



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

JUDGE SOPHIA ADINYIRA , Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals

5. In these circumstances, we hold that the High Commissioner for Human Rights (HC) properly exercised her discretionary authority not to renew Ms. Rees' fixed-term appointment. The appeal on this ground succeeds and the UNDT's order of rescission is set aside.

Compensation

6. Having held that Ms. Rees' non-renewal was lawful, we set aside the award of compensation as an alternative to rescission. Specifically, the amount of two years' net base salary plus the applicable post adjustment, entitlements and benefits, reduced by Ms. Rees' net take-home pay from 1 April 2010 to 31 March 2012, is hereby set aside.

7. Turning to the moral damages awarded by the UNDT, the UNDT took into account the period around the reassignment decision that caused most stress to Ms. Rees and

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33.

and was unlawful in the absence of a completed performance appraisal. He submits that, given Ms. Rees' consistent refusal to take up her new reassignment; her refusal to report to her previous supervisor; and, her refusal to apply for other vacancies in OHCHR, the HC properly exercised her discretionary authority in deciding not to renew Ms. Rees' appointment.

43. The Secretary-General requests that the Appeals Tribunal vacate the aforementioned findings.

On compensation

44. Should the Appeals Tribunal uphold the Judgment on the Merits, the Secretary-General requests that it find that the UNDT erred in law and exceeded its competence in setting the amount of compensation in lieu of rescission; that the UNDT erred in law and fact in awarding moral damages; and, that it erred in law and fact and exceeded its competence to the extent that it awarded compensation in excess of two years' net base salary without a proper evidentiary basis to do so.

45. The Secretary-General requests that the Appeals Tribunal annul the Judgment on Compensation in its entirety.

Ms. Rees' Answer

On the reassignment decision

46. Ms. Rees submits that the UNDT correctly concluded that the decision to reassign her was unlawful because it was improperly motivated. Although it purported to reassign Ms. Rees for her alleged underperformance, the Administration had failed to complete an objective assessment of her performance. The position to which the Administration sought to reassign her was not adequate, which equally reveals that the decision was not properly motivated.

47. Ms. Rees submits that the UNDT correctly concluded that the Secretary-General violated her due process rights. The Administration did not provide a factual basis for its claim that it informed Ms. Rees of its purported concerns about her performance. Ms. Rees submits that the Secretary-General contradicts himself by, on the one hand, arguing that Ms. Rees was reassigned for performance issues whilst, on the other hand, adducing evidence on the importance of the new post to which she was assigned. The Administration failed to meet the required standards of

commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.²

59. The UNDT found that none of these factors existed with respect to the position to which the Administration purported to reassign Ms. Rees. The UNDT specifically found that there could not have been an adequate position since there was no position at the time the Administration purported to reassign her. The UNDT stated, at paragraph 81:

The plan to reassign the Applicant from her position was implemented before a proper 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

63. The Appeals Tribunal does not find these cases applicable. As counsel for Ms. Rees rightly submits, in these cases the former Administrative Tribunal and the UNDT made an exception to the rule that a formal evaluation was required based on the evidence that, at the very least, the staff member had been given extensive notice of any performance concerns and the opportunity to provide written comments on those concerns.

64. In *Riquelme*, the UNDT held that the Organization met the due process standards by giving an informal and continuing process of review by way of setting specific tasks and analyzing the outcome.

65. The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms. Rees' performance was the principal reason for the decision to reassign her, the Administration was required to provide a performance-related justification for its decision. This could have been properly done with the PAS, in accordance with ST/AI/2002/3.

66. The Administration sought to blame Ms. Rees for the absence of a PAS, claiming that she, as a staff member, had to initiate the process.

67. In the present case, the UNDT specifically made a finding that the Secretary-General did not meet the standard. The UNDT said in paragraphs 71 to 72:

In this case the Respondent relies on the Director of RRDD's attempts to constructively guide the Applicant as a substitute for the PAS. In spite of the Director of RRDD's undoubted good intentions, this process failed to meet the high standards of due process set by ST/AI/2002/3. The DHC's identification of the Applicant's alleged shortcomings as early as 2008 was not discussed appropriately with the Applicant so that she could take steps to rectify the situation. The Applicant was never put on fair notice that her performance was likely to lead to a reassignment away from her managerial post as head of WRGU. She was not formally assessed against her work plan.

While in hindsight, the Director of RRDD's meeting with the Applicant on 10 March 2008 to discuss a work plan might be construed as the development of an improvement plan as contemplated by the PAS, this was not conveyed to her at the time. Further, the Applicant was not asked to provide a review of her own performance that could be discussed at the meeting. She had no formal opportunity to comment on or to seek a rebuttal of the opinions that had been reached about her performance.

68. The UNDT correctly found that Ms. Rees had been informally criticised and humiliated based on inconsistent and subjectively-held biases. She was never given an opportunity to comment on or rebut the negative opinions that her supervisors purportedly held.

69. We affirm the decision of the UNDT that the reassignment of Ms. Rees was unlawful. Accordingly, the appeal is dismissed on this ground.

On the non-renewal decision

70. The Secretary-General submits that the UNDT erred in law and fact in concluding that the non-renewal decision was motivated by the managers' assessment of Ms. Rees' performance and was unlawful in the absence of a completed performance appraisal.

71. We take note of the jurisprudence that, in the absence of a PAS to verify the views of management about the performance of a staff member in compliance with ST/AI/2002/3, the Administration's decision of non-renewal of contract based on non-performance or under-performance may be successfully contested.

72. The Secretary-General, however, submits that the non-renewal of Ms. Rees' appointment was ultimately due to the exhaustion of options to retain her within OHCHR, and not due to an assessment of her performance. The Appeals Tribunal notes that after Ms. Rees had objected to her reassignment, and following the Management Evaluation Unit's recommendation, the Administration made several efforts through mediation to try to retain her services. These efforts were not successful as, without changing Ms. Rees' reporting lines, the new post was unacceptable to her. Furthermore, Ms. Rees refused to apply for any vacant P-5 position within OHCHR, saying she wanted a D-2 position.

73. The Secretary-General submits that given Ms. Rees' consistent refusal to take up her new assignment, her refusal to report to her previous supervisor, and her refusal to apply for other vacancies within OHCHR, the HC properly exercised her discretionary authority in deciding not to renew Ms. Rees' appointment when it expired.

74. The Appeals Tribunal notes that given the situation that developed in the RRDB, the workplace environment and the interpersonal relationships had become unsustainable for all concerned.

75. The UNDT recognised that “it is for management to organize its affairs in the best interest of the Organization and that it may involve placin g a staff in a position for which they might not have much appetite”. Although these remarks were made in relation to the finding by the Dispute Tribunal that Ms. Rees was not constructively dismissed, the Appeals Tribunal finds that the same arguments could be used to argue thatthe non-renewal of her fixed-term appointment was reasonable in the circumstances.

76. We consider Ms. Rees’ conduct in this respect unreasonable. No staff member has the right to select his or her own supervisors. No organization can be compelled to keep such a staff member who insists on retaining his or her post while refusing to report to a supervisor who he or she claims has discriminated against him or her or created a hostile work environment.

77. The staff member reserves the right to seekredress through informal or formal complaint procedures pursuant to ST/SGB/2008/5. Ms. Rees was advised to submit a formal complaint of harassment against the DHC and the Director of the RRDD but, having failed to do so, her insistence on different reporting lines is without merit. She cannot insist on a restructuring of the Organization to suit her wishes.

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Rescission of reassignment

81. The UNDT ordered the rescission of the reassignment of Ms. Rees. This Tribunal, looking at the circumstances of the case and the fact that she is no longer in service, finds the rescission of the reassignment unsuitable. Ms. Rees is, rather, entitled to compensation for moral damages and we will consider the issue under the heading of moral damages below. We therefore set aside the order of rescission

Moral damages

82. The UNDT found in this case that Ms. Rees suffered moral damage because of a number of aggravating circumstances in the case of the reassignment decision. The Dispute Tribunal found on the evidence that the period around the reassignment decision caused most stress to Ms. Rees and, accordingly, awarded her four months' net base salary.

83. We find this amount inadequate due to the aggravating nature of the stress she went through even though it is difficult to assess the moral damages she suffered. We therefore enhance the compensation to an amount of six months' net base salary.

Judgment

84. The appeal is allowed in part. The decision of the UNDT on the unlawfulness of the reassignment is affirmed. The appeal against the non-renewal of the fixed-term appointment is allowed. The appeal against the award of compensation in the amount of two years' net base salary and post adjustment entitlements, reduced by Ms. Rees' net take-home pay from 1 April 2010 to 31 March 2012, is allowed and the award is hereby set aside. The award of four months' net base salary for moral damages is enhanced to six months' net base salary.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar