116th Session **Judgment No. 3250**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. N. against the International Labour Organization (ILO) on 16 March 2011, corrected on 14 June, and the ILO's reply of 15 September 2011, no rejoinder having been submitted by the complainant;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, 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, an Italian national born in 1954, joined the International Labour Office, the secretariat of the ILO, in 1990. She worked variously under external collaboration, daily, special short-term and short-term contracts. With effect from 14 August 1996 she was appointed under a special short-term contract as "Editor Reviser English" in the Publications Department (PUBL) at grade P.4. That contract was extended and from 5 October 1996 the terms and conditions of a fixed-term appointment under the Staff Regulations became applicable to her pursuant to Rule 3.5 of the Rules Governing Conditions of Service of Short-Term Officials.

Having won a competition, on 1 September 1998 she was appointed to the P.4 post of "Book Development Editor" in PUBL. In 2001 she also began to serve on the Independent Review Group (IRG), an advisory body responsible for examining appeals submitted by officials regarding job grading. Between 1 September 2002 and 31 January 2003 she was seconded to the Policy and Social Benefits Branch (HR/POL) of the Human Resources Development Department (HRD) to work full time as coordinator of the IRG. On 17 February she completed her secondment and returned to PUBL; it was agreed that her duties with the IRG could, on occasion, take up to 25 per cent of her working time.

On 5 May 2003 the complainant was verbally informed by the Chief of PUBL that, as a consequence of budgetary cuts that were being implemented for the 2004-2005 biennium, her post would be abolished with effect from 1 January 2004. Following internal consultations regarding the complainant's employment status, she was temporarily assigned to HRD from January 2004 to April 2005. During this period she continued her duties as coordinator of the IRG. Meanwhile, in March 2004 she was awarded a contract without limit of time, with retroactive effect from 1 January 2003.

In early 2005, after a competition for the grade P.4 position of Senior Human Resources Officer in the ILO Regional Office in Bangkok was declared unsuccessful by the ILO, the complainant and another official were approached by HRD with a view to being considered for the post. The complainant was subsequently interviewed by a technical evaluation panel which concluded that, if she were given an appropriate pre-departure briefing from HRD, she would be capable of successfully undertaking the duties of the position.

In April 2005 the Director-General approved the complainant's transfer to the post in Bangkok. By a letter of 22 April 2005 she was notified of the terms and conditions of her transfer. In particular, she would be on mission status for the first six months, i.e. she was entitled to the Geneva post adjustment with a daily subsistence allowance (DSA) at the rate applicable to Bangkok for six months

from the date of her arrival, on the understanding that her assignment in Bangkok would be for a minimum of three years. If, within that three-year period, she either won a competition which necessitated her return to headquarters, was transferred to another organisation or resigned, she would be required to refund to the ILO, in an amount proportionate to the length of time remaining in the three-year period, the difference in the post adjustment between Geneva and Bangkok, and the DSA. In addition, she would receive a transitional allowance which would be discontinued on her return to Geneva or upon promotion. At the end of her six-month mission status she would be paid the Bangkok post adjustment, mobility and hardship allowances, an assignment grant, and either a non-removal allowance or household removal expenses, at her election. She was also informed that her entitlement to a rental subsidy at her new duty station would begin after the period of mission status and assignment grant DSA. Her assignment began on 25 May 2005.

The complainant returned to ILO headquarters in Geneva for a mission on 15 November 2005. She took annual leave from 19 to 27 November and then resumed her mission from 28 November to 2 December. On 2 December she fell ill and was placed on sick leave. She remained in the Geneva area while undergoing treatment and was subsequently certified as fit to work with effect from 20 February 2006. However, the accompanying recommendation from her treating physician stipulated that she should remain in Geneva for an additional six months to receive ongoing treatment. By an e-mail of 21 February from the Director of HRD the complainant was asked to remain at home until further notice pending a determination of the administrative and legal consequences of her situation. She was placed on special leave with full pay from 20 February until May 2006.

Meanwhile, on 20 March 2006 the complainant presented a medical certificate which indicated that she was fit to work in Geneva. Following further enquiry by the ILO's Medical Adviser, on 23 March an external medical adviser determined that the complainant would not be able to resume work in Bangkok, but that after treatment she could consider a field post in another location.

In May 2006 the complainant returned to work in Geneva. By a letter of 10 May from the Director of HRD she was informed that, on an exceptional basis she was being offered a temporary assignment for three months to work within the IRG. The Director explained that the assignment took into account the recommendations of the ILO Medical Adviser and that during the three-month period HRD would try to identify a suitable vacant position in a duty station other than Bangkok, either in Geneva or in an appropriate field office. The assignment did not constitute a transfer and her duty station remained Bangkok. Accordingly, her salary would be paid by the Regional Office at the Geneva post adjustment rate, retroactive to 3 December 2005, the day after her mission to Geneva ended. Lastly, the Director pointed out that, as the complainant's assignment to Bangkok had been for less than three years, the issue of the nature and extent of the recovery of any overpayments made to her under the terms and conditions of that assignment would be discussed at a future date.

As from 15 October 2007 she was transferred from the Regional Office to the Official Documentation Branch (OFFDOC) at the headquarters, where, with effect from 18 October, she was placed on a regular budget temporary post as Senior English Editor.

The complainant did not receive performance appraisals for the period from 1 June 2001 to 30 September 2007.

On 19 August 2009 she filed a grievance with HRD under Article 13.2.1 of the Staff Regulations alleging that she had suffered persistent institutional harassment from 2003 to the date of the grievance. The investigator nominated by HRD to review the matter issued her report on 26 January 2010. By a letter of 1 February from the Director of HRD the complainant was informed that the final investigation report was being edited and would be provided to her as soon as it was available. She explained that the investigation had not revealed any intentional or negligent act or actions on the part of the ILO that were intended to cause the complainant moral, physical or professional harm. It had revealed that the complainant had experienced persistent difficulties in communicating with other colleagues throughout her career and this had contributed to her

situation. The Director acknowledged that the complainant's performance had not been evaluated for almost ten years and assured her that every effort would be made to provide a complete record of her service. Lastly, it was stated that there had been a significant overpayment to the complainant of various allowances and entitlements linked to her assignment to Bangkok and the complainant was asked to contact the Administration in order to regularise the outstanding amounts owed by her. The complainant was provided with the edited report and its annexes on 26 March 2010.

On 23 April 2010 she filed a grievance with the Joint Advisory Appeals Board (JAAB) alleging that she had been harassed by the ILO. Also, since the suppression of her post in 2003, she had been transferred to a series of hastily conceived temporary assignments and was currently performing functions for which there was no organisational context and which did not correspond to the job description of the post to which she was assigned. In its report of 9 November 2010 the JAAB concluded that while it had not identified any specific intentional examples of institutional harassment, a long series of mismanagement and omissions by the ILO represented "institutional harassment" of the complainant which had compromised her dignity and career. It recommended, inter alia, that the Director-General instruct HRD to immediately undertake a constructive dialogue with her in order to identify a post that reflected her experience, capacity and career objectives, that he give special attention to her candidacy in the event that she was placed on the shortlist for a competition, that she be awarded 35,000 Swiss francs in moral damages, and that the ILO should not seek reimbursement for the alleged overpayments related to her transfer to Bangkok.

By a letter of 17 December 2010 the complainant was informed that the Director-General agreed with the JAAB's conclusion that there had been no specific examples of intentional harassment, as well as with its finding that the administration of her employment had caused her prejudice, and that he would seek to engage the services of the ILO Mediator or an alternate facilitator in order to establish a dialogue with her. Furthermore, although he did not fully agree with

the implied conclusion of the JAAB that her current position did not correspond with her qualifications and experience, he nevertheless accepted to award her 35,000 Swiss francs. In addition, referring to the amounts paid to her in respect of her transfer to the Regional Office, he considered that the transitional allowance payments which had been paid to her until March 2008 constituted unjust enrichment and that it was appropriate to recover these funds with effect from 3 December 2005, the date upon which she returned to a Geneva-based pay scale. The amount of the overpayment was determined to be 15,606.96 United States dollars. That is the impugned decision.

B. The complainant submits that, contrary to the Tribunal's case law, the ILO failed to conduct an independent investigation into her grievance. She points out that HRD nominated an investigator from its own staff and she challenges the findings and conclusions contained in the investigation report.

Pointing to the JAAB's report, she contends that the JAAB, relying on the Tribunal's case law, correctly concluded that she had suffered from "institutional harassment". In her view, the Director-General selectively rejected some of the JAAB's conclusions and she questions how, having done so, he could then endorse an award of 35,000 Swiss francs.

She argues that the JAAB concluded that her assignment to a post in OFFDOC was unlawful. Therefore, the Director-General's decision to facilitate the establishment of a dialogue with her regarding her employment was fundamentally different from the JAAB's recommendation that she be redeployed elsewhere. She states that she met with the Mediator several times but there was no corresponding attempt on the part of the ILO to find a solution and HRD has failed, to the present date, to find a solution to her employment situation. She points out that she has filed grievances challenging appointments of other officials to positions which, in her view, corresponded to her competencies.

Lastly, she asserts that the decision on the part of the ILO to claim reimbursement of a portion of the transitional allowance paid to

her was taken in retaliation for her having filed her grievance. She points to e-mail exchanges which occurred in 2008 between herself and the Administration regarding the overpayments and she submits that the matter was "dropped" by HRD and only brought up again as a response to her seeking internal redress. She also argues that the ILO is time-barred, under Article 14.8 of the Staff Regulations, from claiming reimbursement for any overpayment made to her.

The complainant asks the Tribunal to set aside the impugned decision and to order the ILO to assign her to a position corresponding to her qualifications, competencies and grade. She seeks reimbursement of the amount claimed by the ILO for its overpayment to her of the transitional allowance. She claims damages for moral injury, and costs in the amount of 5,000 Swiss francs.

C. In its reply the ILO submits that, to the extent the complainant is challenging the decision to assign her to the post of Senior English Editor in OFFDOC, her complaint is time-barred and therefore irreceivable, except insofar as this claim relates to her harassment allegations. Also, her challenges regarding the appointments of other officials are the subject of internal grievance procedures and her claims in this respect are premature and thus, irreceivable.

On the merits, the ILO asserts that it fully met its obligation, as prescribed by the case law of the Tribunal, to conduct a comprehensive, objective and prompt enquiry into the complainant's allegations of harassment. The investigation report was not tainted by a lack of independence on the part of the investigator; she was appointed because she had not been previously exposed to issues related to the complainant, she had not worked with the complainant during the latter's assignment to HRD, and she had a legal background and knowledge of the Staff Regulations.

The ILO contends that the Director-General's decision refusing to acknowledge that the complainant had been subject to "institutional harassment" was well founded for many reasons. First, the findings of the investigation report did not support the conclusion of the JAAB in this respect. Second, while the ILO acknowledged examples of poor

management on its part, in particular regarding the complainant's assignment to Bangkok, its treatment of her did not constitute harassment, as defined by the Tribunal's case law. Third, in the face of a limited range of available posts, the ILO continued its efforts to find her another appropriate assignment. Although those efforts have included some administrative errors and negligence which admittedly caused the complainant prejudice, she has been compensated in this respect. Fourth, she has not shown any evidence of ill will or disproportionate conduct on the part of the ILO. Also, the ILO met its duty of care towards her and respected her dignity by awarding her a contract without limit of time despite the fact that she was not assigned to a permanent position at the material time.

The ILO asserts that the complainant's current position corresponds to her experience and competencies and it has met its duty to provide her with work of the same level as that which she performed previously and matching her qualifications. Moreover, the Administration has participated in the mediation process, and has offered to discuss her career objectives and to provide assistance in identifying opportunities in other organisations in light of the limited number of posts in her field that are available within the ILO.

Lastly, it contends that the Director-General's decision to claim reimbursement of the erroneously overpaid transitional allowance was within the limits of his discretionary authority and is subject to only limited review. It was formally and procedurally correct and factually and legally founded. It asserts that Article 14.8 of the Staff Regulations does not apply to claims made by the ILO and its claim for the recovery of the overpayments two years and four months after they were discontinued meets the standard of "reasonable time" prescribed by the Tribunal's case law.

CONSIDERATIONS

1. On 19 August 2009, the complainant filed a grievance with HRD alleging persistent institutional harassment from 2003 to the date of her grievance. HRD nominated an investigator from among its own

staff and her edited report was provided to the complainant on 26 March 2010. The investigator relied on a definition of harassment given by the National Consultative Commission on Human Rights of France, which distinguishes four forms of moral harassment, one of which is the vertical top-down harassment that encompasses institutional harassment. The investigator, in her conclusions, excluded institutional harassment on the basis that she had found no evidence of intent nor any abuse of power.

2. The complainant filed a grievance with the JAAB on 23 April 2010 on the grounds that she had been treated in a manner incompatible with the terms and conditions of her employment. She claimed that she had been harassed by the Organization and its representatives since her job was suppressed in 2003, as she had been repeatedly and hastily transferred to various temporary assignments and that at the time of her grievance she was in a position whose functions did not correspond to the job description she had been given. She requested to be awarded moral damages and to be assigned to a position corresponding to her competencies and grade.

3. In its report dated 9 November 2010, the JAAB found inter alia that "the Office [had] given neither timely nor adequate attention to resolving the consequences for the appellant of this decision [to suppress her position of Book Development Editor in PUBL]". Noting that the Staff Regulations did not contain a definition of the term "harassment", it relied on a French glossary of juridical terms which defined harassment as "any repeated behaviour or acts which are aimed at or cause the deterioration of employment conditions likely to affect the rights or the dignity of an official, or her/his physical or mental health, or jeopardise her/his professional career". The JAAB also cited Judgment 2370 in which the Tribunal held that:

> "if in the light of the circumstances one could conclude that the conduct had a valid managerial purpose or was the result of an honest mistake, or even mere inefficiency, such finding would properly lead to the conclusion that it could not, 'in all the circumstances', reasonably be regarded as harassment. On the other hand, if the conduct was such that it affected only the complainant or, because of her special vulnerability [...], it affected her

> more severely than her fellow workers, it might follow that it was discriminatory and, even if not intentional, that would lead to the conclusion that the conduct could reasonably be regarded as harassment."

The JAAB also referred to Judgment 2524 in which the Tribunal found that:

> "an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken."

4. The JAAB noted inter alia that "the [complainant] continues today to be assigned a somewhat 'temporary/transitional' post, 7 years after the initial decision was taken to abolish her post and to 'redeploy her in a manner that would not adversely affect her career'". With regard to the complainant's assignment to the post in Bangkok, the JAAB found that the ILO had seriously mismanaged the situation by assigning the complainant to the post irrespective of the fact that she did not meet the minimum education and experience required (as listed in the vacancy notice), and by sending her to Bangkok without the proper briefing as requested by the selection panel. Further lapses in management had been evident by the ILO's follow-up to the complainant's appointment, including the handling of her health situation, her transfer back to Geneva and the overpayment of entitlements linked to her Bangkok transfer and subsequent early return to Geneva. The ILO's "lack of effort" and consequent failure to assign the complainant to an appropriate post from 2005 to 2007, notwithstanding her contract without limit of time status since 1 January 2003, was also noted. The JAAB also commented on the "serious concerns" it had regarding the unsuccessful effort by HRD to assign the complainant to a post for which she was not qualified, disregarding her skills, experience and career objectives. It noted that in the process "it appears that the [complainant] may have been threatened with the prospect of losing her ILO employment if she refused to take this inappropriate position". With respect to the complainant's initial grievance to HRD, the JAAB further observed that HRD "did not seek the [complainant's] agreement to the choice of

the investigator and that [she] was not given the opportunity to read or hear witness statements".

5. The JAAB concluded that "while it [had] not identified any specific intentional examples of institutional harassment, the long series of examples of mismanagement and omissions by the Office represents an 'institutional harassment' of the [complainant] which has compromised her dignity and career within the ILO", and it unanimously recommended that the Director-General instruct HRD to speak with the complainant, possibly with the assistance of a third party, to identify "a post that reflects her experience, capacity and career objectives" and to take into account the seven years in which the complainant's career has been "on hold". Special care should be taken to shortlist the complainant in competitions and the Director-General should give special attention to her candidacy. It also stated that the Director-General should consider that compensation, in the minimum amount of 35,000 Swiss francs, is due for moral injury and that, according to Judgments 2847 and 2899, the alleged overpayments should not be claimed as the complainant was not at fault, the ILO failed over a sustained period to stop the payments or reclaim the overpayments, the complainant was not officially transferred back to Geneva until October 2007, and she did not try to hide or conceal anything. The JAAB also recommended that the complainant try to look forward, pursue an appropriate and productive career, apply for relevant competitions, and take a proactive role in the compensation arrangement recommended.

6. The impugned decision is contained in a letter dated 17 December 2010 which informed the complainant of the Director-General's decision regarding the JAAB's report. In the letter, it was stated inter alia that:

> "The Director-General notes and agrees with the conclusion of the JAAB to the effect that it has not identified any specific examples of intentional harassment of you by either the Office or any individual members of its staff. The Director-General does however accept the observation of the JAAB that there has been a long history of poor management and omission

> with regard to the administration of your employment with the Office and this has caused you prejudice."

The Director-General has accepted to award the sum of 35,000 Swiss francs and concluded that:

> "it is not at this stage appropriate to seek pro-rated reimbursement of the monies paid to you in respect of Mission Status and Assignment Grant. With regard to the transitional allowance payments which continued to be paid to you up to and including March 2008, the Director-General considers that this constitutes an unjust enrichment and that the recovery of these funds with effect from 3 December 2005, i.e., the date upon which you returned to a Geneva based pay-scale is entirely appropriate."

7. The complainant bases her complaint on several grounds. First, the ILO failed to conduct an independent investigation into her grievance. Second, the Director-General was selective in his rejection of the JAAB's findings, specifically in his refusal to accept its finding of institutional harassment. Third, the continued inaction of the Organization with regard to the JAAB's recommendation to assign her to a position corresponding to her competencies, qualifications and grade, continued to harm her. Fourth, the decision to reclaim the payment of the transitional allowance was "grounded on retaliation". She requests the Tribunal to set aside the impugned decision; to order the Organization to assign her to a position corresponding to her competencies, grade and qualifications; to order the Organization to pay moral damages; to order the Organization to refund the amount claimed back in relation to the overpaid transitional allowance; and to order the payment of 5,000 Swiss francs in costs.

8. The Tribunal is of the opinion that the complainant's claim that the Organization failed to conduct an independent investigation into her grievance is unfounded. The complainant has not demonstrated that the investigation was tainted with bias, nor has she alleged any specific elements from which it can be inferred that the investigation was not conducted objectively. The fact that the investigator was a staff member of HRD does not, in itself, show bias. It should be noted that there is no rule which stipulates that internal administrative investigations must be conducted by an outside

investigator. As already noted by both the investigator and the JAAB, the Staff Regulations did not define harassment or set out a procedure for the resolution of harassment grievances, except for the examination of sexual harassment grievances, which is governed by Article 13.4 of the Staff Regulations. That article provides that, where appropriate, an official who is trained as an investigator will be nominated by the Director-General on the recommendation of the Joint Negotiating Committee. Considering this, the Tribunal finds that the complainant has not sufficiently proven her claim of lack of independence. It is useful to note, however, the JAAB's observation, set out above, that HRD "didn't seek the [complainant's] agreement to the choice of the investigator and that [she] was not given the opportunity to read or hear witness statements". This shall be considered in the award of moral damages.

9. The ILO justifies the Director-General's rejection of the JAAB's finding of institutional harassment by focusing on the first part of the JAAB's conclusions, which stated "[t]he Panel concludes that while it has not identified any specific intentional examples of institutional harassment, the long series of examples of mismanagement and omissions by the Office represent an 'institutional harassment' of the [complainant] which has compromised her dignity and career within the ILO". As stated above, the impugned decision specifies:

> "The Director-General notes and agrees with the conclusion of the JAAB to the effect that it has not identified any specific examples of intentional harassment of you by either the Office or any individual members of its staff. The Director-General does however accept the observation of the JAAB that there has been a long history of poor management and omission with regard to the administration of your employment with the Office and this has caused you prejudice."

The Tribunal notes that intent is not a necessary element of harassment and, in this case, it is not a single episode which creates the problem, but instead it is the accumulation of repeated events which deeply and adversely affected the complainant's dignity and career objectives. As such, the JAAB's finding that "the long series of examples of mismanagement and omissions by the Office […] compromised [the complainant's] dignity and career" is well founded

and the Tribunal is of the opinion that this administrative wrongdoing can be defined as institutional harassment.

10. While the conduct of management which is necessary and reasonable would not constitute harassment, the present case demonstrates how continued mismanagement showing gross negligence on the part of the Organization cannot justify any longer the "managerial need" for the repeated temporary transfers of the complainant which had an ill effect on her. Taken individually, the isolated incidents (such as the suppression of the complainant's post without consulting her, her transfer to a position in Bangkok for which she was not fully qualified, the refusal to later transfer her to an identical position in Geneva on the grounds that she was not fully qualified, selecting an external candidate who did not partake in the competition for one of the vacancies for which she applied, her assignment to a post as translator and the immediate cancellation of that assignment on the basis that she lacked a necessary language requirement, and the ILO's failure to provide her with annual performance appraisals for ten years), can perhaps be considered as improper but managerially justified, but taken as a whole the effect is much more damaging to the complainant and can no longer be excused by administrative necessity.

11. With regard to the overpayment of the transitional allowance, the Tribunal agrees with the unanimous view of the JAAB that, considering the particularity of this case, the cited case law, the good faith of the complainant, and the negligent behaviour of the ILO which lent the appearance that the Organization had decided to renounce its claim to the repayment, the complainant should not have been required to pay back the amount claimed. It is useful to note that, in any case, the ILO transferred the complainant officially from Bangkok to Geneva on 15 October 2007, so any request for repayment should have been from that date to the date the Organization ceased the overpayments (March 2008).

12. In light of the above considerations the impugned decision is set aside to the extent that it does not accept the JAAB's finding of institutional harassment and its recommendation not to reclaim repayment, and insofar as it limited the award of damages to the minimum recommended by the JAAB. Considering the nearly ten-year duration of the institutional harassment and its consequences on the complainant's career as she approaches retirement age, the Tribunal awards damages in the amount of 50,000 Swiss francs in addition to the 35,000 francs already awarded. It should be emphasised that the amount determined by the JAAB was a minimum and, in the Tribunal's opinion, a conservative minimum. The Tribunal also orders the Organization to refund the amount it claimed back in relation to the overpaid transitional allowance, with interest at 5 per cent per annum from the date the money was reclaimed to the date it is refunded to the complainant. The complainant requests the Tribunal to order the Organization to identify and assign her to a position corresponding to her competencies, qualifications and grade. However, considering the amount of time which will have passed between her request and the publication of this judgment and that she is approaching retirement age, that may no longer be viable. As such the Tribunal has considered the lost opportunity in the award of damages mentioned above. As the complaint is founded, the Tribunal awards costs in the amount of 1,500 Swiss francs. All other claims are dismissed.

DECISION

For the above reasons,

1. The impugned decision is set aside in accordance with consideration 12 above.

2. The ILO shall pay the complainant damages in the amount of 50,000 Swiss francs in addition to the 35,000 francs already awarded.

3. It shall also refund her the amount claimed in relation to the transitional allowance, plus interest at a rate of 5 per cent per annum from the date the money was reclaimed to the date it is refunded to the complainant.

4. It shall pay her costs in the amount of 1,500 Swiss francs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet