UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/099
Judgment No.: UNDT/2020/097
Date: 24 June 2020
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, LPAS, UNOG

Introduction

1. By application filed on 11 September 2018, the Applicant, a Human Rights Officer (P-3) working for the Office of the High Commissioner for Human Rights ("OHCHR"), challenges "the procedure by which her request for protection from retaliation was processed, the failure to protect her from retaliation and the failure to follow up on Ethics Office recommendations subsequent to her request for protection from retaliation".

2. The Respondent filed his reply on 28 October 2018.

Facts

3. On 15 July 2016, the Applicant made a request for protection from retaliation to the United Nations Ethics Office ("UNEO") under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) ("old policy"). She alleged retaliatory actions by the Chief, Human Rights Council Branch ("HRCB"), OHCHR, the Chief, Development and Economic and Social Issues Branch ("DESIB"), OHCHR, the Chief, Millennium Development Goals Section ("MDGS"), OHCHR, and the Chief, Human Resources Management Section ("HRMS"), OHCHR, following reports of misconduct she made between March 2013 and July 2016.

4. The Applicant alleges that her reports led to the following retaliatory actions:

a. The Chief, HRCB, created a hostile working environment, repeatedly attempted to undermine her work, refused to add an additional reporting officer in her 2013-2014 performance appraisal, spread rumours against her and interrogated colleagues to find out who had filed a report to the Office of Internal Oversight Services ("OIOS") in 2015;

b. The Chief, DESIB, and the Chief, MDGS, requested changes in her 2015-2016 workplan to prevent her from obtaining a rating of "exceeds expectations", and deliberately delayed her 2015-2016 performance

appraisal, excluded her from consideration for all temporary posts in DESIB and created a hostile working environment in this branch; and

c. The Chief, HRMS, approached her former supervisors inquiring about her teamwork competencies and deliberately delayed informing her that the temporary post for which she had been selected was no longer funded.

5. On 7 October 2016, the Director, UNEO, released a memorandum finding that only some of the Applicant's reports constituted a protected activity and that the facts and evidence of her case did not raise a *prima facie* case of retaliation.

6. On 13 October 2016, the Director, UNEO, upon the Applicant's request, agreed to reopen the Applicant's request for protection. The Applicant subsequently submitted additional information to support her claim that the 7 October 2016 memorandum contained errors of facts and law and put forward further alleged retaliatory actions.

7. By email of 9 January 2017, an Ethics Officer from the UNEO informed the Applicant that the UNEO was in the process of consulting the Office of Legal Affairs ("OLA") regarding "the issue of the [Chief, HRCB]'s discretion in [a Member State's] delegation affair".

8. On 19 January 2017, a journalist claiming to have UNEO documents regarding the Applicant's case emailed her inquiring about her availability for a conversation. The Applicant informed the UNEO as well as the OHCHR Communications Department, and she requested an investigation by OIOS.

9. On 23 January 2017, the above-mentioned journalist sent a further email to the Applicant containing the leaked documents.

10. By email of that day, the Director, UNEO, informed the Applicant that it was unlikely that the journalist had obtained documents from her Office but undertook to follow-up on the matter. She also offered to reach out to OHCHR to see what options were available to assist the Applicant given the state of her health.

11. By email of 24 January 2017, the Director, UNEO, reiterated her proposal to contact OHCHR and offered the Applicant a choice between continuing the reopened case with the UNEO or requesting a review of the finding of 7 October 2016 by the Alternate Chair of the Ethics Panel of the United Nations ("EPUN") under the then recently issued Secretary-General bulletin, namely ST/SGB/2017/2 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) ("new policy") that entered into force on 20 January 2017.

12. The Director, UNEO, further noted in her email that "[n]ow that [the Applicant's complaints] are known to OHCHR and potentially beyond, [she was] particularly concerned about how this may be impacting on [the Applicant]". The Applicant agreed to the Director, UNEO, contacting OHCHR.

13. By email of 26 January 2017, the Director, UNEO, indicated that she discussed possible accommodations for the Applicant by OHCHR management on medial ground with the Chief, Programme Support and Management Services, OHCHR, who agreed to initiate the process. In her email, the Director, UNEO, also informed the Applicant that she had learned from said Chief that the Applicant had misrepresented her current supervisory situation, adding that the fact that the Applicant had referred to the leak of UNEO documents in discussions with OHCHR generated a conflict of interest requiring her recusal from the case and its referral to the Alternate Chair of the EPUN, namely the Ethics Adviser at the United Nations Population Fund.

14. On 30 January 2017, the Applicant's case was referred to the Alternate Chair of the EPUN under the new policy.

15. On 2 February 2017, OHCHR issued a press release stating, *inter alia*, that the Applicant had "never faced reprisals" and that her allegations against various managers had been investigated and found unsubstantiated.

16. From 6 to 10 February 2017, the Applicant had exchanges with the Alternate Chair of the EPUN, who stated not to be in position to provide any deadline for the review of the Applicant's request. The Applicant submitted additional information, including about the press release.

17. On 9 February 2017, the Government Accountability Project ("GAP"), a non-profit organization, requested the UNEO to provide interim protection to the Applicant. By letter dated 14 February 2017, the Director, UNEO, replied that the case had been transferred to the Alternate Chair of the EPUN, and explained the reasons behind the time elapsed in the consideration of the Applicant's case.

18. From 25 February through 10 March 2017, the Applicant responded to written questions asked by the Alternate Chair of the EPUN about the substance of her request.

19. By email of 11 April 2017, the Alternate Chair of the EPUN communicated her findings to the Applicant. She *inter alia* agreed with the previous decision of 7 October 2016 from the Director, UNEO, (see para. 5 above). On the information sharing with a Member State, she concluded that the Applicant's allegations against the Chief, HRCB, did not constitute reports of misconduct as the conduct "was within the authority of the staff member, well-known to senior leaders in OHCHR" and did not lead to any investigation.

20. On 27 April 2017, the Applicant requested a second review of her case as foreseen under the new policy.

21. On 1 May 2017, GAP wrote to the Secretary-General setting out irregularities in the consideration of the Applicant's case and requesting his intervention.

22. On 26 June 2017, the Applicant contacted the Alternate Chair of the EPUN noting that two months had elapsed since she had sought review of her decision. The Alternate Chair of the EPUN responded on the next day indicating that the matter would be referred only if the Applicant rescinded her "petition to the Secretary -General". She indicated that once the Applicant, through GAP, requested the Secretary-General to intervene on the case, all lower actions on it had to

cease. She nevertheless committed to allow the EPUN to decide whether it believed to have the authority to review the Applicant's request notwithstanding her petition to the Secretary-General.

23. By email of 7 August 2017, the Second Alternate Chair of the EPUN, namely the Principal Ethics Advisor, United Nations International Children's Fund, informed the Applicant that her case had been referred to her for additional review.

24. On 11 August 2017, the Applicant spoke with the Second Alternate Chair of the EPUN.

25. On 30 August 2017, the Applicant shared with the Second Alternate Chair of the EPUN, a summary of further alleged retaliatory acts.

26. On 11 September 2017, GAP wrote to the Director, UNEO, and to the Alternate Chair of the EPUN, copying the Second Alternate Chair of the EPUN, noting that OHCHR misrepresented the practice of giving names to a Member State's delegation to "Human Rights Watch" which, GAP alleged, reinforced the Applicant's claim.

27. The Chief, HRMS, OHCHR, and the Applicant had a meeting on 13 September 2017.

28. From 21 September 2017 to 4 December 2017, the Applicant submitted additional evidence regarding her reasonable belief that misconduct had occurred and she, together with GAP, requested a follow-up on her request on several occasions.

29. On 8 December 2017, the Applicant was medically evacuated from Mauritania as a result of health problems.

30. On 21 December 2017, the Second Alternate Chair of the EPUN indicated that she would engage with the Applicant only through GAP until receipt of a medical advice allowing her to communicate with the Applicant directly.

31. Between 30 December 2017 and 30 January 2018, the Applicant provided the Second Alternate Chair of the EPUN with additional information concerning her request, including the transcript of a meeting with the OHCHR Chief of Office on 19 January 2017 (cf. annex 39 to the application).

32. By email of 25 January 2018 to GAP, the Second Alternate Chair of the EPUN reiterated that she could not discuss the case with the Applicant in the absence of a report from her physician indicating that such contact would be permissible.

33. On 7 February 2018, the Applicant had a phone conversation with the Second Alternate Chair of the EPUN during which the latter alluded to a pressing need to complete the case.

34. On 21 February 2018, the Applicant forwarded to the Second Alternate Chair of the EPUN links to a letter about her from the United Nations Special Rapporteur on Freedom of Expression to the Secretary-General, along with the latter's reply. The Applicant indicated that a false claim was made regarding the consideration of her case by the UNEO and that her deployment to Mauritania as a measure to protect her against retaliation was a mischaracterization.

35. In her report dated 27 February 2018 on the Applicant's request for protection against retaliation, issued on 2 March 2018, the Second Alternate Chair of the EPUN found no case of retaliation. However, she made a number of recommendations, including that the Applicant and OHCHR engage in "a comprehensive *ad hoc* mediation".

36. By letter of 2 April 2018, the Chef de Cabinet, Executive Office of the Secretary-General ("Chef de Cabinet") wrote to the then United Nations High Commissioner for Human Rights ("High Commissioner"), on behalf of the Secretary-General and further to the recommendations of the Second Alternate Chair of the EPUN, on the Applicant's request for protection against retaliation.

37. The then High Commissioner responded on 30 April 2018 that his Office had taken action as recommended, with the support of the Assistant Secretary-General, Office of Human Resources Management ("ASG, OHRM"), to mediate with the Applicant and "identify an alternate placement for [the Applicant] within the Office of the High Commissioner for Human Rights, in Geneva", but the Applicant "ha[d] already expressed some objection to the new assignment". He noted that the Applicant "had already refused to accept an alternate placement identified for her in January 2018, before the [Chef de Cabinet's] request and the Ethic Panel's recommendation". The then High Commissioner further noted "[the Applicant's] treating physician's views that an 'internal' solution may not be viable in her case], referring to an Applicant's correspondence dated 27 April 2018 to the Secretary -General and her doctor's recommendation.

38. On 30 April 2018, the Applicant sought management evaluation of the decision not to protect her from retaliation. She received a response on 13 June 2018, finding that her challenge was not receivable.

39. On 1 November 2018, the Applicant was selected for a temporary position at the P-4 level in the Rule of Law and Democracy Section. She is currently serving under a fixed-term appointment at the P-3 level expiring on 5 January 2022.

Procedural background

40. The Tribunal held case management discussions on 1 and 16 May 2019.

41. Subsequently, both parties filed additional documents and submissions. These included, amongst others, witness statements from Mr. Christopher Mason, Mr. Dolkun Isa and Ms. Miranda Brown filed by the Applicant, which the Tribunal rejected in its Order No. 44 (GVA/2019) of 28 May 2019 as not directly relevant to the case. They also included responses from the Respondent to Orders No. 42 (GVA/2019) of 20 May 2019 and No. 44 (GVA/2019) of 28 May 2019, which the Tribunal decided to strike out from the record at the opening of the hearing on the merits as they raised issues that should have been brought forward at the case management discussions and were argumentative of decisions made by the Tribunal.

42. The Tribunal held a hearing on the merits from 3 to 4 June 2019, where it heard evidence from the Applicant, her partner and the Chief, Human Resources, OHCHR.

43. It is recalled that the Tribunal was scheduled to hear the Applicant's medical doctor, Dr. Giorgio Michalopoulos, and a summons had been issued in this respect on 28 May 2019 at his request, to be transmitted through Counsel for the Applicant. However, Dr. Michalopoulos refused to appear on the ground that he did not receive a summons directly from the Tribunal by registered mail and with sufficient notice.

Parties' submissions

44. The Applicant's principal contentions are:

Receivability

a. The application must be distinguished from the cases *Wasserstrom* 2014-UNAT-457 and *Nguyen-Kropp & Postica* 2016-UNAT-673 and is receivable. Unlike in these cases, numerous retaliatory acts the Applicant has referred to the Ethics Office cannot be contested in the formal justice system and the finding of the Ethics Office was that no *prima facie* case of retaliation existed, so no investigation took place. This decision deals with the Applicant's request for protection in a final manner and does not constitute a mere recommendation. It thus affects the Applicant's terms and conditions of employment. In addition, *ultra vires* and procedural errors in the consideration of the Applicant's request for protection renders her application receivable;

b. In the alternative, action or inaction on the recommendations made by the Second Alternate Chair of the EPUN, constitute reviewable administrative decisions;

c. Furthermore, the circumstances of the present case required action by the Secretary-General to protect the Applicant from retaliation, irrespective of the determination of the UNEO;

Merits

d. The decision was vitiated by procedural errors and is *ultra vires*. In particular:

i. The Applicant's request for protection has been incorrectly referred between Ethics Offices. There was no real or potential conflict of interest justifying the recusal of the Director, UNEO;

ii. This unjustified referral deprived the Applicant of the review mechanism provided in sec. 9 of the new policy (ST/SGB/2017/Rev.1) as an Alternate Chair was unilaterally selected by the UNEO outside the applicable framework. The Second Alternate Chair of the EPUN was thus not competent to examine the Applicant's request. She had also discussed the case prior to her assignment with the Alternate Chair of the EPUN, thus creating a conflict of interest;

iii. The decision by the Second Alternate Chair of the EPUN to conduct a review of the reasonableness of the first preliminary review was procedurally incorrect as a *de novo* review of the Applicant's request for protection was required under sec. 9 of the new policy; and

iv. The UNEO did not apply a *prima facie* standard of proof as it required the Applicant to adduce evidence that would allow the UNEO to arrive at the conclusion that retaliation contributed to detriment to the Applicant;

e. The UNEO failed to consider relevant material, in particular in its justifications that the provision of names of a Member State's dissidents to that Member State's Mission did not represent misconduct and retaliatory acts alleged by the Applicant;

f. The treatment of the case has been unreasonably delayed, causing detriment to the Applicant;

g. The Secretary-General had a duty to protect the Applicant from retaliation as he had been made aware of the procedural and substantive flaws in the handling of her request. His direct intervention requiring compliance with the UNEO recommendations suggests that he saw a need to protect and he entrusted this responsibility to the ASG, OHRM;

h. The recommendations of the Second Alternate Chair of the EPUN were binding and have not been complied with;

i. The Applicant requests:

i. An order of the Tribunal to refer the matter to OIOS for investigation and that she be afforded protection from retaliation, including transfer with her fixed-term appointment to a suitable alternative post;

ii. An order of the Tribunal that the relevant elements of the press release be publicly retracted;

iii. Compensation for the breach of her contractual rights in terms of the delay in processing her request for protection from retaliation; and

iv. Moral damages flowing from the manner in which her complaint has been handled, the delay and the failure to take protection measures, in the amount of 18 months' net base salary.

45. The Respondent's principal contentions are:

Receivability

a. The application is not receivable *ratione materiae* as a review by the UNEO is not subject to judicial review pursuant to the Appeals Tribunal's jurisprudence. The alleged failure of the Secretary-General to protect the Applicant from retaliation is not reviewable either as there was no duty to act. Furthermore, the recommendations by the UNEO are not binding and thus do not constitute a reviewable administrative decision;

Merits

b. The review procedure was lawful. In particular:

i. The Applicant's allegation to OHCHR senior management that she felt she has been exposed to further retaliation as a result of leaks originating from the UNEO created a potential conflict of interest for the UNEO as this Office would be both an independent reviewer of the Applicant's complaint and an alleged contributor to her alleged retaliation;

ii. The Respondent applied the new policy to allow the Applicant's complaint to be reviewed given the perceived conflict of interest of the Director, UNEO;

iii. The Respondent further devised a procedure based on the new policy to allow the Applicant a third review of her complaint;

iv. The Second Alternate Chair of the EPUN conducted her review in accordance with sec. 9.2 of the new policy, which does not foresee a *de novo* investigation. She considered the specific circumstances of the case and allowed the Applicant to submit further documentation;

v. The UNEO applied the *prima facie* standard of proof. Absent any express consent from the Applicant, it did not contact any witness, contrary to her submissions. Furthermore, the UNEO is not an investigative body. It refers to the material provided by the complainant;

vi. The delays to conduct the three reviews were not inordinate and were largely due to the Applicant's actions, namely her allegations leading the Director, UNEO, to recuse herself, the continuous submission of voluminous documentation, the interference of GAP in the case and the Applicant's constant interferences with the review process;

c. The decision of the Secretary-General not to afford protection from retaliation is lawful as the Applicant did not have a case. All three Ethics Offices concluded that the information sharing did not constitute a protected activity under the old policy. The Applicant's allegations of retaliatory acts were fully examined and the Second Alternate Chair of the EPUN found that even at the *prima facie* level, it could not be established that the allegations constituted detrimental actions and, if so, whether there was any causal link between a protected activity and detrimental actions;

d. The press release was taken into account by the Alternate Chair and the Second Alternate Chair of the EPUN, but was found not to represent a retaliatory act;

e. As to the implementation of the UNEO's recommendation, the Respondent notes that the Applicant was temporarily reassigned to two P-4 positions after her return from sick leave in April 2018; and

f. The Respondent requests the Tribunal to reject the application as irreceivable or, alternatively, to reject it in its entirety on the merits.

Consideration

Procedural issues

Respondent's challenge to the admissibility of certain documents

46. In his reply, the Respondent challenged the admissibility of certain documents annexed to the application, namely:

a. Annex 46, on the grounds that it is "irrelevant and not comprehensible as it is in Dutch"; and

b. Annexes 3, 34 and 39, on the grounds that the documents are "either not signed, the authorship is unclear or are an unauthorized transcript of a meeting".

47. With respect to annex 46, by Order No. 24 (GVA/2020), issued after the case was reassigned to the undersigned Judge, the Tribunal requested the Applicant *inter alia* to file an English translation of the document she filed in Dutch. The Applicant did so and, consequently, the Tribunal finds that the Respondent's challenge to the admissibility of this document is moot.

48. Annexes 3 and 34 are unsigned documents. Concerning the first one, namely the Applicant's "Response to memo from Ethics Office, 25 October 2016", the Tribunal does not see how the lack of signature in such a document could be ground to declare it not admissible. As for the second document, the Tribunal is satisfied with the Applicant's explanations filed also in response to Order No. 24 (GVA/2020) and thus also finds it admissible.

49. Annex 39 is a transcript, by the Applicant, of a meeting she recorded without the consent of the other participant.

50. Art. 18 of the Tribunal's Rules of Procedure contains the set of norms applicable to evidence. However, except for article 18.6, there is no specific provision in relation to admissibility of evidence based on recordings made without consent.

51. The Tribunal finds that this piece of evidence is not admissible in these proceedings because it is tainted by the fact that one of the participants at the meeting was not aware that the meeting was being recorded.

52. In *Perez-Soto* UNDT/2012/078, para. 17, this Tribunal found that "secretly recording a conversation without announcing this to the person to whom one is speaking is unethical and any such documents, or recordings, would generally be inadmissible before this Tribunal".

53. The Tribunal maintains this approach and notes that the Applicant cannot make use of a piece of evidence that was illegally obtained. In fact, in a significant majority of legal systems worldwide, audio or video recordings are only admissible in restrictive circumstances: if consent has been obtained or if a judge has issued a warrant allowing it.

54. Moreover, the Tribunal has also considered that this piece of evidence is not the only one available on file. The Applicant has not shown (and has not even alleged) that the minutes based on the audio-recording were the only way available to her to prove her case. As a consequence, the Tribunal will not take into account the minutes of said meeting since it results from an audio-recording that was made without the consent of the other party.

Receivability

55. The Tribunal will first examine if the 2 March 2018 determination of the Second Alternate Chair of the EPUN that the Applicant did not establish a *prima facie* case of retaliation and, therefore, not to initiate an investigation into her allegations constitutes a reviewable administrative decision. The Tribunal will then examine if the action or inaction of the Administration on the recommendations made by the Second Alternate Chair of the EPUN constitute a reviewable administrative decision.

Does the determination by the Second Alternate Chair of the EPUN that the Applicant did not establish a *prima facie* case of retaliation constitute a reviewable administrative decision?

56. The evidence on file shows that, on 15 July 2016, the Applicant made a request for protection from retaliation to the UNEO under the old policy.

57. The Director, UNEO, issued a first memorandum on the Applicant's request for protection on 7 October 2016, finding that there was no *prima facie* case of retaliation. The case was reopened under the old policy and following the recusal of the Director, UNEO, it was reassigned to the Alternate Chair of the EPUN under the mechanism for dealing with conflicts of interest set forth in sec. 7.7 of the new policy.

58. The Alternate Chair of the EPUN reviewed the Applicant's request for protection applying, on the one hand, the procedure set forth in the new policy but, on the other hand, the substantive elements and standards of the old policy.

59. On 11 April 2017, the Alternate Chair of the EPUN endorsed the initial UNEO's determination of 7 October 2016. A second review was conducted by the Second Alternate Chair of the EPUN, under the procedure set forth in sec. 9 of the new policy.

60. In her decision of 2 March 2018, the Second Alternate Chair of the EPUN found that there was no *prima facie* case of retaliation under the old or the new policy and thus declined to refer the matter to OIOS for further investigation. However, acting under sec. 9.2 of the new policy, she recommended a number of measures to be taken, including for OHCHR and the Applicant to engage in mediation, and for the Applicant to be temporarily reassigned pending completion of such mediation.

61. The Applicant states in her application that she contests the "procedure by which her request for protection from retaliation was processed, the failure to protect her from retaliation and the failure to follow up on Ethics Office recommendations subsequent to her request from retaliation". The Tribunal recalls that the scope of its jurisdiction, as defined by article 2 of its Statute, is mostly and above all "administrative decisions" not procedures *per se*. Reviewing a procedure is necessarily linked to an administrative decision being contested before and reviewed by the Tribunal.

62. The Tribunal is mindful of its obligation to interpret and identify what is, in fact, the "contested decision" according to the applicable law. In *Massabini* 2012--UNAT-238 (para. 25), the Appeals Tribunal held that

> The duties of a judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgement must necessarily refer to the scope of the parties' contentions.

63. This interpretative process has to consider not only the application *per se* but also the applicable legal framework and the features of the internal legal system, as a whole, so as to ensure a harmonious and coherent case law.

64. Consequently, the Tribunal finds that the decision the Applicant intends to contest is the findings in the report of the Second Alternate Chair of the EPUN, dated 2 March 2018.

65. Bearing this in mind, the applicable legal framework is, undoubtedly, the new policy (ST/SGB/2017/2), which entered into force on 20 January 2017 and was revised on 28 November 2017, that has been applied to cases that, as the current one, were already pending before the UNEO when the new policy came into force but were decided upon after that date.

66. The Tribunal notes that the Secretary-General clearly made a difference, in his response of 7 October 2017 to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, between the review mechanisms for UNEO determinations and for its recommendations under the new policy, stating that:

> The new whistle-blower protection policy, which was issued in January 2017, has been applied to cases that remained under consideration when the new policy became effective. This has been to the benefit of complainants. The new policy incorporated several improvements, including: (i) the right for a complainant to seek review of an Ethics Office [determination] and (ii) the requirement that Ethics Office recommendations result in administrative decisions, which can be appealed in the independent internal justice system.

67. Section 10.3 of the new policy provides that "[r]ecommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules".

68. Consequently, the Tribunal finds that it is clearly established in the new policy that the UNEO recommendations are not reviewable administrative decisions and, as such, they fall outside the scope of the UNDT's jurisdiction.

69. The Applicant claims that she is entitled to have access to a procedural mechanism of judicial review, as part of her employment status, in cases where the UNEO determines that there is no *prima facie* retaliation.

70. To examine this claim, the Tribunal will refer to the Terms of Reference of Ethics Offices within the United Nations system, as they define and help to better understand the role that these Offices play.

71. On the one hand, according to sec. 3.1 of ST/SGB/2005/22 (Ethics Office – establishment and terms of reference), the main responsibilities of the Ethics Office are the following:

> (a) Administering the Organization's financial disclosure programmes;
>
> (b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;
>
> (c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest) including administering an ethics helpline;
>
> (d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual training for staff;
>
> (e) Such other functions as the Secretary-General considers appropriate for the Office.

72. On the other hand, secs. 2 and 3 of ST/SGB/2007/11 (United Nations system-wide application of ethics: separately administered organs and programmes) thoroughly describe the Terms of Reference of the Ethics Office of a separately administered organ or program.

73. In particular, sec. 2 clearly distinguishes the functions performed by an Ethics Officer from those performed by other entities in the system, namely, existing investigative mechanisms and/or administration of justice.

74. The Applicant argues that the UNEO finding that there was no *prima facie* case of retaliation is a final decision. From the Applicant's point of view, this is analogous with the treatment of a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority),

where "the procedure followed in respect of the allegations of prohibited conduct" is open to challenge. In this connection, the Applicant refers to *Oummih* 2015-UNAT-518, para. 35, where the Appeals Tribunal reviewed the decision not to open an investigation into some of the Applicant's allegations of harassment. This is also in line with the jurisprudence in *Nwuk*e 2010-UNAT-099, as recalled, for example, in *Parayil* UNDT/2017/055.

75. The Tribunal finds this comparison unsatisfactory for the following reasons. First, the UNEO and an investigative body (such as OIOS) are two different entities, with two different scopes, operating under totally different mandates and legal frameworks. If the internal law-maker intended them to be equivalent in nature and scope, there would have been no need to create two different entities as the functions of each entity could have been merged into a single one.

76. Second, sec. 9 of the new policy includes a mechanism for cases where an initial finding of no *prima facie* retaliation was made that allows a complainant to have his/her case reopened. In fact, after a first examination of a complaint, the matter will be referred to the Alternate Chair of the EPUN if there is new evidence available.

77. Moreover, sec. 7.1 of the new policy provides, in respect of the powers of the UNEO, that said Office will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected activity; and (b) there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

78. Sec. 8 of the new policy establishes the action that the UNEO must take if it finds that a *prima facie* case exists, namely referral of the matter to OIOS for investigation. This means that the two mechanisms are not equivalent but, in certain aspects they complement each other.

79. In fact, upon receipt of the investigation report from OIOS, the Ethics Office, as per sec. 8.4 of the new policy,

> will conduct an independent review of the findings of the report and supporting documents to determine whether the report and the supporting documents show, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action absent the complainant's protected activity or that the alleged retaliatory action was not made for the purpose of punishing, intimidating or injuring the complainant. If, in the view of the Ethics Office, this standard of proof is not met, the Ethics Office will consider that retaliation has occurred. If the standard of proof is met, the Ethics Office will consider that retaliation has not occurred. In all cases, the Ethics Office will inform the complainant in writing of its determination and make its recommendations to the head of department or office concerned and to the Under-Secretary-General for Management. Those recommendations may include that the matter be referred to the Assistant Secretary-General for Human Resources Management for possible disciplinary procedures or other action that may be warranted as a result of the determination.

80. This mechanism is different from the one contemplated in the new policy for findings of no *prima facie* retaliation. As explained above, in these situations, sec. 9 is applicable and a second review will take place by the Alternate Chair of the EPUN. The report will then be sent to the UNEO that decides whether to refer the matter to OIOS pursuant to sec. 8.1.

81. This review mechanism intends to provide complainants with another avenue for having their complaints assessed when further evidence is adduced. The Tribunal notes that here is no legal provision allowing it to conclude that findings of no *prima facie* retaliation can be subject to judicial review and, moreover, such a provision would explicitly contradict the wording and the rationale of sec. 10.

82. The Tribunal also recalls that, even if it considers that the applicable framework is the old policy (ST/SGB/2005/21), the Appeals Tribunal's jurisprudence has, by majority, decided that the acts and omissions of the UNEO do not constitute decisions taken by the Administration.

83. In *Wasserstrom* 2014-UNAT-457, the UNEO had found that there was a *prima facie* case of retaliation. OIOS thus investigated but found that there was no evidence of retaliation. The UNEO then endorsed the conclusion of OIOS and rejected the Applicant's request for protection.

84. The Appeals Tribunal examined whether the UNEO finding that there had been no retaliation against the staff member after the matter had been investigated by OIOS was an administrative decision subject to judicial review. It held that:

> 40. Mr. Wasserstrom had legal remedies available to him regarding his claims of retaliation and wrongful termination. Under Section 6.3 of the Bulletin, Mr. Wasserstrom was not precluded from raising retaliatory motives in a challenge to the non-renewal of his appointment or to other actions taken by the Administration. However, he never sought management evaluation of the decisions to close OPOE or to end his contract with UNMIK or of the alleged retaliatory actions at the Greek border and the search of his premises, despite the requirement under our Statute, Rules and jurisprudence that he must do so to pursue those decisions through the internal grievance mechanism of the administrative justice system.
>
> 41. We agree with the Secretary-General that the Ethics Office is limited to making recommendations to the Administration. Thus, the Appeals Tribunal, with Judge Faherty dissenting, finds that these recommendations are not administrative decisions subject to judicial review and as such do not have any "direct legal consequences". Hence, the Secretary-General's appeal on receivability is upheld.

85. The Appeals Tribunal sitting in full Chamber examined an analogous situation in *Nguyen-Kropp & Postica* 2016-UNAT-673. The UNEO had found after a preliminary review that there was a *prima facie* case of retaliation. An Alternative Investigating Panel conducted an investigation and the UNEO ultimately concluded that retaliation in the Appellants' cases had not been established.

86. The Appeals Tribunal confirmed its earlier holding in *Wasserstrom* that the UNEO solely has a recommendation power and thus is not capable of issuing administrative decisions. In this connection, the Appeals Tribunal held that:

> 38. The Ethics Office must report directly to the Secretary--General. The head of the Ethics Office is accountable to the Secretary-General (footnote omitted). It is therefore not logical to conclude that the Ethics Office need not consult the Secretary-General but can unilaterally make a final decision on the outcome of an investigation report; or, for that matter, any final decision having a direct impact on the terms of appointment or contract of employment of a staff member. Its limited role under Section 5.7 is very clear. It is precisely because of this limitation that it is essential the Ethics Office comply with its obligations under Section 5.7 to make a recommendation, regardless of the outcome of the investigation. The subsequent action – or non-action – of the Administration on the recommendation will constitute a contestable administrative decision if it has direct legal consequences affecting a staff member's terms and conditions of appointment.

87. In her closing submission, the Applicant also argued that there is no UNAT authority in relation to this issue since *Nguyen-Kropp* & *Postica* is an *obiter*, i.e., a language surplus, which is not relevant nor necessary for the actual decision.

88. The Tribunal disagrees with the Applicant in this regard. Contrary to what the Applicant argues, this Tribunal finds that UNAT has clearly stated its position in said judgement, when holding in para 42:

> For the foregoing reasons, we affirm the majority decision in Wasserstrom that the Ethics Office is limited to making recommendations to the Administration which are not administrative decisions subject to judicial review.

89. In *Nguyen-Kropp & Postica*, UNAT clearly defined its interpretation of the UNEO role under the old policy as follows:

> 35. Although the Bulletin does not specifically provide for an instance where the Ethics Office does not find a credible case of retaliation, such a decision would not be a final decision carrying legal consequences. A complainant can always come back with better evidence or, under section 6.3 of the Bulletin, can raise retaliatory motives in a challenge to an action taken by the Administration.

90. Additionally, as stated by UNAT in *Nguyen-Kropp & Postica*, the internal justice system is always open to complainants (provided that the legal requirements are met) who would like to contest a decision they consider as retaliatory in nature, for instance a non-promotion, a lateral transfer or a non-renewal of their contract.

91. Access to justice, as an essential part of the rule of law in the Organization, is clearly ensured by the fact that complainants can always contest decisions or omissions by the administration they deem retaliatory even after a finding of no *prima facie* retaliation has been made by the UNEO.

92. The Tribunal is, therefore, not persuaded by the Applicant's arguments in relation to the nature of the findings made by the UNEO and does not find any solid reason to perform a *contra legem* interpretation of the internal law and to depart from UNAT's established precedent.

93. The Tribunal underlines that only the General Assembly, as the legislative body of the Organization, can establish and define conditions under which access to the internal justice system is granted to staff members. Providing direct access to the Tribunal in relation to UNEO findings of no *prima facie* retaliation remains a policy issue that should be resolved through a legislative act.

94. In view of the foregoing, with respect to the finding of no *prima facie* retaliation, the Tribunal cannot adjudicate in relation to the alleged procedural flaws committed and delays incurred into by the UNEO, nor in relation to the alleged "conflict of interest" that led to the recusal of the former Ethics Advisor, UNEO, from the Applicant' s case, since it all falls out of the scope of its jurisdictional powers.

Did the action or inaction of the Administration on the recommendations made by the Second Alternate Chair of the EPUN constitute a reviewable administrative decision?

95. The Applicant further challenges the Secretary-General's failure to protect her from retaliation, irrespective of the determinations made by the Second Alternate Chair of the EPUN. She claims that the Secretary-General, who had been

made aware of her situation and the "alleged" procedural flaws in the treatment of her request for protection, had an independent duty to protect her from retaliation.

96. The Applicant also challenges the Administration's inaction upon the recommendations made by the Second Alternate Chair of the EPUN claiming that these have not been fully implemented.

97. The facts of the case show that, on 2 March 2018, the Second Alternate Chair of the EPUN issued her report, dated 27 February 2018, to the Applicant, finding no case of retaliation. Yet, she made a number of recommendations, including that the Applicant and OHCHR engage in mediation and that the Applicant be temporarily reassigned pending completion of this process.

98. In said report, the Second Alternate Chair of the EPUN stated that: "some complexities of the present matter are related to OHCHR not acknowledging and responding directly to the [Applicant] at an early stage in 2013, when she first raised the issue and made the reports".

99. The Second Alternate Chair of the EPUN concluded that "[b]y not responding to the [Applicant's] concerns – and thereby not openly and proactively addressing this profound policy difference at an early stage –, OHCHR in [her] view shares some degree of responsibility for the [Applicant's] current situation, where she sees herself as a longstanding whistle-blower who has been failed by the UN system". The report was copied to the Secretary-General's Chef de Cabinet.

100. By letter of 2 April 2018 (see para. 36 above), the Chef de Cabinet wrote to the former High Commissioner on behalf of the Secretary-General, further to the recommendations of the Second Alternate Chair of the EPUN, on the Applicant's request for protection against retaliation. She recalled the mediation recommendation made by the Second Alternate Chair of the EPUN and insisted that:

> in the event that [the Applicant] agrees to mediate, the Secretary--General would count on you and the administration of OHCHR to make all efforts to informally resolve this matter in line with the recommendations of the Alternate Chair of EPUN. To facilitate such efforts, the Secretary--General has requested the Office of Human Resources Management to send a representative at the appropriate level to Geneva to participate, alongside OHCHR, in the mediation.

101. She then went on to state that:

> Notwithstanding such mediation efforts, for this particular case, the Secretary-General is delegating the authority under the applicable legal framework to the Assistant Secretary-General for Human Resources Management, through the Under-Secretary-General for Management, to exercise placement authority to move [the Applicant] to an appropriate position within OHCHR at the earliest opportunity. In exercising such delegated authority from the Secretary-General, the Assistant Secretary-General for Human Resources Management or the Under-Secretary-General for Management will consult with you and [the Applicant].

102. In relation to this specific issue, the Tribunal highlights that according to section 10.1 of the new policy, actions or inactions from the Administration following recommendations of the Ethics Office constitute administrative decisions subject to judicial review:

> The action, or non-action, of the Administration on a recommendation from the Ethics Office under section 8 above [entitled "Ethics Office action where there is a prima facie case"] will constitute a contestable administrative decision under chapter XI of the Staff Rules if it has direct legal consequences affecting the terms and conditions of appointment of the complainant and may be contested within the deadlines specified under those Rules.

103. The Tribunal is of the view that the applicable policy grants the complainants access to justice and this is an expression of the Secretary-General's duty of care in relation to staff members.

Has the Organization exercised its duty of care towards the Applicant?

104. The present case was brought to the attention of the Secretary-General on a number of occasions through his Chef de Cabinet. The Secretary-General was seized of the Applicant's case on 14 March 2017 by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, who recalled the facts of the Applicant's complaint until the case was assigned to the Second Alternate Chair of the EPUN, and expressed concerns about the lack of protection afforded to her.

105. By letter of 5 October 2017 to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Secretary--General, through his Chef de Cabinet, clearly expressed the view that the Applicant's request for protection from retaliation has been treated according to the internal procedures on the following basis:

> [The Applicant] has twice had her requests for protection against retaliation reviewed – the first time by the Ethics Office of the Secretariat and a second time by the Alternate Chairperson of the Ethics Panel of the United Nations, who is not an employee of the Secretariat. In both instances no retaliation was found. At [the Applicant's] request another independent review of the most recent determination is being conducted by a member of the Ethics panel of the United nations, who is not employed by the Secretariat.

106. Again, the Secretary-General, through his letter dated the 2 April 2018 to the then High Commissioner, indicated that he would send a representative at the appropriate level to Geneva to participate, alongside OHCHR, in the mediation and he would delegate authority under the applicable framework to the ASG, OHRM, to exercise placement authority to move the Applicant to an appropriate position.

107. This sequence of events shows that, contrary to what is alleged by the Applicant, the Secretary-General expressed his concern with her situation and took immediate action based on the recommendations received.

108. Therefore, the Tribunal will now analyse whether said recommendations from the Second Alternate Chair of the EPUN were duly implemented by OHCHR, bearing in mind the following sequence of events.

109. In February 2013, the Applicant reported potential acts of misconduct by her First Reporting Officer, the Chief, HRCB, OHCHR. Subsequently, a series of events/matters—some of which have been adjudicated by this Tribunal or are currently in its docket—arose and brought the Applicant to seek positions outside HRCB to, in her words, "escape the harassment, abuse of authority and retaliation to which she asserts she was subjected by [the Chief, HRCB,OHCHR] as a result of her reports of apparent misconduct".

110. In time, OHCHR and OHRM became involved in finding a suitable position for the Applicant who repeatedly requested to be transferred to a mutually agreeable position "away from the direct supervision of those whose conduct [she] reported".

111. At the oral hearing on the merits, the current Chief of Human Resources, OHCHR, testified that she only became aware of the issues involving the Applicant [and her former supervisor] a few months after she took office. She also explained that her first contact with the Applicant took place in July 2017.

112. This witness described then, in a clear and objective way, the several attempts made by her office to find the Applicant an alternative position outside the reporting line of her former supervisor. She also clarified that the Applicant decided, on her own volition, to apply for a temporary position in OHCHR's Office in Mauritania through "Rapid Response".

113. Contrary, to what was argued by the Applicant, the suggestion that the Applicant could be assigned to the post in Mauritania Office came from the head of said office and not from OHCHR in Geneva, which never imposed that solution on her.

114. In fact, current Chief of Human Resources, OHCHR, clearly stated that, as soon as OHCHR knew the Applicant got sick in Mauritania (by the end of her second deployment) she was immediately assisted by them and evacuated to Geneva.

115. The Tribunal finds the testimony of the current Chief of Human Resources, OHCHR, reliable, objective and straightforward as well as absent of bias or ulterior motives against the Applicant.

116. Furthermore, the current Chief of Human Resources, OHCHR, explained that she was working then with the ASG, OHRM, who was also in contact with the Applicant, to identify alternative positions for her according to her competencies and preferred areas of work.

117. The witness confirmed that she and the Applicant exchanged numerous emails and phone calls, and, on an occasion, she even printed and showed the Applicant a list of all funded posts that were available at the time. She mentioned that the Applicant was assigned to a P-4 position, in Geneva, for four months.

118. The current Chief of Human Resources, OHCHR, also clarified that the Applicant was on Special Leave With Full Pay ("SLWFP") for several months and on short-term assignments. She also mentioned that it was the then ASG, OHRM, who, exceptionally, authorized the extension of the Applicant's SLWFP due to her health condition.

119. In relation to the Mediation efforts, which were also recommended by the Second Alternate Chair of the EPUN in her report, the witness said she had a preliminary meeting with the Ombudsman in July 2018. Following said meeting it was the Ombudsman himself who realised and communicated to her that "there was a lack of mutual trust" between the parties, and therefore, mediation was not possible.

120. According to the evidence available on file, during the Applicant's temporary assignment against a P-4 position with the Rule of Law and Democracy Section, OHCHR (1 May 2018 to 30 September 2019), numerous communications between the Applicant and OHCHR took place in connection with the search for a new position.

121. The Tribunal notes, however, that the most relevant exchanges concerning the identification of a suitable position for the Applicant started as of 21 September 2019. The Applicant was offered two Human Rights Officer positions at the P-3 level in OHCHR: one in the Special Procedures Branch/Sustainable Human Development Section, and another in the Human Rights and Economic and Social Issues Section.

122. The exchanges concerning the identification of a suitable position for the Applicant led to an email of 7 October 2019 from the current Chief of Human Resources, OHCHR, to the Applicant informing her of the decision to transfer her. It relevantly reads as follows:

> We have taken note of your email and noted that you have not expressed any preference regarding the two offers. The two offers were suitable and commensurate to your grade and skills. Therefore, we will proceed to your lateral transfer to the P-3 position in the Human Rights and Economic and Social issues section, Thematic Engagement, Special Procedures and Right to Development Division (see TOR attached), effective 7 October 2019. This is a transfer under the authority of the [High Commissioner], in an effort to find a viable, long-term solution to a situation of longstanding concerns. (emphasis in the original).

123. The Tribunal is of the view that the evidence produced before it, clearly shows that the Secretary-General, through the ASG, OHRM and OHCHR, has made all possible attempts to keep the Applicant working in suitable positions, in Geneva, outside the reporting lines of her former supervisor.

124. As a consequence, the Tribunal finds that, according to the evidence produced at the hearing and available on file, there is no evidence of a breach of the duty of care towards the Applicant.

Remedies

125. As remedies, the Applicant has requested the Tribunal to order the following:

a. An Order for the matter to be referred to OIOS for investigation and for the Applicant to be transferred to a suitable alternative position;

b. An Order to publicly retract the relevant elements of the 2 February 2017 press release;

c. Compensation in the amount of USD3,000 for the six months of delay in processing her complaint; and

d. Compensation for moral damages for the failure to take protective measures and the delays in processing her complaint.

126. The remedies available to the Tribunal are set forth in article 10.5 of its Statute, which reads as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

127. The Tribunal cannot grant the first remedy requested, i.e., the referral of the case to OIOS and the transfer of the Applicant to a suitable position, for two reasons. First, because it does not have jurisdiction to review findings of no *prima facie* retaliation made by the Ethics Office and to replace that Office's assessment with its own. Second, because there is no legal basis under the Tribunal's Statute to grant such remedies as the Tribunal is not the decision-maker.

128. Indeed, the referral of the case for investigation has to come from the Ethics Office itself (if a *prima facie* case of retaliation is found) and the decision to transfer the Applicant to another position is a responsibility of the Organization itself (in the current case, of OHCHR) if a positive finding of retaliation is made and under its discretionary authority.

129. As stated in *Sanwidi* 2010-UNAT-084, the role of the Tribunal is limited to review if said exercise of discretion was duly and lawfully exercised:

> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute tribunal determines if the decision is legal, rational, procedurally correct and proportionate. […]. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary--General amongst various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

130. In relation to the second remedy, the Tribunal underlines that the issue related to the Press Release is pending adjudication before it in Case No. UNDT/GVA/2017/052. Consequently, there is clearly a *lis pens* situation in relation to the requested remedy that prevents the Tribunal from adjudicating it in the current case.

131. With respect to the third remedy requested, the Tribunal notes that the sequence of events clearly demonstrates that the Applicant's request was reviewed by three different Ethics Officers: a UN Ethics Officer, the Alternate Chair of the EPUN and the Second Alternate Chair of the EPUN.

132. The evidence on file also shows that the Applicant submitted additional information on 13 October 2016, between 6 and 10 February 2017 and between 30 August and 21 September 2017, leading to the reopening of her case, at least on two occasions: on 13 October 2016 and on 27 April 2017.

133. Under Section 5.3 of the old policy, the Ethics Office "will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation".

134. However, under Section 7.4 of the new policy, the Ethics Office "shall seek to complete its preliminary review within 30 days of receiving all information requested concerning a complaint of retaliation submitted."

135. Additionally, section 9.1 of the new policy states as follows:

> 9.1 If, following a determination by the Ethics Office under section 7.5 or 7.6 above, that there is no *prima facie* case of retaliation or threat of retaliation, the complainant wishes to have the matter reviewed further, he or she may, within 30 days of notification of the determination, refer the matter in writing to the Alternate Chair of the Ethics Panel of the United Nations.

136. The Tribunal finds the fact that the Ethics Office took more than 45 days to complete its preliminary review of the Applicant's complaint is not blatantly illegal or unlawful, due to the complex nature of the matter at stake.

137. Moreover, a careful reading of both sec. 5.3 of the old policy and sec. 7.4 of the new policy as well as the use of the words "will" and "shall", indicate that said deadlines are merely indicative.

138. Further, the Tribunal also recalls that the Applicant, on 13 October 2016, submitted new information to the Ethics Office and said office informed her on 9 January 2017 that they were engaged in consultations with OLA.

139. Also, between 25 February and 10 March 2017, the Applicant was answering questions in writing made by the Alternate Chair of the EPUN to whom the process had been transferred to.

140. The Tribunal also notes that on 27 April 2017, the Applicant requested a second review of her case that led to it being referred to the Second Alternate Chair of the EPUN.

141. The Tribunal, having this sequence of events in mind, cannot but conclude that the Applicant also shares the responsibility for the time taken to consider her complaint. While she was in her own right to request a review, she cannot then

argue that she had nothing to do with period elapsed and attribute it exclusively to the Organization.

142. In the case at hand, the Tribunal is mindful that whenever new evidence was filed and a new review requested, a new deadline began. Such filings and further requests clearly reset the clock for the Organization to take a decision as it reinitiates the entire process.

143. Consequently, the Tribunal is of the view that the Organization cannot be held accountable for alleged delays since they are to be attributed to the Applicant's initiatives.

144. Finally, the Applicant claims compensation for moral damages alleging the lack of protection afforded to her and the delays in the handling of her request for protection from retaliation.

145. The Tribunal has already found that there was no undue delay in the procedure related to the Applicant's request for protection against retaliation. In addition, the Tribunal underlines that it found no evidence that the duty of care in relation to the Applicant was breached or that the Organization has failed to protect her from any retaliatory practises, as she has been working outside the reporting lines of her former supervisor.

146. Compensation for moral damages depends on three cumulative requisites: the elements of harm itself, an illegality and the nexus between the two.

147. In *Kebede* 2018-UNAT-874, the Appeals Tribunal has held the following:

> 20. It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien (footnote omitted).

148. If one of these three elements is not established, compensation cannot be awarded. The Tribunals' case law requires that the harm be shown to be directly caused by the administrative decision in question.

149. The Tribunal does not contest the Applicant's claim that she has suffered anxiety and stress related to the complaint she made to the Ethics Office back in 2016. In fact, the testimony of her partner supports this as he provides a very clear picture of the Applicant's health situation during this period.

150. However, granting a compensation for moral damages depends on a first and foremost requisite: an illegal decision of the Organization. Without said essential element, the Tribunal cannot grant the Applicant any compensation in this regard.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Teresa Bravo

Dated this 24th day of June 2020

Entered in the Register on this 24th day of June 2020

(*Signed*)

René M. Vargas M., Registrar, Geneva