

T.
v.
UNESCO

129th Session

Judgment No. 4225

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. T. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 8 February 2018, UNESCO's reply of 28 May, the complainant's rejoinder of 27 August and UNESCO's surrejoinder of 28 December 2018;

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 impugns the decision rejecting her requests to reclassify her post and to grant her a special post allowance at grade P-3.

The complainant joined the International Centre for Theoretical Physics (ICTP) in Trieste, Italy, in 1985*. She became a staff member of UNESCO in 1993 when UNESCO took over the administration of

* At the time, the International Atomic Energy Agency (IAEA) assumed the administration of ICTP also on behalf of UNESCO. In January 1993 a Tripartite Agreement was concluded between the IAEA, UNESCO and the Government of Italy, which provided for the transfer of the ICTP's administration from the IAEA to UNESCO.

the ICTP from the International Atomic Energy Agency. At the material time, she held the post of Assistant, Field Security, at grade G-6.

In January 2012 the complainant was assigned duties in connection with European Union (EU) funded projects. On 28 February 2012, the Director of ICTP informed staff that an important project had been assigned to the ICTP by the EU, and that the complainant was on the ICTP team entrusted with the task of preparing the proposal for the agreement to be signed and leading the discussions. In the text of the agreement concluded between the EU and the ICTP, the complainant was listed as the ICTP's "Contact for administrative matters" and was referred to as "Special Administrative Assistant, [EU] Project".

In the light of the new duties assumed by the complainant, her supervisors agreed that her job description ought to be updated to reflect these new duties. An updated job description was prepared in July 2013 to which the complainant provided her input in early September 2013. This job description (the September 2013 job description) provided that an equal amount of the complainant's working time would be dedicated to field security duties and EU project duties, 45 per cent respectively, and the remaining 10 per cent to other duties. On 15 November 2013 the complainant inquired as to why she had not received any feedback regarding her updated job description and she asked that it be finalized before the end of 2013.

On 17 March 2014 the Administration provided the complainant with a revised job description (the March 2014 job description), which reduced to 25 per cent the complainant's duties dedicated to field security and to 20 per cent those duties dedicated to EU projects. The complainant disagreed with this revised job description and refused to sign it, requesting that it be changed. On 16 May 2014 she wrote an email to her supervisors and the Director of the ICTP explaining the reasons for her disagreement. Her direct supervisor replied that same day that a new draft job description had been prepared which, as he believed, was currently with the Director.

On 20 May 2014 the complainant signed her performance appraisal report for 2012-2013. In her comments, under the heading "Self-assessment" she indicated that there had been a substantial modification

to her post, both because of the volume of the work and the complexity of the responsibilities which, in her view, corresponded to Professional-level responsibilities, and that she was therefore requesting the reclassification of her post and the granting of a special post allowance as from January 2012.

On 11 July 2014 the complainant submitted a protest contesting the Administration's failure to issue an updated job description and to reply to her requests for the reclassification of her post and the granting of a special post allowance. On 13 August 2014 she was informed that the Administration was in the process of preparing an updated job description and her request for reclassification was therefore premature; as regards her request for a special post allowance, she had not provided evidence that she had received instructions to exercise the duties of a higher grade. Consequently, the Director-General had decided to reject her protest as irreceivable and unfounded. On 11 September 2014 the complainant lodged a notice of appeal against that decision, followed by a detailed appeal on 10 October 2014.

On 11 November 2014 the complainant was provided with a new job description (the November 2014 job description). She replied on 12 November 2014 noting that this new job description was the same as that proposed to her on 17 March 2014, which she had already rejected. She added that she agreed with the job description that was prepared in September 2013. On 19 November 2014 the Administration submitted the November 2014 job description for a post reclassification. A desk audit was conducted by an external classification expert in the period from 14 to 30 September 2015. By a memorandum of 9 December 2015, the complainant was informed that the desk audit had resulted in the classification of her post at the G-5 level with the title "Administrative Assistant", but that she would retain her current G-6 level on a personal basis.

On 22 March 2016 the complainant submitted a protest against this decision. On 22 May 2016 she submitted a notice of appeal, but she did not subsequently submit a detailed appeal. Instead, on 21 and 30 August 2016 the complainant informed the Secretary of the Appeals Board that she was no longer interested in contesting with a detailed appeal the

downgrading of her post based on the new job description, but that she rather wished to resume her first appeal (of 10 October 2014) and to concentrate on her request for the upgrade (reclassification) of her job description based on the additional duties and responsibilities assigned to her in January 2012.

Having held a hearing, the Appeals Board issued its opinion and recommendation in a report dated 21 July 2017. It found that the complainant's first appeal was premature, as there was no challengeable administrative decision, but also noted that on 22 March 2016 the complainant had submitted a second protest "contesting the non-reclassification of her post and the non-granting of a special post allowance". The Appeals Board recommended by a majority, in paragraph 49 of its report: (i) that the complainant be paid the special post allowance at the P-3 level from May 2012 to March 2016 in recognition of the new functions performed by her during that time, as requested by the Director of the ICTP; (ii) that she be paid 1,000 euros for the delay in finalizing her job description and paying her the special post allowance; (iii) that she be paid 2,000 euros in costs; and (iv) that she be reimbursed for the accommodation and travel expenses (Trieste/Paris/Trieste) incurred for the purposes of the Appeals Board's hearing. In an alternate opinion, in paragraph 50 of the report, one member of the Appeals Board recommended that: (i) the complainant be paid the special post allowance "appropriately in accordance with the rules in force, from May 2012 to March 2016"; (ii) the complainant be paid 1,000 euros for the delay in finalizing her job description. Recommendations (iii) and (iv) of the alternate opinion were identical to those of the majority opinion.

By a letter of 14 November 2017, the Director-General informed the complainant that she had decided not to accept the Board's recommendations, with the exception of the recommendation regarding her accommodation and travel expenses, which UNESCO would reimburse up to a maximum ceiling corresponding to the daily subsistence allowance applicable in Paris for two nights. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to award her the special post allowance at grade P-3 for the period from January 2012 to March 2016. In addition to the compensation recommended by the Appeals Board in paragraphs 49 and 50 of its report, she claims 29,000 euros in moral damages, together with interest. She also claims 3,500 euros in costs and the reimbursement of the accommodation and travel expenses (Trieste/Paris/Trieste), which she incurred for the purpose of attending the Appeals Board's hearing.

UNESCO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as devoid of merit in its entirety.

CONSIDERATIONS

1. The complainant impugns the Director-General's 14 November 2017 decision to accept neither the recommendations made by the majority of the Appeals Board members in paragraph 49(i), (ii) and (iii) of its report nor the recommendations made by one Board member in an alternate opinion in paragraph 50(i), (ii) and (iii) of its report. The Director-General accepted the recommendation made in paragraphs 49(iv) and 50(iv) of the report to reimburse the complainant's accommodation and travel expenses incurred to attend the Appeals Board's hearing, up to a maximum ceiling corresponding to the daily subsistence allowance effective in Paris (covering a maximum of two nights), upon presentation of receipts.

2. The reason stated in the impugned 14 November 2017 decision for rejecting the complainant's appeal against the 13 August 2014 decision, which in turn rejected the complainant's 11 July 2014 protest, was that the appeal was not receivable "since the Performance Assessment Report completed by [the complainant's] supervisor in May 2014, including the suggestion to update [her] Job Description, did not in any manner constitute an administrative decision concerning the reclassification of [her] post or the payment of [a special post allowance] that can be contested via a protest within paragraph 7(a) of the Statutes of the Appeals Board". The impugned decision went on to note that the

above-cited reason was “in fact confirmed by the Appeals Board in paragraph 44 of its Report [according to which] ‘[a]s to the receivability, the [complainant’s] first appeal was premature as there was no administrative decision to be challenged. In her initial protest, dated 11 July 2014, the [complainant] was contesting the absence of an updated Job Description pursuant to the positive performance report ...’. Furthermore, the decision of 13 August 2014 related to the [special post allowance] and reclassification was not appealable directly before the Appeals Board under paragraph 7(c) of the Statutes of the Appeals Board by submitting a Notice of Appeal. However, [the complainant] also failed to follow the preliminary procedure by submitting a protest to the Director-General”. The impugned decision also specified that “[i]t should be recalled that the decision that [the complainant] sought to contest, and which was the subject of this appeal, is the memorandum dated 13 August 2014. In this memorandum, the Director-General informed [the complainant] that: [(i)] [her] protest was irreceivable as there was no administrative decision which could be challenged before the Appeals Board; (ii) the request for a post reclassification was premature considering that the ICTP Administration was preparing an updated Job Description at that time and (iii) as regards [the complainant’s] request for [a special post allowance], [she] had not provided any evidence that [she] had received instructions to exercise duties of a higher grade”. The impugned decision further noted that “other elements regarding the results of a desk audit that was carried out after the appeal that [the complainant] submitted on 10 October 2014 fall squarely outside the scope of the appeal examined by the Appeals Board at its hearing of June 2017. As a matter of fact, [the complainant] contested the results of the said desk audit in a new protest submitted on 22 March 2016. On 22 May 2016, [the complainant] submitted a Notice of Appeal contesting the rejecting of [her] protest dated 22 May [*recte* 22 March] 2016. To date, [the complainant has] not submitted to the Appeals Board a Detailed Appeal against that administrative decision”. Subsidiarily, the impugned decision also stated that the complainant’s appeal against the 13 August 2014 decision, insofar as it related to the request for a special post allowance, was unfounded on the merits, as the complainant was not asked to assume the functions of a post at a higher level. The decision

cited Staff Rule 103.17, stating that for a special post allowance to be payable, it is required that a temporarily unoccupied post of a higher grade be vacant or, if a special post allowance is payable for temporary functions (not against another post), the assumed functions must be in connection with sessions of the General Conference, the Executive Board, or other meetings, but the complainant was in neither situation. The reason for not awarding costs contrary to the Appeals Board's majority recommendation in paragraph 49(iii), or the alternate opinion recommendation in paragraph 50(iii), of the Appeals Board's report was that "[t]he Appeals Board does not have the prerogative under its Statutes, or any other rule of the Organization, to award costs and there is no practice to that effect".

3. In its report the Appeals Board considered that the complainant's first appeal, in which she contested the absence of an updated job description and requested the reclassification of her post, further to her positive performance appraisal report for 2012-2013, was premature as there was no administrative decision to be challenged. The Board considered that "this appeal rest[ed] on whether or not the [complainant's] Job Description needed to be updated" and that all other issues flowed from the determination of that issue. It found that "[t]he [complainant] was ascribed new duties from 31 January 2012 which needed to be included in her job description. Her supervisors were all in favour of the updating of the job description and the eventual reclassification of the post as they considered that the duties and responsibilities entrusted to the [complainant] were of a higher grade". It cited Staff Rule 103.17(e), according to which: "When instructed to do so, staff members shall assume functions at a grade higher than their own in connection with a session of the General Conference, Executive Board or other meeting, and may, [...] subject to such conditions as the Director-General may prescribe, be granted a special post allowance for the period during which they assume those higher-grade functions."

4. Based on the foregoing considerations, the majority of the Appeals Board's members recommended to the Director-General, in paragraph 49 of the Appeals Board's report, that the complainant be:

- “(i) paid [the] Special Post Allowance appropriately, at (P-3) three levels above G-6, from 01 May 2012 to March 2016 when the EU project ended - in recognition of the new functions performed, as requested by [the Director of ICTP] on 28 February 2012;
- (ii) paid 1000 euros for the delay in finalizing her Job Description and delayed payment of [a special post allowance];
- (iii) paid 2000 euros in legal costs;
- (iv) be reimbursed for her accommodation and travel expenses from Trieste/Paris/Trieste.”

In an alternate opinion, provided in paragraph 50 of the Appeals Board’s report, in relation to points (i) and (ii), above, one of the Board’s members recommended to the Director-General that the complainant be:

- “(i) paid [the] Special Post Allowance appropriately in accordance with the rules in force, from 01 May 2012 to March 2016 when the EU project ended - in recognition of the new functions performed, as requested by [the Director of ICTP] on 28 February 2012;
- (ii) paid 1000 euros for the delay in finalizing her Job Description.”

5. The complainant bases her complaint on the following grounds:

- (a) the delay in finalizing her job description violated her rights and the failure to conduct a transparent procedure was contrary to UNESCO’s duty of good faith;
- (b) the downgrading of her post was evidence that the Administration did not take into account the substantial modification of the position she occupied and the higher-level duties attached to it;
- (c) the desk audit procedure was flawed as she was not provided with Part II of the desk audit report, including the Individual Evaluation Sheet;
- (d) the decision on the post classification exercise, based on a contested job description, was arbitrary and tainted with unequal treatment;
- (e) the decision to reject the Appeals Board’s recommendations under paragraph 49(i), (ii) and (iii) and paragraph 50(i), (ii) and (iii) was not properly justified and the Appeals Board has the competence to recommend allowances to which the appellant may be entitled;

- (f) the impugned decision, dated 14 November 2017, was sent to her by the Director of HRM with no signature of the Director-General to prove that the Director-General actually took the decision, and it was therefore void;
- (g) there was no need for the complainant to complete the preliminary procedure by submitting a new protest to the Director-General regarding her request for a special post allowance, as the protest she submitted on 11 July 2014 fully founded her appeal;
- (h) she was officially entrusted with new duties by the ICTP Director in connection with the EU funded projects as from 31 January 2012, in accordance with Staff Rule 103.17;
- (i) the ICTP Senior Administrative Officer and the ICTP Director used their authority *ultra vires* to improperly influence her career and they approved a job description that downgraded her post and worsened her position on purpose, which amounted to harassment.

6. UNESCO submits that the complaint is irreceivable for failure to exhaust the internal means of redress. It argues that the complainant's appeal before the Appeals Board was irreceivable, as it was not directed against an administrative decision. It also submits, subsidiarily, that the complaint is devoid of merit.

7. On 11 July 2014 the complainant filed a protest contesting the Administration's failure to issue an updated job description and its lack of a response to her requests for the reclassification of her post and the granting of a special post allowance as from January 2012. These requests were made by the complainant in her performance appraisal report covering the period 2012-2013. The complainant was notified, by a letter dated 13 August 2014, of the Director-General's decision to reject her protest as irreceivable and unfounded in fact and in law. She was informed that with regard to her 11 July 2014 protest, there was no administrative decision which might be challenged before the Appeals Board; that, as the ICTP Administration was currently preparing an updated job description, her request for post reclassification was premature; and that the special post allowance is granted only if a staff

member exercises the functions of a higher grade for more than three months and she had not provided any evidence that she had received instructions to exercise the functions of a higher grade. On 11 September 2014 the complainant filed a notice of appeal and on 10 October 2014 a detailed appeal against the 13 August 2014 decision “to reject the grant of the special post allowance requested both in [her performance appraisal report] and in [her] letter of protest”.

8. On 22 March 2016 the complainant filed a protest against the decision, communicated to her by a memorandum dated 9 December 2015, to reclassify her post pursuant to the results of the desk audit conducted in September 2015. In that protest the complainant effectively challenged the downgrading of her post from the G-6 to the G-5 level, arguing that the desk audit was based on an inaccurate job description and that the auditor had not considered her objections to the job description. She requested that the classification procedure be reopened and that a new classification consultant be selected to update her job description accurately. She filed a notice of appeal on 22 May 2016 but did not file a detailed appeal, and subsequently informed the Secretary of the Appeals Board that she no longer wanted to contest the downgrading of her post (i.e. the 9 December 2015 decision) but that she rather wished to resume her first appeal, filed on 10 October 2014, which was pending before the Appeals Board.

9. The complaint is irreceivable. As noted by both the Appeals Board in its report and the Director-General in her final decision of 14 November 2017, the complainant’s first appeal was irreceivable because her 11 July 2014 protest was not directed against an administrative decision. As noted under consideration 8 above, the complainant’s second appeal was abandoned when she chose not to file a detailed appeal. Thus, the complainant did not follow the proper procedure for submitting her requests for review by the Appeals Board.

10. The Director General correctly decided not to endorse the recommendations of the Appeals Board under paragraph 49(i), (ii) and (iii), and paragraph 50(i), (ii) and (iii) of its report, given that the Appeals Board reached mistaken conclusions in that report. It erroneously

noted, under paragraph 44 thereof that “[a]fter [the] desk audit exercise, [the complainant] submitted a second protest, dated 22 March 2016, under paragraph 7(a) [of the Appeals Board Statutes] contesting the non-reclassification of her post and the non-granting of a Special Post Allowance”. As a matter of fact, the complainant’s second protest related only to the results of the desk audit. Moreover, the Appeals Board did not address the Administration’s argument that any claim regarding the complainant’s requests for the reclassification of her post and the granting of a special post allowance was irreceivable for failure to complete the preliminary procedure by submitting a new protest to the Director-General under paragraph 7(a) of the Statutes of the Appeals Board against the 13 August 2014 decision, in which the complainant was notified that “[the] ICTP Administration [was] currently preparing an updated job description [and therefore] the request for post-reclassification [was] premature” and that “the special post allowance is only granted if one exercises the functions of a higher grade for more than three months [and the complainant had] not provided any evidence that [she had] received instructions to exercise the duties of a higher grade”. Thus, the Appeals Board was mistaken in treating the complainant’s request for a special post allowance as receivable, when no administrative decision had been taken in that regard. Even if the Appeals Board considered that the complainant was challenging the 13 August 2014 rejection of her protest as an administrative decision with regard to her request for a special post allowance, it could not ignore that the complainant was required to file a protest against that rejection (since it was the first administrative decision on her request for a special post allowance) as a preliminary step in the appeal process.

11. The complainant argues that the impugned decision was void, as it did not bear the signature of the Director-General. This argument must be rejected. The letter from the Director of HRM, dated 14 November 2017, clearly states that “the Director-General has asked me to inform you of the following [...]”. As the Tribunal stated in Judgment 3177, consideration 12, “the authorised decision-maker does not have to be the signatory to the final decision. [...] It is not a matter of who signed the decision, but rather who made the decision itself.”

12. In light of the above considerations, the complaint must be dismissed as irreceivable for failure to exhaust internal remedies.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ