

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

108th Session

Judgment No. 2907

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J.-M. D. against the United Nations Industrial Development Organization (UNIDO) on 9 June 2008 and corrected on 9 July, UNIDO's reply of 28 October 2008, the complainant's rejoinder of 28 January 2009 and the Organization's surrejoinder of 7 May 2009;

Considering Articles II, paragraph 5, and VII 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. The complainant, a French national born in 1948, joined UNIDO in 1991 at Headquarters in Vienna as Director of the Industrial Investment Division at the D-2 level. In July 1998, after having held a variety of functions, he was appointed to the post of Inspector-General in the Office of Internal Oversight, likewise at level D-2. The title of this post changed twice during the complainant's tenure; from March 2002 onwards he was referred to as Director of the Internal Oversight Group.

In September 2002, in light of the external auditor's report on the Organization's accounts for the financial period 2000-2001, the Programme and Budget Committee recommended that the Director-General "strengthen the internal oversight function, in a systematic manner, inter alia through an improved staffing profile". During a meeting on 14 October the Director-General informed the complainant that, further to that recommendation, he intended to replace the Internal Oversight Group with a new Office of the Comptroller-General and to fill the post of Comptroller-General by open competition. These measures were announced to staff in the Director-General's Bulletin of 14 November 2002. In that same Bulletin the Director-General stated that the high number of staff at the D-2/L-7 level was financially unsustainable and that, consequently, further extensions of appointments for staff at that level, other than Managing Directors, would not be warranted. The complainant's fixed-term contract was due to expire on 31 December 2002.

The Director-General wrote to the complainant on 10 December 2002 regarding possible future assignments. Referring to their earlier discussions, he noted that the posts in which the complainant had expressed an interest were encumbered and he urged him to give further consideration to field assignments, adding that a solution would have to be found before the complainant proceeded on annual leave at the end of the year. The complainant replied on 12 December that he intended to apply for the post of Comptroller-General, but that he would certainly consider other proposals corresponding to his level and experience in the event that he was not selected. He emphasised that he hoped to be able to remain at Headquarters at least until the end of the school year, because his two daughters were attending school in Vienna, whilst his wife was working in Geneva.

By a memorandum of 13 December 2002 the Director of the Human Resources Management Branch offered the complainant two field positions: Regional Director of the UNIDO Regional Office in Bangkok (Thailand), and Director of the UNIDO Office in Madagascar. Both positions were at the L-6 level and in each case a two-year appointment was offered. In a letter of 16 December 2002 the Director-General informed the complainant that these offers had been

made to him “to ensure the continuation of [his] service with the Organization”, because there were no vacancies at the D-2 level, and that he needed to have a reply from the complainant by 24 December 2002 at the latest. He added that he would consider extending the complainant’s contract until the end of March 2003 in the event that he decided to decline both offers and to await the completion of the recruitment process for the post of Comptroller-General, but that, should the complainant not be selected for that post, a decision on his future contractual status would then depend on a review of field duty stations and the availability of suitable vacancies at that time.

The complainant replied, in a letter dated 24 December 2002, that in view of his family situation he was unable to accept any field assignment at that time. He noted that the Director-General intended to renew his contract for three months pending completion of the recruitment process for the post of Comptroller-General, but expressed his concern as to “the vagueness of [his] contractual status” in the event that he was not selected for that post. However, by an e-mail of 9 January 2003 he informed the Director of the Human Resources Management Branch that he had decided to accept the offer of a two-year appointment as Regional Director in Bangkok. He was assigned to this post with effect from 1 January 2003 by a decision dated 10 January 2003, but he did not take up his functions in Bangkok until the beginning of May, when UNIDO had obtained clearance for his appointment from the Thai authorities.

When the complainant’s appointment expired at the end of April 2005, it was initially extended by six months. On 19 October 2005 he was offered a further extension, this time for a duration of three months. The complainant accepted this extension, but on 7 December 2005 – the Director-General’s last day in office – he wrote to the latter to request a review of the decision to extend his contract by only three months. He stated that his request for review also extended to earlier related decisions commencing with the decision of 10 January 2003 to appoint him to the L-6 level post of Regional Director in Bangkok. He objected in particular to the fact that, on being reassigned to the field, he had only been granted a letter of appointment under the 200 series Staff Rules, and that he had not been informed of the practice

of issuing two parallel contracts – one under the 200 series Rules and another under the 100 series Rules – to staff who were reassigned to the field after having served at Headquarters under a 100 series appointment.* He asserted that, unlike him, all his colleagues who had been reassigned from Headquarters to the field had benefited from this practice, and that the decisions of 10 January 2003 and 19 October 2005 were therefore arbitrary and discriminatory. He added that the latter decision was also arbitrary and discriminatory in that he had been offered an extension that was significantly shorter than that which had been offered to his colleagues.

Replying on behalf of the Director-General, the Officer-in-Charge of the Human Resources Management Branch informed the complainant by letter of 6 February 2006 that, since he had accepted the offer of the post in Thailand on 9 January 2003, the decision to appoint him to that post could no longer be challenged. With regard to the disputed three-month extension of his appointment, she noted that he had since accepted a two-year extension until 31 January 2008, so that his claim in this regard had already been satisfied. As for the practice of granting parallel 100 and 200 series contracts, she pointed out that the complainant was not in the same situation as the colleagues to whom he referred.

On 5 April 2006 the complainant lodged an appeal with the Joint Appeals Board requesting that UNIDO restore his D-2 level, or its equivalent under the 200 series Rules (i.e. L-7), with effect from January 2003. The Board issued its report on 13 February 2008. Contrary to the view put forward by the Organization, it deemed the appeal to be receivable not only with respect to the decision of 19 October 2005, but also with respect to that of 10 January 2003, on the basis that the complainant might have challenged his field appointment earlier had the Administration informed him in January 2003 of the practice of issuing parallel contracts. It considered that

* Subject to certain exceptions which are not relevant to the present case, the 200 series Staff Rules are applicable to staff members appointed for service with technical cooperation projects. The 100 series Staff Rules are applicable to all other staff members, except for those engaged for conferences and other short-term service.

UNIDO had breached the duty of care it owed the complainant by compelling him to take a decision either to leave the Organization or to accept a field assignment at a lower level within a period of less than one month. The Board also noted that the decision not to grant further extensions at the D-2/L-7 level, as announced in November 2002, had not been implemented following the complainant's reassignment to the field and that in this respect he had been treated differently from two of his D-2 level colleagues. It recommended *inter alia* that he be offered a 100 series contract at the D-2 level *ad personam* for the period from 1 January 2003 to 31 January 2006.

By a memorandum of 7 March 2008 the new Director-General informed the Board that he rejected its conclusions and recommendations and that he had therefore decided to dismiss the complainant's appeal in its entirety. That memorandum, which constitutes the impugned decision, was forwarded to the complainant on 13 March 2008 together with a copy of the Board's report.

B. The complainant contends that UNIDO breached its duty of care and failed to act in good faith. He submits that, after he had indicated by letter of 24 December 2002 that he was unable to accept a field assignment, it simply stopped negotiating. When he returned to work in January 2003, he was informed that he had only two choices: Thailand or Madagascar at the L-6 level. Since his contract had expired along with his medical insurance, and facing the prospect of financial hardship for his family, he felt compelled to accept the post in Thailand. Furthermore, whereas he was informed that there were no vacant posts at Headquarters, a colleague was offered two such posts. The Administration did not explain to him the significance of the practice of granting parallel 100 and 200 series contracts to staff members reassigned to the field. Moreover, the policy announced in the Director-General's Bulletin of 14 November 2002, which supposedly justified demoting him to the L-6 level, was not applied subsequently to similarly situated D-2 level colleagues. He adds that the Organization did not show proper regard for his dignity and reputation in reorganising the internal audit function. Not only was he not consulted, but when staff were notified of the reorganisation, no

indication was given as to the role that he would have in future. Moreover, the fact that he was not designated as Acting Comptroller-General pending completion of the recruitment process gave the impression that he must somehow have disgraced himself.

The complainant also contends that he was discriminated against as a result of UNIDO's failure to inform him of the practice of granting parallel 100 and 200 series contracts. He argues that appointments under the 200 series Rules carry fewer guarantees concerning employment and career development. In particular, staff members holding 200 series contracts are not given the same consideration for vacant posts at Headquarters as those holding 100 series contracts. He points out that the Joint Appeals Board rejected the Organization's argument that his field assignment was a new assignment which he unconditionally accepted after his previous contract had expired, as it considered that there had been no break in service. He adds that he also suffered unequal treatment in relation to the short extensions of his assignment in Thailand, which violated UNIDO's policy of granting three-year extensions, and that his performance was not appraised by the former Director-General.

According to the complainant, his demotion to level L-6 was a hidden disciplinary measure imposed after the external auditor had identified shortcomings in the Organization's internal audit function. This measure was one of a series of decisions taken during the former Director-General's tenure which amounted to harassment.

The complainant asks the Tribunal to set aside the impugned decision and to award him material damages equivalent to what he would have earned at the D-2 level from 1 January 2003 until the execution of the present judgment, including all salaries, step increases, emoluments and pension rights, together with interest. He also claims moral damages and costs, and he requests that the Organization be ordered to reinstate his D-2 level under the 100 series Staff Rules with effect from 1 January 2003.

C. In its reply UNIDO submits that the complainant's claims are receivable only insofar as they concern the decision of 19 October

2005 to extend his contract by three months. His claims relating to earlier decisions are irreceivable because he did not challenge those decisions in due time. It rejects the argument that his fear of reprisals exempted him from complying with the applicable time limits, and observes that the allegation that he only recently became aware of the practice of issuing parallel 100 and 200 series contracts is not credible in view of the functions that he has performed in the past.

On the merits UNIDO states that a field restructuring exercise was under way in 2005 when the complainant's two-year appointment as Regional Director was due to expire, hence the need to issue two short extensions pending the finalisation of that process. It denies that he was transferred to the field against his will and submits that the allegation that it stopped negotiating and told him that he could only choose between Madagascar and Thailand is contradicted by the evidence, which shows that the Director-General had invited him to apply for the post of Comptroller-General and was willing to grant him a three-month extension of contract to enable him to do so. The complainant's 100 series appointment as Director of the Internal Oversight Group had expired and he unconditionally accepted the offer of an assignment in Thailand under the 200 series Rules. Once UNIDO had obtained clearance from the Thai Government, he was granted a two-year appointment in accordance with that offer. The Organization therefore considers that it acted in good faith and complied with its duty of care.

The defendant also denies the allegation that the Director-General did not negotiate in good faith with respect to vacant posts at Headquarters. It asserts that the two posts to which the complainant refers are in fact one and the same, and that the post in question had been offered to another staff member, who had accepted it in August 2002.

With regard to the complainant's allegation of unequal treatment, it points out that his situation is different from that of the colleagues to whom he refers. The complainant was offered the post in Thailand in the context of the restructuring of the Organization in 2002, one of the objectives of which was to align senior staff levels with programmatic

requirements. His colleagues were transferred to the field in different circumstances, long after that objective had been achieved, and they retained their grade as well as their 100 series contracts, which had not expired. He has not established, in its view, that he was treated differently from any other staff member in similar factual and legal circumstances.

The Organization denies that the restructuring of the internal oversight function harmed the complainant's dignity or reputation. It points out that this restructuring was undertaken at the request of UNIDO's Member States, and there was nothing to suggest that the complainant had somehow disgraced himself. As for the absence of performance appraisals, it states that this claim is clearly irreceivable.

Lastly, UNIDO rejects as unsubstantiated the allegation that the complainant's appointment as Regional Director constituted a hidden disciplinary measure and likewise his allegations of harassment, which it deems to be irreceivable.

D. In his rejoinder the complainant presses his pleas. He maintains that he was unaware, at the time when he accepted his appointment as Regional Director, of the practice of granting parallel 100 and 200 series contracts, and argues that he was not consulted with regard to the alleged field restructuring exercise. In his view, the decision to grant him short extensions of contract where there were no grounds for doing so supports his pleas of harassment and unequal treatment. Citing Judgment 2742, which involved another organisation, he also asserts that the decision to abolish the Internal Oversight Group and his post as Director of that Group violated Article IX of UNIDO's Financial Regulations, since it left UNIDO without any internal oversight function from mid-November 2002 until 16 June 2003, when the Comptroller-General took up his functions.

E. In its surrejoinder UNIDO maintains its position. It points out that, contrary to the complainant's assertion, it was at no time left without an internal oversight function, since the staff assigned to the Internal Oversight Group continued to perform their functions until they were reassigned to the Office of the Comptroller-General in June 2003. It

adds that the complainant's reliance on Judgment 2742 is misplaced: in the case leading to that judgment, unlike him, the complainant challenged the contested restructuring in a timely manner, and the Financial Regulations of the defendant organisation were in any case not the same as UNIDO's.

CONSIDERATIONS

1. The complainant, a French national, joined UNIDO on 1 October 1991 as Director of the Industrial Investment Division at the D-2 level. When a new Director-General of the Organization took office in December 1997, he was serving as Managing Director of the Division of Administration. After being appointed to the post of Assistant Director-General for External Relations in March 1998 and to that of Inspector-General in the Office of Internal Oversight, he was entrusted as from March 2002 with the duties of Director of the Internal Oversight Group reporting to the Director-General.

2. On 24 September 2002 the Programme and Budget Committee of UNIDO considered the report of the external auditor on the Organization's accounts for the financial period 2000-2001. One of the conclusions reached in this report was that the Internal Oversight Group did not have sufficient resources satisfactorily to perform its review functions. The Committee therefore recommended a strengthening of the Organization's internal oversight function through an improved staffing profile, *inter alia*. In order to follow up this recommendation the Director-General explained in his bulletin of 14 November 2002 that he had decided to replace the Internal Oversight Group with an Office of the Comptroller-General, which would be headed by a senior official recruited by competition.

3. Around the same time the Director-General had decided, as part of a policy aimed at solving the serious financial difficulties then being experienced by UNIDO, substantially to cut the number of directors at D-2 level (or the equivalent L-7 level). Such an intention could already be discerned in the earlier decision – announced in the

Director-General's bulletin of 15 February 2002 – to enhance the Organization's efficiency by reconfiguring the Secretariat into three large divisions, each of which was to be led by a new managing director recruited by competition. Indeed, one of the consequences of this decision was that several directors lost their posts. Pursuing this approach, the Director-General announced in the above-mentioned bulletin of 14 November 2002 that “the alignment of senior level staff with programmatic requirements w[ould] be implemented during the coming months”, and he stressed that he was “also aware that the current high number of D-2/L-7 level of staff [was] financially not sustainable”. He added that “[a] number of steps to address this situation [had], therefore, been initiated, which include[d] separation through natural attrition, reassignment to field offices, and reappointments”, and that “[a]s a result any further extensions of appointments of staff at the D-2/L-7 levels, other than the Managing Directors, [would] not be warranted”.

4. On 14 October 2002, just as the Internal Oversight Group was starting an audit of the Organization's procurement activities, the complainant was summoned to a meeting at which the Director-General upbraided him for initiating this audit without his authorisation.

The next day the Director-General invited the complainant to have lunch with him, to discuss his career prospects. According to the complainant, the Director-General indicated that it was highly unlikely that he would be selected for the Comptroller-General post that was to be filled in March 2003 and that, if no other post at Headquarters proved to be available, he should consider a field assignment.

5. On 10 December 2002 the Director-General sent the complainant a letter in which he suggested, as the Director of the Human Resource Management Branch had already done a few days earlier, that he should “consider carefully the possibility of field assignments”. He emphasised that, as the complainant's appointment was due to expire on 31 December, “time [was] of the essence”.

The complainant replied in a letter of 12 December that it was his intention in due course to apply for the position of Comptroller-General and that, if he were not selected, he would consider another senior post at Headquarters but that, for family reasons, he could not accept a field assignment in the immediate future. As his wife was working for the World Health Organization in Geneva, he had to take care of their two daughters who were attending school in Vienna.

By a memorandum of 13 December the Director of the Human Resource Management Branch offered the complainant two alternative field positions at the L-6 level (equivalent to the D-1 level), namely that of Regional Director of the UNIDO Regional Office in Bangkok or that of Director of the UNIDO Office in Madagascar.

On 16 December the Director-General sent the complainant a letter urging him to accept one of these posts and emphasising that they had been offered to him “to ensure the continuation of [his] service with the Organization” and that, since the posts in question had to be filled as soon as possible, the complainant should send his response “as soon as possible, but no later than 24 December 2002”. Having stated that he “would consider extending [his] contract for three months till the end of March 2003” if the complainant preferred to remain at Headquarters pending the completion of the recruitment process for the post of Comptroller-General, the Director-General pointed out that, should he not be the successful candidate, “a decision on [his] future contractual status w[ould] then depend on [a] review of field duty stations and the availability of suitable vacancies at that time”.

By a letter of 24 December 2002 the complainant confirmed that, for the time being, he could not accept either of the field assignments offered to him because of the above-mentioned compelling family reasons. He asked to be allowed to remain in a post at Headquarters and he emphasised that, to that end, he would be willing to be transferred to a D-1 post if necessary.

6. After the holiday period at the end of the year – when UNIDO Headquarters was officially closed – the complainant had a meeting on 9 January 2003 with the officer-in-charge of the Human

Resource Management Branch at the end of which he finally decided to accept the post of Regional Director in Bangkok in order to retain security of employment. By a decision of the Director-General of 10 January 2003 he was thus assigned to this post as from 1 January 2003 under a contract which was subsequently extended several times for varying periods.

7. On 7 December 2005, the last day of the term of office of that Director-General, the complainant requested him to review the decision of 19 October 2005 offering him an extension of his contract for a period of only three months and, more fundamentally, the aforementioned decision of 10 January 2003 as well as all the subsequent decisions extending his assignment as Regional Director in Bangkok. This request for review was based *inter alia* on the fact that the complainant had been employed in this post exclusively under 200 series contracts applicable to project personnel not working at Headquarters, which are much less favourable than the 100 series contracts held by staff at Headquarters. He contended that, in accordance with a practice of which he had only recently become aware, Headquarters staff reassigned to the field were routinely issued with parallel 100 series and 200 series contracts, which gave them greater job security and enabled them to receive priority consideration for vacant posts at Headquarters. The complainant therefore considered that he had been subjected to arbitrary and discriminatory treatment.

8. As this request for review was dismissed, the complainant lodged an appeal with the Joint Appeals Board which, in its report of 13 February 2008, deemed his claims to be both receivable and well founded and therefore recommended in particular that “the Appellant be offered a 100 series contract at D-2 grade ‘*ad personam*’ for the period 1 January 2003 to 31 January 2006”.

9. By a decision of 7 March 2008 the new Director-General nevertheless rejected the Board’s recommendation and dismissed the complainant’s appeal in its entirety.

That is the decision that the complainant impugns before the Tribunal. It should be noted that he has since been appointed UNIDO Representative to the United Nations and other international organisations in Geneva and Director in the Bureau for Organizational Strategy and Learning, with effect from 1 September 2006.

Receivability

10. The Organization argues that the complaint is irreceivable in that most of the claims contained in it are time-barred. It submits that the decision of 10 January 2003 and all the subsequent decisions which the complainant is now asking to have set aside had already become final by the time he lodged his internal appeal against them, with the sole exception of the decision of 19 October 2005.

However, according to the Tribunal's case law as established in Judgments 752, under 4, and 2821, under 9, for example, exceptions may be made to the applicable time limits when an organisation, by misleading the complainant or concealing some paper from him or her, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith.

As the Joint Appeals Board rightly found, this case law must be applied here owing to the particular circumstances in which the complainant's successive contracts were concluded.

It is true that the contracts in question clearly indicated that they were governed by the 200 series Staff Rules. However, the Organization does not dispute the existence of the practice, on which the complainant relies, of usually or routinely issuing a parallel 100 series contract to Headquarters staff reassigned to the field under a 200 series contract. In addition, there is no doubt that the advantages inherent to a 100 series contract are such that the award of this contract has a substantial bearing on a staff member's employment relationship with UNIDO. Consequently, however surprising this practice of awarding parallel contracts may seem, the Tribunal considers that the Organization could not, without breaching its duty of good faith, conceal from the complainant the fact that he was eligible to benefit

from this practice when he was assigned to Thailand and during the subsequent extensions of his appointment. Hence the above-mentioned time bar cannot be applied to the complainant, who states that he did not learn of the existence of this practice until November 2005 from contacts with colleagues also serving as UNIDO representatives, and who lodged his internal appeal within the new time limit running as from the discovery of this essential fact.

11. None of the three opposing arguments put forward by the Organization can be accepted.

It first submits that the complainant's explanation that the delay in lodging his appeal was due to his fear of being subjected to reprisals by the former Director-General does not justify his failure to comply with the applicable time limit. That statement is correct, but it does not alter the fact that, owing to the unfair conditions under which the disputed contracts were signed, this time limit had not started to run. Since this time limit did not apply, the reasons for the complainant's failure to file his appeal earlier are, by definition, irrelevant.

Secondly, the Organization questions the credibility of the complainant's statement that he knew nothing of the practice of issuing parallel contracts to former Headquarters staff reassigned to the field. It argues that he could not have been unaware of the existence of this practice in view of his level of responsibilities within the Organization and especially since he had previously been the Managing Director of the Division of Administration. However, since the Organization concealed an item of information which the principle of good faith required it to disclose, the burden of proof lies with it and the mere speculation on which it relies is not sufficient to establish that the complainant really knew of this practice.

Lastly, UNIDO submits that the complainant was not entitled to benefit from the practice of awarding parallel contracts because he was not reassigned to the field during the execution of his contract, but was assigned to the post in question under a new appointment following the expiry of his previous contract. This

presentation of the facts is contrived. In the instant case the complainant's change of post clearly took place in the context of an ongoing employment relationship which in reality made it a simple reassignment and not the end of an appointment followed by fresh recruitment. The Tribunal notes, moreover, that the personnel action form of 10 January 2003 terms this change of post a "reassignment" to the post of Regional Director in Bangkok.

12. All the claims entered in the complaint must therefore be regarded as receivable.

The merits

13. The facts set out above show that the complainant's reassignment was part of the Director-General's deliberate policy to reduce the number of senior officials at D-2 level at UNIDO Headquarters. According to the Tribunal's case law, international organisations may undertake restructuring by reducing or reassigning their staff, even for the sole purpose of making budgetary savings (see, for example, Judgment 2156, under 8). However, each and every individual decision adopted in the context of such restructuring must respect all the pertinent legal rules and in particular the fundamental rights of the staff concerned.

14. In this case, it is plain from the submissions that the decision of 10 January 2003 to reassign the complainant failed to meet these requirements in several respects, particularly on account of the hasty manner in which it was adopted.

15. The Tribunal will not accept the plea put forward by the complainant in his rejoinder that his reassignment was rooted in a

decision by which the Director-General unlawfully abolished the Internal Oversight Group. Contrary to his submissions, this group was not abolished until the Office of the Comptroller-General was actually established in June 2003, and the Organization was not therefore in breach of its duty under its Financial Regulations to maintain an internal audit service. The reference in this connection to Judgment 2742 is therefore irrelevant.

16. There is, however, merit in the complainant's plea that the decision of 10 January 2003 was taken in breach of the principle of good faith and of the duty of care which an international organisation owes its staff.

It must be emphasised that, as was found earlier when examining the complaint's receivability, the Organization breached the principle of good faith by concealing from the complainant the existence of a practice which would have enabled him to hold a 100 series contract during his assignment in Thailand.

Equally injurious to the complainant's rights were the actual conditions under which he was forced to accept this field assignment. Indeed, the evidence on file has convinced the Tribunal that, as the expiry of the complainant's contract on 31 December 2002 approached, the Organization built up the pressure around him and thus made it impossible for him to decide calmly what position to adopt on the assignments offered to him.

17. Firstly, the Tribunal notes that the urgent nature of the complainant's choice in this matter, which the Administration repeatedly stressed in its dealings with him, was in reality largely artificial. Apart from the fact that it was the Organization itself which, by previously giving the complainant a contract of only eight months, had set this deadline of 31 December 2002, there was nothing to prevent it from proposing that the complainant should provisionally retain his position as Director of the Internal Oversight Group, rather than giving it to an officer-in-charge, which is what happened in practice. Furthermore, the Organization does not effectively refute the complainant's specific allegations that, contrary to the information he

had received, there was no particular urgency to fill the two field positions he was offered. Indeed, the post which he turned down actually remained vacant for a very long time.

18. Secondly, it is clear from the submissions that, however much the Organization may deny it, the complainant did not receive an unequivocal assurance that his contract would be extended for three months if he chose to remain at Headquarters with a view to applying for the post of Comptroller-General. In the proceedings before the Tribunal the Organization has for the first time produced a draft contract and accompanying letter to that effect dated 7 January 2003. However, not only is it surprising that no mention was made of these documents in the proceedings before the Joint Appeals Board, but the Organization acknowledges that it is by no means certain that they were actually sent to the complainant. Even though this failure to inform him might have been ascribable simply to administrative negligence, it objectively resulted in the complainant being kept in a state of uncertainty as to his immediate future. Furthermore, it was incumbent upon the Organization to take the necessary steps to ensure that the contract extension was offered before the expiry of the previous contract which, by definition, placed the complainant in a situation of legal uncertainty.

19. Lastly, it is plain from the file that the Organization scarcely made any genuine efforts to offer the complainant a new position at Headquarters commensurate with his expectations, even though he had made it clear that he would be willing to accept demotion to the D-1 level. As the complainant rightly contends, if he had failed to obtain the post of Comptroller-General, he could have been assigned to the D-1 position of Director of the Internal Oversight Group, which was also created in the Office of the Comptroller-General and for which he was qualified. Similarly, the post of Director of the Africa Bureau, which was likewise at the D-1 level, in which the complainant had expressly shown an interest, was not offered to him although it was being held temporarily by a staff member at a lower grade pending the appointment of a new director, which did not occur until

2004. The Organization points out that both posts were to be filled by competition. Nevertheless, it should have informed the complainant about the availability of these jobs, and its argument that after all he did not apply for either of them is of no consequence whatsoever. Indeed, this circumstance, which may readily be explained by the fact that, in the meantime, he had taken up his new post as Regional Director in Thailand, arose after the disputed reassignment and therefore has no bearing on its lawfulness.

20. The Organization, by thus placing the complainant in a position where he was in effect compelled to accept one of the assignments to the field proposed for reasons of personnel management policy, breached both the principle of good faith and its duty of care to the complainant. This attitude is all the more inexcusable for the fact that the complainant had 11 years' seniority within UNIDO and that, in turning down previous job offers, he had drawn attention to his difficult family situation, to which no real consideration was given.

21. Some aspects of the Organization's conduct towards the complainant during the period prior to the disputed reassignment also injured the complainant's dignity. The evidence on file shows that the complainant was not consulted at all about the abolition of the Internal Oversight Group of which he was the Director, or about the conditions surrounding the reorganisation of the audit function in UNIDO, whereas he ought to have been consulted, if only as a matter of common courtesy. Furthermore, the fact that the reform of the audit function was announced in the bulletin of 14 November 2002 without any mention of the complainant's future duties was also likely to harm his professional reputation among his colleagues. In addition, despite the Organization's denials, there is no doubt that the Director-General made some unnecessarily hurtful comments about the complainant at the above-mentioned meeting on 14 October 2002. Lastly, it is not disputed that he did not undergo any performance appraisals during the whole period when he reported directly to the Director-General, in other words from 1998 to 2002, whereas the Organization's Staff

Rules required that such an appraisal be made on an annual basis. This failure to take the requisite action was not only a breach of the Staff Rules; it is also indicative of disinterest in evaluating the complainant's merits and shows scant respect for his dignity.

22. The complainant likewise has good grounds for contending that the decisions taken concerning him breached the principle of equal treatment.

The fact, to which attention was drawn earlier, that the complainant, unlike the other members of Headquarters staff reassigned to the field, did not receive a parallel 100 series contract, in itself constitutes unequal treatment for which there is no objective justification.

In addition, it is clear from the file that staff members reassigned to the field in similar circumstances normally retained their former grade and, in particular, that this was the case of two other persons holding D-2 posts. The Organization asserts that these two staff members were reassigned at a later date when the legal context had changed, but the Tribunal notes that its submissions do not mention any case of reassignment, apart from that of the complainant, where the staff member concerned was subjected to demotion comparable to his.

23. Although the Organization thus seriously violated the complainant's rights, his submission that he was the victim of a hidden disciplinary measure is groundless.

As stated earlier, the disputed reassignment was primarily rooted in UNIDO management policy. In the complainant's case this decision also stemmed from the abolition of the Internal Oversight Group in the wake of criticism in the external auditor's report of shortcomings in the review function within the Organization. However, the evidence on file does not support the view that, when the Director-General adopted the impugned decision, he intended to punish any misconduct on the part of the complainant in response to that report which, moreover, did not find fault with the complainant personally. The Tribunal also notes

that, although the Joint Appeals Board considered that there was “probable cause” to believe that this was the underlying reason for the decision, the existence of a hidden disciplinary measure cannot be inferred from mere conjecture and could not be accepted unless it were proven.

24. Nor, in the opinion of the Tribunal, does the evidence on file permit a finding that the Organization’s treatment of the complainant amounted to harassment.

However reprehensible the various above-mentioned breaches of the complainant’s rights may be, including those ensuing from the decision of 19 October 2005, in that they reflect an overall attitude which seriously injured his dignity, they cannot be deemed to stem from harassment. The complainant contends in this connection that the Organization repeatedly gave him short contracts that placed him in a precarious situation. But in this respect the Organization supplies explanations pointing to legitimate management reasons for the decisions in question. Lastly, although the complainant also submits that he suffered discrimination on account of his nationality, there is no substantive evidence of this in the file.

25. Whilst the complainant’s arguments are rejected as far as the latter counts are concerned, it is clear from the above findings that the Director-General’s decision of 7 March 2008 dismissing the complainant’s internal appeal must be set aside, as must the initial decision of 10 January 2003 assigning him to the post of Regional Director in Bangkok as from 1 January 2003 and all the subsequent decisions extending this appointment until 31 August 2006, since all the contracts by which the complainant was kept in the post in question must be deemed to have the same defects as the original contract. This finding applies equally to the contract of 8 January 2006 which, even though the complainant had already at that date challenged his previous contracts, merely extended an assignment

which he could scarcely call into question from one day to the next. The complainant is therefore right in submitting that he must be granted a retroactive parallel 100 series contract at level D-2 covering the whole of the corresponding period.

However, he has no grounds for asking to remain at level D-2 after 1 September 2006, the effective date of his appointment as UNIDO Representative in Geneva and Director in the Bureau for Organizational Strategy and Learning, which is classed at level D-1, since he was assigned to these new duties under a 100 series contract, the terms of which he freely accepted in full knowledge of the facts.

26. It follows that the Organization must be ordered to pay the complainant the equivalent of the additional salary and all the allowances and other material benefits of any kind, including pension rights and, if appropriate, step increases, which he would normally have received had he been awarded a parallel 100 series contract at level D-2 throughout the period from 1 January 2003 to 31 August 2006. All the sums in question shall bear interest at 8 per cent per annum from their respective due dates until the date of payment.

27. The Organization's serious breaches of the principle of good faith and of the duty of care owed to a member of its staff, as well as the injury to the complainant's dignity and the breach of the principle of equal treatment, have also caused the complainant substantial moral injury. In view of the circumstances of the case, the Tribunal is of the opinion that the compensation due to the complainant for this injury may be fairly assessed at 25,000 euros.

28. Since he succeeds to a large extent, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of UNIDO of 7 March 2008, and likewise his decision of 10 January 2003 assigning the complainant to the post of Regional Director in Bangkok as from 1 January 2003 and all the decisions extending this appointment until 31 August 2006, are set aside.
2. The complainant shall be awarded retroactively a parallel 100 series contract at the D-2 level for the period from 1 January 2003 to 31 August 2006.
3. UNIDO shall pay the complainant the equivalent of the additional salary and all the allowances or other material benefits of any kind which he would normally have received during that period, as well as interest on them, as indicated under 26, above.
4. The Organization shall pay the complainant compensation in the amount of 25,000 euros for moral injury.
5. It shall also pay him costs in the amount of 5,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet