

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**UNESCO**

**128th Session**

**Judgment No. 4172**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. J. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 October 2016 and corrected on 16 February 2017, UNESCO's reply of 12 June, the complainant's rejoinder of 24 July and UNESCO's surrejoinder of 30 October 2017;

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 the non-renewal of his appointment for unsatisfactory performance.

The complainant was appointed as Head of the Teachers and Education Support System Section, at grade P-4, in the UNESCO Office in Santiago, Chile, on 13 November 2010. His initial two-year fixed-term appointment was confirmed in November 2011, following a one-year probationary period, and it was subsequently extended three times: first, until 12 September 2013, then until 31 March 2014, and ultimately until 31 October 2014, at which point the complainant separated from UNESCO.

On 16 May 2011 the complainant's supervisor, the Director of the Santiago Office (hereinafter "the Office Director"), wrote in the complainant's Performance Assessment Report for the period from 1 December 2010 to 31 December 2011, in the section reserved for the "Midterm Review": "By mid 2011 (May) a review was carried out with [the complainant]. The expected results were maintained to give [him] the opportunity to improve his performance." Subsequently, in October 2011, the Office Director reported to the Bureau of Human Resources Management (HRM) that the complainant's performance had been satisfactory and fully met expectations, and he recommended granting the complainant a within-grade salary increment.

In May 2012 the complainant filed a harassment complaint against the Office Director, but in September 2012 he was informed that the Director-General had found no *prima facie* evidence of harassment warranting further investigation and that she had therefore decided to close the case.

On 3 July 2012 the Office Director gave the complainant the overall rating "Does not meet expectations" in his Performance Assessment Report for the period from 1 December 2010 to 31 December 2011. He noted that the complainant had been provided with full support, staff, and resources but that he "was always in denial of his under-achievements, regularly blaming others, [and was] not self-aware of much needed improvement".

The complainant expressed his disagreement with his supervisor's assessment and a Review Panel was convened on 3 August 2012 to assess the complainant's Performance Assessment Report. After discussing the appraisal with the complainant and his supervisor and after reviewing the relevant documentation, the Panel concluded that the complainant's performance for 2010-2011 partially met expectations and noted: "The [P]anel reached this conclusion since [the Office Director] both granted [the complainant] a within-grade increment [...] and confirmed his probationary period in mid 2011, which indicates that [the complainant] has provided satisfactory services. At the same time, the [P]anel took into account the supervisor's claim that [the complainant's] performance steeply declined during the last few months of 2011.

The [P]anel also recognised certain areas of improvement that the staff member should work on [...]. The [P]anel also noted the sometimes unclear articulation of the actual results that the staff member and his supervisor agreed on as a possible source of disconnect between their understanding and assessment of expected and achieved results. The staff member should also continue with his efforts to learn Spanish, like he has done in the past year, which the [P]anel recognises and appreciates.” The Panel requested that a six-month Performance Improvement Plan be prepared and implemented and suggested that the supervisor have “regular coaching meetings” with the complainant and that he also provide him with “constructive, practical feedback, especially on administrative matters”.

On 24 August 2012 the complainant contested before the Reports Board his 2010-2011 Performance Assessment Report, in accordance with Item 14.6 “Recourse Mechanisms” of the Human Resources Manual. A six-month Performance Improvement Plan was presented to him in a meeting with the Office Director on 24 October 2012. The complainant refused to sign it. The Reports Board unanimously recommended in its report, dated 22 March 2013, that the Director-General maintain the Review Panel’s rating of “Partially meets expectations”, uphold the Review Panel’s comments, and encourage all available channels for dialogue between the complainant and his supervisor. In a memorandum dated 11 April 2013, the Director of HRM notified the complainant of the Director-General’s decision to endorse the Reports Board’s recommendation.

On 23 September 2013 the Office Director informed HRM that at the end of the six-month period covered by the Performance Improvement Plan, the complainant had not achieved the results identified therein and that his overall assessment was therefore negative. On 10 March 2014 the Review Panel decided to “confirm the supervisor’s overall assessment and global rating ‘[D]oes not meet expectations in the end of the improvement plan’”. The complainant was notified of this decision by an email dated 7 April. By a memorandum of 14 April, the Assistant Director-General for Education recommended to the Director of HRM the termination of the complainant’s appointment for unsatisfactory performance.

On 30 April 2014 the complainant contested before the Reports Board the Review Panel's decision leading to the recommendation to terminate his appointment. In the Reports Board's report, issued in September 2014, two members recommended that the complainant "be given a further chance and efforts be made to find a suitable solution". Two other members considered that the complainant "would not be operational anywhere else" in the Organization and that he "[did] not seem to understand what he [was] being asked to do" nor was he aware of the "seriousness of the problem". They therefore recommended the termination of his appointment. The President of the Reports Board, who participated in the deliberations as a non-voting member, concurred with the latter recommendation.

By a memorandum of 2 October 2014, the Director of HRM informed the complainant that the Director-General considered that the rating "Does not meet expectations" was justified, that his appointment, which as an interim measure had been extended until 31 October 2014, would not be renewed beyond that date and that he would be paid three months' salary in lieu of notice.

The complainant filed a protest against the 2 October 2014 decision which was rejected by the Director-General. On 8 January 2015 he filed a notice of appeal with the Appeals Board and on 25 January 2015 he submitted a detailed appeal. In its opinion of 18 May 2016, the Appeals Board found that the contested decision had been taken in accordance with the applicable rules but, nevertheless, recommended the payment to the complainant of compensation equivalent to two months' salary and the reimbursement of his accommodation and travel expenses. By a letter of 2 August 2016, the complainant was notified of the Director-General's decision to reject the Appeals Board's recommendations and to confirm her earlier decision not to renew the complainant's appointment for unsatisfactory performance. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his retroactive reinstatement with full payment of all emoluments and benefits. He claims damages for the prejudice suffered.

UNESCO asks the Tribunal to dismiss the complaint in its entirety as devoid of merit.

## CONSIDERATIONS

1. By a memorandum of 2 October 2014, the complainant was informed that the Director-General had endorsed the rating “Does not meet expectations”, given by the Office Director in the complainant’s 2010-2011 Performance Assessment Report and at the end of the Performance Improvement Plan (covering the period from 1 November 2012 to 30 April 2013) and confirmed by the Review Panel at the end of the period covered by the Performance Improvement Plan. By the same memorandum, the complainant was also informed that the Director-General had decided not to renew his appointment beyond its expiry on 31 October 2014. In lieu of notice, the Director-General authorised the payment to the complainant of three months’ salary.

2. The complainant filed a protest against that decision but it was rejected. On 8 January 2015 he filed a notice of appeal and on 25 January 2015 he filed a detailed appeal. The Appeals Board submitted its opinion on 18 May 2016, recommending to the Director-General:

- “(i) to note that [...] the [contested] decision was taken within the Organization’s rules in force and the discretionary powers of an Executive Head as regards unsatisfactory performance”;
- “(ii) that however, given the underlying factors analysed above and unrelated to performance, the [complainant] be given the equivalent of two months’ salary, in compensation for the prejudice and moral suffering”; and
- “(iii) that the [complainant] be reimbursed his accommodation and travel expenses”.

3. In a letter of 2 August 2016, the complainant was informed of the Director-General’s decision to confirm her 2 October 2014 decision not to renew the complainant’s appointment for unsatisfactory performance and not to accept the Appeals Board’s recommendations under (ii) and (iii) of the report (reproduced in consideration 2 above). The complainant impugns that decision in the present complaint, alleging procedural irregularities and unfairness, abuse of authority, violations of the Human Resources Manual, the Staff Regulations and Staff Rules, and retaliation on the part of the Office Director.

4. UNESCO submits that the non-renewal decision was validly taken by the Director-General in the proper exercise of her discretion, that the complainant's allegations of procedural irregularities and unfairness are unfounded, and that his allegations of extraneous facts are unsubstantiated.

5. According to consistent case law, "a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. [...] What is more, where the reason given for the non-renewal is unsatisfactory performance the Tribunal will not replace with its own the Organisation's view of the complainant's fitness for his duties" (see Judgment 1052, under 4).

6. The complaint is unfounded. The Tribunal notes that both the complainant's Performance Assessment Report for 2010-2011 and the Performance Improvement Plan results were considered by the Director-General after two bodies had assessed each of them and had found no procedural irregularities, errors of fact, or mistaken conclusions. Even though UNESCO's submission that the granting of the within-grade salary increment on 6 October 2011 was intended to encourage the complainant to improve his performance is not in line with the provision in Human Resources Manual Item 14.5 paragraph 6, it is consistent with the supervisor's statement in the complainant's mid-term review of May 2011 that "[t]he expected results were maintained to give the [complainant] the opportunity to improve his performance". The complainant's argument that he was not given access to information and documents regarding the performance assessment system is unfounded considering that the complainant had access to that system through the Intranet.

7. The complainant asserts that UNESCO violated the Human Resources Manual and the Staff Regulations and Staff Rules. The Tribunal finds that UNESCO followed the proper procedures and

that it acted in conformity with the provisions set forth in the Human Resources Manual and the Staff Regulations and Staff Rules. With regard to the establishment of the complainant's goals, the Tribunal is satisfied that these were clearly defined and notes that the complainant himself acknowledges that the draft goals he developed and submitted to the Office Director within the first two weeks of his arrival in the Office were "identical to those entered into [the online appraisal system] by the Director and used completely unchanged to conduct the first and only performance evaluation in July 2012". The Tribunal is also satisfied that UNESCO provided the complainant with ample training and development opportunities, as evidenced by the documents submitted by UNESCO, namely the summary of training sessions undertaken by the complainant between November 2010 and October 2011. The Tribunal is also satisfied that the complainant was provided with regular feedback, as evidenced by the list of numerous meetings with the Office Director in 2012 and 2013 to discuss the Performance Improvement Plan.

8. The complainant's allegations of abuse of authority and retaliation on the part of the Office Director are unsubstantiated. Moreover, the Tribunal notes that the complainant had filed a claim of harassment against the Office Director on 27 May 2012 but was informed on 6 September 2012 by the Ethics Advisor that the Director-General had found no *prima facie* evidence that would warrant further investigation and had thus decided to close the case. The Tribunal has no evidence before it that the complainant challenged that decision through the internal mechanisms available to him. Furthermore, the complainant has not provided any convincing evidence that the Office Director abused his authority or retaliated against him for this or any other reason. In light of the above considerations, the Tribunal finds that the complaint is unfounded and must be dismissed in its entirety. As the written documentation submitted by the parties was sufficient to allow the Tribunal to reach a reasoned decision, the Tribunal sees no need to order oral proceedings. The complainant also requests the discovery of documents but provides no convincing explanation of their actual pertinence to the case. These requests are thus denied.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ