

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session

Judgment No. 3115

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms E. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 February 2011 and corrected on 17 March, the Organization's reply of 4 July, the complainant's rejoinder of 10 July and UNESCO's surrejoinder of 8 September 2011;

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 facts relevant to this case are set out in Judgment 3114, also delivered this day, on the application for execution of Judgment 2740, relating to the complainant's second complaint. In the present proceedings, the complainant impugns the Director-General's decision of 4 January 2011.

B. She alleges that senior officials of UNESCO misappropriated over two million United States dollars to the detriment of poor countries, and punished her for denouncing their actions. She contends

that the decision of 4 January 2011, by which the Director-General confirmed the reply given by the previous Director-General on 29 September 2008 to her allegations of malpractice, is not properly reasoned because it offers no legal justification for the actions concerned. Concerning her promotion, she submits that the draft memorandum on which she relies is proof of the verbal promise made to her by the Comptroller at the end of 1998. She states that the latter's successor, who took up his duties on 1 January 1999, "violated" the promise and retroactively altered the glowing performance appraisal reports she had received for the period 1997-1999, prompting her to challenge these reports before the Reports Board, without however receiving any reply from the Board. Thereafter, in breach of Staff Regulation 104.11*bis*, she was not given any further performance appraisals, and she submits that this was in order to deprive her of any chance of promotion. She regards the non-fulfilment of the promise of promotion as a reprisal, and she alleges that she has been subjected to harassment by her superiors. She complains that her immediate superior "was completely silent" on the "grave, specific and concordant" accusations of harassment which she had made against her before the Appeals Board, and regards the absence of any inquiry by UNESCO into these allegations as a serious failing on its part. She endeavours to show that the allegations are well substantiated.

For the most part, the complainant reiterates the claims made in her first two complaints, which are set out under B in Judgments 2536 and 2740, including her claim for promotion and her request for a finding by the Tribunal that the duty of discretion, mentioned in Article 1.5 of the Staff Regulations, cannot be "used to prevent compliance with the duty of loyalty". She asks for the present complaint to be joined with her application for execution of Judgment 2740. Furthermore, she considers that since in this instance UNESCO has committed an error of law and an abuse of power, violated fundamental legal principles, omitted essential facts and seriously undermined the safeguards protecting the independence of international civil servants, the Tribunal must substitute itself for

“a hierarchical authority which is now defective”. She also asks the Tribunal to award her compensation of 10,000 euros for “aggravated bad faith [...] aimed at voiding [her] legitimate right to obtain a legal ruling”, 10,000 euros for “flagrant bad faith” and violation of the principle of non-retroactivity in relation to the compilation of her performance reports for the period 1997-1999, 6,000 euros for the refusal to draw up performance reports for her between 1999 and 2003, 75,000 euros for the injury to her career and her pension rights, and 20,000 euros for harassment. She further claims 3,000 euros for costs.

C. In its reply the Organization asserts that the complaint is irreceivable for several reasons. It argues that since the complaint, which concerns the management of UNESCO’s Coupons Programme, does not allege a failure to observe the complainant’s terms of appointment or the provisions of the Staff Regulations, the Tribunal lacks competence, under Article II, paragraph 5, of its Statute, to deal with it. It recalls that, according to Judgment 2299, it is not for the Tribunal to grant a promotion to the complainant, and it points out that she is time-barred from challenging her performance reports for the period 1997-1999 because, by the time she submitted her file on 17 October 2002, three years had already passed since her appeal to the Reports Board.

On the merits and subsidiarily, the defendant submits that the complaint is an abuse of process, since all the matters raised in it have also been raised in the three previous complaints. It draws the Tribunal’s attention to the fact that the competent authorities did not find any breach of the Financial Regulations in the management of the Coupons Programme, and asserts that in this case, the duty of discretion overrode the duty of loyalty.

UNESCO also explains that, according to Staff Regulation 104.11*bis* in force at the relevant time, the complainant’s performance was to be appraised every two years, using Form 218A. It admits that no performance reports were produced for her between 1 February 1999 and 28 February 2003, but states that the salary increase she received

each year by being given an additional step in her grade signified that her performance had been satisfactory. Indeed, according to section 2440 of the UNESCO Manual in force at the time, salary increments were deemed to be equivalent to performance appraisals. Moreover, according to paragraph 2305.8 of the Manual, increments were granted if the Administration considered, on the basis of a report made on Form 218C, that a staff member's performance had been satisfactory, and in the complainant's case, that form had been completed for the years 1999 to 2002.

Concerning the complainant's promotion, the defendant states that the document on which she relies was a draft memorandum to be sent to the Director of the Bureau of Personnel, and that it did not represent either a promise, within the meaning of the Tribunal's case law, or an administrative decision to be notified to the complainant.

Lastly, the Organization recalls that, according to the case law, a person claiming to be a victim of harassment bears the burden of proving his or her allegations, and that in the absence of any wrongful act or evidence of some injury, the claims for compensation are unfounded.

D. In her rejoinder the complainant repeats her arguments and states that the Organization's reply is incoherent and untruthful and that the defendant "repeatedly and deliberately refuses [...] to answer the real questions". She asserts that the decision not to promote her to grade P-5 was vitiated by an abuse of authority.

E. In its surrejoinder UNESCO maintains its position in its entirety. It states that the decision not to grant a promotion to the complainant was made for objective reasons and within the Director-General's discretion.

CONSIDERATIONS

1. The facts relevant to this case are set out in considerations 1 to 4 of Judgment 3114, also delivered this day, on the complainant's application for execution of Judgment 2740.

2. The complainant has asked the Tribunal to join this complaint with her application for execution. For the reasons given in Judgment 3114, the Tribunal will not accede to this request.

3. In the present case, the complainant impugns the Director-General's decision of 4 January 2011 and repeats all the criticisms of the management of UNESCO's Coupons Programme which she had made in her file of 17 October 2002. She alleges that senior officials misappropriated funds to the detriment of poor countries. However, in raising that allegation before the Tribunal, she overlooks the fact that the competence of the Tribunal is clearly and exhaustively defined in Article II of its Statute, from which it follows that the Tribunal cannot interfere either with the policies of the international organisations which have recognised its competence, or with the workings of their administrations, unless a violation of the rights of a staff member is in issue. International civil servants seeking to file a complaint with the Tribunal must show that the decisions they are challenging are such as to affect personal interests of theirs which are protected by the rights and safeguards deriving from the applicable Staff Regulations and Rules, or from the terms of their appointments.

The complaint is therefore irreceivable to the extent that it seeks a finding by the Tribunal on the management of the UNESCO Coupons Programme.

4. It is however open to the complainant to present a case that, although she was, according to her, merely doing her duty as a loyal staff member, without transgressing her duty of discretion, the fact of having denounced malpractice in the management of the Programme resulted in reprisals against her. These reprisals, she asserts, were reflected in the failure to fulfil the verbal promise made to her to grant her a promotion, a violation of the rules applicable to performance appraisals, and persistent harassment. She also alleges that the proceedings before the Appeals Board were tainted by irregularities.

5. By virtue of the principle of good faith, an international organisation which has given a promise to one of its officials must

keep that promise, provided it is a substantive one, i.e. an undertaking to act or not to act or to allow action, that it emanates from a person who is competent or deemed to be competent to make it, that the breach of the promise causes injury to the person who relies on it, and that the position in law has not altered between the date of the promise and the date on which fulfilment is due (see Judgments 782, under 1, and 3005, under 12).

In support of her plea that UNESCO violated the principle of good faith in not keeping the verbal promise made to her to grant her a promotion, the complainant relies on a document, relating to a restructuring, which reiterated the promise in question.

However, that document was merely a draft memorandum intended for the Director of the Bureau of Personnel, and the complainant has not shown that she was given any other assurances of promotion. Accordingly, as she cannot argue that there was a promise meeting the requirements of the case law mentioned above, she cannot invoke a breach by the Organization of the principle of good faith.

6. At the time of the facts in issue, UNESCO's Staff Rule 104.11*bis*, paragraph (a), read in part as follows:

“Performance appraisal is fundamental to the career development of staff members. It is both an obligation and a responsibility of superiors and should be carried out objectively and without fear or favour. Reports in a form and by persons prescribed by the Director-General shall be made on each staff member [...].”

For all staff members holding indeterminate appointments, such as the complainant, reports were to be made every two years on Form 218A, entitled “Periodic Report”.

It is not disputed that this appraisal procedure was not followed for the complainant between 1 February 1999 and 28 February 2003, when she retired. The defendant explains that during this period Form 218C was completed in accordance with paragraphs 2440 and 2305.8 of the UNESCO Manual. The complainant was thus granted a step advancement in her grade and a corresponding increase in her annual salary, indicating that her performance had been satisfactory. The defendant also points out that according to paragraph 2440 of the

Manual in force at the time, such an increase was regarded as the equivalent of a performance appraisal. The complainant has not shown that the requirements for completing and communicating Form 218C were not complied with, and the Tribunal finds that in choosing that appraisal procedure the defendant correctly applied the relevant provisions. Accordingly, the complainant's allegations that there were no performance reports for the period 1999-2003, and, as a consequence, that the only purpose of that omission was to prevent her from being promoted, are unfounded.

So far as concerns the complainant's performance reports for the period 1997-1999, the complaint is time-barred, because by the time she sent in her file of 17 October 2002, over three years had elapsed since the date when she had challenged them before the Reports Board.

7. The facts recounted in the complaint testify to the tension excited between the complainant and her superiors by her concerns, justified or not, as to the management of UNESCO's Coupons Programme. The Tribunal considers, however, that the acts of which her superiors were accused, viewed individually or in combination, do not constitute harassment. In particular, they cannot be defined as acts deliberately intended to demean, humiliate or belittle the complainant.

8. Nor has the complainant succeeded in showing any irregularity, such as she alleges, in the proceedings before the Appeals Board. In the circumstances of the case, the Board cannot be criticised for not having held an adversarial debate between the complainant and her supervisor concerning the charges of harassment levelled by the former at the latter.

9. The complaint, which is unduly and pointlessly lengthy, is therefore unfounded in all respects and must be dismissed in its entirety, without there being any need for the Tribunal to rule upon the manner in which the provisions of UNESCO's Staff Regulations concerning the duty of discretion on the part of staff members were applied, since in any case no sanction was imposed on the complainant for the steps she took in respect of her file of 17 October 2002.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2012, Mr Seydou Ba, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet