UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/035
Judgment No.: UNDT/2017/006
Date: 1 February 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Pallavi Sekhri, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Principal Officer at the D-1 level in the Department for General Assembly and Conference Management ("DGACM"), filed two applications relating to a complaint he submitted on 19 April 2012 to Mr. Shaaban Muhammad Shaaban, then Under-Secretary-General, DGACM ("USG/DGACM"), alleging that Mr. Franz Baumann, the then Assistant Secretary-General, DGACM ("ASG/DGACM"), had engaged in conduct prohibited under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. This judgment concerns the Applicant's challenge to the decision of an initial fact-finding panel ("first FFP") to "delay, withhold, and not submit its report on the investigation and the records of the investigation" (the "impugned decision"). The Applicant seeks compensation for the violation of his due process rights, abuse of process and moral and other damages resulting from it.

3. The Respondent argues the application is not receivable, contending, in essence, that the impugned decision is not appealable as the establishment of a second fact-finding panel ("second FFP") rendered the first FFP moot. If the application is receivable, the Respondent does not refute there was a delay in the investigation process, but contends that the Applicant fails to demonstrate that the delay caused him harm.

4. The Applicant's second application challenging the decision to close the case of his complaint was duly filed under Case No. UNDT/NY/2015/065 and is addressed in the separate judgment *Auda* UNDT/2017/007.

Facts

5. The Applicant submitted a complaint by email dated 19 April 2012 to Mr. Shaaban, alleging that Mr. Baumann had engaged in prohibited conduct under ST/SGB/2008/5. Specifically, the Applicant submitted the following allegations:

a. In a meeting held on 29 September 2011, Mr. Baumann stated that a comment made by the Applicant was "ridiculous";

b. In an email dated 22 November 2011, Mr. Baumann referred to the Applicant as "difficult";

c. Mr. Baumann sent an email to the Applicant on 15 April 2012, copying Mr. Shaaban and other staff members, referring to the Applicant's alleged "contrariness," "divisiveness" and "deceptiveness";

d. Mr. Baumann acted in bad faith and with the intent to obscure the status and official functions of the Applicant by instructing or directing that his name and title be omitted from a DGACM organizational chart; and

e. Mr. Baumann referred to other staff members as being involved in a "racket" in relation to alleged misuse of overtime procedures.

Appointment of the first FFP in 2012

6. On 27 April 2012, Mr. Shaaban, as the then USG/DGACM and responsible officer receiving the complaint, appointed the first FFP to investigate the allegations, which was comprised of two investigators, Ms. MN and Mr. GK, and a note taker.

7. On 13 July 2012, Mr. Shaaban departed DGACM and two weeks later, the Secretary-General appointed Mr. Jean-Jacques Graisse as Acting Head of DGACM.

8. On 20 July 2012, the first FFP interviewed the Applicant after other witnesses had been interviewed. Having not heard back from the first FFP since his interview, the Applicant sent Ms. MN and Mr. GK at least three unanswered requests for an update—on 17 December 2012, 31 January 2013 and 20 March 2013.

9. On 25 March 2013, the Secretary-General appointed Mr. Tegegnework Gettu as the new USG/DGACM. Mr. Gettu accordingly assumed the role of the responsible officer overseeing the Applicant's complaint.

10. Having received no response to his prior queries, the Applicant again emailed the investigators on 10 May 2013 and 15 July 2013, and also copied the then Under-Secretary-General for Internal Oversight Services ("USG/OIOS"), the then Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM") and the Ethics Office.

11. On 24 July 2013, Ms. MN responded to the Applicant and "apologize[d] for the delay, which was due to a series of personal crises" and advised that they "expect to conclude the investigation and report by end of August [2013]."

12. On 19 May 2014, the Applicant emailed the first FFP requesting an update, but received no response.

13. On 9 September 2014, the Applicant emailed OHRM "seeking assistance in clarifying the status and/or outcome of the ongoing fact-finding [i]nvestigation since July 2012, which is being carried under the auspices of OHRM."

14. On 12 September 2014, the Secretary-General announced the transfer of Mr. Baumann to another department.

15. On 15 September 2014, OHRM responded to the Applicant instructing him to direct his inquires to the Office of the USG/DGACM or the Executive Office in DGACM. OHRM stated:

> The panel into your complaint against Mr. [Baumann] was convened under the authority of Mr. [Shaaban] on 27 April 2012 and not under the auspices of OHRM. We note that Ms. [MN] states that her reference to OHRM was based on an interview record template. We have no record of such information being provided to Ms. [MN] but in any case the template should have been amended to reflect the correct position that

> the investigation was being conducted under the auspices of DGACM and not OHRM.

16. On 15 September 2014, the Applicant emailed the Executive Office in DGACM to request an update.

17. On 30 September 2014, Mr. IS, the Chief of Office of the USG/DGACM, emailed Ms. MN requesting an update on the investigation. Ms. MN replied the same day, indicating that, due to a variety of personal and professional reasons, she and Mr. GK had been unable to complete the investigation or prepare the report. She apologized for not having communicated sooner. By memorandum dated 11 November 2014, Mr. GK stated that the "[r]ecords/materials pertaining to the [p]anel's work may be obtained from Ms. [MN] who led the investigation." Mr. GK's memorandum was submitted to Mr. Gettu.

18. On 30 October 2014, the Applicant sent another email to the Executive Office in DGACM to request an update.

19. On 18 December 2014, Mr. IS emailed the Applicant informing him that the investigation by the first FFP could not be concluded and that "this circumstance was not confirmed to DGACM's attention until November 2014." Mr. IS advised that the first FFP was unable to write the report and concluded his email by informing the Applicant that, if he wished to pursue his complaint "despite the time that elapsed," a new panel would need to be convened—which could then contact the previous panel members to "seek any relevant information directly." The Applicant was asked to confirm whether he wished to pursue the complaint.

20. On 9 February 2015, the Applicant requested management evaluation of the impugned decision.

Appointment of the second FFP in 2015

21. On 13 March 2015, Ms. AL, Special Assistant to the USG/DGACM, emailed the Applicant informing him that, because the previously appointed investigators were "unable to conclude the investigation for reasons unrelated to the case," the USG/DGACM had appointed Ms. MS and Mr. EC to a second FFP to continue the investigation.

22. On 16 March 2015, Ms. AL emailed the Applicant informing him that Mr. EC had recused himself in view of a conflict of interest and that an alternate investigator was being sought. On 27 March 2015, the Applicant was informed that Mr. FS was appointed as investigator.

23. On 16 April 2015, Ms. MS and Mr. FS emailed the Applicant a memorandum informing him of their appointment taking over the investigation and inviting him to an interview. The next day, the Applicant responded to the email requesting the terms of reference of the second FFP as signed by the Head of the Department.

24. On 28 April 2015, the Management Evaluation Unit ("MEU") informed the Applicant that his request was "moot and/or not receivable" because the second FFP had been established and was yet to conclude its investigation.

Outcome of the second FFP investigation

25. On 26 June 2015, the second FFP submitted their investigation report to Mr. Gettu.

26. In accordance with sec. 5.18 of ST/SGB/2008/5, by letter dated 8 September 2015, Mr. Gettu informed the Applicant that he had reviewed the second FFP's report, and provided the Applicant with a summary of the findings and conclusions set forth in this report. Mr. Gettu's letter concluded as follows:

Conclusion

> The second panel concluded, after reviewing all the evidence, that the working relationship between yourself and Mr. Baumann was especially difficult following your elevation to the post of Chief, [Office of the USG and ASG], with a different reporting line to the USG/[DGACM].
>
> On your specific complaint, the Panel observed that your complaint cannot be viewed in isolation. Mr. Baumann produced evidence of his own complaints to the USG against your own conduct.
>
> The second panel concluded that none of the incidents cited by themselves can be viewed as abusive and/or offensive and, viewed as a whole they still fall short of amounting to harassment. Thus there was no prohibited conduct under ST/SGB/2008/5.
>
> Following a review of the investigation report and supporting documentation, I have concluded that the record indicated that Mr. Baumann's conduct in the context of your complaints does not violate the provisions of ST/SGB/2008/5, and as this falls under section 5.18(a) of ST/SGB/2008/5, I therefore consider the case closed.

Procedural history

27. On 8 June 2015, the Applicant filed an application before the Tribunal and the Respondent filed his reply on 8 July 2015.

28. On 14 July 2015, by Order No. 141 (NY/2015), the Applicant was ordered to file comments to the Respondent's submissions regarding the receivability of the application, which he did on 21 August 2015.

Consolidation of proceedings and joint statements

29. On 12 July 2016, the Tribunal issued identical orders, Orders No. 168 (NY/2016) and 169 (NY/2016), in the Applicant's two cases before the Tribunal regarding his complaint against Mr. Baumann (the present case and Case No. UNDT/NY/2015/062), directing the parties to respond, *inter alia*, to whether they agree to attempt informal resolution and whether the two cases should be consolidated through an order for combined proceedings. The Tribunal also requested the Respondent to provide the Tribunal a copy of the report of the second fact-finding panel submitted on 26 June

2015 and provide a full explanation, including all relevant particulars, as to why it took more than three years from the date of the submission of the Applicant's complaint on 19 April 2012 until the completion of the report of the second fact-finding panel on 26 June 2015. The parties were also ordered to provide lists of witnesses that they proposed to call, including brief statements of the evidence each party intends to elicit from their proposed, respective witnesses, as well as an agreed bundle of documents which the parties intended to rely upon at the hearing.

30. On 20 July 2016, the parties filed joint statements in both cases, indicating that, while they agreed, in principle, to attempt informal resolution, they were unable to agree on its modalities.

31. On 21 July 2016, the Tribunal issued Order No. 177 (NY/2016), directing the parties to file the jointly-signed statement referred to in Orders No. 168 and No. 169.

32. On 27 July 2016, the Respondent filed the report of the second FFP on an *ex parte* basis.

33. On 28 July 2016, the parties filed their jointly-signed statement, agreeing to consolidation for combined proceedings, proposing a hearing on 14 and 16 September 2016 and submitting the following information and evidence:

a. The Respondent's explanations as to the time taken to complete the investigation by both fact-finding panels;

b. The Respondent's chronology of events taken by the first FFP;

c. Applicant's timeline of events regarding the total investigation (by both panels);

d. A bundle of documents for the hearing; and

e. A list of proposed witnesses.

34. The Respondent proposed three witnesses, namely Ms. MN, the lead investigator of the first FFP; Mr. FS, the lead member of the second FFP; and Ms. AL, the Special Assistant to Mr. Baumann and Mr. Gettu. In addition to the three witnesses proposed by the Respondent, the Applicant listed Mr. GK, investigator of the first FFP, and Ms. MS, investigator of the second FFP, explaining that, if one member of a panel were to be called, then so should be the other panel member. He also listed Mr. Gettu and Mr. DK of the MEU who would provide evidence about the settlement discussions he had had with the Administration.

35. By Order No. 213 (NY/2016) dated 8 September 2016, the Tribunal consolidated the two cases into a combined proceeding. Noting that the Applicant had a third matter pending before the Tribunal (Case No. UNDT/NY/2016/028), in which the parties agreed to suspend the proceedings pending informal discussions, the Tribunal ordered the parties to file a joint submission stating whether they agreed to attempt informal resolution of these two pending cases, failing which they were to propose agreed dates for a two-day hearing on the merits between 3 and 6 October 2016.

Joint submission of 14 September 2016

36. On 14 September 2016, the parties filed a joint submission indicating that they did not agree to further informal resolution efforts and that the only day on which they were both available for a hearing in the first half of October was 6 October 2016.

37. Also on 14 September 2016, the Applicant filed a motion reiterating his request that the Tribunal call, as its own witnesses, the four individuals named by the Applicant in the joint submission of 28 July 2016. The Applicant requested the Tribunal to call Ms. GK of the first FFP and Ms. MS of the second FFP. Also the Applicant requested that Mr. DK of the MEU should be called to testify about the offer of settlement made by the Administration. The Applicant also requested the Tribunal call Mr. Gettu, to testify about "evidence concerning his decision to close out the investigation upon receiving the memorandum of Mr. GK of 11 November 2014, his decision to decline

the settlement offer made by the MEU, and his memorandum to the Applicant dated 8 September 2015." The Applicant further requested the Tribunal to "call/make an order for the witnesses listed to appear for the hearing" and to release the full report of the second FFP.

Request for appearance of witnesses and case management discussion of 27 September 2016

38. On 27 September 2016, the Tribunal held a CMD in relation to the present case and Case No. UNDT/NY/2015/062. The Applicant and counsel for the Respondent attended the CMD in person. Referring to the Applicant's motion dated 14 September 2016 concerning his proposed list of witnesses, the Tribunal noted that some of the proposed witnesses, including the former USG/DGACM, were listed by the Applicant for the purpose of providing oral evidence on the settlement discussions that took place with the Administration, including at the MEU level, as well as on the decision to close the first FFP investigation. The Tribunal noted that the settlement discussions were not a matter for adjudication, as they have no probative value in relation to the substantive issues before the Tribunal. The Tribunal also noted that the reasons for ending the work of the first FFP were uncontested. The Tribunal finally reminded the parties that, in these types of cases, the Tribunal is not expected to conduct a *de novo* review and is not to assume the functions of an investigative body, in accordance with *Messinger* 2011-UNAT-123.

The Applicant's motion of 27 September 2016

39. Also on 27 September 2016, the Applicant filed a motion stating, *inter alia*, that, upon his information and belief, the second FFP was constituted improperly, as it was comprised of two consultants who were not members of DGACM and one who was not listed on the OHRM roster of trained investigators. The Applicant requested the Tribunal to find that the second FFP was fraught with significant procedural

irregularities and their investigation was conducted in a manner that violated explicit provisions of ST/SGB/2008/5.

40. On 28 September 2016, the Respondent replied arguing that the Applicant was informed of the composition of the second FFP on 27 March 2015 and did not contest it at that time, nor before the MEU, and that the claim is meritless, as ST/SGB/2008/5 provides that panel members may include individuals from the OHRM roster.

Scheduling of hearing on 6 October 2016 and Applicant's request for postponement

41. By Order No. 225 (NY/2016) dated 28 September 2016, the Tribunal scheduled a one-day hearing on the merits for 6 October 2016 and directed the parties to file further submissions in preparation for the hearing, including a joint list of agreed-upon witnesses.

42. By Order No. 226 (NY/2016) dated 28 September 2016, the Tribunal, *inter alia*, directed the parties that no further motions shall be filed without its leave and denied the Applicant's motion of 27 September 2016 stating that "a reasoned decision would be issued in due course." The Tribunal notes that the Applicant, in his motion of 27 September 2016, reiterated his grounds of appeal listed in his applications before the Tribunal which are the subject of this judgment and that of *Auda* UNDT/2017/007. If it had granted the motion, the Tribunal would have *de facto* granted the applications in both cases.

43. On 5 October 2016, the Applicant filed a motion stating that his "motion to the Dispute Tribunal [of 14 September 2016] to call the two other members of the fact-finding panels and the responsible official as witnesses during the hearing is still pending with the Tribunal." He requested the Tribunal to postpone the hearing scheduled for 6 October 2016, stating that the parties had previously agreed to hold a two-day hearing. On 5 October 2016, the Respondent responded that there was no need for a two-day hearing and that "a hearing of half a day is sufficient to hear the testimony of the witnesses identified by the Respondent in the Joint Submission,

dated 4 October 2016." The Respondent requested to maintain the allocation of one full day (6 October 2016) for the hearing on the merits. The Respondent also objected to the Applicant's motion to call additional witnesses.

44. By Order No. 233 (NY/2016) dated 5 October 2016, the Tribunal denied the Applicant's motion to postpone the hearing, noting that the two cases had been scheduled by Order No. 225 (NY/2016) dated 28 September 2016, with no objections from the parties. The Tribunal directed that the following witnesses, agreed by the parties in their joint submission of 28 July 2016, testify at the hearing: Ms. MN, Ms. AL and Mr. FS.

Applicant's motion for the recusal of the undersigned Judge

45. On 5 October 2016, the Applicant filed a "Request to the President of the Dispute Tribunal for Recusal of the Case Judge." The Tribunal suspended the proceedings, pending consideration of the request by the President of the Dispute Tribunal.

46. By Order No. 267 (NY/2016) dated 2 December 2016, the President of the Dispute Tribunal dismissed the Applicant's request for recusal.

47. By Order No. 273 (NY/2016) dated 6 December 2016, the Tribunal ordered the parties to attend a hearing in the present case and in Case No. UNDT/NY/2015/062 on 12 January 2017 and ordered that "the parties shall ensure their availability also for Friday, 13 January 2017, should a second day of hearings be necessary."

The Applicant's further request for postponement of hearing and appearance of additional witnesses

48. On 5 January 2017, the Applicant requested a postponement of the hearing, stating:

> The Applicant has been summoned to serve as juror in the New York Supreme Court at 9:00 a.m. on Monday 9 January 2017. The Applicant is obliged to serve on the date scheduled given that the jury service has already previously been postponed twice. The Applicant may therefore not be available for the hearing on 12 January 2017. Given a previously scheduled leave through the end of the month of January 2017, the Applicant requests postponement of the hearing until Thursday 9 and Friday 10 February 2017.

49. The Applicant further requested that Ms. MS and Mr. Gettu be called as witnesses, stating that "Order [No.] 273 (NY/2016) does not indicate whether [Order No.] 233 (NY/2016) in which the Tribunal agreed to have one member of each panel testify on behalf of the panel and decided not to call the responsible official to appear as a witness, [is] still in effect." The Applicant noted he "has already requested that both members of [each] panel be called as witnesses, in particular Ms. [MS] be called as witnesses." The Applicant further requested that Mr. Gettu, the responsible officer, be called as a witness, as "[his] subordinate […] cannot fully testify on behalf of the responsible official."

Further request for additional witnesses

50. By Order No. 273 (NY/2016) dated 6 December 2016, the Tribunal ordered the parties to attend a hearing in the present case and Case No. UNDT/NY/2015/062 on 12 January 2017 and ordered that "the parties shall ensure their availability also for 13 January 2017, should a second day of hearings be necessary."

51. By Order No. 2 (NY/2017) dated 9 January 2017, the Tribunal denied the Applicant's request to call additional witnesses on the grounds that their evidence would be cumulative. The Tribunal also denied the Applicant's request for postponement, stating

> … The Tribunal recognizes that should the New York Supreme Court summon the Applicant to appear for jury duty on 12 and 13 January 2017, he will not be available to appear before the Dispute Tribunal on the same dates. However, it appears that the Applicant has been summoned to [be] present in the New York Supreme Court for only one day, notably on

> Monday, 9 January 2017. To date, there is, therefore, no apparent conflict with the hearing on the merits scheduled before this Tribunal, and the Applicant's motion to postpone the hearing is denied. Should the New York Supreme Court summon the Applicant to serve as a juror on 12 and 13 January, the Tribunal will reconsider how to handle the further proceedings.

52. Order No. 2 (NY/2017) further instructed the Applicant, by 10 January 2017, to "update the Tribunal as to whether he has been instructed to serve as a juror before the New York Supreme Court on 12 and 13 January 2017, and if so, provide substantiating documentation."

The Applicant's second motion for the recusal of the undersigned Judge

53. On 10 January 2017, the Applicant filed two motions: one in response to Order No. 2 (NY/2017), indicating that he would not be required to provide further jury services, and a "Request to the President of the Dispute Tribunal for Recusal of the Case Judge."

54. By Order No. 5 (NY/2017) dated 11 January 2017, the President of the Dispute Tribunal rejected the motion for recusal and indicated that the hearing scheduled for 12 January 2017 was maintained. In his Order, the President stated:

> … The Tribunal has carefully examined the Applicant's request, and has also taken into account the case history as far as it was relevant for the determination of the Applicant's request for recusal of Judge Hunter, Jr., of 10 January 2017.
>
> … It notes that the main reason provided by the Applicant is Judge Hunter, Jr.'s decisions with respect to the calling of particular witnesses, as contained in Orders Nos. 233 (NY/2016) and 2 (NY/2017). The Tribunal disagrees with the Applicant's view that "[t]hese are not merely procedural decisions that can be appealed with the United Nations Appeals Tribunal, but are symptomatic of conflict of interest". The Tribunal finds that while the Applicant may be in disagreement with [such] case management decisions by Judge Hunter, Jr., they are not susceptible to demonstrate any conflict of interest on behalf of the latter … In this respect the Tribunal recalls what it stated in Order No. 267 (NY/2016) namely that "[p]rocedural decisions during case

> management… cannot serve as an argument to contest Judge Hunter Jr.'s impartiality or independence or otherwise lead to the perception by a reasonably and impartial observer that his participation in the adjudication of the matter would be inappropriate".
>
> … [T]he Tribunal wishes to underline that it was inappropriate for the Applicant to have filed the present request for recusal only on 10 January 2017, almost at close of business, while the matter had been set down for a hearing in the morning of 12 January 2017. It is noted that the matters complained of had been well known to the Applicant for some time. In the future, such conduct may be regarded as an illegitimate attempt by the Applicant to interfere with the smooth running of the Tribunal's proceedings and of the administration of justice, and may be found to be vexatious.

55. On the same day, by Order No. 6 (NY/2017), the Tribunal informed the Applicant that should he fail to appear at the hearing on 12 January 2017, the Tribunal would consider whether to dismiss the application in the present case with prejudice.

Hearing

56. On 12 January 2017, the parties attended a hearing on the merits, during which it heard testimony of Ms. MN, Ms. AL and Mr. FS testified. The Respondent did not call the Applicant as a witness at the hearing.

Consideration

Applicable law

57. Article 2.1(a) of the Dispute Tribunal's Statute provides:

> **Article 2**
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> 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 noncompliance;

58. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides in relevant parts (emphasis added):

> **Section 1**
>
> **Definitions**
>
> …
>
> 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. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. 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.
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> …
>
> **Section 2**
>
> **General principles**
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> …
>
> 2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.
>
> …
>
> **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 *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.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

…

Section 5

Corrective measures

…

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

…

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.

…

5.16 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.
>
> …
>
> 5.20 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.

Scope of the case

59. This case concerns the contested "decision of the fact-finding investigation panel to delay, withhold, and not submit its report on the investigation and the records of the investigation." This judgment deals with the issue of the delay into the investigation of the Applicant's complaint against Mr. Baumann, the former ASG/DGACM.

The Applicant's second application contesting the decision to close his complaint without taking further action is addressed in *Auda* UNDT/2017/007.

Receivability

60. The Respondent argues that the application is not receivable as the formal procedures under ST/SGB/2008/5 were ongoing at the time of the application and a final decision had not been taken. The Respondent submits that the application is moot because the Applicant's complaint about the lack of progress by the first FFP was addressed by the establishment of the second FFP. The Applicant contends that the Tribunal has jurisdiction to review an act or omission which modifies the rights of a staff member as recalled in *Gehr* UNDT/2012/095 and that the omission of the Administration to act promptly on a complaint, as required by ST/SGB/2008/5, is an administrative decision which may be reviewed. The Applicant relies on the Dispute Tribunal's judgment in *Birya* UNDT/2014/113, in which it held that:

> The omission of the Administration to act promptly on a complaint as required by ST/SGB/2008/5 is an administrative decision which may be reviewed by the Tribunal before the outcome of the process has been determined by the administration.

61. The Tribunal notes that the jurisprudence of the Dispute and Appeals Tribunals has established that administrative decisions subject to review by the Tribunals are not always presented as affirmative, articulated or written decisions. They may occur in the form of a failure to act, which may be characterized as an implied administrative decision (see, for instance, *Tabari* 2010-UNAT-030, *Nwuke* 2010-UNAT-099, *Zeid* UNDT/2010/022, *Rahimi* UNDT/2011/089, *Applicant* UNDT/2010/148, *Abubakr* UNDT/2011/219). In *Gehr*, in reliance on *Nwuke*, the Dispute Tribunal held that it has jurisdiction to examine the Administration's actions and omissions following a request for investigation submitted pursuant to ST/SGB/2008/5. Similarly, the Dispute Tribunal found in *Abubakr* that the Administration's failure to properly and timeously address an applicant's complaint of harassment and discrimination was a contestable administrative decision received by the Tribunal.

62. Section 5.17 of ST/SGB/2008/5 requires the report of a fact-finding panel to be submitted to the responsible official normally no later than three months from the date of the submission of the complaint. The Applicant has a contractual right to have his complaint addressed timeously and properly. If the Tribunal were to accept the proposition that a staff member is unable to challenge the delay in resolving claims under ST/SGB/2008/5 until an outcome of the complaint is finalized, this could result in further delays and an unacceptable barrier to justice. Precluding staff members to challenge inordinate delays into their complaints of prohibited conduct would foster impunity and allow the Organization to run the clock on an investigation as a possible means to intimidate or tire complainants, as well as contribute to the depletion of the memory of witnesses and the preservation of evidence.

63. In light of the cited jurisprudence, the Tribunal finds that the failure of the first FFP to timely conclude its investigation and its failure to render a report, as well as the Organization's failure to promptly conclude the formal process, is a contestable administrative decision and the application is therefore receivable.

Delay

64. The Applicant submitted a complaint against Mr. Baumann on 19 April 2012 and did not receive a final decision until 8 September 2015—more than three years and four months later. The Applicant contends that "justice delayed is justice denied" and argues that this inordinate delay violates sec. 5.17 of ST/SGB/2008/5, which provides for the report of a panel to be submitted to the responsible officer "normally no later than three months from the date of submission of the formal complaint or report."

65. At the hearing, the Respondent conceded to the delay of over three years, but contended that the delay was caused by rare and exceptional circumstances—namely the professional and personal circumstances of Ms. MN, the lead investigator of the first FFP.

66. At the hearing, Ms. MN testified and confirmed her written statement, which provides as follows:

> …. In December 2012, Mr. [GK] and myself were in a position to commence writing the investigation report … however, a series of unforeseen personal circumstances arose.
>
> … In the circumstance, my ability to complete my professional responsibilities in regard to the investigation was substantially compromised. This unfortunately, in turn impacted the first panel's ability to complete the investigation in a timely manner. …
>
> … DGACM contacted me on 30 September 2014 for an update on the status of the investigation. I responded on the same day informing them that the panel was unable to complete the report for a variety of professional and personal reasons. …
>
> … At the request of DGACM, I handed over all materials relating to the investigation in my possession to the DGACM.

67. The Tribunal notes with concern that Ms. MN testified that the first FFP was only ready to write their report in December 2012, which is eight months after the complaint was made, although sec. 5.17 of ST/SGB/2008/5 provides that the "panel's report shall be submitted to the responsible officer normally no later than three months from the date of the submission of the formal complaint." While the word "normally" does not embrace unforeseeable or exceptional circumstances which may delay and extend the deadline for an investigation panel to conclude its work, any delay caused by such circumstances must remain reasonable through the taking of corrective measures. Among possible corrective measures to control a delay, the Administration could have appointed a new panel as soon as it had become clear that the panel was not in a position to conclude its work within a reasonable time. It was abundantly clear by May 2013, when the Applicant emailed numerous senior officials, that the first FFP would not conclude its work in a timely fashion, and measures should have been taken at that time to preserve the right of the Applicant to have his complaint determined within a reasonable time.

68. The record in the present case is replete with follow-up queries from the Applicant which span a few years, with no responses given to him. The Applicant's emails of May 2013 and July 2013 also alerted multiple senior officials within OHRM, OIOS and the Ethics Office of the delay. The Administration has a duty to respond to staff members' reasonable requests for information, assistance and action, and to inform staff members of administrative decisions affecting them in a timely manner (see, for instance, *Sina* 2010-UNAT-094 and *Obdeijn* 2012-UNAT-201). There is no doubt that ST/SGB/2008/5 creates a duty upon the responsible officer to fulfill the obligations set forth therein. Section 3 of the policy provides that heads of departments are responsible for its implementation and for holding all managers and other supervisory staff accountable for compliance with its terms. The Applicant's queries, at the very least, should have prompted the Administration and the first FFP to take measures to ensure that the Applicant's due process rights under ST/SGB/2008/5 were observed. It is only after the transfer of the subject of the complaint to another department in the Organization was publicly announced by the Secretary-General on 12 September 2014 that follow-up with the first FFP was made and that a remedial measure was considered, namely, the appointment of a second FFP.

69. The Tribunal also notes that the several delays in connection with the first FFP investigation were within the Organization's control. The Applicant was not informed that the first FFP could not complete its work before 18 December 2014, statements that were made by Ms. MN on 30 September 2014 and from Mr. GK on 11 November 2014. The second FFP was duly appointed four months later on 16 April 2015. The second FFP submitted its report to Mr. Gettu on 26 June 2015. Mr. Gettu, as the responsible officer, did not render a decision on the Applicant's complaint until 8 September 2015.

70. The Tribunal has consistently found that delays may constitute a breach of duty. In *Benfield-Laporte* UNDT/2013/162, the Tribunal found that a six-month delay did not meet the requirements for promptness. In *Nwuke* UNDT/2013/157 and *Haydar* UNDT/2012/201, delays were held to constitute a breach of duty. The Respondent's explanations for the delay—which appears to rest, according to the Respondent, on

the shoulders of one of the panel members of the first FFP—does not account for the entire three-year delay nor obviates the duty of the Administration to comply with the policy. Inordinate and/or excessive delay in investigating allegations of misconduct fails to safeguard against the possible continued victimizing of a complainant and tends to foster impunity. In the present case, the delay is so extraordinarily excessive that both the subject of the complaint, the then ASG/DGACM, and the Applicant are no longer staff members of the Organization. In the instant matter, the Tribunal also views the Applicant's repeated queries for status as reasonable and the Administration's collective failure to respond both constitute fundamental breaches of fairness and due process that are owed the Applicant.

71. Noting that the Respondent conceded to its delay in the handling of the Applicant's complaint, the Tribunal concludes that the requirement under ST/SGB/2008/5 for the Administration to act promptly on complaints of prohibited conduct and ensure that the complainant's right to be informed of the status of the investigation have been abridged, with both the delay and the lack of information being excessive, all of which constituting breaches of contract and procedural contractual entitlements.

Relief

72. The Applicant seeks compensation for "the violation of [his] due process rights, abuse of process, and moral and other damages resulting of it." In support of his contentions in his application, the Applicant argues that:

> I had suffered a great deal in my pursuit of justice, and continue to be affected greatly, personally as well as professionally, including being reassigned away from my previous position as the Chief of Office of the Under-Secretary-General of DGACM in October 2013, and banished from my office in the Secretariat Building into an empty half floor in the DC-1 Building, where I and a Personal Assistant were for a long time the only occupants. As a result, I am no longer placed against a regular post and my contract is no longer being extended bi-yearly, as was

> the case previously. Being castaway, regardless of my qualifications, has undermined my chances to hold similar or higher senior positions.

73. The Respondent argues that the Applicant has suffered no harm as a result of the delay in the determination of his complaint.

74. In *Antaki* 2010-UNAT-095, the Appeals Tribunal stated that "compensation may only be awarded if it has been established that the staff member actually suffered damage." In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated (emphasis in the original and footnotes omitted):

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
> >
> > (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> 37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.
>
> 38. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess

> the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). …

75. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may *only* order one or both of the following … (a) [r]escission … [or] (b) [c]ompensation for harm, supported by evidence."

76. With respect to the quantum of the damages suffered, the Appeals Tribunal stated in *Maslei* 2016-UNAT-637 (footnotes omitted):

> 32. … The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the Tribunal.
>
> 33. As we held in *Appleton*: "Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal."

77. When assessing harm caused as a result of breaches of rights, the primary factor to be taken into consideration is the scope of the breaches and their effect on the Applicant. The Tribunal will assess the seriousness of the harm in this case by taking into account the nature of the breaches, the period of time during which the breaches occurred and the individual circumstances of the Applicant or harm he suffered as a result of the breaches. The Tribunal will then turn to the quantum of the compensation.

78. In the present case, the first aspect of breach is the pervasive and continuous nature of the procedural breaches. The gravity of the breaches is established by their scale, pattern and continuous repetition over several years. The three-month deadline in ST/SGB/2008/5 to complete an investigation and make a decision appears on purpose in order to contain the negative effects in a working environment that complaints under ST/SGB/2008/5 necessarily have. Similarly, the Tribunal has consistently held that the Administration has a duty of care which includes a duty to respond to staff's queries

within a reasonable time. A reasonable time is counted in terms of day or weeks, not in terms of years. In the present case, nothing justified the lack of responses owed the Applicant regarding his reasonable requests for status and updates. It took years for him to obtain responses to very simple queries regarding the status of his investigation when courtesy alone should have dictated an immediate response or update.

79. The Tribunal is satisfied that the delay in the handling of the Applicant's complaint against the former ASG/DGACM and the repeated lack of responses to the Applicant's reasonable requests for information and for the status of the investigation into his complaint are not mere irregularities of process, but are sufficiently egregious to amount to abuses of process and are clear breaches of the Applicant's rights which warrant compensation.

80. The psychological suffering or damage to the Applicant was evident. It cannot be overstated that for staff to submit a complaint against a senior official is a difficult path to pursue. The complaint the Applicant had made was not against a peer with whom he had a difficult relationship. Mr. Baumann, the subject of the complaint, was the second most senior official of one of the largest departments of the United Nations Secretariat. He also acted as Officer-in-Charge in the absence of the USG/DGACM, which meant he had supervisory functions over the Applicant. This circumstance is not anodyne.

81. The Tribunal notes the timing of the query from the DGACM administration to the first FFP regarding the status of the investigation, which appears to have been made for the first time on 30 September 2014, two weeks after the announcement that Mr. Baumann, the subject of the complaint, was transferred away from DGACM. There is no doubt that this factor contributed in the Applicant having to work in an anguishing, hostile environment. The Tribunal further notes that the subject of the complaint is no longer in the employ of the Organization and, thus, the specific performance or relief sought by the Applicant can no longer be considered by the Tribunal as a possible option. This circumstance also contributes to the abridgment of the Applicant's due process and natural rights as a human being.

82. At the hearing, the Tribunal asked questions of the Applicant as to the harm he suffered. The Respondent's counsel objected to the statements made by the Applicant on the grounds she had not had a chance to cross-examine the Applicant. However, the Tribunal notes that counsel did not seek to follow-up on the line of questioning posed by the Tribunal nor sought to call the Applicant as a witness, albeit a hostile one.

83. The Applicant stated how he suffered harm to his reputation and general well-being, explaining how he was isolated and ostracized when he was moved to another building of the Secretariat, away from colleagues. The Applicant also explained how he suffered stress and anxiety during the investigation and in his pursuit of justice. The harm suffered by the Applicant is plainly evidenced by his various statements indicating he suffered greatly in his three year pursuit of justice and that he suffered stress and anxiety. There was no need for verification of such psychological impact by a psychiatrist or psychiatric therapist. On the preponderance of the evidence, the Tribunal identified signs of great anxiety and stress in the Applicant, which were more likely than not caused by the delay in the handling of his complaint and the lack of responses owed to him about the status of the investigation into his complaint. The Applicant's demeanor at the hearing was quite telling. His pain in recounting the Administration's delay and repeated failure for several years to respond to his reasonable requests for the status of the investigation was etched on his face and in his body language. The Applicant also appeared confused, erratic and at times unable to complete his sentences. As such, the Tribunal finds the acts and omissions committed by the administration in this case to be egregious and reprehensible. The administrative neglect and negligence that is demonstrated in the present case is of the highest order that should never be tolerated by the Secretary-General.

84. In assessing the "quantum of damages," the Tribunal notes that the Applicant indicated that he has "suffered greatly" in his pursuit of justice. It is settled jurisprudence that the emotional distress of a complainant as a result of the Organization's failure to timely respond to his or her complaint of prohibited conduct may amount to harm warranting compensation (*Abubakr* 2012-UNAT-272,

Benfield-Laporte 2015-UNAT-505). In *Benfield-Laporte* 2015-UNAT-505, the Appeals Tribunal upheld an award of compensation for a six-month delay in informing the Applicant of the decision not to convene a fact-finding panel. In *Ivanov* UNDT/2014/117, the Dispute Tribunal awarded a staff member for the delayed review of his complaint by a responsible official and for the investigation panel's delay in completing its report. In *Ivanov* 2015-UNAT-572, while reducing the amount of the award, compensation was affirmed as warranted. In *Masylkanova* UNDT/2015/088, the Tribunal awarded compensation for the inordinate delay of twenty-six months in handling a complaint of prohibited conduct. In all of these cases, both the Dispute and the Appeals Tribunals recognized the causal link between emotional distress and the Organization's failure to timely respond to complaints of prohibited conduct.

85. The Tribunal, as trier of fact, having observed, again, the Applicant's demeanor at the hearing, the comprehensive nature of his submissions together with the Applicant's statements indicating he has suffered greatly, finds that the Applicant has sustained harm as a result of the delay of the Administration in handling his complaint against Mr. Baumann, a senior official of the Organization. The Tribunal finds that such harm is extensive over a long period of time and serious enough to warrant a compensation award falling in the higher category of non-pecuniary damages.

86. The Tribunal, as trier of fact, having taken all of the circumstances of the present case into consideration, including the extent of the delay, which is found to be egregious, and the repeated lack of responses from the Administration over an extended period of time to the numerous requests for information and status made by the Applicant, awards the Applicant USD15,000 as compensation for the harm he suffered as a result of the breaches to his fundamental due process human rights. This amount takes into consideration the magnitude of the breaches to the Applicant's rights and is on par with awards of compensation made in similar cases such as *Abubakr* 2012-UNAT-272, where the Appeals Tribunal found that compensation to the applicant in the amount of USD25,000 for harm as a result of a breach of investigation-related procedures was adequate.

Orders

87. In view of the foregoing, the TRIBUNAL DECIDES:

a. The application succeeds;

b. The Applicant is awarded the sum of USD15,000 for non-pecuniary damages;

c. The sums above shall bear interest at the U.S. Prime Rate effective from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 1st day of February 2017

Entered in the Register on this 1st day of February 2017

(*Signed*)

Hafida Lahiouel, Registrar, New York