

**B. (No. 2)**

**v.**

**UNESCO**

**136th Session**

**Judgment No. 4685**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms E. B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 January 2020 and corrected on 13 February, UNESCO's reply of 19 May 2020, the complainant's rejoinder of 24 August 2020, UNESCO's surrejoinder of 25 November 2020, the complainant's additional submissions of 8 February 2021 and UNESCO's final comments of 12 May 2021;

Considering the document sent by UNESCO on 10 January 2023 at the Tribunal's request;

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

Having examined the written submissions;

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

The complainant challenges the implied rejection of her requests concerning the effective date of her promotion and the within-grade salary increment.

The complainant joined the International Atomic Energy Agency (IAEA) in October 1989, serving in the International Centre for Theoretical Physics (ICTP). Further to the agreement between the Government of Italy, the IAEA and UNESCO to transfer the administration of ICTP from the IAEA to UNESCO, the complainant

was transferred, on 1 January 1996, from the IAEA to UNESCO. At the time, she held a fixed-term appointment and worked as a G-4 “Scientific Conference Clerk”. This title was modified to “Conference Clerk” in the new job description she signed on 20 March 1998.

On 31 July 2001, the complainant requested a reclassification of her post. A desk audit was conducted in September 2003 by a human resources expert to assess the classification of the Conference Clerk posts. In her report of December 2003, the expert indicated that the audit was conducted against the background of an appeal filed by Conference Clerks concerning the classification level of their posts. The expert recommended that the posts remain at the G-4 level but encouraged the ICTP to review the organizational structure with a view to enhancing the duties in some posts and thus facilitate some level of career path. In February 2004, several Conference Clerks, including the complainant, filed a protest against the report, and, in May 2004, the Bureau of Human Resources Management (HRM) informed them that a Junior Personnel Advisory Board (JPAB) had been constituted to examine their protests. On 16 September 2004, the Director-General decided, based on the JPAB’s recommendation, to upgrade the Conference Clerk posts to G-5. The complainant was so informed on 21 October 2004 and promoted from grade G-4, step 8 to G-5, step 7 as of the same date of the post reclassification, i.e. as from 16 September 2004. In December 2004, she filed a protest against the decision of 21 October 2004, requesting that the reclassification date be 22 March 1999, that is to say, one year after she had started to perform the duties of the post, as provided by Administrative Circular No. 2191 entitled “Integrated policy on recruitment, rotation and promotion”.

The Director of HRM wrote to the complainant on 1 April 2005, stating that, according to a strict application of the rules, her promotion should have taken place on 16 September 2005, that is to say, one year after the reclassification of her post. However, in a “spirit of searching [for] a solution acceptable” for her and the Organization, she was promoted from G-4 to G-5 as from 16 September 2004, which was more favourable to her. The Director of HRM added that the Director-General had confirmed that last date as being correct.

A few days later, on 7 April 2005, having received no decision from the Director-General on her protest of December 2004, the complainant filed a notice of appeal with the Appeals Board, followed by a detailed appeal in February 2006. She contested the effective date of her promotion, stressing that the job description of her reclassified post had been approved on 20 March 1998, and that she had been performing her duties to the satisfaction of her supervisors since then. She added that the process of evaluation of her post, which included a desk audit and the JPAB procedures, took four years, which was not reasonable.

In the meantime, on 10 January 2005, the complainant was informed that her contract was extended until 31 December 2010 and that her within-grade increment was due on 16 September 2006. She initiated the internal appeal proceedings on 8 March 2005, against that decision arguing that, pursuant to Staff Rule 103.4(a), her within-grade increment was due on 1 January 2005 because the previous one was granted on 1 January 2003.

Considering that the complainant's two internal appeals were closely related, the Administration produced a single reply before the Appeals Board in January 2008. The complainant requested several extensions of time to submit her rejoinder, which she finally did in February 2016. UNESCO filed its surrejoinder with the Appeals Board in April 2016.

On 17 October 2017, the Appeals Board issued its opinion on the "appeal" filed by the complainant. It concluded that she no longer had a cause of action regarding her within-grade increment, as 1 January 2005 had been determined as the applicable date despite the fact that a new cycle started on 16 September 2004, the date on which she was promoted to grade G-5. The Appeals Board also considered that the claim to be compensated for the "amount so far lost" was outside the scope of the appeal and was time-barred as the facts she relied upon occurred between 1993 and 1995. Regarding the effective date of the complainant's promotion, it noted that the parties agreed on the principle of retroactivity but not on the starting date. The Organization proposed 1 July 2003 and the complainant 1 March 2001. The Appeals

Board recommended inter alia that the effective date of promotion be made retroactive, “as to take into consideration the functions carried out by the [complainant] from March 1998, upon signing her job description”. It added “as a middle ground, that the effective date of promotion [should] be readjusted to March 2002, with calculation and payment of the differences in salary, allowances and other related entitlements”.

On 19 December 2017, the Director of HRM informed the complainant that the Administration had received the Appeals Board’s report and was “actively considering” it. He added that the Director-General would take a decision as soon as possible. On 15 June 2018, the complainant was offered an agreed separation, but she refused it. In July 2018, having received no final decision on her appeal, she wrote to the Director of HRM requesting a decision on the matter. She reiterated her request on 4 October 2019, asking to be provided with a decision from the Director-General by 18 October 2019. She added that this was her last email on the matter. Having received no decision, she filed her complaint with the Tribunal on 14 January 2020.

The complainant asks the Tribunal to quash the impugned decision with all legal effects flowing therefrom, and to award her moral and exemplary damages in “recognition to all moral, physical and psychological suffering” she sustained. She also asks the Tribunal to order that the date of reclassification of her post be 20 March 1998, that her promotion to grade G-5 be made retroactive to 22 March 1999, and that she be paid all salary, benefits, pension contributions, step increases, entitlements and any other emoluments that she would have been paid if her post had been reclassified on 20 March 1998 and her promotion to G-5 been granted from 22 March 1999. She also seeks the payment of interest, at the rate of 5 per cent per annum, on all sums awarded to her. In addition, she claims an award of costs and any other relief the Tribunal deems necessary, just and fair.

UNESCO asks the Tribunal to reject the complaint as irreceivable insofar as the complainant requests to set the date of her promotion at 22 March 1999 for failure to exhaust internal means of redress. UNESCO submits that the complaint is, in any event, unfounded.

## CONSIDERATIONS

1. The complainant requests oral proceedings. She does not list witnesses to be heard, and the Tribunal is satisfied the written submissions are sufficient to reach a reasoned decision. Therefore, the request is rejected.

2. The Organization does not contest the receivability of the present complaint insofar as it challenges the implied rejection of the complainant's internal appeal. The Tribunal notes that the complainant impugns an implied rejection of her internal appeal. Although the Appeals Board issued its report on 17 October 2017, the Organization failed to adopt an express decision over the subsequent two years, and the complainant did her utmost to obtain such a decision, by requesting it on 19 July 2018 and on 4 October 2019. It is therefore deemed that she has exhausted the internal means of redress open to her under the applicable rules (see Judgment 4226, consideration 4).

3. The Organization raises a threshold issue related to the complainant's claim that her post reclassification be effective as of 20 March 1998 and her promotion to G-5 be effective as of 22 March 1999. In particular, the Organization alleges that the complainant did not challenge in due time the 20 March 1998 decision classifying her post at the G-4 level. The Tribunal notes that the complainant advanced her reclassification claim for the first time on 31 July 2001. She did not challenge in due time the 1998 post description and classification at the G-4 level. Furthermore, in her 31 July 2001 request for post reclassification, she did not ask that the reclassification be retroactive to 1998. As a result, the claim is partially irreceivable to the extent it seeks that the post reclassification and the promotion be retroactive as of 20 March 1998 and of 22 March 1999, respectively. The claim is, however, receivable to the extent it seeks retroactivity of the reclassification as from 31 July 2001, which is the date of the complainant's first claim for reclassification.

4. In any event, the claim that the reclassification (and the promotion) be retroactive is unfounded on the merits. The complainant raises several arguments in relation to that matter which seem to misapprehend the Tribunal's role in relation to these matters.

As the Tribunal recalled in Judgment 4186, consideration 6:

“It is well established in the Tribunal's case law that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, was made in breach of the rules of form or procedure, was based on an error of fact or law, overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion was drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). Indeed, the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts, and it is not the Tribunal's role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of an international organisation (or of the person acting on his behalf) (see, for example, Judgment 3082, consideration 20).”

These principles apply to both the decision to reclassify (with possible promotion) or to refuse to reclassify as well as to the date from which the reclassification should take place.

5. Having examined all the evidence in the file, the Tribunal is satisfied that the complainant has not established that the Organization committed an error of the type referred to in the preceding consideration which would vitiate the discretionary decision actually made.

6. Although the Appeals Board's opinion and recommendation, issued on 17 October 2017, suggested giving retroactive effect to the reclassification (even if not to the extent requested by the complainant), it offered no rationale to support such retroactivity, and rather suggested it as a basis for an amicable settlement between the parties. The Tribunal shares the view of the Appeals Board that an amicable settlement is always advisable when possible.

7. In light of the foregoing considerations, the complainant's claims regarding the date of her post reclassification, along with all legal consequences on her career and salary, are rejected.

8. The complainant's claim for moral damages related to the alleged excessive duration of the reclassification exercise is unfounded. The duration of the reclassification procedure was not unreasonable considering the circumstances of the case: that a desk audit was ordered and conducted in 2003 following a claim lodged in 2001, and that it was then followed by a review conducted in 2004.

9. Concerning her claim for moral damages for the delay in resolving the internal appeal proceedings, the Tribunal notes that, by 14 January 2020, when the complaint was filed, the Director-General had failed to take an express decision (resolving the appeal) on the Appeals Board's opinion issued on 17 October 2017. This is entirely unacceptable and in breach of the Staff Regulations and Staff Rules of the Organization and the Tribunal's case law (see Judgment 3041, consideration 16). It is obvious the complainant suffered moral injury by virtue of this failure. She is entitled to moral damages which the Tribunal assesses in the amount of 10,000 euros.

10. As the complainant succeeds in part, she is entitled to an award of costs in the amount of 5,000 euros.

#### DECISION

For the above reasons,

1. UNESCO shall pay the complainant moral damages in the amount of 10,000 euros.
2. It shall also pay her costs in the amount of 5,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, 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

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ