

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**E. Z. (No. 2)**

**v.**

**UNESCO**

**125th Session**

**Judgment No. 3935**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S. E. Z. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 December 2016 and corrected on 19 January 2017, UNESCO's reply of 18 April and the complainant's letter of 2 May 2017 informing the Registrar of the Tribunal that he would not file a rejoinder;

Considering Article II, paragraph 5, 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 accuses his former supervisor of moral harassment.

At the material time, the complainant held a post at grade P-5 in UNESCO's Office of International Standards and Legal Affairs (hereinafter "the Office"). In March 2011 he lodged an internal complaint of moral harassment against the Director of the Office with the Director-General. He asked the Director-General to identify an interim measure to resolve this situation, "even outside the service", and requested a "hearing" with a view to "ending the deterioration in [his] working conditions". On 29 March the complainant had a meeting with the Director-General during which, according to him, the possibility of a transfer was discussed. On 31 March 2011 he asked the Ethics Adviser, to whom the harassment complaint had been forwarded for

assessment, to “stay the proceedings” pending the “informal resolution” which, he said, the Director-General was in the process of considering.

On 5 September 2012 the complainant requested the Director-General to extend his appointment beyond 30 June 2013, the date on which he would reach the statutory retirement age. On 23 October he submitted a further request to her, asking for the Ethics Office to examine his complaint of moral harassment against the Director of the Office.

As from November 2012 the Ethics Adviser tried to bring about a settlement. On 30 January 2013 the complainant received an agreed separation proposal which provided that his appointment would end the following day and that, in addition to a termination indemnity, he would receive a sum equivalent to three months’ salary in lieu of notice on the condition, among others, that he withdraw his harassment complaint. On 31 January the complainant rejected that proposal and asked the Administration to examine his internal complaint.

On 7 February 2013 the complainant, acting on the basis of item 18.2, paragraph 28, of the UNESCO Human Resources Manual on anti-harassment policy, lodged an internal complaint of moral harassment against the Director of the Office on behalf of one of his former colleagues, Ms C. That complaint was dismissed on 25 April. That same day, he was informed that another internal complaint, in which he had accused the Director of the Office of unethical and wasteful conduct and favouritism during recruitment procedures, had also been dismissed, in accordance with the recommendation of the Ethics Adviser. On 24 May the complainant submitted a protest against both dismissal decisions.

After he had received the comments of the Director of the Office on the complainant’s allegations against her, the Ethics Adviser carried out a preliminary assessment of his internal complaint. In his report of 15 May 2013, the Ethics Adviser concluded that these allegations did not constitute moral harassment within the meaning of the applicable provisions but were “rather manifestations of work-related conflicts”. He therefore recommended that the Director-General close the case. The complainant was advised on 27 May that the Director-General had decided to follow that recommendation, and he submitted a protest against that decision on 4 June. He asked the Director-General to

“initiate an investigation of his [internal] complaint files by independent investigators and to notify [him] of [her] overall decision within the statutory time limits”.

The complainant retired on 30 June. He was informed on 13 August that his two protests had been dismissed, and he lodged a notice of appeal with the Appeals Board on 27 August 2013. In his detailed appeal, he sought redress for the moral injury that he considered he had suffered as a result of harassment since 2009 and the retaliation to which he had been subjected following his refusal to accept the proposal for an agreed separation.

In its opinion of 15 June 2016, delivered after hearing the parties, the Appeals Board concluded that since Ms C. had stated in an e-mail of 22 April 2013 that she had not been harassed, the decision to dismiss the internal complaint which the complainant had submitted on her behalf was consistent with the “existing rules”. However, the Appeals Board found that the decisions to dismiss the complainant’s own complaint of moral harassment and his complaint of unethical and wasteful conduct and favouritism were not justified. Given that the complainant’s allegations and the explanations of the Director of the Office completely contradicted each other, the Ethics Adviser should have extended his enquiries, in particular by hearing witnesses, with a view to ascertaining whether the conduct complained of amounted to harassment or rather consisted of “managerial acts” done in the interests of the service. Noting that the complainant and the Director of the Office had both left the Organization, the Appeals Board considered that it was now impossible to initiate an investigation and recommended by a majority that the “attacked decisions” be quashed and that the complainant be paid a sum equivalent to six months’ salary for injury under all heads.

Discussions began with a view to finding an amicable solution, but they proved unsuccessful. The complainant was notified in a letter dated 2 December 2016 that the Director-General had decided to endorse the majority recommendation of the Appeals Board. That is the impugned decision.

The complainant asks the Tribunal to set aside “all the decisions” covered by the recommendation of the Appeals Board as well as the impugned decision, to the extent that it involves a refusal to open an investigation and to forward the file to the Internal Oversight Service – which, under item 18.3 of the Human Resources Manual, is competent to hear allegations of unlawful or wasteful conduct – for an assessment of all adverse consequences of the abuse of authority to which he states he was repeatedly subjected and which “far exceed the six months’ net salary already awarded by the Director-General”. He claims an amount equivalent to two years’ gross salary in compensation for moral and material injury, and costs in the amount of 15,000 euros. He asks that this complaint be joined with his first complaint.

UNESCO contends that the complaint is irreceivable on the grounds that it is extremely confused and abstruse and does not meet the requirements of procedural fairness. Subsidiarily, it submits that the complaint should be dismissed as unfounded. UNESCO opposes the joinder of the two complaints because it considers that they concern entirely different legal issues. It asks the Tribunal to order the complainant to pay it 6,000 United States dollars to cover part of the costs it has incurred in connection with the present complaint.

#### CONSIDERATIONS

1. The complainant impugns the decision of 2 December 2016 in which the Director-General of UNESCO ruled on the appeal directed against the dismissal of various internal complaints lodged by the complainant, including a complaint of moral harassment against the Director of the Office of International Standards and Legal Affairs, the unit to which he was assigned.

In that decision, the Director-General concurred with the recommendation of the Appeals Board in its opinion of 15 June 2016 and acknowledged that the aforementioned complaint of moral harassment had wrongly been dismissed following a preliminary assessment. The Director-General withdrew various earlier decisions but, like the Appeals Board, she considered that it was no longer possible for practical reasons

to carry out an investigation into the alleged harassment. She therefore agreed to compensate the complainant in the amount proposed by the Appeals Board, thereby leaving unresolved the issue of whether the harassment complaint was well founded.

2. The complainant has requested that this complaint be joined to his first complaint, which is also the subject of a judgment delivered in public this day. However, although the two complaints rest partly on the same arguments, their subject-matter is clearly distinct and they raise different questions of law. The Tribunal hence concurs with the defendant that joinder is not appropriate.

3. UNESCO submits that the complaint is irreceivable on the grounds of its lack of intelligibility. It considers that the complaint is confused and abstruse and hence does not meet the requirements of procedural fairness, in particular owing to the unclear wording of the complainant's claims and the numerous digressions unrelated to the case.

The Tribunal agrees with the Organization that both the structure and the drafting of the complainant's submissions might have been clearer. However, the complaint is sufficiently intelligible to enable the other party to identify its essential purpose and the main pleas on which the complainant relies. The content of UNESCO's reply demonstrates, moreover, that it was able to understand fully the complainant's claims and pleas.

Following the practice it has developed through its case law dealing with this issue, the Tribunal will hence dismiss this objection to receivability (see, for example, Judgments 3298, under 16, or 3616, under 1).

4. Conversely, the Organization is correct to point out that the complainant may not impugn, as he purports to do, "all the decisions covered by the recommendation of the Appeals Board [in] [paragraph] 154 of [Opinion] CAP/414 [of 15 June 2016]". In paragraph 154 of its opinion, the Appeals Board had recommended that the Director-General "quash the attacked decisions", and since the Director-General stated in

her decision of 2 December 2016 that she “[had] decided to accept the [Board’s] recommendations”, which she simply quoted verbatim, the decisions in question must be deemed to have thus been withdrawn by the person who made them. It follows that the claims directed against them are irreceivable because they have become moot.

5. The Tribunal notes that the reference by the Appeals Board in paragraph 154 of its opinion to all of the “attacked decisions” does not seem intended to cover the decision of 25 April 2013 to close the case concerning a complaint of moral harassment submitted by the complainant on behalf of one of his former colleagues. Indeed, it is clear from paragraph 138 of the same opinion that the Appeals Board regarded that decision as lawful, and a recommendation that it be quashed would therefore be patently contradictory. However, assuming that the complainant’s claims must be understood to apply to that decision as well, the Tribunal in any event concurs with the Appeals Board’s finding on the merits, that the decision to close the case on that internal complaint was correct, particularly because the person concerned had denied being a victim of harassment.

6. The Director-General accepted in her decision of 2 December 2016 that the files of the various internal complaints lodged by the complainant should not have been closed by the Ethics Adviser (subject to what has been said above concerning one of them). The Tribunal hence considers that there is no need to examine all of the complainant’s submissions on the flaws which, according to him, affected the preliminary assessment of his complaints of moral harassment and unlawful conduct directed against the Director of the Office. Since the decisions taken at the end of those proceedings were withdrawn by the Director-General, as has been stated above, these submissions are irrelevant.

7. Moreover, since the decision of 2 December 2016 already provided for the injuries suffered by the complainant to be compensated by a payment of six months’ salary, that is 50,804 United States dollars, plainly the complainant’s claims for compensation may only be granted to the extent that he can show that those injuries warranted greater relief.

8. The complainant objects to the fact that the Director-General, having recognised that the decision to close the case on his complaint of moral harassment had been wrong, failed to initiate the investigation for which item 18.2 of the Human Resources Manual on anti-harassment policy provides when the preliminary assessment does not culminate in a decision to close the case.

However, like the Appeals Board, the Tribunal considers that by the time the impugned decision was taken, it was no longer possible to conduct such an investigation, not only because both the complainant and the Director of the Office had left the Organization, but also because of the time that had elapsed since the incidents in question, which in particular made it difficult to gather reliable testimony from witnesses as to whether those incidents occurred and how third parties may have perceived them.

The Tribunal has already found in similar cases that when an internal harassment complaint has wrongly been dismissed, it is not appropriate to order that an investigation be re-opened if that course would raise practical difficulties of this nature (see, for example, in another case concerning a UNESCO official, Judgment 3639, under 8 to 10).

9. This situation means that it is not possible, in the instant case, to reach an informed decision on the merits of the parties' submissions as to the existence and, as the case may be, the effects of the harassment alleged by the complainant. Neither the parties' briefs nor the evidence tendered allow the Tribunal to rule on these points with certainty; this would be possible only if the findings of an investigation that was duly carried out at the material time were available.

Thus, although the complainant alleges, *inter alia*, that he was unduly divested of some responsibilities, improperly placed under the supervision of colleagues who were not his superiors and subjected to humiliating statements and conduct, the evidence on file does not permit a determination as to whether some of these incidents actually took place and whether, viewed as a whole, they constituted harassment or instead resulted from acceptable management decisions or sheer

tactlessness. Furthermore, whilst the complainant plainly had a very difficult relationship with the Director of the Office, that circumstance, which may well be explained by work-related conflicts or even by purely personal antagonism, does not in itself support a finding that the complainant was, as he alleges, a victim of systematic discrimination, retaliation or other conduct amounting to harassment.

10. Nevertheless, the fact that it is impossible for the complainant to have his internal complaints examined constitutes a serious violation of his right to effective means of redress, in particular as far as his harassment complaint is concerned. It has caused him considerable moral injury which, in the Tribunal's view, justifies a higher amount of damages than that already awarded by UNESCO in the impugned decision.

11. The various flaws which, in the complainant's view, affected the preliminary assessment of his internal complaints do not, in this case, warrant redress for an injury distinct from that identified above, which flowed from the wrongful decision to close the case on those matters. However, in his complaint the complainant raises various other irregularities which, in his view, increase UNESCO's liability.

12. The Tribunal does not accept the complainant's submission that UNESCO neglected its duty to prevent harassment in the workplace. The evidence does not show that his working relationship, or that of other employees, with the Director of the Office before he lodged his harassment complaint was such as to require the implementation by the Organization of the measures provided for in aforementioned item 18.2 of the Human Resources Manual.

13. Whereas the complainant claims compensation for the material injury resulting from "psychiatric and therapeutic fees", the evidence does not enable it to be established that these were attributable to the consequences of the conduct of which he accuses UNESCO.

14. Neither can the Tribunal accept the complainant's argument of "arrogation by the Administration of medical expertise", which relates, as far as can be understood, to the statement made by the Director of the Bureau of Human Resources Management in a brief submitted in another case that he suffered from a "feeling of persecution". Assuming that the term was indeed used by that senior official, which UNESCO disputes, the Tribunal cannot infer from this, as the complainant does, that the Organization thus intended to make a medical assessment of his state of health and to insinuate that he suffered from mental health problems.

15. Lastly, the complainant disputes the lawfulness of the proceedings before the Appeals Board. He maintains that the composition of the Board did not provide the requisite guarantees of objectivity and that he was denied access to various documents in the Organization's possession, the disclosure of which should have been ordered by the Board. However, firstly, the fact that some members of the Appeals Board had sat in the case concerning the dismissal of his request for an extension of his appointment (the subject of his first complaint to the Tribunal) does not prevent them from taking part in the consideration of the appeal at issue in the instant case, despite what he asserts. Secondly, the evidence does not show that the failure to disclose the requested documents had, in this case, a material impact on his right to be heard.

16. Conversely, the complainant's contention that in this case UNESCO breached the time limits prescribed in the provisions governing the appeals procedure is well founded.

The evidence shows that the Organization did not file its reply to the complainant's detailed appeal until 11 September 2015, more than 10 months after the submission of the latter on 7 November 2014. It thus plainly disregarded paragraph 12 of the Statutes of the Appeals Board, which provides that the reply must be submitted "[w]ithin one month of the receipt of the detailed appeal". Furthermore, the Appeals Board hearing was not held, as paragraph 14 stipulates, "not later than two months after [receipt of] the reply", since it was held only on 17 March 2016. Lastly, as stated above, the Director-General's final decision was

taken on 2 December 2016, almost six months after the Appeals Board delivered its opinion on 15 June 2016, whereas paragraph 20 of the Statutes provides that the Director-General “shall make a decision thereon as soon as possible”.

It is true that, as UNESCO rightly points out, the failure to observe the aforementioned provisions of the Statutes of the Appeals Board did not seriously infringe the complainant’s rights, and the delays, some of which are attributable to the complainant, can partly be explained by the unusual complexity of the case. It should also be borne in mind that the Director-General’s final decision was preceded by discussions with the complainant aimed at reaching a settlement, which obviously delayed its adoption.

Nevertheless, the Organization was obliged, in accordance with the principle *tu patere legem quam ipse fecisti*, to adhere more strictly to the procedural time limits laid down in the Statutes of the Appeals Board. Its failure to do so caused the complainant moral injury, for which he legitimately claims redress (see, for similar cases, Judgments 3579, under 4, and 3688, under 11).

17. The remaining arguments put forward by the complainant would not justify the award of additional damages, in particular the punitive or exemplary damages that he seeks, but he is entitled to compensation for the injuries examined under 10 and 16, *in fine*, above.

In the circumstances of this case, the Tribunal considers that these two injuries will be fairly redressed by awarding the complainant moral damages in the total amount of 25,000 euros, in addition to the six months’ salary that has already been awarded to him under the decision of 2 December 2016.

18. As he succeeds in part, the complainant is entitled to costs, which, in view of the fact that he did not engage a lawyer, the Tribunal sets at 1,000 euros.

19. UNESCO has entered the counterclaim that the complainant should be ordered to pay costs. It follows from the foregoing that this claim must obviously be dismissed.

#### DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 2 December 2016 is set aside to the extent that it limited compensation for the injury suffered by the complainant to six months' salary, that is 50,804 United States dollars.
2. UNESCO shall pay the complainant, in addition to the sum already awarded pursuant to the aforementioned decision of 2 December 2016, moral damages in the amount of 25,000 euros.
3. It shall also pay him 1,000 euros in costs.
4. All other claims are dismissed, as is UNESCO's counterclaim.

In witness of this judgment, adopted on 16 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ