UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/013
Judgment No.: UNDT/2016/036
Date: 22 April 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stéphanie Cochard, UNOG
Kara Nottingham, UNOG

Introduction

1. The Applicant, a former Investigator at the P-4 level in the Investigations Division ("ID") in the Office of Internal Oversight Services ("OIOS") of the United Nations Secretariat, contests the decision taken by the then Under-Secretary-General ("USG") of OIOS to refer the investigation report of a fact-finding panel formed under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) to the then Assistant Secretary-General ("ASG"), Office of Human Resources Management ("OHRM"). As remedy, the Applicant requests that the impugned decision be rescinded.

2. The Respondent claims that the application is not receivable *ratione materiae* as it does not concern a final administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute, but a preliminary step in the process initiated in accordance with ST/SGB/2008/5.

3. By Order No. 26 (NY/2016) dated 1 February 2016, the Tribunal determined that the preliminary issue of receivability *ratione materiae* was to be decided on the papers before it and ordered the parties to file their closing submissions.

Factual and procedural background

4. On 20 December 2013, the Dispute Tribunal issued *Nguyen-Kropp & Postica* UNDT/2013/176.

5. On 14 January 2014, on a white board in ID/OIOS, was written: "If the facts don't fit the theory, change the facts – Albert Einstein". In reference to the Dispute Tribunal's judgment in *Nguyen-Kropp & Postica* and for satirical purposes, the Applicant changed the ending to read: "If the facts don't fit

the theory, change the photographs" and attributed the quote to another staff member in OIOS.

6. By memorandum dated 17 January 2014, the Applicant's first reporting officer requested the Director of ID/OIOS to initiate a formal investigation into the matter in accordance with sec. 5.11 of ST/SGB/2008/5.

7. By interoffice memorandum dated 31 January 2014, the then USG/OIOS appointed a fact-finding panel to investigate the first reporting officer's report against the Applicant for prohibited conduct under ST/SGB/2008/5. On the same date, by interoffice memorandum, the then USG/OIOS informed the Applicant of the initiation of the fact-finding investigation and the establishment of the panel.

8. On 4 February 2014, the Applicant requested management evaluation of this decision and, after receiving the management evaluation response on 10 March 2014, he appealed the decision to the Dispute Tribunal (Case No. UNDT/NY/2014/017). In *Gallo* UNDT/2015/073, the Tribunal dismissed the Applicant's application against this decision as not receivable, and the decision was not appealed.

9. On 31 March 2014, the fact-finding panel submitted its investigation report concluding that the Applicant's actions and behavior towards one of his OIOS colleagues constituted harassment under sec. 2.2 of ST/SGB/2008/5.

10. By a memorandum dated 9 April 2014, the USG/OIOS forwarded the fact-finding panel's investigation report to the ASG/OHRM for her consideration of disciplinary action against the Applicant and informed the ASG/OHRM that the USG/OIOS concurred with the finding that the Applicant's behavior together with continuing actions following the complaint constituted misconduct.

11. By a note dated 29 October 2014, the USG of the Department of Management ("DM") advised the then Chef de Cabinet that the matter would be more suitably assessed and administered by an entity outside the United Nations Secretariat in order to avoid the appearance of any potential conflict of interests, and therefore it would be transferred to the United Nations Children's Fund ("UNICEF").

12. On 6 November 2014, the USG/DM requested the Executive Director of UNICEF to assess and administer the possible disciplinary matter concerning the Applicant and, on the same day, approval was provided on behalf of the Secretary-General for delegating authority with regard to this matter to UNICEF.

13. By memorandum dated 1 December 2014, the USG/DM informed the Applicant that the fact-finding panel had found that the available evidence supported the allegations that he had engaged in conduct amounting to harassment, as defined by sec. 1.2 of ST/SGB/2008/5. The USG/DM further stated that the Secretary-General had decided to delegate to UNICEF the authority to assess and make a final recommendation on the resolution of the matter.

14. On 5 January 2015, the Applicant presented his comments to the fact-finding panel's investigation report.

15. On 16 January 2015, the Applicant requested a management evaluation of the contested decision.

16. The present application was filed on 26 February 2015.

17. Following its administrative completion, the application was served on the Administrative Law Section ("ALS") in OHRM in New York on 12 March 2015. The Respondent was instructed to file his reply within 30

calendar days of the date of receipt of the application, namely by 13 April 2015, pursuant to art. 10 of the Dispute Tribunal's Rules of Procedure.

18. By letter dated 17 March 2015, the Applicant received a response to his request for management evaluation, by which the then Chef de Cabinet decided to uphold the contested decision.

19. On 30 March 2015, the Respondent filed a submission/motion notifying the Tribunal of a change of counsel and requesting a 30-day extension of time to file his reply.

20. On the same day, the Tribunal (Duty Judge) issued Order No. 51 (NY/2015), by which the Respondent was instructed to file a reasoned request for the substitution of counsel and the Applicant was allowed to file his comments on the Respondent's request. An extension of time to file the Respondent's reply until 27 April 2015 was also granted.

21. By letter dated 1 April 2015, the Deputy Secretary-General informed the Applicant that he had accepted UNICEF's recommendation that "the current letter will serve as a written reprimand, issued pursuant to Staff Rule 10.2(b), which shall be placed in [the Applicant's] Official Status File".

22. The parties filed their submissions pursuant to Order No. 51 (NY/2015) on 6 and 7 April 2015.

23. By Order No. 62 (NY/2015) dated 10 April 2015, the Applicant was requested to confirm his current and future location for purposes of all further proceedings and to indicate whether he was still represented by the Counsel of record; the Respondent was granted a further extension of time to file his reply until 26 May 2015.

24. The Applicant duly filed his submission according to Order No. 62 (NY/2015) on 16 April 2015.

25. By Order No. 67 (NY/2015) dated 23 April 2015, the Tribunal (Duty Judge) granted the newly assigned Counsel for the Respondent (the current Counsel on record) access to all filings and confirmed the deadline for the Respondent's reply.

26. The Respondent's reply was filed on 26 May 2015.

27. By Order No. 99 (NY/2015) dated 29 May 2015, the Tribunal (Duty Judge) ordered the Applicant to file a response, if any, to the receivability issues raised by the Respondent in his reply. The Order was transmitted to the email account of the Applicant but not to his Counsel. No response was filed by the Applicant on or before the set deadline (29 June 2015).

28. By Order No. 191 (NY/2015) dated 24 August 2015, the Tribunal (Duty Judge) instructed the Registry to transmit Order No. 99 to the Counsel for the Applicant. The Applicant was instructed to file a response, if any, to the receivability issues raised in the Respondent's reply by 31 August 2015 and to file the standard "Legal Representative Authorization Form".

29. The Applicant filed the above-said authorization form on 25 August 2015, and by submission dated the same day, declined to file any "further submissions on the matter".

30. By Order No. 245 (NY/2015) dated 28 September 2015, the Tribunal (Duty Judge) ordered the present case to join the queue of pending cases and be assigned to a Judge in due course. The Tribunal further noted that it had a backlog of cases awaiting assignment and that cases are generally considered by the Tribunal based on the date of submission of the application (i.e., first priority is normally given to older cases).

31. The case was assigned to the undersigned Judge on 14 January 2016.

32. By Order No. 26 (NY/2016) dated 1 February 2016, the Tribunal informed the parties that it did not consider that any further evidence would be required at this stage and that the preliminary issue of receivability of the application would be decided based on the papers before it. The Tribunal ordered the parties to file their closing submissions on the preliminary issue of receivability, based solely on and summarizing their submissions already on record by 26 February 2016.

33. By email dated 8 February 2016 (filed in the eFiling portal on 19 February 2016), the Applicant informed the Tribunal that, due to the withdrawal of his Counsel from the cases, he would "proceed with the litigation *pro se*".

34. On 19 and 26 February 2016, the Applicant and the Respondent, respectively, filed their responses to Order No. 26 (NY/2016).

Respondent's submissions on receivability

35. The Respondent's contentions on receivability may be summarized as follows:

> a. Article 2.1(a) of the Dispute Tribunal's Statute provides that the Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual "to appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment". The former United Nations Administrative Tribunal defined the meaning of an administrative decision in Judgment No. 1157, *Andronov* (2003). In *Planas* UNDT/2009/086, the Dispute Tribunal held that an administrative decision can only be considered as such if, *inter alia*, it has "direct legal consequences (effects) on an individual's rights and obligations". This was confirmed in *Andati-Anwayi* 2010-UNAT-058 and *Nwuke* 2010-UNAT-099, to the effect that whether a contested decision amounts to an administrative decision is

determined by whether the contested administrative decision impacts a staff member's rights directly;

b. Based on the foregoing, the contested decision does not produce direct legal consequences for the Applicant, as it cannot be characterized as a final administrative decision, and was only a preparatory step in reaching a final conclusion in the process. Only the final decision made under sec. 5.18(c) of the ST/SGB/2008/5 constitutes the conclusion of the formal procedures and a final and contestable administrative decision. It is not until the process is completed or abandoned that the subject of an investigation has a decision that affects the terms of his or her contract, in accordance with art. 2.l(a) of the Dispute Tribunal's Statute;

c. The qualification of the contested decision may be either the closure of the case, or the completion of the case and imposition of a disciplinary or administrative measure. The final decision in the present case is qualified as the issuance of the written reprimand on 1 April 2015. This reasoning is also in line with the Appeals Tribunal's ruling in *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 32;

d. Similarly, all of the steps in an ongoing selection process prior to the final selection decision are qualified as a preparatory decision which is one of a series of steps which lead to a final and contestable administrative decision (*Ishak* 2011-UNAT-152, para. 29). In this connection, the Dispute Tribunal has held that issues such as the composition of the rebuttal panel can only be challenged in the context of an appeal against the outcome of that process, but cannot alone be the subject of an application;

e. This position on the non-receivability was endorsed by the Appeals Tribunal in *Nguyen-Kropp & Postica* 2015-UNAT-509, on two appeals

filed by the Secretary-General against three judgments rendered by the Dispute Tribunal, including one appeal against two judgments on receivability dated 22 February 2013 (*Nguyen-Kropp* UNDT/2013/028 and *Postica* UNDT/2013/029), and the other appeal against the judgment on the merits (*Nguyen-Kropp & Postica* UNDT/2013/176). Particular reference is made to paras. 34 and 35 of *Nguyen-Kropp & Postica* 2015-UNAT-509, in which the Appeals Tribunal vacated the Dispute Tribunal's judgments on receivability, and consequently the judgment on the merits. This holding is applicable in the present case, as the Applicant is not contesting any actual final decision taken under ST/SGB/2008/5;

f. The application should therefore be rejected in its entirety as not receivable. The contested decision does not have any adverse legal consequences on the Applicant's rights and obligations and he failed to allege how this decision violated his contract of employment or terms of appointment.

Applicant's submissions on receivability

36. By Order No. 99 (NY/2015), the Tribunal requested the Applicant to "file a response, if any, to the receivability issues raised by the Respondent's in his reply". In his 25 August 2015 response, the Applicant stated that he "respectfully declines to make further submissions on the matter". The Applicant's new arguments made in his 19 February 2016 closing statement are therefore not set out here as Order No. 26 (NY/2016) explicitly instructed the parties to base these "solely on and summarizing … submissions already on record". The Applicant's contentions included in his application may be summarized as follows:

a. Upon receipt of the fact-finding panel's investigation report, the USG/OIOS erred in failing to identify that the procedural and

substantive errors in the report were such that it cannot reasonably be described as "well founded" within the meaning of ST/SGB/2008/5;

b. As such, the USG/OIOS's decision to refer the fact-finding panel's investigation report to ASG/OHRM, particularly with an endorsement that she "concurred" with their *ultra vires* finding, is a decision that no reasonable person, acting reasonably, could have made;

c. The decision to refer the fact-finding panel's investigation report to ASG/OHRM was tainted by bad faith and was made for a retaliatory purpose.

Consideration

Applicable law

37. Articles 2 and 8 of the Statute of the Dispute Tribunal state in relevant parts:

> **Article 2**
>
> 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;
>
> (b) To appeal an administrative decision imposing a disciplinary measure;
>
> (c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

…

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

…

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

38. Articles 7 and 35 of the Tribunal's Rules of Procedure state in relevant parts:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

…

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

…

Article 35 Waiver of time limits

Subject to article 8.3 of the statute of the Dispute Tribunal, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.

39. Staff rules 11.2 and 11.4 state in relevant parts:

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing

a request for a management evaluation of the administrative decision.

…

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

…

Rule 11.4

United Nations Dispute Tribunal

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

40. Sections 5.14 to 5.18 of ST/SGB/2008/5 provide as follows (footnote omitted):

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from

the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

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

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

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

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

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

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

> (c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

Receivability framework

41. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae, ratione materiae,* and *ratione temporis* (*Pellet* 2010-UNAT-073; *O'Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

42. In the present case, the Respondent states that the application is not receivable *ratione materiae* because the contested decision is not a final administrative decision which impacted on the staff member's rights directly but rather only a preparatory decision under ST/SGB/2008/5.

43. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United

Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and art. 7.1–7.3 of the Rules of Procedure.

44. It results that for being considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae *and* ratione temporis

45. The Applicant—a former OIOS staff member—filed a management evaluation request of the contested decision on 16 January 2015 and the present application on 26 February 2015, within 90 days of the expiry of the relevant response period for management evaluation. Consequently, the application is receivable *ratione personae* and *ratione temporis*. The Tribunal will therefore consider whether the application is also receivable *ratione materiae*.

Receivability ratione materiae

46. The Tribunal notes that, pursuant to secs. 5.14 to 5.18 of ST/SGB/2008/5, a formal fact-finding investigation starts when the responsible office appoints

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 relevant roster kept by OHRM.

47. After being appointed, the fact-finding panel shall:

a. Inform the alleged offender of the nature of the allegations against him or her (sec. 5.15);

b. Interview the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged (sec. 5.16); and

c. Prepare and submit a detailed report giving a full account of the facts that they have ascertained in the process together with the documentary evidence (written statements by witnesses or any other documents or records relevant to the alleged prohibit conduct (sec. 5.17)).

48. Based on the report, the responsible official shall take a decision (sec. 5.18). Therefore, the report prepared and submitted by the fact-finding investigation panel may only include one of the following findings:

a. That no prohibited conduct took place. In this case, the decision-maker is the responsible official who must decide to close the case (see *Ivanov* 2015-UNAT-519) and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation (sec. 5.18(a)). In cases where the report indicates that the allegations of prohibit conduct were unfounded and based on malicious intent, two decisions are to be made: one by the responsible official based on the panel's indications that the allegations were unfounded (no prohibited conduct took place); and one by the ASG/OHRM based on the panel's indication that the allegations were

based on malicious intent. Therefore, the panel shall submit the report not only to the responsible official but also to the ASG/OHRM who, in such cases, shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or the report (secs. 5.18(a) and 5.19);

b. That there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action. In this case, the decision-maker is the responsible official who shall decide on a type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. The managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counseling or appropriate corrective measures. The responsible official shall also inform the aggrieved individual of the outcome of the investigation and of the action taken (sec. 5.18(b));

c. That the allegations were well-founded and that the conduct in question amounts to possible misconduct. In this case the decision-maker is not the responsible official, but the ASG/OHRM. After receiving the report, the responsible official shall refer the matter to the decision maker, namely the ASG/OHRM. The ASG/OHRM will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken (sec. 5.18(c)).

49. In conclusion, the responsible official (sec. 5.18(a) and (b)) and/or the ASG/OHRM (secs. 5.18(c) and 5.19) must take decision(s) following the mandatory courses of action expressly stated in secs. 5.18(a)-(c) and 5.19 based on the indications from the report of the fact-finding panel, including

the indication if the complaint was made in good faith or was based on malicious intent.

50. The Tribunal notes that as results from the above considerations, the fact-finding panel concluded that the Applicant's actions and behavior towards his OIOS colleague constituted harassment as defined in para. 2.2 of ST/SGB/2008/5 and, in this case, pursuant to sec. 5.18(c), the responsible official had the obligation ("shall") to refer the matter to the ASG/OHRM for disciplinary action. Therefore, the contested decision is of a preliminary nature and not a final administrative decision with direct and independent legal consequences on the alleged offender's legal rights.

51. Section 5.20 of ST/SGB/2008/5 states that:

> Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

52. This section is the last subsection ("Formal procedures") of sec. 5 ("Corrective measures") of ST/SGB/2008/5. The Tribunal is of the view that, since this provision is inserted at the end of the section after all the formal procedures are presented and its content indicates expressly that an appeal may be filed pursuant to Chapter XI of the Staff Rules where the aggrieved individual or alleged offender has grounds to believe that "the procedure" followed in respect to the allegations of prohibited conduct was improper, the appeal can only be filed after the entire formal procedure has been finalized, including the issuance of the final administrative decision by the decision-maker. This interpretation is in line with the content of staff rule 11.4(a) which states that an application against a contested administrative decision may be filed with the Dispute Tribunal.

53. In *Nguyen-Kropp & Postica* 2015-UNAT-509, the Appeals Tribunal held that:

> 31. … Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.
>
> 32. This accords with another general principle that tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

54. The findings of the Appeals Tribunal are binding for the Dispute Tribunal and they are applicable in similar cases (*Igbinedion* 2014-UNAT-410, paras. 23-25; *Zeid* 2014-UNAT-401, para. 22; and *Hepworth* 2015-UNAT-503, para. 40).

55. As results from the above considerations, the contested decision in the present case is not a final decision but a preliminary step after the fact-finding panel has completed its investigation report. Therefore, the contested decision is not an administrative decision capable of being appealed before the Tribunal and the above mentioned pronouncements of the Appeal Tribunal are fully applicable in this case.

56. The Tribunal further observes that, on 2 July 2015, the Applicant filed an application registered before the Dispute Tribunal under Case No. UNDT/NY/2015/041, challenging the final determination of 1 April 2015 made pursuant to a complaint of harassment under ST/SGB/2008/5 against the Applicant.

57. In conclusion, the application is not receivable *ratione materiae* and is to be rejected by the Tribunal without further analysis of the grounds of appeal and requested remedies.

Conclusion

58. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected as non-receivable.

(*Signed*)

Judge Alessandra Greceanu

Dated this 22nd day of April 2016

Entered in the Register on this 22nd day of April 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York