

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Z.

v.

ILO

129th Session

Judgment No. 4253

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. Z. against the International Labour Organization (ILO) on 18 June 2016 and corrected on 26 October, the ILO's reply of 8 December 2016, the complainant's rejoinder of 20 January 2017 and the ILO's surrejoinder of 2 March 2017;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant, who states that he was the victim of moral harassment, claims redress for the injury he considers he has suffered.

The complainant joined the International Labour Standards Department (NORMES) of the International Labour Office (hereinafter "the Office"), the ILO's secretariat, on 1 July 1996 at grade P-3, under an initial short-term contract. On 1 April 1998 he was granted a fixed-term contract at the Regional Office for the Arab States in Beirut under which he received a special post allowance at the P-4 level. In 2002 the complainant was promoted to grade P-5, with retroactive effect from 1 April 2000, following a post reclassification exercise. On 1 January 2003 his contract was converted into an appointment without limit of time.

On 1 May 2004 the complainant was transferred to Geneva. According to a minute of 4 May 2004, the Director of NORMES specified that, following this transfer, the complainant would “perform [...] coordination duties”. On 1 October 2004 Ms D.-H. was appointed Director of NORMES.

From 1 April 2007 the complainant was reassigned to Beirut for a period of three years, though the effective date of his transfer was set at 1 July 2007. In a minute of 12 July 2010 the complainant asked the Office to “honour its commitment” by transferring him to NORMES in Geneva with immediate effect. He also complained that the disclosure of some emails of which he was the author had made his task difficult, as it had led to reprisals against him. On 1 December 2010 the complainant was transferred back to Geneva, where he was again assigned to NORMES. He was then placed under the supervision of a team coordinator who held a grade lower than his. In January 2012, following a restructuring exercise, he was placed under the supervision of a coordinator whose grade was the same as his.

On 10 July 2012 the complainant submitted a grievance to the Human Resources Development Department (HRD). Complaining about working conditions which, in his view, undermined his dignity, he sought a review of the “decision to restructure” NORMES and asked to be assigned to a post commensurate with his P-5 grade. Referring to the disclosure by the Beirut Office of some of his emails, the complainant also asked that measures be taken to remedy the “adverse impact” of that disclosure on his career. On 11 October 2012 the Acting Head of HRD dismissed the complainant’s grievance on the grounds that the post that he occupied, which had been assigned to him taking into account operational requirements and budgetary constraints, corresponded to the level of responsibility of his grade, even if it entailed no team coordination responsibilities. He recognised that the fact that the complainant had been placed under the supervision of a colleague whose grade was the same as his was unsatisfactory, but pointed out that that situation was due to the exceptional circumstances in which his transfer to Geneva had taken place – balancing his personal interests and aspirations with the requirements of the service – and that HRD

would continue to explore other solutions. He added that when the complainant had raised the matter of the disclosure of emails in July 2010, he had been told that there was no need to pursue this matter given that serious efforts had been made to reassign him to headquarters and, consequently, the matter was closed.

In October 2013 another restructuring exercise took place in NORMES at the end of which the complainant remained in the same post under the supervision of the same person, but the latter now had the title of Head of Unit.

On 14 February 2014 the complainant submitted a new grievance to HRD, in which he alleged that the conduct of the Office over almost 10 years – particularly the fact that no Coordinator post had been offered to him and the delay of several months in his reassignment to Geneva in 2010 – constituted “blatant moral harassment”. He asked to be assigned to a post commensurate with his P-5 grade and claimed compensation for the injury suffered. Having received no reply, the complainant referred the matter to the Joint Advisory Appeals Board (JAAB) on 13 August 2014. He retired on 31 January 2016.

In its report of 22 January 2016, although it considered that some of the complainant’s claims related to facts which could no longer be challenged, the JAAB decided to consider the incidents in question inasmuch as they might have constituted part of the harassment of which the complainant considered himself to be a victim. On the merits, it concluded that the complainant’s request to be granted a post commensurate with his grade and his allegations of harassment were unfounded.

By a letter of 4 March 2016 the complainant was informed that the Director-General had accepted the conclusions and recommendations of the JAAB and dismissed his grievance as unfounded. That is the impugned decision.

The complainant asks the Tribunal to find that he was the victim of “blatant moral harassment” and that he suffered discriminatory and humiliating treatment in that his assignment to his post was in violation of the Staff Regulations. He seeks compensation equivalent to eight months’ salary for the fact that the ILO, by delaying his transfer to

Geneva by eight months, did not abide by the terms of his transfer to Beirut established in 2007, as well as the equivalent of nine months' salary for the impact of the Office's actions on his and his daughter's health. He claims compensation for moral and material injury resulting from the disclosure of some of his emails, as well as damages for the defamation with reference to the comments of Ms D.-H. which were annexed to the ILO's reply before the JAAB. The complainant also claims costs.

The ILO asks the Tribunal to dismiss the complaint as irreceivable and, in any event, as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 4 March 2016 whereby the Director-General accepted the conclusions of the JAAB and confirmed the dismissal of the grievance which the complainant had submitted on 14 February 2014 alleging "blatant moral harassment".

2. The complainant seeks oral proceedings and the hearing of numerous witnesses, as well as the disclosure of certain documents. However, the Tribunal considers itself to be sufficiently well informed on the case by the written submissions and thus does not deem it necessary to grant these requests.

3. The complainant takes the Organization to task for not having opened an investigation into his allegations of harassment.

According to the provisions in force at the ILO at the time of the complainant's grievance, all disputes, with the exception of those relating to sexual harassment, were to follow a procedure comprising the following steps:

- review by HRD;
- review by the JAAB.

(Article 3 of the Collective Agreement on Conflict Prevention and Resolution of February 2004 concluded between the International Labour Office and the Staff Union of the International Labour Office, and Articles 13.2, paragraph 1, and 13.3, paragraph 2, of the Staff Regulations.)

Every international organisation is bound by a duty of care to treat its staff members with dignity and avoid causing them undue and unnecessary injury (see Judgment 2067, consideration 17). It is well established that an international organisation has a duty to its staff members to investigate claims of harassment (see Judgments 3071, consideration 36, and 3337, consideration 11). Having noted that no investigation had been conducted by HRD, the JAAB itself undertook a detailed examination of the allegations. Such an approach is acceptable if the examination satisfies the requirements of the Tribunal's case law with regard to investigations into harassment allegations: such investigations must be prompt and thorough, the facts must be established objectively and in their overall context, the law must be applied correctly and due process must be observed (see Judgments 2642, consideration 8, and 3692, consideration 18).

4. The complainant considers that some of these requirements were not fulfilled.

With regard to the lawfulness of the procedure, he takes the JAAB to task for not holding oral proceedings, which would have allowed him to respond to the replies, which he considers inadequate, of HRD to the questions raised by the JAAB. However, the JAAB's report indicates that these replies were provided to the complainant, and that he in fact responded to them. He was thus able to explain why, in his view, HRD had replied incorrectly or not at all to the questions asked. The JAAB could therefore legitimately consider that it was not necessary to order a hearing. In these circumstances, the complainant's objection cannot be upheld.

With regard to the objective establishment of the facts in their context, the complainant mainly contends that the JAAB erred in dismissing the allegations which, in his opinion, establish the harassment

of which he complains. In essence, the following four elements are involved: he alleges, firstly, that he was prevented throughout his career from performing coordination duties; secondly, that from 2007 to 2010 he was unlawfully assigned to Beirut and was intentionally kept there beyond the duration of his assignment; thirdly, that in 2009 confidential emails of which he was the author were disclosed; and fourthly, that he did not receive performance appraisals.

5. The ILO submits that three of these pleas are irreceivable. It argues that the plea relating to the coordination duties that the complainant wished to perform is barred by *res judicata* as he had already raised this matter in his grievance of 10 July 2012, which was dismissed on 11 October 2012. Moreover, it considers that the pleas relating to the complainant's assignment to Beirut (2007-2010) and the disclosure in 2009 of certain confidential emails are time-barred, as no grievance concerning these matters was lodged with the JAAB within the prescribed time limit.

It is true that the acts to which these three pleas relate can no longer, as such, be challenged before the Tribunal. However, inasmuch as the complainant maintains that they contributed to the harassment of which he considers himself to be the victim, the Tribunal must consider them. Indeed, harassment may involve a series of acts over time (see Judgments 2067, consideration 16, and 4034, consideration 16) and can be the result of the cumulative effect of several manifestations of conduct which, taken in isolation, might not be viewed as harassment (see, for example, Judgments 3485, consideration 6, and 3599, consideration 4), even if they were not challenged at the time when they occurred (see, for example, Judgment 3841, consideration 6).

6. In his first plea, the complainant mainly takes the Organization to task for not having assigned him any coordination duties when NORMES was restructured on three successive occasions.

Before the first restructuring exercise, the Director of NORMES had signed a minute dated 4 May 2004 stating that the complainant would "perform [...] coordination duties". This minute was not implemented.

The Tribunal has consistently held that the principle of good faith implies that a promise must be fulfilled, subject to the condition that the promise should “be substantive, i.e. to act, or not to act, or to allow, that it should come from someone who is competent or deemed competent to make it; that breach should cause injury to him or her who relies on it; and that the position in law should not have altered between the date of the promise and the date on which fulfilment is due” (see, for example, Judgments 782, consideration 1, 3005, consideration 12, 3115, consideration 5, 3148, consideration 7, and 3619, considerations 14 and 15). The ILO submits that the complainant does not “appear” to have suffered any real injury, since he waited for almost ten years to raise the issue. This objection cannot be upheld, as the existence of injury does not depend upon the time at which it is alleged. The promise to assign the complainant coordination duties satisfies the criteria established by the case law and should therefore have been fulfilled. The complainant rightly considers that the Organization violated the principle of good faith.

The complainant also takes issue with the fact that, during the two other restructuring exercises, he was not assigned to any Coordinator post, and he makes a series of criticisms against the Organization, and in particular the Director of NORMES, which are, however, not substantiated or not sufficiently substantiated. These criticisms cannot be accepted. It is firmly established in the case law that the person alleging harassment bears the burden of proving the allegation (see Judgments 2745, consideration 20, 3347, consideration 8, 3692, consideration 18, 3871, consideration 12, and 4171, consideration 7). The Tribunal also notes that the complainant turned down a Coordinator post offered to him in May 2014, preferring to retain a post of Special Adviser which he himself describes as “NORMES Coordinator on Technical Cooperation and Training”.

Lastly, the complainant states that he was placed under the supervision of an official whose grade was lower than his and, subsequently, one whose grade was the same as his, which he alleges constitutes an affront to his dignity and to the principle of equal treatment. The JAAB noted that if the complainant was placed under

the supervision of an official who held a lower grade for a time, this was because of the need to return him as soon as possible to headquarters in Geneva. Subsequently, the complainant was under the supervision of an official who was at his grade level. The JAAB recognised that this situation was not ideal but considered that it was the result of the operational requirements of the Office at that time. An international organisation has wide discretion with regard to the organisation of its services and the complainant has failed to establish that the supervision arrangement was not justified by the interests and capacities of the service. The Tribunal finds nothing irregular in a staff member reporting to another who holds the same grade (see Judgment 4084, consideration 11).

7. In his second plea, the complainant contends that his transfer to Beirut from 2007 to 2010 was a ruse on the part of the Director to remove him from headquarters. However, the complainant has failed to substantiate this assertion with sufficiently strong evidence.

The complainant then submits that his assignment to Beirut exceeded the agreed term of three years. He contends that his return to headquarters was delayed and was solely due to the fact that the countries of the region called for him to be returned following the disclosure of some of his confidential emails. The Organization replies that the period of three years was mentioned only as an indication, as is customary for this type of transfer. Before the JAAB, it also claimed that it was not able to return the complainant to headquarters in Geneva before 1 December 2010 because the restructuring of NORMES was “being developed”. In any event, the complainant was returned only a few months after the expiry date of the three-year period envisaged. From this point of view, the Organization cannot be faulted for any irregularity.

8. In his third plea, the complainant takes issue with the Organization for having disclosed to certain representatives of Persian Gulf countries confidential emails that he had sent in 2009 to his superiors condemning current practices in those countries, which, he alleges, made him lose all credibility in the region and had adverse

consequences for his reputation and professional opportunities after his retirement. The JAAB agreed that “such disclosure is neither appropriate nor acceptable, as it was probably detrimental to the dignity and the reputation of the complainant”, but it considered that the complainant was barred from presenting this argument in his harassment grievance.

The disclosure of these confidential emails, which is not disputed by the Organization, constitutes a serious violation of the obligation of good faith and the duty of care. This plea is well founded.

9. In his fourth plea, the complainant asserts that for more than ten years he occupied his post without a job description and without receiving a performance appraisal report.

In its report, the JAAB indicated that it had obtained job descriptions for the posts occupied by the complainant. However, it confirmed that no appraisals had been finalised since October 1999, which is also not disputed by the ILO.

Such a failure clearly constitutes a serious violation of Article 6.7 of the Staff Regulations, which requires staff members to undergo performance appraisals, in principle every two years. This plea is well founded.

10. In conclusion, the Tribunal finds that three irregularities alleged by the complainant are established, namely, the failure to implement the minute of 4 May 2004 assigning him coordination duties, the disclosure in 2009 of certain confidential emails and the absence of performance appraisals since 1999.

11. As explained above in consideration 5, it is necessary to consider whether, taken as a whole, these irregularities are indicative of conduct that could be described as harassment.

In order to determine whether harassment is established, the Tribunal will refer to the Organization’s definition of harassment (see Judgments 2594, consideration 18, 4038, consideration 18, and 4039, consideration 16).

At the material time, the Staff Regulations of the Office contained no definition of harassment other than sexual harassment. However, Article 2.9 of the Collective Agreement on the Prevention and Resolution of Harassment-related Grievances concluded between the International Labour Office and the Staff Union, which used to apply, and Article 13.4 of the current Staff Regulations provide sufficient insight into what the Organization regards as harassment (see Judgment 3071, consideration 43).

The three irregularities noted by the Tribunal, the first of which preceded the harassment claim by ten years and the second by five years, are unrelated and were committed by different persons. It cannot reasonably be concluded that, cumulatively, they are indicative of “harassing behaviour of a discriminatory, offensive, humiliating, intimidating or violent nature or an intrusion of privacy” (Article 2.9, cited above) nor that they are consistent with the creation of an “intimidating, hostile or abusive working environment or [...] used as the basis for a decision which affects [the complainant’s] employment or professional situation” (Article 13.4 of the current Staff Regulations). In the instant case, harassment is not established.

12. Nonetheless, the Organization committed a serious irregularity by failing to conduct an appraisal of the complainant’s performance for more than ten years. It has not been possible to establish the reason for this failure, but the complainant’s criticisms with regard to job descriptions and the absence of a supervisor of a higher grade than his own are without doubt not unrelated.

The ILO recognises its error but states that, on the one hand, it was only in 2014 that the complainant complained about it and, on the other hand, the absence of a performance appraisal report did not have a negative impact on the advancement of his career. It points out that the complainant progressed rapidly to grade P-5, and that nothing indicated that he would have applied for a D-1 post.

A staff member is entitled to have a regular appraisal. In the present case, this right, enshrined in Article 6.7 of the Staff Regulations, has been seriously violated for many years. The fact that the complainant

did not complain about it before 2014 is not relevant, since he was not time-barred from challenging that irregularity when he filed his grievance. Similarly, the Tribunal will not take into account the fact that the absence of appraisals may not have had any impact on his career. Appraisals are not only intended to allow for promotion. They play an important role throughout a staff member's career, including by allowing staff members to know how their superiors evaluate their work and to challenge that evaluation or improve their performance.

In view of the fact that this irregularity contributed to preventing the complainant from progressing in his work and the lack of care with which, according to the evidence, the Organization at times treated him in this matter, the Tribunal considers it appropriate to award him 10,000 Swiss francs in compensation for this moral injury.

13. The complainant also claims damages for failure to respect the terms of his appointment in Beirut, including the duration thereof, for the improper disclosure of some of his confidential emails, and for nine months of sickness and the repercussions of the Office's actions on his health and that of his daughter.

Even if they are based in part on irregularities that the Tribunal recognises as being established, these claims were not raised in an internal appeal within the prescribed time limits and are therefore irreceivable.

14. Lastly, the complainant seeks damages for defamation based on the comments submitted by Ms D.-H. during the proceedings before the JAAB. The Tribunal considers, however, in view of the evidence, that the defamatory character of the comments concerned is not established. This claim for damages must therefore be dismissed.

15. As the complainant succeeds in part, he is entitled to an award of costs, which the Tribunal sets at 750 Swiss francs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant 10,000 Swiss francs in moral damages.
2. It shall also pay him 750 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2019, Mr Patrick Frydman, 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 10 February 2020.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ