



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-518/Corr. 1

Oummih
(Respondent/Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Richard Lussick Judge Sophia Adinyira
Case No:	2014-592
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Ms. Oummih:	Self-represented
Counsel for Secretary-General:	Stéphanie Cartier

Reissued for technical reasons on 30 November 2017.

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/004, rendered in French by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 15 January 2014 in the case of *Oummih v. Secretary-General of the United Nations*. The Secretary-General appealed on 17 March 2014, and Ms. Amal Oummih filed her answer and cross-appeal on 16 May 2014. On 21 July 2014, the Secretary-General filed his answer to the cross-appeal.

Facts and Procedure

2. The following facts are uncontested:¹

... On 1 September 2009, the Applicant was granted a fixed-term appointment of two years as a Legal Officer at the P-3 level at [the Office for Staff Legal Assistance (OSLA)], [Office of Administration of Justice (OAJ)], United Nations Secretariat. Initially posted to Beirut, she was transferred to Geneva in June 2010.

... While the Applicant was on home leave from 22 July to 15 August 2011, the Chief, OSLA, completed her 2009-2010 performance appraisal by giving her an overall rating of “does not meet performance expectations”. The second reporting officer, the former Executive Director, OAJ, took note of the first reporting officer’s appraisal on 10 August 2011. The Applicant initiated a rebuttal process against this performance appraisal report.

... By memorandum of 22 August 2011, the Chief, OSLA, recommended non-renewal of the Applicant’s contract, due to expire on 31 August 2011, on the grounds of her 2009-2010 performance rating.

... By letter of 24 August 2011, the Applicant was informed that, on the recommendation of her office, her contract would be renewed for one month in order to allow her and her supervisor to complete the performance appraisal report for the period from April 2010 to March 2011.

... By e-mail of 28 September 2011, the Executive Office of the Secretary-General informed the Applicant that, in line with a recommendation of the Management Evaluation Unit at United Nations Headquarters in New York, the United Nations Office at Geneva had been requested to extend her appointment from 1 October to 11 November 2011.

¹ Impugned Judgment, paras. 3-46.

... On her return from sick leave on 18 October 2011, the Applicant learned in the course of an e-mail exchange with the Chief, OSLA, that in her absence she had been replaced as counsel by another staff member of the Office in a case pending before the Appeals Tribunal to which she had previously been assigned.

... By e-mail of 19 October 2011 sent to the former Executive Director, OAJ, and the Chief, OSLA, the Applicant complained that another case for which she had been appointed as counsel had been reassigned in her absence to another staff member, without her being informed. The Chief, OSLA, replied to her by e-mail the same day, reproaching her for filing an application concerning the Office.

... Also by e-mail dated 19 October 2011, the Chief, OSLA, informed the Applicant that he would himself contact two applicants whom she had previously represented in order to advise them that she had been taken off their cases and that another staff member from the Office would thenceforth represent them. He also specified that he would inform the Dispute Tribunal of that fact and ordered the Applicant not to contact the Registry of the Tribunal or the two applicants concerned.

... On 25 October 2011, the Applicant wrote to the Information Systems Assistant, OAJ, noting that she had been deprived of access to the internal information-sharing service ("eRoom") by order of the Chief, OSLA. A little later the same day, she wrote to the Executive Director, OAJ, to inform him of that fact and request his intervention.

... On 28 October 2011, she enquired whether she could take back the cases that had been assigned to her Geneva colleague, whose secondment to OSLA was coming to an end. The Chief, OSLA, replied to her that, apart from some cases that would continue to be followed by that colleague, the cases in question would be assigned to other staff members from the Office.

... By letter dated 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and de facto evicted from the Office. By application dated 1 November 2011, the Applicant appealed the said decision under art. 2.1 of the Statute of the [Dispute] Tribunal.

... On 18 November 2011, the Chief, OSLA, completed the Applicant's 2010-2011 performance appraisal report, once again giving her an overall rating of "does not meet performance expectations". The second reporting officer, to wit the Executive Director, OAJ, signed the report on 21 November 2011.

... On 19 December 2011, the Applicant initiated a rebuttal process against the rating in her 2010-2011 performance appraisal. In its report dated 12 March 2012, the rebuttal panel found that the Applicant's 2010-2011 performance appraisal report should be deemed null and void and, in a supplement to the report dated 28 March 2012, changed the Applicant's overall rating to "successfully meets performance expectations".

... On 2 April 2012, the rebuttal panel submitted its report concerning the 2009-2010 performance appraisal report and again decided to change the Applicant's overall rating to "successfully meets performance expectations".

... On 17 April 2012, the Chief, OSLA, gave the Applicant a letter of reprimand that he said would be placed in her file along with any written comments she might make. Following a request for management evaluation, the Applicant was informed on 22 May 2012 that the letter of reprimand had been withdrawn and that all documents pertaining thereto would be removed from her file.

... On 25 April 2012, the Applicant was temporarily assigned to the Office of the United Nations High Commissioner for Human Rights until the end of July 2012.

... On 27 April 2012, the Applicant filed a complaint with the Deputy Secretary-General against her first reporting officer and supervisor, the Chief, OSLA, and against one of her former colleagues at OSLA, under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The alleged improper conduct included the following: deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, retaliation for having filed an appeal and for having requested mediation, defamation, exerting pressure on staff, delaying the attribution of her post, rejecting travel requests, preferential treatment of another staff member.

... On 9 May 2012, the Deputy Secretary-General acknowledged receipt of the Applicant's complaint and instructed the new Executive Director, OAJ, to review it. The Applicant, at the latter's request, completed her complaint on 29 May 2012, 13 June 2012 and 23 July 2012.

... In June 2012, following completion of the rebuttal processes and the upgrading of the Applicant's overall ratings for the 2009-2010 and 2010-2011 performance appraisals, the Applicant's contract was renewed for one year, until 11 June 2013.

... On 13 July 2012, the Director received the comments of the colleague against whom the Applicant had filed a complaint and to whom a detailed summary of the complaint had been sent on 9 July 2012. On 25 August 2012, she received the comments of the Chief, OSLA, on the same complaint.

... On 12 September 2012, the Applicant was informed that her performance for the period 2011-2012 had been rated as "partially meets performance expectations". Following a rebuttal process, the rating was upheld and the Applicant was informed accordingly on 1 February 2013.

... On 21 September 2012, after writing two notes to the file dated 18 September 2012 on her analysis of the complaint against respectively the Chief, OSLA, and the Applicant's former colleague, the Director informed the Applicant that no fact-finding investigation would be carried out on the complaint against her

colleague at OSLA but that an investigation would be opened regarding the Chief, OSLA, solely with respect to some of the facts she had denounced, namely, those concerning the decision to take away from her the cases to which she had previously been assigned as counsel, the fact that certain messages exchanged with the Chief, OSLA, had been copied to other staff members, and finally the question of whether the Chief, OSLA, had created a hostile work environment for the Applicant.

... On the same day, 21 September 2012, the Director decided to open an investigation into a complaint of prohibited conduct made against the Applicant by the Chief, OSLA, and a colleague of the Applicant at OSLA.

... On 8 October 2012, the Director informed the Applicant and the Chief, OSLA, that the investigation into the facts alleged by the Applicant would be conducted by two former staff members on the roster established by the Office of Human Resources Management. That decision was reversed on 9 October 2012 following an objection by the Chief, OSLA, on the grounds of a conflict of interest.

... On 14 November 2012, the Director informed the Applicant of her decision to appoint Mr. B. C. and Ms. A. O., individuals outside the Organization, as members of a fact-finding investigation panel and on 16 November 2012 she engaged them as independent consultants.

... On 17 November 2012, the Applicant asked the Director for further information about the panel members, including confirmation that they were on the roster of the Office of Human Resources Management. The Director replied on 21 November 2012, without, however, indicating clearly whether the panel members were on the roster.

... On 20 November 2012, the Applicant requested a management evaluation of several decisions, including the Director's decision of 21 September 2012 to limit the scope of the investigation on harassment to certain of the facts she had alleged against the Chief, OSLA.

... In December 2012, the panel members travelled to Geneva and New York to interview witnesses, the Applicant and the Chief, OSLA.

... By e-mail of 10 December 2012, the Applicant once again asked the Director whether the panel members were on the roster of the Office of Human Resources Management before being selected to conduct the investigation and whether they had received internal United Nations training on investigating complaints filed under ST/SGB/2008/5. The Director replied on the same day that they were not on the roster in question and that they had not received the training provided by the Office of Internal Oversight Services ("OIOS").

... On 11 December 2012, the Applicant again conveyed to the Director her doubts about the conduct of the fact-finding investigation and asked that a third member, from OIOS, be added to the panel and that the two panel members

already appointed work under his or her supervision. The Director responded in the negative on the same day and reminded the Applicant that she was under an obligation to cooperate with investigations conducted in accordance with staff rule 1.2(c).

... On 6 March 2013, the request for management evaluation particularly of the decision of 21 September 2012 was rejected.

... On 1 April 2013, the panel members submitted their report dated 22 March 2013 to the Director, and on 9 April 2013 they submitted an addendum in response to an additional request by her.

... On 26 March 2013, the Applicant was placed on sick leave.

... On 26 April 2013, the Director, having reviewed the panel's fact-finding investigation report, decided that no further action should be taken on the Applicant's complaint against the Chief, OSLA, and on 29 April 2013 she sent the Applicant a summary of the findings in the report.

... On 4 June 2013, the Applicant filed with this Tribunal her application against the decision of 21 September 2012 whereby the Director refused to open an investigation into all of the facts of harassment, discrimination and abuse of authority she alleged had been committed by the Chief, OSLA, and one of her former colleagues at OSLA. The application was registered under Case No. UNDT/GVA/2013/024.

... On 27 June 2013, the Applicant submitted a request for management evaluation of the Director's decision of 26 April 2013 to take no further action on the complaint against the Chief, OSLA.

... On 15 July 2013, the Respondent submitted his reply to the application of 4 June 2013, asking that it be dismissed and appending a written statement by the Director as well as her two notes to the file of 18 September 2012 produced *ex parte*. On 17 September 2013, the Applicant submitted her comments on the Respondent's reply, in accordance with Orders No. 109 (GVA/2013) of 29 July 2013 and No. 115 (GVA/2013) of 5 August 2013 granting her access to the *ex parte* documents and an extension of the time limit to submit her comments, respectively.

... On 11 September 2013, the Applicant filed an application, registered as Case No. UNDT/GVA/2013/050, contesting the decision to take no further action on her complaint against the Chief, OSLA.

.... On 9 October 2013, the Under-Secretary-General for Management rejected the request for management evaluation of the decision to take no further action on the complaint against the Chief, OSLA.

... On 11 October 2013, the Respondent submitted his reply to the application registered under Case No. UNDT/GVA/2013/050 and requested that it be rejected. A written statement by the Director was appended thereto.

... By Order No. 155 (GVA/2013) of 17 October 2013, the Tribunal requested the Respondent to transmit the full fact-finding investigation report to it on an *ex parte* basis, which was done on 24 October 2013.

... By Order No. 186 (GVA/2013) of 28 November 2013, the Tribunal convoked the parties to a hearing on the merits to be held on 17 December 2013 on both Cases No. UNDT/GVA/2013/024 and No. UNDT/GVA/2013/050.

... On 16 December 2013 at 9.53 p.m. New York time, the Applicant requested the Tribunal to transfer her Case No. UNDT/GVA/2013/050 to its New York Registry. The request was rejected by Order No. 194 (GVA/2013) of 17 December 2013.

... On 17 December 2013, the hearing took place and was attended by the parties by videoconference.

3. On 15 January 2014, the UNDT issued its Judgment. The UNDT found that the Executive Director, OAJ, had “exceeded her role by undertaking a preliminary investigation and informing the individuals concerned, when that role was restricted to promptly assessing the complainant’s good faith and whether a fact-finding investigation was warranted”.² The UNDT held that “[t]he Director’s preliminary investigation of the alleged facts led her to distinguish between those claims that should be investigated by a fact-finding panel and those that did not warrant any follow-up. In taking this action, the Director substituted herself for the panel members whose mandate it was to do so.”³ The Dispute Tribunal concluded that the decision of 21 September 2012 whereby the Executive Director refused to open an investigation into all the allegations raised was a violation of Secretary-General’s Bulletin ST/SGB/2008/5 and should be rescinded.

4. The UNDT further found that the Executive Director’s decision of 26 April 2013 to take no further action on Ms. Oummih’s complaint against the Chief, OSLA, was a direct consequence of the decision of 21 September 2012 and was therefore also unlawful. Additionally, the decision of 26 April 2013 was also unlawful since the Executive Director mainly relied on a fact-finding investigation report prepared by two fact-finding investigation panel members who were unauthorized to do so.

² Impugned Judgment, para. 64.

³ *Ibid.*, para. 65.

5. The UNDT rescinded the two decisions and ordered that “[a] new decision must be taken concerning the complaint lodged by [Ms. Oummih]”.⁴ The UNDT also awarded compensation in the amount of CHF 8,000 for moral damages.

6. On 13 May 2014, Ms. Oummih filed a “Motion for Interim Relief” with the Appeals Tribunal in relation to the UNDT Judgment, and the Secretary-General filed his observations on 27 May 2014. On 27 June 2014, the Appeals Tribunal rendered Order No. 191 denying Ms. Oummih’s motion.

7. By Order No. 209 (2015), dated 9 February 2015, the Appeals Tribunal granted Ms. Oummih’s request for an oral hearing and informed the parties of the timetable for the hearing. On 19 February 2015, the Appeals Tribunal heard oral arguments with both Ms. Oummih and counsel for the Secretary-General attending in person.

Submissions

The Secretary-General’s Appeal

8. The UNDT erred in law and fact by improperly narrowing the scope of the responsible official’s discretionary authority in assessing a staff member’s complaint under Section 5.14 of ST/SGB/2008/5. Contrary to the UNDT’s finding, ST/SGB/2008/5 confers on the responsible official the discretion as to how to determine whether the complaint was made in good faith, and whether the grounds underlying the complaint are sufficient to meet the threshold of warranting a formal fact-finding investigation. In considering whether this discretion was properly exercised, the UNDT ought to have considered whether the course of action followed was “legal, rational, procedurally correct and proportionate”, which the UNDT failed to do.

9. The Executive Director was well within the bounds of her discretionary authority in determining whether all, certain or none of the allegations in the complaint warranted a formal fact-finding investigation. None of the allegations she dismissed provided any grounds to warrant an investigation, as they concerned actions not undertaken by the subjects of the complaint or were moot, unsupported by evidence, and/or manifestly without merit.

⁴ *Ibid.*, para. 77.

10. The UNDT erred in law in finding that the Executive Director did not have the discretionary authority to make inquiries of the alleged offenders. The relevant provisions of ST/SGB/2008/5 do not expressly prohibit a responsible official from requesting such comments, nor do they expressly reserve this authority to a fact-finding investigation panel. The UNDT also erred by failing to consider whether the request for comments from the two alleged offenders prejudiced Ms. Oummih.

11. The UNDT erred in law in finding that the Executive Director's decision to appoint external investigators amounted to a procedural irregularity of such a nature as to vitiate the entire process. Section 5.14 of ST/SGB/2008/5 does not expressly prohibit the responsible official from appointing external investigators, nor does it expressly provide that the criteria for appointing investigators in Section 5.14 are exhaustive.

12. In the circumstances of this case, both the complainant and the alleged offenders were from OSLA, and special conflict of interest issues arose with respect to the appointment of investigators since OSLA's mandate involves representing staff members and former staff members within the Organization's system of administration of justice and includes the scrutiny and challenge of fact-finding investigations undertaken by individuals on the Office of Human Resources Management (OHRM) roster. Since OSLA is operationally independent from the Office of the Executive Director, the Executive Director had no way of knowing which persons on the roster might present a conflict of interest detrimental to either the complainant or the alleged offender.

13. The UNDT erred by rescinding the decision and awarding compensation without first seeking to establish whether Ms. Oummih was prejudiced as a result of the appointment of the two external investigators.

14. The UNDT erred in law and fact by awarding compensation for the delay in reviewing Ms. Oummih's complaint. 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. It does not specify a deadline or the right to be communicated a determination within a given period of time. Furthermore, since Ms. Oummih's complaint was promptly reviewed, no delay was unaccounted for during the process, and there was no negligence on the part of the Organization. Ms. Oummih was therefore not entitled to any compensation for moral damage.

15. Finally, the UNDT erred by ordering the Administration to rescind both decisions and to take a new decision concerning the complaint. There were no procedural flaws, and even if there were, they were not of such a nature as to vitiate the fact-finding investigation and the decision to close the case. A new investigation would present numerous additional challenges such as: (i) the appointment of investigators who present a conflict of interest; (ii) less accurate factual responses and findings given the passage of time since the complaint was submitted; and (iii) subjecting the alleged offenders to two investigations in the same case.

16. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety. In the alternative, the Secretary-General requests that the Appeals Tribunal vacate the UNDT's order to take a new decision concerning the complaint submitted by Ms. Oummih.

Ms. Oummih's Answer

17. As a preliminary matter, Ms. Oummih asks that the Appeals Tribunal hold an oral hearing "[d]ue to the complexity of this case, another closely-related case which is currently pending with the UNDT, and other related matters which are ongoing and which can have an impact on the current case before the Tribunal". In the alternative, she seeks leave to file an additional submission once she has had the benefit of legal assistance by "OSLA or OSLA-equivalent counsel".

18. Ms. Oummih submits that the Secretary-General has failed to present any valid grounds of appeal justifying a reversal of the Judgment. A party must demonstrate that the UNDT has committed an error of fact or law warranting the intervention by the Appeals Tribunal. It cannot merely repeat on appeal arguments that did not succeed before the UNDT.

19. Section 5.14 of ST/SGB/2008/5 prescribes in detail the different steps to be taken once a complaint has been filed. The wording is clear and concise. Section 5.14 does not confer any discretionary authority on the responsible official as to how to handle the complaint beyond determining whether it has been filed in good faith and whether there are sufficient grounds to launch a formal investigation. In accordance with the Appeals Tribunal's jurisprudence in *Scott*, where "the language in the respective disposition is

plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation”.⁵

20. On appeal, the Secretary-General merely reiterates the arguments made at trial, i.e. that the unique circumstances of the case justified the selection of investigators external to the Organization, in violation of ST/SGB/2008/5. This argument was considered by the UNDT Judge who found it to be “uncorroborated by any document” and who concluded that “it cannot be seriously argued that it was impossible to find two competent and unbiased individuals from the roster” which “contained around 200 names”. The Secretary-General does not explain why the Executive Director did not refer the case to OIOS or another investigative body within the common system, if there were genuine concerns about appointing an independent, unbiased panel.

21. Ms. Oummih points to the UNDT’s finding that the Administration has a duty to take the necessary organizational measures to implement the Secretary-General’s bulletins and that no situation can justify the selection of investigators external to the Organization. She refers to a “decision” by the Management Committee that the Department of Management should take steps to amend ST/SGB/2008/5 in order to provide that all cases under ST/SGB/2008/5 be investigated by OIOS instead of through peer review. It also noted that the amendment should be made by October 2013.

22. The cases quoted by the Secretary-General are not relevant to the present case. They relate to the decision on whether to carry out an investigation, whereas the contested decision is the Executive Director’s decision to “unilaterally dismiss serious allegations against the Chief of OSLA, including one that had been addressed and decided formerly by the UNDT” in a suspension of action judgment which the Secretary-General has not appealed.

23. Ms. Oummih requests that the Appeals Tribunal dismiss the appeal in its entirety.

Ms. Oummih’s Cross-Appeal

24. Ms. Oummih requests that the Appeals Tribunal grant her additional compensation in the amount of:

⁵ *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225.

-- one-year salary for the moral harm resulting from the Organization's failure to investigate in a timely manner her claim of harassment/abuse of authority in accordance with the Organization's rules and procedures;

-- six months' salary for the moral harm she suffered as a result of being subjected to an investigation by an "incompetent unlawfully-constituted body in violation of her due process rights"; and

-- USD 40,000 for the delay in addressing her complaint.

25. Ms. Oummih further requests specific performance as ordered by the UNDT and the referral of her complaint to OIOS for investigation; as well as "any other relief deemed just and equitable".

The Secretary-General's Answer to Ms. Oummih's Cross-Appeal

26. Ms. Oummih has not established any error in law, fact or procedure by the UNDT warranting an increase in the amount of compensation.

27. Ms. Oummih's request that the Appeals Tribunal refer her case to OIOS falls outside the jurisdiction of the Appeals Tribunal.

Considerations

28. In the instant case, Ms. Oummih lodged a complaint for abuse of authority against her former supervisor, the Chief of OSLA, and one of her former colleagues at OSLA. At the time of the events, she served as a P-3 Legal Officer with OSLA, OAJ in Geneva.

29. In response to Ms. Oummih's claim, the Executive Director of OAJ informed her that an investigation would be conducted only regarding the Chief of OSLA and solely with respect to some of her allegations. This decision was taken after the Executive Director received comments from the alleged offenders.

30. Ms. Oummih's request for management evaluation was denied and she appealed to the UNDT. The UNDT decided that contacting the alleged offender is the exclusive responsibility of the fact-finding panel and that there was no legal basis for the Executive Director to do so. Consequently, the Administration breached Section 5.14 of

ST/SGB/2008/5 in requesting comments before reaching its decision as to whether the complaint may constitute abuse of authority. Furthermore, the UNDT decided that it was for the panel and not the Administration to decide which facts merited an investigation.

31. As a general principle, the instigation 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.⁶ The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations.

32. Sections 5.14 and 5.15 of ST/SGB/2008/5 read as follows:

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. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

33. The wording is clear and establishes that “the responsible official will promptly review the complaint or report to assess [...] whether there are sufficient grounds to warrant a formal fact-finding investigation”. This was done by the Executive Director.

34. The Executive Director asked for comments from the alleged offenders before making this assessment. Since there was no risk of undermining the investigation, hearing both sides before assigning the case to a panel adds transparency to the procedure. It is the obligation of the fact-finding panel, at the beginning of the investigation, to inform the alleged offender that an investigation will be conducted against him or

⁶ See *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

her. However, this is the latest he or she must be informed, and it does not mean that he or she cannot be informed at an earlier stage.

35. We therefore reverse the UNDT rescission of the 21 September 2012 decision where the Executive Director refused to open an investigation into all the allegations of harassment, discrimination and abuse of authority raised against the Chief, OSLA, and one of Ms. Oummih's former OSLA colleagues.

36. Regarding the establishment of a fact-finding panel, Section 5.14 of ST/SGB/2008/5 stipulates that the responsible official – in this case the Executive Director – must entrust the fact-finding investigation to a panel of two persons from the department who have been trained for that purpose. Should this not be possible, the selection should be made from the roster maintained for that purpose by OHRM.

37. In the instant case, the two members of the panel were neither staff members of OAJ nor were they selected from the roster of OHRM. The Executive Director disregarded a provision of Section 5.14 of ST/SGB/2008/5 when she hired two consultants from outside the Organization to conduct the investigation.

38. We affirm the UNDT Judgment insofar as its conclusion that the investigation was conducted by unauthorized persons and as a consequence thereof their report cannot be taken into account. The rescission of the decision of 26 April 2013 by the UNDT is affirmed and the case is remanded to the Executive Director who shall establish a new fact-finding panel in accordance with ST/SGB/2008/5.

39. Finally, regarding the award of moral damages, the UNDT awarded CHF 8,000 based on its view that Ms. Oummih's health has been affected "by all the disputes with her superiors" and that the irregularities committed led to a major delay in closing the complaint, aggravating the anxiety caused.

40. The delay in the instant case is a result of litigation in which both parties have been partially successful. There is no inordinate delay caused by the Administration as it is only a result of the parties' exercise of their right to appeal.

41. This Tribunal reaffirms its disapproval of the practice of awarding compensation in the absence of actual prejudice. There are no legal grounds that can justify such an award when no actual prejudice was found.⁷ The award of moral damages is therefore rescinded.

42. In light of the above findings, the Appeals Tribunal need not discuss Ms. Oummih's cross-appeal.

Judgment

43. The Secretary-General's appeal is granted in part. The UNDT's rescission of the Executive Director's decision dated 21 September 2012 is reversed and the award of moral damages is vacated. The case is remanded to the Executive Director who shall establish a new fact-finding panel in accordance with Secretary-General's Bulletin ST/SGB/2008/5. Ms. Oummih's cross-appeal is dismissed.

⁷ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114, para. 18.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar