

## NINETY-SIXTH SESSION

### Judgment No. 2318

The Administrative Tribunal,

Considering the complaint filed by Ms C. P. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 21 November 2002 and corrected on 19 March 2003, the Organization's reply of 19 June, the complainant's rejoinder of 23 July, UNESCO's surrejoinder of 22 September, the complainant's further submissions of 14 October and the Organization's observations thereon of 23 October 2003;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Dutch national born in 1951, joined the Organization on 1 January 1992 as a part-time secretary (GS-4) in the UNESCO Staff Association, now the Staff Union. She is employed under a fixed-term contract, which has been extended several times.

The performance report containing the complainant's performance ratings for the period from 1 August 1997 to 31 July 1999 was drawn up on 30 November 1999 and signed by Ms R. - President of the Staff Union and the complainant's immediate supervisor - and by the Secretary-Assistant of the Staff Union. The complainant obtained a global rating D, which, according to the rating scale, denotes a "quality and quantity of work slightly below the level required for the performance of some assigned tasks". She signed the report but added by hand: "Reserving all my rights". On that same day, 30 November 1999, Ms R. recommended withholding the within-grade increment to which the complainant might have been entitled on 1 January 2000, on the grounds that her services had not been satisfactory.

On 6 December 1999 the complainant contested the performance report, particularly on the grounds that the two presidents of the Staff Union preceding Ms R. during the period of evaluation had not given their assessment. The two former presidents were asked to give "additional comments" for the period during which each held the office of President of the Staff Union. On 10 December 1999 they each gave the complainant a global rating C. On that same day the complainant signed both performance reports, which together covered the period from 1 August 1997 to 15 February 1999, once again reserving her rights. On 29 December 1999 her contract was extended for six months. With the introduction of the new seven-level salary scale on 1 January 2000, she was given a new grade - G-5, step 4 - but no increase in pay.

On 11 February, also "to preserve her rights", the complainant submitted two protests to the Director-General, one against the withholding of the within-grade increment, the other against the decision to limit her contract extension to six months "instead of the usual two years". On 28 March and 4 April 2000 the complainant contested her performance ratings of 30 November and 10 December 1999 respectively. The matter was referred to the Reports Board.

On 7 April 2000 the complainant filed appeals with the Appeals Board on the grounds that she had received no reply to her protests of 11 February within the prescribed time limit. On 10 April she received a memorandum dated 5 April in which the acting Director of the Bureau of Personnel informed her that her two protests were premature.

On 29 June 2000 the Secretary of the Reports Board wrote to the complainant that, in the light of the Board's recommendation, the acting Director of what had become the Office of Human Resources Management had decided to maintain the disputed performance ratings - namely the C rating for the period from 1 August 1997 to 15 February 1999 and the D rating for the period from 1 March to 31 July 1999 - as well as the withholding of the within-grade increment. Unwilling to accept that decision, the complainant submitted a protest to the Director-General on 27 July 2000. On 25 September, on the assumption that her protest had been implicitly rejected, she filed an appeal with the Appeals Board. When her protest was rejected by memorandum dated 29 September, the complainant challenged that rejection by filing a further appeal with the Appeals Board on 18 October 2000.

In its report of 5 July 2002, the Appeals Board found no reason to interfere with the C rating the complainant had been given in her first two appraisal reports. On the other hand, it was of the opinion that the third report was tainted with bias and that it was "unjust, unreasonable and arbitrary" to withhold an increment on the basis of a rating covering a period of only five months. The Appeals Board accordingly recommended that the Director-General should dismiss the appeal against the first two performance reports, remove the third report from the complainant's personal file, maintain her performance rating at C for the entire period from 1 August 1997 to 31 July 1999 and cancel the withholding of the within-grade increment due on 1 January 2000. By letter of 29 August 2002, which constitutes the impugned decision, the Director-General informed the complainant that he rejected those recommendations. He considered that it was not for the Appeals Board to review performance ratings attributed by the Administration or to give an opinion as to whether a within-grade increment should be granted or not.

B. The complainant contends that UNESCO drew clearly mistaken conclusions from the facts and refers to the Appeals Board's report to support her argument. She maintains that her performance report of 30 November 1999 is flawed by errors of fact and by Ms R.'s bias against her, which according to her was due to her election to the Executive Committee of the Staff Union in March 1997. She also draws attention to several procedural flaws and to a number of important omissions. She adds that a negative evaluation based on a period of only five months should not adversely affect a staff member's career and salary, and complains that she never received the Reports Board's recommendation.

Referring to Judgment 2067, the complainant also maintains that the Organization has failed in its duty to respect the dignity of staff members and avoid causing them undue and unnecessary injury. She considers that UNESCO deliberately tolerated an "unhealthy working environment". That, she submits, was reflected in the fact that her transfer requests had never been granted and that the Organization had rejected all her applications for other posts.

She asks the Tribunal to set aside the decision of 29 August 2002 and grant her all consequent redress, that is: to order the setting aside of both the decision maintaining the "impugned rating" and the refusal to grant her a within-grade increment; to order that this increment be granted, that her career be restored, and that the "impugned performance ratings be correctly reassessed"; and to award her compensation for moral injury. She also claims costs.

C. In its reply UNESCO endeavours to demonstrate that the Appeals Board made several errors in its assessment of the case. It denies having drawn any clearly mistaken conclusions from the facts. In its view the proper procedure was followed and the complainant has not proved that the disputed rating was maintained as a result of an error of fact. It also denies that Ms R. showed bias against her. The Reports Board gave its opinion on all aspects of the complainant's work and verified that the rating was appropriate. The evaluation of the complainant's performance was correct in view of the discrepancy between the standard expected of her and the results she produced. All three performance reports show that the quality of her work was declining and that she was displaying a "growing spirit of individualism" in the secretariat of the Staff Union. Her conduct was likewise found to be unsatisfactory during the period considered, as demonstrated by certain incidents involving her immediate supervisor.

Citing the Tribunal's case law, UNESCO recalls that the decision to withhold the complainant's within-grade increment lay within the discretion of the Director-General. His decision is a "logical outcome" of the shortcomings observed in the complainant's work and complies with the terms of Staff Rule 103.4(b). The Director-General, who acted in the interests of the Organization, preferred that solution to simply not renewing her contract.

Lastly, UNESCO submits that the complainant's allegations regarding the rejection of her requests for transfer are

not directly related to the disputed issue. The complainant suffered no unnecessary injury since the decision to withhold her within-grade increment is justified in law and in fact. Similarly, since the disputed rating is not flawed, there can be no resulting moral injury.

D. In her rejoinder the complainant contends that both Ms R. and the Secretary-Assistant definitely intended to cause her harm. All the performance reports, both preceding and following the impugned report, show that generally speaking all the appraisers were satisfied with her work. She consequently considers that the central issues are the legality of the report covering the period from 1 March to 31 July 1999 and the related decision not to grant her the within-grade increment.

Moreover, none of her former supervisors ever criticised her conduct. Referring to Judgment 247, in which the Tribunal had considered that the executive head of the defendant organisation had been wrong to treat a disciplinary matter "as a matter of unsatisfactory service", she contends that the Director-General committed an error of law in her case.

She draws attention to the "exorbitant" discretionary power attributed to the Director-General by the Organization in its submissions. In her view, the Director-General cannot withhold a within-grade increment on the grounds of her conduct: such a refusal constitutes a disciplinary measure covered by Rule 110.1, yet he did not initiate any disciplinary proceedings.

E. In its surrejoinder the Organization points out that the Reports Board recognised the legality of both the global rating D attributed to the complainant as well as the withholding of the within-grade increment. It explains that, while it does not normally publish the Board's opinion, in the light of Judgment 2229 that policy needs to be abandoned where publication is in the legitimate interests of the parties, in order to shed light either on the reasons for a disputed administrative decision or on the facts. It therefore produces the opinion issued by the Reports Board, which, it submits, reached completely opposite conclusions to those of the Appeals Board.

According to UNESCO, it is unfair to accuse the complainant's supervisors of bias, since the latter were merely performing their duties in a normal manner. In this connection, it produces a note by Ms R., in which the latter states that she was not driven by any hostility towards the complainant. The Organization also seeks to show that the allegation that those supervisors tolerated an unhealthy working environment is false.

Lastly, UNESCO denies that there was any error of law, since there was no need to resort to disciplinary proceedings in this case.

F. In her further submissions, the complainant submits that the Organization misused the opinion of the Reports Board and puts forward several comments on that opinion. She states that she never experienced any particular difficulty working in a team, except with the Secretary-Assistant of the Staff Union. She contests the Board's finding that she made no effort to improve the situation. In fact, every effort she made was lost on account of the Secretary-Assistant's and Ms R.'s "determination to punish her". According to the complainant, the latter acted out of "political hostility" under the guise of technical remarks.

G. In further observations, UNESCO maintains that the complainant made no effort whatever to improve her technical performance both during and after the period considered. The complainant cannot legitimately challenge the validity of the Reports Board's opinion since it is "based on written and oral exchanges" between the parties to the dispute.

## CONSIDERATIONS

1. (a) The complainant works as a secretary in the Staff Union of UNESCO, at the head of which a president is appointed each year.

For two years, from March 1997 to March 1999, she was also a member of the Executive Committee of the Staff Union.

(b) The performance of UNESCO's staff members is subject to regular appraisals which result in a global rating on a scale of A to E.

The complainant was given a global rating B for the periods from January to September 1992 and from 1 October 1992 to 31 December 1994, and a global rating C for the period 1 January 1995 to 31 July 1997. These ratings were not contested.

Such was not the case for the period from 1 August 1997 to 31 July 1999. The performance report covering that period, in which the complainant received a global rating D, was signed by the President of the Staff Union, Ms R., who had held that office since 1 March 1999, and countersigned by the Secretary-Assistant of the Staff Union, who was the complainant's immediate supervisor. When the two former presidents were asked for additional comments, each handed in a report attributing a global rating C to the complainant for the periods from 1 August 1997 to 28 February 1998 and from 15 February 1998 to 15 February 1999.

The two Staff Union presidents who succeeded Ms R. in that role both gave the complainant a global rating B.

(c) In the light of the appraisal for the period 1 March to 31 July 1999, the Organization, on a recommendation by Ms R., withheld the complainant's within-grade increment and extended her fixed-term contract for a short period. In a protest addressed to the Director-General, the complainant contested the fact that she had been given a six-month contract "instead of the normal two years". As she has since been given another two-year contract, her objections in that respect have become groundless.

The complainant appealed unsuccessfully against the ratings entered on her performance report for the period 1 August 1997 to 31 July 1999 and against the fact that her within-grade increment had been withheld. On 29 August 2002, the Director-General rejected the recommendation of the Appeals Board, which was favourable to the complainant. That is the impugned decision.

2. She asks the Tribunal to set aside that decision and grant her all consequent redress. She wants it set aside insofar as it upholds the "disputed rating", that is, the one relating to the period from 1 March to 31 July 1999 (since as pointed out in her rejoinder she considers that the dispute focuses on the report covering that period); she also asks for it to be set aside insofar as it upholds the refusal to grant her the within-grade increment. She seeks the salary increment in question, with all due consequences; a correct reassessment of her performance ratings, compensation for moral injury, and costs.

She objects to the "exorbitant" discretionary powers attributed to the Director-General and contends that by tolerating an unhealthy working environment UNESCO failed in its duty to respect her dignity and to avoid causing her undue and unnecessary injury.

The Organization submits that the complaint should be dismissed. In its view, the disputed rating is not open to criticism and the impugned decision was taken by the Director-General in the exercise of his discretion.

3. Like any decision lying within the discretion of the appointing authority, decisions concerning the appraisal of a staff member's services by means of ratings, and likewise those concerning the granting of a promotion or an incremental step within the grade, are subject to only limited review by the Tribunal.

4. (a) Decisions concerning performance appraisal may be set aside only on limited grounds such as a mistake of fact or of law or failure to take account of some material fact (see Judgments 724; 806; 1144; 1463, under 14; 2040, under 5; and 2264, under 7). This applies especially where the Organization makes provision for a conciliation procedure in matters of appraisal and where, as in the case of UNESCO, staff members are entitled to appeal to a Reports Board which is closely familiar with the workings of the Organization (see Judgment 1144). Furthermore, performance reports serve no purpose unless the supervisor has full freedom in commenting on the performance of the staff members under their authority. The Tribunal will exercise its power of review only where there has been blatant abuse of authority or breach of a formal or procedural rule (see Judgment 880). Generally speaking, it will be right not to approve a report only if the reporting officer made an obvious mistake over some important point, if he or she neglected some essential fact, was grossly inconsistent or can be shown to have been prejudiced. And the appraiser need not be deemed prejudiced just because the assessment given for one period is not the same as another reporting officer's opinion for an earlier or later period (see Judgment 724).

(b) In the case in hand, the Tribunal must give a ruling on a decision confirming the disputed rating. It must therefore establish whether that decision is tainted by any of the above-mentioned flaws.

The report of the Appeals Board on which the complainant bases her case appears unconvincing for the following reasons:

- (1) Although the Appeals Board does not advocate invalidating the performance report for the period 1 March to 31 July 1999, it proposes withdrawing it from the complainant's personal file, which is practically equivalent.
- (2) The matter of the rating disputed by the complainant was referred to the Reports Board, which recommended that the rating be upheld.

The challenged decision confirming the disputed performance rating and the withholding of the complainant's within-grade increment was notified to her on 29 June 2000, after the Director-General had considered the opinion of the Reports Board. That opinion was therefore a key element of the case. Consequently, the parties - especially the complainant - and the Tribunal should be allowed access to it (see Judgment 2229). The opinion in question has been produced as an annex to the surrejoinder, and the parties were able to comment on it in the course of a third exchange of submissions. It emerges from the opinion that the parties were given the opportunity to express their views before the Board, which then recommended maintaining the disputed rating as well as the withholding of the complainant's within-grade increment. The Board had noted that the complainant did not seem to have made any effort to improve the situation.

The Reports Board's opinion, which was not submitted to the Appeals Board, does not reflect any particular prejudice on the former Board's part.

- (3) The Appeals Board emphasised that the D rating related to a short period of only five months, whereas the previous and subsequent performance reports were not unfavourable. But this in itself does not constitute proof of bias. It is quite natural for the quality of a person's services to vary over time. This is all the more plausible in this case for the fact that the two previous performance reports had already mentioned some shortcomings in the complainant's work, who received a global rating C, and that the change of appraiser may also lead to certain discrepancies in the appraisals, which would not in themselves suffice to invalidate the disputed rating. Furthermore, the fact that the complainant served at the same time as Secretary for the Staff Union and member of its Executive Committee appears to have caused some of the difficulties. Bearing in mind that the complainant left the Executive Committee during the disputed period from March to July 1999, the possibility that the effects of this former overlap in her duties may still have been felt for some time afterwards cannot be excluded.

In addition, while the brevity of the period covered by the disputed rating is a further factor which might be taken into consideration when determining the consequences of the unfavourable appraisal, it is not in itself sufficient to invalidate the appraisal.

- (4) The Appeals Board suspects that there may have been bias, particularly because the disputed performance report was countersigned by the Secretary-Assistant of the Staff Union, with whom the complainant was not on good terms. That still does not invalidate the appraisal in any way. Although the Secretary-Assistant had not signed the other performance reports, the fact that she did so on that occasion was not unusual, considering that she was the complainant's immediate supervisor and it is also understandable that the President of the Staff Union, whose appraisal of the complainant was unfavourable, wished to show that her opinion was shared by another person. Lastly, what the complainant refers to as a poor relationship with the Secretary-Assistant really centres round a totally untoward message she had sent the latter. The complainant can hardly use this argument as grounds for objecting to the disputed appraisal.

The parties' comments in the third exchange of submissions are not such as to affect the impressions that emerge from the remainder of the evidence.

As the Tribunal has emphasised on several occasions, allegations of bias are very difficult to prove and the judge should be careful not to infer bias or bad faith simply because a staff member and his supervisor do not enjoy good professional relations (see Judgments 1732, and 2259, under 13).

The complainant is also wrong to maintain that, in order to assess a staff member's performance, an organisation may not base its judgment on aspects of the person's behaviour (or "conduct"), which might have justified a disciplinary sanction. What is not admissible is that such a sanction, which is subject to specific rules of procedure, should be applied indirectly. The fact that the Organization considered that there was no need to initiate disciplinary

proceedings did not mean that, for the purpose of determining the rating, it could not take account of the complainant's behaviour during the period covered by the appraisal (see Judgment 1546).

It may be concluded from the above that there were no serious grounds for invalidating the rating of the complainant's performance for the period from March to July 1999.

The Director-General's decision is therefore not open to criticism.

5. As noted under 3 above, the award of an extra step lies within the discretion of the appointing authority.

The complainant contends that she was entitled to a within-grade increment, though without offering proof of such entitlement. The Organization, for its part, quotes from Staff Rule 103.4(b), according to which an increment "may be deferred within an increment period, or withheld, if service is not satisfactory", as well as from Administrative Circular No. 1936, which states that "[s]taff members rated D will be considered for training and redeployment; however, their within-grade increment could be deferred or withheld".

The complainant also contends that the withholding of a within-grade increment on the grounds of a staff member's "conduct" is a disciplinary measure. If her conduct was really unsatisfactory, she argues that such a sanction could not have been applied without observing the relevant procedures. That may be so where the staff member's conduct is the only or the chief reason for withholding a within-grade increment, but the circumstances here are different, in that the main reason for withholding the increment was unsatisfactory performance.

In the event, the Director-General based his decision on the recommendation of the complainant's supervisors to withhold the within-grade increment. He could, of course, have agreed to grant the increment all the same, in view of the brevity of the period covered by the rating and the somewhat more favourable ratings for earlier periods. In no way, however, did he exceed his discretionary authority by following the recommendation of the complainant's supervisors, whose assessment of her services was unfavourable.

The complaint is therefore devoid of merit in that respect too.

6. (a) Insofar as the claim for compensation is based on the rejection of the rating and the withholding of the complainant's within-grade increment, it cannot succeed if the complaint fails.

(b) Insofar as it is based on delays in internal procedures, the claim for compensation appears equally unjustified.

The length of the procedure was due, at least in part, to the Organization's appeals system. Moreover, careful examination of the case was bound to take a little time. If in the course of the internal procedure the complainant had felt that it was taking too long, she had the possibility of raising that issue immediately.

(c) The complainant considers that the Organization was wrong in refusing to transfer her, and that UNESCO therefore owes her compensation. She also points out that she has applied unsuccessfully for many other posts at UNESCO.

In its surrejoinder the Organization explains that the Director-General did not consider that a transfer was necessary, since it was legitimate to expect some improvement in the complainant's performance.

Whatever the case, the Tribunal considers that the fact that the complainant was not transferred does not justify an award of compensation, for the following reasons.

Firstly, the reported difficulties are mainly due to the fact that, in addition to her secretarial duties with the Staff Union, the complainant agreed to become a member of the Union's Executive Committee. That, however, was entirely her own choice, and she therefore cannot rely on it in claiming compensation from the Organization. It should also be recognised that the difficulties were further aggravated by shortcomings in the complainant's performance. According to the principle *nemo auditur suam propriam turpitudinem allegans*, she cannot lay the blame on UNESCO.

It should also be noted that, while the complainant did apply unsuccessfully for other posts, she has not contended that she took the initiative of asking to be transferred (except recently, on 16 April 2003, according to UNESCO).

Lastly, it does not appear to have been impossible to pursue working relations in the Staff Union secretariat, since the complainant herself argues that her rating improved after the report relating to the period from March to July 1999, and therefore implicitly that her supervisors were satisfied with her performance.

It cannot be said that the Director-General abused his discretionary authority by not transferring the complainant on his own initiative.

The claim for compensation must therefore be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

*(Signed)*

James K. Hugessen

Jean-François Egli

Seydou Ba

Catherine Comtet