G. (No. 3)

v.

UNIDO

124th Session **Judgment No. 3841**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. G. against the United Nations Industrial Development Organization (UNIDO) on 24 June 2014 and corrected on 17 July, UNIDO's reply of 29 October 2014, the complainant's rejoinder of 26 January 2015 and UNIDO's surrejoinder of 11 May 2015;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to abolish his post, as well as the earlier decision to reassign him to that post.

Facts relevant to this case are to be found in Judgment 3669, delivered in public on 6 July 2016.

By a memorandum of 13 December 2010 the complainant was informed that he was reassigned to the grade P-5 post of Chief, General Support Services Unit (PSM/OSS/GES), with effect from 10 January 2011. He went on indefinite sick leave on 8 November 2011.

By a memorandum dated 16 March 2012 the complainant was informed that following the abolition of his post with effect from 1 January 2012, the Administration would be in contact with him to further discuss his future placement. On 14 May the complainant requested the review of the decision to abolish his post, on the grounds that it was tainted with bias, prejudice, and lack of good faith, and that it was "yet another flawed action in a series of hostile approaches" which UNIDO had taken against him. He asserted that no information had been given to him, as the incumbent of the post, prior to March 2012. The Director of the Human Resource Management Branch replied to his request on 9 July 2012. She considered that, given that he had been involved, like all the other Unit Chiefs, in the preparations for the necessary budget revisions as early as May 2011, he had been fully informed of the abolition of his post well before the memorandum of 16 March 2012. She also stated that, as the complainant had been on sick leave since 8 November 2011, there had been no opportunity for the Administration to review any options for reassignment; that following the abolition of his post, the complainant had been accommodated against a temporary post which had been created for that purpose pending his return from sick leave; and that he would be contacted upon his return to the office so as to look for possible positions to which he could be reassigned.

The complainant filed an appeal with the Joint Appeals Board on 16 August 2012 against the "answer" to his request for review, as well as the decision to reassign him from his previous post to a "to be abolished post".

The complainant returned to work on 26 August 2013. His fixed-term contract expired on 31 December 2013.

In its report of 26 February 2014 the Joint Appeals Board concluded that the complainant's appeal against the decision to reassign him to the post of Chief, PSM/OSS/GES was time-barred. With respect to the decision to abolish that post, the Board concluded that it had been taken in line with the applicable Staff Regulations and Staff Rules. It considered that the complainant's claim for compensation was unfounded, given that he had been accommodated by UNIDO on a temporary post from 1 January 2012 until the expiry of his fixed-term

contract. The Joint Appeals Board recommended dismissing the appeal in its entirety. On 25 March 2014 the Director General decided to endorse the Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to order that an investigation be launched into the circumstances under which he was reassigned to the post of Chief, PSM/OSS/GES with effect from 10 January 2011 and to quash the decision to reassign him as well as the decision to abolish that post. In the event that neither of these decisions can be quashed, he seeks compensation in an amount equal to three years' salary. He also claims an amount equivalent to his "actual damages stemming from the improper abolition of his post", moral damages in the amount of 200,000 Swiss francs, as well as costs, with interest at the rate of 8 per cent per annum from January 2011 on all sums awarded. Lastly, he seeks a further award of moral and exemplary damages for the excessive delay in the internal appeal process.

UNIDO submits that the complaint is irreceivable for failure to exhaust internal means of redress to the extent that it concerns the decision to reassign the complainant to the post of Chief PSM/OSS/GES, the related claims for relief and the claim for reinstatement. It asks the Tribunal to dismiss the remainder of the complaint as unfounded.

CONSIDERATIONS

1. The complainant was employed by UNIDO though his employment concluded on 31 December 2013 as a result of the non-renewal of his contract. Some of the relevant background is found in Judgment 3669 and in Judgment 3840 adopted at this session.

2. In his complaint, filed on 24 June 2014, the complainant seeks to impugn two decisions. The first is a decision of the Director General communicated to him orally on 9 November 2010 and later by memorandum dated 13 December 2010, reassigning him from the position of Chief PSM/OSS/BMS to the position of Chief PSM/OSS/GES effective 10 January 2011. The second impugned decision is the abolition, effective 1 January 2012, of the position to which the complainant had

been reassigned. UNIDO argues that the complaint is irreceivable insofar as it relates to the reassignment. It is, at this point, only necessary to set out the facts relevant to this issue.

3. The internal appeal process concerning, relevantly, the 13 December 2010 reassignment decision was preceded by a request for review on 14 May 2012. The Joint Appeals Board concluded, in substance, in its report of 26 February 2014 that the internal appeal against the reassignment decision was time-barred and was not receivable. The Director General agreed. The complainant confronts this issue in these proceedings by arguing that the reassignment decision could only be challenged by way of request for review in the timeframe he actually followed because "[the complainant] is relying on facts or evidence of decisive importance of which he was not and could not have been aware before the decision was taken". Accordingly, citing Judgments 2203, consideration 7, and 3140, consideration 4, he argues that UNIDO was under a duty to review his request, and "even if the time limit was originally not respected the new decision will set a new one".

4. The factual matrix relied upon by the complainant in support of this argument has two elements. The first element is that at the time the reassignment decision was made, UNIDO was aware that the position to which he was being reassigned effective January 2011 was to be abolished. However, the complainant was not then aware that this was so. He only realised that the decision to abolish the post "must have been made when the draft budgets for the relevant fiscal year were approved, in November/December 2010". At that time, so the complainant argues, the financial consequences of the withdrawal of the United Kingdom from UNIDO were already known and thus known at the time of the reassignment.

5. The difficulty with this argument is that the central unknown fact (that a decision had been made to abolish the position to which the complainant was reassigned at the time of the reassignment or that UNIDO knew that it would have to be abolished) is not established on the evidence. It was not until February 2011 that the United Kingdom

informed the Director General it would withdraw from UNIDO. The evidence does not support the inference, advanced by the complainant, that UNIDO would have been aware, well before the formal advice and later announcement, that this was to occur and that its budgetary planning (which led to the abolition of the complainant's post) was occurring in the context of this knowledge and at the time of the reassignment. Indeed the Tribunal is satisfied that it was only after the United Kingdom's position was known that significant adjustments were made to UNIDO's budgetary arrangements that led to the abolition of several posts including that of the complainant.

6. The second element of the factual matrix is that, on the complainant's account of his experiences within UNIDO, he had been subjected to a broad pattern of harassment and prejudicial behaviour and was entitled to rely on an accumulation of events over time to support an allegation of harassment, citing Judgment 2067, consideration 16. The argument appears to be, though it is not advanced with any particular clarity, that the true significance of earlier conduct towards him (including, it appears, his reassignment) was not apparent till later and the "fact" that he was being subjected to sustained harassment (or evidence that he was) and its significance emerged well after the reassignment decision was made. This particular contention should be rejected. Although the case law recognizes that earlier events may be invoked to establish a pattern of harassment even though they were not challenged at the time they occurred (see, for example, Judgment 3250, consideration 10), it does not follow that a new time limit for challenging these events is open. Moreover, the facts and evidence relied upon were facts and evidence known to the complainant. While, on the complainant's account, their true significance was not immediately known, they are not facts of which the complainant "was not and could not have been aware" at the time of their occurrence. The principle discussed in Judgments 2203 and 3140 has not been engaged.

7. In the result, the complaint, insofar as it seeks to impugn the decision to reassign the complainant, is irreceivable. This leads to a consideration of the remaining matter, namely the complainant's

challenge to the decision to abolish his position. The substance of the complainant's argument addressed in considerations 5 and 6 above involves an acceptance that the abolition of the post of Chief PSM/OSS/GES might be viewed as arising from financial constraints due to the United Kingdom's withdrawal from the Organization and the subsequent need to create economies because of loss of income. However, the complainant argues that the decision to abolish the particular post he occupied was influenced by personal bias and prejudice. He points to the fact (which UNIDO contests) that the position he occupied was selected for abolition notwithstanding that there were numerous vacant positions that could have been abolished. Indeed the complainant notes that all other posts abolished at that time, unlike his post, were vacant posts.

8. The complainant cites Judgment 495, consideration 23, as establishing that all he must demonstrate is that it is more probable than not that bias was a factor. It should be immediately noted that the complainant's challenge to his non-appointment to a position on 19 October 2011 substantially on the grounds of bias and personal prejudice manifest over several years was rejected by the Tribunal in Judgment 3669, fundamentally on the basis that bias and personal prejudice was not established on the evidence. In the present proceedings, the complainant again fails to produce any persuasive probative evidence of bias and prejudice but rather rests his case on generalised assertion. His claim, in this respect, is unfounded.

9. The complainant seeks compensation for what he characterises as the excessive delay in completing the internal appeal process. He notes that he initially submitted a request for review on 14 May 2012 and the final decision was not made until March 2014. UNIDO argues that the relevant commencing time to assess delay is when the internal appeal was filed, namely 16 August 2012. It argues, correctly, that the request for review was disposed of within the prescribed time limits. UNIDO also argues, correctly, that six months of the time taken to deal with the internal appeal involved the resolution of objections by the complainant to the composition of the appeal panel. There is nothing in the circumstances of this case that would warrant reference to that

period in assessing whether the internal appeal had been unduly delayed. The Tribunal is not satisfied it was and, accordingly, there is no warrant for awarding damages on this basis.

10. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ