

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. (No. 4)

v.

UNESCO

128th Session

Judgment No. 4170

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth 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 reports for the 2010-2011 biennium and the decisions to defer her within-grade salary increment until 1 February 2012, to withhold that increment on that date and to not renew her fixed-term appointment for unsatisfactory service.

Facts relevant to this case are to be found in Judgment 4169 on the complainant's third complaint, also delivered in public this day. Suffice it to recall that the complainant joined UNESCO on 3 January 2005 under a fixed-term appointment which was renewed several times, eventually ending on 2 January 2013. She was assigned to a post of secretarial assistant in the Intergovernmental Oceanographic Commission (IOC) in the Natural Sciences Sector.

Three performance reports for the 2010-2011 biennium were drawn up for the complainant. The first report covered the period from 1 January 2010 to 7 February 2011, during which the complainant was supervised by Mr T.A. and Mr J.A., and gave her the overall rating of “Does not meet expectations”. The second and third reports were drawn up by two other supervisors and covered respectively the periods from 7 February 2011 to 31 December 2011 and from 8 July 2011 to 31 December 2011, both giving her the overall rating of “Partially meets expectations”. The complainant formally challenged all of the ratings. In January 2011 her within-grade salary increment, which had already been deferred to 1 February 2011, was again deferred until 1 February 2012, when it was ultimately withheld.

The Review Panel – which is responsible for reviewing the quality, coherence and impartiality of performance reports – decided to endorse the overall rating of “Does not meet expectations” for the three reports. On 22 May 2012 the complainant initiated a contestation procedure to challenge her performance reports before the Reports Board. She asked the Board, in particular, to recommend that the abovementioned reports and the decisions to defer or withdraw her within-grade increment for 2010, 2011 and 2012 be set aside, that she be awarded the three increments which were, in her view, due as of 1 February 2010, and that she be transferred.

The Reports Board heard the parties and delivered a divided opinion in October 2012. Two of its members recommended that the Director-General should maintain the overall rating “Does not meet expectations” and terminate the complainant’s appointment or arrange for her redeployment outside the IOC, depending on the Organization’s needs and possibilities, and the Chairperson of the Board concurred with that position. The two other members recommended changing the complainant’s overall rating to “Partially meets expectations” and placing the complainant at the disposal of the Bureau of Human Resources Management with a view to a transfer outside the IOC. By memorandum of 2 November 2012, the complainant was informed that the Director-General had endorsed the recommendations made by the two members of the Reports Board who were supported by the Chairperson and that,

accordingly, she had decided to maintain the overall rating “Does not meet expectations” and not to renew the complainant’s appointment when it expired on 2 January 2013.

On 21 November 2012 the complainant contested that decision by submitting a protest, then, on 26 December 2012, she filed a notice of appeal. On 9 January 2013 she was advised of the Director-General’s decision to dismiss her protest. After obtaining numerous extensions of the time limit, on 27 November 2014 the complainant submitted her detailed appeal to the Appeals Board, in which she requested it, in particular, to recommend the setting aside of the decision of 2 November 2012 and the performance reports for the 2010-2011 biennium; the withdrawal of those reports; the “restoration of the increments due on 1 February 2011 and 2012”; the payment of the sums corresponding to those increments, including contributions to the United Nations Joint Staff Pension Fund (UNJSPF); and moral and material damages. She also requested her reinstatement in the Organization as from 3 January 2013.

After hearing the parties, the Appeals Board delivered its opinion on 7 October 2015. It recommended that the complainant be paid one month’s salary in addition to the two months’ notice which she had already been granted and 50 per cent of the termination indemnity which could be paid in the event of termination for unsatisfactory service. It also suggested the creation or re-establishment of a human resources unit responsible for transfers to avoid similar situations in the future. By a letter of 27 November 2015, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to accept the recommendation of the Appeals Board concerning the payment of an extra month’s salary, to reject the recommendation concerning the termination indemnity, and to take note of the suggestion made.

The complainant asks the Tribunal to quash the impugned decision; to award her moral and material damages, on the grounds, among others, of the delay in the proceedings before the Appeals Board and material injury; to quash the performance reports for the 2010-2011 biennium with all the consequences that this entails; and to order the “restoration of the increments due on 1 February 2011 and 2012” and

payment of the sums corresponding to those increments, including contributions to the UNJSPF. She also requests her reinstatement as from 3 January 2013 and 5,000 euros in costs. As an alternative to reinstatement, she requests that her claim for compensation be adjusted by “paying salaries and allowances due as from 3 January 2013, including contributions to the [UNJSPF], with interest at the legal rate”. Lastly, she asks that the present complaint be joined to her third, 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 two increments due on 1 February 2011 and 2012” 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 protest against the decision of 2 November 2012, confirmed on 9 January 2013, to, firstly, maintain the rating of “Does not meet expectations” given to the complainant for the 2010-2011 biennium and, secondly, not renew her fixed-term appointment for unsatisfactory service.

3. In the impugned decision, the Director-General accepted the first recommendation made by the Appeals Board that the complainant be paid one month’s salary in addition to the two months’ notice which she had already been granted, dismissed the second recommendation

that the complainant be awarded 50 per cent of the termination indemnity which could be paid in the event of termination for unsatisfactory service, and took note of the third recommendation suggesting the creation or re-establishment of a human resources unit responsible for transfers.

4. In one of her numerous pleas, the complainant argues that the Director-General did not exercise her discretion in an objective and appropriate manner when she adopted the decision of 27 November 2015. The complainant points out that the Appeals Board identified several flaws in the opinion of the Reports Board and in the performance improvement plans that had been drawn up for her, and that the Appeals Board found that the solution of transferring her to another service had not been seriously considered. Accordingly, the Director-General should have revoked her decision of 2 November 2012 to maintain the rating of “Does not meet expectations” and to not renew the complainant’s appointment beyond its expiry.

5. In fact, the Director-General took her decision solely on the basis of the recommendations made by the Appeals Board in the opinion of 7 October 2015 (CAP 403). However, as discussed below, in view of the serious defects that the Appeals Board identified, it should have drawn a different conclusion and recommended to the Director-General that she reconsider her decision of 2 November 2012. The alleged unlawfulness of the impugned decision therefore stems from the Appeals Board opinion.

In CAP 403, the Appeals Board identified three flaws, the first concerning the opinion delivered by the Reports Board, the second concerning the performance improvement plans drawn up for the complainant and the third concerning the failure to give serious consideration to transferring her to another service.

In respect of the first flaw, the Appeals Board recalled that the Reports Board had not reached a consensus on the complainant’s performance rating: two members had supported the Review Panel’s rating of “Does not meet expectations” and recommended terminating the complainant’s contract or redeploying her outside the IOC, with the

Chairperson concurring with them, while the two other Panel members had considered that the performance rating given to the complainant by the Review Panel for 2010-2011 should be replaced by “Partially meets expectations” and that the complainant should be placed at the disposal of the Bureau of Human Resources Management in view of a transfer outside the IOC. Given that Staff Rule 104.11(b) does not give the Panel Chairperson a vote, the Appeals Board found that the Chairperson should not have expressed his opinion in the recommendation to the Director-General, which may have influenced her unduly.

In respect of the performance improvement plans, the Appeals Board noted that these had not been implemented in an efficient and proper manner.

Lastly, in respect of the complainant’s transfer to another service, the Appeals Board recalled that the Reports Board had recommended that measure in 2010 [*recte* 2011] and that, in a decision of 25 January 2011, the Director-General had agreed to “explore” that possibility. However, it found that “this decision was not fully exploited or implemented. It is true that the [complainant] was placed under other supervisors, seven in all, but the change in supervisors could not suffice in the already hostile work climate of the [IOC]. What was actually needed, as recommended by the Reports Board, was to do everything possible, ‘to arrange Ms F.’s redeployment outside the IOC [...]’ in a completely new working environment.”

Having noted these flaws, the Appeals Board could not, without contradicting itself, reach the conclusion that it was appropriate to pay the complainant: (i) a sum equivalent to one month’s salary in addition to the two months’ notice already granted; and (ii) 50 per cent of the termination indemnity which the Director-General could award when an appointment was terminated for unsatisfactory service. Since the Board recognised that the Director-General’s decision of 2 November 2012 to maintain the rating “Does not meet expectations” and to not renew the complainant’s appointment was unlawful, it should have recommended that she reconsider that decision and not that she grant the indemnities provided for in cases of termination of appointment.

6. The complainant raises a further plea in respect of the opinion delivered by the Appeals Board. She alleges that it did not examine her criticisms of her direct supervisor, Mr T.A., although paragraph 5(b) of the Statutes of the Appeals Board 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 addition, she highlights the contrast between CAP 403 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.

It is true that the allegations which the complainant made against her supervisor, Mr T.A., were summarised in CAP 403 in the presentation of the parties’ arguments, and the Appeals Board noted that the complainant “makes reference to a number of incidents surrounding the drawing up of the impugned [performance] report”. However, the Appeals Board failed to respond to these allegations, perhaps considering the flaws that it had identified sufficient to substantiate its recommendations. The Appeals Board did not therefore ascertain whether the complainant’s unfavourable performance rating and the non-renewal of her appointment 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.

7. The impugned decision of 27 November 2015 rests solely on the opinion delivered by the Appeals Board. It is, consequently, tainted by the same flaws and must be set aside (see, for similar cases, Judgments 2742, consideration 40, 2892, consideration 14, 3490, consideration 18, and 3934, consideration 5).

8. 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 2 November 2012, confirmed on 9 January 2013.

9. The Tribunal has consistently held that international organisations have wide discretion in taking decisions concerning staff performance appraisal and whether to renew a fixed-term appointment. 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, 4010, consideration 5, and 4062, consideration 6, and the case law cited therein).

10. One of the complainant's many pleas directed against the Director-General's decision of 2 November 2012, confirmed on 9 January 2013, 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 opinion CAP 403 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 Human Resources 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."

11. In CAP 403, the Appeals Board does not express a view on the complainant's numerous allegations against her supervisor, Mr T.A. By contrast, the opinions of 9 and 12 October 2015 (CAP 399 referred to above and CAP 400) concerning her complaints of moral harassment against two of her supervisors, Mr T.A. and Mr J.A., reveal a mutual lack of respect that had led to tensions and a hostile environment attributable to both the complainant and her supervisors, where the former felt isolated, ill-treated and not duly recognised while the latter considered that they were not duly respected by their subordinate, whose behaviour had become inappropriate. In those opinions, the Appeals Board emphasises that a positive and harmonious working environment, free of intimidation, hostility or offence, was not ensured. It further considers that the complainant was excluded from certain professional activities, probably due to attitudes and tensions between her and her supervisors. Lastly, in its conclusions, the Board invites the Director-General to note that there is evidence "to show there was a dysfunction".

12. 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 and CAP 400 quoted above, the behaviour of the complainant's two supervisors, Mr T.A. and Mr J.A., contributed to creating a tense, hostile working environment.

By failing to take account of this factor when she decided to maintain the rating of "Does not meet expectations" and consequently not to renew the complainant's appointment, the Director-General overlooked essential facts within the meaning of the case law quoted

above in consideration 9 (see, in this respect, Judgment 4062, considerations 11 to 13).

The plea is hence well-founded.

13. It follows from the foregoing that the decisions of the Director-General of 2 November 2012 and 9 January 2013, and the complainant's performance reports for the 2010-2011 biennium, are unlawful and must be set aside, without there being any need to examine the complainant's other pleas.

14. The complainant asks to be reinstated at UNESCO. However, it should be noted that the complainant was not dismissed. The complainant's appointment was not terminated; it was not renewed on its expiry. The Tribunal considers that in the present case, it is not appropriate to order the complainant's reinstatement, in view of the time that has passed, the particular circumstances of the case, and the fact that, as has just been stated, the complainant did not hold an indeterminate appointment (see, for example, Judgments 2763, consideration 27, 3299, consideration 28, and 4009, consideration 16).

15. As an alternative to reinstatement, the complainant requests "an adjust[ment] of the compensation claim by paying salaries and allowances due as from 3 January 2013, including contributions to the [UNJSPF], with interest at the legal rate".

In this regard, the complainant has no grounds for claiming the payment of all the emoluments which she would have received until she reached retirement age, as the renewal of her fixed-term appointment would by no means have guaranteed that the Organization would have continued to employ her until the end of her career.

However, in this case, the Tribunal finds that the material injury suffered by the complainant shall be fairly redressed by ordering UNESCO to pay her the equivalent of the salary and allowances of all kinds which she would have received had her contract been renewed for a period of two years starting from 3 January 2013, under the same conditions as previously applied, net of the amount she received in lieu

of notice and of any occupational earnings she may have received during that period. The Organization shall also pay her the equivalent of the pension contributions that it would have had to pay during the same period. All these amounts 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.

16. The complainant requests the “restoration of the two increments due [respectively] on 1 February 2011 and [on 1 February] 2012”. UNESCO submits that this claim is irreceivable because the “refusals” to award the complainant within-grade increments were separate administrative decisions from the decision concerning her performance rating and the non-renewal of her appointment. According to the Organization, the complainant did not file a protest against these decisions 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. In her observations on her performance reports before the Review Panel and the Reports Board, her protest of 21 November 2012 and her detailed appeal before the Appeals Board in respect of the Director-General’s decision of 2 November 2012, confirmed on 9 January 2013, the complainant requested the “restoration” of the increments due on 1 February 2011 and 1 February 2012 which, in her view, she had been unlawfully “refused”.

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 unfavourable performance rating was indeed the reason for her within-grade increments being deferred and withheld. Given that these salary increases are automatic, the complainant would ordinarily have been entitled to them 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 two annual salary increases corresponding to the two increments – one unduly deferred and the other unduly withheld –

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.

17. In addition, the unlawful nature of the decisions concerning the complainant's unfavourable performance rating and the non-renewal of her appointment caused her substantial moral injury.

Given, in particular, the damage to the complainant's professional reputation caused by the grounds on which her employment with the Organization was terminated, and the lack of care with which, according to the evidence, the Organization at times treated her in this matter, the Tribunal considers it appropriate to award her 10,000 euros in compensation under this head.

18. Lastly, the complainant claims compensation 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 26 December 2012, she did not file her detailed appeal with the Appeals Board until 27 November 2014, having obtained seven 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.

19. 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 2 November 2012 and 9 January 2013, and the complainant's performance reports for the 2010-2011 biennium are set aside.

2. UNESCO shall pay the complainant material damages and interest thereon, calculated as indicated in considerations 15 and 16, above.
3. The Organization shall pay the complainant 10,000 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