



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

NIKWIGIZE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Susan Maddox, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. On 5 June 2016, the Applicant, a former Senior Programme Officer at the P-5 level in the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (“OHRLLS”), filed an application contesting the decision issued on 17 December 2015 by the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) on 3 June 2015 against the Under-Secretary-General of OHRLLS (“USG/OHRLLS”) and a Director in OHRLLS (“the Director”).

2. He requests the following remedies:

(a) As a matter of urgency, the UN should conduct a comprehensive investigation on allegations of racial discrimination, abuse of authority, harassment and threats in [the OHRLLS], including the racial discrimination incidents against African staff members, the selection process of new staff members and panel members. This investigation should be coordinated by [the Office of the Ombudsman], and possibly with the participation of designated experts from Member States. At the conclusion of the investigation, appropriate measures should be taken to address identified issues, including designate African staff members at decision-making level of the office;

(b) The United Nations Dispute Tribunal is requested to accept the present complaint as receivable and that it has merit, as it is related to key values of the United Nations Organization and its Charter. The UN Administration cannot just refute the validity of allegations by asking those who are accused to provide their version. I can prove that responses provided are correct, in particular with regard to the recruitment process. One of the Chiefs in the Office has made similar complaint and this complaint corroborates my allegations. A quite big number of staff members in the office can testify these facts, if asked to.

(c) The United Nations Dispute Tribunal is requested to re-consider disciplinary measures taken against me, in particular the unlawful and harsh dismissal, and reinstate separation indemnity and compensation for loss of employment, for the rest of years, before my retirement date (31/03/2019 or 31/03/2022), the loss of physical integrity and health, as documented by several days of sick-leave.

3. In his reply, the Respondent opposes the application in its entirety and denies all claims, allegations and assertions made by the Applicant.

### **Relevant factual and procedural history**

4. On 23 April 2015, while the investigation concerning the Applicant's alleged misconduct was underway, the Applicant sent a letter to the Secretary-General complaining of "race-based discrimination experienced by some staff members in [OHRLLS]". Amongst others, the Applicant alleged that the Director had maliciously initiated the investigation against him. The Applicant stated that he had reported his concerns to the USG/OHRLLS, but had not received a response. He sought the Secretary-General's intervention to find "an agreeable solution".

5. On 28 April 2015, the USG/OHRLLS wrote to the Applicant to inform him that he had reviewed the Applicant's concerns, made inquiries and concluded that the Applicant's allegations of discrimination were unfounded.

6. On 3 June 2015, the Applicant submitted a formal complaint of discrimination under the provisions of ST/SGB/2008/5 to the ASG/OHRM against the USG/OHRLLS and the Director.

7. On 25 August 2015, in a memorandum from the OIOS, it was alleged that the Applicant had engaged in misconduct by submitting to the Organization in or about 2011 and 2012, one or more education grant claims and/or related documentation that contained false, misleading, inaccurate and/or incorrect information, signatures and/or stamps.

8. On 3 September 2015, the ASG/OHRM requested the USG/OHRLLS and the Director to provide their comments on the Applicant's complaint. On 18 September 2015, the Tribunal referred another separate case, also filed by the Applicant, to mediation. Thereafter, formal consideration of the Applicant's complaint under ST/SGB/2008/5 was suspended pending attempts to reach a global informal settlement.

9. On 21 September 2015, the USG/OHRLLS and the Director provided their comments on the Applicant's complaint to the ASG/OHRM.

10. By memorandum dated 25 September 2015, the Applicant submitted his comments on the allegations of misconduct stating, *inter alia*, that:

... The OIOS report has assessed thoroughly the various submissions for education grant claims. [The Applicant] accepts that the P-41 Form submitted for [JN] for 2010-2011 was false as well as the one submitted for [K and K] for the first term 2011-2012...“.

... The Applicant sincerely apologize[s] for these two false submissions. [He] accept the responsibility on the account of oversight and/or negligence.

11. On 30 November 2015, the Applicant received a letter from the Officer-in-Charge of the Office of Human Resource Management dated 27 November 2015, stating that the Under-Secretary-General for Management had decided to impose on him the disciplinary measure of dismissal in accordance with Staff Rule 10.2(a)(ix). (The Tribunal notes that, on 12 March 2016, the Applicant filed an application contesting his dismissal to the Dispute Tribunal in Case No. UNDT/NY/2016/008; that this application was rejected as not receivable by the Dispute Tribunal in *Nikwigize* UNDT/2016/110; and that this Judgment is currently under appeal before the Appeals Tribunal).

12. On 17 December 2015, the ASG/OHRM informed the Applicant of the impugned decision, providing also her reasons.

13. On 15 February 2016, the Applicant requested management evaluation of the decision not to investigate his complaint, i.e. the impugned decision.

14. On 8 March 2016, the Under-Secretary-General for Management informed the Applicant of the decision to uphold the decision not to investigate his complaint.

15. On 5 June 2016, the Applicant filed the application to the Dispute Tribunal contesting the ASG/OHRM decision not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 on 3 June 2015 against the USG/OHRLLS.

16. On 6 June 2016, the Registry transmitted the application to the Respondent, who was notified that the deadline for filing his reply was on 7 July 2016.

17. On 6 June 2016, the case was assigned to the undersigned Judge.

18. On 14 June 2016, the Respondent filed his reply, submitting that the application is without merit because the procedural issues invoked by the Applicant regarding the contested decision do not constitute violations of ST/SGB/2008/5 and the remainder of his contentions are in part not receivable and in part without merit.

19. By Order No. 194 (NY/2016) dated 10 August 2016, the Tribunal ordered the Respondent to file the comments and documents provided to the MEU by OHRM by 26 August 2016, the Applicant to file his comments thereon, if any, by 9 September 2016, and the parties to file their closing submissions by 26 September 2016.

20. On 24 June 2016, the Respondent filed his response to Order No. 194 (NY/2016) together with the requested documents.

21. On 23 September 2016, the Respondent filed his closing submissions, and so did the Applicant on 24 September 2016.

### **Applicant's submissions**

22. The Applicant's principal contentions may be summarized as follows:

a. Racial discrimination is a serious violation of the United Nations Charter and the Staff Regulations and Rules. The Under-Secretary-General for Management, instead of addressing the issue of racial discrimination in the Office of the USG/OHRLLS, supported the responses provided by the ASG/OHRM, without addressing the questions raised, and the Administration has been reluctant to undertake an investigation on the accountability of managers. Facts are available, such as the number of Africans who are serving in that Office in November 2015 compared with their number in 2012. A number of the Applicant's allegations remains unanswered on purpose;

b. In a hand-over memorandum, a former OHRLLS staff member alerted the USG/OHRLLS about irregularities in the recruitment process of the 10 new posts allocated to OHRLLS, in particular regarding the selection of a European. It was pointed out how European staff had been favoured, but all allegations, with details and supporting documents, were never considered and reviewed;

c. With regard to the promotion of a European staff member, during a meeting, the Applicant had raised the question why this type of recognition was not granted similarly to other units. The response was that

the USG/OHRLLS had decided to reward the concerned staff member for her dedication to Least Developed Countries issues. Staff members present at the meeting wondered what type of dedication she had shown, apart from doing her normal assignments; this also meant that all other staff members did not dedicate themselves to their work, and therefore did not deserve any recognition.

d. Surprisingly, in the letter from the ASG/OHRM on allegations of racial discrimination, the concerned Director stated that the staff in question, from her own country, was recruited before she joined the office, which is completely false as the concerned staff has joined the office in November 2015;

e. Despite the fact the United Nations has positioned itself as the leading voice against any form of discrimination, harassment, sexual abuse and threats, through General Assembly resolutions and the Staff Rules and Regulations, facts demonstrate that the Secretary-General has not been able to take appropriate disciplinary measures against managers who are responsible of wrongdoings, particularly issues of racial discrimination and abuse of authority. Rather, the Secretary-General is favouring a culture of impunity and is partial. Instead of properly investigate the allegations raised, the Administration chose to mischaracterize the Applicant's allegations as false and inaccurate. It is important that the Secretary-General acts on the accountability referrals made and does not try to protect bad managers;

f. The Secretary-General failed to enforce accountability pursuant to the UN Charter. The Administration had consistently violated ST/SGB/2008/5, that states in its introduction that: "United Nations staff members must be treated with dignity and respect and United Nations

workplace should be free of any form of discrimination”. The same Bulletin stipulates in sec. 3.2 that:

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. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

g. In the context of the injustice to Africans, and as one of the senior officers in the office, the Applicant was targeted to be pushed to leave. The process started well before the OIOS investigation regarding the education grant claims submissions started in September 2013. In the Applicant’s previous complaints, he highlighted various incidents of discrimination that he was subjected to since 2012. Therefore, contrary to what the Management Evaluation Unit stated, prior to blowing the whistle of racial discrimination actions within the office, the Applicant consistently received positive performance evaluations that described him as “collegial and enjoying respect from colleagues” or “easy person to work with”, or “appreciative of frank comments and out-of-box views that have enriched the work of the Office”, etc.;

h. The unlawful treatment by managers has impacted not only on the Applicant’s physical integrity and health, but affected his reputation as a respected and mature person. The decision taken by the Administration of his dismissal was unlawful and disproportionate. There were issues under consideration by the Dispute Tribunal and the OIOS that were expected to be



completed by end of December 2015. The fact that the Administration hurried up to take such a decision of dismissal on 30 November 2015, without going through regular channels of mediation of disputes, is a clear indication that the Office had prepared this dismissal well in advance. The following day, after the Executive Officer handed over the dismissal letter, the Applicant was prevented for entering the United Nations premises. To date, the Applicant has not been allowed to collect his personal files and documents, except once at the request of the Dispute Tribunal judge, but with a heavy United Nations police escort and guard.

### **Respondent's submissions**

23. The Respondent's principal contentions may be summarized as follows:
- a. The Tribunal does not have jurisdiction to review the substance of a complaint under ST/SGB/2008/5 but, rather, is limited to assessing the propriety of the procedure applied by the Administration. In this regard, section 5.20 of ST/SGB/2008/5 grants staff members the right to appeal "the procedure followed in respect of the allegations of prohibited conduct". The Appeals Tribunal and the Dispute Tribunal have confirmed that the right of appeal under ST/SGB/2008/5 is limited to procedural matters;
  - b. The Applicant identifies four procedural issues in his application:
    - i. The ASG/OHRM's decision to request comments from the USG/OHRLLS and the Director prior to deciding whether to investigate the Applicant's complaint;
    - ii. The time taken to handle his complaint;
    - iii. The Secretary-General's alleged failure to personally respond to the Applicant's letter dated 23 April 2015;

- iv. The ASG/OHRM's alleged failure to consider the contents of a handover note, submitted by a former OHRLLS staff member to the USG/OHRLLS on 25 August 2015, when deciding whether to investigate the Applicant's complaint of harassment. The handover note alleged irregularities in the recruitment of an OHRLLS staff member;
- c. None of the foregoing issues amount to procedural violations of ST/SGB/2008/5:
  - i. The ASG/OHRM's decision to request comments from the USG/OHRLLS and the Director prior to deciding whether to investigate was legal. The Appeals Tribunal has held that, "[w]here there was no risk of undermining the investigation, it is good practice to hear both sides in order to decide whether there are sufficient grounds to warrant establishing a formal fact-finding investigation and assigning the case to a panel". Furthermore, the ASG/OHRM did not rely solely on the comments of the USG/OHRLLS and the Director, but also on documentary evidence, including personnel records and the Applicant's own account of events, which directly contradicted many of his allegations;
  - ii. The time taken to handle the Applicant's complaint was reasonable. The Administration reviewed the complaint; obtained personnel records and other relevant information; sought comments from the subjects; reviewed the subjects' comments; consulted internally in respect of the complaint against the USG/OHRLLS; assessed the matter; and conveyed the outcome of the matter to the Applicant, with a detailed decision letter. Notably, consideration of the complaint was suspended for two months, during which

the possibility of a global resolution was explored with the Applicant in mediation. The Applicant was in no way prejudiced by the time taken to handle his complaint, particularly given that there was no discrimination to be remedied;

iii. The fact that the Secretary-General did not personally respond to the Applicant's letter of 23 April 2015 was not a procedural violation of ST/SGB/2008/5. First, the need for a response from the Secretary-General was obviated by the fact that, on 28 April 2015, the USG/OHRLLS provided a response to the Applicant. Second, the Applicant's letter to the Secretary-General did not constitute a formal complaint under ST/SGB/2008/5 or any other formal issuance of the Organization. As such, it did not trigger any formal obligation on the part of the Administration to provide a response;

iv. The handover note from a former OHRLLS staff member to the USG/OHRLLS postdated the Applicant's complaint of discrimination by more than two months. The Applicant did not provide this handover note to the ASG/OHRM or to the Management Evaluation Unit, despite the fact that section 5.18 of ST/SGB/2008/5 establishes a clear obligation on the complainant to submit "any [...] evidence and information relevant to" his or her complaint. Nevertheless, the handover note came to OHRM's attention through a separate process involving the author of the handover note. The allegations contained in the handover note were reviewed and found to be unsubstantiated. Accordingly, the Applicant's allegations that the handover note was not considered are without merit;

d. The remainder of the Applicant's contentions are not receivable and/or without merit. In particular:

- i. With the exception of the alleged procedural defects addressed above, the application is, largely, a reiteration of the Applicant's complaint filed with the ASG/OHRM on 23 April 2015. In essence, the Application requests the Tribunal to decide that the Applicant's complaint of discrimination had merit and, therefore, that it should have been investigated. As such, the Applicant is requesting the Tribunal to undertake a substantive review of the matter, which falls outside the scope of review permitted by section 5.20 of ST/SGB/2008/5;
- ii. Should the Tribunal nevertheless decide to undertake a substantive assessment of the Applicant's complaint, the Respondent relies on the considerations set out in the decision letter to the Applicant dated 17 December 2015, and in the management evaluation letter dated 8 March 2016. As set out therein, the Applicant's complaints of discrimination were without merit. Notably, a number of the Applicant's assertions were contradicted by personnel records and/or the Applicant's own account of events;
- iii. The Applicant's submissions regarding his dismissal for misconduct are not receivable. The Applicant has challenged his dismissal in a separate application (Case No. UNDT/NY/2016/008), and his claims are, therefore, duplicative in nature. Furthermore, his submissions regarding his dismissal are not receivable for the reasons set out in the Respondent's submissions in Case No. UNDT/NY/2016/008;
- iv. The Applicant's submissions regarding his request for transfer to Rabat and his request for early retirement are not receivable. The Applicant has not sought management evaluation of those

decisions and he is well outside of the statutory time limits for contesting them;

- v. The Applicant's submissions regarding complaints filed with the OIOS and/or the Ethics Office are not receivable, as they have not been the subject of a request for management evaluation.

## **Consideration**

### *Applicable law*

24. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides, in the relevant part, as follows:

### **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. The aggrieved individual may opt for an informal or a formal process, as explained below. 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.

5.2 All reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of the individuals concerned and ensure confidentiality to the maximum extent possible.

...

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

*Receivability framework*

25. 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, and *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 of the Dispute Tribunal prevents it from considering cases that are not receivable.

26. 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 arts. 7.1–7.3 of the Rules of Procedure.

27. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

*Receivability ratione personae and ratione materiae*

28. The Tribunal notes that the Applicant is a former Senior Programme Officer at the P-5 level in the OHRLLS and therefore the application is receivable *ratione personae*.

29. The Applicant is challenging the decision issued on 17 December 2015 by the ASG/OHRM not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 on 3 June 2015 against the USG/OHRLLS. It is uncontested that the Applicant requested a management evaluation review on 15 February 2016, within 60 days from the date of notification and the application is receivable *ratione materiae*.

*Receivability ratione temporis*

30. Pursuant to mandatory provisions of art. 8.1(d) of the Dispute Tribunal's Statute ("shall"), for an application to be receivable it must be filed within the applicable deadlines, which in cases like the present one, where a management evaluation of the contested decision is required, is "90 calendar days [as] of the applicant's receipt of the administrative decision".

31. The Tribunal notes that the contested decision challenged by the Applicant was communicated to him on 17 December 2015. Therefore, pursuant to art. 8.1(d)(ii) of the Dispute Tribunal's Statute, an appeal against this decision was to be filed within 90 days from the date of communication of the response to the management evaluation request of 8 March 2016, notably by 8 June 2016. It



results that the application submitted on 5 June 2016 was filed within the mandatory time limit and is receivable *ratione temporis*.

32. The Tribunal concludes that it has jurisdiction over the contested decision in the present case.

*Were the relevant procedural requirements of sec. 5 of ST/SGB/2008/5 complied with?*

33. In accordance with the Appeals Tribunal's established jurisprudence, the Tribunal will examine whether the procedures set forth in sec. 5 of ST/SGB/2008/5 were properly followed (see, for instance, *Ivanov* 2015-UNAT-519). The Dispute Tribunal notes that it does not have the authority to engage in a fact-finding exercise or to substitute its discretion for that of the Head of Office in assessing an investigation report (see, for instance, *Messinger* 2011-UNAT-123, *Luvia* 2014-UNAT-417 and *Mashhour* 2014-UNAT-283).

34. It follows from the uncontested facts and supporting documents filed by the parties that, on 3 June 2015, the Applicant submitted a formal complaint against the USG/OHRLLS and the Director under the provisions of ST/SGB/2008/5 to the ASG/OHRM. On 3 September 2015, the ASG/OHRM requested the USG/OHRLLS and the Director to provide their comments to the Applicant's complaint. On 21 September 2016, the USG/OHRLLS and the Director provided their comments to the Applicant's complaint. The consideration of the complaint was suspended pending attempts to reach a settlement, involving also a matter referred to mediation by the Tribunal. On 17 December 2015, the ASG/OHRM notified the Applicant that his complaint concerning the USG/OHRLLS would not be investigated and provided reasons for it.

35. The Tribunal notes that, according to the mandatory provisions in sec. 5.2 and sec. 5.14 of ST/SGB/2008/5, after having received the formal complaint, the responsible official has the following obligations:

a. To handle with sensitivity all the allegations in order to protect the privacy of all concerned individuals and ensure confidentiality to the maximum extent possible; and

b. To promptly review the complaint in order 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.

36. Regarding the first step of the formal procedure, the responsible official is to review whether the complaint appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact finding investigation. The review which must (“will”) be undertaken promptly requires only a (careful) examination of the complaint itself that should not involve a complex activity and/or analysis of the entire dossier based on evidence or comments received from the alleged offenders.

37. As clearly results from secs. 5.15-5.16, at the beginning of the investigation only the fact-finding panel has the competence (“shall”) to inform the alleged offender(s) of the nature of the allegation(s) against him or her. In order to preserve the information that may otherwise undermine the conduct of the fact-finding investigation or result in intimidation or retaliation, the panel must (“shall”) not disclosed it to the alleged offender(s) at that point, which may include the names of witnesses or particular details of incidents. Furthermore, all persons interviewed by the panel in the course of investigation must (“shall”) be reminded of the policy introduced by ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with authorized audits or investigations). The panel must be appointed by the responsible official and must have at least two individuals

who have been trained in investigating allegations of prohibit conduct or, if necessary, from the Office of Human Resources Management roster. The panel must (“shall”) interview the aggrieved individual, the alleged offender(s) and any other individuals who may have relevant information about the conduct alleged, and prepare a detailed report no later than three months from the date of submission of the formal complaint, giving full account of facts that the panel have ascertained in the process and attaching documentary evidence, such as written witness statements and any other relevant documents and records. The responsible official will take the final decision based on the report prepared by the panel.

38. As results from the contested decision, in the present case, the responsible official (ASG/OHRM), after receiving and reviewing the Applicant’s complaint, decided to request the two alleged offenders, the USG/OHRLLS and the Director, to provide comments to the Applicant’s complaint. The alleged offenders provided the responsible official with extensive written explanations together with documentary evidence in response to every allegation included in the complaint. After considering “the entire dossier, including [the] complaint, the annexes thereto and the comments received from the alleged offenders”, the responsible official determined that insufficient grounds existed to warrant a fact-finding investigation based not solely on the grounds included in the complaint but on evidentiary elements, which are exclusively in the competence of the fact-finding panel. It is clear that the responsible official needed additional factual elements and evidence in order to evaluate the complaint and she decided to inform the alleged offenders of the nature of the allegations and to request their comments on the Applicant’s complaint. The alleged offenders’ provision of written explanations together with documentary evidence were therefore used to make a substantive determination on the allegations included in the complaint, and not only a *prima facie* determination if sufficient grounds existed or not to warrant a formal fact-finding investigation.

39. It results that, in the present case, the responsible official, instead of deciding on the preliminary aspect of whether the complaint appeared to include sufficient grounds to warrant a formal investigation, initiated specific activities which, according with the mandatory provisions of secs. 5.15 and 5.16 of ST/SGB/2008/5 are to be conducted at the beginning of the investigation only by a fact finding panel. This includes: (a) informing the alleged offender(s) of the nature of the allegation(s) against him/her; and (b) obtaining written statements and documentary evidence that were in direct contradiction with the allegation made by the Applicant. This Tribunal underlines that only the fact-finding panel, which is to prepare an investigation report and submit it to the responsible official, is to ascertain the facts and the relevant evidence, and the responsible official may only take a decision on the substance of the complaint based on the investigation report submitted by the fact-finding panel.

40. The Tribunal considers that, in the present case, the ASG/OHRM, by initiating the fact-finding process exercised her discretion in acting both as the responsible official and as an official appointed to conduct a fact-finding investigation. In this Tribunal's view, secs. 5.15–5.16 are mandatory and must be applied by the responsible official who has no discretion to interpret them. Furthermore, this Tribunal considers that no such discretion is provided, neither explicitly nor implicitly, by ST/SGB/2008/5, but is a result of the interpretation of the Appeal Tribunal in its relevant jurisprudence, notably in *Benfield-Laporte* 2015-UNAT-505, as also affirmed in *Oummih* 2015-UNAT-518, where it was stated that:

34. In the instant case, Ms. Benfield-Laporte lodged a complaint for abuse of authority against her former supervisor. She had been the Personal Assistant/Administrative Assistant to the Director-General of UNOG and complained because of his behaviour when laterally transferring her to a new post.

35. Ms. Benfield-Laporte contested the decision of the Administration to refuse to conduct a formal fact-finding investigation into her complaint and appealed before the UNDT.

36. The UNDT Judgment decided that there was no legal basis for the ASG/OHRM to contact the alleged offender for comments, as this was the exclusive responsibility of the fact-finding panel. As such, the UNDT found that the Administration breached Section 5.14 of Secretary-General's Bulletin ST/SGB/2008/5 in requesting comments of the alleged offender before reaching its decision as to whether the conduct which was the subject of the complaint may constitute abuse of authority. Furthermore, the UNDT decided that it was for the panel and not the Administration to decide which facts merited investigation.

37. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. Concerning complaints of abuse of authority, Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

[Quoted above.]

38. In our view, the ASG/OHRM has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether an investigation regarding all or some of the charges is warranted. Where there was no risk of undermining the investigation, it is good practice to hear both sides in order to decide whether there are sufficient grounds to warrant establishing a formal fact-finding investigation and assigning a case to a panel.

41. The Tribunal concludes that the responsible official acted in accordance with the binding Appeals Tribunal jurisprudence and the present case cannot be distinguished therefrom as the Applicant has not identified that the responsible official's discretionary action created any "risk of undermining the investigation" (see *Benfield-Laporte*, para. 38, second sentence) and no evidence on the case record can be construed as leading to such inference.

42. The Tribunal observes that, as results from the Respondent's reply, the complaint was submitted by the Applicant on 3 June 2015 and the comments from the alleged offenders were requested by the ASG/OHRM on 3 September 2015, at the end of the mandatory three-month deadline established in sec. 5.17 of ST/SGB/2008/5. The comments and the evidence were provided on 21 September 2015 and the procedure was suspended until 17 November 2015, when the formal

consideration of the complaint under ST/SGB/2008/5 was resumed. The contested decision was issued on 17 December 2015, notably more than six months from the date of the submission of the Applicant's formal complaint. The Tribunal notes that the Applicant did not request compensation for the delay as part of the relief indicated in his application and no compensation can therefore be awarded by the Tribunal.

43. Furthermore, the Tribunal underlines that the issue of the present case does not concern the disciplinary sanction of dismissal imposed against the Applicant and that this matter has already been determined by the Tribunal in a separate judgment in *Nikwigize* UNDT/2016/104, which is currently under appeal.

### **Conclusion**

44. In the light of the foregoing, the Tribunal DECIDES that:

The application is rejected.

*(Signed)*

Judge Alessandra Greceanu

Dated this 3<sup>rd</sup> day of November 2016

Entered in the Register on this 3<sup>rd</sup> day of November 2016

*(Signed)*

Hafida Lahiouel, Registrar, New York