UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/077
Judgment No.: UNDT/2018/018
Date: 8 February 2018
Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KEBEDE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Sandra Baffoe-Bonnie, ECA
Winrose Njuguna, ECA

INTRODUCTION

1. This case concerns the proper approach to be followed to give full effect to the Organization's policy for the protection of staff from any prohibited conduct including discrimination on grounds of disability and ethnicity and the exercise of abuse of power. The principal instruments are ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), ST/SGB/2014/3 (Employment and accessibility for staff members with disabilities in the United Nations Secretariat) and General Assembly resolution 70/170 (Towards the full realization of an inclusive and accessible United Nations for persons with disabilities).

2. The particular issue in this case relates to the redress available to the Applicant as a staff member who believed, in good faith, that the Organization's policy had been breached and the proper procedural steps to be taken by the responsible official to ensure that his complaint was properly and fairly dealt with in accordance with the provisions of ST/SGB/2008/5 and the Organization's policy commitments and intentions as evidenced in the various Resolutions of the General Assembly and administrative issuances promulgated to give effect to this policy.

3. The Applicant's claim for relief included compensation for psychological harm and moral damages.

THE CLAIM

4. On 19 October 2016, the Applicant filed a claim challenging the decision, made on 23 April 2016, by Mr. Carlos Lopes, the then Executive Secretary of the Economic Commission for Africa ("ES/ECA"), not to set up a fact-finding investigation panel to investigate his complaints about workplace discrimination and harassment. The complaint included failure to implement fully the recommendations in the report of the Panel on Discrimination and Other Grievances (PDOG) dated 21 November 2008 to "rectify the ongoing discrimination". He referred to article 8 of the Charter of the United Nations; staff

regulations 1.1, 1.2(a), 1.2(c), 1.3(a); staff rule 1.2(c); ST/SGB/2008/5; and the United Nations Convention on the Rights of Persons with Disabilities.

THE REPLY

5. The Respondent's case, as it is reflected in the reply, is that the contested decision was lawful because the ES/ECA reviewed the Applicant's complaint in accordance with section 5.14 of ST/SGB/2008/5 and determined that three elements of the complaint were not receivable because they related to matters addressed through a 2012 settlement agreement or had not been the subject of a management evaluation request.

6. Given this reply, one of the questions to be addressed by the Tribunal is whether the policy underpinning ST/SGB/2008/5 stands alone as a clear commitment to the identification and eradication of prohibited conduct or is it subject to the technical requirements regarding the receivability of claims in accordance with the Statute, Rules of Procedure and case law of the Tribunal. Further, is it lawful to circumvent the operation and implementation of ST/SGB/2008/5 by buying the staff member's silence through a settlement agreement. Would such a practice be consistent with the Organization's policy to eliminate prohibited conduct.

7. The Respondent submitted that the Applicant's complaints against AG and RA did not demonstrate sufficient grounds to warrant a formal fact-finding investigation. For a reason, which is not apparent, they rely on two first instance judgments:

> a. Relying on *Ostensson* UNDT/2011/050, the Respondent asserts that the ES/ECA reviewed the totality of the alleged facts in the complaint against the definition of prohibited conduct set out in section 1 of ST/SGB/2008/5 and determined that none of the incidents the Applicant complains of fall under any of the definitions in section 1.
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> b. Relying on *Benfield-Laporte* UNDT/2013/162, the Respondent submits that the responsible official is only obliged to establish a fact-

finding panel in cases where the complaint appears to have been made in good faith and in circumstances where there is a reasonable chance that the facts alleged could amount to prohibited conduct. There is no obligation to establish a fact-finding panel if the criteria are not satisfied.

c. The ES/ECA concluded that the complaint of defamation against RA and AG was not prohibited conduct under ST/SGB/2008/5 since the communications were not discussed or raised publicly. The Respondent submitted that the complaints relate to one-off incidents, which did not amount to harassment as harassment normally connotes a series of incidents.

8. Efforts made in the course of the unsuccessful mediation efforts contributed to the delay in communicating the ES's decision.

FINDINGS OF FACT

9. The huge volume of documents describing various concerns on the part of the Applicant over a substantial period of his employment contributed to the difficulty in identifying the core issues in this case. Amongst the difficulties was a confusion about key events and dates. Notwithstanding the confusion, the history of grievances, including the manner in which they were dealt with, provided an informative backdrop to an understanding of what motivated the Applicant to persist in his allegations that there has been a pattern of conduct over several years of him being subjected to detrimental treatment for reasons relating to his disability as a consequence of having contracted polio as a child and also his ethnic origin. A consideration of the historical context aids in an understanding of the reply and responses of the administration.

10. Where the application lacks clarity the Tribunal has a duty to do its best to ascertain the nature of the impugned decision and the relief being sought. The

United Nations Appeals Tribunal ("UNAT") held in *Massabni* 2012-UNAT-238[1] that:

> 25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
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> 26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

11. This application falls to be determined in accordance with the requirements and the underlying purpose of ST/SGB/2008/5 and having regard to the Organization's policy prohibiting all forms of discrimination. In this case the primary focus is on the Applicant's disability.

12. Insofar as events material to a determination of this application are concerned, the Tribunal sets out a chronology of events so as to place in context the request to the ES/ECA, summarized at paragraph 13 below, that an investigation should take place.

> a. In February 2007, the Applicant submitted a formal complaint of discrimination and harassment to the Panel on Discrimination and Other Grievances ("PDOG") alleging that: (i) he had been working on a Temporary Assistance Fund post for 14 years without a promotion as a result of discrimination due to his disability; (ii) his supervisor, Mr. AA, had insulted him by telling him his "brain is as disabled as [his] leg"; (iii) He had been the subject of a smear campaign based on an erroneous assumption that he was Eritrean instead of Ethiopian;

[1] See also *Zachariah* 2017-UNAT-764

(iv) His life was in danger and that he was being harassed but that no action had been taken to correct the situation.[2]

b. In a report dated 21 November 2008, the PDOG concluded that there were "discriminatory overtones" in the treatment of the Applicant and that the way his supervisor treated him created a hostile work environment. The PDOG also concluded that the Applicant had a genuine fear for his safety and that the ECA Library's appointment and promotion process appeared to be irregular. The PDOG recommended, *inter alia*, that: (i) ECA Security further investigate the threats made to the Applicant; (ii) OHRM review ECA's recruitment and promotion processes, especially in relation to the Library; and (iii) the Applicant be considered for a regular budget post rather than continuing to be assigned to a series of temporary assistance fund contracts after more than 14 years of service.

c. On 12 September 2013, the Applicant submitted a request for management evaluation to the Management Evaluation Unit ("MEU") and a complaint of discrimination to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") pursuant to ST/SGB/2008/5 alleging discrimination against him on the basis of his physical disability and the failure of senior ECA managers to address his concerns.

d. The Applicant emailed the ES/ECA on 4 January 2014 regarding the poor working conditions for ECA staff members with disabilities, including himself.

e. By email dated 16 January 2014 the ASG/OHRM informed the Applicant that his ST/SGB/2008/5 complaint should be sent to the ES/ECA.

[2] Exhibit 1 to Application, Report of the Panel on Discrimination and Other Grievances, 21 November 2008.

f. The Applicant forwarded the 12 September 2013 email to Mr. Lopez, the then ES/ECA, on 5 February 2014 and on 17 February 2014, the ECA legal adviser informed him that more specific information would be required for the ES/ECA to act on his complaint.

g. On 1 April 2014, the Applicant provided the ECA legal adviser with the information requested on his ST/SGB/2008/5 complaint.

h. The Applicant wrote to Mr. Lopes, ES/ECA, on 16 April 2014 to complain about the inadequacy of the parking lot assigned to staff with disabilities and on 17 April about the clamping of his car by ECA Security, thereby subjecting him to a detriment as a person with a physical disability.

i. He wrote to Mr. Lopes, ES/ECA, again on 12 May 2014 requesting that arrangements be made for him to attend a conference on the rights of persons with disabilities. In response, the ECA legal adviser informed him on 15 and 16 May 2014 to direct his request to his supervisor for consideration.

j. Between 16 May 2014 and 21 July 2015, the Applicant was emailing various people within ECA about his e-PAS for 2013/2014 and an ongoing mediation process.

k. On 21 July 2015, the Applicant emailed the Secretary-General, copying OIOS and other offices, alleging that he was being subjected to discrimination at ECA for a reason relating to his disability and ethnic origins. He reported that: he was forced to sit idle with no work; his medical records had been “illegally circulated”; and that he had been told that “your brain is as disabled as your leg” and “no room for disabled staff at the unit”. He requested that remedial action be taken. OIOS sent him a questionnaire which he completed and returned on 21 July 2015. He provided OIOS with additional information on 24 July 2015.

l. The Applicant emailed the ES/ECA on 1 August 2015 regarding the mistreatment of ECA staff members, including himself, with disabilities. He alleged that: he had not been given a work assignment since 2007; when he was given work, it was in an inaccessible area such as the basement; his medical records had been circulated to other staff members; and his supervisor had stated "since our staff is disabled no need of assigning him a team leader function" and "no room for disabled staff at the unit".

m. On 25 April 2016, the Applicant received the Inter Office Memorandum ("IOM") recording Mr. Lopes', the ES/ECA's, decision dated 23 April 2016 regarding his complaint, submitted on 1 April 2014 under ST/SGB/2008/5. The ES/ECA informed the Applicant that after reviewing his allegations and the supporting evidence, he concluded that the complaint did not warrant the formation of a fact-finding investigation panel because: two of the complaints were not receivable; the complaint of inaction by the administration on the PDOG report had been settled informally by MEU with compensation; and that the complaints against AG, for sending an email to a number of people stating that he had acted violently towards another staff member, and RA, for referring to him as being incapacitated due to his disability, did not amount to harassment under ST/SGB/2008/5.

n. On 19 and 26 May 2016, the Applicant wrote to MEU requesting an explanation as to why he had not received from MEU a response to his request for management evaluation that he submitted on 12 September 2013. It would appear from the documents that MEU did not respond to this request thereby reinforcing the Applicant's belief that he was being marginalised.

o. On 20 June 2016, the Applicant submitted a management evaluation request against Mr. Lopes' decision of 23 April 2016 not to

form a fact-finding investigation panel into his ST/SGB/2008/5 complaint of 1 April 2014. On the same day, MEU informed the Applicant that it had received his management evaluation request and would respond to him no later than 4 August 2016.

p. MEU responded to the Applicant's management evaluation request on 29 July 2016 upholding the ES/ECA's decision of 23 April 2016.

13. The Applicant's complaint to the ES calling for an investigation included the following:

a. That he has remained as a library clerk at the G-3 level for 14 years despite a good record of performance and that recommendations for promotion to senior library assistant were blocked by the then head of library services.

b. That he was moved to what he considered to be a dead-end job.

c. He was informed that he had not been given responsibilities because all positions in the Inventory Store and Services Management Unit ("ISSMU") require a high degree of physical movement. Accordingly, he has remained "idle" for the past three years.

d. His supervisors failed to finalise his performance assessments thereby jeopardising his advancement within the Organization.

e. Despite being moved to his current post to address his grievances and supposedly to advance his career his request for reclassification of his post was refused on the ground that the post was funded from General Assistance Funds. To address this problem the PDOG Report recommended that "serious consideration" be given to vacant regular budget posts yet appropriate steps were not taken to implement this recommendation.

f. His requests to transfer to another duty station were refused.

g. He had been subjected to insulting and demeaning comments relating to his disability.

h. His original workplan began with the words "Since our colleague is handicapped…". This made him feel "unneeded and perhaps unwanted in the unit".

i. That in a number of specific areas, which he identified, there was a failure to make reasonable adjustments to accommodate the needs of disabled staff including himself. One of his specific concerns was, "Staff members' inability to safely access their workplace or basic facilities, such as bathrooms, serves as a source of humiliation and generates physical safety risks". He mentioned the fact that he had fallen at the ECA compound and injured himself.

THE APPLICABLE LAW

14. UNAT has ruled in several judgments regarding the scope of the Dispute Tribunal's judicial review. In *Sanwidi* 2010-UNAT-084, it was established that:

> … [w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
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> …
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> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that

> the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.[3]

15. The General Assembly, by resolution 70/170 of 17 December 2015, reaffirmed the Convention on the Rights of Persons with Disabilities and affirmed that:

> the United Nations has an important role to play in protecting and promoting the rights of persons with disabilities, including by taking all appropriate measures to ensure that it provides accessibility and reasonable accommodation, bearing in mind that, in the Convention on the Rights of Persons with Disabilities, reasonable accommodation is defined as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

16. ST/SGB/2008/5 was promulgated by the Secretary-General to ensure that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment and abuse of authority ("prohibited conduct").

17. Sections 1.1 and 1.2 of ST/SGB/2008/5 define discrimination and harassment as:

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

[3] See also *Cobarrubias* 2015-UNAT-510; *Ouriques* 2017-UNAT-745.

> 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.

18. Section 2.2 of this SGB places a duty on the Organization to take all appropriate measures to ensure a harmonious work environment and to protect staff from exposure to any form of prohibited conduct. Section 2.3 enjoins staff to act with tolerance, sensitivity and respect for differences.

19. Section 3 concerns the duties of staff members and specific duties of managers, supervisors and heads of department/office/mission in relation to prohibited conduct. This section provides:

> 3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.
>
> 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.
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> 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.

20. Section 4 details measures to prevent prohibited conduct. Section 4.1 provides:

> Prevention of prohibited conduct is an essential component of the action to be taken by the Organization. In the discharge of its duty to take all appropriate measures towards ensuring a harmonious work environment and to protect its staff from any form of prohibited conduct, […].

21. Section 5.14 provides:

> Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report **to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation**. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster (emphasis added).

22. ST/SGB/2014/3 (Employment and accessibility for staff members with disabilities in the United Nations Secretariat) was promulgated to create a non-discriminatory and inclusive working environment for staff members with disabilities at the United Nations. Section 1 of this SGB provides:

> 1.1 The Organization shall take appropriate measures to eliminate discrimination on the basis of disability in the workplace through, inter alia, the adoption of standards and guidelines for the United Nations Secretariat, in order to ensure that staff members with disabilities have access to physical facilities, conferences and services, documentation and information, and professional development. Such measures must be taken within existing resources or with any additional resources approved for this purpose by the General Assembly.
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> 1.2 For the purposes of this bulletin:
>
> (a) "Staff members with disabilities" includes those who have long-term physical and/or mental impairments which, in interaction with various barriers, may hinder their full and effective participation in the work of the Organization on an equal basis with other staff members;
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> (b) "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of employment-related rights. It includes all forms of discrimination, including the denial of reasonable accommodation;
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> (c) "Reasonable accommodation" means necessary and appropriate modification and adjustments in the workplace, where needed in a particular case and without imposing a disproportionate or undue burden on the Organization, to allow staff members with disabilities, in all duty stations, to discharge their official functions. Such reasonable accommodation must be

made within existing resources or with any additional resources approved for this purpose by the General Assembly. Reasonable accommodation may include, for example, adjustment and modification of equipment, modification of job content, working hours, commuting and organization of work for the staff member concerned.

23. Section 2 of ST/SGB/2014/3 provides:

2.1 The Organization is committed, within existing resources or with any additional resources approved for this purpose by the General Assembly, to:

(a) Creating a non-discriminatory and inclusive workplace with non-discriminatory recruitment and employment conditions as well as equal access to continuous learning, professional training opportunities and career advancement;

(b) Taking appropriate measures to ensure that reasonable accommodation is provided to staff members with disabilities, as defined in section 1.2. Reasonable accommodation may include the adjustment of a practice, condition or requirement to take into account the specific needs of a staff member with a disability or disabilities, to enable the staff member to fully participate in the work of the Organization. The accommodation process should be undertaken in consultation with the staff member.

2.2 The staff member concerned shall inform the responsible officials of his or her need for a reasonable accommodation.

24. Section 3 of ST/SGB/2014/3 provides:

3.1 Pursuant to General Assembly resolution 65/186, paragraph 15(d), the Organization is committed to improving accessibility and full inclusion of staff members with disabilities, within existing resources or with any additional resources approved for this purpose by the General Assembly, by:

Physical facilities, conferences and services

(a) Taking appropriate measures to ensure access to and use of premises, facilities and equipment by all staff members with disabilities;

(b) Establishing and implementing provisions, in existing buildings and grounds, for accessible routes, ingress, egress and signage, as well as accessible audio and intuitive wayfinding, including in emergency situations;

25. This Tribunal held in *Omwanda* UNDT/2015/104 that:

> 49. The Tribunal takes into account that it is for the head of department to exercise a judgment as to whether to call for a fact-finding investigation. So long as the head of department exercises his or her discretion in a lawful manner, taking into account relevant factors and disregarding irrelevant considerations, and provided that in all the circumstances the decision was not irrational or perverse, given the overarching policy considerations under ST/SGB/2008/5, the Tribunal will not interfere.

CONSIDERATIONS

26. This Judgment is concerned solely with the question whether the ES/ECA directed himself correctly in accordance with the applicable legal principles in carrying out his duty under section 5.14 of ST/SGB/2008/5 before concluding that the complaint did not warrant the setting up of a fact-finding investigation panel. Such a review necessarily involves a proper consideration of the foregoing anti-discrimination policy and procedures and Resolutions of the General Assembly.

27. It is necessary to examine the actual grounds or reasons for the responsible official's decision at the time he made his decision and not the explanations, justifications and arguments advanced by the Management Evaluation Unit ("MEU") or in the Respondent's reply.

28. The examination of the core justiciable issue requires the Tribunal to examine whether the decision was procedurally correct, whether the decision maker failed to consider matters which he reasonably ought to have considered and particularly whether his identification of the complaints was rather narrowly constrained thereby overlooking significant aspects of the complaint, whether there was a proper self-direction as to the applicable law and whether the decision was a permissible option arrived at in a procedurally correct manner.[4] Accordingly, the Tribunal relies on the IOM dated 23 April 2016 sent by Ms. Sandra Baffoe-Bonnie, Secretary of the Commission and Legal Adviser, on behalf

[4] *Ouriques* 2017-UNAT-745; *Sanwidi* 2010-UNAT-084.

of Mr. Lopes, ES/ECA, and which constitutes the reasons for the decision. It states:

> 1. I am writing on behalf of the Executive Secretary in connection with your complaint dated 1 April 2014 reporting allegations of discrimination and abuse of authority against various staff current and former ECA staff members. In your complaint, you have outlined various instances in which you felt discriminated against which you attribute to your disability. The Executive Secretary notes that subsequent to the filing of your complaint, you agreed to have the complaint informally settled, however, both you and ECA were not able to reach a settlement.
>
> 2. Please note that as required by section 5.14 of ST/SGB/2008/5 on the Prohibition of discrimination, harassment, including sexual harassment and abuse of authority, the Executive Secretary has reviewed the entirety of your allegations and considered all relevant matters and notes in support of your complaint and has reached the conclusion that your complaint does not warrant the formation of a fact-finding investigation panel.
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> 3. The Executive Secretary further makes the following observations:
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> i. It was commendable that you sought mediation to informally settle the matter, unfortunately no agreement was reached.
>
> ii. That complaints against Mr. AA and allegations of general discrimination at the Library section and smear campaign regarding your ethnicity are not receivable. This is because all the three matters were subject of an investigation by the Panel on Discrimination and Other Grievances (PDOG) in 2007 through your complaint in 14 February 2007.
>
> iii. Complaints against Mr. RG and Mr. AT regarding discrimination in the Property Management Unit, are equally not receivable because they were subject of a Management Evaluation requests [*sic*] of 26 April and 21 November 2011.
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> iv. On 19 June 2012 you signed a release form with MEU in the settlement of several pending claims including the inaction by administration on the PDOG report, and allegations against Mr. RG and Mr. AT. In the release form that you signed, you agreed not to bring any claim arising from the matter that was settled out of court through the payment of compensation.
>
> v. The receivable claims were those against Ms. AG and Mr. RA regarding an allegation of defamation and a claim against Mr. RA for referring to you as being incapacitated due to your disability. Please note that defamation is not an offence covered

under ST/SGB/2008/5 therefore this allegation was considered in the context of harassment. The bulletin defines harassment as:

> 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…

vi. The two complaints indicate that the allegations you make were both a one-off incident in which the statements that you found harassing and discriminatory were made. From the definition of harassment above, it is necessary to have a series of incidents to culminate to an action of harassment, therefore the reference to you in two official communications by two different people in different context do not amount to harassment".

4. In accordance with the requirements of ST/SGB/2008/5, this is to inform you that the Executive Secretary completed his review of your complaint and on the basis of the above observations, is of the opinion that, though your complaint appears to have been made in good faith, there are no sufficient grounds to warrant a formal fact finding into the allegations of prohibited conduct.

5. The Executive Secretary is working on taking steps to ensure that ECA realizes the United Nations goal in General Assembly Resolution A/RES/70/170, of an inclusive and accessible United Nations for persons with disabilities.

6. On behalf of the Executive Secretary, I would like to assure you of ECA management's zero tolerance policy against discrimination, harassment and abuse of authority and management's commitment to ensuring that the ECA work environment is not only free from all forms of discrimination, harassment and abuse of authority, but also a harmonious one that upholds the dignity of all staff members.

7. Due to the multifaceted nature of your complaint and against the background of zero tolerance policy on prohibited conduct, the Executive Secretary needed to undertake an extensive review if your complaint which took a bit more time than expected, hence the delay in responding to you.

29. The Tribunal notes that the reference to "the above observations" is a reference to the ES's understanding of section 1.2 of ST/SGB/2008/5 to the facts of this case including reliance placed on a previous settlement and to the pre-requisites of receivability of claims in the formal system of justice.

30. The IOM dated 23 April 2016 read as a whole reveals a very restricted understanding of the entirety and substance of the complaint and a flawed appreciation of the applicable norms. Allegations of institutionally enabled, or tolerated, harassment are evident in the Applicant's complaint and they do not relate to one off incidents as the ES claimed at paragraph 3(vi). There is nothing in the strict interpretation of section 1.2 of ST/SGB/2008/5 to exclude a series of discrete acts performed by more than a single individual from constituting prohibited conduct for which the Organization bears responsibility. The focus of the examination should be on the nature and number of occurrences of alleged prohibited conduct regardless of the number of discrete acts committed by one or more individuals. Such an approach will be consistent with the overarching policy. Failure to do so incurs the risk of undermining the anti-discrimination policy in that several separate acts each of which was committed by a different individual will not meet the test of "harassment". Further the significance of the use of "normally" in para 1.2 seems to have been overlooked. In any event, the Applicant referred to several incidents of prohibited conduct which reasonably caused offence and humiliation to him.

31. The issues for determination are:

a. Did the ES correctly identify the complaints of prohibited conduct?

b. Was the ES correct in deciding that the only complaints that were receivable were those against Ms. A.G. and Mr. R.A. and that they would be considered as one off complaints of harassment and, if so, was there a failure to consider the proper definition of what constitutes harassment under Section 1.2 of ST/SGB/2008/5?

c. Did the ES act procedurally correctly in deciding that by signing a release form with the MEU in an out of court settlement on 19 June 2012 the Applicant was precluded from relying on a number of claims that were pending at the time regardless of whether they may still have been continuing?

d. Did the ES give any or any sufficient weight to the material before him, in the complaint dated 1 April 2014, that amounted to an allegation that irrespective of any settlement reached the Applicant was still being subjected to ongoing discrimination and that one or more of the recommendations made by the PDOG had still not been implemented and were continuing to affect him to his detriment. If so, could such allegations lawfully be excluded from consideration as manifestations of prohibited conduct under ST/SGB/2008/5 for which an independent fact finding investigation was merited.

e. Was the Applicant raising a claim of a continuing pattern of discriminatory treatment within the meaning of "prohibited conduct" under ST/SGB/2008/5?

Did the ES correctly identify the complaints of prohibited conduct?

32. An examination of the totality of the Applicant's complaint and the way in which they were considered by the ES indicates that the ES failed to consider some of the complaints summarized at paragraph 13 above. Further the ES asked himself the wrong question. Under ST/SGB/2008/5, the ES's duty was to examine the complaint in its entirety to see whether it raised issues of prohibited conduct to which the Applicant may still be suffering from. Instead the ES focused just on the two instances concerning AG and RA as isolated instances and asked if the complaints were receivable thereby conflating and confusing the regulatory regime concerning prohibited conduct and the technical requirements of receivability under the formal system of justice. Further he failed to appreciate that the complaint raised the wider allegation of systemic or institutionalised behavior that was not consistent with ST/SGB/2008/5 and the Organization's wider policy commitments.

Was the ES correct in deciding that the only complaints that were receivable were those against Ms. A.G. and Mr. R.A. and that they would be considered as complaints of harassment and, if so, was there a failure to consider the proper definition of what constitutes harassment under Section 1.2 of ST/SGB/2008/5?

33. The ES decided to label the allegations against AG and RA as isolated instances of alleged "harassment" and then misapplied the statutory test. Section 1.2 of ST/SGB/2008/5 states that "harassment normally implies a series of incidents". However, whilst quoting the provision correctly the ES overlooked the crucial word "normally" which suggests that it should not be read to exclude one-off incidents. More significantly, the definition of harassment in section 1.2 covers the entirety of the behaviours complained of irrespective of whether they were several acts allegedly performed by a single person or single acts by several individuals. Further the definition does not exclude institutional or systemic failures which go beyond the actions of AG and RA.

Did the ES act procedurally correctly in deciding that by signing a release form with the MEU in an out of court settlement on 19 June 2012 the Applicant was precluded from relying on a number of claims that were pending at the time and which were continuing to date?

34. At this stage the Tribunal is merely considering the role of the ES under ST/SGB/2008/5 and not the merits of the allegations which would remain to be tested in any investigation. The Tribunal is concerned that both the MEU response and the Respondent's reply place unjustified weight on the fact that some of the allegations raised in this case were the subject of a settlement agreement. They concluded that the ES was entitled to exclude them from consideration and that, in the circumstances, his decision was in accordance with ST/SGB/2008/5 and hence, a lawful exercise of his discretion.

35. The ES relies on the fact that there was a monetary settlement brokered by the MEU following the PDOG report and the Applicant's complaints. It is highly questionable whether it is appropriate to use the cover of a monetary payment to explain away the administration's failure, if any, to implement the recommendations of the PDOG report which found that although many of the Applicant's specific allegations could not be corroborated there was substance in his complaints of an unjustified lack of career progression within the overall context of what appeared to be dubious recruitment practices within the ECA. Whether or not the evidence obtained by an investigation will tend to support the

applicant's allegations addresses directly the requirements under ST/SGB/2008/5. It is not open to the responsible official to exclude from consideration allegations which may have been the subject of a settlement agreement. In other words, the relevant question is whether it appears from a fresh examination of a complaint that prohibited conduct may have occurred but, more importantly, may still be continuing irrespective of whether there was any settlement. The decision whether to commission a fact-finding investigation is not dependent on historical settlements, assuming that it is permissible to do so, but on whether the material before the responsible official merits a fact-finding investigation.

36. From an examination of the foregoing policy documents of the United Nations, it is clear that the enforcement or implementation of the Organization's policy on discrimination and prohibited conduct will be frustrated if wrongdoers are able to buy a potential or actual victim's silence by payment of a monetary settlement. What matters, and what the responsible official's duty is to consider, is whether it appears that prohibited conduct is or may be continuing and, if so, to carry out a fact-finding investigation.

37. At the stage when the ES had to consider whether there was sufficient material to warrant a fact-finding investigation it is an error of law and or procedure to give any weight or otherwise to be influenced by the fact that the complaints may not meet the technical requirements of receivability before the UNDT. The right conferred on staff members under ST/SGB/2008/5 is distinctly different to the rights to redress under the formal system of justice. To conflate the two in discharging a duty under ST/SGB/2008/5 is an erroneous interpretation and understanding of the regulatory regime giving effect to the Organization's policy on prohibited conduct. This policy is not to be confused with the technical requirements of receivability under the formal system of justice. The Tribunal finds that Mr. Lopes, the responsible official, misinterpreted and misapplied the applicable test.

Was the Applicant raising a claim of a continuing pattern of discriminatory treatment within the meaning of "prohibited conduct" under ST/SGB/2008/5?

38. The Tribunal finds that the Applicant was raising complaints of continuing discriminatory conduct principally in relation to his disability but including allegations that he was being referred to in a disparaging manner on grounds of his ethnicity. Any failure on the part of supervisors and managers to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct is in breach of the duty placed on them by Section 3.2 of ST/SGB/2008/5.

39. The Applicant was alleging that supervisors and managers failed in their obligation, under Section 3.2 of ST/AGB/2008/5 to ensure that his complaints of prohibited conduct were promptly addressed in a fair and impartial manner. The IOM sent on behalf of the ES indicates that due to the narrow focus given to the Applicant's complaint and a misdirection as to the applicable law no consideration was given to the wider issues of systemic failures identified by the Applicant. As a person who was directly affected the Applicant was entitled to expect that his complaints of prohibited conduct would be promptly addressed in a fair and impartial manner.

CONCLUSION

40. The Tribunal finds that Mr. Lopes, the then ES/ECA, applied the wrong legal test in deciding that the Applicant's complaint did not warrant the setting up of a fact-finding investigation panel. It is clear that he defined some of the allegations as "harassment" and then proceeded to apply a very narrow definition of what constitutes harassment. In addition, the ES conflated ST/SGB/2008/5 on prohibited conduct with the receivability of claims under the formal system of justice thereby excluding material which he ought to have considered and failing to address the simple question whether it appears that the Applicant may be subjected to prohibited conduct which merited an investigation. The fact that any, or all, of the complaints may not meet the requirements of receivability before the UNDT was an irrelevant and impermissible constraint on the exercise of his

discretion under ST/SGB/2008/5. Finally, the ES committed an error of law and procedure by disregarding allegations of prohibited conduct on the grounds that they were subject to a settlement agreement thereby failing to appreciate that the Applicant was complaining of a continuing state of prohibited conduct.

41. The Tribunal finds that the ES misdirected himself as to the applicable law and procedures.

REMEDY

42. Article 10.5(b) of the UNDT Statute, which concerns remedies, was amended on 18 December 2014 by General Assembly resolution 69/203 to the effect that compensation may only be ordered for harm the existence of which must be supported by evidence.

43. Article 10.5 provides:

> As part of its judgment, the Dispute 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 then reasons for that decision (emphasis added).

44. In *Kallon* 2017-UNAT-742, UNAT held that:

> 60. Accordingly, compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(*b*) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to

adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.

…

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 UNDT 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.

...

69. Our colleagues in the dissenting and concurring opinions to this appeal (Judge Thomas-Felix, Judge Chapman, Judge Lussick and Judge Knierim) are of the view that evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that moral harm has indeed occurred. We are unable to agree. While obviously corroboration will assist the applicant in meeting his or her burden of proof, and thus ordinarily will be required, such evidence is not required in all cases. There is no basis in law, principle or policy which precludes a tribunal from relying exclusively on the testimony of a single witness, be it the applicant or another witness, to make a finding of moral harm. In accordance with universally accepted rules of evidence, the testimony of a single witness must be approached with caution but if it is credible, reliable and satisfactory in all material respects, it may well be sufficient to discharge the evidentiary burden.

…

70. The second kind of moral injury identified in *Asariotis* is that 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. Harm of this nature is associated with the insult to *dignitas* but refers to injury of a particular kind as evidenced by the manifestation of mental distress or anguish. Its presence in the applicant may confirm the violation of personality rights, but in addition might justify a higher amount as compensation. Evidence of this kind of harm speaks to the degree of injury and the issue of aggravating factors. Many who are affronted in their dignity may be of a personality type better able to withstand it, others are more vulnerable. And delictual principles (the so-called "thin skull rule") teach that we are obliged to take our victims as we find them. The best evidence of this kind of harm and the nature, degree and ongoing quality of its impact, will, of course, be expert medical or psychological evidence attesting to the nature and predictable impact of the harm and the causal factors sufficient to prove that the harm can be directly linked or is reasonably attributable to the breach or violation. But expert evidence, while being the best evidence of this kind of injury, is not the only permissible evidence. This Tribunal accepted as much in *Asariotis* when it explicitly stated that such harm can be proved by evidence produced "by way of a medical, psychological report *or otherwise*".22 There is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

45. At section IX of the application, the Applicant seeks an award of moral damages as one of his remedies. Following the ruling in *Kallon*, the Tribunal heard oral evidence from the Applicant on 26 January 2018 in relation to his claim to be compensated for psychological and moral injury.

46. The Applicant seeks compensation for psychological and moral damage. It was apparent from his application that the Applicant has for several years been complaining about the manner in which he had been treated because of his disability. It is also clear that his complaints were not totally ignored and that certain measures had been put in place to accommodate some of his needs. These measures were insufficient. What was difficult to discern from the documents was the extent and severity of any psychological harm he suffered as a direct consequence of Mr. Lopes's decision not to investigate his complaints of prohibited conduct. Ms. Baffoe-Bonnie, Counsel for the Respondent, was correct in submitting that the Applicant had to show a causal link between any distress he said he suffered and the decision not to carry out an investigation.

47. The Applicant gave evidence that he experienced what he described as psychological consequences. When asked to elaborate on this he mentioned loss of sleep, increased pressure, a feeling of hopelessness and deterioration in his overall medical condition. He also mentioned "moral consequences" of a lack of career progression and bad treatment by senior managers due to his disability. The Tribunal takes into account the pre-existing distress that the Applicant was already suffering from and finds that his distress was exacerbated by the unlawful decision to refuse his request, made in good faith, that he was being subjected to continuing detrimental treatment in the workplace for reasons relating to his disability. The fact that the Applicant was already distressed does not preclude him from an award of compensation so long as the Tribunal finds on the evidence that the conduct that was found to be unlawful contributed to the distress that he suffered and is continuing to suffer. The Tribunal assesses this in the sum of USD3000.

JUDGMENT

48. The application succeeds.

49. The decision that the complaint did not warrant the setting up of a fact-finding investigation panel is rescinded and the complaint is referred back to the ES/ECA for proper consideration under section 5.14 of ST/SGB/2008/5.

50. The Tribunal finds that the Applicant is entitled to an award of moral damages in the sum of USD3000, which shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Goolam Meeran

Dated this 8th day of February 2018

Entered in the Register on this 8th day of February 2018

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi