

116th Session

Judgment No. 3252

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Z. S. against the United Nations Industrial Development Organization (UNIDO) on 8 July 2011 and corrected on 16 August, UNIDO's reply of 25 November 2011, the complainant's rejoinder of 26 March 2012, corrected on 28 March, and UNIDO's surrejoinder of 9 July 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Austrian national born in 1960, joined UNIDO in July 2004 under a one-year fixed-term contract as a Project Assistant at grade G-4. On 15 July 2005 she was granted a three-year appointment and on 1 August 2006 she was promoted to grade G-5.

Following receipt of a performance appraisal report for the period from 1 January to 31 October 2007 in which she received negative comments from her two first reporting officers and her overall performance was rated as "needs improvement" by her second

reporting officer, the complainant's contract was extended for one year from 15 July 2008 to 14 July 2009, and her performance increment, which was due on 1 August 2008, was withheld. In July 2008 she submitted a rebuttal to the aforementioned report, and the following month she requested the Director-General to review the decision to extend her contract for only one year. In September she submitted another rebuttal in which she sought a review of the decision regarding her performance increment.

By a memorandum of 3 February 2009 from the Director of the Human Resource Management Branch (PSM/HRM), the complainant was notified that, after having reviewed the report of the rebuttal panel, the Director, who was acting in her capacity as reviewing officer, had decided to endorse the overall rating of "needs improvement". In July 2009 the complainant lodged an appeal against the Director's decision with the Joint Appeals Board (JAB), which subsequently dismissed it. She then challenged that decision in her second complaint before the Tribunal (see Judgment 3253, also delivered this day).

Meanwhile, by a memorandum of 5 June 2009 to the Director of PSM/HRM, the Managing Director of the complainant's Division recommended that the complainant's contract, which was due to expire the following month, be extended for one year with effect from 15 July. The Director-General approved that recommendation on 25 June and the complainant was subsequently offered a one-year fixed-term appointment, which she accepted on 3 July. Later that month, she requested the Director-General to review the decision to offer her an extension of her contract for a period of less than three years. On 25 September 2009 she was informed that that decision was being maintained as it was based on a recommendation from her Director which had been endorsed by the Director-General, and also because her appraisal for 2008 had revealed shortcomings in her performance.

On 24 November 2009 the complainant lodged an appeal with the Secretary of the JAB, challenging the decision to grant her an

appointment of less than three years. Having previously expressed her dissatisfaction with various written comments and the summary evaluation of “needs improvement” contained in her 2008 performance appraisal report, on 17 December 2009 she submitted a rebuttal to that report.

With effect from 15 July 2010 the complainant’s one-year appointment was extended for three years. By a memorandum of 27 September 2010 from the Officer in Charge of PSM/HRM she was informed that, having reviewed her performance appraisal for 2008, her rebuttal to that appraisal and the report of the rebuttal panel, he had decided to maintain the summary evaluation of “needs improvement”.

On 22 January 2011 the complainant filed an appeal with the JAB challenging the Director-General’s decision to maintain the overall rating “needs improvement” with respect to her performance appraisal for the period from 1 March to 31 December 2008. The JAB recommended rejecting her appeal in its report of 17 January 2012. In the meantime, in its report of 9 March 2011 the JAB recommended that the complainant’s appeal challenging the one-year extension of her appointment for the period from 15 July 2009 to 14 July 2010 be rejected. The JAB concluded, among other things, that the decision had been taken in accordance with Staff Rule 103.10(b), which provides that the extension of fixed-term appointments is subject to satisfactory performance. It pointed out that her performance appraisal reports for the periods from 1 January to 31 October 2007 and from 1 March to 31 December 2008 respectively had both contained summary evaluations of “needs improvement”. As her performance was not meeting the required standards, the Administration had been justified in granting her an extension of one year in order to provide her with the opportunity to improve.

By a memorandum of 31 March 2011, which is the impugned decision, the Director-General endorsed the recommendation of the JAB and dismissed the complainant’s appeal in its entirety. He

nevertheless awarded her 1,500 euros in damages for the delay in the internal appeal proceedings. She was so informed by a letter of 8 April 2011.

B. The complainant submits that UNIDO breached the provisions of Staff Rules 103.10(b) and 104.08(a). In particular, it failed to follow the correct procedures regarding her performance appraisal reports. She accuses the Administration of bad faith and asserts that it made no effort to finalise her 2008 performance appraisal prior to her disputed contract extension. Furthermore, during the material time she was not informed, either verbally or in writing, that there were concerns about her work and any feedback she did receive was positive. She asserts that she specifically requested feedback from her Director and first-level supervisor, but was informed that her first-level supervisor did not have time to discuss the matter and it was subsequently referred to her Director's office.

She contends that the Administration extended her contract for only one year on the basis of her performance appraisal report for 2007, without taking into account the fact that that appraisal was the subject of a pending internal appeal. It also failed to consider that she had been awarded a step increment in August 2009.

The complainant challenges the JAB's reliance on her disputed 2007 and 2008 performance appraisals. She submits that it did not conduct a proper investigation into her case in that it failed to consider relevant facts, referring instead to issues pertaining to two other internal appeals which she had lodged.

Lastly, the complainant asserts that she did not contribute to the delay in the internal appeal proceedings.

She asks the Tribunal to quash the impugned decision and the related recommendation by the JAB. She seeks moral damages in an amount equal to one year's salary, as well as 15,000 euros for the delay in the internal appeal proceedings and 4,000 euros in costs. She asks for an oral hearing.

C. In its reply UNIDO argues that the extension decision was a proper exercise of the Director-General's discretion and that, according to the Tribunal's case law, it is subject to only limited review.

The Organization asserts that the decision complied fully with Staff Rule 103.10(b), which provides that fixed-term appointments are normally extended for a period of three years, subject to satisfactory performance and budgetary coverage. It points out that the complainant's appraisal reports for 2007 and 2008 indicate that for the two years preceding the decision, she was not performing at an acceptable level, and she therefore had no right to, nor could she have had a reasonable expectation that she would receive, the normal three-year extension. In addition, it submits that it complied with Staff Rule 104.08(a) regarding service and conduct reports, as well as all the applicable performance appraisal procedures. It denies that it acted in bad faith by not finalising the complainant's appraisal report for 2008 prior to the date her contract was due to be extended.

UNIDO states that the complainant was informed on numerous occasions prior to the impugned decision about shortcomings in her performance. This issue was clearly communicated to her in her appraisals for 2007 and 2008. Moreover, the previous year-long extension of her contract, which she had received in 2008, was in itself a clear signal that improvement was required. It denies that her request for feedback was ignored and asserts that she cannot base such an allegation on one purported instance when it was not possible for her first-level supervisor to meet with her at the time she requested.

It asserts that the Administration was entitled to rely on her disputed performance appraisal report for 2007, despite the fact that it was the subject of an appeal before the JAB. Moreover, the JAB did not err in considering her 2007 and 2008 reports, nor did it overlook essential facts.

UNIDO argues that the time taken for the internal appeal proceedings was fair and reasonable in the circumstances and it contends that her claim for damages in this respect is excessive.

D. In her rejoinder the complainant develops her pleas, in particular with respect to the content of and the procedures followed for her 2007 and 2008 performance appraisals. She asserts that, as the Organization did not finalise her 2008 appraisal before she was required to accept her contract extension, in effect she was granted two successive extensions of only one year on the basis of her flawed 2007 appraisal, which, in her view, is a violation of Staff Rule 104.08. In addition, she asserts that she suffered psychological and financial injury, as well as damage to both her personal and professional reputations. She explains that the amount she claims in damages for delay in the internal appeal process is partially to reimburse medical expenses which she incurred during this period.

E. In its surrejoinder UNIDO maintains its position. It emphasises that the complainant has been treated fairly and that her performance was properly appraised pursuant to the relevant Staff Rules. It asserts that she has been adequately compensated for the delay in the internal appeal proceedings and that her claim for reimbursement of medical expenses is irreceivable for failure to exhaust the internal means of redress.

CONSIDERATIONS

1. The complainant commenced employment with UNIDO on 15 July 2004 at the G-4 level on a one-year fixed-term contract. On 15 July 2005 she was granted a three-year appointment. During that period she was promoted, on 1 August 2006, to the G-5 level. Subsequently her appointment was extended for only one year from 15 July 2008 to 14 July 2009 and again extended only for one year from 15 July 2009 to 14 July 2010. The complainant challenged the decision to place her on a one-year fixed-term contract commencing 15 July 2009 in an appeal to the JAB which she filed on 24 November 2009. The JAB issued a report on 9 March 2011 indicating that it had decided to reject the appeal. This decision was endorsed by the Director-General in a decision of 31 March 2011. The Director-General's

decision is the impugned decision. In addition to dismissing the appeal, the Director-General awarded the complainant 1,500 euros because of the delay between the time the appeal to the JAB was filed and the time it was determined.

2. The complainant has applied for an oral hearing. Considering that it is sufficiently informed by the parties' pleadings and their annexes, the Tribunal disallows the complainant's application for an oral hearing (see, for example, Judgment 3184, under 4).

3. The UNIDO Staff Rules governing the appointment of staff relevantly provide at Rule 103.10:

“(a) On recruitment, staff members shall be granted appointments for a fixed term. The fixed-term appointment, having an expiration date specified in the letter of appointment, shall normally be granted for a period of three years, with the first 12 months being a probationary period that can in exceptional circumstances be extended for an additional period up to one year.

(b) The fixed-term appointment does not carry any expectancy of renewal or conversion to another type of appointment. In the interest of the programme activities of the Organization and subject to satisfactory performance and budgetary coverage, fixed-term appointments shall normally be extended for a period of three years. [...]”

4. In the two-year period preceding the decision to place the complainant on a one-year extension from 15 July 2009 to 14 July 2010, two performance appraisal reports were prepared. One concerned the complainant's performance for the period from 1 January to 31 October 2007 (hereinafter “the 2007 Report”) and the other for the period from 1 March to 31 December 2008 (hereinafter “the 2008 Report”). The 2007 Report contained an overall rating of “needs improvement”. As provided in Appendix M to the Staff Rules (which generally deals with the staff performance appraisal system), the complainant sought a review of this report by submitting a rebuttal. This led to the consideration of the 2007 Report by a rebuttal panel that reported to the reviewing officer. The reviewing officer endorsed

the overall rating of “needs improvement”. An application to the Director-General to review the reviewing officer’s decision was not successful. An appeal against the Director-General’s decision to the JAB was unsuccessful. That matter is the subject of other proceedings before the Tribunal (see Judgment 3253, also delivered this day). As discussed later, the outcome of those proceedings has a material impact on the present case.

5. The 2008 Report, which was in two parts because the complainant’s supervisors changed (though there is an issue about what precisely happened), similarly rated the overall performance of the complainant as “needs improvement”. The second reporting officer for the performance period covered by the 2008 Report recommended the renewal of the complainant’s fixed-term appointment for a period of one year from 15 July 2009 to 14 July 2010. This recommendation ultimately led to the decision which culminated in the decision impugned in the present case.

6. It is necessary to make clear that the Tribunal’s role is not to adjudicate on the question of whether assessments made in appraisal reports are correct or whether discretionary decisions to employ a staff member on a fixed-term contract for one or three years are correct. Discretionary decisions of these types, involving assessment and evaluation, are entrusted to the responsible officers of the international organisations within the Tribunal’s jurisdiction. These types of decisions can only be set aside if they involve some breach of a formal or procedural rule, there is a mistake of fact or law or some material has been overlooked, or a plainly mistaken conclusion has been drawn from the facts, or if there is a misuse of authority (see, for example, Judgment 3006, consideration 7).

7. As with the 2007 Report, the complainant sought a review of the 2008 Report (by submitting a rebuttal) that ultimately resulted in a confirmation by the reviewing officer (on 27 September 2010) of the rating of the complainant’s performance as “needs improvement”. Again, the complainant unsuccessfully appealed to the JAB.

8. There is a general principle applied by this Tribunal that an organisation cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance (see Judgment 2414, consideration 24).

9. In the present case, the impugned decision of the Director-General of 31 March 2011 followed a consideration by the JAB of appeals filed against the 2007 and 2008 reports. Both reports had been the subject of mainly unsuccessful rebuttal proceedings and unsuccessful challenges in the JAB.

However, the challenge to the 2007 Report was unlawfully dismissed as irreceivable (see Judgment 3253, also delivered this day). As a result of orders made in Judgment 3253, the JAB will have to consider the complainant's appeal against the 2007 Report, unless the matter can be resolved by agreement.

The impugned decision in this matter was based, in part, on the JAB's consideration of the appeal in which the complainant contested her 2007 Report. The complainant's internal appeal to the 2007 Report has not been heard on its merits. Thus there is the possibility that that appeal will be successful. That result might well compromise the reasoning of the JAB in this matter which informed the impugned decision. Equally, the appeal may be unsuccessful and the reasoning of the JAB would endure. However, the ultimate outcome will be determined by the Director-General on the recommendation of the JAB.

10. In her pleas, the complainant (who is representing herself) made a number of subsidiary attacks on the assessment that had been made of her and advanced arguments about the construction of various documents. It is unnecessary to detail them and it is sufficient to say that they are untenable or irrelevant.

11. Insofar as the complainant seeks damages for the delay in hearing her appeal to the JAB filed on 24 November 2009, it has been

noted that UNIDO has already paid her 1,500 euros to compensate her for this delay. A delay of almost one and a half years is of a magnitude that would ordinarily warrant an order for damages by this Tribunal. However the amount she was given accords with the compensation the Tribunal would otherwise have been likely to order (see Judgment 2878, consideration 10). In these circumstances, no damages should be awarded.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet