



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former United Nations staff member at the S-2, step 6, level with the Department of Safety and Security (“DSS”) at the United Nations Headquarters in New York, contests the following:

- ... The unlawful decision of [the United Nations Claims Board, “UNCB”] not to compensate him for the loss of his personal property damage in the amount of \$2,277.53, which the Applicant was informed of by way of email from [Ms. SA, name redacted] of Insurance and Disbursement Service on 2 November 2016, and signed by [Mr. DG, name redacted], Secretary UNCB.
- ... The unlawful failure of [the Assistant Secretary-General, Controller, Office of Programme Planning, Budget and Accounts, Department of Management, “ASG/Controller”] of the United Nations to independently review and take a reasoned out and separate administrative decision from the recommendations of the UNCB, and the Controller’s failure to properly inform the Applicant of an independent administrative decision taken pursuant to review of the UNCB’s recommendations regarding the Applicant[’s] claim.
- ... The unlawful procedural due process violations; (i) unlawful retrieval, edition, enhancement, dissemination and review, analysis and interpretation of an electronic [closed-circuit television, “CCTV”] video of the incident of 27 July 2013, by the administration and UNCB (ii) the unlawful failure of the administration to fully investigate [the] Applicant’s report to [the Officer-in-Charge of the Security Investigation Unit] and the Investigator alleging that initial security incident log book entry, and the scene of the Applicant’s accident, were systematically altered, possibly to mislead the investigations (iii) unlawful failure of the administration to allow the Applicant to review and comment on the findings of the investigation before the investigation’s report was submitted to the UNCB (iv) the unlawful exposure and tabling of the Applicant’s medical reports and extent of his injuries by the Secretary UNCB to the UNCB, received by the Secretary UNCB, under his separate role as Secretary [Advisory Board on Compensation Claims] (v) the unlawful failure of

the administration to allow the Applicant to be present at the retrieval of the alleged CCTV video of the incident and to review the CCTV video of the incident from the original recording source in a witnessed manner.

2. In response, the Respondent claims that the application has no merit because the Applicant is not entitled to compensation for the damage to his vehicle under ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service).

Factual and procedural history

3. The factual background of the present case is the same as that in *Kisia* UNDT/2016/040 issued on 25 April 2016 in Case No. UNDT/NY/2014/061, where this Tribunal set forth the facts as follows:

... On 27 July 2013, the Applicant was involved in an accident at the main entrance by security post no. 103 at the United Nations Headquarters in New York where his car collided with a so-called “stinger” security arm barrier. By email of the same date, the Applicant reported the accident to a number of United Nations colleagues, including a Sergeant of the Special Investigation Unit [“SIU”]. An “Incident Report” of the same date was made by an “S/O” [presumably, a Security Officer] from “1st Platoon” to the Assistant Chief of [the Security and Safety Service, “SSS”].

... By email of 31 July 2013, the Applicant sought the advice of the Chief of SSS and provided his views on the 27 July 2013 accident.

... By email of 11 August 2013 to the SIU Sergeant, copied to the SSS Chief, the Applicant sought a status update on his “complaint”.

... By “Claim for Loss of or Damage to Personal Effects Attributable to the Performance of Official Duties” dated 3 September 2013, the Applicant requested USD2,277.53 in compensation for the alleged damages to his car from the 27 July 2013 accident.

... By an investigation report dated 28 October 2013, a Senior Security Officer of SIU provided the SSS Chief with SIU’s findings regarding the 27 July 2013 accident.

... By interoffice memorandum dated 7 November 2013 to the UNCB Secretary, the SSS Chief forwarded the investigation report for the UNCB Secretary's review and possible action.

... In a case summary dated 20 February 2014, the UNCB Secretary set out his views on the circumstances surrounding, and the process leading up to, UNCB's consideration of the Applicant's claim. On the same date, UNCB held its 343rd meeting at which it considered the Applicant's claim regarding his car.

... By interoffice memorandum dated 4 April 2014 to the ASG/Controller, the UNCB Secretary forwarded the undated minutes of the 343rd UNCB meeting on 20 February 2014 for the ASG/Controller's consideration in accordance with ST/AI/149/Rev.4, requesting that, if she approved of UNCB's recommendation, she indicate this on the interoffice memorandum.

... On 23 April 2014, the 4 April 2014 interoffice memorandum was countersigned. However, the actual name of the signer is not written on the document and illegible from the signature.

... By interoffice memorandum dated 25 April 2014 to the Executive Officer of DSS, the UNCB Secretary informed that the UNCB had recommended that the Applicant's claim be denied and instructed that the Applicant be advised accordingly.

... By interoffice memorandum dated 12 May 2014, the acting Executive Officer of DSS forwarded the 25 April 2014 interoffice memorandum to the Applicant.

... By a request for management evaluation dated 8 July 2014, the Applicant appealed the contested decision and requested that the Secretary-General:

... rescind the decision of [UNCB], or order a fresh, fair, impartial and complete investigations on [the Applicant's] accident, or accept liability for the actions or inactions of management of both security and safety and facilities and Commercial [S]ervices Division, as well as of the post officer, and his duty supervisor, under doctrine of *respondeat superior*.

... On 5 September 2014, the Under-Secretary-General for Management informed the Applicant that, upon his request for management evaluation, the Secretary-General had decided to uphold the contested decision.

4. In *Kisia* UNDT/2016/040, this Tribunal remanded the Applicant's claim for compensation for damages to his vehicle back to the UNCB for a new examination, including on receivability for the following reasons (see paras. 48, 49, 51, 52, 53 and 54):

... The Tribunal, after reviewing the content of the contested decision, finds that instead of making her own final and reasoned decision on the Applicant's claim, the ASG/Controller appears to have only signed off on the recommendation made by UNCB to deny the claim on 23 April 2014, as admitted by the Respondent. The Tribunal observes that the signature with the date of 23 April 2014 does not indicate the name and/or the position of the decision-maker.

... Taking into account the above mentioned procedural irregularities of the contested decision, the Tribunal concludes that the mandatory procedure prescribed by ST/AI/149/Rev.4 was not followed and will not further analyze the grounds of appeal related to the merits of the present case.

[...]

... Therefore, in the light of the Appeals Tribunal's binding jurisprudence, according to which the Tribunal cannot place itself in the position of the decision-maker, which in the present case is the ASG/Controller, the Tribunal will grant the application and will rescind the contested decision of 23 April 2014 together with the UNCB's recommendation of 4 April 2014.

... The Tribunal notes that the Respondent submitted that:

... the Applicant has failed to take the reasonable step of claiming the cost of the repairs to his vehicle under his insurance, and has not met the conditions for presenting a claim for compensation established by [secs. 5 and 12 of ST/AI/149/Rev.4].

... The Tribunal underlines that, according to secs. 14 and 16 of ST/AI/149/Rev.4, the UNCB is competent in the first instance to evaluate the receivability of a compensation claim in accordance with its Rules of Procedure, sec. 17. Consequently, the Applicant's compensation claim for property damage for his car is to be remanded for a new examination by UNCB, including on receivability.

... Based on the UNCB's recommendation, the ASG/Controller is then to make the final decision on the Applicant's claim.

5. On 15 September 2016, the UNCB reconsidered the Applicant's claim and determined that it was not receivable due to the lack of action taken to file a claim under personal insurance coverage pursuant to arts. 12 and 14(b)(ii) of ST/AI/149/Rev.4. With regard to art. 14(b)(ii), the UNCP specifically noted that the Applicant "did not report the incident to his insurance company in order to avoid an increase in premiums".

6. On 18 October 2016, the ASG/Controller stamped "approved" on the UNCB's 15 September 2016 recommendation and countersigned it.

7. On 2 November 2016, the Secretary of UNCB informed the Applicant that the UNCB had:

... determined that the claim is not receivable due to lack of action taken to file a claim under personal insurance coverage pursuant to Articles 12 and 14(b)(ii).

Nonetheless, even had the board found the claim to be receivable, the board recommends against compensation and hereby reiterates its grounds for such recommendation from its recommendation at its 343rd meeting.

8. On 22 November 2016, the Applicant filed a request for management evaluation.

9. By letter dated 14 December 2016, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision.

10. On 26 December 2016, the Applicant filed the application in the present case with the Dispute Tribunal.

11. On 27 December 2016, the Registry acknowledged receipt of the application and transmitted it to the Respondent, requesting him to file a reply by 26 January 2017.

12. On the same date, the case was assigned to the undersigned Judge.

13. On 26 January 2017, the Respondent duly filed his reply.

14. On 30 January 2017, the Applicant filed a motion in which he requests: (a) leave to file “brief comments” on the Respondent’s reply; (b) a preliminary determination; and (c) the Respondent’s “documents” to be struck out.

15. By Order No. 20 (NY/2017) dated 31 January 2017, the Tribunal ordered: (a) the Respondent to file a response to the Applicant’s 30 January 2017 motion by 7 February 2017; and (b) the parties to attend a Case Management Discussion (“CMD”) on 15 February 2017.

16. On 7 February 2017, the Respondent filed his response to Order No. 20 (NY/2017).

17. At the CMD on 15 February 2017, the Applicant was self-represented and the Respondent was represented by Mr. Alister Cumming. Having reviewed para. 46 of *Kisia* UNDT/2016/040 (not appealed), by which the ASG/Controller’s decision of 23 April 2014 together with the UNCB’s recommendation of 4 April 2014 were rescinded and the Applicant’s claim was remanded for a new examination by UNCB, the Tribunal reminded the parties that it considered that compliance with sec. 18 of ST/AI/149/Rev.4 is mandatory and that the ASG/Controller was “required to take his/her own decision, which must be a completely separate decision from the UNCB’s recommendation”. Respondent’s Counsel confirmed that no separate decision was issued by the ASG/Controller regarding the Applicant’s claim. To avoid any further delays and considering that one of the relevant steps of the procedure was not observed, pursuant to art. 20 of its Rules of Procedure, the Tribunal therefore

proposed that, with the concurrence of the Secretary-General, the case be remanded for instituting the required procedure as per para. 46 of *Kisia* UNDT/2016/040. The Applicant stated that he would request compensation for the procedural delay. Counsel for the Respondent answered that, before being able to provide any response on the Secretary-General's concurrence, he would need to take proper instructions and requested two weeks to do so. The Tribunal accepted this, noting that, if the Secretary-General concurred, it would order the suspension of the proceedings before it in a subsequent written order.

18. By Order No. 29 (NY/0217) dated 16 February 2017, the Tribunal ordered the Respondent to inform the Tribunal by 1 March 2017 whether, pursuant to art. 20 of its Rules of Procedure, he concurred to remand the case for the completion of the required procedure in accordance with para. 46 of *Kisia* UNDT/2016/040.

19. By submission dated 1 March 2017, the Respondent stated that the ASG/Controller, the decision-maker in the case, requested further time to consider the matter and did not anticipate taking a decision until 8 March 2017.

20. By email of the same date, the Tribunal instructed the Applicant to file his comments, if any, to the Respondent's 1 March 2017 submissions by 2 March 2017.

21. On 2 March 2017, the Applicant objected to the Respondent's request for extension of time.

22. By Order No. 41 (NY/2017), the Tribunal granted the requested time extension and instructed the Respondent to file his response as per Order No. 29 (NY/2017) by 9 March 2017.

23. By submission dated 9 March 2017, Counsel for the Respondent explained that, on 6 March 2017, the ASG/Controller had issued a decision, which had been sent to the Applicant on 8 March 2017, and that, as a result, a decision, separate from the UNCB's recommendation, has therefore been issued and a remand of the case

was not necessary. The ASG/Controller's decision was appended to the submission and, in this decision, she stated as follows to the Applicant:

... With regard to your claim which was remanded to the UNCB by [the Dispute Tribunal] and reconsidered by the UNCB at its 347th meeting, I have carefully reviewed the recommendation of the UNCB.

... After considering such recommendation, the facts of the case and the documentation provided, I have decided to deny your claim for compensation in the amount of USD 2,277.53.

24. On 9 March 2017, the Applicant filed a motion for leave to comment on the Respondent's submission of the same date in which he submitted, amongst other things, that:

... [T]he Applicant respectfully requests that [...] the controller's decision [reference to annex omitted] be found as irregular and *sub judice*, and the Respondent's submission be dismissed and the dispute be properly remanded to the Respondent for the institution of proper procedure and,

... Pursuant to Article 9 of the Tribunal's Rules of Procedure, the Applicant further requests and moves the Tribunal to find at this stage of the proceeding, that the controller of the United Nations had failed to act, by not taking a decision on the recommendation of the UNCB, in breach of a contractual obligation owed to the Applicant and in violation of the Applicant's right to an administrative action, and enter a judgment as these facts have not been disputed and have actually been confirmed and reinforced by the controller's alleged new and irregular decision [reference to annex omitted].

25. By Order No. 47 (NY/2017) dated 17 March 2017, the Tribunal instructed the parties to attend a CMD on 28 March 2017.

26. At the 28 March 2017 CMD, the Applicant was self-represented and the Respondent was represented by Mr. Cumming. The Tribunal noted that, while the ASG/Controller had taken a decision on 6 March 2017, no reasoning was provided along with it and Counsel for the Respondent was requested to provide this reasoning in writing and signed by the ASG/Controller by 17 April 2017. Finding that

all the documents on record were relevant and that the parties had no further evidence, the Tribunal stated that the case would thereafter be ready for determination on the papers before it and instructed the parties to file their closing statements by 26 April 2017. The Applicant reiterated his request to be compensated for the delay in proceedings in addition to the remedies indicated in the application, alleging that his due process rights were violated by the delay in the issuance of the 6 March 2017 decision and its reasoning.

27. By Order No. 63 (NY/2017) dated 30 March 2017, the Tribunal ordered: (a) the Respondent to provide the written reasoning for the 6 March 2017 decision of the ASG/Controller, signed by her by 17 April 2017; and (b) the parties to submit their closing statements, also addressing, as part of their submissions on the requested relief, the additional remedy indicated by the Applicant during the CMD by 26 April 2017.

28. On 17 April 2017, the Respondent filed the ASG/Controller's signed written reasoning for her 6 March 2017 decision.

29. On 26 April 2017, both parties filed their closing statements.

Applicant's submissions

30. The Applicant's principal contentions may be summarized as follows:

- a. ST/AI/149/Rev.4, which regulates compensations for losses to personal properties of staff members attributable to work, like Appendix D to the Staff Regulations and Rules, is a workers' compensation system guided by staff regulation 6.2 as a superior law, and ought to work under the no-fault doctrine, as was previously determined by the Appeals Tribunal in *Wamalala* 2013-UNAT-300. The recommendation that the Applicant was negligent in causing damage to his personal property and the denial of compensation on

grounds of alleged negligence on the part of the Applicant was improper and unlawful and, if anything, the Applicant's personal property suffered damage as a direct result of the Administration's negligence;

b. In accordance with para. 12 of ST/AI/149/Rev.4, the only party that was responsible for the damage to the Applicant's personal property and loss was the Administration. If removed from the sequence of events leading to the loss, the loss would not have occurred. The Applicant's request for a suitable compensation from the Administration was proper;

c. The UNCB and/or the Administration have improperly misinterpreted the language of para. 14(b)(ii) of ST/AI/149/Rev.4 to deny the Applicant compensation. The wording, "if any", should be interpreted as creating a possibility and not a necessity in which case, when applicable, the compensation from UNCB shall be reducible by the amount of any such recovery;

d. Nothing in ST/AI/149/Rev.4 prevents the UNCB from recommending compensation for losses to personal property attributable to work as the Organization is the ultimate responsible entity;

e. ST/AI/149/Rev.4 does not preclude compensation on the basis of failure to make a separate claim from personal insurance as has improperly been applied in his case. The possibility of making a claim from private insurance, where possible, is not a mandatory initial procedural step for the UNCB to find the claim receivable or not;

f. It is an established principle of insurance and a normal personal insurance practice that work-related losses, accidents and injuries are not covered as personal losses, which is the basis of the workers' compensation insurance schemes or systems like ST/AI/491/Rev.4. Moreover, it is

the practice of insurance companies to increase their premiums after claims are made, and the Applicant's decision to only avail himself to a worker's compensation system of a work-related loss was proper;

g. By improperly denying his claim, his right to receive a suitable compensation and recover from his losses has been violated. The United Nations ought to have (a) independently reviewed the recommendations of the UNCB, (b) taken a reasoned and separate administrative decision from the recommendations of the UNCB, and (c) informed the Applicant of such administrative decision. The procedure followed by the Administration was irregular and unlawful;

h. The UNCB only submitted to the Applicant its recommendations, alleging that such recommendations were approved by the ASG/Controller without any separate approval or denial letter and bearing the signature of the ASG/Controller, which was mailed to the Applicant. The procedure followed by the Administration was irregular and the Applicant's right to an administrative action by the Administration was violated;

i. Since there was no indication or even a signature that the ASG/Controller ever authored the decision mailed to the Applicant on 2 November 2016, the decision was unlawful. The UNCB cannot substitute the ASG/Controller and its recommendations cannot substitute the administrative decision of the ASG/Controller, rendering the decision unlawful;

j. The law regulating the use of Information and Communication Technology ("ICT") and resources of the Organization in force at the time of the incident, namely ST/SGB/2004/15 (Use of Information and communication technology resources and data) requires that any investigation involving the Organization's ICT data and resources, such as the electronic

CCTV videos, may only be carried out by the Office of Internal Oversight Services (“OIOS”) and the ICT Department, and the decision of the Chief of SSS to retrieve, enhanced, analyze and interpret the CCTV video of the incident, was a violation of the law;

k. The Applicant’s right to be present at the retrieval of CCTV videos of the incident from the original recording sources was violated as the Applicant was never allowed by the Chief SSS to be present when he was retrieving the CCTV video data or to review the data at the original recording source in a witnessed manner as provided for in the SGB/2004/15. This violated the Applicant’s rights under the law;

l. Any CCTV video data or footages of the incident, retrieved, analyzed and interpreted in violation of the law, especially in a manner that was shrouded by SSS’ ulterior motives, should be declared null and void;

m. The investigator and the UNCB had no competency in enhancing, analyzing, and interpreting electronic CCTV video data—only electronic data analysts within the OIOS and ICT Department possess such competencies. The investigator and the UNCB’s findings or recommendations were merely based on subjective observations of lay persons. These observations are not and cannot substitute facts as they all derive from the video images of the incident that was corruptly edited by the Chief SSS to mislead and cover any truth that the Chief SSS had allowed for unsafe conditions violating regular safety order on the entrance and placing staff members and delegates at higher risks of suffering harm and property damages;

n. The denial decision was therefore not based on facts. The Chief SSS’ submission of an electronic CCTV video of the alleged incident, which was retrieved in violations of the Applicant’s rights to an investigative review, was a procedural illegality. Since the contested decision is based on

the UNCB's recommendations and improper review, analysis and interpretation of an electronic CCTV video data, the decision and the recommendations of the board are unlawful;

o. Nothing stopped the Chief SSS from following proper procedure and from according the Applicant his due process rights as per ST/SGB/2004/15. The Chief SSS had a personal interest in covering the truth, having allowed for unsafe conditions and breaching regular safety order at the entrance without any warning for seven days before the Applicant's incident. The Chief SSS should have been held responsible for this, having been informed about the unsafe conditions as was correctly reported in post log book entry. The Chief SSS improperly used the investigation of the incident, the CCTV videos and the passwords under his care to avoid his culpability;

p. Instead of carrying out its own independent and fair review of the Applicant's claim, the UNCB was improperly influenced by the investigation report that was biased and incompetently prepared. The improper recommendations of the Chief SSS and the medical reports submitted by the Applicant were diverted by the Secretary of the Advisory Board on Compensation Claims to the UNCB in order to expose the extent of injury suffered by the Applicant and with a view not to subsequently offer him compensation for his injuries. The UNCB's review was never fair and the recommendations and decision are without any fairness and are therefore unlawful;

q. The Applicant's right was violated when, after reporting the investigation and the investigator to the "OIC" (an abbreviation unknown to the Tribunal) of systematic alterations of evidence, this report was never investigated. This could have been done on directions from the Chief SSS, who also managed the investigations. The investigator alleged that it was the Applicant who proceeded without signal to proceed, which was exactly

similar to the words, “before being told to go”, inserted into the log book entry regarding the incident, indicating that the investigation was never free and fair and lacked credibility. Such investigation should therefore never have been relied on;

r. It was unclear why the investigator recommended that entry barrier systems should be replaced as soon as they were disabled, indicating that they had been disabled and had created unsafe conditions violating the regular safety order. On the contrary, the investigator found that the Applicant, who was not responsible for the replacement of the disabled barrier systems on the entrance, had a responsibility which was rightly that of the Chief SSS who had acted negligently. The investigation was improperly used to cover facts and to mislead the UNCB and the Administration;

s. The alteration of the log book regarding the incident entry was unlawful;

t. The Applicant’s rights under Staff Regulation 1.2(c) were violated when he was directed through and exposed to known unsafe conditions violating regular safety order on the entrance which led to his incident;

u. The failures of the Chief SSS and the investigator to allow him to review and comment on the findings of the investigation before such reports were submitted to the UNCB were improper and violated his rights;

v. The review of his claim and the recommendations were shrouded by ulterior motives, procedural illegalities and due process violations, rendering the decision unlawful. The UNCB’s reliance on its previous recommendations and *Kisia* UNDT/2016/040 was improper;

31. In his closing submissions, the Applicant further states that the failure of the ASG/Controller to take a separate, reasoned and distinct decision from

the recommendations of the UNCB was irregular and improper and violated his right to a prompt administrative action. He also contends that he should be compensated for the procedural delays and that the Respondent was fully aware that the Applicant suffered severe depression and anxiety and is under constant medication and treatment.

Respondent's submissions

32. The Respondent's principal contentions may be summarized as follows:

a. It is the Dispute Tribunal's role to assess whether the procedures under ST/AI/149/Rev.4 were followed, relevant information was taken into account, and the decision was free from bias or other improper motivation (see *Sanwidi* 2010-UNAT-084). It is not the role of the Dispute Tribunal to make findings about whether damage to the Applicant's vehicle was caused by negligence. That would amount to a *de novo* determination of his claim (see *Karseboom* 2015-UNAT-601);

b. Under staff rule 6.5, staff members are entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable compensation in the event of the loss of, or damage to, their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations;

c. ST/AI/149/Rev.4 defines the terms, conditions and limits governing compensation covered by staff rule 6.5. It sets out the procedures for the submission and examination of claims in connection with such loss or damage (sec. 1). The ASG/Controller, on behalf of the Secretary-General, takes decisions on claims made under ST/AI/149/Rev.4, based on the recommendation of the UNCB. Pursuant to sec. 4(a) of ST/AI/149/Rev.4, no staff member is entitled to compensation for any loss or damage caused by

his or her negligence. Sections 12 to 15 of ST/AI/149/Rev.4 set out the requirements for making a claim. In particular, sec. 12 requires a claimant to take “all reasonable steps” to obtain compensation from his insurance company. Additionally, a claimant shall specify if personal insurance cover was in place, and if any steps were taken to claim under that coverage (sec. 14(b)(ii));

d. The ASG/Controller’s decision was based on a full review of the relevant facts by the UNCB;

e. In *Kisia* UNDT/2016/040, the Tribunal directed the UNCB to consider the question of the receivability of the Applicant’s claim. Accordingly, the UNCB first considered this matter. The UNCB noted that the Applicant had not claimed for the damage to his vehicle under his own personal insurance policy. He stated that he decided not to make a claim under that insurance. The Applicant failed to take the required step of claiming the cost of the repairs to his vehicle under his insurance. He did meet the conditions for presenting a claim for compensation established by secs. 12 and 14(b)(ii). Accordingly, the UNCB recommended that the claim be dismissed as not receivable;

f. The UNCB went on to consider whether it would recommend compensation if the claim was considered receivable. The UNCB recommended that the claim be denied for the same reasons as given at its 343rd meeting, i.e., under sec. 4(1) of ST/AI/149/Rev.4, as the damage was caused by the Applicant’s own negligence. At its 343rd meeting, the UNCB found that the Applicant was familiar with the functions and operation of the traffic systems installed at the security post as a result of his duties as a then Security Officer;

g. The UNCB considered that the barrier was a device that rises up from ground level. It is usually kept in the raised position to prevent unauthorized intrusion of vehicles into the UNHQ premises. The barrier is recessed to the ground level to allow vehicles that are authorized to enter the premises to pass over it;

h. The Applicant had been posted to post no. 103 on five occasions in the period from 31 May to 27 July 2013. He was also aware of the DSS operating procedures relating to the operation of the barrier. The UNCB carefully reviewed the investigation report and the CCTV footage of the incident. The UNCB's conclusion that the damage to the vehicle was caused by the Applicant's negligence was fair and reasonable;

i. Having considered the UNCB's recommendation, the ASG/Controller accepted it and decided to deny the Applicant's claim. The Controller signed and dated her approval of the UNCB's recommendation;

j. The Applicant has failed to establish that the relevant procedures were not followed, that relevant information was not taken into account, and that the decision was not free from bias or other improper motivation. His challenges to the procedure followed during the investigation into the incident are without merit;

k. The SIU has competence to conduct fact-finding investigations of traffic incidents that occur within the United Nations Headquarters complex under the DSS/SSS's standard operating procedures. The SIU's investigation was conducted in accordance with the applicable procedures. The SIU's findings were reviewed by the UNCB and accepted;

l. Contrary to the Applicant's claims, the retrieval, dissemination and review of the CCTV footage of the incident was lawful. The integrity of

the data contained in the CCTV footage was properly preserved and released to the UNCB, in accordance with DSS/SSS's standard operating procedures. The Applicant has not identified any right under the terms and conditions of his appointment that would prevent the Organization from considering relevant evidence in deciding upon his claim under ST/AI/149/Rev.4;

m. The Applicant's claims for relief are without merit as the contested decision was lawful. The Dispute Tribunal does not have jurisdiction to award the Applicant compensation for the damage to his vehicle. This would amount to a *de novo* determination of his claim under ST/AI/149/Rev.4 (see *Karseboom*);

n. Furthermore, art. 10.5(b) of the Dispute Tribunal's Statute, as amended by General Assembly resolution 69/203, provides that compensation for harm may only be awarded where supported by evidence. The Applicant does not provide any evidence to show that he has suffered any harm as a consequence of the Administration allegedly violating his or her rights (see *James* 2010-UNAT-009, *Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095, *Abboud* 2010-UNAT-100, and *Wasserstrom* UNDT/2013/053);

Consideration

Applicable law

33. Staff rule 6.5 from the Staff Rules applicable at the time of the accident (ST/SGB/2014/1) provides as follows (emphasis omitted):

Rule 6.5

Compensation for loss or damage to personal effects attributable to service

Staff members shall be entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable

compensation in the event of loss or damage to their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations.

34. ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service) issued on 14 April 1993, secs.1-5 , 12-16 and 18 provide that:

Purpose

1. Staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5] provide that staff members shall be entitled, within the limits and under the terms and conditions established by the Secretary-General, to reasonable compensation in the event of the loss of or damage to their personal effects, determined to be directly attributable to the performance of official duties on behalf of the United Nations. The purpose of the present instruction is to define the terms, conditions and limits governing such compensation and to set forth the procedure for the submission and examination of claims in connection with such loss or damage.

2. The present instruction shall apply to incidents occurring on or after 1 January 1993. It cancels and supersedes administrative instruction ST/AI/149/Rev.3 of 17 November 1988.

Conditions for the entitlement

3. Without restricting the generality of the provisions of staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5], loss of or damage to the personal effects of a staff member shall be considered to be directly attributable to the performance of official duties when such loss or damage:

(a) Was caused by an incident which occurred while the staff member was performing official duties on behalf of the United Nations; or

(b) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area designated by the United Nations Security Coordinator as hazardous, and occurred as a result of the hazards in that area; or

(c) Was caused by an incident which occurred during any travel, by means of transportation furnished by or at the expense or direction of the United Nations, undertaken in connection with the performance of official duties.

4. No compensation shall be paid for any loss or damage which was:

(a) Caused by the negligence or misconduct of the claimant; or

(b) Sustained by a private vehicle which was being used for official business, including travel in connection with home leave, when such use of a private vehicle was solely at the request of and for the convenience of the staff member.

5. Staff members should note that no compensation shall be paid for the loss of or damage to personal effects, except as provided under the Staff Rules and paragraph 3 of the present instruction. Otherwise, such loss or damage shall be the sole responsibility of the staff member. For this reason, it is recommended that staff members obtain, at their own expense, adequate personal property insurance coverage.

[...]

Notification of loss and presentation of a claim for compensation

12. In the event of any loss of or damage to a staff member's personal effects, he or she shall, as soon as possible, notify the appropriate United Nations authorities and other authorities, including the local police, and submit any pertinent evidence. Where articles have been lost or damaged, the staff member shall take all reasonable steps to recover said articles or to receive suitable compensation from the party responsible, or from his or her insurance company, for such loss or damage. Compensation shall be reduced by the amount of any such recovery.

13. In order to be receivable by the Claims Board (see paras. 16 to 18 below), claims for compensation shall be made within two months of the discovery of the loss or damage, shall include copies of reports of investigations into the loss or damage and shall be submitted by the claimant to his or her executive officer/chief administrative officer for examination and submission to the Claims Board. Both the submissions by the claimant and by the executive officer/chief administrative officer shall be in the form of signed statements as described below.

14. The claimant shall set out in detail:

(a) Information pertinent to the amount of compensation claimed, including:

(i) A description of the article;

(ii) The age and the condition of the article;

- (iii) The original cost of the article and the date of purchase or acquisition;
 - (iv) The replacement cost of the article and supporting documentation on both price and comparability of the proposed replacement article;
- (b) All the circumstances pertinent to the loss or damage and the action taken by the claimant in respect thereof (see para. 12 above), including:
- (i) Statements signed by any other person or persons in a position to furnish information relating to the loss or damage, including copies of reports of investigations into the loss or damage;
 - (ii) Personal insurance coverage, if any, the action taken to claim under that coverage and the results thereof;
 - (iii) In the case of travel by common carrier (air, rail, etc.), a copy of the lost property report and information on any reimbursement claimed from the carrier;
 - (iv) In the case of damage, the cost of repair supported by a copy of the invoice and receipt.

15. On receipt of a claim, the executive officer/chief administrative officer shall:

- (a) Examine the claim and ascertain whether all required information and material as set forth in the present instruction have been provided and, if necessary, request such further information or material as may be required or as he or she considers desirable;
- (b) Provide any additional information on the causes and circumstances of the loss or damage including copies of any investigation reports on the incident which may be available;
- (c) As appropriate, certify and provide supporting documentation:
 - (i) With regard to paragraph 11, as to the dependency status of the staff member;
 - (ii) With regard to subparagraph 3 (c), that the staff member was in official travel status;

- (d) Supply a copy of the inventory filed by the staff member in accordance with the applicable security plan, as appropriate;
- (e) Provide other pertinent observations including information regarding the replacement cost claimed as appropriate;
- (f) Forward the claim, other relevant documents, and his or her comments thereon to the Secretary of the Claims Board.

Consideration of claims

16. All claims shall be examined by the Claims Board in accordance with its terms of reference, set out in annex I/Amend. 2 to the Secretary-General's Bulletin ST/SGB/Organization. The composition of the Board and its administrative arrangements are announced periodically in information circulars. At locations away from Headquarters, local claims review panels may be established, as authorized by the ASG/Controller.

[...]

18. The Claims Board shall act in an advisory capacity to the ASG/Controller and shall transmit its recommendation regarding the settlement of each claim to the ASG/Controller.

Receivability framework

35. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

36. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

- a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations

Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

37. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

38. The Applicant is a former United Nations staff member with the DSS at United Nations Headquarters in New York, and the application is receivable *ratione personae*.

Receivability ratione materiae

39. The Applicant is contesting that, on 11 November 2016, the ASG/Controller approved the 15 September 2016 recommendation of the UNCB to deny the Applicant’s claim for compensation for damage to his vehicle following

an accident that occurred on 27 July 2013 at the United Nations Secretariat building's security post no. 103 in New York. The ASG/Controller's decision, which is alleged not to be in non-compliance with the Staff Regulations and Rules, as well as relevant administrative issuances then applicable to the Applicant's contract, is an appealable administrative decision under art. 2.1(a) of the Statute of the Dispute Tribunal. The Applicant was notified of the contested administrative decision on 2 November 2016 and filed a request for management evaluation on 22 November 2016, i.e., within 60 days from the date of notification. Therefore the application is receivable *ratione materiae*.

Receivability ratione temporis

40. On 14 December 2016, the Applicant received a management evaluation response upholding the decision and, on 26 December 2016, within 90 days from the date of receiving the management evaluation response, he filed the present application. Therefore, the application is receivable *ratione temporis*.

The UNCB's recommendation to the ASG/Controller

41. Section 5 of ST/AI/149/Rev.4 provides that:

5. Staff members should note that no compensation shall be paid for the loss of or damage to personal effects, except as provided under the Staff Rules and paragraph 3 of the present instruction. Otherwise, such loss or damage shall be the sole responsibility of the staff member. For this reason, it is recommended that staff members obtain, at their own expense, adequate personal property insurance coverage.

42. Sections 12 and 14(b)(ii) of ST/AI/149/Rev.4, according to which the UNCB stated that the Applicant's compensation claim was not receivable, provide as follows:

12. In the event of any loss of or damage to a staff member's personal effects, he or she shall, as soon as possible, notify

the appropriate United Nations authorities and other authorities, including the local police, and submit any pertinent evidence. Where articles have been lost or damaged, the staff member shall take all reasonable steps to recover said articles or to receive suitable compensation from the party responsible, or from his or her insurance company, for such loss or damage. Compensation shall be reduced by the amount of any such recovery.

[...]

14. The claimant shall set out in detail:

...

(b) All the circumstances pertinent to the loss or damage and the action taken by the claimant in respect thereof (see para. 12 above), including:

...

(ii) Personal insurance coverage, if any, the action taken to claim under that coverage and the results thereof;

43. The Tribunal considers that, as results from art. 12 read together with art. 14(b)(ii) of ST/AI/149/Rev.4, for a compensation claim for damage to be receivable before the UNCB, the relevant staff member is required (“shall”) to take the following mandatory and cumulative actions, setting forth in detail all relevant circumstances to UNCB:

- a. To notify the United Nations authorities and the local police about the incident as soon as possible;
- b. To submit all pertinent evidence;
- c. In case the staff member holds a valid personal insurance at the date of the incident for the lost or damaged article(s), to take all the reasonable steps to receive suitable compensation under this insurance prior to submitting the claim to the UNCB and then to provide the UNCB with the results thereof, including whether the damages were covered totally or partially by his insurance company.

44. Only if all these elements are met, the UNCB can further analyze the substance of a claim and make its recommendation(s) accordingly to the ASG/Controller.

45. The Tribunal notes that:

a. The Applicant informed the United Nations authorities and the local police about the incident occurred to his car;

b. In Case No. UNDT/NY/2014/061, the Applicant admitted that he had motor vehicle insurance, under which he could have made a claim for the cost to repair his vehicle, but he decided not to make such a claim prior to submitting his claim to the UNCB;

c. As results from the document issued on 2 November 2016, the UNCB considered the Applicant's claim at its meeting on 15 September 2016 and its recommendation, as approved by the ASG/Controller on 18 October 2016, states as follows:

[...]

The board reconsidered the claim for [the Applicant], in accordance with UNDT judgment no: UNDT/2016/040.

The board considered [receivability] of this claim under the following articles of ST/AI/149/Rev.4:

§12 (notification of appropriate UN authorities)

§12 (submission of pertinent evidence)

§12 (reasonable steps to recover from insurance)

§13 (two-month deadline)

§13 (copies of investigation reports)

§13 (submission in form of signed statements)

§14(a) (information pertinent to amount of compensation claimed)

§14(b)(ii) (personal insurance coverage and action taken thereunder)

§14(b)(iv) (cost of repair estimate)

§14(b) (circumstances pertinent to damage)

§15(a) (verification that all required information and material submitted)

§15(b) and (c) (submission of additional information and supporting documentation)

and determined that the claim is not receivable due to the lack of action taken to file a claim under personal insurance coverage pursuant to Articles 12 and 14 (b) (ii).

Nonetheless, even had the board found the claim to be receivable, the board recommends against compensation and hereby reiterates its grounds for such recommendation from its recommendation at its 343rd meeting.

46. It clearly results that the UNCB recommended the application be rejected based only on a procedural ground, namely the non-receivability of the claim, and not on any substantive grounds related to the evidence before the UNCB. Once the UNCB recommended the Applicant's claim be rejected as not receivable, no further determination, comments and/or observations regarding the merits of the claim were to be made by the Board. The Tribunal therefore considers as null and void the following text included in the UNCB recommendation,

“Nonetheless, even had the board found the claim to be receivable, the board recommends against compensation and hereby reiterates its grounds for such recommendation from its recommendation at its 343rd meeting”.

47. The Tribunal considers that, by having valid personal car insurance, the Applicant diligently followed the recommendation of art. 5 of ST/AI/149/Rev.4. However, he did not seek to have the damage to his vehicle resulting from the incident that occurred on 27 July 2013 covered by submitting a claim to receive suitable compensation for the cost of repairs from his insurance company.

48. The Tribunal considers that the Applicant did not take any reasonable steps to receive suitable compensation from his insurance company and one of the cumulative conditions for his claim to be receivable before the UNCB was not fulfilled. The Tribunal concludes that the UNCB's recommendation that the Applicant's claim for damages was not receivable because of "the lack of action to file a claim under personal insurance coverage" was correct.

The ASG/Controller's decision

49. As results from the above considerations, on 18 October 2016, the ASG/Controller signed the UNCB's recommendations.

50. As instructed by the Tribunal in Order No. 63 (NY/2017), on 17 April 2017, the Respondent provided the reasons, dated 11 April 2017, for the ASG/Controller's decision of 6 March 2017, in which she stated as follows:

2. I carefully reviewed the UNCB minutes. The Board appeared to proceed on a correct determination of the law. Its factual conclusions appeared to be supported by the evidence. The UNCB's conclusions (e.g., lack of receivability of the claim, that the claimant was negligent and his claim was entirely without merit) appeared to be reasoned, reasonable and supported by the evidence. However, I proceeded to consider the matter myself and make my own decision.
3. I first considered the Board's recommendation regarding the receivability of the claim. I considered that the Board was correct to determine that the claim was not receivable due to the lack of action taken to file a claim under [the Applicant's] personal insurance coverage. This was in accordance with Articles 12 and 14(b)(ii) of ST/AI/149/Rev.4.
4. I then considered the merits of [the Applicant's] claim. In particular, I noted the investigation report and the security video. I also noted that [the Applicant] had provided an explanation of the events. I was aware that Article 4(a) of ST/AI/149/Rev.4 provides that compensation shall not be paid for loss or damage caused by the claimant's own negligence. Having taken all the documentation before me into account, I came to

the conclusion that [the Applicant] was negligent and that his claim should therefore be denied. I therefore decided to deny the claim.

5. While I reached my own decision on the claim, it bears noting that, pursuant to the relevant legislation (ST/AI/149/Rev.4), the UNCB is charged with drawing conclusions and interpreting fact and law. I therefore accord its recommendations appropriate deference and consider carefully its judgment.

51. These reasons are to be considered part of the contested decision made on 6 March 2017.

52. The Tribunal notes that, as results from the reasoning of the contested decision, the ASG/Controller decided in accordance with art.12 and 14(b)(ii) of ST/AI/149/Rev.4 that the Applicant's claim "was not receivable due to the lack of action to file a claim under his personal insurance coverage" and considers that this part of the contested decision is legally correct and in accordance with the UNCB's recommendation.

53. The Tribunal further notes that, in para. 4 quoted above, the ASG/Controller provided reasons not only regarding the non-receivability of the application, but also on the merits of the application and rejected the Applicant's claim both as being not receivable pursuant to arts. 12 and 14(b)(ii) of ST/AI/149/Rev.4 due to the lack of action taken to file a claim under his personal insurance coverage and on the substance pursuant to art. 4(a) of ST/AI/149/Rev.4 because of his own negligence.

54. The Tribunal underlines that a claim for damages cannot be rejected both on receivability and on its merits and that only a receivable claim can be reviewed and determined on the merits. Since the Tribunal has established that the part of the UNCB recommendation, "nonetheless, even had the board found the claim to be receivable, the board recommends against compensation and hereby reiterates its grounds for such recommendation from its recommendation at its 343rd meeting",

related to the substance of the claim is null and void; the part of reasons provided on 11 April 2017 by the ASG/Controller, namely para. 4, which relates to the substance of the case, is also to be considered null and void.

55. The Tribunal will not further analyze the grounds of appeal related to the merits of the Applicant's claim before the UNCB as the ASG/Controller correctly decided that the claim was not receivable.

Procedural delays

56. The Tribunal notes that in *Kisia* UNDT/2016/040, the Tribunal stated a follows (paras. 47,48, 53 and 54):

... As results from the evidence and from the Respondent's submissions, the contested decision consists in the UNCB's recommendation against awarding the Applicant any compensation, which was included in the minutes of UNCB's 343rd meeting of 20 February 2014 submitted for the ASG/Controller's consideration on 4 April 2014.

... The Tribunal, after reviewing the content of the contested decision, finds that instead of making her own final and reasoned decision on the Applicant's claim, the ASG/Controller appears to have only signed off on the recommendation made by UNCB to deny the claim on 23 April 2014, as admitted by the Respondent. The Tribunal observes that the signature with the date of 23 April 2014 does not indicate the name and/or the position of the decision-maker.

[...]

... The Tribunal underlines that, according to secs. 14 and 16 of ST/AI/149/Rev.4, the UNCB is competent in the first instance to evaluate the receivability of a compensation claim in accordance with its Rules of Procedure, sec. 17. Consequently, the Applicant's compensation claim for property damage for his car is to be remanded for a new examination by UNCB, including on receivability.

.... Based on the UNCB's recommendation, the ASG/Controller is then to make the final decision on the Applicant's claim.

57. The Tribunal notes that, as results from the factual and procedural history, when the contested decision was returned for the Tribunal's consideration, the same procedural error was made, namely that the ASG/Controller did not take a separate and reasoned decision on 18 October 2016, as she simply countersigned and approved the 15 September 2016 UNCB recommendation. Such a decision was made only on 6 March 2017 and the reasons for this decision were only completed on 11 April 2017.

58. At the CMDs held on 15 February and 28 March 2017, the Applicant submitted that he requested to be compensated for the procedural delays in the present case and, in his closing statements, the Applicant contended that he has suffered severe depression and anxiety and is under constant medication and treatment.

59. The procedural history of the present case demonstrates with certainty the procedural delays, consisting in the Administration's failure to make a separate and reasoned decision on the Applicant's claim for damages for almost 6 months, i.e., from 18 September 2016 until 6 March 2017. This further prolonged the proceedings before the Tribunal for another month, from 2 March 2017 until 11 April 2017.

60. In *Benfield-Laporte* 2015-UNAT-505 (issued on 26 February 2015), the Appeals Tribunal held that (see para. 41, footnote omitted):

... 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.

61. Taking into consideration all circumstances of the present case, the Tribunal considers that the present judgment, together with USD3,500 in compensation to the Applicant, represents a reasonable and sufficient relief for the procedural delays

identified above (in comparison, in *Benfield-Laporte*, the Appeals Tribunal, for instance, upheld the Dispute Tribunal's award of USD3,000 in compensation for a six-month delay, notably USD500 per month).

Conclusion

62. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The ASG/Controller's 6 March 2017 decision to reject the Applicant's claim is upheld, except the following part of the reasons provided on 11 April 2017 and which was based on an unlawful part of the UNCB's recommendation:

4. I then considered the merits of [the Applicant's] claim. In particular, I noted the investigation report and the security video. I also noted that [the Applicant] had provided an explanation of the events. I was aware that Article 4(a) of ST/AI/149/Rev. 4 provides that compensation shall not be paid for loss or damage caused by the claimant's own negligence. Having taken all the documentation before me into account, I came to the conclusion that [the Applicant's] was negligent and that his claim should therefore be denied. I therefore decided to deny the claim.

c. The Applicant is awarded USD 3,500 compensation for the approximately seven months' procedural delays attributable to the Administration in the present case. The sum above shall bear interest at the U.S. Prime Rate effective 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 Alessandra Greceanu

Dated this 22nd day of June 2017

Entered in the Register on this 22nd day of June 2017

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge