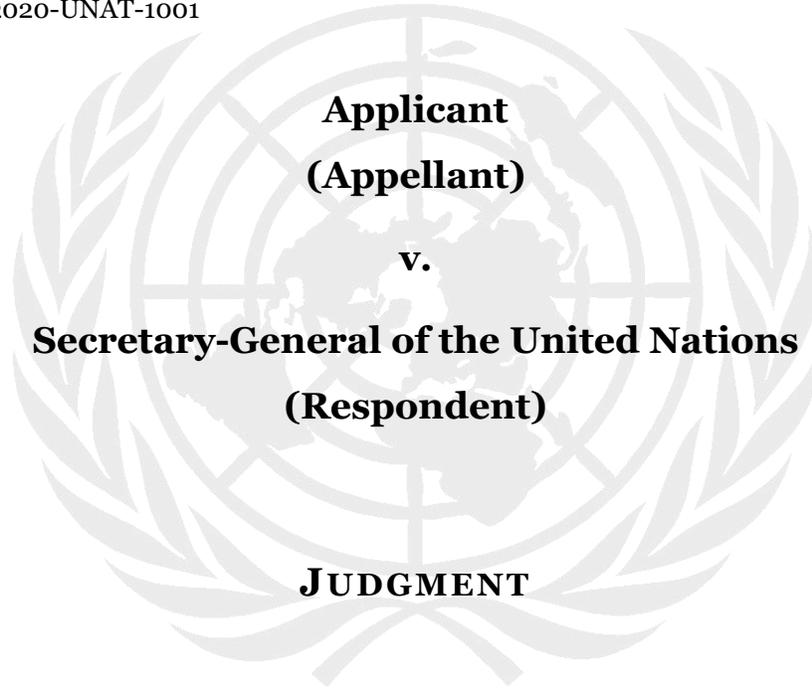




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1001



Applicant

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Martha Halfeld Judge Jean-François Neven
Case No.:	2019-1315
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Applicant: Self-represented

Counsel for Secretary-General: Noam Wiener

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant was an investigator with the Investigations Division (ID), Office of International Oversight Services (OIOS) at the United Nations Office at Vienna (UNOV). In March 2015, the Appellant filed a complaint of harassment and abuse of authority, pursuant to Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority),¹ against his First Reporting Officer, the Deputy Director, ID/OIOS. On 11 October 2016, a fact-finding panel (FPP) issued its report. Based on the FPP investigation report, on 19 April 2017, the Under-Secretary-General for OIOS (USG/OIOS) informed the Appellant that the factual basis for the allegations was not sufficient to justify the institution of disciplinary proceedings, but warranted certain managerial actions, in particular, counselling for the First Reporting Officer on his management style and team-building efforts.

2. The Appellant filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision by the USG/OIOS not to pursue disciplinary action against his First Reporting Officer. The Dispute Tribunal was not persuaded by the Appellant's allegations of a lack of transparency in the investigation process, a breach of confidentiality during the investigation, and a lack of evidence of any managerial actions. However, the Dispute Tribunal concluded that, while the investigation was proper, it was cumbersome and untimely and awarded the Appellant USD 5,000 in moral damages as compensation for delays in the process.

3. The Appellant appeals the Dispute Tribunal's Judgment and requests reasonable accommodation in the form of no further contact with the Deputy Director, ID/OIOS, redaction of all documents pertaining to the case, and increased compensation and damages. For reasons that follow, we dismiss the appeal but redact the Appellant's name from this Judgment.

¹ On 10 September 2019, the Secretary-General issued Secretary-General's Bulletin ST/SGB/2019/8 titled "Addressing discrimination, harassment, including sexual harassment, and abuse of authority" to replace ST/SGB/2008/5. However, he clarified, in paragraph 8.3, that investigations initiated before 10 September 2019 should continue to be handled in accordance with the provisions of ST/SGB/2008/5.

Facts and Procedure

4. The Appellant joined the Organization on 18 May 2007 and was an Investigator at the P-3 level with the ID/OIOS at UNOV when this case arose.
5. On 18 March 2015, the Appellant filed a complaint of harassment and abuse of authority, pursuant to ST/SGB/2008/5 against the Deputy Director, ID/OIOS, his First Reporting Officer.
6. On 10 April 2015, the Appellant contacted the USG/OIOS, asking if any action had been taken in relation to his ST/SGB/2008/5 complaint and whether the subject had been notified of the complaint. The USG/OIOS responded on the same day, informing the Appellant that there were insufficient grounds to warrant a fact-finding investigation into his complaint.
7. On 14 April 2015, the Appellant requested management evaluation of the USG/OIOS' decision not to conduct a fact-finding investigation into his complaint.
8. On 20 July 2015, the Officer-in-Charge of the Management Evaluation Unit (MEU) replied to the Appellant's request for management evaluation. The Appellant was informed that the USG/OIOS had earlier informed the MEU of her intention to appoint an FFP to conduct an investigation into his complaint. Consequently, the MEU considered the Appellant's request for management evaluation moot.
9. Between July 2015 and December 2015, several unsuccessful attempts were made to identify panel members who were based in Vienna. OIOS then decided to reach out to staff members on the Geneva roster of approved panel members.
10. On 13 September 2015, the then USG/OIOS separated from the Administration, and the new USG/OIOS assumed her functions, as of 11 December 2015.
11. On 13 January 2016, the USG/OIOS appointed an FFP of two members from the Geneva roster of trained investigators to conduct an investigation into the Appellant's allegations of prohibited conduct.

12. The Appellant sent numerous inquiries to OIOS as to the status of the FFP investigation, but did not receive a meaningful answer until 28 October 2016, when OIOS informed the Appellant that the FFP had submitted its report to the USG/OIOS. In fact, the FFP had completed its investigation and had sent a report to the USG/OIOS on 11 October 2016.

13. By memorandum dated 5 December 2016, the USG/OIOS transmitted the FFP investigation report to the Officer-in-Charge, Office of Human Resources Management (OiC/OHRM) for consideration of appropriate administrative or disciplinary action. She summarized the findings of the FFP investigation report and expressed her view that the FFP investigation was thorough and its report was well written with sufficient details and thorough analysis of interviews and related evidential materials.

14. By memorandum dated 28 March 2017, the OiC/OHRM responded to the USG/OIOS that the remarks that the Deputy Director, ID/OIOS, had made to the Appellant in August 2014 and February 2015 did not amount to harassment or abuse of authority. The OiC/OHRM consequently decided not to pursue this matter as a disciplinary case but to refer the matter back to OIOS for possible managerial or administrative action under Section 5.18(b) of ST/SGB/2008/5.

15. By letter dated 19 April 2017, the USG/OIOS informed the Appellant of the outcome of the investigation of his complaint against the Deputy Director, ID/OIOS. The Appellant was informed that, based on the FFP investigation report, there was some factual basis for some of his allegations, which were however not sufficient to justify the institution of disciplinary proceedings, but warranted certain managerial actions. In particular, it was noted that the Director, ID/OIOS and the USG/OIOS had provided counselling to the Deputy Director, ID/OIOS, with regard to his management style and team-building efforts.

16. On 30 May 2017, the Appellant requested management evaluation of the USG/OIOS' decision of 19 April 2017. After the MEU failed to timely respond to his request, the Appellant filed an application with the Dispute Tribunal contesting the decision by the USG/OIOS not to pursue disciplinary action against the Deputy Director, ID/OIOS.

17. In Judgment No. UNDT/2019/129 dated 23 July 2019,² the Dispute Tribunal partially granted the Appellant’s application and awarded him USD 5,000 as moral damages. In the Judgment, the Dispute Tribunal first considered, and rejected, the Appellant’s motion to file additional documents that his former counsel from the Office of Staff Legal Assistance (OSLA) had allegedly neglected to submit to the Dispute Tribunal, because, in the view of the Dispute Tribunal, the Appellant had not identified any evidence that would have been determinative for the disposal of the case, and any additional evidence, at the stage of near completion of the proceedings without compelling reasons, would unduly delay the disposal of the case. On the merits, the Dispute Tribunal was not persuaded by the Appellant’s allegations about the lack of transparency of the investigation process, the breach of confidentiality during the investigation, and the lack of evidence of any managerial actions. However, the Dispute Tribunal concluded that, while the investigation was proper, it had taken longer than the standard three months’ deadline, and it had been “very lengthy and cumbersome”.³ Consequently, the Dispute Tribunal awarded the Appellant USD 5,000 in compensation for the serious impact on his well-being and mental health in light of the evidence that he had provided showing the close link between the delay in handling his complaint and the stress and anxiety that he had suffered.

Submissions

The Applicant’s Appeal

18. The Appellant recalls that the Dispute Tribunal issued a corrigendum to the impugned Judgment in order to redact his name. However, its actions to anonymize the impugned Judgment and Order No. 115 (GVA/2018) were inadequate, as one can still find his name under the “Case Name” column for Order No. 115. The Appellant requests that the Appeals Tribunal order that all public documents pertaining to his cases be expunged of any medical information or condition. His request for redaction of medical information also extends to any document that may be issued by the Appeals Tribunal.

² In response to the Appellant’s motions on redaction of judgment dated 26 July 2019 and 31 July 2019, the Dispute Tribunal subsequently issued a corrigendum as UNDT/2019/129/Corr.1. and anonymized Order No. 115 (GVA/2018). It also took measures so that a search of the Appellant’s last name on the UNDT website returned neither the impugned Judgment nor Order No. 115 (GVA/2018).

³ Impugned Judgment, para. 83.

19. The Appellant also says the Dispute Tribunal erred in fact and in law in rejecting his motion to file additional documents in the form of his e-mails with attachments to his OSLA counsel. The Appellant requests that the Appeals Tribunal consider such additional documents in order to reach a just and fair judgment.

20. In view of the “unreasonable delay” in the handling of his complaint, the Appellant maintains that the Dispute Tribunal’s award of USD 5,000 for moral damages was inadequate, as it took only the delay into account, but failed to consider the fact that he continued to be subject to the arbitrary supervision of the Deputy Director, ID/OIOS, during the investigation.

21. He submits that the Dispute Tribunal failed to consider the USG/OIOS’ action to inform the Deputy Director, ID/OIOS, of the Appellant’s ST/SGB/2008/5 complaint against him before the initiation of the fact-finding investigation, which constituted a breach of procedures.

22. In addition, he says the Dispute Tribunal failed to exercise jurisdiction vested in it by not considering whether the decision not to take disciplinary action against the Deputy Director, ID/OIOS, was reasonable, especially in view of his actions of harassment against the Appellant and the clear evidence that he had abused his authority. In the view of the Appellant, the decision not to discipline the Deputy Director, ID/OIOS, was “fundamentally flawed”.

23. The Dispute Tribunal appeared to have neglected to address the evidence that no counselling had been provided to the Deputy Director, ID/OIOS, contrary to the undertaking by the USG/OIOS to take managerial actions.

24. The Appellant requests that the Appeals Tribunal rescind the decision not to discipline the Deputy Director, ID/OIOS, and order provision of a reasonable accommodation for him so that he will have no further contact with the Deputy Director, ID/OIOS. He finally requests that the Appeals Tribunal award him four months’ net base salary or an appropriate amount for the unreasonable delay and two years’ net base salary or an appropriate amount for moral and physical harm.

The Secretary-General's Answer

25. The Secretary-General says the Dispute Tribunal correctly upheld the decision not to take disciplinary action against the Deputy Director, ID/OIOS. Contrary to the Appellant's accusation, the Dispute Tribunal properly exercised its jurisdiction. It found that the Administration had conducted a proper investigation in accordance with the provisions of ST/SGB/2008/5 and held that because a proper investigation had been conducted, it could not compel the Administration to initiate disciplinary proceedings.

26. The Dispute Tribunal correctly held that the USG/OIOS had addressed the findings of the FFP by managerial actions. It is clear from the evidence presented to the Dispute Tribunal that both the USG/OIOS and the Director, ID/OIOS, had addressed with the Deputy Director, ID/OIOS, his management style and that the Appellant had been aware of those actions.

27. The Appellant has not established any basis warranting an increase in the damages ordered by the Dispute Tribunal. The Dispute Tribunal correctly held that the Administration's delay in responding to his complaint did not create a separate ground for liability for moral damages, as distinct from the liability for moral damages sustained by him. The Dispute Tribunal did not commit any errors when it did not compensate the Appellant for continuing to be subject to the supervision of the Deputy Director, ID/OIOS, during the delay, because he had not made this claim in his application.

28. The Secretary-General requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal.

Considerations

29. As a preliminary matter, the Appellant requests the Appeals Tribunal consider additional material. Article 10(1) of the Rules of Procedure of the Appeals Tribunal provides that "[a] party may seek to submit to the Appeals Tribunal ... documentary evidence ... in addition to that contained in the written record. *In exceptional circumstances* and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party."⁴

⁴ Emphasis added.

30. In the instant case, the Appellant has not demonstrated exceptional circumstances warranting the admission of additional evidence on appeal. There is insufficient evidence that the additional material is necessary to determine the appeal. The material should have been provided in accordance with the tribunal processes. There is insufficient evidence that the failure of the Dispute Tribunal to consider the additional material amounted to procedural unfairness that affected its Judgment. The Appeals Tribunal will therefore rely on the factual findings of the Dispute Tribunal.

31. Article 2(1)(a) of the UNDT Statute establishes that the Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent Regulations and Rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

32. Article (2)(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, as well as the Bulletins issued by the Secretary-General and the administrative issuances. These include ST/SGB/2008/5 and ST/AI/371 (Revised disciplinary measures and procedures) and ST/AI/371/Amend.1.⁵ In examining the alleged errors of the Dispute Tribunal committed in its Judgment, we will review the terms and conditions set out in this relevant governing framework.

Whether the Dispute Tribunal erred its decision to uphold the decision by the USG/OIOS, including failing to order reasonable accommodation?

33. Paragraph 5.3 of ST/SGB/2008/5 provides: “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.”

⁵ On 26 October 2017, the Under-Secretary-General for Management promulgated ST/AI/2017/1 titled “Unsatisfactory conduct, investigations and the disciplinary process” to replace, *inter alia*, ST/AI/371 of 2 August 1991 and ST/AI/371/Amend.1 of 11 May 2010. However, she clarified, in paragraph 13.2, that the investigations and disciplinary processes initiated before 26 October 2017 should continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1.

34. Paragraph 5.17 of ST/SGB/2008/5 provides: “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.”

35. ST/AI/371 establishes the obligation to undertake an investigation into “unsatisfactory conduct for which a disciplinary measure may be imposed”.

36. In the instant case, the investigation was instituted, and a report was presented on 11 October 2016, all pursuant to these provisions.

37. As a general principle, the institution of disciplinary proceedings against a staff member is the privilege of the Administration, and it is not legally possible to compel the Administration to take disciplinary action.⁶

38. In this case, the Dispute Tribunal examined the applicable legal framework in Sections 5.11, 5.14 and 5.15 of ST/SGB/2008/5 and considered the Appellant’s allegations of errors in the process including breach of confidentiality, lack of transparency and managerial action, and undue delay in the investigation. Except for the investigation exceeding the time limit contemplated by the ST/SGB/2008/5, for which the Dispute Tribunal ordered compensation, the Dispute Tribunal found no procedural flaws in the investigation that impacted the Appellant’s rights. We find no errors in this analysis.

39. In addition, we find no errors in the Dispute Tribunal’s finding that the Administration had the discretion to initiate disciplinary proceedings against an alleged offender and it could not be compelled to do so. There was no evidence that this exercise of discretion was inappropriate due to a failure to take into account relevant considerations or consideration of irrelevant factors. In addition, as indicated by the Dispute Tribunal, the jurisprudence provides that the tribunals cannot replace the decision-makers in disciplinary matters.

⁶ *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 37, citing *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

40. The Administration's decision to not initiate disciplinary proceedings against the Deputy Director, ID/OIOS, was within its discretion and we find no fault in it. The decision was based on the FFP investigation report, which found that the work environment was tense and difficult due to the actions of the Appellant's supervisor. However, the decision-maker, the Administration or specifically, the USG/OIOS, considered the result of the investigation and decided the complained-of conduct on the part of the alleged offender did not amount to prohibited conduct within the meaning of ST/SGB/2008/5 and, therefore, the conduct could be addressed by managerial action rather than disciplinary means. The Dispute Tribunal held that the Administration was acting within the scope of its authority when it decided not to initiate disciplinary proceedings but to institute certain managerial actions. Having found that the conduct did not amount to prohibited conduct within the meaning of ST/SGB/2008/5, the Administration could not impose the reasonable accommodation requested by the Appellant, namely no contact with his First Reporting Officer.

41. We find no discernible error in the approach or reasoning of the Dispute Tribunal in its findings regarding the investigation process and the exercise of discretion not to take disciplinary action or provide reasonable accommodation.

Whether the Dispute Tribunal erred in the award of compensation or damages for the unreasonable delay and for moral and physical harm?

42. The Dispute Tribunal awarded the Appellant USD 5,000 in compensation for moral damages as a result of the cumbersome process and undue delay in completing the investigation and the resulting anxiety and stress or moral and physical harm. The Appellant says this compensation is insufficient.

43. Article 10(5)(b) of the UNDT Statute provides that the Dispute Tribunal may order "(c)ompensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant". The Dispute Tribunal reviewed the investigative process and found that process exceeded the time limit contemplated by ST/SGB/2008/5, but it also recognized the difficulties faced by the Administration in the circumstances. The Dispute Tribunal reviewed the medical evidence provided by the Appellant to support the effect the delay in the investigative process had had on him. It reviewed the requirements of Article 10(5)(b) and our jurisprudence, specifically *Kebede*,⁷

⁷ *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874.

and *Kallon*,⁸ namely, that there must be supporting evidence beyond the staff member's testimony. The Dispute Tribunal had medical evidence in support. The Dispute Tribunal did not commit an error of law or fact in its assessment of the compensation award, which we find is fair and reasonable in the circumstances.

Whether the Appellant's name should be redacted in all documents pertaining to the case?

44. The Dispute Tribunal reissued its Judgment in Corrigendum 1 to redact the Appellant's last name. The Appellant says this is not sufficient and requests redaction of his name from all documents pertaining to his case.

45. However, the files and submissions filed by the parties are not public information. Therefore, it is not clear why there is a need for redaction of non-public information.

46. In any event, it is not clear that the Appeals Tribunal has the jurisdiction to order blanket redactions of the Dispute Tribunal's files or of non-public information. Neither our Statute nor our Rules specifically provides for an order for this type of blanket redactions.

47. Article 10(9) of our Statute does make some provision for confidentiality when it states that the judgments of the Appeals Tribunal shall be published "while protecting personal data". Given the case concerns an allegation of harassment and relies on medical evidence to support a claim for physical and moral harm, we find that it is reasonable to redact the Appellant's name from this Judgment and any public pronouncement of the Judgment. This is also supported by the Dispute Tribunal's Corrigendum 1 which redacted the Appellant's last name. That corrigendum would become meaningless if the Appeals Tribunal did not follow suit.

⁸ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

Judgment

48. The appeal is dismissed and Judgment No. UNDT/2019/129/Corr.1 is hereby affirmed.
49. We order the Appellant's name be redacted from this Judgment and any public pronouncement of this decision.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Halfeld
Bournemouth, United Kingdom

(Signed)

Judge Neven
New York, United States

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar