

The Administrative Tribunal,

Considering the third complaint filed by Mr A.G. S. against the United Nations Industrial Development Organization (UNIDO) on 30 October 2006 and corrected on 20 November 2006, the Organization's reply of 10 April 2007, the complainant's rejoinder of 22 June and UNIDO's surrejoinder of 3 October 2007;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Canadian national born in 1947, joined UNIDO in 1981 as an Assistant Industrial Development Officer at grade P-2. He was promoted to grade P-3 in 1983 and to grade P-4 in 1991. As from April 1997 he was also President of the Staff Council, the executive organ of the UNIDO Staff Union. On taking up his functions as President, the complainant requested and was granted release from his duties on a 75 per cent basis. Two years later, in May 1999, he requested to be released on a full-time basis. This request too was granted. In the exercise of his functions as full-time President of the Staff Council, the complainant was not subject to supervision or appraisal. For administrative purposes only, he fell under the authority of the Managing Director of the Field Operations and Administration Division, which was subsequently renamed the Division of Administration (ADM).

On 1 January 2003 the Director-General issued Administrative Instruction No. 16 to promulgate the second phase of UNIDO's human resource management framework, designed to foster career growth. The Instruction provided, inter alia, for merit promotions for staff in the General Service and Professional categories, employed under the 100 Series of the Staff Rules, whose performance over a number of years had been consistently rated as very good or outstanding and who had been at least seven years in the same grade. It stipulated that programme managers (directors and supervisors) would be responsible for submitting their proposals for merit promotions to the Performance Review Committee, which would then make its recommendations to the Director-General for approval.

By a memorandum of 17 March 2003 the Director of the Human Resource Management Branch (ADM/HRM) invited all Managing Directors to carry out a review of the staff serving in their respective divisions and to solicit recommendations for merit promotions from the Directors under their authority. A list of staff members eligible for consideration by reason of seniority was attached to the memorandum; it included the name of the complainant. On 20 March the complainant provided the Director of ADM/HRM with the names of the Staff Council's nominees to the Performance Review Committees. By an Information Circular of 13 May the Administration informed all staff members of the composition of the two Performance Review Committees which were constituted to review the recommendations for merit promotion. On 17 July it announced the names of the staff members whose promotion had been approved. The complainant's name was not on the list.

In a letter to the Managing Director of ADM, dated 30 July 2003, the complainant pointed out that, because he was not subject to supervision or appraisal, he had not been given an opportunity to be considered for a merit promotion. He requested that he be allowed to submit a brief to the Performance Review Committee in order for it to assess the merits of his case. Having received no reply, he wrote to the Director-General on 15 October reiterating his request. In his reply on behalf of the Director-General of 11 December 2003, the Managing Director of ADM told the complainant that his request could not be granted because the promotion review had already been finalised. He assured him that his case had been given due consideration, adding that if he had wished to have it reviewed according to a special procedure, he should have submitted a timely request. He also noted that the problem of the absence of performance appraisals would in the future be remedied by the recent decision to release the President of the Staff Council only on a half-time basis.

The complainant lodged an appeal with the Joint Appeals Board on 13 February 2004. He asked that his request for a fair review of his eligibility for a merit promotion be granted and claimed moral damages and costs. On 2 March

the Secretary of the Joint Appeals Board forwarded the appeal to the Director of ADM/HRM, noting that, according to Appendix K to the Staff Rules, the latter was expected to submit a reply within two months from that date. The reply was submitted on 30 April 2004. By a letter of 14 October 2005 the complainant was notified of the composition of the panel which had been constituted to consider his appeal. In its report, which was delivered on 21 June 2006 by a panel whose composition differed from that which the complainant had approved, the Board noted that the complainant “was *de facto* not evaluated using the type of standard UNIDO performance review criterion specified in [the memorandum of 17 March 2003] and applied to other staff members of the Organization”, but concluded that that in itself would not have prevented the Managing Director of ADM from making a recommendation for merit promotion. It found that the Organization had correctly followed the procedures stipulated in Administrative Instruction No. 16, and recommended that the appeal be dismissed in its entirety. By a memorandum of 4 July 2006 the Director-General endorsed the Board’s recommendation. That is the impugned decision.

B. The complainant submits that his case was not given a fair review, in good faith, in the 2003 merit promotion exercise. First, he argues that the Administration acted in breach of the procedures set forth in Administrative Instruction No. 16 in that it failed to assess whether he fulfilled the third criterion laid down therein, namely whether his performance had been consistently rated very good or outstanding for a number of years, and also in that it allowed the Managing Director of ADM, who was neither his director nor his supervisor, to consider his case. In light of the fact that he had neither a supervisor who could recommend him, nor appraisals on the basis of which his performance could be reviewed, the Organization should have taken the necessary steps to set up a procedure to ensure that he received a fair performance evaluation. To that end, UNIDO could have permitted him to submit his brief to the Performance Review Committee – another staff member had been allowed to do so – or it could have considered his re-election as President of the Staff Council over a number of years as proof that staff members rated his performance very good or outstanding. He states that he does not seek to have his case examined under a special procedure.

Second, he contends that, by allowing the Managing Director of ADM to decide on whether to recommend him for merit promotion, the Organization breached the principle of freedom of association. He notes that the authority which the Managing Director of ADM exercises over the Staff Council President is restricted to administrative matters only. Referring to a memorandum of 11 May 2006, in which the Managing Director of ADM had pointed out the importance of guaranteeing “the independence of staff representatives from value judgments by representatives of management”, he argues that the Administration is precluded from evaluating his performance not only in connection with his work as Staff Council President but also for the purposes of a merit promotion.

Third, the complainant asserts that UNIDO violated the principle of equal treatment in that it did not afford him an opportunity equal to that afforded to other staff members eligible for merit promotion. He reiterates that the Administration was under an obligation to afford him an equal chance either by allowing him to submit his brief or by using an alternative evaluation method.

Fourth, he pleads breach of due process. He contends that the composition of the Joint Appeals Board was changed in the course of the proceedings without him being notified, hence depriving him of his right to object to proposed membership. He also contends that there was unjustifiable delay, and that the “Statement on behalf of the Director-General” – the Administration’s reply to his appeal – was irreceivable, having been filed out of time. Moreover, he was not provided with a copy of the memorandum submitted by the Administration to the Board on 11 May 2006, and he was not invited to attend the interview of the Managing Director of ADM.

The complainant asks the Tribunal to set aside the impugned decision and to direct the Organization to make a new decision on the matter. He claims moral damages in the amount of 25,000 euros and costs.

C. In its reply the Organization submits that there was no breach of the principle of good faith or of the procedures set forth in Administrative Instruction No. 16. It argues that in his capacity as President of the Staff Council the complainant discharged the duties of an elected office which was not subject to supervision or appraisal. Given that Administrative Instruction No. 16 establishes an inextricable link between eligibility for merit promotion and the performance appraisal system, the complainant’s performance as President of the Staff Council could not be evaluated for the purposes of the merit promotion exercise. In effect, his performance as Staff Council President did not qualify him for review by the Performance Review Committee. UNIDO further contends that it would have acted in breach of the procedures on merit promotion had it allowed the complainant to submit his brief to the Performance Review Committee, since Administrative Instruction No. 16 does not provide for “auto-

nomination” or the reopening of the merit promotion exercise following its completion. It denies that any other staff member was given the opportunity to submit his or her brief. Furthermore, it believes that it would have been a fundamental breach of the principle of freedom of association to permit the Performance Review Committee, which included representatives of the Director-General, to evaluate the complainant’s performance and, even more so, to allow the Director-General to consider the complainant’s performance when making the final decision concerning his promotion.

The Organization rejects the view that it infringed the complainant’s right to freedom of association. It points out that the Managing Director of ADM simply reviewed the complainant’s eligibility in terms of seniority, thereby acting within the scope of his authority to decide administrative matters in respect of staff representatives. By the same token, UNIDO refutes the allegation that it failed to adhere to the principle of equal treatment. It emphasises that, as a Staff Council President released from his duties on a full-time basis, the complainant had no supervisor and did not perform any functions that could be appraised; hence he was not in the same factual or legal situation as other staff members who were considered for a merit promotion. In the opinion of the Organization, the complainant would have enjoyed preferential treatment had he been authorised to present his case to the Performance Review Committee.

The Organization also denies any breach of due process. It submits that the misconception that the Board’s composition had been changed was due to a clerical error stemming from the simultaneous consideration of the two appeals the complainant had lodged on 23 January and 13 February 2004 respectively. The Secretary of the Joint Appeals Board inadvertently confused the dates of the two appeals, as a result of which the letter which purportedly communicated to the complainant the membership of the Panel set up to consider his appeal of 13 February was in fact referring to his appeal of 23 January. In the opinion of UNIDO, that error did not cause the complainant any prejudice, since he had the opportunity to object to the proposed membership in respect of both appeals. With regard to the alleged delay in the internal proceedings, the Organization argues that since the complainant did not raise the issue during the appeal process, his claim for damages on account of the alleged delay is irreceivable for failure to exhaust internal means of redress. It also holds that the delay was partly due to the late submission of the complainant’s rejoinder to the Joint Appeals Board. The Organization maintains that its reply was filed within the prescribed time limits, adding that even if there had been a delay, it would not have caused him any injury. Similarly, the failure to provide the complainant with a copy of the memorandum of 11 May 2006 did not cause him any injury, given that the information contained therein was already known to him. It denies that the Board interviewed the Managing Director of ADM.

D. In his rejoinder the complainant submits that UNIDO’s assertion that as Staff Council President he was not eligible for consideration for a merit promotion was made for the first time in its reply. He thus invites the Tribunal to dismiss this “new and contradictory” plea. He contests the view that the terms of Administrative Instruction No. 16 preclude staff members not subject to the formal performance review procedure from consideration for a merit promotion. He produces evidence to support his allegation that the Performance Review Committee did review a statement submitted by a staff member and maintains that, since self-nomination is permitted for merit awards, it should by analogy also be permitted for merit promotions. He argues that the submission of a rejoinder to the Joint Appeals Board is not mandatory and therefore the delay in the internal proceedings cannot be attributed to the fact that he did not file his rejoinder sooner.

E. In its surrejoinder the Organization presses its arguments. It submits that its plea of ineligibility is not the reason underlying the Director-General’s decision but rather a legal argument explaining why the complainant’s plea is unfounded. In any event, it asserts its right to develop its arguments or raise new pleas before the Tribunal. In its view, the complainant has failed to provide convincing evidence that another staff member was permitted to submit a brief to the Performance Review Committee. In light of the Tribunal’s decision in Judgment 2662 to award the complainant 5,000 euros for delay and for the irregularity which interfered with his right to challenge the composition of the Joint Appeals Board in connection with his second complaint, UNIDO modifies its plea and submits that the complainant has already received moral damages for the clerical error in the letter notifying him of the Board’s composition and should hence not be compensated twice for the same mistake.

CONSIDERATIONS

1. The complainant joined the Organization in 1981. He was elected President of the UNIDO Staff Council in 1997 and had held that position continuously when, in 2003, the Director-General issued Administrative Instruction

No. 16. Relevantly, that Instruction allowed for merit promotions for persons “whose performance over a number of years ha[d] consistently exceeded expectations – ha[d] been rated as very good or outstanding – and who ha[d] been at least seven years in the same grade”. The Instruction required that “[p]roposals for merit promotions should be made by programme managers (directors and supervisors)”, that they be considered by the Performance Review Committee and that, thereafter, the Committee’s recommendations be submitted to the Director-General for approval.

2. By 30 June 2003 the complainant had spent at least seven years in the same grade. As President of the Staff Council, however, he had been granted full-time release from duties from May 1999. As a result, he had no performance appraisals and no supervisor thereafter. Although the complainant’s name was placed on a preliminary eligibility list because of the years he had spent in the same grade, the Managing Director of ADM did not forward a recommendation for the complainant’s promotion to the Performance Review Committee. The names of those who had received merit promotion were announced on 17 July 2003. As his name was not on the list, the complainant asked the Managing Director of ADM and, later, the Director-General for an opportunity to submit a brief to the Performance Review Committee in order that it could assess the merits of his case. That request was refused on 11 December, it being said that had he “wished to request a special procedure”, he should have done so in a timely manner.

3. On 13 February 2004 the complainant lodged an appeal with the Joint Appeals Board against the “final decision not to grant [him] the opportunity of a merit promotion”. The Board was of the view that the merit promotion procedures had been followed and, in its report of 21 June 2006, recommended that the appeal be dismissed. It also recommended that, for the future, procedures be established to ensure that staff of the Staff Council Office are “evaluated [...] using the same performance evaluation criteria as [are] applied to all other UNIDO staff members”.

4. The Director-General accepted by a memorandum of 4 July 2006 the recommendation of the Joint Appeals Board that the complainant’s appeal be dismissed and the complainant was so informed. That is the decision challenged before the Tribunal. The complainant contends that that decision should be set aside on the ground that the proper procedures were not followed and, also, on the grounds that his right to freedom of association and his right to equal treatment were infringed. He also complains that there were irregularities and delays in the internal appeal proceedings. He seeks to have the question of his merit promotion reconsidered by UNIDO and claims moral damages and costs, including the costs of his internal appeal.

5. The complainant’s argument that proper procedures were not followed is based on the proposition that Administrative Instruction No. 16 required his performance to be evaluated, presumably by the Performance Review Committee. He claims that the “failure to consider [his] performance was a fundamental breach of procedures”. In this regard, he claims that another staff member was permitted to submit a brief to the Committee and suggests that he should have been allowed to do the same. He also suggests that the Managing Director of ADM should not have withheld his name from the Committee. These arguments must be rejected. Administrative Instruction No. 16 clearly provides that “[p]roposals [...] should be made by programme managers (directors and supervisors) [...] and be submitted [...] for review to the Performance Review Committee [...]”. In the absence of a proposal, for whatever reason, the Committee had no power to make any evaluation, much less a recommendation with respect to the granting of a merit promotion. As UNIDO correctly contends, the complainant was not eligible for consideration by the Committee.

6. It is convenient to deal with the arguments concerning freedom of association and the right to equal treatment together. As already indicated, Administrative Instruction No. 16 did not cover the complainant’s case. Its effect was to deny him a valuable opportunity that was available to all other staff members who had served seven years in the same grade. The reason why the complainant was in that situation was that he was President of the Staff Council and, on that account and only on that account, he had been granted full-time release from his duties and, accordingly, had not had a supervisor and could not have his work appraised. He was, thus, subject to a detriment or disability because of his role as President of the Staff Council. The principle of freedom of association is infringed if a person is subject to a detriment or disability or is discriminated against because of his or her activities within a staff association or, as here, within the Staff Council. Within this context, the notion of discrimination requires some elaboration.

7. The Tribunal has consistently held that discrimination occurs when persons who are in the same situation in fact and law are treated differently. The principle of equality not only requires that “situations which are the same

or similar be governed by the same rules”, but that “dissimilar situations be governed by rules that take account of the dissimilarity” (see Judgment 2194). However, the principle of equality may be infringed if the rules that govern dissimilarity are not appropriate and adapted to the dissimilarity (see Judgment 2313). That is because, if they are not appropriate and adapted, they may have a discriminatory effect or a disproportionate impact on different members of the same class.

8. The Organization contends that the complainant was not discriminated against because his position was different from that of other staff members. In particular, it points out that his right to freedom of association would have been infringed if the Administration or the Performance Review Committee had attempted to appraise his performance as President of the Staff Council. So much may be accepted. However, that does not establish that there was no discrimination. The effect of Administrative Instruction No. 16 was that, of all the persons who had served seven years in the same grade, the complainant was the only one – if not the only one, one of the very few – who was not eligible to have the question whether his performance entitled him to a merit promotion determined. Thus, the Instruction had a disproportionate and discriminatory impact on him and those others, if any, who did not have a supervisor and had not had their performance assessed. And as already pointed out, the complainant was in that situation only because he was President of the Staff Council.

9. In Judgment 2313 it was stated that “if [the] rules and procedures [of international organisations] do not ensure adherence to [the] principle [of equality] [...], it is their duty to initiate procedures that do, whether by way of general rule or some specific procedure for the particular case”. That duty was breached in the present case. Because there was no rule to cover the complainant’s situation, it is of no consequence that he did not request an opportunity to have his case considered until after the Performance Review Committee had made its recommendations with respect to merit promotion for other staff. However, that does not mean that an order should be made requiring UNIDO to consider the question of merit promotion for the complainant. Administrative Instruction No. 16 provides no procedure for that course and it is not the function of the Tribunal to prescribe a procedure that would allow it. Moreover, it seems that the complainant retired from the Organization on 30 September 2007. In the circumstances, the proper course is to award compensation for the wrongful denial of a valuable opportunity which the Tribunal sets at 20,000 euros.

10. The complainant’s argument with respect to irregularities in the internal appeal proceedings involves four matters:

- (i) he was not correctly informed as to the composition of the Joint Appeals Board;
- (ii) although he lodged his internal appeal on 13 February 2004, the Board did not report to the Director-General until 21 June 2006;
- (iii) the Administration’s reply in the internal appeal proceedings was not filed within time; and
- (iv) the Joint Appeals Board had regard to a memorandum submitted by the Administration but not provided to him.

11. UNIDO does not dispute that the complainant was wrongly informed as to the composition of the Joint Appeals Board. This occurred because of a clerical error. The Organization contends that it was the same clerical error as that for which the complainant was awarded moral damages by Judgment 2662 and that he “should not be compensated twice for the same mistake”. It was not the same mistake. Although closely related, in the sense that one mistake led to the other, there were two mistakes. As was the case in the internal appeal considered in Judgment 2662, the mistake interfered with the complainant’s right to challenge the composition of the Board. The delay in the present case was of the same order as that also considered in that judgment. UNIDO argues that the complainant should not be heard to complain of delay prior to his filing his rejoinder to the Joint Appeals Board on 12 August 2005 and, also, that he was not prejudiced by the delay thereafter. As in Judgment 2662, that argument must be rejected. No part of the delay was referable to the complainant who filed his rejoinder before he was advised of the composition of the Board and well before it commenced its deliberations.

12. The claim with respect to the late filing of the Administration’s reply in the internal appeal proceedings is also the same as that made in the proceedings that led to Judgment 2662. As in that case, the reply was filed within time, it having been filed within two months of the receipt by the Administration of the complainant’s appeal. However, again, the delay in transmitting the appeal to the Administration is unexplained. The memorandum that

was not provided to the complainant was submitted by the Administration in response to a query by the Board. However, the Board should have forwarded a copy to the complainant for his comments.

13. As in Judgment 2662, the complainant will be awarded moral damages in the amount of 5,000 euros for the delay and other irregularities involved in his internal appeal. There will also be an award of 5,000 euros for the costs of the proceedings before the Joint Appeals Board and the Tribunal.

DECISION

For the above reasons,

1. The Director-General's decision of 4 July 2006 is set aside.
2. UNIDO shall pay the complainant 20,000 euros by way of compensation for the denial of a valuable opportunity, as set out under consideration 9.
3. It shall pay him moral damages in the amount of 5,000 euros.
4. It shall also pay him 5,000 euros in costs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice- President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet