



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bettina Gerber, UNOG

Cornelius Fischer, UNOG

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 9 October 2017, the Applicant, a staff member of the Office of Internal Oversight Services (“OIOS”) in Vienna, filed an application contesting the decision of the Under-Secretary General of OIOS (“USG/OIOS”), not to pursue disciplinary action against the Deputy Director, Investigations Division (“ID”), OIOS, pursuant to a complaint that he had made under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority). The application was registered under Case No. UNDT/GVA/2017/075.

Procedure before the Tribunal

2. On 10 November 2017, the Respondent filed his reply to the application.
3. On 22 June 2018, the Applicant filed a “Motion for Interim Measures pending proceedings” requesting the Tribunal to order “the Respondent ... to immediately refrain from involving the Deputy [Director], [ID, OIOS], in any supervisory or managerial role vis-à-vis the Applicant pending resolution of [his] case”. On 28 June 2018, the Respondent filed his reply to this motion.
4. By Order No. 115 (GVA/2018) dated 3 July 2018, the Applicant’s motion for interim measures pending proceedings was rejected.
5. On 9 October 2018, the Applicant filed another application contesting the decision to continue to involve the Deputy Director, ID, OIOS in supervisory and managerial roles *vi-a-vis* him. The application was registered under Case No. UNDT/GVA/2018/112.
6. By Order No. 5 (GVA/2019) dated 7 February 2019, the Tribunal decided to have a case management discussion (“CMD”) and consolidated the Cases Nos. UNDT/GVA/2017/075 and UNDT/GVA/2018/112 for the purpose of holding a joint hearing, as they concern similar facts and contentions.
7. A CMD was held on 26 February 2019, to clarify the issues in contention as well as to agree a way forward to achieve either Alternative Dispute Resolution or a judicial determination on the merits.

8. Upon the Applicant's request, by Order No. 012 (GVA/2019) dated 1 March 2019, the Tribunal ordered, *inter alia*, the disclosure of the investigation report and other relevant documents that the Respondent had filed *ex parte*.

9. On 21 and 22 March 2019, the Tribunal held a hearing during which it heard evidence from six witnesses, including the Applicant.

10. At the hearing, the Tribunal requested the parties to indicate by 29 April 2019 if they would consider the option of an amicable resolution of the matter through mediation.

11. By separate emails dated 29 April 2019, the parties indicated their availability for mediation under the auspices of the Ombudsman and Mediation services.

12. By Order No. 33 (GVA/2019) dated 2 May 2019, the Tribunal referred the present case and Case No. UNDT/GVA/2018/112 to the Mediation Division in the Office of the United Nations Ombudsman and Mediation Services. The proceedings were therefore suspended pending mediation until 12 June 2019.

13. On 12 June 2019, the parties filed a joint submission informing the Tribunal that the mediation was not successful and requesting that the proceedings in the present case and Case No. UNDT/GVA/2018/112 be resumed before the Tribunal.

14. By email of 5 July 2019, Counsel for the Applicant informed the Tribunal that he was no longer representing the Applicant.

15. On 22 July 2019, the Applicant filed a motion to file additional documents.

Motion to file additional evidence

16. At the outset, the Tribunal addresses the Applicant's motion to file additional documents dated 22 July 2019. In his motion, the Applicant claims that his counsel failed in his duty to act in his best interest and that he failed to submit relevant documents to the Tribunal. The Applicant states that he only became aware of the missing filings after he was granted access to his case file in the Tribunal's electronic case filing system.

17. The Tribunal notes that in the course of the proceedings, the parties had the opportunity to file relevant evidence, to participate at the hearing and to make closing submissions. The proceedings are currently closed and the Tribunal finds that the Applicant did not provide any compelling reason that would warrant a reopening of the debates when a judgment was about to be delivered. The Applicant merely filed several emails between himself and his counsel. He did not identify any evidence that would be determinative for the disposal of the case. Any additional evidence or submissions at this stage would unduly delay the disposal of the case. As a consequence, the Applicant's motion is rejected.

Facts

18. The Applicant joined the Organization on 18 May 2007 and currently serves as an Investigator at the P-3 level at OIOS at the United Nations Office at Vienna ("UNOV").

19. On 18 March 2015, the Applicant filed a complaint pursuant to ST/SGB/2008/5 against the Deputy Director, ID, OIOS to the then USG/OIOS.

20. By email dated 10 April 2015, the Applicant contacted the USG/OIOS requesting if any action had been taken in relation to his complaint and asking whether the subject had been notified of the complaint.

21. On 10 April 2015, the USG/OIOS informed the Applicant that there were insufficient grounds to warrant a fact-finding investigation into the complaint. She also indicated that she "[had] neither advised nor discussed this matter with [the Deputy Director, ID, OIOS]".

22. On 14 April 2015, the Applicant requested management evaluation of the USG/OIOS decision not to appoint a panel to conduct a fact-finding investigation into his complaint.

23. On 20 July 2015, the Officer-in-Charge of the Management Evaluation Unit ("MEU) replied to the Applicant's request for management evaluation. The Applicant was informed that the USG/OIOS had, on 9 July 2015, informed MEU of her intention to appoint a panel to conduct a fact-finding investigation into his

complaint. As a consequence, MEU considered the Applicant's request for management evaluation moot.

24. Between July 2015 to December 2015, several unsuccessful attempts were made to identify panel members based in Vienna. OIOS then decided to reach out to staff members on the Geneva roster.

25. On 13 September 2015, the then USG/OIOS separated from the Organization and was succeeded by a newly appointed one, as of 11 December 2015.

26. On 13 January 2016, the USG/OIOS appointed two panel members from the Geneva roster of trained investigators to conduct a fact-finding investigation into the Applicant's allegations of prohibited conduct. The panel members appointed were the Chief, Audit Section, Office of the United Nations High Commissioner for Refugees ("UNHCR"), OIOS and the Deputy Chief, Distribution Section, United Nations Office at Geneva ("UNOG").

27. The Applicant was interviewed on 22 February 2016.

28. On 11 October 2016, the panel completed its investigation and issued a report which was assessed by the USG/OIOS.

29. By memorandum dated 5 December 2016, the USG/OIOS transmitted the fact-finding investigation report to the Officer-in-Charge, Office of Human Resources Management ("Acting ASG/OHRM") for consideration of appropriate action.

30. By memorandum dated 28 March 2017, the Acting ASG/OHRM responded to the USG/OIOS that the conduct of the Deputy Director, ID, OIOS vis-à-vis the Applicant in August 2014 and February 2015 did not amount to harassment or abuse of authority. The Acting ASG/OHRM consequently decided not to pursue this matter as a disciplinary case but to refer the matter back to OIOS for possible managerial or administrative action under sec. 5.18(b) of ST/SGB/2008/5.

31. By memorandum dated 19 April 2017, the USG/OIOS informed the Applicant of the outcome of the investigation of his complaint against the Deputy

Director, ID, OIOS. The Applicant was informed that based on the investigation report, there was a factual basis for the allegations, which were not sufficient to justify the institution of disciplinary proceedings, but warranted certain managerial actions. In particular, it was noted that the Director, ID, OIOS and the USG/OIOS had provided counselling to the Deputy Director, ID, OIOS with regard to his management style and team-building efforts.

32. On 30 May 2017, the Applicant requested management evaluation of the USG/OIOS decision dated 19 April 2017.

Parties' submissions

33. The Applicant's principal contentions are:

- a. There was an unreasonable delay in the handling of his complaint. While sec. 5.17 of ST/SGB/2008/5 envisions a three-month period within which the investigation should be completed, the overall process in his case lingered on for over 25 months after the allegations were initially reported. The Applicant remained for over two years in the same office and under the general supervision of the alleged offender, waiting for an answer to his complaint. Under the circumstances, the delay was effectively a denial of justice;
- b. The USG/OIOS letter dated 19 April 2017 does not refer to any specific finding or conclusion made by the investigation panel. The absence of any concrete information reflects a clear lack of transparency. The Applicant is prejudiced by the Administration's failure to identify or even allude to the factual findings warranting managerial action;
- c. Under ST/SGB/2008/5, the involvement of OHRM is only provided for in cases where the report indicates that the allegations are well-founded and that the conduct alleged amounts to possible misconduct. This is *per se* inconsistent with the findings that the allegations were found to be insufficient to initiate disciplinary proceedings;

d. There was a breach of confidentiality in handling the Applicant's complaint. Although his complaint was confidential and had only been sent to the USG/OIOS, as well as to the Director, ID, OIOS, it appears that its contents were shared with the alleged offender during the initial stage of the process and before the initiation of any formal investigation;

e. In appointing the Chief of the UNHCR Audit Section in OIOS to investigate the then Officer-in-Charge of the ID, OIOS, the Administration failed to discharge its function to appoint a fully independent and impartial investigation panel. Indeed, the appointment of a panel member with whom the alleged offender could have regular professional contacts is improper and gives rise to a reasonable appearance of conflict of interest which the Administration ought to have avoided;

f. At the time that the Applicant was informed of the Administration's decision in April 2017, managerial actions had arguably already been taken. However, the Applicant, who was the victim of the alleged prohibited conduct, was never informed of the nature and contents of these measures, nor was he involved in any of the measures taken;

g. The Applicant suffered moral harm as a direct result of the investigative failures and the improper handling of his complaint. The Administration's failure to investigate his complaint within a reasonable timeframe creates a clear presumption of moral injury. He also suffered moral damage because of the stress and anxiety caused to him during the process;

h. The Applicant requests:

- i. rescission of the contested decision and reappointment of a properly constituted panel to investigate his complaint;
- ii. disclosure of the investigation report;
- iii. compensation equivalent to four month's net base salary for the unreasonable delay;

- iv. compensation equivalent to five month's net salary for moral and physical harm; and
- v. reasonable accommodation for no further contact with the Deputy Director, ID, OIOS.

34. The Respondent's principal contentions are:

- a. The investigation respected proper procedures and was carried out in accordance with ST/SGB/2008/5. A fact-finding panel with two members, trained in investigating allegations of prohibited conduct in compliance with sec. 5.14 of ST/SGB/2008/5 was established. The panel diligently carried out the investigation, conducting 23 interviews and reviewing 79 documents;
- b. The Applicant's allegation that the Administration failed to have qualified and objective panel members investigating the complaint is unsubstantiated;
- c. Contrary to the Applicant's claim, there was no evidence that the panel members were subject to the influence of the Deputy Director, ID, OIOS while conducting the investigation. None of the panel members has a direct professional relationship with the Deputy Director, ID, OIOS who is stationed in Vienna while the two members of the fact-finding panel are based in Geneva;
- d. The decision not to initiate disciplinary proceedings was lawful. In view of the conclusions of the investigation report, the USG/OIOS referred the matter for disciplinary action to the Acting ASG/OHRM. The latter assessed the matter and concluded that the "[Deputy Director, ID, OIOS] remarks to [the Applicant] in August 2014 and February 2015 do not amount to harassment or abuse of authority" and that therefore the matter would not be pursued as a disciplinary case but referred it back to OIOS for possible managerial or administrative action;

- e. The decision of the Acting ASG/OHRM to take managerial actions, rather than disciplinary action, was proper, proportionate and in accordance with sec. 5.18 b) of ST/SGB/2008/5;
- f. The USG/OIOS complied with sec. 5.18(b) by informing the Applicant by memorandum dated 19 April 2017 of the outcome of the investigation and of the action taken;
- g. While there was a delay in establishing the panel, the record reflects the Administration's efforts in identifying panel members based in Vienna and that the Applicant was kept informed of the situation. Furthermore, during this time period, a new person was appointed USG/OIOS as the successor of the previous one which led to an additional delay in the establishment of a fact-finding panel;
- h. The fact-finding panel was established on 13 January 2016 and submitted its report on 11 October 2016. Section 5.17 of ST/SGB/2008/5 provides that the fact-finding panel's report should be submitted to the responsible official "normally" no later than three months from the date of submission of the complaint. While this three-month deadline was not complied with, the delay for the submission of the report was not unduly long considering the circumstances and the scope of the allegations;
- i. The Applicant had provided no evidence that the time taken to resolve his complaint had caused him actual damages;
- j. The Applicant's allegations with regard to breaches of confidentiality lack any substance or proof. OIOS does not have any knowledge of the complaint being shared with the Deputy Director, ID, OIOS; and
- k. The Respondent requests that the application be rejected in its entirety.

Consideration

35. The Tribunal has carefully reviewed the parties' submissions as well as the evidence on file and produced at the hearing. As a consequence, it has identified the following legal issues:

- i. Whether the investigation was properly conducted, i.e., in accordance with ST/SGB/2008/5;
- ii. Whether the investigation was unduly delayed;
- iii. Whether the decision not to take disciplinary action against the alleged offender was unlawful; and
- iv. Whether the Applicant is entitled to any compensation.

Was the investigation properly conducted?

36. The Applicant's main arguments in respect of procedural flaws in the investigation concerning his complaint of harassment are:

- a. Lack of transparency since he was not notified of the investigation report and the summary that was provided to him lacked concrete information, namely, if the facts had been established and whether those facts amount or not to misconduct;
- b. Breach of confidentiality in handling his complaint since the Administration allegedly disclosed the contents of the complaint to the alleged offender before the initiation of any formal investigation;
- c. Lack of evidence concerning the implementation of managerial actions; and
- d. Apparent conflict of interest of a member of the investigation panel.

37. The Tribunal recalls that during the hearing, the Applicant decided to withdraw the argument raised in relation to the alleged bias and potential conflict of interest involving a member of the investigation panel. As a consequence, the

Tribunal will only address the other three arguments related to the alleged lack of transparency, breach of confidentiality and lack of evidence of managerial action.

The alleged lack of transparency

38. The Applicant raises the issue of lack of transparency related to the investigation that was initiated by the Administration following his complaint for harassment under ST/SGB/2008/5. He argues, *inter alia*, that the USG/OIOS letter dated 19 April 2017 does not refer to any specific finding or conclusion made by the investigation panel. The Applicant is prejudiced by the Administration's failure to identify or even allude to the factual findings warranting managerial actions;

39. The Tribunal's jurisprudence (see *Adorna* UNDT/2010/205 and *Haydar* UNDT/2012/201) and, most importantly, the Appeals Tribunal's jurisprudence, which is binding on this first instance court, has constantly held that, following an investigation under ST/SGB/2008/5, the Organization is not obliged to disclose to the parties the full content of the report unless "extraordinary circumstances" arise. This position has been reiterated in *Ivanov* UNAT-2015-519, which provides as follows:

23. When a formal complaint or report of workplace harassment is received, the procedure to be adopted is clearly outlined in Secretary-General's Bulletin ST/SGB/2008/5. This procedure provides, *inter alia*, for the appointment of a fact-finding panel to look into the allegations; the said panel is mandated to prepare a detailed report and submit this report to the responsible official within a period of three months of receipt of the formal complaint.

24. Under Section 5.18(a) of ST/SGB/2008/5, if the report of an investigation panel concludes that no prohibited conduct took place, the responsible official will close the case. The responsible official must also inform the alleged offender and the aggrieved individual of the outcome of the case by providing them with a summary of the findings and conclusions of the investigation.

40. The Tribunal notes that by memorandum dated the 19 April 2017, the USG/OIOS informed the Applicant of the outcome of the investigation in relation to his complaint of prohibited conduct against the Deputy Director, ID, OIOS. This memorandum reads as follows:

[T]he investigation report indicated that there was a factual basis for your allegations, which while not sufficient to justify the institution of disciplinary proceedings, warranted certain managerial actions. I also consulted OHRM in arriving at this determination.

Please note that I have already taken certain managerial actions in this regard. The Director of ID and I have been providing [the Deputy Director, ID, OIOS] with counselling with regard to his management style and team-building efforts [...].

41. The Tribunal has already stated in Order No. 012 (GVA/2019) dated 1 March 2019 that it considered that the above-mentioned memorandum did not contain a relevant, accurate and complete summary of the findings and conclusions of the investigation.

42. Moreover, at the hearing, it was proven that during the investigation, the Applicant continued to work in the same place, performing the same functions and reporting back to the alleged offender, who was at the top of the hierarchical chain in the OIOS Vienna's office.

43. These factual circumstances should have justified a particular attention to the Applicant's situation from the part of the Organization, which was not the case.

44. Indeed, the Tribunal sees no reason to depart from the assessment it made in said Order, that is, that there were indeed "exceptional circumstances" that justified the disclosure of the investigation report to the Applicant.

45. Since the Applicant was granted access to the investigation report and all relevant documents at the judicial stage, prior to the hearing and in order to prepare for it, the Tribunal considers that the Applicant had the opportunity to have all the elements required to properly present his case before the Tribunal.

46. The Tribunal underlines that while it would have been more appropriate for the Organization to provide the Applicant with a proper summary of the findings and conclusions of the investigation at an earlier stage, i.e., after the investigation had been finalised, the Tribunal is of the view that this procedural flaw bears no impact on the Applicant's right to have access to the internal justice system nor to prepare his case.

The alleged breach of confidentiality

47. Another argument raised by the Applicant relates to an alleged leak of information concerning his complaint against the Deputy Director, ID, OIOS at a stage when it was supposed to be kept confidential. The Applicant alleges that, during a meeting held in the Office of the Deputy Director, ID, OIOS on 19 June 2015, he was told, by the alleged offender, that he knew about the complaint made against him.

48. The Tribunal recalls that the Applicant's complaint dates back to 18 March 2015 and that on 10 April 2015 he sent an email to the USG/OIOS stating the following:

With reference to below e-mail and the complaint submitted with same I would appreciate if you could let me know if any action has been taken, including if the subject has been notified of the complaint.

49. On the same day, the USG/OIOS replied to the Applicant in the following terms:

... As indicated in my response, I have neither advised nor discussed this matter with [the Deputy Director, ID, OIOS]. I have copied Mr. [S.] on this note and my response as I note you forwarded the complaint separately to him.

50. The Tribunal recalls that the *onus* is on the Applicant to demonstrate that there was a breach of the duty of confidentiality regarding the content of the complaint and that said breach is imputable to the Administration.

51. The Tribunal will take into account the applicable legal framework so as to assess the scope of said duty of confidentiality and to determine whether the Administration breached it or not.

52. Sections 5.11, 5.14 and 5.15 of ST/SGB/2008/5 read as follows:

5.11 ... [T]he aggrieved individual may submit a written complaint to the head of department, office or mission concerned ...

5.14 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. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her ...

53. Based on the testimony of the Deputy Director, ID, OIOS at the hearing, the Tribunal finds that indeed he was informed, on the phone, by the then USG/OIOS that a complaint had been made against him but that an investigation would not be initiated since there were no sufficient grounds to warrant a formal fact-finding investigation.

54. At the hearing the Deputy Director, ID, OIOS underlined, however, that he was never made aware of the content of said complaint nor was he given any copy of it.

55. Based on the evidence produced before the Tribunal, it was not possible to determine exactly when the Deputy Director, ID, OIOS was informed about the existence of such a complaint.

56. Moreover, the Tribunal found the witness testimony of the Deputy Director, ID, OIOS spontaneous, clear and objective and has no reasons to doubt its veracity.

57. Consequently, the Tribunal underlines that there was not sufficient evidence to support the Applicant's allegation that the content of said complaint was made available to the alleged offender prior to the beginning of the fact-finding investigation.

The alleged lack of evidence concerning managerial actions

58. The Applicant contends that there is no evidence that the "responsible official" has taken any managerial action. He alleges that it is difficult to understand

how managerial actions could have been taken prior to the notification of the outcome of the investigation to him. He also indicates that he was not informed about said measures nor involved in any of them.

59. The Tribunal underlines that, since the former USG/OIOS initially considered that there were no grounds to initiate an investigation, she was not compelled to take any managerial action at that stage.

60. Indeed, the duty to take appropriate actions, if any, only emerged after the fact-finding investigation was concluded and the investigation report was finalised and assessed by the current USG/OIOS.

61. The Tribunal recalls that documentary evidence on file, in particular, the memorandum dated 5 December 2016 from the current USG/OIOS to the Officer-in-Charge, OHRM, shows that the current USG/OIOS recommended the adoption of appropriate action in relation to the Deputy Director, ID, OIOS.

62. The Tribunal also notes that the Applicant became aware of these actions by letter dated 19 April 2017 from the current USG/OIOS which provides as follows:

Accordingly, the investigation report indicated that there was a factual basis for your allegations, which while not sufficient to justify the institution of disciplinary proceedings, warranted certain managerial actions. I also consulted OHRM in arriving at this determination.

Please note that I have already taken certain managerial actions in this regard. The Director of ID and I have been providing [the Deputy Director, ID] with counselling with regard to his management style and team-building efforts. While we continue with such efforts, I will also make another visit to our Vienna office in May during which I will observe the situation and consider the need for additional measures.

63. In addition, the Tribunal recalls the testimony of the Director, ID, OIOS who stated at the hearing that he had contacted the Applicant and the Deputy Director, ID, OIOS to have a conversation related to the work environment in the Vienna Office. He also testified that he travelled to the Vienna Office and had meetings with the team and the Deputy Director, ID.

64. The evidence, therefore, shows that the Applicant was not only made aware of the USG/OIOS's views but he was also involved in different meetings and conversations with the Director /OIOS who travelled from New York to Vienna to meet both the Applicant and the Deputy Director of the Vienna Office, so as to find a solution.

65. As a consequence, the Tribunal is not persuaded that the Applicant was not consulted nor involved in the resolution of the work problems he was facing.

66. It appears that the Applicant's real concern relates essentially to the fact that no disciplinary action was taken against the Deputy Director, ID, OIOS. This matter will be considered below (see para. 89 and seq.).

67. The Tribunal will turn now into the analysis of the second issue at stake, which relates to the alleged undue delay of the investigation procedure.

Was the investigation unduly delayed?

68. In order to assess this issue, the Tribunal recalls the sequence of events.

69. On 18 March 2015, the Applicant filed a complaint pursuant to ST/SGB/2008/5 against the Deputy Director, ID, OIOS in Vienna.

70. On 10 April 2015, the former USG/OIOS informed the Applicant that there were insufficient grounds to warrant a fact-finding investigation into the complaint. However, following the Applicant's request for management evaluation of this decision, on 9 July 2015, the former USG/OIOS decided to appoint a panel to conduct a fact-finding investigation.

71. Between July 2015 and December 2015, several unsuccessful attempts were made to identify panel members based in Vienna. OIOS then decided to reach out to staff members on the Geneva roster. In the meantime, the former USG/OIOS separated from the Organization and was succeeded by the current USG/OIOS as of 11 December 2015.

72. On 13 January 2016, the then newly appointed USG/OIOS established a panel to conduct the fact-finding investigation. The panel completed the investigation on

11 October 2016. The USG/OIOS assessed the report and, on 5 December 2016, referred the case to the Acting ASG/OHRM for consideration of appropriate action.

73. By memorandum dated 19 April 2017, the USG/OIOS informed the Applicant of the outcome of the investigation and the managerial actions taken in this regard.

74. The sequence of events shows that, indeed, it took 20 months for the Administration to deal with the Applicant's complaint and to notify him of the outcome of the investigation.

75. Section 5.14 of ST/SGB/2008/5 provides 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.

76. The Tribunal notes that the former USG/OIOS had decided, in less than one month after the filing of the complaint, that it did not justify the opening of a formal investigation and she informed the Applicant accordingly on 10 April 2015.

77. The evidence shows that, at this stage, there was no undue delay.

78. According to the evidence produced before the Tribunal, it took around six months (from July 2015 until January 2016) for the Organization to be able to convey a panel. The reason why it happened was because the Organization struggled to find available panel members based in Vienna and it had to look into the Geneva roster.

79. The Tribunal also recalls that the Applicant was being informed about these difficulties and the actions taken by the Administration to convey a fact-finding investigation panel.

80. In this regard, the Tribunal refers to the email dated 18 December 2015 from the Assistant Secretary-General, OIOS to the Applicant, which reads as follows:

I have been requested by Ms. [M.] to provide you with an update on this case. We have now reached out to individuals on the Geneva

roster because we were unsuccessful, after two attempts, to identify available individuals in Vienna. We will also reach out to individuals in the New York roster if there is no availability in Geneva. These additional efforts will hopefully enable us to identify two available panel members in the near future.

81. However, the Tribunal recalls that, pursuant to sec. 5.17 of ST/SGB/2008/5, the investigation report should have been “submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report”.

82. The evidence shows that the report was finalised and submitted to OHRM on 5 December 2016, after a comprehensive investigation which included 23 interviews with the complainant, subject and relevant witnesses and the analysis of more than 79 documents.

83. Moreover, at the hearing, the Tribunal and the parties had the opportunity to ask an investigator why it took so long to finalise the investigation. He clarified that he and his colleagues were not working full time on that investigation and that they were based in Geneva and had to travel twice to Vienna. He also mentioned that the investigators were conducting the investigation on top of their ordinary functions and this prevented them to finalise it earlier.

84. The Tribunal agrees with the Applicant in that the investigation took longer than the standard three months’ deadline. However, the Tribunal also recalls that, in the meanwhile, a new USG/OIOS took office, there were difficulties in the appointment of the panel and the investigation was very lengthy and cumbersome.

85. Mindful of these difficulties, the Tribunal reiterates that this does not preclude the Organization’s duty of care and its responsibilities towards aggrieved staff members.

86. Section 2.2 of ST/SGB/2008/5 provides as follows:

The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

87. The Tribunal is of the view that, even though there is no evidence of gross negligence from the part of the Organization, the investigation process should have been expedited so as to avoid keeping the staff member in a “limbo” concerning the outcome of his complaint and to abide by the deadlines contemplated in the applicable framework.

88. Bearing in mind the circumstances of this case, the Tribunal notes that, while the investigation was going on, the Applicant was working in the same office, performing the same functions and reporting to the same people, who also included the alleged offender.

Was the decision not to take disciplinary action against the alleged offender unlawful?

89. The Applicant argues that the Organization should have initiated a disciplinary proceeding against the alleged offender.

90. The Tribunal finds no merit in this allegation. The Appeals Tribunal consistently held that as general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself and it is not legally possible to compel the Administration to take disciplinary action against a staff member (see *Abboud* 2010-UNAT-100, *Benfield-Laporte* 2015-UNAT-505 and *Oummih* 2015-UNAT-518).

91. The Tribunal cannot replace the decision-maker and, after all, it is the Administration which is better positioned to evaluate the circumstances of the complaint and whether it has solid grounds or not, to justify a disciplinary action.

92. In the present case, the Tribunal is satisfied that the Organization conducted a proper investigation into the complaint.

Is the Applicant entitled to any compensation?

93. The Applicant requests compensation equivalent to four months’ net base salary for the unreasonable delay and compensation equivalent to five months’ net salary for moral and physical harm.

94. The Tribunal has already stated that the investigation process exceeded the time-limit contemplated in ST/SGB/2008/5. Nonetheless, the Tribunal also recognises the difficulties faced by the Administration in identifying panel members and the circumstances that have contributed to such a delay.

95. Pending the investigation into his complaint, the Applicant consulted a psychiatrist and has been following psychiatric treatment since May 2015.

96. According to the Medical Report dated the 15 June 2018, the Applicant's diagnosis was the following:

Diagnosis: ... longer lasting depressive reaction against the background of workplace bullying ... Somatization disorder (stress-related).

97. The Tribunal finds that, based on the witness testimony of Dr. L. who works in the Medical Service of UNOV, the Applicant suffered anxiety, stress and had a "depressive mood" related to the work environment and the delays in the investigation that followed his complaint.

98. In relation to this, the Tribunal refers to the psychiatric report dated 15 June 2018 which states that the Applicant was under psychiatric treatment since March 2015 and was placed on sick leave in May 2018.

99. The Tribunal has no doubts that these symptoms are related to the fact that the investigation took too long and that, during that time, the Applicant had to continue working with the alleged offender, performing the same functions and operating under the same reporting lines.

100. The Tribunal states that there is undoubtedly a close link between the delay in investigating the Applicant's complaint and the damages he has suffered.

101. Article 10.5 (b) of the Tribunal’s Statute provides the following:

(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 (emphasis added).

102. The Appeals Tribunal’s case law has established a high standard of proof in relation to compensation for moral damages (see *Kallon* 2017-UNAT-742, *Zachariah* 2017-UNAT-787 and *Auda* 2017-UNAT-787).

103. In a recent judgment, *Kebede* 2018-UNAT-874, the Appeals Tribunal has stated the following:

21. As regards the award of compensation for harm, our jurisprudence has evolved following the 2014 General Assembly resolution 69/203, which amended our Statute and that of the UNDT, introducing the expression “supported by evidence” after “compensation for harm” in Article 10(5)(b) of the UNDT Statute and Article 9(1)(b) of the Appeals Tribunal Statute. A breach of staff member’s rights, despite its fundamental nature, is thus not sufficient to justify such an entitlement. There must indeed be proven harm stemming directly from the Administration’s illegal act or omission for compensation to be awarded.

22. Our jurisprudence holds that, generally speaking, a staff member’s testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of the UNDT Statute (foot note omitted). The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred (foot note omitted). Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis.

104. As a consequence, compensation for moral damages can only be granted if three cumulative requirements are met:

- i. If there was a breach of a staff member fundamental rights (either substantive or procedural);

- ii. Said breach is caused by the Administration's illegal act or omission and caused the Applicant harm; and
- iii. There is sufficient evidence provided by the Applicant of said breach and the link between the two.

105. Taking into account the circumstances of the present case and the time that it took for the Administration to initiate and finalise the investigation in relation to the Applicant's complaint of harassment, the Tribunal is of the view that the stress and anxiety suffered by the Applicant since 2015 until the investigation was finalised, should be compensated.

106. The close link between the delay in handling the Applicant's complaint of harassment and the stress and anxiety suffered by him is evident from the numerous exchanges of emails between him and the Administration such as those contained in annex 4 of the reply, namely emails dated 18 December 2015, 14 December 2015, 3 November 2015, 2 November 2015, and 10 October 2015. The Tribunal notes that these emails relate to the same issue, namely, his complaint of harassment, the delays in the investigation and the appointment of panel members.

107. In light of the above, the Tribunal finds reasonable and proportionate to the serious impact on the Applicant's well-being and mental health to grant him compensation in the amount of 5000 USD for moral damages.

Conclusion

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

- a. The application is partially granted and the Respondent shall pay the Applicant compensation of 5000 USD salary for moral damages; and
- b. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent

shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable; and

c. All other claims are rejected.

(Signed)

Judge Teresa Bravo

Dated this 23rd day of July 2019

Entered in the Register on this 23rd day of July 2019.

(Signed)

René M. Vargas M., Registrar, Geneva