

116th Session

Judgment No. 3253

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms Z. S. against the United Nations Industrial Development Organization (UNIDO) on 29 August 2011 and corrected on 17 October 2011, UNIDO's reply of 31 January 2012, the complainant's rejoinder of 16 March, corrected on 20 April, and the Organization's surrejoinder of 2 August 2012;

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. Facts relevant to this case can be found in Judgment 3252, also delivered this day. Suffice it to recall that the complainant's performance appraisal report for the period from 1 January to 31 October 2007 contained negative ratings and evaluations from her two first reporting officers, who signed the report jointly. In May 2008 she contested those evaluations by adding written comments to the report. The following month, her second reporting officer rated her overall performance as "needs improvement". As a consequence of her appraisal, the complainant's contract was renewed for one year,

i.e. from 15 July 2008 to 14 July 2009, instead of the normal three-year period, and her performance increment, which was due on 1 August 2008, was withheld.

On 3 July 2008 the complainant submitted a rebuttal to her 2007 performance appraisal in which she alleged that her appraisal had not been conducted in accordance with the Director-General's Administrative Instruction No. 15 of 26 July 2002 concerning performance management, that the evaluations of the reporting officers were arbitrary, that the report was factually inaccurate, and that she had been subjected to harassment and verbal and psychological abuse as a result of misuse of authority. A rebuttal panel was set up to review the matter. In its report of 13 January 2009 the panel concluded that her rebuttal was not justified and that the evaluations by the first reporting officers and the final rating by the second reporting officer were justified and should remain unchanged. It sent its report to the Director of the Human Resource Management Branch (PSM/HRM).

By a memorandum of 3 February 2009 from the Director of PSM/HRM, who was acting in her capacity as reviewing officer, the complainant was informed, inter alia, that the Director had decided to endorse two "low" ratings contained in her performance appraisal, as well as the overall rating of "needs improvement". In her response dated 9 February 2009 the complainant acknowledged receipt, that same day, of the memorandum of 3 February and she requested a copy of the panel's report; a copy was sent to her later that month.

On 7 April the complainant requested the Director-General to review the decision of 3 February. By a memorandum of 11 May she was notified that he had decided to maintain it. On 9 July 2009 she lodged an appeal with the Joint Appeals Board (JAB), challenging the Director-General's decision. During the internal appeal the Board requested clarification from the Administration regarding the date and method of transmittal to the complainant of the memorandum of 3 February 2009. It likewise requested further information from the

complainant regarding her receipt of the memorandum. In its report of 18 May 2011 the Board concluded that there was circumstantial evidence to support a finding that the appeal was time-barred and therefore irreceivable. In its view, the complainant had submitted her request for review to the Director-General beyond the prescribed time limit, i.e. more than 60 days after receipt of the challenged decision.

In a memorandum dated 30 May 2011 the Director-General endorsed the recommendation of the JAB to dismiss the complainant's appeal as irreceivable. He further dismissed it on the merits for the reasons set out in the statement on behalf of the Director-General submitted by the Administration during the appeal. Nevertheless, he awarded the complainant 2,000 euros in damages in view of the delay in the internal appeal process. That is the impugned decision. The complainant was so informed by a letter of 1 June.

B. The complainant contends that her internal appeal was receivable and that she submitted her request for review to the Director-General within the time limit set out in Staff Rule 112.02, that is, within 60 days of her receipt, on 9 February, of the memorandum of 3 February. She asserts that it is standard practice at UNIDO to deliver confidential documents by hand, but in her case the aforementioned memorandum was sent to her through the internal mail service. She points out that her written acknowledgement of receipt of the memorandum dated 9 February 2009 indicates that she received the memorandum that same day and the Administration did not take issue with this date when it replied to her later that month. She states that she received other documents in her in-box during the period from 3 to 9 February, and asserts that the fact that she was present at work during this period is not evidence that the memorandum was sent to her on 3 February. She characterises the JAB's findings in this respect as "biased" and questions what evidence exists to support them. In addition, she argues that, given that 3 February 2009 was a Tuesday and the 9th was a Monday, her complaint should be considered receivable.

With respect to her disputed performance appraisal report, the complainant asserts that the Administration failed to follow the provisions of the Director-General's Administrative Instruction No. 15.

She asks the Tribunal to set aside the impugned decision, to "invalidate" a portion of the report of the JAB and to order the JAB to review its conclusion and recommendations in her internal appeal. She seeks moral damages related to the conduct of and the delay in the internal appeal process. She also seeks costs.

C. In its reply UNIDO states that it is an issue of fact as to when the complainant received the memorandum dated 3 February 2009 and acknowledges that it bears the burden of proof in this respect. It points to its submissions during the internal appeal and contends that, although the JAB did not explicitly state when the complainant received the memorandum, it is implicit in the JAB's findings that this occurred between 3 and 5 February. Consequently, she should have requested a review of the decision by 6 April at the latest. Referring to the Tribunal's case law, it argues that missing a prescribed time limit, even by a short period, is sufficient to render a complaint irreceivable. It further submits that, if the Tribunal finds that the JAB erred on the question of receivability, it is not appropriate to refer the matter back to the JAB because a rebuttal panel has already dealt with the complainant's case on the merits and, in his decision of 30 May 2011, the Director-General likewise dismissed her case on the merits.

The Organization submits that the rebuttal panel thoroughly examined whether the complainant's disputed 2007 performance appraisal report was concluded in accordance with the Director-General's Administrative Instruction No. 15, and although the panel found that certain formal procedures had not been followed, this was not sufficient to warrant a change in her final rating. UNIDO contends that it is clear from the panel's report that the panel addressed the complainant's comments in detail and carried out a comprehensive review of her performance during the disputed period. There is no evidence that it failed to consider any material point or made a

material error, nor is there evidence that it failed to reach a complete, accurate, and non-contradictory conclusion.

With respect to the internal appeal process, UNIDO denies that it did not respect the complainant's appeal rights. The amount awarded to her by the Director-General as compensation for delay was fair and reasonable in the circumstances.

D. In her rejoinder the complainant maintains that she did not receive the memorandum of 3 February 2009 until 9 February. She asserts that UNIDO not only failed to ensure that it was sent to her in a timely manner, but it also failed to ensure that the date of receipt and the identity of the recipient were easily verifiable. Furthermore, it did not preserve the confidentiality of the document. She accuses UNIDO of bad faith in these respects. She develops her pleas regarding her 2007 performance appraisal report and, inter alia, criticises her work situation prior to and during the material time, and her treatment by a number of her supervisors, which, in some instances, she characterises as harassment. Furthermore, she challenges numerous comments and evaluations contained in her report. She refers to her rebuttal statement and argues that UNIDO breached Staff Rule 104.08 relating to service and conduct reports, and also the Director-General's Administrative Instruction No. 15. She contends that the decision contained in the memorandum of 3 February is unfair and biased. She asks the Tribunal to consider whether the report of the rebuttal panel is tainted by procedural irregularity or vitiated by prejudice or extraneous factors. She also requests the Tribunal to order UNIDO to cancel her 2006 and 2007 performance appraisals and remove them from her personal file, and to award her the step increment due to her in August 2008, with interest. Lastly, she seeks moral damages for the harassment and mobbing she suffered and material damages for the medical costs she incurred as a result of that treatment.

E. In its surrejoinder UNIDO maintains its position in full. It submits that the complainant's claims related to her 2006 performance

appraisal report are irreceivable for failure to exhaust the internal means of redress. Referring to the case law, it states that international organisations are given the widest discretion when assessing the performance of staff, and the complainant's 2007 performance appraisal does not reveal any flaws that would justify the Tribunal setting it aside or amending it. The Organization submits that it substantively followed the performance appraisal procedures, that the complainant's appraisal report reflects an impartial and comprehensive assessment, and that the complainant has failed to provide any evidence to support her allegations of harassment and mobbing. The rebuttal process complied with the relevant procedures, and the investigation conducted by the panel was balanced and comprehensive. Lastly, UNIDO asserts that it acted in good faith.

CONSIDERATIONS

1. This case raises a narrow factual issue and requires the application of one legal principle. Much of the surrounding background is discussed in Judgment 3252, also delivered this day. It is unnecessary to repeat it. A staff performance appraisal report was prepared in relation to the complainant for the period from 1 January to 31 October 2007 (hereinafter "the 2007 Report"). The complainant sought a review of this report by submitting a rebuttal. It was considered by a rebuttal panel who reported to the reviewing officer. The reviewing officer prepared an inter-office memorandum dated 3 February 2009 which, in substance, endorsed the 2007 Report. The memorandum was sent to the complainant. The factual issue is when did the complainant receive it.

2. The issue arises in this way. The complainant sought a review of the decision of the reviewing officer by the Director-General in a letter dated 7 April 2009. The Director-General effectively affirmed the decision of the reviewing officer. It was not in issue before the JAB or in this Tribunal that the application for review by the Director-General had to be submitted in writing within 60 calendar days

from the date the staff member received notification of the decision in writing, as required under Staff Rule 112.02(a). The complainant lodged an appeal with the JAB on 9 July 2009. In its report, the JAB determined that the appeal was not receivable. It did so on the basis that it was satisfied that the application for review by the Director-General had been submitted beyond the required time limit of 60 calendar days. The JAB's recommendation that the appeal be dismissed as not receivable was accepted by the Director-General in a memorandum dated 30 May 2011. This is the impugned decision. Also in that memorandum it was said: "Furthermore, the appeal is dismissed on the merits for the reasons set out in the statement on behalf of the Director General".

3. The Tribunal assumes, without deciding, that it was open to the JAB to decide the appeal to it was irreceivable because the earlier application for review by the Director-General was sought out of time. The Tribunal is able to make this assumption because this complaint can be decided on a question of fact.

4. The evidence before the JAB and before the Tribunal furnished by UNIDO is that the inter-office memorandum was dated 3 February 2009 (a Tuesday), that it was posted from the office of the Director of PSM/HRM on the same day in the internal mail in a brown envelope marked "confidential" and that in the ordinary course internal mail was delivered between half a day and one and a half days of it being posted. The import of this evidence, according to UNIDO, is that the complainant must have received the memorandum at some stage between 3 and 5 February 2009 and it followed that the application for review by the Director-General should have been submitted by 6 April 2009 at the very latest (on the basis that the 60 days began to run on the day following the day the memorandum was received, namely 6 February 2009).

5. The complainant's account is different. She said she received the inter-office memorandum on 9 February 2009 (a Monday). This is borne out by an inter-office memorandum she sent to the reviewing

officer dated 9 February 2009. The first paragraph of the complainant's memorandum reads as follows:

"I would like to acknowledge receipt of your [memorandum] dated 3 February 2009 [...]. Please be informed that the said [memorandum] has been received today (9 February 2009) in the afternoon in my in-box in room D1547."

There is a copy of this memorandum in the material before the Tribunal that is date stamped as having been received by the Director of PSM/HRM on 9 February 2009.

6. In addition to this evidence, UNIDO pointed to two instances in which the complainant said she received the 3 February 2009 memorandum on that day. The first instance was in a letter of 7 April 2009 in which she requested the Director-General to review the decision. In that correspondence the complainant said: "I am appealing to you to reconsider the decision communicated to me on 3 February 2009". The second instance was in her appeal to the JAB in which she referred to the 3 February 2009 memorandum as having been "communicated to her on the 3rd February 2009".

7. It is well settled that the burden of proof is on the sender to establish the date on which a communication was received. If that cannot be done (perhaps because the document was sent by a system of transmission that does not permit actual proof), the Tribunal will ordinarily accept what is said by the addressee about the date of receipt (see, generally, Judgments 447, consideration 2; 456, consideration 7; 723, consideration 4; 890, consideration 4; 930, consideration 8; 2473, consideration 4; and 2494, consideration 4).

8. In the present case the addressee, i.e. the complainant, said that the memorandum was received on 9 February 2009. Of course, UNIDO produced evidence intended to establish that the memorandum must have been received, at the latest, by the end of the day on 5 February 2009. There may be cases where such evidence may be sufficient to establish when a particular document was received. An inference could be drawn about the date of receipt

having regard to the date of sending together with evidence about the usual time a document takes to travel through the post, whether internal or external.

9. However, in the present case, there is a significant piece of evidence that suggests the evidence of UNIDO does not prove the date of receipt. It is the complainant's memorandum of 9 February 2009. It cannot be doubted that the complainant wrote her memorandum on or before 9 February 2009. That is established by the receipt stamp dated 9 February 2009. According to the complainant's memorandum, she received the memorandum of 3 February 2009 in the afternoon of 9 February 2009. There is a document in evidence which shows the complainant worked that day until 19:33. It is consistent with the evidence of UNIDO about the time mail takes to be delivered, that upon receiving the 3 February 2009 memorandum in the early afternoon of 9 February 2009, the complainant wrote and sent a memorandum that day which was received that afternoon by the Director of PSM/HRM.

10. Of course it is possible that in some way the complainant's memorandum of 9 February 2009 involved a fabrication of the true position. It is possible that the complainant misstated or even lied in her memorandum of 9 February 2009 about receiving the document on that day. The date of 9 February 2009 is repeated twice in the memorandum. It appears in the heading and in the passage quoted above. However, it is necessary then to ask what might have motivated such conduct. At that time (early February 2009) there would have been no issue for the complainant about compliance with time limits. Even if at the time her mindset was (as it appears to have been) to appeal against any decision with which she was not pleased, it is simply inherently unlikely that she would have been concerned about time limits on the day she received notice of the decision or a few days thereafter. There is really no basis, consistent with common experience, which would justify a conclusion that the complainant deliberately misstated the date. It is also possible that she was confused about the day. However, this also is unlikely.

11. While it is true that she later misstated the date in the two documents referred to above and relied upon by UNIDO, often the best evidence of what occurred on a particular day is direct evidence of the events of that day. The complainant's memorandum of 9 February 2009 is such evidence.

12. The JAB erred in dismissing the complainant's appeal as irreceivable. Even if it applied the appropriate legal test (and it is not entirely clear whether it did), it should have concluded that the evidence supporting the complainant's version of when the 3 February 2009 memorandum was received should be preferred to the evidence of UNIDO.

13. The remedy the complainant is entitled to is that the impugned decision of the Director-General to dismiss the appeal as not receivable be set aside. It was not open to the Director-General to dismiss the appeal, as he purported to do, on the merits on the basis of the statement he had made to the JAB. The matter will go back to the JAB who will consider the complainant's appeal on its merits and thereafter make recommendations to the Director-General. Then the Director-General can make a decision on the merits.

14. The essential complaint of the complainant was that the 2007 appraisal report was used to extend her contract by only one year from 15 July 2008 (though she also challenged the withholding of a step increment). However, since then her contract has been extended once by a further year and then for three years concluding 14 July 2013.

15. In these circumstances, it may appear unnecessary or even undesirable to make orders setting aside the Director-General's decision and remitting the matter to be considered by the JAB. Moreover, the JAB may ultimately recommend that the appeal be dismissed on the merits and the Director-General may dismiss the

appeal on that basis. But the Tribunal has repeatedly emphasised that internal appeals are an important safeguard of staff rights and social harmony (see, for example, Judgment 3184, consideration 15). Also, the internal appeal process is ordinarily an extremely significant element of the entire system of review of administrative decisions affecting the rights of staff employed by organisations which have submitted to the jurisdiction of the Tribunal (see, for example, Judgment 3222, consideration 9). Moreover, every official has an interest in the proper establishment of reports on his or her performance on which her or his career may depend (see, for example, Judgment 3241, consideration 5). Also, we cannot discount the possibility that the complainant might be prepared to reach a sensible agreement with UNIDO to avoid the cost and inconvenience of the matter being pursued any further within the Organization. Such an outcome would be desirable. However, and notwithstanding these observations, the Tribunal should give effect to its conclusion above regarding the flawed internal appeal and make appropriate orders as discussed earlier. Also, damages should be ordered in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. UNIDO shall pay the complainant 3,000 euros in damages.
3. The matter is remitted to the UNIDO Joint Appeals Board to hear and determine the complainant's appeal of 9 July 2009.
4. UNIDO shall pay the complainant 500 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet