

sex. Both males and females can be either the victims or the offenders.

7. ST/SGB/2008/5 also provides in paragraph 2.2 that the “Organization has

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18. This is a case of alleged sexual assault in which the Tribunal has heard evidence and submissions but has not yet reached a determination on the merits of the case save for a finding of procedural error.

19. After evaluating the evidence, the Tribunal concluded that there were sufficient grounds for it to seek the concurrence of the Secretary-General to remand the case under Article 10.4 of the UNDT Statute for institution or correction of the required procedure

20. The Statute and Rules of Procedure do not set out a prescribed procedure to be followed to give effect to the underlying purpose of Article 10.4. However, Article 36.1 of the Rules of Procedure provides that:

concurrence to remand the case for institution or correction of the required procedure.

24. On the same day, by Order No. 184 (NBI/2018), the Tribunal notified the parties that:

1. It is appropriate to stay proceedings while the matter is under consideration by the Secretary-General.

2. On receipt of the response of the Secretary-General, the Tribunal will issue either an Order remanding the case, in accordance with article 10.4 of the Statute, or issue a Judgment on the merits.

25. On 21 January 2019, the Tribunal obtained the concurrence of the Secretary-General that the case be remanded for institution or correction of the required procedure under Article 10.4 of the Statute.

26. The Tribunal regrets the delay in issuing this Order because the Judge who has conduct of this case is not currently on duty. However, to avoid any further delay, notwithstanding that he is on Special Leave Without Pay (SLWOP), the Judge considered it important to issue this formal order to facilitate an expeditious conclusion.

27. Article 10.4 of the UNDT Statute, allows the Tribunal to order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by procedural delay, which is not to exceed the equivalent of three months' net base salary.

28. Any such order is truly compensatory and not punitive. It recognizes, as a matter of general principle, that failure on the part of the Organization to give full effect to its own procedures may result in loss to a staff member. However, not all such errors will inevitably result in loss and each case has to be considered on its own facts and circumstances. However, it may well be surprising if, in a complaint of sexual harassment or assault that is not properly investigated and where there is a finding of inordinate delay, that a Tribunal may find that there has been no loss. However unlikely may such a prospect be, the Tribunal has a duty to individualise the application of Article 10.4 of the Statute to each case.

Accordingly, the Tribunal must first consider whether there has been such loss in this case and, if there has been, to quantify it as best it can.

29. Evidence in support of an award of compensation for loss is to be found first in the Application to the Tribunal which read as a whole indicates that the distress experienced by the Applicant went beyond her being upset by the alleged assault but also by the failure to carry out a proper investigation, to interview her once the investigation commenced and/or to provide her with necessary feedback as well as the delay in reaching a fair conclusion. It should be noted that at the time she filed her application she had no knowledge as to whether any investigation had taken place and she had not been informed that a person claiming to be a witness gave evidence which directly contradicted her account of events. The fact that she was given no opportunity to comment on, or rebut, this evidence was a procedural error which was to her detriment in that it resulted in a fundamentally flawed decision, taken prematurely, to close the case without completing an essential step in the investigation thereby depriving the Applicant of the fair and proper investigation that she was entitled to under the terms of her contract with the Organization.

30. The Tribunal recalls the Applicant's response at the second CMD, on 2 July 2018, when she was given the opportunity to comment. She responded in what may be described as an emotional outburst which reflected the extent to which she was upset. It included the comment that nobody had taken the trouble to hear what she had to say which appeared to the Tribunal to be a clear reference to the fact that the investigation was concluded without any communication with her for 16 months. Order No. 107 (NBI/2018) which followed that CMD records at paragraph 3:

After a full discussion of the issues, the Applicant was given the opportunity to address the Tribunal. It was clear to the Tribunal that the Applicant, who was still working in UNAMID, was upset at the manner in which she had been treated after she had filed a formal complaint of alleged sexual harassment with particular reference to the delay in concluding the investigation and what she regarded as the failure to listen to her and to keep her informed of progress.

31. At the hearing the Applicant repeated her concerns at the lack of any follow up or support following her complaint. She said, “Nobody reached out to me.” “Nobody spoke to me or told me what was happening about my case”. In cross examination, she added that a witness who saw the state she was in shortly after the incident was not interviewed. Later in cross examination she said that, “I wanted my case to be heard. I needed to be heard. I had been carrying my burden all alone and suffering all alone after I had been sexually assaulted. [...] This incident was going to remain as a stigma on me. [...] And I also think I should be treated fairly and given due process to an investigation where I could have been heard. I think that there should also be a fair judgment. I had the right to be heard by whatever investigation was instituted. I should have been heard. I should be allowed to speak. [...] I deserve to have been heard. The Organization owes it to me to hear me. When the investigation was set up, I was not called, I was never told. This is very crucial. This is very important. I need my healing and how do I get my healing if nobody hears me out? Tell me how to get my healing and how to put closure to this? I want to know how I get closure to this when I have never been given the audience and I have never been heard out. My witnesses were not called to give their voluntary statements when the investigation started. Nobody informed me that an investigation had started.”

32. Referring to the decision to close the case without further investigation the Applicant pointed out that it “only refers to the SIU Report. Still waiting for the ST/SGB/2008/5 complaint to be dealt with.”

33. The Tribunal has quoted as best it can the above comments made by the Applicant during her sworn testimony and which explain her state of mind and distress that goes beyond the alleged assault and relates directly to the failures to give full effect to the Organization’s policy and procedures on such prohibited conduct.

34. The particular question to address is whether the procedural error itself caused the loss as distinct from any harm she may have suffered as a result of the alleged sexual assault. Article 10.4 recognises that procedural error may give rise

to loss which is compensable as a distinctly separate award to that which may arise under Article 10.5(b) following a determination on the merits of the claim.

35. The Tribunal has regard to Article 10.5(b) of the UNDT Statute, as amended by General Assembly resolution 69/203 and the rulings by the Appeals Tribunal that: “Generally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages”¹ However, the Tribunal observes that the Resolution which amended Article 10.5 did not amend Article 10.4. If the General Assembly intended that the amendment should apply to both Articles 10.4 and 10.5 of the Statute they would have included it in the Resolution. Nevertheless, the Tribunal considers that due deference should be given to the principle that there must be evidence of loss

either by issuing a judgment on the merits or by further order as may be appropriate.

d. The Applicant be paid, pursuant to Article 10.4 of the Statute, the equivalent of two months net base salary, within 30 days of this Order. If this sum is not paid within the 30 days period, interest will accrue at the rate of an additional five percent to be added to the US Prime Rate until the date of payment.

e. This order be served on the Office of the Secretary-General and the parties.

Signed

Judge Goolam Meeran

Dated this 21st day of February 2019

Entered in the Register on this 21st day of February 2019

Signed

Abena Kwakye-Berko, Registrar, Nairobi