



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/047

Judgment No.: UNDT/2018/005

Date: 12 January 2018

Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

SARWAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George G. Irving, PC

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 26 September 2016, the Applicant, a national of Bangladesh and a former staff member appointed as an Associate Social Affairs Officer at the P-2 level in the Department of Economic and Social Affairs (“DESA”) in New York, filed an application contesting the rejection of [his] formal complaint of harassment and abuse of authority against his First Reporting Officer (“FRO”) and Second Reporting Officer (“SRO”) taken by the Under-Secretary-General of DESA (“USG/DESA”).

2. The Applicant requests as remedies the rescission of the contested decision and compensation in the amount of two years’ net base salary pay for consequential and moral damages.

3. The Respondent contends that the application has no merits because, “[t]he USG/DESA lawfully closed the complaint pursuant to Section 5.18(a), ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The report of the fact-finding investigation indicated that no prohibited conduct took place”. The Respondent requests the application to be dismissed.

## **Factual background**

4. The Tribunal notes the following relevant agreed factual background detailed in paras. 12-19 and 21-35 of the Dispute Tribunal’s Judgment in *Sarwar* UNDT/2016/178:

12. On 22 November 2013, the Applicant’s SRO completed his evaluation of the Applicant’s performance for the 2012-2013 cycle in Inspira [a United Nations online jobsite]. On 22 November 2013, the Applicant met with his FRO and SRO and was informed that his performance for the 2012-2013 cycle had been rated “D – does not meet performance expectations”, the lowest rating available. [...]

13. On 6 December 2013, the Applicant acknowledged the evaluation for the 2012-2013 cycle in Inspira. That same day, the Applicant submitted a rebuttal statement with respect to his rating for the 2012-2013 cycle.

14. On 16 December 2013, the Applicant and his FRO finalized his workplan for the 2013-2014 cycle, and the Applicant inserted it in Inspira.

15. The parties agree that on 31 December 2013, the FRO met the Applicant “to carry out the midpoint review for the 2013-2014 cycle and to finalize the performance improvement plan [“PIP”]” (the midpoint review was not recorded in Inspira until later, on 4 April 2014). That same day, the FRO sent a [PIP] to the Applicant by email, copying the SRO, and stating:

Following the meeting we held at 12pm today to discuss the development of your [PIP], I am attaching the version that we reviewed today. It is our understanding from the meeting that you do not agree to a [PIP] on these areas of your work. We look forward to your response in order to move forward.

The attachment was not submitted to the Tribunal as evidence.

16. On 2 January 2014, the Applicant sent an email to his FRO, copying his SRO, and outlining his objections to the [PIP], including the fact that his FRO had not yet formally approved his workplan for the 2013-2014 performance cycle in Inspira, that he was yet to have a midpoint review for the performance cycle, and that he could not have a [PIP] until he had a midpoint review identifying his shortcomings.

17. On 6 January 2014, the FRO approved the Applicant’s workplan for the 2013-2014 cycle in Inspira. In an email to the Applicant on the same date, she noted that a review meeting had taken place with the Applicant and his SRO on 31 December “during which we reviewed your work and discussed the final version of the [electronic performance appraisal system (“e-PAS”) report]. This meeting was the culmination of many meetings reviewing your work for this [e-PAS] cycle and developing the [PIP].

18. By email to the Applicant dated 14 January 2014, his FRO stated that she was awaiting his reply to her 6 January 2014 email and that: “We are here to support you, yet your performance processes continues to be delayed and this is not conducive to the working environment and the work plan.” The FRO requested that the Applicant revert regarding the [PIP].

19. On 28 January 2014, the rebuttal report was finalized in regard to the Applicant's initial performance evaluation for the 2012-2013 performance cycle ("[f]irst [r]ebuttal [r]eport"). The rebuttal panel concluded in its report that the overall rating should be changed to "C – partially meets performance expectations". The panel concluded that the rating for the core competency of "Professionalism" should be changed from "D – unsatisfactory" to "C – requires development" as should the competencies of "Communication", "Planning and organizing" and "Creativity". The panel concluded that the rating for the competency of "Teamwork" should be changed from "C – requires development" to "B – fully competent".

...

21. On 31 January 2014, the DESA Executive Office ["DESA/EO"] sent the [f]irst [r]ebuttal [r]eport to the Applicant.

22. By email to the Applicant dated 4 February 2014, the Applicant's FRO requested that he inform her if he wanted to add any comments to the midpoint review for the 2013-2014 performance cycle so that it could be finalized. By email response later the same day, the Applicant thanked her for her suggestions, feedback and support on performance issues in a meeting the previous day. He also disputed a comment that she had apparently entered into Inspira which stated that he had not agreed to the [PIP] she had developed for him. He stated "I didn't disagree on a [PIP], rather I wanted to work on a [PIP] that was informed by systematic discussions on my performances and based on my agreed [e-PAS] report for the said period.

23. On 12 February 2014, the FRO sent the Applicant an amended [PIP], to be in effect from 12 February to 25 March 2014.

24. On 18 March 2014, the Applicant's appointment was extended for six months.

25. On 25 April and 2 May 2014, the FRO met the Applicant for the end-of-cycle discussion. On 5 May 2014, the FRO completed her evaluation of the Applicant's performance for the 2013-2014 cycle in Inspira, assigning an overall rating of "D – does not meet expectations".

26. On 30 May 2014, the SRO approved the assessment of the Applicant's performance for the 2013-2014 cycle and on 13 June 2014, the Applicant acknowledged the rating.

27. On 25 June 2014, the Applicant submitted a rebuttal statement in respect to his evaluation for the 2013-2014 performance cycle.

28. On 19 September 2014, the Applicant's fixed-term appointment was extended until 31 October 2014.

29. In a report dated 14 October 2014 (“[s]econd [r]ebuttal [r]eport”), the second rebuttal panel upgraded the Applicant’s rating for the 2013-2014 performance cycle to “C – partially meets performance expectations”. [...]

30. On 20 October 2014, the Applicant submitted a formal complaint of harassment, discriminatory treatment and abuse of authority to the Under-Secretary-General of DESA. The fact-finding panel interviewed the Applicant on 28 January 2015.

31. On 30 October 2014, the Director, [Division for Social Policy and Development] of DESA (“DSPD/DESA”), addressed a letter to the Applicant conveying the decision not to grant him a continuing appointment and to separate him from service upon the expiration of his fixed-term appointment on 30 November 2014. The letter stated:

In accordance with your offer of appointment dated 16 December 2011, you were required to prove within the probationary period of your appointment that you had the qualifications to be a career staff member of the United Nations.

...

Based on the results of the rebuttal panels for the past two e-Performance cycles, it was determined that your service only partially meets expectations. In this regard, it was decided to give you a thirty-day notice and to extend your appointment until 30 November 2014, which will represent the final extension of your appointment.

32. On 7 November 2014, the Applicant requested management evaluation of the decision to separate him from service. He also submitted a letter to the Secretary-General requesting suspension of action of the decision.

33. By letter dated 18 November 2014, the Under-Secretary-General for Management (“USG/DM”) informed the Applicant that the Secretary-General had decided to grant his request for suspension of action and extend his appointment until 7 December 2014.

34. By letter dated 4 December 2014, the USG/DM informed the Applicant that the Secretary-General had decided to uphold the decision to separate him from service.

35. On 7 December 2014, at the close of business, the Applicant was separated from service upon the expiration of his fixed-term appointment.

5. On 12 February 2015, the Applicant filed an application before the Dispute Tribunal registered under Case No. UNDT/NY/2015/003, contesting the decisions of “non-renewal of appointment”, “failure to grant continuing appointment”, and “separation from service”.

6. By Judgment *Sarwar* UNDT/2016/178, the Dispute Tribunal decided, in para. 107, as follows:

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

- a. The application succeeds in part.
- b. The decision to separate the Applicant from service is rescinded. As an alternative to the rescission of the decision the Respondent may elect to pay the Applicant twelve months’ net base pay.
- c. The Respondent is ordered to pay to the Applicant USD5,000 as compensation for non-pecuniary damages.
- d. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable”.

7. The appeal filed by the Secretary-General against this judgment was upheld, the judgment was vacated and the cross-appeal filed by the Applicant was dismissed by the Appeals Tribunal in *Sarwar* 2017-UNAT-757.

8. On 20 October 2014, the Applicant submitted to the USG/DESA a formal complaint of abuse of authority, discrimination and harassment against his FRO, [name redacted, Ms. NS], and abuse of authority and lack of sensitivity and respect for differences against his SRO, [name redacted, Mr. JPG] in accordance with ST/SGB/2008/5. The Applicant provided additional information relevant to the matter on 3 and 12 November 2014.

9. As mentioned above, the Applicant was separated from service on 7 December 2014. Following the submission of his complaint, a fact-finding panel was

formed. The panel interviewed the Applicant on 28 January 2015, while the Applicant was in the process of relocating with his family from the United States to the United Kingdom. Consequently, he did not have the documentation he needed for the interview. Still, he agreed to the interview as the panel members repeatedly stressed that it was the initial interview and there would be more interviews to follow, being the first and last interview the Applicant had.

10. Following the telephone interview, on 5 February 2015, the Applicant sent additional information to the panel to elaborate some of the questions asked during the interview.

11. The investigation was concluded on 15 May 2015, but the Applicant was not notified about the outcome until the following year, on 26 February 2016. The Applicant was informed that the report was sent to an incorrect email address in the first instance with no proof of delivery, although supposedly a confidential document.

12. On 14 April 2016, the Applicant filed a request for a management evaluation of the findings of the investigation report regarding his 20 October 2014 complaint of harassment and abuse of authority against Ms. NS and Mr. JPG, and the subsequent closing of the investigation. The Applicant contended that the report from DESA failed to address most of the specific complaints he had made in his submission, including whether the actions of his supervisor contributed to the creation of a hostile working environment.

13. The Management Evaluation Unit (“MEU”) issued their evaluation on 1 July 2016 upholding the findings of the DESA investigation panel.

### **Procedural background**

14. On 26 September 2016, the Applicant filed an application contesting the rejection by the USG/DESA of “[his] formal complaint of harassment and abuse of authority against FRO and SRO] without an investigation”.

15. On 28 September 2016, in accordance with art. 8.4 of the Dispute Tribunal's Rules of Procedure, the Registry transmitted the application to the Respondent, instructing him to file his reply by 28 October 2016.

16. On 28 September 2016, the case was assigned to the undersigned Judge.

17. On 28 October 2016, the Respondent filed his reply, arguing that the application has no merits because "[t]he USG/DESA lawfully closed the complaint pursuant to Section 5.18(a), ST/SGB/2008/5" as "[t]he report of the fact-finding investigation indicated that no prohibited conduct took place".

18. On 10 January 2017, by Order No. 4 (NY/2017), the parties were directed to confirm their availability for attending a case management discussion ("CMD") on 19 January 2017. The Respondent was also ordered to file by 13 January 2017, a copy of the fact-finding panel's report submitted to the USG/DESA on 13 April 2015 together with all the supporting documentation, considered relevant to the present case.

19. On 19 January 2017, the parties participated in the CMD. The Applicant and his Counsel, Mr. George Irving, participated via telephone and the Respondent was represented by the then Counsel, Ms. Pallavi Sekhri.

20. On 20 January 2017, following the CMD, the Tribunal issued Order No. 16 (NY/2017), instructing the parties as follows (emphasis omitted):

... By 5:00 p.m., on Tuesday, 21 February 2017, the Respondent shall file a submission setting forth:

- a. The Applicant's final performance appraisal; and
- b. The actions taken by the Administration, if any, in accordance with the recommendations made in rebuttal panel reports, together with supporting documentation of these actions, if any.

... By 5:00 p.m., on Tuesday, 28 February 2017, the Applicant shall file a submission setting forth:

- a. The Applicant's views on the fact-finding panel's report and attached documents;



b. Documents relating to the Applicant's performance appraisals and rebuttal processes, upon which the Applicant intends to rely;

c. A clarified request for monetary and moral damages, in light of [the Dispute Tribunal's] Judgment [*Sarwar*] UNDT/2016/178; and

d. Medical documentation and a list of witnesses upon which the Applicant intends to rely as evidentiary support of moral damages, in a redacted format if necessary.

... By 5:00 p.m., on Tuesday, 28 February 2017, the parties shall also file a joint submission informing the Tribunal of the progress of their efforts for an amicable resolution.

21. On 21 February 2017, the Respondent filed his submission in response to para. 14 of Order No. 16 (NY/2017).

22. On 28 February 2017, the Applicant filed his submission addressing the items requested in para. 15 of Order No. 16 (NY/2017). Furthermore, the Applicant informed the Tribunal that “[s]hould a hearing be deemed necessary, the Applicant himself would be the only witness called on his behalf and whose testimony would be limited to the issue of moral damages”.

23. Also on 28 February 2017, the parties filed a joint submission informing the Tribunal that while they had attempted informal resolution, they, however, had not agreed to further informal resolution of the case.

24. On 22 March 2017, the Tribunal issued Order No. 51 (NY/2017) instructing the parties to file a jointly signed submission informing the Tribunal of their availability to attend a half day hearing for the Applicant to testify on the issue of moral damages.

25. On 27 March 2017, in response to Order No. 51 (NY/2017), the parties informed the Tribunal of their availability to attend the hearing between 2 and 4 May 2017.

26. On 29 March 2017, by Order No. 59 (NY/2017), the Tribunal instructed the parties to participate in a half-day hearing at the Tribunal's court room scheduled for the mutually available date of 2 May 2017.

27. On 2 May 2017, the Tribunal conducted the scheduled hearing, at which the Applicant participated and testified remotely via telephone while his Counsel, Mr. George G. Irving, and the then Counsel for the Respondent, Ms. Pallavi Sehkhri, were present in the court room in New York.

28. The Tribunal informed the parties that a transcript of the hearing would be prepared and made available to the parties. As the parties indicated that they had no further evidence to adduce in the present case, the parties were instructed to file their closing submissions, with reference only to the evidence already before the Tribunal, within three weeks from the date the hearing transcript was uploaded to the electronic filing portal and made available to the parties. The parties had no objection to this deadline.

29. By Order No. 86 (NY/2017) issued on 5 May 2017, the Tribunal instructed the parties to submit their closing submissions, with reference only to the evidence already before the Tribunal, no later than three weeks from the date the hearing transcript was uploaded to the electronic filing portal and made available to the parties.

30. On 8 May 2017, the Registry informed the parties that the transcript of the hearing on 2 May 2017 had been uploaded and was available through the electronic filing portal. The notification also informed the parties that their deadline for closing submissions was 30 May 2017.

31. By Order No. 93 (NY/2017) issued on 12 May 2017, the Tribunal instructed the Respondent to submit a copy of the job descriptions for the Applicant and the Applicant's FRO and SRO. On 19 May 2017, the Respondent filed the requested documentation.

32. On 30 May 2017, the parties filed their closing submissions.

### **Applicant's submissions**

33. The Applicant's principal contentions are as follows:

a. The investigation was flawed from both substantive and procedural perspectives. Substantively, although the Applicant gave specific context for each and every complaint and provided documentary evidence, the panel failed to take this information into account. Rather, the panel created its own version of issues terming them as complaints of the Applicant which the Applicant had not raised in his formal complaint. These were set forth in the request for management evaluation which the Applicant claimed were never addressed. Furthermore, the panel failed to address the more serious allegation of cultural insensitivity by asking the wrong questions. They instead raised the lack of proper introduction; lack of guidance and lack of feedback, which the Applicant did not raise since these were outside the scope of ST/SGB/2008/5; also, lack of inclusion in the team leading to social isolation was never raised in the complaint. What was in fact raised was the serious allegations made against the Applicant by colleagues, constituting mobbing, that were encouraged by the supervisor;

b. The accuracy and neutrality of the investigation panel was questionable as it is mentioned several times in the summary of the report that the rebuttal panel upgraded his rating to "requires development". This was the investigators' interpretation of the actual language used in the performance report, which was "C – partially meets performance expectations". The use of a negative connotation for a positive outcome poses a question about the neutrality of the panel and the approach taken to treat it solely as a performance issue. The investigation panel also failed to take into consideration the issues discussed in the interview or to perform any follow-up;

c. The Applicant stated that procedurally, the investigative process was rushed and superficial. On one occasion, the investigative team asked the

Applicant to submit a particular document. Since he did not have access to the document at the time, he referred the investigation team to the rebuttal panel as a certain source of that document since the rebuttal panel made extensive reference to that particular document in their report. The Applicant mentioned that the rebuttal panel members were never approached even though the requested evidence could be found with them;

d. In the Applicant's official complaint of work related harassment and abuse of authority, he made extensive reference to both the rebuttal panel reports (specifically with respect to the accusation of plagiarism, lack of support, extensive negativity and cultural insensitivity) and he argued that it was expected that the investigative panel would at least interview the chairman of the two rebuttal panels, or at least a member of the rebuttal panels, but such interviews were never conducted;

e. During a hearing on the merits of the case brought by the Applicant over his non-renewal, the Chairman of the rebuttal panel was asked about the investigation and he replied that he was not aware of a complaint, and neither the investigative panel nor the MEU contacted him for any clarification of the rebuttal panel's findings. The Applicant noted that the Chairman, incidentally, was Ms. NS's predecessor in the post of Chief of the Unit who thus had an excellent grasp of the work involved;

f. There was no indication about which standard was used by the investigative panel or by the department in assessing the collected evidence. The Appeals Tribunal referred to the 1958 Convention of the International Labour Organization ("ILO") [Discrimination (Employment and Occupation)] and its arts. 1.1 and 1.2 which provides a clear definition of the notion of discrimination;

g. Ms. NS's continued harassment and retaliation became acute after the first rebuttal report for 2012-13 was made available on 31 January 2014. During

that period, the Applicant was organizing an event for the launch of the flagship World Youth Report (“WYR”) 2013 which was scheduled for 14 February 2014. He mentioned that negative and unnecessary emails and other forms of harsh communication continued even after the event successfully took place. Considering the timing and pattern of communication, the Applicant said he was concerned that his FRO was retaliating against him for challenging her assessment. The Applicant stated that the second rebuttal panel considered the criticism unjustified and that it was part of a larger pattern of negativity. The Applicant further claimed that both supervisors engaged in undermining his professional reputation including by bringing up allegations of plagiarism, which the rebuttal panel found unwarranted and disturbing. These allegations reflected an abuse of authority by his supervisors that created a hostile working environment with unnecessary embarrassment, stress and pressure. There was, however, no reference to this incident in the investigation report. Ms. NS’s attitude towards him was critical and demeaning. His other colleagues were influenced by the behavior of Ms. NS to treat the Applicant as an inferior, with her tacit support;

h. Both rebuttal reports cited the fact that both reporting officers lacked cultural sensitivity towards him, who came from a developing country through a programme precisely designed to increase diversity, which is one of the core values of the United Nations. Further, art. 2.3 of ST/SGB/2008/5 contains a provision related to the expectation from all staff members to demonstrate “tolerance, sensitivity and respect for differences” in their interactions with others;

i. The Applicant had repeatedly called the attention of his SRO, Mr. JPG, to the hostile work environment under his supervisor, Ms. NS, and requested a transfer to another post within DESA, but that no steps had been taken to address this issue. He then requested the Director of the Division, [name redacted, Ms. DB], to transfer him, which she agreed to do and asked him to

follow-up with Mr. JPG. Upon inquiry, Mr. JPG informed the Applicant that the request for a move was not approved by the DESA/EO. The Applicant claimed there was no record of such a communication;

j. The Applicant then referred to the Appeals Tribunal's case of *Ivanov* 2015-UNAT-572, para. 27, in which the Appeals Tribunal explained the role of the Dispute Tribunal in dealing with investigation reports which are part of applications it has received;

k. The treatment received by the Applicant as well as the handling of his complaint lacked transparency. The superficiality of the investigation was underscored by the fact that it appeared to dwell solely on whether the matter met the criteria of misconduct or not. ST/SGB/2008/5 provides for an investigation panel to make other recommendations even when the conduct does not rise to the disciplinary level. The fact the report was not produced until after he had been separated from service precluded such a possibility. The Applicant was provided with the report eight months later when his first Tribunal case was being considered and this demonstrated a serious cynicism towards the entire process.

### **Respondent's submissions**

34. The Respondent's contentions are as follows:

a. The application had no merit for the following reasons: (i) the USG/DESA lawfully closed the complaint pursuant to sec. 5.18(a), ST/SGB/2008/5; (ii) the investigation report indicated that no prohibited conduct took place; (iii) the investigation panel, appointed by the USG/DESA, reached its conclusion after conducting an investigation during which it reviewed the evidence relevant to the alleged prohibited conduct; and (iv) the Applicant has not identified any procedural irregularities in the conduct of the investigation, or the determination of the USG/DESA;

b. Section 5.20 of ST/SGB/2008/5 provides limited grounds for an appeal. A staff member may only appeal if he or she “has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper”;

c. In reviewing whether the correct procedure was followed, the Dispute Tribunal may “examine the administrative activity (act or omission) followed by the Administration [ ... ] and [ ... ] decide if it was taken in accordance with the applicable law [and] also determine the legality of the conduct of the investigation” (*Nwuke* 2010-UNAT-099);

d. The Dispute Tribunal is not vested with the competence to conduct a fresh investigation into the complaint (*Messinger* 2011-UNAT-123, *Luvai* 2014-UNAT-417). The scope of judicial review in prohibited conduct cases is restricted to examining how the Organization responded to the complaint (*Luvai* 2014-UNAT-417). It is not the Dispute Tribunal’s role to substitute its own judgment for that of the responsible official in the exercise of his or her discretion under ST/SGB/2008/5 (*Masyllkanova* UNDT/2015/088, affirmed by the Appeals Tribunal in *Masyllkanova* 2016-UNAT-662);

e. The investigation was conducted in accordance with the formal procedures set out in ST/SGB/2008/5. The Applicant did not identify any procedural irregularities in the conduct of the investigation;

f. Following a review of the Applicant’s complaint dated 20 October 2014, the USG/DESA appointed a panel on 22 December 2014 to conduct a fact-finding investigation into the reported prohibited conduct in accordance with sec. 5.14 of ST/SGB/2008/5. The panel consisted of two staff members from the roster of trained investigators maintained by the Office of Human Resources Management (“OHRM”);

g. The panel conducted an investigation of the Applicant's complaint over a three-month period, in accordance with secs. 5.15 to 5.17 of ST/SGB/2008/5. The panel reviewed an estimated total of 150 pages of evidentiary materials and all the documentation provided by the Applicant;

h. The only specific requirement on the conduct of a fact-finding investigation is contained in sec. 5.16 of ST/SGB/2008/5, which provides that such investigation "[s]hall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged";

i. The panel fulfilled the requirement in sec. 5.16. The panel interviewed the Applicant on 28 January 2015. During this interview, the Applicant was given the opportunity to give a full account of his grievances and to substantiate his complaint;

j. On 29 January 2015, the Applicant confirmed that the transcript of his interview accurately reflected what he said during the interview;

k. The panel then interviewed the Applicant's former FRO and SRO. Based on the interviews and evidentiary materials, the panel decided to interview two additional witnesses, who the panel considered may have evidence relevant to the complaint;

l. Contrary to the Applicant's assertion, the panel was not required to interview members of the rebuttal panels. A fact-finding panel maintains the discretion to determine how to conduct the investigation of a complaint, including who may have relevant information about alleged conduct and the extent to which additional enquiries and/or evidence may be required to reach a conclusion in regard to the issues under investigation (*Masyllkanova* UNDT/2015/088, affirmed by the Appeals Tribunal in *Masyllkanova* 2016-UNAT-662). The panel, thus, reasonably determined that it was not necessary



to interview members of the rebuttal panels on the basis that they were not first-hand witnesses of any alleged prohibited conduct. The panel found that the rebuttal reports provided a comprehensive record of the Applicant's performance management issues;

m. In accordance with sec. 5.17 of ST/SGB/2008/5, the panel prepared a detailed report that gave a full account of the facts ascertained and attached the documentary evidence. The Respondent considered the Applicant's complaint that the panel's report did not properly address the substantive issues raised in his complaint is without merit as the panel addressed each of the Applicant's substantive allegations in its report and determined that they were not supported by the evidence;

n. On 13 April 2015, the panel submitted its final report to the USG/DESA. The panel concluded that the facts and evidence demonstrated that the conduct of the Applicant's FRO and SRO did not constitute prohibited conduct under ST/SGB/2008/5. The panel found that the Applicant was provided with appropriate and constructive guidance and feedback from his FRO and SRO. The panel did not find any evidence to support the conclusion that the FRO's and SRO's conduct constituted discrimination, harassment, or abuse of authority;

o. The USG/DESA reviewed the report and concluded that it indicated that the Applicant's FRO and SRO had not engaged in prohibited conduct;

p. On 14 May 2015, the USG/DESA informed the Applicant of the decision to close the complaint as the record of the fact-finding report did not establish prohibited conduct, and provided him with a summary of the findings and conclusions. However, the decision was notified to the Applicant to the wrong email address and he was only notified of it on 26 February 2016. The USG/DESA's decision was taken in accordance with sec. 5.18(a) of ST/SGB/2008/5, which provides that if the report indicates that no prohibited

conduct took place, the responsible official will close the complaint. A copy of the fact-finding report, together with all the supporting documentation, was provided to the Tribunal on 13 January 2017 and therefore made available to the Applicant.

## **Considerations**

### *Applicable law*

35. Article 2.1(a) of the Dispute Tribunal’s Statute provides:

#### **Article 2**

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

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

#### **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.

...

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

...

## **Section 2**

### **General principles**

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2(a) and staff rules 101.2(d), 201.2(d) and 301.3(d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

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.

2.3 In their interactions with others, all staff members are expected to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace.

2.4 The present bulletin shall apply to all staff of the Secretariat. Complaints of prohibited conduct may be made by any staff member, consultant, contractor, gratis personnel, including interns, and any other person who may have been subject to prohibited conduct on the part of a staff member in a work-related situation.

### **Section 3**

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

...

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

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 4**

#### **Preventive measures**

...

4.5 Staff members are responsible for familiarizing themselves with the Organization's policy on prohibited conduct and with the various options and internal channels available for addressing such conduct. Staff members are also reminded of the policy introduced by ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations.

4.6 In order to resolve problems which could potentially give rise to instances of prohibited conduct, managers and supervisors shall maintain open channels of communication and ensure that staff members who wish to raise their concerns in good faith can do so freely and without fear of adverse consequences.

...

## 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.

...

### *Informal resolution*

...

5.6 Aggrieved individuals may ask for assistance from a third party in seeking informal resolution. Depending on the situation and on their level of comfort with one official rather than another, they may seek the assistance of any of the following:

- (a) The Ombudsman or a member of the Ombudsman's Office;
- (b) The Staff Counsellor at the duty station;
- (c) A human resources officer at the duty station;
- (d) A member of the conduct and discipline team in a peacekeeping mission or at Headquarters;
- (e) A member of the executive committee of the staff representative body at the duty station;
- (f) A staff representative of the department or office concerned;
- (g) The Office of the Special Adviser on Gender Issues and Advancement of Women;
- (h) The Focal Point for Women in the Secretariat or the focal point for women in the department or office concerned;
- (i) A member of the Panel of Counsel or the Office of Staff Legal Assistance;
- (j) A supervisor, including the first or second supervisor.

In all cases, the Medical Service may be consulted for advice. Aggrieved individuals may also consult an outside adviser, such as an occupational psychologist or stress counsellor, at their own expense.

...

5.9 Regardless of the outcome, the officials listed in section 5.6 above shall provide continuing support to the aggrieved party at every stage of the process, in consultation with the appropriate officials, taking into account the positive or negative consequences of the proposed course of action. If the temporary assignment of the aggrieved party or the alleged offender to another position is proposed, this may not take place without the consent of the individual concerned.

...

*Formal procedures*

...

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 OHRM 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 (“ASG/OHRM”) for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The ASG/OHRM will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

...

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.

## **Section 6**

### **Monitoring**

...

#### *Monitoring during the investigation*

6.4 Where a fact-finding investigation is initiated following receipt of a formal complaint of prohibited conduct, appropriate measures shall be taken by the head of department, office or mission to monitor the status of the aggrieved party, the alleged offender and the work unit(s) concerned until such time as the fact-finding investigation report has been submitted. The purpose of such monitoring shall be to ensure that all parties comply with their duty to cooperate with the fact-finding investigation and that no party is subjected to retaliation as a result of the complaint or the fact-finding investigation. Where retaliation is detected, the Ethics Office shall be promptly notified and the matter shall be handled in accordance with the provisions of ST/SGB/2005/21. The OHRM may request information from the head of department or office, as necessary.

...

37. ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) provides:

...

**Section 4**

**Administrative instructions**

...

4.2 Administrative instructions shall be promulgated and signed by the USG/DM or by other officials to whom the Secretary-General has delegated specific authority.

...

38. ST/AI/2010/5 (Performance Management and Development System) provides as follows:

...

**Section 3**

**Performance evaluation cycle**

...

3.1 Except as provided in sections 3.2 and 3.3 of the present instruction, the performance cycle shall be 12 months. The cycle begins on 1 April of each year and ends on 31 March of the following year. However, as provided in sections 3.2 and 3.3, the performance period may be shorter or longer than the 12-month cycle, normally not less than 6 months or longer than 18 months.

3.2 When a staff member takes up new duties upon recruitment, transfer or assignment in the course of the performance year, an individual workplan shall be established within the first two months of assumption of the new function. If a staff member actively serves with the United Nations for less than six months during the performance cycle, no e-PAS report or e-performance document is required to be completed.

...

**Section 5**

**Reporting officers and additional supervisors**

5.1 A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting



officer is responsible for:

- (a) Developing the workplan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS report and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

...

## **Section 6**

...

### **Individual plans**

6.3 First reporting officers shall work with staff members they supervise on the development of the staff member's individual workplan for the performance cycle. The workplanning stage includes: (a) establishing individual performance evaluation criteria by setting goals/key results/achievements; (b) defining core competencies, managerial competencies (where applicable), and job-related competencies (where applicable); and (c) formulating a personal development plan, as follows:

...

- (b) Competencies: the organizational competencies listed in ST/SGB/1999/15 define a performance standard against which all staff can be consistently and objectively evaluated. All staff members are held accountable for demonstrating the three core values of integrity, professionalism and respect for diversity/gender equality. In the discussion of the workplan, the staff member and first reporting officers shall select the most relevant competencies related to the goals/key results/achievements identified for the reporting cycle and, where appropriate, managerial competencies. Staff with managerial or supervisory responsibilities must include managing performance among the selected competencies for the

reporting period, and they will be held accountable for the effectiveness of their implementation of the Performance Management and Development System. Specific job-related competencies may be added where appropriate;

...

## **Section 8**

### **Appraising performance**

...

8.3 The first reporting officer shall evaluate the extent to which the staff member has achieved the goals/key results/achievements as set out in his/her workplan. The first reporting officer shall also evaluate and comment on the manner in which the staff member has demonstrated the core values and competencies. The first reporting officer may comment on the staff member's self-appraisal in his/her evaluation of the staff member. First reporting officers are encouraged to discuss the career aspirations of staff during the end-of-the year discussion. An overall rating on the staff member's performance shall be given by the first reporting officer pursuant to section 9 below.

...

8.5 Evaluations are reviewed by the second reporting officer, who may make comments, as appropriate. All parties shall sign the completed e-PAS [report] or e-performance document. The signature of the staff member constitutes an acknowledgement that the performance review has been conducted. It does not indicate that the staff member is in agreement with the evaluation. The rebuttal process provided for in section 15 below cannot be initiated unless the staff member has signed off on the finalized evaluation. If an e-PAS [report] is submitted for signature to a staff member and the staff member does not sign, the e-PAS [report] is considered to be signed by the staff member after 14 days of its receipt by the staff member. A staff member who does not sign his/her e-PAS [report] shall be so informed and the 14-day period for submission of a rebuttal statement by the staff member pursuant to section 15.1 below shall commence as of the date of notification to the staff member.

...

## **Section 10**

### **Identifying and addressing performance shortcomings and unsatisfactory Performance**

...

10.2 If the performance shortcoming was not rectified following the

remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as “partially meets performance expectations”, a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

...

10.4 Where at the end of the performance cycle performance is appraised overall as “does not meet performance expectations”, the appointment may be terminated as long as the remedial actions indicated in section 10.1 above included a performance improvement plan, which was initiated not less than three months before the end of the performance cycle.

...

## **Section 11**

### **Implementation and monitoring by heads of departments and offices**

11.1 Heads of departments/offices/missions are responsible for the implementation of the Performance Management and Development System process. To enhance managerial accountability at all levels, Performance Management and Development System implementation is included as a key indicator in the human resources action plans in order to emphasize the importance of senior management leadership in performance management.

11.2 Primary responsibility for the timely execution of the Performance Management and Development System, overall compliance and consistent and fair implementation rests with the head of department/office/mission. The head of department/office/mission shall promote communication between staff members and their supervisors, encourage ongoing feedback and dialogue and ensure that any change in the mandate or priorities of the department/office I communicated to the staff.

...

39. ST/AI/2012/2/Rev.1 (Young professionals programme (“YPP”)) provides in relevant parts:

## **Section 1**

### **General provisions**

...

1.2 The positions available for recruitment under the young professionals programme shall include all Secretariat positions in the Professional category at the P-1 and P-2 levels established through the regular budget, excluding language posts, and up to 15 per cent of positions at the P-1 and P-2 levels in field operations<sup>2</sup> financed through the regular budget and voluntary contributions.

1.3 In accordance with staff rule 4.16 (b) (ii), recruitment to the Professional category of staff from the General Service and related categories in the United Nations Secretariat shall be made exclusively through competitive examinations.

...

## **Section 2**

### **Eligibility**

...

2.2 The young professionals programme examinations are open to all individuals who:

- (a) Are nationals of one of the Member States participating in examination in a particular year;
- (b) Are not more than 32 years old on 31 December of the year of the examination;
- (c) Are proficient in either English or French;
- (d) Meet the minimum educational criterion set out in section 2.7 of the present instruction and any other requirements stipulated in the announcement of the examinations.

...

## **Section 7**

### **Selection and appointment of successful candidates**

7.1 Successful candidates in the young professionals programme examinations shall be eligible for consideration for appointment at the P-1 or P-2 levels in the Secretariat, depending upon their qualifications and the availability of posts.

...

7.10 Upon selection, successful candidates who are staff members

holding a permanent or continuing appointment shall retain such appointment. Successful candidates who are staff members holding a fixed-term or a temporary appointment or who are external applicants shall receive a fixed-term appointment for a period of two years, after which they shall be granted a continuing appointment, subject to satisfactory performance, in accordance with staff rule 4.14 (b). Any successful candidate whose performance is not satisfactory upon completion of the two-year initial assignment, regardless of his or her type of appointment, will be separated in accordance with the provisions of ST/AI/2010/5 and pursuant to staff regulation 9.3 (a) (ii) and staff rule 9.6 (c) (ii) and (h). In exceptional circumstances, the two-year period under a fixed-term appointment may be extended by not more than one additional year.

7.11 Selected candidates shall be required to serve at any of the duty stations of the United Nations Secretariat worldwide, except as provided for in section 7.5 above. Selected candidates shall be required to serve for a minimum of two years in the position of their initial assignment before being eligible to apply to another position. Selected candidates will be expected to serve in two different assignments: the initial assignment and a second, additional assignment. Upon completion of their initial assignment, selected candidates will be invited to participate in a rotation exercise in accordance with section 8.2 below. The second assignment shall normally be at a different duty station. Selected candidates whose initial appointments are at the P-2 level may apply to P-3 positions through the staff selection system only upon completion of two years in their initial assignment and provided that all other eligibility criteria are met in accordance with ST/AI/2010/3. Successful candidates appointed at the P-1 level shall be promoted to the P-2 level following a minimum of two years of satisfactory performance at the P-1 level.

...

## **Section 8**

### **Professional development support**

8.1 Upon placement, successful candidates recruited through the young professionals programme shall be supported by a series of structured programmes aimed at developing their potential as adaptable and diversified staff members, ready to respond to the evolving mandates of the Organization.

8.2 Successful candidates recruited through the young professionals programme will participate in a rotation exercise after serving a minimum of two years in their initial assignment at the Professional level in accordance with section 7.11 above.

8.3 In accordance with ST/AI/2010/5 on the Performance Management and Development System, managers are required to manage the performance of successful candidates recruited through the young professionals programme, including by defining a workplan, performance objectives and training and learning plans, and to ensure a timely assessment of their performance. Successful candidates recruited through the young professionals programme will be expected to serve on two different assignments in accordance with section 7.11 above and will receive a structured performance assessment for those assignments.

8.4 All successful candidates recruited through the young professionals programme shall be assigned a mentor, who will provide further guidance to ensure successful and accelerated integration into the Organization.

...

40. ST/AI/2001/7/Rev. 2 (Managed Reassignment Programme for staff in the Professional category at the P-2 level recruited through the national competitive examination, the General Service to Professional category examination or the Young Professionals Programme (“YPP”)) provides:

The Under-Secretary-General for Management, pursuant to section III.D, paragraph 6, of General Assembly resolution 51/226 of 3 April 1997, staff regulation 1.2 (c) and section 4.2 of Secretary-General’s bulletin ST/SGB/2009/4, hereby promulgates the following:

### **Section 1**

#### **Purpose**

1.1 The purpose of the Managed Reassignment Programme (the Programme”) is to provide staff in the Professional category at the P-2 level recruited through the national competitive examination, the General Service to Professional category examination or the Young Professionals Programme with enhanced orientation, training, mobility and career support during their first five years of service at the Professional level, in order to facilitate their adjustment and to accelerate the learning period leading to productive work and job satisfaction as international civil servants.

1.2 To that effect, the present instruction establishes the procedures under which staff members included in the Programme shall obtain experience in two different functions during their first five years of service. Staff recruited through the Young Professionals Programme shall normally have their second assignment at a different duty station.

### **Section 2**

## Scope

2.1 Subject to the exceptions in sections 2.2 and 2.4, the following staff members at the P-2 level are required to participate in the Programme:

- (a) Staff members who have been appointed through the national competitive examination, the General Service to Professional category examination or the Young Professionals Programme;
- (b) Staff members who have completed two years of service since their initial recruitment to the Professional category.

2.2 Staff members who wish to defer their participation in the Programme may request the ASG/OHRM to allow for deferred participation, provided that they comply with the provisions under section 1.2 above and subject to their supervisor's approval.

2.3 The Programme shall not apply to:

- (a) Staff members who have been promoted to a P-3 position since their initial recruitment to the Professional category;
- (b) Staff members recruited to posts requiring special language skills. Such staff members are subject to the provisions of administrative instruction ST/AI/2000/1 (as amended by ST/AI/2003/1), entitled "Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills".

2.4 The Programme shall not normally apply to the following staff members. However, they may request the ASG/OHRM to allow their participation in the Programme, subject to the following conditions:

- (a) Staff members who have already made a lateral move as defined in section 1 (q) of administrative instruction ST/AI/2010/3 since their initial recruitment to the Professional category may request another lateral move at the P -2 level for further career development, provided they have completed at least one year of service in their current assignment and subject to their supervisor's approval;
- (b) Staff members who have not yet completed two years of service since their initial recruitment to the Professional category may request early participation in the Programme, provided that they have obtained their supervisor's approval. Early participation will be approved only in exceptional cases;
- (c) Staff members who are on a temporary assignment for a period of less than one year at the time of the Programme may request participation in the Programme, subject to the approval of both their temporary supervisor and their supervisor in their parent

office. The parent position shall normally be available to participate in the Programme.

### **Section 3**

#### **Compendium of job opportunities**

3.1 At least once a year, the OHRM shall issue a compendium of job opportunities, comprising all vacant P-2 positions and the P-2 positions encumbered by those staff members who fall within the scope of the present instruction regardless of the source of funding of the position.

3.2 The compendium shall list all job opportunities in all job families at all duty stations and provide a brief description of the functions, as well as the requirements for each position.

...

### **Section 5**

#### **Selection process**

...

5.3 The OHRM shall conduct a matching exercise of all participants with a view to maximizing the number of reassignments, taking into account the preferences expressed by the staff member and the hiring manager, as well as human resources organizational priorities.

5.4 The ASG/OHRM shall decide on the reassignment of each staff member, which may include a decision not to reassign a participant in the Programme. Such decisions on reassignment shall be final and mandatory for staff members and hiring managers alike.

...

41. The Tribunal notes that ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations) provides as follows:

#### **Staff Rule 9.12 – Certification of service:**

Any staff member who so requests shall, on leaving the service of the United Nations, be given a statement relating to the nature of his or her duties and the length of service. On the staff member's written request, the statement shall also refer to the quality of his or her work and his or her official conduct.



42. The Convention No. 111 of the International Labour Organization (“ILO”) (Discrimination (Employment and Occupation)) (adopted on 25 June 1958 and entered into force on 15 June 1960), provides:

**Article 1**

(1) For the purpose of this Convention the term **discrimination** includes:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

...

43. The Universal Declaration of Human Rights of 1948 (adopted on 10 December 1948) provides in its Article 23(1) that:

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

44. The International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 and entered into force on 3 January 1976, provides the following:

**Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

45. The American Convention on Human Rights of the Organization of American States (adopted on 22 November 1969 and came into force on 18 July 1978) provides, in relevant parts, as follows:

**Article 1 - Obligation to Respect Rights**

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

...

### **Article 5 - Right to Humane Treatment**

1. Every person has the right to have his physical, mental, and moral integrity respected.

...

### **Article 11 - Right to Privacy**

1. Everyone has the right to have his honor respected and his dignity recognized.

...

#### *Receivability framework*

46. 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.

47. 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. 7.17.3 of the Rules of Procedure.

48. 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*

49. The Applicant is a former staff member appointed as an Associate Social Affairs Officer at the P-2 level in the DESA in New York and therefore the application is receivable *ratione personae*.

Receivability *ratione materiae*

50. The Applicant is challenging the rejection of “[his] formal complaint of harassment and abuse of authority against FRO and SRO without an investigation” taken by the USG/DESA, which is an administrative decision subject to a management evaluation request. The Applicant filed a management evaluation request before the MEU on 14 April 2016 within 60 days from the date of notification—26 February 2016—and therefore the application is receivable *ratione materiae*.

Receivability *ratione temporis*

51. The Tribunal notes that the Applicant filed the present application on 26 September 2016, within 90 days of the date of the management evaluation response—1 July 2016—thereby rendering the application receivable *ratione temporis*.

*The Tribunal's competence and the scope of the review in the present case*

52. In *Nwuke* 2010-UNAT-099, the Appeals Tribunal defined the role of judicial review of investigations into allegations of harassment, discrimination and abuse of authority, stating as follows:

31. Article 2 (1)(a) of the [Dispute Tribunal] Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority. Paragraph 2.1 of ST/SGB/2008/5 provides that “every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse”.

32. Paragraph 2.2 adds that “[t]he 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”. Paragraph 5.3 establishes that “[m]anagers 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” ...

33. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and in paragraph 5.17, the final report of those proceedings is referred to as follows:

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 .... 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.

34. Paragraph 5.18 provides for the possible courses of action one of which the responsible official shall take:

- (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual;
- (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) the third option is stated as follows:

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 ASG/OHRM for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The ASG/OHRM will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken (footnote omitted).

- (d) A final option is established in paragraph 5.19:

Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the ASG/OHRM shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

Paragraph 5.20, which is particularly relevant in the present case, finally establishes that “[ w ]here 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.

35. Chapter XI of the Staff Rules provides for the possibility to submit an application before the [Dispute Tribunal], and under Article 10 of the [Dispute Tribunal’s] Statute, the [Dispute Tribunal] may order the rescission of a contested administrative decision or a specific performance, and compensation (indispensable as an alternative to the

rescission or performance ordered when the contested administrative decision concerns appointment, promotion, or termination).

36. In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the [Dispute Tribunal] Statute, the Appeals Tribunal concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The [Dispute Tribunal] has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The [Dispute Tribunal] can also determine the legality of the conduct of the investigation.

37. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission, and in the latter case, Article 10 of the [Dispute Tribunal's] Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

38. In view of the foregoing, the Appeals Tribunal finds that the [Dispute Tribunal] erred in finding *Nwuke*'s application not receivable. *Nwuke* in fact did challenge an administrative decision which he claimed was in non-compliance with his terms of employment. The [Dispute Tribunal] therefore had jurisdiction to decide whether or not to order the conduct of an investigation or other courses of action concerning *Nwuke*'s accusations and complaints.

...

40. But serious and reasonable accusations and requests for investigations constitute important instruments to improve administrative procedures and to ensure that day-to-day actions by the Administration are in compliance with the Organization's law. The Administration must decide within its discretion whether or not to conduct investigations. The Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation and it may be subject to judicial review under Articles 2(1)(a) and 10(5) of the [Dispute Tribunal's] Statute and Articles 2 and 9 of the Statute of the Appeals Tribunal.

41. The General Assembly established the new internal justice system and approved the Statutes of both the [Dispute Tribunal] and the Appeals Tribunal. The Member States of the United Nations made a great effort to achieve an "independent, transparent, professionalized, adequately resourced and decentralized system ... consistent with the

relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike” (A/RES/63/253, preamble, paragraph 2).

42. According to the Statutes, the jurisdiction of both Tribunals and the content of the possible judgments they can render match those high goals and the [Dispute Tribunal] should not decline to exercise its competence in matters like the present, when the respective right is provided for to the claimant by the rules.

...

46. Given this, it seems senseless and quite a paradox to refer him back to the procedures under ST/SGB/2008/5. Essentially, *Nwuke* has already accomplished its requirements, and his situation and pleas have already been examined and evaluated by the Administration. Hence, the [Dispute Tribunal] had competence and must conduct the judicial review of the Administration’s decision, actions taken or failure to act.

53. The Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) stated in *Dawas* UNRWA/DT/2015/009 as follows (emphasis omitted):

45. The competence of the Tribunal is set out in Article 2 of its Statute, and the relevant provisions of Article 2 are as follows:

1. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Commissioner-General as the Chief Executive Officer of UNRWA:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure.

46. The UNAT has held in *Messinger*, 2011-UNAT-123 that:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if



the impugned administrative decisions were improperly motivated it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

47. Therefore, the Tribunal holds that it is entitled to review the Applicant's complaint of discrimination, abuse of power and harassment against [name redacted, Ms. M], the [Director of UNRWA Operations, Jordan ("DUO/J")], even if the [Department of Internal Oversight Services ("DIOS")] concluded in its report that the evidence obtained did not substantiate the Applicant's complaint. In these sorts of cases, the Tribunal's task is to review the alleged facts and determine if they are established. Subsequently, the Tribunal must consider if the established facts can be regarded as acts of discrimination, abuse of power and harassment.

...

65. Even if the above irregularities must at least be considered as highly regrettable when they are committed by a high-ranking manager, assisted by Human Resources Officers, they cannot be automatically considered as acts of abuse of power if these irregularities were committed in good faith. The Tribunal will now assess if the above[-]mentioned irregularities actually qualify as abuse of power.

...

67. It is often very difficult for the Tribunal to distinguish between poor management and abuse of power. However, in the present case, the DUO/J's statements during the investigation conducted by the DIOS clarify the issue. The DUO/J's statements indicate that she improperly used her position to influence the Commissioner-General which is exactly what the definition of abuse of power in [General Staff Circular] No.06/2010 encompasses: "Abuse of power is the improper use of a position of influence, power or authority against another person".

...

71. By stating that these alleged facts must be considered as established, the Tribunal does not conduct a new investigation. Rather it only notes that the alleged facts by the Applicant are very specific, that they have not been contested by the Respondent or investigated by the DIOS. However, most of the facts arise from emails produced as evidence in the case file. The Tribunal applies what has been held by UNAT in *Messinger* 2011-UNAT-123,

quoted above in para. [...] 46 of this Judgment.

54. In upholding the above-mentioned findings of the UNRWA Dispute Tribunal overturning an investigative report, in *Dawas* 2016-UNAT-612, the Appeals Tribunal affirmed the following as the proper role of judicial review:

21. The UNRWA Dispute Tribunal very thoroughly conducted a judicial review of the administrative decision under challenge. It did not erroneously substitute itself for the Administration or conducted a *de novo* investigation as argued by the Commissioner-General. It examined the same facts and the investigation report, and came to the conclusion that several procedural and substantive irregularities, precisely indicated, vitiated the contested result of the proceedings.

...

23. As we held in *Mashhour* 2014-UNAT-483:

It is clear that the [Dispute Tribunal] is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the [Dispute Tribunal's] Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the [Dispute Tribunal] to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

In our view, the exercise the UNRWA [Dispute Tribunal] undertook was not to conduct a fresh investigation into [the Applicant's] allegation of harassment but to draw its own conclusions from the investigation report, which is a legitimate exercise.

24. Irregularities such as the failure to address the specific harassment complaint, several examples of abuse of power (particularly during the periods of sick leave and hospitalization of the staff member) including sending performance evaluation-related emails and attempting to force [the Applicant] to retire for health reasons can be reasonably characterized as breaches of the Agency's policies and regulations, meriting a finding of abuse of power and harassment.

...

27. Therefore, this Tribunal agrees with the rescission of the impugned administrative decision without an order for reinstatement in

the present case, since the staff member has been declared unfit to work for health reasons.

55. In light of the above binding and relevant jurisprudence, the Tribunal is entitled to review an Applicant's complaint of discrimination, harassment and abuse of authority against his FRO, Ms. NS, and his SRO, Mr. JPG, even if the USG/DESA concluded after reviewing the investigation panel's report and the supporting documentation that the record indicates that their conduct did not violate the provision of ST/SGB/2008/5. In this type of case, the Tribunal's task is to review the alleged facts and determine if they are established. Subsequently, the Tribunal must consider if the established facts can be regarded as acts of discrimination, harassment and abuse of authority.

56. The Tribunal notes that the Applicant's complaint referred to allegations of discrimination, harassment and abuse of authority of his FRO and SRO, However, in the application, it is expressly indicated that the Applicant contests the rejection of his formal complaint of harassment and abuse of authority without an investigation.

57. Therefore, the Tribunal holds that it is entitled to review the Applicant's complaint related to harassment and abuse of authority against the Applicant's FRO and SRO even if the USG/DESA concluded in her report that the record indicated that Ms. NS's and JPG's conduct did not violate the provisions of ST/SGB/2008/5.

58. The Tribunal further notes that a fact-finding investigation was conducted in the case by a panel established by the USG/DESA and that the decision was taken based on the recommendations of the fact-finding investigation, and that the allegation that the contested decision was taken without an investigation is not correct and is to be rejected.

59. Accordingly, the Tribunal will first review the alleged facts to determine if they are established. Subsequently, the Tribunal will consider if the established facts can be regarded as acts of harassment and abuse of authority *On the merits*

Procedural irregularities

60. The Tribunal notes that in the present case, the Applicant filed his complaint of harassment and abuse of authority against his FRO and SRO on 20 October 2014. The fact-finding panel, to investigate his allegations of discrimination, harassment and abuse of authority, was appointed by the USG/DESA on 26 December 2014. The panel completed its work and submitted its report on 10 April 2015.

61. In accordance with the mandatory provisions of ST/SGB/2008/5, secs. 5.14, 5.17 (last sentence) and 5.18(b) (last sentence), the panel was to be appointed promptly and a report was to be issued no later than three months from the date of submission of the formal complaint, respectively, three months from 20 October 2014, in January 2015. It results that the panel was appointed more than two months from the date of submission of the complaint and there is no justification for this procedural delay. Moreover, the report was issued on 10 April 2015, approximately six months later, and the Applicant was informed of the outcome of the result of the investigation only on 20 February 2016 because the report was sent to an incorrect email address.

62. The panel never re-interviewed the Applicant after his first preliminary interview on 28 January 2015 as he was informed to be by the panel.

63. The Tribunal concludes the Applicant's contentions regarding procedural errors are correct and the grounds of appeals in this regard are to be granted.

Substantive irregularities

64. The Tribunal notes that in his complaint of 20 October 2014, the Applicant stated in paras. 4-11 (emphasis omitted):

... [Ms. NS] and [Mr. JPG], as my [FRO] and [SRO] respectively, evaluated my performance for 2012-13 and 2013-14 performance cycles, the crucial two years of my career at the United Nations as a young professional, with ratings “D-does not meet performance expectations”. I rebutted both the performance evaluations and the rebuttal panels changed the rating in both the occasions in my favour.

... Those performance appraisals were closely related to the issue of abuse of authority as they reflect [Ms. NS] and [Mr. JPG’s] personal feeling rather than professional. As a matter of fact, [Ms. NS] was retaliating against me since I challenged my first performance evaluation and went for a rebuttal. The fact that I sought a rebuttal was my right as a staff member and is specifically permitted by ST/AI/2010/5. [Mr. JPG] never stopped such retaliations. I will be able to provide documentation of mental and work related harassment immediately after I filed my first rebuttal.

... [Ms. NS’s] continued harassment and retaliation became acute after the rebuttal report for 2012-13 was made available on 31 January 2014. During that period, I was organizing an event for the launch of the flagship [WYR] 2013. The event was scheduled for 14 February 2014, but negative and unnecessary emails and other forms of tough communication continued even after the event successfully took place. I was bombarded with negative emails and other communications during 31 January to 19 February. Considering the timing and pattern of communication, I was concerned that my FRO was retaliating against me because I rebutted my performance evaluation. I will be able to give documentary evidence on this.

... [Ms. NS] showed an extensive level of negativity in my work. She never appreciated my hard work and always tried to put blame on me. It was a general pattern also observed by the rebuttal panels that they categorically mentioned in both the rebuttal reports. [Ms. NS] also exercised an extensive level of nitpicking as a campaign to damage my morale and self-confidence.

... Both [Ms. NS] and [Mr. JPG] tried to denunciate my professional integrity and reputation in many occasions, including through bringing up allegations of plagiarism [...] in many instances, which the rebuttal panel found utterly disturbing. I found the allegations of plagiarism as a reflection of ill intention from my supervisors to create unnecessary mental and professional pressures me to hamper my personal and professional well-being.

... I was often given assignments with very high expectations and with minimum support. I was often evaluated against a very high level of expectations compared to my current position as a P-2 level officer. Also, I was assigned with many *ad-hoc* assignments, which my

supervisors never included in the performance evaluation, except the ones they could use to disgrace me.

... The evaluation of my performance as well as other aspects of my personal relations with [Ms. NS] was often guided by a discriminatory approach. [Ms. NS's] attitude towards me was always critical and demeaning. My other colleagues were also inspired by her attitude to treat me inferior. She never stopped anyone from the team for not behaving properly, but always supported them. I will be able to provide evidence on this.

... Both the rebuttal reports categorically mentioned that [Mr. JPG] and [Ms. NS] lacked cultural sensitivity towards me. Their ways of interaction with me were guided by prejudice and a lack of respect for diversity, which is one of the core values of the United Nations. Also, according to the ST/SGB/2008/5 [A]rticle 2.3 "In their interactions with others, all staff members act expected to act with tolerance, sensitivity and respect for differences.

65. Further, the Tribunal will analyze the substantive errors invoked by the Applicant regarding the investigation and the findings and conclusions of the fact-finding panel.

66. The Tribunal notes that, in the present case, the fact-finding panel interviewed the Applicant as the aggrieved individual, Ms. NS and Mr. JPG, the two alleged offenders, as FRO and SRO, and one witness proposed by the SRO, Mr. BS.

67. The panel also analyzed written evidence consisting in: correspondence between the Applicant and his FRO between 20 December 2013-31 December 2013, 6-31 January 2014, 31 January 2015-31 March 2015, the Applicant's e-PAS reports for years 2012-2013 and 2013-2014, and the reports of the rebuttal panels for these two years.

68. Based on the oral and written evidence, the panel made the following findings and conclusions, in paras. 67-75 of its report:

... The [p]anel finds that the preponderance of evidence obtained suggests that the FRO and SRO's conducts do not constitute a pattern of deliberate or malicious harassment of [the Applicant] and that no prohibited conduct has taken place.

... The evidence gathered by [the] [p]anel shows that, contrary to [the Applicant's] assertions, he was provided with guidance and feedback from the FRO, SRO and members of the team since the beginning of his work in the Social Integration Branch, which would have been expected and typical for any new incoming young [p]rofessional staff member. He was initially given some time to become acquainted with the work of the Branch, had regular meetings with the FRO and SRO in which concerns pertaining to his performance and how to improve it were addressed. The [p]anel acknowledge[d] that for [the] initial period of his performance most of the feedback and interaction between the staff member and his [s]upervisors was conducted orally.

... Both parties were not able to provide sufficient written evidence supporting their statements. Much more written evidence provided fall on the period after the first rebuttal process, where the parties were guided by recommendations provided by performance rebuttal panel.

... Nevertheless, the [p]anel finds that feedback provided to the staff member during his tenure in the Youth Section, both orally and in writing, does not indicate that the FRO and SRO were treating [the Applicant] in a discriminatory manner. The [p]anel finds that, based on the past experience and following the advice of the [r]ebuttal [p]anel, the FRO would want to document discussions pertaining to [the Applicant's] performance.

... The evidence provided also shows that [the Applicant] was socially included in the team. According to the accounts of all interviewees, [the Applicant] was always invited and participated to a number of social events that the team would have, i.e., such as birthday parties, office lunches, office outings, private gatherings at [Ms. NS's] house, which he used to attend at least once until he lodged the first rebuttal in December 2013.

... With respect to the allegation of abuse of authority and constant negative feedback on the part of the FRO, the [p]anel is of the view that the feedback was provided in an appropriate and constructive manner, following the advice of the rebuttal panel, and could not be perceived as otherwise inappropriate or offensive. That the feedback was often negative only reflect that the [the Applicant's] work product did not meet his FRO's expectations. Based on the written evidence produced on communication between [the Applicant] and his FRO and SRO, the [p]anel did not find any written remark or reference pointing to harassment, abuse of authority or authority, or other inappropriate language.

... With respect to the allegation of cultural insensitivity of the SRO, [the Applicant] himself admitted that he did not recall instances

of when the SRO would make comments that would be disrespectful of his culture or country. Also, as discussed before, the written communications that are in our possession do not seem to contain any comment or to have a tone that would appear either insensitive or culturally disrespectful. The FRO and SRO also noted that during his service with the Branch, [the Applicant] never raised the issue of feeling uncomfortable with the team or pointed out to behavior of the FRO or SRO or members of the team that he would consider culturally insensitive.

... The email of 4 April 2014 and [...] of 5 April [2014] have been discussed above, and the [p]anel has expressed its view that the Supervisors took action in order to prevent the creation of a hostile environment against the staff member. The arguably inappropriate comment from a peer, a new staff member in the section, was initially beyond the control of the SRO and FRO, however, they made a timely effort to correct the situation.

... In [...] light of the above, the [p]anel concludes that the conduct of the FRO and SRO [towards] [the Applicant] did not fall under section 1.2, or section 1.4 of ST/SGB/2008/5”.

69. The Tribunal has to determine if the panel’s findings and recommendations/conclusions were correctly established in the sense that the Applicant’s FRO and SRO did not harass and/or abuse their authority in relation to the Applicant in exercising their managerial activities. In order to establish these aspects, the Tribunal will review the content of the evidence presented to the fact-finding panel as mentioned above.

70. Before starting this analysis, the Tribunal underlines that, as results from the facts, the Applicant was recruited on 19 March 2012 on a two-year fixed-term appointment as an Associate Social Affairs Officer at the P-2 level, step 6, in the DSPD/DESA, after successfully completing the National Competitive Recruitment Examination (“NCRE”) in 2009 and being placed on the roster and, as stipulated in the Applicant’s offer of appointment: “[S]taff recruited through the [NCRE] were expected to be considered for a continuing appointment after the completion of an initial two years of probationary service on a fixed-term appointment”, during which time staff were required to demonstrate that they possessed the requisite qualifications to serve as career staff members of the United Nations. The offer of appointment also provided



that Junior Professional staff members were expected to gain experience in two different posts/functions, including by working for two different Units, including being supervised by two different teams of supervisors, during their first five years of service at the professional level. After serving two to three years in their initial position, staff members would participate in a managed reassignment process for transfer to a second post/function, in accordance with their qualifications and the needs of the Organization.

71. On 21 November 2013, the FRO completed her evaluation of the Applicant's performance for the 2012-13 cycle in Inspira.

72. On 22 November 2013, the SRO completed his evaluation of the Applicant's performance for the 2012-13 cycle in Inspira. On 22 November 2013, the SRO, FRO and the Applicant met and the Applicant was informed that his performance for the 2012-13 cycle was rated "D – does not meet performance expectations".

73. On 6 December 2013, the Applicant acknowledged the evaluation for the 2012-2013 cycle in Inspira. That same day, the Applicant submitted a rebuttal statement with respect to his rating for the 2012-2013 cycle.

74. On 28 January 2014, the rebuttal report on the Applicant's initial performance evaluation (2012-2013 cycle) was finalized. On 31 January 2014, the DESA Executive Office sent the report to the Applicant. The rebuttal panel concluded in its report that the rating should be changed to "C – partially meets performance expectations". The panel also instructed that the FRO's assessment of one of the three core values and the core competencies be modified upward.

75. The first rebuttal panel which analyzed and reviewed the Applicant's e-PAS report for 2012-2013 made the following statements (emphasis omitted):

#### Conclusion

3. After careful evaluation of all the relevant evidence, the [p]anel has come to the view that the overall rating should be changed to "C-Partially meets performance expectations". The surrounding circumstances and rationale are described below. The [p]anel also

believes that the assessment of core values and core competencies by the FRO should be modified, details of which are provided below.

Procedural observations and its impact on the evaluation

4. The [p]anel has observed with great concern that the timing of the e-PAS 2012-2013 review has not complied with the established guidelines as described in sections 6, 7 and 8 of ST/AI/2010/5. The initial work plan was entered into Inspira eleven months into the review period, i.e. on 15 February 2013. Most importantly, the mid-point review was completed on 5 March 2013, two weeks later and only three weeks before the end-of cycle appraisal was due on 31 March 2013. The self-evaluation was completed by the staff on 24 April 2013. The FRO evaluation was completed on 21 November, and the SRO evaluation on 22 November 2013. The staff acknowledged the evaluation on 6 December 2013, completing the end-of-cycle appraisal eight months after the completion of the cycle.

5. The explanation for the non-compliance offered by the FRO and SRO is that the staff member delayed the process of drafting the Plan from March 2012 to February 2013. This observation is however contrary to the evidence and not credible. The staff sent a draft work plan to the FRO on 2 May 2012, and another version in July 2012 (after the FRO had sent a notification to submit a plan to all staff reporting to her on 28 June 2012). The work plan can only be entered after it is cleared by the FRO, and no evidence of any such clearance before March 2013 was presented. Also, at no other point in the cycle did the FRO use the opportunity to approve the proposed and submitted work plan to get the e[-]PAS cycle beginning at the proper time. There is thus clear evidence that the staff member, despite being new to the United Nations, submitted his work plan well in time.

...

Review of responsibilities as described in ST/AI/2010/5

7. Staff Member: [t]he [p]anel is of the view that the staff member, despite being a newcomer to the United Nations, did comply fully with his duties as described in ST/AI/2010/5 Section 4. There may be some doubt whether the staff solicited sufficient clarification on organizational goals and individual performance expectations (as required in paragraph 4.1(a) and (b)). However, even as a new staff member, his first draft work plan was submitted to the FRO in 4 May 2012, there is full evidence that he sought and participated in discussions with his FRO to develop the work plan in a timely manner (4.1(c)). The evidence also suggests the staff took all steps to complete each stage of the process for which he was responsible without delay (4.1(d)).

8. FRO: [t]he [p]anel observed some serious shortcomings in the duties of the FRO and SRO as described in paragraphs 5.1 and 5.3 of ST/AI/2010/5 respectively. The FRO did not follow through in her obligations to develop and approve the work plan with the staff member; to conduct the midpoint review and final evaluation in a timely manner; and to ensure that all e-PAS performance documents were completed in accordance with the prescribed procedures, as required (5.1 (a),(b),(c) and (1)). As weekly meetings to address performance issues with the staff were set up only late into the cycle, there is only limited evidence that the FRO sufficiently and promptly advised, supported and coached the staff in a timely manner (5.1(d)).

9. SRO: [t]he SRO did not follow through on his obligations as described in paragraph 5.2, in not ensuring that the performance management and development system principles and procedures were implemented satisfactorily by the FRO (5.3(a)).

...

12. [...] In other words, the [p]anel believes that the expectations set by FRO and SRO were simply too high, and the support provided may have lacked clarity.

13. Goal 2. [t]he second goal of the work plan was to “assist [in the] drafting” of a Secretary-General’s Report on a proposed set of indicators for the World Programme of Action for Youth. The staff claims that no negative feedback was raised at all with him regarding the quality of the draft he presented. This seems credible. The SRO presented the [p]anel a version of the document with a large set of paragraphs being inserted into an earlier draft. It appears to the [p]anel that the staff prepared a simple set of indicators, copied from the outcome of an expert group meeting and based on existing set of indicators, and included only limited introductory text, and submitted the draft to the SRO, with whom he was working directly on this activity. That draft would be incomplete but could serve as a basis for more work. No correspondence on this draft was presented by either staff or FRO/SRO. The SRO stated that he had decided that other staff should complete the finalization of the report to insert the additional text. There is no evidence of any feedback provided to the staff on his draft. It is therefore credible to think that in the absence of any feedback the staff considered his contribution complete. Under these circumstances, it is thus difficult for the [p]anel to make any assessment of the quality of the work and how the staff met the SRO’s expectations. While the draft was certainly incomplete, it could easily serve for more work by the staff if the SRO had chosen to request it.

14. [...] It also makes it more difficult to measure performance evaluations by FRO and SRO except from the basis of third parties.

15. The FRO contend[ed] that the staff failed to pay attention to simple tasks such as sending correct versions of documents; failed to grasp the essence of the negotiations and was therefore unable to enter negotiated text in the computer during the negotiations; and overstated his achievements in this area of work, namely the drafting of a first version with a flow chart. The [p]anel finds that indeed the staff made errors in sending documents and needed the assistance of his colleague in the servicing of the negotiations. Yet, also in this area of work, the tasks assigned required preparation and coaching by the FRO, and could possibly be inconsistent with the responsibilities of a P-2 officer, with less than a year of experience, in other parts of the [United Nations] Secretariat. Furthermore, the delegation of Portugal did express satisfaction with the services provided by him and his colleague, and the flow chart he had produced, while being dismissed by both FRO and SRO in the [p]anel interviews, was appreciated by the [p]anel.

...

18. Some other tasks were also assigned to this staff under this goal. The five most significant tasks were the following, to be discussed in detail below[:]

1. The drafting of a letter to be signed by the [Secretary-General] to be drafted by the staff in response to a letter by the [United Nations Populations Fund, (“UNFPA”)] Executive Director carrying the outcome of a youth forum in Bali, Indonesia;
2. The drafting of a cost plan for the programme’s trust fund;
3. The drafting of inputs to the 2014-15 regular budget of the programme;
4. Coordinate the [United Nations System-Wide Action Plan on Gender Equality and the Empowerment of Women, (“SWAP”)] working group on education;
5. Prepare a fact sheet on youth definitions[.]

19. The email messages carrying the first three of these assignments all indicate haste and a very tight deadline; in brief messages, the FRO is requiring these tasks to be completed either the same day or the next. As was observed in the other tasks, it appears that there was little or no instruction on how to obtain an output that would satisfy the FRO’s expectation. And as also observed before, the tasks assigned may simply be too difficult to achieve for a newcomer.

20. In the first case of the reply to the UNFPA letter, the SRO expressed in the interview dismay over the fact that the draft had

included the line “I judge the conference an immense success...” which he considered totally unacceptable as the conference had discussed sensitive issues related to sexual and reproductive health, and the staff should have considered these sensitive points. In the ePAS core value summary, it is also stated that the outcome document of the conference “would have been a very controversial document for the Member States” and the staff had generated a positive general reply without even looking at the outcome of the conference. The staff was accused of not bothering to read the outcome of the conference before preparing his draft, as it had not been attached to the email instruction; however the staff claimed he had found the outcome already online. It is the [p]anel’s view that the overly negative assessment is unnecessarily harsh and overly judgmental. The observations of the previous paragraph also apply here.

21. In the fourth assignment, the FRO and SRO accuse[d] the staff of not following through in getting a working group of UN agencies together to prepare an agreed text on education for the proposed System-wide Action Plan (SWAP). Three other staff in the youth programme were also assigned to coordinate a working group. There is no evidence to prove that the staff member was less successful than his colleagues in getting the outputs of his working group completed in time and of acceptable quality. In the interview the FRO claimed that the staff had not initiated any action for at least a month in June and July 2012 – however written correspondence proves the contrary, and this evidence was presented to the FRO in her interview. The staff member may have missed the expectation of him to act as convenor and keep his FRO informed in a timely fashion.

22. The fifth assignment was a fact sheet on youth definitions. The staff reported to the SRO on this task. The [p]anel discussed a number of versions of the fact sheet. The staff had prepared two different versions for different audiences. The SRO claimed that despite his coaching the sheets needed a lot of redrafting. The [p]anel however studied the various versions and found the quality acceptable, with only a minor error.

...

29. Communication: FRO evaluated as “D-unsatisfactory”. The [p]anel notes with appreciation that the staff has taken elaborate actions to improve his communication skills during the course of the review cycle, including English drafting skills in courses provided by OHRM. It was also noted that all concerned appreciated his gentle and kind manner and willingness to help and learn. The [p]anel did find some issues in not sufficiently seeking help when he needed it in fulfilling his assignments, and wondered if he kept his superiors informed of his

progress sufficiently. Having considered all the above, the [p]anel believes that the rating should be “C-Requires development”.

30. Teamwork: FRO evaluated as “C-requires development”. In the interview the FRO illustrated this rating by the work on the SWAP working group. However no justification for the rating has been given in the [e]PAS as is required by ST/AI/2010/5. Therefore this area will thus need to be changed to “B-Fully Competent”.

31. Planning and organizing: FRO evaluated as “D-unsatisfactory”. The [p]anel does not agree [with] this rating. While the staff may have taken a long time to complete the required assignments to an acceptable quality, the [p]anel found ample proof of tasks that were completed promptly and returned with the sometimes extremely short deadlines given. Therefore the [p]anel believes that the rating should be “C-Requires development”.

32. Creativity: FRO evaluated as “D-unsatisfactory”. The samples provided by the staff in his rebuttal in this category did not satisfy FRO or SRO’s expectations. However, the [p]anel does appreciate some of the initiatives listed and believes that the rating should be “C-Requires development”.

33. In summary, in the view of the [p]anel, one of the three core values, and three out of four core competencies should be rated as “C-Requires Development”. The overall rating should therefore also be “C-Requires Development”.

#### Observations on managerial feedback and performance support

34. The [p]anel is concerned about the specific circumstance[s] of this rebuttal, where a new staff member, carefully recruited through a competitive process, has been given a negative rating during his first year of service to the United Nations. To this end, [p]anel members inquired specifically on the level of feedback and support that the staff received from his colleagues, and his FRO in particular, during this crucial initial phase of the staff’s United Nations career. There appeared little evidence that he received adequate support for these tasks. Also some of the tasks that he was assigned required a level of experience that could simply not be expected from him.

35. The [p]anel is also concerned about the apparently limited appreciation by the FRO and SRO of cultural explanations for the problems between them and the staff member. Most explanations given to the [p]anel relate to the poor oral and written communication skills of the staff. However the [p]anel also observed some cultural insensitivity by FRO and SRO, as follows. First, the organization of the text of the [WYR] was to be based on the process of immigration by a young person. In the interviews, the FRO and SRO claimed, somehow

presumptuously, that the staff's work on this report should be helped by his own personal experience, as after all, as a Bangladeshi national, he had left his country of origin to study in Europe and had now entered the labour force. Second, in the response to the rebuttal statement, it is claimed that the staff had "an inflated idea of his role" in intergovernmental meetings. This was part of an observed pattern where FRO and SRO dismissed the importance of work that was effectively delivered by the staff member on time, on short notice and to the demonstrated satisfaction of others (such as the representative of Portugal, and [United Nations] colleagues). Third, FRO and SRO indicated that the staff member's acknowledgement of mistakes in performing some of the tasks confirm his poor performance. Instead however, the [p]anel believes that the staff[']s apologies conceal his reluctance, perhaps culturally determined, as a new staff member to seek guidance from senior colleagues in the organization.

36. The [p]anel disagrees with the observation in the e-PAS by the FRO that "the staff member does not meet the standards necessary for this organization", as it believes that is too early to arrive at such a conclusion without sufficient support. In the view of the [p]anel, and based on its observations above, the overall appraisal of "requires development" appears an appropriate rating. The [p]anel expresses the hope that this rating has prompted the staff member to pay more attention to the expectations from him, and from his supervisors to guide him, and to prevent a recurrence of a negative evaluation during the second year of his career. The FRO and SRO deserve praise for effectively managing a programme with much work pressure and growing demands from the highest levels of the organization. Yet, in order to be a more inclusive work unit, its management is invited to consider setting timely, precise and realistic expectations on its staff, that are more in line with the existing practice of engaging junior staff at the P-2 level in other units of the Department and the Organization; and are commensurate with the seniority of the staff involved".

76. The first rebuttal panel finalized its report on 28 January 2014 and was circulated on 31 January 2014.

77. Having reviewed the correspondence on and after the Applicant filed the rebuttal for the e-PAS report of 2012-2013 (6 December 2013) and after the rebuttal panel report was made available (28 January 2014) between the Applicant and his FRO, some of which was copied to the Applicant's SRO, correspondence which was

presented to the fact-finding panel, the Tribunal identified the following relevant elements:

a. Email of 31 January 2014:

Dear [Applicant],

Following up on the team meeting on the WYR Launch meeting yesterday, I am concerned about the preparations. I see similar issues to the ones for the [International Youth Day, “IYD”] event preparations and need you to address them to ensure this important event is a success.

While it was clear in the meeting that there is still much to be done, I am not confident that your planning will ensure it all gets done. You did not share your list of items for the event that you are working on, so I can[...]not refer to the list, but as we went through each item it was clear that for the great majority of them there are still many things that need to [be] handle[d]. [...]

This is not the first event you have worked on. I need to feel confident with your ability to plan this event. Please put some work into this planning and then follow up with me on Monday. Thank you.

[Ms. NS]

b. Email of 31 January 2014:

Dear [Applicant],

Unfortunately, this is another email regarding my concerns for the WYR launch.

At the team meeting yesterday on the WYR launch there was a lengthy discussion on the flyer(s) and the promotion of the event. Everyone agreed that you are very late in the promotion for the event. However there was a need to have a nice flyer as the ones you did and [name redacted, Ms. EN] did were not nice enough for such an important event. [...]

[Ms. NS]

c. Email of 12 February 2014:

Dear [Applicant],

Yesterday we had a team meeting again on the WYR launch, at my suggestion. As discussed, in the past, I would have liked you to take initiative and arrange to update and plan with the team. Normally for such an event where team support is central, one



would arrange regular team briefings/discussions. Considering our discussions about the issues with team work and communication, it is disappointing that each time it's been my initiative. This was an issue with the IYD event but it needs to be improved.

In addition, I was disappointed that you had not updated the planning table for the team or yourself. When I asked you to develop a planning tools the idea was for you to use this as a planning tool in the preparations and to help you keep the work on point and the team informed and aware of their work. It was not to be a stagnant table which is now out of date. For the planning, again yesterday there were many details that I am concerned have not been considered. I remember telling you at previous meetings that I was concerned about the mixer and you needed to ensure it was ok and would work with the performance. It is only now, a few days before the event that you have informed us that there are issues. If this problem was looked into in detail when it was first discussed we could have tried to find other solutions. I was also surprised that [Ms. EN]. still seemed to have confusion/lack of info on what she should present and didn't have the outline/PowerPoint from you. This is again something that I asked you to discussion, plan, and prepare with her weeks ago.

As you are aware, I assigned you this event so that you could improve from the experience of the IYD launch and demonstrate the skills that you believed you have for planning organising, teamwork, and communication that are important for this type of work. I am still quite concerned about not having smooth preparations again.

Despite this being a very busy period, I am ensuring that I am providing you with feedback and coaching. I hope that you find this helpful.

[Ms. NS]

d. Email of 19 February 2014:

Dear [Applicant],

I wanted to follow up on our discussions on the event on Friday. I believe that the event went well. The performers that [name redacted, Ms. L] brought were excellent and I believe this work with [Ms. L] could be the beginning of a great partnership.

That being said, I feel I need to follow up with you on the preparations. Unfortunately, there were many more delays and

issues that were unnecessary. and this not only impacted you but the rest of the team members. I would like to suggest that now that the event is over that we reflect on your work and look for areas for improvement. I truly believe that using a planning tool and engaging the others involved in the planning in the tool will help you tremendously. Imagine if we had such a tool in place from the beginning ... [DPI], our team, and L also had it and worked off of it. Your work would have been smoother and everyone could support you in the preparations and anticipate issues far in advance. At our individual weekly meeting this week, please come prepared to discuss this so it can be a learning experience for you.

In addition, while your presentation was short, it did not necessary fulfil what we wanted which was to provide the audience a short clear understanding of who we are, what the WYR is in general, and the overview of this WYR. As you saw. El prepared a presentation which really did a good job of presenting the points she covered. It presented a lot of info in a short yet engaging way.

Also, at events like this, I also would have liked for one of us to say something brief at the end ... even just thanks. I went up to the stage but by the time I got there 1/2 the people were out of their seats so it would have been awkward.

I kindly suggest you consider this input as well as your own reflections and we can discuss again at our meeting.

All the best,

[Ms. NS]

- e. Email of 28 February 2014:

Dear [Applicant],

This email is in reference to your note taking at meetings. At the last minute this morning I asked the new P[-]2 team member, who joined [three] weeks ago, to take notes at a 10 am meeting. Please see the notes that she sent me just after the meeting. Perhaps you can look at this example for ideas for improvement.

[Ms. NS]

- f. Email of 5 March 2014:

Hi [Applicant],

I have attached the version that I sent to [name redacted, Mr. O]. I had [name redacted, Ms. S] check it over this morning and make some corrections/clarifications. I would like to go through it today with you at our weekly meeting.

[Ms. NS]

- g. Email of 19 March 2014, 6:41 am (emphasis added):

Dear [Applicant],

This is still not of the quality required. I will have to go in early to work in it now. I am very disappointed that you are not able to produce decent BN [unknown]/[talking points, (“TP”)], after two years in DESA. You have not taken into account the reader nor the fact that it will be seen by the others involved in the drafting. And there are typos. I would suggest you come in early and help me clean it up.

[Ms. NS]

- h. Email of 19 March 2014:

Dear [Applicant],

Please find feedback on your notes attached. It is taking a lot of time today to edit your work. I asked [Ms. S] to help me with this one.

I am again asking you to focus on providing information in the notes...if something is referred to, please provide the info about it. Please see attached and revert.

[Ms. NS]

78. On 12 February 2014, the FRO sent the Applicant an amended PIP to be in effect from 12 February to 25 March 2014.

79. On 18 March 2014, the Applicant’s contract was extended for six months.

80. On 25 April and 2 May 2014, the FRO met the Applicant for the end-of-cycle discussions. On 5 May 2014, the FRO completed her evaluation of the Applicant’s performance for the 2013-14 cycle in Inspira. The SRO approved the evaluation on 30 May 2014. The Applicant acknowledged the rating on 13 June 2014.

81. The Applicant's performance for the 2013-14 cycle was rated "D – does not meet expectations". On 25 June 2014, the Applicant submitted a rebuttal statement.

82. On 19 September 2014, the Applicant's fixed-term appointment was extended until 31 October 2014.

83. In a report dated 14 October 2014, the second rebuttal panel upgraded the Applicant's rating for the 2013-2014 cycle to "C – partially meets performance expectations" and including the following findings and conclusions (emphasis omitted):

3. After careful evaluation of all the relevant evidence, the [p]anel has come to the view that the overall rating should be changed to "C – partially meets performance expectations". The rationale for this conclusion is provided below.

4. The [p]anel has observed that the timing of the e[-]PAS 2013-2014 review has not fully complied with the established guidelines as described in sections 6, 7 and 8 of ST/AI/2010/5. The initial work plan was signed off into Inspira nine months into the review period, i.e. on 16 December 2013. The mid-point review was completed on 4 April 2014, three days after the completion of the cycle. The staff's midterm self-evaluation was signed on 11 April 2014. The FRO evaluation was entered on 5 May 2014; the SRO approval on 30 May 2014, and the staff member acknowledgement on 13 June 2014.

5. The explanation for the delay in the drafting of the work plan, and thus the subsequent delays in the midpoint review and final evaluation, is contested. The [p]anel observes that the evaluation of the previous e[-]PAS cycle 2012-2013, was completed in early December 2013. That cycle resulted in a rating of "D-Does not meet expectations". [The Applicant] availed himself of the right to a rebuttal for that performance period. The [r]ebuttal [p]anel's report was issued on 28 January 2014. It concluded that the rating should be changed to "C-Partially meets performance expectations". At the same time, [the] staff [member] and FRO were engaged in discussions on the need for a [PIP].

...

16. To complete these tasks, it was acknowledged by the FRO that no specific knowledge of mental health issues could be required from any staff member working in the unit. However it was expected that the staff, with the help of an intern, would review existing publications and

draw a concept note on that basis. The first draft of the concept note was submitted on 22 March 2013, on the basis of an email request by the FRO on that same day. It is unclear to what extent the draft was initially prepared by an intern, but it had been reviewed by the staff member. The [p]anel has reviewed this draft, and its quality appears to be acceptable for a concept note that is to serve as terms of reference for a consultant, and not intended as a technical reference document or an external publication.

17. In the emailed request of 22 March 2013, the FRO stated that she needed to review it today and was not back in the office until 10 April [2013]. A second version was sent to the SRO on 25 March 2013 and a third version to the SRO on 11 April [2013], with a budget and list of questions for the consultant to address. A fourth and final, even more detailed, version was sent on 29 April [2013] to a prospective consultant. The FRO presented this draft to the [p]anel with many critical hand-written comments and notes, arguing that its quality was very poor. She also stated that sources were not quoted correctly and that some sentences in the draft were “copied without attribution” (the reference to plagiarism was introduced later). The [p]anel is puzzled by this contention, as the draft had been prepared five weeks earlier, and had undergone many edits. The consultant that had been initially contacted was unavailable, and a replacement was contacted on 6 May 2013. This consultant was also provided the concept note and accepted the opportunity to draft the report. There is thus no strong evidence that the staff member underperformed in drafting of the concept note, and the [p]anel finds his performance in this assignment to be acceptable.

18. At the same time, the fact sheet on mental health was prepared by the staff in response to a call to support the work of the [Secretary-General’s] Envoy on Youth with factual information easily retrievable online, as decided in an interagency meeting on 11 and 12 March 2013. On 19 March [2013] requests were made to all agencies with a deadline to submit updated fact sheets by 1 April [2013]. The staff member was asked to prepare a new fact sheet on youth and mental health. He submitted a draft dated 28 March [2013]. The [p]anel finds this draft to be of acceptable quality. The draft contained many references and resources. A second version was sent on 31 March [2013]. On 1 April [2013], the FRO responded to say “I ask you again to reach out to your fellow colleagues and see if anyone can help you review it. Please note that there is some sloppy work here.[...] I think you will see the prospective needs to be along the lines of the editing that I did. If you want I suggest you ask [name of peer staff] for assistance. Please give me a new draft tomorrow by 10:30 am”. On 2 April [2013], the staff submitted a new version. The FRO replied that the draft would be

reviewed at the unit's weekly meeting the same day. In the evening of that day, the staff submitted a new draft, to which the FRO responded to reflect on the statistics used in the draft, and the renewed request to work on this [as soon as possible], as she had assigned the task two weeks earlier.

19. On 5 April [2013], the peer staff member sent a scolding critique by email to the staff, copied to FRO and SRO. It stated, among other points, that: there was extensive reliance on copy-pasting; incorrect and wrong references; "falsifications" in the text, by quoting terms that originally appear as "people" were changed to "young people" within otherwise pasted text and falsifying truth; and issues regarding "tone" regarding challenges by young people facing mental health issues. The message concluded that "I am shocked that you would submit a document that is so heavily plagiarized, and that in addition you would find it appropriate to create outright falsifications in a document to be published under the [United Nations] banner". Within one hour after this message was sent, the FRO emailed the staff to state that "as discussed, this is a very troubling situation that has me concerned about the other work you have done. [...] Our work is in the name of the [United Nations] and I would hope that you would hold that in high esteem. Please let me know your plans to rectify this situation".

20. On the whole, the [p]anel believes that there is certainly some merit in some of the observations by the peer staff on some of the research methods and quotations employed by the staff member. However a large share of the peer's comments on the paper find fault with a reference made to the earlier output, the concept note, which had already been prepared by the staff member. Both FRO and SRO stated that in their view making use of existing material of the organization in a United Nations publication cannot be considered plagiarism. Importantly, it also appears to the [p]anel that the expectations of the staff member were increased significantly and unfairly, as he proceeded in his task. The staff could not be expected to be, or have become, a mental health expert. Third, the immediate follow-up email message by the FRO does not indicate a thorough review by the FRO of the extremely confrontational allegations by the peer staff member. The FRO did not appear to have any doubt on the allegations made; made no immediate effort to thoroughly investigate them; did not address or reprimand the peer staff for the inappropriate tone of the email message; yet instead, asked the staff member for a plan to rectify the allegation within minutes after the allegation was made. The FRO alleges in the e[-]PAS report (page 5) that after she had found out that the mental health fact sheet had unattributed and unchecked facts, she reverted to the concept note and found it also contained copied text without attribution.

21. In evaluating these two tasks in the interview with the [p]anel, the FRO stated that the quality of the work on fact sheet suffered from two main problems, namely of tone and of language. On the issue of tone, the FRO stated that the staff member unnecessarily put young people with mental health issues in a negative spotlight, and that it underreported positive aspects of services that could be delivered to them. Once alerted on this concern, the staff member did not sufficiently incorporate this comment in subsequent drafts. The [p]anel finds this a credible observation, yet it is concerned to what extent these issues can be addressed by a junior staff member on a topic that is new to him. It would be expected that more senior staff would make these revisions, or, if this is not possible, the drafting staff member would attempt to make these revisions to the best of his efforts. On the issue of language, the [p]anel agrees that the drafts it has reviewed were written in poor English.

22. Upon full review of the work that was produced by the staff member, and by the documented feedback he received, the [p]anel is of the view that his initial work on youth and mental health under goals 1 and 3, despite the concerns on tone and language, was of acceptable quality for a new staff member with no substantive experience in the subject matter of his assignment. The extremely negative feedback received during these two assignments, discussed above, and recorded on page of the e[-]PAS report, is not justified.

23. The allegation of plagiarism is serious and contentious. It is repeated in other elements of the staff's work plan. It is addressed elsewhere in this report.

...

27. The [p]anel has no legal expertise or authority on plagiarism by staff members, but regards it a serious allegation that should not be made lightly. The [p]anel agrees with the FRO and SRO that a core element of plagiarism is: "to present work by others with the intention to present it as one's own". The [p]anel finds it doubtful whether the submission of an illustrative text box for a publication on short notice, with a disclaimer made by the staff member in the cover email message, can be classified as plagiarism. The [p]anel agrees that the submission was not publishable due to the reproduction of existing material without quotes, but also notes that the staff member himself stated that further work on the box would be required. Moreover the SRO needed only six minutes to come to the conclusion that the text was plagiarized, and felt the need to copy not only the FRO but also two other staff members [about the] plagiarism. The [p]anel therefore believes that in this case, the allegation of plagiarism is exaggerated and unjustified. The [p]anel

is also concerned [about] the effect of such a heavy-handed allegation on the staff's morale, and on any collaborative spirit in the work unit.

...

30. For most of these [*ad hoc*] assignments the FRO stated that the work was done late and of poor quality. [...] Therefore, given the staff's level of seniority at the P2 level, being asked to undertake these assignments, the [p]anel believes that the performance expectations of the FRO on all these inputs may have been too high.

...

35. The FRO has claimed that the work plan for the event was incomplete and unrealistic. Yet it does not appear that it has gone through a thorough review by the FRO in the planning stages. To illustrate this observation, on 19 July the staff member was asked the following question in a one-line email with the subject line "[H]ave you invited IOM? if not, please prepare". The [p]anel finds it disconcerting that when a staff member is held to high standards, there was no review of the work plan that did not list a role for a key partner organization in the area of migration. The [p]anel is also concerned with the criticism of the staff's performance of this event, when in fact no event to mark [the] [IYD] was held on the previous year, even though it has been mandated by the General Assembly.

...

39. The staff member was asked to make a brief presentation at the event. The SRO stated that this was presumably on the understanding that he and another staff member would present a young face to the people in the work unit, and that therefore the FRO and SRO would not be speaking. The staff member made a brief and limited introduction that fit well with the other presentations made, including those by young artists from the New York area. The staff member made a brief and limited introduction that fit well with the other presentations made, including those by young artists from the New York area.

40. A few days after the meeting, on 19 February, the FRO sent an email to the staff member stating that the event went well, but that there had been many delays and issues that were unnecessary. It also stated that his statement was too short, too informal and not scripted.

41. The Panel recognizes that the staff member did not always receive the support and supervision required from a junior staff member. [...]

...



49. [...] The activities included an assessment of international availability of youth indicators and the preparation of graphs highlighting (statistical) relationships between variables of interest. [...]

...

#### Observations on managerial feedback and support

55. From November 2013 onwards, the [p]anel has observed that the FRO clearly assigned various tasks in writing, rather than only orally. This created a paper trail of evidence for a negative e[-]PAS performance rating, which could be expected to be negative by all concerned. It is recalled that from that month onwards, the 2012-2013 e[-]PAS cycle had been completed, the staff member had started a rebuttal process on that cycle; and that efforts were made to agree on a [PIP]. In this environment, the staff member was reluctant to agree on a work plan for the 2013-2014 cycle and on a PIP.

56. As was the case in the 2012-2013 cycle, the [p]anel is concerned about the specific circumstance of this rebuttal, where a new staff member, carefully recruited through a competitive process, has been given a negative rating during his first two years of service to the United Nations. To this end, panel members again inquired specifically on the level of feedback and support that the staff received from his colleagues and his FRO in particular, during this crucial initial phase of the staff's United Nations career. It appears that the FRO and SRO have made much more effort to provide adequate support for these tasks. The [p]anel believes that in some cases the FRO and SRO have reduced their performance expectations of the staff member.

57. The [p]anel is also concerned about the apparently limited appreciation by the FRO and SRO of cultural explanations for the problems between them and the staff member. Most explanations given to the [p]anel relate to the poor oral and written communication skills of the staff. However the [p]anel also observed some insensitivity by FRO and SRO.

58. For example, FRO and SRO indicated that the staff member's acknowledgements of mistakes in performing some of the tasks confirm his poor performance. Instead however, the [p]anel believes that the staff apologies conceal his reluctance, perhaps culturally determined, to seek guidance from senior colleagues in the organization.

59. A second example of this insensitivity is the fact sheet on mental health. It was one of many that were routinely produced by the team as part of the International Youth Year. Many of the fact sheets were produced by the specialized agencies and published by the team without much review. However the concept note on mental health needed to be developed by the team, on the basis of an earlier piece of work. With

help of an intern the staff member presented an initial draft, and after comments another draft. In her evidence for the allegedly poor work by the staff, the FRO presented a flat-out disrespectful and scavenging review of his work, by a temporary P[-]2 staff member, of the draft concept note that the staff member had prepared (see paras. 18 to 20 above).

60. A third example was the repeated accusation of plagiarism. The [p]anel was presented by the FRO and SRO with definitions from a website, plagiarism.org, and a copy of administrative instruction ST/AI/189/Add.27 of 8 November 1990 on the meaning and alleged intent of the staff member to plagiarized text. The panel reviewed all three alleged cases (the mental health concept note, para. 17; the mental health fact sheet, paras. 18-20; and the Dream Act, paras. 26-27)) and found it doubtful whether they constitute plagiarism. The first case concerned an internal document, the second case (in which the initial accusation by a colleague was immediately assumed to be valid) made use of previous work of the Unit, and the third case concerned an input that the staff member evidently viewed as intermediate input. Whereas the staff member indeed failed to adequately reference and copy sources, the accusations of plagiarism could be seen as exaggerated. Moreover, the allegations appear to be made without sufficient review.

61. A fourth example was the expectation that was set for him was to speak at the [YD] and introduce himself on the podium in front of an audience. The staff member delivered a brief but appropriate and interesting statement at that occasion. (One of the [p]anel members was present in the audience.) Nevertheless, the FRO deemed it necessary to produce a critical evaluation of the Day in writing to her entire team, and provide negative feedback to the staff performance as being too short. In fact a presentation by his peer suffered from technical issues and was not delivered as intended.

62. In this setting, the staff member demonstrated on many occasions a keenness to deliver what was expected of him. In one of the interviews, he expressed fear that whatever piece of work he would submit, it would be subject to a critical review in writing. The Panel finds this fear to be credible, and critical to its evaluation of the performance rating.

63. The [p]anel has observed that there were unnecessary delays in the agreement on and the implementation of, a [PIP] which was instituted for the last six weeks of the current performance period. FRO and SRO have repeatedly accused the staff member of delays on this side; however the [p]anel also observes that with an agreed work plan only in place in December 2013, it would not be possible to implement the PIP much earlier. The Panel is very appreciative of the efforts by the

FRO to implement the plan, including the weekly meetings that were held.

64. The [p]anel learned that in addition to coaching and the implementation of a [PIP], both FRO and SRO supported a transfer of the staff member to more suitable functions within the Division as a further remedial action to the shortcomings in his work. The [p]anel views it as unfortunate that such reassignment could not be implemented.

...

Ratings on core values and competencies

...

68. Professionalism: FRO evaluated as “D-unsatisfactory”. The [p]anel believes that this should be changed to “C-requires development”. While some key inputs were of poor quality and the staff member has difficulties in observing deadlines and meeting commitments, the staff appeared to demonstrate interest to correct and learn from his errors. He also demonstrated pride in his work and achievements. Special consideration should also be given to the staff’s relative inexperience, to the fact that some of the assignments were quite challenging for a junior staff, and that he may not always have been able to find the support that he needed to fulfil all requests in a timely manner, [...].

...

71. Communication: FRO evaluated as “D-unsatisfactory”. There have been many occasions when the staff member’s communication with colleagues as well as with external partners proved to be unsuccessful. While both supervisors and peer staff appear to appreciate his kind manner, the staff member does not appear to internalize assignments, or manages to get a clear understanding of what is being required of him. There are few if any examples of when the staff member has engaged his supervisor and/or his peers to get more clarity on his assignment. Instead the staff member appeared to attempt to undertake assignments at his own insight without consulting others or studying existing practice in an effective manner. At the same time he made efforts to correct errors, engaged colleagues in an open and friendly manner, undertook language classes, and took part in a PIP exercise that focused on his communication skills. In view of these efforts, the [p]anel believes that the rating should be “C-requires development.

...

75. Therefore, on the basis of the detailed analysis of performance goals above, and an evaluation of individual competencies, the [p]anel believes that overall rating should be “C-Requires Development.

84. The Applicant, as the aggrieved individual, was interviewed on 28 January 2015 and he made the following statements before the fact-finding panel:

Q: Did you participate to the YPP orientation programme

A: Yes

Q: That programme offers mentoring to YPP, did you get a mentor?

A: Yes

Q: Did you share your difficulties with the mentor?

A: Yes I did, however, the mentorship programme started only nine months after my appointment...then I discussed the issues with him and he helped me, gave me information.

[...]

Q: Where do you want us to focus to see some elements of harassment: do you have any facts that you want to bring to our attention?

A: On harassment, when I went for the first rebuttal then the harassment started—I lodged the rebuttal on 19 [December] 2013 and since then FRO started harassing me - From 19 [December] 2013 to 19 [January] 2014—the work pressure increased right away.

I submitted the rebuttal request on 19 [December] 2013, on 20 [December] 2013 the FRO asked me to submit a concept note on the launch of the [WYR] by 29 [December] 2013 and, at the same time, to write a statement for the Director of DSPD[/DESA] and an additional concept note.

On the same day the FRO asked me to follow up with a colleague in UNFPA to ensure that a document be completed by 31 [December] 2013.

I did all the requested activities—all was done before the deadline [...].

[...]

From 20 [December] 2013 to 19 [January] 2014, [my] FRO granted me a number of assignments, which I delivered. None of the assignments were mentioned in the work plan. [My] FRO used the ad[-]hoc assignments to “nullify” the regular activity that I was tasked with.

[...]

Q: In the negotiations, were you supposed to deal with [Member States] directly?

A: In some cases, the Member States would deal with the FRO, in most cases, I would go alone to the meetings to draft the resolution.

In note taking: I would do the handwriting and another colleague would type.

[...]

Q: Any other type of harassment that you want to mention about the FRO?

A: On 31 [December] 2014, the rebuttal report came out. From then to 14 February 2014, there were many negative emails from the FRO. I was in the middle of a very important event, the launch of the [WYR] for the year 2014. [The] FRO was constantly harassing me. I believe she was trying to make me fail the project by creating unnecessary tensions.

[...]

Q: Harassment could take different forms, constant negative feedback could be one of it—do you have any other examples? Language, cultural insensitivity would you like to mentioned anything else-

A: [A]s young professional, I was trying to do as they said, did not try to find out whether the comments were culturally appropriate. However, the rebuttal panel indicated that FRO and SRO were culturally insensitive because of the mode of communication, interaction towards me. However, I cannot recall that they directly sa[id] anything against my culture, country. However, I felt discriminated against.

I noted that [Ms. EN], the other P-2 was treated very different[ly] [from] myself.

Q: Could you substantiate the different treatment?

A: In the same presentation for the WYR, I was presenting briefly, [Ms. EN] was giving a [PowerPoint] presentation on how to navigate the website - in the second part of the presentation and was expected to present in an interactive way.

She started, nothing worked out because nothing was working—she could not deliver the presentation.

[...] In a feedback section, I was criticized because I gave an informal presentation, as I was told to do [.]

As another example of different treatment, in the first performance discussion, on 5 March 2013, there was a G-4 staff from my team as a note taker—I found it very embarrassing as I needed to work with her [o]n a daily basis, I needed to give guidance as a professional staff.

The email about “plagiarism” was found inappropriate by the rebuttal panel—in the meantime, SRO sent the email to everyone. This feels [like] harassment to me.

[...]

Q: Did you check with the executive office if any procedure would be available to you to manage your performance, on how to communicate with your supervisor?

A: I went to my supervisor to ask for help—sometimes [the] FRO would not be there, however, since the first rebuttal, the FRO would only communicate with me in writing and sometimes refused to meet me.

Since after the rebuttal, there was no attempt from [the] FRO or SRO to help me. All they did was for purpose of documentation.

I felt that both supervisors, only tried to harass me after the first rebuttal (the emails to everyone, the nit-picking, the accusation of plagiarism—all felt like discriminatory treatment to me).

85. The Applicant’s FRO, Ms. NS, was interviewed on 29 January 2015. In her statement before the fact-finding panel, she made the following remarks:

Q: Did the negative evaluation come to him as a surprise in the [2012[-2013 e-PAS report]?

A: What was unusual for me, is that in his rebuttal he said that he was very surprised and thought he was doing well. There was a disconnect between day-to-day work and what he wrote in the rebuttal... The rebuttal panel advised me to always put the feedback in writing. This is because, even though I had talked to him, he seemed not to process. The written feedback was, upon the [rebuttal panel’s] advice, to make sure that he understood what I was saying. Also, since in the first years I always provided oral feedback, I had nothing in writing and nothing to show. Now, I needed to show that the feedback was provided.

[...]

Q: Third party feedback- nit picking after the WYR event- there were other colleagues unable to deliver, but he was the only one being criticized.

A: [the Applicant] told me that I was seeing the glass half empty, it was the February event, we decided that the young members of the team should meet the presentation for the launching of the report. I don’t remember the exact number of minutes but for example, he told [Ms. EN] that they had ten minutes, that is five minutes each. [Ms. EN] prepared a “prezi” for her presentation, [the Applicant] did not. On the

night before he told us that actually we had only [...] three minutes each for presentations. I received three emails from team members indicating that they did not know what to do and asking for clarification. At the event, there was no one managing the computer (i.e. who would press the button for [Ms. EN's] presentation—she prepared a very cool [“prezi“, a new kind of [PowerPoint] presentation).

On the other hand, [the Applicant] mumbled his presentation, he was not audible, people came to me saying that his was a bad presentation. [Ms. EN] continued delivering a very good presentation even though the computer did not work.

After that event I also gave [the Applicant] oral feedback showing how I prepare for public presentations to feel more comfortable when I do it.

[...]

Q: Role of [the] SRO, was there direct interaction between [the] SRO and [the Applicant], was [the] SRO called to manage the performance situation?

A: In both reporting periods there were assignments on which [the Applicant] reported directly to the SRO. Issues concerning statistics/reports which are the domain of the SRO (you will see in the work plan of the [e-PAS] reports).

In terms of reporting performance issues with [the Applicant], [the] SRO was always present—Particularly, with the la[...]test e[-]PAS, I met with [the Applicant] three times concerning his final assessment. I also indicated to him that, based on all the shortcomings, it was not going to be a positive assessment. He begged me to change it as that would have negative effects on him. I said that I was sorry that this would affect him personally but that his performance had not improved. He requested that the SRO met for the final assessment which we did. The final assessment was done with the SRO present, in total there were four meetings for the final assessment.

[...]

Q: [the Applicant] stated that the accusation of plagiarism was shared with others in the team, and that the sharing of the email put him in a bad situation with the team[.]

A: There were two incidents of plagiarism. I took time to learn about it (the [United nations] rule, the [United States] rule, and the main definition). Essentially the main definition of plagiarism is when you cut something from a document, put it in your document, without indicating the source, without attribution to the original author.

The first time plagiarism occurred, [the Applicant] was given that advice from the SRO by way of email to me and maybe someone else was [copied].

The second time it was a fact sheet on youth mental health. I worked on it many times, because I noted that some facts were untrue. I do know the topic so I could tell. The mistakes would be: the source would indicate that “25% of youth in Australia have mental health issues”, [the Applicant] would change it into “25% of world youth has mental health issues”. With that, I asked [name redacted, Ms. I], another P-2 to help him out with the assignment.

86. The Applicant’s SRO, Mr. JPG, was interviewed by the fact-finding panel on the same day, on 29 January 2015, and he made the following statements:

Q: When did you learn in the first place regarding the underperformance of [the Applicant]?

A: I do not recall the first time I heard of [the Applicant’s] underperformance. At some point [Ms. NS] brought the issue to my attention, saying that there were issues with putting together his [e-PAS report]. We reviewed this matter recently because of the second rebuttal, at a point [the Applicant] had a problem with putting more than one goal in his e[-]P[AS], but I do not recall the first instance. I recall that there were many instances in which it was brought to my attention that he was not performing. It was also reported to me that he had problems processing the information, such as feedback received that was not registered. It could be, unfamiliarity with [United Nations] lingo, however, I soon became aware that he was “off the chart”, he was a little extreme in his lack of performance.

Q: What was the overall outcome of his two performance evaluation reports?

A: For two period[s] he was evaluated as not meeting expectations, and the [r]ebuttal [p]anel (“RP”) changed to “partially meets”.

[...]

Q: Did you interact with [the Applicant] directly, probably providing direct supervision to some of his activities?

A: About the interaction with [the Applicant]... It was almost three years ago, I cannot recall precisely. I would supervise him directly on certain tasks. I interacted with him, also to figure out what he felt comfortable with. I also like to probe people. I told him that he should try to see what he liked to do but I also warned him not to “fool himself” in believing that he was good at something if he was not. Our Branch was under a



lot of pressure, there was no downtime, but, when there was, I would give him some ad[-]hoc assignments. He said he liked doing charts, data. To help him I tried him to downsize one of the goals to give him an assignment that he would be motivated and likely to deliver. In that I had a lot of interaction with him. However, there were issues of communication in general. Also he has difficulties communicating with colleagues. He would not ask for feedback from peers or supervisors. The amount of time we spent with him is way more than the interaction I had with any other staff member.

[...]

Q: Did [the Applicant] bring to you[r] attention any issue of cultural sensitivity towards his, in interacting with him or in the context of any teamwork?

A: He never brought to my attention that the work interaction made him feel uncomfortable; he never raised issues of cultural differences. [Ms. NS] is a very well organized supervisor, and she has to be because of the workload she has. I do not get the issue of cultural sensitivity; he sold it to the panel. The [rebuttal panel] explained this by saying that it did not want to feel one-sided. There are no guidelines on rebuttal panels' mandate, scope of work. I might raise the issue of cultural sensitivity with the Ethics [O]ffice. [the Applicant] is raising the issue of cultural sensitivity without substantiating it.

[...]

Q: How in you[r] opinion [the Applicant] integrated in the team from the beginning? Did he feel included, welcomed and supported?

A: The team is very young, they are all very social, he was part of the team, they had weekly meetings, they often ate together, we celebrated birthdays, I believe we always celebrated his birthday – we had a[n] end-of-the-year party at a restaurant, he was there.

[...]

Q: The [n]o-support complaint...he did his best to learn by himself—and then he was surprised by the negative evaluation—

A: Not true, he did receive feedback and [Ms. NS] can provide you with plenty of examples. When the shortcomings became apparent, we decided to set up a [PIP]. From that point, I instructed [Ms. NS] to provide with very concrete advice. [The Applicant] did all he could not to sign the [PIP].

We had zillions of meetings to help him, convince him to sign the [PIP]. I asked for feedback from [the DESA/EO], the [Executive Officer] [Mr. C] also asked for more info[r]mation on how to do a [PIP] from OHRM. We really tried to do everything that was listed in the policy on

Performance Management. The interaction on this has always been very polite.

He tried everything to postpone the date of his separation, MEU, harassment complaint...etc...

[...]

Q: After he lodged the rebuttal in [December] 2013 .... he reported that he was given a number of [*ad hoc*] assignments that were, from the complexity point of view, beyond his capabilities... e.g., in February 2014 he regards such assignments, as a retaliatory measure because of the rebuttal...

A: there was no change in [Ms. NS's] or my behaviour towards him after [December] 2013. In February 2014, the only thing I could think that he could have been doing on the commission is following the informal negotiations of the resolution. The task is a simple one: taking note of any modified language in the negotiated text, sending it to the main negotiator, he happened to be sending wrong versions to the negotiator who complained..... We always managed his workload in a way that he would never feel overwhelmed. Documentation on negotiations could be provided upon request.....

Q: Did he ever let you know that he felt that this was above his capabilities at his level?

A: The question was raised by the [r]ebuttal [p]anel as well: he was never requested to do more than he could do. Whether he understood it as doing more than he could I cannot say.

Sometimes [Ms. NS] would give instructions on the fly, that is a possibility, we are sometimes under pressure... I do not know if that happened... However, he never raised it with me. If he did, I would have addressed it. If you looked at the rebuttal report, the [p]anel found that his saying that he did not have feedback was not correct.

Q: Would other YPP candidates or other Junior staff receive similar assignments, in terms of level of complexity, tight deadlines, etc?

A: [the Applicant's] assignments were scaled down, ask the other staff members.

I always encourage teamwork—[the Applicant] was sealed from the noise from [*ad hoc*] daily assignments (i.e. TP [presumably, talking points] for Secretary-General, DOS [unknown abbreviation], USG to be done in two hours). He was not given these assignments because he could not do it and was not able to manage his time. Otherwise he was included. For example, we had a few hours to fill up a form on the use of trust funds in our Branch, that he would do under the supervision of [Ms. NS]”.

“Q: Was [the Applicant] receptive to the feedback received, especially negative?”

A: In appearance, he was receptive, he said that in emails which we provided to the [rebuttal panel]

Whether he internalized and could act on it, that, I am not sure. In appearance he was”.

“He said “I asked to be transferred” ... First, he did not ask. He enrolled in the [Management Reassignment Programme, (“MRP”)], was not reassigned under the MRP then I said: “Would you like us to help you finding an internal reassignment?” Although I was not optimistic about improvements, I was willing to help. I spoke to [Ms. B], (Director, DSPD). She looked into it, told me that other heads of Branch were not receptive, she was amenable to move him authoritatively. We spoke with [Mr. C] who consulted with OHRM and he said that no, that if we expected that the final e-PAS would be negative, moving [the Applicant] would just pass a problem to another supervisor. So the instruction was that we should talk to him and say that you tried but that was not feasible.

I feel very disappointed that [the Applicant] filed the complaint, I believe that his purpose was to postpone his separation from the Organization”.

87. The Applicant’s SRO suggested that the fact-finding panel interview a witness, Mr. BS. Mr. BS was interviewed on 3 February 2015, stating as follows:

Q: How was [the Applicant’s] work?

A: To begin with, this is when I became disappointed [by] him: he was not able to take minutes/notes of the meetings, he could not do it well enough so it was easier for me to do them by myself.

[...]

Q: What happened next?

A: In the fall of 2013, I was sitting next to [the Applicant’s] cubicle. Soon after he received the bad [e-PAS report] he asked me what to do. I told [him] that I did not know as I had never faced such a situation. He told me that he felt he had a dilemma. That he could either do his best [to] impress his FRO and SRO, try to make them happy, or that he could contest their evaluation. He seemed very concerned, tried to calculate his moves and weigh his options.

He never mentioned any harassment to me. We were otherwise on cordial terms, he invited me to his house one time at the end of Ramadan

and I accepted. At the end, we did not continue very close relationship as we have not very much in common. We were friendly but not friends. As such when he asked me I could only advise him to try to mend his relationship with [Ms. NS] and [Mr. JPG], while also protecting his own rights as needed.

He never spoke of harassment to me. I have a good relationship with [Ms. NS] and [Mr. JPG], so he might not have shared everything with me. I did not see him being harassed, he did not complain [to] me about being harassed. He did tell me that he was concerned about his future at the [United Nations]. He mentioned that he felt uncomfortable in the Unit after the negative evaluation, he speculated on what [Ms. NS] and [Mr. JPG] were up to....

Q: Did you notice anything unusual in terms of cultural insensitivity from [the] SRO or FRO? Did you notice any discomfort on [the] part of [the Applicant] in terms of working in a [U]nit with a majority of women, or working with people of different culture?

A: No, however, he told me and I could see that he became uncomfortable after the first negative evaluation.

Before that, I did not see him being uncomfortable. He joined a couple of social events that [Ms. NS] hosted: before the negative evaluation, after no.

Q: Were you surprised about the rebuttal?

A: That did not surprise me. I saw him coming to the office early to prepare for that. I think he had put a lot of effort on this, he was asking me for advice. I was also called for the [r]ebuttal [p]anel. He seemed to be calculating the steps forward. He felt that he had to do the rebuttal now to “build a case” in case of a second negative evaluation.

Q: I wish he knew the rules which are: any professional must get two positive evaluations, if one is negative second positive, he may get the third year. Did he ask [...] his [s]upervisors for reassignment?

A: Yes, also I suggested that he asked the Director to assign him to another office.

Q: [The Applicant] indicated that the negative evaluation came to his surprise.

A: The appraisal came as a surprise to him, he confided to me. He was probably not aware that he was not delivering as expected.

[...]

Q: Did you recall what was his previous work experience, education[?]

A: He had experience with [non-governmental organizations] in London, in Central Europe, about his background during the telephone interview the voice seemed that of an older person. I raised it with my colleagues.

Q: One option, the interviewee was a different person, or he was more comfortable over the phone.

However, it struck me.

Q: Did anyone else in the panel notice that?

A: Everybody remarked that. I think so.

Q: Did he say goodbye?

A: One day, he was gone, he did not come to say good bye. It would not surprise me that he would not trust me because I am on good terms with [his] FRO and SRO.

88. The Tribunal underlines that the Applicant's FRO and SRO had the obligation to apply the mandatory provisions referred to under the heading, "Applicable law", above, namely: ST/SGB/2012/2/Rev.1, secs. 1.3, 2.2(c), 7.1(a), 7.10, 7.11, 8.1, 8.2, 8.3, 8.4; ST/SGB/2008/5, secs. 1.2, 1.4, 2.1, 2.2, 2.3, 2.4, 3.2, 4.5, 4.6, 5.3, 5.9, 6.4; ST/AI/2010/5, secs. 3.1, 3.2, 5.1, 6.3(b), 8.3, 8.5, 10.2, 10.4, 11.1, 11.2.

89. The Tribunal, after carefully reviewing the evidence that was brought in front of the fact-finding panel, considers that the findings and recommendations/conclusions made by the fact-finding panel and not sustained by the evidence are therefore incorrect for the following reasons:

a. In the first e-PAS report for 2012-2013, the following ratings were given to the Applicant: (i) Core values: Integrity: "B – Fully competent"; Professionalism: "D – Unsatisfactory"; Respects for diversity: "B – Fully competent"; (ii) Core competencies: Communication: "D – Unsatisfactory"; Team work: "C – Requires development"; Planning and organizing: "D – Unsatisfactory"; Creativity: "D – Unsatisfactory". The correct overall rating would have been "C – Partially meets expectations" (B + D + B + D + C + D + D = average C), and not "D", as wrongly evaluated by the FRO and SRO. The same conclusion was reached by the first rebuttal panel.

b. Further, in the second e-PAS report for 2013-2014, the following ratings were given to the Applicant: (i) Core values: Integrity: “B – Fully competent”; Professionalism: “D – Unsatisfactory”; Respect for diversity: “B – Fully competent”; (ii) Core competencies: Communication: “C – Requires development”; Team work: “C – Requires development”; Planning and organizing: “D – Unsatisfactory”; Creativity: “D – Unsatisfactory”; Continuous Learning: “B – Fully competent”. The correct overall rating would have been “C – Partially meets expectations” (B + D + B + D + C + D + B = average C), and not “D”, as wrongly evaluated by the FRO and SRO. The same conclusion was reached by the second rebuttal panel.

c. It results that the FRO and SRO twice under-evaluated the Applicant giving the overall rating “D” instead of “C” as deserved in accordance with the two rebuttal panels reports, and the Applicant had to file rebuttals twice against each of these two e-PAS reports and his exposure to these complicated procedures could have been prevented if his FRO and SRO had correctly evaluated his performance. Instead of focusing solely on improving his performance as a young professional, he was unnecessarily humiliated by being evaluated with unsatisfactory performance, and he had to spend in total approximately eight months waiting for the rebuttal panel reports (approximately two months for the first rebuttal from 6 December 2013 to 28 January 2014, and approximately five months for the second rebuttal from June to October 2014) to reflect a correct outcome which should have been established from the beginning by his FRO and SRO.

d. Moreover, in the second e-PAS report, the Applicant was given a rating of “D” with the FRO and SRO totally ignoring the observations, recommendations/conclusions made to them by the first rebuttal panel.

e. The tasks established for the Applicant by his FRO were of a higher professional level than expected from his experience as a P-2 during his first year 2012-2013 and continued to be in the second year 2013-2014 as concluded by both rebuttal panel reports. Again, the recommendations made by the first

rebuttal panel were not implemented by the FRO and SRO, and the Tribunal considers that there is no reasonable explanation for it.

f. After 31 January 2014, when the first rebuttal panel report was issued, the Applicant's FRO prepared a PIP for the period 12 February 2014-25 March 2014 and finalized the Applicant's second e-PAS report in May 2014. During this period, she constantly prepared a negative written record of his performance and again under-evaluated his entire activity, marked the second e-PAS report "D – unsatisfactory" even though the correct overall rating should have been "C" and totally ignored any of his achievements during 2013-2014.

g. The first PIP was established and therefore applicable for a period which was less than the required three months according to sec. 10.4 of ST/AI/2010/5. At the end of the first PIP, on 25 March 2014, there was no extension of this PIP for the following period and there was no new PIP established from April 2014 until the Applicant's separation on 7 December 2014.

h. The Applicant had a mentor appointed only eight months after the beginning of his contract and this mentor was from another unit. Further, there is no evidence that he was ever consulted by the Applicant's FRO or SRO before the finalization of the two e-PAS reports.

i. The Tribunal notes that "discrimination" is defined by the Convention No. 111 of the International Labour Organization ("ILO") (Discrimination (Employment and Occupation)).

j. Further, the Tribunal notes that secs. 1.1, 1.2 and 1.4 of ST/SGB/2008/5 define "discrimination", "harassment" and "abuse of authority" as follows:

1.1 Discrimination is defined as being "any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated or maybe manifest itself through harassment or abuse of authority.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offense or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive environment. Harassment normally implies a series of incidents. Disagreement on work performance 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.

[...]

1.4 Abuse of authority: Abuse of authority is defined as being the improper use of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

90. The two rebuttal panels clearly identified and established in their reports, which are final, elements which are defining harassment and abuse of authority, including in the form of discrimination, from both the FRO and SRO. Moreover, it results from the interview that the FRO and SRO had before the fact-finding panel that they completely ignored the conclusions and recommendations of the first rebuttal panel, which indicated that the FRO's and SRO's overly negative assessment was unnecessarily harsh and judgmental since it appeared that there was little or no information on how to obtain the output expected to satisfy the FRO. The first rebuttal panel also dedicated a special part of the report to observations on managerial feedback and management support in which they flagged some cultural insensitivities by the FRO and SRO as part of the observed pattern where FRO and SRO dismissed the importance of work that the Applicant effectively delivered on time and disagreed with the conclusion included in the e-PAS report that the Applicant did not meet the standards necessary for the



Organization. The Applicant's FRO and SRO did not improve their managerial behavior and the professional development support towards the Applicant as recommended by the first rebuttal panel, as expected from them.

91. This negative attitude of the FRO and SRO continued towards the Applicant and the second rebuttal panel also dedicated a special part of this report to observations on managerial feedback and support, concluding that they had limited appreciation of cultural explanation for the problems between them and the Applicant and that the panel observed some insensitivities from them in the presented examples, including the one on plagiarism.

92. Further, the Tribunal notes that the Applicant's initial temporary assignment of two years already expired on 14 March 2014 and that he had the right to be rotated/re-assigned on his second additional assignment as required by secs. 7.11 and 8.2 of ST/AI/2012/2/Rev.1 and to receive a structured performance assessment for his second assignment. However, as results from the SRO's interview before the fact-finding panel, he did not in reality support the Applicant's rotation, namely his transfer to another office, and his statement contradicted the conclusion indicated by the second rebuttal panel that the FRO and SRO supported the Applicant's transfer to more suitable functions within the Division as a remedial action.

93. Both the FRO and SRO, after the extension of the Applicant's contract for another six months, continued to keep him in their Unit being determined to assess his performance for 2013-2014 for a second time with a "D – unsatisfactory", resulting in him being separated from the Organization for unsatisfactory performance, as results from their interview.

94. The Applicant was considered by both rebuttal panels to have the potential to improve his performance. The Applicant submitted his rebuttal regarding the e-PAS for 2013-2014 on 25 June 2014, and the rebuttal panel finalized its report on 14 October 2014. The Applicant's contract was extended only for six months and not for one year as it should have been, due to the particular circumstances of the present

case which should have been considered exceptionally, especially in the light of the conclusion of the second rebuttal panel report, as presented above.

95. On 20 October 2014, the Applicant filed the complaint pursuant to ST/SGB/2008/5, and on 30 October 2014, the Director of DSPD/DESA informed the Applicant of the decision not to grant him a continuing appointment and to separate him from service upon expiration of his fixed-term appointment on 13 November 2014. On 18 November 2014, the USG/DM informed the Applicant that the Secretary-General had decided to grant him his request to suspend the implementation of this decision until 7 December 2014.

96. The Applicant's performance from April to December 2014 was to be evaluated by his FRO and SRO since, for him to be separated for unsatisfactory service, the last two consecutive e-PAS reports must have been unsatisfactory. It results that his last two consecutive relevant e-PAS reports that should have been prepared and taken into consideration by the Organization when making the decision to separate him for unsatisfactory service were: (a) the final e-PAS report for April 2013 to May 2014 as upgraded by the rebuttal panel and (b) the e-PAS report for May 2014 to December 2014. The Applicant was never evaluated for the last period of his activity and the mandatory procedural requirements for such a separation were ignored by all the actors involved in the process, including his FRO and SRO, and therefore the decision to separate him was finally taken without giving any consideration of the last eight months of his activity and the FRO and SRO negatively influenced the Applicant's career.

97. The establishment of the fact-finding panel following his complaint pursuant to ST/SGB/2008/5 was delayed without any reason/explanation, even though this case was of extreme urgency and the Tribunal notes that the FRO and SRO did not observe and implement the mandatory provisions of arts. 4.6, 5.3 and 5.9 of ST/SGB/2008/5 and they did not inform accordingly the USG/DESA of these circumstances.

98. The Tribunal is of the view that in light of the oral evidence presented to the fact-finding panel by the FRO and SRO, instead of them following the

recommendations of the second rebuttal panel to initiate and provide real support to the Applicant at every stage of the process, they continued their negative behavior towards the Applicant and they did not temporarily rotate/assign him to another position in a different Unit for the following six months (up to one year starting from 19 March 2014), and to allow for the continuation of his third probationary year.

99. By constantly having a conduct that was perceived by the Applicant as offensive and humiliating since these behaviors intimidated, belittled and humiliated him, his FRO and SRO exposed him to a hostile work environment and improperly influenced his performance evaluations, and consequently his career and his employment conditions since he was separated from the Organization.

100. The Tribunal concludes that the Applicant's due process and substantive rights and his real chances to improve his performance under the guidance of other supervisors, which he was entitled to, were denied to him.

101. The Applicant's PIP was prepared and applied only for approximately two months, from February to April 2014, less than the requested three months, in a working environment where, for any reasonable person exposed to the harassment and abuse of authority described above, it would have been impossible to improve his/her performance to "satisfactory". Despite his recognized potential, the Applicant was put in the impossibility to improve his performance. Instead of guiding and helping him to improve and to create real conditions in this sense, the FRO and SRO disregarded the rebuttal panel conclusions from October 2014 and continued to consider that their ratings "unsatisfactory" for the Applicant were correct. The Tribunal considers that this attitude, which is contrary to the Staff Regulations and Rules, resulted in the Applicant not receiving a continuing appointment and him being separated.

102. Therefore, the FRO and SRO negatively influenced the Applicant's career by him being separated and being denied the possibility of having an extension of his fixed-term contract for another full year, from 19 March 2014 to 19 March 2015, in order for

him to improve his performance and not to lose his right to have his contract converted into a continuing appointment.

103. The Tribunal notes that the Applicant testified that he asked his SRO for a letter of reference before leaving the United Nations, so that he might apply for jobs outside the United Nations, but this request was rejected.

104. According to the mandatory provisions of staff rule 9.12 “Certification of Service”, any staff member, who so requests on leaving the service of the United Nations, has the right, based on an oral and/or written request, to be given a statement relating to the nature of his or her duties and the length of service. The Tribunal underlines that the statement is to (“shall”) include additional information referring to the quality of his or her work and his or her official conduct, only based on a written request in this sense, which was not the case since the Applicant did not request the statement to include such information. Only on such a basis the Applicant’s FRO and/or SRO could have reasonably considered that the requested statement may negatively affect the Applicant’s career, and therefore the refusal is considered to be unlawful.

105. The Tribunal considers that in the absence of such a statement relating to the nature of the duties and length of service, a former staff member may be prejudiced against because s/he cannot prove having been employed by the Organization when applying for a position with a new employer, including the United Nations. The Tribunal concludes that the Applicant’s right to receive such a statement referring to the nature of his duties and length of service within the United Nations was breached.

106. All the above-mentioned substantive irregularities did not constitute disagreement on work performance or on other work-related issues, were not committed in good faith and they all can be characterized as harassment and abuse of authority, also in form of discrimination, since they resulted in an unfair treatment of the Applicant, offending and humiliating him, demeaning and belittling him and finally resulting in his separation from the Organization.

107. The Applicant's fundamental rights to a harmonious working environment and to protection from exposure to any form of prohibited conduct like harassment and abuse of authority were not respected. Further, the Tribunal considers that the FRO and SRO breached their duty to take all appropriate measures to promote a harmonious working environment free from intimidation, hostility, and any form of prohibited conduct.

108. The Tribunal expresses its regret that the delay in appointing the fact-finding panel resulted not only in the Applicant's separation instead of his rotation to another Unit within the same Division or another suitable Division within DESA but also in an erroneous conclusion which disregarded the clear evidence before it. Based on this incorrect recommendation from the fact-finding panel, the USG/DESA took an unlawful decision not to take action following the Applicant's complaint concluding that the record indicated that Applicant's FRO's and SRO's conduct did not violate the provisions of ST/SGB/2008/5.

109. The Tribunal concludes that grounds for appeal are founded and therefore the appeal is to be granted and the contested decision is to be rescinded.

#### *Remedies*

110. The Tribunal notes that the Applicant requested in the application as remedies the disclosure of the full investigation report, the rescission of the decision and compensation in two-year's net base salary for moral damages.

111. The Tribunal notes that the full investigation report was filed by the Respondent as instructed by the Tribunal on 13 January 2017 and the Applicant in his submission filed on 22 March 2017, withdrew his request for remedies in connection with production of the full fact-finding panel report.

*Rescission*

112. As results from the above considerations, the contested decision not to take action regarding the Applicant's complaint pursuant to ST/SGB/2008/5 is rescinded as being unlawful. Pursuant to art. 10.5(a) and (b) of the United Nations Dispute Tribunal's Statute, the Tribunal can order rescission of the contested decision and/or specific performance:

10.5 As part of its judgement, the Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

113. The Tribunal notes in the present case that the contested decision is not related to the Applicant's appointment, promotion or termination. Therefore, there is no need to establish an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision or specific performance ordered subject to para. 10.5(b) of the Dispute Tribunal's Statute.

114. The Tribunal takes note that the Applicant testified that the treatment he was subjected to on the part of his FRO and SRO had a devastating impact on his professional self-image, morale and emotional health, and he also testified about the continual fear he felt from their behavior. The rebuttal panel for the 2013-2014 e-PAS report, in para. 62 of its report, took note and found this fear to be credible and critical to the evaluation of the performance rating (emphasis omitted):

... In this setting, the staff member demonstrated on many occasions a keenness to deliver what was expected of him. In one of the interviews, he expressed fear that whatever piece of work he would submit, it would be subject to a critical review in writing. The [p]anel finds this fear to be credible, and critical to its evaluation of the performance rating.

115. The Tribunal also notes that the Applicant testified on 2 May 2017 that he started smoking, lost weight, became pre-diabetic and was treated for anxiety.

116. The Tribunal further notes that the Applicant testified on 2 May 2017 that:

[...] I felt I was ignored. I was let down by the system because they did not ever bother sending to the right email address the conclusion or the report of the investigation ...

[...] ... the [United Nations] always talks about diversity, plurality, justice, and, well, human rights and other things. So my understanding when I lodged the complaint, my understanding was that the fact-finding panel or whatever they created, they will approach this case from a very impartial point of view and analyse the situation from a very objective manner; that was not the case. The way this case was handled was not expected from an organisation like the [United Nations]. They did not contact me afterwards when I had the first interview. Then, they finalised the report, which I was never communicated. Then, there was some of the issues, what I raised in my application, was never asked to me when the interview happened. Then some of the important people for this complaint, because they related to the complaint, were never interviewed, and then there was no follow-up with the additional documentation I sent to them.

[...] So altogether, it was like I was frustrated and then I thought, well, they did not see the point; that it was a systematic harassment to a person who came through a very competitive process to be a long-term bureaucrat in the [United Nations] system and they just missed that point totally and [-] and just complied with the [-] complied with the narrative provided to them from my supervisors or the [DESA/EO]. So I felt very bad when I received their communication after nine months.

117. Moreover, the Tribunal notes that the Applicant gave evidence in his testimony of the difficulty in resuming his professional career following his very negative experience in the United Nations and the adverse comments on his record. This effectively precluded him from getting a job elsewhere in the United Nations system.

*Moral damages*

118. Article 10.5(b) of the Dispute Tribunal’s Statute was amended by the General Assembly in December 2014 and the text has introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation “for harm, supported by evidence”. This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

119. In the Black’s Law Dictionary, 6th Ed. (1990), the word “harm” is defined as “[a] loss or detriment in fact of any kind to a person resulting from any cause” (see p. 718).

120. It results that, since art. 10.5(b) of the Dispute Tribunal’s Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

121. In *Benfield-Laporte* 2015-UNAT-505, the United Nations Appeals Tribunal held that (see para. 41, footnote omitted):

... [W]hile not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

122. Further in *Kallon* 2017-UNAT-742, the majority of the full bench of the Appeals Tribunal decided that (footnotes omitted):

62. The authority conferred by the [Dispute Tribunal] Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the [Dispute Tribunal] Statute prohibits the [Dispute Tribunal] from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid



supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(b) of the [Dispute Tribunal] Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation. Much will necessarily depend on the evidence before the [Dispute Tribunal].

64. Conscious of the amendment and its purpose, the [Dispute Tribunal] in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the [Dispute Tribunal] was guided by the principles pronounced by this Tribunal in *Asariotis* [2013-UNAT-309] prior to the amendment of Article 10(5)(b) by General Assembly resolution 69/203. In that case this Tribunal said:

... To invoke its jurisdiction to award moral damages, the [Dispute Tribunal] 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 [Dispute Tribunal] is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

... 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.

65. The distinction drawn between the two categories of moral injury or non-patrimonial damages in *Asariotis* [Appeals Tribunal's Judgment No. 2013- UNAT-309] has two dimensions. On the one hand, it speaks to the kinds of moral damage ordinarily at issue and, on the other, mentions the kind of evidence necessary to prove each kind of moral damage.

66. The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

...

68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the [Dispute Tribunal's] Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

123. In the application, the Applicant indicated that he requested two years' net base salary in compensation as moral damages for the Administration's failure to respect his due process rights and as a consequence of the facts of the conclusions of the investigation panel were not supported by the facts. It results that the Applicant's request for moral damages relates to the first category of moral damages identified in *Asariotis*.

124. The Applicant claimed mental distress and anxiety produced by the contested decision. As results from para. 70 from the Judgment of the Appeals Tribunal in *Kallon* 2017-UNAT-742, additional evidence is required in case of mental distress or anxiety allegedly produced by the contested decision, evidence which can consist in an applicant's testimony and/or medical or psychological report(s)/evidence to prove that the harm can be directly linked or is reasonably attributable to the breach of violation.

125. This Tribunal agrees with the majority decision taken in *Kallon* and considers that, in the present case, the Applicant suffered moral harm as a result of the unlawful decision which breached his due process right to have his complaint fully and fairly considered by the Administration as proved by the totality of evidence according to the

standard of proof established by the Appeals Tribunal in *Kallon*, “[t]he evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence”.

126. The Applicant testified that he suffered mental distress and anxiety, and the Tribunal considers that all factual elements together with the nature of the breach constitute sufficient evidence in the present case to conclude that harm was caused to the Applicant’s dignity and to his career potential.

127. Taking in consideration all the particular circumstances of the case and the latest jurisprudence of the Appeals Tribunal (see *Cohen* 2017-UNAT-716), the Tribunal considers that the present judgment, together with an amount of one year’s net-base salary at the P-2 level, step 8, represents a reasonable and sufficient compensation for the moral harm caused to the Applicant and his request for moral damages is therefore to be granted in part. Since the Appeals Tribunal in *Sarwar* 2017- UNAT-757 reversed the Dispute Tribunal’s judgment in *Sarwar* UNDT/2017/080, the Applicant did not actually receive any compensation for moral damages as sustained by the Respondent in the closing submissions, and the compensation awarded in the present case is not duplicative.

## **Conclusion**

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

- a. The application is granted in part and the contested decision is rescinded. However, there is no need for a new investigation to be conducted as the Tribunal holds that the Applicant has been the victim of harassment and abuse of authority.
- b. The Respondent is to pay the Applicant the compensation of one year’s net base salary as moral damages;

c. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

## Observations

129. The Tribunal notes that in *Sarwar* 2017-UNAT-757, the Appeals Tribunal decided in para. 80 that the Applicant's separation was lawful *inter alia* because:

In effect, therefore, the evidence establishes that while [the Applicant] had some potential to develop, he was lacking particularly in communication, writing, language, planning and organizing skills. There was a reasonable basis and sufficient proof establishing that [the Applicant's] performance fell short of the expected standard. Given that the performance areas were core competencies, without which it was not possible to fulfill the tasks of the position, the deficiency was sufficiently serious to render the continuation of the employment relationship untenable. The [Dispute Tribunal] acknowledged as much, implicitly, in finding that the employment relationship may have irreconcilably broken down. There was accordingly a valid and fair reason for the termination of [the Applicant's] appointment.

130. However, the Tribunal considers that, in light of its conclusions, the Applicant was subjected to harassment and abuse of authority from both his FRO and SRO, as resulted from the evidence before the fact-finding panel, especially the interviews of the FRO and SRO, which highlighted their rationale behind the decision not to grant the Applicant continuing appointment and to separate him from the Organization, and the Applicant had no real chance to improve his performance between 31 January 2014 and May 2014 after the e-PAS report for 2013-2014 was issued. Further, during the last months of his contract, the Applicant had no PIP established and his performance for this period was not evaluated before his separation.

131. The negative attitude of his FRO and SRO towards him during his entire contract with the Organization which, in view of this Tribunal, characterized, harassment and abuse of authority, together with a hostile working environment, the

lack of evaluation of his performance during the last eight months of his activity and the denial of his rotation to another Unit, are bringing a new light in relation to the lawfulness of the separation of the Applicant from the Organization.

132. The Tribunal expresses its trust that the Organization may wish to exercise its discretion and, after reviewing the available vacant suitable positions in accordance with the compendium of job opportunities for 2017-2018, to consider the Applicant for any of these suitable positions, since he successfully passed the NCRE in 2009 and was subsequently placed on the roster.

133. The Tribunal underlines that the young professional staff members who have been appointed from the NCRE roster were recruited through this special recruitment tool established by General Assembly resolution 35/210 (Personnel questions) adopted on 17 December 1980, para. I(2), through competitive examinations which are offered to countries that are not represented/un-represented or are not adequately represented/under-represented in the United Nations Secretariat. It results that the Applicant was identified to have excellent professional knowledge and skills suitable for positions, including being fluent in English, in the United Nations Secretariat and he successfully went through a written examination and an interview which, in the Tribunal's view, are not to be doubted at any level in the United Nations Secretariat. Such staff members constitute an absolute necessary/indispensable segment of the United Nations career staff members designed to ensure equal geographical representation of all Member States in the United Nations Secretariat, with due respect to gender, sex, nationality and race, in order to ensure the achievement of the purposes and principles established in the Preamble and in arts. 1.4 and 1.8 of the United Nations Charter. Therefore, it is very important for the managers to give adequate guidance and support to these new staff members in order for them to be successful in the two-three years probationary service and for their contracts to be converted into continuing appointments which would ensure they become career staff members of the United Nations Secretariat and an adequate representation of their countries of origin. This Tribunal is of the view that the successful performance of these staff members cannot

be reached without a tolerant attitude and an appropriate and realistic workplan developed together with each staff member in order to reach this goal. A successful performance of these staff members is directly linked to a successful managerial programme and supervision, and therefore the failure of such staff members to satisfactorily perform may mirror a failure on the part of the FRO(s) and SRO(s) responsible for their professional development.

134. The Tribunal notes that those Member States, which are also part of the European Union, have adopted on 27 November 2000 the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This document includes legal provisions which make a clear distinction between direct and indirect discrimination based on religion or belief, disability, age or sexual orientation as follows:

#### **Preamble**

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

#### **Article 1**

##### **Purpose**

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

#### **Article 2**

##### **Concept of discrimination**

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. [...]

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

135. The Tribunal recommends similar provisions to be included in an amended version of ST/SGB/2008/5 for a more accurate understanding and application of this policy and commends the Organization for introducing the new mandatory online course on "Working Together Harmoniously" which was introduced on 2 January 2018, as well as the available learning opportunities on unconscious bias such as the unconscious bias briefing for panel members which is expected to bring a positive change in the organizational culture and to prevent future potential acts of



discrimination, harassment and/or abuse of authority. The courses on unconscious bias should be included as part of the on-going training so that all managers will benefit from them, including the Applicant's former FRO and SRO.

*(Signed)*

Judge Alessandra Greceanu

Dated this 12<sup>th</sup> day of January 2018

Entered in the Register on this 12<sup>th</sup> day of January 2018

*(Signed)*

Morten Albert Michelsen, Officer-in-Charge, New York