



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

OSTENSSON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Myriam Foucher, UNOG

## **Introduction**

1. In an appeal registered on 16 January 2009 by the Geneva Joint Appeals Board (“JAB”) and subsequently transferred to the United Nations Dispute Tribunal, the Applicant contests the decision not to take action on his harassment complaint.

## **Facts**

2. The Applicant entered the service of the United Nations Conference on Trade and Development (“UNCTAD”) in 1981 as an Economic Affairs Officer, at the P-3 level. He was appointed as Chief of Section, at the P-5 level, in 2000.

3. With effect from 1 November 2006, he was designated Officer-in-Charge of the Commodities Branch, Division on International Trade in Goods and Services, and Commodities (“DITC”), and he was granted a special post allowance at the D-1 level, from 1 February 2007 to 31 July 2007.

4. On 4 December 2006, the post of Head of the Commodities Branch was advertised and the Applicant applied for this position. However, his application was unsuccessful and, with effect from 1 August 2007, the newly appointed Head of the Commodities Branch took up his functions. By application registered under case number UNDT/GVA/2010/053, which is the subject of *Ostensson* UNDT/2010/120, the Applicant successfully challenged the selection decision. In that Judgment, this Tribunal ordered that the selection decision for the post of Head of the Commodities Branch be rescinded and that the Applicant be compensated in the amount of USD48,000 for moral damage.

5. In an email of 14 November 2007 addressed to the Director of DITC and copied to the Head of the Commodities Branch, the Applicant raised his concerns with respect to the behaviour of his direct supervisor, the Head of the Commodities Branch, making specific reference to his having ordered the move of the Applicant’s secretary against her will and without his consent, and to his reluctance to clear a workshop whose preparation was well advanced. On the

following day, the Head of the Commodities Branch sent an email to the Director of DITC, rejecting the Applicant's assertions as "baseless presumptions" made on account of the latter's disappointment for not having been selected for the post of Head of the Branch. He suggested that either he or the Applicant be transferred to another unit, or that the UNCTAD Secretary-General reaffirm his authority as Head of the Commodities Branch.

6. Later that month, the Director of DITC discussed with the Head of the Commodities Branch and the Applicant individually, then jointly and, on 30 November 2007, she sent an email to both of them, recalling their respective roles and responsibilities as Head of Branch and Chief of Section, and the need to collaborate with mutual respect.

7. On 7 July 2008, the Applicant submitted a written complaint against the Head of the Commodities Branch in accordance with the provisions of Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). Relying on specific instances, he alleged that the Head of the Commodities Branch "systematically attempted to humiliate, marginalize and exclude [him] from the ... work [of the Branch]". According to the Applicant, the Head of the Commodities Branch had, in particular:

- decided that another, lower level, staff member would attend a course in Senegal in November 2007 although the Applicant had attended the three previous courses of this nature and had expressly requested to attend the November 2007 course;
- substituted the Applicant on a project carried out by UNCTAD and other organizations although he had been previously in charge of such project and the Director of DITC had told him that he should contribute significantly to the execution thereof;
- excluded the Applicant from the Sustainable Commodities Initiative although the Applicant had been involved in this initiative since its inception in 2005;

- failed to inform the Applicant about the Commodities Branch policy and excluded him from the preparation of meetings in relation thereto;
- kept the Applicant out of all preparations for the twelfth United Nations Conference on Trade and Development though he had involved several staff members who were working under the Applicant’s supervisor;
- changed the Applicant’s recommendation of a candidate for a post in his Section and failed to inform the Applicant that the selected staff member had arrived in his Section;
- ordered the move of the Applicant’s secretary against her will and without his consent;
- issued instructions to staff members working under the Applicant’s supervision without consulting or informing him;
- never copied the Applicant on any correspondence;
- never appointed the Applicant as officer-in-charge when he was away or not in a position to attend a meeting.

8. In the Applicant’s view, such actions tended to create a hostile work environment and, as such, constituted harassment. Thus, he asked to be transferred out of the Commodities Branch and requested that the Head of the Branch be “made aware that his behaviour [wa]s against the Staff Rules” and removed from his post. His complaint was referred to the Director of the Division of Management and to the Officer-in-Charge of the Human Resources Management Section (“HRMS”).

9. By an email of 21 July 2008 to the Director of the Division of Management, the Officer-in-Charge of HRMS stated *inter alia* that, in his view, “the matter d[id] not constitute a claim for harassment as defined in ST/SGB/2008/5” since, according to the latter, “[d]isagreements on work performance or other work-related issues” are not regarded as harassment. He also

recommended that the issue be addressed at a managerial level by means of mediation.

10. On the same day, the Director of the Division of Management sent an email to the UNCTAD Secretary-General, in which he endorsed the findings of the Officer-in-Charge of HRMS that the matter did not amount to harassment and rather fell into the category of disagreements on work performance or other work-related issues. He suggested that a meeting be held between the Director of DITC, the Applicant, the Head of the Commodities Branch and the Officer-in-Charge of HRMS, and noted that he would not, at that stage, recommend any further action.

11. With effect from 1 August 2008, the Applicant was reassigned as Special Adviser to the Trade, Environment, Climate Change and Sustainable Development Branch.

12. On 15 October 2008, the Applicant, to whom the emails of 21 July 2008 had not been communicated, wrote to the United Nations Secretary-General, explaining that UNCTAD had not taken any action on his harassment complaint. He consequently sought administrative review of the implicit decision of the UNCTAD Secretary-General not to take any action and he requested that UNCTAD be instructed to consider his complaint in accordance with ST/SGB/2008/5.

13. The Applicant was invited to a meeting with the Director of DITC on 20 October 2008. During the meeting, the Applicant was advised that his complaint had been reviewed by the Director of the Division of Management and the Officer-in-Charge of HRMS, both of whom had found that the matter did not constitute harassment within the meaning of ST/SGB/2008/5 and fell into the category of disagreements on work performance or other work-related issues.

14. By a letter dated 18 December 2008, the Applicant was informed by the Administrative Law Unit (“ALU”), United Nations Secretariat, that his request for review had been rejected.

15. On 23 December 2008, the Applicant resigned with effect from 31 March 2009.

16. On 5 January 2009, the Applicant asked ALU to be provided with the “findings dated 21 July 2008 relating to this harassment complaint”. ALU responded on the following day that he ought to direct his request to the competent body within UNCTAD.

17. On 16 January 2009, the Applicant submitted to the JAB his statement of appeal. After the matter was transferred to the Tribunal, a directions hearing was held on 4 May 2010, in order to discuss the opportunity for an amicable settlement. On 15 February 2011, a hearing on the merits took place, to which the Applicant and Counsel for the Respondent attended.

#### **Parties’ submissions**

18. The Applicant’s principal contentions are:

- a. The Officer-in-Charge of HRMS erred in concluding, based on section 1.2 of the Secretary-General’s bulletin ST/SGB/2008/5, that the matter did not constitute harassment but rather fell into the category of “disagreement on work performance or other work-related issues” since the above provision does not exclude work-related issues from the scope of the bulletin. The criterion he should have applied is whether the complaint related to simple disagreements or to “actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment”. The findings of the Officer-in-Charge of HRMS as submitted in his email of 21 July 2008 are devoid of substance and his review of the Applicant’s harassment complaint is tainted by bias owing to his longstanding support of the Head of the Commodities Branch;
- b. There was a *prima facie* case of harassment which warranted a formal fact-finding investigation. Other staff members also felt harassed by the Head of the Commodities Branch, though they did not dare to make

a complaint, and UNCTAD management was well aware of the fact that the problems in that Branch were due to his behaviour. It was clarified in *Abboud* UNDT/2010/001 that there is an obligation to investigate where there is reason to believe that misconduct occurred and it would be absurd to consider that the Tribunal's finding does not apply to harassment cases;

c. The Administration did not discharge its obligation to protect staff members from harassment and to promote a harmonious work environment, free of intimidation and hostility by allowing the Applicant to be reassigned out of the Commodities Branch. It should have investigated his harassment complaint. Besides, it was only before he submitted his complaint that efforts were made to resolve the matter;

d. It follows from section 5.14 of ST/SGB/2008/5, read in conjunction with sections 3.2 and 3.3, that the Administration's failure to act on a harassment complaint must be justified. In the instant case, the Administration did not discharge this obligation properly and it was only after the Applicant filed his request for review that the Director of DITC informed him of the reluctance of the UNCTAD management to take any action against the Head of the Commodities Branch because of the support the latter had received from African States.

19. Based on the above, the Applicant requests the Tribunal to find that UNCTAD failed to investigate his complaint in accordance with the procedures set out in ST/SGB/2008/5, and to order it to pay him compensation in the amount of USD20,000 in lieu of an apology for such failure and its further failure to protect him from harassment.

20. The Respondent's principal contentions are:

a. The Officer-in-Charge of HRMS conducted a proper, objective and prompt review of the harassment complaint and he concluded, in line with the spirit of ST/SGB/2005/5, that there was still a possibility to resolve the matter by informal means. Moreover, both he and the Director of the

Division of Management found that the case was about disagreement on work-related issues and did not amount to harassment.

b. There is no obligation for the Administration to conduct a formal fact-finding investigation upon receipt of a harassment complaint. In line with section 5.14 of ST/SGB/2008/5 and the case law of the former UN Administrative Tribunal, it is within the discretionary power of the Administration to decide whether or not an investigation should be carried out and whether or not disciplinary measures should be imposed on a staff member. In the present case, the decision was within the discretionary power of the Secretary-General of UNCTAD;

c. The Administration made various attempts to solve the conflict between the Applicant and the Head of the Commodities Branch. It first tried to re-establish a healthy work environment by informal means before the Applicant lodged his harassment complaint. Thereafter, it properly considered his harassment complaint and duly apprised him of its outcome. Further, it did not avoid dealing with the harassment complaint by reassigning the Applicant out of the Commodities Branch, such reassignment having been requested by him;

d. The Applicant has not discharged the burden of proving that the decision not to conduct an investigation was based on extraneous factors.

### **Considerations**

21. The Applicant challenges the decision not to take action on the harassment complaint he submitted on 7 July 2008. This matter is governed by the Secretary-General's bulletin ST/SGB/2008/5, which entered into force on 1 March 2008 and was thus applicable at the date when the Applicant submitted his harassment complaint.

22. From the outset, and with respect to the admissibility of the application, it may be noted that the Dispute Tribunal has jurisdiction to examine the Administration's actions and omissions following a request for investigation



submitted pursuant to ST/SGB/2008/5. In *Nwuke* 2010-UNAT-099, the Appeals Tribunal held:

30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

31. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority...

...

36. In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.

23. Concerning the Respondent's argument that the facts reported by the Applicant did not fall into the scope of ST/SGB/2008/5 because they referred to work-related issues, section 1.2 of the bulletin reads as follows:

Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

24. The first three sentences of section 1.2 provide a positive definition of the term "harassment" and the last sentence contains an exception clause. The inclusion in the last sentence of the word "normally" indicates that the exception clause is in no way automatic and that disagreement on work performance or on

other work-related issues may in some circumstances be considered harassment. The Tribunal considers that a literal interpretation of section 1.2 leaves no room for excluding systematically “[d]isagreement on work performance or on other work-related issues” from the scope of ST/SGB/2008/5.

25. The Tribunal further considers that, for the purpose of determining whether specific acts constitute harassment within the meaning of ST/SGB/2008/5, what really matters is that these acts “might reasonably be expected or be perceived to cause offence or humiliation to another person” and that they “tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment”. The Tribunal observes that this approach is consistent with *Elbadawi* UNDT/2010/073, where the term “harassment” was defined by reference to the first three sentences of section 1.2 of ST/SGB/2008/5. The Respondent’s argument to the effect that disagreement on work-related issues is completely excluded from the scope of application of ST/SGB/2008/5 is accordingly rejected.

26. Regarding the question whether or not the Administration erred in deciding not to investigate the matter, section 5.14 of ST/SGB/2008/5 provides:

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.

27. In the instant case, the Applicant first raised his concerns about the behaviour of the Head of the Commodities Branch in November 2007, and the Director of DITC opted for an informal approach to resolve the matter by convening the Applicant and his supervisor to separate and joint meetings that same month, and reminding them of their roles and responsibilities. The Applicant again raised his concerns in July 2008 by submitting a written complaint, explaining that he “ha[d] done everything in [his] power to solve the problem ...

through informal means”. Although the written complaint does not expressly rely on section 5.14, it is not disputed by the Respondent that it is to be regarded as a formal complaint within the meaning of that section.

28. Considering the purpose of ST/SGB/2008/5, as expressed in the introduction thereof, which is to “ensur[e] that all staff members ... 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, and abuse of authority”, it is clear that the protection of staff members is the crux of the bulletin. The Tribunal also observes that harassment is listed among the “specific instances of prohibited conduct” identified by former staff rule 101.2(d), and that section 2.1 of ST/SGB/2008/5 refers to “the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment of abuse” which is correlated with “the core values set out in ... staff rule 101.2(d)”. The right to submit a harassment complaint and to have it promptly reviewed is a key element of the policy set out in ST/SGB/2008/5 and a fundamental procedural safeguard for staff members. As was held by the Appeals Tribunal in *Nwuke* 2010-UNAT-099, “serious and reasonable accusations and requests for investigations constitute important instruments to improve administrative procedures and to ensure that day-to-day actions by the Administration are in compliance with the Organization’s law”.

29. Furthermore, it should be noted that section 5.1 of ST/SGB/2008/5 provides that “[i]ndividuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred”, while section 5.3 imposes on managers and supervisors a “duty to take prompt and concrete action in response to reports and allegations of prohibited conduct”.

30. In light of these principles, the Tribunal considers that the impact of section 5.14 would be defeated if the duty to conduct a formal fact-finding investigation were reduced to cases where prohibited conduct has already been proven. On the contrary, the very purpose of a fact-finding investigation is to establish whether or not the alleged prohibited conduct took place. Therefore, the requirement that there should be “sufficient grounds to warrant a formal fact-

finding investigation” may not be too narrowly interpreted. Although pure disagreement on work performance or on other work-related issues “normally” excludes the application of the procedures foreseen in ST/SGB/2008/5, a fact-finding investigation ought to be initiated if the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the bulletin.

31. With respect to the Applicant’s allegations in his written complaint of 7 July 2008, the Tribunal concedes that some of them, as isolated incidents, could have been regarded as purely work-related issues. This may, for example, be true regarding the decision to send someone else than the Applicant to several meetings. Conversely, the fact that the Head of the Commodities Branch did not involve him in the preparation of meetings although he had involved several staff members working under the Applicant’s supervision might reasonably be expected or perceived to have caused him offence and to have humiliated him. Therefore, even if some of the reported incidents, considered individually, did not necessarily amount to harassment, the 10 allegations taken together regarding events that happened within a short time-span should have warranted an investigation. This is in line with the definition contained in section 1.2 of ST/SGB/2008/5 insofar as it provides that “harassment normally implies a series of incidents”.

32. Accordingly, the Tribunal finds that the Administration erred in finding that the Applicant’s complaint of 7 July 2008 did not provide sufficient grounds to warrant a formal fact-finding investigation.

#### *Compensation*

33. In *Antaki* 2010-UNAT-095, the Appeals Tribunal held: “Compensation may only be awarded if it has been established that the staff member actually suffered damages.”

34. Additionally, the Appeals Tribunal accepted in *Wu* 2010-UNAT-042 that, while not every violation of due process rights necessarily led to an award of compensation, damages could be granted where it had been shown that the

applicant had suffered damage in the form of neglect and emotional stress. This, in the view of this Tribunal, confirms that compensation may be awarded for the moral injury sustained as a result of a procedural flaw (see also *Fröhler* UNDT/2010/135 and *Kamunyi* UNDT/2010/214).

35. In the instant case, the Applicant did not put forward any claim to the effect that he should be compensated for material injury, and indeed the Tribunal finds that he did not suffer any material damage.

36. As to the moral damage, the Tribunal first emphasizes that the protection from harassment, which ST/SGB/2008/5 seeks to enforce is an essential component of the Organization's personnel policy. The principles at stake and their procedural safeguards, as identified at paragraph 28 above, necessarily impact on the seriousness of the resulting injury and the Applicant explained during the hearing that he had indeed felt belittled and humiliated by the manner in which the matter was handled.

37. The Tribunal observes that, although the Administration failed to investigate the Applicant's complaint, it did not refuse to take any action to address his concerns. As recalled above, following the Applicant's email of 14 November 2007, the Director of DITC promptly met with the Head of the Commodities Branch and the Applicant to discuss the matter and subsequently reminded them of their responsibilities. Consequently, there was no delay in responding to his concerns and trying to resolve the matter informally.

38. The Tribunal notes, however, that it was only after the Applicant wrote to the UN Secretary-General on 15 October 2008 that he was informed orally, on 20 October, of the Administration's response to the harassment complaint he had submitted on 7 July 2008. This delay in responding to the Applicant's complaint is particularly unfortunate in light of the circumstance that, as early as 21 July 2008, the Director of the Division of Management had informed the UNCTAD Secretary-General of his opinion that the matter did not constitute harassment. It also contravenes the provisions of ST/SGB/2008/5, whose section 5.3, as explained at paragraph 29 above, imposes on the Respondent a duty to act expeditiously. The Tribunal considers that the Administration failed to discharge

this duty in the present case and that, as a result, the Applicant endured during three months and a half unnecessary psychological distress.

39. This Tribunal has repeatedly emphasized that the quantification of compensatory damages is an inexact science (see for example *Crichlow* UNDT/2009/028, which was upheld by the Appeals Tribunal in *Crichlow* 2010-UNAT-035). This being said, it should be reminded at this juncture that article 10.5(b) of the Statute of the Tribunal provides that compensation shall normally not exceed the equivalent of two years' net base salary of the applicant and article 10.7 prohibits the award of punitive damages.

40. It is also worth recalling the guiding principles for calculation of compensation which derive from the Tribunal's case law, the first and foremost of which is proportionality. This principle requires that all the circumstances of the case be taken into account. Among the various elements to be considered for the purpose of determining appropriate compensation are the nature of the irregularity (*Solanki* UNAT-2010-044), the number and intensity of breaches, the impact thereof on the applicant (*Wu* UNDT/2009/084), and the values and principles at stake (*Applicant* UNDT/2010/148).

41. In view of the foregoing, and in line with *Applicant* UNDT/2010/148 and *Aly et al.* UNDT/2010/195 in which it was found that compensation for moral injury is more fairly awarded in terms of a lump sum rather than as net base salary, the Tribunal finds that the Applicant must be compensated for the moral injury he suffered as a result of the decision not to investigate his harassment complaint in the amount of USD10,000. Although each case has to be determined on its own merits and taking into consideration its particular circumstances (*Solanki* UNAT-2010-044), this sum may be compared to other amounts awarded by the Tribunal like in *Wu* UNDT/2009/084 (confirmed by *Wu* 2010-UNAT-042), *Adorna* UNDT/2010/205 and *Kamal* UNDT/2011/034.

**Conclusion**

42. In view of the foregoing, the Tribunal DECIDES:

a. The Respondent is ordered to pay the Applicant compensation in the amount of USD10,000 for the moral damage he suffered;

b. The above amount is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5 per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Thomas Laker

Dated this 10<sup>th</sup> day of March 2011

Entered in the Register on this 10<sup>th</sup> day of March 2011

*(Signed)*

Victor Rodríguez, Registrar, Geneva