Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ABUBAKR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the alleged failure of the Administration to address his complaint of harassment and discrimination. He seeks, *inter alia*, compensation in excess of two years' net base salary, promotion to the P-5 level, and an order ensuring that "he is given appropriate work that is commensurate with his qualifications".

Procedural matters

Case management

2. The present application was filed with the Dispute Tribunal on 14 August 2009, following an extension of time granted by the Tribunal on 9 July 2009. The Respondent's reply was filed on 5 October 2009, following a brief extension of time granted by the Tribunal.

3. On 16 July 2009 the Tribunal rendered a ruling on the Applicant's application to file additional submissions (*Abubakr* UNDT/2009/079), granting leave for the Applicant to file a response to the Respondent's reply.

4. The Tribunal thereafter issued eight orders in response to various motions and requests, including: Orders No. 3 (9 July 2009), dated 9 July 2009; No. 241 (NY/2010), dated 14 September 2010; No. 106 (NY/2011), dated 4 April 2011; No. 116 (NY/2011), dated 19 April 2011; No. 160 (NY/2011), dated 24 June 2011; No. 178 (NY/2011), dated 15 July 2011; No. 205 (NY/2011), dated 19 August 2011; No. 286 (NY/2011), dated 30 November 2011. The various case management orders were necessitated in part by the Applicant's filing of voluminous and poorly structured submissions, which included over 100 annexes and hundreds of pages of documents. Many of these documents were not relevant to the legal issues in this case, and, as conceded by the Applicant in his submission dated 13 April 2011, the case was

"burdened with layers of papers[,] many of which are purely tangential". This had a negative effect on how expeditiously the Tribunal could deal with this matter and diverted significant resources of the Tribunal.

5. The Tribunal held a hearing on 29 November 2011, during which it heard testimony from the Applicant and a witness for the Respondent. The Applicant decided not to call an additional witness, the former President of the United Nations Staff Union, with Respondent's Counsel submitting that the evidence of this witness was not relevant. Instead, the Applicant tendered the written statement of this witness, requesting that it be given due consideration by the Tribunal in so far as it is relevant. The Tribunal dealt with this statement accordingly, however, in view of the Tribunal's findings herein, particularly with regard to the scope of the case, no significant reliance was placed on it.

6. At the conclusion of the hearing, both parties were granted leave to file closing submissions, which were duly filed on 5 December 2011.

Motion to redact the Applicant's name

7. On 5 December 2011, the same day he filed his closing submission, the Applicant filed a motion requesting that his name be removed from the judgment and from the previously-issued rulings of the Tribunal. The Applicant stated that his application contained personal medical information, that the complaints referred to in his application were of a sensitive nature, and that "[i]n the nature of things" he felt it was "necessary to seek anonymity in order to protect the totality of his interests within the Organization".

8. The Respondent objected to the motion, submitting that it was filed too late in the proceedings, and also that the Applicant failed to provide sufficient grounds in support of his request. According to the Respondent, based on the issues that fall within the scope of this case, it is not necessary to refer in any detail to the

Applicant's personal or confidential evidence in deciding the issues of liability or relief.

9. One of the purposes of vigorous case management is that issues are defined and settled and all preliminary matters are dealt with at the outset, including any motions the parties wish to make. Unless there are unusual or exceptional circumstances, particularly arising from the evidence presented at a hearing before the Tribunal, motions for confidentiality and redaction should be discouraged and will not ordinarily be allowed at this stage of the proceedings. The Tribunal has already issued a number of orders identifying the Applicant by name, and one judgment (*Abubakr* UNDT/2009/079) on a preliminary issue has been publicly available for more than two years.

10. Even though motions for confidentiality must be decided on a case-by-case basis, the granting of same without sufficient reason has the potential to not only invite requests of this kind in every matter, but to negate a key element of the new system of administration of justice—its transparency. It is essentially a question of weighing the public interest against the private interest. This application was filed some time ago, and the present Judgment does not deal with the Applicant's medical history, any sensitive information, or any matters of a highly confidential nature, nor did any such arise during the hearing. The Applicant has therefore failed to persuade the Tribunal that his case is of such a nature as to outweigh the guiding principle of transparency in judicial proceedings and published rulings before the Tribunal.

11. Having considered the grounds furnished by the Applicant and the Respondent's objections, the Tribunal finds that the Applicant has not established sound and valid reasons for redacting his name (see *Yisma* Order No. 63 (NY/2011), dated 1 March 2011). The motion for confidentiality is rejected.

Facts

12. The pertinent facts below are based on the findings made by the Tribunal on the oral testimony given in court, the parties' joint submission of 18 October 2010, and the case record.

13. The Applicant joined the Organization on 12 November 2001 on a short-term appointment as a P-4 level staff member with the Information Technology Services Division ("ITSD"). In February 2002, the Applicant was selected for a P-4 level position as a Computer Systems Officer with ITSD. He was appointed to that position on 12 October 2002, on a fixed-term contract. Thereafter, the Applicant received several extensions, ranging from several months to two years in duration, and worked on several assignments within ITSD.

14. The Applicant alleges that he had been promised, prior to his recruitment in November 2001, that he would "soon thereafter" be moved to a regular budget post, and that it had not been done. The Applicant alleged that he had met with his supervisors on several occasions thereafter to discuss his contractual situation, to no avail.

15. By memorandum dated 8 February 2006, the Applicant wrote to the Under-Secretary-General for Management requesting his assistance with receiving a regular budget post.

16. In April 2006, the Applicant applied for a P-4 level post in ITSD as Information Systems Officer. He was subsequently selected for the position, but alleges that he detected reluctance in the confirmation of his selection.

17. Having heard nothing some months later, on 22 September 2006, he filed a complaint with the Panel on Discrimination and other Grievances ("PDOG"), entitled "Harassment and Discrimination by ITSD". The PDOG was a peer review mechanism for dealing with cases of alleged discrimination and other grievances. Its

21. Although the Applicant's complaint was filed on 22 September 2006, it is common cause that, due to various factors, including personal and professional issues, the work of the two PDOG members assigned to the Applicant's case was significantly delayed. As a result, on 6 June 2007, the Applicant requested an administrative review of "an 'administrative decision' that arose from the failure of management to address complaints lodged by [him] to various bodies to arrest the abiding harassment and prejudicial actions that currently threaten to compromise my career development". It appears that, by "various bodies", the Applicant was primarily referring to the PDOG and the rebuttal panels that were set up to review his rebuttals against unfavourable performance evaluations.

22. On 4 September 2007, the Applicant sent an email to the Acting Coordinator, asking her to reassign his case to someone other than Ms. W. He explained in a follow-up email of 6 September 2007 that Ms. W had been assigned to his case for almost one year, but despite her numerous promises to complete it, it was not done.

23. According to the Acting Coordinator, given the limited resources, and in view of her understanding at the time that the case was near completion, she decided to replace Ms. S (who, due to personal reasons, could no longer participate in the work of the PDOG in the fall of 2007), as a member of the panel and to complete the report together with Ms. W. The Acting Coordinator gave evidence that during that time she, in effect, acted as both the Coordinator of the PDOG as well as Ms. S's replacement as one of the two panel members assigned to the Applicant's case. She undertook to complete the report by October 2007.

24. The Acting Coordinator testified that she received a copy of the draft PDOG report in or around September 2007, and had a meeting with Ms. W, who she thought was the primary drafter of the document. The Acting Coordinator said they may have connected with Ms. S by telephone as well, although she could not recall for certain. The Acting Coordinator said she formed the view that the report contained strong conclusions that were not supported by evidence and that it could not be submitted in

that form. According to the Acting Coordinator, Ms. W became defensive because she thought the Acting Coordinator was criticising her work. Ms. W informed her that a lot of the information was based on interviews conducted by her and Ms. S. The Acting Coordinator asked to see the interview notes and was informed some weeks later that the interview notes had been lost during Ms. W's office move. The Acting Coordinator testified that, as a result, she lost trust in Ms. W, since the PDOG was dealing with confidential matters. However, she conceded that she did not inform the Office of Human Resources Management ("OHRM"), or security personnel, or the Applicant of any lost file.

25. The Acting Coordinator also alluded in her testimony to her suspicion of bias on the part of Ms. S and Ms. W in favour of the Applicant. This allegation was never made previously by the Respondent either at administrative review level, the JAB level, or indeed in the papers before the Tribunal. It is only in the written statement of the Acting Coordinator, submitted to the Tribunal on 16 November 2011, that the alleged partiality of the two members of the PDOG was raised for the first time. Whilst it may be argued that the Respondent is barred from raising this matter so late in the day, an analysis of the evidence, based entirely on hearsay, given by the Acting Coordinator, illustrates that this allegation is in any event highly questionable and unsubstantiated by material direct evidence.

26. The Acting Coordinator testified that she was informed by the PDOG Secretary, who in turn was informed by someone from the Staff Union that Ms. S and Ms. W had a previous working relationship with the Applicant through the Staff Union. The Acting Coordinator

did not report them to anyone and, in fact, retained the same panel members even after the Applicant requested their replacement. When asked under cross-examination why she did not replace Ms. W because of the suspected conflict of interest, the Acting Coordinator said she could not answer that question as "the sequence of events gets murky around this time". She further explained that, since the PDOG had limited resources, and a lot of work on the case had been done, she wanted to finish the case with the people whoibork on t fioJ-17.6 -152D-.0007 Tc.1035 T50[(why si)5.lready, "

Administration's decision not to address his complaints of harassment, discrimination, and abuse of power.

29. On 13 September 2007, the Acting Coordinator sent an email to the Applicant, stating:

> We have reviewed the progress on your case with Ms. [W] yesterday. The case is near finalization and reassigning it to another panel member at this time will delay the conclusion considerably. We have established the deadline of 15 October [2007] for finishing couple more interviews and drafting the final report. To ensure that we finish by this deadline, and in light of the fact that the second panel member that was assigned your case is on a leave of absence due to a family emergency, I will work with Ms. [W] in drafting the final report.
>
> I hope this provides you with assurance that your case will be concluded very soon.

30. The Applicant and the Acting Coordinator had a meeting on 17 October 2007. According to the Applicant, the meeting was arranged at his request as he wanted to

> As an elected representative to the Staff Union Council, I will formally bring the dismal performance issue of [PDOG] before the full council attention.

32. The Acting Coordinator replied on the same day, 18 October 2007, inquiring whether the Applicant's email was to be considered a withdrawal of his complaint and stating that "[u]nless a complainant informs us in writing that s/he is withdrawing the case, PDOG continues to work on any case that is open until a final report on the case is written and submitted to the appropriate authorities". Notably, the email did not contain a request for additional documents.

33. The Acting Coordinator sent a follow-up email on 31 October 2007, requesting that the Applicant respond by 1 November 2007. Specifically, the Acting Coordinator stated:

> The message below was sent to you on October 18. We have not heard from you since. Please respond by close of business tomorrow (1 November [2007]). Please note that work on your case has been paused until we hear from you.

34. The Applicant did not reply to this email. The Respondent submits that no further action was taken by the Administration with regard to the Applicant's complain of 22 September 2006 as the Applicant decided to pursue his grievances through the formal system.

35. The Acting Coordinator testified that, following the meeting of 17 October 2007, she was still awaiting further documents from the Applicant before she could finalise the Report. It is notable that there is no written record of a request for documents informing the Applicant that the report cannot be finalised in the absence thereof. It is also relevant that the Acting Coordinator's testimony is that the documents required to finalise the Report pertained to allegations of corruption made by the Applicant, yet several contemporaneous communications indicate that the Acting Coordinator clearly stated that the PDOG was not mandated to deal with allegations of corruption and would not do so. The witness was not able to furnish

answers to the Tribunal's satisfaction during cross-examination regarding this apparent contradiction.

36. Although a draft report of the PDOG was prepared on or about 15 October 2007, the Respondent contends that this draft report was provided to OHRM only on or around 12 March 2008, when the disclosure of the draft was requested during the JAB proceedings. The draft report contained comments and questions inserted by the Acting Coordinator, supporting her contention that the document was incomplete. When the draft report was submitted to the JAB, the Respondent stated that it was a draft document, that it was the position of the PDOG that "it could not issue its draft report due to lack of supporting evidence", and that it was one of the questions before the JAB "whether it would have been appropriate for the PDOG to proceed in the circumstances" (see the memorandum of 7 August 2008 from the Representative of the Secretary-General to the Secretary of the Joint Appeals Board). According to the Respondent, it was also made clear in the Respondent's answer to the Applicant's appeal before the JAB that "[t]he work of the PDOG ha[d] been suspended pending further input from the [Applicant]" and that the draft report had not been finalised.

37. After the draft report of the PDOG was provided to the JAB, a copy of it was transmitted to the Applicant in the context of the JAB proceedings. The Applicant prepared a response to the draft report, dated 3 April 2008, although he was not requested to do so.

38. On 30 March 2009, the JAB adopted its report (Report No. 2056), finding that the Applicant's complaint was, in effect, fully considered by the PDOG, which had completed its review of the Applicant's case. The JAB stated, apparently based on its belief that the work of the PDOG had been concluded, that "[w]hile it is unclear whether the Organization has acted on the findings of both bodies [i.e., the PDOG and the performance evaluation rebuttal panel], given its zero tolerance [policy on harassment and discrimination] the [JAB] presumes that it will do so in due course".

Accordingly, the JAB found that the Applicant "had recourse for his complaint of harassment which is still ongoing". Both the Applicant and the Respondent now

e. The JAB failed to properly address the Applicant's allegations of harassment and discrimination. The JAB merely left the matter open in the vain belief that given the Organization's policy of zero tolerance it "presumed" that the Organisation would take appropriate action "in due course" to see to it that the violations suffered by the Applicant would be remedied. As a result of the JAB's report, the Secretary-General also failed to recommend and effectuate a meaningful measure to redress the wrongs done to the Applicant;

f. The Applicant experienced significant harm to his professional and personal life, as well as emotional distress and psychological injury, documented by a specialist, as a result of the violation of his rights. The Applicant should be compensated for the injury he suffered to his career and well-being;

g. The Applicant should be awarded compensation in excess of two years' net base salary because the delay in the work of the PDOG and its failure to release the report were surrounded by improper circumstances. The Applicant also requests the Tribunal to take into account that he was unfairly given three poor performance evaluations between 2006 and 2009 and that he is not being given meaningful work or a promotion, so that "one can assume that for the foreseeable future, the Applicant's career progression will be stuck in neutral".

Respondent's submissions

42. The Respondent's primary contentions may be summarised as follows:

a. This case is limited in scope only to the matter raised by the Applicant in his request for administrative review, his appeal to the JAB, and the present application to the Tribunal, namely whether the Applicant's complaint of

alleged harassment and discrimination of 22 September 2006 was properly investigated. The Applicant's claims regarding the circumstances of his hiring in 2001 are time-barred. Further, his claims regarding his contractual situation, his alleged ostracism at work, and lack of proper work assignments are not properly before the Tribunal;

b. The Organization adequately addressed the Applicant's complaint of 22 September 2006. Although the Appli

reasonably and was trying to ensure that the Applicant could not be prejudiced;

d. The draft report was provided to

had resolved the subject matter of that complaint by assisting the Applicant in securing a fixed-term contract on a regular budget post.

3. Whether or not the PDOG panel had a duty to finalise the report in light of the Applicant's failure to provide information requested of him.

4. Whether or not the PDOG panel had a duty to finalise the report in light of the Applicant's complaint against the panel on [18] October 2007 in which he stated that the work of the PDOG was "redundant" and that he had commenced a formal legal process.

Additional legal issues according to the Applicant are:

5. Can the Applicant be blamed for the non-finalization of the PDOG Report?

…

6. Did the Applicant cooperate fully with the PDOG panel?

…

7. Did the JAB and the Secretary-General renege on their duties to recommend and effectuate [any] meaningful measure to redress the wrongs done to the Applicant?

…

8. Whether or not the Applicant's claim for breach of his contract is receivable.

44. The parties agreed in their joint submission that this case concerned the issue of whether the Applicant's complaint was properly addressed. The "additional" issues identified by the parties in the joint submission serve only to address various aspects of the PDOG's handling of his complaint. The Tribunal finds that the joint submission of the parties is consistent with the record and correctly reflects the scope of the present case which is clearly articulated in the request for administrative review, the proceedings before the JAB, and in the application before the Tribunal. Once parties agree issues following case management, particularly in a joint submission, they must be seen to be bound and to stand by those submissions.

45. In his closing submission, despite the agreed submission on the scope of the case and the Tribunal's Orders No. 241 (NY/2010) and No. 106 (NY/2011) regarding the same issue, the Applicant presented, in

i. ITSD's refusal to give him meaningful work at the present time (i.e., in 2011);

j. the alleged failure by the Administration to provide the Applicant with a healthy work environment.

46. The Applicant's closing submission extended well beyond the scope of the case as previously agreed by the parties in their joint submission and as reflected in the Tribunal's Orders No. 241 (NY/2010) and No. 106 (NY/2011). Closing submissions are intended to succinctly summarise the parties' positions, not to introduce substantively new claims for consideration after the parties have presented written and oral evidence.

47. Each of the matters listed in the Applicant's closing submission is a separate administrative decision (either explicit or implied) that should have been contested properly and timeously, starting with a request for administrative review (under the former system) or management evaluation (under the current system) (see, e.g., the United Nations Appeals Tribunal's ("UNAT") rulings in *Syed* 2010-UNAT-061, *Appellant* 2011-UNAT-143, *Kapsou* 2011-UNAT-170, *O'Neill* 2011-UNAT-182). Staff members must follow the established internal mechanisms to properly assert their claims (*Barned* 2011-UNAT-169, *Jennings* 2011-UNAT-184).

48. Although the Applicant may be dissatisfied with various matters that occurred during his career with the United Nations, the Tribunal is bound by the scope of the present case, which was correctly identified by the parties in their joint submission and which stems from the Applicant's request for administrative review. Any other interpretation of the scope of issues properly before the Tribunal would render the legal requirements of administrative review and management evaluation and the requirement of time limits meaningless, as the Applicant would be permitted to attach any past or future decision to his request for review filed on 6 June 2007.

49. Therefore, the Tribunal finds that the main legal issue under review in this case is whether the Organization adequately addressed the Applicant's complaint of alleged harassment and discrimination. The additional issues identified by each party in their joint submission of 18 October 2010 are relevant only to the extent they assist the Tribunal in determining this main legal issue.

The failure of the PDOG to complete its work

50. Administrative instruction ST/AI/308/Rev.1 (Establishment of Panels on Discrimination and other Grievances) of 25 November 1983, in force at the relevant time, set out the terms of reference of the PDOG and the procedure to be followed. The administrative instruction provided:

> 5. The panels shall investigate grievances submitted by staff members arising from their employment with the Organization. Such grievances may include, but are not necessarily limited to, allegations of discriminatory treatment in the United Nations Secretariat on grounds such as those referred to in article 2 of the Universal Declaration of Human Rights. The panels shall seek to resolve the grievances by informal means or, where this proves impossible, by recommending appropriate action by the Secretary-General.
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> 6. In the discharge of their functions, panel members shall act with complete independence and impartiality. …
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> …
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> 10. The panel shall endeavour to act expeditiously in bringing its cases to a conclusion. To this end, the panel shall set up, for each case, a schedule normally not exceeding eight weeks, in order to facilitate the timely completion of necessary investigations and to ensure earliest possible conclusion of the panel's review.
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> …
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> 17. Panel members shall have access, on a confidential basis, to all documents which, in their opinion, may be pertinent to the case and shall have authority to obtain information regarding the issues before the panel from the members of the Secretariat orally or in writing. …
>
> 18. The Assistant Secretary-General for Personnel Services shall act upon the recommendations of the panel and shall inform it, by quarterly reports, of the action taken on those recommendations; the

54. Having observed the witnesses and having considered their oral evidence, the Tribunal is not persuaded that the PDOG's failure to finish its investigation and issue the report was in any way attributable to the Applicant in that the report could not be issued without further documentation from him. The failure of the PDOG to report to the appropriate authorities the alleged loss of the interview notes or the fact that the report may have been compromised leaves many unanswered questions. It is apparent that the work of the PDOG on this case was dysfunctional.

55. Pursuant to ST/AI/308/Rev.1, the PDOG was clearly required to complete its work. If the evidence was insufficient, the panel could have said so and rendered its report accordingly. Further, the Acting Coordinator herself stated in her email of 18 October 2007 that PDOG would complete the investigation and issue its report unless it received instructions to the contrary from the Applicant. The Acting Coordinator conceded in her evidence, in effect, that the Applicant never formally withdrew his case. The PDOG could have and should have issued a final report.

56. The PDOG draft report concluded, *inter alia*

the incomplete nature of the draft report, the findings cannot be tested, and the recommendations could not be acted on.

58. The Tribunal notes that the Applicant's situation was further aggravated by the JAB's erroneous finding that the PDOG finished its work and issued its final report, on the basis of which the Organization presumably would act, and thus that the Applicant had received proper recourse. This finding was relied on by the Respondent in deciding not to take any further action in his case (see Deputy Secretary-General's letter of 13 May 2009). It is surprising that the Respondent accepted the findings of the JAB, considering that the Respondent was aware that the PDOG, in fact, never finished its work and that the JAB was wrong in finding otherwise. The Respondent's agreement with the findings and conclusions of the JAB and his decision not to take any further action were completely contradictory with the Respondent's actual knowledge of the case. Accepting/TT2 cas

Compensation

61. The Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached (*Fröhler* 2011-UNAT-141, *Appellant* 2011-UNAT-143, *Kaddoura* 2011-UNAT-151).

62. In view of the circumstances of this case, including the passage of time, some five years since the Applicant's complaint to the PDOG the Tribunal finds that, in view of all the factors in the present case, the appropriate form of relief is monetary compensation, and not a referral of the matter for a new inquiry. Indeed, in his closing submission, the Applicant did not request the Tribunal to order a new investigation of the harassment allegations. Instead, he requested the Tribunal to order that he be promoted and be paid compensation in excess of two years' net base salary (see para. 44 of the Applicant's closing submission, filed on 5 December 2011).

63. The Tribunal is mindful that the extent of compensation in this case is limited by the scope of the present application. The burden is on the Applicant to substantiate his claim for compensation or damages. In assessing the quantum of compensation the Tribunal may consider actual pecuniary (or economic) loss and non-pecuniary damage, including emotional distress suffered by the Applicant (see *Antaki* 2010-UNAT-095).

64. The Tribunal finds that the Applicant has failed to prove that any actual economic loss warranting compensation was caused to him by the PDOG's failure to complete its investigation and fully address his complaint of harassment.

65. With respect to compensation for emotional distress and negative effect on the Applicant's health, he should be recompensed for the negative impact of the breach and the compensation should be proportionate to the damage suffered by him, taking into account the particular circumstances of the case.

66. The Tribunal notes that, as a result of the PDOG's failure to carry out its mandate, the Applicant has been denied the benefit of a final report on his allegations. He has also lost the right to have any recommendation implemented in his favour, as provided for under sec. 18 of the ST/AI/308/Rev.1. The failure of the PDOG to follow its own rules and to complete the report, and the failure of the JAB and the Administration to properly conclude the matter, means that the Applicant's complaint of harassment and discrimination was not addressed. The Applicant's rights have been compromised further due to the passage of time and the fact that the PDOG has disbanded.

67. The Tribunal is satisfied that the Applicant has demonstrated that he was distressed, and continues to be, by the Respondent's failure to properly address his complaint and this has had some negative effect on his health, as supported by his unrebutted oral and documentary evidence, including the medical affidavit of 11 January 2011, filed on 21 January 2011.

68. With respect to compensation for emotional distress, such compensation has ranged, generally, in the vicinity of several months' net base salary—the exact amount depending, of course, on the particular circumstances of each case and the harm suffered. In determining the appropriate amount of compensation in this case, the Tribunal is mindful of its ruling in *Applicant* UNDT/2010/148 (affirmed in *Appellant* 2011-UNAT-143), by which it awarded USD40,000 to a staff member for the failure of the Organization to timeously and adequately consider his complaint and for the emotional distress caused by that failure.

69. In light of all the aforesaid factors, the Tribunal finds that the Applicant shall be paid USD40,000 as compensation for the harm caused to him.