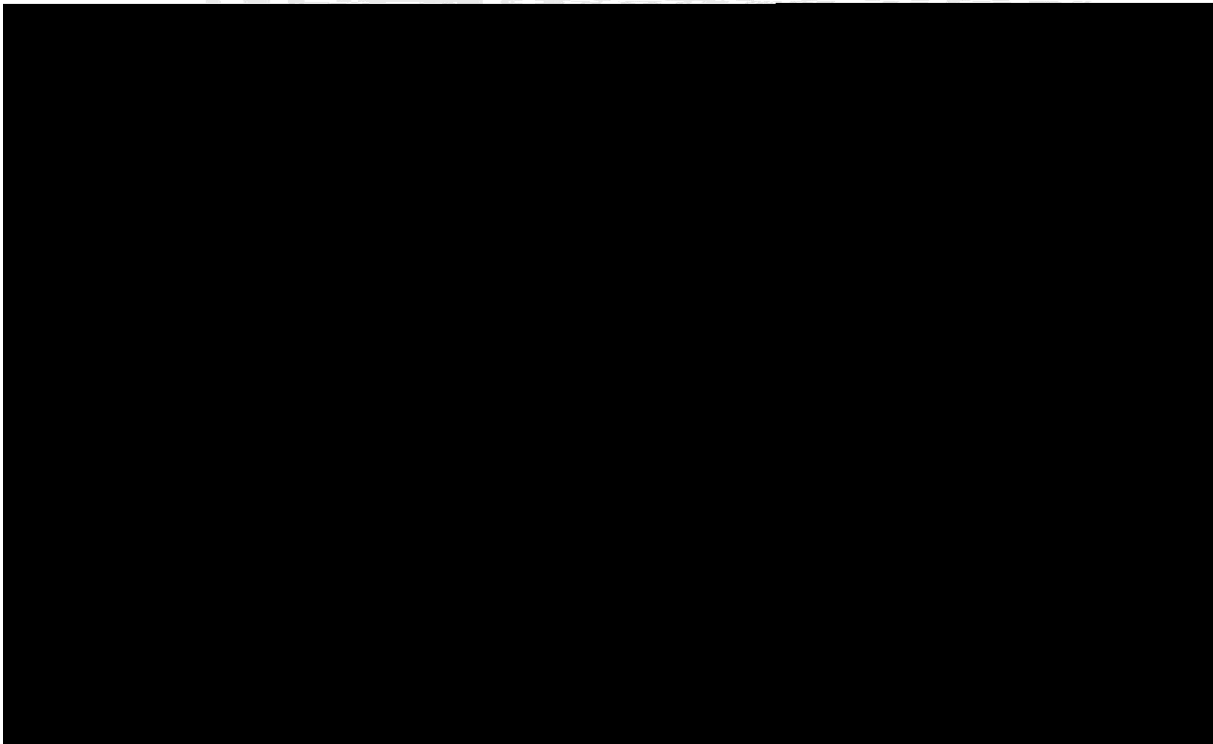




Judgment No. 2019-UNAT-915



Counsel for Respondent/Applicant: Daniel Trup, OSLA

Counsel for Appellant/Respondent: Amy Wood

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/087, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 September 2018, in the case of Yasin v. Secretary-General of the United Nations . The Secretary-General filed the appeal on 5 November 2018, and Ms. Haseena Yasin filed her answer on 17 December 2018.

Facts and Procedure

2. For two years from February 2013 to February 2015, Ms. Yasin worked as Chief of Mission Support (CMS) at the United Nations Assistance Mission in Iraq (UNAMI), Baghdad.

3. The Office of Internal Oversight Services (OIOS) has its presence at UNAMI through an Audit Unit headed by a Chief Resident Auditor. A few days after he arrived in Baghdad on assignment in November 2012, the Chief Resident Auditor and the entire Audit Unit were relocated from Baghdad to Kuwait City mainly due to the crisis in Syria and other security concerns as well as a space shortage in Baghdad. However, it was not clear whether the move was temporary or prolonged. It was also not clear how to mitigate the monetary loss that the Chief Resident Auditor and his audit team sustained as a result of the change of duty station from Baghdad to Kuwait City. The daily subsistence allowance (DSA) rate and other financial entitlements for Iraq were higher than those for Kuwait. The Director of the Internal Audit Division (IAD), OIOS, at Headquarters in New York (Director), was the Chief Resident Auditor's direct supervisor, while the Chief of Staff of UNAMI (CoS) acted as the Chief Resident Auditor's supervisor at UNAMI for the purposes of, inter alia , approving his movement of personnel

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7. On 15 January 2014, Ms. Yasin received an e-mail directly from the Chief Resident Auditor. In this e-mail, the Chief Resident Auditor wrote:

work would precede the entry conference”. Ms

mission is strongly backed by the Chief [Resident Auditor]. [Ms. Yasin] has suggested rotating out the auditor because he has been seriously compromised. ²

15. On 23 January 2014, the Chief Resident Auditor submitted a revised MOP form; it was approved on the same day. He travelled to Baghdad on 28 January 2014 and stayed there till 9 February 2014.

16. On 3 March 2014, Chief Resident Auditor lodged a complaint of abuse of authority and harassment against the CoS and Ms. Yasin pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He alleged that Ms. Yasin and the CoS had abused their authority by *inter alia* interfering with his travel thereby preventing him from carrying out his audit duties in a timely manner without reasonable cause, making malicious, unsubstantiated, ill-motivated and derogatory statements against his person at the SMM, allowing those statements to be published in the minutes of the SMM, conspiring to have the Chief Resident Auditor withdrawn from UNAMI, making comments and allowing innuendo to discredit his personal and professional integrity, character and standing among an undetermined number of colleagues, in

21. By memorandum dated 23 April 2015, the SRSG/UNAMI advised the Under-Secretary-General for the Department of Field Support (USG/DFS) of the outcome of the FFP investigation and his concurrence with the FFP findings. The SRSG/UNAMI also advised the USG/DFS of his decision to issue the CoS a written reprimand, as his conduct “while unacceptable, [did] not warrant disciplinary action”. However, he had to refer the matter of Ms. Yasin to the USG/DFS for appropriate action, as Ms. Yasin had left UNAMI and returned to the Headquarters.

22. On 9 June 2015, the USG/DFS forwarded the SRSG’s report and the FFP report to the Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO).

23. In February 2016, the USG/DPKO forwarded both reports to the Assistant Secretary-General for Human Resources Management (ASG/OHRM). In his view, Ms. Yasin’s behavior “seem[ed] to indicate that she me[t] the definitional requirements of harassment in [...] ST/SGB/2008/5”. The USG/DPKO therefore referred the matter of Ms. Yasin for possible disciplinary action in line with Section 5.18(c) of ST/SGB/2008/5.

24. On 3 October 2016, OHRM sent a memorandum dated 28 September 2016 to Ms. Yasin informing her of the allegations of misconduct against her (Charge Letter). Specifically, it was alleged that Ms. Yasin had harassed, and/or abused her authority towards the Chief Resident Auditor, with no reasonable justification or factual basis. According to the memorandum, she made derogatory comments about the Chief Resident Auditor and his purpose of travel to Baghdad at an SMM. Moreover, she allegedly took actions to ensure the MOP request from the Chief Resident Auditor for his official travel to Baghdad would be withheld. In the memorandum, OHRM warned that Ms. Yasin’s conduct, if established, would constitute sexual harassment and abuse of authority within the meaning of Section 1.3 of ST/SGB/2008/5 and a violation of ST/SGB/2008/5, Staff Regulation 1.2(a) and Staff Rule 1.2(f).⁶

25. On 26 October 2016, Ms. Yasin provided her response, in which she rejected the allegations of misconduct. Ms. Yasin maintained that regarding her questioning of the Chief Resident Auditor in respect of his travel plan to Baghdad in January 2014, she felt that the reasoning provided by the Chief Resident Auditor, the failure to undertake an entry conference

of the audit team, the lack of detailed discussions with the Transport Unit which was predominantly based in Kuwait, did not justify the proposed travel. As the CMS for UNAMI having responsibility for the costs of such a visit for a future audit, she had a duty to make queries to ensure compliance with the Organization's rules and procedures. She raised her legitimate concerns following an independent and objective assessment of the facts and provided policy advice to the SRSG/UNAMI at the SMM upon request. She stated that her conduct was "purely professional with the interest of the organisation

Ms. Yasin's Answer

32. The Secretary-General has failed to indicate under which heading of irregularity as enumerated in Article 2(1) of the Appeals Tribunal Statute he has filed the present appeal. Merely stating that the issuance of a written reprimand was appropriate is not sufficient for the purposes of an appeal. On this ground alone, the appeal should be rejected.

33. By suggesting that Ms. Yasin had an opportunity to respond to the allegations of misconduct prior to the UNDT hearing and was therefore not entitled to challenge the subsequent reprimand and that consequently the Dispute Tribunal erred in reviewing such a decision, the Secretary-General is advancing a legal argument that was not raised at trial. That argument may not be introduced at this stage.

34. The Dispute Tribunal did not err in law or in competence in ordering rescission of the contested decision on the grounds that it was not justified. Ms. Yasin as the CMS acted reasonably in the circumstances, and her actions cannot be interpreted as harassing or humiliating the Chief Resident Auditor. Raising inquiries about the Chief Resident Auditor's travel for further information should not be equated with a charge of harassment or a prevention of duties. She was responsible for managing the purse strings for the entire UNAMI and had to ensure that the most stringent of the financial rules were applied across the board. She was carrying out her fiduciary responsibilities and obligatory due diligence pursuant to the existing applicable financial regulations and rules as a representative of the Secretary-General at UNAMI. Therefore, due deference must be given to those obligations. The Dispute Tribunal recognized those commitments by concluding that Ms. Yasin's actions were reasonable in accordance with her obligations. The only logical conclusion was for the UNDT to order the removal of the written reprimand from Ms. Yasin's official status file.

35. Ms. Yasin requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

36. The issue on appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision to issue Ms. Yasin a written reprimand was unlawful.

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more of the non-disciplinary measures indicated in staff rule 10.2(b)(i) and (ii), where appropriate; or

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General. The Office of Legal Affairs shall review recommendations for dismissal of staff under staff rule 10.2(a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

III. Application to the United Nations Dispute Tribunal

... A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process shall be made within 90 calendar days of receiving notification of the decision. The filing of such an applicat

42. Under the applicable legislative framework, the Secretary-General is bestowed with the discretionary authority to, *inter alia*, impose a disciplinary or an administrative (non-disciplinary) measure on a staff member, who has failed to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or the relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant.

43. The Appeals Tribunal, however, recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.¹¹

44. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. It may consider whether relevant matters were ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.¹²

45. As a result of the judicial review, the first instance tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the first instance tribunal is not conducting a

¹¹ Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2018-UNAT-814, para. 17, citing, *inter alia*, Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2017-UNAT-798, para. 24; Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2017-UNAT-790, para. 40. See also Pérez-Soto v. Secretary-General of the United Nations, Judgment No. 2013-UNAT-329; Bertucci v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-121.

¹² Kule Kongba v. Secretary-General of the United Nations, Judgment No. 2018-UNAT-849, para. 27; Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

merit-based review, but a judicial one. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.¹³

46. As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she, by necessary implication, also challenges the validity of the reasons underpinning that decision.¹⁴ In this respect, as applied to this case, the Tribunal may examine the surrounding circumstances to determine whether the impugned decision was tainted by abuse of authority.

47.

... the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

49. In the case at hand, as per the Reprimand Letter issued on 17 January 2017 by the then ASG/OHRM, the reasoning of the Administration's decision to issue Ms. Yasin a letter of reprimand (and to require her to undertake an on-site training course with a focus on communication and problem-solving skills), as reflected in the relevant facts therein, includes that Ms. Yasin had put the Chief Resident Auditor's MOP request on hold with no reasonable justification or factual basis, and that her actions exhibited shortcomings in communication skills in the context of solving a problem, since her concerns about the MOP form could have been adequately addressed at the time through a constructive and open discussion, the lack of which caused the Chief Resident Auditor to feel that he had been harassed.

50. In the first place, in reviewing the veracity of the factual basis for the impugned written reprimand, the UNDT noted, *inter alia* , that:¹⁹

... at the time of the events (January 2014), the Applicant was the CMS in UNAMI during the period from February 2013 to February 2015, and according to her letter of delegation of authority of 10 April 2013 and, in this capacity, she was responsible for certifying proposed obligations or expenditures on services, facilities, supplies and equipment, as well as those pertaining to personnel. Such certifications were to be, *inter alia* , a) in accord with the Financial Regulations and Rules and related instructions of the United Nations; b) in accord with the purpose(s) for which

... The Applicant testified that she was responsible for certifying that the proposed obligations and expenditures on services, facilities, supplies and equipment, as well as those pertaining to personnel, were reasonable and accorded with the principles of efficiency and effectiveness and that, in her understanding, it was her obligation to ensure that any proposed travel or any expenditure would be utilized in the best possible way for the Organization, the way that is efficient and effective. The Applicant also testified that she had the responsibility to keep clear records to justify any actions she took, as clearly stated in item a) of the letter of delegation of authority of 10 April 2013, which reads that “any proposed expenditures must accord with the Financial Regulation[s and] Rules and related instructions” and that, in the present case, a related instruction would be the administrative instruction on travel. She further testified that she used this body of information to justify whether she was going to grant the first MOP request and its corresponding cost. During her testimony, the Applicant explained the difference between a pre-analytical visit (or “pre-plan and visit”) and an entry conference. She stated that the previous audits (about seven of them) that the IAD/OIOS team had conducted in UNAMI had always had an entry conference prior to the beginning of the audit itself. She explained that entry

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ensure that all the provisions of the OIOS Audit Manual were respected”.²⁰ Ms. Yasin “and [the Chief Resident Auditor] had different views about the audit field work and the use of existing video and/or audio conference facilities in UNAMI as an alternative tool to a face-to-face meeting, which appears to result from the specificity of the language used in this regard”.²¹ “[T]here was no concrete negative result on the planned audit resulting from the annulment of the first MOP and that [Ms. Yasin’s] actions, which she was taking in her capacity as CMS in UNAMI, consisting in a careful review of the alternative means to a face-to-face visit which could have resulted in a lower level of the costs, appear to have been conducted within the margins of her role and responsibilities. There is no convincing evidence that [Ms. Yasin] exceeded her competence and that she acted without a reason with the sole objective to delay the audit visit.”²² And Ms. Yasin “acted within the limit of her responsibility while asking for clarifications from [the Chief Resident Auditor] regarding the first MOP request and informing the then CoS, Mr. MR, about her concerns and/or the possibility to use alternative means, like [video teleconference] facilities. Even though the first MOP was withdrawn by the then CoS on 20 January 2014, all the aspects were clarified on the same day and [the Chief Resident Auditor], as advised by his supervisor, Ms. EB, submitted the second MOP for approval on 23 January 2014. The travel dates were changed by [the Chief Resident Auditor] himself and there was no delay of his travel to UNAMI resulting from [Ms. Yasin’s] actions.”²³

52. Finally, the UNDT, having regard to these findings, determined, *inter alia*, that the contested administrative measure of a written reprimand was not justified, since Ms. Yasin did not withhold or delay the Chief Resident Auditor’s travel to UNAMI, and therefore was to be rescinded as unlawful.

53. The Secretary-General contends in his appeal that the UNDT erred in law and fact by making these findings, in that the record in the case demonstrates that the Chief Resident Auditor’s complaint had been carefully investigated, and the findings and conclusions had been taken fully into consideration prior to the issuance of the contested decision. Moreover, the Secretary-General claims that the evidence produced before the UNDT demonstrated that the reprimand was based on reasonable grounds, sufficient to establish the facts to the

²⁰ *Ibid.*, para. 67.

²¹ *Ibid.*, para. 69.

²² *Ibid.*, para. 71.

²³ *Ibid.*, para. 73.

UNDT, the Appeals Tribunal holds that the facts underpinning the administrative decision to issue Ms. Yasin a written reprimand cannot uphold its reasoning, which is therefore flawed.

58. Indeed, the Secretary-General submits that the UNDT misconstrued the factual basis for the written reprimand, in that Ms. Yasin had shown shortcomings in her communication skills, since she had submitted no evidence to support her suspicion that the Chief Resident Auditor's travel was ill-motivated and, furtherm

reasoning that Ms. Yasin showed shortcomings in her communication skills, and her actions caused the Chief Resident Auditor to feel harassed and humiliated.

61. In conclusion, the Appeals Tribunal affirms the UNDT's findings and conclusions that the impugned decision was unlawful. The UNDT conducted a thorough judicial review of the contested administrative decision. It did not erroneously substitute itself for the Administration, as argued by the Secretary-General. It simply examined the facts and their interpretation led to the correct conclusion that the decision-maker had not exercised his discretionary power properly, in that the factual basis of the impugned decision, indicating its reasoning, was not sufficient to establish them to the required standard of proof, so as to warrant the challenged written reprimand.

62. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.²⁶

63. It is obvious that the Secretary-General was not satisfied with the UNDT's decision. He has failed, however, to demonstrate any error in the UNDT's finding that the Administration's decision to issue Ms. Yasin a written reprimand was unlawful. The Secretary-General merely voices his disagreement with the UNDT's findings and repeats his submissions to the Appeals Tribunal. He has not met the burden of proof for demonstrating an error in the impugned Judgment such as to warrant its reversal.

²⁶ *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30, citing *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and citations therein; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

64. In view of the foregoing, we consider that the issuance of the reprimand was not, as correctly found by the UNDT, a proper exercise of the discretion vested in the Administration.

65. Accordingly, the appeal fails.

Judgment

66. The appeal is dismissed and Judgment No. UNDT/2018/087 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Murphy

Entered in the Register on this 29th