

NINETY-SEVENTH SESSION

Judgment No. 2347

The Administrative Tribunal,

Considering the complaint filed by Mrs A. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 May 2003 and corrected on 2 September, the Organization's reply of 16 December 2003, the complainant's rejoinder of 9 February 2004 and UNESCO's surrejoinder of 21 April 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1947 and has Italian nationality. In 1981 she joined the International Centre for Theoretical Physics (ICTP) in Trieste, Italy, which has been administered by UNESCO since 1996. The complainant was initially employed as a Clerk in the Travel Services section of ICTP's Financial Services division. In 1989 she was appointed Supervisor of Travel Services at grade G 5, a position which she held until March 2000. She is currently employed under a fixed term contract in the Invoice Control unit, still at grade G 5.

In November 1999 the complainant's performance report for the period August 1997 to October 1999 was drawn up by the Finance Officer – the head of Financial Services, who was then her immediate supervisor. The report showed a global rating of C, which is defined on the appraisal form as denoting a “quality and quantity of work corresponding to the level required for the performance of assigned tasks”. However, for the performance of her supervisory functions the Finance Officer gave her a D rating, corresponding to a “quality and quantity of work slightly below the level required for the performance of some assigned tasks”. The Director of Administration confirmed both ratings after having discussed the report with the complainant and her supervisor, in accordance with the applicable procedure. In December 1999 the complainant contested this appraisal, which was duly submitted to the Reports Board for review. Until then, her performance had consistently been rated satisfactory.

At the beginning of 2000 a reorganisation of Financial Services was undertaken. New posts were defined with new titles, and the corresponding post descriptions were submitted to UNESCO headquarters in February for classification. Pending a final decision on classification, the complainant's supervisor began to implement the planned reorganisation on a provisional basis. To that end, he informed the complainant by a memorandum of 2 March that she was temporarily assigned, with effect from 6 March 2000, to the post of Coordinator of the Travel Office of the new Operations and Travel Unit, and that she was to report directly to the acting Supervisor of that Unit.

The complainant objected to this assignment, particularly because she regarded her new direct supervisor as a junior colleague who had no experience of supervisory duties. She submitted a protest to the Director-General on 13 April 2000, alleging prejudice and discrimination against herself and preferential treatment towards her new supervisor. On 18 July, having received no reply to her protest within the statutory deadline, she initiated an internal appeal before the Appeals Board against the decision of 2 March 2000, claiming reinstatement in her previous position, amendment of her performance appraisal report and moral damages for injury to her dignity.

In August 2000 the classification of the new posts was confirmed by headquarters and a vacancy notice was published for the post of Supervisor of the Operations and Travel Unit, which was offered at grade G 6. The complainant applied for this post on 13 September 2000.

On 17 January 2001 the Finance Officer recommended that the complainant's within-grade increment, due on 1

January 2001, be deferred for six months on the grounds of unsatisfactory results achieved by the Travel Office, errors in the complainant's work and her "lack of a cooperative attitude", a decision which was in turn challenged by the complainant and referred to the Reports Board for review. Also on 17 January the Director of Administration notified the complainant that she had not been selected for the post of Supervisor of the Operations and Travel Unit.

By a memorandum of 27 February 2001 the Director of Administration informed the complainant that as from 1 March she would be assigned to Invoice Control. The complainant challenged this decision by submitting a second protest to the Director-General, dated 15 March 2001. In that protest, she also contested the validity of the job description she had been given as Coordinator of the Travel Office, alleging that it had not been approved by UNESCO headquarters, and the qualification requirements of the vacancy notice for the post of Supervisor of the Operations and Travel Unit, insofar as they did not include experience in travel matters. Having again received no reply to her protest within the statutory deadline, she initiated a second appeal before the Appeals Board on 28 May 2001.

In June 2001 the Reports Board issued its report on the complainant's contested performance appraisal and the deferment of her within-grade increment. The Board recommended that the performance report be maintained as it stood, but that the increment be granted retroactively as from the date on which it fell due. It also recommended that a further performance appraisal be carried out within six months, since the complainant had recently been assigned to a new post. These recommendations were subsequently endorsed by the Director of Human Resources Management.

Having joined the complainant's two appeals, the Appeals Board issued its report on 19 December 2002. It concluded that the complainant had proved her case of prejudice, discrimination and preferential treatment and recommended that an enquiry be conducted into the facts of the case. The Board further recommended that the D rating be removed from the contested performance report, and that the complainant be paid 10,000 United States dollars in moral damages, 5,000 dollars in costs, as well as travel expenses and a per diem for her stay in Paris for the appeal proceedings.

By a letter of 26 February 2003 the Director-General informed the complainant that he had decided to reject the recommendations of the Appeals Board on the grounds that they were legally unfounded. That is the impugned decision.

B. The complainant has four pleas. She contends, firstly, that the impugned decision is vitiated by an error of law. Referring to Judgments 2092 and 2261, she submits that the decision contravenes the principle whereby any decision adversely affecting a staff member must be reasoned.

Secondly, the complainant argues that the impugned decision was tainted with abuse of authority in that it was taken for reasons extraneous to the Organization's best interests. In particular, she asserts that the adverse performance appraisal, her assignment to the post of Coordinator of the Travel Office and the drafting of the vacancy notice for the post of Supervisor of the Operations and Travel Unit were intended to secure the promotion of a junior staff member at the expense of her own career in UNESCO.

The complainant's third plea is that there was breach of the Organization's duty to protect its staff members' dignity and to compensate them for the injury suffered. Referring to Judgment 2229, she submits that the two successive decisions to transfer her, occurring within less than a year with neither justification nor prior warning, did not respect her dignity. In addition, these transfers amounted to *de facto* downgrading, since they deprived her of supervisory duties. She also alleges that she was made to report to G 3 and G 4 staff members – her former subordinates – when her supervisor was absent, and that her supervisors subjected her to moral harassment by their criticism of her work.

Lastly, the complainant contends that the Organization breached its obligation to compensate her for injury caused by the malfunctioning of administrative mechanisms. She refers to the fact that the Reports Board took approximately 18 months to submit its report regarding her performance appraisal, whilst the internal appeal procedure lasted three years, and argues that as a result of those delays the selection for the post of Supervisor of the Operations and Travel Unit was "based on false assumptions".

The complainant asks the Tribunal to set aside the impugned decision; to order the Organization to reinstate her "in

her position as Supervisor, Travel Services (now named Supervisor, Operations and Travel)” with retroactive effect, applying interest at an annual rate of 8 per cent to all sums due as a result of such reinstatement; alternatively, to order the Organization to place her at grade G 6, step 7, with retroactive effect from January 2001, applying interest at the same rate to the resulting difference in salary; alternatively, to order the Organization to reinstate her in a position “in keeping with her background, qualifications, position and status within the Organization” and to compensate her for the loss she has suffered “to date” in terms of salary and pension entitlements. Irrespective of the Tribunal’s decision on the above alternatives, she also claims 100,000 euros in moral damages, 6,000 euros in costs for the internal appeals procedure and a further award of costs for the present proceedings.

C. In its reply the Organization submits that the complaint is partially irreceivable, particularly as regards her performance appraisal, which, at the time when the complainant filed her first appeal, had not yet been reviewed by the Reports Board and had not been the subject of a final decision. Similarly, concerning the contested vacancy notice it points out, firstly, that the notice was not challenged within the statutory two-month time limit and, secondly, that it did not constitute a challengeable decision, that is to say an administrative decision violating the terms of her appointment or the Staff Regulations and Rules.

In its preliminary observations on the merits, the Organization criticises the Appeals Board for producing a report “replete with assumptions, innuendoes and speculations”, and for “delv[ing] into matters that were not properly before it”.

As regards the performance appraisal, the Organization argues that the Appeals Board exceeded its jurisdiction by examining the substantive issue of the complainant’s efficiency. Also, the Board failed to substantiate its finding that the performance report was tainted with “prejudice and consideration of extraneous factors” and disregarded the factual determinations of the Reports Board.

UNESCO maintains that the decisions to reassign the complainant fully complied with the conditions defined in the relevant case law and were taken for no other reason than the reorganisation of Financial Services, which was in the Organization’s best interest. It rejects as unfounded the allegation that the complainant had to report to junior colleagues: the acting supervisor of the new Operations and Travel Unit held the same G 5 grade as her, whilst the instructions to report to G 3 and G 4 colleagues during her supervisor’s absences concerned the Operations Office and not the Travel Office, to which the complainant was assigned. It concludes that her claim for moral damages is without merit.

According to the Organization, the complainant’s job description as Coordinator of the Travel Office was in fact approved at headquarters. As for the vacancy notice, it points out that it is not for the complainant to determine the qualification requirements of a vacant post. The post of Supervisor of the Operations and Travel Unit is a new post including only some of the complainant’s former duties and requiring additional, higher qualifications. Far from having proved that the vacancy notice was tainted with prejudice, the complainant is relying on findings of the Appeals Board concerning issues which the latter was not competent to examine, such as the relative merits of the candidates for the vacancy.

D. In her rejoinder the complainant dismisses the defendant’s objections to receivability on several grounds. Firstly, she submits that the Organization has failed to show how the alleged irreceivability would affect the grounds of illegality of the impugned decision put forward in her complaint. Secondly, she observes that these objections were not raised by the Director General in the impugned decision. Thirdly, she considers them to be contrary to the principle of good faith, given the failure of the Reports Board to review her performance appraisal within a reasonable time, the excessive duration of the internal appeal proceedings and the fact that the content of the vacancy notice was clearly at issue in the protest she lodged with the Director-General on 15 March 2001.

Denouncing the Organization’s failure to address the four grounds of illegality on which she relies, she presses her pleas on the merits.

E. In its surrejoinder the Organization maintains its objections to receivability and likewise its arguments on the merits. It submits that the complainant’s four “grounds of illegality” are claims to rulings in law which, in the absence of a cause of action, cannot stand.

CONSIDERATIONS

1. By two internal appeals, the complainant challenged a negative appraisal of her performance of supervisory functions, a decision to defer her within grade salary increment, two successive reassignments and the validity of the vacancy announcement for a supervisory post for which she had applied unsuccessfully.

2. Although the facts were contemporaneous with the reorganisation of her division, the complainant maintains that, taken as a whole, they reveal prejudice and an overriding intention to strip her of her supervisory functions while securing the promotion of a junior staff member favoured by her supervisor.

3. On 19 December 2002 the Appeals Board, having joined the two appeals, submitted its opinion and recommendation to the Director General. The Appeals Board analysed in particular the following issues: the adverse performance report; the withholding of the within grade increment; two successive transfers in the course of one year; reporting to junior staff members; the vacancy notice; and the selection process. It concluded that prejudice and discrimination had occurred and that the complainant had suffered injury to her career, reputation and dignity. The following extracts summarise the Board's findings:

“67. The issue is whether the actions against the appellant were taken in ordinary course and fairly, objectively, impartially in due discharge of normal functions and duties or whether they were done with some oblique motive to promote another staff member junior to the appellant at the cost of the appellant's career in UNESCO.

68. It may be difficult to find a precedent where so many adverse steps affecting a staff member have been taken in a span of two years, not only affecting her career but inflicting considerable mental harassment and indignity to her.

[...]

85. The Appeals Board is of [the] opinion that the appellant has proved her case of prejudice, discrimination and preferential treatment. There are also extraneous considerations for all the above mentioned decisions which have affected her professional career, image [and] reputation and violated her dignity.”

4. The Appeals Board recommended to the Director General that an enquiry be directed into all the issues considered by the Board. It also recommended removing the D rating from the complainant's performance report, and paying her 10,000 United States dollars in moral damages, 5,000 dollars in costs and expenses incurred in attending the proceedings before the Board.

5. On 26 February 2003 the Director General took the following decision, which the complainant now impugns:

“After careful consideration of the report of the Appeals Board dated 19 December 2002 [...] and examination of the entire dossier relating to your appeal, I have decided not to accept the recommendations of the Appeals Board on the grounds that they are legally unfounded.”

6. The complainant argues that the impugned decision was illegal since it was flawed by both an error of law and an abuse of authority. Furthermore, she argues that there has been a breach of the duty to protect staff members' dignity and to compensate them for injury suffered, as well as a breach of the Organization's duty to compensate staff for injury resulting from malfunctioning of administrative mechanisms. More specifically, the complainant relies on the case law of this Tribunal to argue that the impugned decision was not reasoned. She submits that it was not enough to state that the Appeals Board's recommendations were “legally unfounded”, since the Director General was under the obligation to explain why he had reached that conclusion, which he failed to do.

7. Furthermore, the complainant argues that the adverse performance report, her subsequent transfer and the way in which the vacancy notice was drafted were intended to promote a junior staff member at the expense of the complainant's career in the Organization, and thus constitute an abuse of authority.

8. The complainant also states that the Organization did not comply with its obligation to treat its staff members with dignity and to avoid causing them undue and unnecessary hardship. In support of her argument that

two transfer decisions taken within one year did not respect her dignity, she asserts they were taken without any justification or prior warning, that she was *de facto* downgraded and provided with work at a lower level that did not match her qualifications, and that she was placed under the supervision of a junior staff member. The complainant also considers that she has been subjected to moral harassment, since her work has been regularly and unjustly criticised by her new supervisor as well as by the Finance Officer.

9. Lastly, the complainant argues that in the present case there has been a poor functioning of administrative mechanisms on more than one occasion, which has entailed for her considerable prejudice. In this regard, she points out that despite the fact that it was of the utmost importance that her appeals be dealt with expeditiously by the Organization, the internal appeal procedure lasted three years, partly because it took the Organization an incredibly long time to submit its replies before the Appeals Board (one year and four months for the first appeal, eleven months for the second appeal).

10. In its reply the defendant questions the receivability of the first internal appeal with regard to a number, but not all, of the points taken before and accepted by the Appeals Board. It also launches a vigorous attack on the Board's reasoning and in particular on its findings of fact. The Tribunal cannot accept any of the Organization's arguments.

11. It is trite law that any decision negatively affecting a staff member must be reasoned. The Tribunal has consistently held that the breach of the duty to substantiate such decisions is in itself sufficient to warrant the Tribunal's intervention. In Judgment 2261, a recent example following a long line of precedent, the Tribunal stated the following:

"In one respect, however, the complainant's allegation of error of law is fully justified. The Tribunal's case law holds that any decision negatively affecting an employee must be reasoned [...]. It is not for the Tribunal [...] to find justification for the unmotivated decision of the Director General. Those findings cannot be sustained."

12. Likewise, in Judgment 2278 the Tribunal said:

"9. In the first place, the Tribunal has repeatedly stressed the necessity for administrative decisions to be properly supported by reasons. That is especially the case where, after an elaborate internal appeal procedure in which each side has filed extensive and detailed pleadings, the executive head of an international organisation, acting in a quasi judicial capacity and as the penultimate arbiter of disputes between the administration and the staff, decides not to accept the recommendation of the internal appellate body. In Judgment 2092, under 10, the Tribunal said:

'When the executive head of an organisation accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. Where, however, [...] he rejects those recommendations his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body.'

10. As the titular head of the very administration whose conduct is being called into question, the President of the Office must be scrupulous in the performance of his function as final decision maker in internal appeals. It is his duty not only to be fair and objective; his conduct must also make it manifest that he has been so. It is not enough to state, as the President appears to do in the impugned decision, that he thinks the administration has put forward the better case. That is not a reason but a conclusion. The internal appellate process is designed and intended to provide fair, satisfactory and rapid resolution of staff grievances in international organisations. To treat it in the cavalier manner displayed in the present case tends to throw the whole process into disrepute. That is not in the best interests of anybody, least of all the Organisation itself. For its failure to respect an essential formality, the decision must be quashed."

In the same vein see Judgments 1235 and 1355.

13. In the case at hand, it was assuredly not enough for the Director General to disregard the Appeals Board's unanimous recommendations by simply qualifying them as being "legally unfounded". That is no reason at all, but merely a bald and unsupported assertion.

14. The rationale for requiring decisions to be motivated is to allow the staff member to know why he or she had received an unfavourable decision and to make an informed decision as to whether or not he or she should

have recourse to the Tribunal. To say that an Appeals Board's recommendation is wrong in law, without saying why, is not only uninformative, it can be entirely misleading as to the real grounds for the decision. The Organization's arguments before the Tribunal in the present case give an excellent example: it is said that the internal appeals were partially irreceivable. That is an argument in law, but the Director General's decision gives no hint of it. It is also said that the recommendation on which it is based is wrong on the facts: to characterise that as an error of law requires a considerable degree of explanation but none whatsoever is given. The Tribunal will not entertain the arguments which the Organization now puts forward when there is no hint of them to be found in the impugned decision itself. What the Organization is seeking to defend is, quite simply, on its face indefensible.

15. The Director General should have explained and justified why he came to his conclusions. All the arguments presented to the Tribunal regarding the allegedly erroneous fact findings of the Appeals Board, and its so called speculative approach, could and should have been included in the impugned decision, as a justification for the conclusion not to follow the Board's recommendations. The failure to do so leaves the Appeals Board's report intact and uncontradicted.

16. On this ground alone, the decision must be set aside and it is not necessary to dwell upon the complainant's other arguments. However, the Tribunal would also stress the excessive delays incurred during the internal appeal procedure and the Organization's blatant failure to comply with the obligation to prevent and to mitigate poor functioning of administrative mechanisms. The internal appeal process was far too slow with far the greater part of the delay being attributable to the Organization's unseemly delay in filing its materials before the Board. In the Tribunal's view, those factors serve to aggravate the damage which the Board found the complainant to have suffered.

17. The complainant claims retroactive reinstatement "in her position as Supervisor, Travel Services (now named Supervisor, Operations and Travel)", or retroactive regrading to G 6, step 7, or reinstatement in a position "in keeping with her background, qualifications, position and status" together with compensation for financial injury. In addition, she claims 100,000 euros in moral damages, 6,000 euros in costs for the internal appeal proceedings and a further award of costs for the present proceedings.

18. The claim for reinstatement in her former post, which appears no longer to exist as a result of the reorganisation, was, presumably for that reason, not granted by the Appeals Board and for the same reason is not appropriate here. The claim to be retroactively regraded at G 6 was not made before the Appeals Board and accordingly cannot be granted. The Tribunal will, however, order the removal of the D evaluation from the complainant's performance report and the substitution of a C evaluation, and if that results in her being regraded retroactively, so be it.

19. The complainant has suffered serious moral injury as a result of the Organization's actions which the Tribunal evaluates at the sum of 25,000 euros. The recommendation of the Appeals Board that she be awarded costs of the internal appeals in an amount of 5,000 dollars plus her travel expenses between Trieste and Paris and corresponding per diem allowance must also be confirmed. Lastly, the Tribunal will award her the sum of 5,000 euros as costs of the present complaint.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization is ordered to change the August 1997 - October 1999 performance report, signed by the complainant's supervisor on 11 November 1999, to record a "C" rating for supervisory work; any consequential changes to the complainant's employment status shall be made retroactive to that date.
3. It shall pay the complainant: 25,000 euros in damages; 5,000 United States dollars in costs for the internal appeals, plus her travel expenses between Trieste and Paris and corresponding per diem; and a further 5,000 euros in costs for the present proceedings.
4. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2004, Mr James K. Hugessen, Vice President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Ms Mary G. Gaudron, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

James K. Hugessen

Flerida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.