



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/009/
JAB/2007/108
Judgment No.: UNDT/2009/028
Date: 5 October 2009
Original: English

Before: Judge Coral Shaw
Registry: New York
Registrar: Hafida Lahiouel

CRICHLow

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The applicant appealed to the Joint Appeals Board (JAB) against an administrative decision of the United Nations Population Fund (UNFPA), dated 27 June 2007, which removed the applicant from her post with that organization and reassigned her to another post that was scheduled to be abolished. The appeal was transferred to the United Nations Dispute Tribunal on 1 July 2009 for hearing and decision. Both parties agreed for the matter to be heard on the evidence and papers filed in the JAB. Neither party wished to file any further evidence or submissions.

Background facts

2. The applicant has been employed by UNFPA since 1988 when she began as a secretary at G-3 level in the Facilities Management Unit (FMU) of the Procurement and Facilities Management Branch. By 2007 she was a G-5 level office assistant. In the course of her 17-year service the applicant provided administrative, financial and secretarial support to the chiefs of that branch and for many years received positive evaluations of her performance.

3. In April 2005, a new Chief of the Procurement and Facilities Management Branch—the applicant's supervisor—was appointed. It is the case for the applicant that the problems leading to this appeal began when her new supervisor gave instructions concerning the treatment of staff members' annual leave accumulated before 1 April 2005. Specifically, the applicant was instructed to mark some absent staff members as present in the office.

4. The applicant says that, initially, she reluctantly complied with these instructions, although she believed they contravened United Nations staff rules on leave. However, when her supervisor declined to put his instructions in writing she refused to implement them further.

5. Following this, the applicant received two performance reports for 2005 and 2006 which she considered unsatisfactory and not providing an accurate picture of her performance. Following rebuttal process, which essentially maintained the supervisor's evaluation of the applicant's performance in 2005 and 2006, the administration decided to reassign the applicant to a different post in UNFPA, effective 2 July 2007. The applicant was notified of this decision by memorandum dated 26 June 2007.

6. On 23 July 2007, less than one month after her reassignment to the new post, the applicant was loaned to the United Nations Secretariat in New York.

Applicant's submissions

7. The applicant contends that after she declined to comply with her supervisor's requests to mark the absent staff members as present in the office, she suffered retaliatory behaviour which resulted in her reassignment to a post that was scheduled to be abolished. According to the applicant, her supervisor gave her poor performance assessment reports for 2005 and 2006 in retaliation for her unwillingness to comply with his requests.

8. The applicant further asserts that her supervisor failed to follow proper performance evaluation procedures and that he was allowed to retroactively add information to the mid-year review section of her 2006 performance evaluation report. She also alleges that the Rebuttal Panel was biased against her and its report on her 2005 performance report was not well-reasoned and contained errors of fact. Finally, the applicant claims that the respondent abused its discretionary authority when assigning her to a post that was going to be abolished as part of the restructuring of UNFPA.

9. She claims the following relief:

- a. compensatory damages for emotional suffering and stress;

- b. compensation for legal consultation expenses of \$2,500;
- c. reinstatement in her post or a similar post with UNFPA at the same or higher grade level and security, that is to a post not in danger of being abolished;
- d. replacement of her 2005 and 2006 Performance and Appraisal Development (PAD) reports with reports that accurately reflect both her performance and her supervisor's non-adherence to the PAD process; and
- e. the expunging of the 2005 Rebuttal Panel report from her records.

Respondent's submissions

10. The respondent replies first that the applicant's appeal must be deemed to be abandoned because the applicant failed to file the complete statement of appeal within the prescribed time period.

11. In the event that the appeal is receivable, the respondent claims that the actions of UNFPA were lawful, within its rights and for the good of the fund and the applicant.

12. The respondent submits that the performance evaluation procedures were followed both in 2005 and 2006 and the applicant had two consecutive poor performance reviews. The rebuttal review of the 2005 performance evaluation report maintained the supervisor's ratings and the applicant's claim that the 2005 Rebuttal Panel was biased against her is unsubstantiated.

13. Respondent submits that no evidence has been provided to show that the applicant was mistreated by her colleagues and supervisors.

14. It is the case for the respondent that the reassignment of the applicant to the new post was nothing but a good-faith attempt on the part of UNFPA to improve the

applicant's performance by changing her work environment. It agrees that the applicant's new post was scheduled for abolishment, but asserts that a total of 342 posts were abolished as part of the restructuring and that, due the applicant's seniority and permanent contract, "it can be safely said that she would have ranked extremely high on the priority scale for matching to available posts". The respondent notes that the applicant was the only UNFPA staff member who refused to participate in the post matching process.

15. The respondent points out that the applicant agreed to be loaned to the United Nations Secretariat in New York effective 23 July 2007—after only 21 days in her new post. That loan was subject to a general lien giving her the right to return to UNFPA, although not to a specific post.

Preliminary issues

Abandonment of appeal

16. The respondent says that after the applicant received the review of the administrative decision, she submitted an incomplete statement of appeal on 22 October 2007. In accordance with Rule III.E of the Rules of Procedure and Guidelines of the Joint Appeals Board in New York, the applicant was under an obligation to provide to the JAB a full statement of appeal within one month of that. (The respondent assumes that, in accordance with Rule III.E, the JAB requested the appellant to provide a full statement of appeal.) The respondent submits that as the time expired on 22 November 2007 and the applicant submitted her complete statement of appeal without explanation on 7 December 2007, the appeal was fifteen days late and, pursuant to Rule III.E, the appeal shall be deemed to have been abandoned.

17. In response, the applicant sets out the correspondence between her counsel and the JAB in which the counsel requested an extension of time in order for the applicant to obtain further information before filing the appeal in full. On 20

November 2007, the JAB referred to the requests for extension and stated, “Looking forward to hearing from you by Friday, 7 December”.

18. I accept the applicant’s submission that implicit in this message is an agreement by the JAB to an extension until 7 December 2007. The applicant relied upon that message and filed the full appeal within the time granted. In those circumstances I find that the applicant did not abandon her appeal.

Scope of application

19. The applicant’s statement of appeal is very comprehensive. The stated reason for appeal is the decision to reassign her to another post. However, the applicant has added a number of other complaints about the actions of UNFPA and its employees about which she has never sought an administrative review.

20. These other complaints include allegations that she had been treated negatively by her former supervisor before 2005 and that following her reassignment in 2007 she was loaned to the UN Secretariat under a special arrangement that she had not agreed to and that denied her the right to return to the post she previously encumbered.

21. To determine which claims are properly brought by the applicant I refer to the regulations and rules which applied to appeals at the time the applicant brought her claim to the JAB.

22. Staff Regulation 11.1 provided:

“The Secretary-General shall establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules”.

23. Staff Rule 111.2(a) provided:

“A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing”.

24. Article 8 of the Statute of the United Nations Dispute Tribunal provides that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required.

25. While the applicant’s appeal was commenced before the Statute of the United Nations Dispute Tribunal came into force, Article 8 of the Statute reiterates the necessity for this prerequisite preliminary step. I note that the Organization’s system of internal justice contained a similar requirement prior to 1 July 2009. The United Nations Administrative Tribunal on a number of occasions held that the matters submitted to appeal must comply with the procedure laid down in Staff Rule 111.2(a). The Administrative Tribunal stated that claims that did not form part of the initial request for administrative review are non-receivable.¹

26. I therefore find that the applicant’s appeal is limited to the decision to reassign her to another post within UNFPA and the underlying circumstances that led to that decision. In order to assess the lawfulness of the reassignment decision it is necessary to traverse the relevant history leading up to that decision. The relevant matters include the conduct and outcome of the 2005 and 2006 PAD procedures and the subsequent review of those by the Management Review Group (MRG) and a Rebuttal Panel.

27. The applicant’s appeal raises a number of factual and legal issues which will be dealt with in turn. The following is the background to those issues.

¹ United Nations Administrative Tribunal Judgment No. 1196, p. 8 (2004); United Nations Administrative Tribunal Judgment No. 1171, p. 8 (2004).

Breach of leave rules

28. To examine whether there is basis to the applicant's claim that she was subject to retaliation because she stood up to the mishandling and abuse of the leave and attendance records, it is necessary to first assess the facts and law relating to this issue.

29. The Integrated Management Information System (IMIS) automatically adjusts staff members' annual leave at 1 April of each year and deletes any accumulated leave in excess of 60 days. In April 2005, shortly after his arrival at UNFPA, the applicant's supervisor advised the applicant that some staff members had accumulated annual leave in excess of 60 days. He asked her to record those staff members as present when they took this excess leave after 31 March 2005. Having confirmed with the Department of Human Resources (DHR) on 13 April 2005 that the official policy was that such excess annual leave balances could not be carried out beyond 60 days, the applicant advised her supervisor of this. She also raised her concerns about accountability in the event that an absent staff member was involved in an accident or mishap while on leave but marked present at work. According to the applicant, her supervisor informed her that he had asked each staff member to complete a request of annual leave which was to be kept and destroyed upon their return to duty.

30. In April 2005, all staff members concerned except one gave the applicant prior notification of dates on which they planned to utilise the excess leave. Three months later, when the staff member who did not give prior notification was absent, the applicant recorded his absence and sent an email to FMU advising that the staff member was not in his office. A month later her supervisor demanded that she change the records to reflect that the staff member had been present. The applicant asked for a written instruction as in her view it would entail a corruption of the leave monitoring system. When her supervisor refused to put the instructions in writing the applicant would not comply with his request.

31. The respondent does not dispute these facts. It accepts that the supervisor allowed for staff members working under his authority to use their annual leave in excess of the allowable 60 days after 1 April 2005. The respondent states that these staff members wanted to take their annual leave in March 2005, before the cut-off date of 1 April 2005, to ensure they did not lose any leave days in excess of the limit of 60 days. However, because of the inventory exercise ongoing at the time, they were “exceptionally allowed” by the then Chief of FMU to retain the unused annual leave in excess of 60 days and take it after 1 April 2005. The applicant’s supervisor had assured the staff members of this at a staff meeting where the applicant was present. The supervisor said he had checked with DHR, who did not want to set a precedent by formally allowing the lost days to be carried forward, and, as a senior manager, he made a decision to permit those leave days to be used unofficially.

32. The respondent submits that the supervisor was trying to do the right thing by honouring an arrangement promised to staff by his predecessor. The respondent says that the supervisor has since been told by the administration that the language of Staff Rule 105.1(c) does not permit flexibility and must not be subject to deviation.

33. The respondent also submits that the applicant only took action to reveal the “unofficial” absences of one out of four staff members who took leave after 31 March 2005.

34. The relevant law is contained in former Staff Rule 105.1(c), which states:

“Annual leave may be accumulated, provided that not more than twelve weeks of such leave shall be carried forward beyond 1 April of any year or such other date as the Secretary-General may set for a duty station”.

35. It is the policy of the Organization that this rule is to be strictly implemented.

36. It is not disputed that the method by which the applicant’s supervisor chose to resolve the conflict between Staff Rule 105.1(c) and the unjustified commitments given to staff members by his predecessor was unwise. It compromised the

applicant's strongly held commitment to maintaining correct procedures. As a result, the applicant took steps to avoid being complicit in this episode. Her supervisor has been advised by the administration that such agreements are against the rules of the Organization. To that extent, the applicant's actions had an adverse effect on her supervisor. However, the principal question in this case is whether this resulted in the negative ratings she received in her next two PAD cycles, the upholding of these reviews by the MRG report and the Rebuttal Panels and, ultimately, the reassignment of the applicant to another post.

Relevant policies

37. UNFPA's guidebook, "Performance Appraisal and Development (PAD)", states that PAD is an integral and key part of UNFPA's human resource strategy that "supports UNFPA's transformation into an open, transparent, results-oriented organization". Effective management of the PAD system is critical to its success. Supervisors are responsible for applying the system in a timely manner and following the procedures outlined in the guidebook. It is the responsibility of supervisors to identify performance deficits in the mid-year review.

38. The PAD system is divided into three main parts: performance planning, mid-year progress review and end-of-year appraisal. PAD reports are completed electronically by staff members and their supervisors and each then clicks a "finalised" tab. Once all performance appraisal reports have been completed they are reviewed by the MRG which meets in March and April to conclude the performance cycle. The MRG undertakes a detailed review of the staff members' performance only in cases where questions of fairness and consistency are brought to its attention either by the staff member or by the office of human resources. It has the power to make a limited range of assessments, including addressing poor performance. Staff members who consider their performance appraisal to be unfair or inconsistent or not in line with the PAD processing procedures can request a review of the performance appraisal by the MRG. Following an investigation, the MRG can hold a supervisor

accountable for lack of a balanced and fair assessment, adherence to performance standards and compliance with the system.

39. UNFPA's policies and procedures also provide for a Rebuttal Panel. This is comprised of an association of individuals rather than a sitting group. It is tasked to conduct reviews of rebuttal cases with "maximum dispatch". Reviews should be completed within three months after referral to the panel. Panels design their own working arrangements. They take decisions by simple majority and have a quorum of three. A chairperson and a deputy chairperson are elected by members of the panel.

40. When a statement of rebuttal has been received which meets the formal requirements, the chairperson assigns each rebuttal case to a panel member (Rapporteur). At the discretion of the chairperson he or she may assign two rapporteurs should the case be sufficiently complex. A draft report is submitted to the panel for review and endorsement. It should be brief and give reasons why the original combined ratings should or should not be maintained and why the MRG comments should be maintained or altered. The report of the Rebuttal Panel constitutes the final decision of the case when it has been endorsed by the panel.

Issue 1: The PAD reports

41. The applicant's general complaint is that she was persecuted, including through "mobbing" which, from the nature of the complaints she has raised, I understand to mean workplace harassment, and being prevented from performing her official duties.

42. One example of the latter cited by the applicant is the removal of her responsibility for monitoring leave in September 2005 and the reassignment of this function to another staff member who was the same person who the applicant refused to mark as present in the office when he was away.

43. She also alleges that the conduct of the 2005 and 2006 performance appraisal is evidence of persecution against her because:

- a. the 2005 PAD procedure was undertaken in only one month and she had had no prior notice of the alleged deficiencies in her performance and no opportunity for improvement or training to address any such deficiencies;
- b. her former supervisor colluded with the supervisor who took over in April 2005 by providing negative and unjustified comments about her, which in turn led to the inclusion of incorrect information in the applicant's 2005 and 2006 PAD reports.
- c. the correct procedure for mid-year reviews were not followed in 2005 and 2006; and
- d. her supervisor illegally accessed her 2006 PAD report after it had been finalised and added adverse comments without her having the opportunity to review those comments and reply to them.

44. The respondent denies any irregularities in the 2005 and 2006 PAD procedures. In summary its submissions are:

- a. the 2005 PAD report had a performance plan which shows that her performance had been addressed;
- b. it is not the case that the appraisal process for 2005 was carried out in only one month. The planning phase was announced and initiated in May 2005 and the year-end appraisal phase was initiated in January 2006;
- c. the appellant had the right to rebut her performance appraisal ratings and exercised this right for her 2005 PAD report; and

- d. the supervisor did not alter the 2006 mid-year review after it had been finalised in September 2006. In any event, the remarks which appeared there were not adverse to the applicant.

The 2005 PAD report

45. In May 2005, DHR sent an email to all staff in UNFPA, including the FMU, announcing the start of the new PAD cycle and asking the staff to complete the required documentation. In late July 2005, the applicant's supervisor prompted her to complete her PAD report by sending her a reminder of the deadline for completion. The applicant sought assistance from DHR. She and her supervisor planned to meet on 12 August 2005 to discuss the PAD report. However, the applicant went on sick leave at that time until mid-September 2005. The supervisor sent an email reminding her that she had not completed the performance planning part of the PAD report and asked her to do this. He said, "We can then discuss these [PAD entries] before finalising this part of the process". In November 2005, with assistance from DHR, she completed her part of the PAD report, advised her supervisor of it and asked to meet. The meeting to finalise the applicant's PAD report was further delayed because her supervisor was on mission and did not return until early December 2005.

46. In September 2005, after she returned from sick leave, the applicant was advised that her responsibilities for leave monitoring were being removed. She was not told of the reasons but asked to arrange a hand-over to another staff member.

47. There is a factual dispute between the applicant and her supervisor as to whether he raised any performance issues with her during 2005. He says that he had had detailed discussions with her as early as 18 May 2005 about specific issues, including the applicant's interpersonal skills and the need to improve her working relationship with other staff. The applicant denies these discussions took place.

48. On 4 January 2006, the supervisor sent the applicant a letter in which, according to the applicant, he detailed a litany of shortcomings in her 2005

performance. A copy of that letter was not exhibited among the many annexures to the parties' submissions, but they corresponded about it. They met briefly in February 2006 and then again in March 2006 to discuss the year-end appraisal of her 2005 performance.

49. The supervisor's summary appraisal in the 2005 PAD report was almost completely at odds with the applicant's self-appraisal. Whereas she assessed her performance as having fully achieved outputs and being fully proficient in all competencies, her supervisor outlined a number of specific criticisms of the applicant's performance. These were in communications support, administrative assistance, and the organization of time management and protocol. In two areas of performance she received the second lowest performance ratings. In the other areas he found the applicant had fully achieved her outputs and was fully proficient.

50. In her extensive comments in response to the supervisor's assessment, the applicant said that the supervisor had never informed her verbally or in writing of any weaknesses or of the unsatisfactory performance he had outlined in the PAD report. These were first brought to her attention by letter on 4 January 2006. She said he should have brought these matters to her attention as soon as they were evident and should have encouraged her, through discussion and agreement, to improve any perceived deficiencies. She also stated that the comments in her PAD report were due to the fact that she refused to falsify official leave records.

51. In his comments her supervisor expressed disappointment that the applicant did not accept that she had any shortcomings whatsoever. He said he had brought performance issues to her attention on numerous occasions and her reaction always tended to be one of denial or blaming someone else. He explained he was reluctant to put such matters in writing and preferred to deal with them verbally as a matter of routine. He said he had written with reluctance to her in January 2006 about matters they had previously discussed, including her poor relations with other staff members.

52. In the PAD report he also said the leave monitoring function had been taken away from her because of her lack of timeliness and accuracy. He said her inability or unwillingness to deal directly with several staff members when clarifying leave issues resulted in conflicts and lengthy email exchanges on what should have been routine and straightforward matters.

53. After her supervisor had finished his final comments, the applicant made additional comments. Her 2005 PAD report was then reviewed by the MRG. Later, at her request, it was reviewed by a Rebuttal Panel.

The 2006 PAD report

54. The applicant's mid-year section of the 2006 PAD report was not finalised by either the applicant or her supervisor. It was finalised by DHR without comment in September 2006.

55. The applicant says she completed her 2006 end-of-year appraisal on 7 February 2007. On 13 March 2007, she pointed out to her supervisor that the deadline for the 2006 PAD report had passed and asked him to finalise it. On 15 March 2007 he had advised her that the performance appraisal was in draft form and asked her to come and discuss it. He apologised for the delay and said that it had not been possible to complete it in February 2007 as both of them had "other commitments". The applicant took exception to this comment believing she was being blamed for the delay.

56. By 29 March 2007 the supervisor had not completed the PAD report and the applicant was advised by DHR to click on the finalisation tab. At that stage her supervisor had not made his final comments nor, in the applicant's view, had he made any comments on the mid-year review section. In April 2007, when she checked the PAD report, she found that in the mid-year section it had been noted by her supervisor that it had not been completed due to the applicant's absence on sick leave. The applicant refutes this reason and alleges that her supervisor had refused to

complete it. She was at work in June and July 2006 and was on sick leave from 21 August to 11 October 2006.

57. More importantly and seriously, she alleged that her supervisor had been given access to her PAD report to manipulate it to her disadvantage.

58. The respondent has produced evidence from the administrator of the PAD system that the mid-year review section was closed after it had been finalised in September 2006. The administrator says that if the applicant's allegation that it had been reopened after that date were correct, a much later date would have appeared, but this was not the case.

59. The applicant's end-of-year PAD report produced similar results to those in 2005. There were still areas of underperformance identified by her supervisor.

Conclusions on the 2005 and 2006 PAD processes

60. I find that the supervisor made reasonable attempts to complete a mid-year assessment in 2005 but failed because the applicant, through no fault of her own, was not available in August and September 2005. The supervisor was away on mission until December 2005. I find that the failure to complete the assessment was not because of a refusal on his part but because of an unfortunate set of circumstances. The end-of-year assessment took place for over several months, beginning with a letter to the applicant from her supervisor in early January 2006 which, in the applicant's words, raised "at least 16 areas of unsatisfactory performance".

61. The 2006 mid-year assessment may have been similarly disrupted by the applicant's absence, but given the previous year's experience the supervisor could have reasonably been expected to make a special effort to manage what was now clearly a fraught relationship by closely adhering to formal policies and procedures.

62. I am not satisfied that the supervisor made any unauthorised additions to the mid-year review section of the 2006 PAD report. The evidence from the respondent

indicates that this would have been impossible without detection. In any event, the comments are not adverse to the applicant but a neutral statement that she was absent due to illness, a fact not denied by the applicant.

63. I conclude, however, that her supervisor failed to deal with his concerns about the applicant's performance in a fair and transparent manner.

64. First, it was incumbent on the supervisor to give her formal notice of the 2005 performance issues which in his view were serious and had to be addressed. The lack of written evidence of the substance of the performance deficiencies being brought to the attention of the applicant at the time they occurred has led to a dispute about whether or not they were raised and the substance of the specific allegations. This lack is due in part to the breakdown of the mid-year review process which meant that the applicant and her supervisor never met formally during 2005 to have a substantive discussion of the alleged deficiencies.

65. Even if, as alleged by the respondent, these deficiencies were raised verbally with the applicant on a number of occasions, there is no evidence about what, if any, steps were put in place to address them in the best interests of the branch and of the applicant. The performance plan in 2005 did not address the specific concerns of the supervisor and is not evidence that any proper plan addressing the supervisor's concerns with the applicant's performance had been discussed with and agreed upon by the applicant.

66. Second, the supervisor should have advised the applicant of the reasons for the removal of her responsibilities for leave monitoring. Where such change in responsibilities is made because of alleged performance problems, fairness and due process require that a staff member be told in advance of the reasons and be given an opportunity to comment on them. In this case the lack of this fair process gave rise to the applicant's suspicions that the decision was made to mask the breach of policy in the granting of leave about which she had been critical.

67. I conclude that there is no objective evidence that the administration's handling of the 2005 and 2006 PAD procedures amounted to retaliation or persecution of the applicant. However, the combination of the two factors mentioned above exacerbated the applicant's perception of unfairness and explain her belief that there was a link between her criticism of her supervisor and the subsequent actions by the administration.

Issue 2: The MRG report

68. The applicant alleges that the MRG report on her 2005 PAD report was influenced by her supervisor who had a conflict of interest.

69. The respondent submits that the role of the MRG is not to act as a panel to review challenges, rebuttals or appeals against the supervisor's ratings but to serve a management tool which does not have the power to change supervisor's ratings. According to the respondent, it is not the role of the MRG to second-guess the supervisor.

70. Following the 2005 PAD report the matter was considered by the MRG. The applicant's supervisor was one of three members of the MRG and he signed off on its comments which were dated 14 August 2006. These were:

“As reflected in the PAD for the 2005 review period, the MRG notes [the applicant's] partial output achievement; it also notes [the applicant's] developing proficiency in core competencies and full proficiency in functional competencies. The MRG notes with concern that [the applicant's] various performance related issues as reflected in the 2003 PAD and other documented evidence have not improved. The MRG also notes that the staff member did not submit a PAD for 2004. The MRG asks [the applicant] to pay due attention to immediately address the performance related matters. As requested by the divisional MRG, the PRG has reviewed [the applicant's] 2005 PAD and shares the concerns expressed by the divisional MRG[.] The PRG recommends that DHR speak with [the applicant] regarding the above, her performance, and the consequences if her performance does not improve”.

71. Contrary to the respondent's submission, I find that the MRG does have a review function. Under the UNFPA policy the MRG is specifically authorised to review performance assessments, as well as the supervisor's management and compliance with procedures during the PAD process. One of the express functions of the MRG is to review the PAD process, albeit in limited circumstances. Where, as in this case, there is open dissension between a supervisor and the applicant and where the applicant is clearly dissatisfied with the procedure undertaken by the supervisor and has made complaints about them, it is inappropriate for that same supervisor to be part of the MRG. I find that in the circumstances of this case the supervisor should have recused himself from the MRG to avoid the inevitable and justified allegation of conflict of interest by the applicant.

Issue 3: The Rebuttal Panel report

72. After receiving the MRG review the applicant sought a rebuttal of the 2005 PAD report. She was critical of the comments of the MRG and comments in her supervisor's assessment of her performance which she described as inaccurate and harmful. Her rebuttal was accepted for consideration in November 2006. The report was prepared in May 2007.

73. The Chairman of the Rebuttal Panel was unable to find anyone else to prepare the report and appointed himself as rapporteur, which was disclosed in the report. The report also noted that the applicant's rebuttal had been supported with a 20-point annex which extended beyond the ambit of a rebuttal. The Panel confined its decisions to those matters within its jurisdiction and reached the following decisions:

- a. The majority of the supervisor's ratings and MRG comments had been substantiated.
- b. There was a valid concern that the applicant had no prior performance issues recorded in her previous PAD reports. The Rebuttal Panel

recommended striking from it the references to performance issues in the 2003 PAD cycle.

- c. It strongly recommended that the management should be bold enough to take the necessary administrative action to resolve the other issues raised by the applicant beyond the scope and intent of the rebuttal process. It said that the issues had the potential to paralyse the work of the Branch and to spread like a virus if not firmly and timely addressed by the management.

74. The applicant then took issue with the constitution of the Rebuttal Panel and its report. She alleged that the outcome of the Rebuttal Panel's investigation into her complaint about the 2005 PAD cycle was influenced by non-compliance with the established procedures and lack of due process. The applicant asserted that:

- a. the Rapporteur assigned to her case, who was also the Chairman of the Rebuttal Panel, was improperly appointed by the Executive Director of UNFPA and took more than three months to produce a report;
- b. the Panel's investigation relied on testimonies of anonymous witnesses and centred on her character rather than on her legitimate claims; and
- c. the Panel misrepresented a key document when it referred to a letter actually dated 28 July 2006 as being dated 28 July 2005 and used that as evidence that a mid-year review had taken place in 2005.

75. The respondent submits that it supports the composition and findings of the Rebuttal Panel. It provides evidence from the Rapporteur that he was never instructed by the Executive Director to work on this case and had to take over the matter because no other member of the Panel was willing to take the case.

76. I find that the Rebuttal Panel was correctly constituted as required by the procedure and policies set out above, and reached conclusions after it had conducted

a thorough investigation. Its report, although brief (as required by its mandate), addressed the main issue before it, namely whether the combined rating in the PAD report should be maintained. Because of the extent of the rebuttal filed by the applicant it was bound to note that there were issues in the Branch that needed to be addressed but which fell outside the scope of a rebuttal. The only criticism which the applicant correctly makes is that the Rebuttal Panel took account of a letter which it mistakenly dated a year earlier. In the absence of that letter there is no written evidence that the supervisor did raise any performance issues with the applicant other than verbally and informally, a matter which has been dealt with above.

77. In light of the correctness of its constitution and the manner in which the Rebuttal Panel conducted its investigation and prepared its report, there is no basis for impugning its substantive findings, namely that the performance ratings of the applicant by her supervisor were substantiated. The only valid criticism of the Panel is its delay in issuing its report. The applicant does not specify how that adversely affected her.

Issue 4: The change of post

78. In June 2007 the applicant was reassigned to a new post which was marked to be eventually abolished in the forthcoming reorganization of UNFPA.

79. The applicant alleges that this removal from a secure post to one that is being abolished was an abuse of UNFPA Administration's authority because it was done on the basis of fraudulent and untrue 2005 and 2006 PAD reports and there had been misrepresentation of vital evidence (i.e., the letter of 28 July 2006) by the UNFPA Rebuttal Panel.

80. The respondent accepts that the applicant was reassigned and that the post was going to be abolished but submits that the administrative decision was proper and, in fact, necessary at the time it was taken.

The facts

81. The applicant was sent a letter from an Officer-in-Charge at DHR, dated 26 June 2007. The letter stated:

“On 21 June 2007, the Performance Review Group (PRG) met to review the 2006 PAD reports of UNFPA staff. As an outcome of the PRG’s deliberations, I wish to inform you that UNFPA management has decided to reassign you to the G5 Secretary post (no. 1853) in the Culture, Gender and Human Rights Branch . . . effective 29 June 2007 cob.

You may wish to note that your previous post and your future post are budgeted and classified at the same grade (G5) and are financed from the same budget . . .

You are kindly requested to report to . . . CGHR Branch on Monday, 2 July 2007”.

82. There is no evidence that this reassignment had been discussed with the applicant, that she had been given any forewarning of it, or that any other reasons were given for the decision at the time it was made and conveyed to her.

83. In response to the applicant’s request for a review of the decision to reassign her, the Executive Director of UNFPA explained in a letter dated 20 September 2007 that staff regulations gave the right to assign staff members to any of the activities or offices of UNFPA. He said this discretionary decision was taken in good faith and, for the first time, gave the reasons for the reassignment. These were:

- a. that “regretfully, [the applicant was] not performing in accordance with the applicable competencies as demonstrated by [her] recent performance appraisal reports”;
- b. the UNFPA Performance Review Group had decided that the applicant and another staff member who was also meeting difficulties in achieving appropriate performance ratings should be exchanged in their positions to provide a “fresh opportunity for improvement” and

that this was a “good and necessary practice” in human resources management;

- c. he accepted the new post was to be abolished but stated that there were plans for new divisions in which there would be general service posts available for the matching of staff members whose posts were abolished;
- d. the administration took care to ensure that the post to which the applicant was reassigned was classified at the same level and financed from the same budget source; and
- e. the reassignment was timed to give the applicant the benefit of an almost full performance period under a new supervisor and in a new working environment.

Conclusions

84. Where a staff member alleges that actions have been taken against her which have disadvantaged her in her employment it is for the administration to explain and justify those actions. Only the administration can explain why it took the steps it did.

85. In this case, I find that, prompted by the applicant’s request for a review, the Executive Director of UNFPA provided balanced and objectively verifiable reasons for the decision by UNFPA to reassign the applicant from one post to another. The administration did not disguise the fact that the new post to which she was assigned was precarious but has subsequently provided adequate explanation and assurances that it was committed to providing safeguards to the applicant for her continuing employment with the Organization when the new post was abolished.

86. The finding that the applicant was not performing in accordance with the applicable competencies is based on the 2005 and 2006 PAD reports which were found to have been substantiated by the Rebuttal Panel, an independently constituted

review body. There is nothing before the Tribunal to warrant a finding contrary to that of the Rebuttal Panel. The MRG panel should not have included the supervisor of whom the applicant was so critical but the review by the Rebuttal Panel mitigated any prejudice to the applicant as a result of this. UNFPA was therefore justified in its finding of underperformance in 2005 and 2006.

87. The decision to take a proactive approach in an attempt to resolve the performance issues of not only the applicant but another underperforming staff member was, on the face of it, a sensible and rational response to what had been identified by the Rebuttal Panel as a difficult employment situation.

88. Had the administration explained all these matters to the applicant before or at the time of the reassignment she could have had no legitimate complaint about what occurred. However, the letter advising her of the reassignment without these explanations did not adequately explain the reasons to her and no doubt contributed to the applicant's belief that the decision was abrupt and unfair. The reasons were not given to the applicant until she sought a review of the decision. In this regard the previous failings of the PAD process referred to above are relevant. The failure to explicitly address and deal openly with difficult issues when they arose was repeated at the time of the reassignment.

89. I find therefore 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.

Remedies

Compensation for suffering and stress

90. The applicant has claimed for compensatory damages for emotional suffering and stress. The quantification of such damages is an inexact science but there are some guiding principles. The starting point is Article 10.5(b) of the Statute of the Dispute Tribunal which provides that, generally, compensation shall not exceed two years' net base salary of the applicant.

91. Other, non-statutory, principles include:

- a. damages may only be awarded to compensate for negative effects of a proven breach;
- b. an award of compensatory damages is not punitive against the employer; and
- c. an award should be proportionate to the established damage suffered by the applicant.

92. In this case the award of compensation to the applicant must be limited to the effects on her of the one proven breach of duty towards her by the Organization.

93. 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.

94. 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.

Compensation for legal consultation expenses of \$2,500

95. The applicant requests compensation for her legal expenses in the amount of \$2,500.

96. Article 8 of the Statute of the Dispute Tribunal states: “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”.

97. This article does not expressly prevent the Tribunal from making an award of costs but it generally limits such awards to cases where the Tribunal finds that in the course of the proceedings there has been an abuse of the process by a party. There is no evidence of any such abuse by either the applicant or the respondent in this case. Although there may be other instances when the Tribunal will feel compelled to order award of costs, it is not warranted in this case. There are, therefore, no grounds for making this order.

Reinstatement

98. The applicant seeks reinstatement in her post or to a similar post with UNFPA at the same or higher grade level and security (i.e., to a post not in danger of being abolished).

99. Although I have found there was a degree of unfairness by UNFPA in the manner in which it conveyed its decision to reassign the applicant to a new post, I am also satisfied that the decision was otherwise properly made and with appropriate safeguards to the applicant’s continuing employment. The applicant has since moved on from that assigned position. There will be no order for her reinstatement to the post from which she was reassigned.

Replacement of the PADs

100. The applicant seeks replacement of her 2005 and 2006 PAD assessments with reports that accurately reflect both her performance and her supervisor’s non-adherence to the PAD process, as well as the expunging of the report of the Rebuttal Panel from her records. Based on the evidence presented by both parties and reasons given above, this remedy is not warranted.

Order

101. The respondent is ordered to pay the applicant the equivalent of one-month net base salary calculated at her salary level at the date of this judgment.

(Signed)

Judge Coral Shaw

Dated this 5th day of October 2009

Entered in the Register on this 7th day of October 2009

(Signed)

Hafida Lahiouel, Registrar, New York