

UNDT/2011/156, Rees

UNAT Held or UNDT Pronouncements

The Tribunal found that the decision to reassign the Applicant was an unlawful exercise of the Administration's discretion because, although the decision was based on her alleged poor performance, the Applicant's performance had never been evaluated in accordance with the established procedures. The subsequent decision not to renew her contract was flawed for the same reason. Whilst the official reason given was that the Applicant did not accept the post offered or apply for another one, the Tribunal found that the non-renewal decision was motivated by the Applicant's supervisors' assessment of her performance in her previous functions.

Absence of PAS and decisions taken based on performance issues: Given that the Applicant's performance was the principal reason for the decision to reassign her, it was incumbent on the Organization to provide a factual basis for the finding that she was lacking in performance before making the decision. The lawful and indeed fair way for the senior manager to do that was through the use of the PAS, which affords both manager and staff member the opportunity for an objective and fair evaluation of the staff member's performance. Adherence to the process ensures that a decision taken in reliance on the outcome of the PAS is not easily impugned, being the PAS specifically designed to assess performance with all necessary safeguards for both management and staff. Pursuant to administrative instruction ST/AI/2002/3, the heads of departments and offices have primary responsibility for the timely execution, overall compliance with, and fair implementation of the PAS. In any case, regardless of who has responsibility for the process, without a document which properly and fairly reflects the staff member's shortcomings in accordance with the administrative instruction, the Administration has no reliable grounds for taking decisions, whether they be about reassignment, non-renewal or others, based on poor performance.

Consultation: Consultation does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith. Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

Discretionary power for reassignment/non-renewal:

While the Administration has wide discretionary power in deciding to reassign its staff and to renew or not fixed-term appointments, this discretion is not unfettered and can be challenged on the basis that the decision is arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith. Constructive dismissal: UNAT has held in Balestrieri 2010-UNAT-041 that in a case of alleged constructive termination, the actions of the employer must be such that a reasonable person would believe that the employer was “marching [the concerned staff member] to the door”. In other words it must be established that there was a conscious decision to have the applicant leave his or her work.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decisions to reassign her and not to renew her contract.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Judgment in favour of applicant in full. The contested decisions were rescinded and the parties were ordered to provide submissions addressing the nature and quantum of the remedies sought. Normal 0 false false false EN-GB X-NONE X-NONE /* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-priority:99; mso-style-parent:""; mso-padding-alt:0cm 5.4pt 0cm 5.4pt; mso-para-margin-top:0cm; mso-para-margin-right:0cm; mso-para-margin-bottom:8.0pt; mso-para-margin-left:0cm; line-height:107%; mso-pagination:widow-orphan; font-size:11.0pt; font-family:"Calibri",sans-serif; mso-ascii-font-family:Calibri; mso-ascii-theme-font:minor-latin; mso-hansi-font-family:Calibri; mso-hansi-theme-font:minor-latin; mso-bidi-font-family:"Times New Roman"; mso-bidi-theme-font:minor-bidi;}

Full judgment

[Full judgment](#)

Applicants/Appellants

Rees

Entity

UNOG

Case Number(s)

UNDT/GVA/2010/002

Tribunal

UNDT

Registry

Geneva

Date of Judgement

5 Sep 2011

Duty Judge

Judge Shaw

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)

Due process

Non-renewal

Reason(s)

Reassignment or transfer

Discretion

Separation from service

Applicable Law

Administrative Instructions

- ST/AI/2002/3

Former Staff Regulations

- Regulation 1.2(c)

Former Staff Rules

- Rule 101.2(b)

Staff Rules

- Rule 4.13
- Rule 9.4

Related Judgments and Orders

2010-UNAT-041

UNDT/2010/105