

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. (No. 3)

v.

UNESCO

128th Session

Judgment No. 4169

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms L. F. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 13 January 2016, UNESCO's reply of 6 June, the complainant's rejoinder of 5 August and UNESCO's surrejoinder of 14 November 2016;

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 performance report for the 2008-2009 biennium and the decision to defer her within-grade salary increment until 1 February 2011.

On 3 January 2005 the complainant joined UNESCO under a fixed-term appointment which was renewed several times, eventually ending on 2 January 2013. When she was assigned to a post of secretarial assistant in the Intergovernmental Oceanographic Commission (IOC) in the Natural Sciences Sector, she was placed under the direct supervision of Mr T.A.

On 27 January 2010 Mr T.A. gave the complainant the overall rating of “Partially meets expectations” in her performance report for the 2008-2009 biennium and recommended that her within-grade increment be deferred until 1 February 2011. A performance improvement plan was appended to the performance report. The complainant formally contested that report and Mr T.A.’s recommendation, stating that the performance improvement plan was irrelevant and inappropriate.

On 11 March and 10 June 2010 the Review Panel – which is responsible for reviewing the quality, coherence and impartiality of performance reports – met, heard the parties concerned and decided to endorse Mr T.A.’s rating. Considering that the performance improvement plan had been partly implemented, the Panel asked the complainant to complete it. In addition, having noted the difficult environment in which the parties had had to work together, it recommended that the possibility of finding a new subordinate for Mr T.A. and a new supervisor for the complainant be examined.

On 12 August 2010 the complainant initiated a contestation procedure to challenge her performance report before the Reports Board. She asked it to quash the report, to grant her the within-grade increment which, in her view, she deserved, to order her immediate transfer to another unit or division, and to repair all the injury that she claimed to have suffered.

The Reports Board heard the parties at its meeting on 26 November 2010. Following its deliberations, it unanimously recommended maintaining Mr T.A.’s rating and the deferral of the complainant’s within-grade salary increment until February 2011 and transferring the complainant to another service. By letter of 25 January 2011, the complainant was informed that the Director-General had decided to maintain the disputed rating and the deferral of her within-grade increment, and that the possibility of a transfer would be “explored”.

On 25 February the complainant challenged that decision by submitting a protest, which was dismissed as unfounded by a memorandum dated 8 April. On 22 April 2011 she submitted a notice of appeal; then, on 27 November 2014, having obtained numerous extensions of the time limit, she submitted her detailed appeal, in which

she requested, in particular, the quashing of the decision of 8 April 2011 and the performance report for the 2008-2009 biennium, the withdrawal of that report, the restoration of the salary increment due on 1 February 2010, the payment of the sums corresponding to that increment, including contributions to the United Nations Joint Staff Pension Fund (UNJSPF), and moral damages.

After hearing the parties, the Appeals Board delivered its opinion on 5 October 2015. It expressed its regret that the transfer had not taken place but, that notwithstanding, recommended that the Director-General “note that the [...] administrative decision [of 25 January 2011] was taken in accordance with the Organization’s existing rules and regulations”. By a letter of 27 November 2015, which constitutes the impugned decision, the complainant was informed of the Director-General’s decision to accept the recommendation made by the Appeals Board.

The complainant asks the Tribunal to quash the impugned decision, to award her moral and material damages, to quash the performance report for the 2008-2009 biennium with all the consequences that this entails and to order the “restoration of the increment due on 1 February 2010”, payment of the sum corresponding to that increment – including contributions to the UNJSPF – and fair redress for moral injury. She also claims 5,000 euros in costs, “without prejudice to specific and exemplary moral damages” for the delay in the internal appeal procedure. Lastly, she requests that this complaint be joined to her fourth, fifth, sixth and seventh complaints.

UNESCO asks the Tribunal to dismiss the complaint as unfounded. It considers that the claim for the “restoration of the increment due on 1 February 2010” is irreceivable as the complainant failed to exhaust internal means of redress.

CONSIDERATIONS

1. The complainant has filed five complaints against five decisions of the Director-General of UNESCO, all dated 27 November 2015, and asks that they be joined. However, it is appropriate to consider the present complaint separately as it raises distinct legal

questions from those raised in the other complaints and merits individual attention. An order joining the present complaint to the four others – which are likewise the subject of judgments delivered in public this day – will therefore not be made.

2. The complainant, a secretarial assistant in the IOC, impugns the Director-General's decision of 27 November 2015 on her appeal against the decision of 8 April 2011, which confirmed the decision of 25 January 2011 to, firstly, maintain the rating of "Partially meets expectations" which the complainant had received for the 2008-2009 biennium and, secondly, defer her within-grade salary increment until 1 February 2011.

3. In the impugned decision, the Director-General accepted the recommendation of the Appeals Board to "note that the [...] administrative decision [of 25 January 2011] was taken in accordance with the Organization's existing rules and regulations".

4. The complainant alleges a breach of paragraph 5(b) of the Statutes of the Appeals Board, which requires the Board to consider, in cases where the decision appealed against is based on the inefficiency or relative efficiency of a staff member, whether that decision "was affected by prejudice or other extraneous factor". In the complainant's view, the opinion delivered by the Appeals Board on 5 October 2015 regarding her performance rating for the 2008-2009 biennium and the deferral of her within-grade increment (CAP 402) – which led to the impugned decision – did not take account of her allegations concerning the negative attitude displayed by her direct supervisor, Mr T.A., towards her. She highlights the contrast between CAP 402 and the opinion delivered on 9 October 2015 concerning her complaint of moral harassment by her supervisor, Mr T.A. (CAP 399), in which the Appeals Board took into account several pieces of evidence that she submitted and came to findings of fact more favourable to her.

5. In CAP 402, the Appeals Board found that "the [complainant]'s work delivery was satisfactory but there were serious concerns with the [complainant]'s attitude and behaviour towards her supervisors".

By contrast, the allegations which the complainant made against her supervisor, Mr T.A., were summarised in the presentation of the parties' arguments, but after having noted that "the [complainant] [...] makes reference to a number of incidents surrounding the drawing up of the impugned [performance] report", the Appeals Board merely stated that "the statements of the [complainant]'s supervisors, her own statement and that of her Counsel [...] before the Reports Board" were taken into account. This sweeping generalisation does not allow the Tribunal to understand the reasons for which the complainant's allegations concerning the attitude of her supervisor, Mr T.A., were accepted or dismissed, and to what extent, if at all. Since the Appeals Board did not respond to the complainant's allegations, it is impossible to determine whether the Board gave due consideration to the question of whether the complainant's partly unfavourable performance rating and the deferral of her within-grade increment owed to prejudice or other extraneous factor, as required under paragraph 5(b) of the Board's Statutes, which was hence breached. Furthermore, that provision merely illustrates the general principles that apply in this matter, regardless of whether they are laid down in any rule or regulation.

The impugned decision of 27 November 2015 rests on the opinion delivered by the Appeals Board, which the Director-General simply accepted. That decision is, consequently, tainted by the same error of law and must be set aside (see, for similar cases, Judgments 2742, consideration 40, 2892, consideration 14, 3490, consideration 18, and 3934, consideration 5).

6. At this stage in its findings, the Tribunal should normally refer the case back to UNESCO for the Appeals Board to re-examine the complainant's appeal. However, given the length of time since the events and for the sake of procedural efficiency, the Tribunal will not do so and will itself assess the lawfulness of the Director-General's decision of 25 January 2011, confirmed on 8 April 2011.

7. The Tribunal has consistently held that international organisations have wide discretion in taking decisions concerning staff performance appraisal. Such decisions are therefore subject to only

limited review by the Tribunal, which will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1583, consideration 2, 3039, consideration 7, or 4010, consideration 5).

8. One of the complainant's many pleas directed against the Director-General's decision of 25 January 2011, confirmed on 8 April 2011, falls within the scope of that limited review, since it involves essential facts being overlooked, and is decisive as to the lawfulness of that decision.

That plea – which is closely connected to the flaw, noted above, in CAP 402 delivered by the Appeals Board – is that the Director-General did not take account of the complainant's criticisms of the conduct of her supervisor, Mr T.A., in breach of item 14.2, paragraph 2(a), of the Human Resources Manual on the “[p]erformance assessment system”, which requires the performance assessment process to be fair, objective and honest.

Moreover, this rule simply applies a general principle set out in various provisions of the Manual. For example, under the version of item 14.3, paragraph 29, on the “[p]erformance assessment system” which was applicable at the material time:

“Account should be taken of circumstances that may have prevented the staff member from achieving results. Distinction shall be made between circumstances due to external factors and beyond the control of the staff member, and circumstances within his/her control. When circumstances beyond the staff member's control have prevented him/her from achieving the expected result(s)/work assignment(s), they shall not negatively impact on the assessment of the staff member's performance and the rating attributed.”

9. While CAP 402 merely states that the complainant's attitude and behaviour towards her supervisor, Mr T.A., were matters for concern without expressing a view on her numerous allegations in his regard, CAP 399 reveals a mutual lack of respect that had led to tensions

and a hostile environment attributable to both the complainant and her supervisor, where the former felt isolated, ill-treated and not duly recognised while the latter considered that he was not duly respected by his subordinate, whose behaviour had become inappropriate. In CAP 399, the Appeals Board emphasises that a positive and harmonious working environment, free of intimidation, hostility or offence, was not ensured. The Board likewise considers that the complainant had been excluded from certain professional activities, probably due to attitudes and tensions between her and her supervisor. Lastly, in its conclusions, the Board invites the Director-General to note that there was evidence “to show there was a dysfunction”.

10. If the obligations arising from the requirements of fairness, impartiality and honesty during performance assessment laid down in, inter alia, above-cited item 14.2, paragraph 2(a), of the Human Resources Manual, are to be met, the professional context in which the staff member works must be taken into account. However, as the Appeals Board clearly established in CAP 399 quoted above, the behaviour of the complainant’s supervisor, Mr T.A., contributed to creating a tense, hostile working environment.

By failing to take account of this factor when she decided to maintain the rating “Partially meets expectations” and consequently to defer the complainant’s within-grade increment, the Director-General overlooked essential facts within the meaning of the case law quoted above in consideration 7 (see, in this respect, Judgment 4062, considerations 11 to 13).

The plea is hence well-founded.

11. It follows from the foregoing that the decisions of the Director-General of 25 January and 8 April 2011, and the complainant’s performance report for the 2008-2009 biennium, are unlawful and must be set aside, without there being any need to examine the complainant’s other pleas.

12. The complainant requests the “restoration of the increment due on 1 February 2010”. UNESCO submits that this claim is irreceivable because the refusal to award the complainant a within-grade increment was a separate administrative decision from the decision concerning her performance rating. According to the Organization, the complainant did not file a protest against that decision and hence failed to exhaust all internal means of redress, rendering her claim irreceivable under Article VII of the Statute of the Tribunal. This objection to receivability cannot be sustained. The Director-General’s decision of 25 January 2011 concerned both the complainant’s performance rating and the deferral of her within-grade increment and was the subject of a protest then an appeal to the Appeals Board.

It is apparent from Staff Rule 103.4(b) that an increment may be deferred or withheld only if the service of the staff member concerned is not satisfactory. UNESCO confirms that the complainant’s partly unfavourable performance rating was indeed the reason for her within-grade increment being deferred. Given that this salary increase is automatic, the complainant would ordinarily have been entitled to it had she been properly assessed.

The Tribunal hence finds that the material injury suffered by the complainant shall be fairly redressed by ordering UNESCO to pay her the equivalent of the annual salary increase corresponding to the unduly deferred increment and all related allowances. The amounts in question shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until the date of their payment.

13. Having regard, in particular, to the worry that the decisions concerning her performance rating and the deferral of her within-grade increment caused to the complainant in respect of her career prospects within the Organization, the Tribunal considers it appropriate to award her, on this ground, moral damages of 2,500 euros.

14. Lastly, the complainant claims “specific and exemplary moral damages” for the injury allegedly caused by the excessive length of the internal appeal procedure. However, the Tribunal observes in this

regard that although the complainant submitted a notice of appeal on 22 April 2011, she did not file her detailed appeal with the Appeals Board until 27 November 2014, having obtained 15 extensions of the time limit. Since the delay in ruling on the internal appeal was largely attributable to the complainant herself, it is not appropriate to grant this claim.

15. As she succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 750 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 27 November 2015, the decisions of 25 January and 8 April 2011, and the complainant's performance report for the 2008-2009 biennium are set aside.
2. UNESCO shall pay the complainant material damages and interest thereon, calculated as indicated in consideration 12, above.
3. The Organization shall pay the complainant 2,500 euros in moral damages.
4. It shall also pay her 750 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 30 April 2019, 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 3 July 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ