



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/002  
UNDT/GVA/2010/102  
Judgment No.: UNDT/2011/156  
Date: 6 September 2011  
Original: English

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**Before:** Judge Coral Shaw  
**Registry:** Geneva  
**Registrar:** Anne Coutin, Officer-in-Charge

REES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Brian Gorlick

**Counsel for Respondent:**  
Christine Graham, ALS/OHRM, UN Secretariat  
Myriam Foucher, UNOG

## **Introduction**

1. The Applicant has made two applications to the Dispute Tribunal, each contesting a decision by the Office of the High Commissioner for Human Rights (“OHCHR”). The first in time was the decision in June 2009 to remove her as the Head of the Women’s Rights and Gender Unit (“WRGU”) and to reassign her to a post which had not been formally established at that stage but later was given the title of Senior Human Rights Officer, Advisor on Sexual Orientation Issues. She declined to take up this position.

2. The second contested decision was the non-renewal of the Applicant’s fixed-term appointment beyond the date of its expiry on 31 March 2010. With the consent of both parties the two applications were heard together by way of oral hearing.

3. The Applicant seeks appropriate compensation for the alleged unlawful actions of the Organization and for the violations of her rights in the form of: (a) termination indemnity; (b) moral, financial and professional losses she suffered; and (c) “terminal and irreparable harm” caused to her professional reputation and career in the United Nations.

4. The Respondent denies all of the allegations.

## **Issues**

5. The issues relevant to these cases are:

- a. Was there compliance with the performance appraisal obligations?  
If not, what are the consequences?
- b. Was the decision in June 2009 to reassign the Applicant from her position as Coordinator of WRGU in Geneva to another post a lawful exercise of the discretion conferred by former staff regulation 1.2(c) and former staff rule 101.2(b)?

- c. Was the non-extension of the Applicant's contract in March 2010 a valid exercise of the Administration's discretionary power?
- d. Was the Applicant constructively dismissed?

## **Facts**

6. From November 1998 the Applicant, Ms. Madeleine Rees, was employed by OHCHR as Chief of the office in Bosnia-Herzegovina at the P-5 level. In 2006, she was laterally assigned by the then High Commissioner for Human Rights ("HC") to a newly created unit; she was appointed to the position of Coordinator, WRGU, in the Research and Right to Development Branch ("RRDB"), at OHCHR in Geneva. Her fixed-term contract was renewed in 2008. At the time of the first contested decision she held a fixed-term appointment which was due to expire on 31 March 2010.

7. The Applicant's immediate supervisor from September 2006 to June 2009 was Mr. Ibrahim Wani, the Chief of RRDB. From January 2009 her second reporting officer was the Director of the newly established Research and Right to Development Division ("RRDD"), Ms. Marcia Kran.

8. It is not in dispute that the Applicant had not had a performance appraisal since the beginning of her service. Historically, OHCHR's completion rate for the Performance Appraisal System ("PAS") was low. By half of 2009 the completion rate was only about 50%, although in 2009 a concerted effort was made to improve this record. During her time as a manager, the Applicant conducted evaluations in accordance with the PAS standards for her staff.

9. In September 2008 a new HC was appointed, Ms. Navanethem Pillay. She received briefings both before and after taking up office. Only a few days after her taking office the HC addressed a reception held for her by Equality Now, a New York-based non-governmental organization of which the HC had been co-founder. In her address she stated that the OHCHR had a Women's Rights and Gender Unit and that she had heard that it was not working well.

10. There was some dispute about what the new HC had been told about the performance of WRGU and by whom. The Deputy High Commissioner (“DHC”), Ms. Kyung-wha Kang, told the Tribunal that from 2007 the HC had asked her to keep a close eye on WRGU and that generally speaking she, Ms. Kang, was not satisfied with the quality of the work of the Unit. She gave some examples to support this opinion: in 2007 she had re-written a concept paper outlining the strategic orientation of the Unit, for which the Applicant had thanked her; she was unhappy about the level of accountability for the extensive travel that the Applicant was undertaking. The former Chief of RRDB told the Tribunal that he also had had concerns about WRGU which included travel, meeting deadlines and reporting. However as the Unit was not properly resourced and it produced work that was acceptable he did not raise these concerns with the Applicant as performance issues in his weekly meetings with her. In January 2008 he recommended the extension of her contract for two more years; its effective extension took place on 1 April 2008.

11. Another view of the Applicant’s performance was conveyed to the Tribunal by the Director of the Field Operations and Technical Cooperation Division (“FOTCD”). As the manager responsible for all field operations, he served in a different division and was hence not part of the discussion about the Applicant’s performance but he respected her knowledge, experience and professionalism. He heard nothing negative about her performance while she worked in Geneva. He told the Tribunal that the former HC had wanted to promote her to the D-1 level.

12. Against this background, the DHC had told the incoming HC that the Unit needed to better perform. The former Chief of RRDB’s evidence to the Tribunal was that he had given the new HC a broad overview in which he mentioned that there were some issues with WRGU and proposed that the HC should receive a more detailed briefing.

13. It is clear that the new HC began her tenure with a negative impression of the performance of WRGU and made this public. Reports of her statement at the Equality Now reception reached the Applicant who became very concerned. She

and another colleague of the WRGU staff met with the DHC a few days after the HC speech and told her that the work of the Unit was not being recognised at senior management level. The Applicant said that the DHC's response at that meeting was positive. She believed that the DHC understood that the Unit was working hard, was very small and was facing high demands.

14. On 6 October 2008 the HC received a full briefing from WRGU. The then Chief of RRDB and the DHC were also present. The Applicant viewed this as an opportunity to show the HC that her remarks to Equality Now had not been accurate. The DHC interrupted the Applicant's presentation. She was critical of the work of the Unit and the fact that some briefing papers presented had been prepared by consultants. According to the former Chief of RRDB, the DHC expressed extreme displeasure and dissatisfaction. He described her remarks as very direct. Until that moment he had not been aware of how strongly the DHC felt about the Applicant.

15. The Applicant felt these remarks were derogatory. She was devastated by the meeting and could not believe how badly it had gone. In contrast, the DHC described her own contribution as intending to encourage, support and move on. She emphasised that her concern throughout was to maintain the reputation of OHCHR with Member States and other stakeholders and to support the HC to meet her obligations under the Compact with the Secretary-General.

16. In November 2008, the Applicant met with the DHC to discuss the comments she had made at the meeting. The DHC asked her if she did not sense that there were "frustrations" regarding the Unit's work. She advised the Applicant to think how her approach came across. She told her that her problem was that she was confrontational. Notwithstanding these tensions, the Applicant testified that at a second meeting with the HC in December 2008, at which she gave more details of the approach being taken by WRGU, the HC expressed her confidence and approval.

17. A new Director of RRDD took up her position in January 2009. As the working relationship between the former Chief of RRDB and the Applicant was

not good she was asked by the DHC to work closely with the Applicant to improve her performance as the Coordinator of the Unit. The Director of RRDD told the Tribunal that she had a number of concerns about the work WRGU needed to do. She saw her task to be forward looking, to give advice in a positive spirit and to help, guide and support. The aim was to ensure that the Unit's work plan was met and expectations realised. She did not tell the Applicant of the discontent that had been expressed about her at that stage and did not undertake a formal performance review then or later.

18. Throughout the troubled history that followed, the Director of RRDD managed to maintain a cordial relationship with the Applicant while attempting to make the improvements that she and the DHC saw as necessary, but in spite of her efforts the situation deteriorated during 2009.

19. In February 2009 the HC appointed the president of Equality Now to temporarily head the New York office of OHCHR. The president and the Applicant had a history of policy differences about the approach to be taken on women's rights and gender issues and these became apparent when the approach to a particular OHCHR project was being decided. At the end of February the Applicant was told that, to avoid giving conflicting messages, the DHC did not want her to speak about the policy differences concerning the project. The Applicant complied with this directive but the DHC saw her earlier comments as demonstrating a lack of judgment.

20. On 6 March 2009 the Applicant and the DHC sat together on a panel to mark the International Women's Day. The Applicant said that the DHC "froze her out" by refusing to acknowledge her presence and refused to speak to her. When asked to comment on this allegation, the DHC told the Tribunal that she had an ongoing concern that the Unit needed to shape up and that may have manifested itself in stiff behaviour on her part but not hostility.

21. The minutes of the regular morning meeting of the executive and the senior managers held on 10 March 2009 record that the DHC referred to the joint work plan prepared by WRGU for submission by OHCHR and the Division for

the Advancement of Women to the Human Rights Council. She called for those concerned to work on improving the quality of the next year's document by organising consultations and cooperating. The minutes of these meetings are published to all staff. The Applicant said that concerns about this issue had not been raised with her before then and that she perceived the publication as a public rebuke. The DHC told the Tribunal that the remarks were not intended as criticism but as a public encouragement. She did accept in hindsight that it would have been more appropriate to have raised the issues with the Unit beforehand. She had told the Director of RRDD about her concerns before the meeting and instructed her to talk to the Applicant about them.

22. On the same day, after the morning meeting, the Director of RRDD met with the Applicant to discuss matters which she had observed needed to be improved since she had started supervising the Applicant and the Unit. The Applicant said the meeting was informal and there seemed to be no criticism involved. The Director of RRDD raised the need to follow up with projects and events requested by supervisors, including the DHC and the HC, even if she were not in agreement with them, to follow established communication channels in the office and to make timely progress on assigned activities.

23. The Director of RRDD sent a written summary of the 10 March discussion to the Applicant in which she repeated her oral advice that the Applicant was "to pay serious attention to these issues out of concern about how [her] action on these matters may affect the renewal of [her] contract next March". She added that she raised the issues in a constructive spirit as "helpful feedback".

24. When asked for her opinion of the Applicant at that time, the Director of RRDD told the Tribunal that she thought that the Applicant had serious shortcomings. She had been told of performance problems that had happened before her appointment in January 2009 and even under the former HC. The Applicant said she had never been informed of these concerns.

25. The Applicant said in evidence that when she later told the Director of RRDD that she would respond in writing to the issues raised at the meeting she

was told that it might be better if she were to look outside the office for employment.

26. In the Applicant's written response to the Director of RRDD, dated 14 March 2009, she stated, *inter alia*, that this was the first time there had been a formal meeting to provide feedback in over two years and "[i]t would appear that there [were] impressions and perceptions which [were] not grounded in fact and which ha[d] not been raised with [her] at any point". She appreciated the clarification on internal communication. She also stated that:

The last line of your memo related to potential non-renewal of my contract a year from now naturally gives me great concern. It implies that there has already been a failure to comply with the terms of my contract—an inference which I absolutely refute.

She concluded:

I also would hope that we can now move forward, ending the rumours and speculation and on the basis of mutual trust and confidence.

27. This was not to be. During this period the Applicant sought assistance from the OHCHR Staff Committee because she felt that the DHC was displaying open hostility towards her. She was also seeing a stress counselor as she found the working environment to be unbearable.

28. There were further incidents which the Applicant attributed to misunderstandings between her and the HC. The Respondent relied on these incidents to justify the decision to reassign the Applicant.

29. The first of these occurred at a meeting on 20 May 2009. The DHC expressed her discontent with the Applicant's approach to the planning of a proposed panel for an event during the Human Rights Council, the quality of a draft report for the Human Rights Council and the communication regarding the co-sponsoring of a side event at the Human Rights Council. The Applicant described the meeting as difficult. She told the Tribunal that she could not get the DHC to listen. She found her to be angry and dismissive of her explanations. On the same day, the DHC sent her an email in which she wrote: "I am utterly



shocked at the discrepancy of your perception on such a sensitive matter.” The Applicant replied to clarify the process and steps taken regarding the side event. The next day the Applicant had a debriefing with the Director of RRDD who, she said, was very supportive and told her “we will get through this”.

30. On 4 June the DHC sent the Applicant an email concerning the content of an intervention on equality before the law. She wrote that she did not “know what to make of these repeated cases where your recollection and presentation of discussion/events are very much at odds with those of others who partook in the same”. The DHC told the Tribunal that by then she did not have confidence in the Applicant.

31. The Applicant sent emails to the Director of RRDD and others to seek their assistance about the sequence of events which led to the latest dispute. On 8 June 2009, the Applicant wrote to the Director of RRDD that:

[The DHC] was still clearly holding to the position that I mislead the member states over co sponsor[s]hip of the side event despite written confirmation to the contrary ... I have the original notes if need be ... I would be grateful for your advice.

32. In her reply to the above message, the Director of RRDD proposed: “Let us discuss when we meet tomorrow.”

33. On 9 June, the Applicant met with the Director of RRDD and two others. She had written asking for her assistance on how to deal with the misunderstandings and asked for help on how to address “the intimidation and harassment that [she] was receiving from the DHC”. She believed that this meeting on 9 June with the Director was to discuss these matters but, as the minutes record, the meeting covered only WRGU management issues. Topics included internal communication, coordination and travel. Suggestions for improvement in these areas were made.

34. On Friday, 12 June 2009 during a side event at the Human Rights Council the HC mentioned to the Applicant informally and in passing that it would be good for her to work full time on sexual orientation. The Applicant was shocked

and upset and asked the Director of RRDD what was going on. The latter confirmed that she had been told of the decision the day before, although not consulted about it. She affirmed to the Applicant that the HC was thinking about it and suggested they meet later on Monday, 15 June to discuss it.

35. On 15 June 2009, the Applicant, the Director of RRDD and a representative of the Staff Committee met to discuss the HC's decision to remove her from her current position as the Coordinator of WRGU and to assign her to work on sexual orientation. According to the Applicant, she was also notified that a new Coordinator was being brought in and would take over the leadership of WRGU as of 1 July 2009 and that it was unlikely that her fixed-term contract would be renewed after its expiration on 31 March 2010.

36. The Applicant was also told that her mission to Colombia on 20 June 2009 would be cancelled. This mission had been extensively planned for over a year. The Applicant was to be the leader and chief presenter in a series of training programmes to educate prosecutors and others on issues of sexual violence. This cancellation was perceived by the Applicant as another sign of hostility.

37. On 17 June 2009, the Applicant was placed on sick leave on medical advice. On the same day, she was sent an invitation to attend a meeting with the HC and the DHC on 18 June 2009. She advised that she could not attend because of her illness. She then received a message from the Chief of Office of the HC. It enclosed a memorandum from the HC dated 18 June which the HC was intending to give her at the meeting. It read:

This is to inform you of my decision to re-assign you, effective 1 July 2009, from your current functions as coordinator of the Women's Rights and Gender Unit (WRGU) to a post specifically tasked to undertake thematic research and advocacy on the issue of sexual orientation and human rights.

This follows my assessment of the need for new leadership for WRGU as well as the need to allocate dedicated staff to the issue of sexual orientation, in view of my recent engagements on this issue with your substantive input.

I believe that your skills and interest would be better utilized in expanding the expertise of the Office in this thematic area. Your

work will include the undertaking of assignments in relation to this topic and performing any other tasks as assigned.

You will pursue these tasks under the direct supervision of the Director of the Research and the Right to Development Division  
...

38. In spite of the intervention of a senior manager, the Director of FOTCD, the decision to prevent the Applicant from travelling remained. The Applicant feared that all who knew of her involvement would perceive the cancellation of her participation as the consequence of some grave misconduct on her part.

39. It appears that the decision to cancel the Applicant's trip to Colombia was taken hastily. The DHC said that she and the Director of RRDD did not know much about the mission and if they had they might have changed their minds.

40. On 22 June 2009 the Applicant requested the Secretary-General to review the decision to remove her as the Coordinator of WRGU and reassign her. On the same date, she submitted a request for suspension of action before the Geneva Joint Appeals Board.

41. On 26 June 2009, the Director of RRDD officially announced that the Applicant would be "relieved" of her current duties as of 1 July 2009 in the Division's staff meeting. The DHC and the Director of RRDD confirmed to the Tribunal that the reason for the reassignment was the alleged poor performance by the Applicant. The DHC said it had been her idea to reassign her. The decisive matter that led to it was a substandard report to the Human Rights Council. From then she decided that there needed to be new leadership for the Unit. It is clear also from her evidence that the way she perceived the Applicant's performance on other later matters caused her to doubt the Applicant's judgment.

42. Although she was removed from the position of Coordinator of WRGU on 1 July, the Applicant continued to serve in OHCHR as Senior Human Rights Officer without portfolio. During this time the DHC learned that the Applicant was accusing her of bias and discrimination against her as a homosexual person. The Chief, Programme Support and Management Services, OHCHR, told the Tribunal that the Applicant actively discussed how badly she had been treated.

43. The Applicant was notified by letter dated 30 June 2009 that the Joint Appeals Board had recommended and the Secretary-General had granted the suspension of action request regarding the reassignment decision. On 6 July 2009 the Applicant submitted a request for management evaluation under the new system of internal justice which had commenced on 1 July 2009.

44. The minutes of the 9 June meeting were not provided to the Applicant until 24 July 2009. When she got them she emailed to express her disappointment at their content and “the clear motivation behind its content”. She recalled that she had requested the assistance of the Director of RRDD about how to address intimidation and harassment from the DHC. The Director of RRDD replied by email that she had seen no evidence of harassment or intimidation of the Applicant in the Office, and pointed out that there existed specific procedures to raise this kind of allegations; she attached the Secretary-General’s bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

45. By then the Applicant had written to the Office of the Ombudsman seeking advice about options to redress harassment and discrimination against her by OHCHR staff. She attached a detailed document outlining her specific allegations against named staff members.

46. On 13 August 2009 the Tribunal ordered a further suspension of the reassignment decision until the Applicant was informed of the result of the management evaluation (see *Rees* UNDT/2009/007). The order of suspension of action stated:

[C]onsidering that the Tribunal has been informed by the Applicant that Respondent has manifested his will to have resort to mediation in view of settling the dispute at hand and the [Applicant] has shown readiness to engage in such mediation process, the Tribunal expressed its expectation that, unless there is a fundamental change in the overall circumstances of the case, the contested decision should not be implemented as long as the mediation efforts are underway.

47. On 13 August the Applicant was also told of the outcome of the management evaluation dated 12 August 2009. She was told that the Secretary-General decided to uphold the decision to remove her from position of Coordinator of WRGU and that her reassignment to the newly created position should be coupled with a process of consultation. Should the process fail to produce an outcome satisfactory to the Applicant and OHCHR she should be offered priority consideration for selection to suitable available vacancies.

48. On 21 August 2009, the HC wrote to the Applicant advising that she intended to put into effect the original decision to reassign her and asked her to meet with senior management upon her return from vacation to discuss the precise title, scope, functions and expected outcomes of the new function of Advisor on Sexual Orientation Issues. On 24 August 2009, the Applicant queried this decision in light of the Tribunal's decision on suspension of action. The DHC replied that the UNDT had expressed only an expectation about the process and, although this was not binding on the Organization, the spirit of the expectations was being upheld through the continuation of consultations regarding the reassignment. She concluded:

It is, of course, your prerogative to file a formal appeal of the Secretary-General's decision, addressed to the UNDT. The High Commissioner, however, would hope that this step will not be necessary, and that your consultations with the Deputy High Commissioner and the Director of RRDD will be constructive and productive, enabling you to continue contributing to the work of the Office.

49. Between 23 September and 18 December 2009 the parties engaged in mediation under the auspices of the Office of the Ombudsman. The Chief of Programme Support and Management Services said that the office went to enormous lengths and expended a large amount of senior management time trying to negotiate the terms of reference of the post to which it was proposed to transfer the Applicant.

50. It was not possible to reach agreement on a solution that was acceptable to the Applicant as she did not want to return to work under her former supervisors. Also, she believed that the offered position of Advisor on Sexual Orientation

Issues was discriminatory and that given her sexual orientation it would have been nearly impossible to discharge these duties. At the suggestion of the Director of FOTCD, an attempt was made to relocate the Applicant under the direct supervision of another senior manager who was very keen to have her but this was found to be inconsistent with the general lines of division of work in OHCHR.

51. The Applicant filed her application with the Tribunal against her reassignment on 4 January 2010.

52. On 1 March 2010, the Applicant was given notice by the Chief, Human Resources Management Section, OHCHR, that the HC was not going to renew her fixed-term appointment beyond 31 March 2010. The memorandum referred to the fact that she had indicated that the post offered to her was not acceptable and that she had not applied for any vacancy. It invited her to advise if she were to apply for any vacancy in the future so that “appropriate action” could be taken.

53. Before the expiry of the notice period the Applicant actively sought employment outside of the United Nations. She received a positive offer but did not enter into a contract with her now employers in the private sector until after 31 March 2010.

54. On 18 March 2010, the Director of FOTCD sent out invitations to a farewell party for the Applicant. He said this was common practice and that he did it out of respect for her. The event took place and was described as a happy event. However the DHC and the HC were critical of his role in organising it. They saw it as a misjudgement and disloyalty to them.

55. After the Applicant had left the Organization the Director of RRDD asked the former Chief of RRDB to prepare a retrospective evaluation of her performance. In spite of doubts about its use he did as required. That performance evaluation was not shown to the Applicant nor presented to the Tribunal.

56. On 29 April 2010, the Applicant presented a request for management evaluation of the decision not to renew her appointment. She received a negative

reply to that on 14 June 2010. The application to the Tribunal concerning this decision was filed on 9 September 2010.

### **Parties' contentions**

57. The Applicant's principal contentions are, in summary:

a. The Administration's failure to ensure timely, lawful and proper compliance with the administrative instruction ST/AI/2002/3 (Performance Appraisal System) PAS requirements is a serious breach of due process. The responsibility must rest primarily with management, as a non-compliance policy was permitted to develop over the long-term. As a result of an incorrect and irregular performance appraisal, the decision not to renew the Applicant's contract was unlawful. The *ex post facto* evaluation of the Applicant's performance was not in accordance with ST/AI/2002/3 and thereby unlawful. Such a breach of the Applicant's terms of appointment caused damages which should be compensated;

b. When the Administration provides a justification for exercising its discretion, that justification must be supported by the facts, which may not be the case when the Administration has contradicted its own justification. The Administration gave two contradictory reasons for the Applicant's reassignment, i.e., the HC was not entirely satisfied with the management and/or outputs of WRGU, on the one hand, and the post she was going to be reassigned to was a high profile and sensitive position requiring a highly specialized individual able to shape and lead an entirely new area of work;

c. A justification based on a staff member's work performance will not be justified if criticisms or complaints in this respect are not properly made or recorded and shared with the Applicant;

d. The Applicant never received any reliable guidance and support regarding alleged areas for improvement. The claim of the Applicant's

poor performance is wholly unsupported by the circumstances and facts of the case;

e. The Applicant's reassignment in June 2009 was to a position that at the time did not even technically exist. The decision effectively amounted to a demotion. The position was not adequate as it was not in line with the grade, qualifications and professional experience of the Applicant;

f. Reassignment to a position which is not adequate may indicate improper motivation. The reassignment of the Applicant was therefore an unlawful exercise of the Organization's discretion in assigning its employees to different functions. It was taken in bad faith and improperly motivated by personal bias and prejudice of the HC, the DHC and the Head of the OHCHR New York office. It constituted harassment, intimidation and abuse of authority and gave the impression of gross misconduct or incompetence on the Applicant's part, with the consequent damage to her reputation;

g. The non-extension of the Applicant's appointment in March 2010 was not a valid exercise of the Organization's discretionary power. The Applicant was justified in refusing the reassignment because the true reasons behind the decision were personal bias. The decision was unlawful as it was tainted by bias, abuse of authority or bad faith;

h. If there was a refusal by the staff member to take up a reassignment and this was used as the reason for non-renewal and such refusal must be viewed as misconduct or abandonment of post, it would have triggered a completely different process—entailing a number of procedural rights and safeguards—which the Administration cannot circumvent;

i. The Applicant was constructively dismissed since her work environment had become intolerable. Her reassignment amounted to a



demeaning demotion and she suffered general abusive conduct and unwarranted criticism, reprimand and discipline. The violation of the Applicant's due process rights and her capricious removal as Coordinator of WRGU rendered it impossible for her to effectively perform her job functions.

58. The Respondent's principal contentions are, in summary:

a. The impugned decisions were legal, rational, procedurally correct and proportionate;

b. There is a general obligation on the part of the Administration and staff members alike to follow the PAS procedure. However, although the Applicant did not complete the procedure there was sufficient information available to the Administration to conclude that the Applicant underperformed as Chief of WRGU;

c. The Administration had undertaken actions which in substance served a similar purpose to that of a completed PAS. In any event, even though she had not had a performance appraisal, the Applicant was aware of the dissatisfaction of management with certain aspects of her management;

d. Due process was followed for the reassignment. The obligations required for reassignment are not as onerous as for non-renewal as on reassignment the staff member retains a position;

e. The contested reassignment was a lawful exercise of the broad discretion of the Administration under former staff regulation 1.2(c) and former staff rule 101.2(b). The decision was taken in the best interest of the Organization. Management took into account both its concern for the functioning of WRGU and the HC's intention to create a new emphasis on the issue of discrimination based on sexual orientation;

f. The Administration is not bound by the preferences of the staff member. The post to which the Applicant was meant to be reassigned was a post at the same level and in line with her qualifications; the Applicant had no right to retain a given position. Even though consultation is a preference prior to reassignment, its absence does not invalidate the decision; the Applicant had several occasions to share her views with the management, including during the mediation efforts. Once the decision was taken, the Administration took every step to consult and accommodate the preferences of the Applicant;

g. The non-extension of the Applicant's contract was a valid exercise of the Administration's discretion. Fixed-term appointments do not carry any expectancy of renewal;

h. The non-renewal decision was not based on her underperformance, but on her unwillingness to take up the new post offered to her or to apply for any other vacant posts. Therefore the question of compliance with the performance review obligations is not critical;

i. The allegations of bad faith and prejudice and discrimination by the Applicant are groundless. She has not met the burden of proving them, which is incumbent on her nor has she met the burden of proof concerning the allegation of harassment;

j. The Applicant was not constructively dismissed because there was no deliberate scheme of action against her. She only received constructive criticism. There was no evidence of an underlying plan to force her to resign. She did not resign, she just did not want the post she was offered. In any event, in view of the *bona fides* efforts of the Administration the allegation that this was a case of constructive dismissal is without merit.

## Considerations

*Issue 1. Was there compliance with the performance review obligations? And if not, what are the consequences?*

59. Section 1 of ST/AI/2002/3 states that:

The present instruction shall apply to all staff members who hold appointments of at least one year under the 100 series of the Staff Rules ...

60. The performance management system (PAS) set out in that administrative instruction applied to the Applicant as she held an appointment of two years under the 100 series.

61. The purpose of the PAS is to improve the delivery of programmes mandated by the General Assembly by optimizing performance at all levels. It operates by linking individual work plans, setting goals, planning work in advance and providing ongoing feedback. An important function is to promote two-way communication between staff members and supervisors.

62. The administrative instruction requires that the PAS is to be conducted annually with a mid-point review and a final appraisal. In the event of reassignment, transfer or separation, the time for the appraisal period is the period between the beginning of the performance year and the event.

63. The first reporting officer has the responsibility for setting the work plan with the staff member, conducting the appraisals and providing supervision. The second reporting officer is responsible for the first reporting officer's implementation of the process, including holding the first reporting officer accountable for appraising staff in accordance with the PAS guidelines and ensuring fairness and consistency.

64. Thus, pursuant to the administrative instruction, the heads of departments and offices have primary responsibility for the timely execution, overall compliance with, and fair implementation of the PAS.

65. The staff member's responsibilities in the process are defined specifically in section 9 of ST/AI/2002/3. One of these is that before the end of year performance

review, staff members are required to review the way he or she has carried out the work plan and provide a self-appraisal.

66. The rest of the process in the administrative instruction deals with the review mechanism and the rebuttal process by which staff members who disagree with the performance rating given at the end of the performance year may have a written rebuttal considered by a panel.

67. The Tribunal does not accept the Respondent's submission that the responsibility of initiating her own PAS lay primarily with the Applicant. In relation to the assessment process, the primary responsibility under the administrative instruction lies with the first and second reporting officers. The preparation of the staff member's self-review and self-appraisal is to be done before the appraisal meeting which is called by the reporting officers. While it does not expressly say so, the scheme of section 9 points to the reporting officer being responsible for initiating the meeting to which the staff member must respond by preparing a self-review and self-assessment. The PAS gives the staff member an opportunity to comment, challenge and rebut. The ultimate decision is subject to scrutiny.

68. The obligation to complete a PAS remains with the Administration whether a staff member continues employment or is reassigned, transferred or separated. ST/AI/2002/3 specifically provides for the PAS to be completed notwithstanding those events. The Respondent's argument that the obligation to comply with the PAS in reassignment cases is not as important as for non-renewal cases is not correct. The administrative instruction makes no distinction between the two events. Where, as in the present case, a reassignment is made for reasons of non-performance the PAS is essential as an objective evaluation of performance.

69. In the end, 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.

70. 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.

71. In this case, the Respondent relies on the Director of RRDD's attempts to constructively guide the Applicant as a substitute for the PAS. In spite of the Director of RRDD's undoubted good intentions, this process failed to meet the high standards of due process set by ST/AI/2002/3. The DHC's identification of the Applicant's alleged shortcomings as early as 2008 was not discussed appropriately with the Applicant so that she could take steps to rectify the situation. The Applicant was never put on fair notice that her performance was likely to lead to a reassignment away from her managerial post as head of WRGU. She was not formally assessed against her work plan.

72. While in hindsight, the Director of RRDD's meeting with the Applicant on 10 March 2008 to discuss a work plan might be construed as the development of an improvement plan as contemplated by the PAS, this was not conveyed to her at the time. Further, the Applicant was not asked to provide a review of her own performance that could be discussed at the meeting. She had no formal opportunity to comment on or to seek a rebuttal of the opinions that had been reached about her performance.

73. The Respondent acknowledged that it was desirable for the Administration to consult before the decision to reassign. There was no such consultation with the Applicant. While the Respondent argued that this was because the Applicant was on sick leave on the day the HC had decided to meet with her, the evidence shows that the decision to reassign her had been made even before that meeting was scheduled. The HC's memorandum had been prepared with the intention of giving it to the Applicant at the so called consultation meeting.

74. 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. In the present case, even if the meeting had taken place as planned, the issue had been pre-determined and consultation could not have taken place in good faith.

75. In conclusion, the Respondent failed to consult in good faith with the Applicant and did not comply with the performance review requirements of ST/AI/2002/3. It breached the Applicant's rights to due process. The Respondent had no lawful basis for making decisions based on its assessment of the Applicant's performance.

*Issue 2. Was the decision in June 2009 to reassign the Applicant from her position as Head of WRGU in Geneva to another post a lawful exercise of the discretion conferred by former staff regulation 1.2(c) and former staff rule 101.2(b)?*

76. Former staff regulation 1.2(c) conferred the power for the Administration to reassign a staff member. It read:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations ...

77. It is well established that, notwithstanding the width of the discretion conferred by this rule, it 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.

78. The Tribunal holds that the decision to reassign the Applicant was not a lawful exercise of the discretion to reassign because the PAS procedures were not followed. This is not a matter of strict formalism for its own sake. Adherence to the process ensures that a decision taken in reliance on the outcome of the PAS is not easily impugned.<sup>1</sup>

79. The PAS is specifically designed to assess performance with all necessary safeguards for both management and staff. The Applicant was removed from her post as head of WRGU for performance reasons without any objective assessment of her

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<sup>1</sup> *Koumoin* UNDT/2010/105.

performance. Inevitably this leaves room for the suspicion that the actions taken against her were motivated by other than performance reasons.

80. The Applicant was very clear in her mind that the actions taken against her were due to personal animosity, some of it stemming from the OHCHR New York office. The individual who she accused in this regard did not give evidence and had no opportunity to answer such allegations. The Tribunal therefore makes no decision on the Applicant's allegations in this regard. In any event, such a decision is not necessary for the disposal of the case.

81. The plan to reassign the Applicant from her position was implemented before a properly constituted post was available to be offered to her. At the time of the reassignment, on 18 June, there was no post for her to be assigned to, just a name of a position yet to be established. The terms of reference for a position entitled Senior Human Rights Office, Advisor on Sexual Orientation Issues were not judged to be classifiable as P-5 until 10 July. The decision to reassign was made hastily and without proper planning. The circumstances of the reassignment, including the misconceived decision to cancel her mission to Colombia at the last minute, led to the impression that the action was being taken because of some serious wrongdoing by her. The decision was potentially prejudicial to the Applicant's reputation.

*Issue 3. Was the non-extension of the Applicant's contract in March 2010 a valid exercise of the Administration's discretionary power?*

82. In normal circumstances a staff member has no expectancy of renewal of a fixed-term contract.<sup>2</sup> It is in the Secretary-General's discretion whether to renew or not although this discretion must be exercised properly and in good faith. In this case the propriety and legality of the decision has been questioned by the Applicant.

83. The official reason given by the Respondent for the non-renewal was that the Applicant refused to accept the position offered to her by way of reassignment following extensive efforts during mediation to formulate a new position. The Respondent denies that performance issues are relevant to the decision. The Applicant's reasons for not accepting the position were that she would remain under the supervision

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<sup>2</sup> Staff rules 4.13 and 9.4.

of the very managers who she perceived to have treated her so unfairly; given her sexual orientation, the nature of the position amounted to sexual discrimination; and that the position amounted to demotion. The Applicant withdrew the allegations of discrimination at the hearing but still maintained that the decision was unlawful.

84. The Respondent's argument on this point fails principally because it does not accord with the facts. Until the reassignment decision, the Applicant was appointed against the position of Coordinator of WRGU. Although the official reason for the non-renewal of that contract was given as the failure of the Applicant to accept the reassignment or apply for another vacancy, it was clear from the evidence of the DHC and the Director of RRDD that the decision not to renew the Applicant's contract was motivated by their assessment of her performance as Coordinator of WRGU. The Respondent had formed negative views about her performance as early as 2008. These views were given voice through the Director when she warned the Applicant on 10 March 2009 that her action on the matters discussed at their meeting "may affect the renewal of your contract next March". This was an obvious reference to the Applicant's performance. It was those views that led to the first decision to reassign her.

85. The Respondent's witnesses gave evidence that between then and the decision not to renew her contract there had, in their opinion, been no improvement in the Applicant's performance. The Applicant had been appointed to the post of head of WRGU. The formal decision not to renew that contract was flawed for the same reason as the reassignment decision. She was told as early as 15 June that the contract would not be renewed. Although the Respondent argued that the non-renewal occurred because the Applicant did not accept the reassignment, it is clear from the evidence that the management had decided that the Applicant was not performing as required and that this was the main reason for not renewing her contract. In the absence of a PAS to verify the views of management about her performance in compliance with ST/AI/2002/3 the Tribunal concludes that the Respondent acted unlawfully when it did not renew the Applicant's contract.



*Issue 4. Was the Applicant constructively dismissed?*

86. 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 OHCHR.

87. Meeting minutes confirm that although non-renewal was in the thoughts of senior management as early as March 2009, the Respondent’s subsequent attempts to have her reassigned, although not done correctly, are evidence that efforts were made to keep her in the OCHCR system, if not in her original post.

88. It is accepted by the Tribunal that, following the Management Evaluation Unit’s recommendations, the Respondent made efforts through the mediation process to try to retain the services of the Applicant by providing her with a position to be reassigned to.

89. These efforts were not successful because they did not result in an outcome that the Applicant could live with. The Tribunal accepts that it is for management to organise its affairs in the best interests of the Organization and that this may involve placing a staff member in a position for which they may not have much appetite. However in the present case the history of the interaction between the parties was so problematic that without changing the Applicant’s reporting line the new post was unlikely to be accepted by the Applicant. The DHC obviously had lost confidence in her performance and, in spite of her best efforts, the Director of RRDD had been unable to effect the changes in performance that she felt were necessary. On the Applicant’s part, she had been so affected by the work environment that she had to take stress counseling and had invoked the aid of a staff representative.

90. While the Respondent is correct in its contention that the Applicant did not take her complaints of harassment and sexual discrimination to the correct authorities, she did raise these with the Director of RRDD and the Ombudsman; in the latter case she made detailed allegations. These allegations were not pursued.

91. There was sufficient evidence before the Tribunal to find that the Applicant had genuinely held beliefs that she was being harassed based on the manner in which the DHC manifested her disapproval towards her in public meetings and publicly criticised the performance of her unit without forewarning her. Whether or not the DHC was justified in holding the opinions that led to her criticism, it was the manner of communicating these that led to the Applicant's stress and public humiliation.

92. In summary, the work place environment and the interpersonal relationships had become unsustainable for all concerned. It was not handled well by management. On the other hand, the Applicant did not help the situation by the intemperate allegations she made publicly about the DHC following the reassignment.

93. On balance, the Tribunal holds that the Respondent's attempts to keep the Applicant within the Organization in another role, while unsuccessful, were sufficient to save it from a finding that it was marching the Applicant to the door. The Applicant was not constructively dismissed.

*Additional observations*

94. Some witnesses before the Tribunal spoke of fears of possible retaliation by the Organization against those who chose to or were asked to give evidence to the Tribunal. One witness in particular felt particularly vulnerable given that he only had one month left on his contract and that he had heard nothing of its renewal. The former staff representative who gave evidence spoke of the concerns of staff members who would otherwise have been prepared to speak on behalf of the Applicant but who were too apprehensive about the possible adverse consequences to them. Witnesses for the Respondent vigorously denied that there was any basis to such concerns.

95. Without making a final judgment on the validity of such concerns the fact that they were raised must be treated seriously. It is for the Respondent as employer of all staff members to assure them that that they are immune from any suggestion of retaliation for participating in the Internal Justice System. If staff members and others are constrained from appearing before the Tribunal or from giving full and honest evidence because of a perception or fear of retaliation this strikes at the very heart of

the independent and transparent system of administration of justice mandated by the General Assembly resolution 63/253. The Tribunal acknowledges those who gave evidence in spite of their concerns.

### **Conclusion**

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

- a. The Respondent did not comply with the performance appraisal obligations in ST/AI/2002/3;
- b. The decision in June 2009 to reassign the Applicant from her position as Coordinator of WRGU in Geneva to another post was an unlawful exercise of the discretion conferred by former staff regulation 1.2(c) and former staff rule 101.2(b) and should be rescinded;
- c. The non-extension of the Applicant's contract in March 2010 was not a valid exercise of the Administration's discretionary powers and should be rescinded;
- d. The Applicant was not constructively dismissed.

97. Both parties requested that the determination of remedies including the amount of compensation that the Respondent may pay as an alternative to rescission of the decisions and any other compensation sought should be left for a separate consideration.

98. The parties are encouraged to seek mutual resolution of these issues but if this is not possible the matter will be dealt with on the papers. The Tribunal orders:

- a. The decision to reassign the Applicant from her position as Coordinator of the WRGU is rescinded;
- b. The decision not to renew the Applicant's contract is rescinded;

c. The Applicant is to file written submissions addressing the nature and *quantum* of the remedies sought by her by 7 October 2011;

d. The Respondent is to file a response to those submissions by 14 October 2011.

*(Signed)*

Judge Coral Shaw

Dated this 6<sup>th</sup> day of September 2011

Entered in the Register on this 6<sup>th</sup> day of September 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry