Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F.

v.

UNESCO

120th Session **Judgment No. 3505**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. F. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 30 September 2013 and corrected on 29 October 2013, UNESCO's reply of 19 February 2014, the complainant's rejoinder of 2 May, corrected on 4 June, and UNESCO's surrejoinder of 15 September 2014;

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 not to extend her sick leave entitlement beyond the date on which her appointment expired.

The complainant, who joined UNESCO in January 2005, was informed by memorandum of 2 November 2012 that her fixed-term appointment would not be extended beyond its expiry date, which was 2 January 2013.

On 16 November 2012 she was initially placed on sick leave until 17 December. As her state of health did not improve, on 18 December 2012 her attending physician prescribed further sick leave until

18 January 2013. On 6 January 2013 the complainant drew the attention of the Director of the Bureau of Human Resources Management (HRM) to the fact that the Chief Medical Officer of UNESCO had approved her sick leave until 2 January and not until 18 January, which, in her opinion, was inconsistent with Item 6.3, paragraph 34, of the Human Resources Manual according to which "[t]he appointment of a staff member on sick leave due to expire before their sick leave ceiling has been exhausted shall be extended to permit him/her to exhaust his/her sick leave ceiling in full". On 9 January the director replied that, in approving the extension of her sick leave until only 2 January 2013, the date of her separation from service, the Chief Medical Officer had correctly applied Staff Rule 106.1(m), which stipulates that "[e]ntitlement to sick leave shall lapse on the effective date of separation from service".

In an e-mail of 14 January 2013 the complainant asked the Director to explain why she had chosen to apply the rule that was least favourable to her. In another e-mail sent on 25 February the complainant asked the Director "to restore [her] acquired rights to all her leave entitlement, i.e. 98 days of sick leave and 6.5 days of annual leave as at 31 December 2012", and asserted that the Administration had wrongly applied subparagraph (m). As these two e-mails went unanswered, on 23 March the complainant wrote to the Director-General, repeating her request that her acquired rights be restored. In a "corrigendum" dated 12 April 2013, the complainant explained that she was acting under paragraph 7(a) of the Statutes of the Appeals Board. As she considered that there had been no response to her "protest" of 12 April, on 22 May she sent a notice of appeal to the Secretary of the Appeals Board. In a certificate which he drew up on 19 June, the complainant's attending physician stated that she was fit to return to work, but that she should "receive a regular check-up to forestall any relapse".

After the complainant had been informed by a letter from the Director of HRM dated 1 July 2013 that the Director-General had decided to uphold the decision of the Chief Medical Officer approving her sick leave until 2 January 2013, she submitted another notice of appeal on 10 July. On 22 July she requested that her two notices of

appeal be joined. On 9 August, at her request, the Secretary of the Appeals Board granted her a three-month extension of the time limit for filing her detailed appeal.

On 30 September 2013, the complainant filed a complaint with the Tribunal in which she impugned the decision of 1 July 2013.

On 30 October she informed the Secretary of the Appeals Board that she had filed a complaint with the Tribunal since, as she was no longer a staff member of UNESCO, she believed that she no longer had access to the internal means of redress. She therefore requested that the proceedings before the Appeals Board be suspended. As she received no answer, on 8 November she asked the Secretary to confirm that her request for suspension had been granted and to advise her of the extended time limit for filing her detailed appeal. On 18 November 2013 the Secretary of the Appeals Board informed her that she had been allowed an extra six months to submit her appeal.

The complainant asks the Tribunal to set aside the decision of 1 July 2013, to order UNESCO to restore her leave entitlements, in other words 98 days of sick leave on full pay, 192 days of sick leave on half pay and 6.5 days of annual leave, to rule that the date of her separation from service is 19 June 2013 and to order UNESCO to pay her a sum corresponding to the full amount of salary, emoluments and allowances which she should have received in respect of the period 3 January to 19 June 2013, "including contributions" to the United Nations Joint Staff Pension Fund and the Organization's Medical Benefits Fund, together with interest. She further requests 25,000 euros in compensation for moral injury and costs in the amount of 8,000 euros. In her rejoinder, she increases her claim for costs to 12,000 euros.

UNESCO submits that the complaint is irreceivable because internal means of redress have not been exhausted and that it is unfounded.

CONSIDERATIONS

1. Article VII, paragraph 1, of the Statute of the Tribunal states that "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such means of resisting it as are open to him under the applicable Staff Regulations". The only exception allowed to this rule is where staff regulations provide that the decision in question is not such as to be subject to the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body, where there is an inordinate and inexcusable delay in the internal appeal procedure, or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see, in particular, Judgment 2912, under 6, and the case law cited therein, or Judgment 3397, under 1).

2. Paragraph 7 of the Statutes of the Appeals Board reads in relevant part:

> "(a) A staff member who wishes to contest any administrative decision […] shall first protest against it in writing […] to the Director-General […] within a period […] of two months if he or she […] has been separated from the Organization.
>
> (b) The Director-General's ruling on the protest […] shall be communicated to the staff member within […] two months […] if he or she has been separated from the Organization.
>
> (c) If the staff member wishes to pursue his or her contestation, he or she shall address a notice of appeal in writing to the Secretary of the Appeals Board. The time-limit for the submission of a notice of appeal, to be counted from the date of receipt of the Director-General's ruling (or, if no ruling was communicated to the staff member within the time-limit under (b) above, from the expiry of that time-limit), is […] two months in the case of a staff member […]who has been separated."

3. The Tribunal's case law establishes that, when under an organisation's Staff Rules and Staff Regulations only serving staff members have access to the internal appeal procedures, former officials have no possibility of using them and they are then entitled to file a

complaint directly with the Tribunal (see, for example, Judgments 2840, under 21, 3074, under 13, or 3156, under 9).

4. In the case of UNESCO, the Tribunal has already held that Staff Regulation 11.1, Staff Rule 111.1 and the Statutes of the Appeals Board confine access to internal means of redress to “staff members”, in other words solely to serving officials. In pursuance of this case law, it held, for example, that former staff members could not avail themselves of the internal means of redress to challenge a decision taken after they had left the Organization (see Judgment 2944, under 20).

5. However, the wording of the aforementioned provisions of paragraph 7 of the Statutes of the Appeals Board makes it clear that a staff member who “has been separated” may submit an appeal to the Board. Thus, as the Tribunal explained in Judgment 3398 under 2 and 6, the internal means of redress established by the Staff Regulations and Staff Rules are open to any person who has been affected by a decision in his or her capacity as an official, even if he or she has since left the Organization. A staff member of UNESCO whose appointment has ended is therefore still entitled to use the internal means of redress if he or she wishes to challenge a decision taken before his or her separation. It must be noted that, although in such a case this rule will also have the effect of depriving the former staff member of the possibility of filing a complaint directly with the Tribunal, it provides that person with the essential safeguard constituted by the right of officials to pursue an internal appeal against any decision harming their interests.

6. In the instant case, the complainant essentially seeks to challenge before the Tribunal the decision not to extend her entitlement to sick leave and, incidentally, to annual leave, beyond 2 January 2013, that is the date on which her appointment with UNESCO expired.

7. In the complainant’s opinion, this restriction of her leave entitlements did not occur while she was still serving, but resulted from a decision taken by the Director-General on 1 July 2013, in other

words after she had left the Organization, and she therefore could not submit the dispute to the internal appeal bodies.

The Tribunal will not accept the complainant's argument. The purpose of the decision of 1 July 2013 was to dismiss the protest which the complainant had addressed to the Director-General on 23 March 2013 and which, as she expressly stated in a "corrigendum" of 12 April, she was submitting on the basis of paragraph 7(a) of the Statutes of the Appeals Board. The wording of that provision makes it clear that such a protest serves to "contest [an] administrative decision". Thus, by lodging an appeal of that kind, the complainant obviously intended, by definition, to challenge an earlier decision concerning her, the existence of which she necessarily acknowledged by this very act.

8. It is plain from the content of her protest that the administrative decision which the complainant contested was that taken by the Chief Medical Officer of UNESCO to approve her sick leave only until 2 January 2013, whereas she had been prescribed sick leave until 18 January.

As is shown clearly by a screenshot included among UNESCO's submissions, this decision, which took the form of an entry in the Organization's online leave management system, was taken on 2 January.

The fact that this decision was not evidenced by a written document does not prevent recognition of its existence, as the Tribunal's case law has it that an administrative decision may take any form, provided that its existence may be inferred from a factual context demonstrating that it was indeed taken (see, in particular, Judgments 2573, under 8, 2629, under 6, and 3141, under 21).

In truth, the complainant was under no misapprehension as to the existence of this decision, since she immediately objected to it in successive e-mails and then contested it, as stated earlier, by means of a protest.

9. On 2 January 2013 the complainant was still a serving official, because her appointment did not end until the evening of that day. Furthermore, it must be noted that, while she was not formally notified of the Chief Medical Officer’s decision – it would appear that officials must consult the data in the above-mentioned online system in order to find out whether their leave requests have been approved – she learned of it by consulting that system on 2 January. Indeed, the evidence shows that she herself mentioned that date in an e-mail which she sent to the Organization’s welfare officer two days later.

10. The Tribunal notes that the above-mentioned decision of the Chief Medical Officer merely drew the consequences from the expiry of the complainant’s appointment, in accordance with the rule – established in particular by Staff Rule 106.1(m) – that a staff member’s entitlement to sick leave lapses on the date on which that person separates from service. In reality, this dispute therefore concerns not so much that decision as one which the Organization had necessarily taken earlier, albeit implicitly, namely the decision not to extend the complainant’s appointment beyond 2 January 2013, although she was then on sick leave. It is therefore this other decision, which lay not with the Chief Medical Officer but with the Director-General, which in fact the complainant seeks to challenge indirectly by contending that, in those circumstances, she was entitled to such an extension under Item 6.3, paragraph 34, of the Human Resources Manual.

However, this implicit decision not to extend the complainant’s appointment necessarily existed prior to the decision of the Chief Medical Officer which, as stated earlier, drew the consequences therefrom and which, by definition, was also taken before the expiry of that appointment. It was therefore likewise taken at a time when the complainant was still a serving official. Furthermore, it must be noted that although the decision not to extend her appointment was not really formalised, the complainant was also aware of it on 2 January 2013 because its existence could be inferred from the very fact that her sick leave had not been approved for the period after that date.

11. It may be concluded from the considerations set out above that, in the instant case, the complainant had access to the internal means of redress available to UNESCO officials.

Since the disputed decisions could plainly have formed the subject of an internal appeal, and as no agreement has been reached with the Director-General to exempt the complainant from submitting her case to the Appeals Board, as is permitted by Staff Rule 111.2, she was therefore obliged to exhaust internal means of redress before bringing the case to the Tribunal.

12. Moreover, the submissions show that the complainant did initiate internal appeal proceedings by addressing the above-mentioned protest to the Director-General and then by challenging its dismissal in the decision of 1 July 2013 before the Appeals Board.

13. The complainant submits that UNESCO did not show due diligence in processing her internal appeal. However, although she complains that the Director-General did not explicitly respond to her protest within the two-month time limit specified in paragraph 7(b) of the Statutes of the Appeals Board, this situation gave rise to an implied rejection which she could challenge before the Board, which in fact is exactly the step she took. Those proceedings were not delayed long enough to warrant not following them through to completion, until the complainant herself requested their suspension after she had filed her complaint with the Tribunal.

14. It follows from the foregoing that the complaint must be dismissed as irreceivable because internal means of redress have not been exhausted, as required by Article VII, paragraph 1, of the Statute of the Tribunal. The matter shall be remitted to UNESCO in order that the Appeals Board may give an opinion on the two appeals submitted to it by the complainant, after taking such steps as may be necessary to ensure that the procedure has been duly followed.

DECISION

For the above reasons,

1. The complaint is dismissed as irreceivable.

2. The matter is remitted to UNESCO for further action as indicated in consideration 14, above.

In witness of this judgment, adopted on 30 April 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ