UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/072
Judgment No.: UNDT/2013/026
Date: 20 February 2013
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NOGUEIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Environment Programme ("UNEP"), filed complaints of harassment on 9 June 2006 and 14 May 2007 against Mr. Ahmed Djoghlaf, Executive Secretary (ES), Secretariat of the Convention on Biological Diversity ("SCBD").

2. An Investigation Panel subsequently concluded that the allegation of harassment was substantiated. By a letter dated 4 June 2009 ("the Contested Decision") from Ms. Catherine Pollard, the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), thanked the Applicant for bringing the issue to the attention of the Administration and informed him that a decision had been made to take administrative action against Mr. Djoghlaf.

3. In light of the findings of the Investigation Panel, the Applicant is contesting the administrative decisions to merely thank him and to simply take administrative action against Mr. Djoghlaf. He submits that while the Contested Decision recognised that Mr. Djoghlaf had violated United Nations rules, it did not address his professional and personal losses resulting from the abuse and harassment perpetrated by Mr. Djoghlaf. He submits that there should have been more concrete action by the Administration against Mr. Djoghlaf and that the harassment suffered by him should have been addressed or remedied appropriately.

4. The Applicant requests that the Tribunal find that he was harassed by Mr. Djoghlaf in a manner that amounted to an abuse of power from 2005 until January 2007. The Applicant accordingly requests that he be restored to his original position as Principal Officer, D-1 at the SCBD in Montreal. He also requests all salaries and applicable benefits between March 2008 to the date of restoration to his former position be paid to him, or, as an alternative, he be compensated with two years' net base salary under Article 10.5(b) of the Statute for damages and harm incurred. Further, he requests compensation of three months' net base salary under Article 20 of the Rules of Procedure for non-disclosure of the Investigation Panel (IP) report. He also requests that the findings of the UNEP independent

review be made available to him.[1] Finally, the Applicant requests that public sanction be taken against Mr. Ahmed Djoghlaf.

Facts

5. The Applicant joined the SCBD in Montreal on 20 November 2000 as Principal Officer, D-1, head of Implementation and Outreach ("I & O"). The Applicant historically received positive performance assessments; the Performance Appraising System ("PAS") report dated 20 December 2005, described the Applicant as 'a competent and reliable staff member' and a 'valuable asset to the Convention on Biological Diversity ("CBD")'.

6. The Applicant claims that the catalyst for the current dispute was the appointment of Mr. Djoghlaf to succeed the then-Executive Secretary of the CBD Mr. Zedan, in January 2006. Mr. Djoghlaf and Mr. Zedan had a turbulent history, vying each other for an identical post in 1998. Thus, there was a difficult personal history between Mr. Zedan and his successor, leading to an inability to arrange an orderly handover. Additionally, the timing of the handover complicated matters for staff that were under the authority of the Executive Secretary.[2]

7. This prelude to the current dispute did not provide a secure foundation for the Applicant's working relationship with his new superior, Mr. Djoghlaf. The Applicant was dissatisfied with the conduct of his new boss. He asserted that Mr. Djoghlaf started harassing him when he 'refused to introduce changes in an official United Nations document after it was consensually adopted by the Parties to the CBD.' In particular, the Applicant asserts that Mr. Djoghlaf infringed various United Nations rules and regulations, manipulated official documents and 'creat[ed] a hostile work environment'. In addition, the Applicant stated that he was subjected to harassment from Mr. Djoghlaf in the form of multiple emails sent to 'make the complainant change UN documents', 'discrimination, character assassinations, humiliation, abuse of authority, maladministration' and 'monitoring of emails'.

[1] Tribunal's previous ruling *Nogueira* UNDT/NBI/2009/088.
[2] The outgoing Executive Secretary prepared work that his successor would execute.

8. The Applicant complained that Mr. Djoghlaf 'systematically harassed …and consistently built up a constructed dismissal case against him'. Thus, the working relationship between the Applicant and his superior was strained at best.

9. There was a similar conflict regarding the circulation of a 'draft audit report' prepared by the Office of Internal Oversight Services ("OIOS") by Mr. Djoghlaf. The draft audit contained unfavourable allegations against the previous administration, which reflected badly on the Applicant. However, these allegations had not yet been substantiated. It was later determined that Mr. Djoghlaf caused this draft report to be circulated to cast his predecessor in an unfavourable light.[3] Mr. Djoghlaf caused the draft to be publicised against the express views of OIOS. A second OIOS team reviewed its previous audit on 17-21 July, and published a report on 1 February 2007. The report concluded that it was not possible to ascertain whether monitoring had taken place. The Applicant complains that the second report was not circulated in juxtaposition to the first, and therefore his reputation was not vindicated.

10. The Applicant asserts that by April 2006, he was 'completely divested of his responsibilities and mandate'. It was later determined that the Applicant was deprived of all of his supervisory functions by June 2006. This was because Mr. Djoghlaf had discussed with every staff member his or her work plan for 2006-2007, and the Applicant's responsibilities as first or second reporting officer was taken away from the ("PAS") of his staff.

> The reason Mr. Djoghlaf gave, when asked by [the Applicant] for a clarification, was that the staff members themselves had made it clear to him, Mr. Djoghlaf, that they wanted to report directly to the Executive Secretary. There has been no corroboration of this so-called "preference" by the staff and the Panel finds this an extraordinary attitude and hardly believable. The direct result has been, however, that the complainant was left without staff to supervise and no work, which is contrary to what a UN staff member is entitled to. This amounts, in the view of the Panel, to not only abuse of authority but also discrimination vis-à-vis the complainant's colleagues.[4]

[3] Investigatory Panel Report.
[4] Paragraph 107 Convention on Biological Diversity Secretariat, Preliminary Investigation Panel Report 22 October 2007.

11. The Applicant filed a complaint of harassment on 9 June 2006 ("The First Complaint") with UNEP senior management, including the Deputy Executive Director of UNEP, the then ASG/OHRM and the Director of the Investigations Division, OIOS. The complaint included in depth details of the Applicant's grievance. The Applicant claimed that 'my supervisor, Mr. Ahmed Djoghlaf…has consistently and aggressively *harassed* me since he took over his duties…and has systematically deprived me of my authority and functions as stipulated by my job description.' The Applicant asserted that this course of action was a form of 'retaliation' in response to the Applicant's (a) refusal to 'violate UN rules at his request' and (b) 'association with the previous administration.' The Applicant requested that these matters be thoroughly investigated and actions instituted to protect his rights as a staff member.

12. UNEP Administration reacted on 15-17 August 2006 by sending Mr. Suleiman Elmi, Chief, Human Resources Management Services ("HRMS") at the United Nations Office at Nairobi ("UNON"), to Montreal to assess the general situation at the SCBD. His asserted purpose was to: (i) try to calm the situation; and (ii) make recommendations for the resolution of the situation.

13. Mr. Elmi concluded in a report dated 28 August 2008 that the crux of the problem in CBD was the "conflict" between Mr. Djoghlaf and three staff members, including the Applicant. He also concluded that the Applicant was exerting negative influence on other staff members. According to Mr. Elmi:

> Mr. Djoghlaf has started dealing with the concerns of the other staff and is aware of the impact of his management style on some of the staff members. Most of the staff believe in his vision and he should therefore build on their enthusiasm to realize it. He should be encouraged and supported in his endeavour.

14. By a memorandum dated 28 August 2006, Amedeo Buonajuti, Chief, Office of the Executive Director ("OED"), UNEP, informed the Applicant that he was to be reassigned within UNEP and that pending the reassignment he was to work from home. The relevant letter in question states:

> I am pleased to inform you that the Executive Director ("ED") has accepted your request for reassignment within UNEP and is

> actively looking for a suitable position for you before the end of November. I will inform you on the offer as soon as possible.
>
> Pending your reassignment, the ED would expect you to undertake an assignment, working from home […].

15. By a memorandum dated 16 November 2006, Mr. Buonajuti informed the Applicant that he was being offered a one-year extension on his contract by the Executive Director of UNEP ("ED/UNEP") and reassignment to the Division of Environmental Law and Conventions (DELC) in Nairobi effective 01 December 2006. In another memorandum dated 17 November 2006, Mr. Buonajuti stated that,

> [y]ou have applied for the Deputy Director position in the Division of Environmental Law and Conventions ("DECL") and the offer of a one-year extension by the Executive Director is made without prejudging the results of the competition. If successful, you will be appointed to the Deputy position and if not, you will remain in the position offered to you, if you accept it.

16. The Applicant sent some concerns and clarifications regarding his new post to Mr. Buonajuti on 21 November 2006. Following a reply from the OED on 27 November, clarifying the position of UNEP, the Applicant responded that he accepted the reassignment offer on 7 December 2006. This offer was accepted according to the Applicant, after 'protracted discussions' and 'resistance' on his part.

17. On 14 May 2007, the Applicant complained once again from Nairobi ["The Second Complaint"], this time to the Secretary-General, as his complaint of June 2006 was "never acknowledged' and 'a proper investigation was never established.'

18. Accordingly, on 18 July 2007, Mr. Achim Steiner, the ED/UNEP informed the Applicant that a Panel would be established under ST/AI/371 to investigate allegations made by him against Mr. Djoghlaf.

19. The 'Investigative Panel' (IP) was established two months later to (i) provide the Executive Director of UNEP with a factual basis for a decision whether or not to pursue the allegations of the staff member and former staff

members against the Executive Secretary of the CBD as a disciplinary matter and (ii) determine whether or not the allegations of the Executive Secretary against the staff member are to be pursued as a disciplinary matter.

20. The report of the Panel was issued on 22 October 2007. The Panel concluded that 'ample evidence is available to substantiate the accusations of – inter alia – harassment, abuse of authority, unfair treatment and violation of privacy by Mr. Djoghlaf.' This report was not disclosed to the Applicant.

21. On 26 February 2008 the Applicant was separated from service following the non-renewal of his contract.

22. Mr. Steiner informed the Applicant in October 2008 that the IP report had been submitted to Ms. Pollard for "her consideration and further action as appropriate". On 4 June 2009, Ms. Pollard informed the Applicant that administrative action was warranted against Mr. Djoghlaf. The Applicant was thanked for his efforts:

> OHRM reviewed the entire dossier of this case, including the investigation report, the supporting documentation and Mr. Djoghlaf's comments on the matter. The record indicates that Mr. Djoghlaf did not act in a manner consistent with the standards of conduct expected of senior officials of the Organisation and, accordingly, administrative action has been taken against him. Thank you for your assistance and cooperation in this matter, and in particular, for bringing the matter to the attention of the Administration and diligently pursuing it.

23. On 1 July 2009 the Applicant submitted a request to Ms. Angela Kane, Under-Secretary-General for Management, for a management evaluation of the Contested Decision. According to the Applicant, while the Contested Decision recognised that Mr. Djoghlaf had violated United Nations rules, it did not address his 'professional and personal losses resulting from the abuse and harassment perpetrated by Mr. Ahmed Djoghlaf…and the final loss of [his] job'. The Applicant contested the lethargy with which the Administration responded to his complaints, the procedures employed by the Administration (which lacked 'transparency', and were ad hoc in manner), the lack of adherence to procedural guidance of the statutory framework (in particular administrative instructions), the

lack of restraint on 'abuse and harassment' and finally the loss of his job due to 'mismanagement of his case'.

24. The Management Evaluation Unit ("MEU) responded on 14 August 2009 with its deliberation. The MEU decided to evaluate the Applicant's case in light of aspects of his case forming 'new grievances directly emanating from Ms. Pollard's 4 June 2009 letter; or grievances which were the subject of the findings and conclusions of the IP.' The MEU concluded that the Applicant's complaint of 'constructive dismissal' could not be upheld. The MEU observed that the Applicant was subject to 'inordinate delay' and thus recommended that he be compensated with three months net base salary at his current level. Finally, the MEU concluded that their current 'letter' would serve to inform the Applicant that the IP had found Mr. Djoghlaf's allegations against him lacked merit and therefore these allegations had been dismissed and the Applicant was henceforth exonerated of any wrongdoings in his interaction with Mr. Djoghlaf.

25. On 11 November 2009, the Applicant submitted an application to the Dispute Tribunal ("the Tribunal").

Applicant's submissions

26. The management evaluation: (a) does not discuss merits of Applicant's complaints (b) does not state that Mr. Djoghlaf was responsible for harassment and abuse and (c) does not remedy the harm caused to Applicant.

27. In relation to the first complaint, the Applicant asserts that the procedure followed did not constitute a formal investigation and did not respond to the complaint of 9 June 2006. He also asserts that Mr. Elmi did not provide any evidence for the statements in his report.

28. The Applicant clarified his submission to the Court on 4 November 2010. The issues for the Court to determine are as follows (i) whether there was harassment suffered by the Applicant from Mr. Djoghlaf in Montreal in 2005-2007; (ii) whether the Respondent addressed the Applicant's complaints in a fair, balanced, transparent and efficient manner, without bias or extraneous motives

(iii) whether the decision letter was fair, and fully addressed the Applicant's rights and legitimate interests, and (iv) whether the Respondent provided appropriate remedies for the Applicant.

Respondent's submissions

29. The following issues are relevant: (a) the rights of a staff member complaining of harassment in 2006/2007 and whether the contested 4 June 2009 letter violated any of these rights, (b) whether the procedural rights of the Applicant were violated by the conduct of investigation and subsequent disciplinary case concerning Mr. Djoghlaf, and finally (c) whether the Applicant's rights as a former staff member were violated by the outcome of the management evaluation.

30. According to ST/IC/2005/19 and ST/SGB/2005/21, while an Applicant has a right to complain, his/her assertions do not have to be accepted by the administration. Thus, the UN is not empowered under any particular statutory provision to make awards of compensation other than in the context of appeals. While a complainant can appeal against an administrative decision, the decision whether to investigate a case or not is not justiciable.

31. Similarly, ST/SGB/2008/5 is not applicable. Even if the Tribunal does find it applicable, there is no provision for compensation therein, excluding a reference to compensation in the context of an appeal under Ch. XI of Staff Rules. Thus, the Applicant has no right to receive an assessment from the Administration whether misconduct of another staff member is proven, and neither is he entitled to compensation or remedial action for a harm arising therefrom. The procedural violations have been adequately remedied by the Management Evaluation in the form of damages for delay. While there is limited jurisprudence confirming a right to compensation for an adverse administrative decision, this limited jurisprudence is not widely followed. The Applicant's rights were vindicated because his complaint was addressed 'timely and in a fair manner.'

32. In regards to the issue of reassignment, the Applicant was in fact in agreement with the reassignment, and that while he had concerns, he was not 'unwilling' to be reassigned.

Issues

33. The issues in this case are as follows

a. The obligations of the Administration once a complaint of misconduct has been submitted;

b. Whether the Administration properly discharged these obligations;

c. The obligation of the Administration vis-à-vis a complainant in circumstances where the allegations of misconduct contained in the complaint are in fact substantiated by the investigation (e.g. the remedies, if any, that should be given to the complainant to make him whole);

d. Whether the remedies identified in paragraph (c) above were provided to the Applicant in light of findings and conclusions of the Investigation Panel;

e. If the requisite remedies were not provided by Administration, what remedy should the Tribunal provide?

34. To provide context for these issues, the Tribunal will: (i) briefly consider the events in Montreal leading to the establishment of the Investigation Panel and; (ii) look at the administrative procedures initiated by the Applicant and the Administration's actions during the period from 2006 to June 2009. However, the Tribunal will not review OHRM's decision to take administrative action against the Executive Secretary *in lieu* of disciplinary action.

What are the obligations of the Administration once a complaint of misconduct has been submitted?

35. The obligations of the Administration once a complaint of misconduct has been submitted may include a review of: (i) the Administration's response to the complaint; (ii) the conduct of an investigation, as appropriate; and (iii) the procedure followed subsequent to the investigation.

36. As noted by the United Nations Appeals Tribunal in *Nwuke* 2010-UNAT-099:

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

(i) The Administration's response to the complaint

37. In examining the administration's response to the complaint, it behooves the Tribunal to examine 'the administrative procedures initiated by the Applicant and the Administration's actions during the period from 2006 to June 2009' as stipulated by Order 69 (NBI/2011). The Tribunal will therefore take into account the response of the Administration to the original complaint of the Applicant.

38. Pursuant to ST/IC/2005/19, staff members have a duty to report cases of suspected misconduct either to a higher-level official, "whose responsibility it is to take appropriate action", or to OIOS.

39. Under administrative instruction ST/AI/371, the head of department or office has the responsibility and the obligation to review the information and, where there is reason to believe that a staff member has engaged in misconduct, to undertake a preliminary investigation and fact-finding. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of department or office has the duty to report the matter immediately to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts and attaching documentary evidence. Heads of departments also have the right to report such information directly to OIOS for review and action.

40. Thus, the Administration has a duty to deal seriously with any complaint of misconduct, and not brush any substantial findings under the carpet.

41. The Applicant initially submitted a complaint of harassment on 9 June 2006 to UNEP senior management, including the Deputy Executive Director of UNEP, the then ASG/OHRM and the Director of the Investigations Division, OIOS. UNEP Administration did not react until mid-August 2006 and when it did act, it did so in an informal manner in that the purpose of the ensuing 'visit' of Mr. Elmi was merely to "calm" the situation and to make recommendations for resolution of the problem (i.e. the conflict in CBD).

42. The ensuing report clearly indicates that Mr. Elmi's focus was on the general discord amongst CBD staff and had nothing to do with the Applicant's complaint specifically. In this respect, the Tribunal notes that apart from a cursory mention at the beginning of the report that Mr. Elmi had met with the Applicant and two other staff members who had submitted appeals/complaints against Mr. Djoghlaf, no mention was made of the Applicant's complaint of harassment and neither was it addressed anywhere within Mr. Elmi's 5-page report. The Tribunal finds, therefore, that Mr. Elmi's "visit to CBD" did not fulfill the Administration's obligations under ST/AI/371 because the visit did not contend with the Applicant's complaint of 6 June 2009.

43. However, the Applicant filed a complaint again on 14 May 2007, ("the second complaint"). This time the Administration responded promptly by establishing an Investigatory Panel under ST/AI//371. Although the Panel made findings for the Applicant, there was no mention of any kind of curative action for the Applicant from the Administration.

44. The Tribunal notes that the Administration took a total of three years to come to the conclusion that Mr. Djoghlaf 'did not act in a manner consistent with standards of conduct expected of senior officials of the Organisation'. Thus, the response of the Organisation was lengthy and pitted with insufficient responses in light of the mandated procedure. As highlighted in the *Macmillan-Nihlén*[5] case,

[5] Judgment No. 880 (1998) of the Former United Nations Administrative Tribunal.

inordinate delay 'not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant'. The delay in processing the Applicant's original complaint is a factor the Tribunal will take into account when making its final deliberation.

(ii) The Conduct of the Investigation

45. The investigation itself was initially conducted in an informal manner. While the second complaint was taken more seriously, the Applicant was not supplied with a copy of the IP report for two years. The UNDT ruled on 7 September 2009[6] that denying the Applicant access to the report was an infringement of due process. This Tribunal finds the lack of a timely and effective response afforded to the Applicant after he submitted a complaint on 9 June 2006 is an aggravating feature of this case.

(iii) The Procedure followed subsequent to the investigation

46. Under ST/SGB/2005/21, it is the "duty" of staff members to report any breach of the Organization's regulations and rules "to the officials whose responsibility it is to take appropriate action". The express purpose of this Secretary General's Bulletin is to "ensure[]…that the Organisation functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorised audits or investigations […]". Once a complaint has been made, this Secretary-General's Bulletin mandates that a *preliminary review* be conducted by the Ethics Office to establish certain factual issues; including whether the complainant engaged in a protected activity and whether the protected activity was a contributing factor in causing the alleged retaliation. The Ethics Office can *recommend* measures to correct the negative consequences. This Secretary-General's Bulletin gives examples of 'measures' that may be taken for the protection of the individual suffering from retaliation. These measures include rescission of the retaliatory decision, reinstatement, or transfer to another office or function. The language of this Secretary-General Bulletin is permissive rather than mandatory.

[6] Case No. UNDT/NBI/2009/001.

47. Following the investigation, the report of the IP was forwarded to the ASG/OHRM by the Executive Director of UNEP, in accordance with the procedure mandated by ST/AI/371. This Administrative Instruction mandates that '[i]f the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known…' The ASG/OHRM responded by letter of 4 June 2009, asserting that administrative action would be taken against Mr. Djoghlaf. The letter also affirmed that 'Mr. Djoghlaf had not acted in a manner 'consistent with the standards of conduct expected of senior officials of the Organisation.' However, in regards to the Applicant, the letter merely 'thanked' him for his efforts.

48. This Tribunal has already determined in Order No. 69 that the decision of the Administration to subject Mr. Djoghlaf to administrative action rather than disciplinary action is not properly the subject of review by the Tribunal. The Tribunal relied in particular on *Abboud* 2010-UNAT-100 where the Appeals Tribunal stated that 'as a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organisation itself, and it is not legally possible to compel the Administration to take disciplinary action against another part.' Thus, the Tribunal will instead focus on whether the rights of the Applicant as the victim of harm were sufficiently vindicated.

49. As noted, ST/SGB/2005/21 provides protection against retaliation. While the language of ST/SGB/2005/21 is permissive, in the case of *Hunt Matthes* UNDT/2011/063, the Tribunal held that a complainant is entitled to 'certain administrative procedures'. The substantive element of the complainant's case relates to harassment, and his vindication in relation to that wrong. The Tribunal finds that the same principle applies in relation to the wrong of harassment. It would be illogical if victims of one type of harm (retaliation) were subject to greater protection than victims of another type of harm (harassment). Arguably, the statutes and jurisprudence in relation to the harm of retaliation are persuasive in the situation of harassment. However, the wrong of 'harassment' is similarly

protected under ST/AI/2008/5, which refers to 'prohibited conduct'. Additionally, there is case law, which is instructive on the specific point of harassment.

50. Misconduct in the form of harassment is a serious disease which can spread like cancer throughout an organisation if not properly checked. Thus, this Tribunal finds it imperative that misconduct should be appropriately responded to and addressed. The Tribunal considers that General Assembly Resolution 63/253 establishing the UNDT promulgates the imperative for a system of justice which is 'consistent with the relevant rules of international law and the principles of the rules of law and due process to ensure respect for the *rights and obligations* of staff members and the *accountability of managers and staff members* alike.' The Tribunal is highly cognizant of its role in the new internal justice system and intends to maintain said role by building a system of justice that meets international standards through its review of administrative decisions.

The obligation of the Administration vis-à-vis a complainant in circumstances where the allegations of misconduct contained in the complaint are in fact substantiated by the investigation (i.e. the remedies, if any, that should be given to the complainant to make him whole)

51. Section 2.2 of ST/SGB/2008/5 sets out some of the obligations of the Administration vis-à-vis a complainant in circumstances where the allegations of misconduct contained in the complaint are in fact substantiated by the investigation. The provision reads as follows:

> 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.

52. The Respondent contests the applicability of this Secretary General's Bulletin. The Respondent submits that as ST/SGB/2008/5 did not come into force until 1 March 2008 it is not determinative of the rights of the Applicant with respect to matters arising in 2005/2006 and complaints filed in 2006/2007.

53. This Tribunal, however, has already determined in Order No. 137 (NBI/2010) that the aforementioned Secretary-General's Bulletin is relevant to

this case. In determining relevant time limitations, this Tribunal stated that there is an 'uninterrupted continuum between 2006 and the present', and relied on *Shook* 2010-UNAT-013 to hold that the Applicant 'should not be punished for the Respondent's foot-dragging and lethargy in dealing with the allegations that were first reported in 2006.' According to Order No. 137:

> The contents of ST/SGB/2008/5 form part of the conditions of the contract of a staff member with the Organisation. A staff member therefore has a right to be protected from harassment in his/her workplace. If the Organisation just brushes aside a complaint of harassment and does so without giving reasons, a staff member is justifiably entitled to feel and conclude that the Organisation is breaching one of the essential components of the contract binding him/her to the Organisation. This would, no doubt, impact on the work and therefore on the terms of appointment of the staff member.

54. Additionally, regardless of when ST/SGB/2008/5 was promulgated, it is applicable to the current case for the reason that it is based on ST/SGB/2002/1 (Staff rules and regulations of the United Nations), which was in force at the time of the incidents in question. Order No. 137 relies on paragraphs 2.1 and 2.2 of ST/SGB/2008/5.

55. Paragraph 2.1 provides:

> 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 301.2(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.

56. Staff regulation 1.2(a) provides that:

> Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all culture; they shall not discriminate against any individual or group

> of individuals or otherwise abuse the power and authority vested in them.

57. Staff rule 101.2(d) provided:

> Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

58. In view of the fact that the Organization's rules in force prior to 1 March 2008 specifically prohibited discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse, it is incongruous for the Respondent to argue that the Organization did not have the concomitant responsibility to protect its staff from exposure to prohibited conduct or to provide effective remedies solely because SGB/2008/5 had not as yet been promulgated. Given that the philosophy underlying ST/SGB/2008/5 is identical to ST/SGB/2005/21 the Tribunal holds that for the purposes of interpreting the previous rules ST/SGB/2008/5 is relevant.

59. Consequently, the Tribunal concludes that prior to 1 March 2008 the obligation of the Administration vis-à-vis a complainant in circumstances where the allegations of misconduct contained in the complaint had in fact been substantiated by the investigation is now enshrined in paragraph 2.2 of SGB/2008/5, which calls for preventive measures and the provision of effective remedies when prevention has failed.

60. Article 1.3 of the Charter of the United Nations enjoins the Organisation to promote and encourage respect for human rights. Compliance with the international human rights norms and the interpretation of the rules and regulations of the Organisation in accordance with international standards would therefore mean that a staff member has the right to work under the terms and conditions he agreed to and is entitled to just conditions of work and to *protection against unfair dealings in the course of his employment*.

61. According to the case of judgment 1189 of the former United Nations Administrative Tribunal ("former UN Administrative Tribunal"), a failure to take '*appropriate action where harassment is established*, can amount to an

administrative decision of the type giving rise to a right to appeal…' (Emphasis added). The Tribunal in that case held that it was unfair to allow review by the then Joint Appeal Board (JAB) but then to refuse to implement findings on a technicality (Para V). This Tribunal finds that the Administration was under a duty to afford the Applicant a remedy in response to the findings of harassment.

62. The 'right to an effective remedy' is well documented in international human rights instruments. According to Article 2(3)(a) of the International Covenant on Civil and Political Rights, 'any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity' (emphasis added). Article 13 of the European Convention on Human Rights uses similar language: '[*e*]veryone whose rights and freedoms as set forth in this Convention are violated *shall have an effective remedy*' (emphasis added). Under Article 25 of the American Convention on Human Rights 'Everyone has the right to *simple and prompt recourse*, or any other effective recourse, to a competent court or tribunal for *protection* against acts that violate his fundamental rights.'(Emphasis added). Thus, the notion that where there is breach of a right a remedy must ensue is axiomatic.

63. Section 4 of SGB/2008/5 details the preventive measures to be utilized. It is striking however that the bulletin, while far-reaching in some aspects, does not specify the "effective remedies" to be employed when prevention fails.

64. To determine what an "effective remedy" is, the Tribunal turned to Black's Law Dictionary[7], which defined "remedy" as follows:

> […] anything a court can do for a litigant who has been wronged or is about to be wronged. The two most common remedies are judgments that plaintiffs are entitled to collect sums of money from defendants and orders to defendants to refrain from their wrongful conduct or to undo its consequences. The court decides whether the litigant has been wronged under the substantive law; it conducts its inquiry in accordance with the procedural law […].

[7] Bryan A. Garner, *Black's Law Dictionary* (West Publishing Co., 2009). *Black's* definition in turn relies on a definition contained in: Douglas Laycock, *Modern American Remedies 1* (3d ed. 2002).

65. Thus, the breadth of possible remedies that may be granted includes, but is not limited to monetary compensation, rescission and injunctive or protective measures.

Whether the remedies identified above were provided to the Applicant in light of findings and conclusions of the Investigation Panel

66. The Tribunal will review the response of the Administration to determine whether they have sufficiently remedied the wrongs suffered by the Applicant.

67. The judgment thus far has highlighted the fact that the Applicant has been proven to have been subjected to a 'wrong' in particular, harassment. This fact was established by the Investigation Panel, which concluded that there is "ample evidence to substantiate the accusations of – *inter alia* – harassment, abuse of authority, unfair treatment and violation of privacy", and later accepted by both OHRM and MEU.

68. The remedies afforded to the Applicant under the Administrative decision provided by OHRM included a promise of 'administrative action' and 'thanks' for his efforts. Was the response of Ms. Pollard 'thanking' the Applicant for his efforts an "effective remedy"? The Tribunal does not consider these remedies adequate.

69. Additionally, the MEU offered compensation of three months net base salary for inordinate delays, and offered its report as formal confirmation that Mr. Djohglaf's allegations concerning the Applicant lacked merit. The Tribunal does not consider this 'relief' to be adequate either because it was clearly related to the delay in reviewing and acting on the Applicant's complaints. The compensation given was not in relation to the determination of harassment made by the Investigation Panel with respect to the substantive claims raised by the Applicant.

70. In light of the foregoing, the Tribunal concludes that the Respondent failed to provide the Applicant with the requisite remedies (i.e. monetary compensation, rescission or injunctive or protective measures) in light of the findings and conclusions of the Investigation Panel.

If the requisite remedies were not provided by Administration, what remedy should the Tribunal provide?

71. The Tribunal 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 (*Fröhler* 2011-UNAT-141, *Appellant* 2011-UNAT-143, *Kaddoura* 2011-UNAT-151, Abubakr UNDT/2011/219).

72. In the case of *Haile*[8], the former UN Administrative Tribunal concluded that the Applicant had endured harassment from her former supervisor and that this merited compensation. After considering all the factors in the case (i.e. the absence of damage to the Applicant's career, her decision to retire instead of accepting a reassignment, her questionable conduct, etc.), the Tribunal granted the Applicant USD10,000 as compensation.

73. In *Mink*[9], the former UN Administrative Tribunal addressed the issue of whether the Administration investigated the Applicant's allegations of sexual harassment fairly, in good faith, and in a timely and effective manner. The former UN Administrative Tribunal held, *inter alia*, that while the Administration took a number of steps to address the Applicant's complaint, they did not take the necessary measures to contain the problem or its serious negative impact on the two staff members involved as well as the work of the Department. Thus, the Applicant was "entitled to appropriate compensation for denial of fair treatment and for the suffering she endured […]". The Respondent was ordered to pay the Applicant compensation of six months' net base salary.

74. In *Applicant* UNDT/2010/148, the Tribunal canvassed the Administration's 'failure to properly and timeously address the applicant's complaint, in particular, 'to consider the Applicant's complaint against his supervisors'. The Tribunal held that:

> This was not simply an issue of lack of due diligence but also of failure by the Administration to follow its own rules and

[8] Judgment No. 1194 (2004).
[9] Judgment No. 1043 (2002).

> regulations and to ensure protection of the values and principles concerning equal rights and protection against discrimination, enshrined in the Charter (see art. 1.3) and several international instruments…When basic fundamental rights are at stake, a failure to afford *adequate consideration and protection* may be an aggravating, but not a punitive, factor. (Emphasis added)

75. The Tribunal took into account the passage of time in progression of the case to hold that the harm done to the Applicant justified a 'commensurate award'. The Tribunal held that the appropriate compensation for the failure to consider the Applicant's complaint and for the emotional distress he suffered was USD40,000.[10]

76. In light of the foregoing and as a consequence of the Applicant's separation from service, the only effective remedy left for the Tribunal to grant is monetary compensation for the breach of rights he has suffered.

Conclusion

77. The Tribunal concludes that the response of the Respondent thus far has been inadequate and inappropriate in light of the Investigation Panel's conclusion that the Applicant had been subjected to harassment, when said behavior is clearly in contravention of the core values set out in the Staff regulations and Rules of the Organization.

78. Given that the Applicant has been separated from service on 26 February 2008, none of the preventive measures set out in sections 4 or 6.5 of SGB/2008/5 are viable.

79. Accordingly, the Tribunal concludes that the only "effective" and viable remedy that may be awarded under the circumstances of this case is monetary compensation.

[10] This was subsequently upheld by the Appeals Tribunal in its *Appellant* 2011-UNAT-143.

Judgment

80. In light of the foregoing, the Tribunal orders the Respondent to pay the Applicant USD25,000 as compensation for the violation of his right to be free from harassment at the workplace.

81. This sum shall be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

82. All other pleas are rejected.

Signed

Judge Vinod Boolell

Dated this 20th day of February 2013

Entered in the Register on this 20th day of February 2013

Signed

Jean-Pelé Fomété, Registrar, Nairobi