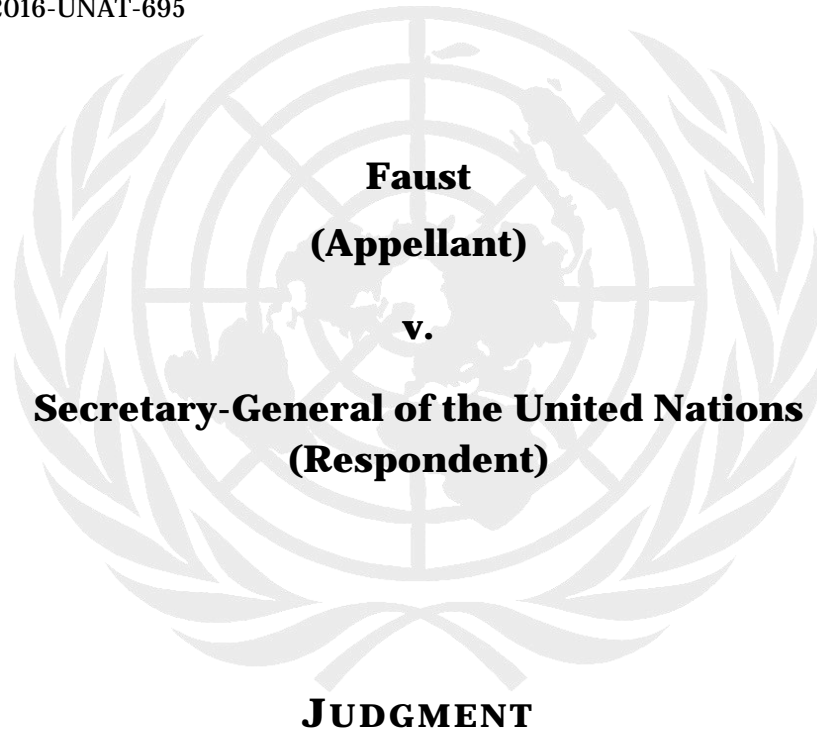




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2016-UNAT-695



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Before:	Judge Martha Halfeld, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2016-925
Date:	28 October 2016
Registrar:	Weicheng Lin

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Counsel for Ms. Faust:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Christin Faust against Summary Judgment No. UNDT/2016/018, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 10 March 2016, in the case of *Faust v. Secretary-General of the United Nations*. Ms. Faust filed her appeal on 9 May 2016, and the Secretary-General filed his answer to the appeal on 30 June 2016.

**Facts and Procedure**

2. The Dispute Tribunal found Ms. Faust's application not receivable on the ground that she did not request management evaluation of the contested decision.

3. The following facts are taken from the UNDT Judgment:<sup>1</sup>

**Introduction**

... By application filed on 3 March 2016, the Applicant, a former staff member of the United Nations Framework Convention on Climate Change ("UNFCCC"), contests the 4 December 2015 decision of the Executive Secretary, UNFCCC, to take no further action, after investigation, on her complaint for prohibited conduct under [Secretary-General's Bulletin] ST/SGB/2008/5 (Prohibition of discrimination, harassment including sexual harassment, and abuse of authority) and, as a result, to close the case.

**Facts**

... On 18 January 2015, the Applicant requested management evaluation, concurrently to the Management Evaluation Unit ("MEU") and to the Executive Secretary, UNFCCC, of *inter alia* "the conduct of [her] supervisors in [the Sustainable Development Mechanisms programme]".

... The Applicant's complaint was pursued in accordance with UNFCCC Secretariat Bulletin B/2011/1 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority and Disciplinary measures and procedures), which implements the provisions of ST/SGB/2008/5 at the UNFCCC Secretariat.

... By letter dated 5 March 2015, the Executive Secretary, UNFCCC, informed the Applicant about the establishment of an investigation panel to conduct a formal fact-finding investigation of her complaint.

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<sup>1</sup> Impugned Judgment, paras. 1-10.

... By email dated 9 September 2015 to the Executive Secretary, UNFCCC, the Applicant, noting that the investigation panel had postponed a second round of interviews and would not meet the 30 September 2015 deadline to submit its report, expressed her disappointment with the time taken to complete the investigation into her complaint. Additionally, the Applicant [drew] the Executive Secretary's attention to the fact that "the 60-day deadline for filing [her] submission on the matter of harassment and abuse of authority to the MEU began on 13 August 2015".

... By email of 14 September 2015 to the Applicant, the Executive Secretary, UNFCCC, replied that after consultation with the investigation panel members, based in Geneva, she was resetting "the deadline for submission by the investigators of the Panel report from 30.09.2015 to 30.10.2015", and that she would inform the Applicant of "the outcome of the Panel's report as soon as it is available".

... On 11 October 2015, the Applicant addressed a request for management evaluation to the MEU "on the basis of an 'implied' decision that no prohibited conduct took place", and asked the MEU to advise her whether:

a. "[T]o wait for the outcome of the investigation" and then "proceed to MEU, should the outcome/decision taken by the [Executive Secretary] not be an acceptable decision"; or

b. "[T]o proceed with the management evaluation, based on the 'implied' decision ... that no prohibited conduct took place".

... By letter dated 26 October 2015, the MEU replied to the Applicant that... "because [her] complaint of harassment and abuse of authority [was] still under consideration within the appropriate processes of the Organization, no final decision ... has been made", and that "[c]onsequently ... [her] request for management evaluation [was] premature". Also, the MEU noted that its reply was "without prejudice to [the Applicant's] right to request management evaluation should [she] wish to challenge a final decision in the matter".

... By letter dated 4 December 2015, which the Applicant alleges to have received on 5 December 2015, the Executive Secretary, UNFCCC, communicated her decision on the Applicant's complaint, namely that the record indicated that the conduct complained of did not violate the provisions of ST/SGB/2008/5, and that she therefore would close the case.

... On 3 March 2016, the Applicant filed [her] ... application ...[with the UNDT].

4. In its Summary Judgment issued on 10 March 2016, the Dispute Tribunal found the application non-receivable. The Dispute Tribunal decided that, as the issue of receivability was a matter of law, it was not necessary to serve the application on the Respondent and, furthermore, it was appropriate to decide on the application by summary judgment under Article 9 of the Dispute Tribunal Rules of Procedure.

5. The Dispute Tribunal noted that the requirement to request management evaluation was a mandatory first step in the appeals process, and rejected Ms. Faust's argument that a request for management evaluation was not necessary because its main goal was met through other means.

6. The Dispute Tribunal also rejected Ms. Faust's submission that she was not required to request management evaluation as the contested administrative decision was taken pursuant to advice from a technical body. The Dispute Tribunal found that a fact-finding panel established to investigate a complaint of prohibited conduct under ST/SGB/2008/5 was not a technical body for the purposes of Staff Rule 11.2(b), and thus the exception to the requirement to submit a request for management evaluation contained in that Staff Rule did not apply.

7. On 9 May 2016, Ms. Faust filed her appeal and, on 30 June 2016, the Secretary-General filed his answer to the appeal.

8. On 29 July 2016, Ms. Faust filed a motion requesting leave to file an additional pleading in response to the answer. On 8 August 2016, the Secretary-General filed his observations on the motion.

### **Submissions**

#### **Ms. Faust's Appeal**

9. Ms. Faust contends that the Dispute Tribunal erred in fact and law in finding that her case did not fall within the exception under Staff Rule 11.2(b) to the requirement to submit a request for management evaluation of the contested decision. The Dispute Tribunal erred by not finding that the fact-finding panel which was appointed to investigate her complaint of prohibited conduct constituted a technical body for the purposes of Staff Rule 11.2(b).

10. In the absence of a designation by the Secretary-General pursuant to Staff Rule 11.2(b) of the bodies that are to be considered as technical bodies, the ambiguity in the Staff Rules should be construed in her favour. The fact-finding panel was comprised of two individuals who had received specialized training in conducting investigations. They should be considered as experts and, therefore, the fact-finding panel constitutes a technical

body. The fact-finding panel provided advice upon which the Executive Secretary, UNFCCC, relied in making her decision on whether the complaint of prohibited conduct was substantiated.

11. The Dispute Tribunal erred by applying the Appeals Tribunal jurisprudence in *Gehr*.<sup>2</sup> The jurisprudence did not apply as the issue in that case was whether a rebuttal panel in the performance management process was a technical body. The Dispute Tribunal also erred by relying upon the Dispute Tribunal jurisprudence in *Gallo*, which found that the decision to accept the report of a fact-finding panel appointed to investigate the complaint of prohibited conduct did not fall under the exception in Staff Rule 11.2(b).<sup>3</sup>

12. Ms. Faust argues that the MEU cannot objectively and reasonably review the UNFCCC Executive Secretary's decision and the issue of whether the fact-finding panel acted in a fair and impartial manner. Also, the MEU's review of the decision would be an unnecessary additional administrative procedure, and the MEU cannot grant her compensation. Furthermore, to demand from victims of harassment to submit a request for management evaluation is discriminatory as it requires this category of staff members to undergo a "lengthier two-tier review process" of two complaints and two evaluations, before they may invoke their right to seek judicial review.

13. Finally, Ms. Faust contends that the Dispute Tribunal erred on a question of procedure by issuing a summary judgment. The Dispute Tribunal ought to have ruled on receivability after receiving the Respondent's reply and her comments on the reply.

14. Ms. Faust requests the Appeals Tribunal to vacate the UNDT Judgment and remand the case for adjudication on the merits.

### **The Secretary-General's Answer**

15. The Secretary-General submits that the Dispute Tribunal correctly applied the relevant jurisprudence. In the absence of a designation by the Secretary-General that fact-finding investigation panels established under ST/SGB/2008/5 constitute technical bodies, the Dispute Tribunal was required to determine whether the Secretary-General intended for such bodies to be considered technical bodies. Further, the Appeals Tribunal in *Masykhanova* recognized that fact-finding panels do not fall within the category of technical

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<sup>2</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-479.

<sup>3</sup> *Gallo v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/036.

bodies.<sup>4</sup> Ms. Faust has failed to establish that the Dispute Tribunal made any error in applying the jurisprudence of the Appeals Tribunal.

16. Contrary to Ms. Faust's submissions, the jurisprudence does not distinguish between "harassment decisions" and other categories of administrative decisions for the purposes of the requirement to submit a request for management evaluation established by Staff Rule 11.2. Ms. Faust unilaterally decided not to comply with the mandatory requirement to submit a timely request for management evaluation.

17. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

### **Ms. Faust's Motion and Secretary-General's Observations on the Motion**

18. Ms. Faust requests leave from the Appeals Tribunal to file a response to the answer in order to address the Secretary-General's "incorrect legal interpretations" and "false presentation on the case of the facts". The Secretary-General argues that the motion should be denied as Ms. Faust has not demonstrated that there are exceptional circumstances justifying the filing of additional pleadings.

### **Considerations**

*Preliminary issue: Ms. Faust's motion for leave to file additional pleadings*

19. Ms. Faust filed a motion seeking leave to file additional submissions.

20. In *Onifade*,<sup>5</sup> we have set forth the following principles regarding requests by parties for leave to file additional pleadings:

... Articles 8 and 9 of the Appeals Tribunal Rules of Procedure (Rules) respectively provide for an appellant to submit an appeal form accompanied by a brief, and for a respondent to submit an answer accompanied by a brief. However, under Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1, we may grant leave to file additional pleadings after the filing of the answer if there are exceptional circumstances for doing so. We find that there are no such exceptional circumstances, as Mr. Onifade merely expresses his disagreement with the statements made by the

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<sup>4</sup> *Masyllkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18.

<sup>5</sup> *Onifade v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-668, para. 26.

Secretary-General in his answer, and seeks to reiterate or supplement the arguments put forward in his appeal.

21. An example of a case where leave was granted is *Roberts*,<sup>6</sup> in which the Secretary-General sought leave to respond to the answer, which asserted that the appeal was moot.

... In the present matter, the Appeals Tribunal is satisfied that the Secretary-General has demonstrated exceptional circumstances for filing an additional submission in that he seeks to respond to new facts and evidence that were not part of the UNDT record. The Secretary-General's motion should be granted.

22. In the present case, we find no exceptional circumstances justifying the filing of an additional submission. Ms. Faust merely reiterates the arguments she made in her appeal and contests the Secretary-General's interpretation of certain Appeals Tribunal cases. The motion is thus rejected.

*Alleged error of procedure in UNDT's proceeding by way of summary judgment*

23. In *Kazazi*,<sup>7</sup> the Appeals Tribunal held as follows with regard to the issuance of summary judgments by the Dispute Tribunal:

... Regarding the Dispute Tribunal's decision to proceed by way of summary judgment, summary judgment is an appropriate tool to deal with issues of receivability in the United Nations internal system of administration of justice. Article 9 of the UNDT's Rules of Procedure provides:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

... The only issue to be addressed by the UNDT was that of the application's receivability, which, contrary to the contention of Mr. Kazazi, is a matter of law and not a matter of fact. As such, in assessing its own competence, the Dispute Tribunal can choose to proceed by way of summary judgement without taking any argument or evidence from the parties because the Dispute Tribunal Statute prevents the UNDT from receiving a case which is not receivable.

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<sup>6</sup> *Roberts v. Secretary-General of the United Nations*, Order No. 233 (2015), para. 4.

<sup>7</sup> *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, paras. 41-43 (internal citations omitted).

... In Mr. Kazazi's case, the application was not receivable in the absence of a timely request for management evaluation. Accordingly, the UNDT correctly applied Article 9 of its Rules of Procedure when it elected to issue a summary judgment.

24. We hereby reaffirm this jurisprudence.

25. In the present case, it is uncontested that Ms. Faust did not request management evaluation of the administrative decision taken by the UNFCCC Executive Secretary on 4 December 2015. It is also not disputed that the Secretary-General has not made a designation to the effect that investigation panels established under ST/SGB/2008/5 qualify as “technical bodies” for the purposes of Staff Rule 11.2(b).

26. Since there is no dispute about the material facts and the question of receivability is a matter of law, the issuance of the summary judgment by the Dispute Tribunal was appropriate.<sup>8</sup>

27. It results from the foregoing that Ms. Faust has not met her burden of proving that the UNDT made an error of procedure when it decided to issue a summary judgment.

*Equivalence between a “technical body” and an “investigation panel” for the purposes of applying the exception to the requirement to request a management evaluation set forth in Staff Rule 11.2(b). Is there an error of law?*

28. The UNDT correctly identified the main issue in the case as whether, as a matter of law, Ms. Faust's application was receivable *ratione materiae*.

29. Staff Rule 11.2 provides as follows:<sup>9</sup>

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) *A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a*

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<sup>8</sup> *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, paras. 41-42 citing *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, paras. 46-47 and cites therein. See also *Monarawila v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-694, para. 29.

<sup>9</sup> Emphasis added.



disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process *is not required to request a management evaluation.*

30. There was no evidence before the Dispute Tribunal (nor before this Tribunal) that the Secretary-General had made a determination pursuant to Staff Rule 11.2(b) designating investigation panels (facting-finding panels) established under ST/SGB/2008/5 as “technical bodies”.

31. The plain wording of the Staff Rule cited above makes it clear that the general rule that a request for management evaluation must be submitted prior to seeking judicial review of an administrative decision is only subject to two exceptions: i) when the administrative decision imposes a disciplinary or non-disciplinary measure following the completion of a disciplinary process; and ii) when the administrative decision is taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General.

32. As for all exceptions, these situations must be interpreted restrictively. The provisions may not be interpreted broadly such as to conclude, for example, that any technical body could be equated to a “technical bod[y], as determined by the Secretary-General” within the meaning of Staff Rule 11.2(b). Similarly, not every formal panel can be likened to a “technical body”. Therefore, an analogy cannot be drawn to determine whether the investigation panel in this case constitutes a “technical body”.<sup>10</sup>

33. Ms. Faust argues that she was exempt from the requirement of submitting a request for management evaluation as a prerequisite to invoking the jurisdiction of the UNDT. She claims that the determination by the Secretary-General under Staff Rule 11.2(b) is irrelevant. She also contends that in the absence of such determination by the Secretary-General, the remaining “ambiguity” should be assumed by the Organization.

34. Ms. Faust’s reliance on these arguments is misconceived. This is a case where we apply the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish.<sup>11</sup> The

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<sup>10</sup> See, generally, *Ardisson v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-136, para. 29; *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, paras. 29-30.

<sup>11</sup> *Benser v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-696, para. 44.

absence of a determination by the Secretary-General designating investigation panels as technical bodies does not create an ambiguity in the Staff Rule itself.

35. Section 5.14 of ST/SGB/2008/5 provides as follows:<sup>12</sup>

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

36. Contrary to Ms. Faust's contention, an investigation panel does not fulfill all the requirements of a technical body and is more like a rebuttal panel, which, in accordance with the Appeals Tribunal's jurisprudence in *Gehr*, does not qualify as a "technical body".<sup>13</sup> First, both are fact-finding panels, designated to assess respectively "harassment, including sexual, and abuse of authority" and "performance", and they both are constituted by members with "specific training in investigation" or "adequate knowledge and experience required to review the appraisal and its rating".<sup>14</sup>

37. Second, although composed of individuals trained in investigating allegations of prohibited conduct, an investigation panel has, as a general rule, specific tasks and a limited and temporary scope of activities. This is in contrast to a "technical body", which has a more durable and broader mandate and is generally composed of professionalized members in a specific matter, not just individuals trained in investigations.

38. Further, in the case of *Masykkanova*, the Appeals Tribunal opined that a fact-finding panel established under ST/SGB/2008/5 does not fall into the category of technical bodies under Staff Rule 11.2(b).<sup>15</sup> The Tribunal stated that "once the investigation has been concluded, its outcome and administrative consequences, as well as any related acts or

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<sup>12</sup> Emphasis added.

<sup>13</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-479, para. 26.

<sup>14</sup> See with regard to rebuttal Panels e.g. Section 14.1 of Administrative Instruction ST/AI/2010/5 (Performance Management and Development System).

<sup>15</sup> *Masykkanova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-412, para. 18 (emphasis added).

omissions, can be challenged in their own right *via management evaluation* and before the Dispute and Appeals Tribunals”.

39. Therefore, Ms. Faust erroneously relied on the interpretation of what is considered to be a “technical body” for the purposes of Staff Rule 11.2(b). Notwithstanding the important role of investigation panels, in the absence of a determination by the Secretary-General that investigation panels established under ST/SGB/2008/5 are technical bodies, the exemption to the requirement of management evaluation under Staff Rule 11.2(b) does not apply.

*Exemption from mandatory management evaluation on other grounds*

40. Ms. Faust’s argument that the MEU will always decide to uphold the administrative decision (and that the management evaluation is thus superfluous) does not persuade this Tribunal, since the essence of the management evaluation process is the assessment of the impugned decision. It is in the interest of the Organization to give special regard to this first step, since it gives the Administration a chance to correct itself or provide acceptable remedies in cases where there has been flawed decision-making, and to reduce the number of cases that need to proceed to formal litigation.<sup>16</sup> Neither the Dispute Tribunal nor the Appeals Tribunal have the jurisdiction to waive deadlines for the filing of requests for management evaluation or to grant any exceptions to it as it is a mandatory requirement pursuant to the Staff Rules.<sup>17</sup>

41. In this respect, the Appeals Tribunal upholds the statement of the Dispute Tribunal that, in the context of the judicial proceedings before the Dispute Tribunal, Ms. Faust may have had the right to the disclosure of the investigation report in order to verify that all the rules were correctly applied.<sup>18</sup> However, this does not supersede the mandatory management evaluation requirement prior to judicial review.

42. Ms. Faust further asserts that she was exempt from requesting management evaluation and could file an application directly with the UNDT because even if the MEU reversed the UNFCCC Executive Secretary’s decision that there was no evidence of prohibited

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<sup>16</sup> *Nagayoshi v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2015-UNAT-498, para. 36, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-381, para. 37.

<sup>17</sup> *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402, para. 23 and citations therein.

<sup>18</sup> Impugned Judgment, para. 22.

conduct, neither the UNFCCC Executive Secretary nor the MEU could award financial damages to her, which means that she would still need to proceed to the UNDT. She also submits that offering compensation as part of mediation or an informal settlement would not be appropriate in cases of harassment, including sexual harassment, because it would be a matter of “hush money” to silence the victim. The primary goal of the requirement for management evaluation to avoid unnecessary litigation before the UNDT could thus not be achieved since “the main relief sought in harassment cases [as opposed to ‘contractual cases’] will be of financial nature” which only the UNDT can satisfy.

43. This assertion is erroneous because it should be borne in mind that the MEU could decide to uphold the administrative decision, or if it does not uphold the administrative decision, it could recommend payment of financial compensation, as has happened in a number of cases. For instance, in 2015, the Organization paid compensation in accordance with the recommendations by the MEU in 10 different cases and for diverse reasons, as shown in the report of the Secretary-General on the administration of justice at the United Nations.<sup>19</sup>

44. Besides, the MEU could also suggest an informal resolution such as mediation, which does not in any way involve an award of “hush money”, but has rather the objective of reaching a satisfying solution for both parties, provided that they are amenable to the efforts of an informal resolution of the alleged grievance.

45. In that regard, ST/SGB/2008/5 is a reflection of the general rule that informal resolution is suitable in many cases, as it offers an “opportunity to resolve a complaint or grievance in a non-threatening and non-contentious manner” (Section 5.5). To think otherwise could affect the credibility of the informal resolution system, which is at the core of the internal justice system, as established by the General Assembly.

46. In the present case, the Appeals Tribunal sees no reason to depart from the general rule that judicial review is the last stage of the dispute resolution system, particularly considering that Section 5.20 of ST/SGB/2008/5 unambiguously refers to Chapter XI of the Staff Rules, to make it clear that, when an aggrieved individual or alleged offender is not satisfied with the outcome of the procedure, he or she should proceed according to the general rules. That is to say that he or she is “encouraged to attempt to have the matter resolved

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<sup>19</sup> Report of the Secretary-General on the Administration of justice at the United Nations, A/71/164, dated 18 July 2016, para. 23.

informally” (Rule 11.1(a)), as a first step; if this phase is unsuccessful, he or she shall “submit to the Secretary-General in writing a request for a management evaluation of the administrative decision” (Rule 11.2(a)) and only then file an application to contest the decision before the UNDT (Rule 11.4).

47. Moreover, Ms. Faust’s reliance on the prohibition of discrimination against victims of harassment is not warranted. In this regard, the gravamen of her argument is that the legal procedure discriminates against victims of harassment, when compared to complaints of other staff members. We do not find any merit in the appeal on these grounds, not only because the Tribunal has not been vested with the power to review general rules or regulations, including procedural ones, such as those set forth in ST/SGB/2008/5, but also because the appeal itself is based on the provisions of ST/SGB/2008/5.

48. Besides, the Appeals Tribunal understands that the special procedural provisions adopted by ST/SGB/2008/5 are purposely conceived to “treat the situation with sensitivity and confidentiality” (Section 5.8), in order to achieve the main objective clearly stated at the beginning of ST/SGB/2008/5, which advocates dignified and respectful treatment of both the aggrieved individual and the alleged offender.

49. The Organization attaches importance to addressing complaints of prohibited conduct, as evidenced by the detailed procedures set out in ST/SGB/2008/5. Under the formal procedures, if the complaint appears to have been made in good faith and there are sufficient grounds to warrant a formal fact-finding investigation, the responsible official shall promptly appoint an investigation panel, as was done in the present case. This investigation takes time and must respect certain special rules, as indicated in ST/SGB/2008/5. This is not a matter of discrimination by the rules, but rather of equity, that is to say that the Organization shall treat different issues differently while respecting the principle of proportionality.

50. Incidentally, the Appeals Tribunal recalls that Ms. Faust herself was apparently persuaded that management evaluation was mandatory in this case, since she requested it in October 2015, alleging that there was an “implied decision” by the UNFCCC Executive Secretary that no prohibited conduct had taken place. The MEU’s response at that time was that her request was premature, because her complaint was still under consideration by the UNFCCC Executive Secretary. This confirms that management evaluation should have

been requested by Ms. Faust before she filed her application to the UNDT contesting the UNFCCC Executive Secretary's decision of 4 December 2015 that there was no evidence of prohibited conduct and that, therefore, she would close the case. In other words, Ms. Faust's submission in this case contradicts her own prior behaviour.

51. In light of the foregoing, there is no conceivable way that the Appeals Tribunal can disagree with the decision of the UNDT. The appeal rests upon misguided grounds and the Appellant has failed to demonstrate that the UNDT committed an error of law or procedure such as to affect the decision of the case.

### **Judgment**

52. The appeal is dismissed and Judgment No. UNDT/2016/018 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of October 2016 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Knierim

Entered in the Register on this 20<sup>th</sup> day of December 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar