



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2017/074  
Order No.: 171 (NBI/2018)  
Date: 31 October 2018  
Original: English

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**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON THE APPLICANT'S  
MOTION FOR DISCLOSURE**

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**Counsel for the Applicant:**  
Michael Brazao, OSLA

**Counsel for the Respondent:**  
Nicole Wynn, ALS/OHRM  
Nusrat Chagtai, ALS/OHRM

## **Introduction**

1. At the time of the application, the Applicant was employed at the United Nations Mechanism for International Criminal Tribunals (MICT) on a fixed term appointment and was based in Arusha.

## **Procedural History**

2. On 19 July 2017, the Applicant filed an application challenging the decision(s) made in respect of the complaint she filed pursuant to ST/SGB/2008/5 on the Prohibition of Discrimination, Harassment including Sexual Harassment and Abuse of Authority. She complains that the process was irregular and also requests disclosure of a copy of the panel's report.

3. The Respondent filed his reply to the application on 17 August 2017.

4. On 12 October 2017, the Applicant filed a motion to amend her pleadings including her additional and amended pleadings with the motion. This was granted without opposition.

5. The Respondent filed additional documents on 26 October 2017.

6. On 12 April 2018, the Applicant filed a motion for an expedited hearing of this matter.

7. On 4 September 2018, the Tribunal issued Order No. 131 (NBI/2018) setting this matter down for a case management discussion (CMD).

8. The CMD took place on 20 September 2018.

9. Among the matters discussed at the CMD was the Applicant's motion for anonymity in these proceedings. The Respondent, reciprocally, requested anonymity for another staff member implicated in this case. Anonymity was granted as requested by both parties, in Order No. 142 (NBI/2018) on 21 September 2018.

10. The Applicant filed a motion for disclosure of the Special Investigations Unit (SIU) report on 12 October 2018. The Respondent filed his response to the motion on 22 October 2018.

***Applicant's Submissions***

11. Article 19 of the UNDT Rules of Procedure grants this Tribunal the authority to issue any order or give any direction “which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties”.

12. Article 36 of the UNDT Rules further affords the Tribunal the authority to decide on matters “not expressly provided for in the rules of procedure”.

13. In *Lahoud* UNDT/2017/009, the UNDT stated:

On a general note, in the seminal case of Sanwidi 2010-UNAT-084, UNAT stated: When 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.

14. In Judgment No. 2015-UNAT-518, the United Nations Appeals Tribunal (UNAT/Appeals Tribunal) found:

As a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.<sup>1</sup> The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and

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<sup>1</sup> See *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

may decide whether to undertake an investigation regarding all or some of the allegations.

15. In *Ivanov*, UNDT/2014/022 (judgment affirmed 2015-UNAT-519), the Tribunal noted that the complainant could receive a copy of the panel’s report if “exceptional circumstances” were put forth:

The Tribunal notes that, in *Adorna* UNDT/2010/205 and *Haydar* UNDT/2012/201, the Dispute Tribunal expressed that, the applicable rule notwithstanding, the decision as to whether to provide an aggrieved individual with a copy of an Investigation Panel’s report should be taken on a case by case basis, including whether the aggrieved individual presented exceptional circumstances for her or his request.

16. The Organization is liable for the consequences of its unlawful decisions, omissions or negligence.<sup>2</sup>

17. A decision to delay making a decision or not to make a decision is a decision. If there is a right to a prompt decision (such as in a performance rebuttal process), the delay may constitute a breach of the staff member’s rights.<sup>3</sup>

18. The length of delay does not determine receivability of a challenge to a delay, but is relevant to the substantive issue of legality of the decision’s time-frame.<sup>4</sup>

19. It is a general principle of administrative law that where there is no time specified for the doing of an act, it should be done within a reasonable time. What constitutes a reasonable time of course depends on a number of factors, including the length of delay and the reasons therefor.<sup>5</sup>

20. ST/SGB/2008/5 states in Section 1 “Definitions”:

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<sup>2</sup> *Rahimi* 2012- UNAT-217.

<sup>3</sup> *Bertucci* 2010-UNDT-094; *Simmons* Order No. 327 (UNDT/NY/2010)); *Simmons* 2012- UNDT-163.

<sup>4</sup> *Alobwede* 2014-UNDT-120 and 2015-UNAT-5860.

<sup>5</sup> *Hashimi* Order No. 93 (UNDT/NY/2011); see also generally *Mokbel* 2012-UNDT-061.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

1.3 Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

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

harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

21. ST/SGB/2008/5 states in Section 2 “General principles”:

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

2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

22. Section 3 includes the duties of managers and supervisors:

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.

23. Section 5 provides for the procedure for formal complaints, the constitution of panels, and the report which they produce:

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

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for

the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

## **Order**

24. Having heard the parties' submissions on the motion for disclosure, the Tribunal is persuaded by the Applicant's arguments and **GRANTS** the motion as requested.

25. The Respondent is **DIRECTED** to disclose the SIU Report by **5 November 2018**.



*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 31<sup>st</sup> day of October 2018

Entered in the Register on this 31<sup>st</sup> day of October 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi