

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY [REDACTED]**

(CASE No: OSCE PoA 1/2018)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 26 January 2018 a letter dated 23 January 2018 from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by [REDACTED] (Appellant), who had worked as [REDACTED] in the OSCE [REDACTED] from 1 September 2015 until 29 July 2016.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Appellant on 1 February 2018 of the constitution of the Panel and asked them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 5 March 2018. The Respondent forwarded his reply on 5 March 2018 which was transmitted to the Appellant, advising [REDACTED] that [REDACTED] has a right to file a rejoinder by 26 March 2018. The Appellant filed such rejoinder on 26 March 2018 which was transmitted to the Respondent for information. The Respondent submitted a surrejoinder on 6 June 2018. The Applicant requested leave to address the surrejoinder on 25 June 2018. All documents were communicated to the parties.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 22-23 November 2018 at the Hofburg premises at Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, and Ms. Jenny Schokkenbroek and Ms. Catherine Quidenus, members of the Panel.
4. After examining all the documents submitted to it, the Panel noted that the Appellant's major claims include the following:
 - a) rescission of the decision dated 8 November 2016 on the Appellant's complaint submitted against the then [REDACTED]
 - b) rescission of the decision dated 8 November 2016 on the Appellant's complaint submitted against the then [REDACTED]
[REDACTED]
 - c) rescission of the decision dated 8 November 2016 on the Appellant's complaint submitted against the then [REDACTED]
[REDACTED]

- d) compensation for material damages in the amount of [REDACTED] (equivalent to three years and one month salary) and [REDACTED] (equivalent to three years and one month of Board and Lodging Allowance),
 - e) compensation for moral damages in the amount of [REDACTED] (equivalent to three years salary),
 - f) award of reasonable legal costs in the amount of [REDACTED] [REDACTED]
5. Along with the appeal, the Appellant submitted a request for preliminary or provisional measures. This request includes the following:
- a) to order the Respondent to disclose all correspondence, minutes, documents or records held by the Respondent relating to the three decisions for which rescission is requested,
 - b) to hold an oral hearing,
 - c) to hear the testimony of 17 individuals (former and current OSCE staff members) at any hearing.

Summary of facts

6. The Appellant joined the OSCE [REDACTED] on 1 September 2015 on a contract with an expiry date of 31 August 2016. The position held by the Appellant is [REDACTED]. The Appellant is a [REDACTED]. The Appellant was seconded to this OSCE position in [REDACTED]. On 30 June 2016 the Appellant submitted [REDACTED] resignation and terminated the employment as per 29 July 2016.
7. Prior to the above mentioned assignment to the OSCE [REDACTED] the Appellant had held various posts in OSCE Missions from August 2006.
8. On 23 May 2016, the Appellant submitted a complaint for harassment. Alleged offenders were the [REDACTED]
9. The complaint was notified to the alleged offenders on 27 May 2016. [REDACTED] answered on 9 June 2016. After having requested an extension of time, [REDACTED] submitted [REDACTED] answer on 13 June 2016, and the [REDACTED] submitted [REDACTED] answer on 25 June 2016.
10. A report on Initial Review Findings (IRF) dated 13 October 2016 was submitted to the Secretary General (SG). The IRF included the recommendation to dismiss the complaints against [REDACTED].

11. By three separate letters dated 8 November 2016, the SG informed the Appellant about his decision to take no further action with regard to the harassment complaints submitted against the [REDACTED]. For the decisions related to [REDACTED] the SG considered that the complaints were *prima facie* unsubstantiated. For the decision related to [REDACTED] the SG considered the facts that the Appellant had resigned and the departure of [REDACTED] was planned.
12. On 7 December 2016, the Appellant submitted a request for internal review of the three decisions dated 8 November 2016 related to the harassment complaints against [REDACTED]
13. On 28 December 2016, an Internal Review Board (IRB) was established by the SG. After submissions of the Respondent and the Appellant on 5 May 2017, 27 May 2017, and 19 June 2017, the IRB issued a report dated 2 August 2017. In this report, the IRB recommended to the SG to reject the Appellant's claims, which he did on 4 September 2017.
14. On 3 November 2017, the Appellant filed [REDACTED] present request for external review (Appeal) of the impugned decisions which was transmitted to the PoA.

Contentions of the parties

15. The Appellant's major contentions are:

- The Respondent did not observe and breached several provisions and obligations governing Appellants' Terms of Assignment insofar as they breach the Staff Regulations and Staff Rules.
- The Respondent did not observe and breached the obligation to investigate a harassment complaint that is not *prima facie* unsubstantiated. Specifically, the Appellant invokes the obligation to properly apply the *prima facie* test as part of that obligation.

16. The Respondent's major contentions are:

- The impugned decisions are valid and in accordance with the applicable Staff Regulations Rules and Staff Rules.
- The dismissal of the Appellant's complaints as *prima facie* unsubstantiated was valid and in accordance with the applicable Staff Regulations and Staff Rules and subsidiary legislation.
- The dismissal of the complaints was in accordance with the procedural requirements of the Staff Regulations and Staff Rules and subsidiary legislation.

Considerations

Procedural issues

Scope of the application

17. Pursuant to Staff Regulation 10.02, staff members shall have a right of final appeal against an administrative decision directly affecting him/her in accordance with the Terms of Reference set force in Appendix 2 of the Staff Regulations and Rules. The Panel notes that the three decisions of 8 November 2016 are the only decisions in the sense of Staff Regulation 10.02. Neither any further events, as presented by the Appellant in ■■■ request for internal review, nor the SG's decision of 4 September 2017 form part of the Panel's review.
18. Further, the Panel does not share the Respondent's view that the Appellant's harassment complaint of 23 May 2016 was submitted out of time, as the last incident purportedly occurred in late March/early April 2016. Pursuant to para. 8.4 of Staff Instruction No. 21/Rev.1 of 28 October 2013 (SI 21) the 30 day time frame to file a formal complaint may be extended in exceptional circumstances. Such an (implicit) extension was apparently granted, as the impugned decisions of 8 November 2016 were based on substantive grounds rather than on a delay on the Applicant's side.

Request for provisional measures

19. It follows from the limited scope of the application that the Panel does not need to ask for further documents, nor to hold an oral hearing and/or to hear witnesses. The only question to be answered is about the legality of the decisions of 8 November 2016 not to take any further action with regard to the Applicant's complaints. This question can be answered on the basis of the documents at hand.

Merits

20. Pursuant to para. 8.1 of SI 21, complaints shall be taken seriously and, *inter alia*, shall be dealt with promptly. The Panel notes that it took the Respondent more than five months from the receipt of the Appellant's formal complaint on 23 May 2016 to the issuance of the impugned decisions of 8 November 2016. On the other hand, the allegations made were numerous and the complaint filed was extensive. As there is no explicit time-limit in the rules for the Respondent to finalize the initial findings, the Panel holds the view that, given the extensiveness of the file, there is no excessive delay in these proceedings warranting compensation (cf. decision of 6 April 2017, OSCE PoA 4/2016, para. 29).
21. All three impugned decisions are based on the exercise of the SG's discretion which is, as the Applicant rightfully points out, not unfettered. In particular, it is a general

principle of international administrative law that reasons must be given. Otherwise, no effective review of discretionary decisions could be achieved. In this respect, the Panel notes that such reasons, although briefly, were provided in the decisions of 8 November 2016. With respect to the decisions regarding the [REDACTED], it was sufficient to refer to the IRF report that was attached to these decisions. Concerning the decision regarding the [REDACTED], the relevant legal provision was quoted. It has to be recalled that it is not for the Panel to replace the SG's discretion by the Panel's own preference.

22. It is not for the Panel to revert to jurisprudence of other international tribunals or to other legal systems where the OSCE has applicable internal rules of its own. Rather, it is the Panel's task to check whether the OSCE adheres to its own rules (see decision of 6 July 2018, OSCE PoA 2/2018, para 25). The Panel will address the legality of the impugned decisions in turn.

Decision related to [REDACTED]

23. Pursuant to para. 2.7 of Annex 2 of SI 21, the SG will determine whether or not the resignation of a complainant in the course of the investigation brings the case to an end. The *ratio legis* of this provision is clear and not in need of extensive justification. Once a complainant leaves the Organization, the duty of care regarding this person decreases. Depending on the circumstances, further investigation may or may not contribute to the purposes of the OSCE Policy on Professional Working Environment.
24. In the present case, the SG acted within the scope of his discretion by deciding to bring the case to an end. Assurances from outside of the OSCE about the continuation of the investigation cannot be attributed to the Respondent. The erroneous reference made to "paragraph 2.7 of Staff Instruction 21..." (instead of para. 2.7 of Annex 2 to SI 21) is a case of *falsa demonstratio* and has no impact upon the legality of the decision; neither has the fact that the SG mentioned the planned departure of the [REDACTED]

Decision related to [REDACTED]

25. Pursuant to para. 29 of Annex 2 to SI 21, upon receipt of the alleged offender, the SG shall review the case and determine whether (a) the allegations should be investigated, (b) the allegations are *prima facie* unsubstantiated, or (c) the allegations fall outside the scope of application of SI 21. The Panel notes that the SG concluded that the allegations regarding [REDACTED] were *prima facie* unsubstantiated and referred to the IRF report.
26. Pursuant to para. 6.9 of SI 21, the OSCE employs a standard based on reasonableness in assessing behavior. Officials must have reasonable grounds before making a

complaint under SI 21. Whether conduct constitutes inappropriate behavior will be based on an assessment of the facts and circumstances in which they occur.

27. Based on this standard, the Panel, having carefully considered the extensive material presented by the Applicant, including the email exchange between [REDACTED] and the [REDACTED] the Panel holds the view that allegations of harassment were indeed *prima facie* unsubstantiated. Rather, the Appellant seemed to have been disappointed about the lack of support from [REDACTED] in [REDACTED] own dispute with [REDACTED] as well as with [REDACTED]
28. Pursuant to para. 6.7 of SI 21, the mere expression of disagreement, admonishment, criticism or similar action regarding work performance, conduct or related issues within a supervisory relationship shall not normally be considered harassment within the meaning of SI 21. The Panel concludes from the documents submitted that the conflict between the Appellant and [REDACTED] as [REDACTED] direct supervisor was work-related, which is not covered by SI 21.

Decision related to [REDACTED]

29. Reference is made to paras. 24 and 25 above. It follows from the documents that the relations between the Appellant and [REDACTED] were rather difficult as from 2 November 2015 when, according to the Appellant's own written statement of 11 January 2016, the Appellant told [REDACTED] [REDACTED] was "acting like an a*****e". In contrast, it is unclear and supported by no evidence that the [REDACTED] accused the Appellant of "cooking the books". The issues at stake, e.g. the use of an OSCE vehicle and the granting of full board instead of DSA, were clearly work-related matters. As such, they are to be considered outside of scope of SI 21, in accordance with its para. 6.7.
30. The Panel is convinced that these disputes could have been handled in a more constructive way. The Panel shares the IRB's view that the unfortunate relationship has shown on all levels a need for improvement of individual professional standards, management and communication. This being said, the Panel sees no reason to determine that the impugned decision not to take further action with regard to the Appellant's complaint exceeds the SG's discretionary powers.

Other requests

31. Since the impugned decisions do not need to be rescinded (claims a) to c), above para. 4), the other claims for compensation are unfounded (claims d) and e)).
32. Pursuant to Article VIII para. 5 of the Terms of Reference of the PoA, the Panel may award costs to be reimbursed for legal fees only to a successful applicant. Since the application fails, no legal costs (claim f)) are awarded.

33. In light of the above, the application is rejected in its totality.

Done in Vienna, on 23 November 2018



Thomas Laker

Chairperson of the Panel



Jenny Schokkenbroek

Member of the Panel



Catherine Quidenus

Member of the Panel