

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3233

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. S.-M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 10 December 2010 and corrected on 23 February 2011, the Organization's reply of 20 June, the complainant's rejoinder of 3 October 2011 and UNESCO's surrejoinder of 27 January 2012;

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 Rwandan national born in 1953, joined the Organization in 1980, in the Office of the UNESCO Representative for the Central African Region. In 1983 she was transferred to the Organization's Headquarters in Paris where, on 2 May 2003, she was appointed to a grade G-6 post as Secretarial Assistant in the Office of the Assistant Director-General for Education. This post was later retroactively reclassified at grade G-7 as of 1 January 2003.

By a letter of 12 September 2005 she informed the Director-General that, on 30 August, the Director of the Bureau of Human Resources Management had advised her of some changes which the new Assistant Director-General for Education wished to make and had asked her to indicate her preferences with a view to a transfer. The following day she had expressed her interest in a G-7 post of Assistant to the Director of the Bureau of Field Coordination. She explained that on 8 September the Director of that Bureau had agreed to her transfer to this post. She also stated that the above-mentioned Assistant Director-General had not warned her personally of her transfer and that he had “reshuffled his office staff” in a sudden and humiliating manner. She considered that her duties had grown since January 2005 and that she could have been given a promotion in recognition of her efforts. Her transfer to the above-mentioned post took effect on 15 September 2005.

On 23 March 2006 the complainant wrote to the Deputy Director-General, referring to her letter of 12 September 2005 and stating that her transfer was humiliating and that it undermined her dignity. In compensation she requested promotion on merit as of 1 January 2005. On 10 May the Director of the Bureau of Human Resources Management replied that “in the circumstances” her transfer – which she had accepted – at equal grade to a post matching her experience and skills, had been the most appropriate solution and that, having regard to the provisions of Administrative Circular No. 2191 on an integrated policy on recruitment, rotation and promotion, the promotion she requested could not be envisaged.

On 15 March 2007 the staff was informed of the resignation with immediate effect of the Assistant Director-General for Education. Since the complainant considered that this resignation constituted a new fact adding weight to her file, on 11 April she submitted a complaint to the Director-General in which she asserted that her transfer had “masked a deliberate act of racial discrimination” against her and accused the Assistant Director-General for Education of acts of moral harassment. By way of redress she asked to be promoted retroactively to a grade P-3 post as of 1 January 2005. As part of the

preliminary assessment of that complaint an interview was conducted on 6 July in the course of which the complainant supplied the Administration with a memorandum enlarging on her allegations of moral harassment. On 20 September 2007 she was advised that the Director-General had decided to hold an investigation.

Two external investigators were appointed. In the report which they submitted on 20 February 2008, they concluded that the allegations of racial discrimination and moral harassment had not been proved. On 29 April 2008 the Director of the Bureau of Human Resources Management informed the complainant that a thorough investigation had been held, which was why it had taken so long and that, in view of its findings, the Director-General had decided to close the file.

On 28 May the complainant lodged a protest against this decision. As she did not receive a reply within the one-month time limit stipulated in Article 7(b) of the Statutes of the Appeals Board, on 24 July she submitted a notice of appeal to the Secretary of the Board. In the detailed appeal which she filed on 22 September she expanded on her allegations against the Assistant Director-General for Education and accused UNESCO of treating her complaint and her requests for promotion in a cavalier and negligent manner. In particular, she requested the cancellation of her transfer, reclassification of her post at the P-4 grade as of 22 September 2004, disclosure of the investigation report and redress for the injury suffered.

By a letter of 3 October 2008, enclosing a censored copy of the investigation report, the complainant was informed that, after examining her protest, the Director-General had decided to maintain his decision to close the file. On 7 October the complainant asked the Director of the Bureau of Human Resources Management for a "legible" version of the investigation report. On 8 December the Director explained that the Director-General had decided to send her a version of the report containing some blacked-out passages in order to protect the right of third parties to confidentiality.

In its report of 12 July 2010 the Appeals Board stated that, although the parties had been unable to reach an amicable solution to the dispute, the Organization had not displayed a lack of good will

towards the complainant. It considered that the fact that she had received a censored version of the investigation report had not occasioned her “significant prejudice” and that it was impossible to promote her to a post in the professional category, since this could not be used as a means of resolving a case of harassment. However, it considered that there was evidence that the Assistant Director-General for Education had abused his authority in the manner in which he effected the complainant’s transfer, which was in itself a manifestation of moral harassment within the meaning of Administrative Circular No. 2232 of April 2005, and that in any event he was not above suspicion of having so acted. Consequently, a majority of the members of the Board recommended that the complainant should be awarded a sum equivalent to three months’ salary in moral damages and costs. She was informed by a memorandum of 16 September 2010 that the Director-General had decided to reject that recommendation. In the opinion of the Director-General, the Appeals Board had not shown that the complainant’s transfer had been unlawful and, by stating that the Assistant Director-General was not above suspicion, it had placed the burden of proof on him, which was “contrary to the principles of the case law regarding the presumption of innocence”. That is the impugned decision.

B. The complainant initially filed an “incidental application for an interlocutory order requiring the disclosure of documents”. Relying on Article 11 of the Rules of the Tribunal, she asks the Tribunal to issue an interlocutory order requiring UNESCO to produce the full, unexpurgated investigation report and its appendices, as well as two further documents, within a fortnight of the notification of this order on pain of payment of a penalty of 150 euros for each day’s delay. She requests 10,000 euros in compensation for the injury suffered on account of the Organization’s unlawful, obstructive and dilatory refusal to forward these documents to her. She also claims 3,000 euros in costs.

In her brief, the complainant taxes UNESCO with having refused to send her the full investigation report and its appendices and with not dealing promptly with her letter of 12 September 2005 and her

complaint of 11 April 2007. She also criticises the inordinate length of the investigation which, in her view, was neither thorough nor objective. She casts doubt on the independence of one of the investigators who, according to her, was a “regular provider of services” to the Organization.

The complainant also endeavours to prove that she was the victim of racial discrimination. She refers in particular to certain racist expressions allegedly used by the Assistant Director-General for Education, a number of press articles published while he was still working in his country of origin and the fact that he suddenly transferred her in order to replace her with an assistant of his own nationality. She stresses that the Organization has never provided any evidence that her transfer rested on objective considerations, a situation which strengthens her impression that an “unspeakable reason” lay behind it. She contends that she was the victim of moral harassment in that her dignity was undermined and she was subjected to the repeated aggressiveness and violent and unjust behaviour of the Assistant Director-General and to an intimidating and hostile work environment. Lastly, she asserts that she suffered “administrative harassment” because, from September 2005 onwards, the Organization displayed indifference, bad faith and bias towards her.

The complainant asks the Tribunal to set aside the impugned decision and to order the Organization to pay her damages in an amount equivalent to three years’ gross salary plus interest. She claims 15,000 euros in costs. She also asks the Tribunal to rule that, should these various sums be subject to national taxation, she would be entitled to a refund of the tax paid from UNESCO.

C. The Organization annexes to its reply a clean copy of the full investigation report and its appendices, as submitted to the Director-General, in order that the Tribunal may see that no pertinent information was concealed in the version forwarded to the complainant. It also points out that she received all the documentation directly related to her allegations and that she was therefore able to defend her interests in keeping with the adversarial principle.

UNESCO argues that the length of the investigation was due to the behaviour of the complainant, who refused to cooperate throughout the investigation of her complaint. It says that it implemented the procedure prescribed by Administrative Circular No. 2232 on anti-harassment policy as soon as it received her complaint, and that the difficulties encountered by the investigators, particularly in obtaining testimony, are not grounds for concluding that their judgement was subjective. Furthermore, the Director of the Bureau of Human Resources Management did not know the investigator whose independence is called into question by the complainant. The Organization submits that the investigators were unable to find any real basis for the complainant's allegations of racial discrimination and harassment because she had produced insufficient evidence in support of them. Moreover, the parties were unable to reach an amicable settlement of the dispute, because the sole purpose behind the complainant's claims was to elicit a sum of money and promotion to a post in the professional category.

UNESCO asserts that the reasons for the complainant's transfer were administrative in nature. The Director of the Bureau of Human Resources Management had consulted her beforehand and had explained to her that, in the wake of the restructuring of the Office of the Assistant Director-General for Education, the duties pertaining to her post would be scaled back considerably, but that the Bureau of Field Coordination needed an experienced secretary like her. The transfer had therefore complied with the provisions of Administrative Circular No. 2191.

The defendant is of the opinion that the complainant's claim that she be granted a sum equivalent to three years' salary is irreceivable, because it was not submitted during the internal procedure. Moreover, this claim is unfounded since her transfer to a post at the same grade as that which she had held previously did not cause the complainant any material injury.

D. In her rejoinder the complainant draws attention to the fact that the version of the investigation report which the Organization

produced with its reply does not contain the minutes of the hearings of two witnesses. She again adverts to the circumstances of her transfer which, in her view, was imposed on her. She denies the Organization's assertion that she was uncooperative and points out that, in the proceedings before the Appeals Board, she had requested redress for the injury suffered. In her opinion, that claim is therefore receivable. She also asks the Tribunal to order UNESCO to produce the e-mails exchanged between one of the investigators and the Director of the Internal Oversight Service.

E. In its surrejoinder the Organization maintains its position in full. It explains that the investigation report does in fact contain a summary of the hearings of the two witnesses mentioned by the complainant.

CONSIDERATIONS

1. At the material time the complainant held the grade G-7 post of Secretarial Assistant to the Assistant Director-General for Education at UNESCO.

In the summer of 2005, after the new Assistant Director-General for Education had taken office, the complainant was transferred, at equal grade, to the Bureau of Field Coordination. She immediately objected to the way in which this transfer had been decided and carried out. On 23 March 2006 she wrote to the Deputy Director-General to suggest that he should grant her promotion on merit, with effect from 1 January 2005, in compensation for the special efforts she had made since the appointment of the new Assistant Director-General, and for the humiliation and loss of dignity she claimed she had suffered which, in her view, had been exacerbated by an attempt to intimidate and/or harass her. No internal appeal was lodged against the decision of 10 May 2006 rejecting this request.

2. On 11 April 2007 the complainant submitted a complaint to the Director-General in which she alleged that the Assistant Director-General for Education, who had recently resigned, had subjected her

to acts of racial discrimination and moral harassment during the brief period in 2005 when he had been her supervisor. On 20 September 2007 she was informed that the Director-General had ordered the opening of an investigation. This was entrusted to two independent external investigators, who reached the conclusion that the alleged acts had not been proved.

As the Director-General decided to close the file, the complainant lodged a protest against this decision. On 3 October 2008 she was advised that her protest had been dismissed and she was sent a censored copy of the investigation report.

3. In the meantime, on 24 July 2008, the complainant had submitted a notice of appeal to the Appeals Board. This was followed by a detailed appeal on 22 September 2008.

On 12 July 2010 the Appeals Board submitted its report to the new Director-General. It recommended inter alia that she should reject the complainant's requests for a promotion and for the communication of a clean copy of the investigation report, and that the complainant's performance, which had not been evaluated since 2003, should be assessed.

The complainant was informed by a memorandum of 16 September 2010 that the Director-General had agreed to follow these recommendations, but that she did not share the Board's opinion on the following two points:

“(iv) [...] the Board finds that the [investigation] report [...] did not cover all the elements in the Anti-Harassment Policy. [...] The report therefore by itself cannot safely be relied upon.

(v) there is evidence that [the Assistant Director-General for Education] abused his authority in the manner in which he effected the appellant's transfer which in itself is a manifestation of moral harassment (paragraph 8 of Administration Circular 2232 of April 2005) in any event he is not above suspicion of having so acted (within the meaning of paragraph 1 [of that circular]). Considering that there should be zero tolerance to harassment or discrimination the Board recommends that the appellant be compensated an equivalent of three months' salary in moral damages and costs.”

In addition, the Director-General considered that the investigation, the quality of which had been monitored by the competent services of the Organization, met the requirements of Administrative Circular No. 2232 and that the circumstances surrounding the complainant's transfer, which she had accepted, did not in themselves constitute an act of harassment. She emphasised that the burden of proof of harassment lay with the person alleging it, and she took the Appeals Board to task for having overstepped its authority by proposing that the complainant be awarded compensation, for which no provision is made in the above-mentioned circular. That is the decision which the complainant now impugns before the Tribunal.

4. In an "incidental application", which was annexed to the complaint form and supplemented a few weeks later by a detailed brief, the complainant asked that the defendant be ordered to disclose the full version of the investigation report and its appendices in order to enable her to present "full and effective arguments". An uncensored copy of these documents was produced by the Organization with its reply, with the result that in her rejoinder the complainant could have expressed her views on any new facts they might have revealed. Having examined the documents thus supplied by UNESCO, the Tribunal observes that the blacked-out passages did not relate to any essential facts relevant to the outcome of the dispute. Furthermore, the censorship which was carried out, and which served to safeguard a right to confidentiality that is worthy of protection, did not render the documents illegible or incomprehensible.

The "incidental application" also sought to obtain two other documents from the Organization, but the complainant has admitted that she knew the key aspects of one of them and she herself has produced the conclusions of the other, which summarise the bulk of its content.

Moreover, the abundant evidence produced by the parties fully informs the Tribunal of the decisive facts.

The claims put forward in the "incidental application" – which has become moot insofar as it concerns the production of the investigation

report and its annexes in the proceedings before the Tribunal – whereby the defendant should be ordered to pay compensation for the injury caused to the complainant by its failure to supply her with certain documents or to give her the full version thereof, must be dismissed because the defence of the complainant's interests before the Tribunal has not been inadmissibly hampered.

5. The complainant first submits that her complaint of discrimination and harassment was not properly investigated.

(a) It should be noted at the outset that this plea cannot be raised with respect to the processing by UNESCO of the request for promotion on merit of 23 March 2006, since a decision was taken on this claim on 10 May 2006, and that decision has become final in the absence of an internal appeal.

(b) The aforementioned complaint was filed more than one and a half years after the events complained of, once the person named in it had resigned from office. At first sight, such an interval might seem surprising, but a staff member who has been the victim of harassment might be understandably reluctant to report it for fear of reprisals. If it were to transpire that the alleged acts did in fact occur, this delay could not be held against the complainant.

Having said this, complaints of harassment or discrimination at work must be dealt with promptly and with particular diligence, not only because of the need to gather testimony as soon as possible, but also because of the repercussions which such behaviour can have on the alleged victim, on the alleged perpetrator, who benefits from the presumption of innocence, and on the organisation's services, whose proper functioning may be disrupted by proceedings related to the complaint.

In the instant case, the proceedings lasted for three and a half years, from 11 April 2007, the date on which the complaint was lodged, until 16 September 2010, the date of the Director-General's final decision. This lengthy period was, however, largely due to the complainant's behaviour during both the preliminary assessment of the merits of the complaint and the investigation. It is plain from the

evidence in the file that throughout the investigation of the case – which the Tribunal deems to have been sufficiently thorough, contrary to the complainant’s submissions – the Organization safeguarded her rights as far as possible. She therefore has no reason to contend that they were flouted. Similarly, there are no grounds for saying that the defendant failed to abide by the requirements of Administrative Circular No. 2232 in respect of the procedure for investigating complaints or of the role and responsibilities of the administrative bodies involved.

(c) The Tribunal notes that, while it proved impossible to resolve the dispute by means of a settlement, this failure cannot be ascribed to the Organization, since the complainant was demanding promotion on merit in order to redress the harassment which she considered she had suffered – a position which UNESCO rightly viewed as irrational.

(d) The complainant’s criticism based on the subjectivity or bias of the investigators, especially of the one who allegedly had such strong ties with the Organization that he had forfeited his independence, is devoid of merit. The ample material submitted by the parties shows, on the contrary, that the preliminary assessment and the investigation were carried out objectively and that UNESCO always paid heed to the grievances of its staff member.

6. Paragraph 6 of Administrative Circular No. 2232 defines harassment as any deliberate, offensive, undesired conduct, incompatible with the Standards of Conduct, in the workplace or in connection with work, that can be reasonably perceived as such, and has the purpose or effect of an affront to the identity, the personality, the dignity or the physical integrity of an employee, or the creation of an intimidating, hostile, degrading, humiliating or offensive work environment. Paragraph 8 explains that moral harassment covers, *inter alia*, any repeated or persistent aggression, whether physical, verbal or psychological, having a negative effect on conditions at the workplace or aimed at humiliating, demeaning, offending or intimidating an individual and potentially seriously affecting their health, career or

dignity. Abuse of authority or of power, inter alia, is subsumed within this definition.

There is no doubt that the acts of which the complainant accuses the former Assistant Director-General for Education would fall within the ambit of this definition if their existence were to be proved. However, the same is not true of the Organization's conduct during proceedings, which cannot be deemed to be administrative harassment, if only because of what was said in consideration 5, above. An unlawful decision or unsatisfactory conduct is not sufficient in itself to constitute harassment (see Judgment 2861, under 37).

The question as to whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of (see Judgment 2553, under 6). There is no need to prove that the perpetrator of the acts in question intended to engage in harassment (see Judgment 2524, under 25), and the Tribunal's case law has always required that an allegation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, it being understood that an accumulation of events over time may be cited in support of such an allegation (see Judgment 2100, under 13). Given the ambiguity of some of the statements made in this case by the Appeals Board, the Director-General was therefore quite right to point out that the burden of proof lay with the complainant.

7. The post of a secretarial assistant entails regular personal interaction with this employee's supervisor. For efficiency's sake, a relationship of perfect trust must exist between these persons and their working relationship must be harmonious. It is not inconceivable that the initial contacts between a new director and the close colleagues of her or his predecessor may lead the former to choose other persons to assist her or him on the administrative level. The exact reasons which prompted the new Assistant Director-General for Education to request that the complainant be assigned to a different post at equal grade are not clear from the file. But there is nothing to prove that this request was prompted either by racial prejudice or by any other improper

motive evidencing disregard for the complainant. At all events she has not supplied any substantive, convincing evidence of such motives, although it appears likely that her supervisor was somewhat surly and discourteous towards her on some occasions and that she was upset by this. The reference to similar behaviour which this senior official had allegedly adopted in the past towards subordinates or other persons external to the Organization while he was working in his country, is based on media campaigns or mere rumours. There is no evidence in the file which convinces the Tribunal that the complainant was a victim of harassment by her then supervisor, or that her transfer, with no change in remuneration, formed part of a strategy of harassment.

8. It may be concluded from the above that the complaint is unfounded and that it must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Seydou Ba, 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 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet