UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/053/UNAT/1539
Judgment No.: UNDT/2013/084
Date: 28 May 2013
Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

HUNT-MATTHES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Nigel Lindup

Counsel for the Respondent:
Philippe Sacher, UNHCR

Introduction

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees ("UNHCR"). She filed an appeal with the former United Nations Administrative Tribunal ("former UN Administrative Tribunal") contesting the decision by UNHCR dated 27 August 2004 not to renew her Fixed-Term Appointment ("FTA") as a Senior Investigation Officer with the Inspector General's Office ("IGO") on performance grounds ("the Contested Decision").

Procedural Background

2. This non-renewal claim is one of three claims brought by the Applicant in two cases before the former UN Administrative Tribunal. The Applicant filed one case challenging the decision not to renew her contract and not to grant her an indefinite contract upon her 2003 interagency transfer from the World Food Programme ("WFP") and another case challenging a decision of the Ethics Office.

3. On 1 January 2010, the two cases were transferred to the Geneva Registry of the United Nations Dispute Tribunal ("the Tribunal") in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice). They were subsequently transferred to the Nairobi Registry by Order No. 51 (GVA/2010).

4. In *Hunt-Matthes* UNDT/2011/064, Boolell J. held that the claim against the decision not to grant the Applicant an indefinite contract was time-barred as the Applicant had not filed an appeal to the Joint Appeals Board ("JAB") within the prescribed time frame. In *Hunt-Matthes* UNDT/2011/063, Boolell J. found that the decision of the Ethics Office was receivable.

5. This case was then assigned to the undersigned Judge for final determination.

6. In preparation for the hearing of the case on the merits, the Tribunal issued Case Management Order Nos. 129 and 158 (NBI/2012) and 001, 039 and 040 (NBI/2013).

7. The Respondent advised the Tribunal during a case management hearing on 31 January 2013 that he would not call any witnesses and on that basis two days were allocated for the hearing. On the evening of the first day of the hearing, the Respondent applied to the Tribunal for leave to call one witness. This application was refused by the Tribunal. The reasons for that decision are contained in Order No. 081 (NBI/2013) which is to be read in association with this judgment.

8. The hearing was held in the Geneva Registry, it being the nearest to the Applicant, the Respondent and several of the witnesses.

9. In her application and at the oral hearing the Applicant further alleged that her separation from UNHCR on the abolition of the Evaluation and Policy Analysis Unit ("EPAU") in 2006 was illegal. She had been appointed to a position with EPAU on 2 September 2004 after the contested decision was made.

10. She initially contested her separation from EPAU by filing an application for Suspension of Action with the JAB which was refused by the board in its decision of 24 May 2006. The Applicant did not challenge the separation from EPAU beyond that point.

11. The Tribunal holds that the Applicant does not have a justiciable claim before the Tribunal relating to her separation from EPAU; however the facts relating to the events that followed the end of her contract at IGO are relevant to the overall consideration of this case and to the issue of remedies.

Issues

12. The issues to be determined are:

a. Was the decision not to renew the Applicant's FTA with the IGO lawful?

b. Did the Organization implement the non-renewal decision of the Applicant's contract?

c. Is the Applicant entitled to any remedies?

Employment background

13. The Applicant began her career with the United Nations in 1994 when she joined the Office of the High Commissioner for Human Rights in Rwanda as a Human Rights Field Officer conducting preliminary investigations for the International Criminal Tribunal for Rwanda. From February 1995 to January 1996, she served as a Crime Prevention and Criminal Justice Officer at the United Nations Office in Vienna. She then worked as the Executive Assistant to the Head of Civil Affairs in 1996 in the former Yugoslavia.

14. Between 1996 and 1998, she worked for UNHCR on short-term appointments as Fund Raising Officer, Human Rights Liaison Officer and Public Affairs Officer. From July 1998, she was employed by WFP in Rome, as an Inspection Officer at the P-4 level. During this period of employment she had several assignments on reimbursable loan from WFP during which she conducted an investigation for the World Health Organization; she worked as an Advisor to the Director, Policy Strategy and Research for the United Nations Programme on HIV/AIDS in Geneva. The Applicant also worked as an Ethics and Oversight Advisor at the Global Alliance for Improved Nutrition in Geneva.

15. It is undisputed that throughout all these appointments, the Applicant's performance was consistently rated as being exceptional and exceeding managers' expectations.

16. In her performance evaluations, she was described as an excellent staff member, full of initiative, task oriented and delivered excellent work. She was considered for re-appointment for most of the positions.

Facts

17. In addition to oral and written submissions the Tribunal heard oral evidence from the Applicant and her three witnesses: Anton Verwey, former Head of EPAU, Cynthia Brzak, former staff member of UNHCR and a member of the rebuttal panel and Francis Montil, former Senior Investigator with the Investigation Division ("ID") of the Office of Internal Oversight Services ("OIOS"). The following is a chronological account of the basic facts in the case. The salient facts are considered more closely in the considerations section of this Judgment.

18. On 2 September 2003, the Applicant took up a one year FTA as Senior Investigation Officer in the IGO of UNHCR, Geneva. For the purpose of Performance Evaluation, UNHCR had put in place the Career Management System ("CMS") and the Performance Appraisal Report ("PAR") as performance assessment mechanisms for their staff members. The Applicant's first reporting officer/immediate supervisor was the Head of the Investigation Unit ("Applicant's supervisor"). Her second reporting officer was the Deputy Inspector General ("DIG").

19. The Applicant's job description was as follows:

> a. Advise the Inspector General and the Head of the Investigation Unit on the legal implications and impediments with respect to the overall United Nations disciplinary procedures and the IGO Investigative initiatives;
>
> b. Ensure proper recording of complaints, oversee the maintenance of the case file management within the Investigation Unit and advise the Inspector General and Investigation coordinator on possible future course of action [sic];
>
> c. Analyse case files, evaluate their urgency and propose priority follow up;

> d. Provide the necessary legal advice and guidance during investigations, participate in investigation missions as and when required;
>
> e. Screen investigation reports to ensure that procedures/techniques and the final conclusions are legally sound and in compliance with United Nations rules, regulations and directives while taking into consideration UNHCR's protection mandate;
>
> f. Liaise with the Legal Affairs sections with respect to legal issues in relation to investigation of cases and transmission of the preliminary reports;
>
> g. Advise on any legal matter that relate to the responsibilities and authority of the Inspector General;
>
> h. Discharge those tasks as requested by the Inspector General.

20. In October 2003, the Applicant was assigned to conduct an investigation in Sri Lanka into an allegation of rape of a refugee by a UNHCR staff member. The case had already been through an internal investigation under the authority of the then Country Representative of UNHCR in Sri Lanka. At the beginning of her investigation, the Applicant was subjected to obstruction and interference by the Country Representative. She said that her investigation was stopped by the then DIG/IGO after she first complained about the obstruction and then the investigation was restarted by her supervisor.

21. Between October 2003 and March 2004 the Applicant reported this obstruction to her immediate supervisor; the UNHCR Legal department in a letter dated 11 March 2004; to the then UNHCR Deputy High Commissioner and to the then UNHCR Mediator. The Applicant eventually concluded her investigation and rendered a report but continued to insist that there should be an enquiry into the obstruction.

22. The Applicant was initially supported in her concerns by her immediate supervisor. In November 2003 he wrote to the Inspector General ("IG") about the staff members who had conducted the internal investigation:

> Dear [IG] I prefer not to reply to [Sri Lanka Country representative] as my words would be quite harsh but I would be grateful if you could do so. If they had not messed up or/and covered up the first investigation, [the Applicant] would not have gone to SLK. Maybe we could reply by asking them what code to charge for [the Applicant's] air ticket and DSA for that mission?
>
> Sorry for venting out my frustration [IG] but this investigation has seen an unprecedented level of non-cooperation, obstruction, breach of confidentiality which deserve some form of response.

23. In December 2003, the Applicant asked the DIG/IGO to prepare a note to record his observations regarding the alleged interference by the Country Representative in Sri-Lanka. The DIG/IGO suggested that he would like to be treated like any other staff member and that it would be simpler if the Applicant interviewed him on the matters at hand rather than him writing a note for the file. The interview took place on 19 December 2003.

24. Two events then ensued which are material to this case as they resulted in what were later referred to in the Applicant's PAR as 'formal warnings.'

25. The first was an exchange of emails on 5 February 2004 between the Applicant and her supervisor. The Applicant told the Tribunal this marked the first moment of the breakdown in the relationship between her and her supervisor. In response to not being initially copied in on some correspondence about the Sri Lanka investigation, the Applicant registered her disappointment that the IGO could not conduct itself in a more transparent fashion. In the course of a long response her supervisor said that he did not like the tone of her allegations. He ended his letter by saying:

> I thank you in advance for taking into consideration any instructions in relation to communications with other colleagues and I am counting on your sense of discipline and responsibilities to make significant and visible efforts in this respect.

26. On the morning of 6 February 2004, the supervisor wrote to the Applicant an email entitled "Morning thoughts" in which he told her "Incident closed as far as I am concerned, unless the DIG or you want to take it to another level. Have a nice day."

27. On the same morning the supervisor wrote to the Applicant commenting on her draft performance objectives she had sent him. She revised the objectives on the same day and returned them to her supervisor for review.

28. The second event concerned an alleged breach of confidentiality by the Applicant. On 29 March 2004, the supervisor wrote to her:

> The Inspector General has brought to my attention allegations that he has received that you reportedly told some persons outside the IGO that he, [the DIG] [UNHCR Sri Lanka Country Representative] had stopped or/and tried to stop the investigation in Sri Lanka. I need to formally ask you whether you have discussed the case outside the IGO with some colleagues and if so in what context …

29. In reply, the Applicant denied discussing details or names about any particular investigation. In an email of 2 April 2004 she said:

> I would like to note that it is not uncommon for allegations to be made against investigation officers and I agree that, in the interest of the integrity of the IGO, they need to be properly investigated. I would thus urge you to refer this matter to OIOS if there is an allegation of breach of confidentiality.

30. On 14 April 2004 her supervisor wrote to the Applicant thanking her for her clarifications and recommending as a lesson learnt to be even more cautious in relation to the sensitive material handled by IGO. The matter was not referred to OIOS.

31. The context of these allegations was described to the Tribunal by Anton Verwey, now retired but at the material time a Senior Director in IGO with some 30 years' experience in UNHCR. He had been involved in the setting up of IGO as an oversight service within UNHCR and had a unique insight into its operations.

32. Mr. Verwey told the Tribunal that the Applicant had never discussed the details of a particular case with him but sought his advice about the quality and integrity of IGO processes with which she was concerned, particularly about interference in a case by senior managers.

33. Mr. Verwey gave evidence from his own experience working in IGO. He recalled instances of overt interference from senior officials in the conduct and outcome of investigations designed, in his view, to manipulate the whole process to get certain outcomes. He gave a specific example of an investigation ordered into a division of UNHCR which he was aware was designed to "clip the wings" of the Head of that division. In his opinion, the concern was not with the facts but to "knock someone down."

34. He had personal knowledge of the breach of confidentiality issue faced by the Applicant and explained it by saying that her supervisor, whom he had known for a long time, was under a lot of pressure.

35. The Applicant consulted the UNHCR mediator on 8 March, 30 March, 2 April, mid May and on 15 June 2004 to get advice about how to manage the issues about interference/obstruction and breaches of confidentiality.

36. In April 2004, IGO received a complaint from a female staff member who alleged she had been sexually harassed by the then UNHCR High Commissioner. The Applicant and her supervisor discussed how the IGO should deal with the complaint. She believed that OIOS was the appropriate recipient of the complaint but it should be first registered with IGO in accordance with the proper procedure. The DIG/IGO and other senior IGO managers said the case should not be registered with IGO at all. The Applicant testified that this divergence of opinions caused a lot of tension in the office.

37. On 5 May 2004 the Applicant and her supervisor met to discuss her pending cases and her draft CMS objectives. A few minutes into the meeting the supervisor was called out urgently. The Applicant told the Tribunal that the objectives were never discussed with her again.

38. In July 2004, while on mission in Indonesia, the Applicant was seriously injured in a car accident and medically evacuated to Geneva. She was placed on full sick leave from August 2004 to 30 September 2004 and thereafter on 50% sick leave until March 2006.

39. On 2 August 2004, a Human Resources Officer, Personnel Administration Section, sent a memorandum to the Acting Inspector General informing him that the Applicant's FTA was due to expire on 2 September 2004 and seeking a recommendation about the further extension or non-extension of her appointment. In paragraph 4 of the memorandum, he stated:

> In the event that you do not wish to recommend the continued employment of the staff member, your recommendation to this effect must be forwarded to us accompanied by a completed PAR, duly signed by the supervisor, the reviewing officer and the staff member. (Part 1 chapter 4 of the CMS Manual and paragraph 27 of the Annex to IOM/54/97-FOM/61/97 of 3 July 1997 refer). A copy of your written notification of your decision to the staff member should also be attached.

40. On 12 August 2004, the Applicant's supervisor wrote to the Applicant who was on sick leave. He asked for information on the finalisation of one of her cases and then stated:

> I had requested you several times from December 2003 to February 2004 to finalise your CMS objectives. I have made several requests subsequently during coordination meetings but have not received a copy of your revised objectives nor Ms. G, ("the focal point"). I never received your self-assessment on the mid-term review, nor your comments on my own interim assessment, so I will have to proceed with the final appraisal on the basis of what I have and will share it with you.

41. In response on 15 August 2004, the Applicant wrote:

> My CMS objectives were finalised and cleared by you. I have completed the interim assessment and it is on my hard drive at the office. I thought that I would sit down with you and we would review it together. I did not understand that I was supposed to send it to you or to [the focal point] Apologies; I will rectify the situation as soon as I am back. ….. Sorry for the inconvenience but this is the first time I am undergoing this process and I am thus not that

> familiar with it. I would appreciate your patience with me on this important issue in order to have a meaningful CMS assessment.

42. Her supervisor replied on 16 August 2004 that he would be patient but reiterated that he had reminded her several times to complete her part of the CMS objectives.

43. On 25 August 2004, without any input from the Applicant, the supervisor wrote to the Human Resources office as follows:

> [….] I wish to confirm that the IGO does not recommend the extension of Ms. Hunt's appointment. This recommendation is based on her unsatisfactory performance appraisal and discussions with the former Inspector General, and the current OIC of the IGO [the former DIG]. This negative performance appraisal and this recommendation are based on what was expected from her as a Senior Investigator. It does not mean that she would not be suitable for another position in UNHCR.

44. On 26 August 2004, the supervisor wrote a note to the Applicant purporting to attach a hard copy of the finalised PAR for the period 1 September 2003 to 30 August 2004. He said he had tried to call her without success. He said he had no alternative but to finalise the PAR without a final discussion about it with her. The Applicant denies knowledge of his attempts to contact her. The hard copy of the PAR was not attached to the note and to date she has never received it.

45. The Applicant was emailed a copy of the PAR on the same day by the focal point. The PAR rated her performance as "unsatisfactory". She was asked to complete her self-assessment on the objectives and to sign some sections of it.

46. The Applicant told the Tribunal that this was the first time she had seen the mid-term assessment dated 12 April 2004. She noted that the PAR reflected a wrong index number and that her supervisor's emails of 5 February 2004 and 29 March 2004 about the alleged breach of confidentiality and transparency issues were cited as warnings to her.

47. The Applicant enquired of the focal point when the mid-term assessment had been forwarded to her if she had received a copy. The focal point replied on 30 August 2004:

> The date on the PAR form for mid-term assessment is the 12 April 2004. I'm afraid I don't know when this was forwarded to you and I did not receive a copy.

48. On 27 August 2004 the Personnel Administration Section, Human Resources sent the Applicant a memo about her separation from service. She was informed that her FTA was due to expire, effective 1 September 2004, but her appointment was being extended as an administrative measure for the duration of her certified sick leave.

49. On 1 September 2004 when the Applicant went to the IGO office, she found a note from her supervisor on her desk dated 10 December 2004 (later agreed to have been in error as it should have read 2003). In it the supervisor asked her to prepare her CMS objectives as soon as possible in order to have a meaningful performance management process. Attached to this note was a copy of her 12 April 2004 mid-term assessment.

50. The Applicant formally advised the administration on 6 September 2004 that she disagreed with the PAR appraisal and would address the underlying issues in the upcoming rebuttal procedure.

51. On 17 September 2004, the Applicant wrote to the focal point inquiring whether she had sent her the signed copy of her PAR which she needed for the Performance Management Unit ("PMU"). The focal point responded on the same day that since she had not received the Applicant's comments and signature on the objectives, the PAR had not been finalized for the PMU. Then the Applicant asked the focal point about the whereabouts of the signed hard copy of her PAR referred to in the 26 August 2004 note from her supervisor. The focal point replied:

> I never sent you hard copies at home. A complete self-assessment of your objectives are still awaited before [the Applicant's supervisor] can sign the PAR. Please take action by filling the

> results/achievement column and sign/initial where applicable for my follow-up.

52. Upon receiving this email, the Applicant sought the advice of the PMU. The same date, the PMU wrote to the Applicant and the PAR focal point as follows:

> Please note that the self-assessment of the stated objectives is normally done by the staff member prior to the supervisors' evaluation (see attached guidelines). In this case, it appears that the normal process was not followed and the supervisor completed the PAR prior to the staff member's self-assessment….

53. Then followed some internal correspondence between the DIG/IGO and the Division of Human Resources Management ("DHRM") about the correct procedures to be followed in the non-renewal of the Applicant's contract. On 16 September 2004 the then Deputy Director DHRM suggested two options to the Acting IG (former DIG) and others:

> Assuming the rebuttal procedure will take some time, we could:
>
> a. extend her contract and place her outside the IGO until the rebuttal is concluded.
>
> b. not to extend her contract once medically cleared and confirm that this is without prejudice to the rebuttal procedure. If it is determined that the performance was fully effective, then we would reinstate her (retroactively?) once a suitable position is identified.
>
> By separate e-mail, we need to advise [the Applicant's supervisor] that he should simply not have extended her contract without going into the performance reasons underlying his decision.
>
> Anxiously….

54. The Applicant's supervisor responded to the PMU on 17 September 2004 as follows:

> Thank you for copying me your e-mail. This email should not be shared with the staff member concerned, as I am only exchanging with you some arguments that I may develop at a later stage in an administrative procedure. I only want to clarify my position.
>
> The staff member has not finalized her objectives in spite of repeated requests. She had not completed her self-assessment in spite of my

requests. I had to proceed with the mid-term assessment on 12 April 2004 on the basis of draft objectives and without her self-assessment. I did not receive any comment from her on my mid-term assessment. I reminded her several times to finalise her objectives and prepare her self-assessment. Nothing happened again. To date I have not received her self assessment for the mid-term review.

DHRM then requested me to finalize her PAR before the end of August 2004. I prepared her final PAR accordingly. She received it on 26 August 2004. No comments were received from her on the PAR besides an indication on 6 September 2004 that she had never received my mid-term assessment and that she will make a rebuttal.

I have repeatedly offered in writing the staff member to meet to discuss my final assessment of her performance. [The Applicant] did not reply to these offers.

She then sought mediation from the Reviewing Officer on 20 September 2004. The Reviewing Officer immediately accepted the request but then [the Applicant] did not follow the offer of the Reviewing Officer.

We then expected to receive her rebuttal. This new round of exchange of emails with [the Applicant] today on her PAR are triggered by an email that I sent to Mr. S.P yesterday to find out whether she has filed a rebuttal.

For the duration of her employment with the IGO, [the Applicant] was not interested to comply with the PAR process. Since 1 September 2004, she has not sent any comment on her PAR nor availed herself of the opportunity to discuss her performance with me or the Reviewing Officer.

I do not think that we can be told on 17 November 2004 that we have not complied with the established procedure. We have done what we could with a non-cooperative staff member. The responsibility for completing a PAR cannot only be on supervisors. The normal process was not followed because of the staff member's failure to comply with instructions.

Your email to [the Applicant] stating a DHRM position that I have not complied with existing procedure is going to be used against UNHCR. I do not think that you have been fully briefed by the staff member about what happened with her PAR. On the basis of my above clarifications, I wonder what else we could have done. I would be grateful to know whether your position still stands or whether you think that on the basis of the information that it was the responsibility of the staff member to finalise her PAR. I do not blame you as you may have assumed that she told you was absolutely accurate [sic].

> The staff member has received a copy of her PAR on 26 August 2004 and I do not intend to change the date, to re-sign a copy now and to resent [sic] it to her in order to make sure that her rebuttal will be admissible within the applicable time limits. I will support the above mentioned facts with evidence at a later stage in any subsequent procedure.

55. The next day, the PMU replied to the supervisor as follows:

> Thank you for your message, Please allow me to make the following observations:
>
> -the completion of the PAR is indeed a dual responsibility for the staff member and the supervisor and should be based on a dialogue between the two parties;
>
> -you have indicated that you have repeatedly offered in writing the staff member to meet in order to discuss your evaluation of her performance and she did not reply to your offers;
>
> -you could have approached the Performance Management Unit (PMU) and in its capacity as the guardian of the performance appraisal process, could have provided the relevant assistance to the staff member and you in order to facilitate the process and urge the staff member to comply with the performance appraisal process; your messages to the staff member could have been copied to PMU;
>
> -as outlined in the existing performance appraisal guidelines, the mid-term review progress is initiated by the staff member who should indicate the progress/constraints in achieving objectives and the supervisor will comment and make a summary of the actions agreed. In this particular case, you, the supervisor completed the mid-term review and thereafter requested the staff member to provide you with comments;
>
> -you stated that you completed the staff member's PAR and forwarded to her while she was on sick leave prior to her self-assessment and there was no discussion with the staff member. You will agree with me that this was not correct;
>
> -there has been procedural flaw from both sides [sic].
>
> The staff member has indicated that she is not in agreement with your appraisal and would like to rebut the PAR. For the rebuttal, she needs to submit to PMU the original hard copy of the PAR signed both by you and herself. Since she received the PAR by email, you need to give her the original hard copy signed – there is no need to change the date on the PAR. Please note that the deadline for

> submission of the rebuttal statement is 30 days as of the signature date of the staff member's disagreement.

56. On 28 September 2004 the then Deputy Director DHRM sent the Applicant a letter extending her FTA until 31 October 2004 advising her that she would be on Special Leave With Full Pay ("SLWFP") from 1-31 October 2004.

57. On 4 October 2004, the Applicant reported back to work at the IGO office but was asked to remove her possessions. In the meantime at the initiative of the then Deputy High Commissioner ("DHC") the UNHCR mediator was brought in to discuss the Applicant's situation. Mr. Verwey was then the Head of the EPAU. He offered the Applicant a position in EPAU as a Senior Evaluation Officer at a P-4 level.

58. Later, in an internal note dated 27 April 2005 to Mr. Verwey, the then Deputy Director DHRM, stated that the Applicant was effectively a Staff In Between Assignments ("SIBA") a status granted to staff members with indefinite appointments, a status which the Applicant did not have since her FTA had to be extended for administrative purposes. Mr. Verwey formally protested to DHRM in May 2005 against what he called the irregular removal of the Applicant from her post at IGO, making her to become an untimely SIBA.

59. On 1 January 2005, in spite of not having received a hard copy of the PAR, the Applicant submitted a rebuttal statement contesting her PAR for the period 1 September 2003 to 30 August 2004.

60. A member of the Rebuttal Panel, Cynthia Brzak told the Tribunal that the Applicant's case was out of the ordinary as it involved lawyers and contained hundreds of pages of documents with allegations and counter allegations of misconduct by both the Applicant and her supervisors.

61. In addition, Ms. Brzak told the Tribunal that the panel was being pressured and "influenced to a point of view." She testified that she was approached by the then Head of the PMU who asked her to meet with the UNHCR Legal Affairs Section as the Executive Office had an interest in the rebuttal process. That request was later put in writing. Another panel member was also approached

by the then Head of UNHCR Legal Affairs who expressed strong feelings about the case. The panel believed that it did not need the guidance of PMU whose role was to receive the panel's final report.

62. On 27 May 2005, the Rebuttal Panel sent a memo to PMU in which it analysed the allegations and counter allegations about unethical behaviour, forgery and breach of confidentiality contained in the Applicant's rebuttal application and in the reply by the Applicant's supervisor. The Panel referred to paragraph 5.1.10 of IOM/FOM/65/2003 (The Role and Functions of the IGO) which stated that "Allegations of misconduct against senior staff of the Executive office will be referred to OIOS as appropriate and will not be dealt with directly by the IGO." The memo further stated that in light of the request by the DIG that the then and past Inspector Generals should be heard on the matter, the panel recommended that the matter be referred to OIOS for action:

> In light of the reciprocal allegations of misconduct involving senior staff of the IGO of the Executive office, and the fact that too many issues need to be clarified before a rebuttal process can be initiated, the Panel believes that this case falls within the mandate of the OIOS and outside the purview of the rebuttal.

63. On 9 June 2005, DHRM requested the Panel to withdraw this memorandum as it could not be accepted as a substantiated report and to present a report by 27 June 2005. Ms. Brzak said that the Panel was shocked by this apparent attempt by DHRM to interfere in the Panel's process and did not respond to its memorandum.

64. On 29 August 2005, the Applicant's PAR for the period of her work at EPAU 4 October 2004 to 1 September 2005 was issued. Her supervisors rated her performance there as being "fully effective" and recommended her for a promotion.

65. In her capacity as a member of the Rebuttal Panel, Ms. Brzak officially referred the Applicant's case to the Director of the Investigations Division, OIOS ("ID/OIOS") on 30 September 2005. She told the Tribunal that she did not ask OIOS to review the Applicant's PAR but to disentangle the allegations of

misconduct from the performance issues. In her referral letter she explained to OIOS what had occurred in the Applicant's rebuttal case and continued:

> Our rebuttal work was hindered by the interference from the Rebuttal secretariat and the Legal Affairs Section under the Director of DHRM….I officially inquire about the action you and your service have taken. Please treat this as a request for final administrative action and decision."

66. Ms. Brzak did not receive a response to this letter. The Applicant went to the OIOS offices in New York in September 2005 and spoke to the Director ID/OIOS. She also met with the then Chief of the Administrative Law Unit ("ALU"), Office of Human Resources Management ("OHRM") on 22 October 2005 in an attempt to resolve her claims informally. She was informed that ALU/OHRM did not wish to engage in any informal resolution and that she should pursue the matter formally with OIOS.

67. On 3 December 2005, the Applicant filed a formal complaint with OIOS alleging harassment and abuse of authority against her former supervisors at the IGO. An OIOS office analyst assessed her case and rated it suitable for investigation.

68. In his reply to the Application, the Respondent stated "On 30 September 2005, the Respondent advised the JAB that 'the supervisor and the reviewing officer of [the Applicant] have agreed, in principle, to withdraw [the Applicant's] PAR (2003-2004), provided that this is also accepted by the Applicant."

69. There is no evidence that this intention was acted on at the time. The Applicant told the Tribunal that the withdrawal was conditional on her dropping her case and she did not accept that proposal.

70. While counsel for the Respondent submitted to the Tribunal that the PAR had been removed from her file, the Applicant was not advised of this until the hearing of her case before this Tribunal.

71. The Applicant's complaint was then referred to the OIOS Vienna Office where Mr. Francis Montil, a former senior investigator with ID/OIOS was the Head of the Office. He told the Tribunal that Ms. Brzak's letter to OIOS was not in the case file nor shared with him when he received the case file. He assigned an investigator to the Applicant's case and sent him to Geneva in March 2006 to conduct investigations. When Mr. Montil left ID/OIOS in July 2006, the investigation into the Applicant's case had not been completed and it was still active. Neither the investigation nor the rebuttal was ever completed.

72. On 21 April 2006, the Director ID/OIOS called the Applicant and informed her that she had been told to reprioritize her cases and the Applicant's was no longer one of the priority cases.

73. On 1 January 2006 a new evaluation unit called the Policy Development and Evaluation Service was set up to replace EPAU. The Applicant was instructed by the Chief of the new unit not to apply for positions in the new unit.

74. The Applicant was given 100% medical clearance in March 2006. On 4 May 2006, she was informed that her contract would not be renewed beyond 31 May 2006. She received notice of separation from EPAU on 30 May 2006. Her request to DHRM on 30 May 2006 to be granted Special Leave With Out Pay ("SLWOP") from EPAU so as to retain her pension rights while she looked for another job, was denied.

Applicant's submissions

75. The Applicant's principal arguments are:

a. The non-renewal of her contract with the IGO on performance grounds was illegal and unlawful;

b. Her removal from the IGO post as Senior Investigation Officer pending the outcome of the rebuttal process and while she was on sick leave was illegal;

c. She was denied due process in the non-renewal of her contract which encompasses a right to have a completed PAR;

d. She was subjected to due process violations in her PAR process including the right to have a rebuttal panel outcome for an impugned PAR;

e. The negative PAR was a tool of retaliation against her;

f. She is a victim of retaliation for insisting on reporting misconduct to her supervisors which confronted them with uncomfortable facts that they ought to have addressed;

g. She was not protected from reprisals for reporting misconduct, harassment and abuse of authority; and

h. She was denied a right to an investigation by OIOS into the allegations against her and her supervisors.

Respondent's submissions

76. The Respondent's principal contentions are:

a. The Applicant's claim is not receivable because the contested administrative decision was implicitly withdrawn and never implemented. This is because the Applicant continued to receive an FTA with EPAU-UNHCR as such there was no direct legal consequence to her;

b. The original decision not to renew the Applicant's FTA with IGO was erroneous as the Applicant was on sick leave and the rebuttal of her PAR was pending;

c. The disputed PAR was withdrawn from the Applicant's file as such she was *de facto* placed into an *ex tunc* situation i.e. there is no disputed PAR;

d. The Applicant frustrated and delayed the completion of her PAR. The administration was *de facto* held at ransom by the active refusal of the Applicant to adhere to established rules;

e. The fact that the PAR was not completed, should not be considered as an argument by the Applicant in the furtherance of her claim, but rather, should demonstrate how the system was manipulated with a view to undermining the PAR process and its related impact on the Applicant's contractual status;

f. The Applicant's due process rights in relation to the rebuttal of the PAR were observed in spite of an inconclusive result by the rebuttal panel; and

g. The Applicant had no right to remain assigned to tasks with IGO, the High Commissioner has discretion to assign staff members as he deems appropriate.

Considerations

Issue 1: Was the decision not to renew the Applicant's FTA with the IGO lawful?

77. The non-renewal of an FTA may be impugned if it is in breach of applicable rules and policies and/or if it was motivated by extraneous considerations. Each of these two elements is relevant to this case. The Tribunal is to determine: (i) if the Applicant's performance was correctly evaluated in accordance with the regulations and policies in force at the time and (ii) if her negative PAR and subsequent non-renewal were motivated by acts of retaliation.

a. Performance Evaluation

78. At the relevant time the key elements of UNHCR's Career Management System were Performance Appraisal, Staff Development, Career Planning and Counseling and CMS Information.

79. An enhanced PAR was designed to regularly provide feedback on the performance of staff based on set work objectives and competencies defined at the beginning of the performance cycle and reviewed through ongoing dialogue between the supervisor and the staff member. It included training and development plans. It comprised of three steps:

> **Step 1 –** The supervisor and the staff member to agree on objectives, competencies and training and development during months 1-2 of the CMS year.
>
> **Step 2 –** Mid-term progress review conducted by the staff member and the supervisor to discuss the following:
>
> - Progress in meeting objectives, and demonstration of competencies;
> - Any problems and how to resolve them (including any additional training and/or development required);
> - Additions or modifications to objectives and/or competencies as a result of any changes in circumstances;
> - A brief written record describing the conclusions of the mid-term progress review and agreed actions is entered on the Annual Appraisal form (PAR 1) by the supervisor. The staff member may add comments to the form if he/she so wishes. In addition, regular informal reviews and continuous discussions of performance and expectations are encouraged throughout the CMS year in addition to the mid-term review.

Step 3 - Annual appraisal discussion and rating of performance

The PAR was to be prepared annually, and was required to be completed prior to taking a decision not to renew a contract for performance reasons;

The completed PAR form, including all signatures was sent to the Performance Management Unit (PMU), DHRM at Headquarters.

The role of the Performance Management Unit (PMU) in DHRM included monitoring the application of the performance appraisal process in order to ensure consistency, and serving as Secretary to the Rebuttal Board.

80. The Respondent has acknowledged that the contested decision made on 25 August 2004 not to renew the Applicant's FTA beyond its expiry date of 1 September 2004 was made on grounds of unsatisfactory performance by the Applicant.

81. He also acknowledges that the PAR which documented the Applicant's performance was not completed either at the time of the contested decision or the expiry of the FTA, that the Applicant expressed her disagreement of the PAR rating, took steps to commence rebuttal procedures and that she was on sick leave until November 2005.

82. Additionally, the Respondent conceded that none of the proper procedures had been followed to validate the supervisor's evaluation of the Applicant's performance before the contested decision was made. This is an appropriate concession by UNHCR. The correspondence from PMU to the supervisor and the advice to the supervisor from the Deputy Director of DHRM[1] demonstrates that the Respondent was aware of the unlawfulness of the procedure from 16 September 2004.

[1] See para 53 and 55.

83. In spite of these concessions the Respondent alleged that the actions of the Administration were justified for two reasons: firstly, that the Applicant contributed to delays in the PAR process and was responsible for its non-completion and secondly because of her poor work performance.

(i) Applicant's contribution

84. The only evidence adduced to support this contention was the supervisor's *ex post facto* justification to PMU on 17 September 2004.[2] There is no contemporaneous written evidence to substantiate the claim that the Applicant had been repeatedly offered in writing to meet to discuss the supervisor's final assessment of her performance. There is no evidence of any written requests from the supervisor to the Applicant to engage in a review of her mid-term assessment.

85. The email exchanges of 6 February 2004 show that the Applicant promptly responded to requests from her supervisor about finalizing the objectives.

86. The first written indication that the Administration held the Applicant responsible for delays in the CMS process was in the letter from her supervisor on 12 August 2004 when she was at home on sick leave.

87. The Tribunal rejects the Respondent's allegation that the Applicant was responsible for the procedural breaches in the CMS process. It was a system that required mutuality and cooperation from both the supervisor and the Applicant. Apart from his attempts to finalize the objectives in February 2004 there is no evidence that the supervisor took or requested the Applicant to take any steps in the process until he was prompted to do so by the Personnel Administration section a month before the Applicant's FTA was due to expire.

88. The Tribunal accepts the Applicant's un-contradicted evidence about the PAR process as truthful and finds that she did attempt to finalise the objectives as required by sending in revised objectives to her supervisor and meeting with her supervisor. That process was not completed because the supervisor left

[2] See para 54.

the meeting early to attend to other matters. She was not shown the supervisor's mid-term assessment before the PAR was completed. She completed her own mid term assessment but the vehicle accident while on mission in Indonesia delayed her submitting it.

89. None of the Applicant's actions exonerate the Administration from responsibility for its breaches of the CMS process.

(ii) Performance

90. Although the Respondent sought to justify the non-renewal of the Applicant's contract on the basis of her unsatisfactory performance, Counsel for the Respondent neither challenged by cross-examination any of the Applicant's statements to the Tribunal about her performance, nor called any witness in response.

91. Instead, the Respondent asked the Tribunal to refer to and take into account a document containing the comments made to the Rebuttal Panel by the Applicant's supervisor and the former DIG/IGO on 20 and 28 January 2005 respectively. He alleged that this demonstrated that the Applicant's accounts of alleged retaliation/harassment and obstruction were entirely incorrect and arose from differences in opinion over purely work related matters and decisions. He also submitted that the supervisor's document would "provide in-depth insight into the performance and work related content of these documents".

92. None of the documents submitted to the Rebuttal Panel can be used in this manner by the Tribunal. The supervisor's comments on the Applicant's performance were prepared for a Rebuttal process which was never completed. It contains allegations and opinions about the performance of the Applicant to which she has strongly objected and which have never been tested by an independent body. The supervisor's statement proves nothing at all except the fact of its own existence.

93. If, as alleged by the Respondent, there were genuine concerns about the Applicant's performance, the supervisor did not have any dedicated performance discussions with the Applicant at the time the issues arose as recommended by the Career Management System and he did not refer these to PMU as required.

94. The Tribunal finds that the breaches of the performance management process were:

a. The finalisation of the PAR without any input from the Applicant was a serious breach of her right due process and contrary to sections 2, 14 to 21 of IOM/54/97-FOM/61/97 and IOM/31/2000-FOM/32/2000 (Revised Performance Appraisal Report). This was compounded by the fact that she was on sick leave. In spite of agreeing to be patient, the supervisor moved to complete the PAR in her absence without waiting for her return from sick leave;

b. The PAR had not been completed either at the time of the contested decision or the expiry of the Applicant's FTA. This is contrary to section 21 of IOM/54/97-FOM/61/97;

c. The Administration proceeded with its decision not to renew the Applicant's contract although she had referred her PAR for Rebuttal which is contrary to annex 2, attachment 1.2 of IOM/54/97-FOM/61/97 on disagreements relating to performance appraisal and rebuttal procedures; and

d. None of the proper procedures had been followed to validate the supervisor's evaluation of the Applicant's performance before the contested decision was made.

95. For these reasons the Tribunal holds that the processing of the Applicant's PAR was unlawful. It was completed in haste and in hindsight once a decision was made not to renew her contract. If the PAR had been subsequently withdrawn from the Applicant's Official Status File by the Administration, the Applicant had not been advised of this fact until the hearing of this case by the Tribunal.

96. The Tribunal finds that as the Applicant's performance was not correctly evaluated in accordance with the regulations and policies in force at the time, the decision not to renew her FTA with the IGO on performance grounds was unlawful.

b. Acts of Retaliation

97. The relevant UNHCR provision in force at the material time was IOM/FOM/65/2003

> 5.2.8 No action may be taken against staff or others as a reprisal for reporting allegations of misconduct or disclosing information to, or otherwise co-operating with, the IGO. An investigation will be initiated against any staff member who is credibly alleged to have retaliated against another staff member or other person who submitted a complaint to the IGO or otherwise co-operated with the IGO.

98. In *Wasserstrom* UNDT/2012/092 the Tribunal stated:

> […] Maladministration or the reasonable belief that it may have occurred is usually identified by a staff member in the course of their carrying out their normal day–to–day functions. To exclude such circumstances from protected status will effectively render nugatory the underlying purpose of the policy underpinning protection to whistleblowers enshrined in ST/SGB/2005/21.

99. The issue is one of causation: was the unsatisfactory PAR and non-renewal of the Applicant's contract properly based on actual substandard performance or was it in reprisal for her reports of misconduct by other and more senior staff insisting that her supervisors formally investigate those allegations.

100. Having found that the decision not to renew the Applicant's FTA on performance grounds was unlawful this allegation may appear to be moot. However the Tribunal holds that the Applicant's case is so grounded in the allegation of retaliation and the Respondent's denial of this is so adamant that it is necessary to consider this issue particularly as it is relevant to the consideration of compensation.

101. By its very nature, an allegation of retaliation can be difficult to evaluate when, as Mr. Verwey put it, seemingly rational administrative arguments are used to justify seemingly rational administrative decisions. In this case the evidence is as follows:

102. The Applicant's job description required her, *inter alia*, to advise the Inspector General and the Head of the Investigation Unit on the legal implications and impediments with respect to the overall United Nations disciplinary procedures and the IGO investigative initiatives and to screen investigation reports to ensure compliance with United Nations rules and regulations and directives while taking into account the UNHCR mandate. The Applicant testified that the matters of concern that she raised with her supervisors were in pursuit of these duties.

103. In 2003 and 2004 the Applicant made several reports of misconduct including: misconduct by senior staff members who had undertaken an internal investigation into a complaint that a UNHCR staff had raped a junior staff member; the hiring of a staff member in the IGO who was at the material time a subject of investigation by the IGO and the Applicant being told not to inform the staff member of that fact, which was in violation of his due process rights and about the IGO internal procedures. In at least one of these she was initially supported by her supervisor.

104. The Tribunal observes that from the time the Applicant interviewed the then DIG/IGO on 19 December 2003 about the obstruction of the Sri Lankan investigation, the relations between the Applicant and her supervisor became strained. The Applicant's criticisms about the IGO processes were characterized not as a legitimate exercise of her duties in her job description but as breaches of authority, office disagreements and performance issues. The Applicant's request for the allegation of breach of confidentiality to be sent to OIOS for independent assessment was not followed up by her managers.

105. The email exchanges between the Applicant and her supervisor in February and March 2004 raised issues of transparency in the IGO and an allegation of breach of confidentiality. They were closed by the supervisor after email exchanges however each issue surfaced again in the PAR as performance management warnings.

106. The Tribunal expressly relies on the evidence of Mr. Verwey to corroborate the Applicant's allegation of ill motivation by the administration. This highly committed, senior former staff member of UNHCR, who had 31 years of experience, described his observations of the Administration taking steps to undermine individuals who did not produce anticipated results. He personally observed the same methods being used on the Applicant.

107. There can be no doubt that the Applicant's uncompromising stance on the application of ethical and procedural standards to investigations caused discomfort at the highest levels. The official response was consistent with that observed in other similar contexts by Mr. Verwey.

108. The negative mid-term assessment which was apparently unilaterally prepared by the supervisor in April 2004 followed closely after the Applicant's allegations of misconduct by UNHCR officials and her criticism of IGO internal procedures. The Tribunal concludes that the Administration chose to mischaracterise these allegations as poor performance rather than to properly investigate them or refer one of them to OIOS as the Applicant requested. The subsequent unlawfully prepared negative PAR and non-renewal of the Applicant's contract was a consequence of the Administration's dissatisfaction with her criticism of the investigative methods and procedures used by individuals in IGO.

109. The failure of the supervisor to refer the Applicant's alleged performance issues to PMU as required by the CMS when those concerns first came to light in early 2004 brings into serious question whether the concerns of the Administration were genuinely about performance.

110. The Tribunal holds that the Applicant has substantiated her case on the balance of probabilities that the negative PAR and the non-renewal of her FTA were acts of retaliation against her for questioning the investigation methods of the IGO and requesting investigations into the conduct of some senior officials.

Issue 2: Did the Organization implement the decision not to renew the Applicant's contract?

111. The Respondent acknowledges that there was an administrative decision not to renew the Applicant's FTA but now states that as this decision was never implemented and therefore it had no legal consequence on the Applicant as she had no break-in-service until she was separated from the Organization in 2006.

112. The Respondent raised this issue for the first time at the hearing on the merits of this case in February 2013. It did not form part of his reply to the substantive Application nor was it raised during the case management meetings which preceded the hearing.

113. Whether a decision has a legal consequence or a direct impact on the terms of appointment of a staff member is largely a question of fact. It is necessary to examine and compare the terms of the Applicant's contract with IGO and her subsequent appointments with EPAU and the circumstances surrounding it.

114. The Applicant received a letter of offer dated 20 June 2003 for a one year FTA under the 100 series of Staff Rules as a Senior Investigation Officer, IGO in Geneva, Switzerland, at the P4 level step 6. The offer stated that "The Standard Assignment Length for this appointment is normally four years." Her appointment was for an initial period of one-year, renewable upon its expiration, subject to the exigencies of service and the agreement of all concerned. The Applicant accepted the terms of this offer by signing and returning a copy.

115. On 8 October 2003 she signed a letter of Appointment which stated: "You are hereby offered a Fixed Term Appointment in the Office of the United Nations High Commissioner for Refugees, in accordance with the terms and conditions specified below." The specified conditions included her

assignment as Senior Investigation Officer. The effective date of appointment was 2 September 2003.

116. On 27 August 2004 the Applicant received a memorandum from DHRM, advising that her FTA would be expiring but that "since you are presently on sick leave your appointment will be extended as an administrative measure for the duration of your sick leave."

117. The Applicant received a confirmation of this from the then Deputy Director DHRM on 28 September 2004. He confirmed the end of her sick leave was 31 October 2004 at which stage her separation would become effective.

118. A Personnel Action recorded that the Applicant was on SLWFP for the month of October 2004, which had been exceptionally approved. It observed that she would not accrue any credit toward salary increment, annual or sick leave during this period and the appointment was solely extended to cover sick leave. The Applicant rejected this offer.

119. On 4 October 2004, the Applicant commenced work with EPAU. Her letter of appointment was not in the same form as that in the IGO contract. It gave her the title of Senior Evaluation officer. She was no longer a Senior Investigation Officer. The initial appointment was for one month, two weeks and two days. It was solely extended for the purpose of sick leave. Unlike the IGO contract it did not state that it was renewable upon its expiration and it was not accompanied by a letter of offer which referred to a standard assignment length of four years. The Administration referred to her as a SIBA.

120. Following an initial contract period of three weeks with EPAU her contract was extended, first to the end of October for the purpose of sick leave and thereafter for various periods of one, two, three, and on one occasion six months.

121. At the beginning of 2006 EPAU was abolished and the Applicant's employment with UNHCR finally came to an end on 31 May 2006.

122. On the basis of these facts the Tribunal concludes that the administrative decision to end her contract with IGO had a direct impact on the terms of her

appointment with UNHCR and her contract of employment. The engagement by EPAU was in all senses an interim arrangement to ensure the Applicant's employment until the expiry of her sick leave and until the resolution of the rebuttal procedure both of which lasted beyond the expiry of her IGO contract.

123. Although not pleaded by the Respondent, the Tribunal raised the issue of whether her acceptance of the EPAU post estopped the Applicant from her claim of non-renewal. The facts however do not support this. When Mr. Verwey confirmed with the then Deputy Director DHRM in May 2005 that the EPAU Administrative Budget and Obligation Document could be adjusted to accommodate the Applicant's salary he stated that this was strictly a practical administrative measure without any consequences for her case.

124. Although the Applicant used the assistance of the mediator during the relevant period there is no evidence of a concluded settlement agreement that resolved the issues she had raised about the circumstances of the non-renewal of her contract with IGO.

125. The Applicant's employment by EPAU was not as the result of a transfer or reassignment. It was a new and separate offer of employment which was fortuitously made at the time when her FTA with IGO was not renewed.

126. The Tribunal finds for these reasons that the Administration did implement its decision not to extend the Applicant's FTA as Senior Investigative Officer with IGO. Although her subsequent engagement by EPAU meant that the Applicant retained her salary for a period of time, the non-renewal decision had a direct legal impact on the terms of her appointment.

Accountability

127. The evidence in this case has revealed one serious matter that must be brought to the attention of the Secretary-General pursuant to art. 10.8 of the Statute of the Dispute Tribunal for possible action to enforce accountability. This is the attempt to interfere in the Applicant's rebuttal process by:

a. The Executive office of UNHCR;

b. The UNHCR Department of Human Resources Management; and

c. The UNHCR Legal Affairs Unit.

128. The Tribunal notes that the referral to OIOS from the Rebuttal Panel was not dealt with or concluded and according to the evidence of Mr. Montil never reached the Applicant's file. No individuals were identified who can be held responsible for this. However the Tribunal finds that the actions of the then Head of the PMU and the then head of the Legal Affairs Section as directed by the Executive Office of UNHCR and the failure of OIOS to investigate and call these individuals to account as requested by Ms. Brzak has contributed to the costs to the Organization as ordered by this Tribunal.

Remedies

129. Pursuant to art. 10.5(b) of the Tribunal's Statue the Tribunal may award compensation, which shall normally not exceed the equivalent of two years' net base salary of the Applicant. In exceptional cases the Tribunal may order the payment of a higher compensation and shall provide the reasons for that decision.

130. The Tribunal may only award compensation for losses which arise directly out of the proven breaches.

131. In *Massabni* 2012-UNAT-238, the Appeal's Tribunal stated:

> Consistent with the jurisprudence of this Tribunal in *Wu* and other cases, not every administrative wrongdoing will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. The claimant carries the burden of proof about the existence of factors causing damage to the victim's psychological, emotional and spiritual wellbeing. When the circumstances of a certain case do not allow the Judge to presume that kind of damage as a normal consequence to an average person placed in the same situation of the claimant, evidence must be produced and the lack of it will lead to the denial of compensation.

132. Pursuant to art. 10.5 (a) of the Tribunal's Statute, the Tribunal may rescind the contested administrative decision and, in the case of termination set an amount of compensation the respondent may pay as an alternative to rescission.

133. In her Application the Applicant stated: "I have not and do not claim that under the staff rules and the terms of my contract with UNHCR, or on the basis of the Administrations actions, I had grounds to expect the renewal of my appointment as Senior Investigation Officer in the Inspector General's Office, UNHCR. I did, however, have grounds to expect to be treated with fairness, honesty and with the full respect of my right to due process."

134. The Applicant gave evidence to the Tribunal about the effects that this case has had on her. In spite of numerous applications for posts and apart from some temporary assignments with the Office for the Coordination of Humanitarian Affairs and the International Labour Organization, since the end of her EPAU contracts she was out of permanent work until she retrained as a teacher in 2012 and took up a new profession as a University professor.

135. She lost access to the United Nations Pension Fund and to her continuing career progression within the United Nations.

136. She explained that it was known in the small world of the United Nations that she had been removed for performance issues and this has left her under a cloud. She expressed deep disappointment that these events took place in IGO when it was incumbent on that office to sort out such issues. She regretted that the allegations about her performance were used as a rationale not to afford her protection against retaliation.

137. She described the damaging effects of nine years of litigation before this case could be determined. She initially retained private counsel but could not afford to continue after incurring substantial legal costs. She presented invoices for the period 23 September 2008 to 9 November 2009 amounting to GBP11,826.75 and for 26 January 2010 to 22 November 2010 amounting to GBP4,264.50.

138. But for the unlawful non-renewal of her contract the Applicant had the chance of being engaged as a Senior Investigation Officer for the four years referred to in her letter of offer in June 2003. Although these four years were subject to exigencies the IGO remained in existence throughout that period.

139. The Applicant's financial losses arising from the non-renewal were to a large extent mitigated by the two years' full employment at EPAU. The Tribunal finds the amount the Respondent should pay in lieu of rescission is one year's full salary with full benefits that would have accrued to her as at her time of employment.

140. On the basis of the Applicant's evidence there can be no doubt about the serious stress and reputational damage caused to her by the discredited negative PAR and the non-renewal on the grounds of unsatisfactory performance particularly in the light of her otherwise highly rated performances at numerous other agencies. In addition she has borne the disappointment of retaliation against her by formerly respected colleagues for identifying and insisting on an investigation into misconduct she genuinely believed was occurring.

141. Accordingly the Tribunal awards the Applicant compensation for moral damages in the sum of USD50,000.

Costs

142. The Tribunal may only award costs if it finds that there has been a manifest abuse of proceedings. This case has taken nine years to reach a decision. That delay cannot be attributed to either party. The changes to the internal justice system are a major contributing factor.

143. However, from the commencement of the proceedings, the Respondent has consistently denied that there was any defect in the PAR process. It was only at the hearing that the Respondent conceded breaches of the CMS procedures. At that stage, Counsel for the Respondent raised the completely new argument that as the decision to terminate the Applicant had never been implemented it did not have any impact on the Applicant. At the end of the hearing the Respondent

disclosed for the first time in his submissions that there is "no unfavorable PAR in respect of the Applicant on UNHCR Records."

144. The Tribunal regards the Respondent's failure to make appropriate concessions of procedural breaches at an early stage as a manifest abuse of the proceedings. There were numerous opportunities for this to occur during the pre-hearing phase of the case including at Case Management Hearings. Such concessions would have resulted in the narrowing of the issues and possibly even a settlement of the case. This failure has added to the Applicant's legal costs, a proportion of which should be refunded to her.

145. The Applicant's legal costs were incurred partially in the preparation of this case and partially in the preparation of the application contesting the decision of the Ethics Office.[3] The first invoice covered appearances by counsel in this case in July 2009 when the matter was being transferred from the former UN Administrative Tribunal to the Geneva Registry of this Tribunal. However as much of the work at that time was in relation to the Ethics case only a third of the first invoice (23 September 2008 to 9 November 2009) should be borne by UNHCR. This amounts to GBP3,942.25. The second invoice covered a period of more activity concerning this case. One half of that invoice should be borne by UNHCR amounting to GBP2,132.25.

146. The total costs to be paid by UNHCR in legal fees is GBP6,074.50

147. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the US Prime Rate in effect from the date of expiry of the 60-day period to the date of payment.

Summary of the findings and remedies

148. In view of the foregoing, the Tribunal **DECIDES:**

a. The decision not to renew the Applicant's contract was unlawful;

[3] Case number: UNDT/NBI/2010/054/UNAT/1680, Judgment number: UNDT/2013/085

b. The Respondent failed to adhere to its lawful obligations in the Performance Management process;

c. The irregular preparation of the unsubstantiated and therefore unlawful PAR was a retaliatory act;

d. The decision not to renew the Applicant's contract by the IGO was implemented;

e. The Respondent is to pay to the Applicant:

(i) One year's salary and all benefits that would have accrued to her. These are to be computed at the Applicant's category and level of employment at the time of her separation from the Organization;

(ii) USD50,000 for moral damages; and

(iii) GBP6,074.50 for legal costs.

f. The Respondent shall bear all the costs of the execution of this Judgment.

(Signed)

Judge Coral Shaw

Dated this 28th day of May 2013

Entered in the Register on this 28th day of May 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi