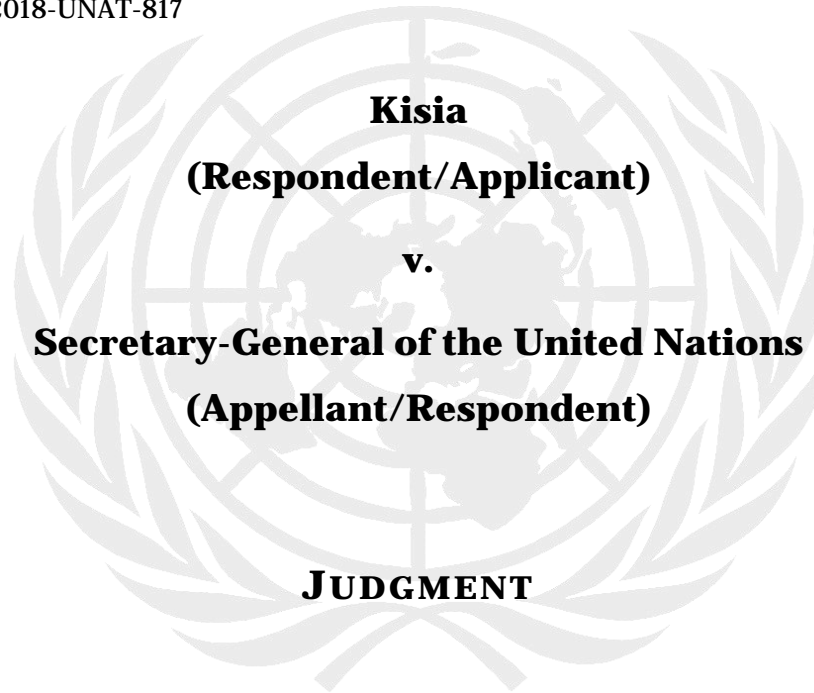




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-817



**Kisia
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Murphy Judge Dimitrios Raikos
Case No.:	2017-1106
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Kisia:

Self-represented

Counsel for Secretary-General:

Amy Wood/Nathalie Defrasne

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/044, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 22 June 2017, in the case of *Kisia v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 21 August 2017, and Mr. Kennedy B. Kisia filed his answer on 16 October 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... (...) On 27 July 2013, 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]^[2] 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 USD 2,277.53 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 [United Nations Claims Board (UNCB)] Secretary, the SSS Chief forwarded the investigation report for the UNCB Secretary’s review and possible action.

¹ Impugned Judgment, para. 3, quoting the facts set out in the parallel case of *Kisia v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/040.

^[2] *Ibid.*, para. 1.

... 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 [Assistant Secretary-General, Controller, Office of Programme Planning, Budget and Accounts, Department of Management (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 [Administrative Instruction] ST/AI/149/Rev.4 [(Compensation for loss of or damage to personal effects attributable to service)], 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 [sic] 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.

3. Mr. Kisia filed an application with the UNDT and on 25 April 2016, the UNDT issued Judgment No. UNDT/2016/040 remanding Mr. Kisia's claim for compensation for damages to his vehicle back to the UNCB for a new examination, including on receivability for the following reasons:³

³ *Ibid.*, para. 4, quoting *Kisia v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/040, paras. 48-49 and 51-54.

... (...) The [Dispute] 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 [Dispute] 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 [Dispute] 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 [Dispute] Tribunal cannot place itself in the position of the decision-maker, which in the present case is the ASG/Controller, the [Dispute] 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 [Dispute] 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 [Dispute] 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.

4. The ensuing events and procedural history are set out as follows in the impugned Judgment:⁴

... 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 UNC[B] specifically noted that the Applicant "did not report the incident to his insurance company in order to avoid an increase in premiums".

⁴ *Ibid.*, paras. 5-29.

... On 18 October 2016, the ASG/Controller stamped “approved” on the UNCB’s 15 September 2016 recommendation and countersigned it.

... 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.

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

... 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.

... On 26 December 2016, the Applicant filed the application (...) with the Dispute Tribunal [contest[ing] the following [decisions]:

... The unlawful decision of [the (...) 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 [the] 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.^[5]

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

... On the same date, the case was assigned to the [UNDT] Judge.

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

... 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.

... By Order No. 20 (NY/2017) dated 31 January 2017, the [Dispute] 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.

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

... 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 [Dispute] 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 [Dispute] 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 [Dispute] Tribunal

^[5] *Ibid.*, para. 1.

accepted this, noting that, if the Secretary-General concurred, it would order the suspension of the proceedings before it in a subsequent written order.

... By Order No. 29 (NY/0217) dated 16 February 2017, the [Dispute] Tribunal ordered the Respondent to inform the [Dispute] 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.

... 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.

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

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

... By Order No. 41 (NY/2017), the [Dispute] 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.

... 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.

... 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 [Dispute] Tribunal's Rules of Procedure, the Applicant further requests and moves the [Dispute] 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].

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

... At the 28 March 2017 CMD, the Applicant was self-represented and the Respondent was represented by Mr. Cumming. The [Dispute] 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 [Dispute] 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.

... By Order No. 63 (NY/2017) dated 30 March 2017, the [Dispute] 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.

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

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

5. The UNDT rendered the impugned Judgment on 22 June 2017, granting the application in part. The UNDT considered that Mr. Kisia had failed to take any reasonable steps to receive suitable compensation from his insurance as required by Sections 12 and 14(b)(ii) of ST/AI/149/Rev.4 and, thus, one of the cumulative conditions for his claim to be receivable before the UNCB was not fulfilled. Therefore, the UNCB's recommendation that Mr. Kisia's claim for damages was not receivable was correct. However, the UNDT held that "when the contested decision was returned for the [Dispute] 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” but instead “simply countersigned and approved the 15 September 2016 UNCB recommendation”.⁶ The UNDT considered that the Controller did not take such a “separate and reasoned decision on [Mr. Kisia’s] claim for damages for almost 6 months” until 6 March 2017.⁷ As a result, the UNDT awarded compensation to Mr. Kisia in the amount of USD 3,500 as a “reasonable and sufficient relief for (...) [such] procedural delays”.⁸

Submissions

The Secretary-General’s Appeal

6. The Secretary-General submits that the UNDT erred on a question of law and fact and exceeded its competence in concluding that the process leading to the denial of Mr. Kisia’s claim was flawed by procedural error. Contrary to the UNDT’s holding, the procedural requirements set forth in ST/AI/149/Rev.4 were properly followed. The UNCB correctly recommended that Mr. Kisia’s claim be dismissed as not being receivable. The Controller’s decision to approve the 2016 UNCB recommendation was a reasoned decision based on the recommendation itself and attached documentation. The UNDT erred in requesting the Controller to provide additional reasoning to support a decision based upon thorough examination and recommendation of the UNCB in accordance with ST/AI/149/Rev.4. The memoranda, dated 6 March and 11 April 2017, issued at the UNDT’s order are not an admission by the Administration that the applicable procedural requirements had not been followed but rather served to expedite the proceedings before the UNDT and to comply with the UNDT orders.

7. The Secretary-General further asserts that the UNDT erred in awarding compensation for undue delay. There was no undue delay warranting the award of any compensation by the UNDT as the procedure set out in ST/AI/149/Rev.4 had been properly followed, and the Controller had lawfully decided within a reasonable delay, namely by the clearly communicated decision dated 18 October 2016 to deny Mr. Kisia’s claim. Even if the Appeals Tribunal were to find that there was an unreasonable delay in the Administration’s consideration of Mr. Kisia’s claim, the UNDT erred in awarding compensation in the absence of evidence of harm in contravention of Article 10(5)(b) of the UNDT Statute and the Appeals Tribunal’s jurisprudence. Mr. Kisia’s

⁶ *Ibid.*, para. 57.

⁷ *Ibid.*, para. 59.

⁸ *Ibid.*, para. 61.

“vague statements regarding ‘depression and anxiety’” do not in and of themselves constitute evidence necessary to establish harm warranting compensation.

8. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, except with respect to the finding that Mr. Kisia’s claim was not receivable, and set aside the award of compensation by the UNDT.

Mr. Kisia’s Answer

9. Mr. Kisia submits that the UNDT’s finding that the process leading to the denial of his claim was flawed by procedural error and delay was proper, reasonable, lawful and within the competence of the Dispute Tribunal. His right to “prompt administrative action” was violated by the Administration’s delay in processing his claim. The UNDT was in incorrect finding that his claim was not receivable on the basis that he had failed to submit a claim to his personal insurance. Such incorrect conclusion was “predicated upon [the] unestablished allegation that [he had been] negligent in causing his property damage and therefore, the entity responsible should have been his personal auto-insurance” which also violated the “no-fault doctrine” applicable in worker’s compensation cases.

10. Mr. Kisia further claims that the UNDT award of compensation for procedural delay was “proper, reasonable, lawful and fair”. The award of USD 3,500 was fair and consistent with previous UNDT decisions. Mr. Kisia also claims to have submitted sufficient evidence of the injuries he suffered from the accident, of the “anxiety and everyday stress of pursuing the claims and the disputes” and of his termination on medical grounds.

11. According to Mr. Kisia, “[t]he only error[] committed by [the] UNDT was its failure to find the [Secretary-General] in contempt and its finding that [Mr. Kisia’s] claim was not receivable, which should be vacated”. The Secretary-General’s appeal was “in essence (...) an attempt to [a]ppeal UNDT Judgment No. 2016/040 which the [Secretary-General] had failed to appeal”.

12. For these reasons, Mr. Kisia requests that the Appeals Tribunal dismiss the appeal, affirm the impugned Judgment “except with respect to its finding that [Mr. Kisia’s] claim was not receivable” and affirm the UNDT “award of compensation for procedural delay occasioned by the Administration” or “order higher compensation”.

Considerations

13. As noted above, in its Judgment, the UNDT took two lines of argument, concerning the administrative decision:

- i. The decision was substantially correct, insofar as it related to the non-receivability of the claim for damages since Mr. Kisia had failed to take any action to claim the coverage under his personal insurance, as prescribed by Sections 12 and 14(b)(ii) of ST/AI/149/Rev.4; and
- ii. the decision was procedurally incorrect, insofar as the decision-maker did not take a separate and reasoned decision; instead, she simply countersigned and approved the UNCB recommendation on 18 October 2016.

The UNDT awarded compensation for “procedural delays”, since the required separate and reasoned decision was taken only during the UNDT proceedings, as late as 6 March 2017.

14. Mr. Kisia’s answer to the appeal reveals that he does not agree with the decision regarding the first finding. However, as there is no blatant error in it and only the Secretary-General filed an appeal and Mr. Kisia did not file a cross-appeal, we will restrict our assessment to the second finding. The request to award higher compensation, made in Mr. Kisia’s answer, is thus, *prima facie*, refused.

15. Regarding the second finding, while the Dispute Tribunal correctly stated that the administrative decision was accurate in substance, the UNDT also concluded that the decision was procedurally flawed and awarded compensation for the delay in correcting it.

16. In this respect, we hold that the UNDT erred on a question of law when it concluded that the procedure was flawed on the basis that it was not sufficient for the ASG/Controller to countersign and approve the UNCB recommendation and that a separate and reasoned decision was necessary for the regularity of the administrative procedure.

17. On the contrary, in the absence of an express provision to this effect, no law requires the decision-maker to make a distinct pronouncement, instead of simply referring to and approving a preceding reasoned recommendation, which also ensures the necessary transparency of the decision.

18. To require additional reasoning in support of a decision, in cases such as the present one, other than the approval of a well-reasoned and reasonable recommendation, would not only burden the Administration with an excess of formality, but would also mean that not even the most thorough and well-founded recommendation could ever be considered sufficient.

19. In light of the foregoing, the 18 October 2016 decision, approving the recommendation annexed to it, is in accordance with the need for efficiency within the Organization which is highly valuable for the accomplishment of its mandate. If the decision-maker fully approves a preceding recommendation and has nothing to add to its reasoning, there is no need for additional arguments, unless that is required by the applicable rules or regulations or the decision ultimately departs from the recommendation, which is not the case here.

20. Lastly, with regard to the “procedural delay” and the compensation awarded therefor, we first take note that the relevant request only arose during the case management discussion hearing and thus had not been raised in the application. Second, in light of what was previously stated in the present Judgment, the Organization finally complied with the first UNDT Judgment, which had ordered the remand of the compensation claim for a new examination and decision. Indeed, in compliance with the Judgment, the decision-maker stamped “approved” on a new recommendation and countersigned it on 18 October 2016—and not on 6 March 2017—with no need for additional arguments or reasoning.

21. Here, we agree with the Secretary-General that the subsequent memoranda, dated 6 March and 11 April 2017, served mainly to expedite the proceedings before the UNDT and did not amount to an admission by the Administration that the applicable procedural requirements had not been followed. Moreover, these submissions do not suggest that the UNDT orders are in any way binding on this Appeals Tribunal even though the first UNDT Judgment has not been appealed.

22. It follows that the UNDT erred in law in finding that there was a procedural delay.

Judgment

23. The appeal is granted and Judgment No. UNDT/2017/044 is hereby vacated insofar as it awarded compensation for procedural delay.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar