

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G. (No. 5)

v.

UNIDO

125th Session

Judgment No. 3950

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. G. against the United Nations Industrial Development Organization (UNIDO) on 10 April 2015, UNIDO's reply of 27 July, the complainant's rejoinder of 16 November 2015 and UNIDO's surrejoinder of 25 February 2016;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision not to renew his fixed-term contract.

Facts relevant to this case are to be found in Judgment 3840, delivered in public on 28 June 2017, on the complainant's second complaint before the Tribunal. Suffice it to recall that the complainant went on indefinite sick leave from November 2011 and that, while he was on sick leave, he was informed that his post was abolished. In his second complaint, the complainant challenged a memorandum of 2 October 2013 informing him of his separation entitlements upon the expiry of his contract on 31 December 2013. The Tribunal dismissed that complaint as irreceivable, on the ground that the memorandum was not an administrative decision.

The decision not to renew the complainant's fixed-term contract was communicated to him by a memorandum of 1 November 2013, which indicated that the Director-General had decided not to renew his contract, as all the efforts made to reassign him to a suitable position at the P-5 level had not yielded any positive results.

On 16 December 2013 the complainant submitted a request for review of that decision of 1 November 2013. This request was dismissed as unfounded on 12 February 2014. On 7 March he appealed before the Joint Appeals Board against the rejection of his request.

The Joint Appeals Board issued its report in December 2014. It found that the decision not to renew the complainant's contract had been taken in line with the Director-General's discretionary power under Staff Rule 110.02 and that UNIDO had demonstrated efforts towards the complainant by accommodating him for two years on a temporary post from 1 January 2012 till 31 December 2013. It recommended that the appeal be dismissed in its entirety. On 5 January 2015 the Director-General decided to endorse the Board's recommendation and his decision was notified to the complainant by a letter of 8 January 2015. That is the impugned decision.

The complainant asks the Tribunal to order UNIDO to assign him to a position commensurate with his grade, training and experience, with retroactive effect from the date of his separation. In the alternative, he asks for the payment of three years' salary with all benefits and entitlements. He seeks 200,000 Swiss francs in moral damages, as well as costs, with interest of 8 per cent on all sums awarded.

UNIDO argues that the complainant's claim for moral damages is irreceivable, as it is based on the decisions to reassign him and to abolish his post, which were the subject of his third complaint before the Tribunal. It also submits that that claim is irreceivable for failure to exhaust internal remedies, as it was not raised during his internal appeal and it is too substantial to be characterized as consequential relief. It otherwise requests the Tribunal to dismiss the complaint as unfounded in its entirety.

UNIDO also requests that the present complaint be joined with the complainant's second complaint, on the ground that they are virtually identical.

CONSIDERATIONS

1. The complainant commenced employment with UNIDO in September 1997. Much of the relevant background is found in Judgments 3669, 3840 and 3841. Suffice it to note, at this stage, that the Director-General decided to abolish the complainant's post in May 2011 effective from 1 January 2012 and that in the second part of 2011 the complainant had unsuccessfully sought appointment to another position within the Organization, the D-1 position of Director, Programme Support and General Management Division, Operational Support Services Branch (PSM/OSS). On 20 October 2011, the day after the complainant was informed that another candidate had been selected for the position, he took sick leave and did not return to work until 26 August 2013, a little under two years later. He did not forewarn UNIDO of his return to work. By memorandum dated 1 November 2013, the complainant was informed that the Director-General had decided not to extend his appointment. That decision was made on 29 October 2013. Accordingly the complainant's fixed-term appointment expired in accordance with its terms on 31 December 2013.

2. The complainant unsuccessfully sought internal review of the decision communicated to him on 1 November 2013. On 7 March 2014 the complainant lodged an internal appeal to the Joint Appeals Board that issued a report dated 10 December 2014 recommending that the appeal be dismissed. On 5 January 2015 the Director-General decided to accept this recommendation and dismissed the appeal. His decision was notified to the complainant by a letter of 8 January 2015. This is the decision impugned in these proceedings.

3. UNIDO asks for the joinder of the present complaint with the second complaint filed by the complainant before the Tribunal. This request has, however, become moot because the Tribunal has already

ruled on the complainant's second complaint in the above-mentioned Judgment 3840.

4. In his pleas, the complainant develops five arguments though they are related. First he argues that the decision not to extend his contract constituted an abuse of authority, as it was improperly influenced by bias and personal prejudice against him. Secondly he argues that the decision was part of a broader campaign of harassment against him. Thirdly he argues that the impugned decision violated UNIDO's obligation to provide transparency. Fourthly he argues that the reasons given were illusory and irregular and fifthly that UNIDO violated its obligation to respect his dignity. UNIDO contests each of those propositions and argues that the non-extension of the complainant's appointment was based on legitimate and valid grounds and was a valid exercise of a discretionary power.

5. The Tribunal notes, at the outset, that the complainant's brief in these proceedings is dated 9 April 2015 and the rejoinder is dated 16 November 2015. The pleas closed with UNIDO's surrejoinder dated 25 February 2016. Judgment 3669, concerning the complainant's first complaint, was delivered in public on 6 July 2016. No application to review that judgment was made. Accordingly, the Tribunal's decision in that earlier matter can be taken to have settled all legal and factual issues raised by the complainant in those proceedings. The subject matter of those earlier proceedings was the failure of the complainant to secure appointment to the D-1 position of Director, PSM/OSS, referred to above, which the complainant was informed of on 19 October 2011. In that matter, the complainant's brief was filed on 8 July 2013 (and corrected on 31 July 2013) and his rejoinder filed on 19 February 2014. Thus the complainant had, in formulating those pleas, all available evidence, including documentary evidence, in existence as late as February 2014. In those pleas the complainant argued that the failure to select him for the position was tainted by bias and ill will, particularly on the part of two members of the Selection Panel, Mr L. and the Director of the Human Resource Management Branch (HRM). The Tribunal rejected those arguments as it did a specific

argument that “a process of restructuring commencing in 2006 in which the Director of HRM [had been] involved constituted a broader pattern of harassment against him”. The Tribunal said: “These changes [were] adequately explained by UNIDO in its pleas.”

6. The issue that arises is whether, in view of the findings and conclusions of the Tribunal in Judgment 3669, the complainant is precluded, as a matter of law, from revisiting the arguments raised and resolved in that Judgment by reference to the evidence the complainant relied on in those earlier proceedings. In relation to the principle of *res judicata*, the case law of the Tribunal presently provides, as exemplified by Judgment 3867, consideration 9, that “the parties, the purpose of the suit and the cause of action must be the same as in the earlier case for the principle of *res judicata* to apply (see, for example, Judgments 1216, under 3, 2993, under 6, or 3248, under 3)”. Whether this now states, too narrowly, the applicable principle or principles involving estoppel, such as “issue estoppel” or abuse of process, and would preclude a complainant re-agitating substantially the same issues based on substantially the same evidence is a matter to be resolved in other proceedings in due course and not in the present proceedings.

7. Nonetheless the Tribunal is entitled to ask, as it did in Judgment 3669, whether there is anything in the evidence submitted in the present proceedings that would lead it to a different conclusion from that which it reached in the first case regarding the question of whether the complainant was the subject of bias and prejudice and had been subjected to a campaign of harassment, which are the issues central to his first and second arguments that the decision not to renew his contract constituted an abuse of authority, as it was improperly influenced by bias and personal prejudice against him, and that the decision was part of a broader campaign of harassment against him. There is not.

8. Similarly the Tribunal can ask, in relation to the complainant’s third and fourth arguments, whether there is anything in the evidence submitted in the present proceedings which would indicate that conclusions in Judgment 3669 about the way the complainant was treated

and the reasons for organisational changes affecting him were not justified on objective grounds, which underpins his arguments that the impugned decision violated UNIDO's obligation to provide transparency and that the reasons given were illusory and irregular. Again, the answer is that there is not. In its reply UNIDO recounts the steps taken after the complainant's return to work in August 2013 following a period of extended sick leave to ascertain whether a position might exist to which the complainant might be appointed. The Tribunal is satisfied that such steps were taken. The third and fourth arguments are unfounded and are rejected.

9. The complainant's fifth and final argument is that UNIDO violated its obligation to respect his dignity. This involved, so it is said in the complainant's brief, "the denigration of his career stemming from personal bias and prejudice, culminated in his unlawful removal from his stable post in BMS (a post which remains vacant to date), placing in a to-be abolished post and ultimately in the impugned decision to not renew his contract". The gravamen of this argument is that the complainant was singled out for improper reasons, which is substantially repetitive of the arguments referred to in the preceding considerations and which the Tribunal has concluded are unfounded. This fifth argument is likewise unfounded and is rejected.

10. In the result, the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, 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

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ