

113th Session

Judgment No. 3129

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. F. against the United Nations Industrial Development Organization (UNIDO) on 2 June 2010 and corrected on 15 September, UNIDO's reply of 21 December 2010, the complainant's rejoinder of 11 March 2011, the Organization's surrejoinder of 15 June, the complainant's further submissions of 2 August and UNIDO's final comments thereon of 24 November 2011;

Considering Article II, paragraph 5, 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, an Indian national born in 1948, joined UNIDO in 1977 at the G-5 level and received a permanent appointment in 1983. She obtained several promotions, the last of which was in October 2002 when, following an internal competition, she was appointed as a Human Resource Specialist in the Human Resource Management Branch (PSM/HRM) at the P-4 level.

In October 2005, shortly before the departure of the then Director-General, two posts in PSM/HRM were reclassified at the P-5 level: the complainant's post and Mr M.'s. As a result, internal vacancy announcements were issued, on 27 October 2005, for two Senior Human Resource Specialists. The complainant applied for one of these posts.

Upon taking office in December 2005, the new Director-General suspended all ongoing recruitment actions in the General Service and Professional categories, including recruitment for the above-mentioned posts in PSM/HRM, pending a review of organisational requirements. Following a consultative process within the Secretariat, in February 2006 the Director-General issued two bulletins on the Organization's new structure. A first bulletin, issued on 13 February, provided a list of staff members who exercised managerial or supervisory responsibilities or who would do so as a result of the restructuring. A second bulletin presenting the new organisational structure in greater detail, as well as a complete list of staff for each unit, was issued on 27 February.

In the context of this restructuring, two new units were established within PSM/HRM, namely the Human Resource Planning and Development Unit (PSM/HRM/HPD – hereinafter “HPD”) and the Staff Services and Employee Relations Unit (PSM/HRM/SSR – hereinafter “SSR”), each of which was to be headed by a Unit Chief at level P-5. Pending the recruitment of these Unit Chiefs, Mr M. was designated Officer-in-Charge of HPD, while Ms A. was designated Unit Chief ad interim of SSR. Ms A. was also appointed Officer-in-Charge of PSM/HRM. The P-5 Senior Human Resource Specialist posts which had been advertised in October 2005 were not part of the newly defined structure. The complainant therefore remained in her functions as Human Resource Specialist, within the new SSR Unit, at level P-4.

At its meeting of 17 May 2006 UNIDO's Executive Board decided inter alia that “the remaining open posts for branch directors and unit chiefs, at the D-1 and P-5 levels respectively, should be advertised as soon as possible – the former both internally and

externally and the latter only internally”. Further to that decision, the post of Unit Chief of HPD was advertised internally on 31 July and the complainant applied for it on 17 August. On 6 December 2006 the Director-General approved the appointment of Ms A. as Director of PSM/HRM with effect from 1 January 2007. Shortly afterwards, he announced in a bulletin of 22 December 2006 the appointment of Mr M. to the post of Unit Chief of HPD.

The recruitment procedure for the post of Unit Chief of SSR began in February 2007, when a first vacancy announcement was issued both internally and externally. The complainant applied for the post and was interviewed by telephone, but her candidature was rejected. The post was re-advertised in May with a slightly modified vacancy announcement and the complainant applied again. She was shortlisted and interviewed, but on 8 November 2007 she was informed that another candidate had been selected for the post.

In December 2007 the complainant requested a review of the decision to appoint Mr I., an external candidate, to the position of Unit Chief of SSR, which, according to her, was the post that she held, with slight modifications. She asked to be granted that post or, alternatively, to be reassigned to a suitable P-5 post within the Organization. On 14 February 2008 she was informed that the decision to appoint Mr I. had been maintained and her request rejected, as all management decisions on the recruitment in question had been taken in accordance with the applicable rules and procedures.

The complainant filed an appeal with the Joint Appeals Board (JAB) on 11 April 2008, and on 30 November, having reached the statutory retirement age, she retired from UNIDO. In its report of 10 February 2010 the JAB found that the selection process for the post of Unit Chief of HPD had been carried out in accordance with the applicable rules and procedures. With regard to the post of Unit Chief of SSR, it rejected her claim to set aside the appointment of Mr I. However, noting that the Executive Board’s decision of 17 May 2006 “that the remaining open posts for branch directors and unit chiefs [...] should be advertised as soon as possible – the former both

internally and externally and the latter only internally” had not been applied consistently, it recommended that the Director-General should award the complainant moral damages.

The Director-General, by a decision of 26 February 2010, rejected the JAB’s recommendation regarding moral damages, on the ground that the Executive Board’s decision of May 2006 did not apply to the post of Unit Chief of SSR, because it was not vacant at that time, Ms A. having been appointed to it on an ad interim basis. He therefore dismissed the complainant’s appeal, but decided to award her moral damages in the amount of 1,800 euros, including costs, for the excessive delay in the proceedings before the JAB. That is the impugned decision.

B. The complainant contends that UNIDO breached the principle of equal treatment. She submits that the JAB correctly found that she had suffered unequal treatment with respect to the advertising of the post of Unit Chief of SSR. Both her post and Mr M.’s were upgraded to the P-5 level in October 2005 and both she and Mr M. were recommended for promotion before the decision of the new Director-General to suspend all ongoing recruitment exercises. In her view, they were therefore in the same position of fact and law. The treatment afforded to Mr M., however, contrasts starkly with that afforded to her. In particular, Mr M. was assigned as Officer-in-Charge to his upgraded post and was thus given the opportunity to take on the full responsibilities of the post before he applied for it.

The complainant also points out that hers was the only Unit Chief post to be advertised both internally and externally. She submits that, contrary to the view put forward by the Director-General to justify the difference in treatment, there is nothing in the Executive Board’s decision of May 2006 to suggest that the requirement that Unit Chief posts should be advertised only internally applied solely to those which were vacant. Nor can that interpretation explain why the post of Unit Chief of SSR was the only one to be advertised externally as well as internally. Indeed, even if one were to accept the argument that the post in question had been filled on an acting basis and was therefore

not “vacant”, that fact alone, she argues, constitutes a “trifling” difference which, according to the Tribunal’s case law, cannot justify the difference in treatment.

Further, the Organization breached its obligation of good faith and its duty of care, by failing to inform her that her status had been changed. In the complainant’s view, the first bulletin published in February 2006, which indicated that Ms A. had been assigned ad interim to the post of Unit Chief of SSR, cannot be equated with an official notification of an administrative decision. Instead, UNIDO left her – the complainant – with the reasonable impression that she remained the incumbent of her upgraded post and that promotion was still a possibility. She also argues that the evidence shows a *prima facie* case of both gender and age discrimination.

The complainant asks the Tribunal to set aside the impugned decision and to award her the difference between what she earned at the P-4 level and what she would have earned had she been promoted to the P-5 level from 1 January 2008 to the date of her retirement, including benefits. She claims moral damages in the amount of 30,000 euros for the discriminatory and unequal treatment she suffered, as well as an additional 3,200 euros for the delay in handling her internal appeal. She claims interest on damages, and costs.

C. In its reply UNIDO argues that Mr M. and the complainant were in different factual and legal situations after October 2005. Unlike Mr M.’s post, the complainant’s post was not reclassified at the P-5 level when PSM/HRM was restructured in February 2006. Furthermore, the complainant was not made Officer-in-Charge of one of the new Units, but continued to perform the same functions she had performed prior to October 2005, at the same level. The Organization adds that she did not possess an advanced university degree from an accredited institution and therefore did not meet all the requirements of the Unit Chief post for which she applied. In UNIDO’s view, the complainant’s claim of unequal treatment therefore rests on a number of erroneous premises.

The Organization also points out that the appointment of an Officer-in-Charge is a matter falling within the discretionary authority of the Director-General. As such, it is subject to only limited review, and the complainant has produced no evidence to show that the appointments of either Mr M. or Ms A. were improper, nor did she contest her non-appointment as Officer-in-Charge within the applicable time limits.

With respect to the complainant's argument that the post of Unit Chief of SSR should have been advertised only internally, UNIDO submits that the applicable rules, contained in Administrative Instructions Nos. 14 and 16, have consistently been interpreted as granting the Director-General the discretion to circulate vacancies internally or externally, depending on the availability of a suitable pool of internal candidates. Moreover, the Executive Board's decision of May 2006 expressly referred to "open posts". The complainant's argument that the Board's decision cannot be interpreted as being limited to vacant posts is therefore incorrect. The defendant asserts that the post of Unit Chief of SSR was not the only one to be advertised externally, as several other P-5 posts were advertised through the same procedure.

UNIDO denies that the complainant suffered any discrimination on account of her gender or age. As she lacked an advanced university degree, she did not possess all the qualifications required for the post and was not selected for this reason. The Organization submits evidence to show that due consideration was given to gender balance in evaluating the complainant's candidature, and it points out that several other staff members promoted in 2007 were close to retirement age.

As regards her allegations of breach of duty of care, good faith and mutual trust, UNIDO contends that they are not supported by the facts. The complainant was not denied a further promotion opportunity, and, in fact, she had several opportunities to compete for the new posts in PSM/HRM, which she did. Moreover, she was also kept informed of the outcome of her reclassification, first through the Director-General's decision to suspend all recruitment actions on

8 December 2005, and then through his bulletin of 27 February 2006 which indicated that she retained her assignment as Human Resource Specialist at level P-4 under the supervision of Ms A., the new Unit Chief ad interim. The Organization considers that, as from 27 February 2006, the complainant could not reasonably have believed that she was the incumbent of the upgraded post, that her promotion to that post was pending, or that the job description of October 2005 was still valid. Lastly, it submits that her claim for additional moral damages on account of delay has no basis and that it is not supported by the Tribunal's case law.

D. In her rejoinder the complainant presses her pleas. The fact that Ms A. had been assigned as Unit Chief ad interim did not, in her view, justify a difference in treatment. Given that the designations "Officer-in-Charge" and "ad interim" both mean that the appointee temporarily assumes the duty of the post in the absence of the incumbent, the complainant fails to see any difference between the post filled on an ad interim basis by Ms A. and the seven other Unit Chief posts that were filled by Officers-in-Charge. She also contends that the inclusion of a non-staff member, Ms J., on the Professional Selection Panel of the Appointment and Promotion Board constituted a breach of the applicable recruitment procedures. As a result, the appointment of Mr I. is tainted by a breach of procedure and should be set aside. Lastly, the complainant amends her claim for material damages by requesting that they be calculated from 1 January 2007 rather than 1 January 2008.

E. In its surrejoinder UNIDO maintains its position in full. As regards the complainant's new plea, the Organization submits that it is factually incorrect, since Ms J. was merely a member of the interview panel, and not of the Appointment and Promotion Board. It submits that, given the shortage of qualified internal candidates, the decision to advertise the SSR post externally was a reasonable and valid exercise of managerial discretion. The mere fact that the complainant's post was reclassified in 2005 did not entitle her to an automatic promotion, nor did it prevent the Director-General from restructuring PSM/HRM

in 2006 or from deciding, in line with the new structure, that her post should remain at the P-4 level. That decision, of which she was notified via the Director-General's bulletin of 27 February 2006, was not challenged in time, and her claims in this regard are therefore irreceivable for failure to exhaust internal means of redress.

F. In her further submissions the complainant disputes the Organization's statement that she did not work at the P-5 level and asserts that she in fact worked as Officer-in-Charge of the Project Personnel Service from 9 October 2001 until mid-December 2007.

G. In its final comments the Organization points out that the complainant's further submissions are manifestly wrong and misleading. It invites the Tribunal to censure the complainant for making fallacious submissions of fact to the Tribunal, knowing them to be untrue.

CONSIDERATIONS

1. The complainant is a former official of the Organization who, at the material time, was working as a Human Resource Specialist at the P-4 level. She impugns the Director-General's decision of 26 February 2010, which partly endorsed the recommendations made by the JAB in its opinion of 10 February 2010. In her internal appeal dated 11 April 2008 the complainant impugned the Director-General's rejection of her request for a review of the decision to appoint an external candidate, Mr I., to the post of Unit Chief of SSR, as well as the rejection of her subsidiary request to be assigned to a suitable P-5 level post within the Organization. The JAB found that the Executive Board's decision of 17 May 2006 "that the remaining open posts for branch directors and unit chiefs [...] should be advertised as soon as possible – the former both internally and externally and the latter only internally" had not been applied consistently in the case of the vacancy for Unit Chief of SSR. The JAB therefore recommended that the Director-General should award the complainant moral damages, but it rejected her claim that the appointment of Mr I.

should be set aside. In the impugned decision, the Director-General awarded the complainant compensation in the amount of 1,800 euros for the JAB's unacceptable delay in completing the appeal. However, he rejected the recommendation concerning moral damages on the grounds that the minutes of an Executive Board meeting do not confer rights or expectations on staff members, that the minutes referred to an agreement to resort to internal vacancy announcements only for posts vacant as of 17 May 2006 and, at that time, the post in question was not considered vacant. According to the Director-General, the post became vacant only on 1 January 2007.

2. In support of her claims, which are set out under B, above, the complainant alleges unequal treatment, gender and age discrimination, and breach of duty of care, good faith and mutual trust.

3. The Organization, in its submissions before the JAB, objected to the receivability of the appeal on the grounds that the complainant did not promptly contest her assignment to the post of Human Resource Specialist instead of that of Officer-in-Charge following the restructuring of PSM/HRM presented in the Director-General's bulletin of 27 February 2006.

However, the Board noted that the complainant had initiated her appeal against the decision of 14 February 2008 within the prescribed time limits and found the appeal receivable. It was indeed necessary for the complainant to wait until the final outcome of the competition (the appointment of Mr I. to the post of Unit Chief of SSR) before initiating the appeal process as, prior to that point, she had a reasonable possibility of success. The previous decisions contained in the Director-General's bulletin of 27 February 2006, namely the appointment of the Officer-in-Charge of PSM/HRM as Unit Chief ad interim SSR, and the advertisement, both internally and externally, of the post of Unit Chief P-5 SSR, did not cause the complainant immediate harm as none of them denied her the opportunity of being eventually appointed to the aforementioned post. It was only with the final decision to appoint Mr I. that the complainant lost the

opportunity to be appointed to that post and the injury to her became evident.

4. Before the Tribunal the complainant claims unequal treatment and breach of duty of care, good faith and mutual trust on the part of the Organization. She submits that she was treated differently from her colleague, Mr M., with regard to promotion. The defendant asserts that she was treated differently only because she was in a different situation from that of her colleagues. In October 2005 the P-4 posts (both of Human Resource Specialists) of the complainant and Mr M. underwent desk audits which resulted in reclassification of the two posts to P-5 and modification of their job titles to Senior Human Resource Specialists. The new Director-General suspended ongoing recruitment actions, including the complainant's post upgrade, by a memorandum of 8 December 2005. The Director-General issued a bulletin on 27 February 2006 entitled "UNIDO Secretariat Structure 2006" which described the new organisational structure, including the establishment of several new units and the appointment of officers-in-charge pending recruitment. Specifically, two new units were added to the PSM/HRM: the Human Resource Planning and Development Unit (HPD) and the Staff Services and Employee Relations Unit (SSR). The P-4 post of Mr M. was upgraded to P-5 and transformed into Unit Chief of HPD and he was appointed Officer-in-Charge and Deputy Director. The post of Ms A. (formerly Deputy Director PSM/HRM, P-5) was abolished and she was designated as both Officer-in-Charge of PSM/HRM and Unit Chief ad interim of the SSR Unit. The complainant's post remained that of Human Resource Specialist, P-4, as the post of Senior Human Resource Specialist which had previously been planned was not adopted under the new structure.

5. It should be noted that this is the first stage at which the complainant began to be treated differently from her colleague, Mr M., without proper justification and without due respect to her dignity. The complainant went on doing basically the same work (classified at P-5 by the auditing team) as she had done prior to the

restructuring and, as part of the Organization's duty of care, it should have notified her officially not only that the suspended recruitment exercise (the upgrading of her post) was to be cancelled, but also of the reasons for that decision. It was not enough to publish a general bulletin to all staff, because her situation was unique in that her desk audit recommendation was pending final approval. Further, the Organization had a duty not only to notify her expressly that the anticipated and recommended upgrade to P-5 had been cancelled, and to give the reasons for that decision, but also to conduct a new desk audit and take steps (such as limiting duties and responsibilities) to maintain her post at the P-4 level. For this, the complainant is entitled to compensation.

6. The Organization's assertion that the post of Unit Chief of SSR was not vacant at the material time is unfounded. The fact that Ms A. was temporarily occupying the post as Unit Chief ad interim does not mean that it was not vacant. In the interests of the efficient running of an organisation, it is natural to have staff members temporarily cover the duties of vacant posts pending recruitment. Those posts are still considered to be vacant and recruitment exercises are performed with the intention of filling the vacancies. The Officers-in-Charge were fulfilling the duties in question pending the results of the competition. Moreover, the difference in their titles was due only to the grade at which Ms A. was working. In UNIDO, a staff member fulfilling managerial responsibilities on a temporary basis is either made Officer-in-Charge or designated to the post "ad interim"; the term used depends on the grade of the staff member in relation to the post in question. "Officer-in-Charge" denotes a staff member acting at a higher level, while "ad interim" denotes a staff member acting at the same or lower grade. In these circumstances, it would not be reasonable to assume that the post of Unit Chief ad interim of SSR was any different. In fact, a competition was ultimately held to fill that post (while Ms A. was still acting in her ad interim capacity) which resulted in the external candidate being selected. Indeed, regardless of the issue of vacancy, no proper justification was ever given for the Organization's different treatment of Mr M. and the complainant.

7. Regarding the decision recorded in the minutes of the Executive Board's meeting, to which reference is made above under 1, the Tribunal is of the opinion that, even if it were to concur with the defendant's reasoning (that such minutes are not binding), the fact that the Organization had followed the Executive Board's decision (to hold only internal competitions for the P-5 Unit Chief positions) for all relevant P-5 posts save that of the SSR Unit and that it did not provide a proper justification for the difference in treatment, was unlawful, as was the decision of 17 January 2007 to advertise the SSR post externally and internally. The subsequent decision of 8 November 2007 to appoint the external candidate, Mr I., to the post constituted unequal treatment and must therefore be set aside without prejudice to Mr I.

8. However, the claims of age and gender discrimination are unfounded as the complainant has not supplied any convincing evidence in support of them. The claim for additional damages due to the late reply from the JAB is also unfounded. The amount already awarded by UNIDO is sufficient to compensate the delay, considering the time frame and difficulty of the case.

9. It follows that the decision of 26 February 2010 must be set aside to the extent that it did not award moral damages to the complainant.

10. In light of the above considerations and taking into account the fact that the complainant is now retired, the Tribunal will order an award of material damages in the lump sum amount of 35,000 euros for the loss of a valuable opportunity for the complainant to be appointed P-5 in the wake of an exclusively internal competition and the consequent loss of salary and pension benefits. The Tribunal will order an award of moral damages in the amount of 15,000 euros and costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The decision of 26 February 2010 to the extent indicated under 9 above and the decision of 8 November 2007 are set aside without prejudice to the successful external candidate.
2. UNIDO shall pay the complainant material damages in the lump sum amount of 35,000 euros.
3. It shall pay her moral damages in the amount of 15,000 euros.
4. It shall also pay her 3,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet