

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

110th Session

Judgment No. 2983

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. D. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 March 2009 and corrected on 25 May, UNESCO's reply of 4 August, the complainant's rejoinder of 16 September and the Organization's surrejoinder of 23 November 2009;

Considering Article II, paragraph 5, 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 was born in 1952 and has dual French and Romanian nationality. She joined UNESCO in 1991. At the material time and until June 2008 she was President of the UNESCO Staff Union (STU).

On 27 March 2007, acting in her capacity as President of the STU, she sent an e-mail to the Director of the Bureau of Human Resources Management in order to forward some information she had received about the UNESCO Office in San José (Costa Rica) and, in particular, about the Office's Director and his wife Mrs R.; she

expressed the hope that she might discuss the matter with the Director of the Bureau.

On 15 June the complainant received a letter, dated 7 June 2007, from Mrs R.'s French lawyer informing her that Mrs R. had learnt of the e-mail through her husband, and that she regarded the statements contained therein as defamatory and an invasion of her privacy. The complainant was asked to apologise, failing which the matter would be referred to the competent courts. The complainant at once informed the Director of the Bureau of Human Resources Management of the threats contained in this letter and invited her to take the requisite steps to "calm" Mrs R.'s lawyer and to remind the Director of the San José Office of his duties as an international civil servant.

As she received no reply, on 26 June the complainant filed a protest with the Director-General to inform him of the content of the letter of 7 June. She called on him to take "exemplary disciplinary measures" against the Director of the San José Office, failing which she would feel obliged to appeal against what she regarded as a serious lack of protection from the Administration.

Having been criticised in STU publications, especially in October 2007, the Director of the San José Office contacted the Administration on several occasions to denounce the "lies" and "false allegations" contained in these publications and to seek an apology from the complainant.

On 7 January 2008 the complainant received a letter from a French bailiff acting on the instructions of Mrs R., serving on her a "demand for an apology" dated 19 December 2007. The complainant informed the Director of the Bureau of Human Resources Management by an e-mail of that same day that she had received "the next episode of harassment" from the Director of the San José Office through his wife's lawyer. The Director of the Bureau subsequently asked the complainant to send her a copy of this letter and offered to assist her in drafting a reply. The complainant turned down this offer, because she did not intend to reply to Mrs R.'s lawyer, and she repeated her request that disciplinary measures be taken against the Director of the San José Office.

The Director of the Bureau of Human Resources Management replied to the complainant's e-mail of 7 January 2008 in a memorandum of 19 February 2008. Emphasising that the complainant's intentions were unclear, she asked whether she intended to lodge a formal complaint of harassment against the Director of the San José Office. If, however, she was seeking protection as a matter of principle, the Director noted that this request was premature at that stage because the Director-General had not yet received any request to lift her immunity as an international civil servant. In the event that he did receive such a request, he would take a decision based on his assessment of the alleged acts and whether or not they formed part of her official duties.

On 29 February 2008 the complainant lodged a protest with the Director-General against the memorandum of 19 February. Having received no reply, she filed a notice of appeal with the Appeals Board in March, followed by a detailed appeal in April 2008. In particular, she asked the Director-General to recognise publicly that she had not overstepped the bounds of her mandate as an officer of the Staff Union, that the Administration should have protected her and that, in her memorandum, the Director of the Bureau of Human Resources Management had "used threatening language" towards her.

In a memorandum of 18 August 2008 the Deputy Director-General informed the complainant that the Administration had never threatened her and had never had any intention of doing so. He explained, with reference to the allegations in STU publications regarding the Director of the San José Office, that it was necessary to show a degree of restraint in such publications and that freedom of expression must "always stop short of personal attacks".

In its report of 12 December 2008 the Appeals Board considered that the memorandum of 19 February 2008 contained no threats, but that its author ought to have expressed an opinion as to whether, in sending her e-mail of March 2007, she had acted within the bounds of her mandate as an officer of the Staff Union. It therefore recommended that the Director-General provide her with a clear answer on this issue.

The complainant was informed by a memorandum of 20 February 2009, which constitutes the impugned decision, that the Administration

had never stated that, in sending the e-mail of 27 March 2007, she had overstepped the bounds of her mandate as the elected President of the STU. She was also reminded that a staff member “must use measured language in professional life and when holding any elected office” and that this was the gist of the memorandum which the Deputy Director-General had sent her on 18 August 2008.

B. The complainant submits that UNESCO “has not defended [her] against the action brought” by Mrs R., that the representatives of the Administration have questioned her actions on various occasions, although she was carrying out her responsibilities as President of the STU, and that the Director of the Bureau of Human Resources Management committed a big error in divulging the confidential e-mail of 27 March 2007. In her opinion, by behaving in this way, UNESCO has undermined her dignity and breached her rights as President of the STU. Under paragraphs 28 and 38 of the Standards of Conduct for the International Civil Service, the Organization ought to have defended her against unjust attacks and to have thus ensured that she could freely exercise her duties as an elected officer of the Staff Union.

The complainant contends that by reminding her that a staff member “must use measured language”, the Administration repeated, in its decision of 20 February 2009, the unfounded accusations contained in the memorandum of 18 August 2008 and implied that she had done something wrong and had failed in that duty. Moreover, she makes it clear that she is not responsible for the statements made in the STU publications.

She seeks the quashing of the decision of 20 February 2009, an award of 6,000 euros in compensation for moral injury and 3,000 euros in costs.

C. In its reply the Organization states at the outset that, in response to the e-mail of 27 March 2007, a team was sent to the San José Office to mediate in the dispute between the Director of this Office and some of his staff. The Director-General then decided to instruct the Office of Internal Oversight to conduct a review of the San José Office. The

confidential review report indicated that the above-mentioned e-mail was inaccurate in certain respects.

UNESCO submits that it did not neglect its duty to protect a staff member. It explains that the letter of 7 June 2007 from Mrs R.'s lawyer and the "demand for an apology" of 19 December 2007 did not constitute documents instituting proceedings or binding legal documents and that consequently the memoranda advising the complainant that her request for protection was premature were justified. The Organization emphasises that at the time of filing its reply with the Tribunal no judicial proceedings against the complainant were pending before courts in France or elsewhere. It further states that it implicitly rejected a request from the Director of the San José Office to take disciplinary action against the complainant further to her e-mail of 27 March 2007 and that it thus afforded her sufficient internal protection.

The Organization points out that the complainant refused to provide it with copies of the letters she had received from Mrs R.'s lawyer and the bailiff acting on her instructions, despite the Administration's requests, and that she thereby breached her duty of good faith and loyalty to the Organization. It likewise criticises her refusal to answer those letters.

UNESCO further contends that the complainant's activities as an officer of the Staff Union have not been hampered and that her dignity has not been undermined. In particular, the Administration never had any intention of lifting her immunity and has never accused her of any personal wrongdoing in connection with the leaking of her e-mail of 27 March 2007. The Organization comments that it has proved impossible to determine on the basis of the available evidence how this e-mail came to be forwarded to the Director of the San José Office, although it has been ascertained that the Administration, and particularly the Director of the Bureau of Human Resources Management, was not the source of this leak.

In addition, the Organization holds that the decision of 20 February 2009 was taken, on the one hand, to reduce tension in the interests of the proper functioning of the Organization and, on

the other, with a view to safeguarding the complainant's right to protection in the event that she was actually sued in connection with the statements she had made as President of the STU.

In UNESCO's opinion the complainant is impugning the decision of 20 February 2009 insofar as it refers to the Deputy Director-General's memorandum of 18 August 2008, yet that memorandum did not adversely affect her. With reference to the reminder contained in the impugned decision that a staff member "must use measured language", the Organization says that it transpired that the complainant had been involved in the STU publications targeting the Director of the San José Office and his wife. It submits that the decision of 20 February 2009 is consistent with the Tribunal's case law and with paragraph 27 of the Standards of Conduct for the International Civil Service which states not only that "[e]lected staff representatives enjoy rights that derive from their status" but also that they "must exercise a sense of responsibility and avoid undue criticism of the organization".

The Organization also points out that the Appeals Board's sole criticism of the memorandum of 19 February 2008 was that it contained no explicit reference to the repercussions of the complainant's e-mail of 27 March 2007, an omission which was corrected by the decision of 20 February 2009. In its view, the complainant's claims seeking the quashing of the impugned decision have therefore become moot and, as such, must be dismissed.

D. In her rejoinder the complainant states that the Administration knows who forwarded her e-mail of 27 March 2007 to the Director of the San José Office, but does not wish to admit that it was the Bureau of Human Resources Management. She says that, contrary to the Organization's statement, copies of the letters from Mrs R.'s lawyer and the bailiff acting on her instructions were sent to the Administration as soon as it requested them.

Reiterating her pleas, the complainant maintains that she did not overstep her responsibilities as President of the STU in sending the e-mail in question and that the Administration was wrong to forward it,

then to refuse to assist her when she informed it that she was being threatened with legal action.

E. In its surrejoinder the Organization denies that the Bureau of Human Resources Management was in any way responsible for forwarding the above-mentioned e-mail and points out that, even if it had been divulged by the Bureau's Director, this would not have been at all unlawful. The Organization maintains that the complainant has not passed on the letters from Mrs R.'s lawyer and the bailiff acting on her instructions and that the issue of the complainant's protection necessarily remained hypothetical in the absence of any evidence of legal proceedings against her.

Since UNESCO considers that the STU publications were "over the top and inaccurate", it holds that the complainant cannot contend that the reminder that an international civil servant has a duty to "use measured language" was unlawful or disproportionate, since trade union freedom does not signify total immunity.

CONSIDERATIONS

1. The complainant joined UNESCO in 1991. At the time of the events giving rise to her dispute with the Organization she was President of the UNESCO Staff Union (STU). She remained President of this trade union organisation until June 2008.

2. On 27 March 2007, acting in her capacity as President of the STU, she sent the Director of the Bureau of Human Resources Management an e-mail concerning the situation in UNESCO's San José Office. This e-mail was worded as follows:

"I don't know if you are aware of it, but it would seem that the situation is explosive. For example, the Director allegedly ordered all the staff to remain in the office and not to leave the premises, because his wife's car had been scratched. The 'guilty party' had to own up. It turned out that the 'guilty party' was the Director's own daughter, who did not dare to tell her parents. Apparently his wife decides who can or can't stay and who should have a contract or not. The words used included terror, gulag and other 'German' references which I will not quote here as a matter of principle. I

hope that you and I will have a chance to discuss this situation, as well as the possibility of investigating and, if necessary, putting an end to it.

[...]"

After several exchanges of e-mails and discussions about the situation in the San José Office, as described by some of its staff, the Organization sent a team to San José from 2 to 5 May 2007 in an attempt to mediate in the dispute between the Director of the Office and some of his personnel.

On 7 June 2007 a French lawyer acting on behalf of Mrs R. sent the complainant a letter in which he accused her of having circulated an e-mail containing assertions which were “not only inaccurate” but an invasion of his client’s privacy and informed her that his client was “entitled to seek [...] the application of Article 9 of the Civil Code on the protection of privacy”. The statements contained at the end of the e-mail in question were described as “absolutely offensive and at all events defamatory and/or insulting”. The complainant was therefore asked if she was prepared to send a properly reasoned letter of apology. She was further informed that, should she fail to take such a step, the matter would be referred to the competent courts.

Having received the lawyer’s letter, on 15 June the complainant e-mailed the Director of the Bureau of Human Resources Management to draw attention to the fact that she had written the e-mail of 27 March, not in a private capacity, but as President of the STU and “that this document ought not to have been circulated outside UNESCO’s Secretariat”. She asked that the requisite steps be taken to “calm” Mrs R.’s lawyer and to remind the Director of the San José Office of his duties as an international civil servant. She added that, failing this, she would be obliged to lodge a complaint against the latter for impeding the exercise of her responsibilities as an officer of the Staff Union.

As the complainant received no written reply to her e-mail, on 26 June 2007 she filed a protest with the Organization’s Director-General in which she complained of “attempted intimidation to prevent [her] from performing [her] duties as an elected officer, which seriously compromis[ed] [her] dignity as an international civil

servant and as a citizen". She requested him to "take exemplary disciplinary measures against the Director of the San José Office so as to ensure that no such situations could reoccur at the UNESCO Secretariat" and she indicated that, "[i]f this [were] not done, [she] w[ould] be obliged to appeal against this grave lack of protection from the Administration".

On 7 January 2008 the complainant received a letter in which a French bailiff, acting at the behest of Mrs R.'s lawyer, served a "demand for an apology" dated 19 December 2007, of which the Public Prosecutor's Office had been notified.

On the same day the complainant sent an e-mail entitled "harassment" to the Director of the Bureau of Human Resources Management to find out whether the Administration intended to adopt disciplinary measures against the Director of the San José Office and, if so, what these measures would be. She added that, if none were taken, she would lodge an appeal.

After several messages had been exchanged between the complainant and the Bureau of Human Resources Management, on 25 January 2008 the Executive Committee of the STU sent the Director of the Bureau a letter entitled "[i]ntimidation of the President of the STU by the wife of the Director [of] UNESCO[']s Office [in] Costa Rica". The Committee pointed out that it was becoming "urgent to take steps to put an immediate end to this case and to prevent any recurrence" and it indicated that if it did not receive any response, it would have to bring the matter to the attention of all colleagues.

In reply to the complainant's e-mail of 7 January, the Director of the Bureau of Human Resources Management sent her a memorandum on 19 February 2008 enquiring, inter alia, whether she intended to lodge a formal complaint of harassment against the Director of the San José Office, in which case she invited the complainant to clarify and substantiate her allegations. The Director explained that "[d]ealing with the issue of legal proceedings against [the complainant] for defamation [...] [wa]s premature at that stage, because the Director-General ha[d] not yet received any request from

the French authorities or [from] any other national authority to lift [her] immunity”.

3. In a memorandum of 29 February the complainant in essence requested the Director-General to confirm unequivocally that she could not be criticised for having forwarded, in her capacity as a staff representative, the information she had received and that she could rest assured that he would automatically dismiss any complaint on this matter. She ended her memorandum as follows:

“I wish to make it clear that in reality I am asking solely for **the respect of my rights as a staff representative**, rights which preclude legal action against me as a result of an indiscretion concerning an official e-mail (sent in my capacity as President of the STU) which I addressed to the Director [of the Bureau of Human Resources Management].”

As her request went unanswered, she filed a notice of appeal with the Appeals Board on 28 March and a detailed appeal the following month. In this appeal she asked the Director-General “to adopt measures remedying the humiliation caused by the undermining of [her] dignity, to recognise publicly that [she] ha[d] never overstepped the bounds of [her] mandate as an officer of the Staff Union, for which [she] ought to have received the Administration’s protection, that the Director [of the Bureau of Human Resources Management] ha[d] knowingly used threatening language towards [her] although she knew that [the complainant] could not be criticised for any action [she] had taken as an elected officer and that it was she herself who had let the Director of the San José Office receive an e-mail addressed to her alone, thus kindling unnecessary tension”.

On 18 August 2008 the Deputy Director-General wrote to the complainant to inform her that the Administration had never threatened her and had never had any intention of doing so and that, if this was how she had interpreted the memorandum of 19 February 2008, it was a pure misunderstanding. He also reminded her that freedom of expression must “always stop short of personal attacks”.

In its report of 12 December 2008 the Appeals Board recommended that the Director-General give the complainant a clear answer as to whether, in sending her e-mail of 27 March 2007 to the

Director of the Bureau of Human Resources Management, she had acted within the scope of her mandate as President of the STU.

On 20 February 2009 the complainant was notified of the Director-General's decision in which he made it clear that the Administration had never stated that, by sending the above-mentioned e-mail, she had overstepped the bounds of her mandate as President of the STU, the elected office which she then held.

However, she was also reminded in paragraph 3 of that decision that a member of staff "must use measured language in professional life and when holding any elected office".

4. The complainant asks the Tribunal to quash the decision of 20 February 2009, to award her 6,000 euros in compensation for the moral injury caused by the undermining of her dignity and the breach of her rights as President of the STU and to award her costs in the amount of 3,000 euros.

5. In support of her complaint she contends that the Organization has infringed paragraphs 28 and 38 of the Standards of Conduct for the International Civil Service, which state:

"28 Staff representatives must be protected against discriminatory or prejudicial treatment based on their status or activities as staff representatives, both during their term of office and after it has ended."

"38 The private life of international civil servants is their own concern and organizations should not intrude upon it. There can be situations, however, in which the behaviour of an international civil servant can reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization. This can also result from the conduct of members of international civil servants' households and it is the responsibility of international civil servants to make sure that their households are fully aware of this."

6. The complainant states that she has been led to impugn the decision of 20 February 2009 because UNESCO, notwithstanding the Appeals Board's opinion, dismissed her "protest against the lack of functional protection from external attack in connection with

a confidential initiative taken in [her] capacity as President of the STU". She stresses that "[n]ot only did the Organization fail to defend [her] against the action initiated by the wife of the Director of UNESCO's Office in Costa Rica, but on several occasions, in particular in the proceedings before the Appeals Board, representatives of the Administration questioned [her] actions, although [these] were fully in line with [her] responsibilities as President of the STU".

She submits that the Director of the Bureau of Human Resources Management committed a big error in divulging an e-mail which ought to have remained confidential.

She considers that the Organization undermined her dignity and breached her rights as President of the STU, because when she was faced with an unjust attack from a senior official of the Organization, the Administration ought to have defended her, not only in her capacity as an international civil servant, but above all because she had been acting in the exercise of her duties as an elected officer of the Staff Union. In this connection she relies on the above-quoted paragraph 28 of the Standards of Conduct for the International Civil Service.

The complainant adds that it was on the basis of paragraph 38 of these Standards that she refused to respond to the attacks from Mrs R.'s lawyer and that the Administration should have defended her.

She takes the Administration to task for having invited her, particularly in the memorandum of 19 February 2008, to pursue the dispute in the French courts and to lodge an internal complaint against the Director of the San José Office.

She considers that by reminding her in the memorandum of 20 February 2009 that a staff member "must use measured language in professional life and when holding any elected office", the Organization compounded the groundless accusations made against her in the memorandum of 18 August 2008.

7. Having examined the parties' submissions, the Tribunal notes first of all that it is not disputed that the complainant sent her e-mail of 27 March 2007 in her capacity as President of the STU and that, in so doing, she did not overstep the bounds of her mandate as an

elected officer of the STU, as indeed the Organization itself expressly recognised in the memorandum of 20 February 2009.

The complainant could therefore, if necessary, claim the specific rights and safeguards which elected staff representatives enjoy in accordance with the general principles which govern employment relationships in international organisations and which are also generally recognised in national labour legislation (see, for example, Judgment 2585, under 11). Nevertheless, it is up to the staff member complaining that such specific rights and safeguards have been violated to prove that fact.

8. In the instant case, the complainant taxes the Organization with denying her the protection against external attacks to which she was entitled as a staff representative acting in the exercise of her duties as an elected officer of the Staff Union.

However, in the light of the available evidence, the Tribunal concludes that no legal proceedings which might have necessitated the provision of such protection had in fact been initiated against the complainant when she submitted her protest to the Director-General. That is why her request for protection was considered premature in the memorandum of 19 February 2008. Indeed, neither the first letter from the lawyer, nor the “demand for an apology”, even though they announced the possibility of a lawsuit, could, at the time, be regarded as documents instituting proceedings such as to oblige the Organization to protect the complainant. Consequently, the Organization cannot be deemed to have neglected its duty to provide the complainant with the protection to which she was entitled.

An international organisation’s duty to protect a staff representative is certainly not confined to defending the person concerned in the event that legal proceedings are instituted against him/her. It may include, for example, the duty to assist the staff representative in any legal steps that this person might wish to take in his/her own defence against threats, insults or defamation. However, although the complainant was invited by the Organization to say whether she was requesting such assistance, there is no indication in

the file that she actually submitted a formal request for protection, or at least that she enabled UNESCO to provide effective protection.

9. Nevertheless, the Tribunal considers that, even though the e-mail of 27 March 2007 was not marked “confidential”, its content was such that it ought not to have been circulated beyond the list of addressees, let alone forwarded *in extenso* to the person mentioned in it. By failing to prevent the leaking of the whole e-mail to the Director of the San José Office, who together with his wife was directly concerned by it, the Director of the Bureau of Human Resources Management manifestly displayed carelessness which gave rise to the reactions against the complainant which she regards as external attacks.

The Tribunal further considers that, by reminding the complainant in its decision of 20 February 2009 that a member of staff “must use measured language in professional life and when holding any elected office”, the Organization, which thereby departed from its own statement that the complainant had not overstepped the bounds of her mandate as an elected officer of the Staff Union, suggested that she had failed in her duties. Indeed, there would be no reason for the Organization to remind the complainant of this duty if it was not of the view that she had failed in it.

10. The impugned decision of 20 February 2009 must therefore be quashed insofar as paragraph 3 thereof reminded the complainant of a staff member’s duty to use measured language.

The Organization has caused the complainant moral injury, which must be remedied by an award of compensation in the amount of 5,000 euros.

As she succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed to the extent indicated under 10, above.
2. UNESCO shall pay the complainant 5,000 euros in compensation for moral injury.
3. It shall also pay her 1,000 euros in costs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 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