Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**K. (No. 8)**

***v.***

**UNESCO**

**140th Session** **Judgment No. 5057**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr L. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 May 2023, UNESCO's reply of 5 September 2023, the complainant's rejoinder of 23 November 2023 and UNESCO's surrejoinder of 26 February 2024;

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 challenges the decision to close his internal complaint of retaliation at the end of the preliminary review procedure.

The complainant joined UNESCO on 2 December 2002 as a grade G-3 security officer, assigned to the Security Unit within the Security and Safety Section, under a two-year fixed-term appointment that was renewed several times until 5 November 2021, when his appointment was terminated on disciplinary grounds. It should be pointed out that, by Judgment 4924, delivered in public on 6 February 2025, the Tribunal, ruling on the complainant's eleventh complaint, set aside the decision to terminate his appointment, without ordering his reinstatement within the Organization.

On 16 January 2020 the then Assistant Chief of the Security and Safety Section, Mr M., signed the complainant's performance appraisal for the 2018-2019 biennium, awarding him an overall rating of "[p]artially meets expectations" and stating, in particular, that the quality of his professional performance was "tarnished by inappropriate behaviour likely to be interpreted by his supervisors as insubordination"*. Mr M. added that, "[d]espite numerous formal and informal requests from his supervisors inviting him to alter his behaviour and manner of communicating, the frequency, form and content of his correspondence [had] remained problematic"*.

In April 2020, in accordance with the provisions then in force of Chapter 14 of the Human Resources Manual, relating to performance management, the complainant referred his appraisal to the review panel, then in June to the Reports Board. By a memorandum of 15 September 2020, he was informed by the Director of the Bureau of Human Resources Management that, after examining his file and the recommendations of the Reports Board, the Director-General had decided to maintain the rating of "[p]artially meets expectations" in his performance report and to confirm the performance improvement plan drawn up by his supervisor.

On 22 September 2020 the complainant lodged an initial internal complaint of retaliation with the Ethics Office, arguing in particular that Mr M. had "down-grad[ed]"* his rating following emails he had sent between March 2018 and October 2019 concerning, inter alia, "the expiry date of certificates for security officers' [telescopic] batons"*. On 2 November 2020 the Ethics Adviser, Ms D., informed him that his internal complaint had been closed without further action as the reports he had made did not constitute a "protected activity" within the meaning of the provisions of the Whistleblower Protection Policy, contained in Item 18.3 of the Human Resources Manual, and that the alleged retaliation had not taken place. Ms D. nevertheless noted the existence of "a situation of conflict and tension [within the Security and Safety Section] due to frequent disagreements between the parties concerned,

* Registry's translation.

potentially aggravated by the disproportionate number of written communications from [the complainant] to [his] supervisors"* and advised the administration to "reconsider the supervisory links"* previously established.

On 7 January 2021 the complainant referred to the Appeals Board the Director-General's decision of 15 September 2020 to maintain his performance report as it stood. On 22 February 2021 he submitted a notice of appeal against the decision of 2 November 2020 closing his internal complaint of retaliation.

On 9 March 2021 he lodged his second internal complaint of retaliation against Mr M., in which he alleged that he had been subjected to retaliation in the form of pejorative comments in his performance report after having reported "misconduct"* relating to non-compliance with the regulations on carrying weapons. The Ethics Office conducted a preliminary review of this new internal complaint in accordance with the abovementioned Policy. On 16 March it asked the complainant to provide further details of the nature of the "protected activity" that had given rise to his internal complaint, to which the complainant replied on 22 March, alleging that Mr M. had infringed a decision of the Executive Board concerning the implementation of an action plan for security within UNESCO, which provided for some security officers to be armed, Mr M.'s failure to comply with his "duty to provide training"* in handling certain weapons, and the failure to comply with the validity periods of the clearances to carry these weapons.

On 21 April 2021 the Ethics Adviser recommended that the Director-General "close the case"*, concluding that the complainant had not engaged in a protected activity within the meaning of the provisions of Item 18.3 of the Human Resources Manual. On 26 April she informed the complainant of the Director-General's decision to close his internal complaint of 9 March 2021 without further action.

* Registry's translation.

On 28 May 2021 the complainant informed the secretary of the Appeals Board that he wished to withdraw his appeal challenging the decision of 2 November 2020. He confirmed this withdrawal on 1 June.

On 22 June 2021 the complainant sent the Deputy Director-General a request for the administrative review of the decision of 26 April to close his second internal complaint of retaliation without further action. This request was rejected as unfounded on 12 August. On 3 September he submitted a notice of appeal against the same decision and on 30 November submitted a detailed appeal to the Appeals Board.

In its opinion of 31 January 2023 transmitted to the parties on 18 February, the Appeals Board noted that "the reports made [did] concern violations, but [...] [were] not as serious as alleged"* and therefore did not constitute a protected activity within the meaning of the Whistleblower Protection Policy. Furthermore, it considered that, in merely asserting that the performance appraisal exercise had been used to damage his career and his personal and professional reputation, the complainant was only speculating and did not provide evidence of any retaliation taken by Mr M. against him. The Board recommended that the appeal be dismissed as unfounded.

By a letter of 23 February 2023, the complainant was informed that the Director-General had decided to follow that recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the opening of disciplinary proceedings against Mr M. on account of the "blatant retaliation"* taken against him. In respect of material injury, he submits that he was denied the opportunity to receive a possible promotion to grade G-4 and claims compensation of 20,000 euros. In his rejoinder, he asks the Tribunal to "update the amount of the material injury suffered"* as at the date of its judgment. Lastly, he claims compensation of 30,000 euros for the moral injury he considers he has suffered, increased by 5,000 euros for the unacceptable length, in his view, of the internal appeal procedure, as well as an award of 10,000 euros in costs.

* Registry's translation.

UNESCO asks the Tribunal to dismiss the complaint as unfounded.

## CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 23 February 2023 by which the Director-General of UNESCO, in accordance with the recommendation of the Appeals Board, rejected his internal appeal against the closure at the preliminary review stage of an internal complaint of retaliation that he had submitted on 9 March 2021 against Mr M., the Assistant Chief of the Security and Safety Section.

The internal complaint related to the content of the complainant's performance report for the 2018-2019 biennium, drawn up by Mr M. in his capacity as the complainant's supervisor, which the complainant argued constituted retaliation against him following reports of failures by the Section's managers to fulfil particular obligations.

2. The Organization objects to the complainant's contentions on the grounds that he could not properly rely on the content of a performance report in support of an internal complaint of retaliation. It also submits that, as the complainant has lodged internal appeals against his appraisal for the 2018-2019 biennium and against the dismissal of an initial internal complaint of retaliation which he submitted on the basis of the content of that appraisal on 22 September 2020, his complaint to the Tribunal contravenes the principle, recalled for example in Judgment 3058, consideration 3, that the same question cannot be the subject of more than one proceeding between the same parties.

These objections cannot be upheld. Although the performance appraisal and the internal complaints of alleged retaliation are admittedly the subjects of different proceedings, the fact remains that retaliation against a staff member may take the form of an unfavourable rating and generally there is nothing to prevent a complainant from relying on the content of one of her or his performance reports in support of an internal complaint. Moreover, while there are obviously close links in the present case between the challenge to the disputed

appraisal – which is the subject of the complainant's thirteenth complaint to the Tribunal – and the challenge to the dismissal of the internal complaint of retaliation at issue in the present proceedings, these disputes raise separate issues. As for the possible duplication between the proceedings relating to the two successive internal complaints, this was in any event resolved by the withdrawal of the appeal initially lodged by the complainant with the Appeals Board against the rejection of the first of them.

3. The complainant's performance report for the 2018-2019 biennium, signed by Mr M. on 16 January 2020, included a reference to the overall rating "[p]artially meets expectations", which was a downgrade from the rating, corresponding to fully satisfactory performance, that appeared in the previous report. In particular, the appraiser justified the rating assigned to the complainant by assessments that "[t]he quality of his professional performance [was] tarnished by inappropriate behaviour liable to be interpreted by his supervisors as insubordination"[*] and that, "[d]espite numerous formal and informal requests from his supervisors inviting him to adjust his behaviour and manner of communicating, the frequency, form and content of his correspondence [had] remained problematic"[*].

4. The complainant submits before the Tribunal, as he previously did in his internal complaint, that this appraisal constituted retaliation against him because he had reported in various emails sent to his supervisors between March 2018 and October 2019 that Mr M. had failed to organise the training required to ensure that clearances to use the "intermediate defence"[*] equipment with which certain security officers were equipped – namely telescopic batons, handcuffs and tear gas – could be renewed when they expired. According to the complainant, the existence of this retaliation is also evident from the wording of the aforementioned assessments, as the reference to supposedly inappropriate correspondence from him was specifically directed at his reports on this matter.

[*] Registry's translation.

5. In the light of the evidence, the Tribunal finds that, irrespective of the merits of the complainant's argument that the reports in question unlawfully affected his appraisal, there is no doubt that the failure reported in the abovementioned emails existed.

According to the information provided by the complainant, who was part of the team of instructors responsible for providing training for other security officers, the clearances to carry intermediate defence equipment, which had been issued by a private service provider following initial training in 2016, were valid for one year as a general rule, or three years in the specific case of instructors. This information is not formally challenged by the Organization. Furthermore, it is not disputed that, as the complainant pointed out in his reports, the expiry of the validity of the clearances had the effect of creating some confusion, insofar as some security officers had considered that they should stop carrying the equipment in question, while others had kept it while wondering whether they were entitled to use it. On this point, the Organization merely states in its surrejoinder – in an argument which does not convince the Tribunal – that the non-renewal of the clearances is not linked to the failure to organise further training in using this equipment.

6. It should be noted that, in a memorandum of 8 November 2019 containing "temporary instructions"[*] – which appears, in view of the timing of events, to have been issued in response to the last of the abovementioned emails, sent directly to the Assistant Director-General for Administration and Management – the Chief of the Security and Safety Section acknowledged, with regard to the clearances issued upon completion of the training received in 2016, that "French, foreign or international standards for vocational training in private or public security usually specify a period of validity for this training of between one and two years"[*] and that, "[a]s these clearances have not been renewed, they should be suspended and the equipment returned"[*]. However, the memorandum announced that, in view of the sensitive "security context" at the time, it had been decided that security officers

[*] Registry's translation.

with such clearances would be authorised to continue carrying the equipment concerned until 1 March 2020 as an "exceptional measure"*.

7. The former Item 18.3 of the Human Resources Manual, applicable in the present case, established a "[w]histleblower protection policy", which intended to protect staff members who reported misconduct or violations of the regulations in force from possible retaliation. The policy stipulated that, if an internal complaint of retaliation was filed, the Ethics Office would conduct a preliminary review to determine whether to recommend to the Director-General that the internal complaint be referred to the Internal Oversight Service (IOS) for investigation, or whether it should be closed at that stage.

Paragraph 6 of Item 18.3, defining "protected activity" for the purposes of the policy, stated that:

> "Protection against retaliation applies to any person having a direct contractual link with UNESCO, who, in good faith:
>
> a. Reports any unlawful, unethical or wasteful conduct, or any other violation of established policies, standards and regulations.
>
> [...]"

Paragraph 17 provided that:

> "The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct [...] are as follows:
>
> (a) To receive complaints of retaliation or threats of retaliation;
>
> (b) To keep a confidential record of all complaints received;
>
> (c) To conduct a preliminary review of the complaint to determine if:
>
> (i) The complainant engaged in a protected activity; and
>
> (ii) The action alleged to be retaliatory or threat of retaliation did take place; and
>
> (iii) There is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation."

* Registry's translation.

8. In the present case, in support of his argument that his reporting of misconduct constituted a protected activity under aforementioned paragraph 6 of Item 18.3, the complainant – who clearly fulfilled the condition of a direct contractual link with UNESCO and whose good faith is not disputed by the Organization – specifically refers to a violation of established standards or regulations, as provided for in subparagraph (a) of that paragraph. He identifies the standards and regulations in question as, firstly, Decision 199 EX/17 of the Executive Board of UNESCO, concerning the implementation of a security and safety action plan adopted in 2016, which, in particular, made provision for organising training for security officers, and, secondly, Item 15.2 of the Human Resources Manual, entitled "Learning and development framework", which makes the managers of departments responsible for ensuring that staff are trained, and, lastly, the regulation limiting the validity period of clearances for carrying intermediate defence equipment.

9. In recommending to the Director-General, in a memorandum of 21 April 2021, that the complainant's internal complaint of retaliation be closed at the preliminary review stage, the Ethics Adviser considered that a report of a violation of either of the standards or regulations cited did not constitute a protected activity within the meaning of Item 18.3. Taking the view that the condition laid down in aforementioned paragraph 17(c)(i) had therefore not been met, she concluded that the case should be closed, without it being necessary to examine whether the internal complaint satisfied the other conditions – which were cumulative in nature – set out by that paragraph.

10. With regard to Decision 199 EX/17 of the Executive Board and Item 15.2 of the Manual, the Ethics Adviser considered that the reporting of their alleged violation could not constitute a protected activity since, respectively, the decision in question was not in itself prescriptive and the managers' duties set out in Item 15.2 were defined too generally for the failure to organise training in a given area to be regarded as a violation of that provision.

The Tribunal agrees with the Ethics Adviser's assessment on these two points.

By contrast, the Tribunal considers that the reporting of the failure to comply with the period of validity of clearances to carry intermediate defence equipment did constitute a protected activity for the reasons set out below.

11. In this regard, it should firstly be emphasised that, contrary to what the Organization maintains, there was indeed a regulation binding the Organization's authorities in this area.

It is true that, at the material time, there was no standard issued by an internal UNESCO body prescribing a period of validity for clearances to carry the equipment in question. However, the Tribunal considers that when, as in the present case, an international organisation employs an external service provider to give training to its employees leading to the issuance of clearances, it is bound by any regulations defined by the service provider regarding the scope or duration of the clearances. In this situation, the organisation concerned should be considered to have agreed to comply with these regulations. It follows that the limits on the period of validity, referred to in consideration 5 above, applicable to the clearances granted to security officers in 2016 must be regarded as an "established regulation" within the meaning of paragraph 6(a) of Item 18.3.

The Tribunal also notes that, in the abovementioned memorandum of 8 November 2019, the Chief of Section expressly acknowledged, even if he did not identify this regulation precisely, that such limits were binding on UNESCO and that failure to comply with them meant that the clearances in question would normally lose their validity if they were not renewed. The Organization thereby itself acknowledged that it was bound by a regulation in this area, and it is hard to see how it could have been otherwise, since, in this case, failing to comply with these time limits, given their purpose, would have breached the requirement of ensuring personal safety.

12. In her memorandum of 21 April 2021, the Ethics Adviser, who did not deny the existence of the regulation in question, nevertheless took the view that the complainant's reports could not be regarded as a protected activity within the meaning of Item 18.3. Noting that the Chief of Section had, in full knowledge of the facts, decided in the memorandum of 8 November 2019 to temporarily authorise security officers to continue carrying intermediate defence equipment despite the expiry of the clearances normally required for that purpose, she considered that "what [the complainant] [had] 'reported'"* was therefore merely a "disagreement with a view taken by the Administration [...] in the exercise of its discretion"*.

The Tribunal cannot endorse this reasoning.

Firstly, and irrespective of whether exceptional circumstances could legitimately justify, in the present case, UNESCO authorising security officers to use intermediate defence equipment beyond the date of validity of the required clearances, the Tribunal considers that the fact that the alleged violation of a regulation results from a management decision adopted deliberately by an administrative authority does not, in itself, prevent the reporting thereof from being recognised as a protected activity within the meaning of Item 18.3.

Secondly, and in any event, the aforementioned memorandum of 8 November 2019 to which the Ethics Adviser referred in the present case when concluding that the complainant's reports did not constitute such a protected activity postdated these reports, as has been stated. It cannot therefore be considered that, at the time when they were made, these reports expressed disagreement with the management decision contained in this memorandum.

In these circumstances, the Ethics Adviser was wrong to consider that the complainant's reporting of a violation of the aforementioned regulation did not constitute a protected activity.

* Registry's translation.

13. It follows that proper reasons were not given for the recommendation to close the complainant's internal complaint at the preliminary review stage and that the Director-General's decision of 26 April 2021, based on that recommendation, was therefore unlawful.

14. In its opinion of 31 January 2023, the Appeals Board, essentially reiterating the Ethics Adviser's reasoning on the issue of recognition of a protected activity, deemed it necessary to add a further reason by noting that, although "the reports [did] concern violations, [...] they [were] not as serious as alleged"[*]. However, as the complainant rightly points out, the criterion of the gravity of the misconduct reported is not specified as such in the applicable provisions. In the form in which it is expressed, this reason is therefore based on an error of law.

15. Beyond the question of recognition of a protected activity, the Appeals Board also assessed whether the complainant had in fact suffered from the alleged retaliation of which he complained, concluding in this respect that he "[did] not provide evidence establishing a link from which it could be inferred that the rating awarded to him [had] constituted retaliation"[*].

However, the assessment during the internal appeal procedure of this other question – to which the conditions set out in abovementioned paragraph 17(c)(i) and (ii) relate – cannot rectify the Ethics Adviser's failure to conduct such an assessment during the preliminary review of the internal complaint.

16. In addition, the complainant is again justified in arguing that the Appeals Board erred in law, as the finding in question is based on an unlawful reversal of the burden of proof. It is true that, according to the Tribunal's case law, it is usually incumbent on the staff member complaining of having suffered retaliation to establish that her or his allegations are well-founded (see, for example, Judgments 4391, consideration 13, or 4238, consideration 5). However, this case law

[*] Registry's translation.

only applies where there are no provisions to the contrary (see, in particular, Judgment 4363, considerations 11 and 12). Yet paragraph 7 of Item 18.3 provides as follows:

> "The present framework is without prejudice to the legitimate application of regulations, rules and procedures, including those governing evaluation of performance [...] However, in applying such regulations, rules and administrative procedures to any staff member, UNESCO management must show by clear and convincing evidence that the same action would have been taken independently of the staff member's participation in the protected activity referred to in paragraph 6 [...]"

It follows that, in the situation referred to in these provisions, which is that in the present case, the burden of proof lies with the Organization.

In its opinion, the Appeals Board did base its conclusion that the appraisal at issue did not constitute retaliation on its examination of "detailed reports"[*] which made clear that the complainant's correspondence, considered inappropriate by Mr M., was not limited to the abovementioned reports of misconduct. However, apart from the fact that the reports in question were not produced before the Tribunal, it must be found that, by failing to ascertain, as required by abovementioned paragraph 7, whether the appraisal would have been the same had the complainant not participated in a protected activity, the Board in any event failed to fulfil its duty.

17. It follows from the foregoing that the impugned decision of 23 February 2023, in which the Director-General endorsed the opinion of the Appeals Board, as well as the decision of 26 April 2021 and the decision of 12 August 2021 rejecting the request for an administrative review of the latter decision, must be set aside, without it being necessary to rule on the rest of the arguments directed against them.

In such a situation, it would generally be appropriate to refer the case back to UNESCO so that a fresh preliminary review of the complainant's internal complaint could be undertaken with a view to assessing, given the recognition of his participation in a protected activity, whether this internal complaint met the other conditions set out

[*] Registry's translation.

in aforementioned paragraph 17(c) and whether the Director-General should therefore have opened an investigation. However, in view of the time that has elapsed since the events, Mr M.'s change of duties in the meantime, and the departure from the Organization of the complainant – whose reinstatement has not been ordered, despite the setting aside of the decision to terminate his appointment in Judgment 4924, delivered in public on 6 February 2025, on his eleventh complaint – the Tribunal considers that such a referral would be inappropriate in this case and will therefore opt instead for the alternative solution of awarding financial compensation for the injury caused by the contested decisions.

18. In this regard, it should be pointed out that the setting aside of the decisions in question does not in itself imply that the complainant's allegations of retaliation should be taken as established or that his performance appraisal for the 2018-2019 biennium should have been different.

It follows from this consideration that the complainant's claim for compensation for the material injury he considers he has suffered cannot be accepted. This claim is based on the assertion that, in the absence of the alleged retaliation, the appraisal in question would have concluded that the complainant's service was satisfactory, from which he infers that he would then have received the step advancement granted in this case, pursuant to Staff Rule 103.4, or even a possible promotion. However, this assertion as to the possible content of the appraisal is purely speculative. The injury relied on is therefore only hypothetical which, in itself, precludes any entitlement to compensation (see, for example, Judgments 4222, consideration 18, 3507, consideration 19, and 2287, consideration 8). Furthermore, the Tribunal considers that the alleged causal link between the unlawfulness of the decision to close the contested internal complaint at the preliminary review stage and the fact that the complainant did not receive a step advancement or promotion is in any event too indirect for such a claim to be effectively presented in the present case.

In addition, the complainant's claim for moral damages must also be dismissed insofar as he seeks compensation for injury resulting from alleged retaliation by Mr M., since such retaliation has not been established.

19. However, the fact that the complainant was denied the right to have his internal complaint properly examined as a result of the Ethics Adviser's wrongful decision to close it caused, in itself, moral injury that should be compensated (see, for comparable examples, Judgments 4922, consideration 18, 4883, consideration 10, or 4471, consideration 22).

20. The complainant also claims an award of moral damages on account of the length of the internal appeal procedure, which he considers excessive.

It is settled case law that officials are entitled to have their appeals examined with the necessary speed, in particular in view of the nature of the decision which they wish to contest (see, for example, Judgments 4660, consideration 24, 4457, consideration 29, or 4063, consideration 14).

In the present case, almost 18 months passed between the lodging of the complainant's notice of appeal on 3 September 2021 and the notification of the Director-General's decision of 23 February 2023 on his appeal. Although three months of this period is explained by the fact that the complainant did not submit his detailed appeal to the Appeals Board until 30 November 2021, such a delay is excessive in view of the nature of the case. Given the high stakes for the staff members concerned, appeals relating to internal complaints of retaliation should normally be handled – like those relating to internal complaints of harassment – with particular speed.

The Tribunal considers that the delay in the conduct of the procedure, for which the Organization does not provide any relevant justification, has thus caused the complainant moral injury that should be compensated.

21. In all, the Tribunal considers that the two heads of moral injury recognised above, taken together, will be fairly redressed by awarding the complainant compensation of 15,000 euros.

22. Lastly, the complainant asks the Tribunal to order the opening of disciplinary proceedings against Mr M. on account of the retaliation of which he accuses him. However, apart from the fact that, as has been stated, the setting aside of the contested decisions does not imply recognition that the retaliation took place, the Tribunal does not in any event have jurisdiction to issue orders of this kind (see in particular, on the subject of similar claims, Judgments 4512, consideration 6, 4313, consideration 11, or 4241, consideration 4).

23. Since he mainly succeeds, the complainant is entitled to costs which – in view of the fact that he was not represented by counsel before the Tribunal – will be set at 1,000 euros.

## DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 23 February 2023 as well as the decisions of 26 April 2021 and 12 August 2021 are set aside.
2. UNESCO shall pay the complainant moral damages in the amount of 15,000 euros.
3. The Organization shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2025, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN JACQUES JAUMOTTE CLEMENT GASCON

RENÉ M. VARGAS M.