*Registry's translation,
the French text alone
being authoritative.*

110th Session **Judgment No. 2966**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Y. E. A. against the United Nations Industrial Development Organization (UNIDO) on 24 February 2009 and corrected on 30 March, the Organization's reply of 6 August, the complainant's rejoinder of 22 September and UNIDO's surrejoinder of 23 December 2009;

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. Facts relevant to this case are given under A in Judgment 2965, also delivered this day, on the complainant's first complaint. In the instant case he impugns the decision of 19 November 2008 insofar as it dismisses his first appeal, that of 22 October 2007, which was directed against the decision to reassign him to Bangkok for four years as from 1 September 2007.

B. The complainant contends that his first internal appeal was submitted within the prescribed time limits. He explains that he

did not receive the memorandum of 15 August 2007 confirming his reassignment to the field until 28 August, as he had been unable to consult his e-mail before that date, because he had been sent on mission to Africa. He draws attention to the fact that, in order "to forestall any trickery on the part of the Administration", he lodged another appeal on 18 December 2007, but it has not been taken into account. He adds that he never agreed to the composition of the Joint Appeals Board and alleges that the rules were changed in order to permit the selection of members favourably inclined towards the Administration.

On the merits, the complainant expresses his surprise that, as a specialist on Africa, he was transferred to Asia "urgently" and that, in doing so, the Director-General displayed "eagerness". In his view, the fact that it was not until 28 August that he was notified of the final decision to reassign him to Bangkok with effect from 1 September 2007 is an "obvious formal flaw". He asserts that he has been subjected to a disguised disciplinary measure on account of his former Staff Union activities. In his opinion, the Director-General took a decision regarding his "involuntary, unilateral [and] premeditated transfer" which was of no particular benefit to him and whose purpose was "to stymie [his] chances of promotion", to harm him financially and to humiliate him. He emphasises that the post to which he was to be transferred was advertised only after his "wrongful termination", at which point he discovered that it was in fact a P-3 level post which had been "adjusted" to the P-4 level for the occasion.

The complainant submits that he implicitly accepted the transfer offer when he proposed the deferral of its practical implementation and he regrets that the Administration rejected this proposal out of hand. He denounces a "dictatorial personnel management procedure based on intimidation and isolation" and he says that he was faced with "a working atmosphere poisoned by harassment". In his opinion, transfers to the field are always "voluntary and aimed at promotion",

an approach which seems to have been called into question by the "double standards" introduced by the Director-General through the latter's insertion in paragraph 27 of the bulletin of 21 April 2006 on field mobility policy of provisions making it possible "to legalise misuse of authority" and to carry out transfers "with total impunity". In his view, the "general clause" enabling the Director-General to reassign the Organization's staff members to any location whatsoever must be regarded as null and void, for it is "too sweeping" and may thus give rise to abuse of authority.

The complainant further accuses the Administration of bad faith in that it took advantage of the fact that he was on mission to discredit him and tarnish his reputation by informing several colleagues of the contents of the memorandum of 15 August 2007, which was not classified as "confidential". He adds that UNIDO treated him unfairly, because his transfer was unwarranted and unnecessary. Lastly, the complainant draws attention to the fact that the other colleagues who had been selected for transfer to the field had no "political" support, and he criticises the Director-General for discriminating against them.

The complainant asks the Tribunal to set aside the impugned decision and to order that his rights be restored "with at least the rank of a diplomat". He also asks for reinstatement at the Organization's Headquarters and compensation with interest for the material injury suffered, including the payment of a termination indemnity. Subsidiarily, he asks for payment of the salary, allowances and "related benefits" he would have received during the four years he should have spent in the field, plus interest, until he reaches retirement age, and the payment of the above-mentioned indemnity. He further asks the Tribunal to set aside the bulletin of 21 April 2006 or, failing that, paragraph 27 thereof. He also requests it to order UNIDO to announce that "it undertakes to remedy the injury suffered by all the other members of staff subjected to the unilateral, discriminatory decision-making" of the Director-General, to publicise the judgment adopted in this case and to send a letter to all African Heads of State, inter alia, "re-establishing [his] honour and [his] probity" and

containing an official apology. He further claims 10,000 euros in compensation for each month that has elapsed for the moral injury suffered and damage to his reputation, as well as costs. Lastly, should his complaint be dismissed, he would like the Tribunal to ask the Staff Union to reimburse his expenses.

C. In its reply UNIDO asks the Tribunal to order the joinder of the complainant's two complaints.

It takes the view that the present complaint is irreceivable. It states that, although the complainant was on mission as from 16 August 2007, he was able to consult his e-mail, and indeed he did so on 20 August. In these circumstances, it considers that the complainant received notification of the memorandum of 15 August 2007 the following day, and that the 60-day period for appealing – stipulated in Staff Rule 112.02(b)(i) – therefore ended on 15 October 2007. However, the complainant did not lodge his first appeal until 22 October. It explains that he could have expressed his opinion on the composition of the Joint Appeals Board and that, if he did not avail himself of this opportunity, it was because he had no objections. In addition, it points out that none of the rules governing the composition of the Board has been amended.

On the merits, the Organization states that the Staff Regulations, the Staff Rules and the bulletin of 21 April 2006 clearly establish that the Director-General had the authority to reassign the complainant to a field post. It denies that he implicitly accepted his transfer and considers, on the contrary, that he plainly refused it from the outset. It rejects as unfounded the allegations that it wished to humiliate, punish, harass or isolate the complainant in his work. It submits that the fact that a P-3 level post was subsequently advertised does not mean that the decision to transfer the complainant to the field was discriminatory or taken for an improper purpose. In its opinion, this decision would, on the contrary, have improved his promotion prospects. It adds that, once it had set the date for the transfer, the

Administration had no cause to alter its decision, unless the complainant put forward compelling reasons, which he failed to do.

Lastly, UNIDO argues that, since the non-renewal of the complainant's contract was justified and proper, he cannot ask for reinstatement. It considers that his other claims are irreceivable or groundless, or that they exceed the Tribunal's competence.

D. In his rejoinder, as he did in the context of his first complaint, the complainant objects to the joinder of his two complaints and asserts that the Organization's reply is tainted with several formal defects.

With regard to receivability, he explains that his first appeal was in fact directed against the decision of 31 August 2007 not to renew his contract and that it was therefore receivable. He contends that, for the Tribunal, "electronic documents are of no legal value" unless they are accompanied by a document whose receipt is officially recorded.

On the merits, he enlarges upon his pleas and enters new claims. In particular, he increases by 5 per cent the amount of the pecuniary claims put forward in his complaint owing to the "absence of internal and external supervision and oversight by the Member States of the Director-General's capacity to include in texts and regulations procedures discriminating against staff members holding acquired rights and protected as Staff Union representatives".

E. In its surrejoinder the Organization reiterates its request for joinder. It rejects the complainant's allegations that its reply is tainted with several formal defects.

On the issue of receivability, it emphasises that the complainant is displaying bad faith. It draws attention to the fact that his first internal appeal was clearly directed against the decision of 15 August 2007. Moreover, it points out that in Judgment 2677 the Tribunal found that e-mail was a valid means of notification.

On the merits, UNIDO maintains its position in full.

CONSIDERATIONS

1. In his second complaint, filed with the Tribunal's Registry on 24 February 2009, the complainant impugns the Director-General's decision of 19 November 2008 insofar as it dismissed his appeal against the decision to reassign him to Bangkok.

2. The Organization requests the joinder of this complaint with that filed by the complainant on 23 February 2009.

For the reasons set forth in Judgment 2965 delivered this day, the Tribunal does not consider it appropriate to accede to this request.

3. Facts relevant to this dispute are given in the above-mentioned Judgment 2965, to which reference should be made.

4. In his rejoinder, the complainant challenges the receivability of the Organization's reply, as he did in his first complaint, alleging that it is tainted with several formal defects which should lead to its rejection.

However, for the same reasons as those stated in Judgment 2965, the Tribunal considers that there is no reason not to take account of this reply.

5. The Organization argues that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal as well as the case law. It states that the memorandum of 15 August 2007 confirming the complainant's reassignment to the field was received by him on 16 August and that, pursuant to Staff Rule 112.02(b)(i), he should have submitted an appeal to the Joint Appeals Board within 60 days of that date, i.e. by 15 October at the latest. Since his appeal was submitted on 22 October, it was out of time.

6. To counter this objection to receivability, the complainant argues that his appeal was filed within the prescribed time limit, because the period available to him to refer the matter to the Joint

Appeals Board must be calculated as from the date on which he received notification of the decision of 31 August 2007 informing him of the non-renewal of his contract.

He says that, in any case, his appeal was "updated and lodged" with the Board on 18 December 2007, after he received confirmation of the decision of 31 August 2007 in the memorandum of 23 November 2007, and that he thereby "anticipated and took corrective action" in respect of the Organization's objections within the prescribed time limits.

He contends that e-mails are of no legal value unless they are accompanied by an official document serving as an acknowledgement of receipt and that, in addition, he had no access to the Internet between 16 and 27 August 2007 and could not therefore consult his e-mail, because he was on mission in Africa.

7. First it must be made clear that the Tribunal will rule only on the issue of whether or not the internal appeal of 22 October 2007 was irreceivable, as contended by the Organization, which requests that the complaint seeking the setting aside of the decision to reassign the complainant to Bangkok be declared irreceivable on that account. All arguments relating to events subsequent to the submission of this appeal will thus be disregarded.

8. The Tribunal notes that the decision forming the subject of the above-mentioned appeal is that of 21 June 2007 informing the complainant of his reassignment to Bangkok, which was confirmed by the memorandum of 15 August 2007, after he had written to the Director-General to challenge it on 3 July 2007.

The Organization asserts that the complainant was notified of the memorandum of 15 August 2007 by means of an e-mail sent to him on 16 August and that this memorandum was also handed to his secretary on the same day.

The complainant disputes the validity of such notification, as did the Joint Appeals Board, which considered in its report that using

e-mail to communicate such an important decision as reassignment to the field was unacceptable. That is why it deemed the date of valid notification to be that on which the complainant returned to Headquarters at the end of his mission and why it declared the appeal to be receivable. However, apart from the fact that, in principle, the Tribunal deems notification by e-mail to be valid (see Judgments 2677, under 2, and 2947, under 12), the only question that arises in the instant case, in order to determine the beginning of the 60-day period in which the complainant could refer the matter to the Joint Appeals Board, is that of the date on which he learnt of the disputed decision.

9. The complainant stated in his internal appeal submitted on 22 October 2007 that he was challenging the decision of 15 August 2007 and that he had received that decision only on 28 August 2007 on his return from Africa, where he had been on mission from 16 to 27 August. Indeed, he claims that during that official mission he had no access to the Internet.

10. The Tribunal cannot, however, accept the complainant's allegations because, apart from the fact that it is clear from the submissions that, during his mission, the complainant stayed in hotels with Internet access and that, in these circumstances, it is improbable that an international civil servant of his level could have spent days without consulting his e-mail, these allegations are contradicted by evidence in the file showing that he accessed his official e-mail account on 20 August 2007 and that he did not log into it again until his return to Headquarters.

The Tribunal concludes from the foregoing that the complainant plainly learnt of the decision of 15 August 2007 on 20 August 2007 at the latest.

11. Since notification of this decision should thus be regarded as having taken place on 20 August 2007, the 60-day period stipulated by the relevant provision of the Staff Rules must therefore be computed as from that date.

As the complainant lodged his internal appeal on 22 October 2007, i.e. more than 60 days after 20 August 2007, this appeal was irreceivable because it was filed out of time.

12. The Tribunal's case law establishes that, if an appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation of that body (see, for example, Judgments 775, under 1, and 2297, under 13).

It follows that the complaint filed on 24 February 2009 must be declared irreceivable.

13. As the complaint is irreceivable, it must be dismissed without there being any need to rule on its merits.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet