

118th Session

Judgment No. 3378

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms Z. S. against the United Nations Industrial Development Organization (UNIDO) on 14 April 2012 and corrected on 6 June, UNIDO's reply of 12 September, the complainant's rejoinder of 12 November, corrected on 13 November 2012, and UNIDO's surrejoinder of 25 February 2013;

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 and the pleadings may be summed up as follows:

A. Facts relevant to this case can be found in Judgments 3252 and 3253, delivered on 5 February 2014, regarding the complainant's first and second complaints.

The complainant's staff performance appraisal report for the period from 1 March to 31 December 2008 (hereinafter "the 2008 Report" or "the report") was completed in two parts during the course

of 2009. It contained separate evaluations from her two first reporting officers, Ms M. and Mr S. The evaluation by Ms M. included negative comments and two “low” ratings, while Mr S.’s evaluation contained positive comments and ratings that were either “satisfactory” or “high”. The complainant contested Ms M.’s evaluation by adding written comments to the report. Having reviewed both evaluations, the complainant’s second reporting officer, Mr P., rated the complainant’s overall performance as “needs improvement”. The complainant challenged that evaluation by adding further written comments to the report, and signed it on 18 November 2009.

On 17 December 2009 the complainant submitted a rebuttal to the 2008 Report in which she alleged, inter alia, that her appraisal had not been conducted in accordance with the Director-General’s Administrative Instruction No. 15 of 26 July 2002 concerning performance management and that the process was invalid, incomplete, and lacked objectivity. In its report of 20 July 2010 the rebuttal panel found, among other things, that UNIDO had not fully complied with the procedures set out in the Administrative Instruction. However, the panel further indicated that it did not find conclusive evidence upon which to base an amendment to the 2008 Report.

By a memorandum of 27 September 2010 the complainant was informed that the Officer-in-Charge of the Human Resources Management Branch (PSM/HRM) endorsed the rebuttal panel’s conclusion to maintain the second reporting officer’s rating of the complainant’s overall performance as “needs improvement”. Consequently, in accordance with Addendum 1 to the Director-General’s Instruction No. 10, Annex IV, the final appraisal (of 27 September 2010) would be filed in her official status file, together with the 2008 Report, her rebuttal, and the report of the rebuttal panel.

On 27 October 2010 the complainant requested the Director-General to review the decision of 27 September. By a memorandum of 25 November she was informed that the Administration concurred with the panel’s conclusion that the flaws in the performance appraisal process did not warrant any changes to her overall rating of “needs improvement” and that the Administration also concurred with the

subsequent endorsement of that conclusion by the Officer-in-Charge of PSM/HRM.

On 22 January 2011 the complainant lodged an appeal with the Joint Appeals Board (JAB) in which she requested that the 2008 Report be cancelled and removed from her official status file. She asked to be reassigned to another department and she sought material damages for medical bills she had incurred in 2008, damages for moral injury and injury to her reputation, and costs.

The JAB issued an initial report on 25 November 2011 in which it agreed with the rebuttal panel's finding that UNIDO's performance appraisal procedures had not been fully observed. It nevertheless concluded that the complainant's appeal should be rejected. By a memorandum of 9 December 2011 the Director-General asked the JAB to provide a supplemental report in order to clarify its reasoning and analysis. In particular, he requested that it identify which procedures set out in the Director-General's Administrative Instruction No. 15 were at issue in the complainant's case and how the "partial observance" of those procedures may have affected the fairness and objectivity of the complainant's appraisal. The JAB issued a revised report on 17 January 2012 in which it maintained its earlier conclusion that the complainant's appeal should be rejected.

By a memorandum of 13 February 2012, the Director-General endorsed the recommendation of the JAB and dismissed the complainant's appeal in its entirety. The complainant indicates on the complaint form that she impugns the decisions of 9 December 2011 and 13 February 2012.

B. Referring to numerous exchanges between herself and several members of the Administration, and the findings by the rebuttal panel, the complainant submits that her performance for the period from 1 March to 31 December 2008 was unfairly assessed in breach of the relevant performance appraisal procedures and the principle of good faith.

She submits that, during a meeting with the rebuttal panel, she discovered that the panel had been provided with a copy of the 2008

Report which had been amended after she signed it on 18 November 2009. Furthermore, the copy of the 2008 Report placed in her official status file had been similarly amended. She characterises UNIDO's actions in this respect as "Fraud".

Lastly, the complainant criticises the internal appeal process related to the 2008 Report. She argues that if the rebuttal panel had carried out a genuine assessment of her functions and achievements during the material time, it would have found evidence to support a decision to amend her rating in that report. In addition, she challenges the Director-General's request to the JAB to provide a supplemental report. She contends that this request was not made in accordance with UNIDO's appeal procedures or the applicable time limits. Moreover, in her view, the JAB did not carry out a proper investigation and, as a result, its conclusions were biased and incorrect.

The complainant requests oral proceedings. She asks the Tribunal to quash the "decision of the JAB report" dated 17 January 2012 endorsed by the Director-General on 13 February 2012. She seeks the cancellation and removal of the 2008 Report from her official status file. She also seeks damages for delay with respect to the Director-General's final decision, compensation for changes made to the 2008 Report after 18 November 2009, damages for injury to her reputation and career, material damages for medical expenses incurred during 2008, moral damages, and costs.

C. In its reply UNIDO contends that, as the complainant failed to submit, within four months, a claim for compensation in the event of illness pursuant to Appendix D to the Staff Rules, her claims for medical expenses are irreceivable for failure to exhaust the internal means of redress.

On the merits, referring to the Tribunal's case law, UNIDO points out that an organisation is given the widest discretion when assessing the performance of its staff. A decision in this respect will stand unless it was taken without authority, or in breach of a rule or form of procedure, or was based on a mistake of fact or law or if some

essential fact was overlooked or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority. UNIDO contends that the complainant has failed to allege any significant irregularities in the performance appraisal process leading to the 2008 Report.

UNIDO asserts that it complied with the Director-General's Administrative Instruction No. 15 and related performance appraisal procedures in all material respects. UNIDO officials acted in good faith when they signed and dated the 2008 Report. In its view, changes that were made to the report after the complainant signed it were no more than immaterial clerical corrections which do not affect the content of the appraisal or the fairness of the appraisal process. Thus, the complainant's claims in this respect are unfounded.

UNIDO characterises the complainant's allegations of procedural errors and bad faith in the internal review processes as vague and unfounded. It submits that the rebuttal panel conducted a thorough and objective investigation in accordance with the applicable rules. Also, there was no flaw in the JAB process. It was completed within a reasonable period of time and the JAB's revised report complied with the Director-General's request and was consistent with its first report. The Director-General's request for a supplemental report was consistent with Staff Regulation 12.1 and he issued his interim and final decisions within the applicable time limits. UNIDO asserts that it acted in good faith and in full compliance with the applicable rules during the internal review procedures.

D. In her rejoinder the complainant presses her pleas. With respect to her claim for medical expenses, she contends that on two occasions she requested information as to how she could make such a claim pursuant to Appendix D to the Staff Rules, but she was subjected to pressure and harassment in her working environment as a result of these requests.

E. In its surrejoinder UNIDO maintains its position in full.

CONSIDERATIONS

1. Much of the background to this complaint is found in Judgments 3252 and 3253. It is sufficient to recount the following facts to complete the general background. On 22 January 2011, the complainant lodged an internal appeal with the JAB. She sought the cancellation and removal of her 2008 staff performance appraisal report (“the 2008 Report”) covering the period from 1 March to 31 December 2008 from her official status file. In addition, she sought other relief that, to the extent relevant, will be discussed later. In a report dated 25 November 2011, the JAB concluded that the appeal should be rejected though it made a recommendation about the establishment of a conflict resolution mechanism within UNIDO to encourage dialogue between a staff member and manager during the performance evaluation process. In a memorandum of 9 December 2011, the Director-General requested, in substance, that the JAB identify in what respects the formal procedures for the appraisal of staff performance had and had not been complied with in relation to the complainant. In a revised report dated 17 January 2012, the JAB repeated its conclusion and recommendation referred to earlier. On 13 February 2012, the Director-General dismissed the appeal in its entirety. This is the impugned decision together with the “decision” of 9 December 2011.

2. In relation to the specific events that led to the creation of the 2008 Report and its subsequent review by a rebuttal panel, the following can be noted. The complainant commenced in a new position in March 2008 and that was the beginning of the period to which the 2008 Report related. At that time her supervisor became Ms M. From June 2008 the complainant also worked under the supervision of Mr S. For most of the reporting period between March and December 2008, the second reporting officer was Mr P.

3. During 2009, various events occurred which resulted in the 2008 Report in its final form, though a number of versions of that report existed because of those events. On 17 December 2009 the

complainant submitted a rebuttal in relation to the 2008 Report. The rebuttal panel reported on 20 July 2010. It noted in its report that it had conducted a series of lengthy interviews with, amongst others, the complainant, Ms M. and Mr S. In the panel's description of the background it noted that the appraisal by Ms M. included two "low" marks with comments that the staff member's performance "needs improvement". The panel also noted that the appraisal by Mr S. was very good. The process of performance management within UNIDO was, at the relevant time, governed by the Director-General's Administrative Instruction No. 15 of 26 July 2002. In its report and immediately preceding the specific references to the comments of Ms M. and Mr S., the panel noted that "according to established best practices reflecting the [Director-General's Administrative Instruction] No. 15, the officers should have prepared a consolidated [performance appraisal], however in this case parts I-IV of the [performance appraisal] were prepared separately by each officer".

4. Under the heading "Findings" the panel set out, in three paragraphs, a number of observations and conclusions. The first was that the formal procedure for carrying out the performance appraisal process was observed only partially and that in particular several objectives and procedures defined in paragraphs 4, 5, 6 and 7 of the Director-General's Administrative Instruction No. 15 "ha[d] not been fully abided by". The second paragraph observed that the lack of continuous dialogue between the supervisors and the complainant may have prevented an environment of continuous learning and contributed to an "un-virtuous circle of misunderstandings". The third paragraph read:

"While recognizing that the evaluation process was only partially observed, the Panel could not find conclusive evidence that the end result of the appraisal would have been different had the process been completely followed. However, the Panel could also not exclude that, *inter alia*, had the two supervisors provided a consolidated appraisal of [the complainant's] performance, the result might have been different."

5. Under the heading "Conclusions and Recommendations" the panel noted that while the complainant's rebuttal appeared justified

bearing in mind that due process was observed only partially, the panel “did not find conclusive evidence to substantiate a change in the appraisal of the [complainant’s] performance”. It also accepted that as a matter of perception, the 2008 Report might not be viewed as accurate, factual or realistic. This was a reference to paragraph 11 of the Director-General’s Administrative Instruction No. 15 which explains that a performance appraisal system is relevant and useful when the assessment is accurate, factual and realistic and is perceived to be so. The remarks by the panel were not intended to reflect a view that, as a matter of fact, the assessment was not accurate, factual or realistic.

6. Against this background, it is necessary to consider the pleas of the parties. However it should be recalled that in cases such as the present in which performance reports are challenged, the Tribunal has recognised that such reports are discretionary and the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence (see Judgment 3228, consideration 3). That said the Tribunal insists upon observance of procedures established to evaluate performance (see Judgments 3252, consideration 8, and 2916, consideration 12).

7. The complainant represents herself and neither her brief nor her rejoinder identifies with particular clarity the criticisms she makes of the procedures that led to the 2008 Report and of the form of the report itself. She makes allegations of fraud (concerning the time and circumstances in which the report was compiled and was signed by others) and lack of good faith. For reasons which emerge shortly, it is unnecessary to address these allegations beyond noting that the complainant has not proved fraud (an allegation requiring clear proof) and UNIDO’s account of events surrounding the creation of the 2008 Report in its reply and surrejoinder provides a plausible and innocent explanation of the events that the complainant viewed as fraudulent or as evidence of bad faith.

8. There is a significant lack of consistency in the finding in the third paragraph of the rebuttal panel's findings referred to above. It can be recalled that the panel said it could not find "conclusive" evidence that the appraisal would have been different if other procedures had been followed. The use of the word "conclusive" may have been used, quite possibly inadvertently, to discount the possibility that there was material or evidence before the panel that pointed in the opposite direction. That is to say, there was material or evidence that suggested the ultimate appraisal might have been different. Yet that is the substance of what the panel said in the final sentence in the passage quoted earlier. Had the supervisors provided a consolidated appraisal, so the panel opined, the result might have been different. This was said in a context where the panel had earlier recognised in its report that established best practice should have resulted in the two supervisors preparing a consolidated report.

9. The JAB did not address this anomaly, at least expressly. It simply noted in its revised report of 17 January 2012 that "in general" the "formally" established procedures for carrying out the staff performance appraisal were duly followed. It also noted that "[t]he deviations from this process as reflected in the [r]ebuttal [p]anel's [r]eport would not change the final rating of the [2008 report]".

10. The Tribunal is satisfied, having regard to the rebuttal panel's finding that best practice had not been followed and that this failure may have resulted in a different appraisal of the complainant's performance, this case is of the character that would warrant a remedy in the Tribunal in light of the principles established by the Tribunal discussed earlier.

11. The relief sought by the complainant, properly understood, is the quashing of the impugned decision of the Director-General of 13 February 2012, the cancellation and removal of the 2008 Report from her official status file, compensation for the delay in the Director-General taking his decision in the amount of 15,000 euros,

compensation (in the sum of two years' salary) for the "fraudulent" changes made to the 2008 Report after it was signed on 18 November 2009, compensation for hampering her career in an amount of 15,000 euros and compensation for all medical bills. The complainant also seeks compensation for moral and reputational damage for unfair treatment in the sum of 50,000 euros together with legal costs in the amount of 4,000 euros.

12. It is necessary to state that notwithstanding the Tribunal's conclusion about the flaw in the appraisal process just discussed, the Tribunal is satisfied that UNIDO has gone to great lengths to mollify the complainant who, as mentioned in Judgment 3252, consideration 10, appears to have a predisposition to appeal against any decision with which she is not pleased. However in view of the conclusion reached, the complainant is entitled to an order that the 2008 Report be removed from her official status file.

13. In relation to the complainant's career, it is true that in 2008 the complainant's contract was extended only for one year (from 15 July 2008 to 14 July 2009) and her performance increment for 2008 was withheld. However that was not a result of the flawed 2008 Report that was not finalised until, at the earliest, September 2009. The same cannot be said with absolute certainty of the decision in June 2009 and affirmed in September 2009 to again extend her contract only by one year from 15 July 2009 to 14 July 2010. However in July 2010 the Director-General granted the complainant a three-year fixed-term contract from 15 July 2010 to 14 July 2013 based on the assessment that her performance had improved (as manifest by her 2009 performance appraisal report). Viewed holistically, the complainant has not established that her career was adversely affected in a way that would warrant an order for compensation of the type she seeks.

14. In relation to the claim for compensation for fraud, no fraud has been proved. In relation to the claim for medical expenses, the Tribunal accepts the contention of UNIDO that the complainant has

not exhausted her internal remedies on this issue. The Tribunal does not accept that there was unjustifiable delay in resolving the complainant's challenge to the 2008 Report. While errors were made in the completion of the 2008 Report, they do not, viewed objectively, amount to unfair treatment of the complainant. Accordingly no compensation should be awarded for unfair treatment. The complainant has succeeded but only in part and she is self-represented. In these circumstances, an award of only 500 euros for costs should be made.

DECISION

For the above reasons,

1. The complainant's performance appraisal report covering the period 1 March to 31 December 2008 shall be removed from her official status file.
2. UNIDO shall pay the complainant 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE
DRAŽEN PETROVIĆ