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Case No.: UNDT/GVA/2009/69

Judgment No.: UNDT/2010/133

## Introduction

1. On 8 September 2008, the applicant filed before the New York Joint Appeals Board (“JAB”) an appeal against the decision of 15 May 2008 not to renew her fixed-term contract and the decision of 1 May 2008 to issue her

6. By e-mail dated 4 June 2007, the Chief Finance Officer, who was the applicant's supervisor and first reporting officer, transmitted to her for signature a special report on her performance during the period 16 January 2007-31 March 2007. In it he gave her the rating "Partially meets performance expectations". After a number of exchanges, her supervisor altered the date of the end of the appraisal period

United Nations Headquarters, which subsequently established an investigation panel to conduct a fact-finding mission.

9. The applicant was on sick leave from 16 October 2007 to 2 November 2007.

10. The Chief Finance Officer sent his team, including the applicant, an e-mail asking them to finalize the mid-point review

15. On 3 December 2007, the Chief Finance Officer, as her first reporting officer, sent the applicant his comments on her mid-point review. He stressed that her performance did not meet expectations and that the

any prior discussion with her and that her e-mail inbox had been tampered with, which would explain how messages from her supervisor that she had never seen had appeared there. She stated that, contrary to what her supervisor claimed in his memorandum of 4 December 2007, she had not received negative comments on her work from section chiefs. Lastly, she described the appraisal of her performance in the memorandum of 4 December 2007 as unjustified and as retaliation by her supervisor for her complaint of harassment.

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appraisal and rebuttal process. By decision dated 19 June 2008, the Secretary-General inform the applicant that he did not accept that recommendation.

31. By letter dated 7 July 2008, the applicant requested administrative review of the decision of 1 May 2008 to place a written reprimand in her official status file and of the investigation panel's findings concerning her complaint of sexual harassment.

32. By letter dated 7 August 2008, the Officer-in-Charge, Administrative Law Unit, responded to the request for administrative review of the decision not to renew the applicant's contract beyond 15 June 2008. She told the applicant that, on the one hand, her request was moot because her contract had been extended until 19 June 2008 to enable the Secretary-General to take a decision on the JAB report concerning her request for suspension of the decision and, on the other, that the decision had been taken in accordance with the applicable rules.

33. On 8 September 2008, the applicant lodged an appeal with the New York JAB against the decision of 15 May 2008 not to renew her fixed-term contract and against the reprimand of 1 May 2008. The respondent submitted his reply on 4 November 2008.

34. Pursuant to the transitional measures set forth in General Assembly resolution 63/253, the case was transferred to UNDT on 1 July 2009.

35. The applicant's additional observations, dated 2 July 2009, were sent to UNDT on 7 August 2009.

36. By a change-of-venue order dated 25 September 2009, UNDT ordered the transfer of the applicant's case from the New York Registry to the Geneva Registry.

37. By letter dated 7 April 2010, the Tribunal requested the respondent to provide it with a copy of the work performance plan to which he referred in paragraph 9 of his reply and copies of the documents concerning the mid-point review to which he also referred in his reply. The Tribunal further requested the production of documents demonstrating that the rebuttal panel



had upheld the applicant's rating of “Partially meets performance expectations”.

38. By memorandums dated 30 April 2010 and 15 May 2010, the respondent informed the Tribunal that he had regrettably been unable to locate either the work performance plan or “the equivalent of a mid-point review” for the applicant. He told it that the special report of June 2007 had revealed shortcomings in the applicant's work. He also submitted to the Tribunal the rebuttal panel's report of 13 June 2008, which was already in the Tribunal's possession.

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filed a complaint of harassment, a complaint that was later found to be unsubstantiated. The reason given for the non-renewal of her contract was legitimate and supported by the record;

- f. The appraisal procedure was followed: the appellant's shortcomings were brought to her attention by the first reporting officer and the equivalent of a mid-point review was undertaken at the time she signed the special report. Therefore, the appellant's submission that her shortcomings and the efforts she needed to make to improve her work were not brought to her attention during the reporting period is incorrect. The PAS report remained in the appellant's electronic in-tray because she failed to take the steps necessary to finalize it;
- g. Regarding the applicant's request for removal of the rebuttal panel's report from her official status file, the panel's investigation was undertaken at her request and the panel upheld her performance rating. Pursuant to section 15 of administrative instruction ST/AI/2002/3, "the performance rating resulting from the rebuttal process shall be binding on the head of the apartment or office and the staff member concerned"; it is therefore beyond the jurisdiction of the Tribunal to address the matter;
- h. The reprimand was issued on the basis of the investigation panel's conclusion that the applicant's serious allegations against colleagues were unfounded and of section 2.3 of Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). It was properly issued and should remain on the applicant's official status file.

## Judgment

41. While the respondent contends that the application



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the applicant's performance in accordance with the procedure set forth in administrative instruction ST/AI/2002/3, did not follow all the stages of that procedure and that, as was noted by the rebuttal panel, her performance was therefore not properly appraised.

51. It follows that the decision not to renew the applicant's contract beyond 15 June 2008, for which the only reason given was her underperformance, was unlawful and must be rescinded. Since it was a decision concerning appointment, the Tribunal must, pursuant to article 10, paragraph 5 (a), of its statute, set an amount of compensation that the respondent may elect to pay as an alternative to rescission. In view of the contracts that the applicant held from the time she commenced workzMYHRcBcRmBczM-ívbHRmB



53. The Tribunal must therefore examine whether the applicant's complaint was based on intentionally false or misleading information and whether, in consequence, the written reprimand was justified. For reasons of confidentiality, it has deliberately limited the references to the alleged incidents of harassment.

54. There is no precise indication of when the applicant first made allegations of sexual harassment against two colleagues and of harassment against her supervisor, who allegedly not only took no steps to protect her but collaborated with the harassers and "punished" the applicant for reporting the incidents. The respondent acknowledges that on 27 September 2007 the applicant informally contacted the Chief Administrative Officer, her second reporting officer, to tell her of the alleged harassment. On that date, the decision not to renew the applicant's fixed-term contract had yet to be taken. Furthermore, the complaint of sexual harassment concerned not her direct supervisor, but two of her colleagues, and it is hard to see any link between a complaint made primarily against her colleagues and not her supervisor and the applicant's intention to prevent the non-renewal of her contract.

55. The Tribunal does not have enough evidence to decide whether the applicant was the victim of sexual harassment, since there remain numerous doubts concerning the accused colleagues' conduct and these doubts must benefit them. However, the doubts as to the reality of the allegations must also benefit the applicant, since it is for the Administration to prove that the complaint was based on intentionally false or misleading information.

56. It cannot be concluded from the available evidence that the applicant's complaint was based on intentionally false or misleading information. On the contrary, the conclusions in the investigation panel's report leave it uncertain what really happened and give the impression that the applicant's colleagues may indeed have behaved inappropriately.

57. It would appear that the applicant perceived her colleagues' behaviour as constituting sexual harassment. Assuming that this was an error of judgement on her part, the complaint she filed is not sufficient to establish

malicious intent. The Tribunal therefore considers that the decision to issue the applicant with a written reprimand was unjustified and unlawful. It follows that the reprimand must be rescinded and, as every rescission by the Tribunal of a decision necessarily implies, that the Administration must remove it from the official status file of the staff member concerned. The fact of having unlawfully issued the applicant with the reprimand caused her moral injury for which she must be compensated by the payment to her of three months' net base salary.

#### Decision

58. In view of the foregoing, the Tribunal DECIDES:

- (1) The decision not to renew the applicant's contract beyond 15 June 2008 is rescinded. Pursuant to article 10, paragraph 5 (a), of its statute, the Tribunal sets compensation at three months' net base salary, which the respondent may elect to pay the applicant as an alternative to rescission;
- (2) The reprimand issued to the applicant is rescinded and the Tribunal orders the respondent to remove it from her official status file;
- (3) The respondent is ordered, pursuant to article 10, paragraph 5 (b), of the statute, to pay the applicant three months' net base salary for the moral injury resulting from the reprimand;
- (4) The above amounts of compensation refer to the applicant's net base salary as of the date of her termination and shall bear interest at the rate of eight per cent per annum from 90 days after the date of the present judgement until they are paid;
- (5) All the applicant's other requests are rejected.

\_\_\_\_\_ (signed) \_\_\_\_\_