



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

Judgment No. 2016-UNAT-662

**Masyllkanova
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Sophia Adinyira Judge Richard Lussick
Case No.:	2015-872
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Nathalie Defrasne

JUDGE DEBORAH FELIX-THOMAS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Aidai Masykkanova against Judgment No. UNDT/2015/088, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 18 September 2015, in the case of *Masykkanova v. Secretary-General of the United Nations*. Ms. Masykkanova filed her appeal on 17 November 2015, and the Secretary-General filed his answer on 18 January 2016.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

... [Ms. Masykkanova] joined the [United Nations] effective 7 March 2011, under a six-month temporary appointment ... with [United Nations Assistance Mission in Afghanistan (UNAMA)] as a Political Affairs Officer (P-3). In this capacity, she was assigned to the Regional Office of Bamyan (Central Highlands Region) in April 2011. Her temporary appointment was extended once until 5 March 2012.

... The record show[ed] tense exchanges between [Ms. Masykkanova] and her immediate supervisor –the Political Affairs Officer (P-4), Central Highlands Region, UNAMA—as from the end of April 2011, relating *inter alia*, to reporting lines and the scope of [Ms. Masykkanova's] purview.

...

... On 15 November 2011, [Ms. Masykkanova] filed a complaint with the local Conduct and Discipline Unit (CDU), UNAMA, for harassment and abuse of authority against her supervisor. ...

... On 17 November 2011, the CDU transmitted the complaint to the Officer-in-Charge (“O-i-C”), Chief of Staff, UNAMA [with a request] that [Ms. Masykkanova's] allegations be investigated in accordance with Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse authority)

...

... On 28 February 2012, the Chief of Staff, UNAMA, informed [Ms. Masykkanova] that his office was considering convening a fact-finding panel to investigate her complaint.

¹ Impugned Judgment, paras. 3-50.

... The [Secretary-General] submit[ted] that on 29 February 2012, a fact-finding panel was appointed to investigate [Ms. Masytkanova's] claims ...

... By note dated 5 March 2012, emailed to [Ms. Masytkanova], [the non-extension of her temporary appointment was reiterated. Reference was made to [her] harassment complaint against her supervisor, reassuring her that the investigation would continue after her separation in accordance with normal policy and procedures.

... [Ms. Masytkanova] was separated from service upon the expiration of her contract on 5 March 2012. She left her duty station on 6 March 2012.

... On 21 March 2012, the Ethics Office replied to an email sent by [Ms. Masytkanova] on 20 February 2012, noting that it did not find a prima facie case of retaliation, emphasizing that the performance and interpersonal issues with her supervisor had existed prior to [Ms. Masytkanova's] report of misconduct to CDU. On 22 March 2012, in response to a follow-up email from [Ms. Masytkanova], the Ethics Office suggested that the submitted documents seemed to indicate a pattern of harassment and abuse of authority, rather than a case of retaliation.

... On 29 March 2012, a Conduct and Discipline Officer, CDU, informed [Ms. Masytkanova] that a fact-finding panel to investigate her complaint had been convened and was expected to commence the investigation on 10 April 2012.

... On 26 April 2012, [Ms. Masytkanova] was interviewed by said panel.

... On 11 July 2012, she filed an application contesting the non-renewal of her temporary appointment [with the UNDT ... which ruled] by Judgment No. UNDT/2014/137, that the non-renewal decision was unlawful since [Ms. Masytkanova] had been given a promise of renewal for three further months; [Ms. Masytkanova] was granted compensation on this account. The Judgment was not appealed.²

...

... [Ms. Masytkanova] was blind copied on [an e-mail dated 8 May 2012] and, on 9 May 2012, she wrote to the members of the fact-finding-panel pointing out that she was in receipt of [this] e-mail indicating an intention of circumventing the panel's work [and requesting its] help and intervention.

... In reply to a request from [Ms. Masytkanova] for an update on the status of the investigation, on 17 July 2012, the Head, Office of Legal Affairs, UNAMA, advised that the work of the fact-finding panel convened to investigate her complaint for harassment and abuse of authority had been "held in abeyance following challenges to the composition of the [p]anel, and other procedural questions raised by [her supervisor]", requiring an evaluation of the panel from the legal standpoint, which was under consideration. [Ms. Masytkanova] answered by email of 18 July 2012, seeking clarification with regard to the circumstances of the decision to hold the panel's work in abeyance, expressing her

² *Masytkanova v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/137.

dissatisfaction for not having been timely informed thereof and asking when the panel would resume its work.

... On 16 October 2012, [Ms. Masytkanova] requested the Chief of Staff, UNAMA, to provide her with an update on the investigation. She renewed this request on 9 November 2012.

... On 27 November 2012, [Ms. Masytkanova] received an email, in response to a previous message from her, from one of the members of the fact-finding panel that had been disbanded, stating that “[she] was also disappointed by the way [the] panel [had been] treated”.

... On 7 December 2012, [Ms. Masytkanova] filed an application with the [UNDT], contesting the decision to disband and not to reinstate the fact-finding panel formed in February 2012 to investigate her allegations of harassment and abuse of authority by her supervisor submitted in 2011

... A new fact-finding panel was appointed on 6 January 2013. However, its chair had to be replaced twice as the two staff members who had been appointed as chairpersons left UNAMA. A new panel was ... appointed on 17 January 2013.

... The panel had to be reconstituted again on 17 February 2013, as its new chairperson also left UNAMA.

... By Judgment No. UNDT/2013/033, rendered on 26 February 2013, the [UNDT] declared the application filed against the decision to disband and not to reinstate the fact-finding panel moot, since UNAMA had convened a new fact-finding panel on 6 January 2013.^[3]

... On 2 May 2013, [Ms. Masytkanova] was interviewed by the fact-finding panel re-constituted in February 2013.

...

... On 16 January 2014, the O-i-C and Designated Official *ad interim*, UNAMA, emailed to [Ms. Masytkanova] his memorandum dated 14 January 2014, informing her of the decision of the Special Representative of the Secretary-General (“SRSG”), following the fact-finding panel’s investigation, to close the case with no further action, based on the finding that no prohibited conduct had taken place. The memorandum summarized the panel’s conclusions in its investigation report, rendered on 9 January 2014. It indicated that no conclusive evidence was found to substantiate [Ms. Masytkanova’s] allegations and described the “most probable characterisation of the events in question” as “a difficult working environment, in a hardship duty station, where the working styles of [Ms. Masytkanova’s] supervisor and

^[3] This judgment was upheld on appeal in *Masytkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412.

[Ms. Masykkanova] clashed”. The SRSG thus did not find that any of the incidents, in isolation or as a whole, rose to the level of harassment or abuse of authority.

... The memorandum further stated that delays in completing the investigation were regrettable but could not be avoided, explaining that: a first panel had been convened on 29 February 2012, but had to be dissolved due to objections raised by [Ms. Masykkanova’s] former supervisor against two of its members; a new panel was convened in January 2013, which had to be dissolved as its chair left UNAMA; the panel was recomposed but the subsequent chairperson left UNAMA as well; on 17 February 2013, a new panel was convened; however, its work was delayed by the difficult nature of life in a hardship duty station, where staff constantly rotate, and also in part as a result of [Ms. Masykkanova’s] actions, such as insisting on having her lawyers present during interviews.

... On 17 January 2014, [Ms. Masykkanova] requested [full disclosure of] the fact-finding panel’s findings, while expressing her concerns that the panel “seems to have conducted a hasty process”.

... On 22 January 2014, the Head, Legal Affairs Unit, replied to [Ms. Masykkanova], rejecting her allegations that the investigation had not been thorough and refusing to disclose to her the full investigation report, as this was not required by ST/SGB/2008/5, which only requires [communication of] a summary of the findings and conclusions of the investigation.

... On 12 February 2014, [Ms. Masykkanova] submitted a request for management evaluation of the fact-finding panel’s findings and of the decision not to disclose the full report.

... On 1 May 2014, [Ms. Masykkanova] filed an application [with UNDT], contesting the findings of the fact-finding panel’s report and the non-disclosure of the fact-finding report by UNAMA. ...

... On 19 May 2014, the Under-Secretary-General for Management informed [Ms. Masykkanova] that the fact-finding panel’s finding and the non-disclosure of the panel’s report were upheld in management evaluation.

... The [Secretary-General] filed his reply on 9 June 2014.

... By Order No. 174 (GVA/2014) of 27 October 2014, the Secretary-General was directed to file ex parte the investigation report of the fact-finding panel; he did so on 28 October 2014 and, subsequently, on 30 October 2014, he filed the report’s annexes.

... A case management discussion was held on 28 May 2015.

... On 8 June 2015, [Ms. Masykkanova] filed a motion for the disclosure of the fact-finding panel report and for witnesses to be heard; she additionally sought to have the actions by the Ethics Office and the Office of Staff Legal Assistance (“OSLA”) reviewed, which in her

opinion failed to protect her as per ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

... Pursuant to Order No. 117 (GVA/2015) of 11 June 2015, [Ms. Masykkanova] filed on 14 June 2015 a list of five witnesses, with a brief summary of the evidence she expected each of them to give, and she suggested several other individuals as witnesses. The Secretary-General submitted comments on [Ms. Masykkanova's] motion on 20 June 2015.

... By Order No. 136 (GVA/2015) of 1 July 2015, the Tribunal rejected [Ms. Masykkanova's] motion in full. Furthermore, it also conveyed to the parties its intention to decide the case without a hearing and based exclusively on the written pleadings and invited them to comment on this point. [Ms. Masykkanova] filed comments concerning the Tribunal's rejection of her motion on 6 July 2015, but did not address the Tribunal's intention not to hold a hearing.

3. On 18 September 2015, the UNDT issued its Judgment. It confined its review to, and examined in turn, the two contested decisions specified by Ms. Masykkanova in her application, namely, (i) the findings of the fact-finding panel and (ii) the non-disclosure of the fact-finding report by UNAMA.

4. With respect to the first, the UNDT found that the fact-finding panel's findings were not an appealable decision; and, that, regardless of the formulation of Ms. Masykkanova's application, the appealable decision was the SRSG's decision not to take further action on her complaint based on the findings of the Panel's report.

5. It further found that, given the conclusions of the investigation (i.e., that no prohibited conduct had taken place), the SRSG's decision to close the case with no further action "stands as nothing but a regular application of sec. 5.18(i) of ST/SGB/2008/5, and constitutes a valid exercise of discretion on the part of the Administration".⁴

6. Having previously noted that the scope of the UNDT's judicial review in harassment and abuse of authority cases is restricted to how management responded to the complaint in question and that it is not to substitute its own judgment for that of the Secretary-General, the UNDT turned to "[t]he crux of the matter ... whether the handling of the complaint and the investigation that led to said conclusion was in accordance with the relevant rules".⁵ In this regard, the UNDT found:

⁴ *Ibid.*, para. 69.

⁵ *Ibid.*, para. 70.

- UNAMA did not deal promptly with the complaint as required by ST/SGB/2008/5, noting “the total duration of the process—26 months—represents more than eight times the three-month benchmark set forth in sec. 5.17 of [ST/SGB/2008/5]”.⁶
- There were “inordinate delays both at the stage of reviewing and assessing [Ms. Masykkanova’s] complaint, and in setting [up] a fact-finding panel and conducting the investigation itself, in breach of various provisions of ST/SGB/2008/5”.⁷
- The fact-finding-panel had wide discretion to determine the evidence relevant to the investigation and found “no solid grounds to conclude that [the panel] exercised this discretion in an unreasonable, arbitrary or otherwise misguided fashion”.⁸
- In reaching its decision, the UNDT observed as “noteworthy that [Ms. Masykkanova] [did] not question the impartiality or the competence of the panel members and, importantly, ... [did] not hold that the successive changes in the panel’s composition resulted in the investigation being carried out by any less able or upright persons”.⁹

7. As to the second decision contested by Ms. Masykkanova, the UNDT found that the Secretary-General did not breach her rights by not sharing with her the full report of the investigation. It noted that, pursuant to Sec. 5.18(a) of ST/SGB/2005/5, her “right was limited to receiving an account of the panel’s findings and conclusions”, which she received via the memorandum dated 14 January 2014, informing her of the decision of the SRSG to close the case with no further action.¹⁰ In reaching its decision, the Dispute Tribunal found the memorandum contained “a relevant, accurate and complete summary of the findings and conclusions of the panel” and the absence of any “extraordinary circumstances” warranting an exception to this general rule. In its view, the “circumstances put forward by [Ms. Masykkanova] in seeking to obtain the report concern essentially the inordinate length and poor handling of her complaint, which are not relevant for the purpose of disclosing the report”.¹¹

⁶ *Ibid.*, para. 77.

⁷ *Ibid.*, para. 83.

⁸ *Ibid.*, para. 94.

⁹ *Ibid.*, paras. 86-87.

¹⁰ *Ibid.*, paras. 97-98.

¹¹ *Ibid.*, paras. 99-100.

8. The UNDT awarded compensation in the amount of USD 3,000 “for the inordinate delay in handling her complaint”,¹² finding “the delays ... were so important and so persistent that they obviously inflicted considerable anxiety, stress and a sense of neglect and injustice to [Ms. Masykkanova]” which the Administration could not have ignored given Ms. Masykkanova’s “repeated inquiries on the status of the investigation”.¹³

9. The UNDT rejected Ms. Masykkanova’s request that the panel’s findings be voided on the grounds they were not a contestable decision and, therefore, their rescission was not envisaged as a possible remedy under Article 10(5)(a) of the Statute of the Dispute Tribunal (UNDT Statute). It held further that, even if Ms. Masykkanova were seeking the rescission of the refusal to take further action on her complaint, “it must be stressed that the delays ... are purely a procedural irregularity, which does not justify the rescission of that refusal decision”.¹⁴

10. The UNDT rejected all of Ms. Masykkanova’s other remedies and pleas on the grounds they were unproven, disconnected from the contested decisions or exceeded the UNDT’s powers pursuant to Article 10(5) of the UNDT Statute.¹⁵

Submissions

Ms. Masykkanova’s Appeal

11. Ms. Masykkanova seeks (i) review of the Judgment “for its fairness and objectivity”; (ii) additional compensation (in the amount of 24 months of full emoluments, of which 12 would correspond to time during which she could have been employed and 12 for emotional distress, harassment and aggravation); and (iii) “a guarantee ... blacklisting does not exist [at the United Nations], either de-facto or de-jure [and] an immediate removal of [her] name and any reference from [any] such list”.

12. Ms. Masykkanova asserts “the extent of the damage and the magnitude of the actions directed against [her] by UNAMA require further examination of the case in order to find sufficient remedy situations”. Specifically, she claims the UNDT “seems to not take into account factual situations”; did not consider UNAMA’s “comparative advantage [in regards

¹² *Ibid.*, para. 108.

¹³ *Ibid.*, para. 105.

¹⁴ *Ibid.*, para. 106.

¹⁵ *Ibid.*, para. 107.

to resources available ... and use [of] the rules to its advantage”; “failed to take into consideration ... the deliberate aggravation and harassment” by UNAMA and its overall disrespect for the process, in which it “sided with [her supervisor] ... [and] decidedly refused to look at [her] complaint” promptly.

13. Ms. Masykkanova disputes the UNDT’s finding that she “[did] not question the impartiality or the competence of the panel members and ... [did] not hold that the successive changes in the panel’s composition resulted in the investigation being carried out by any less able or upright persons”. Ms. Masykkanova submits that she did so, implicitly, in her motions before the UNDT; that the actions by UNAMA show there was no possibility for the panel to act fairly; that the need for the [p]anel to be reconstituted several times shows it was not “free from intrusion, interference and harassment”. She also submits that Section 5.16 of ST/SGB/2008/5 is not meant to allow the panel to “select exclusively those testimonies [favouring] the [Secretary-General] and negat[ing] the voices [of] all other (sic)”.

14. The UNDT also “fail[ed] to see the fallacy in [the] reasoning” of the Ethics Office, asserting that allowing her supervisor to conduct her personnel evaluation while the case was pending against her supervisor was to Appellant’s detriment. Ms. Masykkanova points to this and UNAMA’s reconvening of the panel “as it saw fit [as] clear examples of ill intentions and cover up” by UNAMA.

15. The UNDT’s award is “insufficient” and “does not equate to the level of damage” that Ms. Masykkanova suffered. The UNDT “failed to see the deep scars and the deliberate campaign launched by UNAMA to avoid its responsibility”; failed to take into account the amount of time she had to dedicate “to try to mitigate the unfair advantage” UNAMA had; failed to take into account the “loss of livelihood” that resulted. Asserting “[j]ustice delayed is justice denied”, Ms. Masykkanova claims a compensation of USD 3,000 makes “a mockery of the situation”.

The Secretary-General's Answer

16. The UNDT correctly rejected allegations that the investigation was incomplete and obstructed by the Administration. It also correctly found, after reviewing the regularity of the procedure as per ST/SGB/2008/5, that the fact-finding panel had fairly and correctly exercised its discretion and that there was no evidence the panel acted unreasonably.

17. Ms. Masykkanova has not provided any evidence that would justify the reversal of the decision not to take further action on her complaint. The UNDT's conclusion that there were "no solid grounds to conclude that [the panel] exercised this discretion in an unreasonable, arbitrary or otherwise misguided fashion" should therefore stand. Further, the appeal should be dismissed on the ground that Ms. Masykkanova has failed to identify any error in the Judgment. She repeats or rephrases the same arguments that were presented to, considered by, and ultimately rejected by the UNDT in its Judgment, without specifying any particular error in the Judgment.

18. Ms. Masykkanova has failed to establish any basis for an award of additional compensation. There is no link between the finding of a delay in addressing her complaint under ST/SGB/2008/5 in the present case and the length of her contract or her loss of livelihood. Ms. Masykkanova was awarded compensation in her other case before the UNDT in connection with the non-renewal of her contract.¹⁶ Therefore, any request for compensation related to this decision is outside the scope of the present case.

19. As Ms. Masykkanova has failed to establish that the UNDT erred in finding that UNAMA was ill-motivated in the handling of her complaint, she cannot be entitled to any compensation in that regard.

20. Ms. Masykkanova's additional claims ("blacklisted" from recruitment, regularity of her performance evaluation and allegations of "unethical" behaviour) should be rejected as they are without merit or outside the scope of the case.

21. The Judgment should be affirmed and the appeal dismissed in its entirety.

¹⁶ *Masykkanova v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/137.

Considerations

22. As a preliminary matter, the Appellant requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues which arise from this appeal have been clearly defined by the parties and there is no need for further clarification. We do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. The Appeals Tribunal, therefore, denies Ms. Masykkanova’s request for an oral hearing.

23. The history of this case presents a sorry picture of delay on the part of UNAMA. There were several differently constituted panels to hear one complaint and a total of 26 months elapsed before a decision was given. This is a breach of the Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) which requires that complaints are addressed promptly. In fact, Section 5.14 of ST/SGB/2008/5 provides *inter alia* that:

Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, 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 or, if necessary, from the Office of Human Resources Management roster.

24. We agree with the UNDT and uphold its reasoning that there were “inordinate delays both at reviewing and assessing the complaint, and in setting [up] a fact finding panel and conducting the investigation itself” and that the UNAMA was in breach of ST/SGB/2008/5.

25. The UNDT’s award of USD 3,000 as compensation to Ms. Masykkanova, though at the lower end, is within the range of compensation which has been awarded for this type of breach.¹⁷ Although the Secretary-General challenged Ms. Masykkanova’s claim for additional

¹⁷ See, for example, *Ivanov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-572, para. 28.

compensation, he did not challenge the UNDT's award; and, therefore, there is no reason for the Appeals Tribunal to interfere with it.¹⁸

26. We also agree with the Secretary-General that Ms. Masytkanova has failed to demonstrate on appeal any error by the UNDT that would justify the reversal of its Judgment. As we have consistently emphasized, the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case; rather, an appellant "must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal".¹⁹ The claims which Ms. Masytkanova makes on appeal are essentially a repetition of her arguments that did not succeed before the UNDT. We have reviewed the Judgment and find that Ms. Masytkanova's case was fully and fairly considered by the UNDT and there was no alleged error that would have changed the outcome of her case.

27. We find no fault with the Judgment of the UNDT. Accordingly, the appeal is dismissed.

Judgment

27. The appeal is dismissed and the Judgment No. UNDT/2015/088 is affirmed.

¹⁸ *Flores v. Secretary-General of the United Nations*, Judgment 2015-UNAT-525, para. 26, citing *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-346, para. 23.

¹⁹ *Gallo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-552, para. 14. See also, *Neocleous v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-635, para. 29, quoting, *inter alia*, *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar