



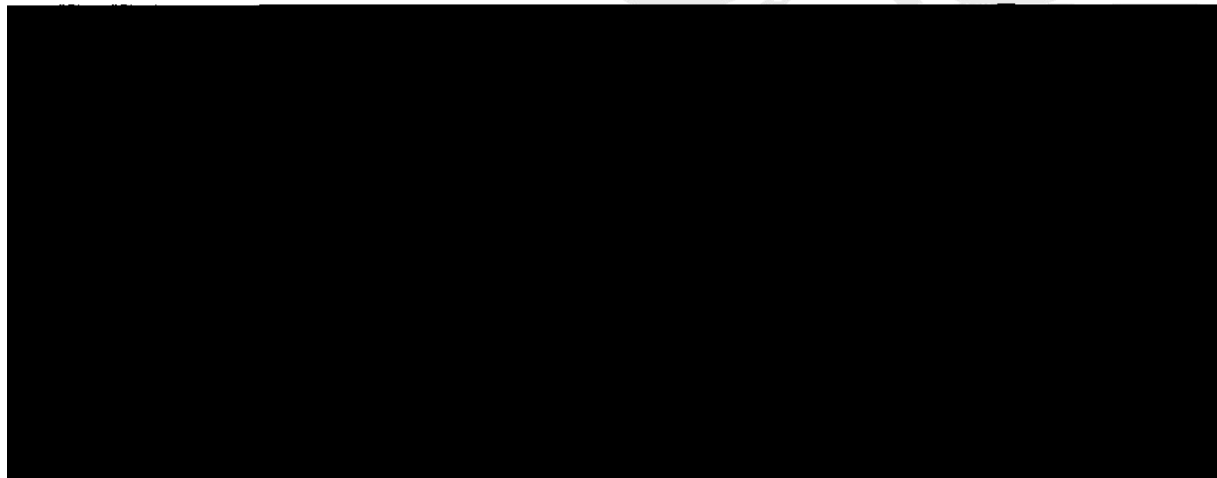
**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-444/Corr.2

Hunt-Matthes
(Respondent/Applicant)

v.

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



Counsel for Ms. Hunt-Matthes: Miles Hastie/OSLA

Counsel for Secretary-General: Stéphanie Cartier/John Stompor

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... On 25 August 2004, the Head of the Investigation Unit informed the Personnel Administration Section that the IGO had not recommended the extension of [Ms. Hunt-Matthes]' contract as a result of her unsatisfactory performance appraisal.

... On 26 August 2004, [Ms. Hunt-Matthes] received a copy of her Performance Appraisal Report ("PAR") for the period 1 September 2003 to 30 August 2004, which included the mid-term assessment dated 12 April 2004. Her performance was rated as "unsatisfactory".

... By a memorandum dated 27 August 2004, the Personnel Administration Section informed [Ms. Hunt-Matthes] that while her fixed-term appointment was due to expire effective 1 September 2004, her appointment was being extended as an administrative measure for the duration of her certified sick leave [until 30 September 2004].

...

... From 1 October 2004 until 30 August 2005 [Ms. Hunt-Matthes] was on 50 per cent sick leave. On 4 October 2004, [Ms. Hunt-Matthes] reported to work but was assigned to the Evaluation & Policy Analysis Unit ("EPAU"), UNHCR, as a Senior Evaluation Officer at the P-4 level where she served on several consecutive short-term appointments until she was separated from service on 31 May 2006.

... On 1 January 2005, [Ms. Hunt-Matthes] submitted a rebuttal statement contesting her PAR for the period 1 September 2003 to 30 August 2004. On 27 May 2005, the Rebuttal Panel issued a report in which it concluded that the case was outside its purview due to the allegations of misconduct involving senior staff of the IGO of the Executive Office. Instead, it recommended that the matter be referred to the Office of Internal Oversight Services ("OIOS") for action. This recommendation was not acted on.

...

... On 3 December 2005, [Ms. Hunt-Matthes] filed a formal complaint with OIOS alleging harassment and abuse of authority against her former supervisors at the IGO. OIOS did not investigate the matter.

... On 22 March 2006, [Ms. Hunt-Matthes] wrote to OIOS seeking protection against retaliation under ST/SGB/2005/21 [entitled "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations"] pending the outcome of her 3 December 2005 complaint. On 7 April 2006, [she] wrote to the Ethics Office requesting protection from retaliation. She alleged that the negative PAR and the decision not to renew her contract pending the outcome of due process constituted retaliation.

... On 19 October 2006, the Interim Director of the Ethics Office informed [Ms. Hunt-Matthes] that the supporting evidence she had provided was insufficient for the Ethics Office to make a determination as to whether there was a credible case of retaliation. She was assured, however, that if she provided the requested material, the review would be undertaken expeditiously.

... Following several email exchanges and a meeting with the Ethics Office, [Ms. Hunt-Matthes] sent supporting documentation on 4 December 2006. By a memorandum dated 18 December 2006, the ... Ethics Office informed [Ms. Hunt-Matthes] of its conclusion that “[...] there is no connection between [her]

5. On 28 May 2013, the Dispute Tribunal issued Judgment on the Merits No. UNDT/2013/085, in which it found, *inter alia*, that Ms. Hunt-Matthes had a right to be protected from retaliation, the Ethics Office applied the wrong criteria in considering whether she had engaged in protected activities, the Ethics Office failed to identify that the retaliatory acts alleged were the unsatisfactory performance report and subsequent non-renewal of her appointment, and the Ethics Office failed to make a proper inquiry into the link between the protected activity and the alleged retaliation. The UNDT awarded Ms. Hunt-Matthes moral damages in the amount of USD 8,000, based on her stress and anxiety caused by the Ethics Office's breach of its duty to her.

Submissions

The Secretary-General's Appeal

The Appeal of the Judgment on Receivability

6. The Secretary-General's separate appeal of the Judgment on Receivability should be received by the Appeals Tribunal.

7. The UNDT erred in finding that Ms. Hunt-Matthes' application was receivable *ratione materiae*. The Ethics Office's determination that there was no *prima facie* case of retaliation is not an administrative decision taken by the Administration. Rather, the Ethics Office merely makes recommendations that may result in administrative decisions; it does not make administrative decisions. The Secretary-General has no authority over the determinations of the Ethics Office and its acts or omissions cannot be attributed to the Organization. Moreover, the Administration has never agreed that the Ethics Office's determination is an administrative decision taken by the Administration.

The Appeal of the Judgment on the Merits

8. The Ethics Office has authority to apply ST/SGB/2005/21 and not any other administrative issuances, as the UNDT erroneously held. The pre-existing mechanisms for protection from retaliation were not eliminated as a result of the establishment of the Ethics Office, and are not within the purview of the Ethics Office. The UNDT erred in finding that the complaints made by Ms. Hunt-Matthes constituted protected activity and that Ms. Hunt-Matthes had engaged in protected activities under ST/SGB/2005/21.

9. The UNDT erred in concluding that the Ethics Office failed to properly review Ms. Hunt-Matthes' complaint to determine if there was a *prima facie* case of retaliation. Since she did not engage in protected activity within the meaning of ST/SGB/2005/21, subsequent actions cannot be deemed retaliatory. The Ethics Office's determination is supported by the JAB.

10. The UNDT erred in determining that the Ethics Office must apply the clear and convincing standard of proof when conducting its preliminary review.

11. The UNDT erred in awarding Ms. Hunt-Matthes compensation for stress and anxiety resulting from delays by the Ethics Office. Some of the delays were caused by Ms. Hunt-Matthes.

Ms. Hunt-Matthes' Answer

The Appeal of the Judgment on Receivability

12. Although the Secretary-General may appeal whether an application has been properly received, that issue can only be raised in an appeal of the final judgment. There can only be one appeal addressing the case as a whole. The Secretary-General has improperly filed a separate appeal addressing the receivability of the application and, thus, has managed to avoid the Appeals Tribunal's rules on page limitations and forced Ms. Hunt-Matthes to file two answers.

13. Alternatively, the appeal is time-barred under Article 7(1)(c) and 7(4) of the Statute of the Appeals Tribunal.

14. The UNDT correctly held that the application was receivable under the jurisprudence of the Appeals Tribunal. The Ethics Office's determination that there was no *prima facie* case of retaliation is the ultimate determination of the Ethics Office -- not a preliminary determination. Although institutionally independent of the Secretary-General, the Ethics Office reports to the Secretary-General and its head is accountable to the Secretary-General; thus, the Administration is responsible for the operations of the Ethics Office. In Ms. Hunt-Matthes' case, the Administration is estopped from challenging the receivability of her application since it acknowledged at the management review stage that the Ethics Office had made an administrative decision.

The Appeal of the Judgment on the Merits

15. The Appeals Tribunal cannot retry the case *de novo*; it reviews for error under statutory grounds. The Appeals Tribunal must defer to the UNDT on factual matters, especially when oral testimony is taken, and should also defer to the UNDT on matters of remedy. When a factual error is appealed, that error must result in a manifestly unreasonable decision to be reversible. There are no legal errors in the UNDT Judgment on the Merits, and the Secretary-General's appeal should be dismissed.

16. The UNDT correctly determined that Ms. Hunt-Matthes engaged in protected activities. When a report is made to the Ethics Office, the Ethics Office is required to conduct a review in accordance with ST/SGB/2005/21, which it attempted to do, albeit deficiently. ST/SGB/2005/21 does not narrowly define retaliation and protected activity, as the Secretary-General asserts. All claims of retaliation are in the purview of the Ethics Office.

17. The Secretary-General has failed to allege that the UNDT's conclusion that the Ethics Office failed to complete its administrative mandate resulted in a manifestly unreasonable determination, as he must when appealing an error of fact.

18. The UNDT correctly determined that the Administration has the burden to disprove retaliation during the preliminary review by clear and convincing evidence under ST/SGB/2005/21, Section 2.2.

19. The UNDT did not commit reversible error when it awarded moral damages to Ms. Hunt-Matthes based on stress and anxiety resulting from the delays and non-processing of her complaint by the Ethics Office. Even if she was partially responsible for some of the delay, the Ethics Office is not absolved of its responsibility to act expeditiously. The award of USD 8,000 is quite modest.

Considerations

20. At the time she filed her answers, Ms. Hunt-Matthes did not request an oral hearing. However, on 3 June 2014, she filed a late motion for an oral hearing. Under Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure, a request for an oral hearing should be granted

find that an oral hearing would assist it “in the expeditious and fair disposal of the case”; thus, the request is denied.

Is A Separate Appeal of the Judgment on Receivability Proper?

21. Our jurisprudence is clear: “[O]nly one appeal is to be filed after the final judgment has been delivered.”

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[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 and

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