

108th Session

Judgment No. 2891

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss H. G. against the United Nations Industrial Development Organization (UNIDO) on 12 June 2008, the Organization's reply of 17 November 2008, the complainant's rejoinder of 5 February 2009 and UNIDO's surrejoinder of 19 May 2009;

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. Facts relevant to this case are to be found in Judgment 2659, delivered on 11 July 2007, in which the Tribunal awarded the complainant compensation in the amount of 29,000 euros on the grounds that her reassignment with effect from 1 March 2004 from the position of Administrative Assistant in the Office of the Managing Director, Programme Coordination and Field Operations Division (PCF/OMD), to that of Programme Assistant in the Multilateral Environmental Agreements Branch, Programme Development and Technical Cooperation Division (PTC/MEA), constituted a hidden disciplinary sanction.

It may be recalled, that immediately after being informed of her reassignment, the complainant went on certified sick leave and did not return to take up her new duties until early June 2004. On 14 May 2004, while still on sick leave, she submitted an application for the position of Administrative Assistant in PCF/OMD, that is, the position she had vacated upon being reassigned. By e-mail of 9 June 2004 the Human Resource Management Branch informed the complainant that, as she had been reassigned on 1 March 2004, her application could not be considered, because paragraph 17 of the Director-General's Administrative Instruction No. 16 of 1 January 2003 provided that “[f]or [staff members’] applications to be receivable, staff should have served in one position for a minimum period of one year”.

On 28 June 2004 the complainant wrote to the then Director-General requesting a review of the decision not to consider her application. She argued that Administrative Instruction No. 16, the objective of which was to put into place a series of human resource management systems that addressed career growth, did not apply to her case because her application for the post of Administrative Assistant in PCF/OMD had not been submitted in the context of a “career growth plan through fast track promotion”; rather she had applied for a position she had previously occupied and from which she had been reassigned against her will. By memorandum of 15 July 2004 the Director of the Human Resource Management Branch replied on behalf of the Director-General that Administrative Instruction No. 16 defined inter alia the eligibility criteria for staff members applying for advertised posts and was therefore applicable to all cases and not only those involving promotions. He recalled that the complainant had only recently been reassigned to a new post and he also informed her that a selection decision had already been made.

On 10 September 2004 the complainant lodged an appeal with the Joint Appeals Board. She requested that the decision regarding her application be annulled, that her application be considered and that she be paid moral damages in an amount equivalent to 12 months’ salary. In its report of 21 February 2008 the Board found that there was no basis for the Organization’s argument that the complainant’s application should not be receivable, that the Organization had

not applied the criterion set forth in paragraph 17 of Administrative Instruction No. 16 in a uniform manner, thereby *de facto* discriminating against the complainant, and that the formulation of the said paragraph was ambiguous and should thus be revised. It recommended that the complainant be awarded moral damages in an amount equal to 12 months' salary, given in particular that reappointment to her previous post would be impractical due to the length of time that had elapsed.

By letter of 17 March 2008 the complainant was informed that on 11 March the Director-General had endorsed the Board's recommendation for an award of compensation, but that he had decided to set the amount at 15,000 euros. The payment was made on 24 April. On 12 June 2008 the complainant filed this complaint impugning the Director-General's decision not to award her the compensation recommended by the Joint Appeals Board.

B. The complainant submits that the Organization wrongfully denied her the right to be considered for the position of Administrative Assistant in PCF/OMD on the basis of an "untenable interpretation" of Administrative Instruction No. 16 and, in particular, of what constitutes "fast track promotion". She asserts that the decision not to consider her application amounted to discriminatory treatment, especially in light of the fact that other candidates, who had not served in their respective positions for one year, were allowed to apply and their applications were considered.

The complainant contends that the Director-General's decision to award her 15,000 euros in compensation was arbitrary because, although he endorsed the Joint Appeals Board's finding of discrimination, he failed to give reasons for not following its recommendation. She also contends that the defendant failed in its duty of care towards her and acted with negligence, and that it should therefore be held accountable for the excessive delays in the determination of her case, which severely harmed her legitimate interest in obtaining a speedy resolution of the dispute.

The complainant requests that the impugned decision be set aside and that she be awarded compensation in an amount equal to 12 months' salary. She also claims exemplary damages for the delays in the internal appeal procedure in the amount of 15,000 euros and costs in the sum of 7,000 euros.

C. In its reply UNIDO denies the complainant's allegations of discrimination. It contends that the Director-General did not endorse the Joint Appeals Board's finding of discrimination but decided, in view of the particular circumstances of the complainant's case, to award her compensation on the grounds that she had not been considered for the position of Administrative Assistant in PCF/OMD.

The Organization also denies the contention that the impugned decision was arbitrary or unjustified. It emphasises that the position for which the complainant applied was at the same grade as that which she occupied and that her selection to the former would not have involved a change of grade. In its opinion, the complaint is not about arbitrariness but about the appropriate amount of moral damages that should be awarded to the complainant. It considers it incorrect for the complainant to accuse the Administration of negligence in order to justify the amount of damages she claims and submits that, as this second complaint necessarily overlaps with the complaint that led to Judgment 2659, any calculation of moral damages should take into account that the complainant has already been paid a total of 44,000 euros in compensation.

UNIDO rejects the complainant's claim for exemplary damages. With regard to the damages claimed in respect of the delays in the internal appeals procedure, it argues that the complainant has been adequately compensated for these delays through the amount already paid to her. It recalls in that respect that in Judgment 2659 the Tribunal awarded moral damages taking into consideration *inter alia* the impracticability of the complainant's reinstatement.

D. In her rejoinder the complainant characterises as inconsistent the arguments put forward by the Organization to justify the Director-General's decision to award her an amount significantly lower than

that recommended by the Joint Appeals Board. In her view, the fact that UNIDO has been sanctioned for an earlier breach does not constitute grounds for a reduced award of damages. She reiterates her allegation of discrimination and refers to concrete examples of candidates whose applications were considered despite the fact that they had served in their respective posts for less than one year.

E. In its surrejoinder the Organization submits that the amount claimed by the complainant in compensation is excessive and unjustified in the circumstances. It dismisses the allegation of discrimination as unsubstantiated and devoid of merit.

CONSIDERATIONS

1. The complainant was reassigned with effect from 1 March 2004 from the position of Administrative Assistant in PCF/OMD to that of Programme Assistant in PTC/MEA. In a first complaint she challenged the reassignment decision and in Judgment 2659 the Tribunal found that it constituted a hidden disciplinary sanction. It thus awarded the complainant compensation in the amount of 29,000 euros.

2. Soon after her reassignment the complainant applied for the position of Administrative Assistant in PCF/OMD, i.e. her previous post, but was informed that her application could not be considered by reason of paragraph 17 of the Director-General's Administrative Instruction No. 16, which provides that "[f]or [staff members'] applications to be receivable, staff should have served in one position for a minimum period of one year". Following the rejection of her request for a review of the decision not to consider her application, the complainant lodged an appeal with the Joint Appeals Board requesting that the decision be annulled, that her application be considered and that she be awarded moral damages equivalent to 12 months' salary. The Board found that the complainant had been *de facto* discriminated

against and recommended that she be awarded the amount she had requested in moral damages. The Director-General endorsed the recommendation for an award of moral damages but decided to set the amount at 15,000 euros.

3. The complainant impugns the Director-General's decision insofar as it does not award her moral damages in the full amount recommended by the Board. She requests 12 months' salary as compensation and exemplary damages in the amount of 15,000 euros for the egregious delay in dealing with her internal appeal, as well as 7,000 euros in costs.

4. She claims that the Director-General's decision was flawed because, although he endorsed the Board's recommendation, thus recognising the discriminatory behaviour on the part of the Organization, he reduced the amount of moral damages to be awarded without fully justifying his decision.

5. The Organization states that the decision to reduce the award of moral damages to 15,000 euros reflects the Director-General's disagreement with the Board's finding of discrimination and takes into account the fact that the complainant's application for her previous post as Administrative Assistant in PCF/OMD did not involve a change of grade. It denies that the decision was arbitrary, unexplained or unjustified and further justifies its opinion by noting that the complainant has already been paid a total of 44,000 euros, including 29,000 euros for the earlier matter.

6. By endorsing the Board's recommendation for an award of compensation, the Director-General recognised that the decision not to accept the complainant's application for her old post was wrong. Moreover, there is nothing in the Director-General's decision to show that he disagreed with the Board's finding of discrimination. The Tribunal sees no reason to depart from that finding and notes that that discrimination appears to be a continuation of the Organization's unfair treatment of the complainant, stemming from the original

reassignment decision which in Judgment 2659 was found to be a hidden disciplinary sanction. It can be added that the argument put forward by the Director-General in his decision of 11 March, namely that “[t]he post to which the [complainant] applied was at [grade G-6, i.e. the same grade as the complainant’s] and, therefore, selection to that post would not have resulted in a change of level”, is irrelevant because it relates to material damages rather than moral damages. While this case stems from the previous complaint, the two cases are separate and distinct, being based on different facts and different administrative decisions. Each unlawful decision must have its own remedy. Therefore, the Organization’s assertion that the damages already paid to the complainant must be taken into account in the calculation of damages in the present case is incorrect.

7. The Tribunal finds that UNIDO failed to deal with the complainant’s appeal in a timely and diligent manner. According to well-established case law, the Organization has a duty to maintain a fully functional internal appeals body. Further, “[s]ince compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed” (see Judgment 2197, under 33). The complainant’s appeal was filed on 10 September 2004 and the Director-General’s decision to endorse the appeal in part was dated 11 March 2008. This represents a significant and unacceptable delay of approximately 42 months. This delay entitles the complainant to moral damages. However, having regard to the reason for the delay (mainly obstacles in the appeal procedure) and considering the Organization’s subsequent steps to rectify the situation, the Tribunal does not consider that the delay warrants an award of exemplary damages.

8. The Tribunal, taking into account that the unlawful non-consideration of the complainant’s application amounted to discriminatory behaviour and considering the importance of the moral injuries stemming from the illegal act as well as from the egregious delay in the internal appeal proceedings, awards the

complainant moral damages – consistent with the Joint Appeals Board’s recommendations – in an amount equal to 12 months’ net salary at the complainant’s grade at the time the decision not to consider her application was taken, less the 15,000 euros already paid to her by UNIDO. No payment of interest is necessary.

9. The complainant is entitled to the costs of these proceedings as well as her costs in the internal appeal in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The Director-General’s decision of 11 March 2008 is set aside to the extent that it did not involve the payment of more than 15,000 euros.
2. UNIDO shall pay the complainant an amount equal to 12 months’ net salary, less the 15,000 euros already paid, as detailed under 8 above.
3. It shall also pay her 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet