Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M. (No. 2)

v.

UNESCO

131st Session **Judgment No. 4369**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms S. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 28 November 2017 and corrected on 20 December 2017, UNESCO's reply of 24 April 2018 and the complainant's email of 13 May 2018 informing the Registrar of the Tribunal that she did not wish to file a rejoinder;

Considering the document produced by the complainant on 24 November 2019, forwarded to UNESCO on 26 November 2019;

Considering the documents produced by UNESCO on 16 December 2020 at the Tribunal's request for further submissions and the email of 7 January 2021 informing the complainant of those exchanges;

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 her appointment.

Facts relevant to this dispute are to be found in Judgment 3639, concerning the complainant's first complaint, which was delivered in public on 6 July 2016. In that case, the complainant, who had filed a formal complaint of moral harassment against her supervisor in December 2011, challenged the decision to close her case. In Judgment 3639, the Tribunal allowed the complaint on the grounds that UNESCO, in breach

of the principle *tu patere legem quam ipse fecisti*, had circumvented the procedure for handling formal harassment complaints, and ordered the Organization to pay the complainant moral damages.

At the material time, the complainant, who held a fixed-term appointment due to expire on 31 January 2017, held a post at grade G-5 in the Natural Sciences Sector at UNESCO's Headquarters.

Following a meeting on 20 October 2015, the Director of the Bureau of Human Resources Management (HRM) confirmed to the complainant by memorandum of 28 October 2015 that, as a consequence of the staffing adjustment policy, her post would be abolished with effect from 1 January 2016, but that every action would be taken to examine her possible re-assignment to any vacant posts with due regard to her qualifications, experience and seniority. If no redeployment were feasible or if the complainant declined the offer of redeployment that might be presented to her, she could opt for an agreed separation under Staff Regulation 109.5 with a notice period of three months. The complainant accordingly applied for several positions.

On 28 January 2016 the Director of HRM wrote to the complainant to inform her that since no post matching her qualifications and experience could be identified, a recommendation would be submitted to the Advisory Board on Individual Personnel Matters (PAB) concerning the termination of her appointment, but she could still opt for an agreed separation.

In its opinion of 18 April, the PAB found that UNESCO's efforts to reassign the complainant had not been "sufficiently convincing", and it recommended that HRM widen its search and complete the process by 31 July. By memorandum of 2 June, the Director of HRM informed the complainant that the Director-General had decided to accept that recommendation, and she reminded her that she was still able to opt for agreed separation. On 2 August the Director of HRM sent the complainant a memorandum, dated 1 August, informing her that despite the renewed efforts, no suitable vacant post had been identified for her redeployment and that her appointment would be terminated with effect from 4 November 2016.

On 8 August 2016 the complainant submitted to the Director-General a protest against the decision of 1 August, in which she accused the Administration and the Director of HRM of having breached procedural rules in several respects in order to "satisfy" the Natural Sciences Sector, which was behind the moral harassment that she alleged she had suffered

for seven years. She stated that she was making a complaint against her direct supervisor Ms C., the Administration and the Director of HRM, who "allowed unethical behaviour to take place with impunity", adding that she would provide "documents and evidence" supporting her allegations in a future communication. On 31 August she submitted to the Director-General a complaint of wrongful dismissal and moral harassment, which was a supplement to her protest. She lodged a notice of appeal on 5 September. By memorandum of 19 September, received by the complainant the following day, the Director of HRM informed her that, in response to her protest, the Director-General had decided to confirm the decision of 1 August, as she considered that the provisions of Item 10.5 of the Human Resources Manual concerning termination of appointment had been complied with. The complainant was told that her allegations of harassment had been forwarded to the Ethics Adviser. On 28 September the complainant lodged her detailed appeal with the Appeals Board. She requested a two-year appointment and compensation for the physical, moral and professional injury that she stated she had suffered. On 4 November 2016 the complainant left the Organization. On 28 April 2017 UNESCO submitted its detailed reply, in which it argued that the appeal was irreceivable because the complainant had lodged her notice of appeal prematurely.

The Appeals Board heard the parties on 7 June 2017. During the hearing, the complainant pointed out that her last salary had not been paid. In its opinion dated 21 July, the Board stated that it would not consider the question of moral harassment, which was the subject of another appeal. While the Board recognized that an executive head was entitled to abolish posts, it wondered whether the stated grounds for abolishing the complainant's post were truly objective and not used as a pretext for dislodging an undesirable staff member. It emphasised that the complainant's professional skills had not been called into question and that budgetary restrictions could not justify the abolition of her post since two posts of higher grade had been advertised and filled shortly afterwards. Noting that it had been possible to redeploy five staff members in a similar situation to the complainant's, the Appeals Board considered that there was reason to believe that the principle of equal treatment had been breached and that the complainant did not appear to have received the priority treatment which her status as a staff member on redeployment afforded her. It found that the complainant's post had been abolished arbitrarily and recommended that either a new post outside the Natural

Sciences Sector be identified and assigned to the complainant with due consideration to her status as a former staff member, or that her appointment be terminated under an agreed separation since the complainant was nervous about re-joining UNESCO. The Board further recommended that she be awarded the sum of 2,000 euros in costs. Lastly, the complainant was invited to correct her administrative status to allow her last salary to be paid.

By letter of 27 October 2017, the Director of HRM notified the complainant that, first and foremost, the Director-General had decided to dismiss her appeal as irreceivable on the grounds that the notice of appeal had clearly been lodged prematurely. The Director of HRM added that, second, the Director-General took the view that the impugned decision was lawful since the procedures applicable to the termination of an appointment had been followed and the complainant, who had never taken advantage of the option of agreed separation, had received the salary which she was owed in full. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and, in consequence, to order UNESCO to pay her 36 months of salary in compensation under all heads. She further seeks the payment of her salary for October and November 2016 and her termination indemnity, and she claims 10,000 euros for the expenses she has incurred in preparing her defence since February 2014 and costs.

UNESCO submits that the complaint is irreceivable since, in lodging a notice of appeal without waiting for the Director-General's reply to her protest, the complainant did not comply with the internal appeal procedure. It adds that only the decision to terminate her appointment is properly before the Tribunal, and that the complaint is irreceivable insofar as it concerns the abolition of her post and harassment. Subsidiarily, UNESCO considers that complaint should be dismissed as unfounded.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision of 27 October 2017 confirming, contrary to the recommendations of the Appeals Board of 21 July 2017, the decision of 1 August 2016 to terminate her appointment owing to the abolition of her post. She further requests

that UNESCO be ordered to pay her various sums which she considers the Organization owes her, as well as compensation and costs.

2. UNESCO submits that the complaint is irreceivable on the grounds that, first, the complainant did not comply with the time limits for the internal appeal and, second, she claims compensation for injury in connection with harassment that is the subject of separate proceedings.

3. As regards the time limits for the internal appeal, under Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations". The Tribunal reiterates that "[t]o satisfy the requirement in Article VII, paragraph 1, that internal means of redress must be exhausted, the complainant must not only follow the prescribed internal procedure for appeal, but she or he must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure" (see Judgments 1469, consideration 16, and 3947, consideration 4).

Furthermore, 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 one month of the date of receipt of the decision [...] contested by the staff member if he is stationed at Headquarters [...]
>
> (b) The Director-General's ruling on the protest [...] shall be communicated to the staff member [...] within one month of the date of the protest if the staff member is stationed at Headquarters [...]
>
> (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 one month in the case of a staff member stationed at Headquarters [...]"

In this case, the Organization criticises the complainant for not having waited for the time limit under abovementioned paragraph 7(b) to expire before submitting her notice of appeal to the Appeals Board.

4. It is not disputed that the complainant received on 20 September 2016 the Director-General's decision of 19 September dismissing her protest of 8 August 2016, supplemented by a memorandum of 31 August 2016. The complainant lodged her detailed appeal with the Appeals Board on 28 September 2016, following that communication. According to the Tribunal's case law, part of an organisation's duty of care towards its staff is to provide procedural guidance to a staff member who is mistaken in the exercise of a right insofar as that may allow them to take effective action. If there is still time, it must inform a staff member of the available means of redress (see Judgments 2345, consideration 1(c), and 2713, consideration 3(d)). In the circumstances of the case, the Appeals Board, or otherwise the Organization itself, if they considered the notice of appeal premature, should have informed the complainant so as to enable her to correct that procedural error, if need be after the decision dismissing her protest was adopted. Neither the Appeals Board nor the Organization complied with that duty. It follows that, owing to the requirements inherent in the principle of good faith, the objection to receivability based on the premature lodging of the notice of appeal with the Appeals Board must be dismissed.

5. The Organization also submits that the complaint is irreceivable to the extent that it seeks to challenge the decision of 28 October 2015 abolishing the complainant's post with effect from 1 January 2016.

The submissions show that the complainant, who was required to comply with the prescribed internal appeal procedure, did not contest the decision to abolish her post (of which she was informed on 28 October 2015) in due time. Under the Tribunal's case law, the decision to abolish a post and the consequent decision to terminate the appointment of the holder of that post, in the event that she or he is not reassigned, are legally separate (see, for example, Judgment 3905, consideration 15) and "the abolition decision is an administrative decision challengeable with the Tribunal in accordance with Article II of its Statute", provided that the complainant has exhausted the internal means of redress that may be available to her or him (see also Judgments 3928, consideration 14, and 3929, consideration 13). Thus, since an internal appeal was not lodged in the prescribed period, the decision to abolish the complainant's post has become final and cannot be contested in these proceedings.

6. In support of her complaint, the complainant criticises UNESCO for, in particular, having breached paragraphs 6, 7 to 10, 11(b), 12 and 17 of Item 10.5 of the Human Resources Manual on termination of appointment. She submits that the Organization did not make any effort or offer "to correct her professional situation".

7. Paragraph 6 of Item 10.5 of the Human Resources Manual, which the complainant alleges was breached, states that "[i]f the necessities of service require that the appointment of staff members is to be terminated as the result of the abolition of a post or a reduction in staff, staff members holding indeterminate appointments shall, as a general rule, be retained in preference to those holding other appointments, subject to the availability of suitable vacant posts in which their services could be effectively used. Due regard shall be paid in all cases to efficiency, competence, integrity and length of service."

8. The Tribunal observes, however, that this provision only concerns staff members with indeterminate appointments. As stated above, the complainant held a fixed-term appointment. It follows that the plea alleging a breach of paragraph 6 is misconceived.

9. The complainant also alleges a breach of paragraphs 7 to 10 of Item 10.5 of the Human Resources Manual, which form part of the applicable procedure in the case of post abolitions or staff reductions. These provisions state as follows:

> "Information to staff members
>
> 7. DIR/HRM informs in writing staff members affected of the abolishment of their post, including of its effective date, and of the actions which are undertaken to find suitable posts for their redeployment. To facilitate such redeployment, HRM asks each staff member concerned to submit an updated version of their Curriculum Vitae.
>
> Re-assignment of staff
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> 8. HRM, in consultation with Sectors/Bureaux/Offices or field offices, examines the possibility of reassigning the staff members concerned to any vacant posts, with due regard to their qualifications and experience, seniority and the type of appointment held.
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> 9. To this end, HRM reviews all vacant posts and posts to become vacant for which staff concerned meet the basic requirements. Posts considered are preferably at equal grade as the abolished post. However, if no such post is available, vacant posts at a lower grade will also be considered.

If a vacant post has been identified,

10. HRM provides each Sector/Bureau/Office/field office in which a vacant post has been identified with the CV of the staff members concerned."

10. The submissions show that the Director-General accepted the PAB's recommendation to extend the search period to 31 July 2016 with a view to reassigning the complainant. By various emails of 6 June 2016, HRM then submitted the complainant's CV to the Assistant Directors-General and the Directors of Bureaux and Sectors. The emails specified that searches were to be conducted for any vacant posts of an administrative or support nature at G-5 or G-4 level. The Tribunal finds that, contrary to the complainant's allegations, the Organization complied with paragraphs 7 to 10 of Item 10.5 of the Human Resources Manual. The plea is therefore unfounded.

11. The complainant further alleges a breach of paragraph 11(b) of Item 10.5 of the Human Resources Manual, which provides that "[i]f the vacant post is under recruitment, but no appointment decision has been taken as yet, HRM/RCR will refer the staff member to the Sector/ Bureau/office/field office concerned. In the evaluation and selection process, the staff member concerned will be given priority over all other candidates, both internal and external. For the transfer to take place, it is sufficient that he/she meets the basic requirements (in terms of qualifications and experience) for the post, notwithstanding the merits of all the other candidates."

12. The Tribunal notes that paragraph 11(b) applies only where a vacant post has been identified. Although the Organization submits that it did not identify a vacant post that could have suited the complainant, on her own initiative, she applied for several posts, including those of assistant (secretarial) and assistant (loans), both at grade G-5. However, the complainant does not provide evidence that she met the eligibility requirements for those posts and that she was unfairly deprived of them. Consequently, she has not demonstrated that the conditions that would have allowed her to receive priority treatment under paragraph 11 were met. It follows that the plea is unfounded.

13. The complainant further alleges that there was a breach of paragraph 12 of Item 10.5 of the Human Resources Manual insofar as she was not offered a post at a lower grade.

Paragraph 12, a breach of which is alleged, states that "[a] vacant post at a lower grade should equally be considered under the same conditions as set out in (a) to (d) above, subject to the consent of the staff member concerned. If he/she accepts to be transferred or appointed to a post of a lower grade, his/her salary will be preserved at the level of the abolished post as at the date at which the post is abolished."

14. The Tribunal observes that, while the complainant states that she did not receive any offers such as provided for in aforementioned paragraph 12 even though she identified seven posts from the beginning of 2016 and was only invited to an interview for three of them, she does not provide any information that would corroborate her allegations.

The Tribunal notes that paragraph 12 is linked to the procedure set out in aforementioned paragraph 9, which requires HRM to review all posts that are vacant or to become vacant, and also to consider lower grade posts. The Organization states, with supporting evidence, that HRM tried to identify such posts on two occasions, on 24 December 2015 and 6 June 2016, but that no vacant posts matching the complainant's profile could be found. The plea is therefore unfounded.

15. The complainant also alleges a breach of paragraph 17 of Item 10.5 of the Human Resources Manual, under which "[n]o termination on the basis of abolition of post or reduction of staff shall take place until the PAB has considered the case and submitted its advice to the Director-General". She argues that the PAB, which met on 18 April 2016 and recommended that the period for identifying vacant posts be extended, should have been consulted again before the decision to terminate her appointment was adopted.

16. The submissions show that the PAB considered, in its opinion of 18 April 2016, that "the efforts to identify a post [had] not been sufficiently convincing [since,] [i]n particular, exchanges with the other sectors show[ed] that the search was confined to the post of Web Assistant [and,] [t]he consultation of sectors having taken place at the end of the year and over a short period, there were too few vacant posts"[*]. The PAB therefore "recommend[ed] that HRM [...] continue its efforts to identify vacant posts for the reassignment [...] [and] that the search process be completed by 31 [July] 2016, with probative evidence

[*] Registry's translation.

provided of the search and consideration"[*]. The Tribunal observes that this opinion was provisional and implied that, if the spirit of paragraph 17 of Item 10.5 of the Human Resources Manual was to be complied with, the PAB should be consulted again after the completion of the additional search for posts which the Organization was invited to carry out. In the circumstances of the case, and since the content of the provisional opinion delivered by the PAB was not improper, the Tribunal considers that a fresh consultation was required at the end of the reassignment process. The Tribunal notes that the Organization terminated the complainant's appointment at the end of the extended period for identifying posts without seeking the PAB's opinion again. It follows that the decision of 1 August 2016 terminating the complainant's appointment was flawed and the impugned decision of 27 October 2017 confirming that decision was itself tainted by an irregularity that warrants its setting aside.

17. Lastly, the complainant submits that the abolition of her post and the subsequent termination of her appointment followed a series of irregularities, which she equates to harassment.

18. The submissions show that, following the appeal proceedings brought by the complainant before the Appeals Board concerning her allegations of harassment, the complainant was informed by the Director of HRM, by letter of 14 August 2018, of the Director-General's decision to follow the recommendation of the Appeals Board of 13 April 2018 and to dismiss her appeal as irreceivable.

19. The Tribunal takes the view that the complainant, who has not shown that she challenged that decision, cannot plead harassment in support of her claim to set aside the decision to terminate her appointment.

20. As regards the complainant's claims for the payment of her salary for October and November 2016 and her termination indemnity, the Tribunal notes, on the basis of documents provided by UNESCO on 16 December 2020 in response to a request for further submissions, that by a transfer made on 8 November 2018 to the complainant's account, the Organization paid her the sum of 64,694.32 euros, which included 2,637.08 euros by way of salary for October, 419.74 euros by way of

[*] Registry's translation.

salary for 1 to 4 November 2016, 9,941.50 euros for paid leave and 51,696 euros by way of a termination indemnity. The Tribunal concludes that these claims have become moot.

21. The complainant also seeks an order for UNESCO to pay her 36 months of salary, amounting to a total of 155,088 euros, in compensation.

Given that the termination of the complainant's appointment was unlawful, as stated above in consideration 16, she is entitled to compensation, which the Tribunal sets at 30,000 euros under all heads.

22. The complainant is also entitled to costs, which the Tribunal sets at 1,000 euros.

However, there are no grounds for awarding her costs for the internal appeal proceedings. Under the Tribunal's case law, costs of this kind may be awarded only in exceptional circumstances (see, in particular, Judgments 4156, consideration 9, or 4217, consideration 12). Such circumstances are not evident in this case.

DECISION

For the above reasons,

1. The Director-General's decision of 27 October 2017 is set aside.
2. UNESCO shall pay the complainant 30,000 euros in compensation for injury under all heads.
3. It shall also pay her costs in the amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 January 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN GIUSEPPE BARBAGALLO FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ