UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/041
Judgment No.: UNDT/2015/059
Date: 26 June 2015
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUTISO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Political Office for Somalia (UNPOS). He filed the current Application on 16 May 2014 to challenge the Administration's "failure to conclude an investigation implicating [him] in a UN vehicle theft".

Procedural history

2. The Application was served on the Respondent on 19 May 2014.

3. The Respondent submitted a Reply on 18 June 2014 in which he asserted that the Application was not receivable because the Applicant had been notified of the conclusion of the investigation and the decision to close the matter.

4. Pursuant to Order No. 185 (NBI/2014), the Applicant submitted his comments on the issue of receivability on 13 August 2014.

5. The Tribunal held a case management discussion on 28 October 2014 on the issue of receivability. Noting that the investigation had been completed, the Tribunal highlighted the fact that the Application failed to clearly address the remedy sought other than the closure of the investigation.

6. The Applicant filed an Application for leave to amend his submissions on 18 November. The Respondent was directed to file his response to the Applicant's Motion by 28 November 2014.

7. On 21 November 2014, the Respondent filed a Motion for extension of time to 5 December 2014 to reply, which was granted by Order No. 260 (NBI/2014).

8. The Respondent submitted his response to the Applicant's Application for leave to amend his submissions on 5 December 2014.

Hearing

9. The United Nations Appeals Tribunal (UNAT) has previously ruled that[1]:

> [T]he UNDT has broad discretion in all matters relating to case handling and that, in order to ensure that the case is fairly and expeditiously adjudicated and that justice is served, the Appeals Tribunal should not intervene hastily in the exercise of the jurisdictional power conferred on the Tribunal of first instance.

10. After a careful review of the record, this Tribunal concluded that the issues for decision were clearly defined in the parties' submissions and that the documentary evidence provided adequately addressed the issues raised.

11. Consequently, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in this case and will rely on the Parties' pleadings, written submissions and the documentary evidence.

Facts

12. The Applicant joined UNPOS on 1 August 2006 as a Driver at the GS-2 level on an appointment of limited duration (ALD) under the then 300 series of the United Nations Staff Regulations and Rules. This appointment was subsequently extended until 30 June 2009.

13. Pursuant to General Assembly resolution 63/250, the Applicant was granted a fixed-term appointment on 1 July 2009 for an initial period of one year. This appointment was then extended until 3 July 2013.

14. On 22 February 2011, the Department of Safety and Security at the United Nations Office at Nairobi (UNON DSS) received a report that a United Nations vehicle, 105 UN 240K, had been missing from the UNON compound since 19 February 2011. UNON DSS commenced an investigation the same day which allegedly implicated the Applicant in the removal of the vehicle from the UNON compound.

[1] *Hersh* 2012-UNAT-243. See also *Bertucci* 2010-UNAT-062 and *Calvani* 2012-UNAT-257.

15. The Applicant was interviewed by UNON DSS on 3 and 8 March 2011.

16. According to the Applicant, UNON DSS handed him over to the Kenyan Diplomatic Police on 7 March who then fingerprinted and interrogated him. On 8 March, he returned to the Police station for further interrogation and an identity parade (a police line-up). On 29 March, 8 and 20 April 2011, he returned to the police station for more robust interrogations.

17. On 13 April 2011, UNON DSS completed its investigation into the theft of vehicle number 105 UN 240K and forwarded a copy of the investigation report to the then Director of UNPOS/the United Nations Support Office for the African Union Mission in Somalia (UNSOA). The investigation report recommended, inter alia, that "appropriate administrative and legal action" be taken against the Applicant and three others for "their roles in regard to the theft of 105UN240K".

18. On 14 May 2012, the Applicant wrote to the Chief Civilian Personnel Officer (CCPO) of UNSOA to request an update on the outcome of the investigation. The CCPO did not reply to the Applicant's email.

19. The UNSOA Conduct and Discipline Team Focal Point (CDT-FP) reviewed the preliminary investigation file on 16 May 2012 and noticed that the statements of the staff members implicated in the theft were not included in the file. UNON DSS provided the complete file in October 2012.

20. On 22 October 2012, the Director of UNSOA sent a fax to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) and the Under-Secretary-General for the Department of Field Support (USG/DFS) by which he forwarded the UNON DSS investigation report and recommended that appropriate action, including suspension, be taken against the Applicant and the other three staff members.

21. On 6 November 2012, a Disciplinary Officer (DO) working with the Conduct and Discipline Unit within DFS (CDU/DFS) at United Nations Headquarters in New York wrote to the UNSOA CDT-FP inquiring about the

whereabouts of the supporting documentation referred to in the fax. The UNSOA CDT-FP responded the same day that the documents would be sent by pouch.

22. On 7 February 2013, the Applicant wrote to the CCPO to obtain information about the investigation. He did not receive a reply.

23. The Security Council, by it resolution 2093 (2013), which was adopted on 6 March 2013, decided that UNPOS should be dissolved "as soon as possible" since it had fulfilled its mandate.

24. By a memorandum dated 24 May 2013, the Applicant was informed of the non-renewal of his contract beyond 3 July 2013[2] due to the closure of UNPOS on 2 June 2013 in accordance with Security Council resolution 2093 (2013).

25. By a letter of 1 July 2013, the CCPO informed the Applicant of the expiry of his contract with UNPOS on 3 July 2013 and of the continuation of the disciplinary process. The CCPO stated further that the Applicant would be informed of the outcome of the process.

26. The Applicant avers that on 1 July in a face to face meeting, the CCPO informed him that although some staff would be transitioned to UNSOA, the Applicant had no chance of being retained because of the ongoing investigation. The Respondent denies that the CCPO made that statement.

27. The Applicant responded to the CCPO's letter on 2 July 2013, requesting once again that the investigation be concluded and that the outcome be communicated to him by 1 August 2013.

28. The Applicant was separated from service on 3 July 2013.

29. On 25 July 2013, the UNSOA CDT-FP wrote to CDU/DFS to inquire about the status of the Applicant's case. CDU-DFS informed the UNSOA CDT-FP that it had never received the investigation report that was pouched and sought information on the status of the complaint.

[2] The Office of Human Resources Management approved a 1-month administrative extension of UNPOS contracts beyond the end of the UNPOS mandate on 2 June 2013.

30. On 30 July 2013, the UNSOA CDT-FP resent the investigation report and its supporting documentation to CDU/DFS. Once again, CDU/DFS indicated on 31 July 2013 that it never received the original set of documents.

31. On 5 August 2013, CDU/DFS informed the UNSOA CDT-FP that the investigation report was incomplete and that the mission's investigation review/analysis had not been provided and as such, it considered the matter to still be pending with UNSOA. On 18 October 2013, the UNSOA CDT-FP uploaded the documentation into the CDU/DFS database and on the same day, CDU/DFS confirmed receipt.

32. In response to a September 2013 request for an update, the UNSOA CDT-FP informed the Applicant's Counsel on 11 October 2013 that the matter was being considered by New York.

33. On 3 February 2014, the Applicant's Counsel wrote to the Administrative Law Section of OHRM (ALS/OHRM) to follow up on the matter. ALS/OHRM referred him to CDU/DFS.

34. On 10 February 2014, the Applicant entered into a contract with the Organization to serve as an individual contractor from 19 February 2014 to 9 August 2014 with UNSOA.

35. On 11 February 2014, Applicant's Counsel wrote to CDU/DFS to follow up on the matter but was referred to the UNSOA CDT-FP. Counsel wrote to the UNSOA CDT-FP on 21 and 25 February 2014. She informed Counsel on 28 February 2014 that the matter was still pending.

36. On 31 March 2014, the Applicant filed a request for management evaluation.

37. The Applicant filed the current Application with the Dispute Tribunal on 16 May 2014. By a letter dated 16 May 2014, the Management Evaluation Unit informed the Applicant that since the matter had been closed by UNSOA, his request for management evaluation was moot.

38. The Director/UNSOA informed the Applicant, by a letter dated 15 May 2014, that the investigation was closed and that the allegations were unsubstantiated.

39. On 2 December 2014, the Applicant entered into another contract with UNSOA to serve as an individual contractor from 4 December 2014 to 3 June 2015.

Issues

40. The Tribunal will consider the following issues in this judgment:

a. Whether the Application of 16 May 2014 is receivable;

b. Whether the Applicant should be granted leave to amend his Application of 16 May 2014; and

c. If the Application is receivable, whether there were procedural flaws in the conduct of the investigation.

i. Should the investigation report have been communicated to the Applicant for his comments before finalization?

ii. Was the investigatory process concluded in a reasonable time frame?

d. Whether it was proper for the Applicant to be handed over to the Kenya police.

Receivability of the Applicant's 16 May 2014 Application

Respondent's submissions

41. Since the Application was filed, the Applicant has been informed by UNSOA that the allegations against him were unsubstantiated and that the matter was closed. Additionally, MEU informed the Applicant by a letter dated 16 May 2014 that since the investigation had been concluded, his request for management evaluation was moot. Accordingly, the Respondent submits that the Application is

not receivable on the grounds that there is no matter in contest since "subsequent to the Application", the investigation was concluded.

42. The Applicant requested that he be provided with a closure letter confirming the end of the investigation against him. This was done by letter dated 15 May 2014 from the Director/UNSOA. As the investigation has been concluded, there is no longer a justiciable dispute before the Dispute Tribunal.

Applicant's submissions

43. The Applicant submits that the Respondent's argument on receivability is not well-founded because apart from the completion of the investigation, the Applicant identified three different issues in his Application that require adjudication by the Dispute Tribunal. To this end, he submits that the Tribunal must examine:

a. The manner in which the investigation was conducted;

b. The duration of the investigation in order to determine whether the Administration breached the Applicant's rights; and

c. Whether this breach caused pecuniary and moral damages.

44. In light of the foregoing, the Applicant submits that it is unreasonable for the Respondent to argue that the Application is moot simply because the Administration completed the investigation at some point.

Considerations

45. Article 2.1 of the Tribunal's Statute states:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of

> appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

46. To determine the receivability of the present Application, it is necessary for the Tribunal to carefully examine the Applicant's request for management evaluation and his Application to determine the precise administrative decision he contested.

47. In his 31 March 2014 request for management evaluation, the Applicant stated in the box entitled "Administrative Decision To Be Evaluated" that the decision he was contesting was the "failure to conclude an investigation into a possible misconduct". He specified that his right to be treated fairly, his right to be informed of the outcome of the investigation pursuant to ST/AI/371 (Revised disciplinary measures and procedures) and his right not to be subjected to "humiliating and degrading treatment" had been violated. He further indicated that the remedy he was seeking was "a closure letter indicating the end of the investigation and compensation of 12 months' net-base salary for the violation of [his] procedural and substantive rights". The Applicant attached a supplementary document to his request for management evaluation in which he specified that the points in issue were:

> a. Whether the Administration has an obligation to conclude an investigation when a staff member has been identified as a subject and has been investigated for possible misconduct;
>
> b. If such an obligation exists, whether the Administration has breached their obligation to conclude the investigation; and
>
> c. If the Administration breached its obligation, then whether monetary compensation equivalent to 12 months' net-base salary is an adequate remedy.

48. The Applicant then submitted that: the Administration had an obligation to conclude the investigation against him; the Administration breached this obligation by "conducting a sloppy investigation and by losing his file more than

once"; and the Administration's breach of its obligation and violation of the principle of fairness resulted in a loss of employment for the Applicant and in considerable stress and anguish over a period of three years.

49. The Applicant concluded his request for management evaluation by asserting that the Administration had breached its obligations to: conduct investigations in a prudent and diligent manner; to handle confidential information in a sensitive manner; to conclude an investigation after it implicated the Applicant in a serious criminal offence and after it subjected him to humiliating and degrading treatment by handing him over to the national law enforcement authorities; inform him of the progress of the investigation even after he requested an explanation; and provide him with an opportunity to respond to the preliminary findings of the investigation before referring it to the ASG/OHRM for action.

50. On 3 April 2014, the Management Evaluation Unit (MEU) advised the Applicant that the parties were encouraged to engage in efforts to resolve the dispute. The expiry date for the response of MEU to inform the Applicant of the outcome on the substantive merit of the Application was 15 May 2014.

51. In his 16 May 2014 Application to the Tribunal, the Applicant repeated that he was contesting the failure to conclude an investigation implicating him in serious misconduct and he attached the same supplementary document to his Application that he had attached to his request for management evaluation.

52. Coincidentally in a letter dated 16 May 2014, MEU informed the Applicant that since UNSOA had informed MEU that the allegations against him were unfounded this amounted to a closure of the investigation and therefore his request for management evaluation was moot.

53. The Tribunal takes the view that MEU took a rather restrictive view of the nature of the Applicant's request. While it cannot be disputed that the Applicant requested closure of the investigation against him he also listed a number of instances that, in his view amounted to "violations of procedural fairness"[3] in

[3] Management evaluation request , Paragraph 47.

relation to: (i) the sloppy manner in which the investigation had been conducted[4]; (ii) the loss of his file by the Respondent[5]; (iii) violations of the principle of fairness resulting in loss of employment and considerable stress[6]; (iv) undue delay in taking a decision and failure to act diligently[7] and (v) no opportunity to comment on the preliminary findings of the investigation prior to its submission to OHRM[8].

54. All the above matters arise from the investigation and the path it followed. These matters did not exist in a vacuum but are connected to the investigation. The closure of the investigation notwithstanding, they are still live issues that must now be addressed by this Tribunal.

55. The Tribunal therefore concludes that all the above matters to the exclusion of the closure of the investigation are receivable.

Should the Applicant be granted leave to amend his Application of 16 May 2014?

56. In his original Application dated 16 May 2014, the Applicant prayed for the following remedy: (i) a closure letter in regard to the investigation that had started in March 2011 to confirm the end of the investigation; and (ii) in the absence of charges a compensation equivalent to 12 months' net base salary.

57. Following a case management hearing on 28 October 2014 the issue of the Applicant amending his Application was canvassed.

58. On 18 November 2014, the Applicant filed a Motion for Leave to Amend the Application (Motion).

59. On 4 December 2014, the Respondent filed his response after being allowed an extension of time to comply with this requirement.

[4] Ibid, paragraph 28.
[5] Ibid, paragraphs 28 and 4.
[6] Ibid, paragraph 29.
[7] Ibid, paragraphs 32 and 43.
[8] Ibid, paragraph 46.

60. The Applicant submits the following in his Motion:

a. At the time of filing the original Application the investigation had not been completed and therefore the main point at issue was the closure of the investigation.

b. The original Application also embodied a prayer for monetary compensation "stemming from the manner in which the investigation was carried out".

c. The Applicant concedes that since the investigation has been closed without any charges being leveled against him the issue to be determined is the award of a monetary compensation because he did not seek only the closure of the investigation but also monetary compensation "which resulted from the unprofessional handling of his case". The issue is therefore limited to whether the Applicant is entitled to any monetary compensation and if so whether that issue was properly pleaded or pleaded in such a way as to enable one to draw the consequential inference therefrom.

61. The Respondent objects to the Motion and to the amendment itself. The Respondent submits that the Applicant had ample time to amend the Application after the decision on the closure of the investigation was communicated to him and failed to do so. Additionally, the subject matter of the amendment that relates to the monetary compensation was never submitted to MEU and is therefore not amenable to the jurisdiction of the Tribunal.

62. The Tribunal has carefully scrutinised the Motion and the nature of the amendment sought but was unable to determine the nature of the amendment sought by the Applicant.

63. The amended Application is a mere recital of the facts and circumstances that are contained in the original application of May 2014. The Motion only clarifies that the issue to be determined is whether the Applicant is entitled to

monetary compensation and the reason why more emphasis was placed on the closure of the investigation.

64. In the original Application the remedy sought is: "The Applicant respectfully requests that the Administration provide him with a closure letter, confirming the end of the investigation against him and the absence of charges and a monetary compensation equivalent to 12 months' net base salary"[9].

65. The amended Application contains a similar averment that reads: "The Applicant respectfully requests a monetary compensation equivalent to 12 months' net base salary".

66. Both Applications raise issues as to the manner in which the investigation was handled, the delay between the start of the investigation and its ultimate closure that spanned over three years, and the humiliating treatment meted out to the Applicant.

67. The purpose of pleadings is to assist a court and the parties by averring a concise statement of the facts on which the relevant party relies. Pleadings should clarify rather than obscure the issues in a case. In the case of *McPhilemy v Times Newspapers*[10], the Court of Appeal held that pleadings are required "to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader".

68. In the view of the Tribunal the original pleadings already set out the cause of action of the Applicant and the facts upon which he was relying. Nothing new was added to the Motion except for a waiver of the averment on the issue of closure. There is neither a new claim in the Motion nor a different factual basis from that originally pleaded to justify the remedy prayed for.

[9] Original application dated 16 May 2014 paragraph 50.
[10] [1999] 3 All ER 775.

69. For the above reasons the Tribunal concludes that there is no live issue in the Motion to determine and will therefore proceed to determine the case on the original pleadings.

Were there procedural flaws in the conduct of the investigation?

Should the investigation report have been communicated to the Applicant for his comments before finalization?

70. The Applicant submits that he was not given an opportunity to comment on the preliminary report of the investigation before it was sent to OHRM in New York. The Respondent did not respond to that submission.

71. Under ST/AI/371, the only requirement that the Administration must comply with is to furnish copies of the documentary evidence to the staff member after charges have been leveled against him or her. There is no provision in the administrative instruction that requires staff members to be provided with copies of preliminary investigation reports for comment. In the present matter the investigation was carried out by the Kenya police and UNON DSS. It is only when the Office of Internal Oversight Services (OIOS) carries out an investigation that there is a requirement for the staff member to be given an opportunity to respond to the investigative findings before finalization of the investigation report.[11]

Was the investigatory process concluded in a reasonable time frame?

Applicant's submissions

72. The Applicant submits that the Respondent breached his obligation to conduct the investigation in a prudent and diligent manner. The Administration kept on losing or misplacing the investigation report. Additionally, the Administration dealt unfairly with him by never informing him of the progress of the investigation even after he requested an explanation.

[11] OIOS Investigations Manual (March 2009), page 77.

Respondent's submissions

73. The Respondent submits that ST/AI/371 as amended does not provide a timeframe for completing an investigation or any associated disciplinary process. As no time frame is specified an investigation should normally proceed with no undue delay.

74. The Respondent adds that as a staff member's terms and conditions of appointment are not affected by the investigative process in any respect, the time taken between a report of possible misconduct and its final resolution should not serve as a basis for a compensable claim.

75. In the present case, though a three-year period ensued between the occurrence of the alleged misconduct and UNSOA's notification of the closure of the investigation to the Applicant, the terms and conditions of his employment were not adversely affected.

Considerations

76. Disciplinary proceedings are in the nature of a quasi-criminal case. Though not all the rules applicable in a criminal matter apply to disciplinary proceedings a minimum of procedural standards of fairness are to be complied with. Thus presumption of innocence; the right to be informed of the charges; the right to respond to the charges within a reasonable time frame; the right to legal representation at the stage when charges are preferred against an individual; the right to a hearing; the right to confront witnesses during a hearing are all rights that a person facing a disciplinary charge is entitled to and they derive from the criminal process. In the case of *Liyanarachchige*[12], UNAT equated the principles of criminal law to disciplinary proceedings:

> En matière disciplinaire, comme, à cet égard, en matière pénale, l'intérêt de la lutte contre les comportements répréhensibles doit

[12] 2010-UNAT-087 and 087e.

> être concilié avec les intérêts de la défense et le respect de la procédure contradictoire[13].

77. It is a fundamental principle in the criminal process that a person facing a criminal charge must be tried within a reasonable time. The issue of delay in the completion of criminal proceedings is very important and conviction may be quashed or damages awarded for undue delay in a trial. The Tribunal is of the view that delay is also a component to be considered in the determination of disciplinary proceedings and that includes the timely completion of an investigation.

78. In the matter of *CH v International Bank for Reconstruction and Development*[14], the World Bank Administrative Tribunal held that the Bank unreasonably delayed giving the Applicant notice of the allegations of misconduct and secondly the Vice President, Human Resources, without explanation took nine months to make his disciplinary decision. This in the view of the World Bank Administrative Tribunal was a violation of the due process rights of the Applicant and ordered the Bank to pay the attorney's fees of the Applicant.

79. In the matter of *CG v International Bank for Reconstruction and Development*[15] the World Bank Administrative Tribunal held:

> [T]he Tribunal is of the view that matters involving misconduct and disciplinary measures should always be dealt with expeditiously. The Tribunal finds, however, that the Bank has not provided a proper justification as to why the HRVP took almost one year to make a decision. Unjustifiable delay in making a disciplinary decision after an investigation can be considered inconsistent with a staff member's due process rights. In the circumstances of the case, taking almost one year for the HRVP to issue his decision on the disciplinary measures after receiving the INT [Bank's Integrity Vice Presidency] Report is excessive and for this reason the Tribunal determines that the Bank shall pay the Applicant's attorneys' fees and costs in the amount $8,213.03.

[13] "In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure".
[14] Decision No. 489 (2014).
[15] Decision No. 487 (2014).

80. In the present matter, UNON DSS' investigation into the alleged theft of the car started on 7 March 2011 and was completed 13 April 2011. The investigation report was forwarded to the Director of UNSOA the same day. For unknown reasons, no action was taken on the investigation report until May 2012 when the Applicant inquired about the status of the investigation.

81. The UNSOA CDT-FP reviewed the file and found that it was incomplete as the statements of the staff members involved were not on file. The complete file was forwarded to her in October 2012. The case was then reviewed and the Director of UNSOA sent his recommendations to the ASG/OHRM and the USG/DFS by pouch on 22 October 2012.

82. It was not until 25 July 2013 that CDU-DFS informed the UNSOA CDT-FP that it had never received the investigation report that had been pouched and sought information on the status of the complaint. UNSOA re-sent the file to CDU-DFS in August 2013.

83. On 5 August 2013, CDU/DFS informed the UNSOA CDT-FP that the investigation report was incomplete and that the mission's investigation review/analysis had not been provided and as such, it considered the matter to still be pending with UNSOA. On 18 October 2013, the UNSOA CDT-FP uploaded the documentation into the CDU/DFS database and on the same day, CDU/DFS confirmed receipt.

84. By a letter dated 15 May 2014, the Director of UNSOA informed the Applicant that the investigation was closed and that the allegations were unsubstantiated.

85. The delay of three years in completing the investigation was in the view of the Tribunal excessive especially since there is no valid justification for such a delay. The reason why the pouch that was sent to New York initially never reached its destination has not been explained; the reason why the Director or Directors of UNSOA slept on the report from 13 April 2011 until 22 October 2012 has equally not been explained. Though the delay may not have been a deliberate wish by the Administration to harm the Applicant but due to errors and

lack of diligence it happened, this fact cannot exonerate the Administration or lessen its responsibility[16]. There was no information as to the progress of the investigation or the date on which the investigator would submit his report. The Administration chose not to answer the Applicant when he queried about the status of the investigation. In *Lauritzen* 2013-UNAT-282, UNAT held that "the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member […]".

86. In *Obdeijn* 2012-UNAT-201, UNAT reiterated that principle in the context of judicial review of administrative decisions:

> The obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

87. Consequently, the Tribunal finds that the delay in conducting the investigatory process caused the complainant moral injury which must be redressed.

Was it proper for the Applicant to be handed over to the Kenya police?

88. The Applicant submits that by handing him over to the Kenyan police the Respondent subjected him to humiliating and degrading treatment. The Respondent did not join issue on this aspect of the pleadings.

Considerations

89. The national investigation started on 7 March 2011 after UNON DSS officials handed the Applicant to the Kenya Police. The Applicant was interrogated on 8 and 29 March 2011 and on 8 and 20 April 2011 by the Kenya Police.

[16] See ILOAT Judgment No. 3064.

90. Article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (the Convention) provides in section 18(a) that officials of the United Nations shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

91. Under section 20 of art. V of the Convention:

> Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

92. It is the duty of the Organization, under section 21 of art. V of the Convention to:

> […] cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

93. By resolution 76(I) of 7 December 1946, the General Assembly granted the privileges and immunities referred to in Articles V and VII of the Convention to all members of the staff of the Organization, with the exception of those who are recruited locally and are assigned to hourly rates.

94. Under ST/SGB/198 (Security, safety and independence of the international civil service) of 10 December 1982, in cases of arrest or detention of staff members, the Secretary-General will use "such means as are available to him to ensure respect for the privileges and immunities of international officials". To that end the Secretary-General should be able to: (i) apprise himself of the grounds for arrest or detention, including the main facts and formal charges; (ii) assist the staff member in arranging for legal counsel; and (iii) intervene with the Government

concerned[17]. Further, ST/SGB/198 states that "[…] the Member States concerned should recognize the functional immunity of staff members asserted by the Secretary-General, in conformity with international law […]".

95. ST/AI/299 (Reporting of arrest and detention of staff members, other agents of the United Nations and members of their families) of 10 December 1982, sets out the procedure to be followed in reporting the arrest or detention of staff members. Paragraph 3 of ST/AI/299 stipulates that:

> The distinction between acts performed in an official capacity and those performed in any private capacity is a question of fact, which depends on the circumstances of the particular case. In this connection, the position of the United Nations is that it is exclusively for the Secretary-General to determine the extent of the duties and functions of the United Nations officials and of experts on mission for the United Nations. To allow authorities of national governments to determine whether a given act was official, or not, would lead to conflicting decisions owing to the large number of countries in which the Organization operates, and, in many cases, it would be tantamount to denial of immunity.

96. In the case of *Kamunyi* UNDT/2010/214, Shaw J referred to an advisory opinion of the International Court of Justice[18] to which the Tribunal will refer and endorse on the responsibility of the Secretary-General vis à vis the agents of the Organization:

> "[...] it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings. That finding, and its documentary expression, creates a presumption of immunity which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts".

[17] Articles 3 and 6 of ST/SGB/198.
[18] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62

97. ST/SGB/198 and ST/AI/299 refer to cases of arrest or detention. There is no mention of a staff member being handed over to the police of the Host State for interview or questioning. The words arrest and detention in ST/SGB/198 have been used purposely because a distinction must be made between the situation where an individual is under arrest and the situation where he is in detention. An arrest would suppose that there is reasonable suspicion or probable cause that an offence has been committed. A detention would be in principle a restriction of liberty without necessarily leading to an arrest unless there is reasonable suspicion that an offence has been committed.

98. The Applicant, as a staff member of the Organization, was protected by the privileges and immunities afforded to officials of the Organization by virtue of Article 105.2 of the Charter and the Convention. The Tribunal is fully cognizant of the fact that the immunity afforded to staff members in the Applicant's position is solely functional. However, it is not within the authority of UNON DSS to decide whether or not immunity, functional or otherwise, applies in any case. ST/AI/299 clearly indicates that this is a matter that rests solely within the discretionary authority of the Secretary-General of the United Nations. Thus when UNON DSS handed over the Applicant to the Kenya police without resorting to the proper procedure for waiver of immunity, they were in breach of the rules governing the protection of a United Nations staff member as provided by the Convention and thereby deprived the Applicant of his due process rights.

99. UNAT referred to the Universal Declaration of Human Rights when dealing with the issue of equal pay for equal work in the case of *Tabari* 2010-UNAT-030 and to the issue of funding in the case of *Chen* 2011-UNAT-107. In the same vein, for the purposes of the manner in which the Applicant was handed over to the Kenyan police, this Tribunal will also refer to international instruments on human rights.

100. Article 9 of the Universal Declaration of Human Rights provides: "No one shall be subjected to arbitrary arrest, detention or exile". Article 9.1 of the International Covenant on Civil and Political Rights states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest

or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". The aim of these provisions is to ensure that no individual is dispossessed of his liberty without compliance with existing legal provisions.

101. The Tribunal considers that whether a person is detained or arrested his freedom of movement is restricted even if by criminal law principles the restriction has a lesser impact in a case of detention than in the case of arrest. An individual, who is called in by the police or who is handed over to them for questioning, does not enjoy, though temporarily, his/her full freedom of movement and would not be able to walk out of the police station on his/her free will. The individual is being detained against his will. Thus, handing over an individual to the police does restrict the freedom of movement of that person even it is momentary as that person would be in detention and depending on the evidence the Police have, that detention can become an arrest. So the risk of a person being arrested whilst in the hands of the police or detained is always present if there is probable cause of his involvement in an offence.

102. This is a disturbing state of affairs and the Tribunal refers this matter to the attention of the Secretary-General not for accountability under Article 10.8 of the Statute of the Tribunal but to respectfully request that the Secretary-General investigate this situation in UNON so that appropriate remedial measures are taken for the protection of staff members and officials based in Nairobi when placed in a situation similar to that of this case. This referral to the Secretary-General is being done to ensure that the appropriate legal and administrative procedures are strictly complied with.

Remedy

103. The Applicant is seeking the following remedies:

a. That the Respondent provide him with a closure letter confirming the end of the investigation against him and the absence of charges; and

b. Monetary compensation equivalent to 12 months' net base salary.

104. Compensation is regulated by Article 10.5(a) and (b) of the UNDT Statute which stipulate :

> As part of its judgment, the Dispute Tribunal may order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

105. Article 10.5(b) was amended by the General Assembly General Assembly in December 2014[19]. The new article reads:

> Compensation, **for harm, supported by evidence** which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

106. In the case of *Abu Nada*[20] the UNRWA Dispute Tribunal pointed out that "it took the Agency a total of 25 months from the date of communicating the alleged "findings of the investigation" to the Applicant to make a final decision. Indeed, the Applicant was given time to put his comments on the record, however, the Tribunal fails to understand the reasons for the excessive delay on the part of the Agency".

107. The UNRWA Dispute Tribunal made the following finding on the delay in completing an investigation when assessing the damages:

> [I]t is up to this Tribunal as the trier of fact to assess the magnitude of the breach based on the evidence before it. According to the evidence, it is clear that the Agency failed to keep the Applicant informed of the progress of its "ongoing" investigation and failed

[19] Resolution 69/203.
[20] UNWRA/DT/2013/038.

> to respond to his inquiries into the duration of his suspension. Essentially, the Agency suspended the Applicant and seemed to have forgotten about him. When the evidence gathered did not support a finding of misconduct the Agency did nothing. It almost appears as if the investigators were hoping for evidence to fall into their laps - and by serendipity, it did. The Tribunal finds that the Agency's excessive delay in carrying out the investigation and making its final decision was a violation of natural justice and the direct cause of the Applicant's stress and anxiety. The Applicant is awarded 25 months' net base salary for moral damages due to the excessive delay of investigation. The Tribunal believes this case merits exceptional circumstances allowing it to award damages beyond the statutory limit of two years' net base salary for the reasons given above.

108. UNAT endorsed the above ruling when determining whether the damages awarded to the Applicant were excessive by holding that "the first instance tribunal is the body best placed to assess the level of damages to be awarded in any particular case"[21]. In an earlier case[22] UNAT held that notwithstanding an extraordinary, an unacceptable and unexplained delay that occurred at the administrative level between the issuance of an investigation report and the termination of an appointment no damages were justified as the first instance tribunal had not determined how and if the due process rights of the staff member had been violated and if he had suffered any harm or prejudice as a result of that violation.

109. In his submissions, the Applicant submits that the delay resulted in violations of the principle of fairness resulting in loss of employment and considerable stress. Should there be evidence of harm when there is an allegation of a breach of fundamental rights? In the case of *Eissa* 2014-UNAT-469, UNAT held that "[a]n award of moral damages for a breach of a staff member's rights, especially when the breach is of a fundamental nature as found by the UNDT does not require evidence of harm or a finding of harm".

[21] *Abu Nada* 2015-UNAT-514.
[22] *Abou Jarbou* 2013-UNAT-292. See also *Zhouk* 2012-UNAT-224, para. 17; *Wu* 2010-UNAT-042, para. 33

110. In *Eissa*, UNAT was following an earlier pronouncement made on the same issue in the case of *Hersh* 2014-UNAT-433-Corr.1. In *Hersh* it was submitted by the Secretary-General that the UNDT erred in awarding compensation purely for procedural and substantive irregularities, without making any determination as to whether the applicant had suffered any moral harm as a result of the administrative actions at issue in the case. It was also submitted that the applicant did not describe any moral harm suffered in her UNDT application, nor did she ask for moral damages or provide any evidence of moral harm. UNAT ruled as follows in addressing that submission:

> As a matter of fact, Ms. Hersh in her application before the UNDT referred to "significant moral damage as a result of the deliberate manipulation of the Organization's processes". In any event, the breach of Ms. Hersh's rights was so fundamental that she was entitled to both pecuniary and moral damages.

111. The Tribunal endorses what it said in *Dahan* UNDT/2015/053 that:

> 73. 'The term "moral damages" is nowhere to be found in the Statute or the Rules of Procedure of the UNDT. However the principle of awarding compensation by way of moral damages is well entrenched in the internal justice system. In a number of cases, moral damages have been awarded by the UNDT and this principle has been approved by UNAT. Should the word "compensation" used in articles 10.5(a) and (b) be understood to include moral damages or are moral damages a separate and distinct remedy that can be awarded in addition to compensation?
>
> 74. In *Kasyanov* UNDT/2010/026 Adams J. observed:
>
> > In my view, the word "compensation" should be given the meaning it has in ordinary parlance without introducing notions of damages developed in various domestic jurisdictions. It comprehends the duty to recompense a staff member as nearly as money can do so for the breach of the contract and the direct and foreseeable consequences of that breach, whether economic or not. Further refinement is neither necessary nor useful.
>
> 75. It is clear from the reasoning of the learned Judge that compensation should be interpreted to include both pecuniary and non-pecuniary loss.

76. However in the case of *Gakumba* 2013-UNAT-387, UNAT seems to be making a distinction between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, articles that are mirrored verbatim in articles 10.5(a) and (b) of the UNDT Statute. UNAT determined that the circumstances of the Gakumba case supported the UNDT "finding of humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member, which led the UNDT to award the reasonable amount of seven months' net base salary as compensation".

77. UNAT then analysed the nature of the compensation permissible under articles 9.1(a) and (b).

> This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

78. What UNAT is saying is that compensation under art. 9.1(a) is awarded for a prejudice suffered as a result of an action taken by the administration on the contract of employment and should not be assimilated to moral damages. Compensation by way of moral damages under art. 9.1(b), which is known in the civil law system as "dommage moral" and in the common law system as "non-pecuniary loss" or non-economic loss", is awarded at the discretion of the court. Moral damages are not punitive in nature but are meant to compensate a litigant for physical suffering, mental anguish, loss of reputation, humiliation, and other causes. Moral damages are not solely a question about money but a warning in the field of employment law to employers on how to treat people.

> 79. In *Eissa* 2014-UNAT-469, UNAT repeated what it had determined in *Gakumba* on the nature of the two heads of compensation that are provided in articles 10.5(a) and (b) of the UNDT Statute by holding:
>
> > An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.
>
> 80. UNAT also held in *Eissa* that "[m]oral damages arise from a breach of a fundamental nature, whether the breach stems from substantive or procedural irregularities. Either type of irregularity may support an award of moral damages.
>
> 81. In *Hersh* 2014-UNAT-433-Corr.1, UNAT held that "[a]n award of moral damages for a breach of a staff member's rights, especially when the breach is of a fundamental nature as found by the UNDT, does not require evidence of harm or a finding of harm".
>
> 82. The amendment to art. 10.5(b) requires evidence of "harm" before compensation is granted. One issue that arises with the amendment is whether the amendment should be made to operate retroactively. Would it be applicable to cases filed before the amendment came into force and thus compel an applicant to adduce evidence even where there is breach of fundamental rights? The question assumes all its importance as UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefitted an applicant[23]. "

112. The Applicant in the present case filed his case in May 2014. The Tribunal considers that it would be unfair to apply the amendment to his case as indeed to all cases filed before December 2014. The Applicant has stated clearly in his pleadings that his due process rights were breached and he underwent stress during that long period it took the Administration to bring his case to a closure. This averment suffices for the Tribunal to identify the breach of the fundamental rights of the Applicant. To have kept the Applicant with a Damocles sword

[23] See *Robineau* 2014-UNAT-396 and *Hunt-Matthes* 2014-UNAT-483.

hanging on his head for a period of three years following the completion of the investigation in April 2011 until its closure in May 2014 was "inhumane and a flagrant abuse of power"[24]. It does not require expert evidence or otherwise to conclude that the delay of the Administration in handling the case of the Applicant went against the basic principles of natural justice and caused him to suffer stress and anxiety.

113. From these averments it can be reasonably be inferred that there were a number of substantive and procedural irregularities. The Tribunal does not consider that evidence establishing the existence of moral injury must compulsorily be *viva voce* evidence. Such a fact can be gathered and/or inferred from the pleadings and documents produced by a party.

114. The Tribunal considers that if the pleadings contain a clear showing of "harm" as in the case of the Applicant that is evidence enough to grant an award for moral damages.

115. The Tribunal awards the Applicant compensation amounting to six months net base salary.

(Signed)

Judge Vinod Boolell

Dated this 26th day of June 2015

Entered in the Register on this 26th day of June 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

[24] The words used by the UNRWA Dispute Tribunal in *Abu Nada* UNWRA/DT/2013/038