

**106th Session**

**Judgment No. 2808**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A.G. S. against the United Nations Industrial Development Organization (UNIDO) on 10 August 2007 and corrected on 12 September, the Organization's reply of 21 December 2007, the complainant's rejoinder of 25 January 2008 and UNIDO's surrejoinder of 8 May 2008;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are to be found in Judgments 2538 and 2662 on the complainant's first and second complaints, delivered on 12 July 2006 and on 11 July 2007 respectively. Suffice it to recall that the elections of November 2003, which culminated in the complainant's re-election as President of the Staff Council, were tainted with controversy due to the last-minute decision to disqualify one of the three candidates on the grounds that her candidacy was not supported by the requisite number of signatures, and also due to an earlier contentious referendum to amend the Statutes of the Staff

Union. In March 2004 the two unsuccessful candidates invited staff members to support a ballot to recall the complainant as President of the Staff Council. The requisite number of signatures was obtained and the ballot was held in June 2004. The result was favourable to the complainant, who thus remained in office.

Prior to that, in January 2004 the complainant had lodged an appeal against the Director-General's decisions of 5 June and 18 September 2003 respectively to reduce his release from duties and to ask him to resume his functions on a half-time basis as an Industrial Development Officer in the Small and Medium Enterprises Branch of the Programme Development and Technical Cooperation Division. In his appeal the complainant argued that these decisions constituted a form of intimidation and retaliation for his Staff Council activities. In its report of 18 January 2006 the Joint Appeals Board held that it was not competent to examine the appeal. It concluded that the issue of the President's release from duties should be dealt with through the means of redress provided for in Administrative Circular AC.80, and that appeals concerning allegations of intimidation, harassment and prejudice fell outside its jurisdiction. It recommended that the case be declared irreceivable and that the Director-General take urgent measures to establish a mechanism for dealing with such cases.

Considering that he was not in a position to take an informed final decision on the complainant's appeal, the Director-General proposed, in a memorandum dated 8 May 2006, to set up an ad hoc Panel to examine his allegations of intimidation, harassment and prejudice. The complainant did not receive that memorandum until 11 May, by which time he had filed his second complaint with the Tribunal, impugning the implied rejection of his appeal. Following an exchange of correspondence between the complainant and the Administration concerning the composition, mandate and rules of procedure of the proposed Panel, the complainant accepted the Director-General's proposal expressing at the same time his disagreement regarding the composition of the Panel. The complainant's second complaint led to Judgment 2662, in which the Tribunal set aside the implied rejection of his appeal and the Director-General's decision to assign him on

a half-time basis to his former duties. However, it dismissed as irreceivable his claims of intimidation, retaliation, harassment and prejudice, on the grounds that they were not the subject of a final decision following the agreement between the parties to refer them to an ad hoc Panel.

The ad hoc Panel was established in December 2006 with the mandate to examine whether the Director-General's decision of 5 June 2003 was taken in retaliation for activities pursued by the complainant in his capacity as President of the Staff Council or was otherwise tainted by intimidation, harassment and prejudice on the part of the Administration.

In its report of 16 April 2007 the Panel found that:

“some of the statements heard [...] would [...] seem to indicate that certain staff members in key positions were perceived to have taken sides. Before, during and after the electioneering, not only were several staff members approached, but opinions were also readily expressed. [...] this was ill-advised involvement in a very contentious issue.”

However, the Panel could not establish that “the persons providing advice had done so at the behest of the Director-General”. It concluded that it was unable to determine that deliberate harassment and intimidation or a network of intrigue had been the driving force behind the decision to curtail the release of the Staff Council President. Nor did it find evidence of overt mobbing. It nevertheless stated that by failing to address the issue through consultation, the Administration had to a certain measure been derelict in its duty of care. It recommended that the Joint Advisory Committee take up the issue of the Staff Council President's release from duties and endeavour to resolve it, while also considering a revision of Administrative Circular AC.80.

By a memorandum of 14 May 2007, which is the impugned decision, the Director-General informed the complainant that he had decided to dismiss his appeal concerning alleged harassment, intimidation, prejudice, retaliation and mobbing and that the issue of the level of release of the Staff Council President would be submitted to the agenda of the Joint Advisory Committee at the earliest opportunity.

B. The complainant contends that the Panel's recommendations are tainted with errors of fact and law and that the impugned decision, which is based on these recommendations, is vitiated by the same errors. He contends in particular that he was the victim of harassment and/or mobbing, which obviously created a stressful and debilitating working environment.

He submits that, notwithstanding the Panel's finding of "ill-advised involvement" of certain staff members in key positions in the 2003 Staff Council elections, the Panel mistakenly concluded that his allegations of harassment could not be proven in the absence of evidence showing that the Director-General gave advice or encouragement to those staff members, which is, in his opinion, irrelevant to the question of whether he was indeed the victim of harassment. Moreover, by noting that the contested acts were not "deliberate" or "overt", the Panel committed a fundamental error in that it considered that intent was required in order to establish harassment, which is contrary to the Tribunal's case law. In the complainant's opinion, the Panel's analysis is flawed, particularly because it disregarded the testimonies of witnesses who confirmed that they had indeed been encouraged by the Administration to run against the President or to exert a disruptive influence on Staff Council activities. It is also flawed insofar as it considered some acts of harassment to be harmless because they were carried out by individual staff members on their own initiative rather than with the encouragement of senior management. Furthermore, he contends that the Panel strayed from its mandate in examining his allegations of harassment and that it denigrated his integrity and character, thus demonstrating a lack of objectivity.

According to the complainant, the Administration's action in reducing his release from duties to 50 per cent was taken in retaliation for his having assisted two managing directors with their appeals, and was a most serious breach of his rights as an international civil servant and a gross abuse of authority. He considers the decision not to grant his request for deferral of his home leave as further evidence of harassment. He argues that the Organization breached his right to due

process by failing in its duty to investigate the allegations of harassment promptly and thoroughly and to protect him, and also by not inviting him to attend the hearing of witnesses, thereby denying him an opportunity to reply to personal attacks. He holds the Administration responsible for the six-month delay in constituting the Panel.

The complainant asks the Tribunal to set aside the impugned decision and to make a finding that he was the victim of harassment. On this account he claims 35,000 euros in moral damages and an equal amount in exemplary damages. He also claims costs.

C. In its reply UNIDO submits that the complaint is irreceivable to the extent that it concerns claims that lie outside the scope of the internal appeal. It points out that in his initial statement of appeal the complainant alleged acts of intimidation, coercion and retaliation on the part of two senior managers and that it was not until he submitted his supplemental statement to the Joint Appeals Board that he claimed mobbing or harassment on the part of the Administration. Accordingly, it considers that the scope of the complainant's internal appeal did not include a claim of harassment or mobbing and that, in line with the Tribunal's case law, the new claims for exemplary damages and damages on account of a stressful and debilitating working environment, should therefore be dismissed for want of finality and non-exhaustion of internal remedies.

It asserts that the complainant has failed to establish any error of fact or law. The Panel did not proceed on the assumption that harassment could not be proven unless there were instructions from the Director-General, but rather on the basis that harassment could not be proven unless it could be established that the acts of senior officials were motivated by reasons other than personal conviction. The Organization rejects as "misguided [and] unjustified" the complainant's allegation that the Panel reviewed issues which had not been submitted to it for examination, and denies that the latter strayed from its mandate, or that it denigrated the complainant's integrity and character, thereby showing a lack of objectivity. Furthermore, it argues that its decision not to grant the complainant's request for

deferral of his home leave was in accordance with the Organization's rules and that it did not constitute evidence of harassment. It also argues that the complainant's account of the information gathered from the interviews and of the Panel's assessment of the evidence is incorrect.

According to UNIDO, the complainant has not proven that he was the victim of retaliation, harassment or mobbing; he is therefore not entitled to moral or exemplary damages. With regard to the alleged delay and breach of the complainant's due process rights, the Organization asserts that these issues have already been raised and dealt with, at least in part, in the context of the complainant's second complaint and should therefore be rejected as *res judicata*. To the extent that they are not barred as *res judicata*, they should be rejected as irreceivable, "misdirected" and unsubstantiated.

D. In his rejoinder the complainant presses his pleas. He asserts that he did raise the issue of harassment in his internal appeal, as the Tribunal noted in Judgment 2662. Relying on the case law, he argues that the Tribunal has the authority to order the payment of exemplary damages even if such damages were not claimed in the internal appeal.

E. In its surrejoinder the Organization maintains its position in full.

## CONSIDERATIONS

1. In Judgment 2662 the Tribunal determined that the decision to reduce the complainant's release from duties from full-time to half-time was unlawful and awarded him moral damages. The complainant had raised allegations of intimidation, retaliation, harassment and prejudice before the Tribunal, but indicated in his rejoinder that he had accepted the Director-General's proposal that these allegations be referred to an ad hoc panel. Accordingly, the Tribunal decided that those claims were not receivable at that time.

2. The ad hoc Panel that had been set up to examine the complainant's allegations issued its report on 16 April 2007. By a

memorandum of 14 May 2007, which the complainant challenges before the Tribunal, the Director-General informed the complainant *inter alia* that, in accordance with the Panel's report, he had decided to dismiss his appeal concerning alleged harassment, intimidation, prejudice, retaliation and mobbing. He also informed him that the issue of the level of release of the Staff Council President would be submitted to the agenda of the Joint Advisory Committee at the earliest opportunity.

3. UNIDO objects to the receivability of the complainant's claims pertaining to an alleged stressful and debilitating working environment and to harassment and mobbing on the grounds that he has not properly raised these issues in his internal appeal and, therefore, has failed to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Statute of the Tribunal. The Organization relies on Judgment 2100, under 11, in which the Tribunal stated:

“In ruling on the second part of the complaint the Tribunal will consider, as the Centre requested, only the allegations made in the internal complaint of 12 October 2000. It will not entertain the others since they have not been addressed in an internal appeal as Article VII, paragraph 1, of the Tribunal's Statute requires.”

4. In support of its objection to receivability the defendant submits that the complainant did not at any time claim damages based on an “alleged stressful and debilitating working environment”. It also submits that the “scope of the [c]omplainant's internal appeal did not include a claim of harassment or mobbing”. It argues, in particular, that the complainant did not allege mobbing or harassment to which the Administration failed to respond or act upon or otherwise decided to reject. In support of this argument, UNIDO relies on Judgment 1149, under 4, where the Tribunal stated the following:

“[...] Whereas in his internal appeal the complainant sought three months' extension, in his complaint he is claiming six. According to the case law the scope of claims to the Tribunal may not go beyond that of the claims that formed part of the internal appeal, since any claim that goes further is barred under the rule in Article VII(1) of the Tribunal's Statute that the complainant must have exhausted the internal means of redress. The

complainant's claim is therefore receivable only insofar as he is asking for the three months' extension."

5. Consequently, it submits that the claims for moral and exemplary damages for harassment are "outside the proper scope of the internal appeal and should be rejected on this ground alone".

6. Moreover, UNIDO contends that the complainant's claims based on alleged delay and breach of due process in connection with the internal appeal are *res judicata* as they "have, at least in part, already been raised and dealt with in his second complaint".

7. Before turning to a consideration of the issues, it is convenient to review the context in which this fourth complaint arises. The dispute between the parties was prompted by the decision of 5 June 2003 to reduce the complainant's release time to perform his duties as President of the Staff Council. In his appeal against this decision the complainant contended that it was retaliatory in nature because of his Staff Council activities. He also contended that he had been the subject of intimidation and reprimand by the Director-General. The Joint Appeals Board held that it was not competent to examine the appeal. The Director-General asked the Board to reconsider the matter but the Board declined to do so. Subsequently, an ad hoc Panel was mandated to address the question whether the Director-General's decision of 5 June 2003 was taken in retaliation for activities pursued by the complainant in his capacity as President of the Staff Council and whether the complainant's allegations of intimidation, harassment and prejudice surrounding that disputed decision were established.

8. The record does not disclose any proceedings having been initiated by the complainant regarding broader allegations of intimidation or harassment by other members of the Administration at the time the Panel began its investigation. His claims throughout the proceedings focused on the decision to reduce the release time and the allegations of intimidation and retaliation in connection with that decision. Further, the mandate of the Panel was not directed

at a broader inquiry regarding staff members of the Organization generally. The Panel was constituted only to consider whether the disputed decision was a form of retaliation or intimidation.

9. Given that the internal means of redress in relation to the allegations of a stressful and debilitating working environment and to general allegations of harassment and mobbing have not been exhausted, these allegations are irreceivable.

10. The Tribunal rejects UNIDO's plea concerning the receivability of the claim for exemplary damages as it is based on a confusion between the claims for relief and the pleas advanced.

11. The Organization does not detail or substantiate its position on the question as to whether the complainant's pleas of alleged delay and breach of due process are *res judicata*. However, the Tribunal observes that in Judgment 2662, under 14, the issue of alleged delay was addressed. The Tribunal stated therein:

“The complainant also submits that the Joint Appeals Board wrongly considered that the Organization's statement in reply, submitted more than two months after he filed his notice of appeal, was receivable. The Board correctly ruled that that statement was receivable because it was filed within two months of the receipt by the Administration of the notice of appeal. However, the delay in transmitting the notice of appeal to the Administration is unexplained. The complainant's argument that he was deprived of a fair hearing because the Joint Appeals Board held that his appeal was not receivable must also be rejected. An internal body, such as the Joint Appeals Board, necessarily has power to determine whether an appeal is receivable. If it is wrong in its determination, the matter can be set right by this Tribunal. However, the fact that an internal appeal body might determine that issue erroneously highlights the need for international organisations to ensure that those bodies are properly resourced and that their proceedings are not beset by unreasonable delay. **By reason of the delay in the present case and the irregularity which interfered with the complainant's right to challenge the composition of the Joint Appeals Board, there will be an award of moral damages in the sum of 5,000 euros.**” (Emphasis added.)

12. As those aspects of delay relating to the internal appeal prior to the constitution of the ad hoc Panel have already been addressed by the Tribunal in Judgment 2662, they will not be considered. However, the plea of alleged delay is receivable insofar as it concerns the constitution of the ad hoc Panel. Although the discussion at this juncture centres on receivability, on the merits of this plea, the Tribunal finds that the delay was not inordinate and was, in part, attributable to the complainant's desire to modify the composition of the Panel. Accordingly, this plea fails.

13. The complainant submits that the ad hoc Panel erred by basing its findings on whether or not the Director-General was actively involved in the perpetration of misconduct by other staff members. First, as noted above, the issue before the Panel concerned the decision to reduce his release time and the question of whether it was retaliatory or intimidating, or tainted in some other manner. While the complainant is correct that general allegations of harassment and mobbing do not require a finding of direct involvement of the Director-General, the alleged misconduct of other officials was not at issue before the Panel. It is evident from a reading of its report, that the Panel fully appreciated the nature and scope of its mandate and properly limited the scope of its investigation to the disputed decision and the motivation for that decision.

14. The complainant also submits that the Panel erred in holding that to constitute harassment the acts in question must be deliberate or overt. He contends that a finding of intent is not a requirement of a finding of harassment. In the Tribunal's view, this assertion is based on a misinterpretation of the Panel's findings. In its report the Panel was explaining that the events and information considered did not collectively establish that the Director-General's decision was tainted by intimidation, harassment or prejudice.

15. Lastly, the complainant pleads breach of due process on two grounds. First, he contends that the Panel did not invite him to attend the hearing of witnesses and withheld from him information regarding

the nature or substance of criticisms made against him. However, he does not offer any evidence of any attempt on his part to participate in the hearing of witnesses, nor has he submitted any evidence that the Panel refused to allow him to participate. Consequently, his plea is rejected. Second, the complainant contends that the Panel made findings based on personal attacks against him to which he was not given an opportunity to reply. Whether or not the Panel had regard to information of that kind, it is clear that its findings on the matter it had to determine were not influenced by such information. Accordingly, this plea is also rejected.

16. The complainant having failed to demonstrate any error of fact or law or a breach of due process, the complaint must be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet