



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/69
Judgment No.: UNDT/2010/133
Date: 26 July 2010
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

ELDAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Amal Oummih

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

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 with a written reprimand. Pursuant to General Assembly resolution 63/253, the appeal was transferred to the United Nations Dispute Tribunal (“UNDT”) on 1 July 2009.

2. The applicant requests that:

- a. The written reprimand be withdrawn from her official status file;
- b. The incomplete performance appraisal report, the special report, the letter recommending non-renewal of her contract and the report of the rebuttal panel be withdrawn from her official status file;
- c. She be awarded two years' salary as compensation for the injury suffered.

Facts

3. The applicant was recruited on 16 January 2007 on the basis of a six-month temporary fixed-term appointment as a Budget Officer at the P-3 level with the United Nations Observer Mission in Georgia (“UNOMIG”). Her contract was subsequently extended for six months, from 15 July 2007 to 15 January 2008. It was further extended until 19 June 2008 to enable the rebuttal panel and an investigation panel to complete their work and the Secretary-General to take a decision on the JAB recommendation concerning her request for a suspension of action.

4. By e-mail dated 30 January 2007, the Chief Finance Officer sent the applicant the Finance Section's work plan for 2006.

5. On 17 May 2007, the Chief Finance Officer sent the Finance Section's work plan for 2007/2008 to all staff in the Section to help them draw up their individual work plans.

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 from 30 April to 31 March 2007. The applicant then signed the special report. She subsequently withdrew her consent and signature pending clarification of a number of issues, including the question who should fill in the section on staff achievements. After a number of exchanges, the achievements were altered slightly and the rating was left unchanged. The applicant signed this new version of the special report on 12 June 2007. The report notes that she had been informed that a six-month extension of her contract was recommended.

7. On 11 July 2007, the applicant submitted to the Chief Civilian Personnel Officer, UNOMIG, a note for her personal file concerning the special report on her performance. In it, she claims that the appraisal procedure was not properly followed, that her rating was unjustified and that her supervisor had not given her the support she needed to perform their duties properly. She contends that she should have been given a performance improvement plan and was entitled to, but had never received feedback to enable her to improve on any identified shortcomings. She stated that, while she was not asking at that point for rebuttal, she wished the note to be part of her file.

8. On 11 October 2007, she lodged a formal complaint of harassment, including sexual harassment, by two of her colleagues with the Special Representative of the Secretary-General. In it, she also said that her supervisor, the Chief Finance Officer, was fully aware of the harassment, participated in it and was indirectly punishing her for having made the harassment public knowledge. She subsequently submitted her complaint to the Panel on Discrimination and Other Grievances, the Ombudsman, the Focal Point for Women in the Secretariat and the Panel of Counsel. After consultation with the Conduct and Discipline Unit, the complaint was transferred to the Office of Human Resources Management ("OHRM") at

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 reviews of the staff members under their supervision and, with respect to their own performance appraisal reports, to make arrangements for a meeting to discuss their mid-point reviews.

11. By e-mail dated 16 November 2007, the applicant informed her second reporting officer, the Chief Administrative Officer, that her doctor had told her she must not have discussions with her direct supervisor and therefore asked whether she could have the mid-point review interview with her. She stated that she had discussed her work plan with her first reporting officer, the Chief Finance Officer, in May 2007.

12. The applicant submitted her work plan to the Chief Finance Officer on 20 November 2007 and he accepted it the same day. By e-mail dated 28 November 2007, the applicant informed the Chief Civilian Personnel Officer, UNOMIG, that she had submitted her work plan to her supervisor on 20 November 2007, but had still not received any feedback from him in order to proceed to the mid-point review.

13. On 30 November 2007, the applicant and the Chief Finance Officer exchanged several e-mails in which he asked her for a meeting to discuss the renewal of her contract. The Chief Finance Officer also said in those e-mails that he had understood that the applicant did not wish to meet him to discuss her mid-point review. She replied that her doctor had advised her not to see him and that the Chief Civilian Personnel Officer, UNOMIG, had told her that there was no need for her to do so.

14. On 3 December 2007, there was a meeting between the applicant, the Chief Finance Officer and the Chief Civilian Personnel Officer, UNOMIG, at which the non-renewal of the applicant's contract because of her performance was discussed with her.

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 shortcomings in her work had been discussed with her. He also stated that he had had extensive discussions with her concerning her special report and had pointed out to her what needed improvement

16. By memorandum dated 4 December 2007, the Chief Finance Officer informed the Chief Civilian Personnel Officer that, because of the applicant's unsatisfactory performance, he was not recommending renewal of her contract. He remarked that, after the special report covering the period 16 January-31 March 2007, the applicant's contract had been extended for six months to give her an opportunity to improve her performance.

17. By e-mail also dated 4 December 2007, the applicant asked the Chief Civilian Personnel Officer for advice about the fact that she had received her mid-point review report on 4 December 2007 and that her supervisor had not discussed it with her before making his appraisal.

18. By e-mail dated 5 December 2007, the applicant wrote to her supervisor emphasizing that the purpose of the meeting on 3 December 2007 had been the renewal of her contract and not her mid-point review and that he had again failed to follow the procedures for performance appraisal.

19. On 7 December 2007, the applicant was informed that her contract would not be renewed beyond 15 January 2008. The contract was subsequently extended on a month-by-month basis to enable completion of the investigation into her complaint of harassment. The investigation took place from 21 February to 5 March 2008.

20. In December 2007, the applicant complained of tampering with her e-mail inbox. The Office of Internal Oversight Services transferred the complaint to UNOMIG, which carried out an investigation in January 2008.

21. On 11 January 2008, the applicant strongly objected to the appraisal of her performance contained in the Chief Finance Officer's memorandum of 4 December 2007 and questioned the validity of the appraisal process. She asserted that her supervisor wrote the special report of June 2007 without

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.

22. By memorandum dated 25 February 2008, the applicant informed the Officer-in-Charge, OHRM, in New York that she did not think her rebuttal of her performance appraisal could be fairly examined by a panel composed of UNOMIG staff and asked OHRM to set up a panel. By memorandum dated 29 February 2008, the Officer-in-Charge, OHRM, replied that she could not accept that request and that, pursuant to section 14 of administrative instruction ST/AI/2002/3, rebuttals were considered by rebuttal panels established at the duty station concerned.

23. On 4 March 2008, the Officer-in-Charge, OHRM, informed the applicant that, further to her request to be placed on unpaid leave, the Secretary-General had decided that it was in the best interest of the Organization for her to be placed on such leave pending the submission of the investigation panel's report and its review by OHRM.

24. The investigation panel submitted its report on 5 March 2008. Its finding was that the allegations of sexual harassment were unfounded.

25. A rebuttal panel was constituted on 14 April 2008.

26. By letter dated 1 May 2008, the Officer-in-Charge, OHRM, issued the applicant with a written reprimand for having made unfounded allegations against her colleagues. She stated, *inter alia*, that the investigation panel had wondered whether, by making her complaint, the applicant had been trying to undermine the integrity and impartiality of the negative evaluations she had received with a view to seeking the reversal of the decision not to renew her contract. She advised the applicant that, in accordance with administrative instruction ST/AI/292, a copy of the letter of reprimand

would be placed in her official status file and that she had the right to comment on it.

27. By e-mail dated 15 May 2008, a member of the Department of Field Support inform the applicant that her fixed-term contract would not be extended beyond 15 June 2008. The applicant responded by e-mail the same day that as of that date she had not been informed of the reason for the non-renewal.

28. On 11 June 2008, the applicant petitioned the Secretary-General for administrative review of the decision of 15 May 2008 not to renew her contract. On the same day, she also asked the New York JAB for suspension of action on that decision as the rebuttal proceedings pertaining to her performance appraisal were not complete.

29. The rebuttal panel submitted its report on 13 June 2008, noting that no proper performance appraisal system (“PAS”) report had been prepared for the applicant and that the only document containing an evaluation of her performance was the memorandum of 4 December 2007 from the Chief Finance Officer, particularly paragraph 12 thereof, which stated that her performance and conduct had not only been wanting but had also constantly impeded the efficient functioning of the Finance Section. The panel concluded from the information it obtained and the available documentation that the evaluation of the applicant's performance contained in paragraph 12 of the memorandum should be upheld.

30. In its report of 18 June 2008 on the applicant's request for suspension of action, JAB found that the Administration had failed in its duty under administrative instruction ST/AI/2002/3 to initiate and complete a PAS report for the applicant. It also expressed surprise that the UNOMIG Administration had treated the memorandum of 4 December 2007 as if it had been a PAS report and established a rebuttal panel. In JAB view, the actions of the UNOMIG Administration constituted a serious abuse of authority and the applicant was entitled to a duly completed PAS report before leaving the Organization. JAB recommended that the decision not to renew the applicant's contract be suspended pending completion of the

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. In the absence of the requested documents, he sought leave to present a witness statement from the applicant's first reporting officer to show that a work performance plan had been drawn up and that the equivalent of a mid-point review had been undertaken with the applicant. The Tribunal allowed the respondent time to provide that statement. On 27 May 2010, the respondent informed the Tribunal that he was regrettably unable to submit a statement from the applicant's first reporting officer and submitted in its stead a statement from the Chief Civilian Personnel Officer, UNOMIG. The applicant submitted her comments on 29 June 2010. Upon inquiry, both parties informed the Tribunal that they concurred with the judge's opinion that there was no need for an oral hearing.

Parties' contentions

39. The applicant's contentions are:
- a. After joining UNOMIG, she received only very positive comments on her work until her colleagues began to harass her. The special report, the written reprimand and the decision not to renew her contract were reprisals for her reporting of the harassment. The special report, which was improperly prepared, was used to justify the non-renewal of her contract;
 - b. The appraisal procedure provided for in administrative instruction ST/AI/2002/3 (Performance Appraisal System), was not properly followed and she received instead, without the benefit of the mid-

point review required under section 8 of the administrative instruction, a special report. Her first reporting officer explained the rating of “Partially meets performance expectations” given to her in the special report by saying that some of her tasks were to be completed within the next six months, so misleading her. He certainly did not tell her that there were shortcomings in her work

- c. The rebuttal panel did not follow the established procedure: in the absence of a PAS report, it reviewed the special report, which covered a period of nine weeks, and the memorandum of 4 December 2007 from the Chief Finance Officer recommending non-renewal of her contract. The rebuttal panel had no right to assess such documents instead of a properly prepared PAS report. JAB found that the Administration had failed in its duty to complete her PAS report in accordance with administrative instruction ST/AI/2002/3;
- d. The decision not to renew her fixed-term contract was taken on the basis of an improper performance report and an improper rebuttal process;
- e. Having been prepared in violation of administrative instruction ST/AI/2002/3, the incomplete PAS report, the special report and the letter recommending non-renewal of her contract are flawed and should be withdrawn from her official status file;
- f. She was subjected to harassment, including sexual harassment, from the time she joined UNOMIG. The conclusions in the report on her complaint are wrong and the investigation panel acted on an unlawful basis. The investigation not having been conducted in accordance with administrative instruction ST/AI/379 (Procedures for dealing with sexual harassment), the written reprimand she received was unjustified and should be withdrawn from her official status file. In particular, administrative instruction ST/AI/379 contained no provision for the issuing of written reprimands; that option was only introduced by Secretary-General's bulletin

ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which was not in force at the time in question;

- g. Instead of protecting her when she had been exposed to unwelcome sexual advances, the Administration gave her a written reprimand. The reprimand was a disguised disciplinary measure and therefore constituted a denial of due process.

40. The respondent's contentions are:

- a. The applicant's appeal against the decision not to renew her contract is time-barred;
- b. The applicant's contract was governed by the then Staff Rule 104.12 (b) (ii), which provided that "[A] fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment", a condition stated in the applicant's letter of appointment and confirmed in the jurisprudence of the former United Nations Administrative Tribunal;
- c. In the special report covering the period from 16 January to 31 March 2007, the applicant received the meeting "Partially meets performance expectations" and her contract was then extended for six months to give her the opportunity to improve her work, which did not happen;
- d. In accordance with section 10.4 of administrative instruction ST/AI/2002/3, the Administration then developed for the applicant a work performance plan which was discussed between her and her first reporting officer. Despite her supervisors' considerable efforts, the applicant's work did not improve and required constant oversight, as reflected in her PAS report;
- e. On 3 December 2007, the applicant was informed that, because of her poor performance and the absence of improvement despite the work performance plan, her fixed-term appointment would not be renewed. Her contract was subsequently extended because she

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 is time-barred, he provides no details in support of that claim, whereas the documents in the

case show that the applicant complied with the time limit set in the then staff rule 111.2 (a).

42. Staff rule 104.12 (b) (ii) in force at the time of the contested decision provided that “[A] fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment” and staff rule 109.7 (a) that “A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. However, when the decision not to renew a contract is, as in the case at issue, based on a staff member’s poor performance, it behoves the Tribunal to check that the Administration followed the relevant procedure.

43. Although the application of section 1 of administrative instruction ST/AI/2002/3 concerning the performance appraisal system is not compulsory for temporary appointments of less than a year, when the supervisor decides, as in the present case, to apply that instruction, its provisions must be fully respected.

44. In the applicant’s case, the respondent established a special report for the period 16 January-31 March 2007, giving her the rating “Partially meets performance expectations”. For the period from 1 April 2007 to 31 March 2008, a PAS report was initiated through the applicant’s submission of a work plan on 20 November 2007. However, as the rebuttal panel noted in its report of 13 June 2008, that report was never completed. On 3 December 2007, the applicant’s first reporting officer included in the “mid-point review” section of this report his assessment of her work, which he rated as not meeting expectations. In the assessment, he emphasized that discussions had been held with the applicant on the occasion of the performance appraisal made in the special report and at a meeting between himself, the applicant and the Chief Civilian Personnel Officer concerning the recommendation not to renew the applicant’s contract beyond 15 January 2008. After this assessment on 3 December 2007, the first reporting officer wrote the memorandum of 4 December 2007 concerning his recommendation not to renew the applicant’s contract beyond

15 January 2008. That recommendation was the basis for the decision of 15 May 2008 not to renew the applicant's contract beyond 15 June 2008.

45. Sections 10.4 and 10.5 of administrative instruction ST/AI/2002/3 provide as follows:

10.4 ... A rating of 'partially meets performance expectations' may justify the withholding of a within-grade increment, particularly if the same rating is given for a second consecutive year, as further clarified in section 16.5.

10.5 A rating of 'does not meet performance expectations' may lead to a number of administrative actions, such as transfer to a different post or function, the withholding of a within-grade increment ..., the non-renewal of a fixed-term contract ...

46. Sections 16.4 and 16.5 provide that;

16.4 One annual rating of 'partially meets performance expectations' may justify the withholding of a salary increment, provided it is documented that, during the corresponding performance year, a performance improvement plan was put into place, in accordance with section 8.3, but that the staff member's performance failed to rise to a level that would justify a rating of 'fully successful performance'.

16.5 Two consecutive annual ratings of "partially meets performance expectations" shall normally lead to the withholding of a salary increment."

47. Section 8.3 of that instruction provides that "[a]s soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member".

48. As the Tribunal has already held in its judgment UNDT/2010/104, *Kapsou*: "It follows from the combination of the above texts that when a staff member holding a fixed-term contract obtains the lowest rating of 'does not meet performance expectations', the Administration is entitled not to renew the staff member's contract on the ground of underperformance alone", whereas "when a staff member obtains the rating 'partially meets performance expectations', meaning that shortcomings have been found in his or her work, the

Administration cannot decide not to renew the staff member's contract on the ground of underperformance without having first taken steps, in consultation with the staff member, to enable improvement of the staff member's performance”.

49. Section 15 of administrative instruction ST/AI/2002/3 establishes the rebuttal process, as follows:

15.1 Staff members who disagree with the performance rating given at the end of the performance year may, within 30 days of signing the completed performance appraisal form, submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given...

15.3 The rebuttal panels shall prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the PAS. The performance rating resulting from the rebuttal process shall be binding on the head of the department or office and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the PAS form, with annotation that the rating was changed as a result of a PAS rebuttal.

50. The respondent contends that the procedure laid down in administrative instruction ST/AI/2002/3 was correctly followed in the case in question. However, the burden of proving that the procedure was properly followed lies with the Administration. The respondent failed to produce the documents requested of him by the Tribunal, in particular the plans and appraisals allegedly drawn up in the context of the special report. The case file contains only the special report with the rating “Partially meets performance expectations”, an incomplete PAS report, i.e., one that contains no final rating, a memorandum recommending non-renewal of the applicant's contract on the ground of her poor performance, and a report by the rebuttal panel based on that memorandum, which was not an appraisal in accordance with the rules of the performance appraisal system. The Tribunal cannot but observe that the Administration, which had decided to appraise

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 work on 16 January 2007, it is appropriate to set this compensation at three months' net base salary.

52. The applicant also contests the written reprimand of 1 May 2008 and asks for it to be removed from her official status file. She contends that the decision is unlawful and that section 5.19 of Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which provides that “[s]hould the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report”, was not in force at the time in question and that the decision could therefore not be based on the bulletin. Contrary to what the applicant claims, the Administration based its decision on 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”, which reads: “The transmission or dissemination of unsubstantiated rumours is not a protected activity. Making a report or providing information that is intentionally false or misleading constitutes misconduct and may result in disciplinary or other appropriate action”.

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)

Judge Jean-François Cousin

Dated this 26th day of July 2010

Entered in the Register on this 26th day of July 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva