



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/GVA/2019/041
UNDT/GVA/2019/042
UNDT/GVA/2019/043
UNDT/GVA/2019/044
Judgment No.: UNDT/2021/077
Date: 30 June 2021
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

DUPARC
EL GAOUZI
TOUALBIA
DREVON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Miriana Belhadj, LPAS, UNOG

Introduction

1. The Applicants, four staff members of the Security and Safety Service (“SSS”), United Nations Office at Geneva (“UNOG”), contest the decision of the former Director-General, UNOG, to take no further action on their complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the Chief, SSS, UNOG.

Facts and procedural history

2. On 4 April 2017, the Applicants emailed a memorandum dated 3 April 2017 to the Chief, SSS, UNOG, conveying their discontent with his decision to have a colleague, Mr. R, attend a Firearms Training Officer (“FTO”) training in Haiti on 10 April 2017, qualifying it as unfair and discriminatory. They further raised alleged breaches of ethics and integrity by Mr. R and the Chief, SSS, UNOG.

3. On 10 April 2017, having not received any reply from the Chief, SSS, UNOG, the Applicants forwarded their communication, together with its attachment, to the Director-General, UNOG, for his attention. In this email, they further clarified that the issues were pertinent to abuse of authority and discrimination.

4. By email dated 18 April 2017, the Director, Division of Administration (“DA”), UNOG, informed the Applicants *inter alia* that he had requested the Human Resources Legal Unit (“HRLU”), UNOG, to establish the facts so as to clarify the situation.

5. Following this, the Legal Team, Legal and Policy Advisory Section (“LPAS”), Human Resources Management Service (“HRMS”), UNOG, conducted a preliminary analysis of the matter and concluded that an investigation was warranted.

6. According to the Respondent, around September 2017, a staff representative, UNOG, who had been advising the Applicants, contacted the then Chief, Legal Team, LPAS, HRMS, UNOG (“Chief/LPAS”), to inform her that the Applicants would lodge an official complaint under ST/SGB/2008/5. It was thus agreed to put the case on hold pending receipt of the official complaint.

7. By email of 23 October 2017 to the Assistant Secretary-General for Human Resources (“ASG/HR”), the Applicants filed a complaint under ST/SGB/2008/5 against the Chief, SSS, UNOG. In their communication, they stated that the complaint under ST/SBG/2008/5 had intentionally not been addressed to the Director-General, UNOG, to avoid any conflict of interest. Further, they requested that an investigation be undertaken by investigators who speak French and who are not UNOG staff members. On 3 December 2017, the ASG/HR acknowledged receipt of the complaint.

8. By email of 16 January 2018, the Applicants submitted before the Office of Internal Oversight Services (“OIOS”) their ST/SGB/2008/5 complaint against the Chief, SSS, UNOG. On 17 January 2018, OIOS acknowledged receipt of the complaint.

9. On 24 January 2018, the Director, DA, UNOG, received a copy of the complaint filed in October 2017 and addressed to the ASG/HR.

10. By email of 2 February 2018, the Chief, LPAS, advised the Administrative Law Section (“ALS”), Office of Human Resources Management (“OHRM”), that the April 2017 communication from the Applicants was not a formal complaint under ST/SGB/2008/5. She outlined the actions taken by UNOG with respect to it and confirmed that it was only on 24 January 2018 that OHRM informed UNOG about the Applicants’ official complaint filed pursuant to ST/SGB/2008/5. She further indicated that:

Based on HRLU's assessment, it is considered that the matter would be best handled by the OIOS as the issues require a good understanding of technical security matters (how firearms training instruction is organized within UNDSS). In addition, the complainants have specifically asked that the matter be reviewed by investigators outside UNOG.

11. By email of 7 February 2018, ALS, OHRM, advised the Applicants that the complaint filed on 10 April 2017 had not been considered under ST/SGB/2008/5 and that they should officially submit their complaint to the Director-General, UNOG, copying the ASG/HR.

12. By email of 20 February 2018, OIOS referred the complaint filed by the Applicants to the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/MSPC"). OIOS indicated in its email, *inter alia*, that it considered the matter would be best handled by the Office of the USG/MSPC.

13. On 9 March 2018, the Applicants wrote to the USG/MSPC complaining about what they considered a lack of due diligence in the handling of their complaint.

14. Following internal discussions between the Office of the USG/MSPC, UNOG and OIOS on how to proceed, it was decided that UNOG would handle the matter.

15. By memorandum dated 31 July 2018, the Director, DA, UNOG, informed the Applicants that a fact-finding Panel ("the Panel") had been composed and would commence its work on 13 August 2018.

16. On 15 November 2018, the Panel submitted its report to the Director, DA, UNOG, concluding that "it [had] not been established that [the Chief, SSS, UNOG] displayed favouritism towards [Mr. R] or otherwise committed prohibited conduct as defined under ST/SGB/2008/5".

17. By memorandum dated 18 December 2018, the Director-General, UNOG, informed the Applicants that he concurred with the Panel's findings and, accordingly, he had decided to close the matter without any further action.

18. On 19 February 2019, the Applicants requested management evaluation of the above-mentioned decision dated 18 December 2018. By letter dated 18 April 2019, the USG/MSPC responded to said request by informing the Applicants that the Secretary-General had decided to uphold the contested decision.

19. On 17 July 2019, the Applicants filed four similar individual applications respectively, which were registered under Case Nos. UNDT/GVA/2019/041, 042, 043 and 044.

20. All four applications were served on the Respondent who submitted his reply on 21 August 2019, with all annexes therein filed on an *ex parte* basis.

21. By Order No. 19 (GVA/2021) of 2 February 2021, the Tribunal, *inter alia*, instructed the Respondent to submit, under seal, redacted versions of the annexes to his reply, which were shared with the Applicants.

22. On 26 April 2021, the Applicants filed a rejoinder pursuant to Order No. 59 (GVA/2021) of 25 February 2021.

23. By Order No. 85 (GVA/2021) of 10 May 2021, the Tribunal instructed the Respondent to submit a response to the Applicants' rejoinder by 24 May 2021.

24. By motion of 21 May 2021, the Respondent requested a two-week extension of time to file his response to the rejoinder. The motion was granted by Order No. 93 (GVA/2021) of 25 May 2021.

25. On 8 June 2021, the Respondent submitted his response to the Applicants' rejoinder.

26. By Order No. 106 (GVA/2021) of 10 June 2021, the Tribunal found that the matter could be determined on the papers without holding a hearing and ordered the parties to file their respective closing submission, which they did on 18 June 2021.

27. For the purpose of ensuring judicial efficiency, the Tribunal hereby decides to join the four applications and dispose them through a single judgment.

Parties' submissions

28. The Applicants' principal contentions are:

a. The review process of the complaint was fraught with irregularities and the procedure set out in ST/SGB/2008/5 was not complied with; specifically, the following:

i. HRLU carried out a fact-finding procedure following receipt of the complaint on 10 April 2017. It was improper to appoint another fact-finding Panel to investigate the same incidents in July 2018;

ii. While the Director, DA, UNOG, indicated on 17 April 2017 that the Applicants would be informed of the outcome of the fact-finding in due course, they only learned about the status of the complaint on 7 February 2018 when they were advised that the complaint addressed to the Director-General on 10 April 2017 was not considered under ST/SGB/2008/5; and

iii. The lack of clarity regarding the whole process followed is reflected by contradicting information received. The contested decision refers to a complaint of 20 October 2017 disregarding all previous complaints and communications.

b. There was an unjustified inordinate delay to conduct the initial review and to establish the Panel as it took the responsible officials 16 months to do so. During the process the Applicants were not made aware of the status of their complaint for more than a year. This compelled them to contact several entities that provided conflicting information. There was a lack of coordination between UNOG, OHRM and OIOS;

- c. The Panel is not fully competent to properly examine the allegations relating to firearms and HRLU appears to concur with this;
 - d. One member of the Panel had worked in UNOG management and, thus, he could not be considered independent;
 - e. The Panel exceeded its authority by making legal findings as to the propriety of the alleged offender's actions instead of limiting its work to asserting the facts;
 - f. The contested decision is based on significant factual misrepresentations of the evidence gathered by the Panel intended to downplay the actions of the Chief, SSS;
 - g. The investigation conducted into the complaint is deficient because irrelevant factors were considered whereas relevant factors were ignored; and
 - h. There are sufficient supported facts that point to misconduct.
29. The Respondent's principal contentions are:
- a. The Administration fulfilled its obligations under ST/SGB/2008/5 with respect to the review of the complaint and the investigation process;
 - b. The Applicants' memo dated 3 April 2017 was not a formal complaint under ST/SGB/2008/5;
 - c. An initial review of a complaint does not constitute an investigation;
 - d. The fact-finding exercise was carried out in an objective and impartial manner;
 - e. A member of the Panel cannot be deemed biased merely because he worked for an entity;

f. The alleged factual misrepresentations in the contested decision are unsubstantiated and mere speculation. The Panel's findings are supported by evidence and the alleged misrepresentations are addressed at different sections of the Panel's report;

g. The Panel did not exceed its authority by including legal determinations in its report. This is within the scope of its functions pursuant to sec. 5.18(a) of ST/SGB/2008/5;

h. The decision to close the matter was taken in accordance with sec. 5.18(a) of ST/SGB/2008/5 and based on the fact that the fact-finding investigation did not establish prohibited conduct;

i. The Applicants have no standing to demand the institution of disciplinary proceedings; and

j. The Applicants contributed to the delay in the treatment of their complaint by not following the processes as outlined in ST/SGB/2008/5.

Consideration

Scope of judicial review

30. Art. 2.1(a) of the Tribunal's Statute confers jurisdiction on the Tribunal to examine the lawfulness of administrative decisions. The administrative decision presently under scrutiny is the decision to take no further action following an investigation of the Applicants' complaint under ST/SGB/2008/5 against the Chief, SSS, UNOG.

31. In making the final decision on the Applicants' complaint, the then Director-General, UNOG, as the responsible official for their case, was bound by sec. 5.18 of ST/SGB/2008/5, which provides in its relevant part that:

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.

32. Since the investigation report concluded that no prohibited conduct was established, the consequent decision to close the matter without any further action was nothing more than regular compliance with sec. 5.18(a) of ST/SGB/2008/5. Moreover, pursuant to this provision, the Applicants were informed of the outcome by memorandum of 18 December 2018, which indeed contained an accurate summary of the Panel's findings.

33. Whilst the last stage of the decision-making process conforms to the applicable rules, the Tribunal may, nonetheless, "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" (see *Kostomarova* UNDT/2016/009, para. 44). In this connection, the Tribunal recalls that sec. 5.20 of ST/SGB/2008/5 provides as follows:

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.

34. Accordingly, in assessing the legality of the decision to take no further action, the Tribunal must examine whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process that ensued, as set out primarily in ST/SGB/2008/5 (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 82).

35. Before commencing this exercise, however, the Tribunal must recall that, in cases of harassment and abuse of authority, it is not vested with the authority to conduct a fresh investigation into the initial complaint (see *Messinger* 2011-UNAT-123, para. 27). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own judgment for that of the Administration (see, e.g., *Sanwidi* 2010-UNAT-084, para. 40). However, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered" (see *Sanwidi* 2010-UNAT-084, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80).

36. In view of the foregoing, the Tribunal will first examine the alleged procedural irregularities in the review of the complaint and in the conduct of the fact-finding investigation, before turning to examining the alleged errors in making the contested decision itself.

Alleged procedural irregularities in the review of the complaint

37. Having reviewed the parties' submissions regarding the review of the complaint and the evidence on record, the Tribunal is of the view that the Respondent has correctly established that only one fact-finding Panel was established in July 2018, and that the core issue in this respect is whether the complaint filed on 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5.

38. The Tribunal notes that on 10 April 2017, the Applicants sent an email to the Director-General, UNOG, alleging that the Chief, SSS, UNOG, committed prohibited conducts of discrimination and abuse of authority. To substantiate their allegations, they attached to their email six annexes, including one document entitled "Mémorandum designation injuste et discriminatoire".

39. The terms “discrimination” and “abuse of authority” constitute “prohibited conduct” within the meaning of sec. 1.5 of ST/SGB/2008/5. The Preamble of ST/SGB/2008/5 emphasizes that its purpose is to ensure all staff members of the Secretariat are “aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority” (see the Preamble of ST/SGB/2008/5).

40. ST/SGB/2008/5 sets forth the rules and procedures governing the review of and the investigation into complaints on discrimination and abuse of authority by a staff member. Therefore, the Tribunal finds that the treatment of the complaint of 10 April 2017 shall be governed by the rules and procedures set forth in ST/SGB/2008/5.

41. Turning to the issue of whether the complaint of 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5, the Tribunal recalls that sec. 5.11 and 5.13 of ST/SGB/2008/5 sets forth requirements of a formal complaint.

42. In particular, 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 and the aggrieved individual copy the written complaint to OHRM for monitoring purposes. Sec. 5.13 provides as follows:

The complaint or report should describe the alleged incident(s) of prohibited conduct in detail and any additional evidence and information relevant to the matter should be submitted. The complaint or report should include:

- (a) The name of the alleged offender;
- (b) Date(s) and location(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 if available;

(g) Date of submission and signature of the aggrieved individual or third party making the report.

43. The evidence on record shows that the complaint of 10 April 2017 contains the details listed in sec. 5.13 of the bulletin. Furthermore, it was addressed to the Director-General, UNOG, in conformity with the requirement that a written complaint be submitted to “the Head of department, office or mission” contained in sec. 5.11. However, the said complaint was not copied to OHRM for monitoring purposes, as required by sec. 5.11.

44. Nevertheless, the Tribunal is of the view that the failure to copy the written complaint to OHRM does not render a formal complaint void. Indeed, pursuant to sec. 5.11, copying the written complaint to OHRM is only for “monitoring purposes”.

45. Moreover, the failure to copy OHRM the written complaint can be easily remedied. Should the Administration consider the fulfilment of the obligation to copy the written complaint to OHRM for monitoring purposes as essential to treating a complaint formally, it should have “promptly” requested the Applicants to re-file the complaint in strict compliance with this requirement.

46. Instead, following the instruction of the Director, DA, UNOG, dated 18 April 2017, HRMS conducted a preliminary analysis of the complaint of 10 April 2017 and concluded that an investigation into the matter would be warranted. Thus, at an early stage, the Administration appears to have treated the complaint of 10 April 2017 as a formal complaint pursuant to sec. 5.14 of ST/SGB/2008/5, which provides in its relevant part that:

Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation.

47. Therefore, the Tribunal finds that the complaint of 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5.

48. However, on 7 February 2018, almost 10 months after the complaint was filed, the Administration informed the Applicants that the complaint addressed to the Director-General on 10 April 2017 was not considered as such under ST/SGB/2008/5.

49. Accordingly, the Tribunal finds that the Administration's review of the complaint of 10 April 2017 is inconsistent with ST/SGB/2008/5. In particular, the Administration acted inconsistently with sec. 3.2 of ST/SGB/2008/5 by failing to promptly address the complaint.

The alleged inordinate delay

50. Sec. 5.3 of ST/SGB/2008/5 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 disciplinary proceedings."

51. 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.

52. Moreover, sec. 5.17 of ST/SGB/2008/5 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)

53. It follows that the Administration must fulfil its obligations to take prompt and concrete action upon receipt of a complaint regarding prohibited conduct, as established in sec. 5.3, to promptly review, assess and, if necessary, appoint an Investigation Panel (sec. 5.14), and to submit the investigation report, normally within three months from the date of the submission of the formal complaint (sec. 5.17). Notably, the three-month time-limit referred to in sec. 5.17 applies to the entire review and investigation processes, which runs from the filing of a formal complaint to the submission of an investigation report to the responsible official.

54. In the case at hand, the Respondent did not dispute that the complaint filed on 23 October 2017 is a formal complaint under ST/SGB/2008/5. Having compared the complaints filed on 10 April 2017 and 23 October 2017, the Tribunal notes that the allegations contained therein are essentially the same. Recalling its finding that the complaint of 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5, the Tribunal thus considers 10 April 2017 as the filing date of the formal complaint.

55. Taking the date of 10 April 2017 as a starting point, over 19 months elapsed until the investigation report was submitted to the responsible official on 15 November 2018.

56. The Tribunal notes that the Respondent seeks to justify the delay by claiming that in September 2017, a staff representative, on behalf of the Applicants, informed the then Chief/ LPAS, that a formal complaint under the ST/SGB/2008/5 would be lodged. However, he did not provide any evidence to substantiate this contention. In any event, the almost five months that elapsed from the date of the complaint (10 April 2017) to September 2017 cannot be considered as a reasonable period to promptly review a complaint in accordance with sec. 5.3 and 5.14 of ST/SGB/2008/5. This five-month reviewing period certainly exceeds the three-month time-limit prescribed by sec. 5.17 that applies to the entire review and investigation processes.

57. Even assuming that the complaint of 10 April 2017 could not be considered as a formal complaint, if one counts from the date of 23 October 2017 when the complaint was addressed to the ASG/HR, it took around 13 months for the Administration to review and investigate the complaint. If one counts from the date of 24 January 2018, when UNOG received a copy of the complaint filed in October 2017, it still took around 10 months for the Administration to review and investigate the complaint.

58. In this respect, the Respondent seeks to attribute the delay to the Applicants for having involved multiple offices. The evidence on record shows that it was only on 7 February 2018 that the Applicants were notified that the complaint filed on 10 April 2017 had not been considered under ST/SGB/2008/5. The Tribunal is thus persuaded by the Applicants' argument that they approached other entities within the Organization when faced with inaction on the part of UNOG. Moreover, the Tribunal wishes to highlight that the Administration should not rely upon the delay caused by internal coordination to justify the procedural delay.

59. Therefore, in either case, the total duration of the review and investigation process is far from satisfying the promptness requirements of sec. 5.3 and 5.14 of ST/SGB/2008/5, and certainly exceeds, by two to five times, the three-month timeframe in sec. 5.17.

60. Accordingly, the Tribunal finds that the Administration incurred unacceptable delays in processing the Applicants' complaint, with no or no reasonable explanation for them, in violation of secs. 5.3, 5.14 and 5.17 of ST/SGB/2008/5.

Alleged errors in the conduct of the investigation

61. In the present case, the Applicants alleged that the Chief, SSS, UNOG, committed prohibited conduct such as discrimination and abuse of authority by having unduly favoured Mr. R when selecting him to participate in training courses, reassigning him to a position in the Group for Investigations and Special Operations ("GEOS") in SSS, UNOG, and with regards to irregularities during a certification exam.

62. The definitions of "discrimination" and "abuse of authority" can be found in sec. 1 of ST/SGB/2008/5. Sec. 1.1 provides that:

Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of **persons similarly situated**, or may manifest itself through harassment or abuse of authority. (Emphasis added)

63. Sec. 1.4 of ST/SGB/2008/5 defines the term "abuse of authority" as follows:

Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence **the career or employment conditions of another**, including, but not limited to, appointment, **assignment**, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. **Discrimination** and harassment, including sexual harassment, **are particularly serious when accompanied by abuse of authority**. (Emphasis added)

64. Secs. 5.15 to 5.17 of ST/SGB/2008/5 sets forth the obligations of the Panel.

In particular, sec. 5.16 provides as follows:

The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and **any other individuals who may have relevant information** about the conduct alleged. (Emphasis added)

65. Sec. 5.17 of the same bulletin provides in its relevant part that:

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**. (Emphasis added)

66. Accordingly, the Panel is obliged to interview any individuals who may have relevant information about and provide any documents or records relevant to the alleged discrimination and abuse of authority.

67. In determining whether the Panel fulfilled its obligations in investigating the complaint, the Tribunal considers that the perusal of the Panel's written record is an appropriate starting point.

68. The Investigation Report concludes in its relevant part that:

The Panel ... reviewed the procedures in place in SSS/UNOG for the selection of candidates to participate in training courses and for reassignment within SSS/UNOG. While it is clearly recommendable that such procedures should be as transparent, objective and fair as possible, the Panel does not find that there is an obligation to ensure that every such decision is taken after a call for an expression of interest by candidates. The Chief and the Management of the Service must be able to exercise their managerial discretion in order to take the decisions that are necessary for the Service to fulfil its functions.

...

The Panel has carefully reviewed all of the evidence relating to decisions taken in relation to training or reassignments and is satisfied that they do not, taken singly or cumulatively, demonstrate favouritism on the part of [the Chief, SSS, UNOG] for [Mr. R]. Instead, the decisions were either taken or requested by others and/or clearly justifiable on the facts as established. The mere fact that another person could possibly have been sent does not establish favouritism.

...

[With respect to the alleged cheating,] [t]he Panel finds that [the Chief, SSS, UNOG] believed that he had addressed the matter, by finding out that it was common for officers to have access to past tests.

...

In conclusion, the Panel finds that it has not been established that [Mr. R] cheated during the Use of Force Policy test. It is satisfied that [the Chief, SSS, UNOG] did think that he had looked into the matter of whether [Mr. R] had the exam as he did not understand that there was a further allegation that he had used that past exam to cheat during the FTO course.

69. In reaching these conclusions, the Tribunal is concerned that the Panel failed to consider relevant information while considering irrelevant factors.

Selection of Mr. R to participate in various training courses

70. First of all, the Tribunal notes that in addressing the allegations related to discrimination and abuse of authority, the Panel should have considered whether the repeated selection of Mr. R to participate in various training courses affected the career or employment conditions of one or more persons “similarly situated” in accordance with sec. 1 of ST/SGB/2008/5. Instead, it concluded that “[t]he mere fact that another person could possibly have been sent does not establish favouritism” without looking into the treatment of other staff members who may be equally qualified.

71. Also troublesome, the Chief, SSS, UNOG, on numerous occasions, deviated from the established procedure—namely a call for applications/expression of interests containing clearly defined selection criteria—when selecting Mr. R to participate in training. In determining whether Mr. R had been unduly favoured, the Panel should have examined, in the relevant period, whether and, if so, how often, the Chief, SSS, UNOG, derogated from the established procedure to the benefit of any staff member other than Mr. R.

72. Second, the Panel failed to consider the limits of the managerial discretion in the selection of a staff member to participate in training courses. Indeed, the manager’s discretion is not unbounded and must be exercised in accordance with the applicable legal framework. In this respect, the Tribunal notes that sec. 2 of ST/AI/1997/4 (Upgrading of substantive and technical skills), entitled “Delegation of authority”, provides that:

Responsibility for managing the resources allocated to each department or office under the provisions of the present instruction is hereby delegated to the heads of departments and offices concerned.

73. Sec. 2.10(b) of ST/SGB/2009/9 (Learning and development policy) further provides that: “Full responsibility for the management of [the funds for learning] is delegated directly to the heads of department/office who are responsible for equitable distribution of the funds”.

74. Therefore, the Chief, SSS, UNOG, has the authority to make the final decision regarding the selection of a staff member to participate in training courses. The fact that the decisions were taken or requested by others might not be relevant in assessing whether the Chief, SSS, UNOG, unduly favoured Mr. R in designating him to participate in various training courses. What is relevant is whether the Chief, SSS, UNOG, has distributed available resources among all staff members in an equitable manner. However, the Panel failed to consider this factor.

75. Moreover, the use of financial resources for training should be maximized, and the funds should be allocated in a fair and reasonable manner. This is supported by sec. 3.2 of ST/AI/1997/4, which provides that when various training plans reveal common needs, centrally organized training programmes may be proposed to maximize use of resources. With respect to the authorization of Mr. R to participate in the FTO training in Haiti, the Panel failed to weigh the decision to send Mr. R, alone, to a training in Haiti against the recommendation by the then Officer-in-Charge of the Training Unit, SSS, UNOG, to bring a trainer to Geneva with a similar budget. The Panel should have considered why the funds were allocated for Mr. R's training alone instead of being used for a group of 10 FTO officers, and whether this allocation was fair and reasonable.

Selection of Mr. R for a position in GEOS

76. Turning to the selection of Mr. R for a position in GEOS, the Tribunal is of the view that the Panel failed to consider that the managerial discretion in reaching a staff selection decision should be exercised in accordance with the applicable legal framework. In this respect, staff regulation 4.3 makes it clear that:

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

77. Indeed, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in selecting a staff member for a position (see 2018-UNAT-847 *Timothy*, para. 25). As the Panel noted, procedures in this respect should be as transparent, objective and fair as possible.

78. Thus, having found that the selection of Mr. R to GEOS again did not follow the established general procedure, i.e., a call for expressions of interest, the Panel should have inquired whether there were cogent reasons for the Chief, SSS, UNOG, to deviate from this procedure and whether it was fair to do so. Instead, the Panel

concluded that there was no obligation to ensure that every such decision is taken after a call for an expression of interest by candidates.

79. Moreover, in addressing alleged discrimination and abuse of authority in staff selection, the Panel should have examined whether there are other “similarly situated” or equally qualified staff members. Instead, it relied upon the evidence of the alleged offender that Mr. R has unique experience and skills on close protection.

Action taken by the Chief, SSS, UNOG, in alleged cheating of Mr. R

80. With respect to the alleged cheating, the Tribunal recalls that ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) sets forth rules and procedures about reporting and processing unsatisfactory conduct such as cheating. Sec. 4.1 of ST/AI/2017/1 provides that:

Pursuant to staff rule 1.2 (c), staff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

81. Sec. 4.6 of ST/AI/2017/1 provides that:

The responsible official shall forward the information of unsatisfactory conduct received to OIOS and should, where possible, acknowledge receipt of such information.

82. Sec. 5.1 of the same administrative instruction provides that:

OIOS retains the ultimate authority to decide which cases it will consider and shall determine whether the information of unsatisfactory conduct received merits any action, and if so, is better handled by the responsible official or by OIOS. OIOS may at any time decide that a case is better handled by it.

83. It follows that the responsible official has the obligation to forward the information of unsatisfactory conduct received to OIOS, which retains the ultimate authority to determine whether the information of unsatisfactory conduct received merits any action. Notably, pursuant to sec. 2.1(a), the responsible official in the present case is the Chief, SSS, UNOG.

84. Accordingly, the Panel should have considered whether and when the Chief, SSS, UNOG, received the information of the alleged cheating and whether he took appropriate action upon receipt of the allegation, namely, forwarding it to OIOS, in accordance with the applicable law. Instead, the Panel found satisfactory the assertion by the Chief, SSS, UNOG, that he believed that he had addressed the matter by finding out that it was common for officers to have access to past tests.

85. Based on the exhaustive review of the investigation records, the Tribunal cannot but conclude that the Investigation Panel unreasonably failed to investigate and determine the relevant issues and thus failed to give proper effect to the purpose and prescripts of ST/SGB/2008/5.

86. In light of the foregoing, the Tribunal finds that these serious deficiencies raise questions about the appearance of the impartiality of the investigation and are thus sufficient to make the resulting report unreliable for the purpose of making a final decision based on it. Consequently, the Tribunal considers it unnecessary to address the Applicants' claims related to, *inter alia*, the independence, skills, and competence of the Panel.

Conclusion on the lawfulness of the contested decision

87. Having found that:

- a. The Administration's review of the complaint of 10 April 2017 is inconsistent with ST/SGB/2008/5. In particular, that the Administration acted inconsistently with sec. 3.2 of ST/SGB/2008/5 by failing to promptly address the complaint;

b. The Administration incurred unacceptable delays in processing the Applicants' complaint, with no or no reasonable explanation for them, in violation of secs. 5.3, 5.14 and 5.17 of ST/SGB/2008/5; and

c. The Investigation Panel unreasonably failed to investigate and determine the relevant issues and thus failed to give proper effect to the purpose and prescripts of ST/SGB/2008/5,

hence, the Tribunal concludes that the contested decision to take no further action on the Applicants' complaint was unjustifiable and unlawful.

Remedies

88. Art. 10.5 of the Tribunal's Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, delineates the Tribunal's powers regarding the award of remedies, providing that:

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.

89. Having found that the procedure leading to the impugned decision to take no further action on the Applicants' complaint was marred with a number of fundamental flaws, and recalling 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 justice in the present case. Accordingly, the contested decision must be rescinded, and the investigation must be set aside.

90. Recalling its finding that the Investigation Report has serious deficiencies that make it unreliable, the Tribunal remands the Applicants' complaint back to the Director-General, UNOG, to have the complaint properly addressed in accordance with the applicable legal framework, in particular, the rules and procedures pointed out by the Tribunal. The Director-General, UNOG, shall establish a new fact-finding panel in accordance with ST/SGB/2008/5. The members of the Panel who previously handled the complaint shall be recused from dealing with the remanded complaint.

91. With regard to the alleged harm, the Tribunal observes that the Applicants did not adduce any evidence of the alleged harm as required under art. 10.5(b) of its Statute. Indeed, "compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred" (see *Kallon* 2017-UNAT-742, para. 67). Therefore, the Tribunal rejects the Applicants' request for compensation for delay, unfair/discriminatory treatment, and damage to career prospects.

Conclusion

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

- a. The contested decision is rescinded and the investigation is set aside;

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- b. The Applicants' complaint is remanded to the Director-General, UNOG, for a proper treatment pursuant to the applicable rules and procedures pointed out by the Tribunal;
- c. The members of the Panel who previously handled the Applicants' complaint shall be recused from dealing with the remanded complaint;
- d. Considering the time that has elapsed, the re-examination of the Applicants' complaint must be completed within three months from the date when this Judgment becomes final and executable; and
- e. All other pleas are rejected.

(Signed)

Judge Teresa Bravo

Dated this 30th day of June 2021

Entered in the Register on this 30th day of June 2021

(Signed)

René M. Vargas M., Registrar, Geneva