

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH
REGARD TO THE EXTERNAL APPEAL BY ██████████**

(CASE No: OSCE PoA 2/2018)

Proceedings

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 26 January 2018 a letter from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by ██████████ (Applicant).
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 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. The reply was transmitted to the Applicant on 6 March 2018, advising ██████████ that ██████████ has a right to file a further statement by 26 March 2018. The Applicant did so on 27 March 2018. Further, the Panel asked for additional information, and the parties submitted their answers on 18 April 2018.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel convened the Panel on 5 and 6 July 2018 at the Hofburg premises in Vienna to examine the appeal. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members Ms. Catherine Quidenus and Ms. Jenny Schokkenbroek.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's claims include the following:
 - a) Revision of the decision on dismissal
 - b) Retroactive reinstatement of ██████████ contract
 - c) Compensation of full material damages in the period following the dismissal
 - d) Compensation for moral damages
 - e) Investigation and identification of individuals responsible for spreading rumors about the Applicant.

Summary of facts

5. The Applicant, a former [REDACTED] at OSCE [REDACTED] [REDACTED], contests [REDACTED] dismissal following a disciplinary procedure. At the time of [REDACTED] dismissal [REDACTED] held a fixed-term contract from 1 January 2017 through 31 March 2017 at [REDACTED]
6. The disciplinary procedure relates to events taking place on [REDACTED], when the Applicant participated in a Gender Mainstreaming training. During two different occasions, the Applicant was involved in verbal disputes with other participants regarding gender equality issues.
7. On 16 November 2016 and 17 November 2016 respectively, two of the concerned participants submitted written complaints with respect to allegations of violations of the OSCE policy on professional working environment as laid down in Staff Instruction No.21/Rev.1 of 28 October 2013 ("the StI"). Both complaints are related to the Applicant's behaviour during said training.
8. On 17 November 2016, the [REDACTED], "on behalf of the [REDACTED]", notified the Applicant of the above allegations and provided [REDACTED] with copies of the complaints, and gave [REDACTED] an opportunity to present [REDACTED] own version of the facts, which the Applicant did. The Applicant was placed on administrative leave with pay with immediate effect.
9. On 15 December 2016, the [REDACTED] appointed an investigative team according to Annex 2 of the StI and informed the Applicant accordingly.
10. The investigation report of 20 March 2017, also based on several interviews conducted between 19 and 23 January 2017, concludes that three incidents at the Gender Mainstreaming training, when considered together, constitute harassment as defined in para. 6.1 and 6.2 of the StI. Pursuant to the report there was corroborating evidence to suggest that the Applicant "shouted in a manner which was, or could reasonably be considered to be threatening and/or aggressive; and conducted [REDACTED] in a manner which was, or could reasonably be considered to be threatening and/or aggressive".

11. By letter of 23 March 2017, the [REDACTED] imposed upon the Applicant the disciplinary measure of dismissal with effect from 31 March 2017. In making this decision, [REDACTED] considered the information provided by two [REDACTED] who filed the complaints, the report of the Investigative Team including witness testimonies, and the overall gravity of the misconduct, in particular noting the fact that the Applicant's behaviour was sustained publicly over two days.
12. The above decision was sent by email to the Applicant on 23 March 2017, and was delivered to [REDACTED] as hard copy on 25 March 2017.
13. On Monday, 24 April 2017, the Applicant initiated an appeal by email and requested to waive the internal appeals procedure which [REDACTED] rejected on 31 May 2017. An Internal Review Board was established on 3 August 2017 and rendered a report on 20 September 2017, recommending that the Applicant's appeal be rejected.
14. On 20 October 2017, [REDACTED] dismissed the Applicant's internal appeal in agreement with said recommendation.
15. On 19 December 2017, the Applicant filed an external appeal via email.

Contentions of parties

16. The Applicant's major contentions are:
 - The investigation was not based on a full and complete examination of the facts and an objective analysis.
17. The Respondent's major contentions are:
 - The appellate review of decisions in disciplinary cases is limited to the examination whether these decisions are tainted by a procedural or a substantive flaw;

- Where an investigation by an investigative body in disciplinary proceedings has been carried out, it is not for the appellate review to reweigh the evidence except in case of manifest error;
- The Applicant failed to provide evidence that the impugned decision or the investigative report were made in bad faith or tainted by prejudice or other extraneous factors;
- The Applicant failed to present any evidence in support of [REDACTED] claim for damages.

Considerations

Procedural issues

Timeliness of the internal appeal

18. Pursuant to Staff Regulation 10.01 (c), which deals with the OSCE's internal appeals procedure, to be considered, an internal appeal shall be lodged within thirty days from the date of the notification of the impugned decision.
19. The Panel has held that notification of an administrative decision can take place in various forms, including electronic messages, obviously with the exception of explicit provisions prescribing a specific form (see decision of 20 April 2018, OSCE PoA 4/2017, para. 23). In the present case, the Applicant was notified of the impugned decision by an email to which the impugned decision was attached, sent on 23 March 2017.
20. Further, the Panel has held that, although OSCE's internal rules are silent on the calculation of time-limits, the day of receipt of the notification is disregarded for the calculation, as it is known from various national and international legal systems (see decision of 24 November 2017, OSCE PoA 2/2017, para. 22).

21. Finally, and in line with many national and international legal systems, the Panel determines that when the last day of a time-limit falls on a weekend or an official holiday, the time-limit ends on the following working day.
22. It follows from the above that the 30 day time-limit started to run on 24 March 2017 and, since 22 April 2017 was a Saturday, ended on Monday 24 April 2017 accordingly. Therefore, the internal appeal of 24 April 2017 was filed in time.

Timeliness of the external appeal

23. Pursuant to Staff Rule 10.02.2 (d) (ii), an application for external appeal must have been filed within sixty days from the date of notification to the applicant of the decision rejecting his/her request for internal review.
24. Based on the findings above, the time-line in the present case started to run on 21 October 2017, i.e. the day after the notification of the decision to reject the Applicant's internal appeal, and ended on 19 December 2017 accordingly. Therefore, the Applicant's request for external appeal, sent by email on 19 December 2017, was filed within the prescribed time-limit.

Merits

25. At the outset, the Panel emphasizes that, pursuant to established principles of administrative law, the review of disciplinary decisions has a limited scope. In general, it is part of such review to examine whether the impugned decision was taken by the competent body in application of the Organizations's own rules for the disciplinary procedure, including due process (procedural legality). In addition, it has to be checked (1) whether the facts on which the disciplinary sanction is based have been established, (2) whether the established facts qualify as misconduct, and (3) whether the sanction is proportionate to the offence (substantive legality).

Procedural legality

26. Regarding the adherence to OSCE's own rules, firstly, the Panel notes that pursuant to Para. 2.8 of Annex 2 to the StI ('Formal Procedures for addressing Allegations of Violation of the Professional Working Environment'), it is for the Secretary General or the Head of the respective Executive Structure to provide the alleged offender with a copy of the complaint at the earliest practicable time. In the case at hand, it was neither the Secretary General nor the Head of the respective Executive Structure, but the [REDACTED] who provided the Appellant with a copy of the complaints by email of 17 November 2016. In the Panel's view, it is not sufficient that [REDACTED] claimed to do so "on behalf of the Head of Mission". Where the Staff Regulations and Staff Rules refer the authority to take specific actions to a specific post or position (see, e.g. Staff Regulations 3.03, 3.04, 3.05, 4.1 (b)), this authority must be exercised by the incumbent of this post or position, unless an officer in charge has been appointed for cases of absence.
27. By said email of 17 November 2016, the Applicant was additionally placed on administrative leave, based on Staff Rule 9.05. Although this decision has not been contested, the Panel notes that the authority to take this decision is also reserved to the Secretary General or the respective head of institution/mission, whereas the [REDACTED] has no competence to do so.
28. Further, Staff Rule 9.02.3 prescribes that the staff member against whom disciplinary action is initiated shall be informed of the right to be assisted by an external lawyer in the course of the disciplinary procedure. The applicability of this provision follows from Para. 2.13 of Annex 2 to the StI, pursuant to which in case of initiation of disciplinary action Article IX of the Staff Regulations and Staff Rules shall apply. Based on the documents at hand, the Panel cannot but take note that in the course of the disciplinary procedure, the Applicant was never informed of the above right to legal assistance.
29. In addition, pursuant to Staff Rule 9.04.2, prior to deciding whether or not the seriousness of the misconduct warrants dismissal, the concerned staff member shall be notified of the allegations against [REDACTED] and be given the opportunity to present his/her

version of the facts. Although the Applicant had been given the opportunity to react to the allegations of harassment at the beginning of the investigation procedure, e. g. by email of 17 November 2016 as well as during an interview on 19 January 2017, the Applicant was not given an – additional - opportunity to present [REDACTED] version of the facts before rendering the impugned decision, i.e. the dismissal of 23 March 2017. Since the Applicant had never before been confronted with the perception that [REDACTED] conduct might warrant dismissal, it could be argued that this constitutes an infringement of the right to be heard.

30. Finally, the Panel notes that, according to Staff Rule 9.04. 2 (b), dismissal shall mean “immediate separation from service” without termination notice to be given to the staff/mission member. In the case at hand, the dismissal of 23 March 2017 was imposed upon the Applicant “with effect from 31 March 2017”. The Panel takes note that postponing the coming into effect of a dismissal is not in line with the clear wording of its legal basis.

31. It follows from the above that the impugned decision was taken in violation of several procedural rules. The question whether or not each single violation alone has sufficient weight to eliminate its procedural legality needs not to be addressed. In the case at hand, the multiplicity of procedural irregularities, including in connection to fundamental rights like the right to legal assistance and the right to be heard, amounts to a massive procedural flaw that results in the assessment that the disciplinary measure is procedurally illegal.

Substantive legality

32. As the impugned decision is procedurally illegal, it is no more necessary to determine its substantive legality. However, the Panel would like to take the opportunity to make some observations with respect to the elements of substantive legality in disciplinary cases, as presented above (see para. 25).

33. Regarding the facts (1), the Panel has no doubts that the factual background of this case has been established in a sufficient way, although the perception of the facts, i.e.

the oral dispute, varies among the participants of the meeting of [REDACTED] [REDACTED]

34. Whether the established facts, i.e. the Applicant's behaviour vis-à-vis [REDACTED] complainants, amount to misconduct within the meaning of the Organization's internal law (2), is questionable, given the broad definitions of improper behaviour in StI No.21/Rev.1 and of behaviour outside the scope of this policy (see para. 6.1 and 6.2 on one hand, and para. 6.7 and 6.9 on the other hand).
35. Regarding the proportionality of the disciplinary measure (3), the Panel would like to point out that the OSCE's system of disciplinary sanctions includes a graded variety of seven different measures among which dismissal is the most severe one (see the list in Staff Regulation 9.04 (a)). Further it has to be recalled that pursuant to Staff Rule 9.04.1 (a), any disciplinary measure shall be proportionate to the gravity of the misconduct. The Panel respects the Organization's broad discretion in deciding on disciplinary measures. However, it follows that dismissal as the heaviest sanction should only be imposed in clear cases of serious misconduct, whereas minor offences should be sanctioned with less severe disciplinary measures, as provided for in the Staff Regulations.

Remedies

36. According to Art. VIII (4) of Appendix 2 to the Staff Regulations and Staff Rules ('Terms of Reference of the Panel of Adjudicators'), if the Panel finds that the application is well founded it shall recommend the rescission of the impugned decision. The Panel shall also fix the amount of compensation to be paid to the Applicant should the impugned decision not be rescinded.
37. As indicated above, the impugned decision lacks formal legality, at least. Therefore, the Panel herewith recommends the rescission of the dismissal. Should the impugned decision not be rescinded, the amount of compensation to be paid to the Applicant is fixed at the amount of termination indemnity that the Applicant would have received after the end of [REDACTED] last fixed-term appointment, ending on 31 March 2017.

38. Regarding the Applicant's other requests, the Panel observes that the recommended rescission of the dismissal will have the effect of retroactive reinstatement of [REDACTED] contract (see above 4 b). On the other hand, the Applicant's last and latest contract would have ended on 31 March 2017 anyway. Since the Applicant had been put on administrative leave with full pay, no additional salary needs to be paid.
39. Pursuant to Staff Regulation 3.11 (a), appointments shall not carry any expectation of extension. Since the Applicant's fixed-term contract ended on 31 March 2017, it is an open question whether the Applicant's contract would have been renewed. The Panel does not speculate about any future appointments the Applicant might or might not have received. Therefore, there is no legal basis for compensation of full material damages in the period following the dismissal (see above 4 c).
40. In the Panel's view, violations of due process can call for financial compensation for moral damages at the discretion of the Panel (see Panel's decision of 6 April 2017, OSCE PoA 4/2016, Para. 29). Therefore, the Applicant's request for moral damages (see above 4 d) is granted and fixed at the amount of 2000 EUR.
41. As to the request for investigation and identification of individuals responsible for spreading rumors about the Applicant (see above 4 e), it is not within the Panel's jurisdiction to grant such requests.

Done in Vienna, on 6 July 2018



Thomas Laker
Chairperson



Catherine Quidenus
Member



Jenny Schokkenbroek
Member