

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

117th Session

Judgment No. 3329

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Y. E. A. against the United Nations Industrial Development Organization (UNIDO) on 12 December 2011, UNIDO's reply of 21 March 2012, the complainant's rejoinder of 20 April and UNIDO's surrejoinder of 6 August 2012;

Considering Article II, paragraph 5, 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. Facts relevant to this case are contained in Judgments 2965 and 2966, delivered on 2 February 2011, concerning the complainant's first two complaints. Suffice it to recall that the complainant, who had refused to be reassigned to Bangkok as from 1 September 2007 and had requested that this measure be deferred, was informed by letter of 31 August 2007 of the decision not to renew his contract. On 25 September, he asked for this decision to be reconsidered and, on 25 October, he brought the matter before the Joint Appeals Board. After the non-renewal of the complainant's contract had finally been confirmed on 23 November 2007, the Board declared the appeal to be irreceivable because it was premature, while recommending that the

complainant be given a further 60 days to explore the possibility of settling the dispute with UNIDO or, failing that, to lodge another internal appeal. Alongside this, the complainant had filed another appeal in which he challenged his “[u]nilateral and unsolicited transfer”. On 19 November 2008, the Director-General dismissed both these appeals. In Judgment 2965, the Tribunal set aside that decision insofar as it upheld the refusal to renew the complainant’s contract, and referred the case back to UNIDO in order that the Board express an opinion on the merits of the appeal, which had to be reclassified as being directed against the decision of 23 November 2007. In Judgment 2966, the Tribunal dismissed as being irreceivable the complainant’s second complaint, which was filed against the decision to reassign him to Bangkok.

In execution of Judgment 2965, the internal appeal procedure was resumed. On 21 July 2011, the Board delivered a first report in which it concluded that the decision not to renew the complainant’s contract was justified.

In a memorandum of 11 August, the Director-General, noting that the Board had not considered all the complainant’s claims, remitted the case to the Board. In its second report, dated 19 September, the Board concluded that with respect to the non-renewal of his contract, the complainant had not exhausted all internal remedies, and it recommended that he should be granted 3,000 euros for moral damages in the context of his appeal lodged against the decision to reassign him to Bangkok. In a memorandum of 10 October 2011, which constitutes the impugned decision, the Director-General informed the complainant that the matter of his reassignment was *res judicata* and that he maintained the decision not to renew his contract.

B. Referring to his complaint as an “application for reconsideration” of the decision of 23 November 2007 confirmed by that of 10 October 2011, the complainant submits that the arbitrary and discriminatory decision to reassign him to Bangkok, which in fact was tantamount to a hidden disciplinary measure imposed on a former Vice-President of the Staff Union, has had negative repercussions on his health, career

and family life. He insists that he never refused such a reassignment but merely proposed to defer it for two years. He takes UNIDO to task for having deliberately decided, as part of its harassment campaign, not to make him an alternative proposal, thereby infringing the principle of good faith. He asks the Tribunal to set aside the “principle of the juxtaposition of rules” whereby the exercise of the right of appeal is hindered through blackmail over the renewal of contracts. Admonishing the Tribunal for having accepted, in Judgment 2966, evidence provided by the Organization concerning the date on which he had received a memorandum confirming his reassignment to Bangkok, he requests it to clarify its position on this point and to sanction UNIDO for having produced a false acknowledgement of receipt. He also criticises the Tribunal for not ordering UNIDO, in Judgment 2965, to restore the contractual relationship binding them and for endorsing the institutionalization of the “principle” of the abusive exercise of a right or the abuse of authority, and he also asks it to clarify its position so that he might, if need be, pursue his case before an impartial body. The complainant requests the Tribunal to rule that the principle of the authority of *res judicata* has been infringed because UNIDO failed to restore the contractual relationship binding him to the Organization, to restore this relationship itself or to grant him compensation on these grounds. Furthermore, he asks the Tribunal to clarify its views on the amount of the compensation, too low in his opinion, which he was granted under Judgment 2965 for damages and costs.

Not only does the complainant question the expertise in law of the members of the Joint Appeals Board, but he takes them to task for being partial and submissive to the Director-General. He sees the memorandum of 11 August 2011 as being proof of the Director-General’s interference in the work of the Board and asks the Tribunal to rule on the Board’s independence. He also requests it to consider the Board’s report of 21 July 2011 null and void as it was replaced by that of 19 September 2011.

The complainant asks the Tribunal to sanction UNIDO for having failed to comply with the language chosen for communications

“during this dispute”, to sanction the Director-General for abusive exercise of a right and abuse of power, to restore his entitlements for the period between 1 January 2008 and 29 February 2020, the date upon which he will reach retirement age, to grant all his pecuniary claims and to rule that the Director-General, UNIDO, its administrative board and its Member States are jointly liable.

C. In its reply, UNIDO states that the complainant should be reprimanded for his “unjustified and inexcusable” attacks against the Tribunal. From the Organization’s standpoint, all the arguments concerning the complainant’s reassignment to Bangkok and the internal appeals procedure implemented pursuant to Judgment 2965, as well as all his requests for clarification, should be dismissed in accordance with the principle of *res judicata*. The Organization points out that the sums granted by the Tribunal in that judgment have not been paid to the complainant because he has failed to reply to many requests for his bank details. It therefore calls upon the Tribunal to rule that, on this point, the judgment in question has been executed.

Furthermore, UNIDO dismisses as unfounded the allegations of discrimination, abuse of power and harassment. It considers that the complainant seriously failed in his obligations as an international civil servant and that his proposal to defer his reassignment by two years was unreasonable. It maintains that the Director-General was right, in exercising his discretionary authority and in the light of the complainant’s refusal to be reassigned to Bangkok, not to renew his contract. The Organization observes that in the last point of the decision in Judgment 2965, the Tribunal specifically rejected the complainant’s request for reinstatement.

UNIDO invites the Tribunal to dismiss the claim that it should be sanctioned for having failed to comply with the language chosen to be used “during this dispute” on the grounds that the complainant has not established that the Organization has breached an obligation warranting such relief.

D. In his rejoinder, the complainant reiterates his pleas and claims. He submits that no one should be bound to comply with the Director-General's instructions when, as in this case, they are unlawful, and he challenges the notion that he failed in his obligations as an international civil servant. He states that UNIDO terminated his appointment on the basis of "personal discrimination", without taking account of the quality of his services. Noting that his name appeared in the version of Judgment 2965 published in the Tribunal's database, he also asks to request the Tribunal to clarify its position on this matter.

E. In its surrejoinder, UNIDO expands upon its arguments. It dismisses any accusation of "personal discrimination" and asserts that the quality of the complainant's services, which were never called into question, has nothing to do with the decision not to renew his contract. Citing the Tribunal's case law, it states that the fact that an official commits a grave breach of duty and of the conduct expected of him constitutes a valid reason for not renewing his contract.

CONSIDERATIONS

1. In Judgment 2965, delivered on 2 February 2011 and to which reference should be made, the Tribunal, ruling on a dispute between the two parties, decided as follows:

- "1. The impugned decision is set aside insofar as it concerns the refusal to renew the complainant's contract.
2. The case is referred back to UNIDO so that it may proceed as indicated under consideration 17 [...].
3. UNIDO shall pay the complainant 3,000 euros for moral injury.
4. It shall also pay him costs in the amount of 2,000 euros.
5. All other claims are dismissed."

Consideration 17 referred to above reads as follows:

"The Director-General's decision of 19 November 2008 must therefore be set aside insofar as it maintained the refusal to renew the complainant's contract.

The case will be referred back to the Organization in order that the Joint Appeals Board express an opinion on the merits of the complainant's

internal appeal, which will be reclassified as being directed against the decision of 23 November 2007.”

2. The decision of 23 November 2007 confirmed that the renewal of the complainant’s contract had been refused, pursuant to his request to review the decision of 31 August 2007 informing him that his contract would not be renewed after 31 December 2007.

3. The Joint Appeals Board, meeting for the first time in execution of Judgment 2965, submitted its report to the Director-General on 21 July 2011. It concluded that “the [complainant’s] refusal to comply with an instruction from the Director-General constituted a breach of conduct and duty in line with Staff Regulation 11.2 and Staff Rule 111.02 and that the Organization’s decision not to renew the [complainant’s] contract was therefore lawful and justified”. It recommended that “the [complainant’s] contention that the decision of 23 November 2007 was tainted by improper motive should be dismissed”.

4. The Director-General, who considered that the Board’s report was incomplete, remitted the case to the Board requesting that it “carefully review and provide [him] with explicit findings and recommendations on the merits of all the claims made by the [complainant] with regard to the contested decision”.

5. The Board handed down a second report concluding, as far as the non-renewal of the complainant’s contract was concerned, that he “did not follow the correct procedure and in so doing he had not exhausted all internal recourses before filing his Appeal”. It was of the opinion that the case “should be dismissed in its entirety”.

6. In a decision taken on 10 October 2011, which constitutes the impugned decision, the Director-General stated that insofar as the Board recommended the dismissal of the internal appeal on receivability grounds, he did not endorse the findings and conclusions of the second report because they were irrelevant, as the Tribunal had

already decided in Judgment 2965 that the appeal should be reviewed on the merits.

However, taking together other findings of the report, he concluded that “the decision not to renew the [complainant’s] contract was neither based on procedural errors nor tainted by irregularity, abuse of power or authority, discrimination or harassment”, and that the complainant had been unwilling to follow instructions and communicate or cooperate with the Administration, merely proposing to defer the transfer for two years, which was unreasonable. He therefore maintained the decision not to renew the complainant’s contract beyond 31 December 2007.

7. The complainant asks the Tribunal to sanction the Director-General “for abusive exercise of a right, abuse of power”; he also asks it to restore all his rights and to accede to all his requests for payment, damages, costs, legal fees and expenses. He requests that the Director-General, UNIDO, its administrative board and the Member States be held jointly liable.

He enlarges upon a number of pleas in support of his claims.

8. The Tribunal will only rule on the pleas and arguments which are related to the decision of 10 October 2011 that the complainant is explicitly challenging, and hence connected to the initial decision of 23 November 2007 confirming the non-renewal of the complainant’s contract beyond 31 December 2007.

No development outside this context will be taken into consideration. This particularly applies to the criticisms levelled at the Tribunal and the attempts to challenge the *res judicata* authority of Judgments 2965 and 2966 which, moreover, have been the subject of applications for review dismissed in Judgments 3327 and 3328 also delivered this day.

9. The complainant takes the Organization to task for not fully executing Judgment 2965, which set aside the decision not to renew his contract. He considers that UNIDO should, in executing that

judgment, have restored the contractual relationship binding him to the Organization or granted him compensation for a period extending from 1 January 2008 to 29 February 2020, the date of his retirement. He argues that by maintaining the decision not to renew his contract, UNIDO “abusively exercised a right”, committed an “abuse of power” and “intended to cause harm”.

The Tribunal points out that, apart from the fact that Judgment 2965 did not order either the complainant’s reinstatement or the payment to him of any compensation but, on the contrary, dismissed all his other claims after awarding him compensation for moral injury and costs, it was impossible at the time, in this particular case, to reinstate the complainant or pay him compensation, given that the substantive issue of the legality of the decision not to renew the complainant’s contract had not yet been decided. The criticism directed at the Director-General on this point cannot therefore be accepted.

10. That being said, the Tribunal recalls that, according to consistent case law, although a decision not to renew a fixed-term or short-term appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. Such a decision will be set aside if it shows some flaw such as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the evidence. (See Judgment 2104, under 4.)

11. The Tribunal notes, as did the Joint Appeals Board, that the relevant provisions of the field mobility policy allow the Director-General to reassign officials, as provided for under paragraph 27 of circular UNIDO/DGB(M).97, which reads as follows:

“[T]he Director-General may in accordance with staff regulation 4.1 reassign any staff member to a field duty station, reassign a staff member to a field duty station for a shorter duration than that foreseen under the present policy or fill available field positions by any other means he considers appropriate.”

Accordingly, the Director-General has wide discretion in the matter.

The complainant could not therefore, without valid grounds, refuse his reassignment to Bangkok.

12. The complainant maintains that he was the victim of a hidden disciplinary measure.

The Tribunal notes that the file shows that the decision not to renew the complainant's contract was taken on the grounds, moreover upheld by the Organization in its written submissions, that the complainant refused to accept his assignment to Bangkok, which was considered a breach of duty and of the conduct expected of a UNIDO staff member.

By thus deciding not to renew the complainant's contract on the grounds that he had committed a professional error, the Director-General took action that was tantamount to a hidden disciplinary measure.

Apart from the fact that the non-renewal of a contract is not included in the exhaustive list of disciplinary measures under Staff Rule 111.03, this decision was not taken in accordance with the procedure laid down for imposing a disciplinary measure.

Consequently, the impugned decision must be set aside.

13. Given the specific circumstances of this case, the Tribunal will not however order the complainant's reinstatement in the Organization. Indeed, reinstatement would be inappropriate, as the complainant himself acknowledges in his written submissions, when he states that it would be "impossible for [him] to be reinstated now that so much time has elapsed".

14. There is however reason to grant the complainant compensation for the damages ensuing from the unlawful nature of the impugned decision.

The Tribunal notes that, as the complainant had refused his transfer to Bangkok and the Organization considered that this refusal impeded the continuation of the employment relationship, the complainant had no guarantee that his contract would be renewed, nor was he entitled *a fortiori* to claim, as he does, the payment of his remuneration until he reached retirement age.

15. In this case, the Tribunal deems it fair to set the amount of compensation due to the complainant at 25,000 euros, for all damages incurred.

16. The Tribunal cannot accede to the Organization's request to consider that it has executed Judgment 2965, insofar as it was ordered to pay the complainant 3,000 euros for moral damages and 2,000 euros for costs.

Indeed, the fact that the Organization has not yet received the complainant's bank details does not suffice to extinguish its debt towards him.

The financial penalties ensuing from this judgment shall therefore be added to the sums awarded in Judgment 2965, if they have not already been paid.

17. The complainant asks the Tribunal to sanction UNIDO for having failed to comply with the language chosen for communications "during this dispute".

However, this claim, which is entirely unsubstantiated, can only be rejected.

18. As regards the matter of the publication of the complainant's name in the full version of Judgment 2965 on the Tribunal's case law database, which is not directly connected to the dispute between the complainant and UNIDO, the Tribunal has asked the Registry to ensure that the anonymity of persons cited in its judgments is preserved.

19. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 2,000 euros.

20. The complainant requests that the Director-General, UNIDO, its administrative board and the Member States be held jointly liable.

The Tribunal cannot accede to such a request, which in any event is outside its jurisdiction.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. UNIDO shall pay the complainant 25,000 euros for all damages incurred.
3. It shall also pay him costs in the amount of 2,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ