

G. (No. 3)

v.

UNIDO

121st Session

Judgment No. 3604

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms N. G. against the United Nations Industrial Development Organization (UNIDO) on 14 February 2013 and corrected on 24 May, UNIDO's reply of 12 September, the complainant's rejoinder of 13 December 2013 and UNIDO's surrejoinder of 19 March 2014;

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 rejection of her appeal against the non-renewal of her appointment for misconduct and the Director-General's refusal to revise decisions taken by the Focal Point for Ethics and Accountability and the Office of Internal Oversight Services (IOS) regarding allegations that she had raised against members of the Administration.

Facts relevant to this case are to be found in Judgment 3441, delivered on 11 February 2015, concerning the complainant's first and second complaints. Suffice it to recall that the complainant joined UNIDO under a fixed-term appointment in October 2001. She was on

extended periods of sick leave between 2005 and 2008 and was on continuous sick leave from March 2008 to January 2011. She returned to work on 24 January 2011.

By a memorandum of 1 February 2011 she was informed that it had come to UNIDO's attention that she had participated as a lecturer or speaker in conferences and seminars in Austria and the United States of America during periods when she was on sick leave. She was invited to provide a response by close of business on 8 February 2011. Following an exchange between the complainant and the Administration, by a memorandum of 25 March 2011 she was notified that the Director-General had decided to extend her contract for a period of six months (from 1 April to 30 September 2011). During the period of the extension, she would have the opportunity to provide clarification on two issues: her participation in professional activities during her extended sick leave and her claims for dependency benefits in respect of her spouse. She was further informed that she would be invited, in accordance with the requirements of Administrative Circular UNIDO/DA/PS/AC.87 of 28 May 1992 on disciplinary measures, for a formal interview that was to take place as soon as possible.

Following numerous exchanges and meetings with the Administration, on 14 June 2011 the complainant was informed that the Administration would proceed with the next step in the disciplinary process, namely a recommendation to the Director-General. In the meantime, on 3 June 2011 the complainant sent a memorandum to the Focal Point for Ethics and Accountability in which she requested an investigation into the actions of members of the Administration regarding her case, alleging that she had been the victim of abuse of authority, harassment and mobbing.

Beginning on 5 August 2011 the complainant commenced a period of sick leave. The Joint Medical Service certified her sick leave until 19 August 2011. It was subsequently extended several times until 13 November 2011.

Meanwhile, on 9 August 2011 the complainant was notified of the outcome of UNIDO's fact-finding exercise regarding her professional activities during her periods of sick leave and her claim for dependency

benefits. She was told that unless clarified, those findings would amount to serious misconduct. Furthermore, if the Director-General agreed with the findings, he could decide not to extend her appointment beyond its current expiry date or to submit her case to the Joint Disciplinary Committee. The complainant provided a response later that same month.

By a memorandum of 16 September she was informed that the Director-General had decided that her contract would not be extended beyond 30 September 2011. Furthermore, as a result of the fact-finding exercise, it had been concluded that her conduct was incompatible with her status as an international civil servant and had failed to meet the standards of integrity required by that status. She was granted one month's salary in lieu of notice.

On 29 September 2011 the complainant requested the IOS to conduct an investigation into the actions of various members of the Administration with respect to her case.

On 21 October 2011 she asked the Director-General to review and reverse the decision not to extend her appointment beyond its expiry date of 30 September 2011. In his reply of 11 November he concluded that her request had no merit.

By a letter of 5 December 2011 the complainant was advised by the Focal Point for Ethics and Accountability that there were no reasons to conclude that members of the Administration had acted improperly towards her. On 13 December she was informed that the IOS considered that there were no grounds for initiating an investigation into the matter.

On 12 January 2012 the complainant challenged the Director-General's decision of 11 November 2011 before the Joint Appeals Board (JAB).

On 3 February 2012 she asked the Director-General to review the decisions of 5 and 13 December 2011 taken by the Focal Point for Ethics and Accountability and the IOS respectively. The Director-General replied on 27 March that he could see no grounds to reverse

either of those decisions because her complaints had been processed in accordance with due process and the established rules.

In April 2012 the complainant challenged the decision of 27 March before the JAB, and requested that this appeal be joined with the appeal she had filed on 12 January. The JAB considered both appeals together and, in its report of 23 November 2012, stated that it could find no grounds for revision of the decision taken by the Focal Point for Ethics and Accountability or the decision taken by the IOS. With regard to the decision not to extend the complainant's contract beyond its expiry date, the JAB was of the opinion that, for the sake of reaching a fair and objective decision, the established process should be duly followed and the case should be submitted to the Joint Disciplinary Committee for consideration.

By a memorandum of 18 December 2012 the Director-General rejected the JAB's recommendation to refer the case to the Joint Disciplinary Committee and dismissed her appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement with effect from the date of her separation from service. She seeks material damages in an amount equivalent to what she would have earned if her contract had been extended for a period of three years, including all salaries, allowances, emoluments, benefits and entitlements, with interest from due dates. She requests the removal of any adverse material from her personnel file, including those relating to the disciplinary procedure and her separation from service, moral damages in the amount of 100,000 euros, exemplary damages in the amount of 100,000 euros and legal costs and any other relief the Tribunal deems just and proper.

UNIDO requests the Tribunal to reject the complainant's claims and to dismiss the complaint.

CONSIDERATIONS

1. The complainant asks the Tribunal to find that the decision not to extend her contract beyond its expiry date was unlawful because it was taken after the commencement of disciplinary proceedings for misconduct but before their completion, and when the JAB did not find misconduct; because the Administration failed to follow applicable rules on extensions of appointment, which included taking the decision without the benefit of a performance appraisal report; because the decision was tainted by UNIDO's failure to meet the duty of good faith and due care to her, including separating her from service while she was on sick leave, and because the decision was taken with bias and prejudice and amounts to an abuse of authority. She also asks the Tribunal to find that she was harassed over a long period of time and that the impugned decision was wrong in fact and law in not so finding and in closing her harassment complaints without taking action upon them. These complaints mirror to a great extent her claims in her internal appeals dated 12 January 2012 and 11 April 2012, which were joined by the JAB at her request.

2. The central questions which this complaint raises for determination will be considered in the following order:

- (1) Whether the decision not to extend the complainant's employment was unlawful entitling her to reinstatement or compensation, or both?
- (2) Whether UNIDO acted unlawfully by separating the complainant from service while she was on sick leave?
- (3) Whether the complainant suffered harassment, or suffered injury by reason of the Administration's breach of good faith and/or duty of care, entitling her to compensation?

3. The complainant's letter of appointment stated that her appointment expired on 30 September 2011. That appointment carried no expectation of renewal by virtue of the version of Staff Rule 103.10(b) then in force. The Tribunal has consistently stated that although a decision

not to extend a fixed-term contract is discretionary it must be taken within the rules and guidelines of an organisation and the Tribunal's case law. The Tribunal will set aside such a decision if it is tainted with legal or procedural irregularity; if it is based on an error of fact or law or if it amounts to an abuse of authority; if some essential fact is overlooked, or if a clearly mistaken conclusion was drawn from the evidence. (See, for example, Judgments 2850, under 6, and 3257, under 7.)

4. The memorandum dated 16 September 2011 on behalf of the Director-General, which informed the complainant of the non-extension her contract, relevantly states as follows:

“2. The results of the fact-finding exercise conducted with regard to (i) your engagement in outside activities during your sick leave, as well as (ii) your claims for dependency benefits with respect [of] your spouse have led to the conclusion that your conduct is incompatible with your status as an international civil servant and fails to meet the highest standards of integrity required by that status. The findings were communicated to you in detail by way of my memorandum dated 9 August 2011, to which you replied on 24 August 2011.

3. I would also like to inform you that the Director-General has further decided to grant you payment of one month's salary in lieu of notice.”

5. Where an organisation exercises its discretion not to extend a fixed-term contract for unsatisfactory service or performance, disciplinary proceedings are irrelevant. In such a case a complainant cannot properly allege hidden disciplinary action. (See, for example, Judgment 1405, under 5 and 6). However, in the present case the non-extension is based on conduct. UNIDO alleges that by engaging in activities outside of her duty station when she was on paid sick leave, without informing it or obtaining its approval and by claiming dependency benefits in respect of her spouse without declaring, in some instances, that he was gainfully employed, as required, the complainant broke UNIDO's rules by which she was bound under her contract of employment. UNIDO also contends that by so doing, the complainant conducted herself in a manner that was not in keeping with the high standards of integrity which were required of her as an

international civil servant, thereby entitling it not to extend her contract when it expired.

6. It is observed that UNIDO informed the complainant from the outset that the investigation of the allegations against her was being pursued under paragraph 20 of Administrative Circular UNIDO/DA/PS/AC.87 of 28 May 1992, which states as follows:

“Where there is an indication of breach of conduct, it is incumbent upon the Administration to follow up with the necessary enquiries and, in the course of doing so, to talk to the staff member concerned. Due process requires that the staff member should be given full opportunity to answer for himself or herself and possibly by his or her explanations to dispose of the entire matter. The staff member is usually called for a confidential conversation with the personnel officer, during which he or she is asked to give an explanation of the conduct in question. This should not be treated as an interrogation, but as an opportunity to clarify discrepancies. It is as much the responsibility of the personnel officer to protect the staff member as to ensure the maintenance of discipline in the Secretariat. Only when there is *prima facie* evidence that a breach of conduct on the part of the staff member has occurred will it be necessary to have a formal interview with the staff member in the presence of a representative of his or her Department. In that event, the staff member should be apprised of the question on which his or her explanation is required and, even though precise charges will not then have been formulated, a transcript of the interview should be prepared and the staff member should be asked to initial a copy of it.”

7. The facts in the present case show that this procedure was basically followed and that transcripts of the interviews which were conducted were prepared.

8. The complainant asks the Tribunal to set aside the Director-General's rejection of the JAB's recommendation on the grounds that the decision not to extend her contract was based on alleged misconduct in respect of which disciplinary proceedings were commenced but not completed, in violation of her right to defence, due process and her terms of appointment, including Administrative Circular UNIDO/DA/PS/AC.87; and that the decision was taken without the benefit of an appraisal report. However, there was no need to have

had the benefit of an appraisal report because the decision was not based on unsatisfactory service or performance. It was based on the joint allegations concerning the dependency claims and her outside work.

9. The Director-General motivated the decision to reject the JAB's recommendation to refer the case to the Joint Disciplinary Committee and his decision not to extend the complainant's contract by stating that the complainant did not make an innocent mistake in filing the status reports for the dependency benefit claims, some of which declared that her spouse was self-employed or not regularly employed when his employment record showed that he had worked as a freelance consultant since 1999. It also showed that he was gainfully employed in various expert/advisory capacities for projects in various parts of the world for the relevant periods, 2005/2006 and 2009/2010. The Director-General stated that a staff member with integrity would have either put "self-employed" or "not regularly employed" in the relevant status reports. Additionally, a staff member who knew the earnings for the previous years at the time of signing the forms would have at least noted something rather than leaving a blank space. The Tribunal notes that the complainant signed the forms for the relevant years in 2010.

As far as the matter relating to the complainant's outside activities were concerned, the Director-General stated that he did not agree with the JAB's conclusion because the appellant (i.e., the complainant before the Tribunal) never disputed the fact that she had participated in unauthorized outside activities, including outside the duty station, while on paid sick leave. He stated that, based on the undisputed and established evidence of those activities, there was serious misconduct justifying non-extension of contract on this ground also.

As regards the recommendation to refer the case to the Joint Disciplinary Committee, the Director-General stated that he had taken into consideration that the complainant did not seek a referral to that Committee in her internal appeal. He stated, additionally, that referral to the Joint Disciplinary Committee would have been ineffectual given the fact that since May 2011, the complainant had avoided all

contact with officials of UNIDO on all matters under review and in August 2012 the Medical Director had advised UNIDO not to communicate with the complainant. Further, during the entire appeal proceedings the complainant's spouse had acted as her representative and still did so.

The Director-General concluded that the foregoing were solid grounds that showed that the complainant's conduct and level of integrity failed to meet the standards required for her status, and that in light of all of the foregoing facts and circumstances it was not necessary or appropriate to proceed to refer the matter to the Joint Disciplinary Committee prior to making the decision not to extend the complainant's contract.

10. For the reasons stated by the Director-General, the Tribunal is of the view that the peculiar circumstances of this case justified the decision not to refer it to the Joint Disciplinary Committee, irrespective of whether, in other circumstances, that might have been required. Referral would have been futile when the complainant would not have participated in the process. Moreover, the evidence of the complainant's breaches, as alleged, was beyond doubt.

11. In claiming dependency benefits, Staff Regulation 6.9(d) and Staff Rule 106.16(g) required the complainant to report to the Director-General any changes in status that would have affected the payment of the allowance. These provisions are to ensure the integrity of the dependency benefit scheme in which the person who claims is responsible to establish entitlement. The complainant failed to follow these requirements.

12. In the second place, the complainant admitted that she participated in outside activities while she was on sick leave. This was in breach paragraph 11(d) of UNIDO's Code of Ethical Conduct (UNIDO/DGB/(M).115). This provision expressly prohibits a staff member on leave from participating in outside activities without prior authorization, as it states as follows:

“Staff members on leave, with or without pay, must bear in mind that while on approved leave of absence they remain subject to the terms of their appointments and contracts with UNIDO. Accordingly, staff members may only engage in outside activities during leave, paid or unpaid, after receipt of a written authorization.”

13. The Tribunal finds that in these peculiar circumstances, the Director-General’s decision not to extend the complainant’s contract was within his discretion. The complaint is therefore unfounded on this ground. The complainant’s further claims that the decision not to extend her contract was tainted by failure to meet the duty of good faith and due care are also unfounded as they have not been proved.

14. The complainant claims that UNIDO was wrong to separate her from service before her health status was determined. She contends that it was a breach of due process and of good faith to have so separated her because no steps were taken under Staff Rule 108.03 to refuse her sick leave and good faith required UNIDO to have made the appropriate inquiries regarding her health. She cited Judgment 938 in support.

15. In Judgment 938, the complainant in the case leading to that judgment was informed on 15 May 1986 that her fixed-term appointment, which was due to expire on 30 June 1986 would not have been extended beyond that date because of unsatisfactory performance; a negative attitude, because her supervisor found her a difficult and unwilling worker, and because there was no suitable vacancy elsewhere. The complainant challenged this decision, and, in her internal appeal, claimed a continuing appointment or financial compensation in lieu; sick leave and the payment of her 1983 increment as from the due date. The impugned decision rejected her internal appeal. She argued, among other things, before the Tribunal, that it was wrong to terminate her appointment on 30 June 1986 as she was on sick leave. The Tribunal stated that a determination was to be made, on considering the Food and Agriculture Organization’s (FAO) Rules on sick leave in light of the facts in the case, as to her ability to return to work. It found that there was no Rule that prevented her from receiving

sickness benefits because her contract ended on 30 June 1986. This was the context in which the Tribunal stated that “a staff member cannot be separated while on sick leave”, and, accordingly, determined as follows, in consideration 13:

“Since the Organization does not contest the medical certificates supplied, it is accepted that the complainant needed leave until 2 August 1986 and she is entitled to have her separation calculated as of that date, not 30 June.”

16. The Tribunal subsequently explained this aforementioned decision taken in Judgment 938. Accordingly, it stated the following in Judgment 3175, under 13 and 14:

“13. The Tribunal notes, however, that although in some of the judgments cited by the complainant an official’s appointment had been extended because that person’s contract had ended during sick leave, the circumstances of the instant case are different to those in the cases concerned by those judgments, because in the Office there is no legal provision or administrative practice permitting the extension of a contract until the end of sick leave.

14. Moreover, as the Organization points out, the Tribunal has clarified its position regarding the extension of a contract to cover sick leave. In Judgments 1494 (under 6 and 7) and 2098 (under 8) it made it plain that the precedent set in Judgments 607 and 938, on which the complainant relies, must not be applied out of context; obviously, the Tribunal did not establish a rule whereby, whatever the circumstances, an official who falls ill towards the end of his or her appointment is entitled to have it extended beyond the date of expiry and to receive a salary for the same term. It is equally plain that the principle set forth in Judgment 938, under 12, that ‘a staff member cannot be separated while on sick leave’ must be seen in context; it cannot be extended to every case in which an appointment ends.”

17. The decision in Judgment 938 is to be distinguished from the present case in that, contrary to the FAO Rule that governed sick leave benefits in that case, UNIDO’s Staff Rule 108.03(e) specifically provides that “[e]ntitlement to sick leave shall lapse on the final date of a staff member’s appointment”. Given this provision, the claim that UNIDO was wrong to separate the complainant from its service before her health status was determined is unfounded.

18. The complainant sets her case of harassment or UNIDO's breach of good faith and/or duty of care in the following context:

“The [Tribunal] has made it clear that harassment can be decided ‘primarily by reference to the [repeated] denial of due process’ and actions that constitute hostility. Judgment No. 2524, consideration 27. Moreover, a staff member may cite an accumulation of events overtime (*sic*) to prove harassment. Even if the Tribunal finds that the administration's actions do not constitute harassment, there may be a breach of good faith and duty of care. In this regard, the Tribunal has consistently held that ‘international organisations have a duty to treat their staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury (see, for example, Judgments 2067, under 17, or 2116, under 5)’. Judgment No. 2936, consideration 19.”

19. Harassment is expressly forbidden in the Director-General's Bulletin of 1 March 2010 entitled Code of Ethical Conduct. The Code indicates that harassment in any form is an affront to human dignity; that staff members must not engage in or be involved in harassment, and that staff members have the right to an environment that is free of harassment. The complainant has drawn attention to the following paragraph regarding harassment that is contained in the *Standards of Conduct for the International Civil Service* (2001), which provides as follows:

“Harassment in any shape or form is an affront to human dignity and international civil servants must avoid it. They should not engage in any form of harassment and must be above any suspicion of it. International civil servants have the right to an environment free of harassment. It is the responsibility of organizations to explain their interpretation of the term and to establish rules and provide guidance on what constitutes harassment and how it will be dealt with.”

20. The Tribunal has consistently stated, in Judgment 2406, under 13, for example, that allegations of harassment must be supported by specific facts presented by the person who makes the complaint, who bears the burden to prove harassment. The Tribunal has also stated, in Judgment 3065, under 10, for example, that an accusation of harassment requires that “‘an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused.’ Furthermore, ‘[i]ts duty to a person who makes

a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context [...], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account [...]’ (see Judgment 2973, under 16, and the case law cited therein).”

21. Additionally, the Tribunal has consistently stated, in Judgment 2295, under 10, for example, that it is not the Tribunal’s role to reweigh the evidence before an internal body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. For that reason such a body is entitled to considerable deference. So that where, as in the present case, the internal body has heard evidence and made findings of fact based on its appreciation of that evidence and the correct application of the relevant rules and case law, the Tribunal will only interfere in the case of manifest error.

22. In relying on a statement in Judgment 2524 to support her submission that harassment may be decided primarily by reference to the repeated denial of due process and other harassing actions, the complainant states that she suffered harassing circumstances that were a culmination of actions by the Administration done in bad faith and in breach of due process. She notes that the Tribunal has held that international organisations have a duty to treat their staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury. The Tribunal notes that it has held, in Judgment 2067, for example, that an accumulation of events over a period of time may be cited in support of a claim of harassment. Having however considered all of the allegations that the complainant raises to support this claim, individually and compendiously, the Tribunal considers it to be unfounded.

23. The repeated instances of absence of due process on which the complainant relies relate to decisions that were taken and actions that were done revolving around her illness and consequent investigations

and the consequential extension of her contract for short periods, which culminated in the decision not to extend her contract. It has been determined in this case that no breach of due process was present either in the decision not to extend the complainant's contract or because that decision was taken notwithstanding that she was on sick leave at the time. It has also been found that there was no breach of due process because the case was not referred to the Joint Disciplinary Committee before the decision was taken not to extend the complainant's contract.

24. As far as the decisions to give the complainant two short term contract extensions to 31 January 2010 and from 1 February to 31 March 2011 were concerned, the Tribunal held, in Judgment 3441, that no breach of due process was involved in the first extension. In the same Judgment, the Tribunal considered that the complainant's health condition and related circumstances at the material time required a more sensitive approach to the notification to the complainant of the second extension. The Tribunal also observed the complainant's allegation that when she met a member of the Administration on 27 January 2011 to discuss the contract extension, that official expressed displeasure because she had sought the review of the Staff Pension Committee's (SPC) decision. The complainant alleged that she was told that this was unprecedented in UNIDO's history and that she risked losing her employment and pension because of that action. Observing that these allegations were uncontroverted, as well as the very short notice that the complainant was given of that contract extension, the Tribunal determined that these actions breached UNIDO's duty of care, good faith and mutual trust to the complainant and awarded her compensation for moral injury. However, in Judgment 3441, consideration 25, the Tribunal held that these allegations did not individually or together amount to harassment. It was further held that contrary to the complainant's further allegation, these actions were not part of a continuing course of moral harassment, psychological aggression or abuse of authority by UNIDO officials. No evidence was provided in the present proceedings which could lead to a contrary finding.

25. In her memorandum of 3 June 2011 to the Focal Point for Ethics and Accountability the complainant sought to challenge the Administration's decision to refer her case to the SPC for determination of incapacity under Administrative Rule H.3(a) of the United Nations Joint Staff Pensions Fund Regulations on the ground that they were tainted by retaliation. She also sought to challenge the decisions to give her the two short-term contracts on short notice, instead of a three-year contract, on the ground that the Administration breached its duties of care, good faith and mutual trust towards her thereby causing her professional injury and injury to her dignity. She sought to challenge the investigations into her outside activities and into the claims for dependency benefits, as well as the manner in which they were conducted and the behaviour of some of the officials involved in these processes on similar grounds. The Tribunal finds that the decision by the Officer-in-Charge of the Focal Point on Ethics and Accountability to recommend the dismissal of these allegations does not evince any procedural irregularity or illegality.

Additionally, the Officer-in-Charge of the IOS decided not to further investigate the complaints, which were concerned with the non-extension of the complainant's contract and the investigation into her conduct. The complainant had alleged that these actions were based on prejudice or other improper motive. The Tribunal considers that it was open to the IOS to find that no evidence was provided to prove these allegations and there was no procedural irregularity or illegality. The Tribunal also considers that the IOS, having noted that the complainant had asked for a review of the decision not to extend her contract, correctly advised that appeal proceedings, rather than an investigation by it, was the appropriate manner by which to challenge that decision. The Tribunal therefore considers that the IOS's findings were within its discretion and they do not evince any procedural irregularity or illegality.

26. As to the complainant's allegation that the decision to recover the dependency payments and to cease further payments to her spouse was motivated by prejudice or that it was the application of a disciplinary measure against her without due process; the Tribunal had

also held, in Judgment 3441, in consideration 24, that this was not proved. The Tribunal further held, in consideration 25, that contrary to the complainant's further allegation, these actions were not part of a continuing course of moral harassment, psychological aggression and abuse of authority by UNIDO officials. No evidence was presented in this case to permit the Tribunal to find otherwise. Accordingly the Director-General's decision to accept the JAB's recommendation to dismiss the complainant's claim of harassment must stand and the harassment claim is dismissed. Consequentially, her request for an order to remove any adverse material from her official file, which she has not identified, and all other claims for relief will also be dismissed.

27. In all of the foregoing premises, the complaint should be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ