

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

(CASE No: OSCE PoA 2/2022)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 12 September 2022 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal which had been forwarded to him on 9 September 2022. In this appeal, [REDACTED] (Applicant), a former [REDACTED] at the OSCE [REDACTED], requests compensation for [REDACTED] alleged unlawful dismissal.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 13 September 2022 of the constitution of the Panel, asking 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 13 October 2022. The Respondent forwarded [REDACTED] reply on 13 October 2022. It was transmitted to the Applicant on the same day, advising [REDACTED] that [REDACTED] has a right to file a response, which [REDACTED] did on 2 November 2022.
3. In accordance with Article VI of the Terms of Reference of the Panel (ToR), the Chairperson of the Panel convened the Panel on 23 and 24 February 2023 in Vienna. The Panel was composed of its Chairperson, Mr. Thomas Laker, its Deputy-Chairperson, Ms. Jenny Schokkenbroek, and its member, Ms. Catherine Quidenus.
4. After examining all the documents, the Panel noted that the Applicant claims reinstatement in a similar position, material damages for loss of employment and removal costs, moral damages, an official apology, and correction of a statement in the final report of the Internal Review Board (IRB).
5. The Respondent, pursuant to [REDACTED] reply, holds the view that there is no administrative decision to be reviewed, and that the Applicant's departure from the Organization was not based on a constructive dismissal.

Summary of facts

6. On 6 April 2021, the Applicant started [REDACTED] employment as [REDACTED].
7. On 16 September 2021, the Applicant's first level supervisor started an email exchange with the Applicant regarding the performance on [REDACTED] work portfolio. On 21 September 2021, a meeting to discuss the Applicant's performance at the end of [REDACTED] scheduled probationary period was set up.
8. Said discussion took place on 23 September 2021. During this meeting, the supervisor raised concerns about the Applicant's performance. On the same day, [REDACTED] shared these concerns with the second level supervisor, the second level supervisor's deputy, and the [REDACTED] Chief of Human Resources [REDACTED] HR) by email. In this email, it is reported that the Applicant "planned to leave in April next year for other reasons (not related to [REDACTED] performance in this job) and that in view of this conversation [REDACTED] might either resign from [REDACTED] post, or contest my assessment of [REDACTED] probation period after I upload it in the system."
9. On 24 September 2021, the Applicant summarized [REDACTED] own recollection of the performance meeting in an email to [REDACTED] supervisor, copying the [REDACTED] HR, according to which the former "outlined three possible courses of action: 1) the initiation of a performance improvement plan, 2) termination of my contract; 3) and, finally, you suggested that I could also consider resigning for the sake of my future career." [REDACTED] found the assessment of [REDACTED] performance as well as the suggestion to resign to be deeply unfair and problematic in view of the Organization's regulatory framework.
10. The [REDACTED] HR reacted by email of 27 September 2021, advising the Applicant that if "you strongly believe that your performance assessment is a result of supervisor's alleged retaliation you should file an appeal ... in accordance with Article X of the [Staff Regulations and Staff Rules] SRSR."

11. On 28 September 2021, a meeting among the four persons mentioned above was scheduled for the following day. In the respective exchange of emails, the [REDACTED] HR asked the Applicant “to initiate your End-of-Probation review in the Talent Management system.” The Applicant responded that [REDACTED] “will initiate the End-of-Probation review only” after the meeting, “as otherwise the whole point of discussion would become moot”.
12. On 29 September 2021, the Applicant met with [REDACTED] first level supervisor, the second level supervisor, and the [REDACTED] HR to discuss the performance issues. Among other options, the participants discussed also the possibility to assess the Applicant’s probationary period as successful and to review [REDACTED] performance through the end-of-year performance review. The Applicant confirmed to have understood this option and announced to decide on the proposed option the following day.
13. On 30 September 2021, the Applicant informed the Organization about [REDACTED] resignation, effective on 31 October 2021.
14. On 21 October 2021, the Applicant submitted a request for internal review “of the decision to seek the termination of my assignment or the extension of the probationary period for alleged unsatisfactory performance, and to impose a Performance Improvement Plan (PIP)...”. In the same document, [REDACTED] adjoined “a formal complaint..., alleging harassment and retaliation by my first level supervisor...”.
15. On 15 November 2021, the Applicant was informed that [REDACTED] submissions were considered connected and be reviewed in line with the appropriate procedure in Staff Instruction No. 21/Rev 1 on OSCE Policy on the Professional Working Environment (SI 21). Accordingly, on 21 February 2022, an IRB was established which rendered its report on 20 May 2022. On 17 June 2022, the Head of Mission (HoM) decided to follow the IRB’s recommendation not to grant the requested appeal.

Contentions of parties

16. The Applicant's contentions are various and will be addressed in detail below, where appropriate. In general, the Applicant's arguments are:

- The intimidating and hostile work environment created by the handling of [REDACTED] end-of-probation review and systematic breaches of internal law amounted to an unlawful termination;
- The internal appeals process was flawed and unfair;
- The findings of the IRB report are factually and legally erroneous.

17. The Respondent's major contentions are:

- The Applicant has not presented an administrative decision for review;
- The circumstances of the Applicant's resignation did not amount to a constructive dismissal;
- There is no evidence that the Applicant was subject to harassment or retaliation.

Considerations

18. At the outset, the Panel deems it necessary to recall that, pursuant to Staff Regulation 10.01, a staff member's final appeal to the Panel must be directed "against an administrative decision directly affecting him/her". As its mandate is limited to the review of administrative decisions, the Panel will address the two issues at stake, *i.e.* the circumstances of the Applicant's departure from the Organization on the one hand, and [REDACTED] complaint about being harassed on the other hand, separately and in turn.

Departure from the Organization

19. As a first and necessary element of an act to be considered as an ‘administrative decision’, it needs to be rendered by the administration. In this respect, the Panel takes note that the Applicant’s departure from the Organization is based upon [REDACTED] own message of 30 September 2021, informing the Organization about [REDACTED] resignation effective 31 October 2021.
20. Also, it follows from the file that the Organization’s administration at no point in time took an explicit decision to terminate the Applicant’s appointment. Whatever the Applicant’s perception of the behavior and/or the messages of [REDACTED] superiors might have been, there is nothing on record that can be interpreted as a request to leave the Organization.
21. Against this background, no explicit decision from the Organization’s administration with respect to the Applicant’s departure can be found that would enable the Panel to review an ‘administrative decision’, as requested.
22. Further, the Organization’s factual course of action does not amount to a case of ‘constructive dismissal’. Pursuant to jurisprudence of international administrative tribunals, such cases are characterized by the administration acting in a manner inconsistent with any further maintenance of the employment relationship, thus ‘marching the employee to the door.’
23. In the present case, no indicators for such behavior can be recognized. On the contrary, it follows from the record that various ways were discussed to keep the Applicant ‘on board’, regardless of the performance issues raised by [REDACTED] first level supervisor: The Applicant was offered the initiation of a performance improvement plan as well as a postponement of the performance appraisal. Rather than considering to accept one of these options to continue [REDACTED] employment with the Organization, the Applicant chose to tender [REDACTED] resignation.
24. Even in the Applicant’s own recollection of the discussion with [REDACTED] supervisors, [REDACTED] resignation was discussed just as one option, as indicated in [REDACTED] email dated 24 September 2021, according to which [REDACTED] first supervisor “outlined three possible

courses of action: 1) the initiation of a performance improvement plan, 2) termination of my contract, 3) and, finally, you suggested that I could also consider resigning for the sake of my future career.”

25. A few days later, at the meeting of 29 September 2022, even a fourth option was presented when the participants discussed also the possibility to assess the Applicant’s probationary period as successful and to review ■■■ performance through the end-of-year performance review.

26. The Panel is aware of shortcomings regarding the supervision of the Applicant’s work and performance. The file indicates that ■■■ first supervisor did not always act in accordance with the relevant provisions of the respective Staff Instruction No. 15/2004 Rev. 2 on Performance Management in the OSCE (SI 15). However, such mishandling was accompanied by efforts to continue with the professional relationship between the Organization and the Applicant. In the end, it was the Applicant’s own decision to leave the Organization. There was no constructive dismissal.

Harassment and retaliation

27. Whereas there is no identifiable - explicit or implicit - administrative decision with respect to the Applicant’s departure from the Organization, ■■■ claims of harassment and retaliation have been dealt with in an administrative procedure which is open to the Panel’s review. Its procedural and substantial legality will be addressed in turn.

Procedural questions

28. The Panel notes that, on 21 October 2021, in addition to ■■■ request for internal review against what the Applicant considered to be the decision to seek the termination of ■■■ assignment, ■■■ submitted a formal complaint alleging harassment and retaliation by ■■■ first level supervisor with respect to the alleged decision.

29. Pursuant to paragraph 1.1 of Annex 2 of SI 21, when an OSCE official has been notified of an administrative or disciplinary decision that he/she alleges derives from harassment or retaliation, these allegations shall be addressed through an appeal against that

administrative decision that he/she may file in accordance with Article X of the SRSR. Further, pursuant to paragraph 1.4 of said provision, it may be decided to have such appeal reviewed by an IRB without further investigation.

30. In the present case, this approach was chosen by the HoM. It follows that the IRB not only had to review the circumstances of the Applicant's departure from the Organization, it was also supposed to examine the Applicant's allegations of being victim of harassment and retaliation. Insofar as the latter allegations were concerned, the IRB acted as a first instance advisory board to the HoM, rather than a body of internal review.

Substantial legality

Harassment

31. Pursuant to paragraph 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 the OSCE's policy on professional working environment. In the same line, paragraph 6.8 of SI 21 clarifies that disagreements with work-related matters, such as transfers, promotions, renewal of contracts, are also not addressed through this policy.
32. The Panel takes note that the Applicant's complaint about harassment is clearly related to and based upon [REDACTED] dissatisfaction about the way [REDACTED] was confronted with performance issues by [REDACTED] first supervisor. In the Applicant's words, it was the "improper handling of [REDACTED] end of probation review" that "created an intimidating and hostile working environment". The Panel notes that these events did not happen earlier than 23 September 2021, *i.e.* only seven days before the Applicant chose to tender [REDACTED] resignation. Under these circumstances, the Panel does not find any extraordinary element in the Applicant's allegations that could justify the application of SI 21 to the current dispute on performance appraisal.

Retaliation

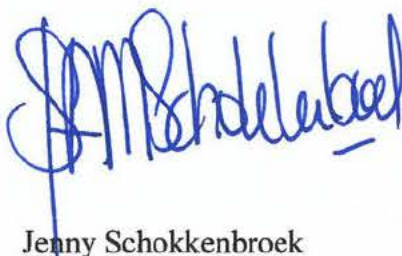
33. Pursuant to paragraph 6.6 of SI 21, retaliation is an action taken against a staff member because he/she reports on harassment, sexual harassment or discrimination or he/she participates in respective investigations or disciplinary proceedings. This is not the case here. The Applicant alleges to be retaliated in connection with ■■■ "report to the Mission's administration about the potentially discriminatory and stigmatizing effects of the new policy on entry into Mission premises" with respect to COVID. However, the Applicant's email exchange with the administration in August and September 2021 deals with ■■■ personal reasons for not being vaccinated against COVID and ends with the information that, at that time, office presence was not mandatory for the Applicant. Therefore, no indications for retaliation against the Applicant can be found, neither with respect to the general policy, nor regarding the Applicant's first supervisor's behavior.

34. In light of the above, the appeal is rejected in its entirety.

Done in Vienna on 24 February 2023



Thomas Laker
Chairperson



Jenny Schokkenbroek
Deputy-Chairperson



Catherine Quidenus
Member