Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G.

v.

UNIDO

121st Session **Judgment No. 3605**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr W. G. against the United Nations Industrial Development Organization (UNIDO) on 20 December 2012 and corrected on 26 April 2013, UNIDO's reply of 14 August 2013, the complainant's rejoinder dated 25 November 2013 and UNIDO's surrejoinder of 12 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 decision to reassign him retroactively to UNIDO's Headquarters in Vienna (Austria) and to recalculate his salary and allowances accordingly, leading to a deduction from his remuneration.

The complainant joined UNIDO in May 1997. In June 2007 he was assigned to Tehran as UNIDO Representative in the Islamic Republic of Iran at grade P-4. In August 2009 he sent an e-mail to the Human Resource Management Branch (PSM/HRM) in which he alleged harassment on the part of his then secretary, Ms R. The following month, allegations of misconduct were made against the complainant

involving, among other things, breaches of the procurement rules. The Office of Internal Oversight Services (IOS) opened an investigation into the matter. In October 2009 Ms R. wrote to the Administration asserting that the complainant had committed crimes against her; she indicated that she intended to initiate proceedings against him before the local courts and that her lawyer anticipated the imminent detention of the complainant by the local authorities.

It was against this background that the Administration requested the complainant to return to UNIDO Headquarters "for consultations on a number of matters". Urgent steps were taken to issue travel authorizations for both the complainant and his wife, and on 15 October 2009 they flew from Tehran to Vienna. The complainant was subsequently directed to remain at UNIDO Headquarters until further notice and he was given temporary assignments.

On the basis of the findings of the IOS investigation, the allegations of misconduct against the complainant were referred to the Joint Disciplinary Committee. In November 2010, at the end of the disciplinary proceedings, the complainant received a written censure. In addition, he was required to reimburse UNIDO for the improper use of resources and he was informed that he would be reassigned to a position without managerial responsibility.

On 14 February 2011 the complainant was notified that the Director-General had decided to reassign him to the Office of the Managing Director of the Programme Development and Technical Cooperation Division at UNIDO Headquarters as Industrial Development Officer and that he would be contacted regarding the details of the reassignment.

Following his return to Vienna, and particularly in April and June 2011, the complainant asked to be paid a daily subsistence allowance (DSA) for his "prolong[ed] mission" at UNIDO Headquarters, i.e. for the period between his arrival in Vienna in October 2009 and his reassignment to a new post in February 2011. This request was rejected on the grounds that his prolonged stay in Vienna could not be considered a mission, as it had been occasioned by the investigation into the allegations of misconduct against him and the ensuing disciplinary

proceedings. UNIDO asserted that he had been told by the Administration on several occasions that his status would be regularised only after the completion of those proceedings, so as not to prejudge the outcome of the proceedings. It proposed that he be reassigned to Vienna either with effect from 15 October 2009 or with effect from 7 November 2009, i.e. the date following the discontinuation of his DSA payments. Both options would entail a recalculation of his salary and entitlements based on the terms, conditions and rates applicable for service at Vienna as well as payment of the entitlements due to a staff member who is reassigned between duty stations. The complainant was asked to provide his comments by 5 August.

On 4 August 2011 the complainant wrote to the Director-General, objecting to PSM/HRM's proposal. He contended that he was entitled to receive both a DSA for his prolonged mission at UNIDO Headquarters and an assignment grant, and he requested payment of those entitlements.

By a memorandum of 5 September 2011 PSM/HRM notified the complainant of the decision to regularise his status by reassigning him to Vienna with effect from 7 November 2009; his entitlements and benefits would be recalculated accordingly. On 21 October the complainant requested the Director-General to review that decision. On 19 December 2011 the Director of PSM/HRM informed the complainant on behalf of the Director-General that the decision of 5 September would be maintained. She explained that the Director-General's decision notified to the complainant on 14 February 2011 constituted the final administrative decision with respect to regularising his administrative status and thus, the decision communicated to him on 5 September 2011 was not a new decision but rather an administrative decision on the "implementation modalities" of the decision of 14 February 2011. In addition, PSM/HRM would further consider his claim for DSA upon receipt of evidence that he had incurred extraordinary expenses during his stay in Vienna at the material time.

On 6 February 2012 the complainant filed an appeal with the Joint Appeals Board (JAB) challenging the decision of 19 December 2011. In its report of 13 September 2012 the JAB found that the complainant was not eligible for a DSA in the absence of appropriate

documentary evidence of his expenses and recommended that his claims be rejected. By a memorandum of 2 October 2012 the Director-General endorsed the recommendations of the JAB and dismissed the appeal in its entirety. That is the impugned decision.

On the complaint form the complainant asks the Tribunal to set aside the impugned decision and to order UNIDO to restore the original date of his reassignment to Headquarters to 14 February 2011. He seeks material damages in an amount equivalent to his DSA entitlement for the period from 15 October 2009 to 13 February 2011, with interest. He seeks material damages based on a reassignment from Tehran to Headquarters effective 15 February 2011, also with interest. He claims other material damages, moral damages in the amount of 100,000 euros, costs, and any other relief the Tribunal deems just and proper.

UNIDO asks the Tribunal to find that the complaint is unfounded and to dismiss it in its entirety.

CONSIDERATIONS

1. In October 2009, the complainant travelled with his wife from Tehran to UNIDO Headquarters in Vienna. Thereafter he remained in Vienna and did not return to Tehran. At that time he was serving as the UNIDO Representative in the Islamic Republic of Iran at a P-4 level. Allegations of misconduct had been made against the complainant in September 2009 involving, amongst other things, breaches of UNIDO's procurement rules. Those allegations resulted in UNIDO's IOS initiating an investigation into them.

The final report of the IOS was issued in April 2010. That report led to the consideration of the matter by the Joint Disciplinary Committee and ultimately the imposition of a disciplinary measure in the form of a written censure by the Director-General in November 2010. Allied to this censure was a decision by the Director-General that the complainant be instructed to reimburse UNIDO for the improper use of resources (hospitality funds, telephone calls, costs associated with the improper use of a UNIDO vehicle).

2. On 14 February 2011 the complainant was advised in a memorandum that the Director-General had decided to reassign him to a position at Headquarters as an Industrial Development Officer. This decision to reassign involved the exercise of a power conferred on the Director-General under Staff Regulation 4.1.

3. Initially in April and later in June 2011, the complainant requested the payment of the DSA due for the period from mid-October 2009 to 13 February 2011. Also in June 2011, the complainant sought payment of an assignment grant. Apparently in response to these requests, an official of PSM/HRM offered the complainant two proposals to change retroactively his date of reassignment to either 15 October 2009 (the date of his travel from Tehran to Vienna) or 7 November 2009 (the date then believed to be the date of the discontinuance of DSA payments to him).

These proposals were rejected by the complainant in August 2011 and he repeated his request for the payments earlier sought. The complainant was told, in effect, on 5 September 2011, that his claim for payments was rejected and that his status had been regularised by reassigning him to Vienna with effect from 7 November 2009.

4. On 21 October 2011, the complainant sought a review of the decision to retroactively assign him to Headquarters and to decline to make the payments he had earlier sought. The review resulted in the decision being maintained. The complainant lodged an internal appeal with the JAB on 6 February 2012. On 13 September 2012 the JAB recommended the dismissal of the appeal in its entirety. This recommendation was accepted by the Director-General in a memorandum of 2 October 2012 and the complainant was informed of this. That is the impugned decision.

5. The complainant challenges the impugned decision on several bases. The first is that the initial decision by the Director-General to reassign him in February 2011 was effective on 14 February 2011. He contends that the subsequent "regularisation" of his status by proposing reassignment effective 15 October 2009 or 7 November 2009

and actual reassignment to Headquarters effective 7 November 2009, was not a decision of the Director-General nor by an individual to whom the Director-General had delegated the power conferred by Staff Regulation 4.1.

The second basis is that a subsequent retroactive reassignment is not authorised by the Staff Rules once reassignment has occurred. The third is that the decision to retroactively reassign the complainant involved double jeopardy and a hidden sanction. The fourth is that, in any event, the complainant was entitled to payment of the DSA. The final argument advanced by the complainant is that the internal appeal process involved a breach of good faith and the denial of due process. UNIDO challenges each of these contentions.

6. The complainant's legal brief does not articulate, with any clarity, all aspects of the relief sought. It is true that the complainant expressly seeks payment of a DSA from 15 October 2009 through to 13 February 2011. However, he also seeks material damages representing benefits lost because of his allegedly unlawful retroactive reassignment effective 7 November 2009. In his brief, he seeks an order that UNIDO "conduct a new calculation of his entitlements, and order payment of interest from due dates" without identifying what those entitlements are. However, having regard to the pleadings as a whole, it is tolerably clear they are whatever benefits may have been payable to the complainant on the footing that he remained stationed in Tehran during late 2009, 2010 and early 2011 notwithstanding his physical presence in Vienna.

7. It is to be recalled that the complainant was informed in September 2011 that he had been reassigned to Vienna effective 7 November 2009. His argument that this was unlawful contains two elements. One is that the decision communicated to him on 14 February 2011 was a decision not only to reassign him to a position at Headquarters but, additionally, to reassign him effective that day, namely 14 February 2011. This founds the argument that the subsequent identification in September 2011 of the reassignment as effective 7 November 2009 involved a retroactive change to the decision made in February 2011.

Another element is that, in any event, the decision that the reassignment would be effective 7 November 2009 could only have been made by the Director-General or the person delegated by him. The complainant contends that, as a matter of fact, it was not.

8. In its surrejoinder, UNIDO argues that in focusing on the decision of 14 February 2011, the real issue is not addressed. It accepts that the reassignment of the complainant to the position of Industrial Development Officer at Headquarters did take effect on 14 February 2011. Instead, it argues, the real issue is whether the complainant's duty station was Headquarters at least from the expiry of his travel authorisation on 6 November 2009 in circumstances where, on UNIDO's characterisation of the facts, the complainant was evacuated from Tehran on 15 October 2009 and was reassigned to other duties at Headquarters pending the IOS investigation into his conduct. It argues that the regularisation decision of 5 September 2011 did no more than recognise these facts.

9. It is convenient to consider first the complainant's particular claim to payment of the DSA from 15 October 2009 through to 13 February 2011. The entitlement to a DSA is conferred by Staff Rule 109.01 when read in conjunction with the rules contained in Appendix G to the Staff Rules. Paragraph (u) of Appendix G creates the particular entitlement to a DSA in accordance with a schedule of rates established from time to time. The complainant argues that Staff Rule 109.01(a)(ii) applied to him from the time he arrived in Vienna in October 2009 until his reassignment to the position of Industrial Development Officer at headquarters in February 2011. Rule 109.01(a)(ii) provides that "[s]ubject to the conditions laid down in the present rules, the Organization shall pay the travel expenses of a staff member under the following circumstances: […] (ii) [w]hen required to travel on official business".

10. UNIDO answers this argument by saying that the applicable provision is not Staff Rule 109.01(a)(ii) but rather is Staff Rule 109.01(a)(vii). That latter provision creates an entitlement to travel

expenses "[o]n travel authorised for medical or security reasons or in other appropriate cases, when, in the opinion of the Director-General, there are compelling reasons for paying such expenses".

11. Having regard to the pleas of the complainant and UNIDO, the issue raised is not the interpretation of Staff Rule 109.01(a). Both the complainant and UNIDO appear to accept that, if as a matter of fact, the travel was authorized for security reasons then Staff Rule 109.01(a)(vii) applied and payment of DSA depended on the discretionary decision of the Director-General to pay DSA. Similarly, the complainant and UNIDO appear to accept that if the travel was for official business the applicable provision was Rule 109.01(a)(ii). Thus the issue raised is not the legal question of the proper interpretation of Rule 109.01(a) but rather the factual issue of whether the travel was for official business or, alternatively, it was travel authorized for security reasons.

12. In its reply, UNIDO recounts the circumstances in which the complainant was requested to travel to Vienna in October 2009. In mid-September 2009 complaints were made against the complainant of serious wrongdoings. Shortly after, UNIDO ascertained that the complainant did not enjoy full diplomatic immunity and only benefited from the functional privileges and immunities of an official under the Convention on Privileges and Immunities of the Specialized Agencies of 1947. It can be inferred that the investigation of this issue arose from a concern that the complainant might be arrested or prosecuted in the Islamic Republic of Iran for conduct which was the subject of a complaint by his then secretary, Ms R., whose relationship with the complainant had, at this time, plainly deteriorated significantly. There was a reasonable basis for this concern. In October 2009 and particularly so on 13 October 2009, Ms R. communicated with the Administration in terms that suggested fairly clearly that she was proposing to take grievances about the complainant to the Iranian authorities which could have resulted in his arrest and detention. It was in these circumstances that arrangements were hastily made on 14 October 2009 to change the date of the complainant's departure from 17 October to 15 October 2009. A travel authorisation generated on 14 October 2009 stated the purpose

of the travel as "HR Evacuation" which was the first travel authorisation generated for this travel. This travel authorisation was cancelled because it was apprehended Ms R. might come to know of the purpose of the travel which, in turn, might have resulted in her expediting her threat to have the complainant arrested. In addition, the cost of the complainant's wife's travel to Vienna was also paid for by UNIDO consistent with Rule 109.02(a) which does not provide a general entitlement to travel expenses for, inter alia, a spouse. The only applicable circumstance is that referred to in Rule 109.02(a)(vii) concerning travel for medical or security reasons.

13. In his rejoinder, the complainant does not dispute this account of the facts but rather suggests that Ms R.'s threat to have him arrested was not serious and, in any event, was not a threat that continued. However, the Tribunal accepts that UNIDO's conduct was, in the circumstances, reasonable and the travel of the complainant and his wife at the time it was undertaken can appropriately be characterised as travel for "security reasons" rather than the more generally described "travel on official business". That this is so is significantly underpinned by the original description of the purpose of the travel as "HR Evacuation". It is true that before the travel the complainant had been requested by e-mail (on 12 October 2009) to travel to Vienna "for consultations on a number of matters" and that those consultations might take two weeks. However this was not the travel actually undertaken and certainly this request to travel did not contemplate that the complainant would remain in Vienna for well over a year, being the period for which the complainant claims payment of DSA. In the result, any entitlement the complainant had to payment of DSA after having travelled to Vienna was dependent on the Director-General forming the opinion that there were compelling reasons to pay travel expenses including DSA. As this did not occur, the complainant's claim for DSA should be rejected. The Tribunal notes that no argument was advanced by the complainant in which it was accepted that his travel initially had been for security reasons but at some indeterminate time after he and his wife arrived in Vienna it ceased to have that character. However, it is conceded by UNIDO that the complainant was entitled

to DSA for the period from 15 October to 6 November 2009 but that DSA has not been paid because the complainant has not lodged the appropriate form. The lodging of the form is not, in a case such as the present, a condition precedent to the payment (see Judgment 3483). DSA for this period should be paid and an order to that effect should be made.

14. Returning to the challenge to the lawfulness of the decision of 5 September 2011, it is necessary to ascertain whether the decision to reassign the complainant to Vienna effective 7 November 2009 was a decision made by the Director-General or a person with delegated power. That is because Regulation 4.1 of the Staff Regulations contemplates that the assignment of staff to "activities or offices" is undertaken by the Director-General.

15. The response of UNIDO is not that the decision was actually made by the Director-General but rather, while seemingly accepting that the decision was made by the Officer-in-Charge, PSM/HRM, it was made in exercise of a delegated authority. It is unnecessary to consider the scope of general delegations made by the Director-General to PSM/HRM which UNIDO relies on. That is because there is sufficient evidence to show the specific decision of 5 September 2011 was made on delegation. That decision was a response to memorandum from the complainant to the Director-General dated 4 August 2011. In the memorandum of 5 September 2011 it is said that the memorandum of 4 August 2011 was forwarded to the Officer-in-Charge, PSM/HRM "for a reply". Apart from this observation, it can be inferred that the 4 August 2011 memorandum was sent from the Director-General's office to PSM/HRM for the purposes of responding on behalf of the Director-General. That PSM/HRM was acting on behalf of the Director-General with his authority in making decisions about the reassignment of the complainant to Vienna, is confirmed by the terms of the review decision of 19 December 2011 in which the Director of PSM/HRM, in maintaining the decision of 5 September 2011, said that the complainant was being informed of the review decision "on behalf of the Director-General". Formulations to this effect have been

treated by the Tribunal as sufficient evidence of delegation of power (see, for example, Judgment 1577, consideration 3), particularly when taken together with the presumption of regularity (see Judgment 2915, considerations 14 and 24).

16. Having determined that the decision was made on delegation, it is then necessary to determine whether it involved an impermissible retroactive alteration of the complainant's status as a staff member assigned to Vienna. The complainant's argument proceeds on the basis that the assignment effected on 14 February 2011 was both an assignment to a position and an assignment to a location. In form, it was both but, in the unusual circumstances in this case, it was in substance an assignment to a position only, and the reference in the memorandum of 14 February 2011 to "UNIDO Headquarters" was simply a mechanism to identify fully the position to which the complainant was being assigned. The unusual circumstances were that the complainant had been working for UNIDO at its headquarters for almost a year and a half. The complainant was doing so in circumstances where on UNIDO's account he had been told shortly after his arrival from Tehran that his administrative status in Vienna and related entitlements would be regularised retroactively upon completion and in light of the IOS investigation and the disciplinary proceeding. While the complainant denies having been told this, it is highly probable that he would have been. It is barely conceivable that there would have been no discussion about his status given that he had left Tehran in the circumstances earlier discussed and was to remain in Vienna for an indeterminate period and, while in Vienna, would continue to work for UNIDO.

17. The Tribunal is satisfied that the rule against retroactivity has not been violated. One qualification to that rule is where the retroactive decision supersedes an earlier one which, at the time at which it was taken, was merely provisional and so was to hold good only until replaced by a final decision (see Judgment 1130, consideration 2). De facto, a decision was taken to assign the complainant to Vienna provisionally (a decision accepted by the complainant) while, amongst

other things, the IOS completed its investigations and issued a report and the Administration made decisions about the complainant in the light of that report. In the result the decision of 5 September 2011 was a final decision replacing the provisional decision and it fell within the qualification to the general rule just discussed.

18. The complainant advances an argument that the decision to reassign him retroactively involved a further disciplinary measure and thus violated the principle of double jeopardy and also constituted a hidden sanction. The complainant also argues that the conduct of UNIDO in the proceedings before the JAB showed that UNIDO "was obsessed with ensuring that the [c]omplainant would continue to suffer from his alleged misconduct". It is by no means obvious, and the complainant has failed to demonstrate, that the conduct of UNIDO should be characterised in the way he suggests. As UNIDO points out in its reply, the rule against double jeopardy does not prevent disciplinary and non-disciplinary consequences attaching to the same acts or events (see Judgment 3184, consideration 7). These arguments of the complainant should be rejected.

19. A related argument is advanced by the complainant that UNIDO failed to act in good faith towards him. In the brief accompanying the complaint, this argument is advanced at a high level of generality and includes submissions or allegations that the complainant's dignity and professional reputation were adversely affected during the disciplinary procedures. In his rejoinder, the complainant deals with the issue briefly and says he "rejects any contention that the [A]dministration acted in good faith when it confiscated his property and rejected his claim for DSA and that it would only pay 'extraordinary expenses'". It is incumbent on a complainant to substantiate an allegation of bad faith (see Judgment 2293, consideration 11). The complainant has failed to do so and this argument should be rejected.

20. In the result, the complainant has not established any basis on which any of the relief claimed should be granted other than in relation

to his claim for DSA for the period from 15 October to 6 November 2009. All other claims should be dismissed.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant DSA for the period from 15 October to 6 November 2009 (if not already paid) within 14 days of the public delivery of this judgment.

2. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 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