

*Registry's translation,
the French text alone
being authoritative.*

112th Session

Judgment No. 3064

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms R. M. against the International Labour Organization (ILO) on 8 January 2010, the Organization's reply of 16 March, the complainant's rejoinder of 14 April and the ILO's surrejoinder dated 13 July 2010;

Considering Articles II, paragraph 1, 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. The complainant is a former official of the International Labour Office, the ILO's secretariat, who retired on 31 October 2009.

On 16 February 2007, when she was working as a grade P.3 translator in the German Section of the Office's Official Relations and Documentation Branch, she submitted a grievance in which she complained of the unhealthy atmosphere which had persisted in the section for many years and contended that she had been subjected to unfair treatment and harassment. In her letter of reply of 21 June the Director of the Human Resources Development Department (HRD)

said that, although the complainant had failed to prove her allegations, most of which were time-barred, she proposed that HRD should engage in an active, ongoing dialogue with the complainant and her supervisors, in order to promote improved communication within the German Section. On 20 July 2007 the complainant referred the matter to the Joint Advisory Appeals Board.

In its report of 17 January 2008 the Board decided not to examine a number of claims on the grounds that they were time-barred or because the complainant had no cause of action. Referring in particular to the Tribunal's Judgment 2642, it pointed out that an accusation of harassment had to be investigated "promptly and thoroughly". Since in the instant case the Office had conducted only an informal investigation, on which no report had been produced, the Board considered that the allegations of "continuous harassment since 1993" – the actual existence of which it felt unable to determine – had not received from the Office the attention required by the Tribunal's case law and in that respect the complainant had been treated unfairly. In those circumstances, it recommended that an in-depth formal investigation of all the complainant's allegations should be conducted "within a very short time" and that its findings should be recorded in a written report. Since the assessment of the complainant's work appeared to be a key issue and her relations with her immediate supervisor and the former heads of section were such that it could not be "expected that their judgement would display the desired level of objectivity", the Board stated that it might be advisable to ask "one or more persons outside the service" to evaluate the complainant's performance. Furthermore, it encouraged HRD, the complainant and her supervisors to pursue and step up their efforts "to promote improved communication and working relations" within the German Section.

By a letter of 18 March 2008 the complainant was advised that the Director-General had agreed to the holding of an in-depth investigation, the findings of which with respect to those of her allegations which were not time-barred would be recorded in a written report. He had also agreed that a qualified person outside the Section should assess the complainant's work and he had asked HRD to

encourage an active dialogue among the parties concerned, if necessary with the support of the Mediator.

On 5 September the complainant enquired as to the progress of the investigation, but she did not receive any answer. On 5 December 2008 she submitted a grievance to HRD, in which she took issue with the fact that the decision of 18 March 2008 to open an investigation had not been implemented and complained that her supervisors had failed to take any measures to improve the working climate within her section. Having received no reply, she referred the matter to the Joint Advisory Appeals Board in March 2009. In its report of 14 September 2009 the Board found that more than 15 months after the adoption of the decision of 18 March 2008, the investigation – which had commenced in May 2009 after a delay which, in its view, was hard to explain – had still not been completed and no information was available as to the date on which the investigator would deliver his report, despite the fact that the complainant was due to retire in October. It also emphasised that HRD had not “actively taken steps to encourage dialogue” between the complainant and her supervisors. It therefore recommended that she be awarded 10,000 Swiss francs in compensation for the moral injury suffered.

By a letter of 16 November 2009, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General, who regretted the “unacceptable delay” – due to an “administrative error” – in holding the investigation, had decided to award her 3,000 francs by way of compensation. However, as the Director-General considered that, pending receipt of the investigation report, it was difficult to determine the extent of the efforts undertaken by the Office to resolve the “tensions” in the German Section, he had asked the investigator to finalise his report by 30 November 2009. In the meantime, he reserved his position on any payment of compensation. The complainant was advised that she would be notified of the Director-General’s decision during the first half of January 2010 at the latest.

In his report of 8 December 2009 the investigator concluded, on the basis of the facts established from the written evidence and the testimony given in interviews, that the complainant had not been harassed. By a letter of 15 January 2010 the Executive Director of the Management and Administration Sector forwarded a copy of the investigation report to the complainant and informed her that, after examining it attentively, the Director-General considered her allegations of harassment to be unfounded.

B. The complainant submits that she was treated in a manner incompatible with her terms and conditions of employment, because no action was taken on two recommendations of the Joint Advisory Appeals Board which had been endorsed by the Director-General. First, she deplors the fact that the investigation was not conducted promptly and that no deadline was set for the submission of the investigator's report. She suspects that the Administration "let matters drag on" in the hope that, in view of her impending retirement, her "case of harassment w[ould] go away as if it had never existed". Secondly, she states that apart from two meetings which she had in 2008 with her immediate supervisor in the presence of the Mediator and the HRD Legal Officer, no formal steps were taken to put an end to the ongoing tensions in her section.

The complainant adds that, if her work was in fact assessed by two United Nations revisers at the request of the Reports Board, she was not informed of this.

She requests the setting aside of the impugned decision, redress for the injury suffered and costs in the amount of 3,000 Swiss francs.

C. In its reply the Organization asks the Tribunal to join the instant complaint with those which the complainant will undoubtedly file against the decision of 15 January 2010 and that of 16 March 2010 by which the Director-General dismissed the grievance she had submitted to contest her performance appraisal report for the period 1 August 2005 to 31 July 2007. Should the Tribunal not accede to this request, the Organization asks it to declare the instant complaint irreceivable on the grounds that it has become moot insofar as it concerns the delay in

conducting the investigation, because the ensuing injury to the complainant has already been redressed by the payment of 3,000 francs in compensation. Moreover, it argues that the complaint is premature to the extent that it relates to the alleged failure to adopt measures to improve working relations within the German Section, because the complainant, who had until 22 February 2010 to file a complaint with the Tribunal, did so one week before being notified of the Director-General's final decision on this matter, as mentioned in the letter of 16 November 2009.

On the merits, the ILO contends that the – albeit inexcusable – delay in holding the investigation was due in particular to the fact that it proved extremely difficult to find a qualified volunteer to conduct the investigation.

It says that, as far as improving working relations was concerned, it had an obligation of endeavour and not of result, and that as the complainant and her immediate supervisor had not been on speaking terms for years, the steps taken were doomed to failure. It points out that, in addition to the two meetings in 2008, the Administration deployed “considerable efforts” at an early stage, but to no avail, as the complainant preferred to lodge an appeal.

The Organization states that the complainant's allegations of harassment and those concerning the assessment of her work are not formally the subject of the instant complaint and are groundless.

D. In her rejoinder the complainant reports that she has not received the 3,000 francs due to her as compensation for the delay in holding the investigation. She emphasises that in 2004 her former second-level supervisor made “commendable efforts” to improve working relations within her section but that no steps appear to have been taken thereafter.

E. In its surrejoinder the ILO maintains its position. It admits that as the 3,000 francs compensation had not been paid to the complainant, apologies were sent to her in a letter of 11 June 2010. It says that steps

were taken to pay the sum in question, but that the complainant stated in a letter of 3 July 2010 that she refused this payment.

CONSIDERATIONS

1. On 20 July 2007 the complainant submitted a grievance to the International Labour Office's Joint Advisory Appeals Board in which she complained of having been treated in a manner incompatible with her terms and conditions of employment and, in particular, accused her immediate supervisor of harassment.

The Board issued its report on 17 January 2008, recommending *inter alia* the holding of an in-depth investigation. On 18 March the Director-General decided to accept this recommendation and, on the basis of the above-mentioned report, he asked HRD to have an investigation carried out into the harassment allegations which were not time-barred, and to encourage the complainant and her supervisors to engage in an active dialogue, if necessary with the support of the Mediator, in order to promote good working relations within the German Section.

2. On 5 December 2008 the complainant filed a new grievance with HRD in which she objected to the fact that there had been no action on the Director-General's decision to hold an investigation and that no steps had been taken to improve the working climate in her section. As she received no response to this grievance, she again referred the matter to the Joint Advisory Appeals Board.

3. On 15 May 2009, with the complainant's agreement, an ILO official was appointed to conduct the investigation as swiftly as possible without jeopardising its quality. The investigator interviewed the complainant on two occasions.

4. In its report of 14 September 2009 the Board recommended that the Director-General should recognise that both allegations contained in the complainant's grievance, namely that concerning the delay in holding the investigation and that relating to the

Administration's failure to adopt measures to improve working relations within her section, were well founded, and that she should be paid 10,000 Swiss francs as compensation for the moral injury suffered.

By a letter of 16 November 2009 the Director-General informed the complainant that he had "decided to follow the Board's recommendation" and to award her compensation in the amount of 3,000 francs "for the unacceptable delay in the investigation". However, he stated that, pending receipt of the investigation report, which he had asked to have finalised by 30 November 2009, he reserved his position on the possible award of compensation for the failure to take steps to improve working relations within the German Section and that the complainant would be notified of his decision in the first half of January 2010 at the latest. It was explained that this letter constituted "a final decision, within the meaning of Article 13.3, paragraph 4, of the Staff Regulations, on the issue of compensation for the delay in examining the allegations regarding working relations" within the German Section.

5. The complainant, who impugns this decision of 16 November 2009, asks the Tribunal to set it aside, to order redress for the injury that she considers she has suffered and to award her costs in the amount of 3,000 francs.

She contends in support of her complaint that the Administration took no steps to implement the recommendations of the Joint Advisory Appeals Board, which had been accepted by the Director-General on 18 March 2008, to hold an investigation and to encourage dialogue between her and her supervisors in order to improve the working climate in her section.

6. In its reply the ILO requests that this complaint be joined with those which the complainant will undoubtedly file against the decisions of 15 January and 16 March 2010. The Tribunal notes that the complainant has since challenged these decisions in her fourth and sixth complaints respectively, but it will not accede to this request for joinder. Precedent has it that complaints are to be joined only if they

raise the same issues of fact and of law. In the instant case not only do the complaints not raise exactly the same issues of fact, they also raise different issues of law (see, in particular, Judgment 1541, under 3).

7. The Organization states that, should the Tribunal decide not to accede to its request for joinder, it deems the complaint to be irreceivable. It submits that the first plea concerning the delay in holding the investigation has become moot, since the injury caused by this delay has already been redressed by the payment of 3,000 francs in compensation and that, as far as the second plea is concerned, i.e. that no steps were taken to improve working relations within the German Section, the complaint is premature since it was filed before the Administration had reached a final decision on this matter, as it had undertaken to do in the letter of 16 November 2009.

8. The Tribunal cannot accept the objection to receivability based on the contention that the complaint has become moot, because the Organization has not been able to prove that the complainant formally agreed to the amount of compensation, which was unilaterally set at a much smaller sum than that recommended by the Joint Advisory Appeals Board, and that she actually received this sum.

As for the question of whether the complaint is premature, the Tribunal will not be able to determine this until it has examined the merits of the case.

9. In essence the complainant submits that the investigation ordered by the Director-General into her allegations of harassment was considerably delayed and that when she filed her complaint no final decision had been reached on these allegations.

10. The ILO admits that “the delay in holding the investigation is inexcusable”. Nevertheless, it considers that “[t]he complainant’s claims in this respect are [...] groundless”, since 3,000 francs were awarded as compensation for this delay.

The Tribunal considers, however, that even if such a sum had been paid promptly and accepted by the complainant, which is not the case,

the Organization could not shed its responsibility for the considerable delay in holding the investigation by simply deciding to award the complainant compensation for the injury suffered, especially as the Board had recommended the payment of greater compensation.

11. The ILO holds that the delay is due, not to the Administration's wish to harm the complainant, but to an error.

In the Tribunal's opinion, this fact likewise does not exonerate the Organization or lessen its responsibility, since the error was committed by its Administration.

As the Board rightly noted in its report of 14 September 2009 more than 15 months after the Director-General's decision there was no information as to the progress of the investigation, or the date on which the investigator would submit his report.

Consequently, it must be found that the delay in conducting the investigation caused the complainant moral injury which must be redressed.

12. Regarding the measures which should have been taken in order to improve working relations within the German Section, the complainant submits that no formal steps were taken to end the continuing tension in the section, apart from two meetings between her and her immediate supervisor in the presence of the Mediator and the HRD Legal Officer.

13. The ILO responds to the plea by contending that it had only an obligation of endeavour, not of result. It emphasises that, in addition to the two meetings mentioned by the complainant, the Administration deployed "considerable efforts" at an early stage, but they proved fruitless because, after the second meeting, the complainant stated that she did not wish to pursue mediation and preferred to lodge an appeal.

In order to justify the lack of any result, the ILO draws attention to the finding in the investigation report that for years there had been a complete breakdown in communication between the complainant and

her immediate supervisor and that attempts to pursue an active dialogue in order to promote good working relations had no prospect of success.

14. The Tribunal notes, however, that in its report of 17 January 2008, the Joint Advisory Appeals Board “encourage[d] HRD and the responsible chiefs of the complainant and of her head of section to pursue and step up their efforts to promote better communication and working relations” within the German Section and that the letter of 18 March 2008 indicated that the Director-General had “endorse[d] this recommendation”.

The Administration was therefore under an obligation to pursue and step up the efforts in question. However, the evidence on file does not show that the Administration used all the means at the disposal of an organisation such as the ILO to achieve the desired result. The fact that the complainant chose to lodge an appeal in order to seek recognition of her rights did not exempt the Organization from its obligations towards one of its officials to whom it owed a duty of care and who has not been found to have committed any fault.

15. While there is no need to dwell on the allegations concerning the assessment of the complainant’s work, which does not formally form the subject of a claim, the Tribunal concurs with the Board’s finding in its report of 14 September 2009 that the Administration “did not actively take measures to encourage dialogue” between the complainant and her supervisors in order to improve working relations within the German Section.

16. In view of the foregoing and, in particular, the length of time which has passed, the Organization’s argument that the complaint is premature cannot be accepted.

17. The complainant has suffered moral injury which must be redressed, also bearing in mind the procedural delay. The Board recommended compensation of 10,000 Swiss francs. The Tribunal considers it fair to increase this compensation to 15,000 francs.

18. The complainant is entitled to costs in the amount of 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ILO shall pay the complainant 15,000 Swiss francs in compensation for the moral injury suffered.
3. It shall also pay her costs in the amount of 2,000 francs.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet