



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

DUPARC

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Jérôme Blanchard, LPAS, UNOG

## **Introduction**

1. The Applicant, a staff member of the Security and Safety Service (“SSS”), United Nations Office at Geneva (“UNOG”), contests the decision of the then Director-General, UNOG, to close his complaint of prohibited conduct under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the Chief, SSS, UNOG, with managerial action pursuant to sec. 5.18 (b) of ST/SGB/2008/5.

## **Facts**

2. On 26 December 2017, the Applicant filed a complaint against the Chief, SSS, UNOG, pursuant to ST/SGB/2008/5, reporting workplace harassment, discrimination, and abuse of authority. In support of his complaint, the Applicant referred to numerous incidents that allegedly took place between 2012 and 2016. The Applicant was also one of several security officers who had filed a joint complaint dated 23 October 2017 against the Chief, SSS, UNOG, based on elements other than those in the Applicant’s 26 December 2017 complaint.

3. On 30 January 2018, the Office of Internal Oversight Services (“OIOS”), who was copied on the Applicant’s complaint, referred the case to the then Director-General, UNOG, for assessment and appropriate action.

4. On 17 July 2018, the Director, Division of Administration (“DA”), UNOG, appointed Ms. C. W. and Mr. P. D. as panel members to conduct a fact-finding investigation pursuant to ST/SGB/2008/5.

5. By memorandum dated 31 July 2018, the Director, DA, UNOG, informed the Applicant of the constitution of the investigation panel, which was to commence its work on 13 August 2018.

6. On 6 August 2018, the investigation panel contacted the Applicant to inform him of missing annexes to his complaint.

7. On 13 August 2018, the Applicant had a first interview with the investigation panel. He was further interviewed on 15 and 17 August 2018.

8. On 16 August 2018, in response to a request from the investigation panel, the Applicant provided the contact details of a witness, Mr. A. G.

9. On 15 November 2018, the investigation panel submitted its report to the Director, DA, UNOG.

10. By memorandum dated 3 January 2019, which the Applicant alleges to have received on 10 January 2019, the then Director-General, UNOG, provided the Applicant with a summary of the investigation panel's findings. He also informed him that as none of the Applicant's allegations were established, with the exception of the decision to impose a weapon restriction on him, there were no grounds to justify a referral for disciplinary action. Concerning the established allegation, the then Director-General conveyed to the Applicant that he had taken managerial action and that, consequently, he considered the case closed.

11. On 11 March 2019, the Applicant requested management evaluation concerning the treatment of his complaint and the decision not to refer the matter for disciplinary action.

12. By letter dated 8 May 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance, responded to said request by informing the Applicant that the Secretary-General had decided to uphold the contested decision.

### **Procedural history**

13. On 22 July 2019, the Applicant filed the application referred to in para. 1 above.

14. On 19 August 2019, the Respondent submitted his reply with two annexes filed on an *ex parte* basis:

- a. Annex 3: investigation report; and
- b. Annex 5: a memorandum dated 3 January 2019 from the then Director- General, UNOG, to the Chief, SSS, UNOG, providing him with a summary of the investigation panel’s findings and informing him of the Administration’s conclusion.

15. By Order No. 76 (GVA/2021) of 19 April 2021, the Tribunal ordered *inter alia*:

- a. The Respondent to redact annexes 3 and 5 to his reply and refile the redacted documents on an under seal basis by 26 April 2021;
- b. The translation from English to French of the redacted investigation report; and
- c. The Applicant to file his rejoinder within 10 days of receipt of the translated investigation report.

16. On 3 June 2021, the Applicant received the translated investigation report.

17. On 8 June 2021, the Applicant filed a motion advising the Tribunal that he had an accident at work on 25 May 2021 and, accordingly, requesting an extension of the deadline until 10 days after his return to work from sick leave.

18. By Order No. 105 (GVA/2021) of 9 June 2021, the Tribunal granted the motion in part and instructed the Applicant to file his rejoinder by 15 July 2021.

19. Upon the Applicant’s further requests dated 7 July 2021, 28 July 2021, 1 September 2021 and 6 October 2021, the Tribunal extended the time to file a rejoinder until 8 November 2021.

20. By motion dated 2 November 2021, the Applicant advised the Tribunal that his sick leave had been extended until 30 November 2021 and requested a further extension of time to file his rejoinder. The Applicant also submitted that his treating physicians were unable to indicate when he would be fit to return to work.

21. By Order No. 161 (GVA/2021) of 3 November 2021, the Tribunal ordered, *inter alia*, that the proceedings before the Tribunal in Case No. UNDT/GVA/2019/046 be suspended until 3 February 2022, or the date the Applicant's treating physician considers him fit to work on his rejoinder, whichever is earlier, and that should the Applicant's sick leave be extended beyond 3 February 2022, he shall promptly file documentary evidence of such extension.

22. On 3 February 2022, the Applicant filed a submission pursuant to Order No. 161 (GVA/2021), requesting an extension of one month for the filing of his rejoinder.

23. On the same day, the Tribunal notified the parties that the Applicant's request had been granted and instructed him to file his rejoinder by 4 March 2022.

24. On 2 March 2022, the Applicant filed another motion for extension of time requesting an additional two weeks to file his rejoinder.

25. By Order No. 30 (GVA/2022) of 2 March 2022, the Tribunal granted the Applicant's motion and instructed him to file his rejoinder by 18 March 2022.

26. On 18 March 2022, the Applicant filed his rejoinder pursuant to Order No. 76 (GVA/2021).

27. By Order No. 44 (GVA/2022) of 23 March 2022, the Tribunal instructed the Respondent to file his comments on the Applicant's rejoinder by 4 April 2022.

28. By Order No. 47 (GVA/2022) of 28 March 2022, the Tribunal convoked the parties to a case management discussion ("CMD").

29. Further to a request for an extension of time, the Respondent filed his comments on the Applicant's rejoinder on 8 April 2022.

30. The CMD took place, as scheduled, on 12 April 2022 with Counsel for each party and the Applicant present.

31. By Order No. 50 (GVA/2022) of 12 April 2022, the Tribunal ordered that:

- a. By 22 April 2022, the Respondent file documentary evidence related to:
  - i. the Administration's 2015 investigation into the irregularities in the recruitment process related to Temporary Job Opening 14/120 ("TJO 14/120");
  - ii. the Applicant's performance document for the 2015-2016 cycle; and
  - iii. the process regarding recruitment in G-4 selections.
- b. By 6 May 2022, the Applicant file his comments, if any, in relation to the documentary evidence filed by the Respondent; and
- c. By 18 May 2022, the parties file closing submissions.

32. On 21 April 2022, the Respondent filed the additional documentary evidence listed in para. 31.a above on an *ex parte* basis, including:

- a. Annex I: The 2015 investigation report into the TJO 14/120;
- b. Annex VI: Communications between the Human Resources Management Service ("HRMS"), UNOG, the Applicant's First Reporting Officer ("FRO") and Second Reporting Officer ("SRO") regarding his performance appraisal rating for 2015 to 2016 cycle;
- c. Annex IX: Interview statement of Mr. R. T. before the investigation panel; and
- d. Annexes X and XI: Documentary evidence in relation to a 2012 incident with a UN electric water pump.

33. By Order No. 56 (GVA/2022) of 26 April 2022, the Tribunal instructed the Respondent to redact Annexes VI, X and XI to his submission of 21 April 2022, and refile the redacted documents on an under seal basis. He did so on 28 April 2022.

34. On 6 May 2022, the Applicant filed his comments in relation to the documentary evidence filed by the Respondent pursuant to Order No. 50 (GVA/2022).

35. On 19 May 2022, the parties filed a joint motion for extension of time, requesting an additional week to file closing submissions by 26 May 2022.

36. On the same day, the Tribunal granted the parties' motion.

37. On 26 May 2022, both parties filed their respective closing submission.

## **Consideration**

### *Scope and standard of judicial review*

38. 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 close the Applicant's complaint of prohibited conduct under ST/SGB/2008/5 with managerial action against the Chief, SSS, UNOG.

39. In making the final decision on the Applicant's complaint, the then Director-General, UNOG, as the responsible official for the 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:

...

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member

concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken[.]

40. The investigation report concluded that none of the allegations had been established except for the decision to impose a weapon restriction on the Applicant. The then Director -General, UNOG, further found that the established facts were insufficient to justify referral for disciplinary action. Nevertheless, he considered that the incident of weapon restriction warranted managerial action against the Chief, SSS, UNOG.

41. The Tribunal recalls that the instigation of disciplinary charges against a staff member is the privilege of the Organization, and it is not legally possible to compel the Administration to take disciplinary action (see, e.g., *Abboud* 2010-UNAT-100, para. 34; *Benfield-Laporte* 2015-UNAT-505, para. 37; *Oummih* 2015-UNAT-518/Corr.1, para. 31).

42. As such, the decision to close the matter with managerial action was nothing more than regular compliance with sec. 5.18(b) of ST/SGB/2008/5. Moreover, pursuant to this provision, the Applicant was informed of the outcome by memorandum of 3 January 2019, which indeed contained an accurate summary of the investigation panel's findings.

43. 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.

44. Accordingly, in assessing the legality of the decision to close the Applicant's complaint with managerial action, the Tribunal "must focus on whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process further to it, as set out primarily in ST/SGB/2008/5" (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 82).

45. 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 Secretary-General (see, e.g., *Sanwidi* 2010-UNAT-084, para. 40). Indeed, as the Appeals Tribunal held in *Sanwidi*:

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

46. Nevertheless, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, 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). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see *Belkhabbaz* 2018-UNAT-873, para. 80).

47. In view of the foregoing, and having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the investigation panel was properly constituted;
- b. Whether the investigation was properly conducted; and
- c. Whether the Applicant is entitled to any remedies.

*Whether the investigation panel was properly constituted*

48. The Applicant submits that there was a conflict of interest in the constitution of the investigation panel on the part of the Director, DA, UNOG, the Respondent's Counsel, and the panel member Mr. P. D.

49. In this respect, the Tribunal notes that as governed by staff regulation 1.2(m) "Basic rights and obligations of staff":

[a] conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

50. Art. 27.1 of the Tribunal's Rules of Procedure defines the term "conflict of interest" as including "any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her". Art. 27.2 further provides that:

A conflict of interest arises where a case assigned to a judge involves any of the following:

- (a) A person with whom the judge has a personal, familiar or professional relationship;
- (b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

51. The Appeals Tribunal's Rules of Procedure contain the same language on this matter. Although relating to judges, these provisions can be useful to enlighten the Tribunal's interpretation of the term "conflict of interest" within the Organization (see *Wilson* 2019-UNAT-961, para. 19).

52. Moreover, the test for determining whether a person is biased or not is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that said person is biased (see, e.g., *Masri* 2016-UNAT-626, para. 21).

Potential conflict of interest by the Director, DA, UNOG

53. In relation to the Director, DA, UNOG, the Applicant submits that it was a conflict of interest for him to act as the responsible official in a complaint where he was a material witness, and that evidence that emerged during the case aggravates said conflict of interest.

54. To support his claim, the Applicant specifically argues that it was the Director, DA, UNOG, who chose not to order an investigation of the incident with the electric pump and thus it was in his interest that the investigation panel do not open the matter in a manner that might have demonstrated the inappropriate nature of his original decision. The Applicant further contends that a panel considering evidence from the individual for whom it is investigating a complaint will inevitably be primed to attach more weight to that authority's evidence than it might in relation to any other witness of fact.

55. In this respect, the Tribunal notes that the Administrative Tribunal of the International Labour Organization ("ILOAT") has consistently held that:

[i]t is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice. Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken” (see ILOAT Judgment No. 3958, C. (No. 3) (2017), para. 11; see also ILOAT Judgment No. 179, In re *Varnet* (1971), para. 1).

56. It follows that absent any explicit provision in the Regulations and Rules, the officials concerned are bound to withdraw “if they have already expressed their views on the issue in such a way as to cast doubt on their impartiality or if for other reasons they may be open to suspicion of partiality” (see ILOAT Judgment re *Varnet*, para. 1).

57. Turning to the present case, the evidence on record shows that the Director, DA, UNOG, played an instrumental role in constituting the investigation panel and acted on behalf of the then Director-General, UNOG. Indeed, the memorandum dated 31 July 2018 informing the Applicant of the panel composition derives from the Director, DA, UNOG, and was signed by him. It also advised the Applicant to refer to the Human Resources Legal Unit (“HRLU”) in case of doubt about the panel composition. Moreover, the investigation report clearly shows that the Director, DA, UNOG, appointed Ms. C. W. and Mr. P. D. as panel members on 17 July 2018, which was further confirmed in the Respondent’s reply.

58. Meanwhile, a note for the file dated 11 November 2012 shows that the Director, DA, UNOG, decided not to take any further action against the Chief, SSS, UNOG, in relation to a 2012 incident with the electric pump that is contained in the Applicant's complaint. As such, the Director, DA, UNOG, had already expressed his views on one incident to be investigated by the investigation panel. A reasonable person may perceive that the Director, DA, UNOG, may have had a biased view on the outcome of said investigation. Indeed, an outside observer could consider that it would be in the interest of the Director, DA, UNOG, if the investigation panel did not make a finding that might have showed any inappropriateness in his original decision.

59. In this respect, the Tribunal further recalls that “[a] conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest” (see ILOAT Judgment No. 3958, para. 11).

60. Therefore, a conflict of interest arises in the present case. Indeed, it is a conflict of interest to have a material witness to a complaint of prohibited conduct presiding over the constitution of the panel and providing advice on the process. Considering his previous assessment of the behaviour of the Chief, SSS, UNOG, in the case of the water pump, it would have been advisable that the Director, DA, UNOG, refrain from performing any decision-making role in the investigation procedure so as to not compromise the integrity of the investigation or raise any perception of bias.

61. Accordingly, the Tribunal finds the constitution of the investigation panel to be procedurally flawed. It was inappropriate for the Director, DA, UNOG, to play an instrumental role in the constitution of the investigation panel considering that he was the decision-maker in relation to one alleged incident, was a material witness in the investigation and was highly likely to be interviewed by the investigation panel.

Potential conflict of interest by the Respondent's Counsel

62. The Applicant submits that the Respondent's Counsel provided legal advice and support to the investigation panel, whereas he was also a witness in relation to significant elements of the investigation. He specifically argues that the Respondent's Counsel provided evidence on the decision to downgrade the rating of the Applicant's e-PAS and was involved in the initial investigation regarding the recruitment process for TJO 14/120 and, as such, his evidence to the investigation panel would have tended to support that the complaint was not well-founded.

63. First, the Tribunal wishes to point out that the Respondent's Counsel serving as a witness in the investigation is a natural consequence of his previous involvement in certain incidents raised in the complaint. Indeed, sec. 5.16 of ST/SGB/2008/5 requires the investigation panel to interview any individuals who may have relevant information about the conduct alleged. As a staff member, the Respondent's Counsel is obliged to cooperate with the investigation panel by serving as a witness.

64. Second, the Tribunal finds no evidence to suggest that the Respondent's Counsel provided legal advice and support to the investigation panel. The Applicant's allegation in this respect is purely speculative, and not supported by any concrete evidence.

65. Moreover, there is no indication that the Respondent's Counsel had any role or interference in the findings made by the investigation panel. The Respondent's Counsel is not a decision-maker regarding the panel composition either. There is also no evidence showing that he had any personal interest in the outcome of the investigation.

66. Consequently, the Tribunal finds unsubstantiated the alleged potential conflict of interest by the Respondent's Counsel.

Potential conflict of interest by the panel member, Mr. P. D.

67. The Applicant submits that Mr. P. D.'s previous position as a senior member of the UNOG administration represents a conflict of interest likely to cause him to give more weight to the evidence of those witnesses from UNOG administration.

68. In support of his claim, the Applicant argues that several witnesses from UNOG administration gave evidence to the investigation panel, and the investigation panel chose to find no misconduct in relation to allegations regarding recruitment against TJO 14/120, abuse of authority in deciding to downgrade an e-PAS rating, and matters relating to the use of a water pump, as well as imposition of firearms restriction, in part due to the assertion that actions of the UNOG administration had resolved these matters.

69. The Tribunal notes that as a fact finder, a panel member shall be an impartial examiner designated to appraise the facts underlying a particular matter.<sup>1</sup> Under secs. 5.16 to 5.18 of ST/SGB/2008/5, the investigation panel shall prepare a detailed investigation report containing its findings, which serves as the basis for the responsible official's final decision. As such, the Tribunal considers that art. 27 of its Rules of Procedure governing the Judges' "conflict of interest" could be applied, *mutatis mutandis*, to the panel members.

70. Accordingly, a conflict of interest arises where a matter under investigation by a panel member involves circumstances that would make it appear to a reasonable and impartial observer that his/her participation in the investigation of the matter could be inappropriate.

71. Turning to the present case, the Tribunal first notes that the memorandum dated 31 July 2018 refers to Mr. P. D. as a "retiree, former Administrative Officer, United Nations Register of Damage, United Nations Office at Vienna". In this respect, the Tribunal notes that sec. 5.14 of ST/SGB/2008/5 mandated the responsible official to consider first appointing staff members working in "the department, office or mission concerned who have been trained in investigating

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<sup>1</sup> See "fact finder", the Merriam-Webster Dictionary, at <https://www.merriam-webster.com/dictionary/fact%20finder>.

allegations of prohibited conduct”, before considering appointing retired staff members from the Office of Human Resources Management (“OHRM”) roster (see, e.g., *Oummih* 2015-UNAT-518/Corr.1, para. 36; *Belkhabbaz* UNDT/2018/016/Corr.1, para. 96).

72. It was “incumbent upon the Organization to establish that it was ‘impossible’ to find staff members in the department, office or mission who could undertake the investigation before considering selecting individuals from the roster maintained by OHRM” (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 97). There is, however, no evidence in the present case that the Director, DA, UNOG, attempted first to select individuals from “the department, office or mission concerned” or that any consideration was given to the appointment of current staff members.

73. Furthermore, the Tribunal notes that Mr. P. D. was also a senior member of the UNOG administration and, as such, he potentially had a familiar or professional relationship with some witnesses such as the Director, DA, UNOG, who also played an instrumental role in the constitution of the investigation panel. Such relevant information was omitted from Mr. P. D.’s professional biography provided to the Applicant upon appointment of the investigation panel. Consequently, the Applicant could not have made any objection to Mr. P. D.’s membership in the investigation panel before it investigated the matter.

74. Accordingly, the Tribunal finds that the above-mentioned factors cumulatively gave rise to a reasonable perception of a conflict of interest on the part of Mr. P. D. as a panel member.

75. In this respect, the Tribunal recalls that “[a]lthough the investigating body is not a judicial entity, and merely finds facts, the integrity of the entire process depends upon not only the absence of bias or conflict of interest but the absence of any reasonable apprehension of bias and self-interest” (see *Messinger* UNDT/2010/116, para. 48).

76. In light of the above, the Tribunal concludes that the investigation panel was neither properly constituted nor properly composed.

*Whether the investigation was properly conducted*

77. In the present case, the Applicant alleged that the Chief, SSS, UNOG, engaged in prohibited conduct such as abuse of authority, harassment and discrimination in relation to several incidents that allegedly occurred between 2012 and 2016.

78. Discrimination, harassment and abuse of authority constitute “prohibited conduct” within the meaning of sec. 1.5 of ST/SGB/2008/5. Their definitions 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)

79. Sec. 1.2 provides that:

Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

80. 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)

81. Secs. 5.15 to 5.17 of ST/SGB/2008/5 set forth the obligations of the investigation 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)

82. Sec. 5.17 of the same bulletin provides 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**. 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)

83. Accordingly, the investigation panel is obliged to seek to interview any individuals who may have relevant information about the alleged prohibited conduct and gather any relevant documents or records.

84. In determining whether the investigation panel fulfilled its obligations in investigating the complaint, the Tribunal considers the investigation panel's written record to be an appropriate basis.

Alleged failure to interview relevant witnesses

85. The Applicant submits that although the investigation panel was provided with the names and contact details of several relevant witnesses, it failed to interview them. He specifically argues that:

a. Mr. A. G. was a key witness in relation to the weapons restriction incident;

b. Ms. L. S. could provide evidence relevant to the way CCTV was used to monitor staff members and similarly provide evidence regarding acts of harassment and abuse of authority she had suffered from the Chief, SSS, UNOG;

c. Some other witnesses could also provide similar evidence regarding acts of harassment and abuse of authority by the Chief, SSS, UNOG; and

d. Mr. S. D. M. specifically advised the Applicant that the Chief, SSS, UNOG, did not want to allow his temporary promotion to G-6.

86. In this respect, the Tribunal recognizes that “the panel has a wide discretion in selecting witnesses” (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 130). However, this discretion is not unfettered, and the investigation panel is directed to interview any individual who may have relevant information about the conduct alleged pursuant to sec. 5.16 of ST/SGB/2008/5. “The applicable criteria for determining if a potential witness should be heard is the relevance of the information he or she may provide” (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 130).

*Witness Mr. A. G.*

87. While it is not disputed that Mr. A. G. possessed relevant information about the conduct alleged, the investigation report states that the investigation panel, “on several occasions, tried to reach [Mr. A. G.], former Assistant Chief, SSS/UNOG, who had since left the United Nations, but did not succeed in doing so”. However, no evidence was referred to in the investigation report or provided to the Tribunal to substantiate this statement. The investigation panel did not indicate when and how it attempted to reach Mr. A. G. either.

88. Furthermore, the Applicant disputes the investigation panel’s statement by submitting that he has been able to contact Mr. A. G. through his secretary on two separate occasions and at minimal notice, that the witness himself indicated that he had not been contacted by the investigation panel, and that Mr. A. G.’s place of work was known to the investigation panel and his telephone number on which the Applicant was able to contact him was provided.

89. Accordingly, the Tribunal finds that the investigation panel did not comply with its duty to interview Mr. A. G., who is a relevant witness under sec. 5.16 of ST/SGB/2008/5.

*Witnesses who were involved in certain alleged incidents of prohibited conduct*

90. Turning to other witnesses listed in para. 85 who were involved in certain alleged incidents, the Tribunal considers that the investigation panel cannot simply ignore the testimony of such witnesses proposed by the complainant. To establish whether the testimony of a proposed witness was relevant or not, the investigation panel would have had to clarify in its report that interviewing him or her would neither have led to different findings of facts nor changed the outcome of the investigation (see, e.g., *Reilly* UNDT/2021/093, para. 137). However, no such analysis was conducted by the investigation panel.

91. Moreover, the Tribunal considers that witnesses whose testimony may be relevant for a fair determination of the facts cannot be ignored without a rational and solid reason. Indeed, the Appeal Tribunals found that an investigation panel “may opt to limit the testimony it hears, but it must do so on reasonable and proper grounds” (see *Belkhabbaz* 2018-UNAT-873, para. 77). However, the investigation panel did not provide any reasonable or proper grounds to justify its failure to interview the witnesses who were involved in the alleged incidents.

92. In addition, since the core issues at stake relate to harassment and abuse of authority by the Chief, SSS, UNOG, and relevant incidents happened in the workplace, the investigation panel should not have ignored the testimony of the Applicant’s proposed witnesses who had direct knowledge of the events alleged and were willing to testify. Given their knowledge of and involvement in the alleged incidents, should those witnesses have been interviewed, the investigation panel may have reached a different conclusion.

93. Accordingly, the Tribunal finds that by opting not to interview the witnesses proposed by the Applicant and who were involved in certain alleged incidents, the investigation panel breached its duty to interview any individual who may have relevant information about the conduct alleged pursuant to sec. 5.16 of ST/SGB/2008/5.

*Other witnesses who could provide similar evidence*

94. With respect to the proposed witnesses that could have provided similar evidence of harassment and abuse of authority by the Chief, SSS, UNOG, the Tribunal finds that such witnesses do not possess relevant information within the meaning of sec. 5.16 of ST/SGB/2008/5. In this respect, the Tribunal notes that sec. 5.13 of ST/SGB/2008/5 provides context when interpreting “any other individuals who may have relevant information about the conduct alleged” in sec. 5.16. It provides in its relevant part that:

5.13 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[.]

95. Therefore, the Tribunal considers that to be relevant under sec. 5.16, the information must be pertinent to the alleged incidents of prohibited conduct. Consequently, similar evidence does not constitute relevant information within the meaning of sec. 5.16 of ST/SGB/2008/5.

96. Accordingly, the Tribunal finds that the investigation panel did not commit any error by not interviewing some other witnesses that could provide similar evidence regarding acts of harassment and abuse of authority by the Chief, SSS, UNOG.

Alleged failure to consider relevant information while considering irrelevant factors

97. The Applicant argues that the investigation panel considered irrelevant factors and failed to consider relevant factors when examining allegations about:

- a. Irregularities in the recruitment process for TJO 14/120;
- b. The use of CCTV by the Chief, SSS, UNOG, to monitor staff;
- c. Comments made by the Chief, SSS, UNOG, in the preparation for a meeting of all UN Chiefs of SSS in Paris in October 2015;
- d. Remarks about overtime claimed;
- e. The attempt by the Chief, SSS, UNOG, to have the Applicant's e-PAS rating downgraded;
- f. Withdrawing the Applicant's authorization to carry a weapon;
- g. Recruitment irregularities in G-4 selection exercises; and
- h. The incident with the UN electric water pump.

*Irregularities in the recruitment process for TJO 14/120*

98. The Applicant submits that the investigation panel considered irrelevant factors when drawing conclusions regarding this incident and failed to address the Applicant's complaint that, during the enquiry by HRMS into the recruitment process, he was ordered by the Chief, SSS, UNOG, to reinstate his candidacy so that the tainted recruitment process might proceed, which allegedly constitutes abuse of authority.

99. To support his claim, the Applicant argues that the fact that the matter had already been addressed by HRMS in 2015 is an irrelevant consideration and that he still contested the conclusions of the previous investigation. He further contends that had the investigation panel properly investigated this matter, it would have concluded that the Chief, SSS, UNOG, interceded in an unlawful manner with the Applicant to cover up the conduct of Mr. N.

100. The Tribunal finds no merit in the Applicant's submissions in this respect. First, having carefully reviewed the investigation report, the Tribunal is satisfied that the investigation panel properly examined whether the Chief, SSS, UNOG, ordered the Applicant to reinstate his candidacy as alleged in the complaint. Contrary to the Applicant's assertion, the investigation panel did not ignore the matter but instead interviewed relevant witnesses and took into consideration the documentary record such as the email exchange between the Chief, SSS, UNOG, and the Applicant. Ultimately, the investigation panel concluded that "it has not been established that any wrongdoing or prohibited conduct on the part of [the Chief, SSS, UNOG] was committed in relation to this recruitment".

101. Second, the Tribunal considers that the investigation panel properly considered the alleged irregularities in the recruitment process for TJO 14/120. The evidence on record shows that based on evidence available, HRMS properly investigated the issue in 2015. Upon request, it provided the Applicant with the outcome of the investigation on 10 July 2015 while inviting him to provide "any new information that might change the finding of the investigation". However, he did not provide any information but acknowledged that the investigation "a permis de rassembler tous les éléments" [English translation: "allowed the gathering of all the elements"].

102. The investigation report further shows that the investigation panel requested the Applicant to provide the SMS messages allegedly sent by Mr. N. to him prior to his receipt of an email with the questions that would be asked by the interview panel. However, the Applicant informed the investigation panel that the SMS messages had been deleted and could not be recovered.

103. Therefore, absent any cogent reason, the Tribunal finds that the investigation panel did not err by concluding that the alleged irregularities in the recruitment process for TJO 14/120 had already been addressed by HRMS in 2015.

104. Moreover, the Tribunal wishes to highlight that the fact that the investigation panel did not reach the conclusion the Applicant wished for does not necessarily mean that it did not consider the totality of the evidence or that it ignored relevant elements.

105. In light of the above, bearing in mind the nature of the allegations and the evidence available to the investigation panel, the Tribunal finds that the Applicant failed to substantiate that the investigation panel considered irrelevant factors and did not consider relevant factors when examining alleged irregularities in the recruitment process for TJO 14/120.

*The use of CCTV by the Chief, SSS, UNOG, to monitor staff*

106. The Applicant submits that the investigation panel ignored the relevant factor that the use of CCTV to monitor staff in the host country, i.e., Switzerland, is illegal. He further argues that rather than gather evidence as to exactly what the Chief, SSS, UNOG, had done and what its impact had been, the investigation panel instead asked the Chief, SSS, UNOG, to provide his own account as to whether his actions might represent misconduct. In the Applicant's view, the issue with CCTV surveillance is the invasion of privacy.

107. The Tribunal considers that whether the use of CCTV to monitor staff in Switzerland is illegal or not is irrelevant in the present case. Indeed, no national laws or regulations are directly applicable to the Organization unless it adopts such national laws as part of its internal law (see *Ernst* 2012-UNAT-227, para. 13; *Wang* 2014-UNAT-454, para. 32). As such, the Tribunal finds no merit in the Applicant's submission that the investigation panel ignored as a relevant factor that the use of CCTV to monitor staff in Switzerland is illegal.

108. Nevertheless, the Tribunal notes that what is alleged in the complaint is that CCTV was misused by the Chief, SSS, UNOG, to monitor and control his staff's movements, which from the Applicant's perspective amounts to an abuse of his authority. In the Tribunal's view, the investigation panel should have interviewed staff members with relevant knowledge such as Ms. L. S. to understand how the CCTV had been used and if there was any abusive behaviour. The testimony of the

Chief, SSS, UNOG, before the investigation panel that he has never been informed of any limitation on the use of CCTV to monitor staff further makes such examination crucial.

109. Moreover, while the Tribunal recognizes the Administration's managerial discretion in utilizing CCTV to monitor staff, such discretion is not unbounded. Indeed, the right to privacy is a fundamental human right under art. 12 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. It provides in its relevant part that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence". In the Tribunal's view, even assuming that the need to secure a safe workplace prevails over the workers' right to privacy in the workplace, some procedural requirements should be met such as notice to the workers and their consent.

110. The Tribunal finds that the investigation panel failed to fully investigate this allegation and the evidence collected was not enough to allow it to draw any conclusions in relation to the allegations made.

*Comments made by the Chief, SSS, UNOG, in the preparation for a meeting of all UN Chiefs of SSS in Paris in October 2015*

111. The Applicant submits that by not investigating the comments made by the Chief, SSS, UNOG, to the Applicant, the investigation panel failed to consider the context and whether such comments amounted to harassment. He also claims that the investigation panel further failed to view his complaint globally and consider those comments within a pattern of actions to his detriment. Moreover, the Applicant argues that the investigation panel failed to examine communications dated 29 January 2016 that were included in the Applicant's complaint.

112. In this respect, the Tribunal notes that, in his complaint, the Applicant alleged that during a discussion on the preparation for a meeting of all UN Chiefs of SSS in Paris in October 2015, the Chief, SSS, UNOG, made aggressive and unfounded accusations, telling him "qu'il n'est pas assez rigoureux et que l'on ne peut pas travailler avec lui" [English translation: "he is not rigorous enough and that it is not possible to work with him"]. Having heard the Applicant and the Chief, SSS,

UNOG, who provided two contradictory versions of the incident, the investigation panel concluded that:

[It] is unable to conclude that [the Chief, SSS, UNOG,] did make these statements to Mr. Duparc. As noted, the comment that Mr. Duparc was insufficiently rigorous doesn't seem to fit the context of their discussion. In addition, [the Chief, SSS, UNOG,] stated that he took the concern seriously and raised it during the meeting of the Chiefs. Even if these statements were said, the Panel does not find that they are of sufficient gravity to constitute harassment or abuse of authority under the terms of [ST/SGB/2008/5].

113. The Tribunal considers that the investigation panel should have considered whether there was any other evidence, prior to concluding that it was unable to conclude that the Chief, SSS, UNOG, did make the statements in question. Indeed, in relation to this incident, the investigation panel failed to interview Mr. J. G., who was present when the conversation took place and was interviewed about other incidents. Instead, the investigation panel chose to disregard the Applicant's account based on an alleged incongruity with the context of the conversation.

114. Moreover, even assuming, *arguendo*, that the statements at issue were indeed not of sufficient gravity to constitute harassment under ST/SGB/2008/5 and that the investigation panel had the competence to make such determination, the Tribunal finds that the investigation panel should have examined the totality of the Chief, SSS, UNOG's behaviour and considered the facts globally prior to reaching its conclusion. In this respect, the Tribunal recalls that sec. 1.2 of ST/SGB/2008/5 provides that "[h]arassment normally implies a series of incidents". This means "[w]hereas incidents taken in isolation may not reach the level of severity to individually constitute harassment, when a number of them are taken together, they may well amount to harassment" (see *Belkhabbaz* UNDT/2018/016/Corr.1, para. 145).

115. Accordingly, the Tribunal finds that the investigation panel breached its duty of due diligence in investigating this segment of the complaint and should have considered other evidence and examined this incident in its global context prior to reaching its conclusion.

*Remarks about overtime claimed*

116. The Applicant submits that the analysis of the investigation panel in relation to this allegation entirely fails to address the mischief complained of. He specifically argues that the Chief, SSS, UNOG, was asserting some moral failing on the Applicant's part for claiming compensatory time off ("CTO") hours when he made no such comments to other security staff members who had claimed compensation for Firearms Training Officer ("FTO") training.

117. In this respect, the Tribunal notes that, in his complaint, the Applicant alleged discrimination on the grounds that on 13 May 2016, the Chief, SSS, UNOG, while discussing the billing of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") for a firearms training course that was delivered by the Training Unit, said aggressively to him "en tout cas vous, les CTO, vous les avez touchés" [English translation: "in any case, you were indeed paid CTO"]. Having interviewed the Applicant, the Chief, SSS, UNOG, and Mr. R. T., the investigation panel concluded that:

The Panel is satisfied that [the Chief, SSS, UNOG,] made this statement after Mr. Duparc had mentioned billing UNESCO for supplementary hours. The Panel finds that this statement cannot be seen to constitute harassment or other prohibited conduct under [ST/SGB/2008/5].

118. While it is satisfied that the investigation panel was able to establish the fact that the Chief, SSS, UNOG, made the statement at issue, the Tribunal is concerned that the investigation panel failed to consider relevant factors in relation to this incident.

119. Specifically, in addressing the alleged discrimination, the investigation panel should have considered whether there was/were other "similarly situated" staff member(s) who had claimed CTO for similar training and how they were treated by the Chief, SSS, UNOG. It should have considered the distinction between the Firearms Training Officer training, for which CTO was granted, and the training provided to UNESCO, where no CTO was granted but the Organization billed

UNESCO for hours worked. Instead, the investigation panel chose to examine whether CTO was available for the UNESCO training.

120. Moreover, the Tribunal recalls that “[d]iscrimination 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” under sec. 1.1 of ST/SGB/2008/5. As such, the investigation panel should have considered the implications of the Chief, SSS, UNOG’s statement to the Applicant and examined whether such aggressive statement might reasonably be expected or be perceived to cause offence or humiliation to another person prior to reaching its conclusion that the statement at issue cannot be seen to constitute harassment or other prohibited conduct under ST/SGB/2008/5.

*The attempt by the Chief, SSS, UNOG, to have the Applicant’s e-PAS rating downgraded*

121. The Applicant submits that the investigation panel relied on the suggestion that this matter had “already been fully resolved” to clear the Chief, SSS, UNOG.

122. He specifically argues that the investigation panel failed to consider the relevant, contemporaneous, written evidence regarding the reasons for UNOG HRMS’ intervention in the e-PAS and that it also failed to investigate why UNOG HRMS requested the e-PAS to be redone. In his view, the correction by HRMS of the action of the Chief, SSS, UNOG demonstrates that he went outside his lawful authority in seeking to have the Applicant’s e-PAS rating downgraded.

123. In this respect, the Tribunal notes that, in his complaint, the Applicant alleged that the Chief, SSS, UNOG, as his SRO had instructed his FRO, Mr. A. G., to lower the rating of his e-PAS for the 2016-2017 cycle. Having interviewed several witnesses, the investigation panel concluded that:

The allegations of [the Applicant] with regard to his first ePerformance review for the 2015-2016 cycle have already been fully resolved. The Panel finds that [the Chief, SSS, UNOG,], as SRO, is responsible for ensuring consistency across the performance evaluations in SSS/UNOG. The fact that he had told the FRO to lower his rating has already been addressed and the Panel is satisfied that, in any case, he did not commit any abuse of power.

124. The Tribunal finds that the investigation panel did not engage in a critical assessment of the evidence in the context of the complaint. The evidence on record clearly shows that the Chief, SSS, UNOG, instructed Mr. A. G. to downgrade the rating of the Applicant's e-PAS on grounds of his perception that his authority was disregarded in relation to a single incident, i.e., the Applicant not attending to his office immediately to discuss his participation in a training. The investigation panel should have investigated whether the behaviour of the Chief, SSS, UNOG was in breach of relevant laws and regulations governing performance evaluation and submit such findings to the decision-maker. By failing to do so, the investigation panel isolated this incident from the overall context of the complaint and minimized its importance in the context of the alleged abuse of authority.

125. The Tribunal notes that the investigation panel improperly considered the Administration's treatment of the matter as a relevant factor and unduly relied on it. In the Tribunal's view, an investigation into a complaint of abuse of authority has a different purpose than the intervention of HRMS. Indeed, HRMS' intervention sought to bring the Chief, SSS, UNOG's actions into compliance with the performance evaluation framework, whereas the investigation panel was instructed to examine whether the alleged conduct had been established, namely, whether the Chief, SSS, UNOG had gone outside his authority when seeking to have the Applicant's e-PAS rating downgraded. As such, the existence of an administrative review of a particular matter should not have any impact on the necessity for an investigation since the two processes look at entirely different issues (see, e.g., *Reilly* UNDT/2019/094, para. 51).

126. Accordingly, the Tribunal finds that the investigation panel failed to exercise due diligence in investigating this incident, thereby undermining the integrity and credibility of the investigation.

*Withdrawing the complainant's authorization to carry a weapon*

127. The Applicant submits that the investigation panel failed to consider or reflect in its report several relevant factors including the evidence that participants for the Security Certification Programme (“SCP”) training, not including the Applicant, were communicated to New York prior to 29 January 2016. He also claims that the investigation panel failed to consider what he believes to be exaggerated allegations against him to justify the weapons’ restriction. He specifically argues that the investigation panel preferred the evidence of the Chief, SSS, UNOG, that the Applicant was insubordinate during the 29 January 2016 call despite the Applicant’s account being supported by three independent witnesses.

128. The Tribunal notes that, in his complaint, the Applicant alleged that the Chief, SSS, UNOG, abused his power when he withdrew the Applicant’s authorization to carry a weapon without any reason and without following the instructions contained in the applicable Manual. Having interviewed several witnesses and reviewed the documentary evidence, the investigation panel concluded in its report that:

In light of regulations under the Weapons Manual and of all of the facts as established by this Panel, the Panel finds that the behaviour of Mr. Duparc, while it could have been subjected to disciplinary measures, was not sufficient to call into question his fitness to be armed. The Panel therefore finds that this allegation is substantiated and that the allegation of prohibited conduct made in the complaint has a factual basis.

129. While it is satisfied that the investigation panel was able to establish the facts and provide a clear conclusion on this allegation, the Tribunal is concerned that the investigation panel failed to consider certain relevant factors, thereby undermining the seriousness of the Chief, SSS, UNOG’s conduct.

130. First, in the Tribunal’s view, in addressing this allegation, the investigation panel should have considered whether the Applicant’s behaviour leading to the placement on weapons’ restriction, namely a refusal to come to the Chief, SSS, UNOG’s office, when asked outside working hours, on grounds of a family duty, amounts to insubordination as alleged by the Chief, SSS, UNOG. The investigation panel should have examined whether the Chief, SSS, UNOG’s determination that

the conduct at issue constituted insubordination was proper or not. Instead, the investigation panel considered that the Applicant's behaviour could have warranted disciplinary action.

131. Second, the Tribunal notes that in concluding that the Applicant behaved inappropriately in not clearly indicating whether he would take the course or not on 29 January 2016, the investigation panel should have considered the documentary evidence showing that a memo dated 25 January 2016 indicating which candidates other than the Applicant had been selected for the SCP training had already been communicated to New York on 28 January 2016.

*Incidents of which the Applicant had no direct knowledge*

132. In relation to the recruitment process for G-4 positions, the Applicant submits that rather than examining Mr. J.'s allegation that the Chief, SSS, UNOG, exercised bias and favouritism in the recruitment process, the investigation panel chose to focus on procedure and relied on the fact that HRMS was involved in many steps of the process.

133. Turning to the incident with the electric water pump, the Applicant submits that in relation to the use of UN property by staff for personal reasons, the investigation panel chose to disregard it on the basis that it occurred in 2012 despite there being no time limit for investigations on allegations of misconduct. He further argues that the investigation panel viewed the allegation relating to misuse of a UN water pump as a discrete complaint of misconduct and chose to ignore it on the basis that it considered it could not have constituted prohibited conduct under ST/SGB/2008/5. He specifically argues that Mr. D., who had informed the Chief, SSS, UNOG, that he was not permitted to take the pump, had subsequently suffered retaliation by the Chief, SSS, UNOG, which represents important "similar fact" evidence.

134. The Tribunal notes that, in his complaint, the Applicant indicated that Mr. J., in two emails to the Chief, SSS, UNOG, questioned the equality and integrity of the promotion procedure within SSS/UNOG and the transparency of the selection procedure for participation at major conferences. He also alleged that in November 2012, because of flooding in the house of the Chief, SSS, UNOG, the latter instructed SSS to deliver the UN electric water pump to his house together with two GIS [Groupe d'interventions spécialisées] staff on duty.

135. The investigation report states, in its relevant part, as follows:

The Panel is satisfied that the recruitments in SSS are carried out in accordance with UN rules and regulations as they are applied in Geneva based on the assertions of Ms. [M.] and that the G-4 recruitment in question was similarly in conformity. The Panel notes that many steps are administered by HRMS.

The Panel also accepts that the Chief has the discretion to assign responsibilities or tasks to staff based on the needs of the Service. The Panel finds that it has not been established that assignments for external missions have been based on favouritism. Certainly, efforts to ensure that such assignments are as objective and transparent as possible, are welcomed. As discussed in the report on the joint complaint, the Panel also praises the initiative of SSS/UNOG to adopt Standard Operating Procedures on reassignments within the Service.

...

The Panel notes that [the incident with the electric water pump] dates back to 2012 and is completely separate from the other matters included in the complaint. The Panel finds that the issue was already addressed by the Director of Administration immediately after the incident in November 2012. The Panel does not find that this incident constitutes prohibited conduct under [ST/SGB/2008/5].

136. While ST/SGB/2008/5 does not set forth any time limit for the complainant to file a complaint, the Tribunal notes that it clearly specifies who has the standing to file a complaint. Under sec. 5.12 of ST/SGB/2008/5, only “aggrieved individuals or third parties who have direct knowledge of the situation may report cases of prohibited conduct”.

137. However, there is no indication that the Applicant was subjected to prohibited conduct during the G-4 recruitment processes or the incident with the electric water pump, or that he had direct knowledge of any of those two incidents. Thus, the Applicant is neither an aggrieved individual nor a third party who had direct knowledge of the situation in relation to the two incidents at issue. Consequently, the Applicant has no standing in filing a complaint of prohibited conduct in relation to them.

138. Thus, while it may not be convinced by the investigation panel's reasoning regarding those two incidents, the Tribunal cannot conclude that the investigation panel acted without due diligence.

139. Accordingly, the Applicant failed to establish that the investigation panel considered irrelevant factors and did not consider relevant factors when examining the recruitment processes for G-4 positions or the incident with the UN electric water pump.

Alleged failure to assess evidence in a coherent fashion

140. The Applicant submits that the investigation panel assessed evidence in an incoherent fashion, diminishing his evidence and preferring the evidence of those whose account tended to exonerate the Chief, SSS, UNOG. Specifically, he alleges that the investigation panel did so by misrepresenting the complaint, accepting witness evidence contradicted by the contemporaneous documentary record, and by giving more weight to the evidence of the Chief, SSS, UNOG, while not asking questions to other witnesses who were present.

141. In this respect, the Tribunal recalls that it has no jurisdiction to conduct a *de novo* investigation of the Applicant's complaint under ST/SGB/2008/5 (see *Messinger* 2011-UNAT-123, paras. 2, 25 and 30). As such, the assessment of the evidence and determining the weight to be attached to it falls within the investigation panel's inherent discretion. Also, the Organization "has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether an investigation regarding all or some of the charges is warranted" (see *Benfield- Laporte* 2015-UNAT-505, para. 38).

142. Moreover, the Applicant bears the burden to clearly identify how the panel misrepresented the complaint, which witness evidence contradicted the contemporary record and in which manner the panel failed to give proper weight to certain evidence. In the Tribunal's view, the Applicant has not met his burden to substantiate this general assertion.

143. Accordingly, the Tribunal finds that the mere assertion that the investigation panel failed to give proper weight to certain evidence or that it should have interpreted the evidence in a particular manner merely reflects his disagreement with the investigation panel's assessment of evidence. Consequently, this claim is rejected.

Whether the investigation panel exceeded its mandate by drawing legal conclusions rather than establishing facts

144. The Applicant argues that the investigation panel exceeded its mandate by drawing legal conclusions rather than establishing facts and that it then relied on such legal conclusions to justify decisions not to investigate certain elements of the complaint.

145. The Tribunal considers that under sec. 5.17 of ST/SGB/2008/5, the role of the investigation panel is not to make legal findings but rather to establish the facts. This is further supported by sec. 6.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which provides that:

The purpose of an investigation is to gather information to establish the facts that gave rise to the allegation of unsatisfactory conduct. The investigator(s) should pursue all lines of enquiry as considered appropriate and collect and record information, both inculpatory or exculpatory, in order to establish the facts. The investigator(s) shall not make a legal determination about the established facts.

146. As such, the investigation panel was not mandated to make legal findings but to establish facts and include in its report both inculpatory and exculpatory information.

147. Moreover, the investigation panel's reliance on its own legal conclusions to justify the decision not to investigate certain elements of the complaint undermines the purpose and the scope of the investigation.

148. Accordingly, the Tribunal finds that the investigation panel exceeded its mandate by drawing legal conclusions.

149. Based on the exhaustive review of the investigation records, the Tribunal concludes that the investigation panel failed to properly investigate and establish the facts in relation to several aspects of the Applicant's complaint and thus failed to give proper effect to the purpose and precepts of ST/SGB/2008/5.

150. In light of the foregoing, the Tribunal finds that these deficiencies bring into question the necessary appearance of impartiality and integrity 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 Applicant's other claims related to, *inter alia*, the "High-Level" visit of Interpol, the incident with Mr. L. R. in the armoury, and the allegation of career blocking.

*Conclusion on the lawfulness of the contested decision*

151. The Tribunal recalls its findings below:

- a. The investigation panel was neither properly constituted nor properly composed;
- b. By failing to interview witnesses proposed by the Applicant who were involved in certain alleged incidents, the investigation panel breached its duty to interview any individual who may have relevant information about the conduct alleged pursuant to sec. 5.16 of ST/SGB/2008/5;
- c. The investigation panel considered irrelevant factors and failed to consider relevant factors when examining allegations about:
  - i. The use of CCTV by the Chief, SSS, UNOG, to monitor staff;

- ii. Comments made by the Chief, SSS, UNOG, in the preparation for a meeting of all UN Chiefs of SSS in Paris in October 2015;
  - iii. Remarks about overtime claimed;
  - iv. The attempt by the Chief, SSS, UNOG, to have the Applicant's e-PAS rating downgraded; and
  - v. The withdrawal of the Applicant's authorization to carry a weapon; and
- d. The investigation panel exceeded its mandate by drawing legal conclusions rather than establishing facts.

152. As such, the Tribunal concludes that the contested decision to close the Applicant's complaint of prohibited conduct with managerial action pursuant to sec. 5.18(b) of ST/SGB/2008/5 is unlawful.

*Whether the Applicant is entitled to any remedies*

153. In his application, the Applicant requests rescission of the contested decision and that the matter be remanded for a further investigation. He further seeks moral damages for: (i) the contravention of his rights under ST/SGB/2008/5, (ii) inordinate delay in processing his complaint, and (iii) the decision to restrict his access to weapons.

154. In this respect, the Tribunal recalls that art. 10.5 of its Statute 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.

#### Rescission of the contested decision

155. Having found that the procedure leading to the impugned decision to close the matter with managerial action was flawed, and that many of the shortcomings concern the very foundations of the regime set out 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.

156. The Tribunal further recalls that a finding of unreasonableness, and consequent invalidity of a contested decision, will “give rise to the discretion to award specific performance—an order directing the Administration to act as it is contractually and lawfully obliged to act” (see *Belkhabbaz* 2018-UNAT-873, para. 80). The Tribunal thus remands the Applicant's complaint back to the Director-General, UNOG, to have the complaint properly addressed in accordance with the applicable legal framework.

157. Recalling its findings that the investigation panel was not properly composed, and that the investigation report has deficiencies that make it unreliable, the Tribunal finds it appropriate to instruct the Administration to establish a new fact -finding panel in accordance with ST/SGB/2008/5. The members of the investigation panel (who previously handled the complaint) shall be recused from dealing with the remanded complaint.

#### Moral damages

158. In relation to the alleged moral damages, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. In this respect, the Appeals Tribunal has consistently held that “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” and requires that “the harm be directly caused by the administrative decision in question” (see *Ashour* 2019-UNAT-899, para. 31; see also *Kebede* 2018- UNAT-874, para. 20).

159. In the present case, other than making general allegations, the Applicant did not adduce any evidence of the alleged damages. Consequently, the Tribunal rejects the Applicant’s pleas in this regard.

### **Conclusion**

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

- a. The contested decision is rescinded, and the investigation is set aside;
- b. The Applicant’s complaint is remanded to the Director-General, UNOG, for proper treatment;
- c. The members of the investigation panel who previously handled the Applicant’s complaint shall be recused from dealing with the remanded complaint;
- d. Considering the time that has elapsed, the re-examination of the Applicant’s complaint must be completed within three months from the date this Judgment becomes final and executable; and
- e. All other pleas are rejected.

*(Signed)*

Judge Teresa Bravo

Dated this 17<sup>th</sup> day of August 2022

Entered in the Register on this 17<sup>th</sup> day of August 2022

*(Signed)*

René M. Vargas M., Registrar, Geneva