



UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting

Introduction

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”). She filed an appeal with the former United Nations Administrative Tribunal (“former UN Administrative Tribunal”) contesting the decision by UNHCR dated 27 August 2004 not to renew her Fixed-Term Appointment (“FTA”) as a Senior Investigation Officer with the Inspector General’s Office (“IGO”) on performance grounds (“the Contested Decision”).

Procedural Background

2. This non-renewal claim is one of three claims brought by the Applicant in two cases before the former UN Administrative Tribunal. The Applicant filed one

Issues

12. The issues to be determined are:
 - a. Was the decision not to renew the Applicant's FTA with the IGO lawful?
 - b. Did the Organization implement the non-renewal decision of the

- d. Provide the necessary legal advice and guidance during investigations, participate in investigation missions as and when required;
- e. Screen investigation reports to ensure that procedures/techniques and the final conclusions are legally sound and in compliance with United Nations rules, regulations and directives while taking into consideration UNHCR's protection mandate;
- f. Liaise with the Legal Affairs sections with respect to legal issues in relation to investigation of cases and transmission of the preliminary reports;
- g. Advise on any legal matter that relate to the responsibilities and authority of the Inspector General;
- h. Discharge those tasks as requested by the Inspector General.

20. In October 2003, the Applicant was assigned to conduct an investigation in Sri Lanka into an allegation of rape of a refugee by a UNHCR staff member. The case had already been through an internal investigation under the authority of the then Country Representative of UNHCR in Sri Lanka. At the beginning of her investigation, the Applicant was subjected to obstruction and interference by the Country Representative. She said that her investigation was stopped by the then DIG/IGO after she first complained about the obstruction and then the investigation was restarted by her supervisor.

21. Between October 2003 and March 2004 the Applicant reported this obstruction to her immediate supervisor; the UNHCR Legal department in a letter dated 11 March 2004; to the then UNHCR Deputy High Commissioner and to the then UNHCR Mediator. The Applicant eventually concluded her investigation and rendered a report but continued to insist that there should be an enquiry into the obstruction.

22. The Applicant was initially supported in her concerns by her immediate supervisor. In November 2003 he wrote to the Inspector General (“IG”) about the staff members who had conducted the internal investigation:

Dear [IG] I prefer not to reply to [Sri Lanka Country representative]
as my words would c

26. On the morning of 6 February 2004, the supervisor wrote to the Applicant an email entitled “Morning thoughts” in which he told her “Incident closed as far as I am concerned, unless the DIG or you want to take it to another level. Have a nice day.”

27. On the same morning the supervisor wrote to the Applicant commenting on her draft performance objectives she had sent him. She revised the objectives on the same day and returned them to her supervisor for review.

28. The second event concerned an alleged breach of confidentiality by the Applicant. On 29 March 2004, the supervisor wrote to her:

The Inspector General has brought to my attention allegations that he has received that you reportedly told some persons outside the IGO that he, [the DIG] [UNHCR Sri Lanka Country Representative] had stopped or/and tried to stop the investigation in Sri Lanka. I need to formally ask you whether you have discussed the case outside the IGO with some colleagues and if so in what context ...

29. In reply, the Applicant denied discussing details or names about any particular investigation. In an email of 2 April 2004 she said:

I would like to note that it is not uncommon for allegations to be made against investigation officers and I agree that, in the interest of the integrity of the IGO, they need to be properly investigated. I would thus urge you to refer this matter to OIOS if there is an allegation of breach of confidentiality.

30. On 14 April 2004 her supervisor wrote to the Applicant thanking her for her clarifications and recommending as a lesson learnt to be even more cautious in relation to the sensitive material handled by IGO. The matter was not referred to OIOS.

31. The context of these allegations was described to the Tribunal by Anton Verwey, now retired but at the material time a Senior Director in IGO with some 30 years’ experience in UNHCR. He had been involved in the setting up of IGO as an oversight service within UNHCR and had a unique insight into its operations.

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results/achievement column and sign/initial where applicable for my follow-up.

52. Upon receiving this email, the Applicant sought the advice of the PMU. The same date, the PMU wrote to the Applicant and the PAR focal point as follows:

Please note that the self-assessment of the stated objectives is normally done by the staff member prior to the supervisors' evaluation (see attached guidelines). In this case, it appears that the normal process was not followed and the supervisor completed the PAR prior to the staff member's self-assessment....

53. Then followed some internal correspondence between the DIG/IGO and the Division of Human Resources Management ("DHRM") about the correct procedures to be followed in the non-renewal of the Applicant's contract. On 16 September 2004 the then Deputy Director DHRM suggested two options to the Acting IG (former DIG) and others:

Assuming the rebuttal procedure will take some time, we could:

- a. extend her contract and place her outside the IGO until the rebuttal is concluded.
- b. not to extend her contract once medically cleared and confirm that this is without prejudice to the rebuttal procedure

requests. I had to proceed with the mid-term assessment on 12 April
2004 on the basis of draft objectives and without ~~her~~ ~~hw~~, -K-H--RsLHwccvcHReLhkwcYv-RK--kR

misconduct from the performance issues. In her referral letter she explained to OIOS what had occurred in the Applicant's rebuttal case and continued:

Our rebuttal work was hindered by the interference from the Rebuttal secretariat and the Legal Affairs Section under the Director of DHRM....I officially inquire about the action you and your service have taken. Please treat this as a request for final administrative action and decision.”

66. Ms. Brzak did not receive a response to this letter. The Applicant went to the OIOS offices in New York in September 2005 and spoke to the Director ID/OIOS. She also met with the then Chief of the Administrative Law Unit (“ALU”), Office of Human Resources Management (“OHRM”) on 22 October 2005 in an attempt to resolve her claims informally. She was informed that ALU/OHRM did not wish to engage in any informal resolution and that she should pursue the matter formally with OIOS.

67. On 3 December 2005, the Applicant filed a formal complaint with OIOS alleging harassment and abuse of authority against her former supervisors at the IGO. An OIOS office analyst assessed her case and rated it suitable for investigation.

68. In his reply to the Application, the Respondent stated “On 30 September 2005, the Respondent advised the JAB that ‘the supervisor and the reviewing officer of [the Applicant] have agreed, in principle, to withdraw [the Applicant’s] PAR (2003-2004), provided that this is also accepted by the Applicant.”

69. There is no evidence that this intention was acted on at the time. The Applicant told the Tribunal that the withdrawal was conditional on her dropping her case and she did not accept that proposal.

70. While counsel for the Respondent submitted to the Tribunal that the PAR had been removed from her file, the Applicant was not advised of this until the hearing of her case before this Tribunal.

71. The Applicant's complaint was then referred to the OIOS Vienna Office where Mr. Francis Montil, a former senior investigator with ID/OIOS was the Head of the Office. He told the Tribunal that Ms. Brzak's letter to OIOS was not in the case file nor shared with him when he received the case file. He assigned an investigator to the Applicant's case and sent him to Geneva in March 2006 to conduct investigations. When Mr. Montil left ID/OIOS in July 2006, the investigation into the Applicant's case had not been completed and it was still active. Neither the investigation nor the rebuttal was ever completed.

72. On 21 April 2006, the Director ID/OIOS called the Applicant and informed her that she had been told to reprioritize her cases and the Applicant's was no longer one of the priority cases.

73. On 1 January 2006 a new evaluation unit called the Policy Development and Evaluation Service was set up to replace EPAU. The Applicant was instructed by the Chief of the new unit not to apply for positions in the new unit.

74. The Applicant was given 100% medical clearance in March 2006. On 4 May 2006, she was informed that her contract would not be renewed beyond 31 May 2006. She received notice of separation from EPAU on 30 May 2006. Her request to DHRM on 30 May 2006 to be granted Special Leave With Out Pay ("SLWOP") from EPAU so as to retain her pension rights while she looked for another job, was denied.

Applicant's submissions

75. The Applicant's principal arguments are:

- a. The non-renewal of her contract with the IGO on performance grounds was illegal and unlawful;
- b. Her removal from the IGO post as Senior Investigation Officer pending the outcome of the rebuttal process and while she was on sick leave was illegal;

- c. She was denied due process in the non-renewal of her contract

d. The Applicant frustrated and delayed the completion of her PAR. The administration was de facto held at ransom by the active refusal of the Applicant to adhere to established rules;

e. The fact that the PAR was not completed, should not be considered as an argument by the Applicant in the furtherance of her claim, but rather, should demonstrate how the system was manipulated with a view to undermining the PAR process and its related impact on the Applicant's contractual status;

f. The Applicant's due process rights in relation to the rebuttal of the PAR were observed in spite of an inconclusive result by the rebuttal panel; and

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79. An enhanced PAR was designed to regularly provide feedback on the performance of staff based on set work objectives and competencies defined at the beginning of the performance cycle and reviewed through ongoing dialogue between the supervisor and the staff member. It included training and development plans. It comprised of three steps:

Step 1 – The supervisor and the staff member to agree on objectives, competencies and training and development during months 1-2 of the CMS year.

Step 2 – Mid-term progress review conducted by the staff member and the supervisor to discuss the following:

- Progress in meeting objectives, and demonstration of competencies;
- Any problems and how to resolve them (including any additional training and/or development required);
- Additions or modifications to objectives and/or competencies as a result of any changes in circumstances;
- A brief written record describing the conclusions of the mid-term progress review and agreed actions is entered on the Annual Appraisal form (PAR 1) by the supervisor. The staff member may add comments to the form if he/she so wishes. In addition, regular informal reviews and f

Step 3 - Annual appraisal discussion and rating of performance

the meeting early to attend to other matters. She was not shown the supervisor's mid-term assessment before the PAR was completed. She completed her own mid term assessment but the vehicle accident while on mission in Indonesia delayed her submitting it.

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96. The Tribunal finds that as the Applicant's performa

105. The email exchanges between the Applicant and her supervisor in February and March 2004 raised issues of transparency in the IGO and an allegation of breach of confidentiality. They were closed by the supervisor after email exchanges however each issue surfaced again in the PAR as performance management warnings.

106. The Tribunal expressly relies on the evidence of Mr. Verwey to corroborate the Applicant's allegation of ill motivation by the administration. This highly committed, senior former staff member of UNHCR, who had 31 years of experience, described his observations of the Administration taking steps to undermine individuals who did not produce anticipated results. He personally observed the same methods being used on the Applicant.

107. There can be no doubt that the Applicant's uncompromising stance on the application of ethical and procedural standards to investigations caused discomfort at the highest levels. The official response was consistent with that observed in other similar contexts by Mr. Verwey.

108. The negative mid-term assessment which was apparently unilaterally prepared by the supervisor in April 2004 followed closely after the Applicant's allegations of misconduct by UNHCR officials and her criticism of IGO internal procedures. The Tribunal concludes that the Administration chose to mischaracterise these allegations as poor performance rather than to properly investigate them or refer one of them to OIOS as the Applicant requested. The subsequent unlawfully prepared negative PAR and non-renewal of the Applicant's contract was a consequence of the Administration's dissatisfaction with her criticism of the investigative methods and procedures used by individuals in IGO.

109. The failure of the supervisor to refer the Applicant's alleged performance issues to PMU as required by the CMS when those concerns first came to light in early 2004 brings into serious question whether the concerns of the Administration were genuinely about performance.

- a. The Executive office of UNHCR;
- b. The UNHCR Department of Human Resources Management; and
- c. The UNHCR Legal Affairs Unit.

128. The Tribunal notes that the referral to OIOS from the Rebuttal Panel was not dealt with or concluded and according to the evidence of Mr. Montil never reached the Applicant's file. No individuals were identified who can be held responsible for this. However the Tribunal finds that the actions of the then Head of the PMU and the then head of the Legal Affairs Section as directed by the Executive Office of UNHCR and the failure of OIOS to investigate and call these individuals to account as requested by Ms. Brzak has contributed to the costs to the Organization as ordered by this Tribunal.

Remedies

129. Pursuant to art. 10.5(b) of the Tribunal's Statute the Tribunal may award compensation, which shall normally not exceed the equivalent of two years' net base salary of the Applicant. In exceptional cases the Tribunal may order the payment of a higher compensation and shall provide the reasons for that decision.

130. The Tribunal may only award compensation for losses which arise directly out of the proven breaches.

131. In Massabni 2012-UNAT-238, the Appeal's Tribunal stated:

Consistent with the jurisprudence of this Tribunal in Wu and other cases, not every administrative wrongdoing will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. The claimant carries the burden of proof about the existence of factors causing damage to the victim's psychological, emotional and spiritual wellbeing. When the circumstances of a certain case do not allow the Judge to presume that kind of damage as a normal consequence to an average person placed in the same situation of the claimant, evidence must be produced and the lack of it will lead to the denial of compensation.

132. Pursuant to art. 10.5 (a) of the Tribunal's Statute, the Tribunal may rescind the contested administrative decision and, in the case of termination set an amount of compensation the respondent may pay as an alternative to rescission.

133. In her Application the Applicant stated: "I have not and do not claim that under the staff rules and the terms of my contract with UNHCR, or on the basis of the Administrations actions, I had grounds to expect the renewal of my appointment as Senior Investigation Officer in the Inspector General's Office, UNHCR. I did, however, have grounds to expect to be treated with fairness, honesty and with the full respect of my right to due process."

134. The Applicant gave evidence to the Tribunal about the effects that this case has had on her. In spite of numerous applications for posts and apart from some temporary assignments with the Office for the Coordination of Humanitarian Affairs and the International Labour Organization, since the end of her EPAU contracts she was out of permanent work until she retrained as a teacher in 2012 and took up a new profession as a University professor.

135. She lost access to the United Nations Pension Fund and to her continuing career progression within the United Nations.

136. She explained that it was known in the small world of the United Nations that she had been removed for performance issues and this has left her under a cloud. She expressed deep disappointment that these events took place in IGO when it was incumbent on that office to sort out such issues. She regretted that the allegations about her performance were used as a rationale not to afford her protection against retaliation.

137. She described the damaging effects of nine years of litigation before this case could be determined. She initially retained private counsel but could not afford to continue after incurring substantial legal costs. She presented invoices for the period 23 September 2008 to 9 November 2009 amounting to GBP11,826.75 and for 26 January 2010 to 22 November 2010 amounting to GBP4,264.50.

138. But for the unlawful non-renewal of her contract the Applicant had the chance of being engaged as a Senior Investigation Officer for the four years referred to in her letter of offer in June 2003. Although these four years were subject to exigencies the IGO remained in existence throughout that period.

139. The Applicant's financial losses arising from the non-renewal were to a large extent mitigated by the two years' full employment at EPAU. The Tribunal finds the amount the Respondent should pay in lieu of rescission is one year's full salary with full benefits that would have accrued to her as at her time of employment.

140. On the basis of the Applicant's evidence there can be no doubt about the serious stress and reputational damage caused to her by the discredited negative PAR and the non-renewal on the grounds of unsatisfactory performance particularly in the light of her otherwise highly rated performances at numerous other agencies. In addition she has borne the disappointment of retaliation against her by formerly respected colleagues for identifying and insisting on an investigation into misconduct she genuinely believed was occurring.

141. Accordingly the Tribunal awards the Applicant compensation for moral damages in the sum of USD50,000.

Costs

142. The Tribunal may only award costs if it finds that there has been a manifest abuse of proceedings. This case has taken nine years to reach a decision. That delay cannot be attributed to either party. The changes to the internal justice system are a major contributing factor.

143. However, from the commencement of the proceedings, the Respondent has consistently denied that there was any defect in the PAR process. It was only at the hearing that the Respondent conceded breaches of the CMSasv,cGRcLh,wGkYwFHGF-RsLhHwtr

disclosed for the first time in his submissions that there is “no unfavorable PAR in respect of the Applicant on UNHCR Records.”

144. The Tribunal regards the Respondent’s failure to make appropriate concessions of procedural breaches at an early stage as a manifest abuse of the proceedings. There were numerous opportunities for this to occur during the pre-hearing phase of the case including at Case Management Hearings. Such concessions would have resulted in the narrowing of the issues and possibly even a settlement of the case. This failure has added to the Applicant’s legal costs, a proportion of which should be refunded to her.

145. The Applicant’s legal costs were incurred partially in the preparation of this case and partially in the preparation of the application contesting the decision of the Ethics Office.³ The first invoice covered appearances by counsel in this case in July 2009 when the matter was being transferred from the former UN Administrative Tribunal to the Geneva Registry of this Tribunal. However as much of the work at that time was in relation to the Ethics case only a third of the

- b. The Respondent failed to adhere to its lawful obligations in the Performance Management process;
- c. The irregular preparation of the unsubstantiated and therefore unlawful PAR was a retaliatory act;
- d. The decision not to renew the Applicant's contract by the IGO was implemented;
- e. The Respondent is to pay to the Applicant:
 - (i) One year's salary and all benefits that would have accrued to her. These are to be computed at the Applicant's category and level of employment at the time of her separation from the Organization;
 - (ii) USD50,000 for moral damages; and
 - (iii) GBP6,074.50 for legal costs.
- f. The Respondent shall bear all the costs of the execution of this Judgment.

(Signed)

Judge Coral Shaw

Dated this 28th day of May 2013

Entered in the Register on this 28th day of May 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi