

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

113th Session

Judgment No. 3114

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2740 filed by Ms E. S. on 9 March 2010 and supplemented on 17 November 2010, the reply of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 22 February 2011, the complainant's rejoinder of 5 March and UNESCO's surrejoinder of 6 April 2011;

Considering Article II, paragraph 5, 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. Judgments 2536 of 12 July 2006 and 2740 of 9 July 2008 deal with the complainant's first and second complaints, respectively. It should be recalled that when she retired on 28 February 2003 she was responsible for a Unit in the UNESCO Coupons Programme and held grade P-4. On 17 October 2002 she had submitted to the Director-General, as she had previously done on 11 February and 31 March 1999, a file denouncing irregularities in the management of the Coupons Programme. She alleged inter alia that "in the context of the

Decade for the Eradication of Poverty, poor countries are financing rich ones”. Considering herself to be one of the “victims” of this “morally and legally unjust system”, she sought an end to the moral harassment she claimed to have suffered for three years and, on the basis of a draft memorandum by the Comptroller at UNESCO, fulfilment of a verbal promise reflected in that note to promote her to the P-5 grade. She also complained that her performance appraisal reports for the period 1997-1999 had been delayed, and that those for the period 1999-2001 had still not been communicated to her. Having been informed of the decisions to assign an official at grade P-5 to the above-mentioned Programme to assist her in her duties in anticipation of her retirement, and to transfer the file she had submitted to the Internal Oversight Service, she lodged a protest, which was dismissed on the grounds that she had not been notified of any administrative decision that could be challenged. Her first complaint was dismissed for the same reason.

On 31 July 2006 the complainant asked the Director-General to take a final administrative decision on the issues she had raised on 17 October 2002. In a decision of 29 August 2006 the Director of the Office of International Standards and Legal Affairs informed her, on behalf of the Director-General, that in view of the adoption of Judgment 2536 he considered the case closed, and that the Organization “d[id] not intend to enter into any further correspondence on the matter in the future”. The complainant referred to the Tribunal the implicit decision to reject her request of 31 July, and the Tribunal decided, in consideration 5 of Judgment 2740, that, notwithstanding the fact that the parties had again addressed the merits of the case in their submissions, the evidence adduced did not permit it, at that juncture, to rule on their dispute in full knowledge of the facts. Accordingly, it set aside the decision of 29 August 2006 and sent the case back to UNESCO “for a reasoned decision on the complainant’s claim submitted to it on 17 October 2002”. It also awarded the complainant 2,000 euros in compensation for the injury she suffered, and 1,000 euros in costs.

In a letter of 11 August 2008 the complainant was informed that the sums awarded to her had been transferred to her bank account. On 29 September 2008 the Director-General replied in writing to the questions raised in the file of 17 October 2002. He stated, inter alia, that as far as the UNESCO Coupons Programme was concerned, the Comptroller had not found any breaches of the Financial Regulations in the course of the audits he had carried out between 1998 and 2003. He added that he was sorry the complainant's performance reports had not been drawn up on time, but the fact that she had received a salary increase each year indicated that her performance had been satisfactory. Lastly, he asserted that she had not provided any evidence of the harassment she claimed to have suffered, and that the draft note on which she relied as the basis for her request for a promotion could not, according to the case law of the Tribunal, be regarded as "a legally binding promise", nor could it constitute an administrative decision. On 8 October 2008 the complainant lodged a protest, but she was informed by letter of 25 November that it had been rejected. In the meantime, on 26 October 2008, she had appealed to the Appeals Board. In its report of 15 July 2009 the Board made a recommendation to the Director-General to declare, with respect to the management of UNESCO's Coupons Programme, that his decision of 29 September 2008 caused no grievance to the complainant, and to confirm that the draft note on which she relied constituted neither a promise of promotion nor an administrative decision. It also recommended that the Director-General should instruct the competent services to examine whether the absence of performance appraisals had caused any prejudice to the complainant and whether she had been the victim of harassment, in which case the necessary instructions should be given for her to be granted appropriate compensation.

In a letter of 16 December 2009 the complainant proposed to the new Director-General an "honourable internal agreement" whereby the misappropriated sums would be reimbursed to the poor countries funding the UNESCO Coupons Programme and her own

situation would be resolved by a “global settlement”. She also asked the Director-General to give her an answer as soon as possible, so putting an end to “the previous UNESCO strategy of claiming to resolve problems by not replying to the questions raised”. On 9 March 2010 she filed her application for execution of Judgment 2740, which she supplemented on 17 November 2010.

B. The complainant asserts that the refusal of the Director-General to take a decision on the recommendations made by the Appeals Board on 15 July 2009 is a “shocking miscarriage of justice”, and she requests the Tribunal to order UNESCO to issue a decision on those recommendations within 30 days. She also requests it to order the Organization to adopt, on the same terms, a reasoned decision on her file of 17 October 2002, and to make a finding on the points she raised in her letter of 16 December 2009. In addition, she claims 10,000 euros in damages and an award of costs.

C. In its reply UNESCO argues that the application is moot since the Director-General, on 4 January 2011, took a final decision confirming her predecessor’s decision of 29 September 2008.

D. In her rejoinder the complainant states that since the final decision of the Director-General was not taken within a reasonable time period, she maintains her claim for damages. Having impugned that decision in a fourth complaint (see Judgment 3115 also delivered this day), she asks the Tribunal to join that complaint with the one now before it.

E. In its surrejoinder UNESCO maintains its position in its entirety. It states that, according to the Tribunal’s case law, failure to adopt a decision within a reasonable period of time is viewed as an implied decision to reject the claim submitted, and as such can be challenged before the Tribunal, which the complainant has done by filing her application for execution.

CONSIDERATIONS

1. The complainant, who joined UNESCO in 1972, retired on 28 February 2003 from her post as Chief of a Unit in the UNESCO Coupons Programme.

In early 1999, and again on 17 October 2002, she had written to the Director-General denouncing misappropriation of funds and various other irregular practices in the management of the Programme. She asserts that, as a result of this, she had suffered reprisals in the form of non-observance of the rules governing performance appraisals and non-fulfilment of an alleged promise to promote her, as well as constant harassment.

2. In Judgment 2536 the Tribunal dismissed as irreceivable the first complaint filed by the complainant, because she had not been notified of any appealable administrative decision. On 9 July 2008 the Tribunal delivered Judgment 2740, allowing her second complaint, which was filed after she had been informed that, further to Judgment 2536, her file was regarded as closed and that the Organization “d[id] not intend to enter into any further correspondence on the matter in the future”. The Tribunal sent the case back to UNESCO “for a reasoned decision on the complainant’s claim submitted to it on 17 October 2002”.

3. The Director-General took that decision on 29 September 2008. He replied in detail to the criticisms expressed of the management of UNESCO’s Coupons Programme, stating that they had been taken into account, to the extent warranted, at the appropriate time. He regretted that the complainant’s performance had not been appraised at the proper time, but in his view, the fact that she had received a salary increase every year since her last appraisal report signified that her performance had been satisfactory. As for her promotion, he stated that the document on which she relied could not be regarded either as “a legally binding promise” or as an

administrative decision. Lastly, he dismissed the allegations of harassment, arguing that, in his view, no specific facts had been adduced to corroborate them.

On 15 July 2009 the Appeals Board issued its report on the case submitted to it. It recommended, in the first place, that the Director-General should declare that his decision of 29 September 2008, insofar as it concerned the management of UNESCO's Coupons Programme, had not caused the complainant any grievance; secondly, that he should confirm that the complainant, as regards her promotion, could not claim that there had been any promise or any administrative decision. However, it also recommended that the Director-General should instruct the competent services to examine whether the absence of performance appraisals had caused any prejudice to the complainant and whether she had been the victim of moral harassment, and if so, give the necessary instructions for her to be paid appropriate compensation.

By a letter of 16 December 2009 the complainant drew the attention of the new Director-General to the fact that her predecessor, before leaving office, had not taken a final decision on the recommendations of the Appeals Board. She proposed an "honourable internal agreement" to her and asked her to reply as soon as possible.

4. In her application for execution, as supplemented on 17 November 2010, the complainant requested the Tribunal to order UNESCO to issue a reasoned decision on her file of 17 October 2002 and to state its position on the recommendations made on 15 July 2009 by the Appeals Board and on the points she had raised in her letter of 16 December 2009, no later than 30 days from the date of this judgment, and with a penalty for delay. She also requested payment of 10,000 euros for damages and an award of costs.

By a decision of 4 January 2011, which is the subject of the fourth complaint filed by the complainant (see Judgment 3115 also delivered this day), the Director-General informed the complainant that, having studied her "repeated claims since 17 October 2002, and

[her] disagreements with the opinion of the Appeals Board”, she had decided to confirm the decision taken by her predecessor on 29 September 2008. She added that she could not accede to the requests made in the letter of 16 December 2009.

5. The complainant requests that the present application be joined with her fourth complaint.

As the conditions for such a joinder are not met, the Tribunal, in accordance with its case law, considers that this request should not be admitted.

6. The Tribunal notes that in her rejoinder the complainant withdraws her claims for execution of Judgment 2740 and for an order that the Organization take a decision on the recommendations of the Appeals Board of 15 July 2009, and on the points raised in the letter of 16 December 2009, these claims having become moot as a result of the decision of 4 January 2011.

However, a question remains as to whether the complainant is correct in her contention that the final decision on the recommendations of the Appeals Board was unduly delayed. This question has to be answered in the affirmative, because there was nothing to prevent the Director-General from taking his decision shortly after he had been apprised of the recommendations. Indeed, it is clear from those recommendations that the Director-General was merely invited to order a further examination of two particular points. However, a year and a half passed following those recommendations before the final decision was reached on the questions raised in the file of 17 October 2002, and that decision was obtained only after the complainant had lodged an application for execution with the Tribunal. This delay is manifestly unreasonable. The complainant will be awarded an indemnity, which it is fair to set at 2,000 euros, for the moral injury she has thus been caused. She will also be awarded the sum of 500 euros for the costs relating to her application for execution.

DECISION

For the above reasons,

1. The Tribunal need not rule upon the complainant's claims for execution of Judgment 2740.
2. UNESCO shall pay the complainant an indemnity of 2,000 euros in compensation for moral injury.
3. It shall also pay her the sum of 500 euros for costs.

In witness of this judgment, adopted on 4 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet