

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**R. (No. 3)**

**v.**

**UNIDO**

**136th Session**

**Judgment No. 4678**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr F. A. R. against the United Nations Industrial Development Organization (UNIDO) on 22 February 2019, corrected on 4 April, and UNIDO's reply of 11 July 2019;

Considering that pursuant to Article 9, paragraph 2, of the Tribunal's Rules the written pleadings were closed after the reply as no rejoinder was filed within the prescribed time limit;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decisions not to extend his fixed-term contract due to unsatisfactory performance and to withhold his within-grade salary increment.

The complainant joined UNIDO in October 2010 as an Electronic Technician at the G-5 level. He held a three-year fixed-term contract, which was extended once from 18 October 2013 until 17 October 2016.

In August 2014, the complainant received his mid-term review on his performance for 2014, which showed that he had only partially achieved the expected results. The first reporting officer (FRO) attached two documents: one providing improvement suggestions and another one containing a six-month performance improvement plan (PIP).

In February 2015, the FRO completed the complainant's end-of-cycle staff performance management appraisal for 2014. He gave him an overall rating of 2, which meant that he had only partially achieved the expected results. The second reporting officer endorsed the overall ratings and recommended that the PIP be extended for an additional three months, that is to say until 31 May 2015. On 26 March 2015, the Department of Human Resources Management (HRM) informed the complainant of the possible consequences of the under-performance demonstrated during 2014, such as withholding salary increment, and of the recourse mechanisms available to him. The following day, the complainant filed a formal rebuttal against his 2014 performance appraisal. He was informed on 16 June 2015 that the Director of HRM agreed with the rebuttal panel's findings that essential facts were taken into consideration in the assessment, that the assessment was supported by evidence and that he had the opportunity to state his views. The Director of HRM therefore endorsed the panel's recommendations that the complainant's PIP be extended until end November 2015, that his staff performance management appraisal for 2015 be conducted in parallel to the PIP, that the second reporting officer act as a mediator during the remaining steps of the staff performance management appraisal, that a progress review of the 2014 PIP be held at mid-term review (July-August 2015), and that a peer review take place at the end of the PIP, the results of which should be taken into consideration in assessing the complainant's final results. As from 23 June 2015, the complainant was on sick leave.

On 28 August 2015, HRM notified the complainant that, in accordance with the Framework for Staff Performance Management (hereinafter "the Framework") contained in Administrative Instruction UNIDO/AI/2012/01 and applicable rules, his within-grade salary

increment due on 1 October 2015 was withheld in view of the final ratings of his 2014 performance appraisal.

The complainant was informed on 15 September 2016 that the Director-General had decided to let his contract expire according to its terms on 17 October 2016 on the grounds that his performance, as recorded in the last reports for 2014, were below the required standards and that, at the end of the PIP on 31 May 2015, his performance had not improved. His performance could not be re-evaluated afterwards as he was on sick leave as of 23 June 2015. The Director-General also noted that, in March 2016, the complainant's supervisor reported to HRM "gross negligence" on his part and that he had declined to comment while on sick leave.

On 27 October 2016, the complainant was notified that the disability benefit, which he had applied for in August, had been certified by the United Nations Joint Staff Pension Fund (UNJSPF) with effect from 18 October 2016, the day following his separation from service.

The complainant requested the Director-General on 31 October 2016 to review the 15 September 2016 decision not to extend his appointment, and the 28 August 2015 decision to withhold his salary increment. Regarding that latter decision, he explained that he could not exercise his right of appeal in due time because he was on sick leave. The complainant was informed on 23 December 2016 that the Director-General had rejected his request noting in particular that he had been awarded a disability benefit from the UNJSPF as he was incapacitated for further service with the Organization. The Director-General added that the withholding of salary increment was justified in case of unsatisfactory performance, and that, in any event, the complainant's request was not submitted within the prescribed time limit.

On 20 February 2017, the complainant lodged an appeal with the Joint Appeals Board (JAB) asking to be reinstated with retroactive effect to the date of his separation, to be paid all salaries, entitlements, benefits and emoluments with retroactive effect to that same date, and to re-enter the UNJSPF. He also claimed payment of his salary increment with retroactive effect and interest on the amounts due.

Lastly, he sought moral damages, costs and the removal of adverse material from his “official status file” and his personnel file.

In its report of 2 November 2018, the JAB recommended rejecting the appeal on the grounds that the complainant’s claims were not justified and his contentions were unfounded. On the withholding of his salary increment, it noted that the complainant’s request was not submitted within the time limit set in Staff Rule 112.02(a), and therefore considered the appeal irreceivable in that respect. It also held that the request to remove adverse material related to his performance appraisal from his “personnel files” was unsubstantiated. UNIDO was required, according to its rules, to keep performance appraisal reports and any related correspondence. The JAB found that the decision not to extend the complainant’s fixed-term contract was based on his unsatisfactory performance, which was legally sound and substantiated in particular by the fact that a PIP had been established, that it was extended several times, that the second reporting officer was involved, and that the rebuttal panel provided recommendations on the complainant’s case.

By a memorandum of 22 November 2018, received by the complainant on 27 November, the Director-General endorsed the JAB’s conclusions that the complainant’s claims were not justified and that his contentions were unfounded. He therefore dismissed the appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to award him material damages for the unlawful withholding of the salary increment due in 2015 and 2016, together with interest from due dates. He also claims moral damages regarding the non-extension decision and additional moral damages for undue delay in the internal appeal proceedings. In addition, he asks the Tribunal to order UNIDO to remove from his “official status”, and destroy, adverse written material relating to his performance and alleged misconduct. Lastly, he claims costs.

UNIDO asks the Tribunal to reject the complaint as irreceivable insofar as he contests the withholding of his salary increment, and in any event unfounded. It considers that the complaint is devoid of merit

insofar as the complainant contests the non-extension decision. Regarding the claim for moral damages for undue delay, it states the complainant was informed on 18 June 2019 that the Director-General had decided to award him 3,750 euros in compensation. UNIDO objects to the complainant's request to remove and destroy adverse written material from his "official status file" explaining that these documents form part of UNIDO's personnel records.

### CONSIDERATIONS

1. The complainant's first claim is concerned with the 28 August 2015 decision to withhold his within-grade salary increment due in 2015 and 2016.

The complainant's second, third and fourth claims are concerned with the 15 September 2016 decision to let his contract expire.

The Tribunal will first address the complainant's first claim, and then the other claims.

2. In his first claim, the complainant requests "material damages to compensate for the unlawful withholding of the salary increment due in 2015 and 2016, with interest from due dates". By memorandum of 28 August 2015, the Department of Human Resources Management (HRM) advised the complainant that, based on the final ratings in the 2014 performance cycle confirmed by the rebuttal panel, his salary increment due as of 1 October 2015 would be withheld (G-5, Step 8 to G-5, Step 9). It is not disputed that the complainant did not seek review of this decision within the 60-day deadline set forth in Staff Rule 112.02(a), and that, before the Tribunal, he only seeks an award of material damages.

The Joint Appeals Board (JAB) stated that the complainant's request had not been submitted within the time limit of 60 days set out in Staff Rule 112.02(a), and therefore considered the appeal irreceivable in this respect.

The first claim will be dismissed.

The complainant argues that the JAB erred in not waiving the time limit as it could have done, in exceptional circumstances, pursuant to paragraph (k) of the JAB Rules. He contends that the fact that he was on sick leave was an exceptional circumstance.

In the ordinary course, sick leave is not an exceptional circumstance in and of itself. The complainant should have provided the JAB with a reasonable explanation as to why his sick leave prevented him from requesting a review in a timely manner, and he did not. In these circumstances, the internal appeal was properly considered irreceivable.

3. The complainant's pleas against the non-extension decision may be summed up as follows:

- (a) the decision failed to take into consideration that he received satisfactory ratings in 2010, 2011, 2012, and 2013;
- (b) the ratings for 2014 were not established in line with Appendix M to the Staff Rules and the Framework for Staff Performance Management (hereinafter "the Framework"), in particular:
  - the first reporting officer (FRO) handed him a performance improvement plan (PIP) without consulting him in advance, in violation of paragraph 17 of the Framework; and
  - the mid-term review did not consider feedback from the complainant's colleagues, as allegedly required by paragraph 6 of the Framework;
- (c) the complainant was not given the opportunity to improve during the six-month period provided by the PIP issued in August 2014 as allegedly "confirmed" by the rebuttal panel;
- (d) the complainant's performance during the first six months of 2015 was not evaluated, in violation of Appendix M to the Staff Rules and the Framework;
- (e) there was no performance assessment after the expiry of the three-month PIP period extension;
- (f) the extended six-month PIP period was not completed; and

- (g) the decision was taken in breach of the principles of good faith and mutual trust.

4. Before addressing the complainant's pleas against the decision not to extend his fixed-term contract for unsatisfactory performance, the Tribunal recalls its well-established case law regarding decisions concerning staff performance appraisals and renewal of fixed-term appointments. Organizations have wide discretion in taking such decisions, which are therefore subject to only limited review by the Tribunal, which will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see Judgment 4170, consideration 9, and the case law cited therein). Where the reason for not renewing a contract is the unsatisfactory nature of the performance of a staff member, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of her or his service, the organization can base its decision only on an assessment carried out in compliance with established rules (see, in particular, Judgment 2991, consideration 13, and the case law cited therein). This presupposes that the person in question has been informed in advance of what is expected of her or him, in particular by the communication of a precise description of the objectives set (see Judgment 3148, consideration 25).

5. It is appropriate to quote the Staff Rules applicable at the material time.

Staff Rule 103.10 in the relevant part read:

"[...]

(c) [...] subject to the achievement of satisfactory service as defined in Staff Rule 104.08 [...], the fixed-term appointment shall normally be extended for a period of three years. When one or both of the overall performance ratings are less than satisfactory, as defined in Appendix M to the Staff Rules, the fixed-term appointment shall be extended to cover a performance improvement period for a minimum of six months up to a maximum of 12 months. Where a fixed-term appointment is due to expire within a performance improvement period, the appointment shall be extended to

cover the performance improvement period plus one month. If both overall performance ratings do not reach a satisfactory level at the end of the performance improvement period, the fixed-term appointment shall normally be allowed to expire or be terminated prior to its expiration date in accordance with Staff Regulation 10.3 (c).”

Appendix M to the Staff Rules dealt with the Staff Performance Management (SPM) appraisal system and its paragraph (c) read:

“(c) In case the [Staff Performance Management system (SPM)] is required at a time when the normal performance cycle may not be possible (e.g. at the entry of new staff, reassignment of serving staff, change in first reporting officers, planned or unplanned absences), the performance period covered by a performance document may not be shorter than six months and not longer than 17 months. Therefore, if at least six months are left within a given year, the performance document shall cover such a period. If there are less than six months left during the given year, this period shall be added to the next year.”

6. In light of these rules, the complainant’s first plea is unfounded. Regardless of earlier satisfactory performances, the extension of a fixed-term appointment requires satisfactory service for the time period under review. Satisfactory service is defined in Staff Rule 104.08 as the achievement of overall performance ratings of 3, 4 or 5. The complainant’s performance, which was satisfactory only up to 2013, justified the previous extension of his contract from October 2013 but not a further extension, which was hindered by the more recent unsatisfactory performance.

7. The complainant’s second plea, which is twofold, is also unfounded. The performance appraisal procedure was consistent with the relevant procedural rules. Pursuant to paragraph 17 of the Framework:

“In case of unsatisfactory performance or shortcomings, it is the FRO’s responsibility to initiate a discussion with the staff member and prepare a performance improvement plan for the purpose of providing the staff member with the opportunity to remedy the unsatisfactory performance or shortcomings and in order to monitor progress.”

In the instant case, the complainant’s FRO held numerous discussions with the complainant and prepared a PIP in order to provide him with an opportunity to improve. The FRO called weekly meetings

and held performance discussions on 28 August, 29 October, and 28 November 2014. The PIP was drawn up during the mid-term review and was sent to the complainant on 28 August 2014, indicating that a meeting would be held.

The allegation related to the lack of feedback from the complainant's colleagues during the mid-term review, as allegedly required by paragraph 6 of the Framework, is unfounded. The Framework does not provide for peer feedback during the mid-term review, but only at the end of the cycle, as it clearly results from paragraphs 6, 15 to 18, and 20 of the Framework.

Paragraph 6, in the relevant part, reads as follows:

“6. The active collaboration of the following actors is reinforced during the SPM cycle:

[...]

- c) Feedback source: Colleagues with whom the staff member cooperates closely, with whom they have significant interaction to achieve the results under their compact and who are entitled to provide a professional opinion on the compact and competencies, in the given performance cycle.”

Paragraphs 15 to 18 describe the mid-term review and make no reference to the “feedback source”.

Paragraph 20 describes the end-of-cycle review and makes reference to the role of the feedback source as follows:

“20. Prior to the end-of-cycle discussion between the FRO and the staff member, and by 1 November, the designated feedback sources shall receive an email informing them to participate in the multi-rater feedback, which is mandatory. They are required to provide the online feedback by the end of November. The staff member is responsible for following up with the feedback sources to ensure the completion of the multi-rater feedback. If this is not a successful outcome, the staff member may seek the assistance of the FRO or HRM to follow up. The individual ratings provided by the feedback sources on the values and competencies are strictly confidential and not subject to rebuttal.”

Paragraph 6 of the Framework gives only a general description of the peer-review referred to as “feedback source”, but does not indicate in which phase of the performance cycle the peer-review is required.

The feedback source is not mentioned in the phase named “mid-term review” (paragraphs 15 to 18) but only in the phase of the end-of-cycle review (paragraph 20).

The argument that the complainant was not given the opportunity to improve during the six-month period provided by the PIP issued in August 2014, as allegedly “confirmed” by the rebuttal panel, is unfounded. The rebuttal panel did not establish that the complainant was not given the opportunity to improve. It only found that a further six-month period of improvement was warranted “[t]o ensure that every opportunity [was] afforded [to] the [staff member] for improvement”. Since the complainant was provided with a further six-month period of improvement, the Tribunal is satisfied that he actually had the opportunity to improve.

8. As to the argument that the complainant’s performance during the first six months of 2015 was not assessed, in violation of Appendix M to the Staff Rules and the Framework, the Tribunal notes that, according to the relevant Staff Rules, the provision that the performance period covered by a performance document cannot be shorter than six months entails that the staff member has been in service for six months or more.

Appendix M to the Staff Rules read, in paragraph (c):

“the performance period covered by a performance document may not be shorter than six months and not longer than 17 months”.

Paragraph 44 of the Framework on unplanned absences clarified:

“When a staff member proceeds on unforeseen and unplanned absence where the return date is not within the control of the Organization, such as long extended sick leave, a provisional report shall be prepared by the FRO, if the staff member has been on duty for 6 months or more during the performance cycle.”

Since the complainant was on duty for less than six months during the 2015 performance cycle, no appraisal was due for that period. Therefore, there was no violation of Appendix M to the Staff Rules nor of the Framework.

9. The argument that there was no performance assessment after the expiry of the three-month PIP extension in May 2015 is not correct. The three-month extension of the PIP coincided with the complainant's rebuttal, which resulted in a final extension of the PIP until the end of November 2015. Therefore, a performance assessment was only due at the end of the 2015 performance cycle, in accordance with the provisions of the Framework.

10. As to the plea that the extended six-month PIP period was not completed, the Tribunal notes that the complainant went on sick leave shortly after the PIP had been extended. This circumstance did not preclude the Director-General from deciding not to extend his contract upon its expiry on performance grounds. Although the complainant had several opportunities to improve, his overall ratings for 2014 remained unsatisfactory, and, in addition, he did not achieve satisfactory ratings for 2015.

11. The contention that the decision not to extend his appointment was taken in breach of the principles of good faith and mutual trust is also unfounded. Contrary to the complainant's argument, good faith does not require an organization to extend the appointment of an underperforming staff member merely because the staff member has applied for a disability benefit, and, in any event, no extension was needed to process a disability benefit request. Additionally, in the instant case, the Organization quickly addressed the complainant's request for a disability benefit in conjunction with his separation from service. Furthermore, the Organization acted transparently towards the complainant, by repeatedly warning him, orally and in writing, that his continued employment was conditional on improved performance.

12. Since the non-extension decision is lawful, the complainant's claims related to such decision are rejected.

Firstly, the Tribunal rejects his second claim, seeking an award of moral damages of 30,000 euros and an award of 10,000 euros for costs for the internal proceedings. Irrespective of any issue related to the receivability of the claim for moral damages lodged internally and to

the burden of proof of moral prejudice, there is no ground for awarding moral damages and costs for internal proceedings, as the non-extension decision was lawful.

13. Secondly, the Tribunal rejects the complainant's fourth claim requesting that the Organization remove and destroy adverse written material from his official status file. He requests that the Tribunal order the removal and destruction of the 2014 Staff Performance Management Form, the rebuttal panel proceedings documents and reports, and any related written material and decisions taken as a result of the rebuttal. He also requests that the Tribunal order the removal and destruction of the 31 March 2016 memorandum from HRM and the "Note for the File" from his FRO relating to "the connection of cameras in the V[ienna] I[nternational] C[enter]".

Since the non-extension decision was lawful and the Organization was obliged to retain these documents, the complainant's claim that the Tribunal order the removal and destruction of adverse written material from his official status file is rejected.

As to the request for an order to remove the 31 March 2016 memorandum, the Tribunal notes that this document was not taken into consideration in the non-extension decision. Thus, it is outside the scope of the present complaint. In any case, the Organization, in its reply, has stated that the memorandum was not placed in the complainant's official status file.

14. In his third claim, the complainant requests moral damages in the amount of 3,500 euros, for the alleged undue delay in the internal appeal proceedings. This claim is moot, as the Director-General has already decided to award him 3,750 euros in compensation, and the complainant was informed of such decision on 18 June 2019.

15. In conclusion, the complaint is moot with regard to the third claim, and unfounded in the remainder.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 11 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ