

NINETY-SEVENTH SESSION

Judgment No. 2329

The Administrative Tribunal,

Considering the complaint filed by Miss A. B. V. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 January 2003 and corrected on 17 February, the Organization's reply of 27 May, the complainant's rejoinder received at the Registry of the Tribunal on 16 September and 6 October 2003, and UNESCO's surrejoinder of 8 January 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Peruvian national born in 1957, joined UNESCO in 1989. She was on special leave without pay from 1 September 1995 to 29 February 1996. At the material time, she was employed as a clerk at grade G 3. She was given a global rating "D" (the highest rating being "A") in her performance report covering the period from 1 March 1994 to 28 February 1996. The within grade salary increment which she should have received on 1 August 1995 was deferred for six months and the increment due in 1996 was refused. The complainant was given a global rating "E" in her performance report for the period from 1 April to 31 December 1997.

On 4 March 1998 the complainant sent the Director of the Bureau of Personnel a "request for an agreed separation". In a memorandum of 12 August, the latter replied that the Director General had decided, in accordance with Staff Regulation 9.1.2, to grant her an agreed separation with effect from 1 October 1998. In accordance with Staff Rule 109.7(a), she was to be paid a termination indemnity equivalent to eight and two thirds months' salary, amounting to 134,000 French francs. The Director added that by accepting the proposed separation, the complainant undertook to initiate no further proceedings against UNESCO, either before the Appeals Board or before the Tribunal. On 18 August the complainant accepted the Director General's offer, but requested that, in view of her eye disorder, he should increase her indemnity by 50 per cent to 200,000 francs, as he was authorised to do under the terms of Rule 109.7(e). By memorandum of 21 August, the Director of the Bureau of Personnel informed her that the Director General had agreed to her request for an increase in her indemnity. On 24 August, as requested, the complainant returned copies of the memoranda of 12 and 21 August, bearing the entry "Read and approved" and her signature.

In a memorandum of 28 September sent to the Director General she stated that she had developed an eye disorder in the exercise of her duties and asked him to be considered under the Staff Compensation Plan and to be granted a disability benefit. On 4 November the Secretary of the UNESCO Staff Pension Committee informed her that if she wished to pursue her claim for a disability benefit, she would have to withdraw her acceptance of the agreed separation, since the two were not compatible, then on 6 November that, pending such withdrawal, her request for a disability benefit would be held in abeyance. Also on 4 November 1998, in reply to a letter from the complainant dated 20 October, the Secretary of the Advisory Board on Compensation Claims sent her an explanatory note setting out the relevant procedure and asking her to furnish evidence which would establish that her illness was attributable to the performance of her official duties.

The complainant wrote to the acting Director of the Office of Human Resources Management on 27 July 2000 requesting the conversion of her agreed separation into a separation for reasons of health. On 1 March 2001 the Chief of the Pension and Insurance Division informed the complainant that her case had been examined by the UNESCO Staff Pension Committee but that, in view of the complexity of the matter, it would be reviewed at the

following session, due to be held in June 2001. In a note to the Secretary of the Staff Pension Committee dated 18 June, the Chief Medical Officer stated that the complainant suffered from a serious disability which had affected the performance of her duties at the time of her separation. In a letter of 12 July to the Chief of the Pension and Insurance Division, the complainant enquired about the decisions taken by the Staff Pension Committee at its June meeting concerning her case and asked whether she might be “recommended for employment at UNESCO’s Office in Peru or in any other international organisation based in Lima”. After the complainant had reiterated her enquiry on 6 November, the Chief of the Pension and Insurance Section of the Human Resources Management Division informed her, on 26 November 2001, that the questions of principle raised by her case were still under consideration. In a letter dated 8 January 2002, the complainant informed him that, since much time had passed, she preferred to be considered for employment at UNESCO’s Headquarters in Paris. On 21 January the Chief of the Pension and Insurance Section asked her to contact the Organization’s Chief Medical Officer in order to arrange an appointment. After she had been examined by the latter and by her own physician, the Chief of the Pension and Insurance Section informed her, on 8 July, that the Staff Pension Committee Secretary’s office had decided, after reviewing the physicians’ report indicating that she was fit for work, to reject her request for a disability benefit. The complainant contested that decision in a letter dated 23 July to the Chief of the Pension and Insurance Section. On 13 September the Assistant Director of the Office of Human Resources Management confirmed the decision, reminding her that, according to the terms of her agreed separation, she had undertaken to initiate no further proceedings and inviting her to apply for any vacant post open to external candidates. In a letter of 3 October 2002, she filed a protest with the Director General in accordance with the terms of paragraph 7(a) of the Statutes of the Appeals Board, which remained unanswered.

B. The complainant submits that she developed her eye condition while employed at UNESCO and that the latter had been informed of that fact through a medical certificate she had supplied. In her opinion, it was her disability which had been the cause of her unfavourable performance ratings, although she was making considerable efforts to overcome her difficulties. Those efforts were never recognised by her superior, however, who on the contrary subjected her to moral harassment until she was driven to request a separation. She says she is in a precarious situation.

Her claims include an assessment by the Tribunal of the moral and material injury she has suffered, recognition of her illness, rectification of her performance reports, the refund of her travel expenses for two return trips between Peru and France, health insurance, the refund of past medical expenses and costs.

C. In its reply UNESCO contends that the complaint is irreceivable on the grounds that the complainant did not file either a notice of appeal or a detailed appeal with the Appeals Board after her protest addressed to the Director General on 3 October 2002 had been implicitly rejected. As a result she had not exhausted internal remedies. Furthermore, the complaint is also irreceivable on the grounds that it was time barred, in view of the fact that the complainant did not submit her protest within the two month period stipulated in paragraph 7(a) of the Statutes of the Appeals Board.

The defendant replies on the merits only subsidiarily. It recalls that the complainant had requested an agreed separation, which had been approved and became final once its terms had been accepted by the complainant. It was on humanitarian grounds, in order to allow her to receive a disability benefit, that the Administration had considered her subsequent request to convert the agreed separation into a termination for reasons of health. When the complainant asked to be considered for employment at Headquarters, however, the Organization’s Chief Medical Officer and the complainant’s personal physician concluded that she was fit for work, as a result of which her request for a disability benefit was no longer receivable in accordance with Article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

UNESCO argues that the conditions for awarding damages on grounds of material or moral injury are not met in this case, since there is no evidence of any unlawful fact, the impugned decision having been taken in accordance with the relevant applicable rules. Lastly, it recalls that when she signed the agreed separation offer, the complainant undertook to initiate no further proceedings either before the Appeals Board or before the Tribunal.

D. In her rejoinder the complainant points out, with regard to the irreceivability of her complaint pleaded by the defendant, that on 23 July 2002 she contested the decision of 8 July 2002 to reject her request for a disability benefit.

On the merits, she reiterates her pleas and argues that it was on account of her feeling of helplessness and the

Organization's failure to recognise the cause of her difficulties that she had changed her claims. She also maintains that her residual work capacity (considering that her incapacity is rated at 80 per cent) is compatible with the receipt of a disability benefit.

E. In its surrejoinder the defendant argues that the fact that the Director General did not reply to the complainant's protest in no way relieved her of the obligation to exhaust all internal remedies in accordance with the procedure laid down in the Statutes of the Appeals Board.

On the merits, it comments that requests for a disability benefit are subject to a well defined procedure, often after a long period of sick leave or repeated absences on grounds of ill health, which was not the complainant's case. According to UNESCO, the real reason for the complainant's request for an agreed separation was to evade the consequences of her poor appraisals rather than a concern for her health. Contrary to the view apparently held by the complainant, it was precisely to take account of her health problems and to give her the opportunity to receive a disability benefit that the Organization consented to convert her agreed separation into a termination for reasons of health. It still maintains, however, that a request for a disability benefit is incompatible with continued employment.

CONSIDERATIONS

1. As a result of her unsatisfactory performance, the complainant was given, in a performance report, a global rating "D", indicating a quality of work slightly below the level required, and in a later performance report, a global rating "E". In March 1998 the complainant requested an agreed separation. The Director General decided to grant it with effect from 1 October 1998 and agreed to her request for an increase of 50 per cent in her termination indemnity. The precise terms were set out in a notice of personnel action of 18 September 1998.

On 28 September 1998 the complainant stated that she had developed an eye disorder in the exercise of her duties and asked to be granted a disability benefit. On 8 July 2002 the Chief of the Pension and Insurance Section informed her that in accordance with the Regulations of the United Nations Joint Staff Pension Fund, and in the light of the physicians' report indicating that she was fit for work, the Staff Pension Committee Secretary's office had decided to reject her request.

On 3 October 2002, under the terms of Article 7 of the Statutes of the Appeals Board, the complainant submitted a protest to the Director General against the decisions of 18 September 1998 and 8 July 2002.

Having received no reply from the Director General, the complainant filed a complaint with the Tribunal on 1 January 2003. In her complaint form, she claims recognition of her illness, rectification of her performance reports, the refund of her travel expenses for two return trips between Peru and France, health insurance, the reimbursement of "non refunded medical expenses" as well as her lawyer's fees, the cost of photocopies and installation expenses. In her brief she refers to her protest of 3 October 2002, to which she received no reply. The complainant seeks the quashing of the implicit rejection of her protest and requests compensation for her moral and material injury, on the grounds that her unsatisfactory ratings were due solely to the eye disorder she contracted in the exercise of her duties.

The Organization contends that the complaint is irreceivable for failure to exhaust the internal remedies and for being time barred and, subsidiarily, that it should be dismissed as being without merit.

2. There is no need to consider whether and, in the affirmative, to what extent the Tribunal is competent *ratione materiae* to hear a grievance regarding the grant of a disability benefit applied for in accordance with the Regulations and Rules of the United Nations Joint Staff Pension Fund. Before filing a complaint with the Tribunal, the complainant must in any case have exhausted all internal remedies, as required by Article VII, paragraph 1, of the Statute of the Tribunal. This she has not done.

Under Article 7 of the Statutes of the Appeals Board, to which the complainant herself refers, if the Director General has not replied within two months of a protest being filed by a member of staff who has been separated from the Organization, notice of appeal may be submitted to the Secretary of the Appeals Board against the implicit rejection within the following two months.

The complainant did not take such action, however, and hence failed to comply with the time limit stipulated in the

above mentioned provision.

The internal remedies were therefore not exhausted and the present case cannot be considered an exception such that the Tribunal may allow waiver of the requirement that such remedies be exhausted.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2004, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

James K Hugessen

Jean-François Egli

Seydou Ba

Catherine Comtet