



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/002
UNDT/GVA/2010/102
Judgment No.: UNDT/2011/156
Date: 6 September 2011
Original: English

Before: Judge Coral Shaw
Registry: Geneva
Registrar: Anne Coutin, Officer-in-Charge

REES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. The Applicant has made two applications to the Dispute Tribunal, each contesting a decision by the Office of the High Commissioner for Human Rights (“OHCHR”). The first in time was the decision in June 2009 to remove her as the Head of the Women’s Rights and Gender Unit (“WRGU”) and to reassign her to a post which had not been formally established at that stage but later was given the title of Senior Human Rights Officer, Advisor on Sexual Orientation Issues. She declined to take up this position.

2. The second contested decision was the non-renewal of the Applicant’s fixed-term appointment beyond the date of its expiry on 31 March 2010. With the consent of both parties the two applications were heard together by way of oral hearing.

3. The Applicant seeks appropriate compensation for the alleged unlawful actions of the Organization and for the violations of her rights in the form of: (a) termination indemnity; (b) moral, financial and professional losses she suffered; and (c) “terminal and irreparable harm” caused to her professional reputation and career in the United Nations.

4. The Respondent denies all of the allegations.

Issues

rtb

- c. Was the non-extension of the Applicant's contract in March 2010 a valid exercise of the Administration's discretionary power?
- d. Was the Applicant constructively dismissed?

Facts

6. From November 1998 the Applicant, Ms. Madeleine Rees, was employed by OHCHR as Chief of the office in Bosnia-Herzegovina at the P-5 level. In 2006, she was laterally assigned by the then High Commissioner for Human Rights ("HC") to a newly created unit; she was appointed to the position of Coordinator, WRGU, in the Research and Right to Development Branch ("RRDB"), at OHCHR in Geneva. Her fixed-term contract was renewed in 2008. At the time of the first contested decision she held a fixed-term appointment which was due to expire on 31 March 2010.

7. The Applicant's immediate supervisor from September 2006 to June 2009 was Mr. Ibrahim Wani, the Chief of RRDB. From January 2009 her second reporting officer was the Director of the newly established Research and Right to Development Division ("RRDD"), Ms. Marcia Kran.

8. It is not in dispute that the Applicant had not had a performance appraisal since the beginning of her service. Historically, OHCHR's completion rate for the Performance Appraisal System ("PAS") was low. By half of 2009 the completion rate was only about 50%, although in 2009 a concerted effort was made to improve this record. During her time as a manager, the Applicant conducted evaluations in accordance with the PAS standards for her staff.

9. In September 2008 a new HC was appointed, Ms. Navanethem Pillay. She received briefings both before and after taking up office. Only a few days after her taking office the HC addressed a reception held for her by Equality Now, a New York-based non-governmental organization of which the HC had been co-founder. In her ce

10. There was some dispute about what the new HC had been told about the performance of WRGU and by whom. The Deputy High Commissioner (“DHC”), Ms. Kyung-wha Kang, told the Tribunal that from 2007 the HC had asked her to keep a close eye on WRGU and that generally speaking she, Ms. Kang, was not satisfied with the quality of the work of the Unit. She gave some examples to support this opinion: in 2007 she had re-written a concept paper outlining the strategic orientation of the Unit, for which the Applicant had thanked her; she was unhappy about the level of accountability for the extensive travel that the Applicant was undertaking. The former Chief of RRDB told the Tribunal that he also had had concerns about WRGU which included travel, meeting deadlines and reporting. However as the Unit was not properly resourced and it produced work that was acceptable he did not raise these concerns with the Applicant as performance issues in his weekly meetings with her. In January 2008 he recommended the extension of her contract for two more years; its effective extension took place on 1 April 2008.

11. Another view of the Applicant’s performance to e

and another colleague of the WRGU staff met with the DHC a few days after the HC speech and told her that the work of the Unit was not being recognised at senior management level. The Applicant said that the DHC's response at that meeting was positive. She believed that the DHC understood that the Unit was working hard, was very small and was facing high demands.

14. On 6 October 2008 the HC received a full briefing from WRGU. The then Chief of RRDB and the DHC were also present. The Applicant viewed this as an opportunity to show the HC that her remarks to Equality Now had not been accurate. The DHC interrupted the Applicant's presentation. She was critical of the work of the Unit and the fact that some briefing papers presented had been prepared by consultants. According to the former Chief of RRDB, the DHC expressed extreme displeasure and dissatisfaction. He described her remarks as very direct. Until that moment he had not been aware of how strongly the DHC felt about the Applicant.

15. The Applicant felt these remarks were derogatory. She was devastated by the meeting and could not believe how badly it had gone. In contrast, the DHC described her own contribution as intending to encourage, support and move on. She emphasised that her concern throughout was to maintain the reputation of OHCHR with Member States and other stakeholders and to support the HC to meet her obligations under the Compact with the Secretary-General.

16. In November 2008, the Applicant met with the DHC to discuss the comments she had made at the meeting. The DHC asked her if she did not sense that there were "frustrations" regarding the Unit's work. She advised the Applicant to think how her approach came across. She told her that her problem was that she was confrontational. Notwithstanding these tensions, the Applicant testified that at a second meeting with the HC in December 2008, at which she gave more details of the approach being taken by WRGU, the HC expressed her confidence and approval.

17. A new Director of RRDD took up her position in January 2009. As the working relationship between the former Chief of RRDB and the Applicant was

not good she was asked by the DHC to work closely with the Applicant to improve her performance as the Coordinator of the Unit. The Director of RRDD told the Tribunal that she had a number of concerns about the work WRGU needed to do. She saw her task to be forward looking, to give advice in a positive spirit and to help, guide and support. The aim was to ensure that the Unit's work plan was met and expectations realised. She did not tell the Applicant of the discontent that had been expressed about her at that stage and did not undertake a formal performance review then or later.

18. Throughout the troubled history that followed, the Director of RRDD managed to maintain a cordial relationship with the Applicant while attempting to make the improvements that she and the DHC saw as necessary, but in spite of her efforts the situation deteriorated during 2009.

19. In February 2009 the HC appointed the president of Equality Now to temporarily head the New York office of OHCHR. The president and the Applicant had a history of policy differences about the approach to be taken on women's rights and gender issues and these became apparent when the approach to a particular OHCHR project was being decided. At the end of February the Applicant was told that, to avoid giving conflicting messages, the DHC did not want her to speak about the policy differences concerning the project. The Applicant complied with this directive but the DHC saw her earlier comments as demonstrating a lack of judgment.

20. On 6 March 2009 the Applicant and the DHC sat together on a panel to mark the International Women's Day. The Applicant said that the DHC "froze her out" by refusing to acknowledge her presence and refused to speak to her. When asked to comment on this allegation, the DHC told the Tribunal that she had an ongoing concern that the Unit needed to shape up and that may have manifested itself in stiff behaviour on her part but not hostility.

21. The minutes of the regular morning meeting of the executive and the senior managers held on 10 March 2009 record that the DHC referred to the joint

the Advancement of Women to the Human Rights Council. She called for those concerned to work on improving the quality of the next year's document by organising consultations and cooperating. The minutes of these meetings are published to all staff. The Applicant said that concerns about this issue had not been raised with her before then and that she perceived the publication as a public rebuke. The DHC told the Tribunal that the remarks were not intended as criticism but as a public encouragement. She did accept in hindsight that it would have been more appropriate to have raised the issues with the Unit beforehand. She had told the Director of RRDD about her concerns before the meeting and instructed her to talk to the Applicant about them.

22. On the same day, after the morning meeting, the Director of RRDD met with the Applicant to discuss matters which she had observed needed to be improved since she had started supervising the Applicant and the Unit. The Applicant said the meeting was infor91xMlicant.8(e1c0.0158 Tp1(d)-4.9 8)73UTj/TT7 31xMl6(d no)-0.

shocked at the discrepancy of your perception on such a sensitive matter.” The Applicant replied to clarify the process and steps taken regarding the side event. The next day the Applicant had a debriefing with the Director of RRDD who, she said, was very supportive and told her “we will get through this”.

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work will include the undertaking of assignments in relation to this topic and performing any other tasks as assigned.

You will pursue these tasks under the direct supervision of the Director of the Research and the Right to Development Division ...

38. In spite of the intervention of a senior manager, the Director of FOTCD, the decision to prevent the Applicant from travelling remained. The Applicant feared that all who knew of her involvement would perceive the cancellation of her participation as the consequence of some grave misconduct on her part.

39. It appears that the decision to cancel the Applicant's trip to Colombia was taken hastily. The DHC said that she and the Director of RRDD did not know much about the mission and if they had they might have changed their minds.

40. On 22 June 2009 the Applicant requested the Secretary-General to review the decision to remove her as the Coordinator of WRGU and reassign her.

43. The Applicant was notified by letter dated 30 June 2009 that the Joint Appeals Board had recommended and the Secretary-General had granted the suspension of action request regarding the reassignment decision. On 6 July 2009 the Applicant submitted a request for management evaluation under the new system of internal justice which had commenced on 1 July 2009.

44. The minutes of the 9 June meeting were not provided to the Applicant until 24 July 2009. When she got them she emailed to express her disappointment at their content and “the clear motivation behind its content”. She recalled that she had requested the assistance of the Director of RRDD about how to address intimidation and harassment from the DHC. The Director of RRDD replied by email that she had seen no evidence of harassment or intimidation of the Applicant in the Office, and pointed out that there existed specific procedures to raise this kind of allegations; she attached the Secretary-General’s bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

45. By then the Applicant had written to the Office of the Ombudsman seeking advice about options to redress harassment and discrimination against her

Issues was discriminatory and that given her sexual orientation it would have been nearly impossible to discharge these duties. At the suggestion of the Director of FOTCD, an attempt was made to relocate the Applicant under the direct supervision of another senior manager who was very keen to have her but this was found to be inconsistent with the general lines of division of work in OHCHR.

51. The Applicant filed her application with the Tribunal against her reassignment on 4 January 2010.

52. On 1 March 2010, the Applicant was given notice by the Chief, Human Resources Management Section, OHCHR, that the HC was not going to renew her fixed-term appointment beyond 31 March 2010. The memorandum referred to the fact that she had indicated that the post offered to her was not acceptable and that she had not applied for any vacancy. It invited her to advise if she were to apply for any vacancy in the future so that “appropriate action” could be taken.

53. Before the expiry of the notice period the Applicant actively sought employment outside of the United Nations. She received a positive offer but did not enter into a contract with her now employers in the private sector until after 31 March 2010.

54. On 18 March 2010, the Director of FOTCD sent out invitations to a farewell party for the Applicant. He said this was common practice and that he did it out of respect for her. The event took place and was described as a happy event. However the DHC and the HC were critical of his role in organising it. They o

reply to that on 14 June 2010. The application to the Tribunal concerning this decision was filed on 9 September 2010.

poor performance is wholly unsupported by the circumstances and facts of the case;

e. The Applicant's reassignment in June 2009 was to a position that at the time did not even technically exist. The decision effectively amounted to a demotion. The position was not adequate as it was not in line with the grade, qualifications and professional experience of the Applicant;

f. Reassignment to a position which is not adequate may indicate improper motivation. The reassignment of the Applicant was therefore an unlawful exercise of the Organization's discretion in assigning its employees to different functions. It was taken in bad faith and improperly motivated by personal bias and prejudice of the HC, the DHC and the

demeaning demotion and she suffered general abusive conduct and unwarranted criticism, reprimand and discipline. The violation of the Applicant's due process rights and her capricious removal as Coordinator of WRGU rendered it impossible for her to effectively perform her job functions.

58. The Respondent's principal contentions are, in summary:

a. The impugned decisions were legal, rational, procedurally correct and proportionate;

f.

Considerations

Issue 1. Was there compliance with the performance review obligations? And if not, what are the consequences?

59. Section 1 of ST/AI/2002/3 states that:

The present instruction shall apply to all staff members who hold appointments of at least one year under the 100 series of the Staff Rules ...

60. The performance management system (PAS) set out in that administrative instruction applied to the Applicant as she held an appointment of two years under the 100 series.

61. The purpose of the PAS is to improve the delivery of programmes mandated by the General Assembly by optimizing performance at all levels. It operates by linking individual work plans, setting goals, planning work in advance and providing ongoing feedback. An important function is to promote two-way communication between staff members and supervisors.

62. The administrative instruction requires that the PAS is to be conducted annually with a mid-point review and a final appraisal. In the event of reassignment, transfer or separation, the time for the appraisal period is the period between the beginning of the performance year and the event.

63. The first reporting officer has the responsibility for setting the work plan with the staff member, conducting the appraisals and providing supervision. The second reporting officer is responsible for the first reporting officer's implementation of the process, including holding the first reporting officer accountable for appraising staff in accordance with the PAS guidelines and ensuring fairness and consistency.

64. Thus, pursuant to the administrative instruction, the heads of departments and offices have primary responsibility for the timely execution, overall compliance with, and fair implementation of the PAS.

65. The staff member's responsibilities in the process are defined specifically in section 9 of ST/AI/2002/3. One of these is that before the end of year performance

70. Given that the Applicant's performance was the principal reason for the decision to reassign her, it was incumbent on the Organization to provide a factual basis for the finding that she was lacking in performance before making the decision. The lawful and indeed fair way for the senior manager to do that was through the use of the PAS, which affords both manager and staff member the opportunity for an objective and fair evaluate

before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined. In the present case, even if the meeting had taken place as planned, the issue had been pre-determined and consultation could not have taken place in good faith.

75. In conclusion, the Respondent failed to consult in good faith with the Applicant and did not comply with the performance review requirements of ST/AI/2002/3. It breached the Applicant's rights to due process. The Respondent had no lawful basis for making decisions based on its assessment of the Applicant's performance.

Issue 2. Was the decision in June 2009 to reassign the Applicant from her position as Head of WRGU in Geneva to another post a lawful exercise of the discretion conferred by former staff regulation 1.2(c) and former staff rule 101.2(b)?

76. Former staff regulation 1.2(c) conferred the power for the Administration to reassign a staff member. It read:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations ...

77. It is well established that, notwithstanding the width of the discretion conferred by this rule, it is not unfettered and can be challenged on the basis that the decision is arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith.

78. The Tribunal holds that the decision to reassign the Applicant was not a lawful exercise of the discretion to reassign because the PAS procedures were not followed. This is not a matter of strict formalism for its own sake. Adherence to the process ensures that a decision taken in reliance on the outcome of the PAS is not easily impugned.¹

79. The PAS is specifically designed to assess performance with all necessary safeguards for both management and staff. The Applicant was removed from her post as head of WRGU for performance reasons without any objective assessment of her

¹ *Koumoin* UNDT/2010/105.

performance. Inevitably this leaves room for the suspicion that the actions taken against her were motivated by other than performance reasons.

80. The Applicant was very clear in her mind that the actions taken against her were due to personal animosity, some of it stemming from the OHCHR New York office. The individual who she accused in this regard did not give evidence and had no opportunity to answer such allegations. The Tribunal therefore makes no decision on the Applicant's allegations in this regard. In any event, such a decision is not necessary for the disposal of the case.

81. The plan to reassign the Applicant from her position was implemented before a properly constituted post was available to be offered to her. At the time of the reassignment, on 18 June, there was no post for her to be assigned to, just a name of a position yet to be established. The terms of reference for a position entitled Senior

Issue 4. Was the Applicant constructively dismissed?

86. UNAT has held in *Balestrieri* 2010-UNAT-041 that in a case of alleged constructive termination, the actions of the employer must be such that a reasonable

91. There was sufficient evidence before the Tribunal to find that the Applicant had genuinely held beliefs that she was being harassed based on the manner in which the DHC manifested her disapproval towards her in public meetings and publicly criticised the performance of her unit without forewarning her. Whether or not the DHC was justified in holding the opinions that led to her criticism, it was the manner of communicating these that led to the Applicant's stress and public humiliation.

92. In summary, the work place environment and the interpersonal relationships had become unsustainable for all concerned. It was not handled well by management. On the other hand, the Applicant did not help the situation by the intemperate allegations she made publicly about the DHC following the reassignment.

93. On balance, the Tribunal holds that the Respondent's attempts to keep the Applicant within the Organization in another role, while unsuccessful, were sufficient

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- c. The Applicant is to file written submissions addressing the nature
and