

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. (No. 7)

v.

UNESCO

138th Session

Judgment No. 4882

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr L. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 5 April 2023 and corrected on 13 April, and UNESCO's reply of 20 July 2023, the complainant having chosen not to file a rejoinder;

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 refusal to grant him compensation, in the form of rest or in financial form, for the time spent putting on and taking off a compulsory service uniform.

The complainant joined UNESCO on 2 December 2002 as a grade G-3 security officer, assigned to the Security Unit within the Security and Safety Section, under a two-year fixed-term appointment that was renewed several times until 5 November 2021, when he was dismissed by the Organization on disciplinary grounds.

By an email of 4 November 2016, Mr D., then Chief of the Security and Safety Section, informed his staff of new requirements concerning the introduction of a service uniform from 10 November. On 5 November

the complainant enquired about “arrangements concerning compensation for putting on and taking off the new uniforms”*. On 19 and 30 November, referring to a meeting held on 29 June 2016 during which the matter of “compensation”* had already been raised and where it had been announced, according to him, that “the question would be considered to allow a sensible decision to be taken”*, he requested clarification in this regard. He did not receive a response.

On 31 July 2019 Mr D. left UNESCO and Mr H. was appointed Chief of the Security and Safety Section with effect from 16 September 2019.

On 4 and 20 March 2020 the complainant asked Mr H. “to take the necessary measures in order that compensation [either in the form of rest or in a financial form] be granted for putting on and taking off security officer uniforms”*. In support of this request, he referred to the French Labour Code, under which compensation must be provided for the time required for changing clothes in the workplace. By an email of 20 March 2020, he was informed that national law did not apply to his position and that he should refer to the rules in force at UNESCO.

On 16 April 2020 the complainant sent the Director-General a protest against that email. On 17 May he filed his first notice of appeal, then on 30 May he submitted his detailed appeal to the Appeals Board. His protest was rejected on 4 June 2020 on the grounds that the email at issue complied with the applicable rules and did not constitute a decision that adversely affected him. Moreover, his request for “compensation for the time to put on and take off the uniform”* was rejected as unfounded. On 9 June the complainant filed a second notice of appeal to inform the Appeals Board that he wished to maintain his challenge. As the two notices of appeal had the same subject matter, he requested that they be joined, which was granted.

In the opinion it issued on 9 December 2022 having heard the parties, the Appeals Board recommended that the appeal should be dismissed as unfounded on the grounds that “nothing in the applicable rules authorise[d] an employee to rely on [the law of the host country]

* Registry’s translation.

to insist that benefits be conferred on her or him”*. The Board also observed that it was not competent to rule on provisions not applicable to the Organization.

By a letter of 20 January 2023, the complainant was informed that the Director-General had decided to accept the Appeals Board’s recommendation “without prejudice to the irreceivability of [his] appeal on the ground that the email of 20 March 2020 [did] not constitute an administrative decision” that could be challenged. That is the impugned decision.

The complainant asks the Tribunal to award compensation for the material and moral injury he considers he has suffered, together with interest for late payment.

UNESCO considers that the complaint is irreceivable for lack of a cause of action. It notes that the email of 20 March 2020 is not a challengeable administrative decision and that the complainant has not identified any applicable rule or term of his appointment that has been breached. It asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 20 January 2023 by which the Director-General of UNESCO, in accordance with the recommendation of the Appeals Board, rejected his appeal against the refusal to take measures accompanying the introduction, as from 10 November 2016, of a service uniform for security officers.

The measures requested consisted of the award of compensation, either in the form of rest or in financial form, for the time that the security officers had to spend changing clothes at the beginning and at the end of each shift owing to the requirement to wear such a uniform.

* Registry’s translation.

2. In support of his request for such measures, the complainant – who indicates that he intended to make the request both on his own behalf and on behalf of colleagues who had delegated him to do so – has, since the start of the dispute, referred to the provisions of Article L. 3121-3 of the Labour Code in force in France (the Organization’s host State). That article, the arrangements for the application of which have been set out in a decision of the French Court of Cassation also cited by the complainant, provides that “[t]he time required for changing clothes, where the wearing of work clothing is mandated by legal provisions, terms of collective agreements, internal regulations or employment contracts and where clothing must be changed on the undertaking’s premises or in the workplace, shall be subject to compensation”^{*} and that “[t]hat compensation shall be granted in the form of rest or in financial form”^{*}.

However, under the Tribunal’s settled case law, as a rule, the conditions of employment of staff of an international organisation are subject exclusively to that organisation’s own Staff Rules and Regulations and to the general principles of the international civil service, and national laws – such as those of the organisation’s host State – apply only where there is express reference thereto (see, in particular, Judgments 4401, consideration 6, 3915, consideration 4, 3484, consideration 12, and 1311, consideration 15). UNESCO’s Staff Regulations and Staff Rules make no reference to national laws in the area to which the complainant’s request relates. The French legislation quoted by the complainant therefore does not apply in this case.

3. The Tribunal notes that the provisions in force at UNESCO relating to the conditions for the compensation of overtime worked by General Services staff, which are to be found in paragraphs 110 to 112 of Item 4b.10 of the Human Resources Manual, do not include any measure applying to the specific case of time spent putting on and taking off a uniform. Moreover, the complainant does not even refer to these provisions in support of his claims.

^{*} Registry’s translation.

4. It is true that, in addition to his submissions concerning the application of Article L. 3121-3 of the French Labour Code itself, before the Tribunal the complainant refers to the Flemming principle – so called after the Chairman of the United Nations Working Group that first stated it in 1949 – according to which the conditions of service for locally recruited staff of international organisations should reflect the best prevailing conditions found locally for similar work. The complainant submits that, pursuant to this principle, UNESCO is required to grant security officers compensation for time changing clothes that is equivalent to that specified, in French law, by aforementioned Article L. 3121-3.

In support of this argument, the complainant makes particular reference to Item 4b.7 of the Human Resources Manual, which, after expressly stating in paragraph 2 that “[t]he salaries and allowances for locally recruited staff are based on the Flemming [p]rinciple”, provides in paragraphs 3 and 4 that “[t]he salaries, allowances and conditions of employment of [these] staff members are established through periodic, comprehensive local salary surveys [...] [which] are conducted to identify the best prevailing conditions in the area”. The complainant also relies on Judgment 1000, in which the Tribunal, when deciding a dispute concerning the level of pay of an organisation’s locally recruited staff, referred to the same principle and to the “general methodology” for comparing conditions of employment designed by the International Civil Service Commission to apply the principle (see considerations 4 to 6 of that judgment).

However, as the Tribunal has already observed in its case law, the Flemming principle, which aims to offer a guide for setting general levels of pay for local staff, offers no basis for claims about any particular component of pay (see Judgments 4090, consideration 10, and 1334, consideration 24). Neither the aforementioned provisions of Item 4b.7 of the Manual, nor the considerations set out in Judgment 1000 – which, moreover, predates these precedents – contradict this case law. It is therefore not appropriate to isolate, as the complainant seeks to do, one element of the pay or of the employment arrangements of UNESCO

security officers and compare it with local conditions of employment, and his line of argument on this point therefore cannot be accepted.

5. The complainant alleges that the Administration of the Organization and the Appeals Board unlawfully “ignored/overlooked”^{*} the aforementioned provisions of Item 4b.7 of the Manual and the content of Judgment 1000 in considering that the same line of argument should be disregarded. However, this plea, which in reality amounts to a resubmission of the line of argument in question in a different form, must also be dismissed for the same reasons.

6. The complainant submits that UNESCO failed in its duty of care towards its staff members by refusing to grant security officers the compensation they sought for the time spent changing clothes in connection with the introduction of the uniform.

However, under the Tribunal’s case law, the duty of care which an international organisation owes to its officials does not extend to the obligation to grant them a benefit to which they are not entitled – as is the case here under the applicable provisions – or to take special steps to exempt them from the normal application of rules (see, in particular, Judgments 3357, consideration 15, and 2986, consideration 36). Nor does the duty of care, which does not prevent an organisation from adopting rules that are less favourable to its staff than those previously in force, imply that the organisation is required, in such a situation, to make exceptions or adjustments to the new rules in question (see Judgment 3034, consideration 25). The fact that the introduction of a uniform imposed new constraints on security officers did not in itself entitle them to compensation for those constraints.

The position would admittedly be different, as an exception to the aforementioned case law, if the introduction of the reform in question had led to a serious deterioration in the financial situation of the staff members concerned (see Judgments 4465, considerations 12 to 18, or 3373, considerations 5 to 11). However, that is plainly not so in the

^{*} Registry’s translation.

present case, as the amount of the monthly pay received by security officers did not decrease in absolute terms.

This plea will therefore be dismissed.

7. Furthermore, the complainant is wrong in criticising the Organization, by referring to the risk of aggression to which security officers would supposedly be subjected if they wore uniforms while travelling outside UNESCO premises, for having endangered those security officers by stipulating that they could change at home if they wished to save time changing clothes on the premises. This contention cannot be accepted in any event, as this was merely an option offered to the staff concerned, who could of course also use the changing rooms provided to them by the Organization.

8. Lastly, the complainant alleges that the Administration of UNESCO “managed the introduction of uniforms for security officers very badly”^{*} in that it failed to specify any compensation to the staff members concerned for time spent changing clothes.

It is certainly permissible to think – without it being appropriate to endorse that last assessment – that it would have been legitimate for the Organization to provide such compensation. That is incidentally what the Appeals Board observed in its opinion, when, after recommending that the complainant’s appeal be dismissed as unfounded, it added that “[h]owever, the Board [took] the view that the introduction of a uniform impose[d] new constraints on the staff concerned and necessitate[d] better support for security officers in terms of adjustments to working hours or facilities”.

But these are considerations of advisability, and not of law, on which, in any event, the Tribunal cannot base its decision in the present case since, as it has repeatedly recalled in its case law, it must essentially give a ruling on points of law (see, for example, Judgments 4454, consideration 7, 3732, consideration 2, or 3424, consideration 11(a)).

^{*} Registry’s translation.

9. It follows from the foregoing that the complaint must be dismissed in its entirety, without there being any need to rule on UNESCO's objections to its receivability.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER