



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/43

Judgment No.: UNDT/2010/104

Date: 7 June 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

KAPSOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Marcus Joyce, OSLA

Counsel for respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By letter of 15 January 2009, the applicant filed an appeal with the New York Joint Appeals Board (JAB) against the decision not to renew her fixed-term contract. She seeks compensation for the damage to her career and the moral and physical injury she suffered during her employment in the Civil Affairs Branch (CAB), United Nations Peacekeeping Force in Cyprus (UNFICYP).

Facts

2. The applicant began working for CAB, UNFICYP, on 30 August 2007 under a four-month fixed-term contract as a GL-4 Records Clerk. Her contract was subsequently renewed several times.

3. On 25 February 2008, the applicant had a meeting with her supervisors and the Chief, Conduct and Discipline Unit, concerning problems encountered in her work. On 27 February 2008, she had a further meeting with the Chief, Conduct and Discipline Unit, on the same topic.

4. On 29 February 2008, she lodged a complaint of harassment with the UNFICYP Personnel Section against one of her colleagues. A meeting between the applicant, her supervisors and the Personnel Section was held the same day. The applicant was informed that her first reporting officer had changed in mid-January. In addition, it was decided that the Staff Counsellor would attempt to resolve the tension between the applicant and the colleague against whom she had filed the complaint.

5. On 3 April 2008, a meeting was held between the applicant and her first and second reporting officers to discuss her Performance Appraisal System report (hereinafter “e-PAS”). On the same day, the first and second reporting officers signed the e-PAS, giving her a rating of “does not meet performance expectations”. On 9 April 2008, the applicant submitted her comments on her e-PAS.

6. On 11 and 14 April 2008 respectively, the first and second reporting officers filed complaints against the applicant, stating that she had made

false oral and written by allegations against them. A fact-finding panel was established to examine those complaints.

7. On 14 April 2008, the applicant submitted a rebuttal of her e-PAS with the Chief, Mission Support, UNFICYP, claiming that her performance evaluation was the result of harassment, discrimination and abuse of authority by her supervisors.

8. On 16 April 2008, in a letter to the fact-finding panel set up to examine the complaints against her, the applicant again stated that her e-PAS was the result of harassment, discrimination and abuse of authority. The panel interviewed her on 17 April 2008. On 20 April 2008, the applicant wrote to the Chairperson of the panel, expressing her surprise that the complaints against her, of which she had not been informed, had been promptly examined, whereas her own complaint against a colleague, although filed earlier, was still awaiting examination.

9. On 20 April 2008, the applicant sent an email to the Office of Internal Oversight Services (OIOS) in New York, requesting it to take action regarding her supervisors' alleged retaliation against her.

10. On 2 May 2008, the rebuttal panel constituted to examine the applicant's e-PAS submitted its report. It recommended changing her rating of "does not meet performance expectations" to "partially meets performance expectations" and providing her with a work improvement plan. It stressed that, during the execution of that plan, her first and second reporting officers should monitor her performance closely and document her progress.

11. By memorandum dated 7 May 2008 addressed to the Chief, Mission Support, the applicant stated that her memorandum of 14 April 2008 was not merely a request for rebuttal of her e-PAS, but also a formal complaint against her supervisors, pursuant to Secretary-General's bulletin ST/SGB/2008/5, for abuse of authority.

12. The same day, the applicant sent an email to the Ethics Office in New York, submitting a complaint against her supervisors for abuse of authority, harassment, discrimination and retaliation.

13. On 19 May 2008, the Chief, Mission Support, sent the applicant a memorandum forwarding the rebuttal panel's report to her and informing her that the panel recommended that her rating of "does not meet performance expectations" be upgraded to "partially meets performance expectations" and that a work improvement plan, the purpose of which would be to assess the improvement in her performance, would be implemented until 31 August 2008. He also informed her that, if no improvement was evidenced by the end of that period, her contract might not be renewed.

14. On 4 June 2008, the applicant signed the work improvement plan.

15. By memorandum dated 7 June 2008 addressed to the Chief, Mission Support, UNFICYP, and the Ethics Office in New York, the applicant challenged the decisions taken in the light of the rebuttal panel's report to extend her contract only for two months and to impose a three-month work improvement plan. On the same day, she also wrote a letter to the Chief, Mission Support, the rebuttal panel and the Ethics Office in New York in which she analysed the rebuttal panel's report and the testimony before the panel and questioned the panel's findings.

16. On 17 June 2008, the applicant submitted to the Secretary-General a request for administrative review pursuant to the then staff rule 111.2(a) of the decision of 19 May 2008. Also on 17 June she submitted to the New York JAB a request for suspension of action on the decision and was placed on sick leave.

17. By emails dated 18 and 25 July 2008 respectively, OIOS informed the applicant that her complaints had been forwarded to the Ethics Office and that OIOS could not act further until the Ethics Office deemed it necessary.

18. By letter of 1 August 2008 addressed to the Chief, Mission Support, the Chief, Conduct and Discipline Unit, recommended that the applicant's contract should not be renewed.

19. By memorandum of 6 August 2008, the Chief, Mission Support, informed the applicant that her contract would not be renewed beyond 6 September 2008 because of her underperformance, particularly during the period 30 August 2007-31 March 2008, and the lack of improvement during the initial period of her work improvement plan.

20. In a memorandum dated 12 August 2008 addressed to the Chief, Mission Support, the Chief, Conduct and Discipline Unit, noting that the applicant had not met the required goals during the appraisal period, recommended that her contract should not be extended. He also summarized the situation and the applicant's working relations with her colleagues.

21. On 2 September 2008, JAB recommended suspension of the contested decision and renewal of the applicant's contract to enable her to execute the work improvement plan for at least three months.

22. By letter of 5 September 2008, the Secretary-General accepted the JAB recommendation and decided that the applicant's contract be extended until 17 November 2008.

23. On 8 September 2008, the applicant returned from sick leave and resumed work.

24. On 28 September 2008, the applicant filed a complaint against her supervisors with the Panel on Discrimination and Other Grievances.

25. On 6 October 2008, the applicant informed the Chief, Mission Support, that she would no longer execute the work improvement plan because it should not have been drawn up by her supervisors, who were prejudiced against her.

26. On 10 October 2008, the Chief, Mission Support, informed the applicant that, in view of her refusal to execute the work improvement plan, her contract would not be renewed beyond 17 November 2008. On the same day, the applicant filed an incomplete statement of appeal before JAB.

27. On 17 November 2008, the applicant's employment was terminated. On the same date, the Director, Ethics Office, sent the applicant his Office's report on her complaint. The Office's conclusion in that report was that there was no prima facie case of retaliation against the applicant. In particular, the report stated that the Office had found no convincing information to demonstrate that the negative evaluation received by the applicant came as a result of her complaint in February 2008 against a colleague or that that complaint contributed to the negative evaluation of her performance and the subsequent decision not to extend her contract. Regarding the applicant's complaints of April 2008 against her

supervisors in the context of her e-PAS, the Office noted in its report that they had been made after the alleged retaliation, i.e. the negative performance evaluation, and therefore failed to meet the condition set forth in Section 5.2 (c) of Secretary-General's bulletin ST/SGB/2005/21.

28. On 25 November 2008, the applicant wrote to the Director, Ethics Office, at New York to express her disagreement with the Office's findings and to state her opinion that the Office had not investigated her complaint in good faith.

29. On 15 January 2009, the applicant filed a complete statement of appeal before JAB contesting the decision not to renew her contract. The respondent submitted his reply on 23 March 2009 and the applicant replied to it on 29 May 2009.

30. Pursuant to General Assembly resolution 63/253, the application was transferred to the United Nations Dispute Tribunal (UNDT) on 1 July 2009. By Order of 23 July 2009, the case was transferred from the New York Registry to the Geneva Registry.

31. An oral hearing was held before UNDT on 19 May 2010, during which the Judge informed the parties that he intended to raise the issue of receivability on his own motion and requested them to submit their comments on that issue in writing. The applicant submitted her comments on 25 May 2010 and the respondent on 29 May 2010.

Parties' contentions

32. The applicant's contentions are:

- a. The application is receivable because the decision of 19 May 2008 was a conditional decision whereby the renewal of her contract was made dependent on her satisfactory completion of the work improvement plan. That decision, which was damaging to her, was the subject of a request to the Secretary-General for administrative review. The decision of 10 October 2008 and the decision of 6 August 2008 not to renew her contract are not new decisions, but confirmations of the initial decision of 19 May 2008 and are

therefore covered by the request of 17 June 2008 for administrative review;

- b. She suffered discrimination and harassment from her supervisors. She was relegated to an uninhabitable office with no furniture other than shelves, no window nor ventilation;
- c. Her supervisors found her performance satisfactory until mid-February 2008, when she complained of having been harassed for seven months by a colleague;
- d. Prior to the meeting of 3 April 2008 she had received no warning, whether verbal or written, that her performance was unsatisfactory. In particular, in December 2007, at the mid-point review for her e-PAS, her work from August to December 2007 was rated as satisfactory and her contract was renewed;
- e. After an attempt at mediation, her supervisors did nothing to resolve the problems she had with a colleague. Her complaints were never formally examined. The fact-finding panel, whose mandate related not to her complaint but to the complaints against her, never submitted its report;
- f. Following her complaint of harassment, her superiors conspired against her, as is clear from her e-PAS, which was improperly prepared in a manner inconsistent with administrative instruction ST/AI/2002/3 and contains factual errors and false allegations;
- g. Having been given, as a result of the rebuttal process, the rating “partially meets performance expectations”, she was eligible, by virtue of sections 10.4, 16.4 and 16.5 of administrative instruction ST/AI/2002/3, for a one-year extension of her contract and the withholding of a within-grade increment. Even if the rebuttal panel had not changed her rating, she would have been eligible for a transfer to a different post;

- h. According to the booklet “Using PAS: A Guide for Staff and Supervisors”, she should have received a one-year contract with a detailed work plan and not a two-month extension of her contract;
 - i. She was not invited to any meeting after December 2007 in preparation for her performance appraisal and her supervisors abused their authority during the final appraisal in order to punish her. The decision not to renew her contract was taken to retaliate and discriminate against her;
 - j. It is abnormal, since they were prejudiced against her, that the supervisors she had complained about were responsible for preparing her work improvement plan and for evaluating her progress during its execution;
 - k. She was forced to sign the work improvement plan because she was told that, if she did not, her contract would not be extended. She protested against the plan, not only orally when signing it, but also in writing, as is shown by her a letter of 7 June 2008 addressed to the Chief, Mission Support;
 - l. It is obvious from her file that there was a conspiracy against her with the sole aim of destroying her career.
33. The respondent’s contentions are:
- a. The application is irreceivable because the decision of 10 October 2008 is a new decision and the Secretary-General was not asked to review it;
 - b. As to the merits of the application, the contested decision was not taken for improper motives and it has consistently been held in case law that the Administration has discretionary power to renew or not to renew fixed-term contracts. It is for the applicant to prove that the Administration’s decision was taken for improper motives and she provides no evidence to that effect;
 - c. Following the Secretary-General’s decision, UNFICYP made the necessary arrangements to implement the work improvement plan,

including weekly meetings with the applicant to discuss her work progress;

- d. It is clear from the content of the applicant's memorandum of 6 October 2008 that her contract was not renewed beyond 17 November 2008 because she refused to participate in good faith in the execution of the work improvement plan;
- e. Contrary to the applicant's contention, the CAB and the Chief Civilian Personnel Officer prepared the work improvement plan and verified that all the assigned tasks were achievable and measurable. The applicant was involved in the plan's preparation and was aware that the renewal of her contract was linked to its successful completion;
- f. The applicant fails to prove that her supervisors did not follow e-PAS procedures. On the contrary, her rating was upgraded;
- g. The report of 12 August 2008 by the Chief, Conduct and Discipline Unit, proves that the applicant's allegations of harassment by her supervisors are without merit. Moreover, UNFICYP determined, through an internal investigation in accordance with Secretary-General's bulletin ST/SGB/2008/5, that there was no evidence in support of her claims of harassment.

Judgment

34. The applicant contests the decision not to renew her fixed-term contract.

Receivability

35. Before ruling on the merits of the application, the Tribunal must first examine its receivability. At the oral hearing on 19 May 2010 the Judge informed the parties that he must first examine the question of the receivability of the application, since he considered that there had been no request for administrative review pursuant to the then staff rule 111.2 (a) of the decision not to renew the applicant's contract beyond 17 November

2008. He then gave the parties one week to submit their comments on the matter.

36. It appears from the facts of the case as set out above that the applicant's only request to the Secretary-General for administrative review was that of 17 June 2008 and that it was made to contest a decision of 19 May 2008. However, the purpose of the letter of 19 May 2008 addressed to the applicant by the Chief, Mission Support, was, firstly, to transmit to her a copy of the rebuttal panel's report, second, to inform her that the panel had recommended that her performance rating of "does not meet performance expectations" should be altered to "partially meets performance expectations", third, to inform her that a work improvement plan, the purpose of which would be to assess the improvement in her performance, would be implemented until 31 August 2008, and lastly, to inform her that, if no improvement was evidenced by the end of that period, her contract might not be renewed.

37. While that letter of 19 May 2008 does not contain any formal decision not to renew the applicant's contract beyond 31 August 2008, JAB, by declaring the request for suspension of the decision not to renew the contract receivable, and the Secretary-General, by accepting JAB's recommendation to suspend execution of that decision until 17 November 2008, considered that the applicant had wished to contest both the decision of 19 May 2008 and the decision of 6 August 2008 whereby the Chief, Mission Support, informed her that her contract would not be renewed beyond 6 September 2008. Given the behaviour of JAB and the Secretary-General, it follows that the applicant cannot be held at fault for not having requested administrative review of the decision of 6 August 2008.

38. By his letter of 5 September 2008, the Secretary-General decided to accept the recommendation of JAB and to suspend until 17 November 2008 the decision not to renew the applicant's contract. However, by letter dated 10 October 2008 the Chief, Mission Support, reminded the applicant of the Secretary-General's letter of 5 September 2008 and confirmed that her contract would not be renewed beyond 17 November 2008. This letter of 10 October 2008 is not a new decision not to extend the applicant's contract and

must be considered a mere reminder of the Secretary-General's decision to suspend execution of the decision not to extend the contract only until 17 November 2008 and hence to confirm that the contract would be terminated from that date. The decision of 10 October 2008 is therefore a confirmation of the earlier decision and the applicant cannot be held at fault for not having requested administrative review of it.

39. The Tribunal therefore finds that the application must be considered receivable.

Merits

40. The then staff rule 104.12 (b) (ii) provided that “[a] fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment” and the then 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”.

41. The applicant first contends that since, following her challenging of her performance rating, the rebuttal panel recommended upgrading it to “partially meets performance expectations”, non-renewal of her contract on the ground of performance was contrary to the provisions cited below, such a step being possible only when the rating is “does not meet performance expectations”, which was not the case where she is concerned.

42. Sections 10.4 and 10.5 of administrative instruction ST/AI/2002/3 (“Performance Appraisal System”), which was then in force, provided that:

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 ...

43. Sections 16.4 and 16.5 provided 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".

44. Section 8.3 of that administrative instruction provided: "As 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".

45. 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.

46. 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.

47. Section 15 of administrative instruction ST/AI/2002/3 provided as follows:

Rebuttal process

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.

48. The file shows that on 2 May 2008 a rebuttal panel of the above-mentioned kind submitted a report recommending that the applicant's rating should be changed from "does not meet performance expectations" to "partially meets performance expectations" and that a performance improvement plan should be established for her. Consequently, since the Secretary-General did not, as the above text entitled him to do, exercise his ultimate authority and change the rating, the staff member must be considered as having obtained the rating "partially meets performance expectations" and the Administration was obliged to take steps to enable her to improve her performance, which it did.

49. Hence, on 19 May 2008 the Chief, Mission Support, sent the applicant a memorandum informing her that a work improvement plan, the purpose of which would be to assess the improvement in her performance, would be implemented until 31 August 2008 and warning her that, if no improvement was evidenced by the end of that period, her contract might not be renewed. On 4 June 2008, the applicant accepted the improvement plan.

50. After several extensions of her contract, the applicant informed the Chief, Mission Support, on 6 October 2008 that she would no longer carry out the tasks contained in the improvement plan because it should not have been drawn up by her supervisors, who were prejudiced against her and had deliberately imposed an impracticable plan on her.

51. The applicant having spontaneously refused to implement the plan intended to give her an opportunity to improve her performance, the Administration was entitled not to renew her contract on the ground of her underperformance.

52. However, the applicant contends that the entire process of rebuttal of her performance appraisal was tainted by prejudice, since her two supervisors had

harassed her for several months after she had filed a complaint against a colleague.

53. The Tribunal notes that the applicant complained several times about the conduct of her direct supervisors, at first informally and then formally in communications addressed to OIOS on 20 April 2008 and the Ethics Office on 7 July 2008 and in an email sent to the Panel on Discrimination and Other Grievances on 28 September 2008. The applicant claims that, while a complaint against her was investigated promptly, her numerous complaints were not followed up, but the evidence in the file shows that most of her complaints were investigated by the Administration, including by the rebuttal panel which considered her performance and by the Ethics Office, which found that she had not been subjected to retaliation. In addition, a report dated 12 August 2008 from the Chief, Conduct and Discipline Unit, to the Chief, Mission Support, summarizes the applicant's situation, with details of her professional conduct.

54. The applicant cannot, therefore, claim that the Administration failed to act on her complaints. While it is obvious that the working relations between the applicant and her direct supervisors were poor, she fails to discharge the burden of proving that her supervisors harassed her and, in particular, that the appraisals made of her performance and the non-renewal of her contract resulted from such harassment.

55. The applicant therefore fails to substantiate her claim that the decision not to renew her contract on the ground of underperformance was illegal.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 7th day of June 2010

Entered in the Register on this 7th day of June 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva