UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/047
Judgment No.: UNDT/2015/051
Date: 16 June 2015
Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Charles Ongweso, Ongweso and Co. Advocates

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Cristiano Papile, ALS/OHRM
Katya Melluish, UNON

Introduction

1. The Applicant filed an application with the Dispute Tribunal contesting the decision of the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") dated 6 June 2013, made following her complaint of discrimination and harassment pursuant to ST/SGB/2008/5 (Secretary-General's Bulletin on Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority).

2. The parties filed a joint statement of facts and issues. The Applicant supplemented her submission with additional facts, which were not agreed to by the Respondent.

3. The parties agreed that the issues in the case are:

a. Were there any procedural irregularities in the handling of the Applicant's complaint of prohibited conduct?

b. If any such irregularities existed, did they vitiate the ASG/OHRM decision regarding the outcome of the Applicant's complaint of prohibited conduct?

c. If there were procedural irregularities, what is the appropriate remedy?

4. Neither party sought an oral hearing of the substantive case. In light of the extensive and comprehensive documentation filed, the Tribunal decided to consider it on the papers. The Applicant asked the Tribunal to consider the need for an oral hearing on remedies, should that issue arise but, given the outcome of this case, and the adequacy of evidence relevant to remedies, the Tribunal has decided that there is no necessity for an oral hearing on remedies.

5. The Applicant's request to file an interlocutory application was granted by the Tribunal. She sought and was granted extensions beyond the deadline of 26 September 2014. Extensions of time were given to enable the Applicant to file such an application up to and after mediation, and failure of the parties to reach an amicable settlement. No application was received by the stated time limit.

6. The Tribunal notes from the evidence, that the Applicant has suffered from periods of illness serious enough that have periodically impacted on her ability to engage with the first fact-finding panel convened to investigate her complaint, and to maintain contact with her private lawyer as well as with the Tribunal. Given the nature of her illness, and the obligation to treat medical records of staff with strict confidentiality (as per sec. 8 of ST/IC/1999/111 (Information circular on Mental health—Medical and employee assistance facilities)), the Tribunal, on its own motion, decided to anonymise this judgment.

Facts

7. The following facts are taken from the joint statement of facts, supplemented by evidence from the documentation filed by the parties.

8. The Applicant entered the service of the Joint Medical Services ("JMS") at the United Nations Office at Nairobi ("UNON"), at the NOC 5 level, in June 2010, on a fixed-term appointment. This appointment was extended until 6 June 2012.

9. The relationship between the Applicant and her First Reporting Officer, the Chief, JMS, as well as with the JMS nurses, deteriorated during 2011. The Applicant sought the intervention of her Second Reporting Officer, the Chief, Human Resources Management Services ("HRMS") at UNON to solve these issues.

10. On 29 November 2011, the Chief, JMS, wrote to the Applicant, in response to an email received from her on the same day). She stated, *inter alia*:

> You are not alone at getting upset: your style and allegations upset me a lot and disturb my concentration on tasks at hand[.]

> [W]e will keep the appointment with [the Chief, HRMS] and you will tell him that you are alleging that I do not know about my office[.]
>
> It is not the first time you make sweeping allegations about colleagues but are unwilling to explain in detail. Unless you do so you are complicit if there is any wrong doing.
>
> I am happy that you feel better but as I have advised you before you need to learn to contain your feelings and express them in a more professional manner.

11. On 4 December 2011, the Applicant sent an email to the Chief, HRMS, complaining that her job was not well defined and that there was no document to guide her. She saw this as the root cause of the problems she encountered at JMS and her work conditions.

12. On 9 December 2011, the Chief, JMS, addressed a note to the Applicant regarding an incident that had happened on the same day in which she criticised the Applicant for her attitude, namely for a "temper outburst" and "disruption of the whole clinic". The Chief, JMS, said that it was a daily occurrence to receive complaints about the Applicant which was disrupting the workflow.

13. On 13 December 2011, the Applicant sent another email to the Chief, HRMS, complaining about the "harassment" to which she had been subjected by the Chief, JMS, the hostile working environment she was experiencing with the JMS nurses, and her exhaustion from an intensive work schedule. The Regional Ombudsman became involved at that stage to help in solving the issues.

14. In a nine-page letter of 19 December 2011, the Chief, JMS, highlighted to the Applicant what she considered to be her shortcomings in the United Nations core values and competencies, namely in "Professionalism", "Integrity", "Respect for Diversity", "Teamwork", "Planning and Organization", "Communication", and "Leadership".

15. On 21 March 2012, the Chief, JMS, emailed all JMS staff in response to an email from the Applicant about drop-in patients and referral to a JMS doctor.

16. On 22 March 2012, the Chief, JMS, provided the Applicant with a performance improvement plan, noting her unwillingness to cooperate with the performance evaluation plan and the mid-term review. On receiving the performance improvement plan, the Applicant wrote to the Chief, JMS, stating:

> I kindly ask you to let me go home till Tuesday next week. I need to reflect on this. I have tried very much to recover from the oppression which you have caused me. You made it worse this morning. I am sorry I am not able to continue anymore.

17. The Chief, JMS, replied immediately that she could see the Applicant was upset, and that she accepted her taking uncertified sick leave.

18. The Applicant then went home, stating that she was feeling unwell.

19. On 23 March 2012, the Chief, JMS, informed the Applicant that she was expecting her back on duty on Tuesday as indicated earlier. The Applicant replied, copying the Chief, HRMS, enquiring whether she was still expected to report back to the office in case she wished to resign.

20. On 24 March 2012, the Applicant provided her comments on the performance improvement plan, and wrote to the Chief, JMS, and the Chief, HRMS:

> I note that the allegations are piling up. I am getting quite overwhelmed. I would like to report on Monday but I am not fit to see patients. I am not sure the patients will be safe in my hands. I wonder if I can be given an alternative job. I have lacked sleep for 3 days running. I think my health is rapidly deteriorating.

21. On 26 March 2012 at 6:04 p.m., the Chief, JMS, emailed the Applicant, copying the Chief, HRMS, and the Regional Ombudsman, stating that she was sorry to hear that she was not well. She also wrote:

> I note that you have indicated that it would (not) be prudent for you to return to work at this time because your current state of mind is still not stable enough to enable you to see patients.

22. The Chief, JMS, added that since it appeared that reasons of mental health had caused the Applicant to be unable to return from leave on the agreed date, she

was to indicate the number of days she anticipated to be on sick leave. The Chief, JMS, also requested the Applicant to provide medical reports from a psychiatrist, with at least ten years standing in the profession, to enable certification of her sick leave and of her medical clearance for fitness to return to work. She concluded that, to "safeguard [the Applicant's] right to confidentiality", the medical reports should be sent to Dr. D., a doctor at the Food and Agriculture Organization ("FAO") in Rome.

23. The Applicant wrote to the Chief, JMS, on 26 March 2012 at 8:25 p.m., advising that she could work and would report for duty the next day, but that nevertheless she was "not well enough to attend to patients". The Chief, JMS, responded on 26 March 2012 at 10:30 p.m., as follows:

> I understand you determine yourself to be fit for work but not to see patients.
>
> As your main function is to see patients and to be on call, any further reduction of your duties has to be based on medical recommendation from a duly registered Doctor and will be assessed based on such recommendation and whether the unit can accommodate such a work place adjustment.
>
> …
>
> You cannot self determine what duty you are fit for or not.
>
> So again you are requested to submit full medical reports to [Dr. D.] so he can advise the ASG on whether there are grounds for work place accommodation of the nature you request.
>
> Meanwhile you have raised yourself the question of fitness to work. Hence until we have the renewed medical clearance from Dr. [D.], you are officially not cleared to return to work.

24. The Applicant replied that she would come to the office the next day, and that she did not see the reasons for the Chief, JMS, to declare her "unfit".

25. By email of 27 March 2012 at 6:32 a.m., the Chief, JMS, replied to the Applicant that she needed to know that the latter was fit to work, and that the Applicant was not to return to work until receipt of a clearance by Dr. D.

26. The Applicant alleges that on 27 March 2012 in the early morning, the Chief, JMS, called her to say she had instructed security to stop her from accessing the compound, and that she should see a psychiatrist and get a medical report to be cleared to work. The Applicant told the Director of Administrative Services, UNON, as well as to the Chief, HRMS, in emails of the same day, that she found this to be "a form of harassment".

27. In relation to this incident, the fact-finding panel that interviewed the Chief, JMS, reported that:

> [The Chief, JMS] confirmed to the Panel that, on the morning of 27 March 2012, she called the complainant advising her not to come to work unless she was "fit to come" in a tone that was pleading. According to [the Chief, JMS], when her pleas went unanswered, she told [the Applicant] that she did not "want to have to ask the people at the gate". According to [the Chief, JMS], she had not done this in a threatening manner. [The Chief, JMS] explained to the Panel that she decided to call [the Applicant] because she had not responded to her email in which she [had] requested [the Applicant] not to come to work until she had obtained the medical clearance. The Panel asked [the Chief, JMS] why there was such a desire to keep [the Applicant] from the office. [The Chief, JMS] answered that she wanted to avoid further disruptions in the office, and because of [the Applicant's] own contention that she was not "feeling right".

28. Later, in her explanations provided on 28 April 2013 to the ASG/OHRM, the Chief, JMS, explained that when she called the Applicant and requested her not to come to JMS on 27 March 2012, she had been influenced by the previous communications from the Applicant, her perception of the latter's health and also because she needed time to seek advice. She said she made the decision in the "heat of the moment". She also acknowledged that she had "no formal authority to refuse entrance to the complex", and that the Applicant "was not denied entry but did voluntarily return home prior to arriving at [the complex]".

29. By email of 27 March 2012 of 7:27 a.m., the Chief, JMS, wrote to the Applicant:

> Thank you for picking my phone this morning. As I informed you, you are not medically cleared to return to work. You indicated you

> do not wish to see a doctor. I remind you of the provisions of the ST/AI on medical clearance. You indicated you wanted to pick some things and then hand in your resignation. I told you that since you have raised doubts about your own mental fitness, your resignation may not be accepted until we have a medical report.
>
> I asked you to go back home and wait until [the Chief, HRMS] gives you an appointment time.

30. By memorandum of 28 March 2012, the Chief, HRMS, informed the Applicant of the steps she needed to undertake to be re-certified as fit for duty. Under the subject "Conditions for your safe return to duty", she was told:

> […] the Organization is constrained to re-assess and confirm your medical fitness to return to duty. This reassessment is being done in line with Staff Rule 6.2(g) to ensure your health and safety and that of the other UN staff members and patients of JMS. Please note that it is incumbent upon you as a UN staff member to "comply promptly with any direction or request made under" Staff Rule 6.2, Sick Leave.
>
> Accordingly, it will be necessary that your fitness to return to duty be medically assessed by an independent psychiatrist before you are deemed fit to return to duty. Please note in this regard that until such time you are re-certified as medically fit to return to full or modified duty, all currently pending matters related to the performance improvement plan and other performance related issues will be held in abeyance. Similarly, the various allegations you have made against [the Chief, JMS] and other staff members of JMS will be addressed after you have been deemed fit to return to duty.

31. The memorandum further stated that the medical report was to be submitted to Dr. D., Chair of the UN Medical Directors, FAO, as a "measure put in place to preserve the confidentiality of [the Applicant's] medical records *vis-à-vis* [the Chief, JMS], [the Applicant's] First Reporting Officer".

32. In April 2012, the Applicant made a formal complaint of discrimination and harassment against the Chief, JMS, to the ASG/OHRM. She enumerated five alleged incidents of prohibited conduct by the Chief, JMS, which principally concerned the events of 26 and 27 March 2012. Her narrative of the incidents included multiple allegations pertaining to different dates under the same heading. Under a heading "Other forms of harassment which I have experienced", she

made various other allegations in the context of which she referred to actions taken by the Chief, HRMS.

33. On 24 April 2012, the ASG/OHRM informed the Applicant that her complaint against the Chief, JMS, had been referred to the Director-General, UNON ("DG/UNON"), for review as to whether there were sufficient grounds to warrant a formal fact-finding investigation. The Applicant acknowledged the referral but raised concerns that her complaint was being dealt with by UNON Administration due to a perceived conflict of interest. The ASG/OHRM referred these concerns to the DG/UNON.

34. In May 2012, the Chief, Division of Administrative Services, UNON, instructed the Chief, JMS, to withdraw the request for medical clearance, and to allow the Applicant to return to work. In an email dated 16 May 2012 to the Applicant, the Chief, HRMS, stated:

> First let me make it very clear that no one barred [you] from accessing the UN compound. Neither I nor [the Chief, JMS] told you or wrote to you not to come to the UN compound.

35. On 25 May 2012, the Applicant emailed the ASG/OHRM, complaining about the delay in the handling of her complaint.

36. On the same day, namely on 25 May 2012, the Chief, JMS, declared the Applicant fit to return to work, and the latter reported back to the office on 28 May 2012.

37. On 1 June 2012, the ASG/OHRM sent a reminder to the DG/UNON with respect to the need for prompt and concrete action on the Applicant's allegations of prohibited conduct.

38. On 6 June 1012, the Applicant was informed by the Officer-in-Charge, HRMS, that her fixed-term appointment expired on 6 June 2012, and that it would not be renewed. Following a request for management evaluation of that decision and a successful application to the UNDT for suspension of action, the Applicant's contract was extended. On 22 October 2012, she was retroactively placed on special leave with full pay ("SLWFP") for one year as of 7 June 2012.

39. On 14 June 2012, the DG/UNON informed the Applicant that her complaint filed under ST/SGB/2008/5 appeared to establish sufficient grounds to warrant a fact-finding investigation and that she had appointed a fact-finding panel ("the panel") of three named members. The Applicant was urged to fully cooperate with the panel.

40. Between 2 July and 29 August 2012, the panel invited the Applicant three times to be interviewed. She replied to the first invitation on 3 July 2012, informing the panel that she had written to the DG/UNON the previous day and asked the panel to contact the DG for an update of her case. She said she would not be able to access emails as she would have liked, and would only respond to future correspondence when she found it possible. To the second invitation to a meeting on 5 July 2012, the Applicant responded that she was not well, and that email communication would be a challenge as she was "up country". She asked the panel to refrain from compelling her to come to any interviews and to be allowed to rest.

41. On 17 July 2012, the Applicant wrote a long letter to the ASG/OHRM about what had occurred to her since she had filed her complaint of harassment. On 20 July 2012, the ASG/OHRM advised her to consider raising these matters with the Management Evaluation Unit and the Ethics Office.

42. On 17 August 2012, the panel invited the Applicant to attend an interview on 24 August 2012. She did not respond to this invitation but on 20 August 2012 she wrote again to the ASG/OHRM explaining her multiple hardships. She asked not to be compelled to attend the fact-finding investigation due to extreme hardship caused by her family situation, her health problems, which she described as worsening, and the emotional effects of having to return to UNON.

43. By memorandum dated 3 September 2012, having received no response from the Applicant to a third invitation to attend a meeting on 5 September 2012, the panel informed the DG/UNON that, in light of the Applicant's refusal to cooperate, they were unable to proceed with their investigation.

44. By memorandum of 19 September 2012, the Director of the Ethics Office, New York, informed the Applicant that it had completed its preliminary review of her request for protection against retaliation pursuant to SG/SGB/2005/21, and had found that there was a *prima facie* case of retaliation. The matter was then referred to the Office of Internal Oversight Services ("OIOS") for investigation, in accordance with sec. 5.7 of ST/SGB/2005/21.

45. On 4 October 2012, the Applicant wrote to the ASG/OHRM with a new complaint of prohibited conduct pursuant to ST/SGB/2008/5 against the Chief, JMS, the Director of Administrative Services, UNON, and the Officer-in-Charge of the Investigations Department, UNON. In particular, she mentioned that on 21 June 2012 she "saw prints of [her] photo pinned at the main gate together with some people who had been accused of stealing UN property" and that she was also told by colleagues that other pictures of her were pinned "at the commissary and at the main lobby".

46. On 19 November 2012, the ASG/OHRM replied to the Applicant that since an investigation into the allegations raised in her report to the Ethics Office would be undertaken, the new matters would not be considered by OHRM under ST/SGB/2008/5.

47. The DG/UNON informed the ASG/OHRM on 12 October 2012 that she had decided to dissolve the panel she had appointed, citing the Applicant's refusal to meet with it. The DG/UNON referred the matter back to the ASG/OHRM for resolution.

48. The ASG/OHRM convened a new two-member fact-finding panel. She informed the Applicant thereof on 6 November 2012, and asked her to fully cooperate with the panel. The Applicant replied on 8 November 2012, expressing her appreciation and stating that she would be "happy to cooperate" with the investigation.

49. The terms of reference of the second fact-finding panel were set out in a memorandum dated 6 November 2012. The panel comprised the Chief of Section, Department of General Assembly and Conference Management, and a Legal

Specialist, United Nations Development Programme, both of whom had been trained in investigating allegations of prohibited conduct.

50. The fact-finding panel visited UNON from 27 November to 7 December 2012 and conducted on-site interviews with 19 individuals, including the Applicant, the Chief, JMS, and the Chief, HRMS, UNON. It also reviewed the documentary evidence provided to it by the Applicant and other individuals, including a large volume of e-mail communications.

51. On 18 March 2013, the fact-finding panel submitted its report to the ASG/OHRM. Of the 17 specific incidents of alleged prohibited conduct it examined (15 allegations against the Chief, JMS, and two against the Chief, HRMS), the panel concluded that only those relating to the 26-27 March 2012 incident by the Chief, JMS, were established.

52. The panel concluded that there was sufficient evidence to establish that the Chief, JMS, had requested the Applicant to obtain a medical clearance from a psychiatrist and not to enter the UNON complex. It stated:

> The [p]anel considers that there is sufficient evidence to establish that [the Chief, JMS] requested [the Applicant] to obtain a medical clearance from a psychiatrist and notes that this request was not considered appropriate by [the Chief, JMS's] Second Reporting Officer, […] who later instructed [the Chief, JMS] to withdraw the request.
>
> The [p]anel also considers that there is sufficient evidence to establish that [the Chief, JMS] requested [the Applicant] not to enter the UNON complex on 27 March 2012 and notes that this request was not considered an appropriate measure by [the Chief, JMS's] supervisors.

53. By memoranda dated 10 April 2013, the ASG/OHRM asked the Chief, JMS, for her comments about her decision to request the Applicant to obtain a medical report attesting to her fitness for duty and not to enter UNON premises, and asked the Director, Medical Services Division ("the Director, MSD") several specific questions about the propriety of the Chief, JMS, requesting the Applicant for a medical report and not to enter UNON premises.

54. The Director, MSD, replied on 24 April 2013, noting that her responses were based on excerpts from the panel report, associated emails and documents, the Staff Rules and Administrative Instructions, her knowledge of UN organisational structures and ethics, and standards of the medical profession. She said that there was a lack of a formal system within the UN for the delivery of medical and medical administrative services to staff working at the UN Medical Service. She noted that the Chief, JMS, had two roles in this case: first, as the Applicant's First Reporting Officer with no authority to request a medical examination and, second, as a Medical Officer who does have such authority provided there is a reasonable basis for the request. She concluded that in this case there was such a basis. She was not aware if the Chief, JMS, had consulted the then UN Medical Director before directing the Applicant not to attend the office.

55. On 28 April 2013, the Chief, JMS, replied with her reasons for requesting the Applicant to undergo a medical examination. She explained these were largely based on her observations and on the communications from the Applicant including one in which the Applicant had said that she was not able to handle conversations with patients and feared she could make mistakes. The Chief, JMS, said she had "no formal authority to refuse entrance to the complex". She said she had sought the opinion of the Medical Director of FAO and the Chair of the Medical Directors working group.

56. Having considered these responses, the ASG/OHRM sent the Applicant a memorandum dated 31 May 2013 and received by the Applicant on 6 June 2013, in which she advised her that she had decided not to pursue administrative or disciplinary action against either the Chief, JMS, or the Chief, HRMS, and to close the case because the facts established by the panel's report and available evidence did not indicate evidence that either of them had engaged in prohibited conduct.

57. In regard to the panel's finding that on 26 and 27 March 2012 the Chief, JMS, improperly revoked the Applicant's medical clearance, ordered her to obtain a medical evaluation from a psychiatrist and banned her from going to work, the ASG/OHRM stated:

> The issue for me to determine is whether [the Chief, JMS] acted improperly when she requested you to obtain a medical clearance from a psychiatrist, in order to support your placement on sick leave, and when she informed you that you were "officially not cleared to return to work" until you had been medically cleared".

58. She further noted that, having reviewed the evidence and considered relevant rules and administrative instructions, as well as the answers given to her request for clarification by the Director, MSD, and by the Chief, JMS, she found that "it was reasonable for [the Chief, JMS] to hold concerns about [the Applicant's] fitness for duty at that time". She also stated:

> Furthermore, I have noted that [the Chief, JMS] took care to mitigate the potential conflict of interest that could have arisen given her dual role as your supervisor and as Chief Medical Officer, by obtaining Dr. [D.']s advice on the matter and by requesting you to submit the requested medical report to Dr. [D.], who was external to UNON, rather than to her.
>
> Finally, I have concluded that there is no evidence that [the Chief, JMS] acted on the basis of bias or improper motives when she requested you to obtain a medical evaluation and when she requested you not to attend work. In this respect, the considerations set out above support a finding that [the Chief, JMS] acted on the basis of concern for your wellbeing and the wellbeing of patients.

59. The ASG/OHRM concluded that it was:

> not inappropriate for [the Chief, JMS] to request you to submit a medical report attesting to your fitness for duty and to request you not to attend work. Accordingly, I have decided not to make a finding against [the Chief, JMS] in respect of this allegation.

60. The ASG/OHRM added, however, that, on the basis of the Director, MSD's, comments, "it would be desirable for MSD to formalize the delegation of authority, from the United Nations Medical Director to the chief medical officers, to request staff members to undergo a medical evaluation or not to attend work, and the procedures to be applied in cases where a medical officer holds medical concerns about a staff member under his or her supervision", and that she would inform the Director, MSD, accordingly.

61. On 6 May 2013, the Chef de Cabinet, Executive Office of the Secretary-General, requested the DG/UNON to extend the Applicant's appointment until 30 September 2013 by keeping her on SLWFP, based on a recommendation by the Ethics Office that it did not expect to receive the OIOS completed investigation report prior to 6 June 2013.

62. On 31 July 2013, the Applicant requested management evaluation of the ASG/OHRM's decision of 31 May 2013. This was upheld following evaluation, and on 13 December 2013, the Applicant filed her application with the Dispute Tribunal, to which the Respondent submitted his reply on 5 February 2014.

Parties' submissions

63. The Applicant's principal contentions are:

a. The panel conducted its investigations at a time she had suffered retaliation, was experiencing intense stress due to the turbulent and harsh nature of the retaliatory action by UNON Administration, and was afraid of going into the UNON complex. The ASG/OHRM had the legal obligation but failed to preserve the integrity of the process, which suffered significant damage to its integrity in that the entire file was exposed to the offender who was the Chief, JMS. The JMS witnesses were intimidated by seeing her suffer retaliation;

b. The whole process was tainted by procedural flaws in that it was handled by the Legal Counsel to the DG/UNON who had a conflict of interest in the contested decision, and the complaint was disclosed to the Chief, JMS, prematurely; as a result, the Applicant suffered retaliation and the Chief, HRMS, was included as an additional offender even when the Applicant had not said so. The ASG/OHRM's decision to refer the Applicant's file to UNON was improper because the Legal Counsel to the DG/UNON—whom the Chief, JMS had consulted—is the one who received the complaint and made decisions on behalf of the DG/UNON. Because of this insensitive disclosure of her complaint to the UNON Administration,

notably to the Legal Adviser of the DG/UNON, the Applicant suffered retaliation in the form of a sudden termination of her fixed term contract;

c. There were delays in the handling of her complaint; namely, it was acted upon only after the rushed attempt to separate her on 6 June 2013; this leads her to believe that if the UNDT had not ruled in her favour in the context of her application for suspension of action, her complaint would have been completely disregarded. Further, it took six months to make a final decision of a fact-finding investigation having been conducted in December 2012, and it is of great concern that this final decision was communicated to her by email sent on the evening of the day her "SLWFP contract" was expiring;

d. The panel appointed by the DG/UNON conducted investigations by sending email communication to JMS staff, asking them to give responses to various allegations contained in the Applicant's complaint, before interviewing her to first understand the nature of her complaints. This action was prejudicial to the integrity of the process since the JMS staff were then sensitised to believe that she had accused them;

e. Provisions of sec. 11.5 of ST/SGB/2008/5 were not put into consideration when making conclusions: relevant documents were omitted, an irrelevant email communication between her and the Chief, JMS, in March 2012, was given disproportional weight, and the ASG/OHRM used information she gathered from the Director, MSD, to justify the Chief, JMS, rationale of sending the Applicant for medical clearance, while ignoring the manner in which the Chief, JMS, did so, her tone, her intimidating emails, her involving the Legal Counsel, her disclosing sensitive and confidential medical information to the Chief, HRMS, who is not authorised to have access to it. The ASG/OHRM further relied heavily on the Chief, JMS's response to the Applicant's complaints, and failed to get back to the Applicant for clarification. In her report, the ASG/OHRM appeared to discriminate against her;

f. She asks for rescission of the contested decision, to be reinstated with supervisory duties, to have a change in her First Reporting Officer, and to expunge her file from all adverse information as well as from her performance reports of 19 December 2011 and 21 March 2012; finally, she asks for compensation for the "mental anguish, anxiety, humiliation and stress" caused by the Chief, JMS's "misconduct", as well as for the delay in dealing with her complaint and for the ASG/OHRM's failure to treat her concerns "with sensitivity".

64. The Respondent's principal contentions are:

a. Insofar as the Applicant seeks to challenge the ASG/OHRM's decision not to initiate a disciplinary process against the Chief, JMS, her application is not receivable, because it is not legally possible to compel the Administration to take disciplinary action against another staff member;

b. The Applicant's right of appeal is limited by sec. 5.20 of ST/SGB/2008/5 to "the procedure followed in respect of" her complaint. The issue in this case is whether the procedure followed in respect of the Applicant's complaint was fair and legal and, if not, whether any procedural failures vitiated the ASG/OHRM's decision regarding the outcome of the Applicant's complaint. In the present case, the entire process was fair and proper, and it is beyond the scope of judicial review to engage in a factual re-assessment of the Applicant's complaint;

c. The thoroughness of the ASG/OHRM's decision letter to the Applicant evidences the seriousness and care with which her complaint was treated. There is no evidence that the ASG/OHRM's decision was motivated by bias, improper considerations or mistake of fact;

d. The inclusion of the Chief, HRMS, as a subject has no impact on the Applicant's terms of appointment or her contract of employment and, therefore, she has no standing, under art. 2(1) of the Dispute Tribunal's Statute, to contest this matter;

e. The Applicant challenges the length of time taken by the ASG/OHRM, but she does not challenge the length of time taken to conclude the investigation. Whereas sec. 5.17 of ST/SGB/2008/5 provides that a fact-finding report should "be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report", it makes no provision for the length of time required to assess the investigation report. The Applicant has not claimed that she suffered harm or prejudice by the length of time taken to reach a decision on the fact-finding report. As she has been on SLWFP throughout the period, pending a determination by the Ethics Office on her complaint of retaliation, the length of time taken to conclude the examination of her complaint of harassment had no impact on her work environment, conditions of service or otherwise; she suffered no prejudice from the investigation having taken longer than the three-months stipulation in sec. 5.17 of ST/SGB/2008/5. The length of time taken to conduct the investigation was justified, having regard to the quantity of the evidence that was collected and reviewed, and the fact that the investigation panel was constituted twice;

f. It was proper for the ASG/OHRM to request input from the Director, MSD, on the 26-27 March 2012 incident, as the purpose of the inquiries to the Director, MSD, and to the Chief, JMS, once the report of the panel was sent to the ASG/OHRM, was only to form the ASG/OHRM's assessment of whether the Chief, JMS, actions on 26-27 March 2012 may have amounted to prohibited conduct;

g. The onus is on the Applicant to provide evidence that establishes—or, at a minimum, provides a *prima facie* basis to conclude—that a breach of the obligations of the Organization occurred, which she has not done. In the absence of such evidence, it is submitted that the record supports a finding that the ASG/OHRM properly arrived at the decision to close the matter;

h. On the basis of the foregoing, the application should be dismissed in its entirety.

Considerations

65. Pursuant to sec. 5.20 of ST/SGB/2008/5, the Tribunal is empowered to review the procedure followed in respect of the Applicant's complaint. The principal issue in this case is whether this procedure was fair and legal or whether any procedural failures vitiated the ASG/OHRM's decision regarding the outcome of the Applicant's complaint.

66. The UNDT may not conduct a fresh investigation into the allegations of harassment, but may draw its own conclusions from the panel's report (see *Mashhour* 2014-UNAT-483), and "determine if there was a proper investigation into the allegations" (*Messinger* 2011-UNAT-123).

67. Any evidence about the Applicant's allegations of retaliation that occurred after the events of 26 and 27 March 2012 and submitted for investigation to OIOS by the Ethics Office, including the non-renewal of the Applicant's contract, is not relevant to her challenge of the decision of the ASG/OHRM on the Applicant's complaint of prohibited conduct. The matters raised in her second complaint to the ASG/OHRM dated 4 October 2012 concerned the events following her return to work on 28 May 2012. They did not form part of the decision of the ASG/OHRM and are therefore not directly relevant to the present case.

68. Further, the Respondent's failure to take disciplinary action against the Chief, JMS, on the basis of the Applicant's complaint may not be reviewed by the Tribunal. It is well-established jurisprudence that "[a]s a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action" (*Oummih* 2015-UNAT-518, *Abboud* 2010-UNAT-100).

Issue 1: Were there any procedural irregularities in the handling of the Applicant's complaint of prohibited conduct?

69. Sections 5.11 to 5.20 of ST/SGB/2008/5 prescribe the mechanism and procedure by which staff members may make a formal written complaint of

prohibited conduct, in circumstances where an informal resolution is not desired or appropriate, or has been unsuccessful.

70. Section 1.2 defines harassment (the principle form of prohibited conduct alleged by the Applicant in the present case) as "any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person".

71. Section 3.2 further prescribes:

> Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers to fulfil their obligations under the present bulletin may be considered a breach of duty.

72. Section 5.3 creates a duty on managers to take "prompt and concrete action in response to reports and allegations of prohibited conduct".

73. Pursuant to sec. 5.14, when a formal complaint is received, the responsible official will "promptly" review the complaint 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 so, a panel of suitably trained individuals is to be appointed "promptly".

74. The panel shall inform the alleged offender of the allegations, and shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the alleged conduct.

75. The panel is to prepare a detailed report to be submitted to the responsible official normally no later than three months from the date of the submission of the formal complaint (see sec. 5.17 of ST/SGB/2008/5).

76. Section 5.18 provides that the responsible official shall take one of three courses of action on the basis of the report:

a. close the case if no prohibited conduct took place;

b. if there was a factual basis for the allegations but not sufficient to justify disciplinary proceedings, managerial action may be taken if warranted; or

c. if the allegations are well-founded and amount to possible misconduct, refer the matter for disciplinary action.

77. The Tribunal will review the three stages of this process in turn: the receipt and review of the complaint, the appointment and conduct of the fact-finding panel and the final decision.

78. The receipt of the Applicant's complaint was dealt with promptly and correctly by the ASG/OHRM who referred it without delay to the DG/UNON. Then followed an unexplained delay of over six weeks for the first fact-finding panel to be convened that potentially compromised the ability of the selected panel to report within three months of receipt of the complaint, as required by the respective ST/SGB.

79. However, once appointed, the panel's attempts to start the investigation were impeded by the Applicant. It is clear from the Applicant's correspondence with the ASG/OHRM that she was unwell and, being away from her place of work, she did not have the use of the facilities of the UNON compound. She plainly had no appetite for being involved in any investigation at that stage. The Tribunal finds that her actions led to the dissolution of the first panel, and that she was responsible for the disruption of the normal conditions required for the three-month deadline to complete the report.

80. The Applicant was concerned about the involvement of the UNON Legal Counsel during this period. She believes that this was a reason why the alleged acts of retaliation took place.

81. The Tribunal notes that the allegations of retaliation are not the subject of these proceedings; even if there were irregularities at that stage of the process, the Tribunal finds that they were cured by the appointment of a new, independent

second panel convened by the ASG/OHRM, on which the Applicant expressed confidence.

82. The second panel undertook its responsibilities promptly within a month of its appointment by conducting extensive interviews over 10 days. Its report described these interviews in detail, and demonstrated a thorough examination of each of the allegations made by the Applicant.

83. The panel misconstrued the Applicant's statements about the Chief, HRMS, as a formal complaint that required investigation. The Applicant later explained that she had not intended to complain about him, and had not sought an enquiry into his actions. However, as the panel concluded that the Chief, HRMS had not engaged in any prohibited conduct, there was ultimately no prejudice to the Applicant or to him.

84. The Tribunal finds that the second panel conducted itself appropriately and with due process to this point. It ended its investigation in UNON in December 2012, and submitted its report to the ASG/OHRM on 18 March 2013.

85. Before the ASG/OHRM reached her decision based on the panel's report, she consulted with the Director, MSD, and the Chief, JMS, about the panel's two negative findings against the Chief, JMS, regarding the incidents of 26 and 27 March 2012.

86. It is necessary to analyse the propriety of these consultations and the subsequent conclusions reached by the ASG/OHRM.

87. The first question is whether the ASG/OHRM acted lawfully when she requested further information after the receipt of the panel's report and before making her decision.

88. ST/SGB/2005/8 neither expressly prohibits nor stipulates that the responsible official can make further enquiries in the exercise of that discretion.

89. In *Benfield-Laporte* (2015-UNAT-505) and *Oummih* (2015-UNAT-518), the Appeals Tribunal held that, based on sec. 5.14 and 5.15 of ST/SGB/2005/8, a

responsible officer who is deciding whether, and to what extent, a fact-finding panel is to be appointed to investigate a case as alleged, "has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether an investigation regarding all or some of the charges is warranted" provided "there was no risk of undermining the investigation".

90. The present case which concerns the responsible official's actions once the fact-finding panel has completed its investigation and before a decision on the action to be taken is made differs from these UNAT cases. However, applying the same rationale of those decisions to the facts of the present case, the Tribunal concludes that the responsible official also has a degree of discretion under sec. 5.18 of ST/SGB/2008/5.

91. Section 5.18 of ST/SGB/2008/5 defines an exhaustive list of options that the responsible official shall apply depending on the outcome of the investigation. If the report does not identify prohibited conduct, the case is closed. If there is a factual basis for the allegations, it is for the responsible officer to decide if the facts warrant disciplinary or managerial action. A choice of these options under sec. 5.18 requires the exercise of judgment and discretion on the part of the responsible official, in light of the panel's findings of fact.

92. In the present case, the panel's report provided a factual basis in support of the finding that the Chief, JMS, did request the Applicant to obtain a medical report and asked her not to enter the compound; therefore, it was for the ASG/OHRM to decide if the facts warranted further action.

93. Her request for comments on the propriety of these requests ran the risk of intruding on and potentially undermining the responsibilities of the fact-finding panel. But, as the responsible official, she was faced with questions of fact or process that remained unclear or unanswered in the panel's report, and that were critical to her assessment. The question is whether the steps she took to fully inform herself about outstanding issues intruded on the investigation panel's findings of fact or amounted to a breach of due process.

94. The Tribunal finds that the ASG/OHRM did not undertake further investigation into the facts, but asked the Chief, JMS, and the Director, MSD, to comment on the reasons for requesting the Applicant to obtain a medical report attesting to her fitness for duty and not to enter UNON premises, both of which had been found to have occurred by the fact-finding panel. The materials relied on by the Chief, JMS, and the Director, MSD, in their responses were restricted to excerpts from the panel's report along with associated emails and documents.

95. As the responsible official, the ASG/OHRM's request for clarification of the reasons for the facts as found by the investigation did not undermine the investigation.

96. The failure of the ASG/OHRM to seek any comments from the Applicant about the same aspects of the investigation report was not a breach of due process: the ASG/OHRM wanted to know the reasons for actions which the fact-finding panel found inappropriate, and only the Chief, JMS, had the information she needed. The Applicant, in contrast, did not possess any relevant information or expertise in this respect.

97. Also, in her report and summary to the Applicant, the ASG/OHRM fully disclosed that she had requested the professional views of the Director, MSD, on the propriety of the Chief, JMS, actions in relation to the request for medical evaluation and non-clearance for work, and that she had given the Chief, JMS, the opportunity to provide her comments on those matters. She also summarised their responses.

98. The final aspect of the process is the decision of the ASG/OHRM based on the report and the responses she received from the Chief, JMS, and the Director, MSD.

91. The Chief, JMS, reply to the ASG/OHRM addressed, as requested, the question of her authority to request a medical report from the Applicant and her direction to the Applicant not to attend the office, pursuant to staff rule 6.2(g).

99. Section 6.2 (g) of the Staff Rules is composed of two parts. The first part states generally that a staff member may be required to submit a medical report or to undergo a medical examination and specifies who may undertake such examinations. It does not say who may require the examination. The second part relates to the specific power to request a staff member to take medical treatment and to direct the staff member not to attend the office.

100. Throughout, staff rule 6.2 refers to "conditions established by the Secretary-General". These are contained in Administrative Instruction ST/AI/2011/3 promulgated for the purposes of establishing conditions and procedures for medical clearance as a requirement for recruitment, change of duty station and assignment. Section 9.1 of that ST/AI makes it clear that medical evaluations may be requested by the UN Medical Director or a duly authorised medical officer. The Tribunal finds that the request by the Chief, JMS, was in accordance with this ST/AI and was not improper.

101. A direction not to attend the office may be made under staff rule 6.2 (g) when, in the opinion of the UN Medical Director, a medical condition impairs the staff member's ability to perform his or her functions. At the relevant time there was no delegation of this authority to offices away from Headquarters. Although the Chief, JMS, asked for the opinion of the Medical Director of FAO, there is no evidence that she sought the opinion of the UN Medical Director. The request was therefore not made in accordance with the rules. The Chief, JMS, was correct to acknowledge that her decision to refuse the Applicant entry to the UN compound was unauthorised and therefore improper. However, this is not the decision that was directly challenged by the Applicant.

102. In assessing the implication of the factual findings of the investigation panel, the ASG/OHRM decided that while the Chief, JMS, dual role as the Applicant's First Reporting Officer and as Medical Officer revealed some systemic problems, she had not acted with bias or improper motives when she requested the Applicant to obtain a medical evaluation and not to attend work. She concluded that this did not constitute prohibited conduct. The ASG/OHRM

identified and proposed a systemic solution to the conflicting situation for Medical Officers when staff members reporting to them become unwell.

103. The context of the request for the Applicant not to attend work was complex. It was made against the background of the Applicant's illness, which the Applicant acknowledged made her unable to work. The Chief, JMS, consulted with senior colleagues from another Organisation before, as she said, making the decision "in the heat of the moment".

104. Although the Chief, JMS, did not follow the correct procedure of consulting with the UN Medical Director about the request for the Applicant not to attend work, the Tribunal finds that it was open to the ASG/OHRM to conclude that the conduct of the Chief, JMS, did not warrant any disciplinary or administrative action. Disciplinary action against a staff member must be supported by clear and convincing evidence (cf. *Molari* 2011-UNAT-164). The Chief, JMS, faced a complex situation, which included the Applicant's illness and the potential for disruption to the patients of the clinic. She acted on advice and in light of the Applicant's stated concern about her ability to deal with patients.

105. The Tribunal finds that the decision not to take any action against the Chief, JMS, was open to the ASG/OHRM on the facts contained in the panel's report. Further, although the Applicant had a significant interest in the outcome of her claim of prohibited conduct, UNAT has held that as "a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action" (*Oummih* 2015-UNAT-518, quoting *Abboud* 2010-UNAT-100).

106. The ASG/OHRM's decision was, however, marred by delay since it was not conveyed to the Applicant until seven months after the second investigation commenced.

107. The Tribunal concludes that the procedure followed in respect of the allegations of prohibited conduct made by the Applicant was proper in all respects, excepting the delays.

Issue 2: If any procedural irregularities existed, did they vitiate the ASG/OHRM's decision regarding the outcome of the Applicant's complaint of prohibited conduct?

108. Pursuant to ST/SGB/2008/5, the Administration's duty to a staff member who makes a formal complaint of prohibited conduct is to take prompt and concrete action. In sec. 5.17 of ST/SGB/2008/5, the panel is required to report normally no later than three months from the date of submission of the formal complaint. This latter provision indicates the period of time a staff member can normally expect to wait for an outcome of his or her complaint.

109. The failure to act promptly on a complaint under ST/SGB/2005/8 is both a procedural irregularity and a breach of a substantive duty imposed on managers and supervisors by sec. 3.2 of the respective ST/SGB.

110. A year elapsed between the filing of the Applicant's complaint of prohibited conduct and the decision of the ASG/OHRM. This was caused by several factors.

111. The first delay was the period of over two months it took the DG/UNON to initiate the first investigation panel after receiving the Applicant's complaint. This delay was noted by the ASG/OHRM who sent a reminder to the DG on the need for promptness. No explanation for this delay was given by the Administration.

112. The next delay occurred while the first panel attempted to commence its investigation and the eventual convening of the second panel. The Tribunal finds that the Applicant significantly contributed to this delay by refusing to be interviewed by the first panel. This is not a criticism of the Applicant, who was unwell at the time and had some concerns about the impartiality of the panel, but it was her responsibility and she cannot claim compensation for any harm arising from that period of delay.

113. Following the investigation by the second panel, it took the ASG/OHRM two and a half months to complete her decision and to inform the Applicant of it. The time spent by the ASG/OHRM in making her enquiries contributed to the last period of delay. Based on *Benfield-Laporte* 2015-UNAT-505, as this delay was

the result of the ASG/OHRM's choice of additional actions to assist her to reach her decision, it should not be discounted from the entire decision-making process and the calculation of the delay.

114. The Applicant waited over six months for an answer to her complaint, from December 2012, when the second investigation was conducted, until June 2013, when she was advised of the decision. This delay was a denial of her right to prompt action on her complaint.

115. However, the delays were not such as to vitiate the decision of the ASG/OHRM. The Tribunal is satisfied that the investigative process was not otherwise procedurally flawed and that the decision was, in the circumstances, lawful.

Issue three: If the outcome of the Applicant's complaint of prohibited conduct was vitiated by procedural irregularities, what is the appropriate remedy?

116. In *Abu Jarbou* 2013-UNAT-292, the Appeals Tribunal held that :

> [N]ot every delay will be cause for the award of compensation to a staff member. Rather the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights.

117. Further, in *Oummih* 2015-UNAT-518 (a case under ST/SGB/2005/8), the Appeals Tribunal stated:

> This Tribunal reaffirms its disapproval of the practice of awarding compensation in the absence of actual prejudice. There are no legal grounds that can justify such an award when no actual prejudice was found.

118. The principle of requiring evidence of harm to justify an award of compensation was referred to in the amendment to art. 10.5(b) of the Tribunal's Statute, introduced by the General Assembly of the United Nations on 18 December 2014 by its resolution 69/203, by adding to said article the words "for harm, supported by evidence" after the word "compensation".

119. In her application, the Applicant prays to be compensated for the mental anguish, anxiety, humiliation and stress caused by the Chief, JMS, alleged misconduct, the delay in resolving her complaint and the ASG/OHRM failure to treat her concerns with sensitivity. Of these, only the claim for harm caused by delay can be evaluated.

120. After her complaint was first made, the Applicant wrote to the ASG/OHRM about the delay of approximately two months in reaching a decision to convene a fact-finding panel to investigate her complaint of prohibited conduct. This was followed up by the ASG/OHRM who wrote to the DG/UNON. In her application, the Applicant contended that it took six months for the ASG/OHRM to make a final decision from a fact-finding investigation that was conducted in December 2012. It is of great concern to her that this final decision was communicated to her by an email sent on the evening of the day her SLWFP was expiring.

121. The evidence on file indicates that the Applicant suffered from significant mental health issues. Although no specific diagnosis was produced to the Tribunal, at various times in their dealings with each other the Applicant and the Respondent acknowledged that she was very unwell. The investigation process, which lasted over a year, at least added to her emotional stress and anxiety. The Tribunal is satisfied that the delays in reaching a final decision were a factor in what the Appeals Tribunal has referred to as neglect and emotional stress (*Benfield-Laporte* 2015-UNAT-505).

122. The Applicant has not demonstrated any grounds upon which to base an award of compensation for material damage since she was on SLWFP during the whole period of the investigation. However, the Tribunal finds that she was caused moral damage by the Administration's failure to process her complaint of harassment promptly in accordance with ST/SGB/2005/8.

123. After taking into account the Applicant's contribution to the delays in the convening of the fact-finding panel, the Tribunal awards her USD3,000 compensation for moral damage.

Conclusion

124. In view of the foregoing, the Tribunal DECIDES that:

a. The Respondent pay the Applicant compensation in the amount of USD3,000 for the inordinate delay in the handling of her complaint;

b. This amount be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment; and

c. All other pleas be rejected.

(*Signed*)
Judge Coral Shaw

Dated this 16th day of June 2015

Entered in the Register on this 16th day of June 2015

(*Signed*)

René M. Vargas M., Registrar, Geneva