



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

KOSTOMAROVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. The Applicant contests the decision to take no further action, after investigation, on her complaint against her supervisor for prohibited conduct under the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment including sexual harassment, and abuse of authority). She also challenges the manner in which the investigation was conducted.

2. As remedies, she requests the rescission of the contested decision, compensation for harm to her professional reputation and her health, as well as for moral injury resulting from the unfair treatment suffered.

Facts

3. The Applicant joined the Organization in 1989. She was subsequently granted a permanent appointment and, in 1993, she was promoted to the G-4 level as Text Processing Clerk, Russian Text Processing Unit ("RTPU"), Languages Service ("LS"), Division of Conference Management ("DCM"), United Nations Office at Geneva ("UNOG").

4. In 2009, a new Chief, RTPU, was appointed. In this capacity, she implemented a number of major changes that transformed deeply the workflows of the Unit; they comprised the use of a module to automate the assignment of tasks, the introduction of productivity standards and the allocation of codes classifying texts to be processed according to their complexity. As a matter of fact, many of the changes were decided by high instances of the Organization and were implemented in text-processing units across the Secretariat.

5. In early 2011, a G-5 vacancy within RTPU was advertised in the Unit. The Applicant applied and was not successful.

6. By mid-2011, important tensions had arisen between the Applicant and her immediate supervisor, the Chief, RTPU.

7. In August 2011, the Applicant brought grievances concerning the management style of her immediate supervisor to the attention of her second reporting officer, the Chief, RTS. By email of 23 September 2011, the Chief, RTS, requested the Director, Division of Conference Management (“DCM”), to intervene to address the “unacceptable performance” and “offensive behaviour” of the Applicant.

8. Towards the end of September 2011, the Applicant was placed on sick leave. On 25 November 2011, based on the reports by the Applicant’s physicians, the UNOG Medical Service Section recommended that she be reassigned to another Unit.

9. After some three months on sick leave, the Applicant resumed work on 12 December 2011.

10. On 13 December 2011, the Chief, RTPU, convened a meeting with the Applicant and a number of other participants, where issues that had been at the heart of their disputes, such as the daily minimal output standard, were addressed.

11. By email of 18 December 2011 to the Director, DCM, the then Chief, LS, the Regional Ombudsman in Geneva, and the Chief, Human Resources Management Service (“HRMS”), UNOG, the Applicant raised issues concerning her relation with her immediate supervisor, the Chief, RTPU. The email, which had no attachments, was entitled “Demande d’engagement officiel des Procédures Formelles pour abus de pouvoir et harcèlement.” The Applicant alleged that, since she voiced her concerns about her supervisor’s management style, the latter had treated her harshly. She further stated that she had brought this matter to the attention of the Chief, RTS, to no avail and that, since her attempts at an informal settlement had failed, she intended to institute a formal procedure for harassment and abuse of power.

12. On 20 December 2011, the Applicant emailed the Office of Internal Oversight Services (“OIOS”) on the same subject. The latter advised her to contact the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) or the Director-General, UNOG.

13. On 13 January 2012, a meeting to address the Applicant's grievances took place with the participation of the Chief, LS, the Chief, RTS, the Chief, RTPU, a Senior Human Resources Officer, HRMS, two representatives of DCM, the Chief, Arabic Text Processing Unit and Text-Processing Units focal point, the Executive Secretary of the Staff Coordination Council, UNOG, and the Applicant, accompanied by her spouse. According to HRMS' summary of this meeting, at the end of it, it was understood that existing productivity standards would be maintained and that the Applicant was encouraged to make efforts to meet them. However, to avoid putting her under additional pressure, she would not have her performance evaluated while awaiting that an investigation panel be put in place and share its conclusions, as a result of the formal complaint she had lodged.

14. By memorandum of 16 January 2012, entitled "Enquête administrative", the Chief, RTPU, asked the Chief, HRMS, through the Officer-in-Charge, LS, and the Chief, RTS, to launch an investigation on the Applicant's "false allegations" and characterised her conduct as insubordination.

15. By memorandum dated 29 March 2012 addressed to the Applicant, the Chief, HRMS, referred to her email of 18 December 2011 and noted that ST/SGB/2008/5 specified the procedure and format to be followed to lodge a complaint.

16. On 6 June 2012, the Applicant submitted to the then Director-General, UNOG, a formal complaint alleging that the Chief, RTPU, had engaged in harassment and abuse of power, had falsified the official productivity records of RTPU, and manipulated the database to enter false information. Six annexes, structured following a "concise timetable" prepared by the Applicant, were attached to the complaint.

17. On 11 June 2012, the Applicant was reassigned to different functions within the same service, under the supervision of a different person, where she remains to date. Such a reassignment had been recommended by the UNOG Medical Services.

18. By memorandum dated 13 July 2012, the Chief, HRMS, referred the Applicant's complaint, as well as her supervisor's counter-complaint, to OIOS, together with another unrelated complaint. The Chief, HRMS, withdrew this submission on 23 July 2012, while announcing that said complaints would be re-submitted separately. The Applicant's and her supervisor's complaints were indeed re-submitted on the following day, 24 July 2012.

19. By memorandum dated 10 August 2012, OIOS referred the aforementioned complaints back to UNOG, considering that this matter would be best handled by UNOG.

20. On 16 November 2012, a two-member fact-finding panel ("the Panel") was appointed to investigate both the Applicant's and her supervisor's complaints.

21. Twenty witnesses were interviewed as part of the investigation, including the two complainants. The Applicant was interviewed at length on 16 January, 6 February, 12 February and 20 June 2013, and submitted or re-submitted various documents, notably, her above-mentioned "concise timetable". The Chief, RTPU, was interviewed on 24 April 2013.

22. On 2 July 2013, the Applicant—who had been interviewed in Russian—was sent the statements of her interviews in English for her review and comments. On 24 July 2013, the Applicant sent an email to the Director-General, UNOG, to the Chief, HRMS, to the ASG/OHRM, and to OIOS expressing concerns about the content of her interviews and their transcripts as prepared by the Panel. The Chief, HRMS, answered on 26 July 2013, encouraging her to comment on the transcripts by using track changes and to address to the Panel an extra note on any matter that she felt had not yet been addressed.

23. On 1 August 2013, the Applicant transmitted her comments on her interviews' reports to the Human Resources Legal Unit ("HRLU"), HRMS, UNOG, together with a copy of her "concise timetable".

24. The Panel rendered its report on 11 October 2013. It concluded that a conflict with "multi-layered aspects" existed between the Applicant and her

supervisor, for which it was not possible to blame one side entirely. These aspects included:

- a. The introduction of solid managerial practices (e.g., a daily check-list for individual measurement), thereby changing the “relaxing and stress-free” situation previously existing in the Unit;
- b. Modifications on a software used to calculate productivity without previous consultations with the team. Although these modifications were not proposed and/or introduced by the Chief, RTPU, she did not make it clear who requested or proposed them;
- c. The Applicant’s attitude, as she was described as a “not tenacious, result-oriented worker”;
- d. The fact that the Applicant was not recommended for a G-5 post within the Unit. It appears that she started openly and officially questioning the daily productivity standard and, subsequently, the modifications to the software around the time of the end of the selection exercise;
- e. The management style of the Chief, RTPU, described as tough, inflexible, stubborn, overly authoritative and, at times intimidating. The situation in the Unit was tense and there was no evidence of any open and constructive dialogue between the Chief and the staff of RTPU; and
- f. The Applicant cast open and repeated doubts on the productivity norms established by management. The Panel described such actions as acts of “potential insubordination” and “intentional attempts to disrupt the working environment” of the Unit.

25. The report stated that the Panel found no evidence of harassment and abuse of authority perpetrated by the Applicant’s supervisor. Likewise, it could not conclude that the Applicant had deliberately made false accusations against her supervisor. On these grounds, it recommended closing the case as regards the reciprocal misconduct allegations, while adopting administrative measures vis-à-vis both concerned staff members.

26. By memorandum dated 14 February 2014, the Acting Director-General, UNOG, informed the Applicant that, after review of the Panel's report, he had decided to close the case with respect to her complaint, with no action to be taken on the grounds that the Panel "did not find evidence to support the allegations of harassment and abuse of authority". In addition, the memorandum reminded the Applicant of her "obligation to follow the directions and instructions properly issued by the Secretary-General and by [her] supervisors, as per [s]taff [r]ule 1.2(a)".

27. The Applicant's supervisor was likewise informed by a separate memorandum of the same date about the Panel's conclusions, and the subsequent decision to close the case with no action. She was reminded of her duties as a supervisor and invited to undertake appropriate training.

28. By email dated 20 February 2014, the Applicant conveyed to the Acting Director-General, UNOG, her disappointment at his decision, and called into question the quality and the pertinence of the investigation. In particular, she shared her concerns that the focus of the investigation was misplaced and that her actual allegations were for the most part not addressed.

29. On 5 March 2014, the Applicant filed an application challenging the 14 February 2014 decision. It was dismissed as irreceivable for want of management evaluation, by summary judgment dated 11 March 2014 (*Kostomarova* UNDT/2014/027).

30. On 15 March 2014, the Applicant requested management evaluation of the decision. She was informed by reply letter dated 19 May 2014 that the impugned decision had been upheld.

31. The Applicant filed the present application on 2 July 2014. The Respondent submitted his reply on 14 July 2014, including ten annexes filed *ex parte*.

32. Pursuant to Order No. 70 (GVA/2015) of 24 March 2015, the parties submitted, *inter alia*, an agreed statement of facts as well as a bundle of documents, and the Applicant proposed several witnesses.

33. A case management discussion was held on 18 May 2015.

34. By Order No. 107 (GVA/2015) of 20 May 2015, all annexes to the Respondent's reply filed *ex parte* were made available to the Applicant on an under seal basis and redacted as appropriate; they included the Panel's investigation report. Furthermore, the Respondent was instructed to provide additional information on the legal basis for entrusting to the Panel the investigation of both the Applicant's complaint for prohibited conduct under ST/SGB/2008/5, and that of her supervisor. The Respondent filed his response to this Order on 27 May 2015.

35. On 1 June 2015, the Applicant provided comments on the Respondent's submission of 27 May 2015, and advised that she no longer wished to call any of the previously requested witnesses.

36. On 15 June 2015, and following instructions delivered in Order No. 114 (GVA/2015) of 8 June 2015, the Respondent filed on an under seal basis a number of communications between the Administration or the Panel and the Applicant or the Applicant's supervisor, during or prior to the Panel's investigation.

37. On 17 June 2015, a hearing on the merits took place, with the participation of both parties in person.

38. Pursuant to Orders No. 124 and 134 (GVA/2015) of 18 and 29 June 2015 respectively, the Respondent provided further information on specific points requested on 20 July 2015, and the Applicant provided comments thereupon on 4 August 2015.

Parties' submissions

39. The Applicant's principal contentions are:

- a. The handling of her complaint was unsatisfactory and the conclusions of the investigation were questionable. The conclusion of the Acting

Director-General, UNOG, indicates a misunderstanding of the essential details of the investigation;

b. The Applicant has had serious concerns about the impartiality of the investigation from the beginning, due to the “friendly terms” between the Director, DCM, and her supervisor. Some of the internal correspondence during the processing of the complaint suggests a bias on the part of the officials that intervened in her case, such as the email of 8 June 2012 where the Chief, RTPU, wrote that a senior officer of HRMS, UNOG, told a colleague from OHRM that the Applicant’s case boiled down to a reluctance to perform and the reply that they would then not help the Applicant;

c. She was advised to re-write her complaint on the ground that it did not meet the formal requirements, and this even though ST/SGB/2008/5 does not prescribe any specific format for such complaints;

d. The investigation failed to address her core allegations relating to the authoritarian management style of the Chief, RTPU, with the support of the Chief, RTS. The record of the Applicant’s interviews did not reflect her answers as they omitted or misquoted many of her statements. The Panel transmitted such records to the Applicant for comments only six months after the interviews took place. The documents produced by the Applicant to the Panel were not even registered. The witnesses were not questioned at all on harassment, and documentary evidence that the Applicant provided was not even mentioned in her interview or relied upon in reaching conclusions. Many of the findings reached were not backed by evidence;

e. Although the OIOS Manual of Investigation Practices and Policies is not mandatory, according to its foreword “it is intended to be used as a practical guide by the United Nations staff members responsible for conducting internal preliminary fact-finding administrative investigations”. In any event, the correct registration and inventory of evidence is a basic practice in investigations conducted in good faith, all the more after the Applicant explicitly requested so;

f. The amount of time taken to initially process her complaint was not reasonable. Almost three months after the Chief, DCM, announced, on 13 January 2012, that the Applicant's complaint was received and an investigation would be launched, she was informed that her complaint was invalid. The Panel was appointed on 16 November 2012, that is, more than five months after she submitted her redrafted complaint;

g. The way in which her complaint was handled caused the Applicant serious disruption of both her professional and private life. Her reputation has been harmed and her relations with her colleagues seriously affected; as a result, the Applicant is isolated because the staff in RTPU is afraid to give the impression that they are close to her; the Chief, RTPU, has reported negative views about the Applicant to her current supervisor in the position she discharges after her reassignment.

40. The Respondent's principal contentions are:

a. Based on the relevant Appeals Tribunal's case-law (*Sanwidi* 2010-UNAT-084, *Messinger* 2010-UNAT-123), there are two issues for determination:

i. Whether the decision not to refer the case for disciplinary action was legally and procedurally correct, reasonable and fair, and proportionate; and

ii. Whether the investigation was proper and conducted in accordance with the applicable rules;

b. The Applicant's email of 18 December 2011 could not have been construed as a formal complaint within the meaning of sec. 5.11 of ST/SGB/2008/5. First, it was not addressed to the Head of Office (the Director-General, UNOG) and, second, it did not contain a description of specific incidents (as required by sec. 5.13 of the bulletin), nor any supporting documentation. Following this email, nonetheless, the Administration promptly convoked a meeting to discuss the issues raised in

it, as an attempt for an informal settlement of the dispute, in line with sec. 5.5 to 5.10 of ST/SGB/2008/5, which failed, despite the Administration's efforts;

c. The Administration acted diligently in reminding the Applicant, on 29 March 2012, that no formal action could be initiated based on her 18 December 2011 email, and inviting her to follow the procedures set out in ST/SGB/2008/5;

d. Given the particularities of the case, entrusting the Panel to investigate both the Applicant's and her supervisor's complaints was proper, and it was deemed appropriate, efficient and operationally sound. Secs. 5.14 and 5.19 of ST/SGB/2008/5 cater for the review and assessment of the aggrieved individual's intent; such determination was necessary not only to address said provisions, especially in view of the Applicant's contradictory statements (in particular at the 13 January 2012 meeting), but also because the Administration was responsible to act upon the request for investigation by the Chief, RTPU. Besides, this course of action presented no risk of undermining the investigation, as all the involved parties had already extensively presented their views before the investigation had even started, and avoided appointing a second separate panel, which was an inefficient use of the Organization's resources;

e. The decision to close the Applicant's case was procedurally and legally correct, since the Panel did not find evidence of harassment and abuse of authority or discrimination by the Chief, RTPU, towards the Applicant;

f. The actions taken by the Administration based on the investigation report were in accordance with sec. 5.18 of ST/SGB/2008/5. Nothing in the report indicated that prohibited conduct had taken place, as none of the Applicant's allegations could be substantiated. Thus, despite some concerns about the management style of the Chief, RTPU, no disciplinary action could have been initiated, pursuant to sec. 5.18(c) of said bulletin;

g. Nonetheless, the Panel's report indicated that there was a factual basis for the allegations, which warranted appropriate corrective measures, and recommended administrative measures in this sense. On this basis, the Applicant's supervisor was strongly reminded of her duties as a supervisor and was requested to undertake management training; DCM's attention was drawn to her management style and her apparent lack of dialogue with the unit's staff, and it was requested to ensure that proper performance documents were in place for the unit's staff members as well as to review the reporting lines for all Text-Processing Units. Lastly, the Applicant was informed of the Panel's findings, and was reminded of her obligation to fully adhere to staff rule 1.2(c). The above constitute appropriate corrective measures to address the situation;

h. The investigation was properly conducted. In claiming the contrary, the Applicant made unspecified general allegations and failed to point to particular documents or information that were allegedly ignored. In accordance with sec. 5.16 of ST/SGB/2008/5, the Applicant, her supervisor and eighteen more individuals were interviewed. The mere fact that allegedly some issues were not raised with the Applicant during her four interviews does not demonstrate that these issues were not considered by the Panel;

i. The Applicant was given the opportunity to review and comment on the transcripts of the four interviews; the Applicant was provided with the four transcripts on 2 July 2013, and returned them with her comments on 1 August 2013. Moreover, all emails and correspondence submitted by the Applicant to the Human Resources Legal Unit were provided to the Panel, and nothing indicates that this information was ignored. The Panel's report stated that it reviewed all relevant documentation, and incidents that the Applicant claims not to have been investigated were specifically referred to in the report and later addressed through managerial actions (such as the discussion on the Applicant's e-PAS). Also, the Panel's report enumerated (and finally found to be groundless) all of the Applicant's allegations concerning harassment and abuse of authority;

j. Hence, the Panel interviewed all individuals who may have had relevant information about the matter, reviewed all pertinent documentation and addressed all the Applicant's allegations. The Applicant has not discharged her burden to prove ill-motivation or bias from the Panel members, nor any flaws in conducting the investigation;

k. The length of time taken by the investigation was due to the extensive scope of the allegations. While sec. 5.17 of ST/SGB/2008/5 provides that the investigation report shall normally be submitted within three months from the date of the submission of the complaint, this is merely a benchmark, not a strict deadline, as evidenced by the reference to the term "normally". In any event, the Applicant was not prejudiced by the time taken to conduct the investigation or to review the report;

l. The Applicant submitted her formal complaint on 6 June 2012, not on 18 December 2011. On 24 July 2012, the matter was referred to OIOS, which referred it back to UNOG on 10 August 2012. On 16 November 2012, the Panel was appointed. The Panel was investigating at the same time the Applicant's and her supervisor's complaints, as well as another complaint in RTS, because no other potential panel members having the required language skills (Russian) were available. In addition, the two panel members had to discharge their normal functions. Operational challenges, combined with the complexity of the matter, explain the amount of time consumed by the investigation. The Panel had to request several extensions of time given the heavy workload in their respective offices and the complexity of the cases;

m. The Panel conducted multiple interviews between 16 January and 20 June 2013. The transcripts of the interviews were sent to all witnesses for signature, which was a time-consuming process;

n. The time between the receipt of the report and the formal response to the Applicant was spent on the review and assessment of the report and supporting documentation, the drafting of the memoranda closing the matter and the related internal procedures;

o. The Administration diligently reassigned the Applicant on 11 July 2012, on the recommendation of the Medical Service Section, UNOG, and pursuant to sec. 5.9 of ST/SGB/2008/5, with the aim of appeasing the conflict and lessening the Applicant's potential harm. Therefore, she suffered no harm due to the length of the investigation, nor because of the decision to close the case or the alleged improper handling of her complaint.

Consideration

Subject-matter and scope of the judicial review

41. According to art. 2.1(a) of its Statute, the Tribunal is competent to examine the lawfulness of administrative decisions exclusively. The administrative decision presently under scrutiny is that to take no further action—that is, disciplinary—after investigation, on the Applicant's complaint against her supervisor for prohibited conduct under ST/SGB/2008/5. The manner in which the investigation was performed, although specifically challenged by the Applicant, does not in itself constitute an appealable decision.

42. In making the final decision on the Applicant's complaint, the Acting Director-General, UNOG, as the responsible official for her case, was bound by sec. 5.18 of the above-mentioned bulletin, which states:

On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation.

43. Since the investigation report concluded that no prohibited conduct was established, the consequent decision to close the case with only administrative measures was nothing else than regular compliance with sec. 5.18(a) of ST/SGB/2008/5. Moreover, this provision was fully respected in that the Chief, RTPU, and the Applicant were both informed of this outcome by respective

memorandum of 14 February 2014, which indeed contained an accurate summary of the Panel's findings.

44. Nonetheless, whilst the last stage of the decision-making process is in conformity with the applicable rules, the Tribunal may enter into an examination of the propriety of the procedural steps that preceded and informed the decision eventually made, inasmuch as they may have impacted the final outcome. Accordingly, although the conduct of the investigation is not a reviewable decision, in assessing the legality of the decision to take no further action, it is pertinent to examine different aspects concerning the handling of the Applicant's complaint, on the one hand, and the investigation that ensued, on the other hand.

45. Before commencing this exercise, however, the Tribunal must recall that it is not vested with the authority to conduct a fresh investigation on the initial harassment allegations (*Messinger* 2011-UNAT-123, *Luvai* 2014-UNAT-417). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own judgment to that of the Secretary-General (see, e.g., *Sanwidi* 2010-UNAT-084).

46. The scope of the judicial review in harassment and abuse of authority cases is thus restricted to how the Administration responded to the complaint in question (*Luvai* 2014-UNAT-417, para. 64). The Tribunal must focus on whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process further to it, as set out primarily in ST/SGB/2008/5. The scope of the judicial review so outlined is supported by the wording of sec. 5.20 of ST/SGB/2008/5:

Where an aggrieved individual or alleged offender has grounds to believe that the *procedure followed in respect of the allegations of prohibited conduct was improper*, he or she may appeal pursuant to chapter XI of the Staff Rules (emphasis added).

Admission of the complaint

47. On 18 December 2011, the Applicant wrote to several senior UNOG officials expressly complaining of prohibited conduct under ST/SGB/2008/5 by her immediate supervisor, the Chief, RTPU. The email's title and content left no

doubt that she requested the institution of formal procedures against her supervisor for abuse of power and harassment at the workplace.

48. On 16 January 2012, three days after the holding of a meeting convened to address the Applicant's concerns, her supervisor wrote to the Chief, HRMS, requesting the initiation of an administrative inquiry to put an end to "false allegations" by the Applicant. She mentioned a message of 12 January 2012 sent by the Applicant to all her colleagues in the Russian (typing) pool, which allegedly falsified the real situation and destabilized the administrative management, being "the example of insubordination".

49. On 29 March 2012, the Chief, HRMS, UNOG, invited the Applicant to file the complaint for the grievances alleged in her email of 18 December 2011 following secs. 5.11 and 5.13 of ST/SGB/2008/5. In response to this memorandum, on 6 June 2012, the Applicant submitted a new complaint for the same allegations, significantly more elaborated and annexing numerous documents. No action had been taken on her allegations until she filed the new complaint.

50. The Administration did not request further particulars or materials regarding the complaint filed by the Applicant's supervisor.

51. The Panel was appointed on 16 November 2012, with the mandate of investigating both the Applicant's complaint, as submitted in June 2012, and that of her supervisor, as transmitted to HRMS on 16 January 2012.

52. It stands out from the above sequence of facts that the Applicant was directed to complete and re-submit her complaint to conform to the requirements of secs. 5.11 and 5.13 of ST/SGB/2008/5, which clearly implied considerable additional work and time (particularly for a non-legally trained person), whereas her supervisor's complaint was admitted and processed as submitted.

53. Sec. 5.11 prescribes that a written complaint be submitted to the Head of department, office or mission concerned, except where such official is the alleged offender, copying OHRM for monitoring purposes. Sec. 5.13 requires that a

complaint describe the alleged incident(s) of prohibited conduct in detail, indicate any additional evidence and information relevant to the matter, and that it include:

- a. The name of the alleged offender;
- b. Date(s) and locations(s) of incident(s);
- c. Description of incident(s);
- d. Names of witnesses, if any;
- e. Names of persons who are aware of incident(s), if any;
- f. Any other relevant information, including documentary evidence; and
- g. Date of submission and signature of the aggrieved individual.

54. The Applicant's emailed complaint of 18 December 2011 was addressed, *inter alia*, to two higher officials in the chain of command above: her first and second reporting officers, and to the Chief, HRMS, UNOG, but not to the Director-General, UNOG, as required by sec. 5.11 of ST/SGB/2005/8. Furthermore, it lacked many of the details listed in sec. 5.13 of the bulletin, such as a complete description, dates and locations of the incidents and the documentary evidence available. On these grounds, it could have been justified to insist on the Applicant's re-filing a complaint in strict compliance with the requirements of format and content of said provisions. However, in such case, the Applicant's supervisor should have been held to the same degree of exigency.

55. The memorandum of the Chief, RTPU, of 16 January 2012, was not addressed to the Director-General, UNOG, either, and it manifestly did not contain all the information required under sec. 5.13 of ST/SGB/2008/5. If anything, it was less detailed than the Applicant's email of 18 December 2011.

56. Indeed, while the Applicant's initial email made no complete description of all concrete incidents at issue, it did provide some substantive information: it unambiguously questioned her supervisor's managerial style, mentioning various aspects of concern, including the evaluation of the complexity of documents and

her unwillingness to discuss work-related matters with the staff. The email further noted that the Applicant's raising her concerns with her second reporting officer, the Chief, RTS, led to immediate "consequences" against her, specifying that she had been accused of lies and defamation and low productivity, that a message asserting that the Applicant had engaged in unethical behaviour had been sent to all her colleagues, as well as to HRMS and the Director, DCM, and also that, upon the Applicant's return from a three-month sick leave, her supervisor announced publicly that she would apply "harsh methods" vis-à-vis the Applicant.

57. As a matter of fact, the memorandum by the Chief, RTPU, consisting of barely two paragraphs and without annexes, was particularly brief and sketchy. It pointed to one sole example of what the Applicant's supervisor considered to be false statements (to wit, that the General Assembly's standards for text-processors had been invented by the Chief, RTPU) and one instance of an action allegedly destabilizing for the Unit (namely, a communication dated 12 January 2012 to all the Applicant's colleagues). Even these incidents were merely mentioned, without any particulars or references to witnesses or other evidence.

58. Despite its vagueness, the Administration acted upon the Chief, RTPU's complaint without requesting further information. Yet, as it will be discussed below (see paras. 62 to 63 below), the Administration wrongly treated this complaint as one falling under ST/SGB/2008/5 whereas, for the sake of consistency, it should have applied the same formal requirements stipulated in secs. 5.11 and 5.13 of the bulletin.

59. Consequently, the Tribunal views the fact that the Applicant, unlike her supervisor, was required to entirely re-draft her complaint as a glaring double standard, potentially indicative of bias, in the manner the two complaints were handled at the early, and critical stage of their admission.

60. Additionally, the course of action described brought about the illogical result of admitting a counter-complaint against a complaint that was eventually considered as not validly lodged, and later accepting a complaint that post-dated its own counter-complaint by more than five months.

Misuse and abuse of procedure

61. ST/SGB/2008/5 was promulgated to address very specific kinds of conduct, namely discrimination, harassment, including sexual harassment, and abuse of authority, as defined in its sec. 1.

62. Pursuant to the clear terms of her complaint dated 16 January 2012, the allegations levelled by the Chief, RTPU, against the Applicant concerned false allegations and insubordination. Hence, by nature, they do not fall under ST/SGB/2008/5. Notwithstanding that, UNOG decided to have these allegations investigated by a Panel established by virtue of the above-referred bulletin; the memorandum appointing the Panel explicitly stated that the latter was set up on the basis of ST/SGB/2008/5.

63. By so doing, the Administration treated the accusations of false allegations and insubordination as if they amounted to the prohibited conduct described in sec. 1 of ST/SGB/2008/5. In this sense, it re-characterised the allegations against the Applicant and, as a result, such allegations were processed through a procedure meant to be reserved to discrimination, harassment and abuse of authority. However, it was beyond the Administration's powers to re-characterise and investigate accusations of false allegations and insubordination in the context of ST/SGB/2008/5, and to appoint a fact-finding panel on this bulletin's basis to inquire into facts of a totally different nature.

64. In addition to the above finding that the Administration should not have appointed a panel established under ST/SGB/2008/5 to investigate allegations of falsehood and insubordination, the manner in which the investigation in question was framed fundamentally distorted the procedure.

65. Once more, the procedures laid down in ST/SGB/2008/5 are intended to address complaints by staff members who feel that they have been subject to discrimination, harassment and/or abuse of authority, to wit, in this case, the Applicant's complaint against her supervisor. The complaint by the Applicant's supervisor not only, as already explained, did not raise allegations of this kind but,

in essence, consisted of a negation of the Applicant's accusations. To this extent, it can be described as a "counter-claim" to the Applicant's complaint.

66. From the moment both complaints were merged in one same investigation, the procedure turned from one tending to shed light into some given allegations, into one opposing two contradictory allegations. Otherwise said, the dynamics of the investigation shifted from inquisitorial to adversarial. From then on, the investigative report discloses that the investigation was diverted from the task of examining the actual Applicant's complaint to an inquiry into the complainant.

67. The foregoing amounts to an abuse of procedure and ultimately resulted in the Applicant's complaint not being adequately addressed. The Applicant certainly sensed and pinpointed that the logics underlying the process had been subverted, as she wrote in an email to HRMS, as early as 14 December 2012: "from the aggrieved individual I already became the alleged offender". The Organization, though, failed to rectify the situation.

68. While the Respondent claims that it was more time and resource-efficient to treat both the Applicant's and her supervisor's complaints jointly, the procedure laid down in ST/SGB/2008/5 was not designed to deal with counter-complaints, and efficiency cannot override due process. All the more so since appropriate mechanisms existed to address the Applicant's supervisor's concerns without compromising the applicable legislative framework. In fact, the possibility of false accusations under the bulletin was expressly contemplated in its sec. 5.19:

Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

69. Further, the option of initiating a separate investigation under Administrative Instruction ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) remained open, as falsehood and insubordination constitute autonomous heads of misconduct.

Incomplete disclosure of the allegations against the Applicant

70. The complaint of the Chief, RTPU, enunciates two types of wrongdoing that she attributed to the Applicant: “false allegations” and “insubordination”. Nevertheless, the 16 November 2012 letters appointing the Panel members omitted any reference to “insubordination”, as it identified the subject-matter of the investigation as concerning, albeit not necessarily limited to:

- a. Harassment and abuse of authority by the Chief, RTPU; and
- b. False allegations by the Applicant.

71. More importantly, neither the memorandum of 12 December 2012 of the Chief, HRMS, UNOG, to the Applicant—advising her of the appointment of the Panel, nor the letter of the same date, whereby the Panel informed her of its appointment and the initiation of its work, indicated that any allegations of insubordination were to be addressed during the investigation. The former referred only to the Applicant’s allegations against her first reporting officer, while the latter alluded to the “allegations of false accusation as submitted by ... [the] Chief, [RTPU]”, without mentioning insubordination.

72. None of the subsequent correspondence from the Panel and/or the Administration warned the Applicant that her alleged insubordination was being investigated. Nor did the Panel orally provide such warning or information at any of the four interview sessions held with her, according to the Panel’s interview transcripts. Lastly, the Tribunal has verified that the Applicant at no point received a full copy of her supervisor’s complaint.

73. In sum, the Applicant never had access to a copy of the complaint against her, and the relevant correspondence to the Applicant from the Administration contained an incomplete paraphrase of her supervisor’s allegations. It follows that the Applicant was not made aware of the full extent of the allegations against her.

74. In spite of this lack of proper notification, the insubordination allegations were part and parcel of the investigation, if not at the core of it. This transpires from the line of questioning of the different witnesses and from the tenor of the

Panel's findings; in particular, one of its conclusions, as officially conveyed by the 14 February 2014 memorandum of the Director-General, UNOG, was that the Applicant had "'openly and repeatedly' cast doubt on the productivity norms established by the Management", that her acts could be described as "'act[s] of potential insubordination' and 'intentional attempts to disrupt the working environment of the Unit'", and that she did not accept—or displayed efforts to listen to—the arguments and facts that had led to the modifications of working procedures.

75. The above contravenes sec. 5.15 of ST/SGB/2008/5, which requires that "[a]t the beginning of the fact-finding investigation, the panel ... inform the alleged offender of the nature of the allegation(s) against him or her".

76. If there was any validity to the consideration of the complaint by the Applicant's supervisor under ST/SGB/2008/5, then it was necessary that the Applicant be informed of the allegations against her. Being informed of the details of the allegations against him or her constitutes a fundamental attribute of due process for any staff member subject to an investigation; without such knowledge the concerned staff member is unable to identify and provide the evidence that may serve his or her case. For these reasons, this crucial right was not respected in the present case, and the absence of information certainly hindered the Applicant's ability to provide the relevant information to counter the allegations against her, in the event of them being validly the subject of investigation.

77. This is all the more serious knowing that the Applicant's supervisor, in contrast, had full details of the Applicant's complaint against her. First, the Respondent has confirmed that the Director, DCM, sent a copy of the Applicant's complaint of 18 December 2011 to the Chief, RTPU. Although the latter stated not to have received the Applicant's 6 June 2012 complaint, she wrote in an email to the Director, DCM, of 8 June 2012, that two days after the filing of the Applicant's June 2012 complaint, she had met with two officers of HRMS, UNOG, who had shown her the Applicant's complaint and its annexes, and had discussed the content of it and the way forward. Second, it is abundantly clear from the summary of the meeting of 13 January 2012 that on this occasion the

Applicant's allegations were explained and discussed at length; in fact, three days after the Chief, RTPU, lodged her complaint against the Applicant.

78. Also, it is quite apparent from her answers when interviewed by the Panel that the Chief, RTPU, was fully acquainted in advance with the accusations against her; indeed, it is striking that the Panel asked only one substantive question to the Applicant's supervisor, to which she gave such a discursive response that it filled four pages in the interview record prepared by the Panel, including the production of not less than four supporting documents that the Chief, RTPU, had ostensibly printed beforehand and taken to the interview.

79. Hence, the lack of notification to the Applicant of the allegations against her is compounded by the fact that, after the Administration had, improperly, converted the procedure in an adversarial one, it failed to ensure the equality of arms between the two concerned staff members. This difference in treatment trampled procedural fairness.

Content of the investigation

80. Beyond its ill-conceived scope, the Tribunal is concerned that the investigation seems not to have addressed the actual allegations in the Applicant's complaint in an adequate and complete manner.

81. A reading of all interview statements gathered, provides the Tribunal with enough elements to question the quality of the investigation. Many of the questions put to witnesses were, at best, irrelevant and, at worst, improper. Some questions were hardly apt to shed any light on the conflicting allegations, such as if a certain colleague of the Applicant knew why she had spent three months on sick leave. Too many of them were extremely broad, not anchored to a specific incident; others elicited very general and/or subjective replies, as they queried the perception of different members of RTPU about a certain person or situation; for example, most of the witnesses were asked about their impression of the Applicant as an employee and one of them was asked why he/she thought the Applicant was doing "all of this". Certain questions appear to be leading, such as whether the conflict between the Applicant and her supervisor had sparkled since

the Applicant had not obtained a promotion to a post within the Unit shortly after the Chief, RTPU, had taken up such functions. Also, many relevant incidents were not queried about, such as the events on the day the Applicant returned from sick leave or the messages sent by the Chief, RTPU, to all the Unit staff directly concerning the Applicant.

82. Similarly, in the Tribunal's view, the Panel made an uneven use of follow-up questions. More precisely, it seems that, whenever a witness conveyed a negative opinion regarding the Applicant, the Panel followed up asking for more details, while, if a positive opinion was expressed, these answers were systematically not followed up. One of the witnesses supported the Applicant's expressed view that the Chief, RTPU, manipulated the attribution of codes to documents to be processed in the Unit according to their complexity; no follow up was made.

83. Contrary to the treatment of the Applicant, who underwent four lengthy interviews, the Chief, RTPU, was interviewed by the Panel only once, for a total of four hours. Only six questions are on record: five were standard introductory or closing questions; only one was in connection with the facts under investigation, namely "How would you describe your relation with [the Applicant]?", to which she gave a remarkably comprehensive response. Surprisingly, especially considering that she was both subject and complainant in a complex case, the Panel asked no other question(s) to probe, clarify or complement her statements.

84. Based on the exhaustive review of the investigations records, the Tribunal is of the view that the investigation failed to consider relevant matters, while taking into account irrelevant issues.

85. The Tribunal observes that the issues concerning the investigation are largely imputable to systemic problems, to wit, the lack of professionalization of the investigation function in the Organization or, failing that, of a of fully adequate training, support and guidance of volunteer investigators. That being said, the Tribunal cannot but find that, in the instant case, the investigation's shortcomings make the resulting report unreliable and could not reasonably be relied upon to base the impugned decision. The report was additionally tainted by

the basic procedural error of combining two unrelated matters, making it improper to rely upon it in making the impugned decision.

Delay in the process

86. Sec. 5.3 of the bulletin provides that:

Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of

87. Sec. 5.14 of the same bulletin requires the responsible official to review and assess the complaint “promptly” and also, if there are sufficient grounds to warrant an investigation, to “promptly” appoint a panel for that purpose.

88. Lastly, its sec. 5.17 prescribes:

The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than *three months from the date of submission of the formal complaint or report*. (emphasis added)

89. In the case at hand, taking as a starting point the date of the Applicant’s redrafted complaint of 6 June 2012, over 18 months elapsed until the final (impugned) decision to take administrative rather than disciplinary action was communicated to the Applicant. If one counts rather as from the date of the original complaint, 18 December 2011, it took nearly seven months longer. In either case, the total duration of the process is far from satisfying the promptness requirements of secs. 5.3 and 5.14 of ST/SGB/2008/5, and certainly exceeds, by six to eight times, the three-month timeframe in the above-quoted sec. 5.17.

90. The Tribunal concedes that promptness is to be assessed in light of the characteristics of the case and also that the use of the term “normally” in sec. 5.17 indicates that the timeframe set out is not an absolute binding limit. However, the relevant case law provides some helpful benchmarks: the Appeals Tribunal judged

excessive a period of six months from between the filing of the complaint and the refusal to launch a fact-finding investigation (*Benfield-Laporte* 2015-UNAT-505); the Dispute Tribunal ruled that three months and a half for the assessment of a complaint (*Haydar* UNDT/2012/201), seven months for the appointment of the investigation panel (*Birya* UNDT/2014/092), or one of some 13 months from the complaint until the decision that no action would be taken (*Gehr* UNDT/2012/095) were in breach of ST/SGB/2008/5. Relevantly, the delay in the case at hand was clearly beyond the ones just referred to.

91. Furthermore, the chronology of events reveals that, the first concrete action taken after receiving the first report by the Applicant, dated 18 December 2011, was convening a meeting that took place only one month later, on 13 January 2012. At that meeting, the Applicant was reassured that her complaint had been well received and that a fact-finding panel was going to be appointed to inquire into her allegations. Yet, a month and a half later, on 29 March 2012, HRMS raised that the Applicant's complaint did not meet formal requirements and directed her to re-submit it, which she did on 6 June 2012, in slightly more than two months. However, the Panel was not appointed until 16 November 2012, that is, over five months after the Applicant had filed her second complaint. Since then, the investigation ran for almost 11 months, as the Panel rendered its report on 11 October 2013. After that, the final determination that no disciplinary action would be engaged came only on 14 February 2014. Otherwise said, the review of the investigation records and conclusions took four additional months. Therefore, even assuming that the Applicant's first complaint was formally incorrect and needed to be completed, it remains that her case spent at least 23 months awaiting for the Administration to complete one or another of the steps of the procedure.

92. The Respondent puts forward the difficulties in finding appropriate panel members and the heavy workload placed on them. The Panel, composed by the two only Russian-speaking available investigators, was performing two investigations simultaneously, while discharging the functions of their respective substantive job; the present case involved reviewing considerable documentation and interviewing 20 witnesses, with the additional work of translating into English the interviews conducted in Russian. While 11 months remains a considerable

timespan for an investigation, the Tribunal acknowledges that the investigation has been complex and laborious. Be it as it may,, this does not, in any event, account for the over 12 months spent at other stages of the procedure, including reviewing the Applicant's first complaint and advising her that it did not meet formal requirements.

93. The Tribunal is satisfied that the Administration incurred in unacceptable delays at almost every stage of the processing of the Applicant's complaint, with no or no reasonable explanation for them, in violation of sec. 5.3, 5.14 and 5.17 of ST/SGB/2008/5.

Remedies

94. Having found that the procedure leading to the impugned decision was marred with a number of fundamental flaws, and stressing that many of them concern the very foundations of the regime set in ST/SGB/2008/5, the Tribunal finds that there has been a miscarriage of process in the present case. In view of that, the contested decision must be rescinded and the investigation set aside.

95. The Tribunal further holds that the Applicant has sustained significant moral damage resulting from the contested decision.

96. First, as the Acting Director-General, UNOG, followed the Panel's recommendations also with respect to the Applicant, she was soundly rebuked in the 14 February 2014 memorandum that, finding proven that she committed a series of wrongdoings, reminded her of her obligation to follow the directions and instructions properly issued by the Secretary-General and by her supervisors, as per staff rule 1.2(a). It follows that, instead of diligently deploying the required action to remedy the professional harm that the conflict with her supervisor had already occasioned, the Administration, based on a deficient inquiry, issued a memorandum containing statements damaging for the Applicant's professional reputation. Accordingly, this memorandum is to be withdrawn from the Applicant's professional records, including her Official Status File ("OSF").

97. This is not at odds with learning *Oummih* 2014-UNAT-420, as it is distinguishable from the present case because, unlike for the performance appraisal, which must be placed in the staff member's OSF, there is no specific requirement to include a memorandum such as the one at stake in the relevant OSF pursuant to any administrative issuance. The memorandum in question was brought into existence pursuant to a severely flawed and thus, void, process and it is thus appropriate to remove it from all official repositories.

98. Second, the Applicant suffered unnecessary stress and anxiety due to the unduly protracted processing of her complaint. In this regard, it is well-settled case-law that delays in the ST/SGB/2008/5 procedure may cause harm warranting compensation (*Abubakr* 2012-UNAT-272, *Benfield-Laporte* 2015-UNAT-505, *Masykanova* UNDT/2015/88). While the Applicant's reassignment under the supervision of a different manager was a sensible mitigating measure, it could nevertheless not spare her from a certain isolation and reputational harm, as she remained within the same service, and from stress and uncertainty that she sustained during the pendency of the matter.

99. Guided by the above-mentioned case-law, and bearing in mind that the procedure at issue has been affected not only by inordinate delays but also by grave irregularities, the Tribunal awards the Applicant financial compensation in the amount of USD4,000 on this account.

Conclusion

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

- a. The contested decision is rescinded and the investigation set aside;
- b. The memorandum of 14 February 2014 from the Acting Director-General, UNOG, to the Applicant is to be removed from her professional records;
- c. The Respondent shall pay the Applicant compensation of USD4,000 for moral damage stemming from undue delays and procedural vices in addressing her complaints;

d. This amount shall 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.

(Signed)

Judge Rowan Downing

Dated this 28th day of January 2016

Entered in the Register on this 28th day of January 2016

(Signed)

René M. Vargas M., Registrar, Geneva