

115th Session

Judgment No. 3221

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr S. S. against the International Labour Organization (ILO) on 7 March 2011, the Organization's reply of 9 June, the complainant's rejoinder of 13 September and the ILO's surrejoinder of 13 December 2011;

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. Facts relevant to this case are to be found in Judgments 3219 and 3220, also delivered this day, concerning the complainant's first and second complaints, and Judgment 3050, delivered on 6 July 2011, concerning his third complaint. Suffice it to recall that the complainant joined the International Labour Office – the ILO's secretariat – in 1999 as an Internal Auditor at grade P.3. He was promoted to grade P.4 in June 2001 and was transferred to the position of Finance and Administrative Officer in the Regional Office for the Arab States in Beirut, Lebanon, on 1 February 2004. At his request, on 1 August 2007 he was transferred to the Office of Internal Audit and

Oversight (IAO) at headquarters in Geneva. On a temporary basis pending identification of a longer term assignment, he was assigned to the same position that he had held prior to leaving for Beirut. In October 2007 he was offered a temporary assignment to a P.4 position in the Financial Services Department, which he refused. In February 2008 he was granted a contract without limit of time with effect from March 2008.

By a letter of 2 December 2009 the complainant filed a grievance with the Human Resources Development Department (HRD) in accordance with Article 13.2, paragraph 1, of the Staff Regulations, alleging that he was being treated in a manner incompatible with his terms and conditions of employment. He contended that he was being subjected to humiliation, harassment and retaliation by HRD. He asked to be allowed to refer the matter directly to the Tribunal given that HRD was not in a position to respond to his grievance in an impartial manner. He wrote again to HRD on 1 February 2010 recalling that, in August 2007, he had been transferred back to headquarters and assigned to his previous position in the IAO on a temporary basis pending the identification of a longer term assignment at a higher grade. He alleged that since then he had been denied any possibility of promotion and had been offered only one alternative assignment, which he refused as it was for a P.4 position of a temporary nature. He emphasised that, as from 1 May 2008, he had been Officer-in-Charge of the Investigation and Inspection Unit in the IAO and had thus received a special allowance as from 1 November 2008. He asked to be paid the special allowance with retroactive effect from the date on which he assumed the duties of Officer-in-Charge, in accordance with Article 3.7(b) of the Staff Regulations. He also requested that all opportunities of a permanent position be examined, stressing that he had successfully performed the duties of Officer-in-Charge of the Investigation and Inspection Unit at the P.5 level for 20 months.

The Director of HRD replied on 5 March 2010 to his letters of 2 December 2009 and 1 February 2010, explaining that his current employment status was the result of the proper application of ILO

rules and procedures. She stressed that he had been temporarily assigned to the IAO in 2007 following his request to return to headquarters before the end of his tour of duty, which would normally have lasted between three and five years, and that his assignment in the IAO had been made pending the identification of a long-term assignment, and not “a longer term assignment at a higher grade”. Moreover, as from March 2008, he had been granted a contract without limit of time, notwithstanding the temporary nature of his assignment. With respect to the special allowance, she noted that the IAO had been requested to take the necessary steps to discontinue it as from 1 September 2009 following the appointment of Mr C. as Principal Investigator/Chief of Investigation and Inspection Unit, but that it had failed to do so. Given that there had been certain “lapses of communication which may have increased [his] frustrations and perception of being unfairly treated”, she indicated that the Office was prepared to forfeit the retroactive recovery of the allowance, provided that he confirmed that he had not been informed of HRD’s requests that the IAO discontinue the payment of the allowance and regularise his administrative situation by assigning him to the position of Senior Auditor, at grade P.4, with effect from 1 September 2009. She added that, if he disagreed with his assignment to the position of Senior Auditor, he could file a grievance with the Joint Advisory Appeals Board (JAAB) within one month. On 8 March 2010 the complainant wrote to HRD indicating that the Director’s “ultimatum” whereby he should either accept the appointment as Senior Auditor at grade P.4 or file a grievance with the JAAB was evidence of intimidation and harassment on the part of HRD. By a minute of 17 March the Director of HRD informed the complainant that if he refused the P.4 appointment the Office would consider that he had “abandoned” his post.

On 11 March 2010 the complainant submitted a grievance to the JAAB alleging that he was being subjected to intimidation, harassment, humiliation and retaliation on the part of HRD. He asked to be appointed, without delay, to a position which matched his qualifications at the P.5 level. He also asked that appropriate measures be taken to end the campaign of harassment, humiliation and

retaliation against him and he claimed compensation for the damages suffered.

In its report of 4 October the JAAB found no evidence of a campaign of harassment, humiliation or retaliation. It noted *inter alia* that the complainant had been granted a permanent contract despite the fact that he was assigned to a temporary position. It nevertheless held that he had been treated in an unfair manner and that he had had to face a general attitude of mistrust and inflexibility which could be perceived as intimidation. Consequently, it recommended that the Director-General instruct HRD to adopt a more constructive attitude towards the complainant and engage, without delay, in a genuine dialogue with him, directly or through a facilitator, and to make every effort to find an acceptable way out of the present “deadlock”.

By a letter of 6 December 2010 the complainant was informed that the Director-General had decided to reject his grievance as unfounded. However, noting that HRD’s insistence on the strict application of the rules had precipitated the current state of confrontation between the complainant and the Office management, he had decided to refer the matter to the Mediator, or an alternate facilitator if the complainant preferred, with a view to establishing a positive and forward-looking dialogue with the complainant. Moreover, as the complainant was not satisfied with his current assignment in the IAO and the inter-personal dynamics within the unit had become increasingly strained, the Director-General offered him the possibility of a new assignment in the Financial Services Department pending the identification of other possibilities in the context of the proposed dialogue. That is the impugned decision.

B. The complainant reiterates some of the arguments put forward in his first, second and third complaints. He also submits that the Organization has acted in violation of the applicable rules in dealing with his administrative situation and assignments since his transfer to Beirut in 2004. In particular, he alleges violation of Article 3.7(b) of the Staff Regulations in that he was not paid the special allowance as from 1 May 2008 when he was temporarily reassigned to the

position of Officer-in-Charge of the Investigation and Inspection Unit. He also contends that the decision to assign him to the P.4 position of Senior Internal Auditor in March 2010 with six months' retroactive effect was taken in breach of Article 1.9 of the Staff Regulations, according to which the Director-General shall assign an official to his duties subject to the terms of his appointment and "account being taken of his qualifications". In his case, no consideration was given to the fact that he had relinquished that position in February 2004 to serve in the field and that, since then, his qualifications had significantly expanded through his field service and through his assignment as Officer-in-Charge at the P.5 level.

He submits that the Organization also breached the applicable rules when dealing with his grievance. He alleges in particular that Article 13.3 of the Staff Regulations was violated because the Director of HRD copied the JAAB on a minute by which she tried to dissuade him from pursuing the grievance he had submitted to HRD. Moreover, HRD took its initial decision on his grievance on the basis of documents which had not been communicated to him. He further pleads undue delay in the internal grievance process.

The complainant contends that he was subjected to a campaign of humiliation, harassment and retaliation. Indeed, he was sent on mission on short notice, always around the time when a reply to his grievance was sent by the ILO, his work plan was not followed and his line manager pressured him verbally and in writing to look for a job outside of the ILO and spread false defamatory rumours behind his back. He adds that his treating physicians were contacted without his permission to discuss his health, that he was anonymously subscribed to receive information about job vacancies at the United Nations and that his computer was searched in January 2011. Moreover, the Office's replies to his various internal grievances contained false, hurtful and defamatory statements aimed at damaging his reputation. He alleges that the campaign of retaliation and harassment progressively escalated to a series of "constructive dismissal actions and the fabrication of documents attempting to falsely justify a summary dismissal". The Office made "vicious

intimidations”, including “insults of ‘abandonment of post’”, and subjected him to “repeated psychological aggression” putting him under pressure to resign. In addition, he alleges abuse of authority, bad faith and malice on the part of the Office together with failure to treat him with dignity. He indicates inter alia that he was misled into giving up his permanent position at headquarters to serve in the field and that he was transferred back to exactly the same position upon return but on a “temporary” basis. He was denied all promotion opportunities.

The complainant asks the Tribunal to order measures of investigation in accordance with Article 11 of its Rules on the grounds that the ILO resorted to an unlawful defence strategy, which included harassment, abuse of authority, dilatory tactics, suppression of material evidence, fraud and forgery, in its responses to his grievances. He also asks the Tribunal to “resolve [his] employment status by [his] appointment” to a position that matches his qualifications at the P.5 level with retroactive effect from 1 May 2008 and to award him material and moral damages. He further seeks punitive and exemplary damages as well as costs.

C. In its reply the ILO contends that the complaint is irreceivable insofar as the complainant reiterates or develops the arguments and claims he put forward in his first, second and third complaints. Moreover, it is time-barred insofar as his claims are based on events that occurred more than six months prior to the date on which he submitted his grievance to HRD alleging that he was being treated in a manner incompatible with his terms and conditions of employment. Indeed, Article 13.2 of the Staff Regulations provides that an official should request HRD to “review the matter within six months of the treatment complained of”. With respect to the payment of the special allowance, it indicates that the complainant was informed in writing on 10 February 2009 that it would be paid to him with retroactive effect from 1 November 2008 and did not contest this decision prior to filing his grievance under Article 13.2 of the Staff Regulations; he is therefore time-barred to challenge it now. It stresses that, to date, the complainant is still being paid the allowance despite the fact that he is

no longer entitled to it, and that the Office has not yet sought recovery of the overpaid amounts, in the hope of “finding some form of resolution to [his] situation”.

On the merits, the Organization denies that the complainant was treated in a manner incompatible with his terms and conditions of employment. In its view, the complainant has failed to prove his allegations of retaliation, harassment, abuse of authority, bad faith and malice. It submits inter alia that the position of Senior Internal Auditor, at grade P.4, matched his qualifications. It explains that the complainant contested that assignment and asked the Director of HRD what would happen if he refused it. The Director of HRD replied that the Office would be bound to consider that he had “abandoned his post”, as it would be considered as unacceptable behaviour from a staff member on a temporary assignment. According to the defendant, the claim to be appointed at grade P.5 should be denied because the complainant must win a competition or undergo a job regrading exercise in order to be promoted. It stresses that the complainant was granted an appointment without limit of time as well as a merit increment, which clearly indicate appreciation of his work. Moreover, the Office has made repeated and sincere efforts in good faith to engage in dialogue with him and deeply regrets that he has declined to meet with the HRD Legal Officer and the Mediator to discuss the situation. Lastly, it contends that the complainant’s allegation that it forged certain documents is unsubstantiated, as is the allegation that it attempted to suppress evidence material to his claims.

With respect to the payment of his special allowance, the ILO indicates that the complainant was asked to perform duties at the P.5 level only as from 1 May 2008 and that his entitlement to receive the allowance ceased in September 2009 when another staff member was assigned to the P.5 position for which he had been Officer-in-Charge.

D. In his rejoinder the complainant indicates that he has not requested the setting aside of any administrative decisions taken six months prior to the submission of his grievance to HRD; he merely

cited them as evidence of ongoing unfair treatment, harassment and constructive dismissal.

E. In its surrejoinder the Organization maintains its position.

CONSIDERATIONS

1. The background facts for this fourth complaint may be found in Judgments 3050 and 3220, on the complainant's third and second complaints respectively, which were dismissed as irreceivable, and also in Judgment 3219 that dealt with his first complaint. In Judgments 3219 and 3220 the joinder of the present complaint to those complaints was rejected.

2. An overview of the complaint presently before the Tribunal will assist in understanding the positions of the parties. There are two main, albeit highly intertwined, issues. First, the complainant alleges harassment and retaliation by the Organization after his return to headquarters from Lebanon. Second, he claims that his long period in temporary status at a P.4 grade was improper and that the Organization did not expend sufficient effort to place him in a position that matches his skills and qualifications, a P.5 post. Although the Organization did eventually give him a permanent post, it was at level P.4. The complainant claims that after filling a P.5 position above grade on a temporary status for approximately two years, although the exact period of time is debated, he is entitled to a position at P.5 that matches his demonstrated ability to work at that higher level.

3. To demonstrate the pattern of harassment and abuse of authority by the Organization, the complainant refers to his transfer to and from Lebanon, his other complaints before the Tribunal and several other decisions regarding competitions and compensation that occurred over a prolonged period of time.

4. In response to the Organization's submission that the claims relating to earlier decisions that the complainant did not challenge are

irreceivable as time-barred, the complainant clarifies that he is not seeking to have these earlier decisions overturned but instead is attempting to establish a pattern of harassment and retaliation by the Organization.

5. The complainant also raises the conduct of the Organization in relation to the handling of his grievances as further evidence of the Organization's harassment and intimidation. He argues that the Organization has improperly intimidated him in an attempt to prevent him from exercising his right to appeal.

6. The genesis of the present complaint is a harassment grievance the complainant filed with HRD in December 2009. Unsatisfied with the response to his grievance, the complainant filed a harassment grievance with the JAAB. This grievance also deals with the regularisation of his employment status.

7. It should be noted that the JAAB concluded that the grievance was not time-barred as the older events formed "part of an accumulation of events supporting his claim that he has been subject to harassment, humiliation and retaliation".

8. In general, the JAAB agreed with the complainant that he had not been treated fairly. However, it found that the complainant's field service did not entitle him to a promotion and he was given no "undertaking concerning a future promotion".

It also found that, although "the Office decisions or conduct, taken in isolation, may appear to have a valid managerial explanation or may have been [...] the result of bureaucratic inefficiency", "when taken as a whole, they reveal a growing pattern of insensitivity and inflexibility".

The JAAB gave the following examples of its concerns:

- the Office should have reacted more quickly to transfer the complainant to headquarters after the bomb explosion in Lebanon;

- the complainant’s special circumstances and injury should have been brought to the attention of and been considered by the selection panel in the competitions for which he applied; and
- the Office’s response to the reclassification request by the complainant’s responsible chief was inflexible with a strict application of the procedural rules “instead of trying to find legitimate ways to facilitate the responsible chief’s wishes”.

9. The JAAB was also critical of the decision impugned in Judgment 3219 in that the Director-General criticised the complainant for making allegations of conflict of interest, which, in the Board’s view, “called into question the right of the [complainant] to make such allegations as he deem[ed] fit to substantiate his grievance and [...] coming from a higher-ranking official, [...] could reasonably be perceived as intimidating”. Furthermore, it had recognised in its recommendation in the complainant’s first grievance that a “certain potential for conflict of interest undoubtedly existed”.

10. Regarding the complainant’s compensation claim for his injuries in Lebanon, the JAAB observed that the bomb blast occurred at 5:40 p.m. – which is well outside the working hours of the Beirut Office – yet a statement made on a document reporting progress of the claim was critical of the complainant for being at home instead of at work when the blast occurred.

11. As to the complainant’s transfer to the permanent P.4 position and the special allowance, the JAAB found that the transfer decision was communicated to the complainant “belatedly” and was done in an “inappropriate manner”. The JAAB observed that until March 2010 the complainant was unaware of the discussions relating to his administrative status that were ongoing between his line manager and HRD. The complainant was performing the duties of the above grade P.5 position, the competition at issue in Judgment 3219, until March but was informed on 5 March 2010 that he had been appointed to the P.4 position with retroactive effect to September 2009.

In these circumstances, the JAAB expressed the view that it was inappropriate for the Organization to tell the complainant in its minute of 17 March 2010 that if he refused the assignment to the P.4 position he would be viewed as “abandon[ing] [his] post”, particularly since the phrase “in administrative law has a definite meaning and very clear implications”.

12. The JAAB acknowledged that the Organization correctly applied Article 3.7(a) of the Staff Regulations dealing with the special allowance. In particular, it began at the correct date as the complainant was not transferred to a new duty station to take up the temporary post. It was also correct administrative practice to discontinue the special allowance once the post was taken up by the selected candidate in September 2009 and the post was no longer “vacant”. This being the case even though the new incumbent “only took up his functions at a later date”. However, the JAAB criticised the Office for not having explained this to the complainant and he continued to be paid the special allowance.

13. The JAAB concluded that having examined the events since the complainant’s transfer to Lebanon “it [could not] be said that the [complainant] ha[d] been the subject of a campaign of harassment, humiliation or retaliation: he was granted a permanent contract although occupying a temporary position and his allegations about rumours spread by the management of the Office [were] based on hearsay and impossible to substantiate”.

14. However, it also concluded “that the [complainant] ha[d] been treated in an unfair manner and that recently he ha[d] been subjected to intimidation”. Additionally, “[w]hen he started to present formal grievances, he increasingly met with inflexible and disproportionately harsh reactions from the management of the Office”. The JAAB opined that “what started as simple bureaucratic neglect, with no particular ill will, ha[d] progressively evolved into an intimidating conduct, in the face of the [complainant’s] relentless flow of demands and grievances”.

15. The JAAB recognised that the complainant, “by his unfounded expectations, and his own inflexibility and lack of restraint, [bore] some responsibility in the current state of confrontation between him and the Office management”. It considered that the situation was a real waste for both parties and that there was a need “to adopt a more reasonable attitude and re-establish dialogue”.

16. It recommended that the complainant’s request for a P.5 appointment be rejected as unfounded and that the Director-General should instruct HRD to adopt a more constructive attitude and to engage immediately in a discussion with the complainant directly or with the assistance of a person having the confidence of both parties and make every effort to find a way to break the existing deadlock.

17. The Director-General adopted the unanimous recommendation of the JAAB and dismissed the grievance. He rejected the JAAB’s finding of intimidation on the part of the Organization but accepted its recommendation that “both parties must attempt to re-establish a constructive dialogue with a view to finding a mutually acceptable solution to the present deadlock”. He suggested the use of the ILO Mediator or an alternative facilitator might also be used if suggested by the complainant.

18. As well, because of tension within the IAO, the complainant was offered the possibility of a new assignment in the Financial Services Department and asked if he would be interested. That decision is impugned before the Tribunal.

19. The extensive pleadings of the parties are summarised in sections B, C, D and E above and will not be repeated here. The question of receivability entails a number of observations. Decisions such as the transfers to and from Lebanon and the challenges to competitions are clearly not receivable and will only be considered to determine whether they form part of a pattern of ongoing harassment

or retaliation. The complainant's argument that he should have started receiving the special allowance earlier is out of time. As well, the case he relies on to overcome the time bar is of no assistance as the rule for special allowance payment in the Staff Regulations is clear and was not concealed.

20. Only those claims that are not time-barred or that involve allegations of ongoing harassment or unfair treatment on the part of the Organization will be considered. These include the complainant's allegations that the ILO has been harassing him by inappropriately discouraging him from filing grievances and using the internal means of redress available to him; the Organization's lack of effort to regularise his employment status and its failure to act on its alleged promise to grant him a promotion; and the challenge to his appointment to the P.4 post.

21. While organisations can be expected to live up to promises made to staff members in certain circumstances, there is no evidence to support the complainant's claim that he was promised a promotion to grade P.5. Indeed, in his pleadings there is a reference to his own statement that he "made a common sense assumption" about deserving a grade P.5 position. As to his assertion of entitlement to a P.5 post on the basis of his qualifications and skills, a decision in relation to the placement of staff is highly discretionary in nature and is subject to only limited review. As the complainant has not identified a reviewable error in this regard, the plea fails.

22. Although the complainant takes issue with the Organization's delay in finding him a permanent position, he was not prejudiced by the delay. He worked above grade at a P.5 post (from May 2008 to early 2010) with a special allowance for a significant period of time. The Organization required the position to be staffed during the competition for the post and while the selected candidate was on sick leave. Once the selected candidate returned from leave, the complainant was found a permanent P.4 position. This will be discussed in greater detail below.

23. As to the allegations of intimidation, the impugned decision in Judgment 3219 states:

“The Director-General notes the conclusion of the [Board] that your allegations of impartiality and of conflict of interest on the part of the interview panel members were not supported by evidence following a thorough review of the file and associated correspondence. It is a matter of serious concern to the Director-General that an ILO official would make such serious allegations based solely on circumstantial evidence.”

As the JAAB observed in the present case, this observation calls into question a staff member’s right to substantiate a grievance as the staff member sees fit to do. By any standard this can only be viewed as intimidation. It is even more problematic given that the JAAB did not find as stated by the Director-General that the allegations were not supported by the evidence. Rather, the JAAB found that a “certain potential for conflict of interest undoubtedly existed”.

24. A further act of intimidation by the Organization is found in the minute of 17 March 2010 in which the complainant is told that if he refused the assignment to the P.4 position he would be viewed as having “abandoned [his] post”. Viewed in the context of the Organization’s complete mishandling of the communication of the appointment and given the serious nature of an abandonment of post and the potential consequences flowing from it, this is particularly egregious conduct.

25. The Tribunal also concludes that the manner in which the Organization placed the complainant in the permanent P.4 position showed a complete disregard for the complainant’s dignity and did not reflect the respect owed by an organisation in its dealings with a staff member.

26. The complainant submits there was an inordinate delay in the internal grievance process. Given the number of matters raised in the grievance and given that the JAAB required additional information in its consideration of the issues, the time taken from the filing of the grievance to the date of the final decision was not unreasonable in the circumstances.

27. The acts of intimidation which, in the Tribunal's view, amount to harassment coupled with the Organization's failure to treat the complainant with dignity and respect entitle the complainant to moral damages in the amount of 15,000 Swiss francs and costs in the amount of 750 francs. The impugned decision will also be set aside.

DECISION

For the above reasons,

1. The decision of 6 December 2010 is set aside.
2. The ILO shall pay the complainant moral damages in the amount of 15,000 Swiss francs.
3. It shall also pay him costs in the amount of 750 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet