



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

BELKHABBAZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Natalie Dyjakon, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal. The public version of the judgment has been redacted pursuant to art. 11.6 of the Dispute Tribunal's Statute.

Introduction

1. By application filed on 25 April 2017, the Applicant, a former Legal Officer (P-3) in the Office of Staff Legal Assistance (“OSLA”), challenges 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.

Facts

2. The facts, most of which were previously established in Judgments *Oummih* UNDT/2014/004 and *Oummih* 2015-UNAT-518, are no longer in dispute. The summary below is in large part taken from these judgments, as well as Judgments *Applicant* UNDT/2011/187 and UNDT/2012/111. In order to provide the full context of this matter it is necessary to give a comprehensive factual background.

3. On 1 September 2009, the Applicant was granted a two-year fixed-term appointment as a Legal Officer at the P-3 level in OSLA, Office of Administration of Justice (“OAJ”), United Nations Secretariat. Assigned initially to Beirut, she was transferred to a position in Geneva in June 2010.

4. While the Applicant was on home leave from 22 July to 15 August 2011, the former Chief, OSLA, completed her performance appraisal for 2009-2010, giving her an overall rating of “Does not meet performance expectations”. The second reporting officer, the former Executive Director, OAJ, confirmed this rating on 10 August 2011. The Applicant initiated a rebuttal process in respect of this performance appraisal.

5. By memorandum of 22 August 2011, the former Chief, OSLA, recommended that the Applicant’s contract, which was due to expire on 31 August 2011, should not be renewed in light of her performance appraisal for 2009-2010.

6. By letter of 24 August 2011, the Applicant was notified that her contract would be extended for one month, in order to complete her performance appraisal for 2010-2011.

7. By e-mail of 28 September 2011, the Executive Office of the Secretary-General advised the Applicant that the United Nations Office at Geneva was asked to extend her contract from 1 October to 11 November 2011.

8. Upon her return from sick leave on 18 October 2011, the Applicant learned through an e-mail from the former Chief, OSLA, that she had been replaced during her absence by another Counsel in a case assigned to her.

9. By e-mail of 19 October 2011 addressed to the former Executive Director, OAJ, and to the former Chief, OSLA, the Applicant complained that another case to which she was assigned had been transferred to another Counsel during her absence, without informing her. The former Chief, OSLA, responded to her on the same day via email as follows:

... In light of your extended absence from [the Office of Staff Legal Assistance] and general unprofessional behaviour, I had to reassign your cases to other counsel. You have complained that you should have been informed. Consider yourself so informed. Note that you specifically communicated you did not wish to be disturbed [with] work-related issues while on sick leave. This was respected apart from the matter of your performance evaluation ...

Further, what I have seen from our own research (as you have not provided an updated case list) is that you do not have many active files, so the workload can be managed by others.

Given your continued unprofessional and provocative behaviour towards myself as your supervisor as well as other colleagues ... you cannot be trusted as fellow counsel in [the Office of Staff Legal Assistance]. Your actions, or lack thereof, have been extremely disruptive to the Office. I have never experienced such a difficult personnel situation in my almost twenty years in the UN system.

I will discuss your situation again [with the Executive Director of the Office of Administration of Justice] and whoever else is required ... In the meantime please refrain from calling or sending unhelpful, angry emails to colleagues, including myself.

The fact you are pursuing a formal complaint against the [Office of Administration of Justice/Office of Staff Legal Assistance] and are intent on litigating against the Organi[z]ation is a further consideration. I cannot imagine how [the Office of Staff Legal Assistance] can have a colleague handling files and accessing confidential office information in that circumstance.

10. By another e-mail of 19 October 2011, the former Chief, OSLA, informed the Applicant that he would contact two staff members whom she had previously represented in order to advise them that she was no longer in charge of their cases and that another Counsel would be appointed to represent them. He further mentioned that he would inform the Dispute Tribunal of that fact and ordered the Applicant not to contact the Registry of the Tribunal nor the two concerned applicants.

11. On 25 October 2011, the Applicant wrote to the Information Systems Assistant, OAJ, noting that she had been deprived of her access to the internal system of data sharing (“eRoom”) upon instruction from the former Chief, OSLA. Later during the day, she wrote to the former Executive Director, OAJ, to inform him of the matter and to request his assistance.

12. On 28 October 2011, the Applicant enquired whether she could take back the cases reassigned to her colleague in Geneva, whose secondment to OSLA was coming to an end. The former 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.

13. On 1 November 2011, the Applicant sought suspension of action of the decision to deprive her of her functions and to *de facto* evict her from her unit, before the Tribunal. The request for suspension of action was granted for the duration of the management evaluation by Judgment No. UNDT/2011/187 of 4 November 2011.

14. On the same day, the Applicant was informed that her contract would be renewed until the completion of the rebuttal procedure she initiated against her performance evaluations.

15. By e-mail of 6 November 2011, the former Chief, OSLA, informed the Applicant that he had decided to restore her access to the eRoom and to give her back a file that he had previously removed from her.

16. 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 former Executive Director, OAJ, signed the report on 21 November 2011.

17. 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”.

18. By application of 19 January 2012, the Applicant challenged the decision of 24 August 2011 to extend her appointment only for one month, until 30 September 2011. She also contested similar decisions to extend her contract for one-month periods by another application filed on 4 April 2012. By Judgment UNDT/2012/110 of 20 July 2012, the Tribunal found that the contested decisions were illegal and ordered the Secretary-General to pay the Applicant an amount of CHF10,000 as moral damages. This judgment was vacated by the Appeals Tribunal in Judgment 2013-UNAT-341 of 21 June 2013.

19. On 7 February 2012, the Applicant filed a new application with this Tribunal contesting the decision to deprive her of her functions and to *de facto* evict her from her unit. By Judgment UNDT/2012/111 of 20 July 2012, the Tribunal found that the contested decision was unlawful and ordered the Secretary-General to pay the Applicant an amount of CHF9,000 as moral damages.

20. On 2 April 2012, the rebuttal panel submitted its report concerning the 2009-2010 performance appraisal report and decided to change the Applicant’s overall rating for that period also to “Successfully meets performance expectations”.

21. On 17 April 2012, the former Chief, OSLA, issued a letter of reprimand to the Applicant, indicating that it would be placed in her official status 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.

22. 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.

23. On 27 April 2012, the Applicant filed a complaint with the Deputy Secretary-General against her first reporting officer and supervisor, the former 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.

24. On 9 May 2012, the Deputy Secretary-General acknowledged receipt of the Applicant's complaint and instructed the then 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.

25. 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.

26. 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 so notified by letter dated 31 January 2013. Whilst the Rebuttal Panel maintained the Applicant's rating, it noted that its report "should be viewed in the context of a PAS process which was not faithfully followed and or a relationship between the staff

member and [First Reporting Officer] that had already deteriorated dramatically before the start of the relevant performance period”.

27. On 21 September 2012, after writing two notes to the file dated 18 September 2012 on her analysis of the Applicant’s complaint against the former Chief, OSLA, and the Applicant’s former OSLA colleague, the then Executive Director, OAJ, 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 former Chief, OSLA, had been copied to other staff members, and finally the question of whether the former Chief, OSLA, had created a hostile work environment for the Applicant.

28. On the same day, 21 September 2012, the then Executive Director, OAJ, also decided to open an investigation into a complaint of prohibited conduct made against the Applicant by the former Chief, OSLA, and a colleague of the Applicant at OSLA. The report of investigation into this complaint was provided to the Tribunal as an annex to the investigation report of the second fact-finding panel into the Applicant’s complaint, but the Tribunal is unaware of the decision ultimately made by the responsible official on the outcome of this complaint against the Applicant.

29. On 8 October 2012, the then Executive Director, OAJ, informed the Applicant and the former 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 former Chief, OSLA, on the grounds of a conflict of interest.

30. On 14 November 2012, the then Executive Director, OAJ, informed the Applicant of her decision to appoint two individuals outside the Organization as members of a fact-finding investigation panel and, on 16 November 2012, she engaged them as independent consultants.

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

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

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

34. By e-mail of 10 December 2012, the Applicant once again asked the then Executive Director, OAJ, 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").

35. On 11 December 2012, the Applicant again conveyed to the then Executive Director, OAJ, 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 then Executive Director, OAJ, 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).

36. On 26 March 2013, the Applicant was placed on certified sick leave ("CSL"), and, from 22 July 2013, she was on CSL with half pay.

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

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

39. By e-mail of 10 May 2013, the Applicant was informed that the then Executive Director, OAJ, had decided not to renew her contract beyond its expiration date of 11 June 2013.

40. On the same day, 10 May 2013, she received her performance appraisal for the period 2012-2013, with the rating "Partially meets performance expectations", signed by the former Chief, OSLA, and the then Executive Director, OAJ, as her first and second reporting officers, respectively.

41. By email of 15 May 2013, the then Executive Director, OAJ, upon the Applicant's request, informed her of the reasons for the non-renewal of her contract, which were as follows:

You have been unable to maintain professional working relationships with colleagues.

You have required an inordinate amount of supervisory attention.

Your performance has only partially met performance expectations for two consecutive years.

You have lost the confidence of the First Reporting Officer and Second Reporting Officer.

Renewal of your appointment would be inconsistent with the operational requirements of [OSLA] and [OAJ].

42. By e-mail of 30 May 2013, addressed to the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, copied, in particular, to the then Executive Director, OAJ, the Applicant stated her intention to initiate a rebuttal of her performance appraisal.

43. On 3 June 2013, the Applicant initiated a rebuttal of her 2012-2013 performance appraisal. On the same day, by e-mail addressed to the then Executive Director, OAJ, and the Director, Office of the Chef de Cabinet, Executive Office of

the Secretary-General, she requested confirmation that she could expect her appointment to be renewed for the duration necessary to complete the rebuttal process, pursuant to section 4.12 of administrative instruction ST/AI/2013/1 (Administration of fixed-term appointments).

44. By e-mail of 3 June 2013, the Applicant was informed by the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, that her contract would not be extended for the duration of the rebuttal procedure as the reasons for non-renewal went beyond performance, so that section 4.12 of administrative instruction ST/AI/2013/1 did not apply in her case. On 4 June 2013, the Applicant requested management evaluation of that decision, followed on 5 June 2013 by an application to the Tribunal for suspension of action, which was granted by Order No. 78 (GVA/2013) of 10 June 2013. On 22 July 2013, the Applicant filed an application with the Tribunal, registered under Case No. UNDT/GVA/2013/039. This application is still pending. On the same day, 22 July 2013, she filed an application for interim measures in order to suspend the execution of the contested decision, which was rejected by Order No. 108 (GVA/2013) of 25 July 2013.

45. On 4 June 2013, the Applicant filed an application against the decision of 21 September 2012 whereby the then Executive Director, OAJ, refused to open an investigation into all of the facts of harassment, discrimination and abuse of authority which she had reported as having been committed by the former Chief, OSLA, and by one of her former colleagues in OSLA. The application was registered under Case No. UNDT/GVA/2013/024.

46. On expiration of the Applicant's contract on 11 June 2013, it was extended to 19 July 2013 for "administrative reasons" in order to allow her to avail herself of her right to sick leave. This extension to the contract has subsequently been renewed on a regular basis and the Applicant was ultimately separated from the Organization on 5 April 2014, upon exhaustion of her sick leave entitlements.

47. On 27 June 2013, the Applicant requested management evaluation of the decision of the then Executive Director, OAJ, dated 26 April 2013 to take no further action on the complaint against the former Chief, OSLA. On 11 September 2013,

she filed an application before the Tribunal, which was registered under Case No. UNDT/GVA/2013/050.

48. On 10 July 2013, the Applicant requested management evaluation of the decision not to extend her contract beyond 11 June 2013 and, on 14 October 2013, she filed an application before the Tribunal, which was registered under Case No. UNDT/GVA/2013/057. This application was heard from 13 through 17 November and 13 through 15 December 2017 and the parties are yet to file their final submissions.

49. By Judgment No. UNDT/2014/004 of 15 January 2014 issued in cases Nos. UNDT/GVA/2013/024 and UNDT/GVA/2013/050, the Tribunal rescinded the decision of 21 September 2012 whereby the then Executive Director, OAJ, refused to open an investigation into all the facts of harassment, discrimination and abuse of authority allegedly committed by the former Chief, OSLA, and one of the Applicant's colleagues. The Tribunal also rescinded the decision of 26 April 2013, whereby the then Executive Director, OAJ, determined that no further action should be taken on the Applicant's complaint against the Chief, OSLA.

50. In particular, the Tribunal found that the then 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". The Tribunal 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." The Dispute Tribunal concluded that the decision of 21 September 2012, whereby the then 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.

51. The UNDT further found that the then Executive Director's decision of 26 April 2013 to take no further action on the Applicant's complaint against the former 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 then Executive Director mainly relied on a fact-finding investigation report prepared by two fact-finding investigation panel members who were unauthorized to carry out such investigation.

52. By Judgment 2015-UNAT-518 pronounced on 26 February 2015 with reasons issued on 17 April 2015, the Appeals Tribunal reversed the Dispute Tribunal's rescission of the 21 September 2012 decision to limit the scope of the investigation. However, the Appeals Tribunal upheld the Dispute Tribunal's rescission of the 26 April 2013 decision to take no further action on the Applicant's complaint against the former Chief, OSLA. The Appeals Tribunal held that the composition of the panel did not conform with the provisions of ST/SGB/2008/5 and remanded the case to the then Executive Director, OAJ, to establish a new fact-finding panel.

53. By letter of 5 May 2015, the Applicant expressed her concern that the then Executive Director, OAJ, may have a conflict of interest in the role of responsible official in relation to her complaint, given that she had decided not to renew the Applicant's appointment and that this decision was being challenged. On 22 May 2015, she formally requested the then Executive Director, OAJ, to recuse herself.

54. By letter of 7 May 2015, the then Executive Director, OAJ, informed the Applicant that she intended to appoint a second panel to conduct a fact-finding investigation into the reported prohibited conduct and identified two retired staff members from the roster of trained investigators maintained by OHRM.

55. On 19 May 2015, the panel was formally appointed to investigate the following allegations:

- a) Whether [the Chief, OSLA] reassigned [the Applicant]'s cases pursuant to an e-mail communication dated 9 October 2011 and, if so, why, and whether such conduct was retaliatory for seeking recourse in the formal system of justice;
- b) Whether [the Chief, OSLA] copied others on confidential communications from himself to [the Applicant] and, if so, why, and whether such conduct embarrassed her; and

c) Whether [the Chief, OSLA] created hostile conditions for [the Applicant] within [OSLA], and cumulatively, through his direct e-mail and verbal communications with her.

56. The panel reviewed documentary evidence provided by the Applicant and the former Chief, OSLA, and interviewed 17 witnesses between 28 May 2015 and 20 November 2015, in addition to the Applicant who was interviewed on 25 September, 15 and 20 November 2015. Witnesses included the then Executive Director, OAJ, who was interviewed at the request of the former Chief, OSLA, after she recused herself (see para. 58 below). The panel made repeated requests to interview the former Chief, OSLA, but the latter refused, on the ground that he was himself challenging certain aspects of the investigation, including the composition of the panel, and that the matter was *sub judice*. Instead, the panel sent the former Chief, OSLA, written questions, to which he responded in writing.

57. The panel met with the then Executive Director, OAJ, on 1 June 2015 upon assuming its functions and on 12 June 2015 “to provide a general status report”.

58. By letter of 13 July 2015, the then Executive Director, OAJ, recused herself as the responsible official under ST/SGB/2008/5 with respect to the fact-finding investigation into the Applicant’s complaint against the former Chief, OSLA, and advised the panel that the matter had been referred to the Assistant Secretary-General, OHRM.

59. On 6 September 2016, the panel submitted its report to the OiC, OHRM. Its conclusions may be summarized as follows:

- a. The former Chief, OSLA, reassigned the Applicant’s cases through an e-mail of 19 October 2011. However, there is no evidence that these acts were of a retaliatory nature. Rather, “the measures taken were of a managerial and operational nature, necessary to coordinate the work of the section and to deal with the absences of a staff member who was not sufficiently diligent in reporting on her case load and case status, and in keeping the office informed about her whereabouts and absence”. Although the panel found it would have been expected that the Applicant’s cases be returned to her upon her return

from leave, it stated that it could not assess whether this may have happened as the matter was settled through legal channels;

b. The former Chief, OSLA, copied others in emails dealing with confidential issues concerning the Applicant, such as performance issues and a reprimand. He continued this practice in spite of the repeated requests from the Applicant to stop and a similar request from his supervisor. This conduct embarrassed the Applicant. However, there is no evidence that it was done maliciously or with an intent to harm;

c. The former Chief, OSLA, “could be aggressive and even abrasive in his tone or his communications” but he “was perceived by his colleagues as fair in general”. “[H]is aggressive and blunt manner and communications were described by his supervisors as in need of toning down, whether with General Assembly delegates, senior officials or his OSLA team”. OSLA colleagues were aware of the tensions between the Applicant and the former Chief, OSLA, however they “did not describe [the former Chief, OSLA] as someone who would embarrass a colleague, be vindictive or act in a retaliatory way”. The Applicant “contributed adversely to the situation through her behaviours and actions”. The behaviour of the former Chief, OSLA, can in part be attributed “to increased frustration with the [Applicant]” but there is no evidence of a pattern of hostile, harassing or threatening treatment in general or vis-à-vis [the Applicant] in particular”.

60. By letter of 25 October 2016, the OiC, OHRM, informed the Applicant that based on the report of the fact-finding panel, he had concluded that no prohibited conduct took place and, therefore, that he had decided to close the matter. In particular, he concluded as follows:

While [the former Chief, OSLA] reassigned [the Applicant’s] cases in October 2011, he acted as a reasonable manager would have acted in light of circumstances that he then faced.

While [the former Chief, OSLA] communicated certain confidential information for [the Applicant] to a wider audience than was necessary, this appears to have been a result of a lapse of managerial judgment in that he did not devise a different approach to ensure the

confidentiality of this information. However, there is no indication that he was ill-motivated when he did so.

[The former Chief, OSLA]’s communication style was considered, at times, to be aggressive and abrasive; however, neither this trait nor his other actions seem to have been the source of the tension that existed between you and him. The Panel indicated that at the heart of the tension was [the Applicant’s] own behaviour that adversely impacted [her] OSLA colleagues, including [the former Chief, OSLA].

61. On 23 December 2016, the Applicant requested management evaluation of the decision of the OiC, OHRM, to take no further action in respect of the complaint against the former Chief, OSLA, dated 25 October 2016 (“contested decision”).

62. By letter of 25 January 2017, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision.

63. On 25 April 2017, the Applicant, who was then self-represented, submitted her application to the Tribunal.

64. On 31 May 2017, the Respondent submitted his reply.

65. On 17 August 2017, the Respondent filed the investigation report of the second fact-finding panel (“investigation report”), together with its annexes, on an *ex parte* basis. A missing annex was filed on 8 September 2017. The investigation report and its annexes were subsequently disclosed to the Applicant, in a redacted form.

66. On 12 October 2017, the Applicant filed additional submissions, pursuant to the Tribunal’s directions.

67. By email of 27 October 2017, OSLA advised the Geneva Registry that it would represent the Applicant. Thereafter, the Applicant was represented by Counsel.

68. By motion of 3 November 2017, the Applicant sought leave to amend her application and to produce additional documents. Leave was granted on 7 November 2017.

69. On 17 November 2017, the Tribunal held a hearing on the merits of the case.

70. By motion filed on 8 December 2017, the Applicant sought leave to tender additional evidence and requested that her name be anonymised in any orders and in the final judgment in the present case (“Applicant’s motion to adduce new evidence and for anonymity”).

71. On 20 December 2017, the Respondent opposed the Applicant’s motion to adduce new evidence and for anonymity.

72. On 21 December 2017, the Respondent filed additional documents discussed during the hearing concerning the history of the adoption of ST/SGB/2008/5.

Applicant’s motion to adduce new evidence and for anonymity

73. By her motion, the Applicant seeks leave to tender as evidence an email of 18 September 2015 from the ASG, OHRM, concerning the handling of her complaint against the former Chief, OSLA, as well as statements of medical expenses dated 4 December 2017, 3 April 2014 and 9 December 2013.

74. The Tribunal notes that except for the statement of 4 December 2017, the documents that the Applicant seeks to adduce had been available to her for a considerable period of time. The Applicant had ample opportunities to submit these documents beforehand and their filings after the hearing and during the deliberations is untimely. Taking them into consideration at this stage would cause prejudice to the Respondent, who should be given the opportunity to test the evidence that is being considered by the Tribunal. The Applicant has not provided any cogent reason that would explain the delay in the filing these documents and justify the reopening of the evidential stage of the proceedings. As to the statement of 4 December 2017, although it was issued after the case was taken under deliberations, it concerns treatments that were done beforehand so the Applicant was in a position to request such a document earlier from her doctor and to submit it to the Tribunal. Furthermore, the documents that the Applicant seeks to adduce are not absolutely necessary for the determination of the case. In respect of the medical expenses, the Tribunal notes that the Applicant did not request

compensation for medical expenses so their filing at this stage would not prompt the award of material damages.

75. As to the Applicant's request for anonymity, the Tribunal notes that the previous judgments in respect of the Applicant's complaint against the former Chief, OSLA, were not anonymised, so a large part of the facts discussed in the present judgment are already in the public domain. However, Judgements UNDT/2011/187 and UNDT/2012/111, which dealt with the decision to reassign the Applicant's cases, were anonymised.

76. The Tribunal finds that given that previous judgments dealing with the Applicant's complaint were not anonymised and the importance of making a full and comprehensible record of these proceedings accessible to the public, there are no cogent reasons to deviate from the general rule that the name of an applicant should be mentioned in the judgment. The Tribunal, however, finds it appropriate to redact part of the published judgment, to remove confidential medical information.

77. Therefore, the Applicant's motion to adduce new evidence and for anonymity is rejected.

Parties' contentions

78. The Applicant's principal contentions are:

- a. The panel committed several procedural errors in the conduct of the fact-finding investigation, namely:
 - i. It failed to interview the former Chief, OSLA, in contravention with sec. 5.16 of ST/SGB/2008/5. Despite the breach of duty of cooperation by the former Chief, OSLA, the panel found that he had been cooperative and did not report him for misconduct nor temporarily suspended the investigation, thereby refusing to pursue an avenue of investigation and displaying bias;

ii. It took into consideration the statement made by the former Chief, OSLA, during the first fact-finding investigation, which was later considered to be unlawful as the panel was not legally constituted, thus rendering this evidence unreliable;

iii. It considered irrelevant material in taking into account the separate complaint made against the Applicant by the former Chief, OSLA and a former colleague;

iv. It failed to consider relevant material in disregarding the judgments of this Tribunal which found that the Applicant had been unlawfully deprived of her functions by the former Chief, OSLA;

v. It failed to interview all relevant witnesses and conducted an unbalanced investigation by interviewing the witnesses proposed by the former Chief, OSLA, while refusing to interview those proposed by the Applicant for alleged practical reasons;

b. The responsible official under ST/SGB/2008/5 also committed procedural errors in the handling of the Applicant's complaint, namely:

i. Both the then Executive Director, OAJ, and the ASG, OHRM, had a conflict of interest to act as responsible officials under ST/SGB/2008/5 given that they were involved in the proceedings lodged by the Applicant before the Dispute Tribunal in respect of the non-renewal of her appointment;

ii. The then Executive Director, OAJ, selected two panel members who were retired staff members without considering the possibility to appoint current staff members, in contravention with sec. 5.14 of ST/SGB/2008/5 and para. 32(a) of the Guidelines for UN Secretariat Managers;

iii. The ASG, OHRM, failed to constitute a new panel following the recusal of the then Executive Director, OAJ. The panel, who was

appointed by the then Executive Director, OAJ, before her recusal, may reasonably be perceived as being biased;

iv. The then Executive Director, OAJ, unjustifiably limited the scope of the second fact-finding investigation, thereby leaving some of the allegations made by the Applicant in her complaint unaddressed;

v. The OiC, OHRM, did not have authority to take the contested decision as he was not the designated responsible official under ST/SGB/2008/5;

vi. The OiC, OHRM, failed to properly consider the report of the fact-finding panel and to conduct a full analysis of the evidence gathered, as required;

vii. The OiC, OHRM, simply endorsed the conclusions of the panel, notwithstanding the irregularities in the process. He also failed to provide important details to the Applicant, notably the fact that the former Chief, OSLA, had not been interviewed;

c. Both the panel and the responsible official committed procedural irregularities in the conduct of the investigation and the decision to close the matter, namely:

i. They applied the wrong test for establishing harassment in requiring evidence of intent, whilst the test prescribed by sec. 1.2 of ST/SGB/2008/4 is an objective one;

ii. The investigation suffered inordinate delays as overall it lasted almost five years since the initial filing of the complaint on 27 April 2012 and it took over a year after the Appeals Tribunal judgment issued on 26 February 2015 to complete the investigation report, in contravention with sec. 5.17 of ST/SGB/2008/5;

d. The aforementioned irregularities render the investigation report so unreliable that the decision to close the Applicant's complaint without further

action is unlawful. The Organization failed to provide the Applicant a fair, transparent and effective investigation. Had the Organization fulfilled its obligations, the investigation would likely have been concluded before the Applicant was separated from the Organization and her appointment would most certainly have been renewed;

- e. The Applicant requests:
 - i. Rescission of the contested decision;
 - ii. Compensation for loss of opportunity equivalent to two years' net base salary, with interests;
 - iii. Compensation for breach of contract equivalent to three months' net base salary, with interests;
 - iv. Compensation for moral damages equivalent to six months' net base salary, with interests;
- f. The Applicant, separate from her Counsel, also requests the Tribunal to make a number of specific findings, including that the former Chief, OSLA, harassed her, and to refer the former Chief, OSLA, for accountability.

79. The Respondent's principal contentions are:

- a. The investigation was conducted lawfully as:
 - i. The then Executive Director, OAJ, fully complied with the judgment of the Appeals Tribunal in constituting a new fact-finding panel;
 - ii. Further, this panel composed of two retired staff members on the roster of trained investigators maintained by OHRM complied with the provision of sec. 5.14 of ST/SGB/2008/5;
 - iii. The ASG, OHRM, lawfully exercised the role of responsible official following the recusal of the then Executive Director, OAJ, in compliance with sec. 5.11 of ST/SGB/2008/5. Further, the OiC, OHRM

had no conflict of interest as he was not identified in the Applicant's complaint and the legal actions brought by the Applicant before the Dispute Tribunal are not against the OiC, OHRM, but the Secretary-General;

iv. The panel reviewed the documentary evidence provided by the Applicant and the former Chief, OSLA, interviewed 17 additional witnesses which it found relevant and sufficient to establish the facts under investigation and took evidence from both the Applicant and the Chief, OSLA, through testimony or written questions;

v. The panel's request to obtain a copy of the report into the complaint against the Applicant was reasonable as it was mentioned by one witness. In any case, the panel did not base its conclusion on this report;

vi. The panel of the second fact-finding investigation indicated in its detailed report that no prohibited conduct by the former Chief, OSLA, had taken place;

b. The OiC, OHRM, lawfully closed the complaint pursuant to sec. 5.18(a) of ST/SGB/2008/5 following the recusal of the then Executive Director, OAJ;

c. The Applicant has not identified any procedural irregularities in the conduct of the investigation, or the determination of the OiC, OHRM;

d. The amount of time taken to complete the second investigation is reasonable given the procedural matters raised by the Applicant, the number of witnesses and the context in which the investigation took place; and

e. The Applicant is not entitled to compensation as the decision was lawful and, in any event, she did not substantiate any damage that she claims to have suffered.

Consideration

Scope of judicial review

80. According to art. 2.1(a) of its Statute, the Tribunal is competent to examine the lawfulness of administrative decisions exclusively. The administrative decision presently under scrutiny is the decision to take no further action, that is, disciplinary action, after an investigation following the Applicant's complaint against her former supervisor for prohibited conduct under ST/SGB/2008/5. The manner in which the investigation was performed, although specifically challenged by the Applicant, does not in itself constitute an appealable decision.

81. Nonetheless, the Tribunal's review is not limited to the ultimate decision to take no further action. The Tribunal may 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. Accordingly, although the conduct of the investigation is not a reviewable decision, in assessing the legality of the decision to take no further action, it is pertinent to examine different aspects concerning the handling of the Applicant's complaint, on the one hand, and the investigation that ensued, on the other hand.

82. The scope of the judicial review in harassment and abuse of authority cases is thus restricted to how the Administration responded to the complaint in question (*Luvai* 2014-UNAT-417, para. 64). 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. The scope of the judicial review so outlined is supported by the wording of sec. 5.20 of ST/SGB/2008/5 (emphasis added):

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.

83. Before commencing this exercise, the Tribunal must recall that it is not vested with the authority to conduct a fresh investigation on the initial harassment allegations (*Messinger* 2011-UNAT-123, *Luvai* 2014-UNAT-417). 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). However, the Tribunal may draw its own conclusions from the evidence collected by the fact-finding panel (*Mashhour* 2014-UNAT-483; *Dawas* 2016-UNAT-612, para. 24).

84. In view of the foregoing, the Tribunal will first examine the alleged procedural errors in the appointment of the 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

85. Pursuant to sec. 5.14 of ST/SGB/2008/5:

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.

86. Pursuant to sec. 3.2 of ST/SGB/2008/5, "managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner".

87. In the present case, the appointment of the panel followed a judgment by the Appeals Tribunal which vacated a previous fact-finding investigation into the Applicant's complaint and remanded the case to the then Executive Director, OAJ, to "establish a new fact-finding panel in accordance with ST/SGB/2008/5".

88. It is noted that the lack of objectivity of the then Executive Director, OAJ, to act as responsible official in respect of the Applicant's complaint due to an alleged conflict of interest was not at issue before the Appeals Tribunal or even the Dispute Tribunal in respect of the first investigation. It only became an issue when the then Executive Director, OAJ, decided on 9 May 2013 not to renew the Applicant's

appointment, which triggered the Applicant to challenge this decision before the Dispute Tribunal. By that time, the decision to take no action against the former Chief, OSLA, following the first investigation, which was the subject of the first round of proceedings in this matter, had already been taken.

89. The Applicant, after the Appeals Tribunal's judgment and before any action was taken by the then Executive Director, OAJ, immediately raised with the latter the issue of her conflict of interest arising out of the fact that as the responsible official in respect of her complaint against the former Chief, OSLA she had taken the decision not to renew the Applicant's appointment, a matter subject of review. The then Executive Director, OAJ, initially refused to meet with her to devise a solution or to recuse herself. The then Executive Director, OAJ, maintained that she was directed by the Appeals Tribunal to appoint a new panel and her correspondence with the Applicant suggests that she did not perceive herself as having a conflict of interest.

90. That noted, the then Executive Director, OAJ, finally recused herself on 13 July 2015. No information was provided as to why exactly she did so but it is reasonable to assume that she agreed with the Applicant that she had a conflict of interest due to her being the decision-maker of the decisions concerning the non-renewal of her appointment, which was being challenged before this Tribunal. In the Tribunal's view, such conflict clearly existed. This is the only conclusion that can reasonably be drawn from her recusal as, if she had no conflict of interest, she would have been mandated to fulfil her role of responsible official under ST/SGB/2008/5.

91. By the time she recused herself, the then Executive Director, OAJ, had already taken action by appointing the fact-finding panel and had met with them twice. She requested the ASG, OHRM, to take over the role of responsible official but did not take any action to vacate the previous decisions she had made in handling the Applicant's complaint. Likewise, the ASG, OHRM, did not appoint a new panel and there is no evidence that she formally endorsed the appointment of the panel made by the then Executive Director, OAJ.

92. The Tribunal finds that the reasons for the recusal of the then Executive Director, OAJ, existed at the time she appointed the panel and that such reasons were expressly and repeatedly brought to her attention by the Applicant, but at that moment in time, she refused to act upon them. Being conflicted, the then Executive Director, OAJ, had to recuse herself at the earliest opportunity as her handling of the Applicant's complaint gives rise to a reasonable apprehension of bias and, therefore, does not comply with sec. 3.2 of ST/SGB/2008/5. She could not validly appoint the panel nor give any instruction as to how to carry out its mandate.

93. The Appeals Tribunal's judgment was not a valid reason for the then Executive Director, OAJ to act, despite having a conflict of interest, nor does it legitimise her conduct, as the issue of a conflict of interest was not considered by the Appeals Tribunal, as discussed above. Upon the referral of the Appeals Tribunal, the only available course of action for the then Executive Director, OAJ, was to recuse herself. No tribunal, properly informed, would direct that a person act in the face of a conflict of interest. The Appeals Tribunal had no knowledge of the existence of a conflict when it made its direction to the then Executive Director, OAJ. She had two options, either notify the parties to the appeal before the Appeals Tribunal so that they could seek directions, or recuse herself at the earliest time in the ordinary course.

94. In view of the foregoing, the Tribunal finds that the panel, appointed by a responsible official 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.

95. Notwithstanding the above finding it is necessary and appropriate in this case to determine all matters advanced by the Applicant.

96. The Tribunal finds 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 allegations of

prohibited conduct”, before considering to appoint retired staff members from the OHRM roster. The use of the expression “if necessary” makes it clear that only if it is not possible to appoint two individuals from the department, office or mission concerned, the responsible official may select individuals from the OHRM roster, who may be retired staff members. Moreover, the expression “individuals from the department, office or mission concerned” necessarily refers to current staff members. This is also clear from the French version of sec. 5.14, which refers to two “fonctionnaires”. This interpretation was confirmed by the Appeals Tribunal in its Judgment *Oummih* 2015-UNAT-518, at para. 36, where it held (emphasis added):

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.

97. The Dispute Tribunal also stressed in Judgment *Oummih* UNDT/2014/004 (at para. 69) that 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.

98. There is no evidence in the present case that the then Executive Director, OAJ, attempted first to select individuals from “the department, office or mission concerned”. In this respect, it is noted that the Respondent during the hearing was asked to clarify how this expression would concretely translate in the context of OSLA, but he could not provide any specific answer. The Tribunal understands that it would refer to OAJ, in view of the interpretation that was given by the Administration to sec. 5.11 of ST/SGB/2008/5 in referring the Applicant’s complaint to the then Executive Director, OAJ, as responsible official. In any event, since there is no evidence that any consideration was given to appointing current staff members of OAJ or of any other department or office, the Tribunal finds that sec. 5.14 has not been complied with.

99. This procedural error would not, in and of itself, warrant a declaration that the constitution of the panel was unlawful absent any specific objection having been raised by the Applicant at an earlier stage or any demonstration that it impaired the quality or the impartiality of the investigation. However, it is reasonable to expect that in circumstances where a first investigation was vacated due to the unlawful composition of the panel and where the then Executive Director, OAJ, was mandated to initiate a second one, the applicable procedure for nominating the panel set forth in ST/SGB/2008/5, as further distilled in the judgments of the Dispute and Appeals Tribunal, would be strictly adhered to. In the present circumstances, where the responsible official lacked the requisite impartiality and no explanation was provided by the Respondent as to why retired staff members were preferred to active ones of the department, the Tribunal finds that the disregard to the priority set out in sec. 5.14 for appointing panel members constitutes an additional factor giving rise to a reasonable apprehension of bias on the part of the former Executive Director, OAJ.

Conflict of interest of the responsible official

100. The Applicant alleges that the ASG, OHRM, and her OiC could not act as responsible officials in respect of her complaint as OHRM “is the adversarial party in these proceedings” and, therefore, has a conflict of interest. The Applicant claims that the matter had to be referred to the OIOS.

101. The Tribunal finds that the referral of the matter to OHRM was done in accordance 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.

102. The Applicant did not substantiate her claim that the ASG, OHRM, or her OiC had any conflict of interest. Her claim that OHRM acts as the Respondent in these proceedings is misguided. The Respondent is the Secretary-General and the

fact that OHRM ultimately responds to him, as any other office, does not in and of itself create a conflict of interest.

Alleged procedural errors in the conduct of the investigation

Scope of the investigation

103. The Applicant alleges that the then Executive Director, OAJ, unjustifiably limited the scope of the investigation.

104. In its email of 21 September 2012, the then Executive Director, OAJ, informed the Applicant that she had decided to open an investigation into the following allegations formulated in the Applicant's complaint against the former Chief, OSLA:

- (i) Whether [the former Chief, OSLA] engaged in prohibited conduct within the meaning of ST/SGB/2008/5 by reassigning your cases pursuant to an e-mail communication dated 19 October 2011;
- (ii) Whether [the former Chief, OSLA] engaged in prohibited conduct within the meaning of ST/SGB/2008/5 by copying others on confidential communications from himself to you; and
- (iii) Whether [the former Chief, OSLA] engaged in prohibited conduct within the meaning of ST/SGB/2008/5 by creating hostile working conditions for you within OSLA through his direct e-mail and verbal communications with you.

105. This is the decision that was the subject of review before the Dispute and the Appeals Tribunal. The Appeals Tribunal upheld the decision of the then Executive Director, OAJ, to limit the scope of the investigation as above. In so doing, it did not in any way amend the scope of the investigation. Hence, the scope of the investigation is *res judicata*, that is, it had been considered by the Appeals Tribunal and it was this scope of investigation which had to be applied to the investigation undertaken by the new panel directed to be appointed. The responsible official had to appoint a new panel to conduct this particular investigation.

106. However, the then Executive Director, OAJ, limited the scope of the investigation in respect of the two first allegations when she appointed the second panel as follows:

a) Whether [the Chief, OSLA] reassigned [the Applicant]'s cases pursuant to an e-mail communication dated 19 October 2011 and, if so, why, and whether such conduct was retaliatory for seeking recourse in the formal system of justice, as asserted in paragraphs 1 to 2 and paragraphs 17 and 18 of the complaint;

b) Whether [the Chief, OSLA] copied others on confidential communications from himself to [the Applicant] and, if so, why, and whether such conduct embarrassed her, as asserted in paragraph 13 of the complaint[.]

The third allegation remained unchanged.

107. In appointing the panel, the then Executive Director, OAJ, circumscribed and qualified the facts under investigation, such that they would only amount to misconduct if certain additional factual elements were established. In other words, the then Executive Director, OAJ, set conditions for the alleged facts to constitute prohibited conduct which were not present in the definition of the scope of the investigation reviewed by the Dispute Tribunal and the Appeals Tribunal. In respect of the first allegation quoted in para. 106 above, she added that the requirement that the reassignment of the Applicant's cases had to be done in retaliation for her seeking recourse in the formal system of justice in order to constitute prohibited conduct. In respect of the second allegation, she required that it be established that the conduct of copying others on confidential communications effectively embarrassed the Applicant to amount to prohibited conduct. By setting specific criteria for the facts to qualify as prohibited conduct, the responsible official also orientated the investigation in a specific direction and implicitly excluded alternative avenues of investigation that could demonstrate that the alleged facts amounted to prohibited conduct for other reasons, thereby limiting the scope of the investigation.

108. The Tribunal finds that variation to the terms of reference of the panel by the then Executive Director, OAJ, was in clear violation of the terms of the Appeals Tribunal's judgment and, therefore, unlawful. It may even constitute contempt of court, by failure of the then Executive Director, OAJ, to comply with the Appeals Tribunal's judgment. The inclusion of these additional elements to establish misconduct is particularly pervasive in the context of the present case where the responsible official recused herself (only) after having appointed the panel, as it

may be perceived as an attempt to influence the decision-maker who would ultimately have to decide on whether the alleged facts constituted misconduct.

109. Therefore, the Tribunal finds that the formulation of the terms of reference of the second panel was unlawful.

Failure to interview the former Chief, OSLA

110. Pursuant to sec. 5.16 of ST/SGB/2008/5 (emphasis added):

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.

111. In the present case, the panel sought to interview the former Chief, OSLA, on a number of occasions but the latter refused, on the ground that he was himself challenging certain aspects of the investigation, including the composition of the panel, before the Dispute Tribunal and that the matter was *sub judice* at the time. The panel refused to suspend the investigation pending resolution of the matter by the Dispute Tribunal and, instead, afforded the former Chief, OSLA, the opportunity to provide written answers to its questions and to submit documentary evidence.

112. The former Chief, OSLA, had an obligation to cooperate with the investigation. This obligation is clearly expressed in sec. 6.4 of ST/SGB/2008/5, which provides that:

Where a fact-finding investigation is initiated following receipt of a formal complaint of prohibited conduct, appropriate measures shall be taken by the head of department, office or mission to monitor the status of the aggrieved party, the alleged offender and the work unit(s) concerned until such time as the fact-finding investigation report has been submitted. The purpose of such monitoring shall be to ensure that all parties comply with their duty to cooperate with the fact-finding investigation and that no party is subjected to retaliation as a result of the complaint or the fact-finding investigation...

113. Sec. 1.2 of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) in force at the relevant time and applicable through sec. 5.15 of ST/SGB/2008/5

similarly provided that “[i]t is also the duty of staff members to cooperate with duly authorized audits and investigations”.

114. It was not for the former Chief, OSLA, to decide whether or not his challenge before the Tribunal would exempt him from testifying during the investigation. Once his objection had been rejected by the panel, he had to abide by his obligation of cooperation and testify. Likewise, the responsible official had a duty to ensure cooperation of the former Chief, OSLA, with the fact-finding investigation. There is no evidence that the then Executive Director, OAJ, or the ASG, OHRM, took any action to ensure cooperation by the former Chief, OSLA, or to reprimand him for his failure to abide by his obligations as a staff member.

115. The failure to interview the former Chief, OSLA, violates 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. He was even allowed to submit his previous statement to the first fact-finding panel, which the second panel took into consideration. In other words, he was allowed to participate and influence the investigation while refusing that his evidence be tested and challenged by the panel. This course of action constitutes a flagrant lack of consideration of due process and lead to an unbalanced investigation. Further, no credibility can be given to any of the evidence or written statements made by the former Chief, OSLA. His failure to cooperate should have led the panel to draw a negative inference or to consider that the Applicant’s allegations remained unchallenged by the subject of the investigation. At the very least, in relying on the documents and statements made by the former Chief, OSLA, which could not be properly tested, the panel considered unreliable and thus irrelevant material. The panel had a clear legal duty to interview the former Chief, OSLA, which duty it failed to discharge.

Consideration of irrelevant material

116. The Applicant takes issue with the fact that the panel considered the statement made by the former Chief, OSLA, to the first fact-finding panel, which was later found to be unlawfully constituted.

117. As recalled above, the panel allowed the former Chief, OSLA, to submit his previous interview statement to the first fact-finding panel and apparently took it into consideration as it quotes excerpts from it in its report. This is in flagrant contradiction with the panel's commitment to "disregard the fact that an earlier fact-finding investigation had occurred" and its advice to the witnesses that "it had seen no documentation" from that previous investigation and that "earlier testimony that they may have given would not be seen or taken into account".

118. The Tribunal finds that in ordering the constitution of a new fact-finding panel, the Appeals Tribunal clearly mandated that the investigation be conducted *de novo*. The panel apparently understood this principle but nevertheless considered the first interview of the former Chief, OSLA, as he refused to be interviewed again. It is clear that an interview conducted by a panel found to be unlawfully constituted and incompetent to conduct an investigation could not be considered by the second panel as it does not present the necessary guaranty of reliability. Also, as discussed above, this evidence could not be properly tested as the former Chief, OSLA, refused to cooperate with the investigation.

119. The Tribunal finds that the consideration of the interview of the former Chief, OSLA, by the first invalid fact-finding panel amounts to reliance on irrelevant material and constitutes a fundamental flaw in the investigation. This error is such as to raise serious concerns as to the competence of the panel. The Tribunal is unable to identify whether such irrelevant consideration was as a consequence of lack of training of the panel or for some other reason.

Failure to consider relevant material

120. The Applicant also takes issue with the fact that the panel did not take into account the findings of the Dispute Tribunal in its Judgments *Applicant* UNDT/2011/187 and UNDT/2012/111, in respect of the first allegation contained in her complaint concerning the reassignment of her cases.

121. Judgment UNDT/2011/187 (available only in French) concerned an application for suspension of action against the decision of the former Chief, OSLA, to deprive the Applicant of her functions and to *de facto* evict her from the Office.

In particular, Judge Cousin examined whether the decision of the former Chief, OSLA, contained in his email of 19 October 2011 to remove the Applicant's from her cases, and his decision of 25 October 2011 to remove the Applicant's access to the eRoom, were *prima facie* unlawful. Judge Cousin held that:

Le Tribunal doit donc apprécier si le supérieur hiérarchique d'un fonctionnaire peut le priver légalement, pendant une certaine période, de l'essentiel de son travail sans se fonder comme en l'espèce sur un quelconque texte. Il ne saurait être contesté que l'intention du supérieur hiérarchique a été à la fois de priver la requérante de tout contact avec les personnes susceptibles de lui demander des conseils du fait de sa position de fonctionnaire du Bureau d'aide juridique au personnel à Genève et de réduire à leur minimum les relations de travail entre elle d'une part et d'autre part son supérieur hiérarchique direct et les autres fonctionnaires du Bureau.

Si le Chef du Bureau d'aide juridique au personnel considérait que l'intérêt du service justifiait que la requérante n'effectue plus aucune des tâches principales qui lui étaient attribuées, il lui appartenait d'utiliser les nombreuses procédures prévues par le Statut et le Règlement du personnel à cet effet, par exemple le congé spécial à plein traitement dans l'intérêt du service, le non-renouvellement de contrat ou le licenciement. Mais il ne pouvait légalement la priver de l'essentiel de son travail dès lors que, si le travail est un devoir pour le fonctionnaire en service, il est aussi un droit.

Ainsi, alors même que le Tribunal estime que la décision contestée n'a pas de caractère disciplinaire, il considère qu'elle paraît de prime abord irrégulière comme ne reposant sur aucun texte.

122. The Tribunal notes that in this judgment, Judge Cousin did not examine whether the conduct of the former Chief, OSLA, was prohibited under ST/SGB/2008/5. However, his findings clearly indicate that he considered that the measures were not justified by operational requirements, notably as they entail that the Applicant would be deprived of her functions for the future.

123. This holding was later confirmed by Judge Cousin in his Judgment *Applicant* UNDT/2012/111 which dealt with the merits of the Applicant's application against the decision to deprive her of her functions and to *de facto* evince her of the Office, where he held that:

[T]he contested decision, which in fact constitutes several measures concerning the organization of the unit, was taken by the Applicant's

direct supervisor and had the sole effect of effectively depriving her of any possibility of performing her functions, whilst requiring her to be present in the unit.

The Chief of the Office of Staff Legal Assistance, as the Applicant's direct supervisor, was entitled, particularly on the grounds of the leave taken by the latter, to assign the cases attributed to her to other staff members and to ask her to cease the exchange of over-heated e-mails with him or other colleagues. However, he was not authorized to deprive her, as he did, of her functions into the future.

Thus, the object of the contested decision was to deprive the Applicant of the bulk of her work when a staff member has not only a duty but also a right to perform the work for which he or she has been recruited. For that reason alone, the decision of the Chief of the Office of Staff Legal Assistance was therefore unlawful.

124. The panel, in turn, referred to the judgment on the suspension of action, but not to the one on the merits of the Applicant's application. Whilst the panel noted that the Dispute Tribunal had found that the reassignment of the Applicant's cases constituted an "irregular" action as a staff member cannot be "simply deprived of [his or] her work", it stated that it was not its role "to analyse the Tribunal's judgment or its reasoning". Instead, the panel focussed on the fact that the judgment on the application for suspension of action was "immediately implemented, with [the Applicant] being returned to her cases and related functions" (at para. 129) and then went on to examine whether the measure was of a retaliatory nature (at para. 130). In this respect, the panel found (at para. 138) that:

Given the absences of [the Applicant], the uncertainty about her whereabouts and whether she was or was not in the office, and her less than complete record in submitting progress/status reports, [the former Chief, OSLA]'s contention that he needed to take managerial actions and operational decisions to coordinate the work of the section does seem to square with the facts.

125. The panel ultimately concluded that:

182. It is the Panel's assessment that the subject acted within his responsibilities to supervise and coordinate the work of his office. The Panel believes that it was acceptable for the manager to reassign cases considering the staff member's prolonged absences, his difficulties in properly tracking the status of the complainant's cases and deadlines for filing to the Tribunal.

183. The Panel notes that as the complainant's absences were so long and at times unpredictable, it appeared to be a managerial necessity to find ways to handle pending work. The Panel believes that it would have been expected that the cases be returned to her upon her return. (This is also what the Tribunal ruled.)

184. It cannot be known whether this might have happened, but given Ms. Belkhabbaz's immediate appeal to the Tribunal, the matter was settled through legal channels rather than through other forms of discussion/negotiation between the relevant parties. The Panel did not find it unreasonable for the section chief to adopt managerial measures to deal with the complainant's workload.

...

187. The Panel finds on balance, that the measures taken were of a managerial and operational nature, necessary to coordinate the work of the section and to deal with the absences of a staff member who was not sufficiently diligent in reporting on her caseload and case status, and in keeping the office informed about her whereabouts and absences.

126. The panel's conclusions 1) that the reassignment of the Applicant's cases was justified by operational requirements and 2) that it cannot be known whether the cases would have been reassigned to the Applicant upon her return from sick leave are in flagrant contradiction with the holdings of this Tribunal in Judgments UNDT/2011/187 and UNDT/2012/111. At the outset, it is noted that the Tribunal in these judgments found that the actions were "unlawful", not "irregular" as stated by the panel. The reason why these actions were considered to be unlawful is specifically because they could not be entirely justified by operational requirements, notably due to the fact that the cases were not reassigned to the Applicant upon her return from sick leave on 18 October 2011. The unlawful nature of the measure taken by the former Chief, OSLA, was *res judicata* and the panel was obliged to take this finding into account. The role of the panel was not to reassess this matter but rather to examine whether the facts established that the actions to reassign the Applicant's case taken by the former Chief, OSLA, constituted prohibited conduct under ST/SGB/2008/5. This could be the case if it was established that the measure was of a retaliatory nature, but not only in these specific circumstances. In this respect, the Tribunal already stressed that the then Executive Director, OAJ, unlawfully limited the scope of the terms of reference of the second investigation.

127. Therefore, the Tribunal finds that the panel blatantly disregarded a judgment issued by this Tribunal on the matter under consideration and, as such, failed to consider relevant material to its investigation.

Failure to interview witnesses proposed by the Applicant

128. Sec. 5.16 of ST/SGB/2008/5 quoted above provides that “the fact-finding investigation shall include interviews with ... any other individuals who may have relevant information about the conduct alleged”.

129. The Tribunal notes that the panel interviewed 17 witnesses, in addition to the Applicant. It appears that most were identified by the panel itself, and that both the Applicant and the former Chief, OSLA, were given the possibility to propose further witnesses. The panel accepted the two witnesses proposed by the former Chief, OSLA, although one had finally to be dropped due to her medical condition. As to the Applicant, she proposed five additional witnesses, who were “temporary personnel or interns/volunteers in either Geneva and Beirut”. The panel explained its decision on the Applicant’s proposed witnesses as follows: “For practical reasons, the Panel decided to keep the additional names to two, maximum, for both the subject and the complainant”.

130. The Tribunal recalls that the 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.

131. In the present case, the investigation report indicates that the panel was not concerned with the relevance but the quantity of the witnesses to be heard. No assessment was made as to whether the five witnesses proposed by the Applicant were relevant to the investigation. Rather, the panel applied a quantitative limitation. Presumably, the limit of two was drawn from the fact that the panel acceded to the request by the former Chief, OSLA, to interview two additional witnesses. By not assessing the relevance of the Applicant’s proposed witnesses, the panel did not comply with sec. 5.16 of ST/SGB/2008/5.

132. As outlined above (see para. 115 above), the Tribunal is also concerned that the panel allowed the subject of the investigation to propose witnesses without himself abiding by his obligation to cooperate. Hence, the former Chief, OSLA, was able to put his case before the panel through others without subjecting himself to an interview and possibly being challenged.

Test for establishing prohibited conduct

133. The Applicant asserts that both the panel and the OiC, OHRM, applied the wrong test in determining whether the established facts amounted to prohibited conduct under ST/SGB/2008/5.

134. At the outset, the Tribunal notes that the panel did not formally examine whether the facts established amount to prohibited conduct but limited itself to “establishing the facts about the allegations made by the complainant”. Indeed, the panel did not even refer to the definitions of discrimination, harassment, sexual harassment or abuse of authority contained in ST/SGB/2008/5 nor indicated which type of prohibited conduct it was investigating. Rather, it seemed to have investigated and considered the matters referred to it by the then Executive Director, OAJ, *in abstracto*, without demonstrably taking into account the provisions of ST/SGB/2008/5.

135. As to the OiC, OHRM, he determined that the established facts did not amount to harassment, based on the following:

While [the former Chief, OSLA] reassigned [the Applicant’s] cases in October 2011, he acted as a reasonable manager would have acted in light of circumstances he then faced.

While [the former Chief, OSLA] communicated certain confidential information for [the Applicant] to a wider audience than was necessary, this appears to have been a result of a lapse of managerial judgment in that he did not devise a different approach to ensure the confidentiality of this information. However, there is no indication that he was ill-motivated when he did so.

[The former Chief, OSLA]’s communication style was considered, at times, to be aggressive and abrasive; however, neither this trait nor his other actions seem to have been the source of the tension that existed between [the Applicant] and him. The Panel indicated that at

the heart of the tension was [the Applicant's] own behaviour that adversely impacted [her] OSLA colleagues, including [the former Chief, OSLA].

136. Harassment is defined in sec. 1.2 of ST/SGB/2008/5 as follows:

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.

137. The second and third conclusions reached by the OiC, OHRM, demonstrate that he misunderstood or incorrectly applied the test set forth in sec. 1.2 of ST/SGB/2008/5 for establishing harassment.

138. In his second conclusion about the sending of confidential emails to a wider audience than was necessary, the OiC, OHRM, considered that the former Chief, OSLA, was not “ill-motivated”, thereby applying a subjective test for establishing harassment. The Respondent also argued in this connection during the hearing that the jurisprudence of the Appeals Tribunal requires that the alleged offender had malicious intent or be on notice that his or her conduct was unwelcome, referring to *Perelli* 2013-UNAT-291 and *Bagot* 2017-UNAT-718.

139. As to the requirement of intent or to put the alleged offender on notice that his or her conduct is unwelcome, the Tribunal notes that none of the cases referred to by the Respondent support his view that there needs to be evidence of any malicious intent to establish harassment. In the Judgments *Perelli* and *Bagot*, the Appeals Tribunal did require that the alleged offender had constructive knowledge that his or her conduct was “unwelcome”, but these were cases involving sexual harassment. In this respect, it is noted that the Appeals Tribunal applied this test in *Bagot* only when it examined the allegations of sexual harassment and not when it considered those of harassment and abuse authority (see para. 68).

140. Whilst this Tribunal does not have to consider the test applicable for establishing sexual harassment in the context of the current proceedings, it notes that the judgment *Perelli* was not based on ST/SGB/2008/5 but on ST/AI/379 (Procedure for dealing with sexual harassment), which previously dealt with sexual harassment and contained a definition of sexual harassment different from the one contained in ST/SGB/2008/5. In *Bagot*, the Appeals Tribunal referred to the test applied in *Perelli* without making any distinction between the applicable provisions.

141. In any event, the Tribunal finds that sec. 1.2 of ST/SGB/2008/5 very clearly sets out an objective test for establishing harassment in stating that “the conduct *might reasonably be expected or be perceived* to cause offence or humiliation” (emphasis added). The test focusses on the conduct itself and requires an examination as to whether it would be expected or be perceived to cause offence or humiliation to a reasonable person. It is not necessary to establish that the alleged offender was ill-intended and, to that extent, the motivation of the alleged offender is not directly relevant for establishing harassment.

142. Further, the reference to “unwelcome conduct” does not require that the alleged offender be put on notice that his or her conduct is unwelcome. Sec. 5.5 of ST/SGB/2008/5 specifically provides in this respect that:

Aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her behaviour is offensive. However, disparity in power or status or other considerations may make direct confrontation difficult, and aggrieved individuals are not required to confront the offender.

143. Also, acts that may amount to harassment such as those described in sec. 1.2 would, by nature, be unwelcome. This may not always be true in situations concerning allegations of sexual harassment where, in some cases, staff members may engage in consensual exchanges of a sexual nature and, at some point, one of them no longer consents to being part of such exchanges. In this particular scenario, it may be required that the other staff member be put on notice of the change in the dynamics of the relationship.

144. The third conclusion of the OiC, OHRM, is also problematic in that it seems to consider whether the former Chief, OSLA, had reasons to be “aggressive and abrasive” towards the Applicant, amongst others, as an excuse or a justification for his conduct. In this connection, the Tribunal notes that the panel conducted an extensive investigation into the general behaviour of the former Chief, OSLA, as a manager, and that of the Applicant. Several, if not all witnesses, were interviewed mainly on their general perception of the two protagonists. The panel also spent a considerable amount of time establishing who was responsible for the broken relationship. The Tribunal recalls that while some contextual information may be relevant in an investigation into alleged prohibited conduct, such investigation should not turn into a personality contest or an enquiry into who is right or wrong in a difficult professional relationship. Again, what needs to be looked at is the conduct of the alleged offender, to make a determination as to whether, in and of itself, it could be reasonably expected or be perceived to reasonably cause offense or humiliation to the aggrieved individual. Ultimately, it may be that a complainant also commits prohibited conduct or other reprehensible acts, but the matters are to be considered separately and handled in accordance with the applicable procedure, such that the rights of each party are respected.

145. Finally, the OiC, OHRM, did not consider the panel’s factual conclusions globally, in order to determine whether the acts committed by the former Chief, OSLA, when examined together, would constitute harassment. This is a fundamental error as sec. 1.2 provides that “[h]arassment normally implies a series of incidents”. Whereas 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.

146. Also, the OiC, OHRM, did not consider whether the alleged facts could amount to abuse of authority as alleged in the complaint. Abuse of authority is defined in sec. 1.4 of ST/SGB/2008/5 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.

147. In view of the foregoing, the Tribunal finds 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

148. Sec. 5.14 of ST/SGB/2008/5 provides that the responsible official, upon finding that there are sufficient grounds to warrant a formal fact-finding investigation, shall “promptly” appoint a fact-finding panel. Sec. 5.17 of ST/SGB/2008/5 provides that the fact-finding investigation 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”. The Tribunal notes that ST/SGB/2008/5 set tight deadlines for the conduct of investigations into prohibited conduct. One of the reasons for this is because those acts which amount to prohibited conduct have the potential to deteriorate the work environment and, as such, require rapid intervention. It is also noted that sec. 5.14 and 5.17 are interrelated insofar as the deadline for the panel to submit its investigation report starts from the date of the complaint, and not from the time of its assignment.

149. The Tribunal notes that Applicant filed her complaint on 27 April 2012. The litigation in respect of the scope of the investigation and the appointment for the first panel was definitely settled by the Appeals Tribunal on 26 February 2015, with the reasons for its judgment being published on 17 April 2015. A second panel was appointed on 19 May 2015 and it delivered its report on 6 September 2016. The contested decision to take no further action on the Applicant’s complaint was issued on 25 October 2016.

150. In its Judgment 2015-UNAT-518, the Appeals Tribunal held that there had been no inordinate delay caused by the Administration in the handling of the

Applicant's complaint up to the Appeals Tribunal's judgment on 26 February 2015 as this delay was the "result of a litigation in which both parties have been partially successful".

151. When taking into account the date of the issuance of the reasons for the Appeals Tribunal's judgment, that is 17 April 2015, as the starting point for examining compliance with sec. 5.17 of ST/SGB72008/5, it results in the finding that the report was submitted more than 16 months later. This is more than five times the period normally allowed for an investigation panel to submit its report. Whilst sec. 5.17 envisages that some investigations may exceed the three-month time period, an investigation that takes five times the time normally allowed is unreasonable. This is even more so when considering that this investigation was the second one that was carried out in respect of the Applicant's complaint, initially filed in April 2012. In the circumstances, it fell upon the Administration to be particularly diligent in ensuring completion of the second investigation in a timely fashion.

152. The panel explained in its report that "[a] number of factors contributed to the investigation taking significantly longer than the Panel had expected and hoped", including difficulties in scheduling the Applicant's first interview due to her unavailability and her request to be re-interviewed, difficulties in arranging the participation of the former Chief, OSLA, in an interview, and the time necessary to review a large body of evidence submitted by the Applicant and the former Chief, OSLA (see paras 15-17 of the investigation report).

153. The Tribunal acknowledges that this was not a simple matter and that a large volume of documentary evidence had been produced, which undoubtedly required considerable attention. As to delays related to the scheduling of the Applicant's interview, the Tribunal notes that the first interview was conducted on 25 September 2015 so it had a limited impact on the overall length of the investigation. It is also noted that several witnesses, located in various locations, were interviewed. In this respect, however, the Tribunal notes that it is incumbent upon the panel to select witnesses who are relevant to establishing the facts under investigation. In the present case, there was already a large body of relevant

documentary evidence and it appears that the panel, instead of focussing on the facts under investigation, made a general enquiry into the professional behaviour of both the former Chief, OSLA, and the Applicant, discussed above (see para. 144 above). The time taken to carry out this exercise, which was not directly relevant to establishing the facts under investigation, is not a legitimate justification for the inordinate delay in concluding the investigation. Finally, any delay caused by the failure of the former Chief, OSLA, to cooperate with the investigation is imputable to the Administration as it failed to take the appropriate measure to ensure his cooperation, as discussed above.

154. In view of the foregoing, the Tribunal finds that the panel failed to conduct the investigation in a timely manner, in violation of sec. 5.17 of ST/SGB/2008/5.

Conclusion on the lawfulness of the contested decision

155. Having found that:

- a. the constitution of the panel was unlawful as retired staff members from the roster maintained by OHRM were selected before considering the appointment of current staff members from the office, department or mission, in contravention with sec. 5.14 of ST/SGB/2008/5, and the then Executive Director, OAJ, could not validly appoint the panel members as she had a conflict of interest;
- b. the mandate of the panel was unlawfully restricted by the then Executive Director, OAJ, in contravention with the judgment of the Appeals Tribunal;
- c. the panel failed to interview the former Chief, OSLA, in contravention with sec. 5.16 of ST/SGB/2008/5, and violated the basic requirements of procedural fairness in allowing him to nevertheless testify in writing, adduce documentary evidence, propose witnesses and submit his interview by the first panel;
- d. the panel considered irrelevant material in taking into account the interview of the former Chief, OSLA, by the first fact-finding panel which

was found to have been unlawfully constituted as it did not meet any of the two requirements set out by ST/SGB/2008/5;

e. the panel failed to consider relevant material in not taking into account the conclusions reached by the Dispute Tribunal in Judgments UNDT/2011/187 and UNDT/2012/111 with respect to the decision of the former Chief, OSLA, to deprive the Applicant of her functions and *de facto* evict her from the Office;

f. the responsible official did not apply the correct test for determining if the established facts amounted to harassment and did not examine whether they could amount to abuse of authority; and

g. the inordinate delay for the panel to submit its report, in violation of sec. 5.17 of ST/SGB/2008/5,

the Tribunal concludes that the contested decision to take no further action on the Applicant's complaint was unjustifiable and unlawful.

Remedies

156. Art. 10.5 of the Tribunal Statute, as amended by resolution 69/203 of the General Assembly adopted on 18 December 2014, 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, and shall provide the reasons for that decision.

Rescission

157. Having found that the contested decision to take no further action on the Applicant's complaint was unlawful, the Tribunal rescinds it.

158. The procedural errors in the appointment of the panel and the conduct of its investigation identified above would in normal circumstances justify the establishment of a new fact-finding panel to conduct a fresh investigation into the full breath of the allegations made by the Applicant, as circumscribed in the Judgment of the Appeals Tribunal. However, the Tribunal agrees with the Applicant that this would not be appropriate in the present case given the passage of time and the fact that two invalid investigations have already been conducted.

159. Under the circumstances, and fully aware of the limits of its judicial review (see para. 83 above), the Tribunal is of the view that despite all the above-mentioned errors and the fact that the full breath of the Applicant's complaint has not been properly investigated, the evidence collected by the panel, particularly the documentary evidence, is sufficient to reach a conclusion that the former Chief, OSLA, committed prohibited conduct.

Finding on prohibited conduct

160. Firstly, as already established by the Dispute Tribunal in Judgments *Applicant* UNDT/2011/187 and UNDT/2012/111, the former Chief, OSLA, reassigned all the Applicant's cases to another counsel while she was on sick leave, without informing her. Upon the Applicant's return from sick leave on 18 October 2011, the former Chief, OSLA, refused to give her back her cases and even stated that given the low workload of the Applicant, it could be absorbed by other counsel, thereby indicating that the measure was not intended to be only temporary, as appears from his email of 19 October 2011. Rather, the Chief, OSLA, informed the Applicant by another email of the same day that he would contact two applicants that she previously represented to inform them that she was no longer in charge of their cases and that another Counsel would be appointed to represent them. He further mentioned that he would inform the Dispute Tribunal and ordered the Applicant not to contact the Tribunal nor the two concerned applicants. The former Chief, OSLA, also cut the

Applicant's access to the eRoom, so she would no longer have access to the OSLA case files. The Applicant did not get back her files and her access to the eRoom until she successfully challenged the above-mentioned measures before the Dispute Tribunal.

161. As discussed above, the Dispute Tribunal already held that the above-mentioned measures could not be legitimately justified by operational requirements from the moment that the Applicant came back to work on 18 October 2011. In refusing to give her cases back to the Applicant upon her return, and by himself advising the Applicant's clients that their cases had been reassigned to another counsel and preventing the Applicant from contacting the Dispute Tribunal Registry, the former Chief, OSLA, took measures that went well beyond what may have been necessary to ensure that the work in OSLA was carried out during the Applicant's absence and *de facto* isolated her. In this connection, the Dispute Tribunal held in Judgment UNDT/2011/187:

Il ne saurait être contesté que l'intention du supérieur hiérarchique a été à la fois de priver la requérante de tout contact avec les personnes susceptibles de lui demander des conseils du fait de sa position de fonctionnaire du Bureau d'aide juridique au personnel à Genève et de réduire à leur minimum les relations de travail entre elle d'une part et d'autre part son supérieur hiérarchique direct et les autres fonctionnaires du Bureau.

162. In addition, the way the former Chief, OSLA, reassigned the Applicant's cases without first informing her and the aggressive tone of his email of 19 October 2011 indicate that he sought to punish the Applicant for her conduct which apparently displeased him. It is apparent that he did not simply intend to take administrative measures in the interest of OSLA. This is notably evidenced from the following excerpts of the 19 October 2011 email:

You have complained that you should have been informed. Consider yourself so informed.

...

Given your continued unprofessional and provocative behaviour towards myself as your supervisor as well as other colleagues ... you cannot be trusted as fellow counsel in [the Office of Staff Legal Assistance].

The former Chief, OSLA, also wrote to the Applicant in an email of 18 October 2012:

I should add that [Mr. Y.] was assigned his case during your extended absence. You should not contact the UNAT about this matter to avoid creating confusion or prejudicing the client. That's an order.

163. Finally, and this is of much concern to the Tribunal, the former Chief, OSLA, explicitly stated in the last paragraph of his email of 19 October 2011 that the Applicant's seeking recourse in the formal justice system against OSLA was a consideration in the decision to remove her from her files:

The fact you are pursuing a formal complaint against the [Office of Administration of Justice/Office of Staff Legal Assistance] and are intent on litigating against the Organi[z]ation is a further consideration. I cannot imagine how [the Office of Staff Legal Assistance] can have a colleague handling files and accessing confidential office information in that circumstance.

164. He also wrote in an email of 15 February 2012 that “[he] ha[d] been prudent to not share details of how [he] spent an inordinate amount of time trying to deal w[ith] [the Applicant], and address [her] many complaints, allegations and applications.”

165. As the former Chief, OSLA, refused to testify in the investigation, his emails of 19 October 2011 and 15 February 2012 must be taken as they are and his further explanations provided to the first panel or in writing to the second one could not be properly tested and must therefore be disregarded.

166. These two emails are evidence of the fact that the former Chief, OSLA, was displeased with the Applicant for her seeking recourse in the formal justice system and that this played a role in this decision to remove the Applicant from her cases and of the means to fulfil her functions. Sec. 1.4 of ST/SGB/2005/21, in force at the time, defined retaliation as “any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy”. It has been often noted with concern that neither the policy, nor any other document, provide protection against retaliation for staff members who lodge cases before the Tribunals (see. the General Assembly Resolution A/RES/72/256

on Administration of justice at the United Nations, para. 13). The foregoing notwithstanding, the Tribunal finds that the Applicant's exercise of her legal rights influenced, in whole or in part, the decision of the former Chief, OSLA, to remove her from her files. That is sufficient to conclude that the former Chief, OSLA, retaliated against the Applicant and that he used his position of authority to do so, through improperly influencing her work conditions.

167. Secondly, it is not disputed that the former Chief, OSLA, copied others in emails dealing with confidential issues concerning the Applicant, such as performance issues and a reprimand. In particular, the former Chief, OSLA, generally copied these emails to the OSLA New York and Geneva generic accounts, which are accessible to all OSLA administrative assistants and legal officers, for no apparent reason, as the relevant individuals, such as the Applicant's Second Reporting Officer and the legal officer acting as officer in charge of OSLA in the absence of the Chief, OSLA, were notified separately. A fellow OSLA Legal Officer was also personally copied in some of the confidential emails regarding a performance improvement plan that the former Chief, OSLA, sought to institute to improve the Applicant's performance, although this Legal Officer was in no way involved in the management of the Applicant's performance. The former Chief, OSLA, also copied the OSLA New York and Geneva generic accounts, an administrative assistant in the Executive Office of the Secretary-General and an Information and Technology Officer in OAJ, in a correspondence of 23 April 2012 regarding the handover of the OSLA Geneva Office when the Applicant went on secondment to the Office of the High Commissioner for Human Rights which included in the chain previous emails concerning the reprimand and the management of the Applicant's performance, without any apparent reason.

168. The Applicant requested the former Chief, OSLA, to stop copying others in personal and confidential emails on several occasions. The Applicant's Second Reporting Officer at the time also advised him of the same. Despite these repeated requests, the practice persisted and no evidence was adduced that the former Chief, OSLA, undertook to act differently.

169. The emails concerning the Applicant's performance and a reprimand were clearly of a confidential nature and prejudicial to the Applicant if not treated as such. Their disclosure to colleagues might reasonably be expected or be perceived to cause offence or humiliation to the Applicant. Indeed, the evidence shows that this inappropriate practice did embarrass the Applicant as she repeatedly requested the former Chief, OSLA, to stop it.

170. Thirdly, the former Chief, OSLA, often used an aggressive tone and made demeaning remarks in his written communications with the Applicant.

171. In addition to the email of 19 October 2012 discussed above (see para. 162 above), the former Chief, OSLA, also wrote to the Applicant in an email of 15 July 2011: "You contacted UNHCR to mess up another colleague which is unacceptable behaviour". In a further email of 1 November 2011 discussing the same matter, the former Chief, OSLA, wrote:

Doing such a thing [referring to the Applicant allegedly sharing with an OSLA colleague a document from the former Chief, OSLA, highly critical of that colleague] is mean-spirited and malicious. Haven't you done enough already to harm [the concerned colleague]? Please stop such behaviour...

May I remind you, as I told you but you said I was lying, that before hiring you I was advised by [Mrs. X.] that you were difficult to work with and I should not hire you. I also met you in New York and thought you would do a good job and be a good colleague. I gave you the benefit of the doubt, but I was mistaken.

...Moreover, it was unethical [to contact the UNHCR ombudsman to complain about the said colleague] as [she] was formerly your client and you went to complaint about her and raised issues that you were a party to as her former counsel.

How do you expect me or anyone else in the OAJ/OSLA to trust you given what you have done and continue to do? It's simply impossible. You have damaged OSLA's reputation, and continue to do so, through your actions.

...Your behaviour and attitude are beyond anything I have seen in almost 20 years in the UN system.

172. In an email of 15 February 2012, the former Chief, OSLA, wrote: “More generally, several OSLA colleagues are aware of there being a problem as a result of your unprofessional behaviour and aggressive manner.”

173. In another email of 16 November 2011, he wrote:

“You should know that you upset [Mrs. X, referring to an administrative officer in OSLA], who’s a really nice and helpful person and is trying her best, as you reportedly raised your voice and hung up on her. It is not acceptable that you *bark* at your colleagues and treat them poorly (emphasis added).

174. The Tribunal finds that the references to the Applicant “barking” at colleagues, as if she was a dog, “messaging up” a colleague, and being “mean-spirited” may tend to demean or belittle her. The same holds true for the many references of the former Chief, OSLA, to the Applicant being “unprofessional”, not trustworthy and damaging OSLA’s reputation, without providing any legitimate justification.

175. It was also established by a number of witness testimonies that the former Chief, OSLA, could be at times “aggressive” and even “abrasive” in his oral communications in general, including with the Applicant. He was also described by one witness as being “hot-blooded”. Another witness said he had “a very strong personality... [and] he would benefit from consulting or reflecting before acting”. The former Executive Director, OAJ, who became the first reporting officer of the former Chief, OSLA, on 7 May 2012, that is after the complaint was filed, said that the former Chief, OSLA, “could come across as very strong, sometimes too strong”. She advised him “to be aware of the tenor of his communications” and said that she saw an improvement in his behaviour, but this was after the complaint was filed so it had no direct impact on any of the facts alleged in the complaints.

176. Although the Tribunal is reluctant to rely upon witness testimonies collected by the panel due to the errors in its appointment, it finds that because the evidence on that point comes from several different witnesses and is further corroborated by the written communication of the former Chief, OSLA, with the Applicant, it is sufficiently reliable to conclude that the former Chief, OSLA, adopted at times an

aggressive and abrasive tone in his oral communications with the Applicant, as he did in some of his written communications.

177. There is ample evidence and it is indeed not disputed that all these events occurred in the context of a very tense and difficult relationship between the Applicant and the former Chief, OSLA. There is no doubt either that the Applicant contributed to creating this tense relationship and that the former Chief, OSLA, was exasperated by the Applicant's behaviour, notably by her alleged failure to follow his instructions. This information is relevant as contextual background to understand what may have prompted the conduct of the former Chief, OSLA, but it is not determinative as to whether the former Chief, OSLA, committed prohibited conduct as alleged in the complaint, as discussed above (see para. 144 above).

178. The abrasive and aggressive communications, written and oral, from the former Chief, OSLA, to the Applicant, his supervisee, were not acceptable within the Organization as they created, or at the very least contributed to, an intimidating and hostile work environment. They might also reasonably be expected or be perceived to abuse the Applicant.

179. The fact that the former Chief, OSLA, may have been irritated by the Applicant's own behaviour does not legitimise his conduct. It is expected that supervisors manage their temper and adopt a controlled and measured approach towards those they supervise. Whilst a conduct from a staff member that is deemed unacceptable by a manager may warrant an admonishment or even a formal reprimand, there are ways to proceed, in a formal and informal sense. It is perfectly acceptable for a manager to say to a staff member that their behaviour is unacceptable, or even unprofessional, but there is no justification to adopt an aggressive or abrasive tone or to make remarks that tend to demean or belittle the staff member. In the instant case, the former Chief, OSLA, evidently crossed the boundaries of what would be reasonably expected from an experienced manager dealing with an allegedly difficult staff member.

180. Likewise, the fact that the former Chief, OSLA, was apparently similarly aggressive and abrasive with others cannot serve as an excuse for his behaviour or otherwise lessen the gravity of his conduct towards the Applicant. It is not required

that a reprehensible conduct be targeted to a specific individual to constitute harassment. If anything, this rendered remedial actions even more necessary.

181. In view of the foregoing, the Tribunal finds that there is 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.

182. Taken as a whole, these incidents amount to harassment and abuse of authority, and, therefore, constitute prohibited conduct under sec. 1.2 and 1.4 of ST/SGB/2008/5.

183. Pursuant to sec. 5.18(c) of ST/SGB/2008/5(c):

If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken (reference omitted).

184. Turning to the jurisdiction of this Tribunal to order the institution of disciplinary procedures, the Appeals Tribunal held in *Nwuke* 2010-UNAT-099 (at para. 5) that:

A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

185. Since sec. 5.18(c) of ST/SGB/2008/5 provides for the institution of disciplinary proceedings following a finding of prohibited conduct, it forms part of the Applicant's terms of appointment, thus the Tribunal has jurisdiction to order it. The Tribunal notes that the Applicant did not specifically ask for this remedy but finds that her request for the former Chief, OSLA, to be referred for accountability is sufficient to cover this type of remedy, which is also aimed at ensuring accountability and flows from the Tribunal's findings on prohibited conduct.

186. In view of the foregoing, the Tribunal considers it appropriate to remand the case to the current ASG, OHRM, to institute disciplinary procedures in accordance with sec. 5.18(c) of ST/SGB/2008/5. The Tribunal notes that the former Chief, OSLA, has now moved to the Office of the High Commissioner for Refugees ("UNHCR"), so whilst he no longer works for the Secretariat, he remains under the overall authority of the Secretary-General as the Chief Administrative Officer of the Organization under art. 97 of the Charter of the United Nations.

187. The Tribunal notes that its findings on prohibited conduct are limited to those alleged facts which could be established based on the evidence collected by the panel. A wide range of allegations remain unaddressed, notably the Applicant's allegations that the former Chief, OSLA, used her performance appraisals as a retaliatory tool against her, as there was insufficient evidence collected by the panel for the Tribunal to reach a conclusion on these allegations. In this respect, the rescission of the contested decision without remanding the case for a new investigation would not allow to fully remedy the procedural flaws identified above.

Compensation for harm

188. The Applicant claims compensation for harm as a result of the non-renewal of her appointment, which she attributes to the Organization's failure to conduct a full, fair and timely investigation into her complaint. She alleges that it is reasonable to assume that her appointment would have been renewed if a proper investigation into her complaint had been conducted. She also claims compensation for moral damages.

189. The Tribunal notes that the decision not to renew the Applicant's appointment was motivated by a series of reasons, which are enumerated in a letter of the then Executive Director, OAJ, dated 15 May 2015 (see para. 41 above).

190. This decision not to renew the Applicant's appointment was taken on 10 May 2013 whilst her complaint, filed on 27 April 2012, was still under investigation. It cannot be excluded that the above findings about the prohibited conduct committed by the former Chief, OSLA, could have, at the very least, impacted on some of the reasons for the Applicant's non-renewal, in particular the first one in respect of the Applicant's inability to maintain professional working relationships with colleagues and the fourth one in respect of the loss of confidence of her First and Second Reporting Officers. A full investigation into the whole complaint, within the scope defined by the Appeals Tribunal, would have also shed light on some additional elements of the Applicant's complaint which could possibly also have impacted on the decision not to renew her appointment.

191. However, there is insufficient evidence to conclude in the context of the present case that the Applicant's fixed-term appointment would or should have been renewed had these findings been known at the time or even that she lost an opportunity of renewal. At most, the Tribunal can only find in the context of the present case that the Applicant lost an opportunity for proper findings to be considered when deciding whether or not to renew her fixed-term appointment. This loss of opportunity is, in and of itself, difficult to compensate in the context of the present case as the chances of the Applicant's appointment being renewed if the findings of this Tribunal had been considered are too speculative given the various reasons for the non-renewal of her appointment and the chronology of the events.

The Tribunal notes however that the issue of the non-renewal of the Applicant's appointment is currently under consideration in Case No. UNDT/GVA/2013/057, which had been suspended for some time pending the outcome of the investigation in the present case. Any consideration of the impact of the findings on prohibited conduct committed by the former Chief, OSLA, on the non-renewal of the Applicant's contract will be best addressed in the context of this other case. That noted, the Tribunal is in a position to assess in the present case the moral harm that the Applicant suffered as a result of losing her employment while her complaint of harassment remained unresolved, in examining her claim for moral damages.

192. The Applicant claims that she suffered harm as a result of being subject to harassment and abuse of authority while working under the supervision of the former Chief, OSLA, as well as from the protracted proceedings in respect of her complaint and the multiple fact-finding investigations.

193. The Applicant produced medical certificates and reports documenting her claim. [REDACTED]

[REDACTED]

[REDACTED]

194. Based on this evidence, the Tribunal finds that the Applicant is entitled to compensation for the psychological harm she suffered from June 2011 until at least May 2014 and in September 2017, as a result of the harassment and abuse of authority she was subject to, the inordinate delays in handling her complaint and the several procedural errors which had caused her to, *inter alia*, undergo two successive investigations and lose her employment without her complaint being resolved. Given the severe gravity of the moral harm caused to the Applicant, over a period of approximately three years, the Tribunal finds it appropriate to award her moral damages in the amount of USD20,000.

195. The Tribunal finds that the Applicant is also entitled to compensation for the loss of opportunity to have her complaint fully and properly investigated as a result of the impossibility to conduct a third investigation at this stage. Whilst the determination of the appropriate amount of compensation involves a certain degree of empiricism, similar to the determination of a compensation in lieu of rescission for loss of opportunity in non-selection cases (see, e.g., *Mwamsaku* 2011-UNAT-265; *Sprauten* 2012-UNAT-219; *Niedermayr* 2015-UNAT-603), the Tribunal shall nevertheless determine a figure that it considers appropriate to compensate the Applicant's harm. In this case, the Tribunal is not in a position to evaluate the likelihood that the Applicant's allegations would have been found well-founded had the correct procedure been followed, but the Tribunal's findings above on the prohibited conduct committed by the former Chief, OSLA, confirms that at least part of her complaint was well-founded and that it cannot be excluded that her other allegations had also some merits. The Tribunal finds it appropriate in the circumstances to set the amount of compensation to USD10,000.

Conclusion

196. In view of the foregoing, the Tribunal ORDERS:

- a. The contested decision to take no further action into the Applicant's complaint of harassment and abuse of authority against the former Chief, OSLA, is rescinded;
- b. The former Chief, OSLA, committed prohibited conduct under ST/SGB/2008/5 as described in para. 181 above;
- c. The case is remanded 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;
- d. The Applicant shall be paid moral damages in the amount of USD20,000;
- e. The Applicant shall 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;
- f. The aforementioned compensations shall bear interest at the United States 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 prime rate 60 days from the date this Judgment becomes executable; and
- g. All other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 5th day of February 2018

Entered in the Register on this 5th day of February 2018

(Signed)

René M. Vargas M., Registrar, Geneva