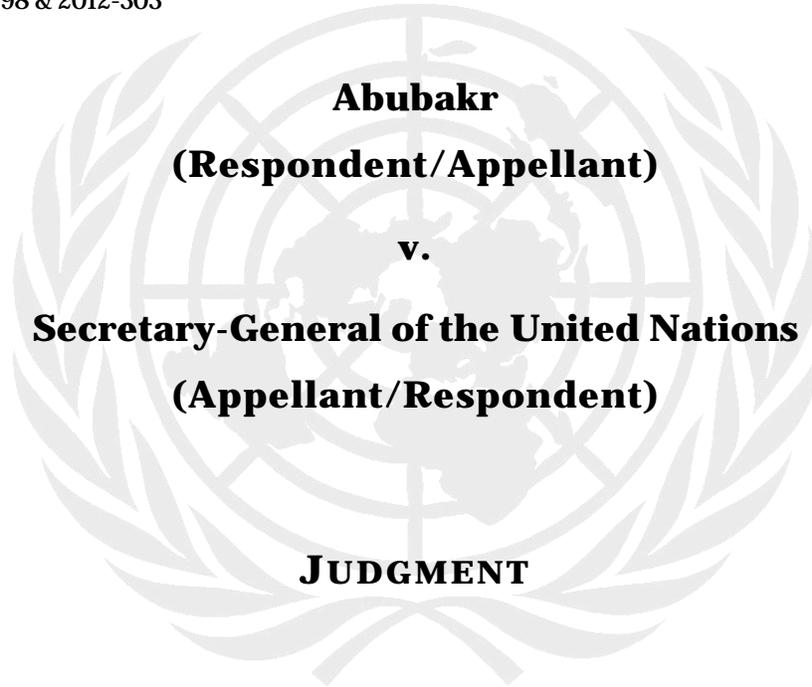




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case Nos. 2012-298 & 2012-303



**Abubakr
(Respondent/Appellant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Richard Lussick

Judgment No.: 2012-UNAT-272

Date: 1 November 2012

Registrar: Weicheng Lin

Counsel for Respondent/Appellant: Duke Danquah

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE MARY FAHERTY, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals, one filed by the Secretary-General of the United Nations and the other by Mr. Abuobaida Abubakr, against Judgment No. UNDT/2011/219, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 December 2011 in the case of *Abubakr v. Secretary-General of the United Nations*. Mr. Abubakr and the Secretary-General filed their respective answers on 9 April 2012 and 30 April 2012.

Synopsis

Secretary-General's Appeal

2. The Secretary-General asserts that the Dispute Tribunal erred in law and in fact by failing to recognize the significant actions taken by the Administration to address Mr. Abubakr's complaints of harassment and discrimination and by concluding that the facts of the present case were substantially similar to the facts in the UNDT Judgment *Applicant* (UNDT/2010/148), thereby warranting the same award of USD 40,000 to Mr. Abubakr as was awarded in the aforementioned case.

3. The Secretary-General seeks to distinguish between the facts in the *Applicant* case and the facts in Mr. Abubakr's case so as to persuade this Tribunal to find that the UNDT erred in law and in fact in determining that Mr. Abubakr's complaint merited USD 40,000 as compensation.

4. Notwithstanding the Secretary-General's pleas, the Appeals Tribunal does not find that the Dispute Tribunal erred in law and fact in choosing not to recognize, as in any way meaningful, the majority of the actions relied on by the Secretary-General. At the end of the day, by virtue of the "dysfunctional" work of the Panel on Discrimination and Other Grievances (PDOG), Mr. Abubakr was left bereft of any proper process through which his claims of harassment and discrimination could be addressed.

5. In all these circumstances, we reject the Secretary-General's pleas that the Dispute Tribunal's finding that Mr. Abubakr's predicament merited compensation was erroneous in law and fact.

6. On the issue of the level of compensation awarded, we find that the UNDT erred somewhat on the generous side in comparing the due process deprivations suffered by Mr. Abubakr to those in the *Applicant* case and, bearing in mind the Dispute Tribunal's finding that the PDOG process assisted Mr. Abubakr to some degree in that he got his budgeted post, we hereby vary the level of compensation to an award of USD 25,000.

7. The Secretary General's appeal is, thus, upheld to the extent set out above.

Mr. Abubakr's Appeal

8. The Dispute Tribunal correctly determined that the scope of Mr. Abubakr's case was whether or not the Administration had adequately addressed his claims of harassment and discrimination. Furthermore, the UNDT did not err in law or fact when it found that the scope of the case, as had been determined following a joint submission by the parties, did not embrace any of the ten issues listed in Mr. Abubakr's closing submissions to the Dispute Tribunal. The UNDT correctly determined that these were matters which should have been contested by him by way of administrative review or management evaluation.

9. In its consideration of the foregoing, the UNDT did not err in law or fact.

10. With regard to Mr. Abubakr's appeal on the issue of economic loss, the Appeals Tribunal is satisfied to uphold the Dispute Tribunal's finding that he failed to establish that he sustained actual economic loss warranting compensation by reason of the Administration's failure to address his claims of harassment and discrimination. The UNDT made no error of law or fact in so finding.

11. The appeal is, thus, dismissed.

Facts and Procedure

12. Both the Secretary-General and Mr. Abubakr accept the facts as set out in paragraphs 12 to 40 of the impugned Judgment rendered by the Dispute Tribunal:

12. The pertinent facts below are based on the findings made by the Tribunal on the oral testimony given in court, the parties' joint submission of 18 October 2010, and the case record.

13. The Applicant joined the Organization on 12 November 2001 on a short-term appointment as a P-4 level staff member with the Information Technology Services Division (“ITSD”). In February 2002, the Applicant was selected for a P-4 level position as a Computer Systems Officer with ITSD. He was appointed to that position on 12 October 2002, on a fixed-term contract. Thereafter, the Applicant received several extensions, ranging from several months to two years in duration, and worked on several assignments within ITSD.

14. The Applicant alleges that he had been promised, prior to his recruitment in November 2001, that he would “soon thereafter” be moved to a regular budget post, and that it had not been done. The Applicant alleged that he had met with his supervisors on several occasions thereafter to discuss his contractual situation, to no avail.

15. By memorandum dated 8 February 2006, the Applicant wrote to the Under-Secretary-General for Management requesting his assistance with receiving a regular budget post.

16. In April 2006, the Applicant applied for a P-4 level post in ITSD as Information Systems Officer. He was subsequently selected for the position, but alleges that he detected reluctance in the confirmation of his selection.

17. Having heard nothing some months later, on 22 September 2006, he filed a complaint with the Panel on Discrimination and other Grievances (“PDOG”), entitled “Harassment and Discrimination by ITSD”. The PDOG was a peer review mechanism for dealing with cases of alleged discrimination and other grievances. Its cases were handled by staff members acting in a volunteer capacity, usually two staff members per case, who were, in effect, doing this work in their spare time without any additional resources. (The PDOG was abolished as of 1 July 2009, with the introduction of the new system of justice.)

18. In October 2006, two PDOG members, Ms. W and Ms. S, were assigned to investigate the Applicant’s case. The Acting Coordinator of the PDOG gave oral evidence before the Tribunal that the work of PDOG at the time was managed by her but that the internal procedures of the PDOG were not well set out and many of them were based on developing practices. The Acting Coordinator explained that her functions included supervising the work of the PDOG, monitoring compliance with the deadlines, and managing the caseload.

19. Following the filing of his complaint with the PDOG, on 13 November 2006, the Applicant was notified that he had been selected for the position he applied for in April 2006. He subsequently received a fixed-term contract and was placed on a regular budget post. The Applicant testified that he could not be certain that this was due to any intervention on the part of the PDOG. However, based on the evidence in this case, the Tribunal finds that the granting of this appointment against a regular budget post was at least in part due to the efforts of the PDOG. This is confirmed by a

memorandum from Ms. W to the Acting Coordinator, dated 29 March 2007, in which Ms. W stated that the Applicant approached the PDOG seeking its assistance in “getting an established post and contract extension” and that Ms. W and Ms. S “informally resolved the matter concerning [the Applicant’s] contract and post” and that the Applicant had been “placed against an established post and given a contract extension which were satisfactory to him”.

20. On 18 January 2007, the PDOG received a further communication from the Applicant, in which he confirmed that ITSD had placed him on a regular budget post but claimed that he was still being subject to discrimination and harassment.

21. Although the Applicant’s complaint was filed on 22 September 2006, it is common cause that, due to various factors, including personal and professional issues, the work of the two PDOG members assigned to the Applicant’s case was significantly delayed. As a result, on 6 June 2007, the Applicant requested an administrative review of “an ‘administrative decision’ that arose from the failure of management to address complaints lodged by [him] to various bodies to arrest the abiding harassment and prejudicial actions that currently threaten to compromise my career development”. It appears that, by “various bodies”, the Applicant was primarily referring to the PDOG and the rebuttal panels that were set up to review his rebuttals against unfavourable performance evaluations.

22. On 4 September 2007, the Applicant sent an email to the Acting Coordinator, asking her to reassign his case to someone other than Ms. W. He explained in a follow-up email of 6 September 2007 that Ms. W had been assigned to his case for almost one year, but despite her numerous promises to complete it, it was not done.

23. According to the Acting Coordinator, given the limited resources, and in view of her understanding at the time that the case was near completion, she decided to replace Ms. S (who, due to personal reasons, could no longer participate in the work of the PDOG in the fall of 2007), as a member of the panel and to complete the report together with Ms. W. The Acting Coordinator gave evidence that during that time she, in effect, acted as both the Coordinator of the PDOG as well as Ms. S’s replacement as one of the two panel members assigned to the Applicant’s case. She undertook to complete the report by October 2007.

24. The Acting Coordinator testified that she received a copy of the draft PDOG report in or around September 2007, and had a meeting with Ms. W, who she thought was the primary drafter of the document. The Acting Coordinator said they may have connected with Ms. S by telephone as well, although she could not recall for certain. The Acting Coordinator said she formed the view that the report contained strong conclusions that were not supported by evidence and that it could not be submitted in that form. According to the Acting Coordinator, Ms. W became defensive because she thought the Acting Coordinator was criticising her work. Ms. W informed her that a lot of the information was based on interviews conducted by her and Ms. S. The Acting

Coordinator asked to see the interview notes and was informed some weeks later that the interview notes had been lost during Ms. W's office move. The Acting Coordinator testified that, as a result, she lost trust in Ms. W, since the PDOG was dealing with confidential matters. However, she conceded that she did not inform the Office of Human Resources Management ("OHRM"), or security personnel, or the Applicant of any lost file.

25. The Acting Coordinator also alluded in her testimony to her suspicion of bias on the part of Ms. S and Ms. W in favour of the Applicant. This allegation was never made previously by the Respondent either at administrative review level, the JAB level, or indeed in the papers before the Tribunal. It is only in the written statement of the Acting Coordinator, submitted to the Tribunal on 16 November 2011, that the alleged partiality of the two members of the PDOG was raised for the first time. Whilst it may be argued that the Respondent is barred from raising this matter so late in the day, an analysis of the evidence, based entirely on hearsay, given by the Acting Coordinator, illustrates that this allegation is in any event highly questionable and unsubstantiated by material direct evidence.

26. The Acting Coordinator testified that she was informed by the PDOG Secretary, who in turn was informed by someone from the Staff Union that Ms. S and Ms. W had a previous working relationship with the Applicant through the Staff Union. The Acting Coordinator did not verify the dates of their alleged involvement in the Staff Union activities. The Acting Coordinator said she asked the PDOG Secretary to call Ms. W and ask about potential conflict of interest. Ms. W apparently denied the existence of any conflict of interest. However, because Ms. W was so defensive about the draft report, the Acting Coordinator felt "there was a personal level of involvement" and suspected the two panelists were biased in the Applicant's favour. The Acting Coordinator made no contemporaneous record of these concerns, did not report them to anyone and, in fact, retained the same panel members even after the Applicant requested their replacement. When asked under cross-examination why she did not replace Ms. W because of the suspected conflict of interest, the Acting Coordinator said she could not answer that question as "the sequence of events gets murky around this time". She further explained that, since the PDOG had limited resources, and a lot of work on the case had been done, she wanted to finish the case with the people who worked on it already, "even though there [was] this problem".

27. The Acting Coordinator from the outset qualified her evidence with the disclaimer that events having transpired some time ago, her recollection may have faded. The Applicant's evidence generally was given in a direct and clear manner, and the Tribunal found his testimony to be consistent and reliable. His unrefuted testimony in this regard is that he, Ms. W, and Ms. S were involved in Staff Union activities at different periods of time and that the Applicant joined the Staff Union in July 2007, approximately ten months after filing his complaint with the PDOG, when Ms. W was no longer serving in the Staff Union. The Tribunal wonders why the panel members, if

at all they were biased in Applicant's favour, would have inordinately delayed the Report for well over a year, causing the Applicant to request the removal of Ms. W. Furthermore, one of the recommendations of the panel was highly critical of the Applicant and stated that he be held fully accountable for failing to complete assignments given to him and failing to complete his annual performance appraisal as mandated by the rules. The Tribunal finds that there is no reason to suggest that there was any kind of improper influence or bias on the part of Ms. W or Ms. S. Respondent's Counsel correctly, in the Tribunal's view, chose not to pursue these allegations in his closing submission.

28. The Applicant testified that he fully cooperated with the PDOG, but, as he saw no progress in its work, his level of frustration increased. Therefore, on 10 September 2007, the Applicant submitted an appeal to the JAB against the Administration's decision not to address his complaints of harassment, discrimination, and abuse of power.

29. On 13 September 2007, the Acting Coordinator sent an email to the Applicant, stating:

We have reviewed the progress on your case with Ms. [W] yesterday. The case is near finalization and reassigning it to another panel member at this time will delay the conclusion considerably. We have established the deadline of 15 October [2007] for finishing couple more interviews and drafting the final report. To ensure that we finish by this deadline, and in light of the fact that the second panel member that was assigned your case is on a leave of absence due to a family emergency, I will work with Ms. [W] in drafting the final report. I hope this provides you with assurance that your case will be concluded very soon.

30. The Applicant and the Acting Coordinator had a meeting on 17 October 2007. According to the Applicant, the meeting was arranged at his request as he wanted to see if there were any outstanding issues. He recalled that the meeting lasted only several minutes, that the Acting Coordinator apologized for the delay in finalising his case, and that he was not asked for any additional documents. The Acting Coordinator testified, according to her recollection, that the meeting lasted longer and that she did ask the Applicant for additional documents during that meeting.

31. The day following this meeting, on 18 October 2007, the Applicant sent an email about the treatment of his complaint. He stated:

The excessive delays by the [PDOG] to address my complaint, have substantially aggravated my problem which compelled me to pursue the matter at a higher level. The case is now before the Joint Appeals Board—JAB[—]and it's beyond mediation, as both parties are barred by the rules to discuss the case before it's adjudication by the JAB in a public hearing.

I regret to inform you that I have absolutely no confidence in the current work of the panel which certainly not going to lead to any meaningful resolution. These delays have rendered the work of the panel mute and redundant to say the least. As an elected representative to the Staff Union Council, I will formally bring the dismal performance issue of [PDOG] before the full council attention.

32. The Acting Coordinator replied on the same day, 18 October 2007, inquiring whether the Applicant's email was to be considered a withdrawal of his complaint and stating that "[u]nless a complainant informs us in writing that s/he is withdrawing the case, PDOG continues to work on any case that is open until a final report on the case is written and submitted to the appropriate authorities". Notably, the email did not contain a request for additional documents.

33. The Acting Coordinator sent a follow-up email on 31 October 2007, requesting that the Applicant respond by 1 November 2007. Specifically, the Acting Coordinator stated:

The message below was sent to you on October 18. We have not heard from you since. Please respond by close of business tomorrow (1 November [2007]). Please note that work on your case has been paused until we hear from you.

34. The Applicant did not reply to this email. The Respondent submits that no further action was taken by the Administration with regard to the Applicant's complain of 22 September 2006 as the Applicant decided to pursue his grievances through the formal system.

35. The Acting Coordinator testified that, following the meeting of 17 October 2007, she was still awaiting further documents from the Applicant before she could finalise the Report. It is notable that there is no written record of a request for documents informing the Applicant that the report cannot be finalised in the absence thereof. It is also relevant that the Acting Coordinator's testimony is that the documents required to finalise the Report pertained to allegations of corruption made by the Applicant, yet several contemporaneous communications indicate that the Acting Coordinator clearly stated that the PDOG was not mandated to deal with allegations of corruption and would not do so. The witness was not able to furnish answers to the Tribunal's satisfaction during cross-examination regarding this apparent contradiction.

36. Although a draft report of the PDOG was prepared on or about 15 October 2007, the Respondent contends that this draft report was provided to OHRM only on or around 12 March 2008, when the disclosure of the draft was requested during the JAB proceedings. The draft report contained comments and questions inserted by the Acting Coordinator, supporting her contention that the document was incomplete. When the draft report was submitted to the JAB, the Respondent stated that it was a draft document, that it was the position of the PDOG that "it could not issue its draft

report due to lack of supporting evidence”, and that it was one of the questions before the JAB “whether it would have been appropriate for the PDOG to proceed in the circumstances” (see the memorandum of 7 August 2008 from the Representative of the Secretary-General to the Secretary of the Joint Appeals Board). According to the Respondent, it was also made clear in the Respondent’s answer to the Applicant’s appeal before the JAB that “[t]he work of the PDOG ha[d] been suspended pending further input from the [Applicant]” and that the draft report had not been finalised.

37. After the draft report of the PDOG was provided to the JAB, a copy of it was transmitted to the Applicant in the context of the JAB proceedings. The Applicant prepared a response to the draft report, dated 3 April 2008, although he was not requested to do so.

38. On 30 March 2009, the JAB adopted its report (Report No. 2056), finding that the Applicant’s complaint was, in effect, fully considered by the PDOG, which had completed its review of the Applicant’s case. The JAB stated, apparently based on its belief that the work of the PDOG had been concluded, that “[w]hile it is unclear whether the Organization has acted on the findings of both bodies [i.e., the PDOG and the performance evaluation rebuttal panel], given its zero tolerance [policy on harassment and discrimination] the [JAB] presumes that it will do so in due course”. Accordingly, the JAB found that the Applicant “had recourse for his complaint of harassment which is still ongoing”. Both the Applicant and the Respondent now agree that the JAB’s finding that the PDOG had finished its work was erroneous.

39. By letter dated 13 May 2009, the Deputy Secretary-General informed the Applicant of the Secretary-General’s decision to agree with the findings and conclusions of the JAB and not to take any further action in this matter. The Deputy Secretary-General’s letter stated:

The JAB noted that the Organization is under an obligation to look into any good faith complaint of harassment. The JAB stated that the PDOG is a UN body established to find facts in precisely the type of grievances put forward by you, and the PDOG panel in the case in question was duly established to carry out that mandate. Furthermore, the JAB stated that the PDOG report articulates the facts of the case and the cogent reasoning underpinning the PDOG panel’s conclusions.

The JAB also stated that you benefited from the review of a Rebuttal Panel which concluded that your original appraisal rating and the evaluations and comments should not be maintained due to what it found to be egregious failure to properly administer your PAS. The JAB further stated that while it is unclear whether the Organization has acted on the findings of both bodies, you have had recourse for your complaint of harassment which is still ongoing. In light of the foregoing, the JAB unanimously concluded that the Respondent did not violate your terms of

appointment in the context of this case and therefore unanimously decided to make no recommendation.

The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. The Secretary-General agrees with the findings and conclusions of the JAB. In accordance with the JAB's unanimous decision to make no recommendation in favour of the present appeal, the Secretary-General has decided not to take any further action in this matter.

40. On 14 August 2009, the Applicant filed an application against the “[d]ecision of the Secretary-General dated 13 May 2009, received by [the] Applicant on 13 May 2009, and the recommendation of the Joint Appeals Board— Report No. 2056”.

13. The UNDT issued Judgment No. UNDT/2011/219 on 29 December 2011. It found that the scope of the case was limited to the main legal issue that the parties had agreed on in a joint submission dated 18 October 2010, which was whether or not the Organization adequately addressed Mr. Abubakr's claims of harassment and discrimination. It held that the additional issues identified by the parties in the joint submission served only to adjudicate the main issue. The UNDT found that this scope of the case was clearly articulated in the request for administrative review, the proceedings before the JAB, and in the application before the UNDT. The issues raised in Mr. Abubakr's closing statement were separate administrative decisions which had not been contested before and extended beyond the scope of the case as previously agreed on by the parties in their joint submission.

14. The UNDT found that after Mr. Abubakr had filed a harassment and discrimination complaint with the PDOG, the PDOG failed to act expeditiously in bringing his case to a conclusion, finishing its investigation and finalizing its report. The UNDT found that the Organization failed to properly address Mr. Abubakr's complaint of harassment and discrimination and, therefore, breached his contract. It awarded Mr. Abubakr USD 40,000 as compensation for the emotional distress caused by those failures, but found that no compensation for actual economic loss was warranted.

15. Both parties appealed. The Secretary-General appealed on 22 February 2012 and Mr. Abubakr appealed on 27 February 2012.

Submissions**Secretary-General's Appeal**

16. The Secretary-General challenges the UNDT's findings and award in respect of emotional damages.

17. The Secretary-General submits that the UNDT erred in law in concluding that the facts of the present case were substantially similar to those of the *Applicant* case, thereby warranting the same award of USD 40,000 as compensation for emotional distress, because the facts of Mr. Abubakr's case differ substantially from those of the *Applicant* case:

a) The Administration took meaningful action in response to Mr. Abubakr's complaint, which is reflected by the fact that, at least partly because of the assigned PDOG, Mr. Abubakr was granted the appointment against a regular budget post.

b) Contrary to the *Applicant* case, there were no unaddressed communications to the Administration.

c) The PDOG almost completed its draft report before its work was put on hold while the Acting Coordinator made efforts to reach a properly founded result. In the *Applicant* case, the Administration failed to take any action.

d) In the *Applicant* case, the Organization accepted that the Applicant should be compensated whereas here it did not.

18. The Secretary-General also submits that the UNDT erred in law and fact by determining that Mr. Abubakr had provided evidence that he suffered emotional distress warranting compensation. Mr. Abubakr did not establish, with either oral or documentary evidence, that the PDOG's failure to finalize its report caused him emotional distress. Instead, Mr. Abubakr claimed that his psychosomatic illness was caused by acts of harassment and discrimination in the workplace. The UNDT, however, never made any affirmative finding that Mr. Abubakr had been subjected to harassment.

19. The Secretary-General further submits that the UNDT erred in fact in finding that Mr. Abubakr's evidence in support of his damages was "unrebutted", as the Secretary-General made arguments to rebut Mr. Abubakr's evidence.

20. The Secretary-General requests that the Appeals Tribunal vacate the UNDT's award of USD 40,000 to Mr. Abubakr as compensation for emotional distress.

Mr. Abubakr's Answer

21. Mr. Abubakr avers that the UNDT acted within its province of authority in finding that the Administration had failed to take adequate actions to address his complaint of harassment and discrimination.

22. Mr. Abubakr submits that the UNDT acted correctly by determining that he had provided evidence that he suffered emotional distress warranting compensation.

23. Mr. Abubakr submits that the UNDT had the power and authority to access the totality of the evidence provided by the parties and fashion an appropriate remedy.

24. Mr. Abubakr requests that the Appeals Tribunal uphold the UNDT's award of USD 40,000 as compensation for emotional distress.

Mr. Abubakr's Appeal

25. Mr. Abubakr challenges the UNDT's refusal to award him economic damages.

26. Mr. Abubakr submits that the UNDT erred in law and fact in failing to recognize that all the legal issues raised in his two requests for review were receivable so that the matters they contained were properly before the UNDT.

27. Mr. Abubakr submits that the UNDT erred in law and fact in not considering the legal issues raised by him as an interrelated unit "so that the fabric of the Appellant's case was broken, thus making it impossible for full justice to be done to his cause of action".

28. Mr. Abubakr submits that the UNDT erred in law and fact by failing to award compensation once it had established that his contract had been breached. It also erred by failing to invite the parties to make specific submissions as to the quantum of damages and compensation, once it had found that Mr. Abubakr's interests had been legally injured.

29. Mr. Abubakr requests that the Appeals Tribunal remand the case to the UNDT for the unresolved matters to be adjudicated. He further requests that the Appeals Tribunal find that he has proven the existence of economic loss, so that the UNDT may order appropriate compensation.

Secretary-General's Answer

30. The Secretary-General submits that the UNDT properly defined the scope of the case. Mr. Abubakr failed to properly identify any additional administrative decisions that the UNDT should have addressed. The UNDT correctly relied on Mr. Abubakr's June 2007 request for administrative review and the joint submissions of the parties to determine the scope of the case, and correctly eliminated additional issues in Mr. Abubakr's closing submission based on receivability.

31. The Secretary-General submits that the UNDT correctly found that Mr. Abubakr did not establish any economic loss.

32. The Secretary-General requests that the Appeals Tribunal affirm the UNDT's conclusions as to the scope of the case and as to the finding that Mr. Abubakr did not establish economic loss.

Considerations

Secretary-General's Appeal

33. In the course of his written submissions, the Secretary-General maintains that the Administration "did all it could reasonably be expected to do to address [Mr. Abubakr's] complaints and that it succeeded in large part in their resolution".

34. Thus, the Secretary-General asserts that the Dispute Tribunal erred in law and in fact by failing to recognize the significant actions taken by the Administration to address Mr. Abubakr's complaints of harassment and discrimination and by concluding that the facts of the present case were substantially similar to the facts in the UNDT Judgment *Applicant* (UNDT/2010/148), thereby warranting the same award of USD 40,000 to Mr. Abubakr as was awarded in the aforementioned case.

35. The Appellant seeks to distinguish between the facts in the *Applicant* case and the facts in Mr. Abubakr's case so as to persuade this Tribunal to find that the UNDT erred in law and in fact in determining that Mr. Abubakr's complaint merited USD 40,000 as compensation.

36. It is noteworthy to the Tribunal that the Dispute Tribunal Judge did not premise her ultimate conclusion, that there had been a breach of Mr. Abubakr's contract of employment, on any comparison of the facts in the case with that of the *Applicant* case. Rather, the Dispute Tribunal documented, in paragraphs 12-40 of its Judgment, in painstaking detail the nature of Mr. Abubakr's complaint and what transpired between the time of the making of the complaint of 22 September 2006 and the ultimate response to that complaint on the part of Administration, namely, the letter of 13 May 2009 advising Mr. Abubakr of the decision not to take further action in the matter.

37. There is no doubt but that the facts in the present case differ to those in the *Applicant* case. A central issue in that case was that no action was taken, in response to the complaint of harassment and discrimination, resulting in a finding of the UNDT, upheld by the Appeals Tribunal, "that the Administration failed to address the applicant's complaint with required due diligence".¹

38. In the present appeal, the Secretary-General submits that the Administration took a number of actions to address Mr. Abubakr's complaint of "Harassment and Discrimination by ITSD". Firstly, the PDOG enquiry was established pursuant to ST/AI/308/Rev.1. As paragraph 8 of his submissions, the Secretary-General contends that Mr. Abubakr's success in November 2006 in obtaining a fixed-term contract to be placed against a regular budgeted post was, as observed by the UNDT, "at least in part due to the efforts of the PDOG".²

39. However, what is not addressed in the Secretary-General's submissions is the fact that, on 18 January 2007, Mr. Abubakr, while acknowledging to the PDOG that he had been placed on a regular budget post, continued to claim that he was being subject to discrimination and harassment.

¹ *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/148, para. 24.

² *Abubakr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/219, para. 19.

40. Secondly, it is contended, while acknowledging that the PDOG Report was delayed and never finalized, that there were “no persistent unaddressed communications to the Administration”. It is contended that, in so far as there were unaddressed communications, this occurred on the part of Mr. Abubakr, a matter which the Dispute Tribunal Judge recognized. We note, however, that at paragraph 35 of its Judgment, the UNDT effectively rejected the PDOG Acting Coordinator’s testimony that she was awaiting further documentation from Mr. Abubakr before the PDOG Report could be finalized.

41. Thirdly, in support of his argument that significant action was taken by the Administration to alleviate Mr. Abubakr’s complaints, it is submitted that the PDOG had “almost completed” the draft Report before it was “put on hold”. The delay, it is submitted, was due to “the Acting Coordinator’s desire to ensure that a properly founded result be reached in the case, after she became concerned that the report contained strong conclusions that were not adequately supported by evidence”.

42. We note that, for the most part, the Dispute Tribunal was less than satisfied with the explanation given by the Acting Coordinator for the delay in the finalization of the Report.

43. At paragraph 54 of its Judgment, the Dispute Tribunal stated:

Having observed the witnesses and having considered their oral evidence, the Tribunal is not persuaded that the PDOG’s failure to finish its investigation and issue the report was in any way attributable to the Applicant in that the report could not be issued without further documentation from him. The failure of the PDOG to report to the appropriate authorities the alleged loss of the interview notes or the fact that the report may have been compromised leaves many unanswered questions. It is apparent that the work of the PDOG on this case was dysfunctional.

44. The Appeals Tribunal does not find that the Dispute Tribunal erred in law and fact in choosing not to recognize, as any way meaningful, the majority of the actions relied on by the Secretary-General. At the end of the day, by virtue of the “dysfunctional” work of the PDOG, Mr. Abubakr was left bereft of any proper process through which his claims of harassment and discrimination could be addressed. In so far as “actions” were taken by the Secretary-General, they, in effect, came to nought.

45. The Appeals Tribunal notes the extraordinary state of affairs that pertained after the now acknowledged “erroneous” findings of the JAB were communicated to the Appellant. The Dispute Tribunal put it thus in paragraph 58 of its Judgment:

The [Secretary-General’s] agreement with the findings and conclusions of the JAB and his decision not to take any further action were completely contradictory with [his] actual knowledge of the case. Accepting the findings of the JAB allowed the [Secretary-General] not to take any further action on the Applicant’s case based on the JAB’s finding that recourse had been given, while refusing to act on the findings of the draft PDOG report on the basis that the work of the PDOG could not be completed.

46. As effectively found by the UNDT, this was a “win-win” situation for the Secretary-General, whilst Mr. Abubakr’s claims of harassment and discrimination were effectively sidelined.

47. In all these circumstances, we reject the Secretary-General’s pleas that the Dispute Tribunal’s finding that Mr. Abubakr’s predicament merited compensation was erroneous in law and fact.

48. The Secretary-General urges the Appeals Tribunal to reverse Mr. Abubakr’s award of USD 40,000 on the basis that he “did not establish that he suffered damages as a result of the breach that was found namely the PDOG’s failure to finalise its report”.

49. As observed by the Dispute Tribunal, the UNDT “is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached”.³ It correctly noted that the burden rests with Mr. Abubakr to substantiate his claim for compensation or damages.

50. The main thrust of the Secretary-General’s submissions on the issue of compensation is that the emotional stress and adverse impact on his health, claimed by Mr. Abubakr, resulted not from the breach of his employment contract as found by the Dispute Tribunal - namely the failure of the PDOG to complete its mandate pursuant to ST/AI/308/Rev.1 - but rather from the harassment and discrimination that he alleged. It is further submitted that the Medical Affidavit filed by Mr. Abubakr underpins this contention. Moreover, the Secretary-General submits that the UNDT never made any affirmative findings that Mr. Abubakr had been subjected to harassment.

³ *Abubakr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/219, para. 61.

51. The constraints on the Dispute Tribunal with regard to the harassment issue are eloquently set out by the Dispute Tribunal Judge at paragraphs 56-59 of the Judgment and need not be repeated here, save to state that the import of the Judge's pronouncements is that Mr. Abubakr was the victim of the Administration's failure to ensure that he had a meaningful forum through which to address his complaints.

52. With regard to Mr. Abubakr's claim for compensation, the Dispute Tribunal Judge stated as follows:

66. The Tribunal notes that, as a result of the PDOG's failure to carry out its mandate, the Applicant has been denied the benefit of a final report on his allegations. He has also lost the right to have any recommendation implemented in his favour, as provided for under sec. 18 of the ST/AI/308/Rev.1. The failure of the PDOG to follow its own rules and to complete the report, and the failure of the JAB and the Administration to properly conclude the matter, means that the Applicant's complaint of harassment and discrimination was not addressed. The Applicant's rights have been compromised further due to the passage of time and the fact that the PDOG has disbanded.

67. The Tribunal is satisfied that the Applicant has demonstrated that he was distressed, and continues to be, by the Respondent's failure to properly address his complaint and this has had some negative effect on his health, as supported by his unrebutted oral and documentary evidence, including the medical affidavit of 11 January 2011, filed on 21 January 2011.

53. A careful reading of the UNDT Judgment shows that, at the end of the day, what Mr. Abubakr was being compensated for was the "harm" caused to him by the fact that he was deprived, by virtue of the breach of his employment rights, of the statutory due process he should have benefited from, as provided for by ST/AI/308/Rev.1. As part of its consideration of the level of compensation Mr. Abubakr's circumstances merited, the Dispute Tribunal Judge was entitled to pay regard to his testimony and to any relevant other evidence including medical evidence. While we are not persuaded that the expert medical evidence produced in this case could assist the UNDT Judge, given the observations as set out at paragraph 57 of the Judgment, we nevertheless uphold the UNDT decision that Mr. Abubakr's predicament merited a compensatory award.

54. On the issue of the level of compensation awarded, we find that the UNDT erred somewhat on the generous side in comparing the due process deprivations suffered by Mr. Abubakr to those in the *Applicant* case, and bearing in mind the Dispute Tribunal's finding that the PDOG process assisted Mr. Abubakr to some degree in that he got his budgeted post, we hereby vary the level of compensation to an award of USD 25,000.

55. The Secretary General's appeal is thus upheld to the extent set out above.

Considerations

Mr. Abubakr's Appeal

Did the UNDT err in law and fact in limiting the scope of Mr. Abubakr's application to the issue of whether or not the Organization adequately addressed the claim of alleged harassment and discrimination?

56. On 6 June 2007, Mr. Abubakr wrote to the Secretary General seeking a review of an administrative decision that arose from the failure of management to address complaints lodged by him with various bodies "to arrest the abiding harassment and prejudicial actions that currently threaten to compromise [his] career development".⁴

57. Following his application to the UNDT in August 2009, by Order No. 241 (NY/2010) the Dispute Tribunal Judge, having set out her "tentative" view that the scope of the case was limited to "whether the Organization adequately addressed the Applicant's complaint of harassment and discrimination", invited a joint submission from the parties on the legal issues in the case "particularly in light of the request for administrative review dated 6 June 2007".

58. As recited at paragraph 43 of the UNDT Judgment, in their joint submission of 18 October 2010, both parties identified the following agreed legal issue namely, "[w]hether or not the Organization adequately addressed the Applicant's claims of alleged harassment and discrimination".

⁴ *Abubakr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/219, para. 21.

59. Four additional legal issues were identified by Mr. Abubakr as follows:

43. [...]

5. Can the Applicant be blamed for the non-finalization of the PDOG Report?

...

6. Did the Applicant cooperate fully with the PDOG panel?

...

7. Did the JAB and the Secretary-General renege on their duties to recommend and effectuate [any] meaningful measure to redress the wrongs done to the Applicant?

...

8. Whether or not the Applicant's claim for breach of his contract is receivable.

60. The additional issues raised by Mr. Abubakr, and, indeed, three additional issues raised by the Secretary-General, were considered relevant only to the extent that they assisted the Dispute Tribunal in determining the main legal issue.⁵

61. In his closing submission to the UNDT, Mr. Abubakr raised a number of other matters, all of which were effectively rejected as non-receivable as it was held that they constituted administrative decisions which should have been contested properly and timeously, either by a request for administrative review or management evaluation.

62. In his appeal to this Tribunal, Mr. Abubakr takes issue with the approach adopted by the UNDT and maintains that "a substantial part of his cause of action was improperly eviscerated by that ruling". Moreover, he submits that the issues raised by him in his closing submission had previously been subsumed under the additional issues which the UNDT had listed in Order No. 106 (NY/2011) as forming the scope of the case.

63. We find no merit in this argument as we consider the matters referred to in Mr. Abubakr's closing submission to be at a considerable remove from the seven subsidiary issues raised between him and the Secretary-General in their response to UNDT Order No. 241 (NY/2010).

⁵ See *Abubakr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/219, para. 43.

64. The UNDT correctly determined that the ten issues Mr. Abubakr raised extended well beyond the scope of the case as previously agreed by the parties and, notwithstanding the submissions made to this Tribunal, we are satisfied that none of the ten issues capable of being litigated as of June 2007 were subsumed in his 6 June 2007 letter to the extent hereby reader of that letter would reasonably or logically conclude that administrative review was being sought.

65. We agree entirely with the Dispute Tribunal Judge when she states:

47. Each of the matters listed in the Applicant's closing submission is a separate administrative decision (either explicit or implied) that should have been contested properly and timeously, starting with a request for administrative review (under the former system) or management evaluation (under the current system) (see, e.g., the United Nations Appeals Tribunal's ("UNAT") rulings in Syed 2010-UNAT-061, Appellant 2011-UNAT-143, Kapsou 2011-UNAT-170, O'Neill 2011-UNAT-182). Staff members must follow the established internal mechanisms to properly assert their claims (Barned 2011-UNAT-169, Jennings 2011-UNAT-184).

48. Although the Applicant may be dissatisfied with various matters that occurred during his career with the United Nations, the Tribunal is bound by the scope of the present case, which was correctly identified by the parties in their joint submission and which stems from the Applicant's request for administrative review. Any other interpretation of the scope of issues properly before the Tribunal would render the legal requirements of administrative review and management evaluation and the requirement of time limits meaningless, as the Applicant would be permitted to attach any past or future decision to his request for review filed on 6 June 2007.

66. Insofar as Mr. Abubakr makes the case that his request, on 25 September 2008, for administrative review of the decision not to accede to his request for a new Rebuttal Panel to consider his e-Pas rebuttals for the period 1 April 2006-31 March 2007 confers jurisdiction on the UNDT to consider "appurtenant" e-Pas matters, we reject this contention as stretching the bounds of logic.

67. Insofar as Mr. Abubakr contends that the Dispute Tribunal did not give consideration to the seven additional matters it duly identified as relevant to the main issue, we are satisfied that it did so. As apparent from its Judgment, the additional items (2-6) were the subject of analysis and, equally, in the context of the Dispute Tribunal's overall findings, the issue of the Administration's failure to address the claims of harassment and discrimination

and the consequent breach of contract (additional items 7 and 8) underpinned the UNDT'S conclusion that Mr. Abubakr's circumstances merited an award of compensation.

68. Thus, for all of the foregoing reasons and, indeed, by reason of the matters set out in paragraphs 48 and 49 of the UNDT Judgment, we reject the submission that the Dispute Tribunal Judge "disrupted the fabric of the Appellant's case".

69. Accordingly, the appeal regarding the scope of the case is dismissed.

Did the UNDT err in law and fact resulting in a manifestly unreasonable decision in deciding that Mr. Abubakr failed to establish actual economic loss?

70. At paragraphs 21-23 of his submission Mr. Abubakr sets out the matters in respect of which he claims entitlement to compensation for economic loss.

71. We are, however, satisfied to uphold the Dispute Tribunal's finding that Mr. Abubakr failed to establish that he sustained actual economic loss warranting compensation by reason of the PDOG's failures. We note, in particular, that many of the heads of economic loss fell outside the scope of his case as properly defined by the UNDT.

72. Moreover, having regard to the speculative nature of some of the submissions made on the issue of economic loss, neither this Tribunal nor the UNDT could reasonably be expected to entertain such arguments, in the absence of actual evidence linking the claimed losses to the Administration's failures, as defined in this case.

73. It is further asserted that the UNDT erred in law in not inviting submissions as to the quantum of compensation sought. We do not find that the UNDT erred in failing to exercise discretion in this regard, particularly in circumstances where Mr. Abubakr in his submissions outlined the various heads of loss in respect of which he sought a compensatory award. As already set out herein, it was not manifestly unreasonable for the Dispute Tribunal Judge to determine that no case of actual financial loss relevant to the scope of the application was established. Consequently, it was not manifestly unreasonable on the part of the UNDT not to exercise its discretion to seek submissions on quantum.

Judgment

74. Mr. Abubakr's appeal in its entirety is dismissed. The Secretary General's appeal is upheld in respect of the UNDT's award of monetary compensation, which is reduced to USD 25,000.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Lussick

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar