UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.:	UNDT/GVA/2014/042 UNDT/GVA/2014/043
Judgment No.:	UNDT/2014/120
Date:	30 September 2014
Original:	English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

ALOBWEDE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant, a former Translator/Interpreter/Reviser (P-4) at the International Criminal Tribunal for Rwanda ("ICTR"), contests the following two decisions:

a. The "[f]ailure by the Management of the ICTR to timeously address [his] formal complaint of harassment and abuse of authority filed on 4 August 2012 against a staff member of the ICTR, Mr. [K.], Translator/Interpreter in the Language Services Section" ("the first application");

b. The decision made by the ICTR Registrar on 2 August 2013 to close his complaint, based on the conclusion that the conduct complained of did not constitute harassment or abuse of authority ("the second application").

Procedural history

2. Both applications were filed with the Nairobi Registry of the Tribunal on 6 December 2013 and were registered under Cases Nos. UNDT/NBI/2013/089 and UNDT/NBI/2013/090. On 6 January 2014, the Respondent filed a consolidated reply to both applications in which he challenged the receivability of the first application.

3. By Orders Nos. 155 and 156 (NBI/2014) of 9 June 2014, both cases were transferred to the Geneva Registry, where they were registered under Cases Nos. UNDT/GVA/2014/042 and UNDT/GVA/2014/043 and assigned to the undersigned Judge.

4. The Tribunal joined the two cases and granted leave to the Applicant to comment on the Respondent's reply on the issue of receivability[1], which he did on 7 July 2014.

[1] Order No. 98 (GVA/2014) of 26 June 2014.

5. The parties informed the Tribunal that they neither requested a hearing on the merits nor intended to make any interlocutory application. As they were unable to agree on the facts, each party provided separate filings of facts and issues to be determined by the Tribunal.

6. In response to Order No. 122 (GVA/2014) of 14 August 2014, the Respondent filed an *ex parte* copy of the final report of the panel appointed to conduct the fact-finding investigation into the Applicant's complaint of prohibited conduct. He did, however, neither provide the initial versions of that report nor the dissenting opinion to it. By Order No. 132 (GVA/2014) of 22 August 2014, the Tribunal found that the report was relevant to the issues before it and ordered that it be disclosed to the Applicant in its entirety.

7. Following disclosure of the report to him, the Applicant filed his comments on it and made further submissions. He is critical of the failure of the Respondent to provide the Tribunal with the initial version of the report prepared by Mr. M., which reached a different conclusion from that reflected in the final report. The final report was referred to as a majority report and as such excluded the views of Mr. M., who did not provide a dissenting opinion in writing to be annexed to the report.

8. The Respondent did not provide any explanation as to why he did not transmit the initial report and the dissenting opinion to the Tribunal, as ordered by Order No. 122 (GVA/2014).

9. The Tribunal holds that the decision on the Applicant's complaint of harassment was made on the basis of the final report, and any documents which preceded it are not relevant or are only marginally relevant to the issues in this case. No further orders are necessary in relation to the report in order to reach a determination on the case.

Facts

10. The Applicant entered the service of ICTR, in the Language Services Section ("LSS"), on 26 August 1997, as a Translator/Interpreter at the P-3 level. On 1 February 2001, he was promoted to the P-4 level, and on 31 January 2014, he retired from the Organization at the age of 62.

11. Around 18 July 2012, the Applicant was assigned without prior notice to interpretation duties effective 23 July 2012. There is a dispute about who took the assignment decision but it is not necessary to revolve that dispute for the purposes of this case.

12. The Applicant became aware of the assignment by an email he received from another staff member in the Interpretation Unit ("IU") on 19 July 2012. The Applicant considered that the assignment had been made contrary to the established practice and immediately replied to the email, expressing his surprise at the assignment and asking who had done it, hoping that "[they] w[ould] not go back to the chaotic situation that was the order of the day some time ago".

13. On the same day, the Applicant was emailed an "assignment sheet" for the interpretation task on 23 July 2012. Still on the same day, the Applicant sent an email to Mr. K., who was then Officer-in-Charge of the IU ("OiC/IU"), LSS, ICTR, copied to the Chief, LSS. He explained his problem with being assigned in such a manner, pointed to his existing work commitments and advised that he was due approved leave. He stated that he found that "this manner of putting the cart before the horse is quite inappropriate and totally uncalled for".

14. The Chief, LSS, responded to the Applicant by email of the same day. She acknowledged the points he had made, took responsibility for the situation and advised that the Applicant would be replaced by another interpreter.

15. The Applicant replied in an open email to the Chief, LSS, and his fellow interpreters, reiterating that his complaint was that Mr. K. had failed to inform him in a timely fashion that he had been assigned to interpretation duties. He ended this email as follows:

> While hoping that this matter should now be laid to rest, each and every one of us should learn to assume responsibility for the tasks we freely accepted to perform.

16. On 20 July 2012, Mr. K. sent the Applicant a long email, which was copied to 29 colleagues in LSS. In that email, Mr. K. said he had "profound contempt" for the Applicant who he described as "a mentally retarded individual"; and "an ill-bred little miserable man", "a seventy-year old and moribund individual" who was "hypocritical and despicable". He referred to him as "the petty dissatisfied nutcase (mad or foolish person) that [the Applicant had] always been, the mean person who has made dishonesty his daily bread", and said that "[the Applicant's] memory [was] affected by some disorders that verge on Alzheimer's disease"[2].

17. Towards the end of this tirade after a string of sarcastic epithets, Mr. K. wrote:

> You should know that I, [Mr. K.], have nothing but contempt for clowns of your ilk. Life has already rendered me very strong and if your intention is to wage war against me, well a piece of advice: find out from those who know me and you will have a better idea of the person you are getting ready to confront. I will stop at nothing, with no holds barred[3].

18. The Head, IU, saw this email exchange while he was on leave. He called the Applicant and asked him to avoid writing any further emails to colleagues, while at the same time telling him not to react and to wait for his return to the office.

19. Also on 20 July 2012, the Chief, LSS, replied to Mr. K.'s email, copying all colleagues to whom it had been sent (email as translated from French by the Applicant):

---

[2] As translated by the Applicant from French.
[3] *Idem.*

> Dear Colleagues,
>
> I have just read this message and all I can say to each and everyone is that, whatever be the circumstances, we owe one another respect and courtesy. There is a tone which is appropriate in verbal and written communications between colleagues. It would be proper for all of us to always remember the "essential values" of the Organization we are working for. I hope all of us will understand this and that this type of mail will no longer be circulated among us.
>
> I wish all of you a nice weekend.

20. The Chief, LSS, says that on 20 July 2012, she called Mr. K. to her office, and verbally reprimanded him for his behaviour. The Applicant disputes this as he believes that in spite of her email to all staff, the Chief, LSS, was complicit in the sending of Mr. K.'s email.

21. Upon his return from leave, the Head, IU, met with the Applicant and Mr. K. He says that the Applicant told him that he and Mr. K. were good friends, even showing him a tie he had received from Mr. K. as a present.

22. On 4 August 2012, the Applicant lodged a formal complaint of harassment and abuse of authority against Mr. K., pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The complaint was addressed to the then Registrar of the ICTR.

23. On 29 August 2012, the Applicant was requested to submit a report of the prohibited conduct in accordance with sec. 5.13 of ST/SGB/2008/5. By reply of 13 September 2012, the Applicant pointed out, *inter alia*, that his complaint of 4 August 2012 already contained all the elements set out in sec. 5.13 of ST/SGB/2008/5.

24. On 1 September 2012, the then Registrar ceased his functions and was replaced by an Acting Registrar of the ICTR.

25. The Acting Registrar set up a fact-finding panel ("the panel") of three members to investigate the Applicant's complaint on 20 September 2012 and informed the Applicant on 1 October 2012. On 3 October 2012, the Applicant was notified of the names of the panel members and asked to submit a list of witnesses, which he did on 8 October 2012.

26. In an email dated 18 October 2012 addressed to the Chief, LSS, and entitled "Apologies", Mr. K. took full responsibility for the contents of his email of 20 July 2012. He acknowledged that his email was unprofessional and unbecoming of a UN staff member. He expressed regret, but stated that the email had to be read against the backdrop of a certain context of tensions in the working environment of the IU.

27. Mr. K.'s email was forwarded to the panel. In view of Mr. K.'s admission, the panel restricted its interviews to the Applicant, Mr. K. and the Chief, LSS, who were interviewed on 19 October 2012.

28. At the end of November 2012, the Applicant met with the Chairperson of the panel, who explained that one of the panel members was away on leave but that the panel intended to complete its report before 31 December 2012.

29. On 1 January 2013, the new Registrar of the ICTR ("the Registrar"), took up his functions.

30. On 29 January 2013, the Chairman of the panel sent an email to Mr. M., a member of the panel who had separated from the ICTR on 31 December 2012. He said that he and the third member of the panel "[had] now agreed on a draft with a different outcome as proposed by [Mr. M.]". The draft was attached for his consideration and comments. Mr. M. replied the following day, expressing his disagreement on the principles that "intention to harass is critical to the question" and that conduct "must not be a happenstance". It was his opinion that there was no abuse of authority from Mr. K., but that there was harassment, and that "these were the views expressed by the panel when I prepared the report".

31. On 1 February 2013, the Applicant asked the Registrar of the ICTR about the status of his complaint. The Registrar replied on the same day, stating that he was not aware of the Applicant's complaint, but that "preliminary investigations [had] informed [him] that the panel had had a problem finalizing its report because one of its members was separated from the ICTR at the end of 2012". The Registrar had also been informed that the report had been submitted to the Chief, Division of Administrative Support Services ("DASS"), ICTR, "two or three days ago for processing", and that he would keep the Applicant informed of any decision taken.

32. The Applicant acknowledged receipt of the Registrar's email on 4 February 2013, and drew attention to some alleged violations of ST/SGB/2008/5 in the processing of his complaint.

33. In fact, the panel had submitted its report—dated 31 December 2012—to the Chief, DASS, on 1 February 2013. In his cover memorandum to the Chief, DASS, the Chairperson of the panel noted that the other two members had separated from the ICTR on 31 December 2012, and that there was a dissenting opinion that would be circulated by one of the former panel members. Given that information, the Registrar "decided to wait for the dissenting opinion in the hope that it would be coming within a reasonable time".

34. By email of 12 February 2013, the Chairman of the panel asked Mr. M. to send him his dissenting opinion to the draft report.

35. On 6 May 2013 and despite his request for "protective measures", the Applicant was assigned to service the same hearing with Mr. K., which he found provocative and traumatizing.

36. On 19 July 2013, the Applicant filed his first request for management evaluation of the "failure to act" on his complaint.

37. By email of 23 July 2013, the Chairman repeated his request for Mr. M's dissenting opinion.

38. On 30 July 2013, the Registrar met with the Applicant. He informed him that if the Mr M's dissenting opinion was not received "by the end of the week", he would proceed to consider the report of the panel as it was and issue a decision.

39. By memorandum of 2 August 2013, the Registrar informed the Applicant that the dissenting opinion had not arrived and that he had decided to consider the report of the panel as it was. He noted that the panel had concluded the following:

> [T]he investigative panel, by majority, found that the language used by Mr. [K.] was unprofessional and unbecoming of a United Nations staff member;
>
> [H]owever, referring to paragraph 1.2 of ST/SGB/2008/5, the panel found and expressed the view, Mr. [M.] dissenting, that the language used, only at one instance without any previous or subsequent similar behavior, does not amount to harassment as harassment normally implies a series of incidents;
>
> [T]he investigative panel also found, by a unanimous decision, that Mr. [K.] did not abuse authority by writing and sending his email message of 20 July 2012, given that he was not in a supervisory position vis-à-vis yourself.

40. The full report, which was released to the Applicant by order of the Tribunal, gave further reasons for the decision. It stated:

> The Majority could not find any intent or motive for this behaviour save for the immediate provocation perceived by Mr [K.] In addition, Mr. [K.]'s apology, which the Majority finds to be sincere and unqualified, confirms the panel's opinion that Mr [K.']s email was a one-off emotional response and not indicative of any intent to harass or intimidate [the Applicant].

41. The Registrar noted that having considered the report and the Applicant's complaint, he had concluded that the conduct of Mr. K., "while reprehensible, did not constitute harassment or an abuse of authority". In view of this, he advised the Applicant that "the UN-ICTR hereby closes the matter [he] raised alleging harassment and abuse of authority".

42. On 19 August 2013, the Registrar addressed a "Letter of Caution" to Mr. K. He referred to the email of 20 July 2012 which Mr. K. had addressed to the Applicant and which he had copied to 29 colleagues of LSS, and reminded him of the importance of strictly adhering to the UN code of conduct. He asked him to "avoid a repeat of this unfortunate incident", and to register his commitment to the core values of the UN by signing an agreement to a commitment to adhere to the UN code of conduct, which Mr. K. did on 20 August 2013. The Applicant was not advised of this action by the Registrar.

43. On 17 September 2013, the Applicant filed a second request for management evaluation against the decision of 2 August 2013.

44. By letter dated 9 September 2013, sent to the Applicant by email on 18 September 2013, the Secretary-General concluded that the delay in providing the Applicant with a final outcome on his complaint was unreasonable and merited compensation of USD1,000. In that letter, the Secretary-General also considered and upheld the substantive decision of the Registrar to close the case.

Parties' submissions

45. The Applicant's principal contentions are:

a. There were inordinate delays in the handling of his complaint. It was only following reminders or actions on his part that the procedure was followed and moved forward. He seeks adequate compensation for those delays;

b. The panel and the Registrar of ICTR erred in concluding that the conduct of Mr. K. did not amount to harassment or abuse of authority under ST/SGB/2008/5;

c. One single incident constitutes harassment if the incident is sufficiently serious; the literal reading of sec. 1.2 of ST/SGB/2008/5 does not exclude such an interpretation as it uses the term "normally";

d. The insulting tone and content of the email sent by Mr. K., and the fact that it was copied to 29 colleagues with whom the Applicant interacts on a daily basis to humiliate and embarrass him, render that single incident very unusual and serious enough to constitute harassment on its own; this is consistent with the case law as well as with the definition of harassment;

e. The email contained threats to his security, safety and life, thus it created an intimidating, hostile and offensive work environment within the meaning of sec. 1.2 of ST/SGB/2008/5; the Administration should have taken actions immediately following the complaint to protect him but failed to do so. Mr. K. resumed work on 20 August 2012 and he worked "in the same city, in the same building, in the same Section and on the same floor" as the Applicant, who no longer felt secure and safe;

f. Mr. K. failed to apologize to him directly and to withdraw his allegations through a statement addressed to him and copied to all colleagues who had been copied on the email of 20 July 2012; he only apologized to the Chief, LSS, one day before his scheduled interview with the panel;

g. The Administration's explanation that Mr. K. did not exercise supervisory authority over the Applicant is manifestly wrong as Mr. K. had officially been designated OiC/IU, in the absence of the Head, IU, by memorandum of 9 July 2008, so that the authority to assign interpreters to interpretation duties and supervise their work was automatically vested in Mr. K. as and when he officiated as OiC/IU;

h. Finally, the Administration's attitude in handling his complaint, which swept it "under the carpet", was a denial of his right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse, as enshrined in sec. 2.1 of ST/SGB/2008/5; the Administration exacerbated his anxiety and emotional distress by trying to protect Mr. K. and helping him to evade accountability; the decision to close the complaint also contributed to his continued and heightened harassment,

particularly due to the fact that the first report drafted by the panel was later amended by its Chair, to which Mr. M.—a panel member who had left ICTR on 31 December 2012—expressed his disagreement; this demonstrates the "behind-the-scenes intrigues and scheming" and the Administration's bad faith in this case;

i. The fact-finding panel report dated 31 December 2012 has several flaws, which renders it invalid. In summary:

i. It was signed by only two of the three panel members;

ii. One panellist's signature was placed next to the typed name of Mr. M. who did not sign; this amounts to a fraudulent act or forgery;

iii. The panellists underwent a briefing on the procedure to follow from the Legal Officer, DASS; this shows that they could not have been trained in investigating allegations of prohibited conduct as required by sec. 5.14 of ST/SGB/2008/5;

iv. The panel came to an end on 31 December 2012 and before the report was presented on 1 February 2013, two panel members had already left the ICTR.

j. The letter of caution, which was issued to Mr. K. 17 days after the decision of 2 August 2013 to close the case, was in contradiction with the actions allowed by sec. 5.18 (a) and (b) of ST/SGB/2008/5;

k. The Applicant requests that the Tribunal find that the contested decision was not lawful and that he be granted compensation equivalent to two years' net base salary for the breach of his rights, including for his moral damage as he suffered from severe emotional distress and anxiety as a result of Mr. K.'s actions and the Administration's attitude, and for the damage to his dignity and reputation. He also asks for compensation in the amount of one year's net base salary for the Administration's inordinate delay in making a final decision on his complaint.

46. The Respondent's principal contentions are:

a. The delay in the handling of the Applicant's complaint can be explained by the circumstances of the case (absence of panel members and their workload, change in ICTR Registrars, awaiting of the dissenting opinion);

b. The inordinate delay (from February 2013 until July 2013) was recognized by the Secretary-General in his reply to the Applicant's request for management evaluation. The applicant was correctly paid USD1,000 as compensation for moral damage;

c. The cases quoted by the Applicant in support of a higher amount of compensation are not applicable to his case since they all involve periods of delay considerably longer than five months and an alleged serious misconduct;

d. As regards the merits of the case, it is clear from the language used in ST/SGB/2008/5 that a single incident may amount to harassment, but the ICTR Registrar's decision to close the case was lawful in view of the circumstances;

e. Mr. K. sent the email in response to what he saw as a provocation by the Applicant, and he did so at a time when he was suffering from stress following his return from surgery. The content of the email, while clearly reprehensible, was part of an argument between the Applicant and him, for which he had apologized. There were no further incidents between the two, and there had been no interference with the Applicant's ability to do his job; in view of this, the Registrar's decision not to further refer the matter for disciplinary action but instead to issue a letter of caution to Mr. K., was a course of action that was clearly open to him under sec. 5.18 of ST/SGB/2008/5 and within his discretion;

f. Mr. K.'s conduct did not constitute an abuse of authority, as the latter was not the reporting officer of the Applicant hence not in a position of "influence, power or authority";

g. Should the Tribunal conclude that the ICTR Registrar misdirected himself on the legal issue whether a single incident could amount to harassment, such finding does not render his overall decision unlawful. Based on the circumstances of the case, it was not manifestly unreasonable to conclude that the single incident—consisting of one email with no prior history or subsequent incident—did not amount to harassment rising to the level of misconduct; accordingly, although an incorrect legal test may have been applied, the outcome is still sound and would have remained the same under a different legal test; furthermore, the practice of the Secretary-General in disciplinary matters shows that a disposal of the case through a verbal reprimand and a written letter of caution was appropriate for a single incident such as this;

h. In view of the above, the application should be rejected and no compensation should be granted; the Applicant did not suffer any impact on him, his circumstances and his entitlements. Through seeking damages, he seeks to put himself in a better position than if the Registrar had referred the matter for disciplinary action, which cannot be correct.

Considerations

Receivability

47. With regard to the first application alleging "[f]ailure by the Management of the ICTR to timeously address [the Applicant's] formal complaint of harassment and abuse of authority", the Respondent acknowledges that in certain circumstances not making a decision can amount to a reviewable administrative decision, and that the delay in rendering a decision could in itself amount to a separate decision that could be challenged before the Tribunal.

48. However, the Respondent submits that in the present case there was no delay in handling the complaint prior to February 2013. After that date, as the delay which followed from February 2013 until July 2013 was relatively short, it did not amount to a challengeable decision in itself. The first application should be rejected as not receivable due to a lack of a challengeable administrative decision.

49. The Tribunal rejects that submission. The length of a delay does not determine receivability but is relevant to the substantive issue of whether, in all the circumstances, the complaint of harassment was acted on promptly.

50. A failure to act promptly on a complaint in accordance with the Secretary-General's Bulletin on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority ("ST/SGB/2008/5") is not only a procedural omission but a breach of duty which may impact on the rights of a staff member (*Birya* UNDT/2014/092).

51. In this case, there were acknowledged delays in the consideration of the Applicant's complaint of prohibited conduct. The Tribunal finds that these met the test in *Birya* and that the first application is receivable.

52. As there was a final outcome to the complaint of prohibited conduct, the first application will be considered as part of the challenge to the legality of the ICTR Registrar's decision on the Applicant's complaint.

Issues

53. In view of the above, the legal issues the Tribunal has to consider are:

a. Was the ICTR Registrar correct in concluding that the conduct complained of by the Applicant did not amount to harassment or abuse of authority;

b. Were there delays in addressing the Applicant's complaint of harassment and abuse of authority and if so, did the delays amount to a breach of duty; and

c. Remedies if appropriate.

Was the ICTR Registrar correct in concluding that the conduct complained of by the Applicant did not amount to harassment and abuse of authority?

54. It is not for the Tribunal to substitute its judgment for that of the Secretary-General, but to review and establish if the correct procedures were followed. In addition, when reviewing the outcome of a process it is the responsibility of the Tribunal to ascertain if the facts on which the decision was based were well established and met the relevant definition. This is analogous to the review of disciplinary cases such as *Mahdi* 2010-UNAT-018 or, more recently, *El-Khalek* 2014-UNAT-442.

55. The function of a fact-finding investigation panel established under ST/SGB/2008/5 is to ascertain facts. Section 5.17 of that Bulletin only requires the panel to give a "full account of the facts". It is not expressly mandated to draw conclusions from those facts.

56. Section 5.18 of ST/SGB/2008/5 further prescribes the mandatory steps that a responsible official shall take once the report is submitted. That Section is silent as to who should reach conclusions about whether prohibited conduct took place; however, the overall structure and wording of the Bulletin strongly suggests that it is for the "responsible official" acting pursuant to sec. 5.18 to reach the conclusion on the basis of the facts as found by the fact-finding panel.

57. The above notwithstanding, whether responsibility for reaching a conclusion based on the facts rests with the fact–finding panel or on the responsible official, the decision must be one that properly applies the correct definitions.

Harassment

58. The definition of harassment in sec. 1.2 of ST/SGB/2008/5 states:

> 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.

59. First, the conduct must be "improper and unwelcome". In the present case the Respondent acknowledged that the conduct by Mr. K. was unprofessional and unbecoming of a United Nations staff member. Mr. K. himself recognized this in writing. It was also clearly unwelcome on the part of the Applicant.

60. Second, the actions must "tend" to an outcome. "Tend" means to be liable to possess or display (a particular characteristic)[4]. This word relates to the **effect** of the words, gestures or actions on the recipient. It does not refer to the intention of the alleged harasser. The Appeals Tribunal has stated in *Applicant* 2013-UNAT-280 that "the definition of harassment, at its most basic, would incorporate conduct in the workplace or in connection with work which was unwelcome on the part of the recipient".

61. Of the alternative types of harassment set out in the next part of the definition, the first is directed at "another", who can be taken to be an individual, whereas the second is about the creation of a hostile work environment. The second type implies more ongoing and pervasive acts and effects than the first.

62. While the definition goes on to say that harassment normally implies a series of incidents, this does not exclude the possibility that harassment may be caused by a single event. In *Parker* 2010-UNAT-012, para. 38, the Appeals Tribunal held that a one–off incident may amount to harassment.

[4] http://www.oxforddictionaries.com/definition/english/tend?q=tend+to#tend__11

63. Although a course of conduct or series of incidents may be of a quality or type that amounts to harassment, the absence of a series of incidents does not automatically lead to the conclusion that an individual has not been harassed. In fact, the Respondent accepted in his submission that it is clear from the language used in ST/SGB/2008/5 that a single incident may amount to harassment.

64. The Tribunal holds that in the context of actions directed at an individual—as opposed to the creation of a hostile work environment—it is not correct to exclude a single act from the definition of harassment without evaluating the quality and nature of the act and the effect on the recipient.

65. In addition, the intentions of the alleged harasser, while no doubt relevant to any consequent remedial action taken, should not outweigh the effects of his or her actions on the recipient. The ST/SGB/2008/5 is a protective measure for staff members who complain of prohibited conduct and should be interpreted in that light.

66. In this case, the Tribunal holds that the panel and the responsible official misinterpreted the ST/SGB/2008/5 definition of harassment by finding that an action "only at one instance without any previous or subsequent similar behaviour, does not amount to harassment as harassment normally implies a series of incidents".

67. In addition, the report also shows that the panel members were more focused on the intentions and mitigating circumstances of the alleged offender rather than on the effect on the Applicant. This is also a misinterpretation of the definition and in breach of ST/SGB/2008/5.

Abuse of Authority

68. Abuse of authority is defined in sec. 1.4 of ST/SGB/2008/5 as:

> [..] the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

69. This definition requires a superior/subordinate relationship between the harasser and the person harassed, as well as the misuse of the superior status. Mr. K. was OiC/IU at the time he wrote the above-referenced email, but the evidence before the Tribunal indicates nothing more than a possibility that he was using his power or authority in this role to influence the Applicant's career. His email could also be characterised as a single, albeit reprehensible and vituperative outburst from one staff member to another.

70. The Tribunal concludes that there was no misdirection by the panel or the Registrar in relation to this definition.

Outcome of the Registrar's decision

71. It is necessary to examine the Respondent's proposition that even if one accepts that the Registrar misdirected himself on the definition of harassment, the outcome would have been the same had such misdirection not occurred.

72. Section 5.18 of ST/SGB/2008/5 prescribes the mandatory actions available to the responsible official on the basis of a report received from a panel.

73. If it is found that no prohibited conduct took place, the case is closed and the alleged offender and aggrieved individual are advised accordingly.

74. If the panel finds a factual basis for the allegations of prohibited conduct, the responsible official must consider if the conduct is sufficient to warrant the institution of disciplinary proceedings or taking managerial action.

75. If the report indicates that the allegations were well founded and that the conduct amounts to possible misconduct, the matter shall be referred to the Assistant Secretary-General/OHRM for disciplinary action.

76. If the facts are not sufficient to warrant the institution of disciplinary proceedings but the report indicates that there was a factual basis for the allegations justifying managerial action, sec. 5.18(b) lists a number of discretionary follow-up measures that may be taken. These include mandatory training, reprimand and other appropriate corrective measures. Section 5.18(b) also requires that the responsible official inform the aggrieved individual of the outcome of the investigation and of the action taken by the Administration. A failure to do so is considered a breach of duty as set out in sec. 5.3.

77. In this case, the finding was that there was no prohibited conduct and the Registrar closed the case. He then took action against the alleged offender by issuing him a written caution about his behaviour.

78. In the absence of a finding that prohibited conduct had occurred, the Tribunal questions why it was necessary for the Registrar to reprimand or caution Mr. K. pursuant to sec. 5.18 (b) of ST/SGB/2008/5. The fact that he did indicates that he had some concerns about Mr K.'s behaviour, but he was not acting on the basis of a finding that harassment had occurred and he also did not advise the Applicant of the action he took.

79. The ultimate decision as to whether the Applicant was the subject of harassment was for the Registrar or other responsible official to make, taking into account the lawful requirements of ST/SGB/2008/5. Similarly, if the conclusion was that prohibited conduct had occurred, the responsible official then had to turn his mind to the consequent courses of action under sec. 5.18 of ST/SGB/2008/5 including possible disciplinary action. It is not possible or appropriate for the

Tribunal to predict what the outcome would have been had there been a conclusion that the Applicant had been harassed by Mr. K.

80. The Tribunal does not accept the Respondent's submission that the outcome would have been the same even if a finding of harassment had been made.

86. In relation to the Applicant's submissions concerning the validity of the report, the Tribunal finds as follows:

a. The signing by only two panel members is unusual but not a mandatory requirement. The reasons were adequately explained by the Respondent;

b. An allegation of fraud or forgery is extremely serious and should not be made unless there is compelling supporting evidence. There is none in this case;

c. Briefing panellists on procedural matters is a prudent measure and does not give rise to a reasonable inference that the panellists could not have been trained in investigating allegations of prohibited conduct as required by sec. 5.14 of ST/SGB/2008/5.

87. While it is correct that the report was presented after two panel members had left the ICTR, that did not prevent its presentation.

88. None of the above allegations about the fact-finding panel report have sufficient substance or evidential basis to establish breaches of ST/SGB/2008/5.

Were there delays in addressing the Applicant's complaint of harassment and abuse of authority and, if so, did the delays amount to a breach of duty?

89. Pursuant to ST/SGB/2008/5, the Administration's duty to a staff member who makes a formal complaint of prohibited conduct is to take prompt and concrete action. Section 5.3 of ST/SGB/2008/5 places the responsibility on supervisors and managers to take prompt action in relation to reports and allegations of such conduct. The requirement for promptness is repeated in

sec. 5.14 requiring the responsible official to "promptly review" a complaint and to "promptly appoint" a fact finding panel if he/she finds that the complaint appears to have been made in good faith and that there are sufficient grounds to warrant such a formal investigation.

90. In sec. 5.17 of ST/SGB/2008/5, the panel is required to report normally no later than three months from the date of submission of the formal complaint. This latter provision indicates the period of time a staff member can normally expect to wait for an outcome of his or her complaint. As such, it does not matter at which stage the delays took place, the overall right of a staff member is to obtain a prompt answer.

91. In the present case, the Administration initially took prompt action on the Applicant's complaint of 4 August 2012 by convening a fact–finding investigation panel on 20 September 2012. The Applicant was kept informed of the panel's setting-up and of the conduct of the investigation.

92. The Chair of the panel provided the Applicant with reasons for the delay in the submission of a report at the end of November 2012; but, in spite of the expectation that the report would be completed by 31 December 2012, it was not given to the Registrar until 1 February 2013—over a month later. This was more than four months after the panel had been convened and almost six months from the date of the formal complaint dated 4 August 2012. This was well in excess of the three months normally required by sec. 5.17 of ST/SGB/2008/5.

93. This delay was then compounded by the Registrar, who was the responsible official, by not taking action for a further six months while he apparently waited for the dissenting opinion. In total, it took 11 months from the date of the complaint for a decision to be made.

94. The Tribunal finds that while the delays were caused, first, by the disagreement between the panel members as to the outcome and, then, by the attempts to obtain the dissenting opinion, such delays should have been avoided by proper oversight and management of the problems by the Registrar who had the express duty—imposed by sec. 5.3 of ST/SGB/2008/5—to take prompt and concrete action in response to reports and allegations of prohibited conduct. The Administration's overall delay in reaching a decision on the Applicant's complaint was excessive and in breach of that duty, especially as the Applicant and Mr. K. continued to work together in the same section.

95. The Applicant's allegation that the Administration failed to provide him with protective measures against his harasser is not a separate claim in the Applicant's application but is addressed in the considerations on remedies.

96. In summary, the Tribunal holds that two breaches are established:

a. The ICTR Registrar misinterpreted the definition of harassment when reaching a decision on the Applicant's complaint, which was in breach of ST/SGB/2008/5; and

b. The delays in addressing the Applicant's complaint of harassment and abuse of authority resulted in the failure to give it prompt and concrete action in breach of ST/SGB/2008/5.

Remedies

Rescission and specific performance

97. The decision that there was no harassment was so fundamentally in error that it cannot stand and must be rescinded. Left in that position, the Applicant would be deprived of any outcome to his complaint of harassment. For that reason and in line with the approach adopted by UNAT in *Malmström et al* 2013-UNAT-357, the Tribunal considered ordering by way of specific performance that the Applicant's claim under ST/SGB/2008/5 be reconsidered by a responsible official taking into account the correct legal position as identified by

the Tribunal in this judgment. However, the Applicant advised the Tribunal that he does not request a fresh investigation into his complaint. In the absence of such a claim no such order will be made (*James* 2010-UNAT-009).

Compensation

98. The Applicant sought the following remedies:

a. One year's net base salary as compensation for the Administration's inordinate delay in making a final decision on his complaint, and for the severe emotional distress and anxiety he suffered as a result of the Administration's failure to act expeditiously and any other and further remedies that the UNDT may deem just and proper;

b. Compensation equivalent to his two years' net base salary for the error in concluding that the email from Mr. K. did not amount to harassment; and

c. Any other and further remedies that the Tribunal may deem just and proper.

99. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated:

> 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.

100. In the same judgment, the Appeals Tribunal specified circumstances under which, generally, an award for moral damages may arise; these include a breach of procedural due process entitlements guaranteed in the employee's contract of employment. The Tribunal further stated that:

> 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.

101. In this case, the Tribunal considers compensation for two discrete breaches: one, procedural, namely the delay to provide the Applicant with an answer to his complaint, and another, substantive, when deciding the outcome of the investigation into the Applicant's claim of harassment.

Compensation for Delay

102. In *Abu Jarbou* 2013-UNAT-292, the Appeals Tribunal held that :

> Not every delay will be cause for the award of compensation to a staff member. Rather the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights.

103. Staff members generally make complaints of prohibited conduct because they believe that they have not been treated with dignity and respect. ST/SGB/2008/5 was promulgated to, *inter alia*, ensure that staff members have effective remedies when prevention has failed. In this case, the Applicant remained for a full year in the same work environment as the alleged offender, waiting for an answer to his complaint. Under the circumstances, this delay was a denial of justice.

104. The Applicant, whether rightly or wrongly, strongly perceived the delays in concluding his complaint as demonstrating the Administration's desire and determination to protect Mr. K. by helping him to evade accountability for his misconduct, and a denial of protection from him. The Respondent alleges that there were no other adverse events which affected the Applicant once he submitted the complaint. The Tribunal finds no evidence to support the Applicant's allegations that the Respondent deliberately protected Mr. K., but accepts that it is probable that working in close quarters for over a year with his alleged harasser without any resolution of the complaint was embarrassing and humiliating.

105. The Tribunal finds that the Applicant suffered a violation of his due process rights to prompt action on his complaint by the Administration, as provided for under ST/SGB/2008/5. He also suffered harm in the form of embarrassment and humiliation during the time it took for the Registrar to decide and act on the report of the fact-finding panel.

106. The amount of compensation which may be awarded for such delay varies from case to case on the basis of the differing facts. For instance, in *Gehr* UNDT/2012/095, the compensation awarded for the frustration and uncertainty during a 13-month delay of an investigation which resulted in the rejection of an unmeritorious complaint was USD3000. In *Ostensson* UNDT/2011/050, USD10,000 was awarded for moral damages for both delay and procedural breaches. In *Jennings* UNDT/2010/213 (affirmed by 2011-UNAT-184), the Tribunal awarded USD6,000 for more than one year delay in a rebuttal process.

107. On any measure the compensation of USD1,000 offered by the Secretary-General for the 11-month delay was inadequate to compensate the Applicant for the frustration, humiliation and embarrassment he suffered. In consideration of all the circumstances of this case, the Tribunal awards the Applicant the sum of USD5,000 for moral damages resulting from the undue delay from which the sum of USD1,000 already awarded should be deducted if it has already been paid to the Applicant.

Compensation for the substantive breach of ST/SGB/2008/5

108. There is no evidence that the Applicant suffered any material loss, such as loss of salary or entitlements as a result of the wrong assessment made by the ICTR Registrar in his finding that no harassment occurred, for which he may be compensated.

109. In support of his claim for moral damages, the Applicant specifically refers to the fact that not only did he receive the insulting email, but that it was also copied to 29 of his colleagues, resulting in humiliation and embarrassment to him.

110. Although Mr. K. apologised to the Chief, LSS, the Applicant has received no apology and the allegations in the email have not been withdrawn. He also alleges that the Administration took no steps to protect him. He worked "in the same city, in the same building, in the same Section and on the same floor" as his harasser and no longer felt secure and safe.

111. The Respondent notes that although the Applicant and Mr. K. continued to work in the same environment, the Applicant made no further complaints, and it is alleged that he received a gift from Mr. K.

112. Regardless of this latter allegation, the Tribunal finds that the erroneous findings made by the Registrar, ICTR, in application of ST/SGB/2008/5, which resulted in the decision that the Applicant had not been subjected to harassment was so fundamental that it gives rise to an award of moral damages for harm to the employee. For this harm, Tribunal awards the sum of USD10,000 to the Applicant for moral damages caused by the substantive breach of ST/SGB/2008/5.

Conclusion

113. In view of the foregoing, the Tribunal DECIDES that:

a. The decision to close the Applicant's complaint of 4 August 2012, based on the conclusion that the conduct complained of did not constitute harassment or abuse of authority is rescinded;

b. The Applicant is to be compensated in the total sum of USD15,000 for delay and breach of ST/SGB/2008/5, from which the sum of USD1,000, if already paid to the Applicant, should be deducted;

c. This amount shall be paid within 60 days from the date this Judgment becomes executable, during which period 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% shall be added to the US Prime Rate until the date of payment; and

d. All other pleas are rejected.

(*Signed*)

Judge Coral Shaw

Dated this 30th day of September 2014

Entered in the Register on this 30th day of September 2014

(*Signed*)

René M. Vargas M., Registrar, Geneva