

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**V.**  
**v.**  
**UNESCO**

**125th Session**

**Judgment No. 3942**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. V. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 8 October 2015 and corrected on 23 November, UNESCO's reply of 14 March 2016, the complainant's rejoinder of 23 April, corrected on 29 April, and UNESCO's surrejoinder of 8 August 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;  
Having examined the written submissions;

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

The complainant challenges the decision not to reinstate her in her former position.

The complainant worked in the UNESCO Institute for Statistics (UIS) under a series of Appointments of Limited Duration (ALD) commencing in 2010.

On 29 October 2012 the Director of UIS (Mr V.d.P.) informed her that, due to budgetary constraints, her contract would not be renewed upon its expiry on 31 December 2012. On 21 November 2012 she submitted a complaint to the Ethics Adviser, alleging that the decision not to renew her contract constituted retaliation for having filed a harassment complaint against her supervisor at UIS, Mr G., who was the Director's "protégé".

Upon the recommendation of the Ethics Advisor, the Director-General decided to refer the case to the Internal Oversight Services (IOS) for investigation, in accordance with the provisions of the UNESCO Whistleblower Protection Policy.

In an email of 25 July 2013 the complainant was informed by the Ethics Advisor that, having received the investigation report and the recommendations of the Ethics Office, the Director-General had found that the Director of UIS had engaged in retaliation by not renewing her contract and that she would be reinstated in her former position as Programme Specialist for the UIS with retroactive effect as if her contract had been renewed as from 1 January 2013, in accordance with paragraph 28 of the Whistleblower Protection Policy. The email stated that she would soon be contacted by the Administration to implement that decision.

Having enquired of the Administration on several occasions as to the implementation of that decision, the complainant was informed by the Director of Human Resource Management (HRM) on 7 October that the ALD had been abolished as from 1 January 2013 and that the Administration was reviewing the most appropriate way to implement the said decision.

By a letter of 6 November 2013 the Director of HRM explained to the complainant that, as ALD contracts were limited to a maximum period of four years and as she had started her employment in February 2010, her ALD contract could not have been extended beyond 31 January 2014. However, as ALD contracts had been abolished with effect from 1 January 2013, it was not possible to reinstate her under an ALD contract. Consequently, the Director-General had decided to pay the complainant an amount equal to the salary she would have received had her contract been renewed through 31 January 2014.

On 31 December 2013 the complainant submitted a protest against that decision. By a letter of 17 March 2014 she was informed that the Director-General had decided to confirm the decision notified to her on 6 November 2013.

The complainant appealed on 27 March 2014 before the UNESCO Appeals Board against the decisions of 6 November 2013 and 17 March 2014, asking for reinstatement and claiming damages and costs, as well as the production of a number of documents, including documents relating to the non-renewal in 2012/2013 of any staff member under an ALD contract.

In its opinion of 3 July 2015, the Appeals Board found that the decision of 6 November 2013 had been made in accordance with applicable rules. It recommended that the complainant be provided with the correspondence or documents that had not been communicated to her.

In a memorandum of 8 July 2015, the Secretary of the Appeals Board transmitted the Board's opinion and recommendation to the complainant. The complainant indicates in her complaint form that she impugns that "decision".

As preliminary matters, the complainant seeks the disclosure of various documents and requests oral proceedings. She asks the Tribunal to quash the decision of 6 November 2013 and to order her reinstatement in her former position, with retroactive effect from 1 January 2013. She claims material and moral damages in the amount of 540,000 United States dollars, as well as costs.

UNESCO submits that the complaint is devoid of merit.

### CONSIDERATIONS

1. The complainant commenced employment with UNESCO in 2010. Both initially and subsequently, she was employed under a succession of Appointments of Limited Duration (ALD), a form of short-term contract then used by UNESCO. It is unnecessary to detail all events leading to the filing of this complaint before the Tribunal on 8 October 2015. Suffice it to note that in October 2012 the complainant was informed her contract would not be renewed upon its expiry on 31 December 2012. The complainant viewed this decision as an act of retaliation and, accordingly, filed a complaint to UNESCO's Ethics Adviser. The complainant was successful in establishing retaliation and

she was informed in an email of 25 July 2013 that the Director-General had decided that she would be reinstated as from 1 January 2013. However this decision was never given effect to and ultimately the Director-General decided to pay the complainant an amount equal to the salary she would have received had her contract been renewed through to 31 January 2014. That date reflected the maximum period of four years the complainant could have been employed under an ALD having regard to the date of her initial engagement. It should be noted that, effective 1 January 2013, ALD contracts were replaced by a different method of contracting in broadly similar circumstances, namely Project Appointments (PA). The complainant was informed of the Director-General's decision to make the payment by letter dated 6 November 2013. The stated reason for the decision was that actual reinstatement would have violated the limit of four years mentioned earlier.

2. The complainant unsuccessfully lodged a protest against the decision communicated on 6 November 2013 and she was informed of the confirmation of the decision in a letter dated 17 March 2014. Thereafter the complainant lodged an internal appeal to the UNESCO Appeals Board against the decision communicated on 6 November 2013 confirmed by the decision of 17 March 2014. The Appeals Board rendered an "opinion and recommendation" dated 3 July 2015 which was forwarded to the complainant by memorandum of 8 July 2015. In the final paragraph of the "opinion and recommendation", the Appeals Board said:

"66. In view of the above considerations, it should be noted that, while the eventual offer of a Project Appointment was a possibility, the decision was entirely under the Organization's jurisdiction, as new contracts constitute new contractual relationships, to be justified by the Organization's objectives.

Consequently:

- (i) the impugned decision was taken within the Director-General's discretionary powers as the Chief Executive, in accordance with the existing rules and regulations, especially since the decision of 23 July 2013 did not establish the modality and limits of implementation. They were only defined on 18 October 2013

- (ii) the appellant be provided with the correspondence or documents if any, that have not been submitted yet, in conformity with the rules governing such process. Access to information regarding a staff member, is proof of transparency and such access leads to attainment of better governance.”

3. In the complaint form filed with the Tribunal, the complainant identifies this opinion and recommendation of the Appeals Board, having regard to the date of decision identified on the form, as the impugned decision. Annex A to UNESCO’s Staff Regulations and Staff Rules addresses the procedure to be followed in an internal appeal. These provisions contemplate the Appeals Board issuing a report and advising the Director-General on what action, if any, he or she should take, the report being forwarded to the Director-General and the Director-General making a decision based on the report. Paragraph 20 of Annex A declares that the Director-General “shall make a decision thereon [on the Appeals Board report] as soon as possible”. It appears, from the material before the Tribunal, that no decision was made by the Director-General following, and based upon, the Appeals Board report in the period of a little over three months between the issuing of the Appeals Board report and the filing of the complaint in the Tribunal. However, UNESCO does not challenge the receivability of the complaint in these proceedings, which can be taken to be an agreement that the matter can be dealt with by the Tribunal.

4. The complainant seeks an oral hearing and the production of certain documents. However the Tribunal is satisfied it can resolve the case on the material before it and, as it has done so in favour of the complainant, the additional material is unlikely to enhance the complainant’s case.

5. In the email of 25 July 2013, it was stated that “[f]ollowing the recommendations of the Ethics Office, the Director-General consequently found that Mr [V.d.P.] had engaged in acts of retaliation, by not renewing your contract”. That is to say, the executive head of UNESCO had been affirmatively satisfied that the complainant had been the subject of an act of retaliation and that conclusion was based

on information gained and advice furnished through the process of internal investigation and reporting by the appropriate bodies. In the letter to the complainant dated 6 November 2013 advising her she would not be reinstated but would be paid, effectively, a year's salary, it is not suggested that the earlier conclusion of the Director-General that the complainant had been the subject of retaliatory conduct was wrong. Indeed at least implicit in that letter was that the earlier conclusion was correct. That would have been the rationale for making the payment to the complainant as compensation for the retaliatory decision not to renew her contract.

6. Yet somewhat unusually, UNESCO appears to argue, in its pleas, that the decision in October 2012 not to renew the complainant's contract was a rational and considered decision based on financial and other relevant considerations. No explanation is offered by UNESCO in its pleas as to how this argument can be advanced in the face of an express and unqualified conclusion of the Director-General, which underpins the decision communicated on 6 November 2013 and the earlier decision communicated on 25 July 2013, that the non-renewal decision was not a rational and considered decision based on financial and other considerations but was an act of retaliation against the complainant. Logically, that decision not to renew the contract cannot have both characteristics. If, as the Director-General concluded, it was an act of retaliation, this precluded it from being a decision based on financial and other considerations, even if it might have been justified on those grounds had it not been the intention of the decision-maker to make the decision as an act of retaliation. UNESCO's argument that it was, in fact, a rational and considered decision is disingenuous and should be rejected. A defendant organisation in proceedings before the Tribunal should not ordinarily be permitted to maintain a factual and legal position which is diametrically opposite to the position earlier accepted to be the case and foundational to the impugned decision which the organisation is defending, unless it involves a concession, in the proceedings before the Tribunal, favourable to the complainant.

7. The terms of the Director-General's decision, as described in the email of 25 July 2013, were that she "be reinstated in [her] former position as a Programme Specialist for the Institute with a retroactive effect, having [her] contract start, as if it was renewed after 31 December 2012, in accordance with paragraph 28 of the Whistleblower Protection Policy". The substance of the decision was clear and unambiguous. Her reinstatement did not depend on any particular form of contractual arrangement and this decision was made in circumstances and at a time where it would have been known in July 2013, or at least should have then been known to the Director-General and those advising her, that the type of contract under which the complainant had been employed in October 2012 (an ALD contract) when the unlawful decision not to renew was made, had by July 2013 been superseded, several months before, by a new form of contract, namely the PA contract. It is true that the email concludes by informing the complainant that she would be contacted about "the implementation of the aforementioned decisions". But this could not reasonably have been intended to derogate, or understood as derogating from, the substance of the decision, namely the reinstatement of the complainant to the position she formerly held.

8. However, and notwithstanding what is said in the preceding consideration, the Director-General appears to have been persuaded that reinstatement was not possible having regard to overarching limits imposed on the duration of ALD contracts. The Tribunal accepts, for the purposes of this discussion, that the executive head of an organisation has a discretionary power to review an earlier decision and can, for good reason and acting bone fide, vary or rescind that decision (see, for example, Judgment 618, consideration 5, though compare Judgment 3871, consideration 3), unless the earlier decision is immune from revision either because of the effect of normative legal documents within the organisation such as staff rules or regulations, or because of the application of principles found in the Tribunal's case law such as promissory estoppel (see, for example, Judgment 1781, considerations 12 to 14). But the rationale for the reversal decision, in the present case, does not withstand close scrutiny. As just discussed, if the decision to reinstate was made at a time when the ALD form of contract had been

abandoned (and this was or should have been known to the Director-General), then reinstatement under some other form of contract must have been intended. Constraints that had existed before 1 January 2013 on the limits on the duration of total employment under ALD contracts ceased to have any legal relevance at least to the position of the complainant once a decision was made to reinstate her.

9. It is true that the remedy chosen in the decision communicated on 6 November 2013 certainly compensated the complainant, financially, for the direct effect of the unlawful non-renewal of her contract as an act of retaliation. However, that decision fails to recognise that bare financial compensation for lost income arising directly from non-renewal of the complainant's contract for an unlawful reason might be an insufficient remedy. This failure is an error of law involving a failure to take into account relevant considerations.

10. The decision communicated on 6 November 2013 fails to give full effect to the obvious rationale for paragraph 28 of the Whistleblower Protection Policy and the Policy as a whole. As the Policy itself states in paragraphs 1 to 3, it is intended to provide enhanced protection against retaliation for individuals who report misconduct, provide information in good faith on alleged wrongdoing, or cooperate with a duly authorised audit, investigation or inquiry. It does this in circumstances in which it is recognised that staff members have a duty to report any breach of the Organization's regulations and rules to officials whose responsibility it is to take appropriate action. The Policy recognises that an individual who makes such a report in good faith has the right to be protected against retaliation.

11. Paragraph 28 of the Policy empowers the Director-General to take appropriate measures if retaliation is established. While the paragraph confers a discretionary power about what particular measure might be adopted, the stated purpose of the measure is identified as being to "correct the negative consequences suffered as a result of the retaliatory action". Reinstatement is expressly identified as one such measure. While paying the complainant compensation certainly corrected one negative consequence of the retaliatory decision not

to renew her contract, it did not correct other negative consequences such as, for example, the likely personal hurt and injury felt by the complainant flowing from not being offered further employment. Another negative consequence of the retaliatory decision was that it eliminated the possibility that, had the complainant's contract been renewed (and it would have been as a PA and not an ALD), she would have had the opportunity of seeking further and future employment within UNESCO from the position of being an existing staff member which, at least as a practical matter if not legally as well, is a position of some advantage. That opportunity was lost by the unlawful non-renewal of her contract. It is not apparent that these matters were taken into account by the Director-General when, in November 2013, she revisited her earlier decision to reinstate the complainant.

12. For the preceding reasons, the complainant is entitled to moral damages that the Tribunal assesses in the sum of 60,000 United States dollars. The complainant seeks reinstatement but, given the effluxion of time, such an order would be inappropriate. However, in addition to the compensation already paid, the complainant is entitled to material damages for the lost opportunity of future and further employment beyond 12 months with UNESCO, which the Tribunal assesses in the sum of 40,000 dollars. The complainant is entitled to costs assessed in the sum of 10,000 dollars.

#### DECISION

For the above reasons,

1. UNESCO shall pay the complainant moral damages in the amount of 60,000 United States dollars.
2. UNESCO shall pay the complainant material damages in the amount of 40,000 United States dollars.
3. UNESCO shall pay the complainant 10,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ