Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

JENNINGS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. The Applicant is a former staff member in the Procurement Division of the Department of Management in New York. She entered the service of the Organisation on 13 March 2008 on an eleven-month fixed-term contract. She contests the decision to separate her from service following the non-renewal of her fixed-term appointment. The Applicant asserts, *inter alia*, that she was harassed and discriminated against and that her performance evaluation process was not in accordance with the established procedures. She requests reinstatement with retroactive effect and compensation for damage to her career and reputation or, in the alternative, fifteen years' net base pay and pension benefits.

2. On 16 July 2009 the Tribunal rendered judgment on a suspension of action request by the Applicant (*Jennings* UNDT/2009/002), rejecting the request, and on 23 November 2009 it rendered a judgment on the Respondent's request for an extension of time to file a reply (*Jennings* UNDT/2009/080), granting a one-month extension. Five case management orders were issued in this case in response to various motions and requests: Orders Nos. 49 (NY/2010) (15 March 2010), No. 173 (NY/2010) (19 July 2010), No. 179 (NY/2010) (26 July 2010), No. 205 (NY/2010) (16 August 2010), and No. 264 (NY/2010) (4 October 2010). Two case management hearings were held on 10 March and 4 August 2010, respectively.

3. The application, the Respondent's reply, and subsequent submissions constitute the pleadings and the record in this case. By Order No. 205, in light of the strong objections expressed by the Applicant to a hearing on the merits and cross-examination of witnesses, and with the consent of the parties, the Tribunal ordered that the matter be decided by the Tribunal on the papers before it and without any further hearings.

6. On 26 June 2010 the Applicant replied to the proposed hearing as follows: "I do not require nor do I desire a hearing on the merits and therefore 'object'". The Applicant reiterated her objection in a further submission dated 7 July 2010, in which she stated that "[t]he Applicant maintains that the above-referenced hearing were it to take place serves only to benefit the Respondent and is therefore biased (the [R]espondent is being given 'another bite at the apple' so to speak)". The Applicant also reiterated that her "written material and supporting documentation[n] are more than sufficient to stand on their own". In view of the strong objections expressed by the Applicant to a hearing on the merits, the Tribunal ordered by Orders No. 173 and No. 179 that the hearing scheduled for 29 July 2010 (and subsequently rescheduled for 4 August 2010) be a case management hearing the purpose of which would be to address outstanding matters and not to receive oral evidence. The Tribunal also ordered the Respondent to file and serve written statements by witnesses that he had previously proposed to call. These signed statements from the Applicant's former supervisors were filed on 29 July and 4 August 2010. The Applicant subsequently filed several submissions in response, commenting on these statements and further addressing the issues in this case.

7. Although the statements filed by the Respondent pursuant to the Orders No. 173 and No. 179 were signed and made "to the best of [each of the proposed witnesses'] knowledge and belief" and identified each of them by name and title, the purpose of these statements was to provide the Applicant with the opportunity to review the proposed evidence of the five witnesses that the Respondent intended to call in order for the Applicant to determine her position regarding a hearing on the merits. As a result of the Applicant's position (explained below), these witnesses did not appear before the Tribunal and were not subjected to cross-examination. The statements filed before the Tribunal were neither witnessed nor attested to. Having considered the circumstances under which these statements were presented to the Tribunal, the Tribunal decided not to admit them as evidence and therefore they have not been used to make any determination either for or against the Applicant. The Tribunal notes, however, that *had* these statements been admitted as evidence—

> by my immediate supervisors. These issues were raised with the chief of the Procurement Division by my counsel in order to seek a resolution, but soon after I was advised I would be separated from service. I believe this [is] an act of retaliation and have brought the case to the attention of the UN Ethics Office, where it is currently under review.

20. On the same day, the Applicant filed a request with the Joint Appeals Board ("JAB") for a suspension of action on the decision not to renew her fixed-term contract. The JAB issued its report on 26 June 2009, recommending, *inter alia*, that the implementation of the decision not to renew her contract be suspended "until such time as her appeal has been considered on the merits or until 31 August 2009, whatever is earlier".

21. On 29 June 2009 the Ethics Office issued a report on the Applicant's case, declining to find a prima facie case of retaliation. The Ethics Office stated in its report, *inter alia*:

> 1. On 17 June 2009, [the Applicant] … lodged a complaint of retaliation with the Ethics Office pursuant to Secretary-General's Bulletin ST/SGB/2005/21, "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations".
>
> 2. In support of her request for protection, [the Applicant] stated that she had reported possible corruption in the Procurement Division (PD) to a member of the Panel of Counsel as well as harassment by her supervisor to senior managers in the PD, including the Director. [The Applicant] alleged that the unfair evaluation she received in the mid-term review of her performance as well as the subsequent decision not to renew her contract were retaliatory actions taken as a result of her having reported misconduct.
>
> …
>
> 13. Based on the above and after careful review of all the information received, the Ethics Office is unable to find convincing evidence to support a finding that [the Applicant's] reporting of alleged harassment by

> explicitly indicated in such email that the e-PAS would have to be rolled back to Start-End-of-Cycle and that [the Applicant] would be the activity owner from that point on.
>
> On 12 May 2009, e-PAS support team sent an email to [the Applicant] advising that the intended changes can now be done. [The Applicant] should open the e-PAS, edit it and proofread carefully before submitting it forward to her Reporting Officers. In addition, on 20 May 2009 [the Applicant] was advised by email by [the second team leader] that the e-PAS had been rolled back and that supervisors can now be changed. Since 12 May 2009, the e-PAS has been with [the Applicant] for action and was released to the [third team leader] on 7 July 2009.

24. On 13 July 2009 the Applicant filed an application with the Dispute Tribunal seeking further suspension of the implementation of the administrative decision of 28 May 2009 not to renew her fixed-term appointment. The Applicant submitted that the decision not to renew her appointment was improperly motivated and retaliatory and that she would suffer irreparable harm as a result of the non-renewal of her contract. The Applicant submitted that her e-PAS report for the period of May 2008 to June 2009 had not been completed and her right of rebuttal had not been exercised. The Applicant stated: “As of today I have

Additional supervisor(s)

First Reporting Officer

…

Comments on Values and Competencies

[The Applicant] is fully competent in some areas and developing in others.

…

Overall Comments

[The Applicant] had problems with her performance in the first section of the reporting period, as described in the mid-point review. Since she moved to Field Supply Team her performance has improved.

Second Reporting Officer's comments

I agree with the comments above and with the overall rating.

Staff member's comments

To All Concerned.

Please be advised that I plan to "rebut" appraisal.

26. The Applicant's overall rating was "[p]artially meets performance expectations". She was rated as "Fully Competent" with respect to integrity, respect for diversity and gender, teamwork, accountability, client orientation, and commitment to continuous learning. She was rated as "Developing" with regard to professionalism, communication, planning and organization, creativity, and technological awareness.

27. On 16 July 2009 the Tribunal rendered *Jennings* UNDT/2009/002, rejecting the application for a suspension of the contested administrative decision. The Tribunal found that the Applicant failed to satisfy the criteria established in art. 2.2 of its Statute.

28. On 17 July 2009 the Applicant filed a complaint of harassment and abuse of authority with OHRM against the Chief of the Procurement Division and two of her former team leaders. On 21 July 2009 the Applicant received an email from OHRM, stating that her complaint was being forwarded to the Under-Secretary-General for Management for action pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Respondent

misconduct is not an administrative decision within the meaning of art. 2.1 of this Statute and, in any event, is not a matter for this Tribunal.

33. The issue of the Applicant's grade level on her recruitment is also not properly before the Tribunal as this claim was not the subject of the Applicant's request for administrative review. The Tribunal finds it appropriate to observe that, even if this claim were receivable, the Applicant would not have succeeded on it because she was offered a contract at the P-2 level and accepted this offer. Even if some promise was given to the Applicant prior to her signing the contract, as she alleges, it would have no effect as it predated the written contract signed by the Applicant and the terms stated therein. A promise could not override the clear words of the letter of appointment signed subsequently (*Epworth* UNDT/2010/193).

Applicant's submissions

34. Below is a summary of the Applicant's principal contentions concerning only the relevant matters within the scope of the case:

a. The decision not to renew the Applicant's contract with the Procurement Division was procedurally defective and motivated by improper considerations. The Applicant was subject to harassment and discriminatory treatment and her separation was an act of retaliation for having filed complaints against her supervisors.

b. The Tribunal is not being asked to reevaluate the Applicant's performance or to substitute its views for those of the supervisors, but rather to see whether the process followed to arrive at the final assessment met the requirements of due process and fundamental fairness.

c. The Applicant's first and second team leaders were biased in their treatment of the Applicant and the harassment only intensified when she was transferred from one unit to another. While the Applicant worked under her second team leader, the Chief of the Procurement Division began to request

weekly "work output performance" meetings with the Applicant to discuss her assignments. The Applicant's second team leader also began to request "weekly output" meetings to discuss her work, during which her former (first) team leader was present. These meetings were separate and apart from those requested by the Chief of the Procurement Division. Thus, on a weekly basis the Applicant had two separate meetings with different supervisors about her work. No other staff member in the Procurement Division was subjected to such level of supervision. The weekly "work output performance" meetings were based on the premise that there had been a "work output" issue while working with the previous team leader. However, in reality there were no "work output performance" issues as all work assigned while working with her prior supervisor had been completed without reassignment and on many occasions the Applicant had to ask for additional work to be assigned. These meetings were nothing more than self-serving forms of harassment and abuse and were used as a vehicle to harass and demean the Applicant.

d. During her time in the Procurement Division, there were emails sent multiple times a day that monitored her time and denigrated her on the bases of her performance and nationality. The Applicant also had her work sabotaged by her supervisors to demonstrate her incompetence (her supervisor modified her work documents and forwarded the revised documents to other managers). During this period the Applicant became extremely frustrated, defensive and began to suffer serious health concerns. It appeared to the Applicant that "all parties had banned [sic] together against [her] for what [she] could only surmise was for [the Applicant's] demise and the instrument of choice to effectuate that end would be [her] 'work output'".

e. As a result of the Applicant's many protests, after approximately two months of working under her second team leader, the Applicant was informed that, in the furtherance of a fresh start, an out-of-section transfer would be granted. On 10 November 2008, the Applicant began her new work

Case

emails, the Tribunal finds that the purpose of these meetings was to provide the Applicant with feedback concerning her performance and ways to improve it and to give her guidance as to her work objectives.

42. There is an extensive documented record before the Tribunal showing the Administration's efforts to accommodate the Applicant in improving her performance. The Tribunal finds that the Applicant's supervisors instituted, in consultation with the Applicant, appropriate, reasonable, and timeous measures to improve her performance, which included two transfers— at the Applicant's request and in consultation with her—to different units and different supervisors. The fact that the Applicant worked under three supervisors in the course of approximately one year provides proof of management's serious concerns with her performance and of the efforts put in place to address the situation.

43. There is no doubt that at the time of and in the months prior to the decision not to renew the Applicant's appointment she was aware of her supervisors' and management's negative views concerning her performance. The dissatisfaction with the Applicant's performance was well documented since September 2008. The Respondent's submissions in this respect are consistent with the record before the Tribunal. Having found that the efforts to improve the Applicant's performance did not bear fruit, the Administration did not have to institute a second round of improvement measures and renew the Applicant's short-term contract further in order to do so.

44. Although the Applicant's e-PAS was not finalised until after a decision had been taken to separate her, it is an established fact that the Applicant was given the final e-PAS report for her final comments and signature approximately two weeks before she was notified, in writing, of the decision not to renew her contract. The Tribunal finds that the report was not finalised due to the Applicant's failure to follow the procedures established for the end-of-cycle appraisal in the e-PAS report. The Applicant had the "ownership" of the e-PAS report in the period of 12 May to 7 July 2009—this is confirmed in the parties' submissions and in the record before the

Rebuttal Panel was expected to be constituted. Further, in Order No. 179, dated 26 July 2010, the parties were directed to "exert their best efforts to schedule and conduct the Rebuttal's Panel hearings as soon as possible".

52. On 29 July 2010 the Respondent filed a submission explaining the reasons for the delay in finalising the rebuttal proceedings. The Respondent submitted that the Rebuttal Panel was constituted in August 2009 and met in October 2009. At that meeting, the Panel decided to "speak to the Applicant before meeting with the representatives from management". No meeting took place, however, as the Chairman of the Panel was away on business in the second half of October and the first half of November 2009. In "early 2010", the Chairman of the Panel contacted the Applicant but was unable to arrange for a meeting convenient to him to meet with her. He finally contacted the Applicant on 23 July 2010—i.e., several days after the Tribunal issued Order No. 173 requiring submissions on the status of the rebuttal proceedings—proposing to meet with the Applicant on 27 or 28 July 2010. The Applicant was not available on those dates and no meeting took place as the Chairman, in turn, was not available to meet in August 2010. Then, at the insistence of the Applicant, a new Rebuttal Panel was constituted, with a new Chairman.

53. By submission dated 21 September 2010 the Respondent provided the Tribunal with a copy of the Report of the new Rebuttal Panel, stamped 21 September 2010. The Panel found that the e-PAS "had been administered in conformity with the UN's regulations, rules and administrative issuances" and that the issue of alleged harassment and other complaints contained in the rebuttal statement were not considered relevant to the Applicant's performance evaluation. The Rebuttal Panel further stated:

> 7) Other than a few emails relating to two cases complimenting her on her work, [the Applicant] has not provided any evidence to rebut her [first reporting officer's] assessment of poor performance. The [first reporting officer's] assessment is backed up by a comprehensive record of exchanges between various managers and supervisors and [the Applicant]. The areas of underperformance were clearly explained to [the Applicant] early on in the reporting period,

and regularly reinforced thereafter. In particular, the comments contained in her mid-point review, a series of weekly meetings to monitor her performance, and comments at the meeting at which she was informed of her contract extension, should have left her in no doubt that her performance was unsatisfactory and which areas needed to be improved.

8) Given the above, the Panel is of the view that there is

Conclusion

56. The Tribunal finds that the decision not to renew the Applicant's contract was based on lawful grounds and was not vitiated by any improper considerations, such as retaliation for the Applicant's complaints, or by failure to take any proper considerations into account. The Tribunal finds that the contested decision was not vitiated by any procedural errors.

57. The Tribunal finds that there was an unreasonable delay in the rebuttal process. Although this delay had no bearing on the lawfulness of the contested decision, it caused emotional distress to the Applicant. The Respondent shall pay the Applicant USD6,000 as compensation for this emotional distress. This sum is to be paid within 60 days of the date on which the Judgment becomes executable. If payment is not made within the 60-day period, an additional five per cent shall be added to the US Prime Rate applicable as at the date of this Judgment until the date of payment.

58. The Applicant's other pleas are rejected.

Signed

Entered in the Register on this 9th day of December 2010

(*Signed*

day of December 2010