Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. (No. 9)

v.

UNESCO

140th Session **Judgment No. 5058**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr L. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 15 May 2023 and corrected on 24 May 2023, UNESCO's reply of 5 September 2023, the complainant's rejoinder of 3 December 2023 and UNESCO's surrejoinder of 4 March 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 harassment at the end of the screening procedure.

Facts relevant to this case are set out in Judgment 5057, also delivered in public this day, concerning the complainant's eighth complaint. Suffice it to recall here that 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, but 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 that the quality of his professional performance was "tarnished by inappropriate behaviour likely to be interpreted by supervisors as insubordination"*. He added 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"*. Following this appraisal – which was confirmed, after it had been challenged before the Reports Board, by a decision of the Director-General of 15 September 2020 – on 22 September 2020 the complainant lodged an 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. After lodging an appeal against this decision with the Appeals Board, the complainant withdrew the appeal by an email of 28 May 2021, then confirmed the withdrawal on 1 June. However, in the meantime, on 9 March 2021 the complainant had lodged a second 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 for the 2018-2019 biennium after having reported "misconduct" relating to non-compliance with the regulations on carrying weapons. The closure without further action of that second internal complaint – ordered in a decision of 26 April 2021, which was confirmed after it was challenged

* Registry's translation.

before the Appeals Board by a decision of the Director-General of 23 February 2023 – is the subject of aforementioned Judgment 5057.

On 27 January 2021 Mr M. signed the complainant's performance appraisal for 2020, awarding him the overall rating of "[p]artially meets expectations" and stating that "his manner of communicating with various levels of management [was] abrasive and inappropriate in both substance and form"* and that this was "incompatible with the objective of the efficient and smooth running of a security and safety service"*. The complainant was placed on a performance improvement plan from 18 March to 7 September 2021. During the implementation of the plan and the various related discussions, Mr M. criticised the complainant for an "inappropriate"* email that he had sent to an administrative manager in the Security and Safety Section on 24 April 2021, in which he had requested the communication of the detailed operational procedure in the event of a knife attack. On 23 September Mr M. informed the complainant of his comments on each of the discussions they had held as part of the performance improvement plan. The complainant submitted his self-appraisal on 30 September.

On 15 October 2021 the complainant submitted an internal complaint to the Director of the Internal Oversight Service (IOS) accusing Mr M. of moral harassment, alleging in particular that, during discussions held as part of the performance improvement plan, Mr M. had used his position as supervisor to "unduly influence [his] career, in particular the renewal of [his] contract and [his] performance appraisal"*. On 2 November 2021 he was informed by the IOS Head of Investigations that the allegations related to performance appraisal mechanisms for which specific means of redress existed and that, consequently, no action would be taken on his internal complaint.

On 23 December 2021 the complainant sent the Deputy Director-General a request for the administrative review of the IOS decision to close his complaint of harassment with no further action. This request was rejected as unfounded on 4 February 2022. On 26 February the

* Registry's translation.

complainant submitted a notice of appeal against the same decision, then on 20 May he sent a detailed appeal to the Appeals Board.

In its opinion of 23 December 2022, communicated to the parties on 8 February 2023, the Appeals Board recommended that the appeal be dismissed as unfounded on the grounds, in particular, that the allegations in the internal complaint of 15 October 2021 – which had been considered by IOS as "indicative of the tensions surrounding the performance appraisal process and not [as] constituting harassment"* – were expressly excluded from the scope of harassment. In that regard, it stated that it did not have jurisdiction to take a view on the assessment by IOS. In response to the complainant's specific argument that the Head of Investigations did not have authority to decide to close his internal complaint, the Board replied that the complainant had not provided any evidence that the decision of 2 November 2021 had been taken "outside the authority"* of the Director of IOS. It nevertheless recommended that the Administration ensure that decisions of this type were formally notified under that Director's signature.

By a letter of 15 February 2023, the complainant was notified of the Director-General's decision to dismiss his appeal in accordance with the recommendation of the Appeals Board. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and claims compensation of 30,000 euros for the moral injury he considers he has suffered, increased by 5,000 euros for what he considers to be the unacceptable length of the internal appeal procedure, as well as an award of 5,000 euros in costs.

UNESCO asks the Tribunal to dismiss the complaint as unfounded.

* Registry's translation.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 15 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 screening stage of an internal complaint of harassment that he had submitted on 15 October 2021 against Mr M., the Assistant Chief of the Security and Safety Section.

This internal complaint related to the content of monitoring discussions held as part of the performance improvement plan running from 18 March to 7 September 2021 on which the complainant had been placed as a result of Mr M. awarding him the overall rating of "[p]artially meets expectations" in his 2020 appraisal. It should be noted that this rating was itself mainly justified by the appraiser's assessments concerning the complainant's "behavioural objectives"[*], according to which "his manner of communicating with various levels of management [was] abrasive and inappropriate in both content and form"[*], which was deemed "incompatible with the objective of the efficient and smooth running of a security and safety service"[*]. The appraisal in question was thus similar to that drawn up for the 2018-2019 biennium, which gave rise to the internal complaint of retaliation leading to the complainant's eighth complaint to the Tribunal, which is the subject of Judgment 5057, also delivered in public this day.

2. In his complaint of harassment, the complainant essentially accused Mr M. of having repeatedly criticised him during the abovementioned discussions – to the point of focusing them on this incident alone, according to him – for having sent an email to an administrative manager in the Section on 24 April 2021 asking for the communication of the "detailed operational procedure"[*] that security officers should follow in the event of a knife attack. The email was considered inappropriate by the complainant's supervisors, particularly

[*] Registry's translation.

in view of the context in which it was sent and its wide circulation within the Section.

3. Item 16.2 of the Human Resources Manual, relating to "[a]nti-harassment policy", which results from a reform that took place in this area in June 2019 and is therefore applicable *ratione temporis* in the present case, introduced a procedure for screening internal complaints of harassment which provides – contrary to the previous rules – that the Internal Oversight Service (IOS) is to undertake this screening when such a complaint is registered.

Paragraph 36 of Item 16.2 states that:

> "Upon receipt of an allegation, IOS initiates a screening in order to decide whether or not the allegation warrants the opening of a formal investigation. [The purpose of this screening is to assess whether the allegation, if established, would constitute a case of harassment within the meaning of this policy.]"

4. In this case, the email of 2 November 2021 by which the IOS Head of Investigations informed the complainant that his internal complaint had been closed justified this decision in the following terms:

> "All the actions which, in your opinion, could be classified as harassment or abuse of authority relate to performance appraisal mechanisms for which specific means of redress exist. No specific evidence separate from your performance appraisal is provided in support of your internal complaint, which we will therefore not pursue."[*]

5. The Tribunal considers that the complainant is entitled to maintain, as he does in his submissions – by indirectly linking this plea to the criticism of a "failure to state reasons" for the closure – that that decision is tainted by an error of law.

It is true that the discussions held with Mr M. as part of the complainant's performance improvement plan related to the "performance appraisal mechanisms" mentioned by the Head of Investigations in the aforementioned email. The evidence shows that a final appraisal is normally carried out at the end of the implementation

[*] Registry's translation.

period of such a plan, taking into consideration any progress made and replacing the initial appraisal that triggered the implementation of the plan.

It is also true that UNESCO has specific appeals procedures for challenging performance reports – in addition to the ordinary appeals procedures, also available in this area – which are normally open to staff members.

However, apart from the fact that it appears from the evidence that the complainant could not access these specific means of redress in his particular situation, IOS erred in law in considering that the fact that the complainant's allegations of harassment related to the conduct of an appraisal procedure of itself ruled out the need to investigate his internal complaint.

6. Paragraph 71 of aforementioned Item 16.2 expressly provides that "the [...] procedure [described in this item] does not impede on the right of staff members to appeal any administrative decision that has resulted from harassment, independently from the harassment complaint process". The Tribunal considers that it can be inferred from these provisions that, symmetrically, the fact that a staff member may challenge a decision which, in her or his view, is the result of harassment, does not prevent her or him from legitimately submitting an internal complaint to report that harassment. The same applies to allegations of harassment relating to an appraisal. While paragraph 71 admittedly refers to the ordinary appeal mechanism in force at UNESCO – that is the submission of a request for administrative review followed, where appropriate, by an appeal to the Appeals Board – it is clear that the fact that there are also specific means of redress for appraisals is irrelevant in this respect.

7. This assessment is in line with the Tribunal's ordinary case law, which accepts that proceedings may be brought simultaneously to challenge, on the first hand, an appraisal and, on the other hand, the closure of a complaint of harassment based wholly or partly on that appraisal (see, for an example of this type of situation, Judgments 4900,

4901 and 4902). This case law also applies more generally to any administrative decision that is alleged to involve harassment (see in particular, for the case of a decision to abolish a post, Judgments 3688 and 3192).

8. The solution that thus emerges from the applicable provisions and the case law is obvious, in terms of legal logic, because the lodging of an appeal against an appraisal and the submission of a complaint of harassment on account of actions relating to that appraisal have neither the same subject-matter nor, if they are successful, the same effects. In particular, if a complaint of harassment is considered to be well-founded, this may confer entitlement to specific compensatory or protective measures that cannot be obtained by challenging the appraisal itself. It is also important to emphasise that, in the abovementioned situation where a complaint to the Tribunal concerning the closure of an internal complaint and a complaint concerning an appraisal coexist, if the Tribunal agrees that the argument alleging the existence of harassment may be properly raised in the case involving the appraisal, it will consider that argument "only to the extent that it is strictly related to the legality of the specific decision challenged in the case at hand" (see Judgments 4902, consideration 3, or 4901, consideration 3). The possibility of challenging an appraisal cannot therefore be considered as a substitute for that of lodging an internal complaint.

9. Aforementioned Item 16.2 above contains a section entitled "What would not be considered harassment?", which consists of paragraphs 18 and 19. These paragraphs read as follows:

> "18. The dividing line between harassment and other work-related conflicts may, at times, be difficult to establish. Situations of conflict and tensions do not necessarily constitute harassment.
>
> 19. It is a manager's responsibility to manage his/her team. To this effect, they must take a number of managerial decisions which have an impact on individual employees, such as [...] the monitoring of progress against expected results, etc. They must also communicate on sensitive matters, such as giving performance feedback. Such managerial actions, decisions and communications to staff, when taken in good faith, are not considered as

> harassment. These work-related matters are dealt with notably under the provisions of the Performance Management Policy (see [Human Resources] Manual Chapter 14)."

It follows from these provisions that, in the event of a complaint of harassment based on actions relating to the appraisal of a staff member's merits – and in particular, as in this case, to discussions forming part of a performance improvement plan – IOS should endeavour to distinguish between actions entailed by the normal exercise of the power of appraisal, even if those actions may take place in a climate of tension between the staff member concerned and her or his supervisor, and actions that should be regarded as constituting harassment.

The provisions in question cannot therefore be interpreted as having intended to absolutely exclude actions relating to an appraisal from the scope of the definition of harassment or as precluding the submission of an internal complaint on the basis of such actions.

10. In the present case, however, it is clear from the wording of the aforementioned decision of 2 November 2021 that IOS did not consider whether or not the actions alleged by the complainant in his internal complaint could be regarded as constituting harassment, but closed the internal complaint as a matter of principle on the grounds that it related to an appraisal procedure. IOS thereby misconstrued the duty, set out in paragraph 36 of Item 16.2, which it is required to perform at the stage of screening a complaint of harassment, since that duty is precisely "to assess whether the allegation, if established, would constitute a case of harassment within the meaning of [the provisions of this item]"[*].

11. The error of law criticised above on which the decision of 2 November 2021 to close the internal complaint was based therefore renders the impugned decision of 15 February 2023 unlawful and thus suffices to justify the setting aside of the latter decision, given that, in any event, the failure of IOS to conduct a proper screening of the

[*] Registry's translation.

internal complaint could not have been effectively rectified during the internal appeal procedure.

However, it should also be noted that the complainant is justified in submitting that the Appeals Board did not carry out its duties properly either.

12. In the paragraph of its opinion of 23 December 2022 examining the complainant's criticisms of the reasoning for the disputed decision to close his internal complaint, the Appeals Board stated the following:

> "The complainant [...] alleges humiliation and abuse of power that were not taken into account. Admittedly, it does not come within the Appeals Board's jurisdiction to take a view on the assessment by [the Director of] IOS of the actions alleged by the complainant. However, the Board notes that the competent official described these actions as indicative of the tensions surrounding the performance appraisal process and not constituting harassment. Such actions are expressly excluded from the scope of harassment."*

13. It is certainly undeniable that actions which are merely "indicative of the tensions surrounding the performance appraisal process"* and not of genuine harassment as defined by the provisions of Item 16.2 would be "expressly excluded from the scope of harassment"* pursuant to paragraphs 18 and 19 of that item, to which the Appeals Board seems to have intended to refer by using such wording in this passage of its opinion.

However, the Board incorrectly assessed the decision of 2 November 2021 in considering that IOS had expressed a judgement as to whether the actions alleged by the complainant in his internal complaint should be considered as indicating mere tensions or as constituting harassment. In fact, IOS, which – as has been stated – closed the internal complaint as a matter of principle solely on the grounds that it related to an appraisal procedure, did not examine this

* Registry's translation.

issue in its decision. The Board was therefore wrong to believe that it could identify a classification by the investigative body of the actions.

14. Moreover, the Appeals Board committed an error of law in considering in the aforementioned paragraph of its opinion that "it [did] not come within [its] jurisdiction [...] to take a view on the assessment by [the Director of] IOS of the actions alleged by the complainant"*. The role of an appeal body is generally to determine whether administrative decisions submitted to it are both lawful and well-founded, and there was no rule preventing this power from being exercised in full in the present case.

It is true that, pursuant to a well-established case law to which the Board apparently intended to refer on this point, the Tribunal sets certain limits on its own power of review in this area (see, for example, Judgments 4703, consideration 8, 4291, consideration 12, or 3593, consideration 12). However, this case law – which cannot be construed as excluding all judicial review of an investigative body's assessment of the merits of an internal complaint – concerns the role of the Tribunal itself, and not that of an appeal body such as the Appeals Board.

The case law in question refers more generally to the particular features and limits of the Tribunal's judicial role. However, these specificities do not apply to appeal bodies and, as the Tribunal has held on several occasions, such a body is wrong when, in defining its own role, it refers to restrictions that apply in certain cases to the judicial review of administrative decisions (see, for example, Judgments 4923, consideration 5, 3161, consideration 5, or 3077, consideration 3). While the Tribunal's sole function is to review the lawfulness of these decisions and, ordinarily, it rules only on points of law, it is for the appeal bodies, which are vested with a power of review extending to a complete re-examination, to determine whether the decision submitted to them was, in their view, the correct decision or whether, on the facts, some other decision should have been taken (see, for example, Judgments 5003, consideration 5, 3161, consideration 6, or 3032,

* Registry's translation.

consideration 10). The only exception to this is where the rules governing the appeal body restrict this power (see, in particular, Judgments 3318, consideration 5, and 3077, consideration 3), which is not the case for UNESCO's Appeals Board as regards decisions concerning the screening of complaints of harassment.

15. The impugned decision of 15 February 2023, in which the Director-General endorsed the Appeals Board's opinion, is thus tainted by flaws in addition to the flaw criticised above resulting from the unlawfulness of the decision to close the internal complaint itself.

Moreover, it should be pointed out that the fact that the Board did not properly review the decision to close the complainant's internal complaint had the effect, in the circumstances of the case, of denying him his right to have the merits of his internal appeal duly considered by that body.

16. It follows from the foregoing that the decisions of 15 February 2023 and 2 November 2021 must be set aside, without there being any need to rule on the complainant's other pleas against them. The same applies to the decision of 4 February 2022 on the complainant's requests for an administrative review, insofar as it rejected the request concerning the decision of 2 November 2021.

In such circumstances, it would ordinarily be appropriate to refer the case back to UNESCO so that the complainant's internal complaint could undergo a fresh screening to assess whether the allegations it contained warranted the opening of 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 termination of 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. Instead, as the complainant himself suggests, it will opt for the alternative solution of ordering financial compensation for the moral injury caused by the disputed decisions.

17. In this regard, it should be pointed out that the setting aside of the decisions in question in no way implies that the complainant's allegations of harassment against Mr M. are well-founded. The complainant's claim for damages must therefore be dismissed insofar as he seeks compensation for injury allegedly attributable to such harassment.

18. However, the fact that the complainant was denied the right to have his internal complaint properly examined as a result of the wrongful decision of IOS 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).

Moreover, the errors committed by the Appeals Board regarding the assessment of the contested decision and the scope of its competence led, as has been stated, to the complainant being denied his entitlement to have his internal appeal handled appropriately. As a result, the complainant's right to an effective appeal was breached, causing him moral injury that also warrants compensation.

In the circumstances of the case, 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.

19. 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 this regard, the Tribunal firstly notes that the complainant's allegation that UNESCO took eight months to rule on his request for an administrative review of the decision of 2 November 2021, submitted on 23 December, is factually incorrect. The evidence shows that the decision rejecting this request was taken – as indicated above – on

4 February 2022, that is only 43 days after the request was submitted, which is far less than the 60-day period allowed to the Organization in this respect by Article 10 of the Statutes of the Appeals Board.

With regard to the subsequent appeal procedure, it should be noted that less than a year passed between the complainant's submission of his notice of appeal, on 26 February 2022, and the notification of the Director-General's decision of 15 February 2023 on his appeal and that this period included an almost three-month wait for the complainant to submit his detailed appeal. Given the statutory time limit of 90 days from the submission of a detailed appeal within which the Administration must submit its reply, the Board did not have a complete file until 22 August 2022, that is five months and three weeks before the end of the appeal procedure. In these circumstances, the Tribunal considers that, even taking into account the requirement that appeals relating to complaints of harassment be handled with particular speed, the length of the procedure cannot be regarded as unreasonable.

More specifically, the complainant alleges that the Appeals Board failed to comply with the time limit within which its report must be submitted to the Director-General, pursuant to Article 23 of its Statutes, that is 60 days following the end of the session during which the case was examined. However, while it is true that this time limit was not observed owing to unforeseen circumstances, the Tribunal considers that, in the present case, this did not result in any tangible injury to the complainant, particularly since the delay at this stage of the procedure was offset by the Director-General's subsequent swift final decision, which was adopted only one week after the report was submitted.

The complainant's claim for compensation for the length of the internal appeal procedure will therefore be dismissed.

20. However, 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 15 February 2023 and the decision of 2 November 2021, as well as the decision of 4 February 2022 to the extent that it rejects the request for an administrative review of the latter decision, 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.