
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1401

Moïse Alain Nkoyock (Fils)
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Leslie F. Forbang Judge Katharine Savage
Case No.:	2022-1767
Date of Decision:	27 October 2023
Date of Publication:	13 December 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Sètondji Roland Adjovi
Counsel for Respondent:	Angélique Trouche

was said to have included the use of words and other conduct characterised variously as “demeaning, intimidating, humiliating, and abusive”.

7. Mr. Nkoyock joined the Organization in 2006. As the outcome of an internal restructuring in May 2015, he became OiC of SPMS, UNODC in Vienna.

8. On 17 February 2022, he transferred to UNOCT at the P-5 Level. He then held a continuing appointment. He was tasked with breaking up silos of staff grouped around particular products and implementing what was called a “matrix approach” 0 2

13. The terms of reference for the investigative panel (provided to it on 28 August 2018) included, pertinently, that it was to “establish the facts with respect to the allegations made by the aggrieved individuals”. The investigative panel was expressly informed that it was not required to determine whether the facts as found by it constituted prohibited conduct or misconduct.

14. On 31 October 2018, the investigative panel issued its investigation report (the Report). This runs to 96 pages without annexures. The detailed complaints of the complainants against both subjects of the investigation together with supporting documentation add a further 196 pages to that Report. It is a lengthy and comprehensive report, including summaries of the complaints and Mr. Nkoyock’s responses to them as told to the investigative panel.

15. The Report revealed significant evidence of a

that it had been established by a preponderance of evidence that Mr. Nkoyock had created a hostile, offensive and humiliating work environment by:¹

- engaging in a behavioural pattern of using words and/or action of a demeaning, intimidating, humiliating, and/or abusive nature towards [his supervisees, Mr. S, Mr. T and/or Mr. R];
- in April 2016, expressing [his] dissatisfaction with [Mr. AK, a supervisee] in a meeting with several participants and in [his] e-mail to his subordinates, which was perceived by [Mr. AK] and others as demeaning, intimidating and humiliating;
- repeatedly asking [Mr. R and Mr. T] if they had reported prohibited conduct on [the Appellant's] part to the Staff Council or to the management, which [Mr. R and Mr. T] perceived as offensive and intimidating;
- repeatedly asking [Mr. S, Mr. T, Mr. R and Mr. K (a witness)] to give [him] the name

4 d T of the person who gave the letter of [

21. On 29 April 2021, Mr. Nkoyock filed a motion seeking the production of evidence. He requested that the UNDT order the production of the report of the OIOS investigation into alleged further and retaliatory allegations made by some of the original complainants against him, investigation report No. 0019/020.

22. On 2 June 2022, by Order on Case Management No. 60 (GVA/2022), the UNDT directed the parties to advise whether a hearing was required, and to provide a list of potential witnesses, if any, with justification of each witness' relevance. The UNDT also requested Mr. Nkoyock to justify his request for the production of investigation report No. 0019/020.

23. On 13 June 2022, the Secretary-General submitted that no hearing was needed in the absence of a material dispute about the facts and provided a list of witnesses in the event of a hearing taking place. Mr. Nkoyock submitted that a hearing was warranted (as already requested in his application which also listed witnesses) and provided reasons for requesting the disclosure of investigation report No. 0019/020.² He also submitted a motion requesting the disclosure of two additional investigation reports (No. 0413/019 dated 27 February 2021³ and No. 0847/020 dated 26 November 2020⁴) on grounds that they were relevant tl-1.5 (n)1TJO.003 Tc 0..0

UNDT stated that investigation report No. 0019/20, which concerned a retaliation complaint against Mr. Nkoyock, post-dated the complaints of prohibited conduct, and therefore

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THE UNITED NATIONS APPEALS TRIBUNAL

THE UNITED NATIONS A

43. Mr. Nkoyock also takes issue with the UNDT's finding that Mr. K's testimony was not tainted by ulterior motives. Mr. K was immediately appointed as OiC of SPMS when Mr. Nkoyock was placed on Administrative Leave With Pay (ALWP), and then was immediately regularized against his former P-4 position when he moved to UNOCT.

44. Furthermore, the UNDT erred when it failed to subpoena Mr. B whose testimony would have enabled him to establish the racist environment that the UNDT simply dismissed as "mere allegations of racism". As a consequence of the above, Mr. Nkoyock contends that the UNDT's refusal to hear witnesses and to allow him to produce evidence were serious errors of procedure and law that impacted the decision in this case. The UNDT erred on questions of fact resulting in a manifestly unreasonable decision.

45. Finally, turning to the composition of the investigative panel, Mr. Nkoyock contends that had current staff members been appointed to conduct the investigation as per the requirements of Section 5.14 of ST/SGB/2008/5, those staff members would not have needed to be remunerated separately and in addition to their existing salaries; whereas after being handpicked by the Chief, HRMS, the investigators were paid by UNODC. Moreover, the Chief, HRMS selected the investigators without first giving full consideration to the requirements of Section 5.14 of ST/SGB/2008/5 that "the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct".

46. Mr. Nkoyock requests the UNAT to declare that his due process rights were violated and to rescind the 25 September 2020 decision in its entirety. Alternatively, if the UNAT considers that a sanction is warranted, Mr. Nkoyock asks that the UNAT reduce the sanction to the administrative/managerial measure (the requirement to attend on-site or online interactive training on workplace civility and communication) under Staff Rule 10.2(b) and Section 5.18(b) of ST/SGB/2008/5. If the remedy includes rescission of the decision of "a loss of three steps in grade", Mr. Nkoyock further asks that the emoluments removed from his salary since 25 September 2020 reflecting the difference between P-5 Step 1 and Step 4, be paid to him with five per cent interest through off-cycle payroll. In addition, pension fund payments reflecting the P-5 Step 4 level should be made to cover the difference of his pension entitlements since 25 September 2020. In the further alternative, Mr. Nkoyock requests that the impugned Judgment be set asnd

The Secretary-General's Answer

47. The Secretary-General contends that Mr. Nkoyock failed to demonstrate any procedural error. First, whether the three investigation reports were disclosed to Mr. Nkoyock would not have changed the outcome of the case. The UNDT had access to the investigation reports and determined that they were “of limited probative value” and as such their disclosure would have had no impact on the lawfulness of the Sanction Decision. The purported bias would also not change anything about Mr. Nkoyock’s misconduct, as alleged conduct by others than Mr. Nkoyock is beyond the scope of the instant case. The UNDT was correct to reject Mr. Nkoyock’s plea for the disclosure of documents that are irrelevant to the case. As rightly found by the UNDT, there is no evidence in the record of improper motives against Mr. Nkoyock.

48. Second, the UNDT has broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. The admissibility of evidence rests primarily with the UNDT which has an appreciation of all the issues for determination and the evidence before it. The information obtained during an investigation is confidential pursuant to Section 5.2 of ST/SGB/2008/5 and Section 10.1 of ST/AI/2017/1. The UNDT was correct to state that “there must be a compelling and relevant reason for the Tribunal to order the disclosure of a confidential document”. Contrary to Mr. Nkoyock’s argument, vague allegations of bias cannot be allowed to overcome or bypass such a strong imperative of confidentiality. The UNDT was provided with the three investigation reports on an _____ basis and upon review, concluded that none of them demonstrated the alleged bias. These reports also concern facts about events that occurred after the complaint and are “hence not supportive of [Mr. Nkoyock]’s claim of malicious motives”. Mr. Nkoyock is also incorrect in assuming that

THE UNITED N

52. The Secretary-General concludes that Mr. Nkoyock failed to show any error by the UNDT warranting the UNAT's intervention and asks that the UNAT dismiss the appeal.

Considerations

53. We have identified nine separate grounds of appeal advanced by Mr. Nkoyock which we will now address. Some overlap with others, and some are different aspects of others. For example, several of the Appellant's separate criticisms address the consequences of the UNDT not holding a hearing with witnesses and are said to illustrate why it erred in not allowing this. We will address these grounds collectively. We start with an overview of the way in which the UNDT dealt with Mr. Nkoyock's appeal (brought by application) challenging the Respondent's administrative decision.⁷

54. The UNDT did not approach the case before it as an appeal against the conclusions of the Organization, including a hearing of relevance.

THE UNITED NATIONS APPEALS TRIBU

ex parte

62. The UNDT also erred in law more particularly at paragraph 43 of its Judgment. There it rejected Mr. Nkoyock's assertion that persons who had made allegations against him were improperly biased against him. It did so by recourse to evidence in the investigation report(s) that it had considered but found to be inadmissible in the appeal. By refusing him access to these reports and thereby their introduction into evidence in its Order No. 77, the UNDT can only have concluded that they, or at least the substance of those outcomes the UNDT allowed access to, were not relevant.

63. However, in the following paragraph, the Judge states expressly that she analysed all three investigation reports to reach her conclusion that there was no bias against him as Mr. Nkoyock had alleged. If the reports were irrelevant and the Secretary-General and the UNDT were entitled to withhold them from Mr. Nkoyock, the Dispute Tribunal should not then have relied on their contents in making a finding against him. If, as it did however, it used them as relevant evidence, the reports should have been admitted into evidence and disclosed to Mr. Nkoyock. It would follow from this, also, that he should have been allowed an opportunity to dispute those reports before the UNDT, but he was not.

64. This was a breach of the Appellant's due process or natural justice rights. To decide a case on evidence that is known to one party and to the Dispute Tribunal but is kept from the other party, is not consistent with and indeed is antithetical to, an independent and neutral Dispute Tribunal established by the General Assembly. It is a fundamental principle of fairness recognised by most legal systems that parties to litigation are entitled to know the cases against them and thereby have an opportunity to accept or contradict these including by calling impeaching evidence, by cross-examination, and by submissions made to the tribunal. Here, we can only conclude that the UNDT decided, after its examination of the documents, that they were irrelevant

investigators, albeit former staff members. The Respondent's failure to disclose the names of the investigators, albeit former staff members, to the Appellate Tribunal is a breach of its duty of disclosure. (82)

which we agree) but decided ultimately that this was an insufficiently consequential error to affect the validity of the decision. We address that issue subsequently.

69. The Appellant says that the Chief, HRMS had a conflict of interest which ought to have precluded her in any event from making those appointments of panel members. The appeal on this point is that by prohibiting him from questioning witnesses at a hearing (and in particular the Chief, HRMS whose presence he had requested for this purpose), the Appellant was improperly deprived of an opportunity to establish bias by her.

70. While we cannot go so far as to say that the action by the Chief, HRMS in herself appointing the investigative panel was a biased exercise of power, we conclude that there were grounds on which the UNDT should have allowed Mr. Nkoyock to have questioned her as a witness before the Dispute Tribunal. Not only was the appointment of the panel wrongfully undertaken as we have identified previously in this Judgment, but, as the Chief, HRMS herself is said to have conceded, she could have been called by the investigators to provide evidence to them as a relevant witness

by reference to what he said were their unsubstantiated claims against him of retaliation. The UNDT determined that because the allegations of retaliation related to conduct by the Appellant that was said to have occurred after those complainants had complained initially about the Appellant's conduct towards them, such evidence would be irrelevant to the matter before it and was thus inadmissible.

72. While that assessment was correct factually and as far as it went, the UNDT did not address the reasoning behind the proposed evidence and its relevance as it should have. It was

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THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 20

84. Article 9(1) of the UNAT Statute provides relevantly:

Article 9

1. The Appeals Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

85. Pty85cn5r2 0 Td[(P) (t)

88. Because of the nature of the sanctions imposed and Mr. Nkoyock's cessation of employment with the Organization, it is not appropriate to grant any other remedies sought by the Appellant.

Judgment

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