

The Administrative Tribunal,

Considering the complaint filed by Mrs E.S.M. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 February 2005, UNESCO's reply of 8 June, the complainant's rejoinder of 4 July and the Organization's surrejoinder of 14 October 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Swedish national born in 1943, joined UNESCO in 1972 on a temporary appointment as a clerk in the Bureau of the Comptroller (BOC), in the Expenses Control Division. After several other contracts and promotions, she obtained an indeterminate appointment in 1975 and was promoted to grade P-4 in 1993. At the material time she was responsible for a Unit in the UNESCO Coupons Programme in the Division of the Comptroller (DCO replacing the BOC) and, having reached the statutory retirement age, she left the Organization on 28 February 2003.

On 17 October 2002 the complainant had submitted a file to the Director-General containing serious accusations of misconduct allegedly committed by the Comptroller and the Treasurer in the management of the Coupons Programme. Apart from alleged irregularities in the management of the programme in question, some of her allegations concerned her performance appraisals, the psychological harassment to which she claimed to have been subjected for three years and the failure to honour a commitment allegedly made to promote her to grade P-5. By a memorandum of 22 October 2002 she was informed that the file had been referred to the Deputy Director-General.

By an e-mail of 6 January 2003, the Comptroller informed the complainant of his decision to assign another official, who held grade P-5, to the Coupons Programme in order to assist her in her duties, bearing in mind that she would be retiring on 28 February 2003. An exchange of correspondence ensued between the complainant and the Administration, and in a memorandum of 18 January 2003 she was informed that the Executive Assistant to the Deputy Director-General was in turn referring her file to the Office of Internal Oversight for study and for recommendations thereon to the Director-General. As to her administrative status, she was reminded that her promotion to grade P-5 was subject to the approval of her hierarchical superiors.

On 22 January 2003 the complainant filed a protest within the meaning of paragraph 7(a) of the Statutes of the Appeals Board. Having received no reply within the statutory time limit, she lodged a notice of appeal with the Secretary of the Appeals Board, in accordance with paragraph 7(c) of the Board's Statutes, followed by a detailed appeal dated 10 March 2003.

In a report dated 13 December 2004, the Board concluded with the exception of one of its members that neither the e-mail of 6 January 2003 nor the memorandum of 18 January 2003 had notified the complainant of any administrative decision that could be challenged under paragraph 5(a) of the Statutes of the Appeals Board. It therefore recommended, by a majority, rejecting the appeal. The Director-General accepted that recommendation, and the complainant was informed accordingly in a letter of 27 January 2005, which constitutes the impugned decision.

B. In her complaint the complainant objects to the excessive duration of the proceedings before the Appeals Board. She considers that the notion of "a reasonable time" established by the Tribunal's case law was not applied.

She accuses her two hierarchical superiors, namely Mrs N., who combined the – in her view incompatible – duties of Treasurer, Deputy Comptroller and Chief of the Coupons Programme, and Mr W., the Comptroller, of having

misappropriated the sum of 2.16 million United States dollars between 1990 and 2001 to the detriment of the poor or poorest countries in the world which finance the UNESCO Coupons Programme. In her view, the actions of those officials, far from being related to “management problems” as alleged during the internal appeal proceedings, constitute “offences of false balance sheets, insincere and false accounting and fictitious jobs” perpetrated in violation of both UNESCO’s regulations and the United Nations Charter. She lists what she considers to be evidence proving her accusations and points out that the figures she puts forward have never been contested by the Organization.

According to the complainant, the actions she denounces were made possible as a result of a failure to apply the principle of separating management and audit responsibilities. Since the assignment of the Coupons Programme to the Division of the Comptroller, the latter has acted as both judge and party and is the main beneficiary of the reported irregularities, which is contrary to the above-mentioned principle.

The complainant identifies three types of victims of the misappropriations of funds: firstly the poor countries that finance the Coupons Programme; then the United Nations Development Programme (UNDP), insofar as the enormous amount of work it has done for the Coupons Programme has been diverted from its objective and used illegally to fund UNESCO accountants, treasury officials and supernumeraries; and lastly herself, since she has been subjected to harassment for having reported the misconduct in accordance with the Standards of Conduct for the International Civil Service.

The complainant asserts that as a measure of retaliation she was deprived of performance appraisals from 1999 to 2003, in breach of the Organization’s Staff Regulations and Staff Rules.

She contends that it was also to punish her that the promise made to her by the former Comptroller, both verbally and in an unsigned memorandum, to promote her to grade P-5 was not kept by his successor.

The complainant avers that for four years she experienced real “hell at work”, which caused her considerable moral injury.

She asks the Tribunal:

- “– to find her complaint receivable
- to acknowledge her withdrawal of claim concerning the two-year extension of her contract initially considered and to determine her rights and obligations as at 1 March 2003, the date of her retirement
- to rule that, in conformity with Article 40 of the new ‘Standards of Conduct for the International Civil Service’ and Article 101(3) of the United Nations Charter, Regulation 1.5 of UNESCO’s Staff Regulations and Staff Rules concerning the duty of discretion cannot be used as a cover for crimes and offences punishable under national laws
- to rule that in accordance with Article 6 of the ‘Standards of Conduct in the International Civil Service (Article 7 of the new Standards), Regulation 1.5 of UNESCO’s Staff Regulations and Staff Rules cannot be used to prevent compliance with the duty of loyalty arising under the above articles and to authorise [her] to inform the UNDP of the losses sustained as a result of UNESCO’s illegal actions
- to authorise [her] therefore, notwithstanding the provisions of Regulation 1.5 of UNESCO’s Staff Regulations and Staff Rules, to inform the victims regarding the malpractices observed in this case and the losses and damage they have sustained as a result of UNESCO’s illegal actions
- to order UNESCO to pay her compensation of 6,000 dollars for refusing to draw up [her] performance appraisals [...] for four years, from 1999 to 2003
- to promote [her], in accordance with the verbal promise given, to grade P-5 with effect from 1 July 1999, and to reconstitute her career accordingly
- to grant [her] 20,000 dollars in damages for moral injury
- to grant [her] compensation of 5,000 dollars on account of the abnormal and ‘unreasonable’ duration of the

proceedings before the Appeals Board in this case

- to grant [her] 2,000 dollars in costs
- to grant [...] interest at the legal rate on any sums paid”.

C. In its reply UNESCO contends that the complaint is irreceivable on the grounds that there is no administrative decision to challenge: the e-mail of 6 January 2003 simply informed the complainant of the temporary assignment of a P-5 official to the Coupons Programme in view of her imminent retirement, while the memorandum of 18 January 2003 merely informed her of the action that was being taken regarding her file concerning the Programme and gave her some clarifications regarding her administrative status.

On the merits, subsidiarily, regarding the alleged failure to apply the principle of the separation of management and audit responsibilities, the Organization points out that, since the Director-General is the executive head of the Secretariat, he alone can decide on the Secretariat’s structure and assign, to any official or service he considers competent, any duty or responsibility. UNESCO moreover is not subject to any external legislation.

The defendant Organization points out that in accordance with Regulation 1.5 of the Staff Regulations, staff members must exercise discretion, and that since the Director-General is the executive head of the Secretariat, any request relating to the provisions of the Staff Regulations and Staff Rules must be addressed to him and to him alone.

Regarding the complainant’s performance appraisals, the defendant explains that, while the complainant’s performance had admittedly not been assessed for some time, after the date of her last performance report she nevertheless received a salary increment every year during the period under consideration, in accordance with Rule 103.4(a) of the Staff Rules, and that Item 2440 of the Administrative Manual considers a salary increment as equivalent to a performance report.

With regard to the alleged promise of promotion, UNESCO points out that the complainant bases her allegation merely on a draft memorandum which was never sent to its addressee, the Director of the Bureau of Personnel. The memorandum in fact concerned proposals by the Comptroller for a reorganisation which was being considered of the Bureau of the Comptroller, and it constituted neither a promise to the complainant nor an administrative decision of which she was to be notified. The document in question cannot therefore, according to the Tribunal’s case law, be considered as a promise by the administration producing legal effects. As for the alleged verbal promise, it is up to the complainant to furnish proof thereof.

D. In her rejoinder the complainant denies that her complaint is irreceivable, since she complied with all the necessary formalities with regard to both her complaint and her appeal to the Appeals Board.

The complainant submits that UNESCO’s argument whereby neither the Standards of Conduct for the International Civil Service nor the United Nations Charter prevail over Regulation 1.5 is contrary to the principle of the hierarchy of rules and amounts to conferring unfettered power on the Director-General.

She accuses UNESCO of failing to distinguish between the provisions governing performance reports and those concerning salary increments.

She maintains that the draft memorandum constitutes “the beginning of written evidence” of the promise she was made that she would be promoted to grade P-5, and she adds that there can obviously be no “absolute” proof that a verbal promise has been made.

The complainant reiterates that she has suffered moral injury on the grounds that, according to her, there is a direct causal link between her denunciation of the misappropriation of funds and the injury she suffered.

E. In its surrejoinder UNESCO explains that, as far as the complainant’s appeal before the Appeals Board was concerned, her decision to submit a rejoinder had the effect of delaying the scheduling of the Board’s hearing, because the Administration was then obliged to submit a surrejoinder. Moreover, the complainant’s refusal to supply an electronic version of her submissions prevented the translation service from translating all the documents contained in her voluminous file in time.

The defendant endeavours to invalidate the evidence put forward by the complainant in support of the alleged promise of promotion, which it describes as mere suppositions.

CONSIDERATIONS

1. The complainant, who joined UNESCO in 1972 on a temporary appointment, was later given a fixed-term appointment, which on 1 September 1975 was converted into an indeterminate appointment.

Having reached the statutory retirement age, she left the Organization on 28 February 2003. At that time she was responsible for a Unit in the UNESCO Coupons Programme in the Division of the Comptroller and held grade P-4.

2. On 17 October 2002 she had submitted a file to the Director-General containing accusations of misappropriation of funds and misconduct allegedly committed by her hierarchical superiors, namely the Comptroller and the Treasurer, in the running of the UNESCO Coupons Programme, to the detriment of the poor and poorest countries.

In her complaint brief, she states that she also objected to their “illegal and immoral attitude, contrary to Article 6 of the ‘Standards of Conduct for the International Civil Service [...], which was aimed at misappropriating the valuable work provided free of charge by the UNDP [...] for the UNESCO Coupons Programme, a programme of assistance for the educational, cultural and scientific development of poor and developing countries, in order to fund posts of accountants, treasury officials and supernumeraries illegally in the accounting and treasury services of UNESCO (DCO)”.

In the same file she complained that a verbal promise to promote her to grade P-5, allegedly made at the end of 1998 by the then Comptroller, had not been honoured, that in breach of Rule 104.11bis of the Staff Rules her performance reports had not been drawn up for four years, and that she had received no reply to her protest filed on 21 June 1999 concerning her performance reports for 1997-99.

Lastly, she complained that she had been subjected to harassment for the last three years.

By a memorandum of 22 October 2002 she was informed that the file she had submitted to the Director-General had been transferred to the Deputy Director-General.

On 6 January 2003 the Comptroller informed the complainant by e-mail of his decision to assign another P-5 official to the Coupons Programme to assist her with her tasks in view of her forthcoming retirement scheduled for 28 February 2003.

After an exchange of correspondence, the complainant was informed on 18 January 2003, by the Executive Assistant of the Deputy Director-General, that the file was being referred to the Office of Internal Oversight for study and for recommendations thereon to the Director-General. Regarding her administrative status, the Organization states that she was then reminded that her promotion to grade P-5 needed to be approved by her hierarchical superiors and that contract extensions beyond the statutory retirement age were granted by the Director-General on an exceptional basis.

On 22 January 2003 the complainant filed a protest within the meaning of paragraph 7(a) of the Statutes of the Appeals Board. As she did not receive a reply within the statutory time limit, she lodged a notice of appeal with the Secretary of the Appeals Board and sent in her detailed appeal on 10 March 2003.

In a report issued on 13 December 2004, the Appeals Board considered, by a majority, that neither the e-mail of 6 January 2003 nor the memorandum of 18 January 2003 had notified the complainant of any administrative decision that could be challenged under paragraph 5(a) of the Statutes of the Appeals Board, and concluded in particular that the draft memorandum of 1998 by the former Comptroller constituted neither a promise nor a final administrative decision capable of creating legal effects in terms of the Staff Regulations and Staff Rules. It therefore recommended rejecting the appeal.

By letter of 27 January 2005, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to accept the Appeals Board’s recommendation.

3. The complainant's claims are given under B above.

4. The defendant contends that the complaint is irreceivable on the grounds that there is no administrative decision to challenge. In its view, neither the e-mail of 6 January 2003 nor the memorandum of 18 January 2003 had notified the complainant of a decision. The first of those communications, it says, merely informed her that a P-5 official was being temporarily assigned to the UNESCO Coupons Programme, while the second communication only informed her of the action taken with regard to her file concerning the management of the Programme and gave her clarifications regarding her administrative status.

5. According to paragraph 5(a) of the Statutes of the Appeals Board:

“The Board shall consider appeals against an administrative decision or against any disciplinary action where a staff member alleges that it conflicts either in substance or in form with the terms of his contract, or with any Staff Regulation or Staff Rule relevant to his case.”

The Tribunal notes that the protest filed by the complainant on 22 January 2003 concerned “the decision of 6 January 2003 by the Comptroller, Mr W[.], and the decisions contained in [Mr K.'s] memorandum of 18 January 2003 [...] confirming [the] discussion [the complainant had with Mr K. on] 17 January 2003”. On consulting these communications of 6 and 18 January 2003, the Tribunal finds, as did the Appeals Board, that they did not notify the complainant of any administrative decision against which an appeal would lie under paragraph 5(a) of the Statutes of the Appeals Board, cited above. The complaint must therefore be found irreceivable insofar as it follows an internal appeal which was itself irreceivable. Contrary to the view put forward by the complainant, the fact that the Appeals Board examined not only the issue of lack of jurisdiction or irreceivability but also the merits of the case does not render the defendant's objection to receivability inadmissible.

Since the complaint is irreceivable, there is no need to order the hearing of witnesses.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

James K. Hugessen

Seydou Ba

Claude Rouiller

Catherine Comtet