

5. The Applicant's request to file an interlocutory application was granted by the Tribunal. She sought and was granted extensions beyond the deadline of 26 September 2014. Extensions of time were given to enable the Applicant to file such an application up to and after mediation, and failure of the parties to reach an amicable settlement. No application was received by the stated time limit.

6. The Tribunal notes from the evidence, that the Applicant has suffered from periods of illness serious enough that have periodically impacted on her ability to engage with the first fact-finding panel convened to investigate her complaint, and to maintain contact with her private lawyer as well as with the Tribunal. Given the nature of her illness, and the obligation to treat medical records of staff with strict confidentiality (as per sec. 8 of ST/IC/1999/111 (Information circular on Mental health—Medical and employee assistance facilities)), the Tribunal, on its own motion, decided to anonymise this judgment.

Facts

7. The following facts are taken from the joint statement of facts, supplemented by evidence from the documentation filed by the parties.

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16. On 22 March 2012, the Chief, JMS, provided the Applicant with a performance improvement plan, noting her unwillingness to cooperate with the performance evaluation plan and the mid-term review. On receiving the performance improvement plan, the Applicant wrote to the Chief, JMS, stating:

I kindly ask you to let me go home till Tuesday next week. I need to reflect on this. I have tried very much to recover from the oppression which you have caused me. You made it worse this morning. I am sorry I am not able to continue anymore.

17. The Chief, JMS, replied immediately that she could see the Applicant was upset, and that she accepted her taking uncertified sick leave.

18. The Applicant then went home, stating that she was feeling unwell.

19. On 23 March 2012, the Chief, JMS, informed the Applicant that she was expecting her back on duty on Tuesday as indicated earlier. The Applicant replied, copying the Chief, HRMS, enquiring whether she was still expected to report back to the office in case she wished to resign.

20. On 24 March 2012, the Applicant provided her comments on the performance improvement plan, and wrote to the Chief, JMS, and the Chief, HRMS:

I note that the allegations are piling up. I am getting quite overwhelmed. I would like to report on Monday but I am not fit to see patients. I am not sure the patients will be safe in my hands. I wonder if I can be given an alternative job. I have lacked sleep for 3 days running. I think my health is rapidly deteriorating.

21. On 26 March 2012 at 6:04 p.m., the Chief, JMS, emailed the Applicant, copying the Chief, HRMS, and the Regional Ombudsman, stating that she was sorry to hear that she was not well. She also wrote:

I note that you have indicated that it would (not) be prudent for you to return to work at this time because your current state of mind is

made various other allegations in the context of which she referred to actions taken by the Chief, HRMS.

33. On 24 April 2012, the ASG/OHRM informed the Applicant that her complaint against the Chief, JMS, had been referred to the Director-General, UNON (“DG/UNON”), for review as to whether there were sufficient grounds to warrant a formal fact-finding investigation. The Applicant acknowledged the referral but raised concerns that her complaint was being dealt with by UNON Administration due to a perceived conflict of interest. The ASG/OHRM referred these concerns to the DG/UNON.

34. In May 2012, the Chief, Division of Administrative Services, UNON, instructed the Chief, JMS, to withdraw the request for medical clearance, and to allow the Applicant to return to work. In an email dated 16 May 2012 to the Applicant, the Chief, HRMS, stated:

First let me make it very clear that no one barred [you] from accessing the UN compound. Neither I nor [the Chief, JMS] told you or wrote to you not to come to the UN compound.

35. On 25 May 2012, the Applicant emailed the ASG/OHRM, complaining about the delay in the handling of her complaint.

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39. On 14 June 2012, the DG/UNON informed the Applicant that her complaint filed under ST/SGB/2008/5 appeared to establish sufficient grounds to warrant a fact-finding investigation and that she had appointed a fact-finding panel (“the panel”) of three named members. The Applicant was urged to fully cooperate with the panel.

40. Between 2 July and 29 August 2012, the panel invited the Applicant three times to be interviewed. She replied to the first invitation on 3 July 2012, informing the panel that she had written to the DG/UNON the previous day and asked the panel to contact the DG for an update of her case. She said she would not be able to access emails as she would have liked, and would only respond to future correspondence when she found it possible. To the second invitation to a meeting on 5 July 2012, the Applicant responded that she was not well, and that email communication would be a challenge. She stated that she would not be able to attend the meeting.

44. By memorandum of 19 September 2012, the Director of the Ethics Office, New York, informed the Applicant that it had completed its preliminary review of her request for protection against retaliation pursuant to SG/SGB/2005/21, and had found that there was a *pr a fac e* case of retaliation. The matter was then referred to the Office of Internal Oversight Services (“OIOS”) for investigation, in accordance with sec. 5.7 of ST/SGB/2005/21.

45. On 4 October 2012, the Applicant wrote to the ASG/OHRM with a new complaint of prohibited conduct pursuant to ST/SGB/2008/5 against the Chief, JMS, the Director of Administrative Services, UNON, and the Officer-in-Charge of the Investigations Department, UNON. In particular, she mentioned that on 21 June 2012 she “saw prints of [her] photo pinned at the main gate together with some people who had been accused of stealing UN property” and that she was also told by colleagues that other pictures of her were pinned “at the commissary and at the main lobby”.

46. On 19 November 2012, the ASG/OHRM replied to the Applicant that since an investigation into the allegations raised in her report to the Ethics Office would be undertaken, the new matters would not be considered by OHRM under ST/SGB/2008/5.

47. The DG/UNON informed the ASG/OHRM on 12 October 2012 that she had decided to dissolve the panel she had appointed, citing the Applicant’s refusal to meet with it. The DG/UNON referred the matter back to the ASG/OHRM for resolution.

48. The ASG/OHRM convened a new two-member fact-finding panel. StbyxK2x(bm-IFxbK20[heFix

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The issue for me to determine is whether [the Chief, JMS] acted improperly when she requested you to obtain a medical clearance from a psychiatrist, in order to support your placement on sick leave, and when she informed you that you were “officially not cleared to return to work” until you had been medically cleared”.

58. She further noted that, having reviewed the evidence and considered relevant rules and administrative instructions, as well as the answers given to her request for clarification by the Director, MSD, and by the Chief, JMS, she found that “it was reasonable for [the Chief, JMS] to hold concerns about [the Applicant’s] fitness for duty at that time”. She also stated:

Furthermore, I have noted that [the Chief, JMS] took care to mitigate the potential conflict of interest that could have arisen given her dual role as your supervisor and as Chief Medical Officer, by obtaining Dr. [D.]’s advice on the matter and by requesting you to submit the requested medical report to Dr. [D.], who was external to UNON, rather than to her.

Finally, I have concluded that there is no evidence that [the Chief, JMS] acted on the basis of bias or improper motives when she requested you to obtain a medical evaluation and when she requested you not to attend work. In this respect, the considerations set out above support a finding that [the Chief, JMS] acted on the basis of concern for your wellbeing and the wellbeing of patients.

59. The ASG/OHRM concluded that it was:

not inappropriate for [the Chief, JMS] to request you to submit a medical report attesting to your fitness for duty and to request you not to attend work. Accordingly, I have decided not to make a finding against [the Chief, JMS] in respect of this allegation.

60. The ASG/OHRM added, however, that, on the basis of the Director, MSD’s, comments, “it would be desirable for MSD to formalize the delegation of authority, from the United Nations Medical Director to the chief medical officers, to request staff members to undergo a medical evaluation or not to attend work, and the procedures to be applied in cases where a medical officer holds medical concerns about a staff member under his or her supervision”, and that she would inform the Director, MSD, accordingly.

61. On 6 May 2013, the Chef de Cabinet, Executive Office of the Secretary-General, requested the DG/UNON to extend the Applicant's appointment until 30 September 2013 by keeping her on SLWFP, based on a recommendation by the Ethics Office that it did not expect to receive the OIOS completed investigation report prior to 6 June 2013.

62. On 31 July 2013, the Applicant requested management evaluation of the ASG/OHRM's decision of 31 May 2013. This was upheld following evaluation, and on 13 December 2013, the Applicant filed her application with the Dispute Tribunal, to which the Respondent submitted his reply on 5 February 2014.

Parties' submissions

63. The Applicant's principal contentions are:

- a. The panel conducted its investigations at a time she had suffered retaliation, was experiencing intense stress due to the turbulent and harsh nature of the retaliatory action by UNON Administration, and was afraid of going into the UNON complex. The ASG/OHRM had the legal obligation but failed to preserve the integrity of the process, which suffered significant damage to its integrity in that the entire file was exposed to the offender who was the Chief, JMS. The JMS witnesses were intimidated by seeing her suffer retaliation;
- b. The whole process was tainted by procedural flaws in that it was handled by the Legal Counsel to the DG/UNON who had a conflict of

f. She asks for rescission of the contested decision, to be reinstated with supervisory duties, to have a change in her First Reporting Officer, and to expunge her file from all adverse information as well as from her performance reports of 19 December 2011 and 21 March 2012; finally, she asks for compensation for the “mental anguish, anxiety, humiliation and stress” caused by the Chief, JMS’s “misconduct”, as well as for the delay in dealing with her complaint and for the ASG/OHRM’s failure to treat her concerns “with sensitivity”.

64. The Respondent’s principal contentions are:

a. Insofar as the Applicant seeks to challenge the ASG/OHRM’s decision not to initiate a disciplinary process against the Chief, JMS, her application is not receivable, because it is not legally possible to compel the

e. The Applicant challenges the length of time taken by the ASG/OHRM, but she does not challenge the length of time taken to conclude the investigation. Whereas sec. 5.17 of ST/SGB/2008/5 provides that a fact-finding report should “be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report”, it makes no provision for the length of time required to assess the investigation report. The Applicant has not claimed that she suffered harm or prejudice by the length of time taken to reach a decision on the fact-finding report. As she has been on SLWFP throughout the period, pending a determination by the Ethics Office on her complaint of retaliation, the length of time taken to conclude the examination of her complaint of harassment had no impact on her work environment, conditions of service or otherwise; she suffered no prejudice from the investigation having taken longer than the three-months stipulation in sec. 5.17 of ST/SGB/2008/5. The length of time taken to conduct the investigation was justified, having regard to the quantity of the evidence that was collected and reviewed, and the fact that the investigation panel was constituted twice;

f.

Considerations

65. Pursuant to sec. 5.20 of ST/SGB/2008/5, the Tribunal is empowered to review the procedure followed in respect of the Applicant's complaint. The principal issue in this case is whether this procedure was fair and legal or whether any procedural failures vitiated the ASG/OHRM's decision regarding the outcome of the Applicant's complaint.

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b. if there was a factual basis for the allegations but not sufficient to justify disciplinary proceedings, managerial action may be taken if warranted; or

c. if the allegations are well-founded and amount to possible misconduct, refer the matter for disciplinary action.

77. The Tribunal will review the three stages of this process in turn: the receipt and review of the complaint, the appointment and conduct of the fact-finding panel and the final decision.

78. The receipt of the Applicant's complaint was dealt with promptly and correctly by the ASG/OHRM who referred it without delay to the DG/UNON. Then followed an unexplained delay of over six weeks for the first fact-finding panel to be convened that potentially compromised the ability of the selected panel to report within three months of receipt of the complaint, as required by the respective ST/SGB.

79. However, once appointed, the panel's attempts to start the investigation were impeded by the Applicant. It is clear from the Applicant's correspondence with the ASG/OHRM that she was unwell and, being away from her place of work, she did not have the use of the facilities of the UNON compound. She plainly had no appetite for being involved in any investigation at that stage. The

second panel convened by the ASG/OHRM, on which the Applicant expressed

responsible officer who is deciding whether, and to what extent, a fact-finding panel is to be appointed to investigate a case as alleged, “has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether an investigation regarding all or some of the charges is warranted” provided “there was no risk of undermining the investigation”.

90. The present case which concerns the responsible official’s actions once the fact-finding panel has completed its investigation and before a decision on the action to be taken is made differs from these UNAT cases. However, applying the same rationale of those decisions to the facts of the present case, the Tribunal concludes that the responsible official also has a degree of discretion under sec. 5.18 of ST/SGB/2008/5.

91. Section 5.18 of ST/SGB/2008/5 defines an exhaustive list of options that the responsible official shall apply depending on the outcome of the investigation. If the report does not identify prohibited conduct, the case is closed. If there is a factual basis for the allegations, it is for the responsible officer to decide if the facts warrant disciplinary or managerial action. A choice of these options under sec. 5.18 requires the exercise of judgment and discretion on the part of the responsible official, in light of the panel’s findings of fact.

92. In the present case, the panel’s report provided a factual basis in support of the finding that the Chief, JMS, did request the Applicant to obta

94. The Tribunal finds that the ASG/OHRM did not undertake further investigation into the facts, but asked the Chief, JMS, and the Director, MSD, to comment on the reasons for requesting the Applicant to obtain a medical report attesting to her fitness for duty and not to enter UNON premises, both of which had been found to have occurred by the fact-finding panel. The materials relied on by the Chief, JMS, and the Director, MSD, in their responses were restricted to excerpts from the panel's report along with associated emails and documents.

95. As the responsible official, the ASG/OHRM's request for clarification of the reasons for the facts as found by the investigation did not undermine the investigation.

96. The failure of the ASG/OHRM to seek any comments from the Applicant about the same aspects of the investigation report was not a breach of due process: the ASG/OHRM wanted to know the reasons for actions which the fact-finding panel found inappropriate, and only the Chief, JMS, had the information she needed. The Applicant, in contrast, did not possess any relevant information or expertise in this respect.

97. Also, in her report and summary to the Applicant, the ASG/OHRM fully disclosed that she had requested the professional views of the Director, MSD, on the propriety of the Chief, JMS, actions in relation to the request for medical evaluation and non-clearance for work, and that she had given the Chief, JMS, the opportunity to provide her comments on those matters. She also summarised their responses.

98. The final aspect of the process is the decision of the ASG/OHRM based on the report and the responses she received from the Chief, JMS, and the Director, MSD.

91. The Chief, JMS, reply to the ASG/OHRM addressed, as requested, the quest

99. Section 6.2 (g) of the Staff Rules is composed of two parts. The first part states generally that a staff member may be required to submit a medical report or to undergo a medical examination and specifies who may undertake such examinations. It does not say who may require the examination. The second part relates to the specific power to request a staff member to take medical treatment and to direct the staff member not to attend the office.

100. Throughout, staff rule 6.2 refers to “conditions established by the Secretary-General”. These are contained in Administrative Instruction ST/AI/2011/3 promulgated for the purposes of establishing conditions and procedures for medical clearance as a requirement for recruitment, change of duty station and assignment. Section 9.1 of that ST/AI makes it clear that medical evaluations may be requested by the UN Medical Director or a duly authorised medical officer. The Tribunal finds that the request by the Chief of Mission was in-
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identified and proposed a systemic solution to the conflicting situation for Medical Officers when staff members reporting to them become unwell.

103. The context of the request for the Applicant not to attend work was complex. It was made against the background of the Applicant's illness, which the Applicant acknowledged made her unable to work. The Chief, JMS, consulted with senior colleagues from another Organisation before, as she said, making the decision "in the heat of the moment".

104. Although the Chief, JMS, did not follow the correct procedure of consulting with the UN Medical Director about the request for the Applicant not to attend

119. In her application, the Applicant prays to be compensated for the mental anguish, anxiety, humiliation and stress caused by the Chief, JMS, alleged

Conclusion

124. In view of the foregoing, the Tribunal DECIDES that:

- a. The Respondent pay the Applicant compensation in the amount of USD3,000 for the inordinate delay in the handling of her complaint;**
- b. This amount be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment; and**
- c. All other pleas be m- FtK""xy"yx**