

**119th Session**

**Judgment No. 3399**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. E. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 July 2012, UNESCO's reply of 30 October, the complainant's rejoinder of 11 December 2012 and UNESCO's surrejoinder dated 7 March 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, 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 joined UNESCO in June 2006 as a Programme Specialist at grade P-3. In June 2011 another staff member of UNESCO, Ms S., filed a harassment complaint with the Ethics Adviser against the complainant. After having been interviewed by the Ethics Adviser in connection with Ms S.'s allegations, the complainant filed a complaint of harassment against him, objecting to the way in which he had conducted that interview. In these circumstances, the Deputy Director-General decided that the complaint against Ms S. should be examined by the Ethics Officer, and not the Ethics Adviser.

On 14 November 2011 the Ethics Officer reported to the Director-General that there was sufficient evidence to conclude that Ms S. had been subjected to moral harassment by the complainant. He therefore recommended that the case be pursued in accordance with the disciplinary procedure set out in the Human Resources Manual.

The Director-General endorsed that recommendation the following day, and the complainant was invited on 12 December to reply to the charges made against her. By a memorandum of 23 February 2012 she was informed of the Director-General's decision to impose on her a written censure.

In the meantime, in January 2012 the complainant filed a harassment complaint with the Director-General against the Ethics Officer alleging that he had behaved unethically while investigating the harassment complaint filed by Ms S. The complaint was referred to the Internal Oversight Service (IOS) for investigation. On 2 February IOS submitted its report in which the investigator concluded that there had been no misconduct on the part of the Ethics Officer. By a memorandum of 25 April 2012 the complainant was informed that, based on the IOS report, the Director-General found no prima facie evidence of harassment on the part of the Ethics Officer warranting further investigation and therefore had decided to close the case.

On 14 June 2012 the complainant wrote to the Office of the Director-General indicating that she disagreed with the decisions of 23 February and 25 April and wished to file a complaint directly with the Tribunal. She added that, if she received no reply from him by 28 June, she would proceed to the Tribunal. Four days later the complainant was informed that she should comply with applicable internal procedure and that the first step was to file a protest with the Director-General. On 18 June the complainant wrote directly to the Director-General reiterating her request for a waiver of the internal appeal procedure and, on 21 June, she filed a protest asking the Director-General to review the IOS investigation report. Having received no reply from her she filed her complaint with the Tribunal on 23 July 2012. She indicates on the complaint form that she is impugning the decision of 25 April 2012.

B. The complainant submits that the Director-General did not reply to her message of 18 June or to her protest of 21 June. Her silence should be construed as an authorisation to appeal directly to the Tribunal. She filed her complaint directly with the Tribunal against the decision of

25 April 2012, in order to comply with the requirement to file a complaint within 90 days from the notification of the contested decision. She adds that she received the letter of 23 February 2012 imposing the written censure only on 10 April 2012.

On the merits, she submits that the Ethics Officer investigated the harassment complaint filed against her despite the fact that no rule provided for that possibility; it was the responsibility of the Ethics Adviser to do so. She also alleges that she was denied due process and that she suffered unequal treatment because she was not heard with respect to the harassment complaint filed against her. Moreover, she did not receive a copy of the IOS report concerning the harassment complaint she filed against the Ethics Officer.

She asks the Tribunal to quash the decision of 23 February 2012, and the earlier decision of the Director-General of 15 November 2011, which “was recorded on the memorandum of 14 November 2011”. She also asks the Tribunal to set aside the decision of 25 April 2012, and to award her material and moral damages as well as costs.

C. In its reply UNESCO contends that the complaint is irreceivable for failure to exhaust internal remedies as the complainant did not file an internal appeal against the decisions of 23 February and 25 April 2012. The Director-General did not agree to her request to waive the internal appeal procedure. The absence of reply to her request to go directly to the Tribunal should be construed as a refusal.

On the merits, UNESCO explains that the Deputy Director-General, who according to item 18.2, paragraph 32, of the Human Resources Manual, is responsible for handling complaints involving the Ethics Adviser, decided that the Ethics Officer should examine the harassment complaint filed against the complainant to avoid any possible conflict of interest, given that the complainant had earlier filed a complaint of harassment against the Ethics Adviser. It considers that she has not demonstrated that the Ethics Officer’s analysis of the harassment complaint filed against her lacked thoroughness and objectivity. It denies any violation of due process asserting that the complainant was provided with the opportunity to respond to Ms S.’s allegations.

It explains that she was not provided with a copy of the IOS report concerning the harassment complaint she filed against the Ethics Officer because she did not ask for it. Lastly, it submits that her claims for material and moral damages, apart from being unsubstantiated, are new claims and should therefore be considered irreceivable.

D. In her rejoinder the complainant alleges bad faith on the part of UNESCO, stressing that she has received no reply to her protest of 21 June 2012, but that her contract was not renewed beyond its expiry date of 9 December 2012.

E. In its surrejoinder UNESCO denies any bad faith. It states that the complainant's contract was not renewed because of her unsatisfactory performance.

#### CONSIDERATIONS

1. The Organization raises irreceivability as a threshold issue. In her first claim in her complaint, the complainant asks the Tribunal to quash the memorandum dated 14 November 2011, in which the Ethics Officer, who investigated the harassment complaint that was filed against her in June 2011, recommended the imposition of disciplinary proceedings against her to the Director-General. In the second claim, the complainant seeks to set aside the decision which the Director-General made on 15 November 2011 endorsing the recommendation. The complainant further seeks to set aside the decision of 23 February 2012 by which the Director-General imposed the written censure upon her. In the third claim, the complainant challenges the decision of 25 April 2012 in which the Director-General decided to close the case as there was no *prima facie* evidence of harassment, which warranted further investigation.

2. The complainant's first claim will be dismissed as irreceivable, first, because as provided by Article VII, paragraph 1, of the Tribunal's Statute, the complainant could not validly challenge the decision of the Ethics Officer, contained in the memorandum dated 14 November 2011, as it was not a final decision. The final decision would have been that

of the Director-General taken on the recommendations of the Appeals Board. In the second place, the complainant did not pursue the internal appeal procedure against the Director-General's decision of 15 November 2011 as Article 7 of Annex A to the Staff Regulations and Staff Rules requires. She had accordingly failed to exhaust her internal remedies as Article VII, paragraph 1, of the Tribunal's Statute requires. The matter does not come within any of the exceptions from this rule that the Tribunal's case law recognizes. The complainant did not cure the failure to exhaust her internal remedies by obtaining a waiver from the Director-General to file the challenge directly to the Tribunal pursuant to Staff Rule 111.2(b) (see, for example, Judgment 3190, under 9). The complainant was not entitled to infer the Director-General's waiver from the absence of a reply to her request (see, for example, Judgment 458, under 3).

3. Insofar as the complainant seeks, in her second claim for relief, the quashing of the decision of 23 February 2012 by which the Director-General imposed the written censure upon her, that claim is irreceivable for the same reasons as the first claim is irreceivable.

4. The complainant's third claim challenges a final administrative decision. It is common ground that she received that decision on 25 April 2012, two days after she returned to the office from certified sick leave. Article 7(a) of the Statutes of the Appeals Board requires an internal appeal to be filed within one month of the date of receipt of the decision. The complainant did not do so. It is firm case law that a staff member is not allowed on her or his own initiative to evade the requirement that internal means of redress must be exhausted before a complaint is filed before the Tribunal (see Judgment 3190, under 9, and the case law referred to therein). The third claim is therefore irreceivable.

In the foregoing premises, the complaint as a whole is irreceivable and must be dismissed in its entirety.

## DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

CLAUDE ROUILLER

HUGH A. RAWLINS

DRAŽEN PETROVIĆ