UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/062
Judgment No.: UNDT/2017/007
Date: 1 February 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Pallavi Sekhri, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Principal Officer at the D-1 level in the Department of General Assembly and Conference Management ("DGACM"), filed two applications pertaining to a complaint he submitted on 19 April 2012 to Mr. Shaaban Muhammad Shaaban, the then Under-Secretary-General, DGACM, alleging that Mr. Franz Baumann, then Assistant Secretary-General, DGACM, had engaged in conduct prohibited under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The present judgment concerns the Applicant's challenge to the decision of Mr. Tegegnework Gettu, the then USG/DGACM, dated 8 September 2015, based on the report of a second fact-finding panel ("second FFP") to close his complaint without taking any further action. The Applicant seeks rescission of the decision to close his case or, in the alternative, an order that the report of the second FFP be transferred to the Office of Human Resources Management ("OHRM") for action. The Applicant also seeks compensation for the inordinate delay in the investigation of his complaint and the violation of his right to due process. Finally, he seeks protection from exposure to any form of prohibited conduct through preventive measures and provision of effective remedies when prevention has failed.

3. The Applicant's first application challenging a decision by an initial FFP to "delay, withhold, and not submit its report on the investigation and the records of the investigation," together with the Applicant's request for compensation for delay in the investigation of his complaint, was duly filed under Case No. UNDT/NY/2015/035 and is addressed in Judgment *Auda* UNDT/2017/006.

4. In the present case, the Respondent argues that the Applicant's contentions lack merit and that the Applicant has not identified any procedural irregularities in

the conduct of the fact-finding investigation or in the determination by Mr. Gettu to close the case against Mr. Baumann.

Facts

5. The Applicant submitted a complaint by email dated 19 April 2012 to Mr. Shaaban, alleging that Mr. Baumann had engaged in prohibited conduct under ST/SGB/2008/5. 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.

6. On 27 April 2012, Mr. Shaaban as the then responsible officer, assembled a FFP ("first FFP") to investigate the Applicant's complaint.

7. 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.

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

9. 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.

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

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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."

19. 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."

20. 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]."

21. 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.

22. 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."

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

24. 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 sec. 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 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 section 5.18(a) of ST/SGB/2008/5, I therefore consider the case closed.

Procedural history

25. On 22 October 2015, the Applicant requested management evaluation of the decision to close the case related to his complaint under ST/SGB/2008/5 without further action. On 17 November 2015, the Management Evaluation Unit ("MEU") responded to the Applicant, informing him that the Secretary-General had decided to uphold the contested decision.

26. On 20 November 2015, the Applicant filed an application before the Tribunal and the Respondent filed his reply on 21 December 2015.

27. By Order No. 316 (NY/2015), the Tribunal ordered that the case join the queue of pending cases and be assigned to a Judge in due course.

28. On 1 July 2016, the case was assigned to the undersigned Judge.

Consolidation of proceedings and joint statements

29. On 12 July 2016, the Tribunal issued identical Orders No. 168 and 169 (NY/2016) in the Applicant's two cases regarding his complaint against Mr. Baumann (the present case and Case No. UNDT/NY/2015/035), directing the parties to respond, *inter alia*, to whether they agree to attempt informal resolution and whether the two cases should be consolidated through an order for combined proceedings. The Tribunal also requested the Respondent to provide the Tribunal with a copy of the report of the second fact-finding panel submitted on 26 June 2015 and provide a full explanation, including all relevant particulars, as to why it took more than three years from the date of the submission of the Applicant's complaint on 19 April 2012 until the completion of the report of the second fact-finding panel on 26 June 2015. The parties were also ordered to provide lists of witnesses that they proposed to call, including brief statements of the evidence each party intends to elicit from their proposed, respective witnesses as well as an agreed upon bundle of documents which the parties intended to rely on at the hearing.

30. On 20 July 2016, the parties filed joint statements in both cases, indicating that, while they agreed in principle to attempt informal resolution, they were unable to agree on its modalities.

31. On 21 July 2016, the Tribunal issued Order No. 178 (NY/2016), directing the parties to file the jointly-signed statement referred to in Orders No. 168 and No. 169.

32. On 27 July 2016, the Respondent filed the report of the second FFP on an ex parte basis.

33. On 28 July 2016, the parties filed their jointly-signed statement agreeing to consolidation through an order for combined proceedings, proposing a hearing on 14 and 16 September 2016 and submitting the following information and evidence:

a. The Respondent's explanation as to the time taken to complete the investigation by both fact-finding panels;

b. The Respondent's chronology of actions taken by the first FFP;

c. The Applicant's timeline for the two cases;

d. A bundle of documents for the hearing; and

e. A list of proposed witnesses.

34. The Respondent proposed three witnesses, namely, Ms. MN, the lead investigator on the first FFP, Mr. FS, the lead investigators of the second FFP and Ms. AL, Special Assistant to Mr. Baumann and Mr. Gettu. The Applicant stated that he "has no witnesses to call but respectfully requests the Tribunal to call the [seven] witnesses listed below." In addition to the witnesses proposed by the Respondent, the Applicant listed Mr. GK, an investigator on the first FFP and Ms. MS of the second FFP, explaining that should a member of a panel be called, then so should the other panel member. The Applicant listed Mr. Gettu and Mr. DK of the MEU to provide evidence about the settlement discussions he had with the administration.

35. By Order No. 213 (NY/2016) dated 8 September 2016, the Tribunal consolidated the two cases (the present case and Case No. UNDT/NY/2015/035) into one combined proceeding. Noting that the Applicant had a third matter pending before the Tribunal (Case No. UNDT/NY/2016/028) in which the parties agreed to suspend the proceedings pending informal discussions, the Tribunal ordered the parties to file a joint submission stating whether they agree to attempt informal resolution of these two cases, failing which they were to propose agreed dates for a two-day hearing on the merits between 3 October 2016 and 6 October 2016.

Joint submission of 14 September 2016

36. On 14 September 2016, the parties filed a joint submission indicating that they did not agree to further informal resolution efforts and that the only day on which they were both available for a hearing was 6 October 2016.

37. Also on 14 September 2016, the Applicant filed a motion reiterating his request that the Tribunal call, as its own witnesses, the four individuals named by the Applicant in the joint submission of 28 July 2016. The Applicant requested that the Tribunal call Ms. GK of the first FFP and Ms. MS of the second FFP. Also, the Applicant reiterated that Mr. DK of the MEU should be called to testify about the offer of settlement made by the administration. The Applicant also requested that the Tribunal call Mr. Gettu to testify about "evidence concerning his decision to close out the investigation upon receiving the memorandum of Mr. GK of 11 November 2014, his decision to decline the settlement offer made by the MEU, and his memorandum to the Applicant dated 8 September 2015." The Applicant further requested the Tribunal to "call/make an order for the witnesses listed to appear for the hearing" and to release the full report of the second FFP.

Request for appearance of witnesses and case management discussion of 27 September 2016

38. On 27 September 2016, the Tribunal held a case management discussion ("CMD") in relation to the present case and Case No. UNDT/NY/2015/035. The Applicant and counsel for the Respondent attended the CMD in person. Referring to the Applicant's motion dated 14 September 2016 concerning his proposed list of witnesses, the Tribunal noted at the CMD that some of these proposed witnesses, including Mr. Gettu, were listed by the Applicant for the purpose of providing oral evidence on the settlement discussions that took place between him and the administration, including the MEU, as well as on the decision to close

the first FFP investigation. The Tribunal noted that the reasons for ending the work of the first FFP were uncontested. The Tribunal also noted that the settlement discussions were not a matter for adjudication as they have no probative value in relation to the substantive issues before the Tribunal. The Tribunal also reminded the parties that, in these types of cases, the Tribunal is not expected to conduct a de novo review and is not to assume the functions of an investigative body in accordance with *Messinger* 2011-UNAT-123.

The Applicant's motion of 27 September 2016

39. Also on 27 September 2016, the Applicant filed a motion stating, *inter alia*, that, upon his information and belief, the second FFP was constituted improperly as it was comprised of two consultants who were not members of DGACM and one panel member who was not listed on the OHRM roster of trained investigators. The Applicant requested the Tribunal to find, *inter alia*, that the panel was fraught with significant procedural irregularities and their investigation was conducted in a manner that violated the explicit provisions of the ST/SGB/2008/5.

40. On 28 September 2016, the Respondent replied arguing that the Applicant was informed of the composition of the second FFP on 27 March 2015 and did not contest it at that time nor before the MEU and that the claim is meritless, as ST/SGB/2008/5 provides that panel members may include individuals from the OHRM roster.

Scheduling of hearing on 6 October 2016 and Applicant's request for postponement

41. By Order No. 225 (NY/2016) dated 28 September 2016, the Tribunal scheduled a one-day hearing on the merits for 6 October 2016 and directed the parties to file further submissions in preparation for the hearing, including a joint list of agreed-upon witnesses.

42. By Order No. 226 (NY/2016) dated 28 September 2016, the Tribunal, *inter alia*, directed the parties to not file any further motions without its leave and denied the Applicant's motion of 27 September 2016 stating that "a reasoned decision would be issued in due course." The Tribunal notes that the Applicant, in his motion of 27 September 2016, reiterated his grounds for relief, praying that his applications (which are the subject of this judgment and that of *Auda* UNDT/2017/006) be granted. In other words, if this Tribunal had granted the motion, it would have *de facto* granted the applications in both cases.

43. On 5 October 2016, the Applicant filed a motion stating that his "motion to the Dispute Tribunal [of 14 September 2016] to call the two other members of the fact-finding panels and the responsible official [Mr. Gettu], as witnesses during the hearing is still pending with the Tribunal." He requested the Tribunal to postpone the hearing scheduled for 6 October 2016, stating that the parties had previously agreed to hold a two-day hearing. On the same day, the Respondent responded that there was no need for a two-day hearing and that "a hearing of half a day is sufficient to hear the testimony of the witnesses identified by the Respondent in the Joint Submission, dated 4 October 2016." The Respondent requested maintenance of the allocation of one full day (6 October 2016) for the hearing on the merits. The Respondent also objected to the Applicant's motion to call additional witnesses.

44. By Order No. 233 (NY/2016) dated 5 October 2016, the Tribunal denied the Applicant's motion to postpone the hearing scheduled for 6 October 2016, noting that the two cases had been scheduled by Order No. 225 (NY/2016) dated 28 September 2016 with no objections from the parties. The Tribunal directed that the following witnesses testify at the hearing: Ms. MN, Ms. AL, and Mr. FS.

The Applicant's motion for the recusal of the undersigned Judge

45. On 5 October 2016, the Applicant filed a "Request to the President of the Dispute Tribunal for Recusal of the Case Judge." The Tribunal suspended the proceedings pending consideration of the request by the President of the Dispute Tribunal.

46. On 2 December 2016, by Order No. 267 (NY/2016), the President of the Tribunal dismissed the Applicant's request for recusal.

47. On 6 December 2016, by Order No. 273 (NY/2016), the Tribunal ordered the parties to attend a hearing in both cases on 12 January 2017 and ordered that "the parties shall ensure their availability also for Friday, 13 January 2017, should a second day of hearings be necessary."

The Applicant's further request for postponement of hearing and appearance of additional witnesses

48. On 5 January 2017, the Applicant requested a postponement of the hearing, stating:

> The Applicant has been summoned to serve as juror in the New York Supreme Court at 9:00a.m. on Monday 9 January 2017. The Applicant is obliged to serve on the date scheduled given that the jury service has already previously been postponed twice. The Applicant may therefore not be available for the hearing on 12 January 2017. Given a previously scheduled leave through the end of the month of January 2017, the Applicant requests postponement of the hearing until Thursday 9 and Friday 10 February 2017.

49. The Applicant further requested that Ms. MS and Mr. Gettu be called as witnesses, stating that "Order [No.] 273 (NY/2016) does not indicate whether the Dispute Tribunal Order [No.] 233 (NY/2016) in which the Tribunal agreed to have one member of each panel testify on behalf of the panel and decided not to call

the responsible official to appear as a witness, [is] still in effect." The Applicant noted that he "has already requested that both members of the panel be called as witnesses… and requests that both members of the panels, in particular Ms. MS, be called as witnesses." The Applicant further requested that Mr. Gettu, the responsible officer, be called as a witness, as "[his] subordinate… cannot fully testify on behalf of the responsible official."

Further request for additional witnesses

50. On 6 December 2016, by Order No. 273 (NY/2016), the Tribunal ordered the parties to attend a hearing in both cases on 12 January 2017 and ordered that "the parties shall ensure their availability also for Friday, 13 January 2017, should a second day of hearings be necessary."

51. On 9 January 2017, by way of Order No. 2 (NY/2017), the Tribunal denied the Applicant's request to call additional witnesses on the grounds that their evidence would be cumulative. The Tribunal also denied the Applicant's request for postponement, stating,

> … The Tribunal recognizes that should the New York Supreme Court summon the Applicant to appear for jury duty on 12 and 13 January 2017, he will not be available to appear before the Dispute Tribunal on the same dates. However, it appears that the Applicant has been summoned to present in the New York Supreme Court for only one day, notably on Monday, 9 January 2017. To date, there is, therefore, no apparent conflict with the hearing on the merits scheduled before this Tribunal, and the Applicant's motion to postpone the hearing is denied. Should the New York Supreme Court summon the Applicant to serve as a juror on 12 and 13 January, the Tribunal will reconsider how to handle the further proceedings.

52. Order No. 2 (NY/2017) further instructed the Applicant, by 10 January 2017, to "update the Tribunal as to whether he has been instructed to serve as a juror before

the New York Supreme Court on 12 and 13 January 2017, and if so, provide substantiating documentation."

The Applicant's second motion for the recusal of the undersigned Judge

53. On 10 January 2017, the Applicant filed two motions, one in response to Order No. 2 (NY/2017), indicating that he will not be required to provide further jury services, and a "Request to the President of the Dispute Tribunal for Recusal of the Case Judge."

54. On 11 January 2017, by Order No. 5 (NY/2017), the President of the Tribunal rejected the motion for recusal and indicated that the hearing scheduled for 12 January 2017 was maintained. In his order, the President stated:

> … The Tribunal has carefully examined the Applicant's request, and has also taken into account the case history as far as it was relevant for the determination of the Applicant's request for recusal of Judge Hunter, Jr. of 10 January 2017.
>
> … It notes that the main reason provided by the Applicant is Judge Hunter, Jr.'s decision with respect to the calling of particular witnesses, as contained in Orders No. 233 (NY/2016) and 2(NY/2017). The Tribunal disagrees with the Applicant's view that "[t]hese are not merely procedural decisions that can be appealed with the United Nations Appeals Tribunal, but are symptomatic of conflict of interest." The Tribunal finds that while the Applicant may be in disagreement with [such] case management decisions by Judge Hunter, Jr., they are not susceptible to demonstrate any conflict of interest on behalf of the latter … In this respect the Tribunal recalls what it stated in Order No. 267 (NY/2016) namely that "[p]rocedural decisions during case management… cannot serve as an argument to contest Judge Hunter Jr.'s impartiality or independence or otherwise lead to the perception by a reasonably and impartial observer that his participation in the adjudication of the matter would be inappropriate."
>
> … [T]he Tribunal wishes to underline that it was inappropriate for the Applicant to have filed the present request for recusal only on 10 January 2017, almost at close of business, while the matter had been set down for a hearing in the morning of 12 January 2017. It is

> noted that the matters complained of had been well known to the Applicant for some time. In the future, such conduct may be regarded as an illegitimate attempt by the Applicant to interfere with the smooth running of the Tribunal's proceedings and of the administration of justice, and may be found to be vexatious.

55. On the same day, by Order No. 6 (NY/2017), the Tribunal informed the Applicant that should he fail to appear at the hearing on 12 January 2017, the Tribunal would consider whether to dismiss the application in the present case with prejudice.

Hearing

56. On 12 January 2017, the parties attended a hearing in both cases, during which it heard the testimony of Ms. MN, Ms. AL, and Mr. FS.. The Respondent did not call the Applicant as a witness at the hearing.

Consideration

Applicable law

57. Article 2.1(a) of the Dispute Tribunal's Statute provides:

> **Article 2**
>
> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> *(a)* 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 alleged noncompliance;

58. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides in relevant part (emphasis added):

> **Section 1**
>
> **Definitions**
>
> …
>
> 1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.
>
> …
>
> **Section 2**
>
> **General principles**
>
> …
>
> 2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.
>
> …
>
> **Section 3**
>
> **Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission**
>
> …
>
> 3.2 … Managers and supervisors have the *obligation to ensure that complaints of prohibited conduct are promptly addressed* in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their

annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

…

Section 5

Corrective measures

…

5.3 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.

…

5.14 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.

…

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged.

5.17 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, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. 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.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) 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;

(c) 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. 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.

…

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

Scope of the case

59. This case concerns the decision by Mr. Gettu, the then USG/DGACM, to close the case of the Applicant's complaint against Mr. Baumann, the former

ASG/DGACM, as he agreed with the report of the second FFP which concluded that no prohibited conduct took place. The Applicant asserts that Mr. Gettu erred when he concluded that the record did not indicate that Mr. Baumann's conduct violated ST/SGB/2008/5 and that he erred when he decided to close the case pursuant to sec. 5.18 of ST/SGB/2008/5. The Applicant contends that the investigation into his complaint was flawed as it suffered delay, lacked confidentiality and breached due process in relation to the witnesses interviewed and the lack of integrity of the investigation. The issue of delay in investigating the Applicant's complaint is addressed in *Auda* UNDT/2017/006. Each of the other issues will be considered in turn.

Was the investigation into the complaint against the former ASG/DGACM flawed?

Witnesses

60. The Applicant alleges that the procedure set forth in ST/SGB/2008/5 was not followed because the second FFP did not interview all of the witnesses that he had identified for the first FFP and it did not provide him with an opportunity to identify new witnesses.

61. The Respondent submits that a fact-finding panel has the discretion to determine how to conduct the investigation of a complaint. After carefully reviewing the records of the investigation conducted by the first FFP, the second FFP determined that further interviews were required with the Applicant and six of the other 14 witnesses interviewed by the first FFP, as well as interviews with the subject of the complaint and an additional two witnesses. The second FFP reasonably concluded that the statements of other witnesses interviewed by the first FFP contained sufficient information for the purposes of the investigation. During his interview with the second FFP, the Applicant was invited to submit a list of witnesses in support of his complaint and did not name any new witnesses.

62. The Tribunal concurs with the Respondent that the key provision from ST/SGB/2008/5 is sec. 5.16, which states that the investigation "shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged." There is no requirement that all witnesses named by the complainant must be interviewed. In any event, all of the witnesses identified by the Applicant were interviewed either by the first FFP or the second FFP, and a number of witnesses were interviewed by both panels.

63. The Tribunal also notes that, in support of his submission on this point, the Applicant cited para. 90 from *Masylkanova* UNDT/2015/088 (affirmed in 2016-UNAT-662), which discusses sec. 5.16 of the policy:

> …. Apart from prescribing that the aggrieved individual and the alleged offender shall be interviewed, which they were in the case at hand, this provision leaves to the investigators' judgment to determine who is likely or not to shed light on the behaviour complained of. Although the Appeals Tribunal recently ruled in *Flores* 2015-UNAT-525 that due process required to hear the witnesses proposed by the applicant, a fundamental difference existed between that case and the present one: Flores was not the complainant but the alleged offender, and he identified witnesses in response to the charges brought against him. This is why this finding has not, and may not lightly be, extrapolated to the case at bar.

64. The cited extract does not support the Applicant's submissions. It merely confirms that sec. 5.16 of ST/SGB/2008/5 provides members of a fact-finding panel with the discretion to determine who to interview, in addition to the complainant and the alleged offender, when investigating a complaint of prohibited conduct. In *Masylkanova*, the Tribunal concluded that "the panel had wide discretion to determine the evidence that was relevant for the investigation. The Tribunal found no solid grounds to conclude that it exercised this discretion in an unreasonable, arbitrary or otherwise misguided fashion."

65. In *Masylkanova*, the Tribunal distinguished the case of *Flores*, which concerned the rights of the subject of an investigation rather than the rights of a complainant. In *Flores*, the Appeals Tribunal stated that "the records indicate that Ms. Flores provided the names of witnesses in her response to the charges and that there was no action taken by the Administration to interview such individuals" (*Flores* 2015-UNAT-525, para. 24). The Appeals Tribunal found that "the failure of the Administration in this regard was an undeniable breach of Ms. Flores' due process rights." Noting that Ms. Flores was the alleged offender rather than the complainant, the Dispute Tribunal, again, in *Masylkanova* stated that the case "may not lightly be extrapolated to the case at bar."

Integrity of the investigation

66. The Applicant claims that the course of the investigation departed significantly from that set out under ST/SGB/2005/8. In particular, he submits that the Administration failed to safeguard the integrity and confidentiality of the investigation when records from the first FFP were submitted to Ms. AL, the Special Assistant to the USG/DGACM, who had before served for a long time as a Special Assistant to Mr. Baumann, the subject of the Applicant's complaint.

67. The Respondent submits that the integrity of the investigation was maintained and no information was disclosed to Mr. Baumann, which could have undermined the investigation or resulted in intimidation or retaliation. The Applicant has not presented any evidence that the limited role played by the Special Assistant in transferring the records of the investigation interfered with or influenced the outcome of the investigation.

68. During her evidence adduced at the hearing, Ms. AL stated that she had acted as the Special Assistant to Mr. Baumann but that her role in relation to supporting the investigation was administrative in nature. She stated that she had been instructed

to contact the first FFP to follow-up on the status of their work and then, once the first FFP members confirmed that they were no longer available, to contact potential rostered investigators to ask who was available for the second FFP. Ms. AL confirmed her statement attached to the parties' joint submission of 4 October 2016, in which she stated that:

a. She had been further instructed by the USG/DGACM to provide all the relevant documentation to the second FFP and had placed them in two binders which were delivered to the two members of the second FFP;

b. She did not read or consider the documentation during the process; and

c. Her role with the second FFP was limited to scheduling some appointments with witnesses at the second FFP's request.

69. During his cross-examination of Ms. AL, the Applicant asked questions to confirm the statements made by the witness and asked why she had been called as a witness in the investigation conducted by the first FPP. Ms. AL stated that she was not aware of why she had been interviewed by the first FFP and that she had not seen nor signed the written statement made after her interview with the first FPP. With regard to the second FFP, she confirmed that she was instructed to contact the potential investigators who were appointed at the same or higher professional level as the Applicant to ask them if they were available to serve as investigators. She stated that Mr. FS was retired at that point in time but that Ms. MS was an active staff member at the time she accepted the appointment to act as an investigator.

70. The Tribunal is troubled that Ms. AL, who served as a witness in the investigation conducted by the first FFP and had worked at a senior professional grade staff at the relevant times directly with Mr. Baumann, the subject of the complaint, would be involved in the workings of the second FFP. It is further troubling that the only witness statement missing from the record that was transmitted

from the first FFP to Ms. AL was actually Ms. AL's statement. There is no doubt that the second FFP worked on the basis of the record from the first FFP. The Respondent has insisted in his reply that the record of the first FFP was transmitted to the second FFP and became part of the entire record used by the second FFP to prepare their report, which was thereafter transmitted to Mr. Gettu, together with their recommendation to close the case.

71. 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.

72. The Tribunal finds that the 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 FPP;

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.

73. 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 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.

74. As such, the Tribunal finds that Ms. AL's role in relation to the second FFP constituted a breach of procedural fairness owed to the Applicant under ST/SGB/2008/5.

Was the decision of Mr. Gettu, the then USG/DGACM, to close the Applicant's complaint flawed?

75. The Applicant submits that the second FFP confirmed that there was a factual basis for the allegations and therefore was obliged to make a recommendation under either secs. 5.18(b) or 5.18(c) of ST/SGB/2008/5, which relate to either managerial action (for instance: training, reprimand, or other corrective measures) or disciplinary action.

76. In particular, the Applicant notes that the second FFP had found that the conduct of Mr. Baumann could "be perceived to cause offense," was "reckless," or his "language used in this particular instance [could] reasonably be perceived to cause offense." The Applicant submits that the second FFP "embarked on an inappropriate journey of justifications and excuses," "paid no regard to

the pertinent administrative rules" and "relied on innuendo and its own opinions other than facts" to absolve the subject of the complaint from any wrongdoings.

77. The Respondent submits that Mr. Gettu's decision to close the case was lawful. The report of the second FFP concluded that no prohibited conduct took place—viewed as a whole, the incidents complained of fell short of amounting to harassment. Section 5.18(a) of ST/SGB/2008/5 states that if the report indicates that no prohibited conduct took place, the responsible official "will close the case." According to the Respondent, there is no other option open to the responsible official in such a case.

78. The Tribunal notes that ST/SGB/2008/5 does not state that a fact-finding panel is to make legal recommendations or even draw legal conclusions based on the facts established during the investigation.

79. Section 5.18 of ST/SGB/2008/5 lists the various actions available to the responsible officer upon his or her receipt of the investigation report. In laying out such actions, sec 5.18 specifically states "if the report indicates", which connotes that a responsible official is expected to exercise discretion in reviewing the report. Nothing in sec 5.18 strips the responsible official of exercising discretion nor is the responsible official bound to the legal conclusion and legal recommendations of an investigation panel. In fact, the investigation panel is mandated to investigate and report on the facts, thus the terminology "fact-finding panel." The responsible official is vested with the authority to act on the facts deduced and such actions constitute administrative decisions. ST/SGB/2008/5 does not confer the investigators with the authority to issue administrative decisions. Binding responsible officials to legal conclusions or legal findings made by a fact-finding panel would be tantamount to delegating administrative decision making to the panel, thereby rendering the responsible official as a mere rubber stamp. This is not the structure and delegation of mandate and authority devised by the ST/SGB/2008/5, and thus it is

incumbent upon fact-finding panels to collect the facts and responsible officials to review the investigative report and act as the responsible official sees fit, having considered the totality of the facts and circumstances presented.

80. In addition, in accordance with the Tribunal's jurisprudence, in particular *Wasserstrom* UNDT/2012/092, paras. 32 and 49 (although the Judgment was overturned by the Appeals Tribunal, this was done on the basis of receivability and not the substantive findings), a decision-maker's duty when reviewing an investigation report should include an assessment of the procedure leading to the preparation of the investigation report and its annexes including the witness statements prepared and taken by the fact-finding panel to ensure that the statements' content is properly reflected in the investigation report.

81. During his testimony, Mr. FS, the lead investigator in the second FFP, admitted that the allegations made by the Applicant had a factual basis and that certain language used by Mr. Baumann, when taken out of context, might be perceived to cause offense or be abusive. He confirmed, however, the conclusion reached in his report that such comments could not be considered in isolation and could not be viewed as abusive or offensive in view of the difficult relationship between the Applicant and the subject. The second FFP, therefore, concluded that while the facts were established, they did not rise to the level of misconduct under ST/SGB/2008/5 because of the unharmonious relationship between Mr. Baumann and the Applicant, nor rise to the level of misconduct within the context in which the offensive or abusive language was used by Mr. Baumann.

82. There is a plethora of case law from the United Nations Appeals Tribunal stating that the administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations (*Masylkanova*; *Benfield-Laporte* 2015-UNAT-505; *Oummih* 2015-UNAT-518; *Rangel*

2015-UNAT-535). The Tribunal will not interfere with the discretion of the administration and substitute its opinion for that of the administration in the absence of evidence that the decision is tainted by error or illegality, is arbitrary, excessive, abusive, discriminatory or absurd.

83. Thus, the Tribunal must first determine whether the decision to close the case was improper, absurd or excessive as is alleged by the Applicant.

84. This Tribunal finds it worthy to note the actions taken previously by the Secretary-General in similar cases where the alleged conduct was factually substantiated. Information circulars on "the practice of the Secretary-General in disciplinary matters and cases of criminal behavior" set forth summaries of facts, in particular regarding the use of abusive and/or offensive language, which warranted disciplinary measures. In ST/IC/2014/026, a staff member who engaged in a pattern of verbal abuse and ridicule towards a colleague over a number of years and attempted to physically assault the same staff member on one occasion, but admitted and apologized for his conduct, was disciplined with a written censure, loss of five steps in grade and deferment for two years of eligibility for consideration for promotion. The Information Circular describes how another staff member, who was the head of a regional office and harassed staff members and interns under the staff member's supervision by engaging in a pattern of conduct that included shouting or intimidating actions, was disciplined with a demotion with deferment for one year of eligibility for consideration for promotion. ST/IC/2015/22 refers to a case in which a staff member who used threatening language, including veiled threats, towards another staff member was demoted with deferment for one year of eligibility for consideration for promotion. In the same Information Circular is the case of a staff member who, during a staff protest at a peacekeeping mission, intimidated a security officer and, as a result, was found guilty of misconduct and was given a loss of three steps in grade and a written censure.

85. The Tribunal takes note of the number of cases in which verbally abusive staff members are disciplined. In the present case, the conclusion reached by the second FFP that the abusive or offensive language used by the second most senior official in DGACM did not rise to the level of misconduct and that no managerial action was recommended may appear absurd, excessive or arbitrary when comparing how it was handled tin the information circulars which discuss similar allegations. The allegations against the former ASG/DGACM were found substantiated but they benefited from exculpatory circumstances.

86. The second FFP had indeed found that there seems to be no doubt that some of the language admittedly used by Mr. Baumann and cited by the Applicant would not be considered appropriate among colleagues in an international organization. The second FFP report had found that it would certainly be considered offensive when used out of context, in public or widely circulated to other members of the staff in written form. The second FFP stated that the use of terms such as "divisive," "contrarian," "deceptive," "ridiculous," "difficult" or a "racket" is very strong and can be viewed as offensive and would not normally be considered appropriate, in particular, from a senior staff member. The issue, according to the second FFP, was whether the use of any of these words bordered on being abusive and whether, when taken together, Mr. Baumann's conduct towards the Applicant constituted harassment as defined under ST/SGB/2005/5. The second FFP concluded that this was not the case and that the conduct of Mr. Baumann did not amount to misconduct. No findings were made regarding whether the conduct amounted to abuse of authority and no managerial action was recommended, which the Applicant indicated was a cause for concern.

87. The Tribunal notes that sec. 5.17 of ST/SGB/2008/5 does not appear to authorize a FFP to draw legal conclusions or legally characterize the facts. In fact, the provision limits the authority of the FFP to the preparation of a detailed report, giving a full account of the facts that they have ascertained in the process. However,

the Tribunal must also take into consideration the valid exercise of the discretion of the administration when reviewing an investigation report and the facts substantiated therein. By accepting the exculpatory "context" excuse, the administration exercised its discretion. Before making a determination as to whether this discretion was properly exercised, the Tribunal must also consider whether it was reasonable for Mr. Gettu to base his decision on the basis of an investigation process which this Tribunal found was fraught with procedural breaches of the Applicant's rights.

88. The Tribunal found, in the companion case decided in *Auda* UNDT/2017/006, that the 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. In this companion case, the Tribunal also found that the involvement of Ms. AL, the Special Assistant who previously served as a special assistant to Mr. Baumann, the subject of the investigation, in identifying investigation panel members and providing support to the second FFP was not consistent with her status as a witness in the investigation. As mentioned above, the fact that Ms. AL's written statement to the first FFP was found missing by the second FFP after she handed over the first FFP's record raises more questions than it answers, thus, constituting a serious procedural breach.

89. Mr. Gettu had a duty as the decision-maker, when reviewing the investigative report, to also assess the procedure leading to the preparation of the report. Mr. Gettu was obliged to review the investigative process holistically, including both fact-finding panels, as Mr. Gettu, himself, tasked the second FFP to "continue the investigation" begun by the first FFP. This is a clear indication that the second FFP was not constructing a de novo investigation, but continuing the work of the first FFP after having received the first FFP's investigative record, albeit minus the statement taken of Ms. AL. It is unreasonable that, if Mr. Gettu reviewed the entire procedure, he would not identify the egregious delay of three years, the lack

of responses regarding the status of the investigation due to the Applicant and the conflicting role Ms. AL played as serious breaches of procedural fairness tainting the entire process.

90. Overall, the Tribunal, as a trier of fact, finds that the circumstances of the present case demonstrate that the decision to close the case of the Applicant's complaint against Mr. Baumann was improper, as it was based on an investigation process tainted by serious breaches of procedural fairness. The Tribunal is of the view that, in accordance with the jurisprudence of the Tribunals on procedural breaches vitiating an investigation process (which can be compared to the extrapolated criminal procedure theory of the fruit of the poisonous tree), a responsible official cannot make a proper determination and decision under ST/SGB/2008/5 on the basis of an investigation report that was tainted by serious procedural breaches. Having found that the decision to close the case was improper because it was tainted by procedural irregularities, there is no need for the Tribunal to determine whether Mr. Gettu's acceptance of the "context excuse" was a proper exercise of discretion.

91. For the reasons above, the Tribunal concludes that the Applicant has succeeded in showing that the decision to close the case of his complaint against Mr. Baumann was tainted by procedural irregularities and was, thus, improper.

Relief

92. The Applicant seeks rescission of the decision to close the case of the complaint against the then ASG/DGACM "or in the alternative to order DGACM to turn the report of the [second FFP] to [OHRM] for action in accordance with paragraphs 5.18(b) and 5.18(c) of ST/SGB/2008/5."

93. In *Antaki* 2010-UNAT-095, the Appeals Tribunal stated that "compensation may only be awarded if it has been established that the staff member actually suffered

damage." In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated that (footnotes omitted):

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
> >
> > (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> 37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.
>
> 38. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). …

94. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may only order one

or both of the following … (a) [r]escission … [or] (b) [c]ompensation for harm, supported by evidence."

95. At the hearing, the 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. However, the Tribunal notes that counsel did not seek to follow-up on the line of questioning posed by the Tribunal nor sought to call the Applicant as a witness.

96. 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. It cannot be overstated that a complaint against a senior official of the Organization is a difficult path to travel and a road less traversed by most, in particular, when the subject of the complaint acted as Officer-in-Charge of the entire Department in the absence of the USG/DGACM. The Tribunal in this regard notes the timing of the first FFP's announcement that it could not complete its work and the appointment of a second FFP after the subject of the complaint was transferred away from DGACM, namely two years after the complaint was made. A coincidence? Hardly! The Tribunal further notes that the 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.

97. With respect to the quantum of the damages suffered, the Appeals Tribunal stated in *Maslei* 2016-UNAT-637 that (footnotes omitted):

> 32. … The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the Tribunal.
>
> 33. As we held in *Appleton*: "Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal."

98. As guided by the Appeals Tribunal, this Tribunal is of the view that the procedural contractual entitlements of the Applicant were breached by the irregularities identified herein: Ms. AL's role during the second FFP was improper and created an apparent conflict of interests of a serious nature since it cast 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.

99. Having taken all the facts and circumstances of this case into consideration, as well as those determined in *Auda* UNDT/2017/006 and noting the Tribunal's award of USD5,000 in *Messinger* UNDT-2010-116 (affirmed in 2011-UNAT-123) for compensation for harm as a result of a breach of investigation related procedures, the Tribunal awards USD5,000 to the Applicant, which, together with this judgment, constitute adequate compensation for the harm that he suffered.

Orders

100. In view of the foregoing, the TRIBUNAL DECIDES:

a. The application succeeds.

b. The Applicant is awarded the sum of USD5,000 as compensation for harm resulting from the procedural fairness breaches in connection with the second investigation into his complaint under ST/SGB/2008/5.

c. The sums above shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 1st day of February 2017

Entered in the Register on this 1st day of February 2017

(*Signed*)

Hafida Lahiouel, Registrar, New York