

UNDT/2021/077, Duparc, El Gaouzi, Toualbia, Drevon

UNAT Held or UNDT Pronouncements

In making the final decision on the Applicants' complaint, the then Director General, UNOG, as the responsible official for their case, was bound by sec. 5.18 of ST/SGB/2008/5. Since the investigation report concluded that no prohibited conduct was established, the consequent decision to close the matter without any further action was nothing more than regular compliance with sec. 5.18(a) of ST/SGB/2008/5. In assessing the legality of the decision to take no further action, the Tribunal must examine whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process that ensued, as set out primarily in ST/SGB/2008/5. Alleged procedural irregularities in the review of the complaint The Tribunal is of the view that the Respondent has correctly established that only one fact-finding Panel was established in July 2018, and that the core issue in this respect is whether the complaint filed on 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5. The complaint of 10 April 2017 contains the details listed in sec. 5.13 of the bulletin. Further, it was addressed to the Director-General, UNOG, in conformity with the requirement that a written complaint be submitted to "the Head of department, office or mission" contained in sec. 5.11. However, the said complaint was not copied to OHRM for monitoring purposes, as required by sec. 5.11. 44. Nevertheless, the failure to copy the written complaint to OHRM does not render a formal complaint void. Moreover, at an early stage, the Administration appears to have treated the complaint of 10 April 2017 as a formal complaint pursuant to sec. 5.14 of ST/SGB/2008/5 by concluding that an investigation into the matter would be warranted. Therefore, the complaint of 10 April 2017 constitutes a formal complaint under ST/SGB/2008/5. However, on 7 February 2018, almost 10 months after the complaint was filed, the Administration informed the Applicants that the complaint addressed to the Director-General on 10 April 2017 was not considered as such under ST/SGB/2008/5. Accordingly, the Administration's review of the complaint of 10 April 2017 is inconsistent with ST/SGB/2008/5. The alleged inordinate delay Taking the date of 10 April 2017 as a starting point, over 19 months elapsed until the investigation report was submitted to the responsible official on 15 November 2018. The Tribunal noted that the total duration of the review and investigation process is far from satisfying the promptness requirements of sec. 5.3 and 5.14 of ST/SGB/2008/5, and certainly exceeds, by two to five times, the three-month timeframe in sec. 5.17. Alleged errors in the conduct of the investigation The Panel is obliged to interview any individuals who may have relevant information about and provide any documents or records relevant to the alleged discrimination and abuse of authority. In determining whether the Panel fulfilled its obligations in investigating the complaint, the Tribunal considers that the perusal of the Panel's written record is an appropriate starting point. Having reviewed the investigation report, the Tribunal is concerned that the Panel failed to consider relevant information while considering irrelevant factors. Selection of Mr. R to participate in various training courses First, in addressing the allegations related to discrimination and abuse of authority, the Panel should have considered whether the repeated selection of Mr. R to participate in various training courses affected the career or employment conditions of one or more persons "similarly situated" in accordance with sec. 1 of ST/SGB/2008/5. Instead, it concluded that "[t]he mere fact that another person could possibly have been sent does not establish favouritism" without looking into the treatment of other staff members who may be equally qualified. Second, the Panel failed to consider the limits of the managerial discretion in the selection of a staff member to participate in training courses. Indeed, the manager's discretion is not unbounded and must be exercised in accordance with the applicable legal framework. Moreover, the use of financial resources for training should be maximized, and the funds should be allocated in a fair and reasonable manner. The Panel should have considered why the funds were allocated for Mr. R's training alone instead of being used for a group of 10 FTO officers, and whether this allocation was fair and reasonable. Selection of Mr. R for a position in

GEOS The Panel failed to consider that the managerial discretion in reaching a staff selection decision should be exercised in accordance with the applicable legal framework. Having found that the selection of Mr. R to GEOS again did not follow the established general procedure, i.e., a call for expressions of interest, the Panel should have inquired whether there were cogent reasons for the Chief, SSS, UNOG, to deviate from this procedure and whether it was fair to do so. Instead, the Panel concluded that there was no obligation to ensure that every such decision is taken after a call for an expression of interest by candidates. Moreover, in addressing alleged discrimination and abuse of authority in staff selection, the Panel should have examined whether there are other “similarly situated” or equally qualified staff members. Instead, it relied upon the evidence of the alleged offender that Mr. R has unique experience and skills on close protection. Action taken by the Chief, SSS, UNOG, in alleged cheating of Mr. R The Panel should have considered whether and when the Chief, SSS, UNOG, received the information of the alleged cheating and whether he took appropriate action upon receipt of the allegation, namely, forwarding it to OIOS, in accordance with the applicable law. Instead, the Panel found satisfactory the assertion by the Chief, SSS, UNOG, that he believed that he had addressed the matter by finding out that it was common for officers to have access to past tests. Based on the exhaustive review of the investigation records, the Tribunal cannot but conclude that the Investigation Panel unreasonably failed to investigate and determine the relevant issues and thus failed to give proper effect to the purpose and prescripts of ST/SGB/2008/5. In light of the foregoing, the Tribunal finds that these serious deficiencies raise questions about the appearance of the impartiality of the investigation and are thus sufficient to make the resulting report unreliable for the purpose of making a final decision based on it. Hence, the Tribunal concludes that the contested decision to take no further action on the Applicants’ complaint was unjustifiable and unlawful. Remedies The Tribunal rescinded the contested decision and the investigation was set aside. Recalling its finding that the Investigation Report has serious deficiencies that make it unreliable, the Tribunal remands the Applicants’ complaint back to the Director-General, UNOG, to have the complaint properly addressed in accordance with the applicable legal framework.

Decision Contested or Judgment/Order Appealed

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

Legal Principle(s)

In cases of harassment and abuse of authority, the Tribunal is not vested with the authority to conduct a fresh investigation into the initial complaint. As for any discretionary decision of the Organization, it is not the Tribunal’s role to substitute its own judgment for that of the Administration. However, the Tribunal may “consider whether relevant matters have been ignored and irrelevant matters considered”. If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down. The Administration must fulfil its obligations to take prompt and concrete action upon receipt of a complaint regarding prohibited conduct, as established in sec. 5.3 of ST/SGB/2008/5, to promptly review, assess and, if necessary, appoint an Investigation Panel (sec. 5.14), and to submit the investigation report, normally within three months from the date of the submission of the formal complaint (sec. 5.17). The Administration has the duty to act fairly, justly and transparently in selecting a staff member for a position. The responsible official has the obligation to forward the information of unsatisfactory conduct received to OIOS, which retains the ultimate authority to determine whether the information of unsatisfactory conduct received merits any action. Compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Duparc

El Gaouzi

Toualbia

Drevon

Entity

UNOG

Case Number(s)

UNDT/GVA/2019/041

UNDT/GVA/2019/042

UNDT/GVA/2019/043

UNDT/GVA/2019/044

Tribunal

UNDT

Registry

Geneva

Date of Judgement

30 Jun 2021

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Discrimination and other improper motives

Investigation

Applicable Law

Administrative Instructions

- ST/AI/1997/4
- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2008/5
- ST/SGB/2009/9

Staff Regulations

- Regulation 4.3

UNDT Statute

- Article 10.5

UNAT Statute

- Article 2.1(a)

Related Judgments and Orders

UNDT/2016/009

2010-UNAT-084

2018-UNAT-873

2018-UNAT-847

2017-UNAT-742