

UNDT/2018/016, Belkhabbaz

UNAT Held or UNDT Pronouncements

The Tribunal examined the alleged procedural errors in the appointment of the investigation panel and the conduct of its investigation, before turning to examine the alleged errors in the making of the contested decision itself.; Appointment of the panel; The Tribunal found that the panel, appointed by a responsible official (the then Executive Director OAJ) who had a conflict of interest, was not constituted in accordance with sec. 5.14 of ST/SGB/2008/5. It was illegal and void ab initio. A decision maker cannot, knowing the basis of a request for recusal, take important steps in a process such as to appoint a fact-finding panel and subsequently recuse himself. Such conduct offends due process rights and is contrary to fundamental notions of procedural fairness.; Conflict of interest of the responsible official; The Tribunal found that the referral of the matter to OHRM was done in accordance with sec. 5.11 of ST/SGB/2008/5, which provides that where the official who would normally receive the complaint is the alleged offender, “the complaint should be submitted to the Assistant Secretary-General for Human Resources Management”. Although the then Executive Director, OAJ, was not herself the alleged offender, it was legitimate to apply sec. 5.11 by analogy and transfer the matter to the ASG, OHRM.; Alleged procedural errors in the conduct of the investigation; The Tribunal found that the formulation of the terms of reference of the second panel was unlawful.; The Tribunal also found that the failure to interview the former Chief, OSLA, violated sec. 5.16 of ST/SGB/2008/5. Most importantly, it vitiated and tainted the whole investigation as the former Chief, OSLA, was nevertheless allowed to present written answers, to suggest witnesses and to adduce documentary evidence. The Tribunal considered that the panel had a clear legal duty to interview the former Chief, OSLA, which duty it failed to discharge.; The Tribunal further found that the consideration of the interview of the former Chief, OSLA, by the first invalid fact-finding panel amounted to reliance on irrelevant material and constituted a fundamental flaw in the investigation. This error was such as to raise serious concerns as to the competence of the panel.; The Tribunal found that the panel blatantly disregarded a judgment issued by this Tribunal (Applicant UNDT/2012/111) on the matter under consideration and, as such, failed to consider relevant material to its investigation.; The Tribunal also noted that no assessment was made as to whether the five witnesses proposed by the Applicant were relevant to the investigation whereas the Chief of; OSLA, the subject of the investigation, was allowed to propose witnesses, without himself abide by his obligation to cooperate.; Test for establishing prohibited conduct; The Tribunal found that the responsible official applied the wrong standard for determining whether the facts established by the panel amounted to harassment and failed to consider whether they could amount to abuse of authority.; Delays in the investigation; The Tribunal found that the panel failed to conduct the investigation in a timely manner, in violation of sec. 5.17 of ST/SGB/2008/5 and concluded that the contested decision to take no further action on the Applicant’s complaint was unjustifiable and unlawful.; Remedies; The Tribunal rescinded the decision to take no further action on the Applicant’s complaint and it found that there was clear and convincing evidence that the former Chief, OSLA: a)Deprived the Applicant of her functions and prevented her from performing her work without any legitimate justification but rather, in whole or in part, as a reprisal for seeking recourse in the formal system of administration of justice. As such, the former Chief, OSLA, unlawfully used his position of authority to influence the Applicant’s working conditions; b)Copied others in personal and confidential communications concerning the Applicant’s performance and a reprimand, which might reasonably be expected or be perceived to embarrass the Applicant and, indeed, embarrassed her; and; c)Adopted an aggressive and abrasive tone and made demeaning remarks in his written and oral communications with the Applicant, which created a hostile and offensive work environment.; The Tribunal considered that taken as a whole, these incidents amounted to harassment and abuse of authority, and, therefore, constituted prohibited conduct under sec. 1.2 and 1.4 of ST/SGB/2008/5.; The Tribunal therefore considered it appropriate to remand the case to the current ASG, OHRM, to institute disciplinary procedures against the former Chief, OSLA in accordance with sec. 5.18(c) of

ST/SGB/2008/5.; Given the severe gravity of the moral harm caused to the Applicant, over a period of approximately three years, the Tribunal found it appropriate to award her moral damages in the amount of USD20,000. The Tribunal also ordered that the Applicant be paid compensation for harm as a consequence of the impossibility to have the full breath of her complaint investigated in the amount of USD10,000.

Decision Contested or Judgment/Order Appealed

The Applicant challenged the decision of 25 October 2016 to take no further action in respect of her complaint of harassment and abuse of authority against her former supervisor, the former Chief, OSLA.

Legal Principle(s)

The scope of the judicial review in harassment and abuse of authority cases is restricted to how the Administration responded to the complaint in question (Luvai 2014-UNAT417); The Tribunal is not vested with the authority to conduct a fresh investigation on the initial harassment allegations (Messinger 2011-UNAT-123, Luvai 2014-UNAT-417). It is not the Tribunal's role to substitute its own judgment for that of the SecretaryGeneral (Sanwidi 2010-UNAT-084). However, the Tribunal may draw its own conclusions from the evidence collected by the fact-finding panel (Mashhour 2014UNAT-483; Dawas 2016-UNAT-612); The investigation panel has a wide discretion in selecting witnesses. However, this discretion is not unfettered and the panel is directed to interview individuals who may have relevant information. The applicable criteria for determining if a potential witness should be heard is the relevance of the information he or she may provide.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

This judgment was modified by the Appeals Tribunal in its Judgment Belkhabbaz 2018UNAT-873).

Full judgment

[Full judgment](#)

Applicants/Appellants

Belkhabbaz

Entity

OAJ

Case Number(s)

UNDT/GVA/2017/018

Tribunal

UNDT

Registry

Geneva

Date of Judgement

5 Feb 2018

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Applicable Law

Secretary-General's bulletins

- ST/SGB/2005/21
- ST/SGB/2008/5

UNDT Statute

- Article 10.5

UNAT Statute

- Article 2.1(a)

Related Judgments and Orders

2014-UNAT-417

2011-UNAT-123

2010-UNAT-084

2016-UNAT-612

UNDT/2011/187

UNDT/2012/111

2013-UNAT-291

2017-UNAT-718

2015-UNAT-518

2010-UNAT-099

2012-UNAT-219