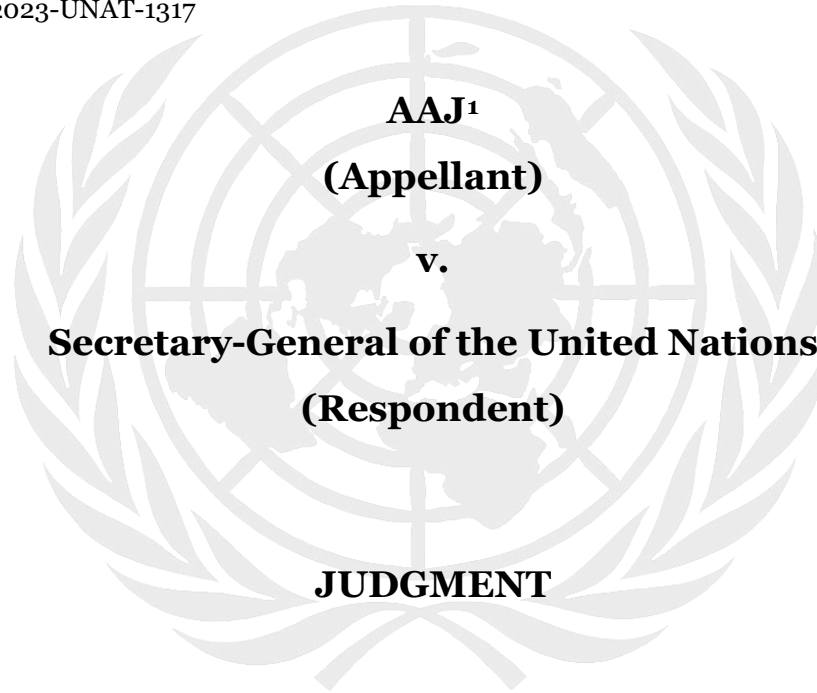




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1317



Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Graeme Colgan
Case No.:	2022-1671
Date of Decision:	24 March 2023
Date of Publication:	11 April 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Dorota Banaszewska
Counsel for Respondent:	Rupa Mitra and Amanda Stoltz

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE MARTHA HALFELD, PRESIDING.

1. Appellant² contested several decisions or actions in relation to the Administration's handling of her complaint of sexual harassment by former supervisors, including, in particular, the decision of the Department of Management Strategy, Policy and Compliance (DMSPC), Office of Human Resources, not to provide information on the specific actions taken with respect to her former supervisors—her first reporting officer (FRO) and second reporting officer (SRO) (the contested Decision).
2. By Judgment No. UNDT/2021/165³ (impugned Judgment), the United Nations Dispute Tribunal (UNDT) rejected the Appellant's application.
3. Appellant lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure⁴

5. Appellant is a staff member of the United Nations Office on Drugs and Crime (UNODC), Division of Treaty Affairs, Corruption and Economic Crime Branch, Conference Support Section.⁵
6. She commenced service with the Organization on 14 February 2018, in the Regional Section for Latin America and the Caribbean (RSLAC) of UNODC on a P-3 fixed-term appointment.⁶
7. In July 2018, Appellant reached out to the Chief of Human Resources, UNODC, to report sexual harassment in March 2018 by the FRO and SRO, and to seek assistance and support and request reassignment.⁷ In August 2018, she was placed on certified sick leave for about two months.

² Appellant was granted anonymity by the United Nations Dispute Tribunal, Order No. 174 (GVA/2021).

³ *Applicant v. Secretary-General of the United Nations*, Judgment dated 29 December 2021.

⁴ Summarized from the impugned Judgment as relevant to the appeal.

⁵ Impugned Judgment, para. 11.

⁶ *Ibid.*, para. 2.

⁷ *Ibid.*, paras. 3–4.

8. In October 2018, upon return from sick leave, Appellant was reassigned to the Field Operations Management Support Section (FOMSS).⁸ Her new first reporting officer and second reporting officer for the 2018–2019 performance evaluation period was the Chief, FOMSS.

9. On 6 December 2018, Appellant filed with the Office of Internal Oversight Services (OIOS) a complaint of sexual harassment against the FRO and SRO.⁹ On 28 December 2018, OIOS informed her that it had initiated an investigation into her complaint.¹⁰

10. Following a review of the investigation reports, disciplinary processes were initiated against the FRO and SRO by two allegations of misconduct memoranda, both dated 16 December 2019.¹¹

11. By letter dated 13 May 2020, the Assistant Secretary-General for Human Resources Management (ASG/OHR) informed Appellant of the outcome of the investigation.¹² With respect to the action taken, the ASG/OHR informed her as follows: “the Under-Secretary-General for Management Strategy, Policy and Compliance [USG/DMSPC] has decided to impose disciplinary sanctions on [FRO] and [SRO] respectively. In addition, the [USG/DMSPC] has decided to take administrative action in relation [to SRO]”.¹³

12. On 19 May 2020, Appellant requested information on the actions taken.

13. By e-mail of 22 May 2020, in response to the Appellant’s request, the Administration communicated to her the contested Decision, noting that due to privacy and confidentiality concerns, the Secretariat does not reveal details about an individual sanction imposed on a staff member.¹⁴

14. On 11 June 2020, Appellant requested management evaluation of the Administration’s decision not to provide her with the information on the specific actions taken with respect to the FRO and SRO.¹⁵ By letter dated 10 July 2020, the USG/DMSPC responded to said request by informing her that the Secretary-General had decided to uphold the contested Decision.

⁸ *Ibid.*, para. 6.

⁹ *Ibid.*, para. 7.

¹⁰ *Ibid.*, para. 9.

¹¹ *Ibid.*, para. 12.

¹² *Ibid.*, para. 14.

¹³ Letter of 13 May 2020, Annex 2 of Appellant’s application before the UNDT.

¹⁴ Annex 4 of Appellant’s application before the UNDT.

¹⁵ Impugned Judgment, para. 16.

15. On 8 October 2020, Appellant filed an application with the UNDT, contesting the following decisions and actions:

- (a) the Administration's failure to take appropriate action in relation to her complaint,
- (b) the Administration's decision not to provide information on the specific actions taken with respect to the FRO and SRO, to the extent required by Section 5.18(c) of ST/SGB/2008/5, applicable to that investigation,¹⁶
- (c) undue delays in the investigation, in the initiation and conducting of a disciplinary process, and in taking the final decision on the imposition of disciplinary sanctions against the FRO and SRO, and
- (d) the Administration's failure to take appropriate action to protect her from sexual harassment in the workplace environment and to remedy the harm suffered.

The Impugned Judgment

16. On 29 December 2021, the UNDT rendered the impugned Judgment, rejecting the application.

17. The UNDT held that Appellant had not requested management evaluation of the contested decisions outlined at (a), (c) and (d) above and those elements of the application were not receivable.

18. As regards providing information, the UNDT found that Section 5.18(c) of ST/SGB/2008/5 clearly stated that the aggrieved individual would be informed of "the action taken". The language used in this provision is plain, common and causes no comprehension problems. Neither does it follow from the aim and purpose of Section 5.18(c) of ST/SGB/2008/5 that the Administration is obliged to provide the specific information requested. Section 5.18(c) of ST/SGB/2008/5 seeks to strike a balance between the right of an aggrieved individual, the privacy of the subject staff member and the confidentiality of the process.

19. The UNDT, considering also that a staff member has no right to compel disciplinary action against another staff member, concluded that Appellant similarly did not have a right to compel the Administration to provide details of the disciplinary action taken.

¹⁶ Secretary-General's Bulletin (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), applicable to investigations initiated prior to its supersession in 2019.

Procedure before the Appeals Tribunal

20. On 25 February 2022, Appellant filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 29 April 2022.

Submissions

Appellant's Appeal

21. Appellant requests the Appeals Tribunal to reverse the impugned Judgment regarding the contested Decision not to provide the requested information on the specific actions taken with respect to the FRO and SRO, and direct the Administration to provide the information.

22. Appellant submits that the SRO and she have been working in the Division of Treaty Affairs since November 2020 and she meets the SRO on a regular basis in divisional meetings.

23. She argues that the UNDT erred in law by interpreting Section 5.18(c) of ST/SGB/2008/5, including its aim and purpose, incorrectly. The information provided must enable an assessment of whether the action taken is proportionate to the committed misconduct and whether her rights have been sufficiently protected by the Administration, including the risk of repeated harm from the perpetrators.

24. Appellant contends that the rights of the offenders are sufficiently protected by the victim's obligation to keep the information confidential. Furthermore, the situations encompassed by Section 5.18(c) of ST/SGB/2008/5 and Section 8.9 of ST/SGB/2017/Rev.1 are similar, especially in this case where she might be subject to retaliation for testifying against one of the offenders.

25. Appellant points out that the UNDT, holding that the contested Decision was not unlawful and the Administration had fulfilled its obligations, did not acknowledge the following facts: she had been meeting with one of the offenders on a regular basis due to them working for the Organization, which might be highly detrimental to her mental well-being,¹⁷ and the SRO had initiated proceedings before the UNDT, in which Appellant would probably be questioned as a witness.

¹⁷ Appellant refers to para. 14 of the Closing Submissions before the UNDT.

The Secretary-General's Answer

26. The Secretary-General requests that the Appeals Tribunal dismiss the appeal.

27. The Secretary-General argues that the UNDT correctly concluded that the contested Decision had been lawful. Appellant merely repeats the submissions made before the UNDT and the appeal should be dismissed on this ground alone.

28. The Secretary-General submits that ST/SGB/2017/Rev.1 is a separate and different legal framework, applying only if the misconduct involved retaliation, which is not the case here. In any event, it does not require the Administration to provide information “as specific as possible”.

29. The Secretary-General argues that Appellant has failed to show any error on the part of the UNDT with regard to one of the offenders continuing to work for the Organization or the Appellant's potential testimony in another case. These do not constitute exceptions to the provisions in ST/SGB/2008/5 or justify being informed of the specific measures applied to the offender. Having failed to seek leave to submit evidence on Appellant having testified as a witness in a separate case on 25 January 2022, such evidence is inadmissible.

Considerations

30. The appeal does not challenge the UNDT's finding of non-receivability regarding the failure to request management evaluation of three of the four contested decisions or actions. The only remaining contested decision is therefore the decision not to provide AAJ with the information on the specific actions taken with respect to her former supervisors to the extent required by Section 5.18(c) of ST/SGB/2008/5, following her complaint of sexual harassment.

31. In her appeal, AAJ requests not only the *rescission* of the contested administrative decision (not to provide her with the information), but also the *specific performance* by the Administration to provide her with the information requested, that is, “on the specific actions taken with respect to her former supervisors”. According to AAJ, respect for privacy of the alleged offender and confidentiality of the process should not have prevailed over her right to be informed of the *specific* actions taken since: (i) SRO was still an active staff member, had been meeting her on a regular basis and she had to testify against him in a hearing concerning his application before the UNDT, all of which could have affected her mental health; (ii) this information was supposed to be shared only with her and kept strictly confidential; and (iii)

this information was necessary for her to be able to assess the proportionality of the action to the misconduct and possibly contest the exercise of the Administration’s discretion.

32. In matters of discrimination, harassment, including sexual harassment, and abuse of authority, the Secretary-General’s Bulletin ST/SGB/2008/5 applies. The rationale of this special instrument has fundamental importance within the Organization. As this Appeals Tribunal has already stated in *Faust*¹⁸, the special procedural provisions adopted by ST/SGB/2008/5 are purposely conceived to “treat the situation with sensitivity and confidentiality” (Section 5.8)¹⁹ “in order to achieve the main objective clearly stated at the beginning of ST/SGB/2008/5, which advocates for dignified and respectful treatment of both the aggrieved individual and the alleged offender, together with the collective aim of maintaining a good working environment”. It is for this reason that the Organization “attaches importance to addressing complaints of prohibited conduct, as evidenced by the detailed procedures set out in ST/SGB/2008/5”, and “[t]his is not a matter of discrimination by the rules, but rather of equity, that is to say that the Organization shall treat different issues differently while respecting the principle of proportionality”.²⁰

33. It results from ST/SGB/2008/5 that, as a general principle, an affected individual may contest the outcome of an investigation. The Appeals Tribunal has also established that “once the investigation has been concluded, its outcome and administrative consequences, as well as any related acts or omissions, can be challenged in their own right via management evaluation and before the Dispute and Appeals Tribunals”.²¹ Once established that an affected individual has the right to appeal against the outcome of an investigation, the Appeals Tribunal must then determine the scope of the relevant information which should be made accessible to the complainant, in order to allow him or her to file a meaningful claim when the Administration decides to take action.

¹⁸ *Faust v. Secretary General of the United Nations*, Judgment No. 2016-UNAT-695, paras. 48–49. See also *Loeber v. Secretary General of the United Nations*, Judgment No. 2018-UNAT-836, para. 25.

¹⁹ Section 5.8 of ST/SGB/2008/5 provides as follows: “All involved in the informal resolution process must recognize the need to treat the situation with sensitivity and confidentiality to the greatest extent possible.”

²⁰ *Ibid.*

²¹ *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-786, para. 35; *Masykkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18.

34. Sections 5.14 and 5.18 of ST/SGB/2008/5 provide that under the formal procedure, if the complaint appears to have been made in good faith and there are sufficient grounds to warrant a formal fact-finding investigation, the responsible official shall promptly appoint an investigation panel, which could lead to disciplinary measures and managerial actions, as well as follow-up measures that may be necessary. Sections 5.18(a), (b) and (c) stipulate the options open to the responsible official following the issuance of the investigative report, which are: (a) closing the case; (b) managerial action and follow-up measures; (c) disciplinary action. While for option (a), the aggrieved individual shall be provided with a *summary* of the findings and conclusion of the investigation, options (b) and (c) require that the complainant be *informed* of the outcome of the investigation and of the action taken.

35. Specifically, ST/SGB/2008/5 provides in its Section 5.18(c) the following²²:

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

...

(c) 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*.

36. The case record indicates that the complaint of sexual harassment filed by AAJ against her former supervisors (FRO and SRO) led to investigations whose reports were the basis for disciplinary processes and sanctions against both persons, as well as an additional administrative measure against her former SRO. This demonstrates that the complaint filed by AAJ was perceived by the Administration as having fulfilled all the requirements to ensure that disciplinary measures and managerial action be taken against both offenders. It is incidentally lamentable that such unacceptable behaviour as sexual, or any sort of, harassment may still exist in high profile organisations such as UNODC, which is designed to combat drugs and crime, particularly in hierarchical relationships where respect and example should prevail

²² Emphasis added.

over abuse and harassment. The principle of accountability must be severely reinforced where and when there is a breach of staff and management duties and obligations in this regard.

37. Apart from the disciplinary measures and managerial action taken, equally important as a corrective measure to protect AAJ's dignity and respect was the fact that the Administration acted promptly, when unofficially informed of the wrongdoing, by placing AAJ on certified sick leave for approximately two months, before reassigning her at her request to a new workplace.²³ The letter informing AAJ of the action taken, dated 13 May 2020, also contained the acknowledgment of the reasons for her complaint with a quite detailed abstract of the findings of the investigation report, which the Appeals Tribunal considers good practice.

38. In this context, the fact that AAJ was informed of the actions taken, without further specification of which disciplinary measure was imposed on which offender and which specific managerial action was warranted towards her former SRO, seems to suffice. The administrative decision to impose sanctions or disciplinary measures on other staff members is a prerogative which pertains to the Administration in the regular exercise of its discretion, not to other staff members, even though they may also have been victims. Such a decision is therefore not subject to challenge by AAJ, who was not *directly* affected by it. In this regard, harm to her mental well-being by the fact that she still meets her offender on a regular basis and has been a witness in an application filed by this person before the UNDT cannot be seen as a *direct* effect of the contested administrative decision, but rather an *indirect* consequence of it, therefore not challengeable under the internal justice system.²⁴ The lack of details regarding the disciplinary measures and managerial action communicated to AAJ did not render the information defective, according to Section 5.18(c) of ST/SGB/2008/5.

39. Moreover, seeing that the Administration gave proper consideration to AAJ's complaint to the extent that it not only afforded her immediate relief, but also carried out a formal fact-finding investigation, eventually imposing disciplinary measures on both alleged offenders as well as additional managerial action in relation to her former SRO, the Appeals Tribunal considers that the ultimate purpose of ST/SGB/2008/5 was achieved in relation to AAJ, following her complaint of sexual harassment against her former supervisors. This interpretation derives from the very purpose of ST/SGB/2008/5, which is that all

²³ Impugned judgment, paras. 4–6.

²⁴ See *Lee v. Secretary General of the United Nations*, Judgment No. 2014-UNAT-481, paras. 48-49. See also *Pedicelli v. Secretary General of the United Nations*, Judgment No. 2015-UNAT-555, para. 28.

staff members of the Secretariat 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.²⁵

40. Lastly, although not directly raised in the appeal, it is important to highlight that Section 5.20 of ST/SGB/2008/5, regarding a possible appeal that an aggrieved individual or alleged offender may file in the event that they have grounds to believe that the *procedure* followed in respect of the allegations of prohibited conduct was improper, does not apply to the case at hand. This is because in her appeal, AAJ does not raise any issue relating to the *procedure* following her complaint²⁶, but she is rather concerned about the *proportionality* of the sanction imposed for the misconduct committed, which would require an assessment of the regular exercise of discretion of the Administration. However, such an assessment would be more appropriate if and when such sanction were challenged by the staff member directly concerned.

41. In light of the above, the Appeals Tribunal finds that the UNDT interpreted Section 5.18(c) of ST/SGB/2008/5 correctly when it concluded that the information provided to AAJ concerning the action taken, including the specificity of that information, met the requirements of that provision, and that the Administration's refusal to disclose the requested information was lawful.

²⁵ Preamble to ST/SGB/2008/5.

²⁶ The application on undue delays in the investigation was dismissed by the UNDT on grounds of receivability, no appeal having been filed in this regard.

Judgment

42. The appeal is dismissed, and Judgment No. UNDT/2021/165 is hereby affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Colgan

Judgment published and entered in the Register on this 11th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar