

The Administrative Tribunal,

Considering the complaint filed by Ms H. G. against the United Nations Industrial Development Organization (UNIDO) on 15 June 2006, UNIDO's reply of 9 October 2006, the complainant's rejoinder of 26 January 2007 and the Organization's surrejoinder of 10 April 2007;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Lebanese national born in 1951, joined UNIDO in 1976 as a Clerk/Typist at grade G-4 and was offered a permanent appointment in 1979. Having been granted two promotions, in January 1988 she was promoted to grade G-7 which corresponds to grade G-6 in the new grading structure. She served as an Administrative Assistant in various divisions of the Organization until 27 February 2004, when she was reassigned with effect from 1 March as a Programme Assistant to the Multilateral Environmental Agreements Branch in the Programme Development and Technical Cooperation Division (PTC/MEA). With effect from 13 October 2005 she was transferred to the Energy and Cleaner Production Branch in the Programme Development and Technical Cooperation Division (PTC/ECB) as a Programme Assistant at grade G-6.

In September 2002 an anonymous letter accusing UNIDO's Director-General and senior management of corruption and mismanagement was circulated to Member States, Permanent Missions, other United Nations organisations and the Staff Council of UNIDO. Soon thereafter, in a series of interviews that took place in December 2002 and January 2003, the complainant was questioned by senior management in connection with a search she had allegedly conducted with the assistance of another staff member for the purpose of obtaining information which was attached to the anonymous letter. A second series of interviews was held in November and December 2003; this time the complainant was questioned about her alleged search by the Director of the Internal Oversight Group.

On 27 February 2004 the Managing Director of the Programme Coordination and Field Operations Division (PCF) told the complainant that the Director-General had decided to reassign her to PTC/MEA with effect from 1 March 2004. After being informed of her reassignment, on 1 March 2004 the complainant required medical treatment and went on certified sick leave until 4 June 2004. By a letter of 6 April 2004 the Organization forwarded to the complainant a memorandum dated 27 February 2004, in which the Director of the Human Resource Management Branch officially informed her of the Director-General's decision to reassign her to PTC/MEA as a Programme Assistant.

In a memorandum to the Director-General, dated 26 May 2004, the complainant expressed her disappointment about the fact that her reassignment had been made "with little regard for [her] qualifications and experience [and without any] prior consultation"; she requested a review of the decision and reinstatement to her previous post. On 11 June 2004, in a letter signed by the Director of the Human Resource Management Branch, she was notified of the Director-General's decision to reject her request for review. She was informed that the decision had been taken in the interest of the Organization and that the Director-General saw no reason for reconsideration.

On 12 August 2004 the complainant appealed the Director-General's decision with the Joint Appeals Board. She argued that the decision was tainted with procedural irregularities, that it was not in the best interest of the Organization and that it had caused her moral and physical injury. In her comments of 5 August 2005 on a statement made on behalf of the Director-General before the Board dated 12 October 2004, she further contended that her reassignment was linked to the investigations concerning the anonymous letter and that it constituted a veiled sanction. In its report of 20 February 2006 the Board found that the complainant's reassignment "was carried out in a way that harmed her professional dignity" and recommended that she be paid 7,000 euros in compensation for moral damages. It also held that her reassignment in October 2005 to PTC/ECB had rectified her status and

therefore recommended that her request for reinstatement be dismissed. However, it failed to find evidence supporting the allegation that the reassignment amounted to disciplinary action. In a memorandum dated 16 March 2006 the Director-General endorsed the recommendations of the Joint Appeals Board. That is the impugned decision.

In a memorandum of 21 April 2006 the complainant communicated to the Director-General her disagreement with some of the findings of the Board and requested that the amount offered in compensation be raised. She was subsequently notified by a memorandum dated 25 April 2006, which referred to the Director-General's decision of 16 March 2006, that the amount of compensation recommended by the Board, namely 7,000 euros, would be deposited into her salary account. In response to her request of 21 April she was informed by another memorandum of 19 May 2006 that the Director-General had offered to increase the amount recommended by the Board by 3,000 euros. She rejected this offer on 25 May, adding that she was prepared to accept in full and final settlement 20,000 euros paid at the latest by 6 June 2006, or else she would file a complaint with the Tribunal. On 2 June UNIDO reiterated its offer of an additional 3,000 euros. Following the filing of her complaint with the Tribunal, the Organization made a renewed effort to settle the matter by offering on 28 August 2006 an additional 5,000 euros, bringing the total amount to 15,000 euros. On 4 September 2006 the complainant declined the offer, stating that the proposed amount did not compensate her for the unjust suffering she had endured both professionally and personally as a result of the Organization's wrongdoing.

B. The complainant challenges the Director-General's decision to reassign her to PTC/MEA as a Programme Assistant. She contends that at no point was she given an adequate explanation of the reasons underlying her reassignment or an opportunity to respond. She refuses to accept that "rotation" and the "exigencies of service" in PTC/MEA were the real reasons behind the decision and recalls that the Director of PTC/MEA indicated that the Branch had not requested her reassignment since it already had two Programme Assistants and thus there was no urgent need for another one. In this context, she draws attention to the fact that she was reassigned with her post as no new post had been created for her and that the Administration failed to provide her with a job description and by implication a job classification.

She dismisses the assertion that her reassignment provided her with an opportunity for career growth, arguing that it amounted to a *de facto* demotion, since it entailed a downgrading of her responsibilities: from advising senior managers and directors in administrative matters and reporting directly to the Managing Director of the PCF Division, she was placed in a position where her sole responsibility was to provide secretarial assistance to a Professional staff member at grade P-3. Moreover, the complainant says that she fails to see how the decision to reassign her from a position in which she had gained "invaluable expertise" to a post for which she had no experience could be made in the interest of the Organization.

The complainant further submits that the decision to reassign her constituted a "hidden sanction". She alleges that her questioning by senior management had an inquisitorial character. During the interviews she was intimidated and spoken to in an offensive manner; her office was searched and she was kept under surveillance. Referring to the Board's conclusion that there was no evidence of any steps taken against her prior to her reassignment which could support the view that she was the target of disciplinary sanctions, she points out that the series of interviews to which she was subjected amounted to such prior steps. She also draws attention to the fact that, despite its request, the Joint Appeals Board was not given access to the report prepared by the Internal Oversight Group concerning the investigation that had taken place in November and December 2003. As a result, it did not have at its disposal all the information relevant to her case.

Furthermore, the complainant argues that the Administration violated her right to be heard and consequently her right to due process in that it consistently refused her access to a piece of evidence that contained crucial information.

In addition, she contests the Board's finding that her status was rectified when she was transferred to the PTC/ECB as a Programme Assistant at grade G-6. Noting that the responsibilities of a Programme Assistant are inferior to those of an Administrative Assistant, she submits that since her reassignment she has been "under-utilized". In her opinion, in order to be consistent with its findings, the Board should have recommended that she be reinstated to her previous post.

The complainant also contends that her professional and personal reputation was damaged as a result of the Director-General's decision to reassign her without any prior consultation or justification, after sixteen and a half

years of continuous satisfactory service as an Administrative Assistant. She considers the amount offered by the Organization in moral damages as inadequate to account for the injury she sustained over a period of three years.

Lastly, in light of the fact that it took the Organization more than 18 months to conclude the internal proceedings, she argues that UNIDO should be held accountable for the “excessive delay in the hearing and determination of [her] appeal”.

The complainant asks the Tribunal to set aside the decision of 25 April 2006, insofar as it did not reinstate her to her previous post as Administrative Assistant, and to order the Organization to pay her 20,000 euros in compensation for moral damages. She also claims 5,000 euros in damages and costs incurred due to the excessive delay in the internal appeal and an additional 5,000 euros in legal fees.

C. In its reply the Organization refutes the plea that the complainant’s reassignment was a hidden sanction, arguing that it was decided in good faith, in response to the need to strengthen the administrative support staff for technical cooperation activities in PTC/MEA, as underlined in the 2004 management review of the PTC Division. Given that the review conducted by the Internal Oversight Group did not produce any evidence that the complainant had acted in bad faith, which would warrant disciplinary action, her allegation that her reassignment was a hidden sanction must be dismissed as unfounded. Equally unfounded is her argument that the Joint Appeals Board was not given access to the formal report of the Director of the Internal Oversight Group – which became the Internal Audit Group, Office of the Comptroller General (OCG/IAG) – given that no such report ever existed. This being so, it cannot be accepted that the complainant was denied the right to be heard as a result of the fact that she was not given access to information concerning her case. UNIDO further rejects as unsubstantiated the complainant’s characterisation of the interviews in December 2002 and January 2003 and in November and December 2003 respectively as intimidating and offensive. It emphasises that at no point did the complainant request the Human Resource Management Branch to initiate disciplinary measures against the alleged perpetrators, and points out that the allegation that the transfer amounted to a hidden disciplinary sanction was neither made in her request for review nor in her statement of appeal.

In response to the complainant’s argument that the Director-General failed to give reasons for her reassignment, UNIDO submits that the matter was given full consideration in the proceedings before the Joint Appeals Board and that, in line with its recommendations, the Director-General accepted to pay the complainant compensation in moral damages.

The Organization argues that the complainant’s claim for reinstatement to her previous post must be dismissed as unfounded in law. It contends that the claim is irreceivable, insofar as the complainant contests her transfer to PTC/ECB, and asserts that the posts of Programme Assistant and Administrative Assistant are both classified at grade G-6. Additionally, it expresses the view that reinstatement is not an appropriate remedy because the previous position has been filled by another staff member, who was recruited following a vacancy announcement.

UNIDO refutes the complainant’s allegation that the amount she was offered in compensation was inadequate and accordingly requests the Tribunal to reject her claim for 20,000 euros. It observes that, in view of the fact that her reassignment was not a hidden sanction, any claim for damages resulting from the interviews that senior management held with the complainant is irreceivable for failure to exhaust the internal means of redress. It asserts that the amount recommended by the Board was based on the facts of the case and the Tribunal’s case law, and recalls that, in spite of UNIDO’s efforts to resolve the dispute in an amicable manner, the complainant turned down a settlement offer of 15,000 euros as well as the initiative of the Legal Adviser to offer in final settlement the amount of 17,500 euros. For the same reasons, the Organization considers that the claim for costs should likewise be denied.

Similarly, UNIDO dismisses the claim for damages resulting from the “excessive delay” in the internal proceedings as devoid of merit. It contends that the complainant must be held responsible for part of the delay, given that she submitted her comments some ten months after the statement on behalf of the Director-General had been filed.

D. In her rejoinder the complainant develops her pleas. She asserts that, contrary to what the Organization alleges, already in her appeal before the Joint Appeals Board she considered her reassignment to be linked to the investigations following the circulation of the anonymous letter. She maintains that she was denied access to the reply given by the Director of the OCG/IAG in response to the request of the Joint Appeals Board in connection with its investigation, and denounces the absence of a formal investigation report. She questions the Legal

Adviser's authority to offer her 17,500 euros as a final settlement and says that she was never officially offered that sum.

Lastly, she reiterates her request for reinstatement; in the event the Tribunal considers reinstatement inappropriate, she asks to be appropriately compensated.

E. In its surrejoinder the Organization maintains its position. It submits that the complainant has not provided any convincing argument to support the view that the amount recommended by the Joint Appeals Board was insufficient or that her rejection of the Organization's offer of 15,000 euros was reasonable. It considers the fact that no formal report was prepared by the OCG/IAG as immaterial. Furthermore, UNIDO refutes the allegation that the complainant was never officially offered 17,500 euros in moral damages, emphasising that the Legal Adviser has wide discretion in litigation matters. It also rejects the amended claim for reinstatement, noting that nowhere in her internal appeal did the complainant request compensation in lieu of reinstatement.

CONSIDERATIONS

1. The complainant impugns the decision of the Director-General of 16 March 2006 – which was followed by a memorandum from the Administration dated 25 April 2006 concerning the transfer of the compensation granted to her – insofar as it does not reinstate her to her previous post and it does not award her moral damages in the amount she claimed in her appeal. In his decision the Director-General endorsed the conclusion of the Joint Appeals Board that the complainant's transfer to the PTC/ECB in October 2005 had rectified her status as well as its recommendation that she be compensated in the amount of 7,000 euros.

2. She requests that the Tribunal set aside the decision of 25 April 2006, insofar as it did not reinstate her in her previous position as Administrative Assistant and order the Organization to pay 20,000 euros in compensation for moral damages. She also requests that the Organization be ordered to pay her 5,000 euros in damages and costs for the excessive delay in the internal appeal proceedings and an additional 5,000 euros in legal costs.

3. In her submissions the complainant argues that her sudden reassignment from the post of Administrative Assistant to that of Programme Assistant was a hidden sanction and that it was not in the interest of the Organization. She contends that the Joint Appeals Board erred in basing its conclusions on evidence that she was refused access to, thereby infringing her right to due process, and that the Board also erred in saying that her situation was "rectified" since she was transferred to a post which it considered equal in responsibility to her previous post. Lastly, she claims that the amount she was awarded in moral damages was not equal to the suffering she endured.

4. As her main plea the complainant states that her sudden reassignment was a response, in the form of a hidden sanction, to a series of interviews that had taken place between December 2002 and December 2003 as part of an internal investigation into an anonymous letter which made allegations of corruption and mismanagement by UNIDO's Director-General and senior management and which had been circulated to Member States, Permanent Missions, other United Nations organisations, and UNIDO's Staff Council. She points out that she was never informed of the outcome of the interviews she had with senior management and the Internal Oversight Group or the conclusions of the investigation. On 27 February 2004 she was informed orally by her immediate supervisor, the Managing Director of PCF, that the Director-General had decided to reassign her to PTC/MEA, with effect from the following working day, 1 March 2004. The complainant was so distressed by the news that she immediately went home. After seeing the Medical Officer at the Joint Medical Service she was put on certified sick leave. She remained on sick leave until June 2004, when she returned to work on a part-time basis as a Programme Assistant in PTC/MEA. She resumed full-time status in early July 2004. The complainant notes that there was no urgent need for another Programme Assistant in PTC/MEA and that the Branch had not asked for her reassignment. She emphasises that no reasons were given for her sudden reassignment, no prior consultations or discussions were held, and no job description was given to her despite requests on her part, all of which support her claim that her transfer was a hidden sanction. Moreover, she considers that the reassignment amounted to a *de facto* demotion because her new post, although classified at the same G-6 grade, held fewer responsibilities and less prestige. She contends that other staff members would see the decision as a negative reflection on her work, therefore causing harm to her professional reputation.

5. After unsuccessfully requesting the Director-General to review his decision to reassign her to PTC/MEA,

the complainant filed an appeal with the Joint Appeals Board. During the internal proceedings she requested access to four documents submitted by the Organization and reviewed by the Board. The Chairperson of the Board responded by forwarding three of the four documents and stating that “[a]s a matter of principle”, she had decided to decline the complainant’s request for the fourth document. The document that was withheld from the complainant was the reply of the Director of the OCG/IAG to the Board’s memorandum of 1 February 2006 requesting information on the interviews which had taken place in November and December 2003 and enquiring whether any wrongdoing had been determined or established. The complainant contends that the Board’s refusal to grant her access to that specific document violated her right to due process.

In addition, she argues that the Organization should be held accountable for the “excessive delay” in the internal proceedings: it took the Board 16 months to hold its first meeting and 18 months to submit its report.

6. The Organization replies that the complainant’s reassignment from the post of Administrative Assistant to that of Programme Assistant was in the interest of the Organization and was motivated by “the need to strengthen the administrative support staff for technical cooperation activities, particularly in [PTC/MEA]”. It denies that her reassignment was a hidden sanction and asserts that it was made in good faith. The defendant argues that in transmitting three out of the four documents the complainant had requested, the Appeals Board acted in accordance with paragraph (q) of Appendix K to the Staff Rules which states that “[t]he Chairperson of the Panel shall determine which documents are to be transmitted to the members of the panel and to the parties”. Accordingly, it considers that there was no breach of due process. It also argues that the complainant’s claim for damages for the delay in the internal proceedings should be dismissed for lack of merit. It asserts that the complainant was responsible for part of the delay since she submitted her comments on the statement on behalf of the Director-General some ten months after it had been filed. The Organization also points out that the complainant rejected a reasonable settlement offer of 15,000 euros and considers that in line with the Tribunal’s case law, an award of moral damages or costs is not appropriate in these circumstances.

7. In its report the Board found that “notwithstanding the authority of the Director-General”, the complainant’s reassignment was effected “without proper notice, without sufficient consultation with [her], with no adequate reason being given [...], and to a function that did not exist”. It went on to state that while it was “at a loss to explain the motives for the reassignment, it found no evidence that the [complainant] was suspected of wrongdoing which could have served as the basis for a disciplinary action, whether formal or hidden”. The Board also noted that “after a considerable gap of 1 year 8 months”, the complainant was finally transferred to a function with responsibilities “that were equivalent to those of her previous post”. On the basis of these findings it concluded that the transfer of the complainant to a job with equivalent responsibilities on 13 October 2005 “rectified her status” and recommended that “the [complainant’s] claim to be reinstated in her previous position be dismissed”. It further concluded that the reassignment was carried out “in a way that harmed her professional dignity” and recommended that she “be paid financial compensation for moral damages [...] in the amount of 7,000 euros”.

8. The Tribunal is of the view that the complainant’s reassignment to PTC/MEA as a Programme Assistant, with effect from 1 March 2004, was a hidden sanction. A hidden sanction is a measure which appears to be adopted in the interests of the Organization and in accordance with the applicable rules, but which in reality is a disciplinary measure imposed as a penalty for a transgression, whether real or imaginary. The true disciplinary nature of an administrative measure that constitutes a hidden sanction is not always apparent. It is therefore necessary to examine the particular circumstances in each case where there is an allegation that an administrative measure is a hidden sanction.

9. In the present case there are a number of indications that taken together lead to the conclusion that the complainant’s reassignment to PTC/MEA was a hidden sanction. First, the decision was taken only two months after the last in a series of interviews that had taken place between December 2002 and December 2003 as part of an internal investigation. The Organization did not publish any formal report on the results of the investigation but instead stated in a memorandum submitted to the Board that the interviews had “not reveal[ed] any evidence to support a charge that [the complainant] [...] [had] acted in bad faith”. It is important to note that this document, which was not seen by the complainant until it was submitted as part of the Organization’s reply in the proceedings before the Tribunal, does not explicitly clear the complainant from any wrongdoing in connection with the circulation of the anonymous letter in September 2002.

Furthermore, the Joint Appeals Board erred in denying the complainant access to that document given that all

documents which have or may have a bearing on its conclusions must be made available to all parties concerned in accordance with the right to due process. Both the Board and the Organization relied on paragraph (q) of Appendix K to the Staff Rules. Nevertheless, they erroneously interpreted that provision to mean that the chairperson of the panel may decide that some documents may not be transmitted to members of the panel and to the parties respectively, when in fact as a matter of principle the evidence examined must be accessible to all parties.

10. The second indication that the complainant's reassignment was a hidden sanction is that the complainant was informed suddenly, that is without prior notice and without an opportunity to be heard. Neither did the text of the memorandum dated 27 February 2004 give any explanation of the Director-General's decision. It merely stated: (1) "Due to the exigencies of service, the Director-General has decided to reassign you to PTC/MEA in the function of Programme Assistant with effect from 1 March 2004", and (2) "I wish you all the best in your new assignment." In a similar case where the complainant had been reassigned without prior notice and without an opportunity to be heard the Tribunal stated that "[t]aken together, the material circumstances give grounds for considering that the impugned transfer partly constituted a hidden disciplinary sanction" (see Judgment 1929, under 9).

11. Third, contrary to the Organization's claim that the reassignment was beneficial to the Organization, the fact is that the PCF Division remained without an Administrative Assistant from 1 March to 23 July 2004. In addition, the complainant had no experience as a Programme Assistant and PTC/MEA apparently did not need one because it already had two staff members carrying out the duties of Programme Assistant. That, combined with the fact that there was no vacancy announcement for the post to which she was reassigned and that the complainant was not given a job description for the post in question, is a further indication of a hidden sanction. The Tribunal concludes that the complainant's reassignment from the post of Administrative Assistant to that of Programme Assistant was a hidden sanction.

12. It follows that the impugned decision, that is the Director-General's decision of 16 March 2006, must be set aside, insofar as it did not involve the payment to the complainant of moral damages higher than 7,000 euros. As regards the delay in the internal proceedings, the Tribunal observes that the Organization's argument that part of the delay was caused by the late submission of the complainant's comments to the Board is irrelevant as it had no bearing on the delay, given that the Board was ready to hold its first meeting only on 6 December 2005, that is 16 months after the submission of the appeal, which is an unacceptable delay. As regards the complainant's claim for moral damages, the Tribunal, considering the length of the hidden disciplinary procedure and the delay in the internal appeal proceedings which resulted in the impracticability of the complainant's reinstatement, the offence to her dignity and good name caused by those procedures and by the Organization's subsequent decisions, awards the complainant 22,000 euros in addition to the sum of 7,000 euros already paid. This amount includes compensation for the delay in the internal appeal proceedings and for non-reinstatement as alternatively requested by the complainant. In addition, the complainant is entitled to 4,000 euros in legal costs.

13. In the circumstances, there is no need for the Tribunal to deal with the other issues raised by the complainant.

DECISION

For the above reasons,

1. The Director-General's decision of 16 March 2006 is set aside to the extent that it did not involve the payment to the complainant of compensation higher than 7,000 euros.
2. UNIDO shall pay the complainant 22,000 euros in compensation for moral damages, in addition to the sum of 7,000 euros already paid.
3. It shall also pay her 4,000 euros in legal costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G.

Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.