

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**M.**  
**v.**  
**UNESCO**

**122nd Session**

**Judgment No. 3639**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 July 2014, UNESCO's reply of 3 November 2014 and the complainant's e-mail of 31 January 2015 informing the Registrar of the Tribunal that she would not file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

The complainant accuses her former supervisor of moral harassment.

On 7 December 2009 the complainant, a grade G-5 official assigned to the Natural Sciences Sector, informed the Mediator that she was being subjected to moral harassment by her supervisor, Mr I. She says that she had two meetings with the Mediator in 2010. The Mediator also contacted Mr I.

The complainant was notified by an e-mail of 14 November 2011 that the Ethics Office – which she had contacted in January 2010 and on several occasions in 2011 – intended to close her file. In view of the steps that had since been taken in the Natural Sciences Sector, the author of that e-mail considered that UNESCO had not breached its duty of care

towards the complainant. He added that the Ethics Office did not intend to intervene in the ongoing discussions concerning the complainant's reassignment, as this was a "management issue". However, he advised the complainant that she could file a formal complaint. The complainant did so on 21 December 2011. She alleged that she had been subjected to moral harassment by Mr I. since September 2009 and, in particular, that she had been isolated and that her her dignity and her health had been undermined. On 1 January 2012 the complainant was transferred at the same grade to the Executive Office of the aforementioned sector.

On 28 February 2012 the Ethics Adviser, having determined after a preliminary assessment of the formal complaint that that there was no *prima facie* evidence of harassment, recommended that the Director-General should close the case. On 2 March the Ethics Adviser sent the complainant a memorandum informing her that the Director-General considered that the allegations in her complaint did not constitute moral harassment within the meaning of the applicable provisions, but were "rather manifestations of a work-related conflict and the result of the lengthy discussions" surrounding her transfer, and had therefore decided to close her case.

On 28 March 2012 the complainant lodged a protest requesting the setting aside of the decision of 2 March. Having received no reply within the time limit specified in the Statutes of the Appeals Board, she filed an appeal with the Board on 4 May 2012. In her detailed appeal she sought recognition of the fact that she had been subjected to moral harassment, redress for the moral, professional and physical injury which, she contended, she had suffered, and the regularisation of her situation by means of a promotion to grade P-3, or at least to grade P-2.

In its report, which it submitted on 19 December 2013 after hearing the parties, the Appeals Board informed the Director-General that, in its opinion, there was sufficient evidence to warrant requesting a review by the Internal Oversight Service of the complainant's working conditions in the Executive Office in order to establish whether she had suffered prejudice, but that it could not recommend compensation for damage to her career or a promotion. As a preliminary measure, it recommended that the Director-General should transfer the complainant

to another sector, if she so wished. By a memorandum of 15 April 2014, which constitutes the impugned decision, the complainant was informed that the Director-General had decided not to accept the Board's recommendations, except for the recommendation not to award compensation.

On 12 July 2014 the complainant filed a complaint with the Tribunal seeking the setting aside of the impugned decision, the payment of compensation equivalent to 30 months' salary for injury under all heads, the regularisation of her situation by promotion to grade P-3, or at least to grade P-2, and the payment of 10,000 euros "for the expenses she has had to incur for the preparation of her defence since February 2010 and costs".

UNESCO submits that the complainant's allegations regarding the period after 1 January 2012 and her non-promotion are irreceivable, as internal means of redress have not been exhausted. It also invites the Tribunal to make various declarations in law and to reject the complainant's claims.

### CONSIDERATIONS

1. The complainant seeks the setting aside of the decision taken by the Director-General on 15 April 2014. In that decision the Director-General refused to follow most of the recommendations made by the Appeals Board on 19 December 2013 after examining the appeal against the decision to dismiss the formal complaint of moral harassment filed by the complainant on 21 December 2011. This is the subject matter of the complaint, since the Tribunal cannot entertain the complainant's more general submissions concerning her situation at UNESCO, which are of no relevance to this dispute.

2. The Tribunal will therefore first consider whether the procedure laid down under item 18.2 of UNESCO's Human Resources Manual – concerning the Anti-harassment Policy –, which was in force at the material time, was followed. If it was not, as the complainant contends, the Tribunal should either refer the case back to UNESCO in order that

it may take the proper steps to examine the complainant's harassment complaint, or, if appropriate, it should itself rule on the merits of that complaint.

3. The procedure for examining harassment complaints is governed by paragraphs 21 to 43 of item 18.2 of the Human Resources Manual. Before submitting a formal complaint to the Director-General, the employee in question may attempt to resolve the situation informally, by clarification between the parties involved, or by early resolution through mediation by a third party. Neither of these two courses of action is mandatory. (See paragraphs 21 to 26 of item 18.2.)

If the complainant considers that informal resolution is inappropriate or unsuccessful, he/she may initiate the formal complaint procedure by submitting a formal complaint, in writing, to the Director-General. If he/she so wishes, he/she may request the assistance of, or be represented by, a staff member or former staff member, at any stage of the formal procedure. "The complaint shall be made in good faith, which means that the complainant must believe that the way he/she perceived the [relevant acts] reflects the facts. Bad faith implies an element of malice, ill will, improper motive, fraud or similar dishonest practice." (See paragraphs 27 to 30 of item 18.2.)

Paragraphs 31 and 33 to 37 read as follows:

"Preliminary assessment by the Ethics Adviser

31. Harassment complaints submitted to the Director-General shall be dealt with on his/her behalf by the Ethics Adviser, who shall inform [the Director of the Bureau of Human Resources Management]. The Ethics Adviser shall take immediate steps to conduct a preliminary assessment of the complaint.
33. The complainant and/or any person who submitted the complaint shall be interviewed in order to:
  - (a) Clarify the allegation;
  - (b) Ensure that the complaint bears on harassment related events;
  - (c) Make sure that all available evidence is submitted, and
  - (d) Consider the possibility of informal resolution;
34. If, on the basis of the preliminary assessment, the case is to be pursued, the alleged harasser shall be given 10 working days to respond to the

- allegations and provide countervailing evidence. [...] The alleged harasser will also be advised of his/her right to be assisted or represented.
35. On the basis of the complaint, the reply by the alleged harasser, and the evidence produced, the Ethics Adviser will evaluate whether there is a prima facie evidence of harassment. If required, the Ethics Adviser will extend the enquiries in order to ensure that the evidence is submitted.
  36. Should the facts as a result of the preliminary assessment indicate that no harassment has occurred, the Ethics Adviser will recommend to the Director-General that the case should be closed. The Ethics Adviser notifies the parties involved and [the Director of the Bureau of Human Resources Management] of the Director-General's decision and provides the reasons thereof. The Ethics Adviser should endeavour to complete the preliminary assessment no later than 45 days from the date of submission of the formal complaint.

Referral for investigation

37. If the Ethics Adviser finds that there are reasons to believe that the complaint is founded, he/she shall refer the matter, within 10 working days of receipt of the alleged harasser's reply, to the Director-General who will decide on an investigation and send the case to Director [of the Internal Oversight Service]. Both parties and [the Director of the Bureau of Human Resources Management] shall be notified accordingly. This notification will include a statement of the nature of the complaint and the arguments made. It will also include a statement of the steps that will be followed to have the complaint investigated, and the anticipated duration of the investigation."

4. Under paragraph 51, the complainant has the right "[i]n accordance with Staff Rule 111.1 and the Statutes of the Appeals Board" to appeal "any administrative decision that has resulted from harassment, independently from the harassment complaint process".

5. In the instant case, the complainant asserts that she "first tried to initiate an informal procedure involving a mediator as early as December 2009", but that she encountered obstruction from the supervisor whose conduct she was denouncing.

It is clear from the evidence in the file that, on 7 December 2009, she reported to UNESCO's Mediation Service that she had been subjected to moral harassment by her supervisor. On 5 January 2010 she met with the Ethics Adviser, who advised her to pursue the mediation process as,

in his view, the dispute with her supervisor did not appear to involve harassment. On 30 March 2011 the complainant complained to the Ethics Office that she was being side-lined, which can constitute moral harassment according to paragraph 10(d) of item 18.2 of the Human Resources Manual.

Despite the fact that between March 2010 and July 2011 the complainant had been placed on certified sick leave three times for a total duration of almost six weeks on the basis of medical opinions, the last of which recorded “exhaustion due to moral harassment”, the defendant organisation continued to insist that her dispute concerned only an unsatisfactory assignment and not a working relationship that might be qualified as harassment as defined in item 18.2 of the Human Resources Manual. On 14 November 2011 the Ethics Office notified the complainant of its intention to close her case, unless she decided to initiate the formal complaint procedure. This information was confirmed in an e-mail of 16 December 2011.

6. After the complainant had filed a formal complaint on 21 December 2011, she was transferred to another unit, where she was assigned to a post equivalent to that which she had held previously. The Ethics Adviser, after asking the supervisor accused by the complainant to respond to her allegations, recommended that the Director-General should close the case. On 2 March 2012 the complainant was informed that a decision had been taken to close her case on the grounds that, while it was sometimes difficult to distinguish between harassment and other work-related conflicts, the acts alleged in her complaint did not constitute moral harassment but were “rather manifestations of a work-related conflict and the result of the lengthy discussions surrounding the transfer of [her] post”.

7. In its report of 19 December 2013 the Appeals Board found that it was unable to give an informed opinion on the merits of the allegations of moral harassment, as no investigation of this matter had been carried out by the competent body and the supervisor targeted by the allegations had left the Organization (see paragraph 65). It emphasised that after the unsuccessful mediation process and the filing of the formal complaint,

more could have been done to respond to this complaint, even though no evidence of harassment had been found.

It is unnecessary to determine whether the impugned decision – which rejected most of the Appeals Board’s recommendations without dealing in any depth with these considerations relating to the duty of care – satisfied the requirement that reasons must be stated whenever a decision departs from the opinion of an advisory appeal body.

8. That is because the submissions in the file show that, in breach of the provisions of the aforementioned paragraph 33 of the Human Resources Manual, the Ethics Adviser did not interview the complainant. Contrary to what he apparently believed, the fact that the Ethics Adviser had already talked to the complainant before she filed her formal complaint could not in any circumstances exempt him from conducting such an interview. For this reason alone, the preliminary assessment that he was required to make is fundamentally flawed and, as a result, it cannot be assumed that no investigation was needed. It must therefore be found that, in disregard of the principle *tu patere legem quam ipse fecisti*, UNESCO circumvented the procedure for handling formal harassment complaints which it had itself set up under paragraphs 27 *et seq.* of item 18.2 of the Human Resources Manual.

9. It follows from the foregoing that the complaint must be allowed and the impugned decision set aside.

The case would normally be sent back to the Organization in order that it might examine the harassment complaint in accordance with the applicable rules. In the circumstances of this case, however, the Tribunal will not take this step, since both the complainant and her supervisor have left the Organization.

10. The unlawfulness of the impugned decision has caused the complainant obvious moral injury, which must be redressed by awarding her compensation in the amount of 15,000 euros.

11. The complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

12. All other claims must be dismissed.

13. The requests for declarations in law contained in the reply must also be dismissed.

#### DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 15 April 2014 is set aside.
2. UNESCO shall pay the complainant compensation in the amount of 15,000 euros for moral injury.
3. UNESCO shall also pay the complainant costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 29 April 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

*(Signed)*

CLAUDE ROUILLER      PATRICK FRYDMAN      FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ