**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

# ON RECEIVABILITY

**Counsel for Applicant:**
Self-represented

**Counsel for Respondent:**
Mr. Alan Gutman, ALS/OHRM, UN Secretariat

… On 6 October, the Applicant wrote to [the Director] to remind him that still nothing had been done to address the concerns set out in his Complaint against [the then USG/OIOS] [reference to annex omitted].

… On 6 October 2015, despite the deadline specified in paragraph 5.17 of ST/SGB/2008/5, [the Director] wrote to the Applicant: "Well noted. As previously noted, your complaint is being taken seriously, but as you might imagine in a large bureaucracy such as ours, resolving matters such [as yours] is by no means an easy and straight forward matter." [The Director] proposed meeting with the Applicant to discuss the case [reference to annex omitted].

… On 8 October 2015, the Applicant met with [the Director] to discuss his Complaint, but the case was not resolved and no action was contemplated.

… On 9 October 2015, [the then Acting Head of OIOS] informed the staff of OIOS that [Mr. MS] was on an extended leave of absence with effect from 8 October 2015 and that [name redacted], Deputy Director, would be Officer-in-Charge of the Investigations Division until further notice [reference to annex omitted].

... On 12 October 2015, the Applicant wrote to [the Director] to inform him that the situation at the New York office of the Investigations Division continued to deteriorate, and to express his wish to discuss his options [reference to annex omitted].

... [Paragraphs redacted for privacy reasons].

… On 16 October 2015, the Applicant met with [the Director] to discuss his Complaint, but the case was not resolved.

… [The then Acting Head of OIOS] wrote to the Applicant on 16 October 2015, saying:

> Please let me have your specific suggestions on the additional actions that need to be taken to further improve your work environment. Please let me further

submissions filed in the case to date would be translated from English into French and vice versa. The parties were instructed that no further filings were to be made without leave of the Tribunal.

14. By Order No. 45 (NY/2016) dated 22 February 2016, the Tribunal ordered the parties to attend a case management discussion ("CMD") on 2 March 2016 to discuss, *inter alia*, the motion filed by the Applicant on 4 January 2016 requesting that the Tribunal: strike out the Respondent's reply to the application and order production of a reply in French; order the Respondent to include a "certification" in his reply; order the Registry to use French in all communication with the parties in this case; declare that French "is the language of Case No. UNDT/NY/2015/063"; admit additional evidence.

15. At the CMD on 2 March 2016, the Applicant was self-represented and the Respondent was represented by Mr. Alan Gutman. The Tribunal enquired, *inter alia*,

a mediated agreement via referral of the matter to the Office of the Ombudsman and Mediation Services, the Respondent disagreed.

18. By Order No. 26 (NY/2017) dated 13 February 2017, the Tribunal instructed the parties to attend a CMD to discuss the further proceedings of the case, including whether to deal with the issue of receivability as a preliminary matter on the papers.

19. At the CMD, held on 23 February 2017, the Applicant was self-represented and the Respondent was represented by Mr. Alan Gutman. Upon enquiry by the Tribunal, the Applicant confirmed that, as submitted by the Respondent, his reporting lines had changed. Counsel for the Respondent reiterated the submission that the relief sought by the Applicant in the present case had thereby been fully granted while the Applicant contended that some issues remained unsolved. The Tribunal encouraged the parties to enter into informal negotiations because it appeared that some scope for an amicable resolution existed and such outcome would be the most beneficial for everyone involved. Both parties otherwise agreed that failing an amicable resolution, the issue of receivability could be handled as a preliminary issue on the papers, for which reason it was also premature to decide on the language of a substantive hearing, the Applicant having requested that proceedings be conducted in French.

20. By Order No. 39 (NY/2017) dated 29 February 2017, the Tribunal suspended the proceedings until 11 April 2017 for the parties to further explore the possibilities for settling the case informally, either *inter partes* or through the mediation services of the Ombudsman.

21. On 11 April 2017, the Applicant filed a submission (in French, to which he attached an unofficial English translation) in which he, *inter alia*, expressed his willingness to explore the possibility of an amicable settlement. On the same date, the Respondent filed a submission stating that:

> … The parties have held discussions on addressing the Applicant's workplace concerns. The Respondent, however, does not consider such discussions as settlement negotiations.
>
> … The Respondent does not concur with a further suspension of the proceedings, and requests that the case proceed to a final judgement.

22. By Order No. 103 (NY/2017) dated 6 June 2017, considering the Respondent's unwillingness to further suspend the proceedings and the parties' agreement at the CMD on 23 February 2017 to handle the matter of receivability as a preliminary issue on the papers on record, the Tribunal ordered the Applicant to file his submissions in response to the Respondent's contentions on the receivability of the application by 6 July 2017.

23. By Order No. 136 (NY/2017) dated 20 July 2017, the Tribunal provided the following order:

> … By 5:00 p.m., Thursday, 27 July 2017, the Applicant is to file his submissions in response to the Respondent's contentions on the receivability of the application. If no such response is filed, the Tribunal will proceed to determine the question of receivability on the papers before it.

24. On 27 July 2017, the Applicant emailed the Registry and stated that he did not wish to file any response to the Respondent's contentions on the receivability of the application.

**Consideration**

25. In the reply, the Respondent submits that the application is not receivable because:

> a. The complaint underlying the application did not disclose possible prohibited conduct as defined in ST/SGB/2008/5 and, therefore, the procedure

> ... […] [T]he decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of

> As the [Dispute Tribunal] found, it was unreasonable for the Appellant to assume that a decision regarding his request for an investigation could have been reached within fourteen days from his request – especially when he was not prejudiced or harmed in the interim. A staff member "may not unilaterally determine the date of the administrative decision for the purpose of challenging it" [*Rabee* 2013-UNAT-296]. Yet, that is what the Appellant attempts to do.

found that, independent of the merits of whether a specific request was eventually to be granted, the relevant staff members primarily had a right to at least have their requests considered by the Administration.

33. The Respondent

take this complaint seriously because such complaint could potentially have very significant impact not only on the staff member but also on involved managers and/or supervisors and, as stated in sec. 3.2, "Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner". Embedded in the text of the sec. 3.2 is therefore a duty for the Administration, at minimum, to consider such complaint and then inform the complainant about the outcome of these deliberations—otherwise, in cases such as the present, the provision would be left without any practical effect or meaning (the purposive approach). This also appears, commendably, to be the understanding of the Director in his communication with the Applicant, undertaking that his complaint would be considered and that a response would be forthcoming.

37. Indeed, the MEU noted that paragraph 3.2 of ST/SGB/2008/5 provides that a breach of a duty may lead to a number of consequences, including reflection in the staff member's performance appraisal or administrative or disciplinary action. The MEU further noted that, by email dated 21 August 2015, the Director confirmed to the Applicant that the matters he had raised were being considered in the context of para. 3.2 (see letter dated 28 August 2015).

38. The Tribunal finds that under sec. 3.2 of ST/SB/2008/5 and as a matter of good faith and fair dealing (see, for instance, *Bertucci* 2011-UNAT-121, para. 7, and *Hamayel* 2014-UNAT-459, para. 17), by failing/omitting to review and consider the Applicant's complaint and informing him of the result, the Administration rendered an appealable administrative decision in accordance with art. 2.1 of Dispute Tribunal's Statute and the Appeals Tribunal's consistent jurisprudence in, for instance, *Monarawila*, *Harb* and *Schook*. The Tribunal notes that the complaint was submitted on 18 February 2015 and therefore not prematurel38.

39.

post management evaluation, the Respondent cannot submit that the Tribunal may not consider matters beyond the scope of an applicant's request if indeed the Administration produces evidence of events subsequent to the management evaluation request on the one hand, and then objects to the applicant offering rebuttal evidence on the other (see *Smith* UNAT-2017-768).

44. Furthermore, the Tribunal also notes that following the MEU's

11.2(a), the MEU advising "your complaint is being considered in the appropriate context".

*Is the present application* res judicata*?*

47. The Respondent contends that, in his application, the Applicant alleges that the then USG/OIOS refused to initiate an investigation into a complaint that the Applicant had previously filed against a former OIOS staff member. The Respondent further states that the then USG/OIOS's decision not to initiate an investigation into the previous complaint was already contested by the Applicant, and was adjudicated as non-receivable by the Dispute Tribunal in *Nadeau* UNDT/2015/097 and that, to the extent that the application seeks to contest the manner in which the former complaint was handled, it is *res judicata*.

48. The Tribunal notes that the Respondent's objection is qualified and limited to matters which the Applicant raises seeking "to contest the manner in which the former complaint was handled". These are matters which may be raa00 g0 G[(a)] TJ300558 me

**Conclusion**

49. Defining the appealable contested administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute as the Administration's failure/omission to consider the Applicant's complaint dated 18 February 2015 under S612 a58.27 624.22 Tm0 g0 G[( )] TJETQ0.0