



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

OMWANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Didier Sepho

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Officer with the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”), contests two decisions:

(a) The issuance of a Performance Notice to him as a result of an incident in which he prematurely closed a security gate, grazing the rear bumper of a motor vehicle which was leaving an underground car park. He submits that the adverse record was placed on file without respecting his right to due process; and

(b) The decision of the Under-Secretary-General for Safety and Security (“USG/DSS”), notified to the Applicant on 1 August 2014, to refer his complaint of harassment and discrimination back to the SSS because the USG/DSS considered that it did not warrant a formal fact-finding investigation but that it raised issues related to performance.

2. The Applicant submitted a further general claim of denial of equal and fair treatment, which he agreed is coterminous with the above two claims. A number of other claims made by the Applicant in his initial application were withdrawn during the course of the proceedings.

3. In a submission dated 30 October 2015, after the hearing on the merits, the Applicant stated that when his previous two-year contract expired in August 2014, he was given a six-month extension rather than a further two-year extension. He alleged that this was as a result of the Performance Notice. This decision should have been contested at the time of the contract renewal. It did not form part of the initial claim and cannot be introduced as a new element of the application at this late stage in these proceedings.

4. Accordingly, the Tribunal finds that the decisions properly before it in this case are the two decisions identified in para. 1 above.

Relevant factual background

Performance Notice

5. By interoffice memorandum dated 27 February 2014, the Applicant reported to Mr. Bryan Black, the Assistant Chief, SSS, that while on duty that day at Post 103, a car had been hit by the security gate while exiting the Post, causing minor damage to the rear bumper. The Applicant stated: “I thought the car had cleared the gate before closing it”. In subsequent correspondence with Mr. David Bongi, the Chief of the SSS, the Applicant alleged that this report was prepared by Senior Security Officer Lenworth James, in Officer James’s own words, and that the Applicant was asked to sign it. Officer James gave evidence on the first day of the hearing, held on 18 September 2015. He was not questioned about this allegation by Counsel for the Applicant. The Tribunal regards this allegation as having been abandoned.

6. A stamp on the Applicant’s memorandum dated 27 February 2014 indicates that it was forwarded to the SSS Special Investigations Unit, which received it on 28 February 2014.

7. On 29 May 2014, Officer James, who is or was at the time a member of the SSS Special Investigations Unit, forwarded an Investigation Report to Mr. Michael Browne, Deputy Chief, SSS. Officer James stated that he had viewed video surveillance footage from the Security Operations Center and observed the following:

The recordings showed that at approximately 1446 hours, the electronically control north gate was opened and two cars were seen exiting. The first vehicle drove slowly through the gate and

came to a stop at the traffic light just outside of the gate. The second vehicle followed and came to a stop directly behind. The second vehicle did not clear the gate completely. The gate remained in the open position for approximately one minute. With both vehicles still stopped at the red light, the gate could be seen closing. The light changes to green and both vehicles drove forward, but not before the closing gate graze the rear bumper of the Lexus.

The Report notes that Officer James requested that the driver of the vehicle provide an estimate of the cost of repairs, but no estimate was ever submitted. The investigation concluded that the Applicant “was inattentive, and did not ensure that the path of the gate was cleared before closing it”. Officer James recommended that the Applicant be reminded to exercise more care when operating the barrier and electronic controls, and that the case be marked closed pending further developments.

8. By interoffice memorandum dated 27 June 2014, Mr. Bongzi, Chief, SSS, informed Mr. Black as follows:

The investigation determined that the accident occurred due to negligence by Officer Omwanda. He was inattentive and did not ensure that the path of the gate was cleared before closing it.

Due to his negligence, Officer Omwanda will receive a Performance Notice from his supervisor and be re-trained on the use of stinger barrier operations and until this training occurs, he is not to be assigned to a post requiring barrier operations.

9. At a hearing on the merits on 18 September 2015, Inspector Donald Patterson testified that he prepared a Performance Notice dated 1 July 2014 to issue to the Applicant. The Performance Notice was produced by the Respondent during the hearing. The document includes a summary of the circumstances in which a Performance Notice should be issued, stating:

Issued for negligent performance, or behavior pattern that warrants greater than just counselling, but less than the more serious

“Notice of Counsel”. Performance Notices will be reflected in an individual’s e-Performance Report.

10. The Performance Notice recalls the details of the incident on 27 February 2014 and states: “An investigation determined that the accident occurred due to negligence by you. As a result, you are hereby issued a Performance Notice”.

11. Inspector Patterson testified that he prepared the above wording based on the content of the memorandum from Mr. Bongi dated 27 June 2014, which was transmitted to him by the Assistant Chief, Mr. Black, with an additional annotation. Following the hearing, the Respondent produced Mr. Bongi’s memorandum dated 27 June 2014. The Respondent was unable to locate the version of the memorandum that was transmitted to Inspector Patterson with an annotation by Mr. Black.

12. Inspector Patterson stated that he presented the Performance Notice to the Applicant, who refused to sign it. The Applicant told Mr. Patterson that he had not been negligent. The Applicant’s refusal to sign the Performance Notice is recorded in an annotation at the bottom of the document.

Complaint of harassment and discrimination

13. By email to Mr. Bongi dated 2 July 2014, the Applicant recalled that he had been asked to sign a Performance Notice that day. He provided his own account of the incident that took place on 27 February 2014 before raising a number of due process concerns. He also alleged that other officers had caused similar accidents without action being taken against them and that he was being discriminated against. He further alleged that he had been subjected to harassment by his supervisors since 2010.

14. By email to the Applicant dated 3 July 2014, Mr. Bongi responded to his concerns and allegations. He explained why the Performance Notice had been issued and stated that, unless the Applicant produced other supporting evidence that would mitigate the findings in the Special Investigations Unit report, the Performance Notice would stand. Mr. Bongi stated that, should the Applicant have any evidence of harassment or discrimination by his supervisors, he should provide it either to Mr. Bongi or to Mr. Black, the Assistant Chief of SSS.

15. The Applicant responded to Mr. Bongi the same day, stating: “The evidence I have I cannot entrust with a team that is bent to show me as an incompetent officer”. He raised further due process concerns about the issuance of the Performance Notice and stated that Mr. Bongi, Mr. Black and Inspector Patterson had treated him unfairly since 2010.

16. Mr. Bongi responded to the Applicant the same day stating that he was welcome to come and see him directly. The Applicant stated that he would only talk to someone in the hierarchy who was above the Chief.

17. By email dated 9 July 2014 and titled “Harassment and Discrimination”, the Applicant forwarded the above correspondence to Mr. Peter Drennan, USG/DSS. In his email the Applicant stated: “Kindly, go through my first email to [Mr. Bongi] and assist me in getting due process of the matters. I have documentary evidence that I promise to give to an independent and impartial team”.

18. On 1 August 2014, the Applicant was notified that the USG/DSS had reviewed the allegations and did not find any grounds to warrant a formal fact-finding investigation under the terms of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The email further stated: “The information provided does relate to issues that fall

outside the purview of the SGB and will be addressed by the Security and Safety Service”. Mr. Bongi was copied on the email.

Procedural background

19. The application was filed on 28 September 2014 and the reply on 29 October 2014.

20. The case was assigned to the undersigned Judge on 20 July 2015.

21. A case management discussion (“CMD”) was held on 4 August 2015. The parties agreed that it would be useful to engage in discussions to explore the possibility of achieving an amicable alternative resolution of this dispute.

22. On 5 August 2015, with the consent of the parties, the Tribunal ordered a stay of proceedings until 13 August 2015 to enable the parties to engage in discussions. On 13 August 2015, the parties informed the Tribunal that they had been unable to reach a resolution.

23. A number of further orders were issued and three more CMDs were held (on 25 August 2015, 16 September 2015, and 18 September 2015) by the Tribunal to clarify and narrow the issues in dispute and to determine the most appropriate way to resolve these matters.

24. A hearing on the merits was held over two days to accommodate the availability of witnesses. On 18 September 2015, Senior Security Officer Lenworth James and Inspector Donald Patterson gave evidence. On 1 October 2015, Mr. Peter Drennan and Mr. David Bongi gave evidence. The Applicant listened to the proceedings on both days via telephone link from Nairobi, Kenya. The parties agreed that it was not necessary for the Applicant, who was on sick leave, to give evidence. Counsel for the Applicant was given leave to consult his client at any stage of the hearing.

25. On 14 October 2015 the parties filed their closing submissions.
26. Having considered the parties' closing submissions, the Tribunal issued two further orders requesting information from the parties and held a CMD on 28 October 2015.

Applicable law

27. Article 2.1 of the Statute of the Dispute Tribunal provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ...

(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 noncompliance;

28. ST/AI/2010/5 (Performance Management and Development System) provides:

Section 10

Identifying and addressing performance shortcomings and unsatisfactory performance

10.1 ... When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include ... additional training ... provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

...

Section 15

Rebuttal process

15.1 ... Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets performance expectations” cannot initiate a rebuttal.

...

15.7 The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

29. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides:

Section 1

Definitions

1.1 Discrimination is any unfair treatment or arbitrary distinction based on a person’s race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. ...

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. ... Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

...

Section 3

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

...

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct.

...

Section 5

Corrective measures

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

...

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct ...

...

5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department ...

...

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

- (a) The name of the alleged offender;
- (b) Date(s) and location(s) of incident(s);
- (c) Description of incident(s);
- (d) Names of witnesses, if any;
- (e) Names of persons who are aware of incident(s), if any;
- (f) Any other relevant information, including documentary evidence if available;

...

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. ...

Consideration

Performance Notice

30. The Respondent submits that the issuance of a Performance Notice is not a final administrative decision that may be appealed but rather a preparatory step in the performance management process. He submits that the issuance of a Performance Notice can only be contested in the context of a final administrative decision adverse to the Applicant, such as a completed performance appraisal.

31. The Appeals Tribunal has stated that what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision, *Andati-Amwayi* 2010-UNAT-058.

32. At the hearing, Mr. Bongzi characterized the decision to issue the Performance Notice as follows:

All this was, was a performance issue. There was a piece of paper that said you didn't follow the procedures and you have to do some retraining. Within a matter of a week, it could have all been done, and with good performance, the Performance Notice would have been taken out of the local file [and] thrown away ... This officer turned it into what it is today by refusing to follow the lawful order of a supervisor to attend retraining.

33. The Tribunal notes that, according to the Performance Notice issued to the Applicant, such a document “*will be reflected* in an individual’s e-Performance Report (emphasis added)”. By Order No. 272 (NY/2015), dated 20 October 2015, the Tribunal ordered the Respondent to answer a number of questions in relation to the legal status and effect of a Performance Notice. The Respondent filed a response on 23 October 2015 and the Applicant filed comments on that response on 27 October 2015.

34. In his response dated 23 October 2015, the Respondent stated that a Performance Notice is issued in the context of performance management under the terms of ST/AI/2010/5 (Performance Management and Development System). He stated that the first step in managing a performance shortcoming is to notify the staff member of the shortcoming. A Performance Notice is not placed on a staff member's Official Status File, but is instead held on an SSS working file for the purpose of performance management. The policy considerations were explained by the Respondent as follows:

The Performance Notice/Notice of Counsel template establishes a consistent approach in the management of a large workforce where supervisors do not enjoy the luxury of fixed worked [sic] stations and consistent administrative hours or administrative support. SSS is a dynamic environment for both supervisors and officers. SSS supervisors are normally tasked with first and second reporting officer duties for a larger number of subordinate officers than comparable supervisors throughout the United Nations System. Further, unlike other departments and sections within the Organization, staff in SSS work various shifts at various times and are directly supervised by a range of supervisors. As a result, all supervisors are not immediately aware of the performance history of a staff member and/or whether they are engaged in remedial measures to address performance issues. For this reason, it is important that these matters be reflected in a working file in order that a range of managers can be made aware of any performance issues current at any particular time. Ultimately, the template developed allows for a user-friendly means by which performance management can be implemented in a transparent and consistent manner, so that "like" performance matters are always similarly managed across SSS.

35. The Respondent further stated:

The Performance Notice is only relevant for the reporting period in which it occurred. Accordingly, if the matters referred to in a Performance Notice are not incorporated in the staff member's end of year assessment then there will be no other reference to the performance shortcoming in the staff member's record.

36. There is no reference to the Performance Notice in the Applicant's electronic performance appraisal system ("e-PAS") reports for the performance cycles 2013–2014 and 2014–2015, which were produced in evidence. Further, the Applicant received an overall rating of "successfully meets performance expectations" for both performance cycles. The Tribunal notes that, in accordance with sec. 15.1 of ST/AI/2010/5, a staff member who receives an overall performance rating of "successfully meets performance expectations" or "consistently exceed performance expectations" cannot initiate a rebuttal. Section 15.7 states that "[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed".

37. The Tribunal finds that the Performance Notice in this case is, for all practical purposes, extinguished. It formed no part of the Applicant's performance appraisal for the performance cycles 2013–2014 and 2014–2015 and will not be referred to in any subsequent e-PAS. In addition, in a submission filed on 30 October 2015, the Respondent confirmed:

The performance notice would not be part of the decision making process in promotion exercises. The notice would only be used if it was reflected in the e-performance being considered in the officer's promotion.

The Respondent noted that the Applicant's performance appraisals have been completed and there is no reference to the Performance Notice. Finally, the Tribunal notes that the Respondent has repeatedly stated that the Notice of Performance has not and will not be placed on the Applicant's Official Status File.

38. The Tribunal finds that this Performance Notice was not reflected in the Applicant's e-PAS and was not placed on the Applicant's Official Status File. The Tribunal concludes that the Performance Notice issued to the Applicant has not, in and of itself, affected his legal rights. Having found that his legal rights

were not affected by the decision to issue the Performance Notice, it is not necessary for the Tribunal to consider the Applicant's other submissions in relation to this issue.

Complaint of harassment and discrimination

39. At the hearing, Mr. Drennan was questioned regarding his consideration of the Applicant's email of 9 July 2014, by which the Applicant forwarded his earlier correspondence with Mr. Bonggi.

40. Mr. Drennan initially stated that he "did not find anything that led me to the conclusion that there was discrimination, harassment ... or the abuse of authority". However, when it was pointed out to Mr. Drennan that his role under ST/SGB/2008/5 was not to determine whether there were any facts that qualified as discrimination or harassment, but rather to assess whether there were sufficient grounds to warrant a formal fact-finding investigation, he agreed. He then stated: "The conclusion drawn by me was that there was insufficient [material] to actually establish that a formal fact-finding investigation should be conducted".

41. The Applicant's email to Mr. Drennan of 9 July 2014 stated that he had documentary evidence that he was willing to provide to an independent and impartial team. At the hearing, Mr. Drennan noted that Mr. Bonggi had already provided the Applicant with an opportunity to present evidence of harassment or discrimination, which the Applicant declined to do. Mr. Drennan noted that "nothing additional" was provided to him in the Applicant's 9 July 2014 email. Although there were allegations of discrimination and harassment, there was nothing to support those allegations, and therefore he reached the conclusion that there were insufficient grounds to warrant a formal fact-finding investigation.

42. At the hearing, Counsel for the Applicant read aloud the following extract from the Applicant's email to Mr. Bongi dated 2 July 2014, which was forwarded to Mr. Drennan on 9 July 2014:

I have several documented records of harassment by supervisors since 2010 until today and I intend to use them to prove the maltreatment I have experienced under these supervisors. When other officers, whose names I will soon give as references, caused accidents at Posts 2, 3, and 103 with the barriers no action was taken against them. Why has Asst. Chief Black, Insp. Patterson and the Investigation Unit decided to discriminate against me?

43. Mr. Drennan was then asked whether, based on this extract, he may have had a ground to warrant a fact-finding investigation. He stated that he stood by his earlier statement that, based on the information before him, he reached the conclusion that there were insufficient grounds to warrant such an investigation. He added that

there is ample opportunity or was ample opportunity for any of those matters to be raised if there was something substantive. And if there was something substantive, then I would have placed weight on that ... But there was nothing raised there which took me to the position to say that I needed to establish a fact-finding mission.

Mr. Drennan noted that Mr. Bongi had already provided the Applicant with an opportunity to disclose such evidence and that the Applicant did not do so but instead put the matter before him.

44. ST/SGB/2008/5 places an obligation on managers to be proactive and responsive in promoting a harmonious workplace and dealing with complaints of prohibited conduct. However, it also states that a complaint or report by an aggrieved staff member should include relevant particulars, including the name of the alleged offender(s), the relevant dates, a description of the incident(s) and any documentary evidence.

45. The Applicant's email to Mr. Drennan on 9 July 2014 included no such information. Nor were sufficient details, as required under ST/SGB/2008/5, included in the email exchanges between the Applicant and Mr. Bonggi, which were forwarded to Mr. Drennan. In these circumstances, the Tribunal finds that it was open to Mr. Drennan to request more information from the Applicant, which he did not do. Whether this failure amounts to an error of law will depend not on what the Tribunal may itself have done in these circumstances but on what any reasonable head of department would have considered appropriate to have done given the overall spirit and intent of the policy under ST/SGB/2008/5.

46. A reasonable head of department would have noted the serious nature of the allegations being presented and that they could amount to allegations of a breach of ST/SGB/2008/5. Consideration would then have been given to the practical reality of workplace interactions and the reasonability and feasibility of requiring the complainant to provide particulars and evidence to one of the senior managers against whom the allegations had been made. A reasonable head of department would have taken full account of the reason why the complaint, indicating that further particulars would be provided, was being made directly to him or her and not, as in this case, to the Chief. The head of department was required under sec. 5.14 of ST/SGB/2008/5 to consider two matters: first, whether the allegations were made in good faith and second, whether there were sufficient grounds to warrant a fact-finding investigation. At no time was it suggested that the Applicant was not acting in good faith. The remaining question is whether it was reasonable and consistent with the policy to conclude, in the circumstances of this case, that a fact-finding enquiry was not warranted.

47. In accordance with sec. 3.2 of ST/SGB/2008/5, Mr. Drennan, as a senior manager, has a duty to take all appropriate measures to ensure a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. The email from the Applicant dated 9 July 2014 placed Mr. Drennan on

notice that, from the Applicant's perspective, there had been a serious breach of ST/SGB/2008/5 and that the matters about which he was concerned were appropriately addressed to Mr. Drennan in accordance with sec. 5.11 of ST/SGB/2008/5. The Applicant put forward serious allegations of discrimination, disparity of treatment and ongoing harassment and stated that he had documented records to support such allegations. He also stated that he was willing to provide such evidence to an independent and impartial investigation team.

48. Given that the Applicant was alleging that Mr. Bongi was himself one of those who had engaged in prohibited conduct, it would appear inconsistent with the letter and spirit of ST/SGB/2008/5 for Mr. Drennan to have referred the matter to the Chief. Given the circumstances, the Tribunal considers that Mr. Drennan should have asked the Applicant to provide such evidence to enable him to determine whether there were sufficient grounds to warrant a formal fact-finding investigation. If the Applicant failed to provide the information that he claimed he had, that may have cast some doubt on the legitimacy of the allegations and raised a question as to whether he was acting in good faith.

49. The Tribunal takes into account that it is for the head of department to exercise a judgment as to whether to call for a fact-finding investigation. So long as the head of department exercises his or her discretion in a lawful manner, taking into account relevant factors and disregarding irrelevant considerations, and provided that in all the circumstances the decision was not irrational or perverse, given the overarching policy considerations under ST/SGB/2008/5, the Tribunal will not interfere. However, the clear policy guidance is that the decision-maker must have regard to the difficult and sensitive nature of such allegations, including the reluctance of those who believe that they have been subjected to conduct in breach of the policy to take those issues up directly with the person whom they consider to be the wrongdoer. The Tribunal considers that, having received allegations of harassment and discrimination, and having

received an undertaking to provide evidence to support those allegations, it was contrary to the policy set out in ST/SGB/2008/5 for Mr. Drennan to conclude, without requesting further particulars or evidence from the Applicant, that there were insufficient grounds to warrant a fact-finding investigation. The Tribunal finds that the decision was procedurally flawed and is accordingly rescinded.

Remedy

50. In his application, the Applicant sought rescission of the decision to issue him with a Performance Notice. In addition, in his closing statement, dated 14 October 2015, the Applicant sought an award of damages in the amount of USD10,000 for the violation of his rights, the rejection of his harassment complaint, the Respondent's retaliation against him, and for emotional distress.

51. Having rejected the Applicant's claims regarding the Performance Notice, the Tribunal will not order any relief under this head.

52. The Tribunal rescinds Mr. Drennan's decision, dated 1 August 2014, to conclude, without any enquiry, that there were insufficient grounds to warrant a fact-finding investigation. The Tribunal considers that the Applicant's requests for protection and equal and fair treatment will be adequately addressed by providing the Applicant with an opportunity, should he so wish, to resubmit his complaint to Mr. Drennan, along with the necessary particulars and evidence, if any, in support thereof. Failure to provide such particulars will entitle Mr. Drennan to close the file on this complaint.

53. The Appeals Tribunal has consistently held that not every breach will lead to an award of moral damages. Compensation may only be awarded if it has been established that the staff member actually suffered harm. The Tribunal may thus award compensation for actual pecuniary or economic loss, non-pecuniary damage, stress and moral injury (See, for example, *Antaki* 2010-UNAT-095,

paras. 20–21). Whether or not a breach will give rise to an award of moral damages will necessarily depend on the nature of the evidence put forward before the Dispute Tribunal (*Andreyev* 2015-UNAT-501, para. 33).

54. By Order No. 271 (NY/2015), dated 20 October 2015, the Applicant was ordered to provide a concise submission and any evidence in support of his request for compensation for emotional distress.

55. In his response to Order No. 271 (NY/2015), filed on 23 October 2015, the Applicant provided a note from a doctor dated 10 September 2015 that stated that the Applicant was receiving treatment for certain health issues. The doctor expressed the opinion that the Applicant was unable to return to work at the date the note was written, due to the recorded health issues. The doctor also stated: “I recommend that Mr. Omwanda be approved for disability”.

56. On the basis of the evidence before the Tribunal it is not possible for the Tribunal to make a definitive finding that there is a causal link between the failure properly to examine the Applicant’s complaint of harassment and discrimination and his current health issues. However, it is reasonable for the Tribunal to conclude, on the basis of the totality of evidence, and all the circumstances of this case, that for the Applicant to have been informed that the USG/DSS decided not to establish a fact-finding enquiry but to refer his complaint back to the Chief, who was one of the individuals against whom he was making the allegations, must have caused him a significant, though not excessive, degree of distress for which the Applicant is entitled to compensation. The Tribunal assesses this in the sum of USD3,000.

Orders

57. The Applicant’s claims regarding the issuance of the Performance Notice are rejected.

58. Mr. Drennan's decision, made in the absence of any enquiry, that there were insufficient grounds to warrant the establishment of a fact-finding investigation is rescinded.

59. Should the Applicant wish to resubmit his complaint to the Head of Department, he shall provide Mr. Drennan with the necessary information and particulars within 30 days of the date of this judgment.

60. Mr. Drennan shall consider any submission from the Applicant in accordance with ST/SGB/2008/5 and provide a response to the Applicant.

61. Failure on the part of the Applicant to submit the necessary particulars within 30 days of the promulgation of this judgment will entitle Mr. Drennan to close the file.

62. The Respondent is ordered to pay to the Applicant the sum of USD3,000. The amount shall be paid with interest at the United States prime rate with effect from the date that this Judgment becomes executable until payment of the said amount. An additional five per cent shall be added to the United States prime rate 60 days from the date this Judgment becomes executable.

Observation

63. Given the fact that the Applicant is on long-term sick leave the Respondent may, if the Applicant consents, consider that, in the circumstances of this case, it may well be in the interest of the Applicant, the DSS and the Organization, to pay heed to the Applicant's doctor's advice that a disability benefit is an appropriate and suitable option to pursue.

(Signed)

Judge Goolam Meeran

Dated this 3rd day of November 2015

Entered in the Register on this 3rd day of November 2015

(Signed)

Hafida Lahiouel, Registrar, New York