

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

R.
v.
UNESCO

127th Session

Judgment No. 4062

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 December 2016 and corrected on 21 December 2016, UNESCO's reply of 10 April 2017, the complainant's rejoinder of 11 May and UNESCO's surrejoinder of 28 August 2017;

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 may be summed up as follows:

The complainant challenges the decision not to renew her fixed-term contract on the grounds of unsatisfactory performance.

Having worked for UNESCO as a supernumerary or under temporary contracts, on 1 January 2010 the complainant was granted a fixed-term contract which was subsequently renewed several times. After being assigned to a G-4 post in the Culture Sector, on 18 April 2011 she was transferred to the Intangible Cultural Heritage Section within the same Sector, under the supervision of Ms L.-W. In the complainant's performance assessment report for the 2010-2011 biennium, Ms L.-W. considered that she had only partially met expectations, which the complainant disputed. A draft performance improvement plan for the

period from 1 June to 1 December 2012 was then prepared, but it was not finalized. On 11 July 2012, having heard the complainant and Ms L.-W., the Review Panel, which is responsible for reviewing the quality, coherence and impartiality of performance assessment reports, concluded that the assessment was justified and that a three-month performance improvement plan should be established. It called on the complainant to “continue to make an effort of concentration and attention”^{*} and on the supervisor to “provide frequent and more personalized coaching”^{*}.

As Ms L.-W. had taken leave of absence for health reasons, Mr S. prepared the plan, which covered the period from 28 March to 27 June 2013, and ensured its implementation. In his overall evaluation dated 26 November 2013, Mr S. stated that the work carried out by the complainant was “in general, too imprecise to meet the expectations linked to the post”. On 12 December 2013 the complainant expressed her disagreement with that assessment, emphasizing, in particular, the lack of support provided to her in implementing the plan.

On 5 January 2014 Mr S. indicated that, despite the implementation of the plan, the complainant’s performance for the 2012-2013 biennium had “unfortunately not met expectations”^{*} and gave her the rating “Does not meet expectations”. On 17 February 2014 the Assistant Director-General for Culture recommended terminating the complainant’s appointment on grounds of unsatisfactory performance.

The Review Panel having endorsed the assessment of 5 January, the complainant initiated a contestation procedure to challenge her performance assessment report. The Reports Board heard the parties at its meeting on 23 July 2014. Following its deliberations, it noted that during her career, the complainant had demonstrated “a number of qualities”^{*} and that if, during her last assignment, she had not performed her tasks well, this was because she had often not understood them. Considering, however, that this situation did not justify terminating her appointment, the Board unanimously recommended not to amend her assessment, but to transfer the complainant to another service.

^{*} Registry’s translation.

By a memorandum dated 2 October 2014, the Director-General informed the complainant that she had decided to maintain the disputed performance assessment report and not to renew her appointment at its expiry on 31 October 2014, but that, exceptionally, she would grant her a sum equivalent to three months' notice.

On 28 October the complainant challenged that decision by means of a protest, which was dismissed by a memorandum of 14 November. On 25 November 2014 she submitted a notice of appeal, followed by a detailed appeal on 19 March 2015. After hearing the parties, the Appeals Board issued its opinion on 9 May 2016. It expressed regret at the lack of communication between the complainant and her supervisors and at the fact that the complainant had not received the training and support she had needed, and recommended that the decision of 2 October 2014 be annulled and the complainant transferred to a new post. In a letter dated 2 August 2016, which constitutes the impugned decision, the complainant was informed of the decision of the Director-General to reject the recommendations of the Appeals Board and to confirm the decision of 2 October 2014.

The complainant asks the Tribunal to set aside the impugned decision and to order the payment with interest of all salary and allowances that she considers due for the period between 1 November 2014 and 13 November 2023, when she would have reached retirement age. In addition, she seeks compensation in the amount of 50,000 euros for moral injury and costs in the amount of 8,000 euros.

UNESCO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 2 August 2016 whereby the Director-General of UNESCO dismissed her appeal against the decision taken by the Director-General on 2 October 2014, and confirmed on 14 November 2014, to maintain the negative performance assessment that she had received for the 2012-2013 biennium and not to renew her fixed-term contract on the grounds of unsatisfactory performance.

2. Of the many pleas entered by the complainant in support of her complaint, one must be accepted at the outset, namely that the aforementioned decision dated 2 August 2016 is insufficiently substantiated.

3. The Tribunal has consistently held that the executive head of an international organization, when taking a decision on an internal appeal that departs from the recommendations made by the appeals body, to the detriment of the employee concerned, must adequately state the reasons for not following those recommendations (see, for example, Judgments 2339, consideration 5, 2699, consideration 24, 3208, consideration 11, 3695, consideration 9, or 3830, considerations 6 and 8).

4. In this case, the Appeals Board, in its opinion of 9 May 2016, had recommended that the Director-General annul the 2 October 2014 decision not to renew the complainant's appointment and, rather than terminate the appointment, transfer her to a different post within the Organization.

These recommendations, as stated in the opinion, were essentially based on the fact that "the Appeals Board [had] reache[d] the conclusion that there was a clear lack of communication between the [complainant] and her supervisors". The Board emphasised that, due to this lack of communication, the complainant "did not get the [necessary] training and support when she needed it", whereas "[i]t would have helped her in [addressing] her shortcomings".

This finding of the Appeals Board in fact echoed the earlier unanimous opinion of the Reports Board. Indeed, this other appeals body, which is competent to review performance assessments, had already noted that there were serious communication issues in the Section to which the complainant was assigned, and had observed that the complainant, who had, up until then, shown professional skills that had been recognised in the various posts she had held within UNESCO, could no doubt provide satisfactory services in another post. Although it proposed to maintain the negative assessment of the complainant on

the grounds that she did not meet the expectations of her supervisors, the Reports Board had likewise recommended not to terminate the complainant's appointment but rather to transfer her to another service.

However, concerning the observations of the Appeals Board on that matter, the letter informing the complainant of the decision of 2 August 2016 only states that:

“In regard to the alleged lack of communication with your supervisor, the Director-General maintains, as did the Reports Board, that your rating “*Does not meet expectations*” for the 2012-2013 period was given in accordance with applicable rules on performance assessments.

Therefore, and in accordance with the applicable texts on performance assessments, the Director-General confirms her decision of 2 October 2014 not to renew your fixed-term appointment on grounds of unsatisfactory performance”^{*}.

Contrary to the impression conveyed by its opening line, this reasoning does not, in fact, in any way address the consequences of the issue raised by the Appeals Board, namely that in this case the working environment in which the complainant was performing her duties was marked by a clear lack of communication with her supervisors. Simply stating in general terms that the assessment of the complainant had been carried out in accordance with the applicable rules is by no means a relevant answer to the observations expressed in this regard by the appeals body in its aforementioned opinion. The Tribunal therefore considers that, in her decision of 2 August 2016, the Director-General did not adequately state the reasons for not following the recommendation of the Appeals Board to annul the decision of 2 October 2014 and, rather than not renew the complainant's contract, to transfer her to another post.

This flaw alone constitutes sufficient grounds to set aside the impugned decision of 2 August 2016.

5. However, the lawfulness of the decision of 2 October 2014, which, in itself, is not affected by the above considerations, must also be examined.

^{*} Registry's translation.

6. The Tribunal has consistently held that international organizations have wide discretion in deciding whether or not to renew fixed-term contracts. Such decisions are therefore subject to only limited review by the Tribunal, which will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1262, consideration 4, 3586, consideration 6, 3679, consideration 10, 3743, consideration 2, or 3932, consideration 21).

7. One of the pleas raised by the complainant against the decision not to renew her contract and which falls within the scope of that limited review since it involves essential facts being overlooked, is decisive in ruling on the lawfulness of this decision.

The plea in question – which is, moreover, closely related to the aforementioned flaw found in the decision of 2 August 2016, which was not properly reasoned – is that the Director-General overlooked the very unfavourable circumstances under which the complainant performed her duties.

8. The evidence, and in particular the hearing before the Reports Board and deliberations of the Appeals Board, as presented in the respective opinions of these two collegial bodies, shows that at the material time there were serious internal communication shortcomings in the Intangible Cultural Heritage Section, to which the complainant was assigned.

It appears, and the evidence also shows, that this situation was to a large extent due to the great number of responsibilities and particularly complex tasks that had been assigned to that Section. This had in fact prompted the complainant's direct supervisor, on 20 March 2013, to report his superiors on the Section's "[i]ntolerable workload"* in a memorandum especially intended for that purpose, in which he

* Registry's translation.

emphasised that the resulting working conditions were extremely difficult for himself and for all staff members concerned.

Such a working environment is clearly detrimental to the quality of staff performance and makes it particularly difficult, *a fortiori*, for employees who are not providing satisfactory services to improve the quality of their performance.

9. With respect to the complainant, it is true that the Organization had prepared a performance improvement plan, for which paragraphs 16 *et seq.* of item 14.4 of the Human Resources Manual provide in the event that a staff member's performance is deemed unsatisfactory, which was implemented over a period of three months, from March to June 2013. However, the evidence shows that as the complainant's direct supervisor was not sufficiently available, the requirements of the plan were not fully observed. Indeed, whereas the plan provided for, in particular, weekly meetings between the supervisor and the complainant in order to define her objectives, the Organization does not seriously dispute that these meetings were not actually held since, apart from the meeting convened for the final assessment, only two meetings between these two persons on the implementation of the plan were organised, on 29 April and 9 July 2013.

It follows from the foregoing that the complainant did not receive the regular feedback from her supervisors that she would have needed in this case in order to substantially improve the quality of her performance.

10. The Tribunal also notes that the complainant, who had already occupied various positions within UNESCO since 2002 under different types of contracts, had always worked satisfactorily, as is evidenced by several very complimentary testimonials written by her former supervisors that appear in the file. It should also be noted that for the period of the 2010-2011 biennium preceding her transfer to the Intangible Cultural Heritage Section, the complainant, as previously, had been assessed favourably, which confirms that it was only in the context of her assignment to that Section that she encountered difficulties in her work.

11. Paragraph 29 of item 14.3 of the Human Resources Manual, on the “[p]erformance appraisal process”, provides that:

“Account should be taken of circumstances that may have prevented the staff member from achieving results. Distinction shall be made between circumstances due to external factors and beyond the control of the staff member, and circumstances within his/her control. When circumstances beyond the staff member’s control have prevented him/her from achieving the expected result(s)/work assignment(s), they shall not negatively impact on the appraisal of the staff member’s performance and the rating attributed.”

12. It follows from these provisions, which, moreover, merely state general principles that apply to any professional appraisal procedure, that particular circumstances such as a serious lack of communication between an employee and her/his supervisors, or extraordinary pressure on the service that an employee is working in, resulting from an unbearable collective workload, must be taken into account in assessing the performance of a staff member.

13. In this case, the Tribunal considers that by overlooking these factors when she decided, on 2 October 2014, not to renew the contract of the complainant on grounds of unsatisfactory service, the Director-General disregarded essential facts, within the meaning of the case law cited above, thus rendering that decision unlawful.

14. In this regard, the Tribunal also notes that the Reports Board wrongly considered in its aforementioned opinion that it should recommend that the negative assessment of the complainant be maintained. It is clear that her performance was unsatisfactory during the period under consideration, but, having found that she had been placed in an abnormal working environment which was liable to have a negative influence on the quality of her work, the Board could not, without contradicting itself, make such a recommendation, as such a finding necessarily implied that the assessment of the complainant was flawed for having overlooked that fact.

15. The defendant Organization appears to justify overlooking such elements by repeatedly stating in its submissions that, in any event, it would be legally impossible to renew the fixed-term contract of a

member of staff who had been rated negatively during her/his last period of activity. UNESCO bases that argument on the requirement of paragraph 1 of item 14.5 of the Human Resources Manual, which provides that “[e]xtensions of appointment are subject to satisfactory service” and that in order for a staff member’s appointment to be extended, her/his supervisor must make a written recommendation confirming that the performance of the staff member has been satisfactory.

In this case, the fact that, as stated above, the complainant’s assessment was flawed affords sufficient grounds not to apply these provisions.

The Tribunal emphasises, however, that these provisions cannot be interpreted in that manner by the defendant Organization, and that such an argument – which may explain the flaw noted above in the reasoning of the decision of 2 August 2016 – involves a mistake of law.

On the one hand, as the complainant rightly observes, paragraph 5 of item 14.5 provides that if a performance improvement plan fails, the negative rating given to the employee’s performance “**may result in the termination or non-extension of the staff member’s appointment**” (emphasis added), which shows that, even in such a case, that is not automatically the outcome.

In addition, and more importantly, the interpretation proposed by the Organization directly contradicts the provisions of subparagraph (b) of Staff Rule 104.6, which provides that “[a] fixed-term appointment **may, at the discretion of the Director-General**, be extended, or converted to an indeterminate appointment” (emphasis added). Indeed, that provision confers on the Director-General a discretionary power to extend or renew appointments which cannot, in any event, be restricted by a lower ranking norm. In this regard, the Tribunal is bound to observe that, in the present case, the position of the defendant Organization is somewhat contradictory, since it essentially argues at the same time that the Director-General had a discretionary power to decide whether or not to extend the complainant’s contract and also that she was obliged not to renew her contract, whereas these two contentions are by definition incompatible.

16. It follows from the foregoing that the decision of the Director-General of 2 August 2016 and those of 2 October 2014 and 14 November 2014, as well as the complainant's performance assessment report for the 2012-2013 biennium, must be set aside, without there being any need to examine the complainant's other pleas.

17. The complainant, who is not asking to be reinstated within UNESCO, has however requested compensation for the material injury suffered as a result of the termination of her employment with the Organization.

In this regard, the complainant has no grounds for claiming the payment of all the emoluments which she would have received until she reached retirement age, as the renewal of her fixed-term contract would by no means have guaranteed that the Organization would continue to employ her until the end of her career.

However, in the circumstances of this case, the Tribunal finds that the material injury suffered by the complainant shall be fairly redressed by ordering UNESCO to pay her the equivalent of the salary and allowances of all kinds which she would have received had her contract been renewed for a period of two years starting 1 November 2014, under the same conditions as previously applied, net of the amount she received in lieu of notice pursuant to the decision of 2 October 2014 and of any occupational earnings she might have received during that period. The Organization shall also pay her the equivalent of the pension contributions that it would have had to pay during the same period. All these amounts shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until the date of their payment.

18. In addition, the unlawfulness of the disputed non-renewal of her contract and of the decision of 2 August 2016 caused the complainant substantial moral injury.

Given, in particular, the damage to the complainant's professional reputation as a result of the grounds given to terminate her employment with the Organization, and the lack of care with which, according to the evidence, the Organization at times treated her in this matter,

the Tribunal considers it appropriate to award her 10,000 euros in compensation under this head.

19. As the complainant succeeds for the most part, she is entitled to an award of costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 2 August 2016 and those of 2 October 2014 and 14 November 2014, as well as the complainant's performance assessment report for the 2012-2013 biennium, are set aside.
2. UNESCO shall pay the complainant material damages and interest thereon, calculated as indicated in consideration 17, above.
3. The Organization shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay her 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Drazen Petrovi , Registrar.

Delivered in public in Geneva on 6 February 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ