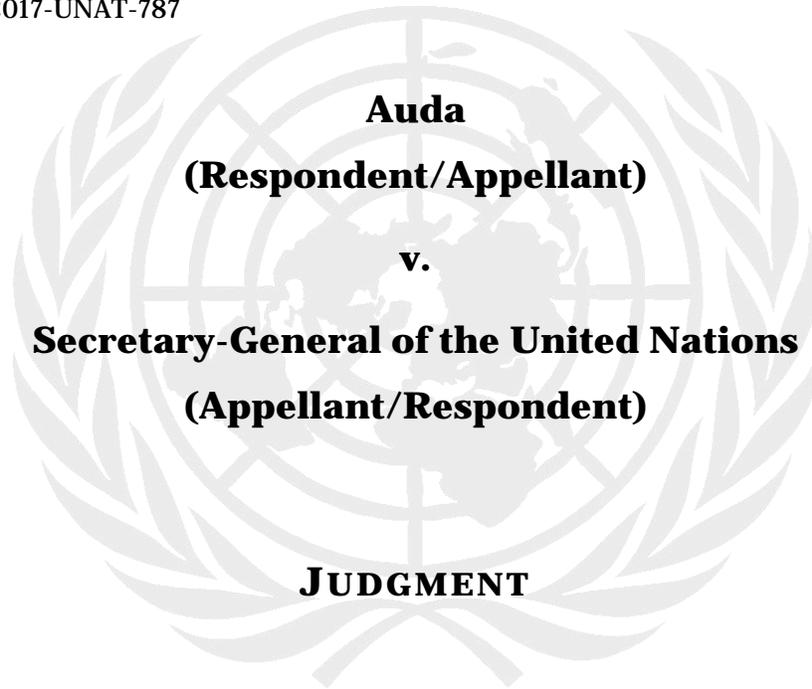




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2017-UNAT-787



**Auda  
(Respondent/Appellant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Dimitrios Raikos, Presiding  
Judge Richard Lussick  
Judge Sabine Knierim

**Case Nos.:** 2017-1069 & 2017-1071

**Date:** 27 October 2017

**Registrar:** Weicheng Lin

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**Counsel for Mr. Auda:** Self-represented

**Counsel for Secretary-General:** Wambui Mwangi

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York issued Judgment No. UNDT/2017/007 in the case of *Auda v. Secretary-General of the United Nations* on 1 February 2017. On 3 April 2017, the Secretary-General filed an appeal, which was registered as Case No. UNAT-2017-1069, and Mr. Hesham A. Auda filed an answer thereto on 5 June 2017. Also on 3 April 2017, Mr. Auda filed a separate appeal against this Judgment, which was registered as Case No. UNAT-2017-1071, to which the Secretary-General filed an answer on 5 June 2017. On 21 July 2017, the Appeals Tribunal issued Order No. 292 (2017), pursuant to which it consolidated both cases.

**Facts and Procedure**

2. At the material time, Mr. Auda was a Principal Officer at the D-1 level with the Department for General Assembly and Conference Management (DGACM). The facts as found by the Dispute Tribunal are as follows:<sup>1</sup>

... The Applicant submitted a complaint by email dated 19 April 2012 to Mr. Shaaban [Muhammad Shaaban, the then Under-Secretary-General, DGACM (USG/DGACM)], alleging that Mr. [Franz] Baumann [then Assistant Secretary-General, DGACM (ASG/DGACM)] had engaged in prohibited conduct under [Secretary-General's Bulletin] ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harrassment, and abuse of authority)]. Specifically, the Applicant submitted the following allegations:

- a. In a meeting held on 29 September 2011, Mr. Baumann stated that a comment made by the Applicant was "ridiculous";
- b. In an email dated 22 November 2011, Mr. Baumann referred to the Applicant as "difficult";
- c. Mr. Baumann sent an email to the Applicant on 15 April 2012, copying Mr. Shaaban and other staff members, referring to the Applicant's alleged "contrariness," "divisiveness" and "deceptiveness";
- d. Mr. Baumann acted in bad faith and with the intent to obscure the status and official functions of the Applicant by instructing or directing that his name and title be omitted from a DGACM organizational chart; and
- e. Mr. Baumann referred to other staff members as being involved in a "racket" in relation to alleged misuse of overtime procedures.

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<sup>1</sup> Impugned Judgment, paras. 1 and 5-24.

... On 27 April 2012, Mr. Shaaban as the then responsible officer, assembled a [fact-finding panel (FFP)] (“first FFP”) to investigate the Applicant’s complaint.

... On or about 13 July 2012, Mr. Shaaban departed DGACM and, two weeks later, the then Secretary-General appointed Mr. Jean-Jacques Graisse as Acting Head of DGACM.

... On 25 March 2013, the then Secretary-General appointed Mr. [Tegegnework] Gettu as the new USG/DGACM. Mr. Gettu accordingly assumed the role of the responsible officer overseeing the Applicant’s complaint.

... By a series of emails spanning approximately three years, from 2012 to 2014, the Applicant sought updates about the status of the investigation from DGACM and other senior officials. Almost all of the requests for updates and information remained unanswered.

... On 12 September 2014, the Secretary-General announced the transfer of Mr. Baumann to another department, away from DGACM.

... On 30 September 2014, following a query from Mr. IS, Chief of the Office of the USG/DGACM, Ms. MN, lead investigator of the first FFP, advised that the FFP would not be in a position to complete their investigation report. On 11 November 2014, by way of a memorandum to Mr. Gettu, Mr. GK, the second investigator of the first FFP, confirmed Ms. MN’s statement that the report could not be completed.

... By email dated 18 December 2014, Mr. IS informed the Applicant that the investigation of the first FFP “could not be concluded due to the unavailability of one of the investigators due to a variety of personal and professional reasons.” The email stated that “this circumstance was not confirmed to DGACM’s attention until November 2014.” The Applicant was further informed that the panel had been unable to write the report or to submit to DGACM any documentation reflecting the interviews they conducted. The email concluded by informing the Applicant that, if he wished to pursue his complaint “despite the time that elapsed,” a new panel would need to be convened, which could then contact the previous panel members to “seek any relevant information directly.” The Applicant was asked to confirm whether he wished to pursue the complaint.

... On 13 March 2015, Ms. AL, the Special Assistant to the USG/DGACM, emailed the Applicant informing him that, because the previously appointed investigators were “unable to conclude the investigation for reasons unrelated to the case,” the USG/DGACM had appointed a second FFP to continue the investigation into the allegations of prohibited conduct. The Special Assistant informed the Applicant that two new investigators, Ms. MS and Mr. EC, would be in contact with the Applicant to arrange a meeting.

... On 16 March 2015, the Special Assistant emailed the Applicant informing him that Mr. EC had recused himself in view of a conflict of interest and that an alternate investigator was being sought.

... On 27 March 2015, the Special Assistant emailed the Applicant to inform him that Mr. FS was appointed to the second FFP as an investigator.

... On 16 April 2015, Ms. MS and Mr. FS emailed the Applicant a memorandum informing him of their appointment taking over the investigation and inviting him to an interview.

... The Applicant responded to the email on 17 April 2015, requesting the terms of reference of the second FFP as signed by the Head of Department and stating:

This weekend will mark the third anniversary of this investigation... It is sad that the previous investigation panel has willingly decided and accordingly acted to delay[,] withhold, and not submit its report on the investigation and the records of the investigation. It is imperative that the terms of reference include a clear and explicit statement that the new panel has obtained and now holds all the records compiled by the previous panel, including, but not limited to, all the emails and correspondences exchanged, hand writings, and drafts.

... By email of 18 April 2015, Ms. MS and Mr. FS responded to the Applicant, attaching an email they received from the Special Assistant, which they believed set forth their terms of reference as “tasked by Mr. Gettu to continue the investigation and determine the facts of the complaint of harassment, and to prepare a detailed report addressed to Mr. Gettu.”

... On 20 April 2015, the Applicant sought an assurance that the second FFP had “already obtained and now holds all the records compiled by the previous panel.”

... On 20 April 2015, Ms. MS and Mr. FS emailed the Applicant, stating “[p]lease be advised that the records from the former panel have been provided to us by [the Special Assistant]. It is our understanding that the records provided to us are complete, except for one witness statement [that of the Special Assistant].”

... On the same day, the Applicant replied that “pending confirmation of completeness of records and given a previously scheduled appointment,” he was unavailable to meet as proposed.

... On the same day, Ms. MS and Mr. FS emailed the Applicant stating that “it is true that one witness [Ms. AL, the Special Assistant] has informed us that she did appear before the panel and was not sure whether her statement is on file. This is a matter for the panel to verify and pursue and cannot be the reason for declining to appear as scheduled before us.”

... On 26 June 2015, the second FFP submitted their investigation report to Mr. Gettu.

... By letter dated 8 September 2015, Mr. Gettu informed the Applicant that he had read the report of the second FFP. He provided a summary of the findings and conclusions of the report pursuant to [Section] 5.18 of ST/SGB/2008/5. The conclusions of the second FFP and the subsequent conclusions of Mr. Gettu, based on the report, were communicated as follows:

*Conclusion*

The second panel concluded, after reviewing all the evidence, that the working relationship between yourself and Mr. Baumann was especially difficult following your elevation to the post of Chief, [Office of the USG and ASG], with a different reporting line to the USG/[DGACM].

On your specific complaint, the Panel observed that your complaint cannot be viewed in isolation. Mr. Baumann produced evidence of his own complaints to the USG/[DGACM] against your own conduct.

The second panel concluded that none of the incidents cited by themselves can be viewed as abusive and/or offensive and, viewed as a whole they still fall short of amounting to harassment. Thus there was no prohibited conduct under ST/SGB/2008/5.

Following a review of the investigation report and supporting documentation, I have concluded that the record indicated that Mr. Baumann's conduct in the context of your complaints does not violate the provisions of ST/SGB/2008/5, and as this falls under [S]ection 5.18(a) of ST/SGB/2008/5, I therefore consider the case closed.

3. On 20 November 2015, Mr. Auda filed an application with the UNDT, challenging the decision of the USG/DGACM, Mr. Gettu, to close the investigation into his complaint without taking any further action (contested decision).
4. On 31 December 2015, Mr. Auda separated from the Organization.
5. On 28 September 2016, the UNDT issued Order No. 226 (NY/2016) denying Mr. Auda's motion requesting, *inter alia*, that the UNDT find that the panel was improperly constituted and its investigation was conducted in a manner that violated ST/SGB/2008/5. The Order stated, *inter alia*, that a "reasoned decision would be issued in due course".

6. On 1 February 2017, the Dispute Tribunal issued Judgment No. UNDT/2017/007.<sup>2</sup> The Dispute Tribunal concluded that Mr. Gettu's decision—i.e., to close Mr. Auda's complaint without further action on the basis of the second FPP's conclusion that no prohibited conduct had taken place—was improper. The UNDT held that “a responsible official cannot make a proper determination and decision under ST/SGB/2008/5 on the basis of an investigation report (...) tainted by serious procedural breaches”.<sup>3</sup> In reaching its decision, the Dispute Tribunal found that the investigation had been flawed, because actions taken by the then Special Assistant to the USG/DGACM (Ms. AL) were “incompatible with her status as a witness in the investigation”<sup>4</sup> and that her “role in relation to the second FPP constituted a breach of procedural fairness owed to [Mr. Auda] under ST/SGB/2008/5”.<sup>5</sup> The Dispute Tribunal awarded Mr. Auda USD 5,000 as compensation for harm he had suffered “as a result of a breach of investigation-related procedures”<sup>6</sup> in connection with the second investigation into his complaint. In making its award, the UNDT referred to Mr. Auda's testimony regarding the harm suffered to his reputation and general well-being, as well as the timing and surrounding circumstances of the suspension of the first FPP and appointment of the second FPP. It also noted, *inter alia*, that the relief Mr. Auda requested (i.e., rescission of the decision and a referral for accountability) could not be implemented as Mr. Baumann was no longer employed by the Organization.

7. On 3 February 2017, Mr. Auda filed an application for interpretation of Judgment No. UNDT/2017/007, which the UNDT rejected on 31 March 2017 by Judgment No. UNDT/2017/022. It concluded that no interpretation was needed and that Mr. Auda essentially asked the UNDT to address a hypothetical scenario (i.e., Mr. Baumann's possible reemployment).

8. As noted above, both parties appeal Judgment No. UNDT/2017/007.

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<sup>2</sup> On the same day, the UNDT issued Judgment No. UNDT/2017/006 in a companion case, which was also appealed by both parties and has been disposed of by the Appeals Tribunal in Judgment No. 2017-UNAT-786.

<sup>3</sup> Impugned Judgment, para. 90.

<sup>4</sup> *Ibid.*, para. 71.

<sup>5</sup> *Ibid.*, para. 74.

<sup>6</sup> *Ibid.*, para. 99.

### **Submissions**

*Case No. 2017-1069*

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

9. The Secretary-General submits that the Dispute Tribunal erred in law and exceeded its jurisdiction when it found that the decision to close the case was improper and by substituting its own opinion for that of the Administration. The USG/DGACM's role was to determine whether prohibited conduct had occurred based on the facts identified in the report submitted by the second FPP, and his decision to close the case was procedurally proper and in accordance with the relevant legislative framework.

10. The UNDT did not establish that the USG/DGACM's decision to close the case based on the investigative report had been tainted by "error or illegality, [or was] arbitrary, abusive, discriminatory or absurd". The UNDT exceeded its limited scope of judicial review when it made its own assessment that the procedural errors (which had no influence on the substantive nature of the investigative report) should have prevented him from closing the case.

11. The UNDT erred by awarding Mr. Auda compensation for harm resulting from the procedural fairness breaches. Not only did Mr. Auda not request such relief but there is no legal basis for the award of moral damages: (i) neither of the procedural breaches identified by the UNDT affected the outcome of the investigation; (ii) the UNDT based its award on statements made that were neither sworn, affirmed nor made under a promise to tell the truth, in violation of Article 17 of the UNDT Rules of Procedure; and (iii) the UNDT awarded compensation in the absence of any evidence of harm. The award, thus, is unsubstantiated and amounts to punitive damages. The UNDT also erred by awarding compensation for delay by the second FPP which, if considered a *de novo* investigation, was completed within the timeline established by ST/SGB/2008/5. When considering the compensation awarded on the same day in Mr. Auda's companion case (Judgment No. UNDT/2017/006), the UNDT overly- and doubly-compensated him for the procedural irregularities in the investigation of his complaint. The UNDT erred by issuing two separate Judgments and awards in the consolidated proceedings.

12. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment in its entirety or, alternatively, reduce the amount of compensation awarded.

**Mr. Auda's Answer**

13. Mr. Auda submits that the Dispute Tribunal acted within its jurisdiction and competence and was correct in law by issuing separate Judgments following consolidated proceedings. They address different procedural violations in connection with separate FFPs that, while sharing a common background, do not have the same facts.

14. The Dispute Tribunal did not substitute its opinion for that of the USG/DGACM. The UNDT applied the correct standard of review and correctly determined that the circumstances of the case demonstrated that the contested decision was improper as it was based on an investigation process tainted by serious breaches of procedural fairness. The UNDT correctly assessed the role of Ms. AL and concluded her actions constituted a breach of procedural fairness. The Secretary-General's contentions that the procedural irregularities did not affect the substance of Mr. Auda's complaint and that the UNDT erred by not limiting its examination to whether Mr. Gettu had committed a procedural error in reaching his decision are without merit. Mr. Gettu was the responsible official under ST/SGB/2008/5, whose responsibility encompassed all phases of the investigation and actions of his subordinates.

15. The Dispute Tribunal did not overly-or doubly-compensate Mr. Auda. The two awards were made for distinct procedural violations by the different FFPs. The award of USD 5,000 in this case was made for the harm resulting from the procedural breaches by the second FFP and the decision to improperly close the investigation; it was not made for the overall delay in the investigation, irrespective of whether or not the second FFP carried out a *de novo* investigation.

16. Mr. Auda requests that the Appeals Tribunal reject the Secretary-General's appeal in its entirety, except the quantum of compensation against which Mr. Auda filed an appeal.

*Case No. 2017-1071*

**Mr. Auda's Appeal**

17. Mr. Auda submits that the UNDT erred when it held that it was impossible for it to order either rescission of the contested decision or a referral for accountability. Neither the rescission of the contested decision nor a referral for accountability implies or necessitates a fresh investigation. ST/SGB/2008/5 establishes both organizational and personal responsibility for acts of misconduct. It is conceivable that Mr. Baumann could be reemployed by the

United Nations; in that event, the basis for the UNDT's refusal to grant such relief would no longer be valid. The UNDT's exercise of discretion in this regard was unreasonable and infringed Mr. Auda's right to due process. It has *de facto* closed the investigation and, thus, exceeded its competence.

18. The UNDT erred by not ruling on the improper constitution of the second FFP and the outcome of its investigation. In so doing, it not only failed to follow its own Order No. 226 (NY/2016) but also left standing the flawed outcome of the improperly constituted second FFP.

19. The UNDT erred in assessing the full quantum of compensation. Its award does not take into account the failures to rescind the contested decision and to refer for accountability nor Mr. Auda's future harm resulting from the UNDT's having effectively closed the investigation in the event Mr. Baumann is reemployed by the United Nations.

20. Mr. Auda requests that the Appeals Tribunal rescind the decision to close the investigation, refer the case for accountability to the Office of Human Resources Management (OHRM) or, alternatively, "void the flawed investigation report of the improperly constituted second FFP" and order in-lieu compensation and/or specific performance.

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

21. The Secretary-General submits that Mr. Auda's appeal is not receivable. The UNDT found in his favour. Mr. Auda, who has failed to demonstrate how the Judgment has harmed him, is merely dissatisfied with the UNDT's decision; this is not a sufficient basis for an appeal.

22. Mr. Auda has also failed to demonstrate how the UNDT's discretion to order compensation was manifestly unreasonable. Contrary to Mr. Auda's assertions, the UNDT did not *de facto* close the case as it was already closed by the USG/DGACM; and, the UNDT issued a reasoned decision as to why it would not order rescission or a referral for accountability. Mr. Auda impermissibly attempts to appeal his rejected application for interpretation, by repeating the same hypothetical scenario of Mr. Baumann's possible reemployment.

23. The composition of the second FFP conformed to the criteria specified in ST/SGB/2008/5. Mr. Auda failed to provide any evidence to the contrary. It was unreasonable for Mr. Auda to challenge the constitution of the panel over a year after he was made aware of the identities of the panel members; and, it is unreasonable for him to continue to do so now.

24. Mr. Auda's request for additional compensation illustrates his misunderstanding of the purpose of compensation. Mr. Auda simply disagrees with the compensation awarded.

25. The Secretary-General requests that this Tribunal dismiss Mr. Auda's appeal. He also requests that costs be imposed on Mr. Auda for having filed a frivolous claim.

### Considerations

#### *Receivability*

26. The first issue to be decided is whether Mr. Auda's appeal is receivable.

27. As the Appeals Tribunal has recently noted:<sup>7</sup>

... In *Rasul*,<sup>[8]</sup> *Sefraoui*<sup>[9]</sup> and other cases,<sup>[10]</sup> the Appeals Tribunal held that the party in whose favor a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. Thus, the successful party is prevented from filing an appeal, which is an instrument to pursue a change of a judicial decision, in the form of modification, annulment or vacation, used as a way to repair a concrete grievance directly caused by the impugned judgment. The concrete and final decision adopted by a court must generate the harm that constitutes the *conditio sine qua non* of any appeal. It is not enough to claim that the grievance comes from the reasoning of the judgment, from all or part of its motivation or from the rejection of certain or all of the arguments submitted by a party. The right to appeal arises when the decision has a negative impact on the situation of the affected party. That means that a judgment can contain errors of law or fact, even with regard to the analysis of the tribunal's own jurisdiction or competence and yet, it may still be not appealable.

28. The Secretary-General submits that Mr. Auda's appeal is not receivable and should be rejected in its entirety as Mr. Auda's position prevailed at the first instance.

29. This is not entirely true. In his application filed with the UNDT, Mr. Auda's request for relief included rescission of the decision to close his case or, in the alternative, an order that the report of the second FFP be transferred to OHRM for action. The UNDT only partly favoured him by awarding (moral) damages in the amount of USD 5,000, while dismissing

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<sup>7</sup> *Bagot v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-718, para. 29.

<sup>[8]</sup> *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077, para. 15.

<sup>[9]</sup> *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.

<sup>[10]</sup> *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, paras. 14-23; *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134, para. 34.

his other pleas. Therefore, contrary to the Secretary-General's contention, the appeal is receivable since Mr. Auda only partially prevailed before the Dispute Tribunal and is entitled to file an appeal to pursue the modification, annulment or vacation of its Judgment.

### *Merits*

30. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action.<sup>11</sup> The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.<sup>12</sup> Only in particular situations (i.e., in a case of a serious and reasonable accusation) does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Appeals Tribunal Statute (Statute).<sup>13</sup> However, the Administration's discretion can also be confined in the opposite direction. There are situations where the only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member.<sup>14</sup>

31. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, paragraph 2.1 of ST/SGB/2008/5 provides that: "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

32. Section 2.2 adds that:

... The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to

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<sup>11</sup> *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr.1, para. 31, and *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

<sup>12</sup> *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 38, and *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

<sup>13</sup> *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33, citing *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 40.

<sup>14</sup> *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 33.

any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

33. Section 5.3 of ST/SGB/2008/5 establishes that:

... Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

34. Sections 5.14 and 5.15 of ST/SGB/2008/5 provide:

... 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.

... At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by [the Secretary-General's Bulletin] ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)].

35. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and, in Section 5.17, the final report of those proceedings is referred to as follows:

... The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence (...). This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

36. Section 5.18(a)-(c) provides for the possible courses of action, one of which the responsible official shall take:

... If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual;

... If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

... If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question.<sup>[15]</sup> The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

37. A final option is established in paragraph 5.19(d):

... Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

38. In the case at hand, the UNDT, in reviewing the administrative decision by the USG/DGACM to close Mr. Auda's case regarding his complaint against the former ASG/DGACM under ST/SGB/2008/5, considered two issues: (i) whether the investigation into the complaint against the ASG/DGACM was flawed,<sup>16</sup> and (ii) whether the USG/DGACM's decision to close Mr. Auda's case without further action was flawed.<sup>17</sup>

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<sup>[15]</sup> These procedures are set out in Administrative Instruction ST/AI/371/Rev.1 (Revised disciplinary measures and procedures).

<sup>16</sup> Impugned Judgment, paras. 60-74.

<sup>17</sup> *Ibid.*, paras. 75-91.

39. On the first issue, the UNDT found that the administrative actions performed by Ms. AL (the Special Assistant to the USG/DGACM and the former ASG/DGACM) for the second FFP were “incompatible with her status as a witness in the investigation”. Thus, the UNDT concluded that Ms. AL’s role in relation to the second FFP constituted a breach of procedural fairness owed to Mr. Auda under ST/SGB/2008/5.<sup>18</sup>

40. Specifically, the UNDT noted that:<sup>19</sup>

... While the fact that Ms. AL contacted the first FFP to seek feedback regarding the status of the investigation may be considered minor, it conflicts with her role as a witness interviewed in the course of the investigation into the Applicant’s complaint, and her role became substantively more important when she received custody of the record from the first FFP, was tasked to identify investigation members for a second FFP, communicated directly with the Applicant in respect of the matter and reached out to individuals to schedule appointments on behalf of the second FFP.

41. Further, the UNDT found that:<sup>20</sup>

... [T]he fact that Ms. AL performed the following tasks is incompatible with her status as a witness in the investigation:

- a. She received the apparent custody of the investigation record from the first FFP, which did not contain a written statement of her own interview;
- b. She contacted potential investigators and identified available investigators for the second FFP;
- c. She prepared binders containing copies of the record from the first FFP, which she transmitted to the second FFP;
- d. She provided the second FFP with logistical and administrative support.

42. Under these circumstances, the UNDT concluded that:<sup>21</sup>

... All the tasks performed by Ms. AL lend themselves to an appearance of impropriety, which is not cured by Ms. AL’s claim that she did not see nor sign a copy of her witness statement given to the first FFP and that she refrained from reading the record that was transmitted to her for safekeeping by the first FFP. The fact, alone, that she copied the record in order to prepare two binders of the documents, which

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<sup>18</sup> *Ibid.*, paras. 73-74.

<sup>19</sup> *Ibid.*, para. 71.

<sup>20</sup> *Ibid.*, para. 72.

<sup>21</sup> *Ibid.*, para. 73.

she then handed over to the second FFP, is not consistent with her duty to avoid the appearance of impropriety and maintain confidentiality as a witness in the investigation. Indeed, the fact that she was interviewed as an individual who may have relevant information about the conduct alleged (see sec. 5.16 of ST/SGB/2008/5) constitutes a conflict of interest, which should also have precluded her from being involved in identifying investigators to participate in the second FFP and in providing some administrative and logistical support to the second FFP.

43. On the second issue, the UNDT found that it had not been reasonable for the Administration (USG/DGACM) to base his decision to close Mr. Auda's case on an investigation process that was "fraught with procedural breaches" of Mr. Auda's rights.<sup>22</sup> In this regard, the first instance Judge pointed to three serious procedural irregularities: (i) the delay in the investigation into Mr. Auda's complaint and the lack of responses to his requests for information about the status of the investigation;<sup>23</sup> (ii) the incompatibility of Ms. AL's involvement in the work of the second FFP with her status as a witness in the investigation; and, (iii) the fact that Ms. AL's statement was missing from the materials handed over to the second FFP.

44. Based on these irregularities, the UNDT concluded that the decision to close Mr. Auda's case was improper as it was tainted by procedural irregularities. This Tribunal finds no discernible error in the approach or reasoning of the Dispute Tribunal concerning both issues.

45. In terms of the judicial review of the administrative discretion, the jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010, establishing that:<sup>24</sup>

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The [Dispute] Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the

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<sup>22</sup> *Ibid.*, paras. 75-91.

<sup>23</sup> *Ibid.*, para. 88.

<sup>24</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

role of the [Dispute] Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the [Dispute] Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the [Dispute] Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

46. And, if a rescission of the flawed administrative decision is no longer available (i.e., if, for example, in a reclassification matter, the staff member has retired from the Organization) then compensation is owed by the Administration.<sup>25</sup>

47. In his appeal, Mr. Auda raises the failure of the UNDT to order rescission of the administrative decision to close his case and not refer it to OHRM for further action.

48. In terms of this issue, the UNDT held that:<sup>26</sup>

... [T]he relief sought by the Applicant, namely rescission of the decision and a fresh investigation, can no longer be implemented as Mr. Baumann, the subject of the complaint, is no longer in the employ of the Organization, and investigations under ST/SGB/2008/5 cannot be conducted against persons who are not staff members of the Organization. The other alternative relief sought by the Applicant, namely referral of the case to OHRM, cannot be considered either for the same reason.

49. We find no reasons to differ from that conclusion. Contrary to the arguments raised in Mr. Auda's appeal, the UNDT correctly applied the foregoing jurisprudence in considering Mr. Auda's claim that the administrative decision to close his case be rescinded and the case

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<sup>25</sup> *Ejaz, Elizabeth, Cherian & Cone v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-615, para. 32, citing *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622, paras. 30-51; *Egglefield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 27.

<sup>26</sup> Impugned Judgment, para. 96.

referred to OHRM. Under the specific circumstances of the case at hand, as found by the Dispute Tribunal, rescission of the challenged administrative decision was no longer possible.

50. Mr. Auda also raises, in his appeal, the failure of the UNDT to directly address the issue of the lawful and proper constitution of the second FFP. He asserts that its composition was improper, as it was composed of two individuals on the roster of OHRM who were no longer staff members, as they had retired, and were reportedly holding a consultancy or a “when actually employed” contract.

51. With respect to this issue, the Secretary-General asserts in his submissions that:

... (...) In the present case, as Ms. AL testified before the UNDT, it was necessary to appoint investigators from the OHRM roster since there were no investigators available within DGACM. Both of the investigators on the second FFP were listed on the OHRM roster (...) and both had successfully completed training in investigating allegations of prohibited conduct. Moreover, ST/SGB/2008/5 does not restrict panel members to current staff, and Ms. AL’s statement explained why the USG/DGACM considered it necessary to appoint two former staff members to the second FFP. The Appellant was notified of the constitution of the second FFP on 27 March 2015 and did not object to the members at that time, or in his request for management evaluation.

52. We agree with the Secretary-General’s submissions. Section 5.14 of ST/SGB/2008/5 requires that where a complaint warrants a formal fact-finding investigation, the responsible official shall promptly appoint a panel. The panel is to consist 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 OHRM roster. Therefore, the Section contemplates the selection of either an internal panel of staff members or one selected from the OHRM roster. It does not specify what the OHRM roster is but, unlike the case of the internal panel, it does not require that the persons on the OHRM roster be staff members.

53. In light of the foregoing, we find no error in law or in fact warranting our intervention with the UNDT’s implied rejection of Mr. Auda’s contention thereupon. Further, the findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here.

*Compensation*

54. Turning to the issue of the compensation awarded to Mr. Auda, we hasten to note that the history of this case presents a sorry picture of delay on the part of the Administration. There were two differently constituted panels to hear one complaint and a total of 41 months elapsed before a decision was given.

55. The Secretary-General challenges the UNDT's award of USD 5,000 as compensation, for the non-pecuniary harm caused by the serious breaches of Mr. Auda's rights, including an egregious delay and repeated refusal to respond to his reasonable requests for information and case updates spanning several months. In particular, the Secretary-General avers, *inter alia*, that the UNDT erred by awarding compensation in the absence of any evidence of harm.

56. Mr. Auda, in his appeal, seeks an increase in the moral damages to reflect "the denial of rescission of the decision and referral of the case to OHRM".

57. We agree with the UNDT and uphold its reasoning that there were inordinate delays both at reviewing and assessing the complaint as well as reaching a final decision on it, and that the Administration was in breach of ST/SGB/2008/5, which requires that complaints are addressed promptly. As the UNDT correctly put it:<sup>27</sup>

... [T]he delay in handling the complaint against Mr. Baumann and the repetitive lack of responses to the Applicant's numerous and reasonable requests for information and status of the investigation into his complaint, which spanned several years, were serious breaches of his fundamental due process and human rights.

58. We also concur with the UNDT's conclusion that the procedural irregularities identified in the impugned Judgment:<sup>28</sup>

... [C]ast the investigation with an ominous cloud of impropriety, while Mr. Gettu's subsequent closure of the case, after reviewing the second FFP's investigation report, was an inappropriate exercise of discretion since his review was based on an investigation report tainted by serious breaches to the Applicant's rights, including an egregious delay and repeated refusal to respond to the Applicant's reasonable requests for information and case updates spanning several years.

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<sup>27</sup> *Ibid.*, para. 88.

<sup>28</sup> *Ibid.*, para. 98.

59. This Tribunal has held that while not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.<sup>29</sup>

60. However, General Assembly resolution 69/203, adopted on 18 December 2014, amended Article 10 of the UNDT Statute. Article 10(5) of the UNDT Statute now states in relevant part:<sup>30</sup>

... As part of its judgement, the Dispute Tribunal may only order one or both of the following:

...

(b) Compensation for harm, *supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

61. In the instant case, the UNDT found that:<sup>31</sup>

... At the hearing, the [Dispute] Tribunal asked questions to the Applicant as to the harm he suffered. The Respondent's counsel objected to the statements made by the Applicant on the grounds she had not had a chance to cross-examine the Applicant. (...)

... The Applicant stated how he suffered harm to his reputation and general well-being, explaining how he was isolated and ostracized, how he suffered stress and anxiety during the investigation and in his pursuit of justice. (...)

62. Based on these findings, the UNDT awarded Mr. Auda USD 5,000 as compensation for harm as a result of a breach of investigation related procedures considering that it, together with this award, constituted adequate compensation for the harm that Mr. Auda had suffered.

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<sup>29</sup> *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 41, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33.

<sup>30</sup> Emphasis added.

<sup>31</sup> Impugned Judgment, paras. 95-96.

63. We find that the UNDT erred in awarding compensation when Mr. Auda did not present any evidence, apart from his own unsworn testimony,<sup>32</sup> to prove that he suffered any kind of harm as a result of the procedural irregularities.

64. We find further that Mr. Auda has not attained the threshold required for proof of harm to receive an award of compensation in accordance with the provisions of Article 10(5) of the UNDT Statute. Generally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages.<sup>33</sup> As Mr. Auda's testimony was the only evidence presented to support his allegation of harm to his reputation and general well-being, the UNDT committed an error of law in stating that this alone was sufficient to sustain an award of compensation under Article 10(5)(b) of the UNDT Statute.

*Costs on appeal*

65. The Secretary-General seeks costs against Mr. Auda in an amount to be determined by the Appeals Tribunal, pursuant to Article 9(2) of its Statute, on the ground that Mr. Auda has brought frivolous claims before the Appeals Tribunal which are not receivable and moreover, have no basis in law or in fact. The Appeals Tribunal determines that Mr. Auda's appeal is not frivolous and does not constitute an abuse of the appeals process. Thus, the Secretary-General's request for an award of costs is denied.

66. In view of the forgoing, we grant the Secretary General's appeal in part and vacate the UNDT's order of the award for damages.

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<sup>32</sup> See Article 17(3) of the UNDT's Rules of Procedure (requiring sworn testimony); see also *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 27.

<sup>33</sup> *Comp. Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742 where four Judges, and hence a majority, supported this view in two separate opinions: Concurring Opinion by Judge Sabine Knierim, para. 2, and Joint Partial Dissenting Opinion by Judge Deborah Thomas-Felix, Judge Richard Lussick and Judge Rosalyn Chapman, para. 12.

**Judgment**

67. Mr. Auda's appeal is dismissed. The Secretary-General's appeal is granted in part. The UNDT's award of damages, ordered in Judgment No. UNDT/2016/007, is vacated.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2017 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Knierim

Entered in the Register on this 8<sup>th</sup> day of December 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar