

**M.**

**v.**

**UNESCO**

(Application for review)

**130th Session**

**Judgment No. 4327**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4172 filed by Mr T. J. M. on 17 April 2020;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

#### CONSIDERATIONS

1. The complainant applies for the review of Judgment 4172, delivered in public on 3 July 2019. The complaint leading to that judgment was filed against the decision of the Director-General of UNESCO not to renew his appointment beyond its expiry on 31 October 2014. His complaint was based essentially on alleged procedural irregularities and unfairness, abuse of authority, violations of the Human Resources Manual and the Staff Regulations and Staff Rules, and retaliation on the part of his supervisor, the Director of UNESCO's Santiago Office. The Tribunal dismissed the complaint as unfounded and, at considerations 5 to 8, determined that:

“5. According to consistent case law, ‘a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. [...] What is more, where the reason

given for the non-renewal is unsatisfactory performance the Tribunal will not replace with its own the Organisation's view of the complainant's fitness for his duties' (see Judgment 1052, under 4).

6. The complaint is unfounded. The Tribunal notes that both the complainant's Performance Assessment Report for 2010-2011 and the Performance Improvement Plan [PIP] results were considered by the Director-General after two bodies had assessed each of them and had found no procedural irregularities, errors of fact, or mistaken conclusions. Even though UNESCO's submission that the granting of the within-grade salary increment on 6 October 2011 was intended to encourage the complainant to improve his performance is not in line with the provision in Human Resources Manual Item 14.5 paragraph 6, it is consistent with the supervisor's statement in the complainant's mid-term review of May 2011 that '[t]he expected results were maintained to give the [complainant] the opportunity to improve his performance'. The complainant's argument that he was not given access to information and documents regarding the performance assessment system is unfounded considering that the complainant had access to that system through the Intranet.

7. The complainant asserts that UNESCO violated the Human Resources Manual and the Staff Regulations and Staff Rules. The Tribunal finds that UNESCO followed the proper procedures and that it acted in conformity with the provisions set forth in the Human Resources Manual and the Staff Regulations and Staff Rules. With regard to the establishment of the complainant's goals, the Tribunal is satisfied that these were clearly defined and notes that the complainant himself acknowledges that the draft goals he developed and submitted to the Office Director within the first two weeks of his arrival in the Office were 'identical to those entered into [the online appraisal system] by the Director and used completely unchanged to conduct the first and only performance evaluation in July 2012'. The Tribunal is also satisfied that UNESCO provided the complainant with ample training and development opportunities, as evidenced by the documents submitted by UNESCO, namely the summary of training sessions undertaken by the complainant between November 2010 and October 2011. The Tribunal is also satisfied that the complainant was provided with regular feedback, as evidenced by the list of numerous meetings with the Office Director in 2012 and 2013 to discuss the Performance Improvement Plan.

8. The complainant's allegations of abuse of authority and retaliation on the part of the Office Director are unsubstantiated. Moreover, the Tribunal notes that the complainant had filed a claim of harassment against the Office Director on 27 May 2012 but was informed on 6 September 2012 by the Ethics Advisor that the Director-General had found no prima facie evidence that would warrant further investigation and had thus decided to close the case. The Tribunal has no evidence before it that the complainant challenged that decision through the internal mechanisms available to him. Furthermore, the complainant has not provided any convincing evidence that the Office Director abused his authority or retaliated against him for this or any other reason. In light of the above

considerations, the Tribunal finds that the complaint is unfounded and must be dismissed in its entirety. [...]"

2. The complainant's application for review is based on the Tribunal's alleged failure to take into account material facts. In particular, he questions whether the Tribunal fully considered:

- (a) the Office Director's alleged inconsistencies regarding the complainant's performance;
- (b) that the complainant did not sign the PIP, demonstrating that he did not agree with it;
- (c) the alleged lack of response from senior-level officials to his requests for clarification;
- (d) the Office Director's contradictory statements;
- (e) the alleged unfairness of expecting him to deliver the presentation of the work assigned in the PIP to professional staff in Spanish; and
- (f) that the process for establishing his performance goals was flawed as: he had no access to any UNESCO performance documents; the goals were not translated into performance objectives and did not follow the SMART principle; there was no discussion of short- or medium-term job-specific learning needs, objectives, and corresponding actions; no learning or development plan was discussed or developed; tasks, daily activities and requests were not aligned with performance goals, with his job description, or with any explicitly identified expected result; his draft performance goals were used as the only basis for his performance evaluations; no formative evaluation system was used for performance evaluation or for the PIP; the procedural requirements of Chapter 14 of the Human Resources Manual were not respected; Staff Regulations and Staff Rules were not followed; the performance evaluation process failed to identify performance gaps or allow him the time or opportunity to address them; and the Office Director's evaluations were "vague, harsh, negative, inaccurate and in no way productive to allow [him] to identify any areas requiring improvement, let alone a process to be used to remedy any perceived performance issues".

3. As the Tribunal recalled in Judgment 4199, consideration 2, its judgments may be reviewed only in exceptional circumstances and on strictly limited grounds. The rationale for this was stated, for example, in Judgments 3815, consideration 4, and 3899, consideration 3, as follows:

“[P]ursuant to Article VI of its Statute, the Tribunal’s judgments are ‘final and without appeal’ and have *res judicata* authority. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As stated, for example, in Judgments 1178, 1507, 2059, 2158 and 2736, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts which the complainant was unable to rely on in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review (see, for example, Judgments 3001, under 2, 3452, under 2, and 3473, under 3).”

4. The arguments relied on by the complainant in his application for review, and the evidence which he presents to support them, merely invite the Tribunal to reconsider its findings on these issues on the grounds that it has, in effect, misinterpreted the facts and/or misapplied the law. Although the complainant attempts to base its application for review on the alleged Tribunal’s failure to take into account material facts, his submissions essentially seek to call into question the Tribunal’s exercise of judgement in assessing the evidence. The grounds for review advanced by the complainant are simply an attempt to re-litigate matters that have already been decided. As noted above, such pleas afford no grounds for review.

5. It follows that the complainant’s application does not raise any admissible ground for review of Judgment 4172. It must therefore be summarily dismissed in accordance with the procedure set out in Article 7 of the Tribunal’s Rules.

#### DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 13 July 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

DRAŽEN PETROVIĆ