

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**R. (No. 2)**

**v.**

**UNESCO**

**127th Session**

**Judgment No. 4063**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 21 September 2016 and corrected on 13 October 2016, UNESCO's reply of 20 February 2017, the complainant's rejoinder of 6 June and UNESCO's surrejoinder of 18 September 2017;

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 terminate his appointment on disciplinary grounds.

Facts relevant to this case are to be found in Judgment 3398 on the complainant's first complaint. At the material time, the complainant held the grade D-1 post of Director of the Regional Bureau for Science and Culture in Europe, in Venice, Italy, under a fixed-term appointment which was due to expire on 31 October 2012.

In December 2009, in the context of the implementation of an European Union support programme, the Friuli Venezia Giulia region in Italy, which was the CHERPLAN project leader and which included, among its funding partners, the Institute of Environmental Geology and

Geoengineering (IGAG), submitted an Expression of Interest in which the complainant's spouse was named as contract person for IGAG and the complainant as a strategic partner associated with the project in his capacity as Director of the Regional Bureau in Venice. A project application was sent to the European Commission in September 2010 and, following the selection procedure, the project was accepted.

On 21 August 2010 the complainant's spouse, also the manager of a commercial company registered under Swiss law (INNOREG SAGL), sent a letter to Mr M. – a “UNESCO Artist for Peace” – to remind him to repay a debt. The next day, the complainant sent a copy of that letter to Mr M. from his UNESCO e-mail account.

After allegations were made against the complainant and his spouse in September 2010, the Director-General ordered the Internal Oversight Service (IOS) to re-open an earlier investigation concerning both of them that had been initiated at the beginning of the year. The allegations were as follows: (1) the complainant managed a private business – INNOREG; (2) he was using his position as Director of the Regional Bureau in Venice to provide financial support to the CHERPLAN project, which was coordinated by his spouse; (3) he introduced her as a UNESCO consultant at official regional meetings to which she often accompanied him; and (4) the Regional Bureau had awarded a contract to a company that was directed by an acquaintance of the complainant, Mr E. In its report of April 2011, IOS concluded that the complainant's spouse had, at least until September 2010, been directly involved in preparing the CHERPLAN project, which had created a situation of conflict of interest, in that the Regional Bureau supported the project; that the complainant had violated the rules applicable to procurement by awarding a contract to the company directed by Mr E. without any competitive process; that the complainant had engaged in unauthorized commercial activities within the company INNOREG; and that he had misused UNESCO's e-mail system by sending the e-mail of 22 August 2010. IOS also found that the complainant had made misrepresentative statements by repeatedly asserting that his spouse had not participated in the CHERPLAN project in 2010 and that

INNOREG was a “dormant company”. IOS therefore recommended that a disciplinary measure be imposed on the complainant.

By a memorandum of 27 May 2011, the complainant was informed that, on the basis of the IOS report, the Director-General had decided to charge him with the following: (1) knowingly engaging in actions creating a conflict of interest; (2) violating UNESCO’s procurement rules; and (3) engaging in unauthorized commercial activities and misuse of the Organization’s e-mail facilities. The complainant was requested to provide written comments, which he did on 28 June. On 2 September he was informed that his case would be referred to the Joint Disciplinary Committee (JDC). In the report that it submitted at the end of October 2011 after hearing the parties, the JDC noted that the Administration had withdrawn the charge of violating UNESCO’s procurement rules. It considered that the complainant had unwisely exposed himself to a potential conflict of interest, but that his actions had not been detrimental to the Organization. The charge regarding commercial activities was, in its opinion, unsubstantiated. Lastly, it considered that the complainant had been at fault in sending the e-mail of 22 August 2010, because, in doing so, he had used his official position in a private matter. However, it noted that the complainant had acknowledged his mistake, and that this action had not caused any damage to UNESCO. Considering that the complainant had acted negligently, the Committee recommended that the disciplinary measure of written censure be imposed on him.

By a memorandum dated 1 February 2012, the complainant was informed that the Director-General considered that he had engaged in the following misconduct: (1) conflict of interest in relation to the CHERPLAN project; (2) fraudulent misrepresentation, by attempting to conceal the role of his spouse in the CHERPLAN project from IOS; (3) unauthorized commercial activities, and receiving remuneration from an outside source, in breach of Staff Rule 101.5 and Staff Regulation 1.6; and (4) an additional conflict of interest, stemming from the business relationship between INNOREG and Mr M. , to whom he had granted a UNESCO consultant contract. In view of those circumstances, the Director-General had decided, under Staff Rule 110.1, to terminate the complainant’s appointment on 15 February 2012. He was informed

that, on an exceptional basis, he would receive one month's pay in lieu of notice.

In his first complaint, filed on 28 April 2012, the complainant impugned the decision of 1 February 2012. However, on 26 March he had submitted a protest to the Director-General, asking her to set aside that same decision. The termination decision was confirmed on 23 May 2012. On 25 June the complainant sent a notice of appeal to the Appeals Board, asking it to stay its proceedings *sine die* as he had already filed a complaint with the Tribunal. Having received no reply, he re-sent his notice of appeal by e-mail on 2 July 2012. He was then told that this was "the first communication" received from him. In consideration 7 of Judgment 3398, delivered in public on 11 February 2015, the Tribunal found that there was nothing in the file to show that the Appeals Board had taken a decision on the request for a stay of proceedings, which it had received before the expiry of the prescribed time limit; and that UNESCO was therefore "not in a position to criticise the complainant for failing to submit his detailed appeal to the Appeals Board in a timely manner, as it [did] in its surrejoinder"; and that "[i]n these circumstances, having regard to the Organization's duty to act in good faith and duty of care, UNESCO [would] be asked to examine the appeal that was filed at the earliest on 25 June 2012 and at the latest on 2 July 2012, and to invite the complainant to file his detailed appeal within one month of the delivery of [Judgment 3398]". The complaint was thus dismissed, and UNESCO was invited to comply with consideration 7 of the judgment.

On 10 March 2015 the complainant was invited to submit his detailed appeal to the Appeals Board, which he did the next day. UNESCO submitted its reply in October 2015, and the complainant did not file a rejoinder. After hearing the parties, the Appeals Board issued its opinion on 20 May 2016. It considered that only the charge of unauthorized commercial activities and receiving remuneration from an outside source was substantiated, but that the disciplinary sanction imposed on the complainant in this respect was nevertheless within the discretionary power of the Director-General. It recommended that the complainant be reimbursed his accommodation and travel expenses to attend the hearing. By a letter dated 2 August 2016, the complainant

was informed that the Director-General considered that the four charges listed in the memorandum of 1 February 2012 were proved; that she therefore confirmed the decision to terminate his appointment; that she and did not accept the recommendation of the Appeals Board to reimburse his travel and accommodation expenses, as she considered that it had no legal basis in any applicable rule. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the decisions of 1 February and 23 May 2012, to order his reinstatement, or to refer the case back to the Organization for a new decision and for payment of the remuneration of which he has been deprived since the termination of his appointment, and to award him compensation with interest for the material and moral injury he claims to have suffered, as well as 15,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal. He also asks the Tribunal to order the Organization to deduct from “the various pecuniary awards an amount corresponding to the fees and taxes that he has undertaken to pay his counsel, and to pay that amount directly to him”\*. In his rejoinder, he also seeks moral damages on the grounds that UNESCO violated the letter and spirit of Article 6(4) of the Rules of the Tribunal by submitting in annex to its reply the English version of the Standards of Conduct for the International Civil Service, and by citing a provision of the Administrative Manual and a judgment of the Tribunal in their English version in footnotes. He asks the Tribunal to disregard that annex and those footnotes.

UNESCO contends that the complaint is unfounded.

### CONSIDERATIONS

1. The complainant asks that the decision of 2 August 2016 by which the Director-General confirmed the termination of his appointment and the decisions of 1 February and 23 May 2012 be set aside. In addition, he seeks reinstatement or the referral of the case back to the Organization for a new decision and for payment of the remuneration

---

\* Registry’s translation.

of which he has been deprived since the termination of his appointment, payment of compensation for moral and material injury, with interest, and an award of costs.

2. The complainant alleges that UNESCO violated the letter and spirit of Article 6(4) of the Rules of the Tribunal by submitting in its reply the English version of the Standards of Conduct for the International Civil Service, and by citing an applicable text and an excerpt from the case law in English, whereas the complaint was filed in French. He asks the Tribunal to disregard these items.

3. However, in accordance with Article 8(2)(b) of the Rules of the Tribunal, a defendant organization before the Tribunal is only required to provide a translation into the language chosen for the proceedings by the complainant for “any text which is not in English or French”. Given that, in this case, the documents in question are drafted in English, UNESCO did not have to provide a French version thereof. In addition, the fact that excerpts from applicable texts and case law were cited in English in the defendant Organization’s submissions does not warrant these items being disregarded. It follows that this plea must be rejected.

4. The complainant alleges that his right to an effective internal appeal was violated. He argues to that effect that the Appeals Board ignored most of his arguments, as did the Director-General.

5. The Tribunal finds that, contrary to what the defendant Organization makes out, while the Appeals Board did express an opinion on the complainant’s pleas concerning the failure to consult the Executive Board and the composition of the JDC, it did not, however, mention the many other pleas of a procedural nature raised by the complainant. It did not, for instance, address his arguments concerning the fact that the Special Advisory Board was not consulted, nor those concerning the various flaws that he identifies in the disciplinary proceedings, nor those concerning the breach of due process. Thus, the Appeals Board did not examine all of the complainant’s pleas. In addition, the Director-General did not address those pleas in her

decision of 2 August 2016 either. Accordingly, the right of the complainant to an effective internal appeal was denied. The decision impugned is thus unlawful, which justifies it being set aside.

6. At this stage of its findings, the Tribunal should normally refer the case back to the Organization in order for the internal appeal procedure to be resumed in a lawful manner. However, in view of the time that has elapsed since the events, and having regard to the importance of reaching a final determination in this judgment as to the lawfulness of the disputed disciplinary measure, in this case the Tribunal will examine the matter itself instead.

7. The complainant argues that UNESCO violated the right to due process in that he was not clearly informed, at the beginning of the proceedings, of the charges against him. He explains that two of the charges on which the Director-General relied to justify the sanction imposed on him were not set out as such in the list of charges referred to the JDC for review. In particular, he asserts that it was only at the end of the proceedings that the Administration accused him of fraudulently concealing the role of his spouse in the CHERPLAN project from the investigator, and of wrongly exposing himself to a conflict of interest, in that the company INNOREG entered into a contract with Mr M., to whom he had earlier awarded a UNESCO consultant contract.

8. According to the defendant Organization, the charges against the complainant were properly communicated to him at the beginning of the disciplinary proceedings and at every stage thereof.

9. The evidence, and in particular the report of the Joint Disciplinary Committee, shows that the disciplinary proceedings were opened against the complainant on the basis of the following charges:

- (a) knowingly engaging in actions creating a conflict of interest;
- (b) violating procurement rules; and
- (c) engaging in unauthorized commercial activities and misusing UNESCO's e-mail facilities.

The Tribunal notes that, in the decision of 2 August 2016, confirming that of 1 February 2012, the Director-General considered that the statements made by the complainant during the investigation to fraudulently conceal the role of his spouse in the CHERPLAN project constituted a separate charge, whereas in the list of charges submitted to the JDC, the concealment was simply presented as an element corroborating the first conflict of interest.

Above all, the Tribunal also notes that the last charge relied on by the Director-General, namely the additional conflict of interest as a result of INNOREG entering into a contract with Mr M., was not submitted as such to the JDC.

The complainant is therefore right in contending that the sanction imposed on him is partly based on charges different from those referred to the JDC.

Furthermore, some of the charges on which the Director-General relied were considered to be unsubstantiated by the JDC – which, moreover, proposed that the complainant should receive only a written censure – and others were not upheld by the Appeals Board.

In these circumstances, the Tribunal cannot be affirmatively satisfied that the decision of the Director-General would have been the same had she only considered the charges specifically presented as such in the list of charges referred to the JDC. The termination decision, which was taken unlawfully, must therefore be set aside for this reason.

10. It follows from the foregoing that the termination decision of 1 February 2012 and that of 23 May 2012 confirming it, as well as the decision of 2 August 2016, must be set aside, without there being any need to consider the complainant's other pleas.

11. The complainant asks to be reinstated in the Organization. However, according to the Tribunal's case law, the reinstatement of an official on a fixed-term contract is ordered only in exceptional cases (see Judgment 3417, consideration 9). The Tribunal does not consider this case to be exceptional and will not order the reinstatement of the complainant.



12. The complainant is, however, entitled to compensation for the material injury suffered as a result of the unlawful termination of his appointment. In the circumstances of the case, the Tribunal considers that this injury may be fairly redressed by awarding him an amount equivalent to the salary and allowances of all kinds to which he would have been entitled up until the date of expiry of his contract, namely 31 October 2012, net of the amount he received in lieu of notice at the time his appointment was terminated and of any earnings he may have received during that period.

The Organization shall also pay the complainant an amount equivalent to the pension contributions which it would have had to make for the same period.

The Tribunal will not award interest on these amounts.

13. The termination of the complainant's appointment for disciplinary reasons, due in particular to the injury to his professional reputation, also caused him moral injury, which may be fairly redressed by awarding him compensation in the amount of 15,000 euros.

14. The complainant criticises the excessive length of the internal appeal proceedings.

The Tribunal recalls its consistent case law according to which a staff member is entitled to an efficient internal means of redress and to expect a decision on an internal appeal to be taken within a reasonable time (see Judgment 3336, consideration 6). In this case, the complainant submitted his detailed appeal to the Appeals Board on 11 March 2015 – following the public delivery of Judgment 3398 – and the decision of the Director-General on this appeal was issued only on 2 August 2016, that is almost seventeen months later.

Given the nature of the case, which concerns a termination for disciplinary reasons, the Tribunal considers that such a period of time was excessive and that, in this regard, moral damages should be awarded to the complainant in the amount of 1,000 euros.

15. The complainant requests that the Organization be ordered to refund travel and accommodation costs that he incurred to attend the hearing before the Appeals Board. He submits that, even in the absence of any explicit written provision, the Organization can make that reimbursement under paragraph 22 of Annex A to the Staff Regulations and Staff Rules, which provides that “[i]n the case of an appeal by a staff member serving away from Headquarters, if the Director-General after consultation with the Chairperson [of the Appeals Board] decides that the presence of the appellant is necessary, he may arrange for the journey to be made at the Organization’s expense, either by combining it with official travel or otherwise. If the Director-General does not consider the appellant’s presence necessary, the appellant has the right nevertheless to attend the hearing provided that he travels at his or her own expense and at a time approved by the Director-General.”

16. The Tribunal, however, considers that Annex A merely gives the Director-General the option of charging the travel costs to the Organization, and that, in this case, the decision not to reimburse the costs incurred by the complainant to defend his case before the Appeals Board did not constitute an abuse of the discretion thus conferred upon her.

17. The complainant’s counsel has asked the Tribunal to order the Organization to make a deduction in his favour from the pecuniary awards granted to the complainant. But it is not the Tribunal’s role to interfere in the private relations between a complainant and his counsel. That request shall therefore be dismissed.

18. As the complainant succeeds in part, he is entitled to an award of costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 2 August 2016, the termination decision of 1 February 2012 and that of 23 May 2012 are set aside.
2. UNESCO shall pay the complainant material damages calculated as indicated in consideration 12, above.
3. It shall also pay him moral damages in the total amount of 16,000 euros.
4. Lastly, it shall pay him costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 November 2018, 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 6 February 2019.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ