UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/017
Judgment No.: UNDT/2015/088
Date: 18 September 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MASYLKANOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member who served until 5 March 2012 under a temporary appointment with the United Nations Assistance Mission in Afghanistan ("UNAMA"), contests:

a. the findings of a fact-finding panel constituted to investigate her allegations of harassment on the part of her supervisor, and

b. the non-disclosure of the fact-finding investigation report by UNAMA.

2. By way of remedies, she requests:

a. Voiding the fact-finding panel's findings and fully disclosing same to her;

b. Removal of all adverse material from all her files pending a UNDT judgment;

c. Her reinstatement in a Political Officer post;

d. Compensation for economic losses, as she was deprived from gainful employment;

e. Compensation for the damage to her career potential, as well as emotional distress;

f. Compensation for violation of her rights due to inaction in response to her complaint, undue delays and failure to protect her form retaliation;

g. That twelve involved staff members be held accountable for harassment and abuse of authority, gross negligence and breaches in the application of rules, as well as total violation of due process and failure to protect her from retaliation following the report of prohibited conduct.

Facts

3. The Applicant joined the Organization effective 7 March 2011, under a six-month temporary appointment limited to service with UNAMA as a Political Affairs Officer (P-3). In this capacity, she was assigned to the Regional Office of Bamyan (Central Highlands Region) in April 2011. Her temporary appointment was extended once until 5 March 2012.

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

5. According to the Applicant, in May 2011, she approached, first, the Head of Office, Central Highlands Regional Office, UNAMA, and later the Director of Political Affairs Division ("Director, PAD"), to discuss her difficult relationship with her supervisor. She claims that both advised her to bear with the situation, noting that she was employed on a temporary contract.

6. On 21 June 2011, the Applicant sent an email to her supervisor, titled "working together", expressing her concerns about the "increasing tensions in [their] Communication/cooperation" and identifying numerous instances of disagreement between them.

7. At the beginning of July 2011, the Applicant received from the Human Resources Administration Unit a letter of appointment extending her contract for a further five months and 28 days, i.e., from 7 September 2011 to 5 March 2012.

8. On 13 July 2011, a letter purportedly authored by four national colleagues of the Applicant was addressed to the Director, PAD, bringing to his attention the "ill treatment of [the Applicant] by [her supervisor]" and stressing that she was not the first staff member experiencing difficulties with that supervisor.

9. On 7 August 2011, the Applicant's supervisor transmitted to her a performance improvement plan, which, the Applicant claims, was established without her input and on which she was urged not to comment. The Applicant signed it with comments.

10. On 15 November 2011, the Applicant filed a complaint with the local Conduct and Discipline Unit ("CDU"), UNAMA, for harassment and abuse of authority against her supervisor. In essence, she alleged that since her joining the office, her supervisor failed to support her as a staff member and sought to undermine her work and marginalize her, a pattern that increasingly grew to harassing behaviour that extended to the guest house where both the Applicant and her supervisor lived, along with a number of colleagues.

11. On 17 November 2011, the Conduct and Discipline Officer, CDU, transmitted the complaint to the Officer-in-Charge ("O-i-C"), Chief of Staff, UNAMA. By an accompanying memorandum, she requested that the Applicant's allegations be investigated in accordance with Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse authority), noting that:

> [T]he alleged acts of harassment include intimidating, humiliating and undermining [the Applicant] in the office and outside of the office (guest house), appear to be done or are deliberately done by [the Applicant's supervisor] in her capacity as supervisor and senior officer of [the Applicant]. It is also noted that the alleged harassing conduct of [the Applicant's supervisor] has created a hostile working environment for [the Applicant].

12. The same memorandum stated that the Applicant wished a formal investigation to be conducted since "previous interventions … were not successful and … [her supervisor] ha[d] not changed her alleged harassing conduct but [it got] worse each day".

13. Also on 17 November 2011, the Applicant's supervisor lodged a complaint for false accusations of harassment against the Applicant.

14. On 14 December 2011, the Head, Office of Legal Affairs, Office of the Special Representative of the Secretary-General, UNAMA, who was at the time the Acting Chief of Staff, UNAMA, acknowledged receipt, in this capacity, of the Applicant's complaint for harassment and advised that it had been forwarded to the Acting Head, Office of Legal Affairs, for advice. He wrote again, on 23 January 2012, informing the Applicant that he had transmitted her complaint to the newly appointed Chief of Staff, UNAMA, to avoid any conflict of interest between the two functions he was discharging.

15. On 25 January 2012, the Applicant's supervisor sent the Applicant an appraisal of her performance, in a Performance Evaluation Form ("PEF") already signed by her first and second reporting officers, and covering the period 7 March 2011 to 6 March 2012. The Applicant was rated overall as "Does not meet performance expectations", and was given the ratings "Requires development" or "Unsatisfactory" in all but two of the competencies assessed. The Applicant signed this PEF on 29 February 2012, adding "I disagree" next to her signature.

16. By memorandum dated 1 February 2012, the Applicant manifested her disagreement with the appraisal and elaborated on her achievements.

17. On 13 February 2012, in response to a request from the Applicant for an update on her complaint, the newly appointed Chief of Staff, UNAMA, informed her that neither him nor his office conducted investigations such as the one she had requested, but that a number of options could be envisaged for this purpose, including the convening of a fact-finding panel.

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

19. The Respondent submits that, on 29 February 2012, a fact-finding panel was appointed to investigate the Applicant's claims of harassment and abuse of authority, and puts forward that the Applicant was so informed at the time, which the latter denies.

20. By note dated 5 March 2012, emailed to the Applicant on the same day, the Chief of Mission Support, UNAMA, reiterated the non-extension of the Applicant's temporary appointment. Reference was made to the Applicant's harassment complaint against her supervisor, reassuring her that the investigation would continue after her separation in accordance with normal policy and procedures.

21. The Applicant was separated from service upon the expiration of her contract on 5 March 2012. She left her duty station on 6 March 2012.

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

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

24. By memorandum dated 17 April 2012, the Chief of Staff, UNAMA, informed the Applicant that the fact-finding panel to investigate her allegations against her supervisor had been appointed and had convened on 16 April 2012.

25. On 26 April 2012, the Applicant was interviewed by said panel.

26. On 11 July 2012, she filed an application contesting the non-renewal of her temporary appointment with the New York Registry of the Tribunal. That case was subsequently transferred to the Geneva Registry and the Tribunal ruled, by Judgment No. UNDT/2014/137, that the non-renewal decision was unlawful since the Applicant had been given a promise of renewal for three further months; the Applicant was granted compensation on this account. The Judgment was not appealed.

27. On 8 May 2012, the Head, Office of Legal Affairs, and Chief of Staff *ad interim*, UNAMA, addressed an email, *inter alia*, to the Complaints and Discipline Officer, which read:

> As discussed this morning, kindly review the communications from [the Applicant's supervisor] regarding the CDU matter of [the Applicant] and [her supervisor] and advice me at arms length in my [Chief of Staff *ad interim*] capacity on the issues raised by [the Applicant's supervisor], including suggestions for the way forward which may include alternatives to a Fact Finding Panel, with due regard for due process and equally ensuring the rights of [the Applicant] and [her supervisor].

28. The Applicant was blind copied on the email in question and, on 9 May 2012, she wrote to the members of the fact-finding panel pointing out that she was in receipt of the above-cited email indicating an intention of circumventing the panel's work; she requested the panel's help and intervention.

29. In reply to a request from the Applicant for an update on the status of the investigation, on 17 July 2012, the Head, Office of Legal Affairs, UNAMA, advised that the work of the fact-finding panel convened to investigate her complaint for harassment and abuse of authority had been "held in abeyance following challenges to the composition of the Panel, and other procedural questions raised by [her supervisor]", requiring an evaluation of the panel from the legal standpoint, which was under consideration. The Applicant answered by email of 18 July 2012, seeking clarification with regard to the circumstances of the decision to hold the panel's work in abeyance, expressing her dissatisfaction for not having been timely informed thereof and asking when the panel would resume its work.

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

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

32. On 7 December 2012, the Applicant filed an application with the New York Registry of the Tribunal, contesting the decision to disband and not to reinstate the fact-finding panel formed in February 2012 to investigate her allegations of harassment and abuse of authority by her supervisor submitted in 2011, when she served with UNAMA. She claimed that she had been subject to "deliberate attempts to prevent a transparent and fair investigation", denying her the delivery of justice; she sought, *inter alia*, reconstitution of the fact-finding panel and recommencement of its work.

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

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

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

36. On 2 May 2013, the Applicant was interviewed by the fact--finding panel re-constituted in February 2013.

37. On 27 August 2013, in a Facebook conversation with the Applicant, a former member of the fact-finding panel stated that the panel was not given any timeframe to complete the investigation and that the Head, Office of Legal Affairs, UNAMA, "made it sound like he planned to keep dragging it out so he wouldn't actually have to do anything about it".

38. On 16 January 2014, the O-i-C and Designated Official *ad interim*, UNAMA, emailed to the Applicant his memorandum dated 14 January 2014, informing her of the decision of the Special Representative of the Secretary-General ("SRSG"), following the fact-finding panel's investigation, to close the case with no further action, based on the finding that no prohibited conduct had taken place. The memorandum summarized the panel's conclusions in its investigation report, rendered on 9 January 2014. It indicated that no conclusive evidence was found to substantiate the Applicant's allegations and described the "most probable characterisation of the events in question" as "a difficult working environment, in a hardship duty station, where the working styles of [the Applicant's] supervisor and [her]self clashed". The SRSG thus did not find that any of the incidents, in isolation or as a whole, rose to the level of harassment or abuse of authority.

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

40. On 17 January 2014, the Applicant requested the O-i-C, UNAMA, to fully disclose to her the fact-finding panel's findings, while expressing her concerns that the panel "seems to have conducted a hasty process".

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

42. On 12 February 2014, the Applicant submitted a request for management evaluation of the fact-finding panel's findings and of the decision not to disclose the full report.

43. On 1 May 2014, the Applicant filed an application with the New York Registry of the Tribunal, contesting the findings of the fact-finding panel's report and the non-disclosure of the fact-finding report by UNAMA. The application was registered under Case No. UNDT/NY/2014/38. By Order No. 103 (NY/2014) on change of venue of 2 May 2014, the case was transferred to the Geneva Registry, where it was registered under Case No. UNDT/GVA/2014/017.

44. On 19 May 2014, the Under-Secretary-General for Management informed the Applicant that the fact-finding panel's finding and the non-disclosure of the panel's report were upheld in management evaluation.

45. The Respondent filed his reply on 9 June 2014.

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

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

48. On 8 June 2015, the Applicant filed a motion for the disclosure of the fact-finding panel report and for witnesses to be heard; she additionally sought to have the actions by the Ethics Office and the Office of Staff Legal Assistance ("OSLA") reviewed, which in her opinion failed to protect her as per ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

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

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

Parties' submissions

51. The Applicant's principal contentions are:

a. During 26 months after she had filed a formal complaint for harassment and abuse of authority against her supervisor, UNAMA did nothing, despite the clear directives in ST/SGB/2008/5. Initially, UNAMA senior management blatantly ignored her request for prompt action, exacerbating the hostile environment in the workplace and prompting her supervisor to retaliate, including by drafting a malicious evaluation of the Applicant's performance;

b. The failure to conduct a prompt review of her complaint precluded a finding that her supervisor engaged in harassment, and warrants the conclusion that the performance evaluation and subsequent non-renewal of her appointment were unlawful. It was a violation of the right to a work place free from harassment and to a fair investigation;

c. By refusing to investigate the case and deliberately delaying the case UNAMA continued to disregard her rights, perpetuated harassment and prevented her from re-employment with the Organization. UNAMA has not suggested to remove contested derogatory material from her files until the investigation concluded, thereby directly damaging her career potential;

d. UNAMA has demonstrated, through its actions and inactions, blatant disregard for her due process rights. From the time she made the Administration aware of the conduct of her supervisor to the present, UNAMA has never shown good will or impartiality, nor attempted to provide her due process, except for the SRSG instruction to extend her contract, which was ignored;

e. The Head, Legal Affairs Unit, UNAMA, mishandled and intentionally interfered in the investigation, and disbanded the first panel without informing the Applicant. This is consistent with comments made by two former members of the fact-finding panels;

f. The whole investigation process was hijacked by UNAMA with the sole intention of pursuing foot dragging. Almost none of the staff of the Bamyan Office—where both the Applicant and her supervisor were posted— was interviewed by the panel, in particular, none of the national staff members who signed the letter of complaint dated 13 July 2011 against the supervisor. Only individuals directly involved in the matter were interviewed, and none of the testimonies in favour of the Applicant were included in the investigation report. The summary of the report contains unsubstantiated accusations against her;

g. Although ST/SGB/2008/5 may not oblige UNAMA to fully disclose the report, it does not preclude it from doing so. In several cases, the Tribunal has held that an investigation report should have been disclosed to the concerned staff member as a matter of good faith and fair dealing.

52. The Respondent's principal contentions are:

a. The scope of any appeal pursuant to ST/SGB/2008/5 is limited to challenge any procedural breach during the course of the review and investigation process. The Tribunal reviews a decision made in response to a complaint of harassment in the context of the evaluation procedure detailed in ST/SGB/2008/5. The merits of a decision pursuant to an ST/SGB/2008/5 investigation cannot be contested;

b. In certain circumstances delay in the review of a complaint may be unavoidable. In assessing if the Administration acted adequately, the nature of the complaint and of the enquiries that were required in order to review and assess the complaint have to be taken into account;

c. It is accepted that the Administration did not adequately comply with sec. 5.14 and 5.17 of the bulletin and did not institute a timely review and investigation of the complaint. While the reasons for the delay do not entirely excuse the Administration, they demonstrate that, to a large extent, a significant delay in the conduct of the investigation was unavoidable;

d. The first panel, established in February 2012, was dissolved due to valid objections against two of its members raised by the subject of the complaint, to avoid any perception of bias. On 6 January 2013, a second panel was convened; shortly thereafter, its chair was reassigned to another mission, requiring the appointment of a new chairperson. On 17 January 2013, a new chair was identified to constitute the second panel, but before the work started, he moved to a new position outside the mission. On 17 February 2013, a new panel was composed;

e. The investigation was slow due to a number of operational challenges associated with the security and working environment in Afghanistan. UNAMA is categorized as a Class E hardship and non-family mission, where staff members are entitled to rest and recuperation breaks of five working days every six weeks of physical presence in the country, as well as family visit and annual home leave. This made it extremely difficult to have all panel members and/or witnesses present in the mission area at the same time. The panel's work was also delayed when the Applicant declined a scheduled interview in April 2013, as she required her lawyers to be present; the interview was rescheduled and took place on 2 May 2013. Furthermore, security restrictions sometimes limited the movement of panel members or witnesses;

f. The Applicant's allegations that the former Senior Legal Adviser, UNAMA, delayed the investigation, are false. The role of the Office of Legal Affairs in this and all other fact-finding investigations is strictly limited to drafting the Convening Order at the request of the Head of Mission, and to provide a short briefing on procedural aspects to the panel. The former Senior Legal Adviser had no responsibility for the timelines of the investigation;

g. The Applicant was not prejudiced by the delay in the investigation for two reasons: (a) she separated from the Organization during the early stages of the investigation and, thus, the delay did not affect her ongoing working relationship, and (b) the ultimate decision was not in her favour; therefore, there would have been no advantage to the Applicant in having her complaint dismissed at an earlier time. Not every illegality will necessarily lead to an award of compensation, and the Applicant has not demonstrated that the delay in considering her complaint under ST/SGB/2008/5 caused her loss or injury that could be compensated with the award of damages;

h. The panel interviewed the Applicant and her supervisors, as well as two additional witnesses, after it had made discretionary judgments as to which other witnesses should give evidence. It also reviewed voluminous documentation. The SRSG adopted the panel's factual findings. The Applicant has failed to identify which, if any, of these findings were unreasonable to arrive at;

i. The SRSG—who has discretion to determine whether or not the panel adequately met its terms of reference (including its exercise of discretion in determining the individuals that should be interviewed)—concluded that the panel interviewed staff with relevant information about the alleged prohibited conduct (sec. 5.16 of ST/SGB/2008/5). Since the primary subject-matter of the complaint was the nature of the interaction between the Applicant and her supervisor, the primary evidence was, to a large extent, the substantial contemporaneous documentation that each of them provided;

j. It was determined that it was not necessary to interview national staff. In particular, the four national staff who allegedly wrote the letter dated 13 July 2011, had not sufficient immediate direct or relevant evidence concerning this interaction. Furthermore, the SRSG found reasonable the panel's determination not to interview the alleged signatories of the letter, noting that the authenticity of the letter was questionable based on the information that the former Head of Division transmitted to the panel, namely that two of the alleged signatories were unaware of the letter, and that one signed but the negative statements on the Applicant's supervisor were introduced after he signed;

k. It is not the task of the Applicant or that of the Dispute Tribunal to re-conduct the investigation and second-guess the merit of each of the steps taken in the investigative process. The essential question is not whether the panel could have had more evidence or weighted the evidence before them differently, but whether the Applicant was accorded a proper investigation of her complaint;

l. The SRSG decision was lawful and reasonable. It was based on the panel's findings that the allegations presented by the Applicant were not substantiated by the facts, having found that the panel fully investigated her complaint. The SRSG concluded that the events the Applicant complained about were disagreements concerning work performance and/or other work-related issues, which do not constitute harassment under sec. 1.2 of ST/SGB/2008/5;

m. The decision by the SRSG not to disclose the panel's report was lawful and reasonable. The Applicant is not entitled to the report, but only to a summary of the panel's findings and conclusions (sec. 5.18(a) of ST/SGB/2008/5). She was provided with such summary in the comprehensive decision letter of 14 January 2014. The Applicant has not established that she meets the criteria to receive a copy of the panel's report, in particular, that "extraordinary circumstances" exist entitling her to it.

Consideration

Procedural matters

Hearing

53. Based on the information obtained at the case management discussion, it was the Tribunal's view that an oral hearing on the merits was not necessary; this was conveyed to the parties, by Order No. 136 (GVA/2015), inviting them to comment thereon. The parties did not object to the case being determined on the papers. In particular, although she filed comments following the above-referred Order, the Applicant did not oppose the suggested course of action.

54. The case will therefore be examined on the basis of the written pleadings.

Ex parte documents

55. Upon the Tribunal's instructions, the Respondent filed *ex parte* the report of the investigation into the Applicant's complaint of harassment with its annexes. On 8 June 2015, the Applicant moved for disclosure of the report. This motion was rejected for the motives detailed in Order No. 136 (GVA/2015).

56. Given that the Applicant has not had access to the investigation report and its annexes, the Tribunal, in keeping with *Bertucci* 2011-UNAT-121, will not rely on these documents to make its findings, save for the purpose of ensuring that the summary provided to the Applicant in the memorandum of 14 January 2014 adequately reflected the content of the report.

57. For the sake of clarity, it is appropriate to distinguish the above-mentioned motion for disclosure and its rejection, from the Applicant's request for disclosure of the same report to UNAMA senior management and its refusal to share it, as communicated by its Head, Legal Affairs Unit, on 22 January 2014.

58. The motion is part of a judicial procedure and was dealt with by virtue of the Tribunal's broad discretion to handle proceedings for the fair and expeditious disposal of a case (*Bertucci* 2010-UNAT-062, para. 23; *Leboeuf* et al. 2013-UNAT-354, para. 8), whereas UNAMA refusal to disclose the report is one of the two administrative decisions contested in the present application and, as such, will be addressed under the merits of the application.

Scope of the application

59. The material scope of any application is defined by the applicant as he or she identifies the administrative decision or decisions at issue. In the present case, the Applicant specified two contested decisions in her application, namely:

a. Findings of the fact-finding panel report;

b. Non-disclosure of the fact-finding report by UNAMA.

60. The Tribunal's review is thus confined to these two decisions, that will be examined in turn.

No further action with respect to the complaint of harassment

61. The Appeals Tribunal held in *Massabni* 2012-UNAT-238 that:

> 2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
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> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

62. The application at hand describes the first decision appealed as "the findings of the [fact-finding panel r]eport". At the same time, all details provided to help identify said decision (decision-maker, date on which the decision was made, author of the communication by which the Applicant was informed thereof) correspond rather to the decision of the O-i-C and Designated Official *ad interim*, UNAMA, not to take further action on the Applicant's complaint against her supervisor.

63. It is noted, in this respect, that the panel's conclusions are not an appealable decision, but the result of the analysis of the evidence gathered. At most, it can be regarded as a preparatory step in a complex decision-making process and not as an administrative act having, in and by itself, direct legal effect on the Applicant's rights. An application against it would necessarily be irreceivable (see *Birya* 2015-UNAT-562; see also *Nwuke* 2010-UNAT-099, *Masylkanova* 2014-UNAT-412).

64. In contrast, the determination that no further action, disciplinary or other, would follow as a result of the Applicant's complaint, has a direct impact on her right to have a work environment free from harassment (see *Messinger* UNDT/2010/116) and, particularly, on those stemming from ST/SGB/2008/5 (see *mutatis mutandis*, *Östensson* UNDT/2011/050).

65. Moreover, it transpires from the Applicant's contentions that the decision by which she feels aggrieved is the Administration's refusal to institute disciplinary proceedings against her former supervisor following the investigation. If she takes issue with the handling of her complaint and the conduct of the investigation, she does so inasmuch as they were part of a process leading to said decision.

66. In this light, the Tribunal considers that the first impugned decision, regardless of its literal formulation in the application, is that to take no further action on the Applicant's complaint for harassment.

67. This being clarified, the Tribunal must recall that, in reviewing such a decision, it is not vested with the authority to conduct a fresh investigation on the initial harassment allegations (*Messinger* 2011-UNAT-123, *Luvai* 2014-UNAT-

417). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own judgment to that of the Secretary-General (see, e.g., *Sanwidi* 2010-UNAT-084). The scope of the judicial review in harassment and abuse of authority cases is restricted to how management responded to the complaint in question (*Luvai* 2014-UNAT-417, para. 64). The Tribunal must thus focus on whether the Administration breached its obligations pertaining to the review of the complaint, the investigation process further to it or the decision-making as to the adequate course of action, which are set out in ST/SGB/2008/5

68. These obligations were analysed in *Haydar* UNDT/2012/201:

> 16. ST/SGB/2008/5 clearly delineates the entire procedure to be followed by the Organization upon receipt of a formal complaint of prohibited conduct. Section 5.14 provides that:
>
> > Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.
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> 17. The Tribunal is of the view that depending on the circumstances of the case, section 5.14 may have two elements that must be satisfied by the Organization. The first component of section 5.14 is the review and assessment of the complaint. The second component, which calls for the Responsible Official to "promptly" appoint a fact finding panel to investigate the allegations contained in the complaint, comes into play if the Responsible Official finds after the assessment that the complaint appears to have been made in good faith and that there are sufficient grounds to warrant a formal fact-finding investigation.
>
> …

> 29. Section 5.18 sets out several courses of action to be taken by the Responsible Official on the basis of the fact-finding report. These actions range from: (i) closing the case where the report indicates that no prohibited conduct took place, informing the individuals and providing them with a summary of the findings and conclusions of the investigation; (ii) the Responsible Official imposing managerial action if the report indicates that there was a factual basis for the allegations but not sufficient to justify the institution of disciplinary proceedings; and (iii) the Responsible Official referring the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action where the report indicates that the allegations were well-founded.

69. In the instant case, given the conclusions of the investigation, i.e., that no prohibited conduct had taken place, the decision to close the case with no further action (other than informing the Applicant and her supervisor) stands as nothing but a regular application of sec. 5.18(i) of ST/SGB/2008/5, and constitutes a valid exercise of discretion on the part of the Administration.

70. The crux of the matter therefore lies on whether the handling of the complaint and the investigation that led to said conclusions was in accordance with the relevant rules.

Delay in the process

71. In this connection, the above-cited sec. 5.14 of ST/SGB/2008/5 requires the responsible official to review and assess the complaint "promptly" and also, if there are sufficient grounds to warrant an investigation, to "promptly" appoint a panel for that purpose. In addition, sec. 5.17 of the same bulletin prescribes that:

> The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than *three months from the date of submission of the formal complaint or report*. (emphasis added)

72. More generally, sec. 5.3 of the bulletin provides that:

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

73. Against this background, the Tribunal notes that the Applicant lodged her complaint on 15 November 2011, and was notified of the final decision on the course of action to take only on 16 January 2014, that is, 26 months later.

74. A closer look at the sequence of events reveals that, since the Applicant filed her complaint, it took UNAMA three and a half months—if not five—to set the first fact-finding panel. Indeed, the Respondent claims that this panel was appointed on 29 February 2012. However, it tendered no evidence whatsoever supporting this date, and it was not until 29 March 2012 that the CDU advised the Applicant that a panel had been convened. Thereafter, only on 17 April 2012, the Chief of Staff, UNAMA, informed the Applicant officially that a fact-finding panel had been established and that it had convened on 16 April 2012.

75. Later, after the first panel was dissolved in early May 2012 in light of the alleged offender's objections to its composition for conflict of interest, no new panel was convened until eight months later, on 6 January 2013. There is nothing to suggest that the Administration undertook any efforts to re-appoint a panel during the eight-month gap, despite the Applicant's numerous reminders. It was only after she turned to the Tribunal and filed a complaint for the disbandment of the first panel that the Administration set up a new one.

76. Finally, a full year elapsed between the appointment of on 17 February 2013, of the panel that would eventually complete the investigation, and the issuance of a final decision to close the case and its notification to the Applicant, on 16 January 2014.

77. Without a doubt, this timeline is far from fulfilling the "promptness test" required by sec. 5.3 and 5.14 of ST/SGB/2008/5; indeed, the total duration of the process—26 months—represents more than eight times the three-month benchmark set in sec. 5.17 of the bulletin.

78. When put in perspective with the relevant case law, the delays in this case appear clearly excessive. In *Benfield-Laporte* 2015-UNAT-505, a delay of nearly six months between the filing of the complaint and the refusal to conduct a fact-finding investigation was deemed incompatible with the requirement of promptness by the Appeals Tribunal. In *Birya* UNDT/2014/092, the same requirement was considered breached because seven months elapsed from the filing of the complaint until the appointment of the investigating panel. In *Ostensson* UNDT/2011/050, a delay of three months and a half in informing the applicant of the decision not to investigate his complaint was found to violate sec. 5.3 of ST/SGB/2008/5. In *Gehr* UNDT/2012/095, the Tribunal found that a delay of over 13 months from the report of prohibited conduct until the response that no action would be taken warranted compensation. In *Haydar* UNDT/2012/201, the Tribunal found against the Respondent because the assessment of the complaint took three months and the appointment of a fact-finding panel more than a year since the applicant had filed his complaint. In *Nwuke* UNDT/2013/157, the Tribunal ruled that the Administration breached its duties as no formal or documented steps had been taken after it received a complaint for discrimination and no explanation for this delay was given.

79. In fact, the Respondent admits to not having adequately complied with sec. 5.14 and 5.17, and not having instituted a timely review and investigation of the Applicant's complaint. He submits, nonetheless, that the delays were to a large extent unavoidable. In particular, he highlights that the panel had to be fully or partially re-composed several times for circumstances out of the Administration's control: first, the objections raised by the subject of the investigation regarding the panel's composition, which were found to be valid and, later, the departure from UNAMA of the appointed chairpersons. The Respondent also stresses the nature of the complaint and of the enquiries, as well as the operational constraints linked to the security and working environment in Afghanistan, notably, the difficulties

in having all panel members and witnesses coincide in the mission area due to movement restrictions and the fact that UNAMA staff are entitled to frequent leave and breaks, or even the need to re-schedule the Applicant's interview so that her lawyers could attend.

80. The Tribunal appreciates the practical and logistical challenges encountered. However, there is no evidence that the Administration took any positive steps to try to resolve them within an acceptable timeframe (see *Birya* UNDT/2014/092). In any event, these problems could only explain a relatively minor part of the lengthiness of the process. Indeed, as noted above, a significant delay occurred already at the stage of merely assessing the allegations and deciding to convene a fact-finding panel; at this point, the alleged difficulties played no role. Another eight months were spent to re-appoint a panel after the composition of the first one had been challenged. Again, this gap was certainly not caused by logistics in the field. Finally, while the Tribunal accepts that the problems in getting together all the people involved most probably slowed down the conduct of the investigation, they can hardly account for one full year to carry out the investigation, even considering that the inquiry was complex and laborious.

81. Regarding the need to re-constitute the panel several times in early 2013, these procedural vicissitudes protracted the process for barely six weeks (from 6 January to 17 February 2013), which seems almost negligible compared to the total 26 months timespan.

82. In conclusion, the bulk of the cumulated delays was primarily due to UNAMA failure to take diligent action. The Applicant's insistence in having her lawyers present at her interview had a paltry impact, compared to the Administration's inaction.

83. For all the foregoing, the Administration incurred inordinate delays both at the stage of reviewing and assessing the Applicant's complaint, and in setting a fact-finding panel and conducting the investigation itself, in breach of various provisions of ST/SGB/2008/5.

Alleged flaws of the investigation

84. The Applicant maintains that UNAMA management, and particularly its Head, Legal Affairs Unit, purposefully delayed and obstructed the investigation into her complaint. It is trite law that any allegation of ill-motivation must be supported by convincing evidence, and that the burden to adduce same rests with the applicant who advances it.

85. The Applicant submits two informal messages from two former panel members. These messages need to be weighted with caution as they are unofficial and detached from their context. Even if the Tribunal was to rely on them at face value, these statements are not as far-reaching as the Applicant argues. One of them simply expresses disappointment at the way the panel was treated, without any other indication; it may well be that it referred simply to the panel's disbandment. The other one states that the panel was not given any timeframe to complete its task and leaving its drafter with the impression that the Head, Legal Affairs Unit, UNAMA, intended to drag the investigation. The drafter of this message gave no concrete details on the basis for this impression but, be it as it may, her statement points to nothing else but the manifest lack of timely handling and resulting inordinate delays that the Tribunal has already developed at length and found established.

86. Moreover, it is worth recalling that the Head, Legal Affairs Unit, UNAMA, handed the management of the Applicant's complaint to the Mission's Chief of Staff as early as January 2012. Any influence he may have had henceforth on the procedure was in his limited capacity as legal advisor. At any rate, the primary responsibility for the conduct of the investigation rested with the panel.

87. On this point, it is noteworthy that the Applicant does not question the impartiality or the competence of the panel members and, importantly, she does not hold that the successive changes in the panel's composition resulted in the investigation being carried out by any less able or upright persons.

88. The Applicant avers, nevertheless, that the witnesses that might have favoured her were not interviewed, including the four local colleagues who purportedly sent a letter complaining about the management style of their common supervisor and the Applicant's mistreatment by her. In sum, the Applicant doubts that the investigation was complete and sufficiently in-depth.

89. The only specific direction on how the investigation should be conducted is provided by sec. 5.16 of ST/SGB/2008/5:

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

90. Apart from prescribing that the aggrieved individual and the alleged offender shall be interviewed, which they were in the case at hand, this provision leaves to the investigators' judgment to determine who is likely or not to shed light on the behaviour complained of. Although the Appeals Tribunal recently ruled in *Flores* 2015-UNAT-525 that due process required to hear the witnesses proposed by the applicant, a fundamental difference existed between that case and the present one: Flores was not the complainant but the alleged offender, and he identified witnesses in response to the charges brought against him. This is why this finding has not, and may not lightly be, extrapolated to the case at bar.

91. In this case, besides the Applicant and her supervisor—as the aggrieved individual and the alleged offender—two more witnesses were interviewed, i.e., the Head of the Bamyan Regional Office, and the Director of the Political Affairs Division, who, by their functions, had knowledge of the strained relations between the Applicant and her supervisor, but were not personally involved in the complaint.

92. Regarding the purported signatories of the complaint letter of July 2011, it is not an unreasonable exercise of its discretion if the panel, having reserves on the reliability of said letter, chose to focus on other evidence.

93. Also, the conflict between the Applicant and her supervisor was extensively documented in writing. Since the panel could therefore largely rely on first-hand documentary evidence, it is hardly surprising that it sought less oral evidence. This does not necessarily mean that the evidence gathered was insufficient or selective.

94. In summary, the panel had wide discretion to determine the evidence that was relevant for the investigation. The Tribunal found no solid grounds to conclude that it exercised this discretion in an unreasonable, arbitrary or otherwise misguided fashion.

Non-disclosure of the investigation report

95. Shortly after receiving the 14 January 2014 memorandum informing her of the closure of her case, the Applicant requested access to the investigation report. The UNAMA management refused, as communicated to her on 22 January 2014. This is the second decision impugned in this application.

96. The obligations incumbent on the Administration in this respect are stipulated in sec. 5.18(a) of ST/SGB/2008/5, as follows:

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

97. Under this provision, the Applicant's right was limited to receiving an account of the panel's findings and conclusions; the Administration was under no obligation to provide her with the report itself (see e.g., *Ivanov* UNDT/2014/117).

98. The Organization fulfilled this duty through the memorandum of the O-i-C and Designated Official *ad interim*, UNAMA, dated 14 January 2014, to the Applicant. In this connection, the Tribunal was able to verify that the memorandum indeed contains a relevant, accurate and complete summary of the findings and conclusions of the panel.

99. This said, the Tribunal has held that, this general rule notwithstanding, the decision to provide or not a complainant with a copy of the investigation report should be made on a case-by-case basis, taking due account of the "requirements of good faith and fair dealing" (*Adorna* UNDT/2010/205, *Haydar* UNDT/2012/201). However, this case law leaves no doubt that the general rule of the above-quoted sec. 5.18 may only be departed from in "extraordinary circumstances".

100. No such extraordinary circumstances are met in the present case. The facts surrounding it are manifestly not comparable to those in *Adorna*, where the Organization refused to share the report with the subject of the misconduct complaint (as opposed to the complainant) after disclosing it to the national authorities. In fact, the circumstances put forward by the Applicant in seeking to obtain the report concern essentially the inordinate length and poor handling of her complaint, which are not relevant for the purpose of disclosing the report (see *Ivanov* 2015-UNAT-519).

101. In view of the above, the Organization has not breached the Applicant's rights by not sharing with her the full report of the investigation at issue.

Remedies

102. Contrary to the Respondent's assertion, the delays in acting upon her complaint caused prejudice to the Applicant.

103. First, it is factually incorrect that the Applicant was no longer at UNAMA. Instead, it is undisputed that from 15 November 2011 to 5 March 2012, the Applicant remained posted in UNAMA and reported to the very same person she had levelled serious accusations against. As such, the fact that she brought formal allegations against her supervisor clearly could have compounded their already strained relation.

104. Second, it is now well-established that the emotional distress of a complainant as a result of the Organization's failure to timely respond to his or her complaint for prohibited conduct amounts to harm warranting compensation (*Abubakr* 2012-UNAT-272, *Benfield-Laporte* 2015-UNAT-505).

105. The delays in this case were so important and so persistent that they obviously inflicted considerable anxiety, stress and a sense of neglect and injustice to the Applicant. The Administration could not have ignored that, particularly considering the Applicant's repeated inquiries on the status of the investigation. On this account, the Tribunal awards the Applicant financial compensation in the amount of USD3,000.

106. The Applicant expressly requested that the findings of the fact finding panel be voided. It has already been explained above that the panel's finding themselves are not a contestable administrative decision. Therefore, their rescission cannot be envisaged as a possible remedy under art. 10.5(a) of the Tribunal's Statute. Even if the Tribunal were to interpret that the Applicant is seeking the rescission of the refusal to take further action on her complaint, inasmuch as it was based on the panel's findings, it must be stressed that the delays in deciding, enabling and completing the investigation are purely a procedural irregularity, which does not justify the rescission of that refusal decision.

107. Many of the remedies requested by the Applicant correspond to alleged breaches that the Tribunal, after review, has found unproven. Others are disconnected from the two decisions at issue in the present proceedings, or else exceed the Tribunal's powers as laid down in art. 10.5 of its Statute. To this extent, the Tribunal shall not grant the rest of the remedies sought.

Conclusion

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

a. The Respondent shall pay the Applicant compensation of USD3,000 for the inordinate delay in handling her complaint;

b. 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

c. All other pleas are rejected.

(*Signed*)

Judge Thomas Laker
Dated this 18th day of September 2015

Entered in the Register on this 18th day of September 2015

(*Signed*)

René M. Vargas M., Registrar, Geneva