisation’s regulations and rules to officials whose responsibility it is to take appropriate action and cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.” The Tribunal notes that this is directly drawn from staff rule 1.2(c).<sup>1</sup> The Applicant asserted that the alleged decision is incorrect, effectively being in breach of this staff rule. She asserts the matters she complained of should have been the subject of investigation. It is the decision not to investigate such matters which forms the basis of her application.

### **Consideration**

14. The Tribunal recalls that for it to have jurisdiction there are a number of preconditions.

15. Article 2 of the UNDT Statute relevantly provides:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an *administrative decision* that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance (emphasis added)

16. Also, art. 3 of the UNDT Statute relevantly provides:

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including The United Nations Secretariat or separately administered United Nations funds and programmes;

---

<sup>1</sup> ST/SGB/2014/1, and repeated in ST/SGB/2016/1

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

17. It is necessary to first consider what is meant by the words “administrative decision” in the context of the terms of appointment or contract of employment. It has been long determined in domestic jurisdictions that one must have a particular and personal interest in a decision to be able to challenge an administrative decision. In the context of the UNDT jurisdiction the following has been determined by the UNAT in *Lee* 2014-UNAT-481:

48. The Dispute Tribunal correctly concluded that Ms. Lee’s application was not receivable *ratione materiae* because it challenged a decision that was not an administrative decision subject to judicial review. In reaching this conclusion, the UNDT correctly applied the definition of administrative decision set forth in Andronov:

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

49. We have consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must “produce[] direct legal consequences” affecting a staff member’s terms and conditions of appointment; the administrative decision must “have a direct impact on the terms of appointment or contract of employment of the individual staff member”. The UNDT correctly found that the decision Ms. Lee was challenging did not “produce[] direct legal consequences” affecting her employment.

50. The UNDT also properly considered “the nature of the decision, the legal framework under which the decision was made,

and the consequences of the decision” in determining that Ms. Lee was not challenging an administrative decision subject to judicial review.

18. This has subsequently been applied by the UNAT in *Abu Ayyash* 2015-UNAT-543 (paragraph 16).

19. In the current matter the Applicant asserts that she has complied with her contractual duty to report a matter she believes fell within her obligations under staff rule 1.2(c). To make such a report is consistent with the contractual obligations she had as a staff member. However, once having made the report she has no personal or contractual interest in the consideration of, and the decisions flowing from such report. She had a duty, which she performed, in full. It was then for the Organisation, and it alone, to determine what, if any, action would be taken following the report. The fact that the decision to proceed or not is with the Respondent alone is clear from staff rule 10.1(c)<sup>2</sup>, whereby it is provided:

The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

20. The Applicant has no personal interest in the outcome. The decision had no direct legal consequence upon her contractual relationship with the Organisation. It would only have a direct legal consequence for those who are the subject of the complaint, if a decision were to have been taken to investigate the matter and to proceed with disciplinary action against such individual(s).

21. If the complaint had been one of harassment, then the Applicant would have an interest, as any decision would have a direct legal consequence upon her rights granted under the Regulations and Rules. In the application and the reply by the Applicant to the motion for summary judgment, the Applicant makes it clear that she is not dealing in this matter with any issues of formal harassment under ST/SGB/2008/5 “Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority”.

---

<sup>2</sup> Ibid.

22. To assist the Applicant appreciate this matter, the Tribunal sets out below the relevant passages in the case of *Nwuke* 2010-UNAT-099 which make the clear distinction in respect of when a staff member may or may not have a right of review of a decision in respect of an investigation into alleged misconduct. The Applicant should note in particular paragraph 29 (emphasis added):

28. So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

29. *In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.*

30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

31. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority. Paragraph 2.1 of ST/SGB/2008/5 provides that "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

32. Paragraph 2.2 adds that "[t]he Organization has the duty to take all appropriate exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed". Paragraph 5.3 establishes that "[m]anagers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings".

33. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and in paragraph 5.17, the final report of those proceedings is referred to as follows:

The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence .... This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

34. Paragraph 5.18 provides for the possible courses of action one of which the responsible official shall take: (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual; (b) If the report indicates that there was

a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) the third option is stated as follows:

If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken (footnote omitted).

(d) A final option is established in paragraph 5.19:



Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

Paragraph 5.20, which is particularly relevant in the present case, finally establishes that “[w]here an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules”.

23. Thus there is a right of appeal given in respect of complaints made under ST/SGB/2008/5. Such right is specific and directly contained in the administrative issuance. The same is not true following a report made under the obligation of a staff member pursuant to staff rule 1.2(c) contained in ST/SGB/2014/1. No review is provided for the reporting staff member.

24. The Applicant has no right of appeal or review in this matter as the decision not to carry out an investigation is not an “administrative decision” within the jurisdiction of the Tribunal.

25. The Tribunal thus determines that this is a matter appropriate to be considered in a summary manner as provided for in art. 9 (Summary judgement) of its Rules of Procedure, which reads:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

26. The application is rejected as irreceivable, as being beyond the jurisdiction of the Tribunal.

**Conclusion**

27. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Rowan Downing

Dated this 16<sup>th</sup> day of August 2016

Entered in the Register on this 16<sup>th</sup> day of August 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva