



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/024
UNDT/GVA/2013/050
Judgment No.: UNDT/2014/004
Date: 15 January 2014
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

OUMMIH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, United Nations Secretariat
Susan Maddox, ALS/OHRM, United Nations Secretariat

Introduction

1. By application sent by e-mail on 4 June 2013 to the Geneva Registry of the Tribunal and registered under Case No. UNDT/GVA/2013/024, the Applicant contests the decision of 21 September 2012 whereby the Executive Director (hereinafter "the Director"), Office of Administration of Justice ("OAJ"), refused to open a fact-finding investigation into all of the facts she had denounced as constituting prohibited conduct on the part of her first reporting officer and direct supervisor, the Chief, Office of Staff Legal Assistance ("OSLA"), and one of her former colleagues at OSLA, but agreed to open an investigation into certain of the alleged facts against the Chief, OSLA. She seeks rescission of the contested decision and compensation in the amount of €50,000 for moral damage sustained.

2. By a second application received on 11 September 2013 and registered under Case No. UNDT/GVA/2013/050, the Applicant seeks rescission of the decision of 26 April 2013 whereby the Director determined that no further action should be taken on the Applicant's complaint against the Chief, OSLA, because she had concluded, based on the prescribed fact-finding investigation, that he had not engaged in prohibited conduct. The Applicant also seeks compensation for the moral damage sustained, disclosure to her of the full investigation report and other documents, and an order for a new fact-finding investigation.

Facts

3. On 1 September 2009, the Applicant was granted a fixed-term appointment of two years as a Legal Officer at the P-3 level at OSLA, OAJ, United Nations Secretariat. Initially posted to Beirut, she was transferred to Geneva in June 2010.

4. While the Applicant was on home leave from 22 July to 15 August 2011, the Chief, OSLA, completed her 2009-2010 performance appraisal by giving her an overall rating of "does not meet performance expectations". The second reporting officer, the former Executive Director, OAJ, took note of the first reporting officer's appraisal on 10 August 2011. The Applicant initiated a rebuttal process against this performance appraisal report.

5. By memorandum of 22 August 2011, the Chief, OSLA, recommended non-renewal of the Applicant's contract, due to expire on 31 August 2011, on the grounds of her 2009-2010 performance rating.
6. By letter of 24 August 2011, the Applicant was informed that, on the recommendation of her office, her contract would be renewed for one month in order to allow her and her supervisor to complete the performance appraisal report for the period from April 2010 to March 2011.
7. By e-mail of 28 September 2011, the Executive Office of the Secretary-General informed the Applicant that, in line with a recommendation of the Management Evaluation Unit at United Nations Headquarters in New York, the United Nations Office at Geneva had been requested to extend her appointment from 1 October to 11 November 2011.
8. On her return from sick leave on 18 October 2011, the Applicant learned in the course of an e-mail exchange with the Chief, OSLA, that in her absence she had been replaced as counsel by another staff member of the Office in a case pending before the Appeals Tribunal to which she had previously been assigned.
9. By e-mail of 19 October 2011 sent to the former Executive Director, OAJ, and the Chief, OSLA, the Applicant complained that another case for which she had been appointed as counsel had been reassigned in her absence to another staff member, without her being informed. The Chief, OSLA, replied to her by e-mail the same day, reproaching her for filing an application concerning the Office.
10. Also by e-mail dated 19 October 2011, the Chief, OSLA, informed the Applicant that he would himself contact two applicants whom she had previously represented in order to advise them that she had been taken off their cases and that another staff member from the Office would thenceforth represent them. He also specified that he would inform the Dispute Tribunal of that fact and ordered the Applicant not to contact the Registry of the Tribunal or the two applicants concerned.

11. On 25 October 2011, the Applicant wrote to the Information Systems Assistant, OAJ, noting that she had been deprived of access to the internal information-sharing service ("eRoom") by order of the Chief, OSLA. A little later the same day, she wrote to the Executive Director, OAJ, to inform him of that fact and request his intervention.

12. On 28 October 2011, she enquired whether she could take back the cases that had been assigned to her Geneva colleague, whose secondment to OSLA was coming to an end. The Chief, OSLA, replied to her that, apart from some cases that would continue to be followed by that colleague, the cases in question would be assigned to other staff members from the Office.

13. By letter dated 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and de facto evicted from the Office. By application dated 1 November 2011, the Applicant appealed the said decision under art. 2.1 of the Statute of the Tribunal.

14. On 18 November 2011, the Chief, OSLA, completed the Applicant's 2010-2011 performance appraisal report, once again giving her an overall rating of "does not meet performance expectations". The second reporting officer, to wit the Executive Director, OAJ, signed the report on 21 November 2011.

15. On 19 December 2011, the Applicant initiated a rebuttal process against the rating in her 2010-2011 performance appraisal. In its report dated 12 March 2012, the rebuttal panel found that the Applicant's 2010-2011 performance appraisal report should be deemed null and void and, in a supplement to the report dated 28 March 2012, changed the Applicant's overall rating to "successfully meets performance expectations".

16. On 2 April 2012, the rebuttal panel submitted its report concerning the 2009-2010 performance appraisal report and again decided to change the Applicant's overall rating to "successfully meets performance expectations".

17. On 17 April 2012, the Chief, OSLA, gave the Applicant a letter of reprimand that he said would be placed in her file along with any written comments she might make. Following a request for management evaluation, the Applicant was informed on 22 May 2012 that the letter of reprimand had been withdrawn and that all documents pertaining thereto would be removed from her file.

18. On 25 April 2012, the Applicant was temporarily assigned to the Office of the United Nations High Commissioner for Human Rights until the end of July 2012.

19. On 27 April 2012, the Applicant filed a complaint with the Deputy Secretary-General against her first reporting officer and supervisor, the Chief, OSLA, and against one of her former colleagues at OSLA, under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The alleged improper conduct included the following: deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, retaliation for having filed an appeal and for having requested mediation, defamation, exerting pressure on staff, delaying the attribution of her post, rejecting travel requests, preferential treatment of another staff member.

20. On 9 May 2012, the Deputy Secretary-General acknowledged receipt of the Applicant's complaint and instructed the new Executive Director, OAJ, to review it. The Applicant, at the latter's request, completed her complaint on 29 May 2012, 13 June 2012 and 23 July 2012.

21. In June 2012, following completion of the rebuttal processes and the upgrading of the Applicant's overall ratings for the 2009-2010 and 2010-2011 performance appraisals, the Applicant's contract was renewed for one year, until 11 June 2013.

22. On 13 July 2012, the Director received the comments of the colleague against whom the Applicant had filed a complaint and to whom a detailed summary of the complaint had been sent on 9 July 2012. On 25 August 2012, she received the comments of the Chief, OSLA, on the same complaint.

23. On 12 September 2012, the Applicant was informed that her performance for the period 2011-2012 had been rated as "partially meets performance expectations". Following a rebuttal process, the rating was upheld and the Applicant was informed accordingly on 1 February 2013.

24. On 21 September 2012, after writing two notes to the file dated 18 September 2012 on her analysis of the complaint against respectively the Chief, OSLA, and the Applicant's former colleague, the Director informed the Applicant that no fact-finding investigation would be carried out on the complaint against her colleague at OSLA but that an investigation would be opened regarding the Chief, OSLA, solely with respect to some of the facts she had denounced, namely, those concerning the decision to take away from her the cases to which she had previously been assigned as counsel, the fact that certain messages exchanged with the Chief, OSLA, had been copied to other staff members, and finally the question of whether the Chief, OSLA, had created a hostile work environment for the Applicant.

25. On the same day, 21 September 2012, the Director decided to open an investigation into a complaint of prohibited conduct made against the Applicant by the Chief, OSLA, and a colleague of the Applicant at OSLA.

26. On 8 October 2012, the Director informed the Applicant and the Chief, OSLA, that the investigation into the facts alleged by the Applicant would be conducted by two former staff members on the roster established by the Office of Human Resources Management. That decision was reversed on 9 October 2012 following an objection by the Chief, OSLA, on the grounds of a conflict of interest.

27. On 14 November 2012, the Director informed the Applicant of her decision to appoint Mr. B. C. and Ms. A. O., individuals outside the Organization, as members of a fact-finding investigation panel and on 16 November 2012 she engaged them as independent consultants.

28. On 17 November 2012, the Applicant asked the Director for further information about the panel members, including confirmation that they were on the roster of the Office of Human Resources Management. The Director replied on 21 November 2012, without, however, indicating clearly whether the panel members were on the roster.

29. On 20 November 2012, the Applicant requested a management evaluation of several decisions, including the Director's decision of 21 September 2012 to limit the scope of the investigation on harassment to certain of the facts she had alleged against the Chief, OSLA.

30. In December 2012, the panel members travelled to Geneva and New York to interview witnesses, the Applicant and the Chief, OSLA.

31. By e-mail of 10 December 2012, the Applicant once again asked the Director whether the panel members were on the roster of the Office of Human Resources Management before being selected to conduct the investigation and whether they had received internal United Nations training on investigating complaints filed under ST/SGB/2008/5. The Director replied on the same day that they were not on the roster in question and that they had not received the training provided by the Office of Internal Oversight Services ("OIOS").

32. On 11 December 2012, the Applicant again conveyed to the Director her doubts about the conduct of the fact-finding investigation and asked that a third member, from OIOS, be added to the panel and that the two panel members already appointed work under his or her supervision. The Director responded in the negative on the same day and reminded the Applicant that she was under an obligation to cooperate with investigations conducted in accordance with staff rule 1.2 (c).

33. On 6 March 2013, the request for management evaluation particularly of the decision of 21 September 2012 was rejected.

34. On 1 April 2013, the panel members submitted their report dated 22 March 2013 to the Director, and on 9 April 2013 they submitted an addendum in response to an additional request by her.

35. On 26 March 2013, the Applicant was placed on sick leave.

36. On 26 April 2013, the Director, having reviewed the panel's fact-finding investigation report, decided that no further action should be taken on the Applicant's complaint against the Chief, OSLA, and on 29 April 2013 she sent the Applicant a summary of the findings in the report.

37. On 4 June 2013, the Applicant filed with this Tribunal her application against the decision of 21 September 2012 whereby the Director refused to open an investigation into all of the facts of harassment, discrimination and abuse of authority she alleged had been committed by the Chief, OSLA, and one of her former colleagues at OSLA. The application was registered under Case No. UNDT/GVA/2013/024.

38. On 27 June 2013, the Applicant submitted a request for management evaluation of the Director's decision of 26 April 2013 to take no further action on the complaint against the Chief, OSLA.

39. On 15 July 2013, the Respondent submitted his reply to the application of 4 June 2013, asking that it be dismissed and appending a written statement by the Director as well as her two notes to the file of 18 September 2012 produced *ex parte*. On 17 September 2013, the Applicant submitted her comments on the Respondent's reply, in accordance with Orders No. 109 (GVA/2013) of 29 July 2013 and No. 115 (GVA/2013) of 5 August 2013 granting her access to the *ex parte* documents and an extension of the time limit to submit her comments, respectively.

40. On 11 September 2013, the Applicant filed an application, registered as Case No. UNDT/GVA/2013/050, contesting the decision to take no further action on her complaint against the Chief, OSLA.

41. On 9 October 2013, the Under-Secretary-General for Management rejected the request for management evaluation of the decision to take no further action on the complaint against the Chief, OSLA.

42. On 11 October 2013, the Respondent submitted his reply to the application registered under Case No. UNDT/GVA/2013/050 and requested that it be rejected. A written statement by the Director was appended thereto.

43. By Order No. 155 (GVA/2013) of 17 October 2013, the Tribunal requested the Respondent to transmit the full fact-finding investigation report to it on an *ex parte* basis, which was done on 24 October 2013.

44. By Order No. 186 (GVA/2013) of 28 November 2013, the Tribunal convoked the parties to a hearing on the merits to be held on 17 December 2013 on both Cases No. UNDT/GVA/2013/024 and No. UNDT/GVA/2013/050.

45. On 16 December 2013 at 9.53 p.m. New York time, the Applicant requested the Tribunal to transfer her Case No. UNDT/GVA/2013/050 to its New York Registry. The request was rejected by Order No. 194 (GVA/2013) of 17 December 2013.

46. On 17 December 2013, the hearing took place and was attended by the parties by videoconference.

Parties' submissions

Director's decision not to investigate certain facts denounced by the Applicant

47. The Applicant's main contentions, submitted in writing and orally at the hearing, are:

- a. The Administration has an obligation to act promptly and effectively in order to determine the facts when a staff member files a complaint of harassment and abuse of authority; in the instant case, however, the Director did not comply with ST/SGB/2008/5;
- b. The Tribunal must review the contested decision in its entirety and verify whether the alleged facts were such as to warrant the launching of a formal fact-finding investigation. Such an investigation must be opened when there are sufficient grounds, that is, allegations that are sufficiently specific and serious to amount to misconduct;
- c. Her allegations were such as to indicate a situation of moral harassment and abuse of authority. The investigation should have encompassed all the facts she had denounced, as they were clearly linked to one another. Setting aside some of the allegations had the effect of excluding from the investigation other facts that might have been found, in the course of that investigation, to constitute incidents of harassment and abuse of authority;
- d. Section 5.14 of ST/SGB/2008/5 is clear: the decision-maker's role is simple and is restricted to reviewing two points, to wit, whether the complaint was made in good faith and whether the denounced facts in their entirety contain sufficient grounds for the appointment of a fact-finding investigation panel. The Director did not have the authority to look into the actual facts and in particular should not have sought the views of the Chief, OSLA. The jurisprudence established by the Appeals Tribunal in *Nwuke* should apply, as should *Ostensson*, in which it was held that the complaint must be considered in its entirety;
- e. As stated in *Benfield-Laporte* UNDT/2013/162 of 5 December 2013, the competence of the official responsible for reviewing the complaint is restricted. ST/SGB/2008/5 did not authorize the Director to seek the views of the person against whom the complaint had been lodged, that is, the

Chief, OSLA; there had also been procedural delays, a breach of the obligation to act promptly set out in sec. 5.14 of ST/SGB/2008/5;

f. Contrary to the Respondent's contention, the panel appointed to investigate the facts retained by the Director restricted its investigation to the facts she had referred to them;

g. She provided at the hearing details of the moral damage sustained. Acknowledgment that harassment has occurred is very important for the victim's recovery and the inverse is also true, that is, the refusal to acknowledge harassment causes significant trauma to the victim.

48. The Respondent's main contentions, submitted in writing and orally at the hearing, are:

a. As has been confirmed by the Appeals Tribunal, the Dispute Tribunal has a limited role in reviewing decisions that lie within the Secretary-General's discretionary authority;

b. The rights of the Applicant recognized in ST/SGB/2008/5 were respected. The Administration reviewed the Applicant's complaint promptly. The complaint was filed on 27 April 2012 with the Deputy Secretary-General, who transmitted it to the Director on 9 May 2012. Given the complexity of the complaint, the Director requested further clarifications from the Applicant on 22 May 2012, and they were provided on 29 May, 13 June and 23 July 2012;

c. The Director carefully reviewed each of the Applicant's allegations in order to determine which of them should be investigated and it is within the Administration's discretion to determine which facts should be the subject of a fact-finding investigation. The Director reviewed each incident both individually and also in relation to the other facts as a whole;

d. Contrary to the Applicant's contention, the circumstances in the instant matter are different from those in *Benfield-Laporte* UNDT/2013/162.

The procedure followed by the Administration in requesting an explanation from the alleged offender regarding the contents of the complaint before deciding whether to appoint an investigation panel was not criticized in *Haydar* UNDT/2012/201; in order to avoid launching fact-finding investigations that prove groundless, the Administration must have the authority to assess whether sufficient elements are present to warrant the establishment of an investigation panel; there was no indication from the Applicant that she had suffered any damage from the Director's request for comments from the Chief, OSLA, until the Director made her decision. With respect to the procedural delay, it was caused solely by the Applicant's attitude and not by the Administration;

e. Some allegations related to difficult working relations and not to prohibited conduct. The Applicant criticizes the jurisprudence found in *Osman* UNDT/2012/057, but this judgment was upheld on appeal (*Osman* 2013-UNAT-301);

f. The staff member who lodges a complaint must provide all the evidence. The purpose of the fact-finding investigation is to verify whether the alleged acts can be deemed harassment or abuse of authority. It is not for the complainant to determine the scope of the investigation;

g. The Director's decision is not arbitrary, as is apparent from the two notes she wrote on 18 September 2012; it is up to the Applicant to provide evidence to the contrary, which she has not done;

h. Compensation is not appropriate.

Director's decision to take no further action on the harassment complaint against the Chief, OSLA, based on the findings of the investigation report

49. The Applicant's main contentions, submitted in writing and orally at the hearing, are:

a. The fact-finding investigation panel was improperly constituted because, contrary to the provisions of ST/SGB/2008/5, its members were not selected from the roster established by the Office of Human Resources Management. The panel members selected by the Director from outside the United Nations had no knowledge of the rules and procedures or of internal investigation techniques. They were neither current nor former staff members and were not on the roster of the Office of Human Resources Management;

b. The panel members were in a situation of conflict of interest in respect of the Director's Office and a promise was made to place them on the roster of the Office of Human Resources Management once the investigation was completed. Their independence and objectivity can be questioned;

c. During the investigation, the panel members received their instructions from the Director. The Applicant was informed that failure to cooperate with the panel members would be deemed a refusal to cooperate with an official investigation. She was denied a copy of the transcript of the recordings of witness statements. According to OIOS practice, the recording of witness statements is an exception and, in the event that a recording is made, a transcript must be provided to the staff member under investigation;

d. After the panel members left Geneva in December 2012, they had no discussion with her, thereby depriving her of her right to comment on the various witness statements they had received;

e. The panel members' findings are erroneous and lack objectivity and supporting evidence. The panel members adjusted the length of their investigation to the number of days for which they were remunerated.

50. The Respondent's main contentions, submitted in writing and orally at the hearing, are:

- a. The application is irreceivable *ratione materiae*. The Director's decision in determining that the Applicant's direct supervisor had not engaged in prohibited conduct towards her is not a decision that is subject to review by the Tribunal. That decision could be subject to review only in the context of a challenge to a disciplinary measure imposed on the alleged offender. The Tribunal does not have the authority to declare that prohibited conduct has or has not occurred. The Director's decision did not infringe on the Applicant's rights under the terms of her appointment;
- b. The application is also irreceivable *ratione temporis*. The Applicant was informed of the decision to appoint the fact-finding investigation panel on 14 November 2012 and did not submit a request for management evaluation of this decision within the prescribed 60-day time period;
- c. The conduct of the fact-finding investigation was proper: 28 individuals were interviewed and numerous documents were reviewed. The Director considered the report and received an addendum thereto after seeking clarification with regard to one aspect;
- d. The panel members were selected by the Director from outside the United Nations after she had first appointed two retired staff members from the roster of the Office of Human Resources Management and then realized that there might be a conflict of interest. Decision-making responsibility with regard to an investigation lies with the chief of the department in question and not with OIOS;
- e. The panel members selected had extensive experience with harassment cases and, while they asked the Director a few minor questions in the course of their fact-finding investigation, they conducted that fact-finding investigation completely independently;
- f. The Applicant, contrary to her contention, had every opportunity to submit her comments to the panel members. While they were paid by the Organization, that is also true of former staff members on the roster of the

Office of Human Resources Management who are appointed as panel members. The panel members had available to them all the policy documents on fact-finding investigations at the United Nations;

g. The onus is on the Applicant to explain how the appointment of these panel members might have vitiated their findings; however, she has not shown any prejudice that resulted from that fact alone. The Director's appointment of these panel members was a reasonable exercise of her authority;

h. The fact-finding investigation was properly conducted, with sufficient time, and the Applicant was given the opportunity to have several interviews with the panel members but did not make herself available. The Applicant has not established that she suffered any prejudice as a result of the recording of the interviews by the panel members in a departure from the usual practice of OIOS investigators;

i. The Director rightly concluded, on the basis of the fact-finding investigation report, that the Chief, OSLA, had not engaged in harassment or abuse of authority. An award of compensation to the Applicant is not appropriate.

Consideration

51. The Applicant, who at the time of the impugned decisions was serving as a Legal Officer at OSLA in Geneva, contests, firstly, the decision of 21 September 2012 whereby the Director refused to open an investigation into all the facts of harassment, discrimination and abuse of authority allegedly committed by the Chief, OSLA, and one of her colleagues, at the time a Legal Officer at OSLA, and secondly, the decision of 26 April 2013 whereby the Director determined that no further action should be taken on the Applicant's complaint against the Chief, OSLA.

52. Given that the two aforementioned applications are contesting two decisions taken by the same individual, to wit, the Director, in response to the same complaint of harassment, discrimination and abuse of authority filed by the Applicant, the Tribunal finds that, to ensure the proper administration of justice, it should join the two applications and rule thereon in a single judgment.

Receivability

53. The Tribunal must first decide whether the two decisions contested by the Applicant are final decisions that as such may have infringed on her rights as a United Nations staff member. By her first decision of 21 September 2012, the Director refused to open an investigation into a certain number of facts reported by the Applicant as prohibited conduct. There is no doubt that, in taking this decision, the Director closed the case on part of the Applicant's complaint, particularly the part pertaining to her colleague. By the second decision of 26 April 2013, the Director closed the case on the rest of the Applicant's complaint; this is clearly a second decision that put an end to the complaint and the Applicant was justified in filing two separate applications concerning two final decisions.

54. The Tribunal must next examine the Respondent's contentions regarding non-receivability. The Respondent contends, first, that the application is irreceivable inasmuch as the Director's decision in determining that there was no misconduct by the Applicant's direct supervisor does not affect the Applicant's rights under the terms of her appointment and therefore is not subject to review by the Tribunal. The Tribunal must reject this argument: the purpose of Secretary-General's bulletin ST/SGB/2008/5 is to protect staff members who are victims of discrimination, harassment, including sexual harassment, and abuse of authority. Moreover, under its Statute, the Tribunal is competent to hear and pass judgment on an application filed by any staff member to contest an administrative decision that is in non-compliance with his/her terms of appointment or his/her contract of employment (art. 2.1 (a), of the Statute). The Statute specifies that the terms "contract" and "terms of appointment" include all applicable regulations

and rules and all relevant administrative issuances in force at the time of alleged non-compliance. It cannot be contested that the bulletin in respect of which the Applicant claims non-compliance gives her certain rights and the Tribunal notes that, as has been confirmed by *Nwuke* 2010-UNAT-099, the violation of those rights is a breach of her rights under the terms of her contract of employment.

55. The Respondent also contends that the Applicant is time-barred from contesting the decision to appoint the fact-finding investigation panel because she failed to request a management evaluation of that decision within the prescribed 60-day time limit. The Respondent is obviously confusing the contested decisions with the legal arguments. The request for management evaluation of the decision to close the Applicant's complaint was made within the prescribed time limit. While the Applicant contests before the Judge the procedure followed in appointing the panel members, she did not request its rescission but was merely making a legal argument against the decision to close her complaint. The Appeals Tribunal has already ruled that the various preparatory procedural steps undertaken by the Administration in order to reach a final decision cannot be appealed in separate applications and that only the final decision can potentially breach the staff member's rights and therefore be subject to judicial review (see *Ishak* 2011-UNAT-152 with respect to the selection process). On the other hand, in requesting rescission of the final decision, an applicant may obviously raise all of the irregularities that occurred during the process that led to the final decision. The Tribunal must therefore reject the irregularities raised in defence by the Respondent.

Merits

56. On 27 April 2012, the Applicant filed the aforementioned complaint with the Deputy Secretary-General under the provisions of Secretary-General's bulletin ST/SGB/2008/5 on the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.

57. The facts reproached to the Chief, OSLA, included the following: *de facto* deprivation of functions, discrimination, abuse of authority, retaliation through

performance appraisals, retaliation for filing two applications with this Tribunal on her own behalf, retaliation for seeking mediation by the Ombudsman of the Office of the United Nations High Commissioner for Refugees, giving misinformation about her to the Appeals Tribunal and instructing a colleague to put her name in a motion filed with this Tribunal in New York. Other incidents of discrimination and harassment were also alleged.

58. The facts reproached to her former colleague at OSLA included receiving preferential treatment from the Chief, OSLA, in particular having often been designated Officer-in-Charge of the Office in the absence of the Chief, OSLA, during which time he allegedly committed abuses of authority in respect of the Applicant.

59. At the Director's request, the Applicant supplemented her complaint on 29 May 2012, 13 June 2012 and 23 July 2012 by reporting some additional facts.

60. As stated above, the Director, by the two contested decisions taken under the provisions of ST/SGB/2008/5, closed the complaint. The Tribunal must therefore consider whether the Director responded appropriately to the complaint filed by the Applicant.

61. In contesting the manner in which her complaint was handled, the Applicant contended firstly, in particular at the hearing, that the Director, by her decision of 21 September 2012, failed to comply with sections 5.14 and 5.15 of ST/SGB/2008/5. These sections read as follows:

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. [...]

62. She maintains that the Director failed to comply with the text cited above since her role was supposed to be restricted to promptly assessing whether the complaint had been made in good faith and whether a formal fact-finding investigation was warranted. The text did not authorize her to carry out a preliminary investigation of the facts, particularly by requesting the two alleged offenders to submit comments. The Applicant relies, *inter alia*, on this Tribunal's ruling in *Benfield-Laporte* UNDT/2013/162.

63. The following facts are uncontested: the Applicant filed her complaint on 27 April 2012 with the Deputy Secretary-General against the Chief, OSLA, and one of her colleagues at OSLA. On 9 May 2012, the Deputy Secretary-General instructed the Director to review the complaint. At the Director's request, the Applicant supplemented her complaint on 29 May 2012, 13 June 2012 and 23 July 2012. On 13 July 2012 and 25 August 2012, the Director received comments as requested from the colleague named in the complaint and the Chief, OSLA, respectively.

64. The two notes to the file dated 18 September 2012 and drafted in great detail by the Director, particularly show that her decision about whether or not to open a fact-finding investigation into some of the facts denounced by the Applicant was partially based on the responses given by the two alleged offenders. The Tribunal, following the jurisprudence established by *Benfield-Laporte* UNDT/2013/162, finds that the Director exceeded her role by undertaking a preliminary investigation and informing the individuals concerned, when that role was restricted to promptly assessing the complainant's good faith and whether a fact-finding investigation was warranted.

65. The Director's preliminary investigation of the alleged facts led her to distinguish between those claims that should be investigated by a fact-finding panel and those that did not warrant any follow-up. In taking this action, the Director substituted herself for the panel members whose mandate it was to do so.

The Tribunal finds that the Secretary-General's intention in issuing Secretary-General's bulletin ST/SGB/2008/5 was to minimize the involvement of the responsible official by asking that individual solely to make a prompt assessment of the aggrieved staff member's good faith and the seriousness of the complaint. The Tribunal therefore finds that the decision of 21 September 2012 whereby the Director refused to open an investigation into all the facts of harassment, discrimination and abuse of authority committed by the Chief, OSLA, and one of the Applicant's former colleagues is unlawful as a violation of Secretary-General's bulletin ST/SGB/2008/5 and should therefore be rescinded. While the Respondent argues that in *Haydar* UNDT/2012/201 Judge Boolell did not criticize the fact that the official responsible for handling a complaint under ST/SGB/2008/5 carried out a preliminary investigation notably by requesting comments from the alleged offender, this Tribunal finds that, in the aforementioned judgment, the Judge did not express a view on the legality of the preliminary investigation, but considered the background of the complaint process solely in order to rule on whether the requirement for prompt action in the procedure set out in sec. 5.14 of ST/SGB/2008/5 had been met.

66. From the Tribunal's finding stated above that the decision of 21 September 2012 is unlawful, it follows necessarily that the Director's decision of 26 April 2013 to take no further action on the Applicant's complaint against the Chief, OSLA, must also be considered unlawful. The second decision is a direct consequence of the first.

67. Furthermore, the Tribunal finds that the second decision of 26 April 2013 is unlawful on other grounds. In taking this second decision, the Director mainly relied on a fact-finding investigation report prepared by two fact-finding investigation panel members whom she herself had appointed.

68. Section 5.14 of ST/SGB/2008/5 stipulates that the responsible official must entrust the fact-finding investigation to a panel of at least two individuals from the department, office or mission concerned who have been trained for that purpose or, if necessary, from the roster of the Office of Human Resources Management.

It is not disputed that the two individuals appointed by the Director to carry out the fact-finding investigation into facts which could be found to amount to prohibited conduct were not staff members of the Organization, nor were they on the roster of the Office of Human Resources Management. This is an obvious violation of the provision cited above, which is clearly worded and cannot be interpreted in any other way.

69. The Respondent contended that, given the functions performed by the Chief, OSLA, the Director was unable to find “in the department, office or mission” staff members who would not have been in a conflict of interest in conducting such an investigation. This assertion is uncorroborated by any document. While the Tribunal is willing to believe that it might be difficult for the Administration to select staff members capable of conducting an investigation involving high ranking senior officials within the Organization, in the instant case, the P-5 level of the Chief, OSLA, did not make such a selection an impossibility. Even assuming that it was indeed impossible, the bulletin provides for another solution: selecting panel members from the roster of the Office of Human Resources Management. In the Tribunal’s view, it cannot seriously be argued that it was impossible to find two competent and unbiased individuals from the roster when the Respondent himself indicated at the hearing that the roster contained around 200 names. Although the Respondent also stated at the hearing that many of the individuals on the roster could not be selected to carry out a fact-finding investigation because their grade levels were below that of the Chief, OSLA, no evidence was filed to support these claims. Even if it accepts this last assertion, the Tribunal recalls that the Administration has a duty to take the necessary organizational measures to implement the Secretary-General’s bulletins and that it was therefore incumbent upon the Office of Human Resources Management to maintain a roster with a wide range of panel members with sufficiently high grade levels to handle all types of fact-finding investigations should they be selected from among the current or former staff members.

70. The Tribunal therefore finds that no situation of *force majeure* made it permissible to select two individuals who were not on the roster and were

completely outside the Organization. The investigation was therefore conducted by persons who were unauthorized to do so. Consequently, the report they prepared may not be taken into account and the Director's decision, which was based primarily on the findings of the report, is also unlawful for that reason.

71. The Tribunal notes that its decision does not run counter to the jurisprudence of *Nwuke* UNDT/2013/157 cited by the Respondent. In her judgment, Judge Shaw found that an investigation carried out by a panel made up of one current staff member of the Organization and one retired staff member from the roster of the Office of Human Resources Management had been conducted properly. The Judge added that, even if the investigation panel had been improperly constituted, that irregularity would have been inconsequential, since in that case the Judge had well specified that the Applicant had never claimed that the investigation had been biased. The jurisprudence cited by the Respondent is inapplicable in the instant case, in which the Applicant has, on the contrary, strongly contested the panel members' qualifications and manner of conducting the investigation.

72. It follows from all the foregoing that the decision to close the Applicant's complaint is unlawful and must therefore be rescinded. This rescission owing to a procedural flaw makes it unnecessary to disclose the full investigation report to the Applicant or to hold another hearing for witness testimony.

Prejudice

73. The Applicant has requested compensation for the moral prejudice sustained owing to the closing of her complaint. The Tribunal has rescinded the contested decisions on procedural grounds. Since the facts that gave rise to the complaint have not been established by properly appointed investigators, the Tribunal has been unable to express a view as to the merits of the complaint, a question that the Tribunal might possibly consider only after the Administration has taken another decision on how to handle the complaint.

74. The only question that remains to be decided by the Tribunal concerns the causal link between the irregularities committed and the moral prejudice sustained by the Applicant. It is not therefore for the Tribunal to award compensation to the Applicant for the moral prejudice she may have sustained as a result of prohibited conduct but solely to consider whether she suffered moral prejudice as a result of the fact that, although she filed her complaint on 27 April 2012, owing to the irregularities committed, no proper decision has been taken as at the date on which the Tribunal is rendering its decision. The Applicant testified at the hearing that her health had deteriorated as a result of the harassment that she had experienced and that she had suffered from severe anxiety.

75. The Tribunal has no doubt that the Applicant's health has been affected by all the disputes with her superiors and considers it unnecessary to hear testimony from the doctor(s) who have treated the Applicant, since in any case it would be difficult for them to discern, from among all the conflicts that the Applicant has had with the Administration, those that were the cause of her health problems. Nevertheless, as has been stated above, respective liabilities have not yet been established, and the Tribunal is unable to award compensation for all the moral prejudice that may have been sustained. However, it seems certain that the irregularities committed led to a major delay in closing the complaint and therefore aggravated the anxiety caused to the Applicant by this delay. The Tribunal finds it appropriate to award the sum of CHF 8,000, considering that the Applicant filed her complaint on 27 April 2012 and that the final disposition of her complaint is still, at this date, far from being known.

76. Although the Respondent requested an opportunity to make additional submissions before the Tribunal made any decision as to compensation for prejudice caused to the Applicant, the Tribunal recalls that, as stated above, it has not made a finding on prejudice linked to the alleged harassment but only on prejudice arising from the irregularities that led to a delay in closing the complaint. The Tribunal is of the view that it was not necessary to convoke the parties to another hearing or allow a further exchange of written submissions in order to determine the compensation to be awarded in that regard.

Conclusion

77. In view of the foregoing, the Tribunal DECIDES:

- a. The two contested decisions, to wit, the decision of 21 September 2012 referred to in para. 1 hereof and the decision of 26 April 2013 referred to in para. 2 hereof, are rescinded. A new decision must be taken concerning the complaint lodged by the Applicant;
- b. The Administration is ordered to pay the Applicant the sum of CHF 8,000 as moral damages;
- c. The aforementioned compensation shall be paid with interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the United States prime rate 60 days from the date this Judgment becomes executable;
- d. All other pleas are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 15th day of January 2014

Entered in the Register on this 15th day of January 2014

(Signed)

René M. Vargas M., Registrar, Geneva