

The Administrative Tribunal,

Considering the application for execution of Judgment 2347 filed by Mrs A. M. on 3 March 2005, the reply of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 13 June, the complainant's rejoinder of 29 August, and the Organization's surrejoinder of 19 October 2005;

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's career at the International Centre for Theoretical Physics (ICTP) in Trieste, Italy, which has been administered by UNESCO since 1996, is summed up under A in Judgment 2347 delivered on 14 July 2004 on her first complaint. In that judgment, the Tribunal set aside a decision of the Director-General of UNESCO on the ground that he had not explained and justified his decision to reject both the Appeals Board finding that the complainant had suffered prejudice and discrimination and its recommendations for redress. One of the recommendations was that a D rating be removed from the complainant's August 1997-October 1999 performance report. The Tribunal ordered, *inter alia*, the removal of the D rating and the substitution of a C, stating "if that results in her being regraded retroactively, so be it". The Tribunal also ordered the Organization to pay the complainant 25,000 euros in damages, 5,000 United States dollars in costs for the internal appeals, plus the complainant's travel expenses between Trieste and Paris and corresponding *per diem*; and a further 5,000 euros in costs for the proceedings before the Tribunal.

The complainant was informed on 9 September 2004 that a C rating for supervisory work had been substituted for the D rating on her performance appraisal report. By a memorandum of 24 September, the Senior Administrative Officer of ICTP informed the complainant that the change from D to C rating for supervisory work did not affect the overall rating which remained C, and that her performance did not merit a regrading or change in employment status. By 23 October 2004, the complainant had received full payment of the sums owed by UNESCO pursuant to Judgment 2347. She filed her application for execution on 3 March 2005.

B. The complainant contends that although the Organization paid her the amounts due and modified her appraisal report as ordered by the Tribunal, it "did not draw all legal consequences from the judgment regarding her employment status". She construes Judgment 2347 as imposing an obligation on the Organization to review carefully whether the change from a D to a C rating for supervisory work had an impact on her request for regrading and to provide her with a "sound and reasoned decision" on the matter. The fact that the Senior Administrative Officer, in his memorandum of 24 September 2004, merely indicated that the change from D to C for supervisory work "[did] not merit a regrading or change in employment status" was not enough to fulfil the Organization's obligation to her under the judgment. According to the complainant, UNESCO has not executed Judgment 2347 in full and good faith.

She also asserts that she suffers from a stress disorder owing to the "emotional injury" she has endured since 1999 as a result of poor management. She alleges that the ICTP is not willing to draw all the legal consequences from the judgment although strongly encouraged by the Director of the Office of International Standards and Legal Affairs of UNESCO to do so. Indeed, in a memorandum dated 20 September 2004 concerning the implementation of Judgment 2347, the Director of Legal Affairs stated that "[G]ood administration requires 'lessons learned' and not recrimination, especially where there is more than enough blame in the handling of the case to go around, with the biggest share having to do with the genesis of the problem/case".

The complainant asks the Tribunal to order UNESCO to implement Judgment 2347 in full and to provide her with a reasoned decision regarding her employment status, further to the change in the performance report. She also claims moral damages and costs.

C. In its reply UNESCO states that the application for execution filed by the complainant is not receivable for two reasons. Firstly, the claim for retroactive regrading was dismissed by the Tribunal in Judgment 2347; consequently, her present complaint, which reveals no new facts, constitutes an implicit application for review of that judgment. The fact that the Tribunal, in that judgment, declined to declare the Director-General's decision unlawful on the matter of her claim to be retroactively regraded renders this question *res judicata*. It further contends that the complainant merely reiterates facts that are *res judicata*. Secondly, the Organization asserts that the complainant is not challenging a final decision and that she has not exhausted the internal means of redress. By a letter of 4 March 2005 (that is one day after filing her present complaint with the Tribunal), the complainant requested the ICTP Consultative Board to advise her about the possibility of having her post regraded. The defendant considers the complainant's application for execution of Judgment 2347 as a "means to put pressure on the ICTP Consultative Board". It also states that, since the Board has not yet made its recommendation, it will not comment on the complainant's request for reclassification.

In subsidiary pleas, the defendant reiterates that the overall C rating was not affected by the change in one of the sub-level ratings from D to C and indicates that "the rules of UNESCO do not provide for promotion on the merits". Indeed, promotion in UNESCO may only be granted on the following two grounds: reclassification of a post with or without retroactive effect and internal competition for a higher post. The complainant herself does not deny that the Tribunal did not order retroactive regrading, and her post is awaiting a decision on classification.

It denies that it did not act in good faith or lacked the will to implement the judgment fully. It contends that the reference made by the complainant to the memorandum of 20 September 2004 issued by the Director of Legal Affairs aims to mislead the Tribunal. According to the Organization, the aforementioned memorandum was issued pursuant to the ICTP's request to receive additional funding in order to implement Judgment 2347.

D. In her rejoinder the complainant contends that her application for execution is "not an implicit request for reviewing the *res judicata*". She reiterates her view that she construes the above-mentioned judgment as meaning that the Organization had an obligation to review carefully the issue of regrading and to provide her with a sound and reasoned decision.

As regards the absence of a final decision, the complainant asserts that the Organization's position is based on the wrong assumption that her application is "part of a new claim relating to reclassification procedures" and not linked to the judgment's implementation. She states that the application does not request the Tribunal to decide on the post reclassification issue, but instead to decide whether or not, pursuant to Judgment 2347, she was entitled to receive a reasoned decision in writing, after a fair and careful review of her situation. She asserts that there is no need to have exhausted the internal remedies in order to challenge the final decision of the Organization, according to which it has fully and fairly executed the judgment.

On the merits, the complainant reiterates her position and notes that the defendant has remained silent regarding her main plea on the Organization's failure to provide her with a sound and reasoned decision.

In support of her claim for moral damages, she supplies two medical certificates dated 2 May 2005.

E. In its surrejoinder UNESCO maintains its arguments. It contends that there is "ill will and malice" in the way in which the complainant simultaneously requested a regrading of her post with the ICTP Consultative Board and filed an application for execution with the Tribunal. In its view, the complainant is not seeking a "reasoned decision" concerning the rejection of her application for retroactive regrading but instead wishes to compel the Organization to promote her. UNESCO considers that the complainant acted in bad faith and "abuse of purpose" and asks the Tribunal to declare that the application for execution is not receivable.

The defendant reiterates that there were no "implicit legal effects" in the judgment which could lead to the "retroactive regrading" of the complainant's post. In addition, it argues that the complainant's allegation concerning the Organization's failure to provide her with a "sound" decision concerning the regrading of her post is "legally and factually unfounded" in view of the clear motivation expressed by the Organization in its various actions, written statements and explanations.

## CONSIDERATIONS

1. This is an application for execution of Judgment 2347. In that decision the Tribunal said as follows:

“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.”

2. In the formal decision, apart from ordering the payment of damages and costs, the Tribunal said:

“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. As was made clear in the passage last quoted, the rating which was ordered to be changed from D to C was for supervisory work. That was only one of the categories in the performance report in question and the overall rating for the whole report was a C.

4. All the monetary amounts ordered by the judgment have been paid in full but the complainant argues that it was not fully executed. She considers that, although the Organization changed her performance report as ordered by the Tribunal, it did not draw all the legal consequences from that judgment regarding her employment status. She was hoping to obtain a higher grade (G-6) notwithstanding that the Tribunal specifically declined to make such an order.

5. She construes Judgment 2347 as imposing an obligation on the Organization to review the issue carefully and provide her with a sound and reasoned decision and asserts that it did not respect that obligation.

6. Even assuming that the complainant’s view of the reach of the judgment is correct, the application cannot succeed. In a communication sent to her before the end of September 2004 by a Senior Administrative Officer she was informed that “the change from D to C rating for supervisory work does not result in a change in the overall rating, still being a C”. That was clearly a reasonable view and the Organization’s consequential decision that the change did not by itself justify her being re-graded but that the latter question should be submitted to the Consultative Board was both reasonable and consistent with the judgment. The complainant has now filed the appropriate application with that body and that was the correct course to follow.

7. Judgment 2347 having been fully executed, the application must be dismissed.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr James K. Hugessen, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

James K. Hugessen

Mary G. Gaudron

Agustín Gordillo

