



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2009-012

Crichlow
(Appellant and Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations
(Respondent and Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Mark P. Painter
Judge Kamaljit Singh Garewal

Judgment No.: 2010-UNAT-035

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) ruled that the Administration provided balanced and objectively verifiable reasons for the decision to reassign Carol Crichlow (Crichlow) from one post to another and awarded her compensation for suffering and stress. The Appeals Tribunal dismisses both the appeal of Crichlow and the cross-appeal of the Secretary-General.

Facts and Procedure

2. Crichlow has been a staff member of the United Nations Population Fund (UNPFA) since 1988 when she joined the Organization at the G-3 level in the Facilities Management Unit of the Procurement and Facilities Management Branch. By 2007, she was a G-5 level office assistant. She is currently working on secondment with a UN mission.

3. In April 2005, Crichlow's supervisor allowed four staff members to unofficially use their excess leave days, in accordance with the commitments made by the supervisor's predecessor, even though such an arrangement was inconsistent with the Staff Rules. Crichlow was responsible for handling leave and attendance records in her office and refused to record one of the staff members as being present when he had unofficially used his excess leave. Crichlow claims that she was subject to retaliation as a result of this incident, as reflected in her negative performance appraisals and other management decisions. Following a rebuttal process, which basically maintained her 2005 and 2006 performance appraisal development (PAD) reports, she was reassigned, effective 2 July 2007, to a different post in the UNPFA "to give her a fresh opportunity for improvement". Her request for administrative review was denied.

4. On 23 July 2007, Crichlow was loaned to the United Nations Secretariat for a period of one year.

5. Crichlow appealed the decision to reassign her to another post. The UNDT issued its Judgment on 5 October 2009. The UNDT stated that she had added a number of complaints about the actions of the UNFPA and its employees with respect to which she had not sought administrative review. These complaints included allegations that she had been treated negatively by her former supervisor prior to 2005 and that following her reassignment in 2007, she was loaned to the United Nations Secretariat under a special arrangement that she had not agreed to, and that the Administration had denied her the right to return to the post she had previously encumbered. The UNDT rejected these claims because they did not form part of the initial request for administrative review. It stated that the appeal was therefore limited to the decision to reassign her to another post within UNFPA and the underlying circumstances leading to that decision. It considered that in order to assess the lawfulness of the reassignment decision, the relevant matters to be considered were the conduct and outcome of the 2005 and 2006 PAD procedures and the subsequent review by the Management Review Group (MRG) and the Rebuttal Panel.

6. The UNDT dismissed Crichlow's application. It, however, found that

although UNFPA was substantively justified in taking the decision to reassign the applicant, the manner in which it conveyed this decision to her was inadequate and in breach of its obligation as an employer to treat its staff fairly. It failed to give her any proper reason for the assignment at the time it was made and this reinforced the applicant's belief that she was being treated in an underhand manner in order to retaliate against her actions over the leave issues in 2005. I find that she was misguided in this belief but the way UNFPA handled her situation did little to alleviate her concerns and, in fact, caused her unnecessary stress and anxiety.

...

It is obvious from her appeal that the applicant has been aggrieved in her work place for many years and that the reassignment was seen by her as one further blow.

Taking all of these matters into account, I find that the applicant is entitled to an award of one-month net base salary calculated at her salary level at the date of this judgment.

7. On 15 December 2009, Crichlow appealed the UNDT Judgment. The Secretary-General filed his answer on 11 February 2010. Crichlow filed a reply to the Secretary-General's answer on 29 March 2010.

8. The Secretary-General filed a cross-appeal on 12 January 2010. Crichlow filed her answer to the cross-appeal on 15 March 2010.

Submissions**Crichlow's Appeal**

9. Crichlow requests that an oral hearing be held in her case.

10. She alleges that the UNDT erred (1) in not reviewing the UNFPA's approval of her loan to the United Nations Secretariat; (2) in its conclusions regarding her 2005 PAD report; (3) in its conclusions regarding her 2006 PAD report; (4) in its conclusions regarding the rebuttal report; and (5) in its conclusions regarding the decision to reassign her to another post.

11. Crichlow submits that the UNFPA Administration did not act in good faith when it suggested that Crichlow be loaned to the United Nations Secretariat for one year instead of six months. A six-month loan would have entitled her to return to a specific UNFPA post. The extension of her loan period placed the Administration in a position to deny her the right to return to a specific post. Crichlow was not informed of the consequence of such extension until after she accepted it. She now has no specific post to return to and she remains on loan with the United Nations, pending the outcome of her appeal.

12. Crichlow alleges several errors in the UNDT's conclusions regarding her 2005 and 2006 PAD reports. She submits that the Administration's handling of her 2005 and 2006 performance reviews was retaliatory and punitive.

13. Crichlow further alleges that the UNDT erred in its considerations and conclusions regarding the rebuttal process. Contrary to the Rules and Regulations governing the rebuttal panel process, the chairman of the rebuttal panel conducted the investigation, interviewed witnesses, and appointed himself rapporteur, thereby monopolizing the case and prolonging the mandated period for completion. The UNDT agreed that the time was excessive, but refused to grant relief, noting that there was no indication as to how this had affected her. Crichlow submits that "[t]he prolongation of the rebuttal exercise allowed the Chairman four months' access into [her] 2006 performance review and the supervisor's questionable perspective on her 2006 and 2007 performance" tainted the investigation. Crichlow complains that the rebuttal panel only interviewed her once; failed to give her an opportunity to contradict the testimony of

anonymous witnesses against her; refused her request to call her own witnesses; and made the evaluation of her rebuttal “behind closed doors”. Crichlow submits that the UNDT’s finding that the rebuttal panel confined its decisions to matters within its jurisdiction is false. The rebuttal panel considered certain issues to be outside the ambit of its mandate, but proceeded to make recommendations based on these issues.

14. Crichlow finally challenges the UNDT’s conclusions regarding the Administration’s decision of 26 June 2007 to reassign her to a post which had already been abolished. The UNDT erred in concluding that the Executive Director has provided “balanced and objectively verifiable reasons for the decision to reassign [her]” and failed to acknowledge that the Administration violated her due process rights. She claims that the UNDT committed errors of fact by accepting the Executive Director’s explanation that the reassignment was due to performance reasons, when no performance issues existed.

15. Crichlow submits that her reassignment to a post slated for abolition was equivalent to a termination of contract. Under Staff Rule 9.1(a), the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of service require abolition. The poor performance evaluations in 2005 and 2006 would have weighed heavily against her in the decision-making process to match her against any post. Under these circumstances, she was justified in not participating in any job matching exercise. Moreover, under the UNFPA Policies and Procedures Manual, procedures are to be followed before a staff member is terminated for unsatisfactory performance. None of the prescribed procedures was followed in her case which, she submits, constitutes a denial of her due process rights and a breach of her terms of employment.

16. Crichlow requests compensation for the multiplicity of violations of her due process rights; retaliation by the Administration; the Administration’s abuse of its discretionary authority; collusion in harassment and demeaning of Crichlow using the UNFPA PAD process; and legal fees. She further requests the replacement of her 2005 and 2006 PAD reports with reports that accurately reflect her performance; and the reinstatement to her former post or another similar post within the UNFPA.

Secretary-General's Answer

17. The Secretary-General responds that the appeal is time-barred and should be dismissed. The Judgment was issued on 5 October 2009 and transmitted to both parties on 7 October 2009. Under Article 7(1) of the Appeals Tribunal's Statute, an appeal is receivable if filed within 45 calendar days of the receipt of the judgment. Crichlow filed her appeal on 15 December 2009, more than three weeks after the deadline. Crichlow did not request a suspension or waiver of the deadline to file her appeal. The Administration has taken action to implement the Judgment following the expiry of the period for filing an appeal. It paid the compensation ordered by the UNDT on 21 December 2009.

18. In the alternative, the Secretary-General submits that Crichlow has not established any errors that would require a reversal of the UNDT Judgment. She essentially raises the same claims as in her application to the UNDT. She has not established any errors of fact or law that would require a reversal of the UNDT's decision to limit itself to reviewing the decision to reassign Crichlow to another post within the UNFPA. Contrary to Crichlow's assertion, the original request for administrative review did not refer to the issue of the UNFPA's approval of her loan to the UN Secretariat and the UNDT did not fail to exercise jurisdiction vested in it or err in law in declining to review the UNFPA's approval of her loan to the United Nations Secretariat.

19. The Secretary-General further contends that the UNDT did not commit any errors of fact or law that would require a reversal of the UNDT's conclusions regarding the 2005 and 2006 PAD reports and regarding the rebuttal panel report.

20. The Secretary-General submits that there are no errors of fact or law that would require a reversal of the UNDT's conclusions regarding Crichlow's reassignment to another post. While the UNDT faulted the UNFPA management for its failure to strictly comply with its procedures in the conduct of the 2006 PAD report, it did not call into question the substance of the report.

21. The Secretary-General claims that Crichlow is not entitled to any legal remedies in addition to those granted by the UNDT.

Secretary-General's Cross-Appeal

22. The Secretary-General submits that the prohibition on the award of exemplary and punitive damages was expressly introduced into the UNDT statute, and that the UNDT erred in ordering compensation in paragraph 94 of the Judgment. The UNDT may award compensation for non-pecuniary loss, such as moral injury. Particularly in view of the prohibition on exemplary and punitive damages, a judgment pronouncing that the Organization acted wrongly vis-à-vis a staff member may, in appropriate cases, constitute sufficient satisfaction for any moral injury incurred by a staff member.

23. The Secretary-General challenges the basis on which the UNDT determined that moral damages were warranted. Firstly, he submits that the UNDT erred in stating that the UNFPA Administration failed to give Crichlow any proper reason for the reassignment at the time it was made. The letter notifying her of her reassignment explained that the decision followed the deliberations of the Performance Review Group on the 2006 PAD reports of the UNFPA staff members and it was therefore clear that the decision was made for performance-related reasons. Secondly, the Secretary-General asserts that Crichlow's general assertion of "emotional stress and suffering" does not constitute a sufficient basis upon which to award moral damages. Thirdly, the Secretary-General notes that the UNDT awarded compensation for stress allegedly suffered by Crichlow arising from her unfounded belief that she was subject to retaliation, which the UNDT itself qualified as "misguided". The UNDT's decision makes it sufficient for applicants to merely assert that they suffered stress from a belief that they had been subjected to retaliation or harassment without even providing evidence in support of their assertions and even if the UNDT itself found their beliefs unfounded and misguided.

24. The Secretary-General further submits that the award of moral damages for shortcomings that have already been corrected during the course of the administrative review process is punitive and constitutes an error of law. The UNFPA Executive Director answered Crichlow's request for review of the decision to reassign her; she provided Crichlow with a full explanation of the reasons for her reassignment to another post and the measures that had been undertaken to ensure that she would not be adversely affected. In doing so, the UNFPA Administration corrected its own failure to

provide her with a full explanation at the time of her reassignment. The UNDT erred by failing to take such correction into account when ordering the award for compensation.

25. The Secretary-General requests that the one month's net base salary ordered in paragraph 94 of the Judgment be vacated.

Crichlow's Answer to Secretary-General's Cross-Appeal

26. In her answer to the Secretary-General's cross-appeal, Crichlow mainly reiterates the arguments in her submission on appeal.

Considerations

On Crichlow's appeal

27. As a preliminary matter, the Appeals Tribunal notes that Articles 8 and 9 Of the Appeals Tribunal's Rules of Procedure provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer. Under Article 31(1) of its Rules of Procedure, the Appeals Tribunal may allow additional pleadings in exceptional circumstances. Crichlow has not demonstrated any exceptional circumstances justifying the need to file a reply to the Secretary-General's answer. Accordingly, the Appeals Tribunal decides to strike Crichlow's additional submission and not to take it into consideration.

28. Turning to Crichlow's request for an oral hearing, the Appeals Tribunal notes that the parties' submissions are sufficient and that the Appeals Tribunal does not require an oral hearing under Article 8(3) of its Statute to assist in the determination of the appeals before it.

29. The Appeals Tribunal does not entertain the Secretary-General's objection that Crichlow's appeal is time-barred. The UNDT rendered its Judgment on 5 October 2009. Under Article 7(1)(c) of the Appeals Tribunal's Rules of Procedure, the time limit for filing an appeal is 45 calendar days. On 13 November 2009, Crichlow requested an extension of the time-limit for filing her appeal against the impugned Judgment until 22 December 2009. On 19 November 2009, the Appeals Tribunal's Registrar informed

Crichlow on behalf of the Appeals Tribunal's President that she had to file her appeal by 27 November 2009. On 27 November 2009, Crichlow filed her appeal. On 7 December 2009, she was informed that her appeal failed to comply with the formal requirements and that she was required to resubmit a corrected version. On 15 December 2010, Crichlow resubmitted her appeal. In light of the foregoing, the appeal was filed in a timely manner.

30. The Appeals Tribunal recalls that under Article 2(1) of its Statute, the Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT in which it is asserted that the UNDT has "(a) Exceeded its jurisdiction or competence; (b) Failed to exercise jurisdiction vested in it; (c) Erred on a question of law; (d) Committed an error in procedure, such as to affect the decision of the case; or (e) Erred on a question of fact, resulting in a manifestly unreasonable decision". The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and is thus not an opportunity for a party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the UNDT. Rather, he or she must demonstrate that the UNDT has committed an error of fact or law warranting the intervention by the Appeals Tribunal.

31. Crichlow alleges that the UNDT erred in finding that her application was limited to the reassignment decision and the circumstances leading to that decision. The UNDT excluded any other complaints about the actions of the UNFPA on the basis that those complaints had not been subject to an application of administrative review, mandatory under Rule 111.2(a) of the Staff Rules applicable at the relevant time. Crichlow has not demonstrated how the UNDT erred in making this finding. Because Crichlow failed to request an administrative review on the matters, the UNDT had no jurisdiction *ratione materiae* to consider these matters and rightfully declined to do so. The Appeals Tribunal finds no error in the UNDT Judgment on this point.

32. Similarly, Crichlow does not demonstrate that the UNDT erred in finding that the Administration's decision to reassign her was not tainted by errors of law or fact. Instead, she merely voices her disagreement with the UNDT's conclusions and resubmits her submissions before the UNDT. Crichlow has not met the burden of demonstrating

how the UNDT erred in making the impugned finding. For the foregoing reasons, Crichlow's appeal is dismissed.

On the Secretary-General's Cross-appeal

33. The Secretary-General challenges the UNDT's decision to award damages on the ground that Crichlow had been aggrieved in her work place for many years and that the reassignment was perceived by her as "one further blow".

34. We note that the Secretary-General has already paid the damages, thereby accepting the UNDT Judgment. The cross-appeal is therefore moot.

Judgment

35. The Appeals Tribunal dismisses Crichlow's appeal and the Secretary-General's cross-appeal.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Painter

(Signed)

Judge Garewal

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal