UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/063
Judgment No.: UNDT/2018/052
Date: 25 April 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Mr. Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 23 November 2015, the Applicant filed an application contesting the Secretary-General's failure to act in accordance with ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) with respect to a complaint that he submitted on 18 February 2015.

2. As remedies, the Applicant requests the Tribunal to order the Respondent: (a) to initiate an official investigation into his complaint; (b) to immediately take the appropriate steps to give full effect to his "right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse" pursuant to ST/SGB/2008/5, sec. 2.1; (c) to ensure that the Applicant is treated accordingly or transferred to another post; and (d) to compensate him with two years of net-base salary for failing to take action against the then Under-Secretary-General for Internal Oversight Services ("USG/OIOS") and additionally USD50,000 for stress and suffering.

3. In his reply, the Respondent contends that, for various reasons, the application is not receivable. The Respondent further submits that the application is without merit.

Facts

4. In his application, the Applicant summarizes the relevant facts, the material particulars of which have not been contested by the Respondent, as follows (official translation from French):

> … On 18 February 2015, the Applicant submitted a complaint against [name redacted, the then USG/OIOS] at the time of the events at issue [reference to annex omitted]. [The then USG/OIOS] was appointed by the General Assembly pursuant to resolution 48/218B for

a term of five years without possibility of renewal; her term ended on 13 September 2015.

… The Complaint was submitted in accordance with ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and was sent to [name redacted], Secretary-General of the United Nations ["the Secretary-General"], with a copy addressed to [name redacted], Assistant Secretary-General for Human Resources Management ["the then ASG/OHRM"].

… Not having received any response from the Secretary-General, the Applicant followed up his case on 20 February 2015 by resending the Complaint by e-mail. A copy of the Complaint was forwarded to [the then ASG/OHRM] [reference to annex omitted].

… Not having received any response from the Secretary-General, the Applicant followed up his case on 2 March 2015 by resending the Complaint by e-mail once again. A copy of the Complaint was forwarded to [the then ASG/OHRM] [reference to annex omitted].

… On 2 March 2015, [the then ASG/OHRM] opened the e-mail from the Applicant [reference to annex omitted]. The Applicant has received no correspondence from [the then ASG/OHRM] in connection with the case as of the date on which this application is filed.

… Not having received any response from the Secretary-General, the Applicant followed up his case on 17 March 2015 by resending the Complaint by e-mail yet again. A copy of the Complaint was forwarded to [the ASG/OHRM].

… On 27 March 2015, the Applicant received an acknowledgement of receipt from "SGCentral": "Dear [the Applicant]. This serves to acknowledge receipt of your correspondence at the Executive Office of the Secretary-General". The acknowledgement of receipt was signed by [name redacted], Information Management Officer, Executive Office of the Secretary-General ["EOSG"] [reference to annex omitted].

… On 8 May 2015, the Applicant was informed by [name redacted], Director of the Office of the Under-Secretary-General for Management ["the Director"], that the Department of Management had been asked to review the Complaint. [The Director] wrote: "This is to inform you that this office has been requested by the EOSG to review the matter in question [the Tribunal notes that the Director

further noted that, "We will revert to you in due course"]". The Applicant's Complaint was attached to the e-mail from [the Director, reference to annex omitted].

… Still not having received any response to his Complaint from the Secretary-General, the Applicant submitted a request for management evaluation on 19 August 2015 [reference to annex omitted].

… On 21 August 2015, [the Director] wrote to the Applicant: "Dear [the Applicant]. This is to confirm that the matters you have raised are being considered in the context of paragraph 3.2 of ST/SGB/2008/5. Rest assured that your complaint is being taken seriously and that appropriate action will be taken in due course." [reference to annex omitted]

… On 28 August 2015, the Applicant acknowledged receipt of the e-mail from [the Director] [reference to annex omitted]. The Applicant added that [the then USG/OIOS] continued to fail to take action to improve the work environment and he sent [the Director] an article published in Foreign Policy [reference to annex omitted].

… On 28 August 2015, the Management Evaluation Unit [("the MEU")] informed the Applicant of the response to his request for management evaluation. The [MEU] concluded that the Applicant's request was not receivable [reference to annex omitted].

… On 14 September 2015, [name redacted], Chief, Office of the Under-Secretary-General, Office of Internal Oversight Services ["the Chief"], informed the staff of OIOS that [name redacted] had been appointed Acting Head of OIOS as of 14 September 2015. The e-mail from [the Chief] contained a memorandum dated 4 September 2015 addressed by [name redacted, the Chef de Cabinet of the Secretary-General] to [the then USG/OIOS] [reference to annex omitted]. It should be noted for the purposes of this case that [name redacted] [was] the Chef de Cabinet of the Secretary-General.

… On 28 September 2015, the Applicant wrote to [name redacted], Assistant Secretary-General, OIOS, in his capacity as [the then] Acting Head of OIOS. The Applicant asked him to provide clarification regarding the position of [name redacted, Mr. MD] and also regarding the measures that he intended to take to improve the work environment within the New York office of the OIOS Investigations Division [reference to annex omitted].

… For the purposes of the case, it should be noted that the following information was communicated regarding [Mr. MD's] position:

> a. On 9 April 2014, [Mr. MD] indicated that he would be absent for six months [reference to annex omitted].
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> b. On 10 April 2014, [name redacted, Mr. MS], Director, Investigations Division, informed his staff that [Mr. MD] had been assigned to the Procurement Division for an initial period of six months; the assignment was effective as of 10 April 2014 [reference to annex omitted].
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> c. On 27 February 2015, the Applicant asked [the then USG/OIOS] about the status of [Mr. MD's] assignment since he was announcing his return; [the then USG/OIOS] replied: "I would be interested in how he is announcing his return as this will not happen." [reference to annex omitted]
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> d. On 10 April 2015, [the then USG/OIOS] sent a terse e-mail to the staff of the New York office of the Investigations Division: "For your information, I have been informed today that [Mr. MD] has decided to continue his assignment with Procurement Division." [reference to annex omitted]. However, [the then USG/OIOS] did not provide any details regarding that assignment.
>
> e. As of the date on which this application is filed, senior management has not provided any details regarding the nature of the assignment, or even [Mr. MD's] place of work; in addition, there are persistent rumours that [Mr. MD] does not have an office in the Procurement Division and that he has told third parties that he is working on a "special project". Again, no details have been provided about this "special project", its purposes or its time frame.

… [The then Acting Head of OIOS] opened the Applicant's e-mail on 28 September 2015 [reference to annex omitted].

… Not having received any response from [the then Acting Head of OIOS], the Applicant followed up on 5 October 2015 by resending his e-mail of 28 September 2015 and insisting that the unresolved concerns mentioned in his previous e-mail were affecting his health [reference to annex omitted].

… [The then Acting Head of OIOS] opened the Applicant's e-mail on 5 October 2015 [reference to annex omitted].

… On 6 October, the Applicant wrote to [the Director] to remind him that still nothing had been done to address the concerns set out in his Complaint against [the then USG/OIOS] [reference to annex omitted].

… On 6 October 2015, despite the deadline specified in paragraph 5.17 of ST/SGB/2008/5, [the Director] wrote to the Applicant: "Well noted. As previously noted, your complaint is being taken seriously, but as you might imagine in a large bureaucracy such as ours, resolving matters such [as yours] is by no means an easy and straight forward matter." [The Director] proposed meeting with the Applicant to discuss the case [reference to annex omitted].

… On 8 October 2015, the Applicant met with [the Director] to discuss his Complaint, but the case was not resolved and no action was contemplated.

… On 9 October 2015, [the then Acting Head of OIOS] informed the staff of OIOS that [Mr. MS] was on an extended leave of absence with effect from 8 October 2015 and that [name redacted], Deputy Director, would be Officer-in-Charge of the Investigations Division until further notice [reference to annex omitted].

... On 12 October 2015, the Applicant wrote to [the Director] to inform him that the situation at the New York office of the Investigations Division continued to deteriorate, and to express his wish to discuss his options [reference to annex omitted].

... [Paragraphs redacted for privacy reasons].

… On 16 October 2015, the Applicant met with [the Director] to discuss his Complaint, but the case was not resolved.

… [The then Acting Head of OIOS] wrote to the Applicant on 16 October 2015, saying:

> Please let me have your specific suggestions on the additional actions that need to be taken to further improve your work environment. Please also discuss these suggestions with your supervisors so that they can let me know of their recommendations. I am requesting that you do this because your note does not highlight any concrete measures that I can act on at this time.

The Applicant notes that although [name redacted] was Acting Head of OIOS, he made no mention of the concerns expressed in

> the Applicant's email of 28 September 2015 [reference to annexes omitted].
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> … On 20 October 2015, the Applicant informed his supervisor, [name redacted, Mr. DW], Acting Deputy Director, that he would be on sick leave until 16 November 2015, as from 15 October 2015 [reference to annex omitted].
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> … On 2 November 2015, the Applicant responded to the request for suggestions from [the then Acting Head of OIOS] (dated 16 October 2015, [reference to annex omitted]). The Applicant sent a copy of his response to [Mr. DW and Mr. MS], who were his first and second reporting officers, respectively Mr. DW. The Applicant sent [the then Acting Head of OIOS] three reports (produced by [names redacted] to support the statements made in his email [reference to annexes omitted].
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> … On 2 November 2015, [the then Acting Head of OIOS] opened the Applicant's email of 2 November 2015 [reference to annexes omitted].
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> … On 18 November 2015, the Applicant informed his supervisor, [Mr. DW], that he had seen his doctor and that his sick leave had been extended until 21 December 2015 [reference to annex omitted].
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> … On 19 November 2015, [name redacted], Deputy Director of the Medical Services Division, certified the Applicant's sick leave for the period from 15 October to 21 December 2015 [reference to annex omitted].
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> … As of the date on which this application is filed, the Secretary-General has neither accepted nor rejected the Complaint against [the then USG/OIOS].
>
> … Neither the Secretary-General nor [the then Acting Head of OIOS] has taken any steps to improve the work environment in the New York office of the Investigations Division.

Procedural history

5. On 23 November 2015, the Applicant filed the application, which was drafted in French and accompanied by more than 550 pages of annexes, the vast majority of which were in English.

6. By email dated 24 November 2015, and written in English, the New York Registry of the Dispute Tribunal ("Registry") informed the Applicant that he had uploaded Annex 12 to his application twice and had not uploaded Annex 13. He was asked to upload the missing document to the Dispute Tribunal's eFiling portal.

7. By email dated 25 November 2015, the Applicant responded to the Registry stating that he was surprised to receive correspondence in English given that his application was filed in French. He requested to receive any future correspondence from the Registry in French. The Applicant uploaded the missing annex to the Tribunal's eFiling portal on the same day.

8. The application having been completed by the addition of the missing annex, on 25 November 2015, the Registry transmitted the application to the Respondent, requesting that he file his reply within 30 calendar days pursuant to arts. 8.4 and 10 of the Dispute Tribunal's Rules of Procedure.

9. On 28 December 2015, the Respondent filed his reply.

10. On 4 January 2016, the Applicant filed a motion, in French, to strike out the Respondent's reply to the application because it was filed in English rather than French. He also sought leave to produce additional evidence and advised that he would be unavailable from 14 January to 11 February 2016.

11. On 12 January 2016, the Respondent filed a response, in English, to the motion, requesting that the Tribunal reject it in its entirety.

12. On 13 January 2016, the Applicant filed his comments, in French, to the Respondent's response to the motion.

13. By email dated 14 January 2016, and written in English, the Registry informed the parties that, per the instructions of the undersigned Judge, all

submissions filed in the case to date would be translated from English into French and vice versa. The parties were instructed that no further filings were to be made without leave of the Tribunal.

14. By Order No. 45 (NY/2016) dated 22 February 2016, the Tribunal ordered the parties to attend a case management discussion ("CMD") on 2 March 2016 to discuss, *inter alia*, the motion filed by the Applicant on 4 January 2016 requesting that the Tribunal: strike out the Respondent's reply to the application and order production of a reply in French; order the Respondent to include a "certification" in his reply; order the Registry to use French in all communication with the parties in this case; declare that French "is the language of Case No. UNDT/NY/2015/063"; admit additional evidence.

15. At the CMD on 2 March 2016, the Applicant was self-represented and the Respondent was represented by Mr. Alan Gutman. The Tribunal enquired, *inter alia*, as to the possibility of alternative dispute resolution. Both parties stated that they were open to the possibility of resolving this matter informally, and they agreed to suspend the proceedings for four weeks after which they would inform the Tribunal as to whether they agree to enter into mediation discussions. The CMD proceedings were conducted entirely in English.

16. By Order No. 64 (NY/2016) dated 2 March 2016, the Tribunal suspended the proceedings for four weeks and ordered the parties to file a joint submission by 30 March 2016 informing the Tribunal whether they intend to seek the assistance of the Office of the Ombudsman and Mediation Services to resolve this matter.

17. On 30 March 2016, the parties filed a jointly signed submission in which they stated that they were unable to agree to seek the assistance of the Office of the Ombudsman and Mediation Services to resolve the case informally. The parties further informed the Tribunal that whilst the Applicant's preference remained

a mediated agreement via referral of the matter to the Office of the Ombudsman and Mediation Services, the Respondent disagreed.

18. By Order No. 26 (NY/2017) dated 13 February 2017, the Tribunal instructed the parties to attend a CMD to discuss the further proceedings of the case, including whether to deal with the issue of receivability as a preliminary matter on the papers.

19. At the CMD, held on 23 February 2017, the Applicant was self-represented and the Respondent was represented by Mr. Alan Gutman. Upon enquiry by the Tribunal, the Applicant confirmed that, as submitted by the Respondent, his reporting lines had changed. Counsel for the Respondent reiterated the submission that the relief sought by the Applicant in the present case had thereby been fully granted while the Applicant contended that some issues remained unsolved. The Tribunal encouraged the parties to enter into informal negotiations because it appeared that some scope for an amicable resolution existed and such outcome would be the most beneficial for everyone involved. Both parties otherwise agreed that failing an amicable resolution, the issue of receivability could be handled as a preliminary issue on the papers, for which reason it was also premature to decide on the language of a substantive hearing, the Applicant having requested that proceedings be conducted in French.

20. By Order No. 39 (NY/2017) dated 29 February 2017, the Tribunal suspended the proceedings until 11 April 2017 for the parties to further explore the possibilities for settling the case informally, either *inter partes* or through the mediation services of the Ombudsman.

21. On 11 April 2017, the Applicant filed a submission (in French, to which he attached an unofficial English translation) in which he, *inter alia*, expressed his willingness to explore the possibility of an amicable settlement. On the same date, the Respondent filed a submission stating that:

> … The parties have held discussions on addressing the Applicant's workplace concerns. The Respondent, however, does not consider such discussions as settlement negotiations.
>
> … The Respondent does not concur with a further suspension of the proceedings, and requests that the case proceed to a final judgement.

22. By Order No. 103 (NY/2017) dated 6 June 2017, considering the Respondent's unwillingness to further suspend the proceedings and the parties' agreement at the CMD on 23 February 2017 to handle the matter of receivability as a preliminary issue on the papers on record, the Tribunal ordered the Applicant to file his submissions in response to the Respondent's contentions on the receivability of the application by 6 July 2017.

23. By Order No. 136 (NY/2017) dated 20 July 2017, the Tribunal provided the following order:

> … By 5:00 p.m., Thursday, 27 July 2017, the Applicant is to file his submissions in response to the Respondent's contentions on the receivability of the application. If no such response is filed, the Tribunal will proceed to determine the question of receivability on the papers before it.

24. On 27 July 2017, the Applicant emailed the Registry and stated that he did not wish to file any response to the Respondent's contentions on the receivability of the application.

Consideration

25. In the reply, the Respondent submits that the application is not receivable because:

> a. The complaint underlying the application did not disclose possible prohibited conduct as defined in ST/SGB/2008/5 and, therefore, the procedure

followed in respect of it is not appealable under its sec. 5.20 of ST/SGB/2008/5;

b. The matters raised in the application are not administrative decisions;

c. The application raises various claims in respect of which a management evaluation has not been requested;

d. The application seeks, in part, to re-litigate matters that have already been adjudicated as non-receivable.

Is the contested decision an appealable administrative decision?

26. The Dispute Tribunal's Statute, art. 2.1, provides as follows:

> **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;

27. The key characteristics of an appealable administrative decision, reiterated by the Appeals Tribunal in *Harb* 2016-UNAT-643 (para. 26 and 27), is that:

> ... In the seminal case of *Andati-Amwayi*, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows […] what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

> ... […] [T]he decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

28. The Appeals Tribunal reiterated in *Reid* 2014-UNAT-419 that, for an application to be receivable, an applicant must identify a specific decision which had a direct and adverse impact on his contractual rights (see, similarly, in *Planas* 2010-UNAT-049, *Chriclow* 2010-UNAT-035, and *Appellant* 2011-UNAT-143). However, the Dispute Tribunal may, *sua sponte*, define and identify the administrative decision(s) and issue(s) at stake as held by the Appeals Tribunal in *Monarawila* 2016-UNAT-694, para. 32 (see, similarly in *Collas* UNAT-2014-473):

> … […] It happens routinely that a [Dispute Tribunal] judge may need to identify the existence and date of a contested decision which may be express or implied. This requires adequate interpretation and comprehension of the application and the response submitted by the parties. The judge has an inherent power to define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review. With an implied administrative decision, the [Dispute Tribunal] must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests, based on objective elements that both parties can accurately determine.

29. It is also trite that "not making a decision [is] also a decision because it could be a decision by implication" (*Schook* 2010-UNAT-013; see similarly, for instance, in *Tabari* 2010-UNAT-030 and *Fedorchenko* 2015-UNAT-499). With regard to such omission, in *Terragnolo* 2015-UNAT-566 (para. 36), the Appeals Tribunal stated that:

> … The Appeals Tribunal has held that "[t]he date of an [implied] administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine" [*Rabee* 2013-UNAT-296, para. 19, citing *Rosana* 2012-UNAT-273, para. 25.].

> As the [Dispute Tribunal] found, it was unreasonable for the Appellant to assume that a decision regarding his request for an investigation could have been reached within fourteen days from his request – especially when he was not prejudiced or harmed in the interim. A staff member "may not unilaterally determine the date of the administrative decision for the purpose of challenging it" [*Rabee* 2013-UNAT-296]. Yet, that is what the Appellant attempts to do. Thus, the Appeals Tribunal determines that the [Dispute Tribunal] correctly concluded that there was no implied administrative decision to challenge at the time the Appellant filed his judicial review application and that his application was also not receivable on this ground.

30. In the present case, in the application, the Applicant described the contested decision as the "Failure to act in accordance with ST/SGB/2008/5". He further submits that "In the present case … the Secretary-General has a legal obligation to review a complaint submitted in accordance with ST/SGB/2008/5 once the complaint has been received and that, as of the date on which this application is filed, he has not fulfilled that obligation".

31. Based thereon, the Tribunal finds that the contested administrative decision may be defined as the Administration's alleged failure/omission to review and/or consider the Applicant's complaint dated 18 February 2015 and to inform him of the result.

32. While it could be argued that this definition does not directly correspond with the manner in which the Applicant has phrased his request for remedies as, among other remedies, he requests the Tribunal to order the Respondent to initiate an investigation into his complaint rather than simply review it. However, before any such investigation can possibly be initiated, the Administration will necessarily first need to turn its mind to the question of whether there is an appropriate basis for doing so. See, for instance, the Appeal Tribunal in *Hastings* 2011-UNAT-109 and *Malmstrom* 2013-UNAT-357 (affirmed in *Kulawat* 2014-UNAT-428), where it was

found that, independent of the merits of whether a specific request was eventually to be granted, the relevant staff members primarily had a right to at least have their requests considered by the Administration.

33. The Respondent does not dispute, as a matter of fact, that the Administration has not reviewed/considered the Applicant's complaint, and has not proffered any evidence contrary to such assumption. The Respondent rather contends that it does not have a duty to do so because "The Complaint is not a formal complaint of prohibited conduct under Section 5 of ST/SGB/2008/5 and, consequently, the manner in which it was handled is not appealable under section 5.20 of ST/SGB/2008/5". The Respondent further submits that "It is clear from section 3.2 that a manager's failure to promote a harmonious work environment is not 'prohibited conduct' in and of itself. Instead, it is a matter to be addressed through performance management and/or administrative or disciplinary action". The Respondent adds that "Section 5 of ST/SGB/2008/5 sets out formal and informal procedures for addressing 'prohibited conduct". Section 5 only provides a mechanism for addressing allegations of 'prohibited conduct', as is evident by the use of that term throughout the Section [footnote omitted]. Nowhere does Section 5 (or any other part of ST/SGB/2008/5) state that a manager's failure to promote a harmonious work environment is 'prohibited conduct', or that such a failure may properly be the subject of a complaint of prohibited conduct under Section 5 of ST/SGB/2008/5 [footnote omitted]".

34. However, the Tribunal observes that sec. 3.2 of ST/SGB/2008/5, pursuant to which the Director stated that the complaint would be considered (see the 21 August 2015 communication to the Applicant); and which the MEU opined was "the appropriate context" for the Applicant's complaint which was being considered and for which "appropriate action would be taken in due course" (see MEU letter of 28 August 2018); provides that:

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

35. In the present case, it is undisputed that the Applicant submitted a complaint about the work environment in his Department but that he never received a response to this complaint. However, from the facts and the documentation on record it is evident that the Applicant was explicitly promised such a response:

> a. On 8 May 2015, the Director informed the Applicant that the Office of the Under-Secretary-General for Management had been requested "by the EOSG to review the matter in question" and that, "[w]e will revert to you in due course";
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> b. On 21 August 2015, the Director wrote to the Applicant that "This is to confirm that the matters you have raised are being considered in the context of paragraph 3.2 of ST/SGB/2008/5. Rest assured that your complaint is being taken seriously and that appropriate action will be taken in due course"; and
>
> c. On 6 October 2015, the Director reiterated that the Applicant's complaint was being taken "seriously" but he also noted that "in a large bureaucracy such as ours, resolving matters such [as yours] is by no means an easy and straight forward matter".

36. It appears evident that if a staff member files a complaint about her or his work environment under sec. 3.2, the Administration must, as stated by the Director,

take this complaint seriously because such complaint could potentially have very significant impact not only on the staff member but also on involved managers and/or supervisors and, as stated in sec. 3.2, "Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner". Embedded in the text of the sec. 3.2 is therefore a duty for the Administration, at minimum, to consider such complaint and then inform the complainant about the outcome of these deliberations—otherwise, in cases such as the present, the provision would be left without any practical effect or meaning (the purposive approach). This also appears, commendably, to be the understanding of the Director in his communication with the Applicant, undertaking that his complaint would be considered and that a response would be forthcoming.

37. Indeed, the MEU noted that paragraph 3.2 of ST/SGB/2008/5 provides that a breach of a duty may lead to a number of consequences, including reflection in the staff member's performance appraisal or administrative or disciplinary action. The MEU further noted that, by email dated 21 August 2015, the Director confirmed to the Applicant that the matters he had raised were being considered in the context of para. 3.2 (see letter dated 28 August 2015).

38. The Tribunal finds that under sec. 3.2 of ST/SB/2008/5 and as a matter of good faith and fair dealing (see, for instance, *Bertucci* 2011-UNAT-121, para. 7, and *Hamayel* 2014-UNAT-459, para. 17), by failing/omitting to review and consider the Applicant's complaint and informing him of the result, the Administration rendered an appealable administrative decision in accordance with art. 2.1 of Dispute Tribunal's Statute and the Appeals Tribunal's consistent jurisprudence in, for instance, *Monarawila*, *Harb* and *Schook*. The Tribunal notes that the complaint was submitted on 18 February 2015 and therefore not prematurely as in *Terragnolo*, the Applicant in this instance having exhausted all channels over a considerable period of time.

39. The Respondent, in this instance, also contends that the application does not identify any appealable administrative decision with direct legal consequences affecting the Applicant's own terms or conditions of appointment. In particular, that whilst the Applicant contests the alleged failure of the administration to take "concrete measures" to improve his work environment, and whilst he recounts at length the reasons why he considers his work environment to be hostile; neither the fact that the Applicant is dissatisfied with his work environment, nor that the then USG/OIOS may have decided to investigate or not investigate other complaints brought by other staff members; are administrative decisions with direct legal consequences affecting his own terms or conditions of appointment. Accordingly, the application is not receivable under art. 2 (1)(a).

40. As one of his remedies, the Applicant requests the Tribunal "to order the Respondent to immediately take the appropriate steps to give full effect to his right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse". That a staff member has the contractual right to a harmonious working environment cannot be gainsaid. The Tribunal notes that sec. 2.1 recognizes, in line with para. 3 of the Charter of the United Nations and the core values set out in the various staff regulations and staff rules, 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. Furthermore, sec. 2.2 of ST/SGB/2008/5 under General Principles provides that "the Organization has a 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 where prevention has failed". To this end, heads of departments and offices shall provide annual reports to the Assistant Secretary-General for Human Resources Management which shall include an overview of all preventive measures taken "with a view to ensuring a harmonious work environment" (sec. 6.1 of ST/SGB/2008/5).

41. Furthermore, in his letter of 21 August 2015, the Director confirmed (and the MEU endorsed) that the matters raised by the Applicant would be considered in the context of para. 3.2 of ST/SGB/2008/5 which, *inter alia*, obligates managers and supervisors "to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct". The Tribunal also notes that it is not of insignificance that, at some stage during these proceedings, the Applicant's reporting lines had been changed in a commendable but apparently unsuccessful effort to try to resolve issues between the parties (see para. 11 of Order No. 136 (NY/2017)). Consequently, by this the Administration also acknowledged, and the Tribunal finds that the contested decision had direct legal consequences affecting the Applicant's own terms or conditions of appointment.

Did the Applicant request management evaluation of all claims related to the contested decision?

42. The Respondent submits that various allegations in the application postdate the Applicant's 19 August 2015 request and were not, therefore, subject to management evaluation. The Respondent contends that it is well-established that the submission of a request for management evaluation is a mandatory step that must be followed before the Applicant may have recourse to the judicial process. In accordance with art. 8.1 of the Dispute Tribunal's Statute, the Tribunal does not have jurisdiction to entertain those claims. The Respondent alludes to several paragraphs in the application regarding facts which postdate the request for management evaluation.

43. The Tribunal notes that these facts mainly concern attempts, at several follow-ups by the Applicant, regarding his unresolved concerns; some of which in the plea on the merits the Respondent has also alluded to. Regarding matters arising

post management evaluation, the Respondent cannot submit that the Tribunal may not consider matters beyond the scope of an applicant's request if indeed the Administration produces evidence of events subsequent to the management evaluation request on the one hand, and then objects to the applicant offering rebuttal evidence on the other (see *Smith* UNAT-2017-768).

44. Furthermore, the Tribunal also notes that following the MEU's recommendation that the matter was not receivable, the Administration was still taking the Applicant's complaint under serious consideration, although apparently, as stated by the MEU, under sec. 3.2 of ST/SGB/2008/5 and not under sec. 5.2. In this regard, the Tribunal notes that the Respondent may be estopped from raising issue with the application per the principle of equitable estoppel (see *Aly et al* UNDT/20110/195). As the International Court of Justice observed in its Judgment of 12 October 1984 concerning *Delimitation of the Maritime Boundary of the Gulf of Maine Area* (*ICJ Reports* 1984, p. 305), "the concepts of acquiescence and estoppel, [albeit based on different legal reasoning and] irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity" (also see *Tolstopiatov* UNDT/2011/012, para. 81).

45. In any event, in his request for management evaluation dated 19 August 2015, the Applicant identified, in English, the contested administrative decision as "Failure by the Secretary-General to take action upon receipt of a complaint filed pursuant to ST/SGB/2008/5". In the application to the Dispute Tribunal, according to the official translation from French to English, the Applicant described the contested decision as "Failure to act in accordance with ST/SGB/2008/5".

46. Accordingly, there is in substance no difference in the manner in which the contested decision has been stated in the management evaluation request and the application. The Tribunal finds that the Applicant has properly sought management evaluation of the contested decisions in accordance with staff rule

11.2(a), the MEU advising "your complaint is being considered in the appropriate context".

Is the present application res judicata*?*

47. The Respondent contends that, in his application, the Applicant alleges that the then USG/OIOS refused to initiate an investigation into a complaint that the Applicant had previously filed against a former OIOS staff member. The Respondent further states that the then USG/OIOS's decision not to initiate an investigation into the previous complaint was already contested by the Applicant, and was adjudicated as non-receivable by the Dispute Tribunal in *Nadeau* UNDT/2015/097 and that, to the extent that the application seeks to contest the manner in which the former complaint was handled, it is *res judicata*.

48. The Tribunal notes that the Respondent's objection is qualified and limited to matters which the Applicant raises seeking "to contest the manner in which the former complaint was handled". These are matters which may be raised at the merits stage *should* they arise in the particular specific instance. In any event, it is questionable whether a matter adjudicated as non-receivable can be said to be *res judicata* if the merits have not been canvassed considered and determined, and if there is still an actual unresolved controversy between the parties. Moreover, it clearly follows from *Nadeau* UNDT/2015/097 that this Judgment concerns another complaint of the Applicant under ST/SGB/2008/5, namely a complaint dated 27 December 2013, which the then USG/OIOS dismissed on 18 February 2015. The complaint in the present case is dated 18 February 2015 and therefore cannot have been adjudicated as part of *Nadeau* UNDT/2015/097.

Conclusion

49. Defining the appealable contested administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute as the Administration's failure/omission to consider the Applicant's complaint dated 18 February 2015 under ST/SGB/2008/5 and to inform him of the result, the Tribunal finds that the application is receivable.

50. The Tribunal notes that some measures were taken in an attempt to resolve issues which appear to continue to plague the relevant department in this case, a unit of some significance and gravitas. The Tribunal entreats the parties to reconsider resolving the present case amicably by engaging in settlement discussions especially in the exceptional circumstances of this case, including the Applicant's personal circumstances, and particularly as some efforts have already been made in this regard, and, by **Tuesday 29 May 2018**, to inform the Tribunal about the outcome of any settlement discussions.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of April 2018

Entered in the Register on this 25th day of April 2018

(Signed)

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