

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V.
v.
UNIDO

122nd Session

Judgment No. 3670

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. V. on 12 July 2013 against the United Nations Industrial Development Organization (UNIDO) and corrected on 15 October 2013, UNIDO's reply of 3 February 2014, the complainant's rejoinder of 9 May, UNIDO's surrejoinder of 18 August, the complainant's further submissions of 24 October and UNIDO's final comments thereon of 9 December 2014;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges her Staff Performance Appraisal (SPA) report for the period 1 July 2009 to 30 June 2010, as well as the decision not to renew her fixed-term contract.

The complainant joined UNIDO as a Human Resource Specialist at the P-4 level on 1 July 2009 under a one-year fixed-term contract. In March 2009 an offer of a three-year fixed-term contract (subject to a one-year probationary period) had been made to the complainant following a competitive recruitment process. However, that offer was conditional on receipt of satisfactory references. As questions arose

during the reference-check process and concerning some of the information provided by the complainant, the offer of a three-year contract was withdrawn and she was offered a one-year contract instead.

The goals to be achieved by the complainant and her main assignments as described in her SPA report were agreed upon by the complainant and her first reporting officer in September 2009.

The complainant and her supervisors met several times in February 2010 for the purpose of conducting a mid-term review. She was then informed of concerns about several areas of her performance. In an email of 23 March 2010 her supervisors reiterated their concerns and encouraged her to “do [her] best in meeting [their] expectations and thus confirming [her] suitability for continued employment with UNIDO”. A further meeting was held on 3 May 2010 to assess the complainant’s performance and progress.

By a memorandum of 17 May 2010 the first reporting officer recommended to the Director-General that the complainant’s fixed-term appointment be allowed to expire on 30 June 2010, on the grounds that her performance was unsatisfactory. On 21 May 2010 the Director-General approved the supervisor’s recommendation. He also decided to give the complainant a two-month extension on “humanitarian grounds, in order to provide [her] with time to wind down matters”. The complainant was so informed on 26 May.

On 10 June the first reporting officer assigned “Low” ratings to seven out of the ten areas listed under Part IV of the complainant’s SPA report. Efforts were made in July and August to organise a meeting with the complainant to discuss her performance and have her sign the SPA report. The complainant eventually signed it on 31 August 2010, i.e. on the last day of her contract extension. The second reporting officer completed the SPA report on 16 September 2010, assessing the complainant’s performance as unsatisfactory.

Meanwhile, on 22 July and 23 August respectively, the complainant had requested the Director-General to review his decision to extend her contract for two months and the decision to withdraw the offer of a three-year fixed-term contract that had been made to her initially. In her

second request she also claimed material and moral damages. These requests and claims were rejected on 17 September and 20 October 2010.

In September 2010 UNIDO proposed to the complainant a settlement agreement, involving a one-year contract extension in exchange for settling all claims, which she rejected.

In February 2011 the complainant sought to file a rebuttal to the SPA report pursuant to Appendix M to UNIDO Staff Rules. She was informed that it was irreceivable.

On 19 April 2011 she requested the Director-General to review the decision to grant her a one-year instead of a three-year fixed-term contract, the decision to extend it for two months and the decision to offer her as final settlement a one-year contract. She also requested the review of her SPA report and claimed material and moral damages. By a decision dated 6 June 2011 all her requests and claims were dismissed as either unfounded or time-barred.

The complainant lodged an internal appeal on 12 August 2011. In its report of 29 June 2012 the Joint Appeals Board (JAB) recommended that a rebuttal panel be constituted. The Director-General accepted the recommendation to allow the complainant an opportunity to rebut her SPA report. In its report issued in November 2012 the Rebuttal Panel agreed with the overall unsatisfactory rating. In his final appraisal the reviewing officer also decided to maintain the overall unsatisfactory rating. A copy of the report and the final appraisal were communicated to the JAB on 5 December 2012 for completion of the internal appeal process. On 21 March 2013 the JAB issued an addendum to its report recommending that the entire appeal be dismissed as unfounded. On 16 April 2013 the Director-General endorsed the JAB's recommendation. That is the decision impugned.

The complainant asks the Tribunal to set aside the impugned decision and to order the removal of the SPA report as well as all documents relating to the rebuttal procedure from her personnel file. She seeks 100,000 euros in material damages, 50,000 euros in moral damages, as well as costs.

In its reply UNIDO asks the Tribunal to reject the complaint as entirely unfounded and to dismiss her claims for relief based on the decision to offer her a one-year fixed-term contract and the decision to extend her contract for two months as time-barred. It submits that her claims based on the settlement agreement are also irreceivable for lack of a cause of action. In its surrejoinder UNIDO adds that the complaint is time-barred in so far as it challenges the non-renewal of the complainant's contract beyond the two-month extension and seeks the payment of material and moral damages.

CONSIDERATIONS

1. The complainant commenced employment with UNIDO on a one-year fixed-term contract commencing 1 July 2009. She had initially been offered a three-year contract but this arrangement did not eventuate. The complainant was employed as a Human Resource Specialist at the P-4 level in the Human Resource Management Branch (HRM).

2. In May 2010 the complainant was informed by the Director of HRM that he would be recommending that her appointment be allowed to expire on its due date, namely 30 June 2010. Such a recommendation was in fact made and accepted by the Director-General on 21 May 2010 though he decided to give the complainant a two-month extension on humanitarian grounds. The complainant was informed of this decision on 26 May 2010. The complainant's employment ended on 31 August 2010 at the conclusion of the two-month extension.

3. Central to the complainant's case in these proceedings is the way in which her performance was evaluated and, in particular, assessed in her SPA report. However it is unnecessary to recount much of the detail which both the complainant and UNIDO set out in their pleas. That is because the content of the SPA report and the circumstances in which it was prepared were assessed by a rebuttal panel (the Panel) and a reviewing officer in a final appraisal issued in late November 2012. The substance of their conclusions is not, in a persuasive way, challenged by either party. The consideration of the SPA report by the Panel was

the product of a recommendation of the JAB that a rebuttal panel be established. This recommendation was in a report of the JAB dated 29 June 2012 prepared, as an interim report, during internal appeal proceedings commenced by the complainant on 12 August 2011. The recommendation concerning a rebuttal panel was accepted by the Director-General on 27 July 2012.

4. The final conclusions and recommendations of the JAB were embodied in a report dated 21 March 2013. In that report the JAB summarised the Panel's conclusions:

“that the SPA document represents on the whole a fair evaluation of the staff performance during the period and agreed to the unsatisfactory rating by the second reporting officer. Based on the conclusions of the rebuttal panel, the JAB dismisses the case in its entirety.”

This recommendation was accepted by the Director-General who dismissed the complainant's internal appeal on 16 April 2013. This is the decision impugned in these proceedings.

5. It is convenient to refer to several aspects of the Panel's report. As noted by the JAB, the Panel concluded that the SPA report represented on the whole a fair evaluation of the complainant's performance during the period in question and agreed with the “unsatisfactory” overall rating. However the Panel was critical of the content of the SPA report and the environment in which the complainant had been required to work generally and, specifically, as it might have impacted on her performance.

6. In relation to the report itself, the Panel noted that the complainant had been evaluated overall as unsatisfactory and that seven of the ten evaluation criteria were rated as low. The Panel described this as “a very severe assessment by any means”. Its own evaluation led it to conclude that there was enough evidence to support the low rating given to the complainant against several criteria (quality and quantity of work, ability to meet deadlines and problem-solving) but in relation to others (initiative, ability to work independently and strategic thinking) the Panel was not able to establish the validity of the low rating.

7. In relation to the environment in which the complainant worked, the Panel noted that “the professional relationship amongst the staff, [the complainant’s] supervisors and reporting officers had rapidly deteriorated and degenerated into an environment of negative prejudice which in itself would have adversely impacted on the [complainant’s] performance”. The Panel later noted that the rapid deterioration in the relationship soon after the complainant joined UNIDO on 1 July 2009, had been compounded by the “ambiguous reporting lines between assistants, professionals, unit chiefs and directors” that prevailed at that time. The Panel summarised the reporting lines and concluded that “this misalignment of hierarchical structure and reporting lines certainly contributed to growing frictions between [the complainant] and her Unit Chief”.

8. After this analysis the Panel observed that “hardly six months into the employment contract, the two parties were evidently preparing for litigation”. It noted that a process had been adopted in relation to the complainant for “mid-term reviews”. It observed that, at face value, this was a constructive initiative intended to help the complainant improve her performance. However it also noted that their sheer frequency pitted the complainant against her superiors and that did little to improve her performance and, additionally, contributed much to the growing tension between the complainant and her supervisors.

9. In a section of its report entitled “Conclusions”, the Panel first observed, as noted earlier, that it agreed with the overall rating of “unsatisfactory” and that the SPA report represented on the whole a fair evaluation of the complainant’s performance. However the Panel then made several telling observations. The first was that while a staff member “has a contractual obligation to perform to the best of his/her abilities, the employer likewise has an obligation, moral if not contractual, to nurture a conducive environment that encourage[s] the staff member to perform effectively and entice him/her to fully develop his/her abilities”. The Panel went on to say that this opportunity had not been given to the complainant. The Panel then observed that the complainant had been working in the HRM Branch and that, unlike in other divisions of the

Organization, HRM could not play the role of external mediator when a dispute arises within its own ranks. In relation to the position of the complainant in HRM, the Panel observed that the complainant was “[l]ocked in an argument against seasoned HR officers” and that she “had rather limited chances to defend her position”.

10. The Panel concluded that the complainant “[had not been] given a fair chance to perform to her full potential” and, in the circumstances, she should have been given a “second chance” and it gave, as an example, the complainant being offered a one-year contract in a different administrative unit at UNIDO. Had that happened, the Panel opined it would have given the complainant the opportunity “to prove her true worth”. But the Panel noted that the complainant had been given such an opportunity in September 2010 but had declined this offer. This last mentioned observation concerns an offer made in unsuccessful settlement discussions which did not resolve the parties’ differences.

11. In his final appraisal of 23 November 2012 the reviewing officer similarly expressed the view that the overall assessment of the complainant’s performance was unsatisfactory, noting that the criteria of quality and quantity of work, ability to meet deadlines and problem-solving reflected attributes which were important in the complainant’s role as a Human Resource Specialist. He made independent observations about the deterioration of the relationship between the complainant and her supervisors but said that he could not “fully attribute [the complainant’s] unsatisfactory performance to this factor”, and he also observed that the complainant was not alone in working in ambiguous reporting lines and others who were had not been assessed as performing unsatisfactorily.

12. The Tribunal is satisfied, particularly having regard to the Panel’s assessment and that of the reviewing officer, that the detailed assessment of the complainant’s performance in the SPA report was flawed though the overall assessment of her performance as unsatisfactory is not, as a matter of substance, flawed.

13. In her brief, the complainant seeks by way of relief an order requiring the removal of the SPA report from her personnel file and all documents relating to the rebuttal procedure. She also seeks material damages for the damage to her reputation and career prospects and for losing a valuable opportunity for a contract extension and career within UNIDO. She also seeks moral damages and costs. There was an issue in the pleas whether it was open to the complainant to argue that the decision not to extend her appointment and to give her a two-month extension on humanitarian grounds was unlawful. UNIDO argues that this aspect of her complaint is irreceivable. This is correct. The decision not to extend the original contract was made on 21 May 2010. It is true that on 22 July 2010 and 23 August 2010, the complainant sought, in aggregate, administrative review of a range of decisions that may reasonably be viewed as including the decision not to extend her original contract for a period greater than two months or not to offer her a new contract. The Director-General responded to these requests on 17 September 2010 and 20 October 2010. He appears to have taken the position that any challenge to the decision not to extend her original contract was time-barred. Irrespective of whether this is correct, no internal appeal was lodged from this decision within the 60 days specified in the Staff Rules. Accordingly internal means of redress were not exhausted, which renders irreceivable this aspect of the complainant's complaint.

14. However if, as is the case, she successfully impugns the original assessment of her performance in the SPA report, then she is able to seek relief for any consequences which might reasonably or naturally flow from that flawed assessment. That might include the loss of the opportunity to have her appointment extended. That said, the overall assessment of her performance originally was and remained, after considered and detailed internal review, unsatisfactory. In the circumstances it would be inappropriate to award material damages on the basis that the complainant lost the opportunity of securing a contract renewal.

15. However the complainant is entitled to moral damages for the failure of UNIDO to undertake originally an assessment of her performance which was free of the deficiencies identified by the Panel

in its report. The Tribunal assesses those damages in the amount of 20,000 euros.

16. It would be inappropriate to order that the SPA report and documents concerning the rebuttal process be removed from the complainant's file held by UNIDO. While the former is flawed, the last mentioned documents provide a rational and reasonable context in which the SPA report can be viewed. In aggregate, they reflect a balanced assessment of the complainant's performance that UNIDO is entitled to retain in its personnel records.

17. The complainant is entitled to costs in the amount of 6,000 euros.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant moral damages in the amount of 20,000 euros.
2. UNIDO shall pay the complainant 6,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

ANDREW BUTLER