regulations 1.1, 1.2(a), 1.2(c), 1.3(a); staff rule 1.2(c); ST/SGB/2008/5; and the United Nations Convention on the Rights of Persons with Disabilities.

THE REPLY

5. The Respondent's case, as it is reflected in the reply, is that the contested decision was lawful because the ES/ECA reviewed the Applicant's complaint in accordance with section 5.14 of ST/SGB/2008/5 and determined that three elements of the complaint were not receivable because they related to matters addressed through a 2012 settlement agreement or had not been the subject of a management evaluation request.

6. Given this reply, one of the questions to be addressed by the Tribunal is whether the policy underpinning ST/SGB/2008/5 stands alone as a clear commitment to the identification and eradication of prohibited conduct or is it subject to the technical requirements regarding the receivability of claims in accordance with the Statute, Rules of Procedure and case law of the Tribunal. Further, is it lawful to circumvent the operation and implementation of ST/SGB/2008/5 by buying the staff member's silence through a settlement agreement. Would such a practice be consistent with the Organization's policy to eliminate prohibited conduct.

7. The Respondent submitted that the Applicant's complaints against AG and RA did not demonstrate sufficient grounds to warrant a formal fact-finding investigation. For a reason, which is not apparent, they rely on two first instance judgments:

a. Relying on *Ostensson* UNDT/2011/050, the Respondent asserts that the ES/ECA reviewed the totality of the alleged facts in the complaint against the definition of prohibited conduct set out in section 1 of ST/SGB/2008/5 and determined that none of the incidents the Applicant complains of fall under any of the definitions in section 1.

b. Relying on *Benfield-Laporte* UNDT/2013/162, the Respondent submits that the responsible official is only obliged to establish a fact-

finding panel in cases where the complaint appears to have been

United Nations Appeals Tribunal ("UNAT") held in *Massabni* 2012-UNAT-238[1] that:

> 25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or

(iv) His life was in danger and that he was being harassed but that no action had been taken to correct the situation.[2]

b. In a report dated 21 November 2008, the PDOG concluded that there were qmb 12.0 Tf] TJ ET Q q BT /41(e)-17(d90(b)-1(e)-37(i)-2442/F1 12.0 221

f. The Applicant forwarded the 12 September 2013 email to Mr. Lopez, the then ES/ECA, on 5 February 2014 and on 17 February 2014, the ECA legal adviser informed him that more specific information would be required for the ES/ECA to act on his complaint.

g. On 1 April 2014, the Applicant provided the ECA legal adviser with the information requested on his ST/SGB/2008/5 complaint.

h. The Applicant wrote to Mr. Lopes, ES/ECA, on 16 April 2014 to complain about the inadequacy of the parking lot assigned to staff with disabilities and on 17 April about the clamping of his car by ECA Security, thereby subjecting him to a detriment as a person with a physical disability.

i. He wrote to Mr. Lopes, ES/ECA, again on 12 May 2014 requesting that arrangements be made for him to attend a conference on the rights of persons with disabilities. In response, the ECA legal adviser informed him on 15 and 16 May 2014 to direct his request to his supervisor for consideration.

j. Between 16 May 2014 and 21 July 2015, the Applicant was emailing various people within ECA about his e-PAS for 2013/2014 and an ongoing mediation process.

k. On 21 July 2015, the Applicant emailed the Secretary-General, copying OIOS and other offices, alleging that he was being subjected to discrimination at ECA for a reason relating to his disability and ethnic origins. He reported that: he was forced to sit idle with no work; his medical records

l. The Applicant emailed the ES/ECA on 1 August 2015 regarding the mistreatment of ECA staff members, including himself, with disabilities. He alleged that: he had not been given a work assignment since 2007; when he was given work, it was in an inaccessible area such as the basement; his medical records had been circulated to other staff members; and his supervisor had stated “since our staff is disabled no need of assigning him a team leader function” and “no room for disabled staff at the unit”.

m. On 25 April 2016, the Applicant received the Inter Office Memorandum (“IOM”) recording Mr. Lopes’,

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form a fact-finding investigation panel into his ST/SGB/2008/5 complaint of 1 April 2014. On the same day, MEU informed the Applicant that it had received his management evaluation request and would respond to him no later than 4 August 2016.

p. MEU responded to the Applicant's management evaluation request on 29 July 2016 upholding the ES/ECA's decision of 23 April 2016.

13. The Applicant's complaint to the ES calling for an investigation included the following:

a. That he has remained as a library clerk at the G-3 level for 14 years despite a good record of performance and that recommendations for promotion to senior library assistant were blocked by the then head of library services.

b. That he was moved to what he considered to be a dead-end job.

c. He was informed that he had not been given responsibilities because all positions in the Inventory Store and Services Management Unit ("ISSMU") require a high degree of physical movement. Accordingly, he has remained "idle" for the past three years.

d. His supervisors failed to finalise his performance assessments thereby jeopardising his advancement within the Organization.

e. Despite being moved to his current post to address his grievances and supposedly to advance his career his request for reclassification of his post was refused on the ground that the post was funded from General Assistance Funds. To address this problem the PDOG Report recommended that "serious consideration" be given to vacant regular budget posts yet appropriate steps were not taken to implement this recommendation.

f. His requests to transfer to another duty station were refused.

g. He had been subjected to insulting and demeaning comments relating to his disability.

h. His original workplan began with the words "Since our colleague is handicapped…". This made him feel "unneeded and perhaps unwanted in the unit".

i. That in a number of specific areas, which he identified, there was a failure to make reasonable adjustments to accommodate the needs of disabled staff including himself. One of his specific concerns was, "Staff members' inability to safely access their workplace or basic facilities, such as bathrooms, serves as a source of humiliation and generates physical safety risks". He mentioned the fact that he had fallen at the ECA compound and injured himself.

THE APPLICABLE LAW

14. UNAT has ruled in several judgments regarding the scope of the Dispute Tribunal's judicial review. In *Sanwidi* 2010-UNAT-084, it was established that:

> … [w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absu(s)8( )-110I48 e 8(e)2.0 Tf10(a)3(bs)82(h)19(e)3(

21. Section 5.14 provides13

made within existing resources or with any additional resources approved for this purpose by the General Assembly. Reasonable accommodation may include, for example, adjustment and modification of equipment, modification of job content, working hours, commuting and organization of work for the staff member concerned.

23. Section 2 of ST/SGB/2014/3 provides:

2.1 The Organization is committed, within existing resources or with any additional resources approved for this purpose by the General Assembly, to:

(a) Creating a non-discriminatory and inclusive workplace with non-discriminatory recruitment and employment conditions as well as equal access to continuous learning, professional (t)-42(i)3nino

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(b)

25. This Tribunal held in *Omwanda* UNDT/2015/104 that:

> 49. The Tribunal takes into account that it is for the head of department to exercise a judgment as to whether to call for a fact-finding investigation. So long as the head of department exercises his or her discretion in a lawful manner, taking into account relevant factors and disregarding irrelevant considerations, and provided that in all the circumstances the decision was not irrational or perverse, given the overarching policy considerations under ST/SGB/2008/5, the Tribunal will not interfere.

CONSIDERATIONS

26. This Judgment is concerned solely with the question whether the ES/ECA directed himself correctly in accordance with the applicable legal principles in carrying out his duty under section 5.14 of ST/SGB/2008/5 before concluding that the complaint did not warrant the setting up of a fact-finding investigation panel. Such a review necessarily involves a proper consideration of the foregoing anti-discrimination policy and procedures and Resolutions of the General Assembly.

27. It is necessary to examine the actual grounds or reasons for the responsible official's decision at the time he made his decision and not the explanations, justifications and arguments advanced by the Management Evaluation Unit ("MEU") or in the Respondent's reply.

28. The examination of the core justiciable issue requires the Tribunal to examine whether the decision was procedurally correct, whether the decision maker failed to consider matters which he reasonably ought to have considered and particularly whether his identification of the complaints was rather narrowly constrained thereby overlooking significae0(h37(o)-2431.0 135.36 622vg2476.6399 Tm [(c)3(o)-25

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of Mr. Lopes, ES/ECA, and which constitutes the reasons for the decision. It states:

> 1. I am writing on behalf of the Executive Secretary in connection with your complaint dated 1 April 2014 reporting allegations of discrimination and abuse of authority against various staff current and former ECA staff members. In your complaint, you have outlined various instances in which you felt discriminated against which you attribute to your disability. The Executive Secretary notes that subsequent to the filing of your complaint, you agreed to have the complaint informally settled, however, both you and ECA were not able to reach a settlement.
>
> 2. Please note that as required by section 5.14 of ST/SGB/2008/5 on the Prohibition of discrimination, harassment, including sexual harassment and abuse of authority, the Executive Secretary has

under ST/SGB/2008/5 therefore this allegation was considered in the context of harassment. The bulletin defines harassment as:

> 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…

vi. The two complaints indicate that the allegations you make were both a one-off incident in which the statements that you found harassing and discriminatory were made. From the definition of harassment above, it is necessary to have a series of incidents to culminate to an action of harassment, therefore the reference to you in two official communications by two different people in different context do not amount to harassment".

4. In accordance with the requirements of ST/SGB/2008/5, this is to inform you that the Executive Secretary completed his review of your complaint and on the basis of the above observations, is of the opinion thathaofcabion

30. The IOM dated 23 April 2016 read as a whole reveals a very restricted understanding of the entirety and substance of the complaint and a flawed appreciation of the applicable norms. Allegations of institutionally enabled, or tolerated, harassment are evident in the Applicant's complaint and they do not relate to one off incidents as the ES claimed at paragraph 3(vi). There is nothing in the strict interpretation of section 1.2 of ST/SGB/2008/5 to exclude a series of discrete acts performed by more than a single individual from constituting prohibited conduct for which the Organization bears responsibility. The focus of the examination should be on the nature and number of occurrences of alleged prohibited conduct regardless of the number of discrete acts committed by one or more individuals. Such an approach will be consistent with the overarching policy. Failure to do so incurs the risk of undermining the anti-discrimination policy in that several separate acts each of which was committed by a different individual will not meet the test of "harassment". Further the significance of the use of "normally" in para 1.2 seems to have been overlooked. In any event, the Applicant referred to several incidents of prohibited conduct which reasonably caused offence and humiliation to him.

31. The issues for determination are:

a. Did the ES correctly identify the complaints of prohibited conduct?

b. Was the ES correct in deciding that the only complaints that were receivable were those against Ms. A.G. and Mr. R.A. and that they would be considered as one off complaints of harassment and, if so, was the(r)-7(a)3(s,)9(n)19(e)1(a

33. The ES decided to label the allegations against AG and RA as isolated instances of alleged "harassment" and then misapplied the statutory test. Section 1.2 of ST/SGB/2008/5 states that "harassment normally implies a series of incidents". However, whilst quoting the provision correctly the ES overlooked the crucial word "normally" which suggests that it should not be read td(r)-xhe

applicant's allegations addresses directly the requirements under ST/SGB/2008/5. It is not open to the responsible official to exclude from consideration allegations which may have been the subject of a settlement agreement. In other words, the relevant question is whether it appears from a fresh examination of a complaint that prohibited conduct may have occurred but, more importantly, may still be continuing irrespective of whether there was any settlement. The decision whether to commission a fact-finding investigation is not dependent on historical settlements, assuming that it is permissible to do so, but on whether the material before the responsible official merits a fact-finding investigation.

36. From an examination of the foregoing policy documents of the United Nations, it is clear that the enforcement or implementation of the Organization's policy on discrimination and prohibited conduct will be frustrated if wrongdoers are able to buy a potential or actual victim's silence by payment of a monetary settlement. What matters, and what the responsible official's duty is to consider, is whether it appears that prohibited conduct is or may be continuing and, if so, to carry out a fact-finding investigation.

37. At the stage when the ES had to consider whether there was sufficient material to warrant a fact-finding investigation it is an error of law and or procedure to give any weight or otherwise to be influenced by the fact that the complaints may not meet the technical requirements of receivability before the UNDT. The right conferred on staff members under ST/SGB/2008/5 is distinctly different to the rights to redress under the formal system of justice. To conflate the

discretion under ST/SGB/2008/5. Finally, the ES committed an error of law and procedure by disregarding allegations of prohibited conduct on the grounds that they were subject to a settlement agreement thereby failing to appreciate that the Applicant was complaining of a continuing state of prohibited conduct.

41. The Tribunal finds that the ES misdirected himself as to the applicable law and procedures.

REMEDY

42. Article 10.5(b) of the UNDT Statute, which concerns remedies, was amended on 18 December 2014 by General As( )-170(G)11(e)42-22(h)19(e)3( )-290(U)1(N)1(D)1(T

> adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.
>
> …

68.

> substantive or procedural rights. Harm of this nature is associated with the insult to *dignitas* but refers to injury of a particular kind as evidenced by the manifestation of mental distress or anguish. Its presence in the applicant may confirm the violation of personality rights, but in addition might justify a higher amount as compensation. Evidence of this kind of harm speaks to the degree of injury and the issue of aggravating factors. Many who are affronted in their dignity may be of a personality type better able to withstand it, others are more vulnerable. And delictual principles (the so-called "thin skull rule") teach that we are obliged to take our victims as we find them. The best evidence of this kind of harm and the nature, degree and ongoing quality of its impact, will, of course, be expert medical or psychological evidence attesting to the nature and predictable impact of the harm and the causal factors sufficient to prove that the harm can be directly linked or is reasonably attributable to the breach or violation. But expert evidence, while being the best evidence of this kind of injury, is not the only permissible evidence. This Tribunal accepted as much in *Asariotis* when it explicitly stated that such harm can be proved by evidence produced "by way of a medical, psychological report *or otherwise*".22 There is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

45. At section IX of the application, the Applicant seeks an award of moral damages as one of his remedies. Following the ruling in *Kallon*, the Tribunal heard oral evidence from the Applicant on 26 January 2018 in relation to his claim to be compensated for psychological and moral injury.

46.

47. The Applicant gave evidence that he experienced what he described as psychological consequences. When asked to elaborate on this he mentioned loss of sleep, increased pressure, a feeling of hopelessness and deterioration in his overall medical condition. He also mentioned "moral consequences" of a lack of career progression and bad treatment by senior managers due to his disability. The Tribunal takes into account the pre-existing distress that the Applicant was already suffering from and finds that his distress was exacerbated by the unlawful decision to refuse his request, made in good faith, that he was being subjected to continuing detrimental treatment in the workplace for reasons relating to his disability. The fact that the Applicant was already distressed does not preclude him from an award of compensation so long as the Tribunal finds on the evidence that the conduct that was found to be unlawful contributed to the distress that he suffered and is continuing to suffer. The Tribunal assesses this in the sum of USD3000.

JUDGMENT

48. The application succeeds.

49. The decision that the complaint did not warrant the setting up of a fact-finding investigation panel is rescinded and the complaint is referred back to the ES/ECA for proper consideration under section 5.14 of ST/SGB/2008/5.

50. The Tribunal finds that the Applicant is entitled to an award of moral damages in the sum of USD3000, which shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Goolam Meeran

Dated this 8th day of February 2018

Entered in the Register on this 8th day of February 2018

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi