

**S. (No. 5)**

*v.*

**UNIDO**

**124th Session**

**Judgment No. 3842**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Ms Z. S. against the United Nations Industrial Development Organization (UNIDO) on 25 July 2014 and corrected on 11 November 2014, UNIDO's reply of 9 March 2015, the complainant's rejoinder of 8 June, corrected on 3 July, and UNIDO's surrejoinder of 14 October 2015;

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

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges her 2007 performance appraisal report.

Facts relevant to this case can be found in Judgments 3252 and 3253, delivered in public on 5 February 2014, concerning the complainant's first and second complaints respectively. Suffice it to recall that the complainant's performance appraisal report for the period from 1 January to 31 October 2007 contained negative ratings and comments from her two first reporting officers and her overall performance was rated as "needs improvement" by her second reporting officer. On the basis of this appraisal the complainant's contract was extended for only one year and her performance increment, which was due on 1 August 2008, was withheld. The complainant challenged her 2007 performance appraisal without success, first by means of a rebuttal, and then by

submitting a request for review to the Director-General. Following the rejection of that request, she brought the matter before the Joint Appeals Board (JAB), which recommended that the appeal be dismissed as time-barred. The Director-General's decision of 30 May 2011 to accept that recommendation was challenged by the complainant in her second complaint before the Tribunal. In Judgment 3253 the Tribunal set aside the decision of 30 May 2011 and remitted the matter to the JAB to hear and determine the complainant's appeal on the merits. It also awarded the complainant damages and costs.

Following the public delivery of Judgment 3253 a new JAB panel was constituted to consider the complainant's appeal. In its report of 2 April 2014 the JAB reviewed the complainant's contentions. It endorsed the rebuttal panel's conclusions that no performance-related meetings had taken place in order to identify emerging problems and allow the complainant sufficient time during the performance cycle for improvement. It further held that the rebuttal panel had not committed any procedural errors. In addition, the JAB found that the decision to withhold the complainant's salary increment had been taken in line with the Staff Rules, that her 2007 performance appraisal report should not be cancelled or removed from her official status file, and that the decision to grant an extension of her contract for only one year was justified. Lastly, having asked the complainant to provide additional information regarding her allegations of mobbing and harassment, the JAB reviewed that information and found that there was no convincing evidence to support those allegations. The JAB concluded that the complainant's claims were not justified and her contentions were unfounded, and that the Director-General's decision of 3 February 2009 (whereby he endorsed two "low" ratings contained in her performance appraisal, as well as the overall rating of "needs improvement") should be maintained. By a letter of 28 April 2014 the complainant was informed that the Director-General had decided to endorse the conclusions and recommendations of the JAB and to dismiss her appeal in its entirety. That is the impugned decision.

As a preliminary matter the complainant seeks oral proceedings. She asks the Tribunal to set aside the impugned decision and the decision of 30 May 2011 to the extent that the former Director-General dismissed her appeal on the merits. She seeks the cancellation and removal of her 2007 performance appraisal report from her personnel files, the retroactive award of the step increment that was withheld as from 1 August 2008, with interest, and the cancellation of her 2006 performance appraisal report. She claims compensation for unfair treatment, mobbing and harassment, damage to her career and professional reputation, and she seeks moral damages for psychological injury. She also claims costs.

UNIDO submits that the complainant's claims in relation to her 2006 performance appraisal report, her claims for compensation for damage to her career and reputation, and her claim for moral damages are irreceivable for failure to exhaust internal remedies. It asks the Tribunal to dismiss the complaint in its entirety.

#### CONSIDERATIONS

1. Much of the relevant background to the present case is found in Judgments 3252 and 3253 that dealt with the complainant's first and second complaints respectively. In Judgment 3253 the Tribunal set aside a decision of the Director-General accepting a recommendation of the JAB to dismiss the complainant's internal appeal against a contested 2007 performance appraisal report (the 2007 Report) on the basis that it was irreceivable. The matter was remitted to the JAB by the Tribunal to hear the appeal concerning the 2007 Report on the merits. In Judgment 3252 the Tribunal set aside a decision placing the complainant on a one-year contract extension commencing 15 July 2009. It did so because that decision was based, in part, on the contested 2007 Report in circumstances where the challenge to that report had not been considered on its merits. Mention should also be made of Judgment 3378 concerning the complainant's third complaint, in which she successfully impugned a decision dismissing her internal appeal challenging her 2008 staff performance appraisal report.

2. The complainant requests oral proceedings. However, the briefs and the evidence submitted by the parties are sufficient to enable the Tribunal to reach an informed decision. The complainant's application for oral proceedings is therefore rejected.

3. After the public delivery of Judgment 3253, the JAB considered the merits of the complainant's internal appeal against the 2007 Report and, in a report dated 2 April 2014, recommended, in effect, that the appeal be dismissed in its entirety. The Director-General accepted this recommendation and this was communicated to the complainant by a letter dated 28 April 2014. This is the impugned decision.

4. The grounds on which the complainant seeks to impugn the decision of 28 April 2014 are obscured by the fact that she incorporates by reference, and relies on, the pleas advanced in her second complaint. This is not an acceptable way to articulate arguments advanced in subsequent proceedings (see, for example, Judgments 3692, consideration 4, and 3434, consideration 5). Nonetheless the Tribunal will endeavour to glean those arguments from the material and to address them.

5. However, as a preliminary matter, it is necessary to deal with issues of receivability raised by UNIDO about aspects of the complaint. The complainant seeks to challenge in these proceedings her 2006 performance appraisal report (2006 Report). UNIDO argues, correctly, that this report was not the subject of the internal appeal that led to the impugned decision. Its tender in the internal appeal as a piece of evidence would not have had the result that the appeal itself should be treated as having been against both the 2006 Report and the 2007 Report. The complainant, in relation to the 2006 Report, did not exhaust the internal means of redress and her complaint, insofar as it challenges that report, is irreceivable.

6. The complainant seeks, in the present proceedings, damages on various bases which UNIDO contends are irreceivable because, as UNIDO submits, they were not raised in the internal appeal. As these claims are unfounded, it is unnecessary to deal with the question of receivability.

7. The principles governing the Tribunal's consideration of challenges to staff performance appraisal reports are well settled. Indeed, they are discussed in Judgment 3378, consideration 6. The Tribunal recognises that such reports are discretionary and 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 drawn from the evidence. Nonetheless the Tribunal insists upon observance of procedures established to evaluate performance.

8. In the present case, the 2007 Report, as it concerns the assessments by the complainant's two first reporting officers, mostly assessed the complainant's performance as satisfactory. Each of her levels of contribution in qualitative terms, contribution in quantitative terms, ability to work independently, initiative, client orientation and problem-solving were assessed as satisfactory. However, her levels of ability to work in teams and adaptability/flexibility were assessed as low. The reason provided for these latter assessments was explained by her first reporting officers as "Staff member does not respond in a constructive manner to suggestions for improvements and/or suggestions related to organization of work". Implicit in this observation is that discussions on this topic had taken place. In the complainant's comments on the 2007 Report, she challenged that there had been discussions about her "ability to work in teams".

9. In due course, and in accordance with a procedure contemplated by Staff Rule 104.08(a) together with Appendix M to the Staff Rules, the complainant submitted a rebuttal that was considered by a panel of investigation (the Panel). The Panel produced a report dated 13 January 2009. Of some significance, the Panel itself interviewed the complainant, her two first reporting officers and her second reporting officer. The Panel's first finding in the report was that there had been a failure in the "2007 staff performance appraisal exercise", to follow formal procedures in three respects. The immediate source of these requirements was the Director-General's Administrative Instruction No. 15 of 26 July 2002 concerning performance management. The first procedural flaw was that there had been, it appears, a failure to set

objectives at the beginning of the year and to make an evaluation according to the set goals. The second was that during the course of the year there had been no performance-related meetings to ensure timely information concerning recognised and/or potential problems and thereby allowing during the year for improvement to take place. The third was that there had been no meeting between the supervisor(s) and the complainant before making the final rating.

10. However it is to be recalled that the fundamental difficulty, as perceived by her first reporting officers, concerned the complainant's attitude and her inability to work in a team. On this issue, the Panel made express and particular findings about the extent to which this was discussed with the complainant and the veracity of the criticisms about her. The Panel said "the [complainant's] behaviour in terms of not accepting comments and constructive criticisms towards improving her attitude was confirmed by her direct supervisor, her Unit Chief, the Branch Director and by HRM. During the interview with [the complainant] the Panel also felt that this might be the case" and later "[the complainant] seems to have difficulties working in a team". The Panel concluded:

"After a thorough investigation of all available sources, the Panel concluded that the rating was done on the basis of [the complainant's] performance and work-related behavior during the reporting period. The detailed ratings given in part IV [of the 2007 Report] are closely interlinked with the written comments in the same part and are related to the ability to work in teams with the required flexibility.

The rebuttal is therefore not justified and not supported by the findings of the investigation. The Panel considers that the evaluations by the First Reporting Officers and the final rating by the Second Reporting Officer are justified and should therefore remain **unchanged**."

11. Following the public delivery of Judgment 3253 the JAB dealt with an internal appeal lodged by the complainant on 9 July 2009 in a report dated 2 April 2014. That appeal was against an administrative decision of 3 February 2009 endorsing the conclusions of the Panel. The JAB acknowledged the conclusions of the Panel about procedural flaws involving the assessment of the complainant's performance leading to the 2007 Report, though it only referred to one of them (the absence

of performance-related meetings). The JAB did not discern any flaws in the procedure of the Panel. It also reviewed extensive material provided by the complainant in support of her allegation of mobbing and harassment. It concluded there was no convincing evidence of mobbing or harassment.

12. While some of the comments of the JAB are contestable, it was correct to say there had been no errors in the procedures of the Panel. The Panel's report indicates that it undertook a sensitive and thoughtful analysis of the 2007 Report that involved its own investigation of the manner in which the 2007 Report had been prepared and the substance of the criticisms of the complainant's performance. It is true the Panel identified some procedural flaws in the way the complainant's performance had been dealt with during the reporting period and how the 2007 Report had been compiled. However, because the Panel undertook its own investigation, which included interviewing the complainant and her two first reporting officers, it was well placed to express its views about the 2007 Report and the conclusions reflected in it. Quite clearly it was satisfied that there had been discussions between the complainant and her supervisors about the perceived essential failings of the complainant. In the result, procedural flaws identified by the Panel and repeated, up to a point, by the JAB were immaterial. Moreover the complainant has not made out that, as a matter of fact, the JAB's conclusion about her mobbing and harassment allegations, is incorrect. The Director-General was entitled to dismiss the internal appeal and accept the recommendation that the 2007 Report be maintained.

13. The complaint should be dismissed as unfounded.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 18 May 2017, Mr Giuseppe Barbagallo, Vice-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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ