

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

110th Session

Judgment No. 2965

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. E. A. against the United Nations Industrial Development Organization (UNIDO) on 23 February 2009 and corrected on 30 March, the Organization's reply of 6 August, the complainant's rejoinder of 22 September and UNIDO's surrejoinder of 23 December 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, who was born in 1960, has dual French and Togolese nationality. He joined UNIDO in 1988 at the P-2 level. He was promoted to the P-3 level in 1990 and to the P-4 level in 2005. At

the material time, he was working at the Organization's Headquarters in Vienna.

On 27 February 2007 the Executive Board of UNIDO decided *inter alia* that several long-serving field staff members who had never held a post at Headquarters should be relocated there, while the same number of Headquarters staff members would be sent to the corresponding duty stations. After an exchange of e-mails and two meetings, the complainant was informed by a memorandum of 21 June that he was being reassigned to the Organization's Regional Office in Bangkok, Thailand, for four years as from 1 September 2007, to occupy the post of Industrial Development Officer at the P-4 level.

On 3 July 2007 the complainant wrote to the Director-General to ask him to "suspend his decision regarding the unilateral and unsolicited transfer" to Bangkok, arguing in particular that the terms of the Director-General's bulletin of 21 April 2006 on field mobility policy had not been respected. Citing paragraph 26 of this bulletin, which states that staff members may request a personal waiver to delay reassignment for medical or other compelling reasons, he said that he would have no objection to "reconsidering any legally open field posts and to applying for them in two years' time", when the first part of his son's studies would have been completed. He also explained that, for health reasons, he could not contemplate reassignment in the immediate future. The complainant was notified of the Director-General's decision confirming his reassignment as from 1 September 2007 by a memorandum of 15 August, which was sent to him by e-mail on 16 August, the date on which he had left for a mission in Africa.

On 29 August, after a meeting with the complainant, the Director of the Human Resource Management Branch cautioned him that failure to comply with the decision to reassign him to Thailand might have serious consequences. By a letter of 31 August she informed him that his contract would not be renewed when it expired on 31 December 2007, since his refusal to follow the Director-General's instructions constituted a grave breach of duty and of

the conduct expected of a UNIDO staff member as described in Staff Regulations 1.1 and 4.1*. On 25 September the complainant asked the Director-General to review the decision not to renew his contract, having regard to his state of health among other things. The Director of the Human Resource Management Branch replied, by a memorandum of 23 November, that the decision of 31 August was maintained.

In the meantime the complainant had lodged two internal appeals. In the first, dated 22 October 2007, he challenged his “[u]nilateral and unsolicited transfer” and in the second, dated 25 October 2007, his “disguised, contrived termination”. On 6 November 2008 the Joint Appeals Board issued a single report on both appeals. With regard to the first, it considered that using e-mail to communicate such an important decision as reassignment to the field was unacceptable and that the complainant had received notification of the memorandum of 15 August 2007 only upon his return from mission on 26 August. In those circumstances, it deemed the appeal in question to be receivable and recommended that the complainant be awarded moral damages in the amount of 3,000 euros since, in the Board’s opinion, he had not been properly consulted about the plan to reassign him. The Board declared the second appeal to be irreceivable because it was premature, the complainant having submitted it without waiting for a reply to his request for review of 25 September 2007. Nevertheless, it recommended that the Director-General should give the complainant a further 60 days to enable him to explore the possibility of settling the dispute with the Organization or, failing that, to lodge another appeal. By a decision of 19 November 2008 the Director-General dismissed the complainant’s first appeal on the grounds that it was irreceivable because it was time-barred. He took the view that the complainant had received notification of the memorandum of 15 August 2007 on the following day. Like the Board, he deemed the second appeal to be

* According to Staff Regulation 1.1, UNIDO staff, by accepting appointment, “pledge themselves to discharge their functions and to regulate their conduct with only the interests of the Organization in view”. Regulation 4.1 reads in relevant part: “Staff are subject to the authority of the Director-General and to assignment by him or her to any of the activities or offices of the Organization.”

irreceivable, but he did not endorse the recommendation that the complainant should be given an additional 60 days, as this was not in line with Staff Rule 112.02(b)(i). In the instant case, the complainant impugns this decision of 19 November 2008 insofar as it rejects his second appeal, namely that directed against the decision not to renew his contract. In a second complaint, he impugns the same decision insofar as it rejects his first appeal, which was directed against the decision to reassign him to Bangkok.

B. The complainant endeavours to show that his second appeal was receivable. He explains that, in case he did not receive a reply to his request for review of 25 September 2007, and since he was faced with circumstances beyond his control, namely a stay in hospital for an undetermined period as from 23 October, he filed this appeal “in advance”, which was not prohibited by any text. In his view, it is of little importance that he did not wait for a reply to his request for review, since the reply proved to be negative and he did not receive it until 26 November 2007, which in his opinion was beyond the applicable time limit. He adds that he never agreed to the composition of the Joint Appeals Board and that there are several indications that that body was biased.

On the merits, the complainant says that, despite his “irreproachable” service, he has been subjected to “improper and premeditated termination”, since no serious or real reasons have been given to him. He takes the Organization to task for wishing to get rid of him on account of his former Staff Union activities and for not initiating a procedure before the Joint Disciplinary Committee, which would have obviated a situation where the Director-General became a judge in his own cause. He maintains that the latter, through the combined operation of paragraph 27 of the bulletin of 21 April 2006 and Staff Regulations 1.1 and 4.1, was able to misuse his authority and engage in blackmail by alleging insubordination. The complainant also considers that he has been the victim of harassment at the workplace. He states that the impugned decision was based on

“personal discrimination” reflecting a desire to stymie his career development, and that its purpose was to serve as a punishment and an example in order to “establish the Director-General’s authoritarian power”.

The complainant seeks the quashing of the impugned decision. He also asks to have his rights restored “with at least the rank of a diplomat”, to be reinstated at the Organization’s Headquarters “but through leave of absence and transfer to other United Nations agencies or bodies” and to be awarded compensation plus interest for material injury, including the payment of a termination indemnity. Subsidiarily, he seeks the payment with interest of the salary, allowances and “related benefits” he would have received until he reached retirement age, as well as payment of the above-mentioned indemnity. He further asks the Tribunal to invalidate the Joint Appeals Board’s report and paragraph 27 of the bulletin of 21 April 2006, and to order UNIDO to publicise the judgment on this case, with a penalty of 10,000 euros per day for default, and to send a letter to all African Heads of State “re-establishing [his] honour and [his] probity” and containing an official apology. Lastly, he claims an indemnity in the amount of 2,948,000 euros and costs.

C. UNIDO, which has submitted a reply identical to that entered in response to the complainant’s second complaint, asks the Tribunal to order the joinder of the two complaints, arguing *inter alia* that the impugned decision is the same in both cases and that the decisions to reassign the complainant to the field and not to extend his contract are inseparably linked.

The Organization submits that the complaint is irreceivable. It regards the complainant’s second internal appeal as premature, since he lodged it on 25 October 2007 without waiting for the reply to his request for review of 25 September 2007, of which he was notified on 23 November 2007. It states that the complainant’s contention that he was faced with circumstances beyond his control is devoid of merit. It also points out that he could have expressed his opinion on the composition of the Joint Appeals Board and that, if he did not avail

himself of that opportunity, it was because he did not have any objections.

On the merits, the Organization explains that the refusal to comply with a valid instruction from the Director-General constituted a serious breach of a staff member's obligations, as defined in particular by the Standards of Conduct for the International Civil Service. It emphasises that the Director-General exercised his discretionary authority in deciding not to renew the complainant's contract, even though the latter's conduct might have justified the adoption of disciplinary measures.

Lastly, UNIDO submits that, since the non-renewal of the complainant's contract was justified and proper, he cannot ask for reinstatement. It considers that his other claims are irreceivable or groundless, or that they exceed the Tribunal's competence. As for the claim for the payment of 2,948,000 euros, it describes the amount as "exorbitant" and states that "no legal principle would justify such an indemnity in this case".

D. In his rejoinder the complainant objects to the joinder of his two complaints on the grounds that, even if they are "interdependent", they are "entirely different" in purpose. He holds that, by submitting only one reply, UNIDO did not respect the principle of formal parallelism. In his view, this reply is tainted with several formal defects, such as the fact that it was signed by the Chief of the Office of Legal Affairs, although the latter does not indicate that the Director-General had delegated the authority to him to do so, or that not every page was initialled. Furthermore, as the page bearing the signature is numbered by hand, he says that it is "dubious and illegal". He asks the Tribunal to reject it and to find that, since the reply is irreceivable, it has not been submitted within the prescribed time limits. In the complainant's opinion, proof of the above-mentioned delegation of authority ought to be obtained, as well as a new version of the reply printed on headed paper and stamped on the last page.

The complainant maintains his position on the issue of receivability. On the merits, he enlarges on his pleas and enters new

claims. In particular, he increases by 5 per cent the amount of the pecuniary claims put forward in his complaint, owing to the “absence of internal and external supervision and oversight by the Member States of the Director-General’s capacity to include in texts and regulations procedures discriminating against staff members holding acquired rights and protected as Staff Union representatives”.

E. In its surrejoinder the Organization reiterates its request for joinder. It rejects the complainant’s allegations that its reply is tainted with formal defects. It points out that, according to the Rules of the Tribunal, an organisation must provide a power of attorney only when it is not represented by a serving or former official. In this case, it was represented by one of its officials, namely the Chief of the Legal Affairs Office, who was acting not only in the exercise of his duties but also at the express request of the Director-General. In addition, Article 8, paragraph 2(c) of the Rules merely provides that copies of the organisation’s reply must be certified to be true by its representative.

UNIDO maintains its position in full with regard to receivability and the merits.

CONSIDERATIONS

1. At a meeting held on 27 February 2007 the Executive Board of UNIDO decided that the Organization’s field offices should play a stronger role in implementing technical cooperation projects and that a strategy should be drawn up to that end. It further decided that, in order to give effect to this policy, several long-serving field staff who had never held a post at Headquarters should be relocated there, while the same number of staff members from Headquarters would be assigned to the field to replace them.

Against this background the complainant was informed on 24 May 2007 that the Director-General was planning to assign staff members from Headquarters to Nigeria, Algeria and Thailand. After an exchange of e-mails and two meetings, he was notified on 21 June that

he was to be reassigned to the Regional Office in Bangkok as from 1 September 2007.

2. On 3 July 2007 the complainant asked the Director-General “to suspend his decision regarding the unilateral and unsolicited transfer”. The Director of the Human Resource Management Branch replied on behalf of the Director-General by a memorandum dated 15 August 2007, sent by e-mail on 16 August and handed to the complainant’s secretary on the same day, that the decision to reassign him to Bangkok was maintained, as was the date on which he should report for duty in his new post.

By a memorandum of 31 August the complainant advised the Director that, in view of his ongoing disagreement with the Administration, it seemed reasonable to pursue the dispute before the Joint Appeals Board and then before the Administrative Tribunal of the International Labour Organization.

3. By a letter of 31 August 2007 the Director of the Human Resource Management Branch informed the complainant of the decision not to renew his contract beyond 31 December 2007 on the grounds that his refusal to follow the Director-General’s instructions constituted a grave breach of duty and of the conduct expected of a UNIDO staff member. On 25 September 2007 the complainant requested a review of this decision.

4. On 22 October 2007 he lodged an internal appeal with the Joint Appeals Board against his “[u]nilateral and unsolicited transfer [...] to Bangkok scheduled by the Administration for 1 September 2007”. On 25 October he lodged a second appeal entitled “Procedural flaw and disguised, contrived termination”.

5. On 23 November 2007 he received the reply to his request for review of the decision of 31 August 2007: he was told that the decision not to renew his contract was maintained.

6. On 6 November 2008 the Joint Appeals Board issued a single report covering both internal appeals. In respect of the first appeal, it found that this appeal was receivable and recommended the payment of a sum of 3,000 euros for moral injury. In respect of the second, it considered that the complainant had not followed the correct procedure and that this appeal was not receivable as it was premature. Nevertheless, it recommended that the complainant should be given a further 60 days to enable him to explore the possibility of settling the dispute with the Organization or, failing that, to provide him with an opportunity to lodge another internal appeal.

By a decision of 19 November 2008 the Director-General, who did not endorse the Board's recommendations, rejected both appeals in their entirety.

7. On 23 and 24 February 2009, respectively, the complainant filed two complaints to impugn this final decision of 19 November 2008, the first complaint being directed against this decision insofar as it rejected his internal appeal against his "premeditated improper termination with abuse and misuse of authority" and the second against the same decision insofar as it rejected his appeal against his "unilateral transfer [...] to a post in Bangkok not open to competition and offering no opportunity for promotion".

8. The Organization requests the joinder of the two complaints. The complainant objects to this request.

The Tribunal finds that, although they are contained in a single decision, the measures challenged by the complainant are different in nature. The request for joinder will therefore not be granted. Here the Tribunal will consider only the complaint filed on 23 February 2009 seeking the quashing of the decision of 19 November 2008 insofar as it dismissed the complainant's appeal against the non-renewal of his contract.

9. In his rejoinder the complainant challenges the receivability of the Organization's reply which, he says, is tainted with several

formal defects. He contends that the principle of formal parallelism has not been respected because UNIDO has presented a single reply to the two complaints, that the last page of this reply should have borne the Organization's stamp, that it should have been printed on headed paper and initialled on each page, that there is no indication that the Director-General had delegated his authority to its signatory and that the page bearing the signature is "dubious and illegal" because it has been numbered by hand. He adds that the annexes to the reply "which reflect exchanges between UNIDO officials of which [he] received no copies" constitute "a distortion of transparent procedures and a breach of the law" and that the Organization's good faith must be regarded as questionable in all the instances of communication with him by e-mail. He considers that these flaws should lead to the rejection of the reply in whole or in part.

10. The Tribunal notes that, although the Organization has submitted only one reply to the two complaints, it has endeavoured to present counter-arguments in response to each of them.

With regard to the signing of the reply, the Tribunal draws attention to the fact that, under Article 5, paragraph 4, of its Rules, a defendant organisation is not obliged to provide a power of attorney when it is represented by a serving or former official.

As far as the remaining arguments are concerned, the Tribunal finds that the complainant has produced no evidence of a breach of any text or practice by UNIDO which would infringe his rights, and that the use of e-mail is normal practice in communications between the administration of an organisation and its staff.

Hence there is no reason not to take account of the Organization's reply.

11. In his rejoinder the complainant puts forward new claims aimed in particular at increasing his pecuniary claims. However, it is well established by the Tribunal's case law that a complainant may

not, in his or her rejoinder, enter new claims not contained in his or her initial complaint (see, for example, Judgments 960, under 8, or 1768, under 5). These new claims must therefore be rejected.

12. In support of its objection to receivability, the Organization relies on the following texts:

Article VII, paragraph 1, of the Statute of the Tribunal, which reads:

“A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.”

Staff Rule 112.02, which reads:

“(a) A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.

- (b) (i) If the staff member wishes to make an appeal against the answer received from the Director-General, the staff member shall submit his or her appeal in writing to the Secretary of the Joint Appeals Board within 60 days from the date of receipt of the answer;
- (ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Secretary of the Joint Appeals Board; alternatively, the staff member may, within the following 90 days, apply directly to the Administrative Tribunal of the International Labour Organization in accordance with the provisions of its Statute.

[...]”

13. UNIDO submits that the complainant filed his internal appeal against the decision not to renew his contract to the Joint Appeals Board on 25 October 2007 although no reply had yet been

given to his request for review of the decision in question. It infers from this that, since the complainant had not complied with Staff Rule 112.02(b)(i), his internal appeal was premature and hence irreceivable. In these circumstances, it holds that the requirement laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must be exhausted was not met.

14. It is clear from the above-quoted Staff Rule 112.02(b)(ii) that the Director-General has 60 days to reply to a request for review of an administrative decision and that the staff member may refer the matter to the Joint Appeals Board within 30 days of the end of the 60-day period given to the Director-General, if the latter has not replied.

In the instant case the complainant does not deny that he submitted his appeal to the Board before the end of the 60-day period given to the Director-General. The fact that he was in hospital when his appeal was lodged – a factor which he did not ask the Board to take into consideration – did not entitle him to ignore the prescribed time limits and to jump a stage which could have been put to good use to find an amicable solution.

Similarly, the argument that “the complainant could not run the risk of being faced with the Administration’s silence while he was in hospital” does not justify premature referral of the dispute to the Joint Appeals Board, since the rule states that, if the Director-General does not reply within 60 days, the person concerned has 30 days to submit an appeal. The Board was therefore right to conclude that the appeal was premature.

15. It is a matter of firm precedent that the rule set forth in Article VII, paragraph 1, of the Statute of the Tribunal means that where the Staff Regulations lay down a procedure for an internal appeal, it must be duly followed: there must be compliance not only with the set time limits but also with any rules of procedure in the regulations or implementing rules (see, for example, Judgment 1653, under 6).

By referring the matter to the Joint Appeals Board before the expiry of the period of time given to the Director-General to reply to his request for review, the complainant clearly did not comply with the above-mentioned requirement.

16. However, as the Tribunal has frequently emphasised in its case law, an administration must not deprive a staff member of his or her right of appeal by being excessively formalistic (see Judgments 2715, and 2882, under 6, and the case law cited therein). Indeed, that is why the Board recommended that the complainant should be given 60 days to enable him to submit a new appeal, if this proved necessary. Having refused to follow this recommendation, the Director-General could not reject the complainant's appeal as being premature without adopting an excessively formalistic approach. In these circumstances, in order not to deprive the complainant of his right of appeal for a trivial reason, the Director-General ought to have treated his internal appeal as being directed against the decision of 23 November 2007.

17. 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.

18. The Organization shall pay the complainant compensation in the amount of 3,000 euros for the moral injury suffered on account of the failure to respect his right of appeal.

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

DECISION

For the above reasons,

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, above.
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.

In witness of this judgment, adopted on 11 November 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet