



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

IVANOV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Joseph Grinblat

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Population Affairs Officer in the Population and Development Section (“PDS”), Population Division, in the Department of Economic and Social Affairs (“DESA”), contests the 8 January 2013 decision of the Under-Secretary-General, DESA (“USG/DESA”) to take no action on his complaint for defamation and harassment.

2. The Applicant requests the Tribunal to find that his due process rights were breached and that it order that a copy of the report from the Investigation Panel be produced to him. Further, the Applicant seeks damages equal to at least one year’s net base salary to compensate him for the violations of his due process rights and for mental stress and suffering. The Applicant also requests the Tribunal to find that he has been victim of defamation by his supervisor which, according to him, constituted harassment pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and recommend that the USG/DESA and the Under-Secretary-General, Management (“USG/DM”) take appropriate measures against his supervisor.

## **Relevant factual and procedural background**

3. On 5 January 2012, the Applicant submitted a complaint to the USG/DESA in which he requested that an investigation be conducted into the alleged defamatory language contained in a 28 October 2011 memorandum received by the USG/DESA from the Applicant’s supervisor, then Chief, PDS, DESA. In response to a 20 January 2012 follow-up email, the USG/DESA acknowledged receipt of the Applicant’s request on 10 February 2012.

4. On 29 March 2012, the Applicant contacted the then USG/DM and requested her to order that an investigation be conducted into his allegations.

5. On 12 April 2012, the Executive Officer, DESA, recommended that the USG/DESA convene a panel to investigate the allegations set out in the complaint (“the Investigation Panel”). The USG/DESA, appointed the Investigation Panel the following day.

6. On 26 November 2012, the Investigation Panel submitted its detailed report to the then USG/DESA. By memorandum dated 8 January 2013, the Executive Officer, DESA, informed the Applicant of the conclusions of the Investigation Panel’s report into his allegations that he was the victim of harassment and abuse of authority from his supervisor. The memorandum stated that: the content of the 28 October 2011 memorandum did not meet the definition of harassment per ST/SGB/2008/5; the disagreements between the Applicant and his supervisor were performance related and were therefore outside the scope of ST/SGB/2008/5 and attempts had been made to resolve those issues within that context; the content of the 28 October 2011 memorandum was the subject of a separate investigation by the same Investigation Panel.

7. On 9 January 2013, the Applicant wrote to the newly appointed USG/DESA to express his disagreement with the summary of the Investigation Panel’s report noting that it had stated that the content of the memorandum which he complained of was the subject of a separate investigation by the same Panel, questioning as to the topic of the investigation for which the current report was issued.

8. On 16 January 2013, the Executive Office of DESA acknowledged receipt of the Applicant’s communication of 9 January 2013. The Executive Officer, DESA, confirmed that “[b]ased on a review of [the Investigation Panel’s report, the Under-Secretary-General closed the case on 9 January 2013 without proposing further action in accordance with sec. 5.18 of ST/SGB/2008/5”.

9. By letter dated 26 January 2013, the Applicant contacted the USG/DM and requested that the Management Evaluation Unit (“MEU”): (a) reject the decision of the USG/DESA to close the case without further action, under the faulty conclusion

that “the disagreement between [the Applicant] and [his supervisor] were in fact related to performance and outside the scope of ST/SGB/2008/5”; and (b) “find that there was defamation from [his supervisor] against him, and to order that disciplinary measures be taken against [his supervisor]. [The Applicant] further request[ed] that an appropriate compensation be given to him, for the violation of his rights for due process in the long time it took to answer his complaint, and for his moral damage”.

10. On 19 March 2013, the Applicant was informed by the USG/DM that the Secretary-General had decided to uphold the recommendation of the MEU to take no further action regarding the Applicant’s complaint. The MEU noted that three months had elapsed since the time the Applicant had filed his complaint and the establishment of an Investigation Panel, resulting in the latter being in breach of the requirement that allegations be investigated promptly. In light of the MEU’s findings, the Secretary-General decided to (a) “compensate [the Applicant] in the amount of [USD]1,000 for delay in making the initial determination to establish the Investigation Panel [...]”; (b) conclude[d] that the time-frame for submitting the investigation report was consistent with ST/SGB/2008/5, and; (c) uph[eld] the contested decision of the USG/DESA to take no further action regarding [the Applicant’s] complaint”. The MEU’s letter further noted that the Applicant had declined the award of USD1,000.

11. On 15 April 2013, the Applicant filed an application with the Dispute Tribunal contesting “the decision to take no action on [his] complaint for defamation and harassment”. The Respondent filed his reply on 17 May 2013.

12. On 22 May 2013, the Applicant filed a motion for leave to present comments on the Respondent’s reply. On 23 May 2013, the Respondent filed his response to the Applicant’s submission, requesting the Tribunal to reject the Applicant’s motion for leave to file comments on the reply.

13. On 30 May 2013, by Order No. 137 (NY/2013), the Tribunal ordered the parties to file a jointly-signed statement identifying any agreed legal issues,

including the question of the non-receivability of the application as argued by the Respondent, present agreed facts in chronological order, and inform it as to whether the parties were amenable to resolve the matter informally. On 27 June 2013, the parties filed their joint response to Order No. 137.

14. On 29 January 2014, the undersigned Judge was assigned to the present case.

15. On 31 July 2014, the Tribunal, by Order No. 217 (NY/2014), ordered the parties to file a jointly-signed statement indicating whether either party required the production of new documents and whether there were reasons that an oral hearing should be held. On 7 August 2014, the parties filed a joint submission in response to Order No. 217 indicating that a hearing was not needed.

16. On 11 August 2014, the Tribunal, by Order No. 234 (NY/2014), considered the Applicant's request to receive a copy of the complete investigation report relating to the present matter and determined that it was not a preliminary issue. Rather, it formed part of the remedies requested in the application. In the same order the Tribunal rejected the Applicant's request to receive a copy of documents related to a separate investigation conducted by the same Investigation Panel that handled the present matter but which did not concern the Applicant's allegations. Further, the Tribunal ordered the parties to file their closing submissions by 15 August 2014.

17. On 15 August 2014, the Applicant filed a submission in response to Order No. 234 reiterating the requests previously addressed by Order No. 234. That same day, by Order No. 243 (NY/2014), the Tribunal informed the Applicant that these requests had already been addressed by Order No. 234 and ordered the parties to file their closing submissions, as previously indicated, by 15 August 2014.

18. On 15 August 2014, the Respondent duly filed his closing submissions submitting that the review of the Applicant's complaint and the investigation were properly conducted and noting that there was a delay in completing the investigation due to difficulties in scheduling interviews. This delay was recognized by the USG/DESA who awarded the Applicant USD1,000 in compensation and

the Respondent stated that there was no basis for any additional award. The Respondent further stated that the Applicant correctly received a summary of the investigation report in accordance with ST/SGB/2008/5 and was not entitled to a full copy of the investigation report.

19. On 18 August 2014, the Applicant filed his closing submissions in response to Orders No. 234 and 243 stating that his request for the full report of the Investigation Panel was a preliminary issue and that once he received a copy of the report he would be able to present a more elaborate application. He also requested that the Tribunal order the production of a copy of the report and of any document relating to the separate investigation and to find that the conclusions of the Investigation Panel are unreasonable and that he was a victim of harassment.

#### **Applicant's submissions**

20. The Applicant's principal contentions may be summarized as follows:

a. The Applicant's due process rights were violated as a result of DESA's reluctance and delays to act on the Applicant's complaint. It took more than three months to appoint an Investigation Panel, and nearly eleven months from the date of the submission of the complaint for the Investigation Panel's report to be submitted and more than a year to have a decision from the USG/DESA on the complaint. This violation was recognized by the MEU. The Applicant acquired the right to receive a copy of the Investigation Panel's full report when the report was used against him by DESA and the MEU.

b. The statements about the Applicant's alleged medical problems constitute harassment in accordance with sec. 1.2 of ST/SGB/2008/5 as the Applicant never exhibited any of the purported issues referred to in the 28 October 2011 memorandum. The Investigation Panel did not verify the veracity of these allegations.

c. The conclusion of the Investigation Report did not address the Applicant's main complaint of defamation and harassment and wrongly concluded that the false allegations made by his supervisor did not constitute harassment, but rather referred to a disagreement related to performance.

d. The MEU erred in finding that that there was no sign of bad faith on the part of the Applicant's supervisor in reporting his view and the compensation provided by the MEU for the delay in addressing the Applicant's complaint was not sufficient. The Applicant requests that the Tribunal grant him an amount equal to at least one year's salary to compensate him for the violation of his rights for due process, and for the mental stress and suffering which he endured following the sharing of some of the content of the memorandum with other staff members.

### **Respondent's submissions**

21. The Respondent's principal contentions may be summarized as follows:

a. With the exception of the delays incurred in investigating the Applicant's complaint, the Applicant has failed to identify any breach of procedure under ST/SGB/2008/5.

b. The delay in submitting the Investigation Panel's report was not unreasonable. The use of the term "prompt" implies a period sufficient to make a determination as to the elements of good faith and sufficiency of grounds. The work commitments and scheduled leave of the interviewees during the initial phase of the investigation were the cause of the delay in completing the investigation and report. However, the delays were recognized by the USG/DM, who awarded the Applicant USD1,000 in compensation for the delays. There is no justification for any additional award.

c. The Investigation Panel determined that the disagreements between the Applicant and his supervisor were related to performance issues rather

than those forming the basis of his complaint and the memorandum is in no way an attempt to malign the Applicant's character. It is a confidential communication informing the USG/DESA of a number of serious issues arising in her department. It could not have been an instrument of harassment since it was not intended for release to the Applicant. Also, defamation would normally refer to statements of a public nature, and the Investigation Panel found no evidence that the matters raised in the memorandum had been raised or discussed publicly.

d. In accordance with sec. 5.18, the Applicant is not entitled to receive a copy of the full investigation report, but rather only a summary and conclusion of its findings.

## **Considerations**

### *Receivability*

22. The Applicant received the contested decision on 16 January 2013 and requested management evaluation on 31 January 2013. On 19 March 2013, he was informed that the Secretary-General had decided to endorse the MEU's recommendations regarding the lawfulness of the decision to take no further action in response to the Applicant's complaint of defamation and harassment, including the refusal to provide him with a copy of the full investigation report. The present application was filed on 15 April 2013, within 90 days from 19 March 2013 and meets all the receivability requirements of art. 2 of the Dispute Tribunal's Statute and art. 7(a) of its Rules of Procedure.



*Applicable law*

23. ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) provides in sec. 1.2 that:

It is also the duty of staff members to cooperate with duly authorized audits and investigations. ...

24. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) addresses the procedures that are to be followed upon management receiving a formal complaint or report on harassment and abuse of authority by a staff member:

**Section 1**

**Definitions**

...

1.2 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 provision of this policy but in the context of performance management.

...

**Section 2**

**General principles**

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

2.3 In their interactions with others, all staff members are expected to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace.

2.4 The present bulletin shall apply to all staff of the Secretariat. Complaints of prohibited conduct may be made by any staff member, consultant, contractor, gratis personnel, including interns, and any other person who may have been subject to prohibited conduct on the part of a staff member in a work-related situation.

### **Section 3**

#### **Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission**

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

...

## **Section 5**

### **Corrective measures**

5.1 Individuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred. The aggrieved individual may opt for an informal or a formal process, as explained below. Regardless of the choice made, the aggrieved individual is encouraged to keep a written record of events, noting dates, places, a description of what happened and the names of any witnesses and of anyone who may have information concerning the incident or situation at issue.

5.2 All reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of the individuals concerned and ensure confidentiality to the maximum extent possible.

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

...

### *Formal procedures*

5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or, for mission staff, to the Under-Secretary-General for Field Support. Formal resolution may also be initiated by the submission of a report of prohibited conduct from a third party who has direct knowledge of the situation to one of the officials listed above (the “responsible official”). The aggrieved individual or third party shall copy the written complaint or report to the Office of Human Resources Management for monitoring purposes.

5.12 In all instances, aggrieved individuals or third parties who have direct knowledge of the situation may report cases of prohibited conduct directly to the Office of Internal Oversight Services, without the need to obtain authorization or clearance from any official.

5.13 The complaint or report should describe the alleged incident(s) of prohibited conduct in detail and any additional evidence and information relevant to the matter should be submitted. The complaint or report should include:

- (a) The name of the alleged offender;
- (b) Date(s) and location(s) of incident(s);
- (c) Description of incident(s);
- (d) Names of witnesses, if any;
- (e) Names of persons who are aware of incident(s), if any;
- (f) Any other relevant information, including documentary evidence if available;
- (g) Date of submission and signature of the aggrieved individual or third party making the report.

5.14 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.

5.15. At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender, and any other individuals who may have relevant information about the conduct alleged.

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no

later than three months from the date of submission of the formal complaint or report.

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

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(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.

25. The Tribunal considers that seeing that secs. 5.14–5.18 use the terms “will” and “shall” to establish the actions that are to be taken by the responsible official and/or by the Investigation Panel upon receiving a formal complaint, those steps are mandatory.

26. In accordance with the mandatory provisions of sec. 5.14, upon receiving a formal complaint or report, the responsible official has the following obligations:

a. To promptly review the complaint in order to assess if the complaint has been made in good faith and if there are sufficient grounds to warrant a formal fact-finding investigation;

b. Should there be sufficient grounds for a formal fact-finding investigation, to 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 accordance with secs. 5.15–5.17 of ST/SGB/2008/5, the Investigation Panel has the following obligations:

a. Inform the alleged offender of the nature of the allegations against him or her and remind him or her of the policy introduced by ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits and investigations (5.15);

b. Conduct a fact-finding investigation, including interviews with the aggrieved individual, alleged offender and any others individuals which may have relevant information about the conduct alleged (sec. 5.16);

c. Prepare a detailed report giving a full account of the facts that ascertained during the investigation process (sec. 5.17);

d. Submit the investigation report, together with documentary evidence, to the responsible official normally no later than three months from the date of submission of the formal complaint or report (sec. 5.17).

28. The Tribunal considers that an aggrieved individual who submits a complaint or report containing the elements mentioned in sec. 5.13 has the following correlative due process rights which stem from the obligations presented above:

- a. To have his/her complaint promptly reviewed, and assessed by the responsible official and, when applicable, investigated by the Investigation Panel, normally within three months from the date of the formal submission;
- b. If the responsible official decides that there are sufficient grounds to warrant a formal fact-finding investigation, to be interviewed by a promptly appointed Investigation Panel, and to be reminded of the policy introduced by ST/SGB/2005/21;
- c. To be informed and receive a summary of the findings and conclusions of the investigation if the report indicates that no prohibited conduct took place (sec 5.18(a)) or to be informed of the outcome of the investigation and of the actions taken if the actions warrant managerial or disciplinary action (secs. 5.18(b) and 5.18(c)).

29. The Tribunal finds that both the responsible officer and the Investigation Panel must fulfill their obligations, as established in sec. 5.14 (to promptly review, assess and if necessary appoint an Investigation Panel), and sec. 5.15–5.17 (to investigate and submit the report), normally within three months from the date of the submission of the formal complaint.

30. The time-limit referred to in sec. 5.17 applies to the entire process described in secs. 5.14–5.17, which runs from the filling of a complaint or report in accordance with sec. 5.13 to the finalization and submission of an investigation report to the responsible official. The Tribunal considers that the three months deadline is a fundamental element of the procedure set by ST/SGB/2008/5 which guarantees that the Organization will take all appropriate measures to ensure a harmonious work environment and protect its staff from exposure to any prohibited conduct through effective.

31. The Tribunal considers that the responsible official and the Investigation Panel are required to respect this specific deadline since the text indicates that the report “shall normally be submitted to the responsible official” no later than three months from the date of submission of the formal complaint or report.

*Commencement of the investigation*

32. As results from the evidence, the Applicant filed his complaint of harassment on 5 January 2012, the Investigation Panel was established on 12 April 2012 and the Investigation Panel completed its report on 26 November 2012.

33. As such, the Investigation Panel was only established by the responsible official more than three months after the Applicant had submitted his formal complaint. This is equivalent to the entire time period normally afforded to the Organization for reviewing a complaint and then, where appropriate, completing the investigation process, including the finalization of the investigation report by the Investigation Panel.

34. In his request for management evaluation, the Applicant indicated that his “rights for due process in having [his] complaint properly investigated” had been violated by the contested decision.

35. In their 19 March 2013 response, the MEU noted that:

[I]n the present case over three months had elapsed between the time the complaint was filed with the [USG]/DESA and the establishment of the Investigation Panel. The MEU could not find sufficient basis to show that the review of that duration was “prompt” in the sense of section 5.14 of the SGB. Consequently, it concluded that the Administration did not observe the time frame set out in section 5.14.

36. The Tribunal notes that the USG/DM decided to uphold these findings and to compensate the Applicant “in the amount of US[D]1,000 for delay in making the initial determination to establish the Investigation Panel pursuant to sec. 5.14 of ST/SGB/2008/5”.



37. The Tribunal finds that, taking into consideration the above decision, the USG/DM recognized that the Administration's failed to observe the timeframe set out in sec. 5.14, resulting in a breach of the Applicant's due process rights and awarded the Applicant USD1,000 for the three months delay in establishing an Investigation Panel. The Tribunal considers that this amount of compensation is fair and reasonable for the violation of this specific rule.

38. However, the Tribunal considers that the MEU ignored the fact that the delay in appointing the Investigation Panel breached not only sec. 5.14, but also sec. 5.17, as the deadline by which the Investigation Panel was required to submit its report had already elapsed prior to it even being appointed. The MEU noted that

[T]he Investigation Panel submitted its report on 26 November 2012, more than seven months after the USG/DESA tasked the Panel with the case, attributing the delay to work commitments and scheduled leave of the interviewees and, ultimately, the investigators during the initial phase of the investigation. The MEU considered that the integrity of an investigation presupposes that investigators inquire into and take into consideration all relevant facts, including the testimony of knowledgeable witnesses. It considered that a Panel's fact-finding could reasonable be delayed by scheduling conflicts from work commitments and leave schedules of knowledgeable witnesses expected to testify. Consequently, the MEU concluded that the Investigation Panel had justified the delay beyond the three-month "norm" in the SGB.

39. The Tribunal considers that the fact-finding activities of the Investigation Panel are directly linked to the availability of the aggrieved individual, alleged offender and any others individuals which may have relevant information about the alleged conduct.

40. Once they are appointed, the members of the Investigation Panel must understand the importance and the urgency of their task and assume full responsibility to conduct a fair and complete investigation within the stipulated deadline. The Investigation Panel must conduct its investigation diligently and give all the necessary instructions to the persons involved in the investigation to ensure their availability (including by informing the managers of the interview schedule) in order

to be able to conduct the proceedings and finalization of its report within three months. Further, in accordance with sec. 1.2 from ST/SGB/2005/21, staff members involved in the proceedings have the obligation to fully cooperate with the Investigation Panel without delaying the investigation and, if necessary, they have to adjust their schedule (including leave) with the Administration's support.

41. In his closing submission the Respondent stated that “[p]ursuant to sec. 5.17 the investigation report shall “normally” be submitted to the decision-maker within [three] months of the filing of the complaint. There was a delay in the investigation due to work related difficulties in scheduling interviews”.

42. Section 5.17 explicitly states that the investigation report is to be submitted, normally, no later than three months from the date of submission of the formal complaint. The Tribunal notes that, in the present case, the cause for the delays in finalizing and submitting the investigation report were partially identified by the MEU (see para. 38 above). Even if some of these delays were attributable to reasons such as work commitments and the leave schedules of the Investigation Panel's members and/or of the seven staff members interviewed during the investigation, the Tribunal finds that they cannot be considered unavoidable and they do not represent exceptional circumstances. In light of the deadline established by sec. 5.17, seven months cannot be considered a reasonable period of time to complete an investigation report. The Investigation Panel is presumed to be aware of the rules governing its functioning and that, in the present case, the deadline by which it was supposed to complete its report had already expired when it was appointed. The Investigation Panel should therefore have been more diligent in conducting its proceedings and should have submitted its report within three months from the date on which it was appointed – 12 April 2012, and no later than 12 July 2012.

43. The report was only submitted on 26 November 2012 and the additional delay in completing the investigation report further violated the Applicant's due process right to have his complaint investigated within three months. This additional breach of

the Applicant's due process rights was not covered by the USG/DM's first award of USD1,000.

44. The Tribunal concludes that the Applicant's due process rights to have his complaint promptly reviewed and assessed by the responsible official, for an Investigation Panel to be promptly appointed by the same responsible official after receiving his complaint on harassment, and for the report to be finalized within three months, were violated.

45. Regarding the award of moral damages, in *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated:

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

46. In *Kamal* 2012-UNAT-204, the Appeals Tribunal ruled that delay in itself, in the absence of negligence or a violation of specific rules by the Administration, cannot be considered a valid ground for compensation. *Per a contrario*, in the present case,

the delays indisputably violated the specific deadlines contained in secs. 5.14 and 5.17 requiring the investigation process to be concluded within three months. In *Hersh* 2014-UNAT-433, the Appeals Tribunal reaffirmed that a breach of a due process right entitles an applicant to compensation.

47. The Tribunal considers that under *Asariotis*, pursuant to secs. 5.14 and 5.17, the delay experienced by the Applicant being directly linked to a breach of what the Tribunal considers a fundamental procedural right as indicated in para. 30 of this judgment in itself constitutes an appropriate basis for compensation.

48. Taking into consideration the findings from para. 42, the Tribunal concludes that there were no reasonable justifications for the Investigation Panel's delays, beyond the three month norm set by sec. 5.17, in completing their investigation report and, therefore, partially grants the Applicant's grounds of appeal regarding the breach of his due process rights and his request for compensation.

49. The Tribunal notes that the USG/DM recognized that the three months delay in appointing the Investigation Panel resulted in a breach of sec. 5.14 and awarded the Applicant compensation in the amount of USD1,000 (approximately USD300/month). The Tribunal, in the light of the particular circumstances of the present case, will therefore grant the Applicant an additional award of compensation in the amount of USD1,300 for the additional delay of four months that it took the Investigation Panel to submit its report following the expiration of the three month time period by which it was required to submit its report following its appointment. Taking into consideration that the Applicant refused to accept the initial payment of USD1,000, it results that the Respondent is to pay to the Applicant a total compensation of USD2,300.

#### *Investigation report*

50. Upon receiving the report from the Investigation Panel, the responsible official must then take one of the three courses of action described in sec. 5.18.

51. As stated by sec. 5.18(a), if the report concludes that no prohibited conduct was carried out by the alleged offender, the responsible official will close the case and inform the alleged offender and the aggrieved individual of the Investigation Panel's findings and conclusions in the form of a summary.

52. In the present case, on 8 January 2013, the Applicant was informed that the Investigation Panel had concluded that "based on information gathered by the panel, the actions of [his supervisor], including the memo to the USG/DESA do not meet the definition of harassment per ST/SGB/2008/5. The disagreements between [the Applicant] and [his supervisor] are in fact related to performance and are outside the scope of the above SGB". Further, on 16 January 2013, the Applicant was informed that "based on a review of the panel's report, the Under-Secretary-General closed the case on 9 January 2013 without proposing further action in accordance with sec. 5.18 of ST/SGB/2008/5".

53. As a result of the decision to close the case, the Applicant was not entitled to receive a detailed copy of the investigation report but, rather, only a summary of its findings and conclusions which, per the evidence submitted by the parties, the Applicant received from the USG/DESA on 8 January 2013. Consequently, the Tribunal considers that this matter is strictly related to the substance of the case and does not represent a preliminary issue.

54. The Tribunal notes that, in *Adorna* UNDT/2010/205 and *Haydar* UNDT/2012/201, the Dispute Tribunal expressed that, the applicable rule notwithstanding, the decision as to whether to provide an aggrieved individual with a copy of an Investigation Panel's report should be taken on a case-by-case basis, including whether the aggrieved individual presented exceptional circumstances for her or his request. Nevertheless, in the present case, the Applicant did not identify any exceptional circumstances that would justify diverging from the requirement that the Applicant only be provided with a summary of the Investigation Panel's findings and conclusions.

55. Regarding the content of the document received by the Applicant, the Tribunal observes that, even if it refers to the “conclusions of the investigation panel”, it actually consists of a summary covering both the findings and conclusion of the Investigation Panel. The Tribunal considers that special attention must be given by the responsible official to the accuracy of such a document which represents the “heart” of the argument on each point, in order to ensure that all the elements included in the report are correctly summarized and clearly presented to the claimant.

56. The Tribunal underlines that, as results from sec. 1 from ST/AI/292 (Filing of adverse material in personnel records), adopted on 15 July 1982, the Secretary-General stated that “anything that is adverse to the staff member should not go in a confidential file unless it has been shown to the person concerned”. ST/AI/292 further states:

2. Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. ...

3. Adverse material may originate from sources outside the Organization or from other staff members in their personal capacity commenting on a staff member’s behavior or activities. If the material is anonymous, it will be discarded. Otherwise the incoming communication will be shown to the staff member, who will be asked to comment on the allegations, if a question of his or her conduct is involved. Both the adverse material and the staff member’s comments will be kept in the non-privileged portion of the confidential file to which the staff member will have access.

...

5. ... Under the existing system, all the performance reports, special reports and other communications pertaining to the staff member’s performance are a matter of record and are open to rebuttal by the staff member. The report and the rebuttal, if any, as well as the final appraisal by the head of the department or office are placed in the official status file. This file constitutes the sole repository of documents relating to the contractual status and career of the staff

member. It is available for inspection by the staff member once a year before the annual promotion review and in other circumstances specified in the administrative instruction ST/AI/108 on application to the staff member's personnel officer.

6. It is noted, however, that some organizational units, for their own convenience, maintain files on individual staff members which contain copies of documents in the official status file and correspondence internal to the organizational unit concerned. Such files may be kept only as working files for a limited period of time and shall not include any material reflecting unfavorably on a staff member's performance or conduct that has not been brought to his or her attention and communicated to the Office of Personnel Services.

57. It results that adverse material related to a staff member's character, reputation, conduct, performance or career can only be included together with the staff member comments, if any, in the confidential file, official status file or in the working file after the entire document has been presented to the staff member for comments. Consequently, the summary of findings and conclusions reflecting the final report of the Investigation Panel constituted to investigate a complaint based on sec. 15.8(a) of ST/SGB/2008/5 can represent such a document and the accuracy of it is very important. The full investigation report cannot be included in a staff member's Official Status File seeing that, as in the present case, if the case is closed, the staff member is not entitled to receive it and not comment on it.

#### *Case closure*

58. The Tribunal will further analyze the Applicant's submission regarding the decision taken by the responsible official to not take further action, and close the case, on his complaint of work place harassment.

59. In the present case, the Tribunal concludes that there is no evidence that the Investigation Panel did not gather sufficient evidence or erred in reaching its findings and conclusions presented in the report. With the exception of the delays incurred in appointing the Investigation Panel and it then submitting its investigation report to the responsible official, the procedures were followed correctly.

60. As results from the summary of the report, the Investigation Panel established that the actions of the Applicant's supervisor did not meet the definition of harassment in ST/SGB/2008/5, which is similar to stating that no prohibited conduct took place. The Tribunal considers that, in the present case, the responsible official respected the mandatory provisions in sec. 15.8(a), which state that "if the report indicates that no prohibited conduct took place, the responsible official will close the case...". The responsible official then appropriately provided the Applicant and his supervisor with a summary of the findings and conclusions. It results clearly from sec. 15.8(a) that, in such a case, the responsible official has no right to verify the activity of the Investigation Panel or to take any other course of action, except to close the case.

61. The Tribunal rejected the Applicant's 31 July 2014 request, which was reiterated on 15 August 2014, to receive a copy of documents related to a separate investigation conducted by the same Investigation Panel, on the grounds that the scope of the present case is limited to the decision not to take any action on the Applicant's complaint for defamation and harassment. The Tribunal notes that the 6 January 2013 communication from the Executive Office in DESA confirmed that following the receipt of the Investigation Panel's report, the USG/DESA closed the case on 9 January 2013 without proposing any further action.

62. In his response to Order No. 137 (NY/2013) on case management, the Respondent clearly indicated that there was no investigation conducted by the Investigation Panel under ST/AI/371 in connection with the Applicant's complaint against his supervisor's 28 October 2011 memorandum. This response clarified one of the conclusions included in the summary of the Investigation Panel's report, namely that the content of this memorandum was not the subject of a separate investigation by the same Investigation Panel. It results that the Investigation Panel only conducted a single investigation into the Applicant's complaint of harassment and there is no contradiction in the summary of the investigation report.



63. Consequently, the Applicant's grounds of appeal against the decision by the USG/DESA not to take action in response to his complaint for harassment and abuse of authority, including his refusal to provide him a copy of the investigation report, are to be rejected. Further, the Applicant's additional request to receive a copy of documents related to a separate investigation conducted by the same Investigation Panel which was included in the closing submissions is to be rejected since no such investigation took place.

64. The Applicant's request that the Tribunal find that he has been the victim of defamation by his supervisor which, according to him constituted harassment under ST/SGB/2008/5, and to recommend that the USG/DESA and the USG/DM take appropriate measures in that regard stand also to be rejected, because the Tribunal considers that there is no evidence to contradict the findings of the Investigation Panel that the disagreements between the Applicant and his supervisor were performance related. Section 1.2 of ST/SGB/2008/5 states that "disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provision of this policy".

65. In *Messinger* 2011-UNAT-123, the Appeal Tribunal confirmed that this Tribunal does not have jurisdiction to conduct a *de novo* investigation of a formal complaint of harassment and to substitute the legal findings and conclusions of the responsible officials. The Tribunal concludes that there is no legal basis for it to rescind the contested decision nor does it have the competence to make recommendations to the USG/DESA and/or the USG/DM regarding appropriate measures to be taken in relation thereto.

**Conclusion**

66. In the light of the foregoing, the Tribunal DECIDES

a. The appeal is granted in part.

b. The Respondent is to pay compensation in the amount of USD2,300 constituting of:

(i) USD1,000 for the delay in having the Applicant's complaint promptly reviewed and assessed by the responsible official; and

(ii) USD1,300 for the delay by the Investigation Panel in completing its investigation report.

c. All other grounds of appeal are rejected.

*(Signed)*

Judge Alessandra Greceanu

Dated this 25<sup>th</sup> day of September 2014

Entered in the Register on this 25<sup>th</sup> day of September 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York