Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S.

v.

UNESCO

125th Session **Judgment No. 3940**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 7 October 2015, UNESCO's reply of 4 February 2016 and the complainant's letter of 30 March 2016 informing the Registrar that he would not file a rejoinder;

Considering Article II, paragraph 5, 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 abolish his post.

At the material time, the complainant, who had joined UNESCO on 1 December 1993, held a fixed-term appointment and was performing duties at grade G-5 in the Publications Workshop at the International Institute for Educational Planning (hereinafter "the Institute").

By a memorandum of 30 April 2014, the Director of the Bureau of Human Resources Management (HRM) informed the complainant that his post would be abolished with effect from 2 September 2014 "because of the outsourcing of part of the printing work and the reduction in the overall volume of publications". She told him that a redeployment process led by a "Redeployment Group" would be initiated, unless he decided to opt for an agreed separation, which would

entitle him to a 50 per cent increase in the "statutory separation entitlements". The complainant did not opt for this solution.

On 16 May 2014 the complainant submitted to the Director-General a protest against the decision of 30 April, contending that it was based on erroneous grounds.

On 22 October the Director of HRM explained to the complainant that, all possible redeployment options having been explored without success, the Director-General had decided to terminate his appointment with effect from 31 October 2014. She told him that in addition to three months' pay in lieu of notice, he would receive a termination indemnity in accordance with Staff Rule 109.7. On 28 October 2014 the complainant was informed that since he had chosen to work during the notice period, his appointment would end on 21 January 2015.

Meanwhile, the complainant, who had received no reply to his protest, had filed an appeal with the Appeals Board on 20 June 2014. In his detailed appeal, he maintained that his post had been abolished in an abusive and arbitrary manner and requested that it be "reinstated". In the event that this was not possible, he requested payment of the salary that he would have received and the contributions that UNESCO would have made to the United Nations Joint Staff Pension Fund (UNJSPF) had he remained in the service of the Organization until his statutory retirement date, 31 January 2018. He also claimed compensation for material and moral injury.

On 7 July 2014, in response to the aforementioned protest, the complainant was informed that the Director-General had decided to confirm the decision to abolish his post.

In its opinion of 10 July 2015, the Appeals Board, having heard the parties, considered that the decision to abolish the complainant's post had been taken in accordance with the Organization's existing rules and regulations. Stressing, however, that the procedure culminating in the abolition of posts in the Institute seemed to have lacked transparency and objectivity and that the complainant had "lost hope in the redeployment process" as he had been offered only posts that did not correspond to his profile, the Board made two recommendations: first, that he be awarded a sum equal to 50 per cent of the termination

indemnity that he had received and, second, that he be paid an amount corresponding to the UNJSPF contributions "that he would have received" had he left the Organization at the statutory retirement age.

On 28 August 2015 the Director of HRM informed the complainant that the Director-General had decided to confirm the decision of 7 July 2014 since, as the Appeals Board had acknowledged, the decision to abolish his post had been taken in accordance with the existing rules and regulations. She explained that the Director-General had decided not to follow the Board's first recommendation because staff members did not have a right to payment of the indemnity and because, by deciding not to opt for an agreed separation, which would have entailed a 50 per cent increase in the statutory separation entitlements, he had forfeited the right to such an increase. The Director-General had decided to reject the second recommendation because, in her view, it had no basis in law. That is the impugned decision.

The complainant asks the Tribunal to set aside this decision, as well as the decisions that it confirms: in particular, the implicit decision to reject his protest; the belated decision of 7 July 2014 rejecting his protest of 16 May 2014, in which he had challenged the decision of 30 April 2014 that had led to all the termination measures, such as the decisions of 22 and 28 October 2014; and the calculation of indemnities and pension rights. He also requests reinstatement in his former post. In the event that this is not possible, he requests payment of the salary that he would have received and the contributions that UNESCO would have made to the UNJSPF had he remained in the service of the Organization until 31 January 2018, with interest. Alternatively, he requests payment of the sums recommended by the Appeals Board as compensation for the material injury he has suffered, likewise with interest. Lastly, he claims 15,000 euros in moral and punitive damages and 5,000 euros in costs.

UNESCO submits that the complaint should be dismissed as unfounded.

CONSIDERATIONS

1. The complainant's post was abolished through a decision contained in a memorandum of 30 April 2014. In this document, he was offered an agreed separation and was told that if he refused this offer, a redeployment process would be initiated. While the possibility of termination (in the event that this process was unsuccessful) was mentioned, legally the complainant was not informed of the Director-General's decision to terminate his appointment until 22 October 2014.

2. The Tribunal has consistently held that a distinction must be made between a decision to abolish a post and a decision to terminate an appointment (see, for example, Judgment 3755, under 3).

The complainant submitted a protest against the decision of 30 April 2014, but not against the decision of 22 October 2014 terminating his contract. As the decision was not appealed internally within the prescribed time limit, it became final and the complainant may not indirectly challenge its lawfulness in these proceedings. Indeed, given that time limits serve the purpose of, amongst other things, creating finality and certainty in relation to the legal effect of decisions, a decision which is not challenged within the prescribed time limits is fully and legally effective when the applicable time limit for challenging that decision before the competent internal appeal bodies has passed (see Judgment 3755, under 3).

In his submissions, the complainant enters pleas with regard to the abolition of his post, and others with regard to the termination of his appointment. For the reasons stated above, the Tribunal will consider only the contentions in respect of the first decision.

3. The Tribunal's case law concerning the abolition of a post in the context of a restructuring process was succinctly stated in Judgment 2830, under 6:

> "(a) An international organisation may find that it has to reorganise some or all of its departments or units. Reorganisation measures may naturally entail the abolition of posts, the creation of new posts or the redeployment of staff (see Judgments 269, 1614, 2510 and 2742). The steps

> to be taken in this respect are a matter for the Organization's discretion and are subject to only limited review by the Tribunal (see Judgments 1131, under 5, and 2510, under 10).
>
> (b) The Tribunal has consistently held that 'there must be objective grounds' for the abolition of any post. It must not serve as a pretext for removing staff regarded as unwanted, since this would constitute an abuse of authority (see Judgment 1231, under 26, and the case law cited therein)'."

4. In the memorandum of 30 April 2014, one of the stated reasons for the abolition of the complainant's post was "the outsourcing of part of the printing work".

In his complaint, the complainant criticises this outsourcing process. He submits that the tasks that he had performed were not in fact eliminated but were transferred to holders of service contracts. He alleges misuse of these contracts, the holders of which are, according to him, given priority over staff members on fixed-term appointments, such as himself.

The complainant also asserts that the chain of events in 2013 and 2014 supports his contention that there was a "hidden" reason for abolishing his post. He explains, inter alia, that in an e-mail of 15 November 2013, to which he received no reply, he conveyed to the Director of HRM his concern at the fact that on the previous day, one of his colleagues had told him that his appointment was going to be terminated. He also states that at a meeting held on 4 February 2014, he was informed that his post would be abolished and was given a vague explanation regarding the use of service contracts. He takes the Institute to task for having said nothing to its staff, particularly with regard to the outsourcing of activities. He also mentions that on 20 March 2014 several staff members, including himself, sent the Director-General a letter stating that the abolition of their posts was arbitrary and criticising the Institute's restructuring process.

In addition, the complainant emphasises that in April 2014 the Acting Director of the Institute refused to provide him with a report prepared by an "external consultant" – which, according to the complainant, contained information that led the Acting Director to propose that his post be abolished – on the grounds that this document

was confidential. Lastly, the complainant submits that the decision of 7 July 2014, informing him that the Director-General had decided to confirm the decision to abolish his post, contained no information that allowed him to verify the "apparent or real" reasons for the decision.

In advancing these arguments, the complainant essentially seeks to establish that he was not properly informed of the implementation of the restructuring plan or of the outsourcing measures arising therefrom.

5. The Tribunal notes that, according to item 13.9, paragraph 17, of the Human Resources Manual, holders of service contracts "are neither staff members under UNESCO's Staff Regulations and Staff Rules nor officials under the Convention on the Privileges and Immunities of the Specialized Agencies. Their rights and obligations are based on the terms of the contract they have signed with the Organization, including the general conditions annexed to the contract [...]."

The Tribunal has consistently held that the outsourcing of certain services, that is to say the use by an organisation of external contractors to perform tasks that it feels unable to assign to officials hired under its staff regulations, forms part of the general employment policy that an organisation is free to pursue in accordance with its general interests. The Tribunal is not competent to review the advisability or merits of the adoption of such a measure in a specific field of activity (see Judgments 3275, under 8, 3225, under 6, 3041, under 6, 2972, under 7, 2907, under 13, 2510, under 10, 2156, under 8, and 1131, under 5).

6. In Judgment 3376, however, the Tribunal recalled that an organisation "that resorts to subcontractors, be they companies or individuals, must ensure that the contract it signs with them will not have an adverse impact on the situation of officials who are subject to the staff regulations and will not unjustifiably infringe the rights they enjoy under those regulations. The risk of such an infringement is particularly great in the case of long-term contractual outsourcing and in cases where the tasks involved are still partly performed concurrently by regular staff (see Judgment 2919 *passim*). In such cases the duty of care requires the organisation to provide the staff concerned with

adequate information concerning the outsourcing procedures and their possible impact on their professional situation and to prevent any possible adverse impact thereon (see Judgments 2519, under 10, 1756, under 10(b), and 1780, under 6(a)).”

As noted above, one of the reasons for the abolition of the complainant’s post was “the outsourcing of part of the printing work”. On this point, the Appeals Board emphasised in its opinion of 10 July 2015 that the procedure culminating in the abolition of some posts at the Institute seemed to have lacked transparency and objectivity and was subject to review by the Tribunal insofar as long-term service and temporary contracts had been privileged over fixed-term posts.

The lack of transparency noted by the Appeals Board is corroborated by the evidence on file, which shows that although the complainant contacted his supervisors on numerous occasions, they did not provide him with sufficient information as to the reasons for the outsourcing of the tasks that he performed and the way in which it would be achieved. Moreover, the evidence does not show that the Organization did its utmost to minimise the negative impact of the use of service contracts on the complainant’s status.

7. It follows that the Director-General’s decisions of 28 August 2015 and 7 July 2014, and her decision of 30 April 2014 abolishing the complainant’s post, which were unlawful, must be set aside without there being any need to examine the complainant’s other pleas in respect thereof.

8. As stated in consideration 2 above, the setting aside of these decisions does not entail the setting aside of the termination decision. Thus, the complainant cannot, in any event, be reinstated in his former post.

9. The complainant is, however, entitled to damages. In assessing the injury that he suffered, it will be borne in mind that he had been in the service of UNESCO since 1 December 1993 and that although he held only a fixed-term appointment that would have

expired on 30 November 2015, he was just over three years from retirement when his post was abolished. In view of all the circumstances of the case, the Tribunal considers that that the various forms of injury suffered by the complainant may be fairly redressed by awarding him compensation assessed *ex aequo et bono* at 50,000 euros.

10. As the complainant succeeds, he is also entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The Director-General's decisions of 28 August 2015, 30 April 2014 and 7 July 2014 are set aside.
2. UNESCO shall pay the complainant compensation under all heads in the amount of 50,000 euros.
3. UNESCO shall also pay the complainant costs in the amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ