

The Administrative Tribunal,

Considering the fourth complaint filed by Ms M. D. against the World Tourism Organization (UNWTO) on 3 May 2006 and corrected on 16 August, the Organization's reply sent on 28 November 2006, the complainant's rejoinder of 6 April 2007 and UNWTO's surrejoinder of 15 July 2007;

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. Rule 15(2) of the Staff Rules of the Organization, entitled "Locally recruited officials", is worded as follows:

"An official shall be classified as locally recruited if, at the time of appointment, he fulfils any of the following conditions:

- (i) he is a Spanish national, or
- (ii) irrespective of his nationality, he is a permanent resident in Spain, or
- (iii) at the time of appointment he accepts an offer of local recruitment."

Information regarding the career of the complainant – who is Italian – is given under A in Judgments 1272 and 1407 concerning her first and third complaints respectively. When the complainant was appointed to a post at the Organization's Headquarters in Madrid in 1984, she was given locally-recruited status. After performing duties at grade G.3 then G.5, in 1997 she was appointed assistant to the Deputy Secretary-General at grade G.6. In April 2000 she was promoted to grade P.2 as an Officer in the Quality of Tourism Development Section; her letter of appointment stated that the other conditions of her original contract remained unchanged. On 1 November 2003 she was transferred to the Sustainable Development of Tourism Department; it was stipulated that this transfer did not imply any change in her grade or status.

The World Tourism Organization became a specialised agency of the United Nations (UN) in December 2003. By a letter of 13 December 2004 addressed to the Secretary-General, the complainant and three of her colleagues asked to be granted international status as from 1 January 2005, the date on which the revised Staff Rules would enter into force as a result of the Organization's change in status; they referred to the "practice" of granting international status to General Service staff members of such agencies on promotion to the Professional category, provided they are not nationals of the duty station – in this case Spain. They sent reminders on 21 January, 18 February and 10 August. On 1 September the Secretary-General notified them that legal consultations had been initiated on the issue and that he would reply to their request on receipt of the requested information. By a memorandum of 11 October he informed them that the Organization's Legal Adviser was of the opinion that the above-mentioned practice was not systematically applied and that specific situations were therefore to be taken into consideration.

In the meantime, on 29 September, the complainant and her three colleagues had lodged an appeal with the Joint Appeals Committee. In its report of 14 December 2005, the Committee recommended the rejection of the appeal. By a memorandum of 3 February 2006, which constitutes the impugned decision, the Secretary-General informed the complainant and her colleagues that he had decided to reject the appeal "at this time". In his opinion, the granting of international status to General Service staff reclassified in the Professional category was not mandatory under the Organization's Staff Regulations and Rules; he drew attention to the fact that UNWTO's practice in this area differed from that of the United Nations. Moreover, the Secretary-General was concerned that to grant international status following such reclassifications would result in *de facto* discrimination against Spanish

officials. However, he considered that the question merited further study and he therefore proposed to consult the Staff Association as well as the Appointments and Promotions Board.

B. The complainant alleges the existence of a procedural defect relating to the impartiality of the Joint Appeals Committee, especially that of the member appointed by the Secretary-General and the member elected by the staff. She points out that in December 2005 she had challenged the composition of the Committee, but that her objections were not accepted.

On the merits the complainant contends that the Secretary-General's description of the United Nations system in his memorandum of 3 February 2006 is tainted with an error of fact. She submits that on becoming a specialised agency of the United Nations, UNWTO ought to have taken the necessary steps to bring its Staff Regulations and Rules into line with those of the United Nations, in particular with the provisions of Appendix B to the UN Staff Rules, which lays down that any person who is regarded as having been locally recruited shall cease to be so regarded from the date on which he or she is reclassified to the Professional category. The Staff Rules of the World Tourism Organization do not, however, contain a similar provision and that is why her request was turned down.

The complainant also denounces two errors of law. First, she affirms and endeavours to prove that she does not meet the condition stipulated in Rule 15(2)(ii) of the Staff Rules, since she has never been permanently resident in Spain. Secondly, relying on the Tribunal's case law, she accuses the Administration of having failed in its duty to inform staff. In her opinion, an organisation infringes the principle of legitimate expectations if it does not inform a staff member that a decision might injure him or her. In her case, when she was recruited she was not informed that there were two kinds of status – local and international – or of the legal consequences attaching thereto.

Moreover, the complainant contends that some essential facts have been overlooked. In her opinion, the argument that it is impossible to change an official's place of residence was not a valid reason for refusing to grant her international status, because the Secretary-General could permit a derogation from that precept under Staff Rule 14(6)(b). He did not, however, contemplate that solution even though there was a precedent for doing so; in this connection she refers to Judgment 1006. In addition, the complainant alleges unequal treatment insofar as another colleague – an external collaborator – was awarded international status on moving to the Professional category.

Lastly, she contends that the Administration drew clearly mistaken conclusions from the evidence. She holds that it cannot reasonably be alleged that Spanish officials are in the same position in fact and in law as other staff members holding a post in the Professional category. She emphasises that international status was created to “compensate for the expatriation of international civil servants”.

The complainant asks the Tribunal to quash the impugned decision and to draw all legal consequences from such quashing, particularly by awarding her international status as from 1 January 2005, with Italy being recognised as her home. She also claims costs.

C. In its reply the Organization rejects the complainant's allegation of a procedural defect in the internal appeal. It asserts that the Chairman of the Joint Appeals Committee, who was best placed to assess his two colleagues' suitability to sit on the Committee, held that there were no grounds for challenging them.

On the merits the Organization affirms that, although it has become a specialised agency of the United Nations, it was not obliged to align its Staff Regulations and Rules with those of the UN in order to permit the granting of international status to General Service staff members who are promoted to the Professional category. The reason why it has chosen not to is that such alignment would prevent, or at least make less frequent, this type of promotion, which is a particularly useful means of ensuring flexible career management in a very small organisation such as UNWTO.

The Organization asserts that at the time of her appointment the complainant was permanently resident in Spain – the only official address she had supplied was in Madrid – and that she also accepted the offer of local recruitment. Consequently, in accordance with Staff Rule 15(2)(ii) or (iii), she had to be given local status and the question of a change in her status does not arise in law. UNWTO draws the Tribunal's attention to the fact that the complainant did not challenge the status she had been given when she signed her initial contract or indeed when that contract was renewed and that according to Judgment 1666 a staff member “must object to the terms before he signs” his contract. Furthermore, at the time of her appointment the complainant had been clearly informed that she was being recruited locally. In this connection, the Organization explains that, according to the case law, it has a duty to

inform a staff member only if a decision is likely to affect that person's legitimate rights or interests. In the instant case the complainant cannot assert any right other than those which have actually been granted to her.

UNWTO submits that Rule 14(6)(b), to which the complainant refers, concerns the determination of the home of an official who has international status on recruitment and that, in her case, it is paragraph (c) of the Rule that applies. That paragraph makes it clear that, without exception, "[t]he home of an official of the General Service category who has been locally recruited shall be deemed to be at the duty station". In the case of the external collaborator, since he was not promoted from the General Service to the Professional category, his situation was not identical to or comparable with that of the complainant.

Lastly, the Organization maintains that acceding to the complainant's request would constitute a breach of the principle of equal treatment vis-à-vis Spanish staff members.

D. In her rejoinder the complainant enlarges upon her pleas. She explains that prior to 2003 it would have been pointless to challenge the status she had been given, and she appends to her submissions several documents to support the contention that she has never been resident in Spain. She endeavours to show that the above-mentioned external collaborator did belong to the General Service category before being appointed to a Professional category post and receiving international status.

E. UNWTO reiterates its position in its surrejoinder.

CONSIDERATIONS

1. The complainant, an Italian national born in 1958, was recruited by the World Tourism Organization in 1984. After holding several General Service posts, in April 2000 she was promoted to a grade P.2 post in the Quality of Tourism Development Section.

2. In 1984 the complainant had been recruited locally within the meaning of Staff Rule 15(2), which is reproduced under A above.

Locally-recruited officials are not entitled to the same benefits as officials with international status, such as the education grant and home leave awarded pursuant to Staff Rules 13(6) and 18(1) respectively. Indeed, these provisions indicate that the benefits in question are due only to officials who have not been recruited locally and whose duty station is not situated in their home country.

3. On 13 December 2004 the complainant asked the Secretary-General to grant her international status, which, in her opinion, she should have been awarded on entering the Professional category, in keeping with a well-established practice within the specialised agencies of the United Nations. On 11 October 2005 the Secretary-General, referring to the opinion he had received from the Organization's Legal Adviser, replied that the practice on which she relied in support of her request was not systematically applied and that specific situations should therefore be taken into consideration.

The Joint Appeals Committee, to which the matter was referred, issued its report on 14 December 2005. On 3 February 2006 the Secretary-General rejected the appeal "at this time" on the basis of that report. That is the decision challenged before the Tribunal.

4. The complainant objects to the composition of the Joint Appeals Committee, which is governed by Staff Rule 31(2).

5. Every official has the right to due process before the authority responsible for taking a decision concerning him or her. This right presupposes, on the one hand, that the said authority is properly constituted, that is to say that its members have been appointed in accordance with the rules governing its composition and, on the other hand, that those members are impartial. The purpose of the second requirement is to ensure that administrative bodies dealing with disputes give fair treatment to the officials who turn to them, in other words that they display no bias, that they act in good faith throughout the proceedings and that they uphold the rights of the defence, especially the right to equal treatment and the right to a hearing in all its aspects, so as not to give any official cause to believe that his or her case has been prejudged.

The duty to act independently and impartially is incumbent not only on the authority competent for issuing the final formal decision in proceedings, but also on bodies responsible for giving an advisory opinion or for making a recommendation to this authority, *a fortiori* where the recommendation is a formal part of the decision-making process (see Judgment 2315, under 27).

The above requirements apply to any joint appeals committee set up within an organisation, even if its opinions are not binding on the executive head of the organisation in question.

6. The complainant submits that two members of the Joint Appeals Committee, one appointed by the Secretary-General and the other elected by the staff, did not offer the requisite guarantees of impartiality in her case. In this respect she denounces the relationship of dependency between these two members, since one was the supervisor of the other.

The Committee dismissed this objection on the grounds that its members had been legitimately elected. This reply is unsatisfactory if it implies that the independence of an advisory or decision-making body is guaranteed by the fact that its members have been properly appointed or elected: the lawfulness of the appointment or election of the members of an administrative body dealing with disputes does not in itself guarantee the independence and impartiality of these members with respect to each specific case submitted for their consideration.

The complainant does not, however, provide any evidence that either of the two persons concerned was biased against her. Neither the fact that they both worked in the same department and that one was the subordinate of the other, nor their respective career aspirations as described in the submissions to the Tribunal, nor the fact that the member elected by the staff was also a member of the Appointment and Promotion Board, were likely *per se* to prevent them from being completely impartial when expressing an opinion on an issue of the kind raised by the complainant.

The fact that the Secretary-General's nominee was appointed after the member elected by the staff cannot be regarded as a sign of bias against the complainant. The Organization states that this is standard procedure justified by the wish to give the staff the greatest possible freedom of choice in view of the small number of its officials and hence of persons available to sit on the Joint Appeals Committee. This explanation is convincing.

In the light of the foregoing, the pleas raised by the complainant concerning the lawfulness of the internal appeal proceedings prove to be unfounded.

7. It has been established that at the time of her appointment the complainant was recruited locally within the meaning of Staff Rule 15(2). Locally-recruited officials of the Organization retain local status throughout their period of service. Rule 14(6) explains this as follows in paragraphs (b) and (c):

“Nationality, recognized home

(b) [...] An official's home shall remain unchanged for the duration of his service unless the Secretary-General decides that there are compelling reasons for permitting a change.

(c) The home of an official of the General Service category who has been locally recruited shall be deemed to be at the duty station.”

The Tribunal considers that these texts are clear and leave no room for interpretation insofar as they establish the principle that, when an official is taken on with local status, that status is permanent.

8. (a) The complainant's request that her promotion from the General Service to the Professional category be accompanied by the granting of international status is essentially premised on the fact that the Organization, on becoming a specialised agency of the United Nations on 23 December 2003, accepted the Statute of the International Civil Service Commission (ICSC) and should therefore immediately adapt its rules to those of the UN, which stipulate that international status is to be granted to locally-recruited staff members when they are reclassified to the Professional category.

(b) In rejecting this request, the Secretary-General observed that the practice on which the complainant relied is not yet universally applied amongst organisations of the United Nations system and that it is certainly not mandatory for UNWTO, which has not yet included it in its Staff Regulations and Rules.

He added that at UNWTO promotion from the General Service to the Professional category was often granted to reward merit, whereas in other organisations within the United Nations system the Professional and General Service categories were clearly separated on the basis of the different qualifications required of staff in the two categories. A change in the system in force at UNWTO might therefore demoralise staff, because meritorious staff in the General Service category would stand less chance of moving to the Professional category owing to the higher costs entailed by the obligation to grant international status automatically to such staff members provided that they are not Spanish. The change in question might also prompt a feeling of being discriminated against among Spanish staff members, who make up about half of the personnel because – on account of their nationality – they could never be given international status, even upon being promoted to the Professional category.

9. The complainant holds that this reasoning is tainted with an error of fact, because the Secretary-General's comparison of the promotion rules at the UN and those at UNWTO does not reflect reality. Moreover, she submits that the financial consequences to which he refers are inconsistent with the fact that promotion to the Professional category is an exceptional measure.

This plea is irrelevant. The complainant bases her argument on a resolution of the General Assembly of the United Nations, but the passage to which she refers tends to bear out the Secretary-General's reading of the disparity in the promotion rules under comparison. The complainant likewise fails to disprove the Secretary-General's statement to the effect that the practice on which she relies is applied differently in the various organisations within the United Nations system. Furthermore, her submissions do not lead the Tribunal to conclude that the Organization's acceptance of the Statute of the ICSC obliges it immediately to adapt its rules on the granting of international status without conducting a prior in-depth analysis of the strains this would place on it, in view of the fact that it is a small international organisation and that half of its staff members have the nationality of the country in which it has its Headquarters. Lastly, it must be emphasised that the Secretary-General has not ruled out the possibility of a future amendment of the Organization's Staff Rules, in the terms requested by the complainant, if that is feasible.

In these circumstances, the Tribunal has no reason to order the Organization to adopt a solution which has not been shown by the complainant to be mandatory under any general standard or principle of international civil service law which takes precedence over the Organization's internal rules.

10. The complainant incidentally takes the Secretary-General to task on a more specific matter, namely his reference to potential discrimination against Spanish staff members. His words must, however, be interpreted to mean simply that Spanish staff members could legitimately consider that some staff members who, like them, had been recruited locally and assigned to posts at the Organization's Headquarters – as is the case of the complainant – were receiving preferential treatment if, on being promoted to the Professional category, they were to receive the material benefits associated with the granting of international status. Understood thus, this additional argument underpinning his decision cannot be criticised in any way.

11. The complainant further alleges that she ought not to have been given local status because at the time of her appointment she was not permanently resident in Spain within the meaning of Staff Rule 15(2)(ii). In support of this statement, she produces a number of documents which, she says, prove that at the material times her permanent residence was always either in Belgium or in Italy.

The complainant does not dispute the fact that when she was appointed, and when her appointment was subsequently renewed, she accepted the offer of local recruitment, a possibility for which provision is made in Staff Rule 15(2)(iii). As indicated under 7 above, a person who is recruited locally retains that status throughout his or her period of service. This rule does not draw any distinction according to which of the three conditions set out in Rule 15(2) provided the basis for awarding local status.

The complainant now claims that when she signed her initial contract the Organization did not inform her of the consequences of her declaration or, in particular, of the differences between local and international status. But this assertion cannot be accepted. It was up to the complainant to ask the Organization about the implications of the main clauses of the offer she was invited to accept and about the consequences of her replies on points which were decisive for her future career and salary. Rapid perusal of the Staff Regulations and Rules would have revealed the implications of accepting the offer of local recruitment. Her contention that the Organization has, to her detriment, breached its duty to inform staff is therefore unjustified.

12. Lastly, the complainant takes the Secretary-General to task for not availing himself of the possibility he is

given by Staff Rule 14(6)(b) to derogate for compelling reasons from the rule that an official's home remains unchanged for the duration of his or her service.

The issue of whether locally-recruited General Service officials may benefit from such a derogation, which the Organization disputes on the basis of Rule 14(6)(c), is moot. Indeed, such a derogation is in any case granted at the discretion of the Secretary-General, and nothing in the complainant's submissions gives grounds for the Tribunal to censure misuse or abuse of this discretion.

In support of her argument, the complainant relies on Judgment 1006. In the case leading to that judgment, a former Secretary-General of UNWTO had deemed a staff member's divorce to be a compelling reason to change her status because it had resulted in her home being transferred from Spain to Peru. Some years later, however, the new Secretary-General had reversed his predecessor's decision with immediate effect because he considered that it had been wrong. In the above-mentioned judgment, reviewing the decision of the new Secretary-General, the Tribunal confined itself to finding that, even if there had been misinterpretation of a Staff Regulation, it was too late to reverse a decision by which the Organization had abided for almost nine years. Clearly the complainant cannot therefore infer from that judgment that a favourable decision should be taken on the request she has formulated in this case.

The complainant also relies on the right to equal treatment and refers to a situation which she considers to be similar to her own. The Tribunal has no reason not to accept the detailed explanations of the Organization, which states that the official in question – an external collaborator – was not promoted from the General Service to the Professional category. Hence his situation is in no way comparable with that of the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet