

SEVENTY-FIFTH SESSION

***In re* LOUIS (No. 3)**

Judgment 1263

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Frantz Marceau Louis against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 28 September 1992, UNESCO's reply of 4 November 1992, the complainant's rejoinder of 29 January 1993 and the Organization's surrejoinder of 11 March 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulation 9.1.2 and UNESCO Staff Rules 109.6 and 109.7;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Haiti, was employed by UNESCO from 1975 to 15 October 1988. His career is set out under A in Judgment 1131 of 3 July 1991.

In a letter of 27 April 1992 he asked the Director-General to pay him 15,325.52 United States dollars, an amount equivalent to a 50 per cent increase in his termination indemnity under Regulation 9.1.2 and Rule 109.7(d). On 15 June 1992 the Director of the Bureau of Personnel told him that his claim was irreceivable as *res judicata* because the Tribunal had dismissed it, among others, in ruling on his first complaint in Judgment 1131. On 13 August 1992 the complainant asked the Director to state whether he was to take UNESCO's objection as a final decision; if so, he would go to the Tribunal. On 28 September 1992 he did so.

B. The complainant submits that UNESCO gave him neither the prescribed three months' notice nor the 50 per cent increase in termination indemnity.

He maintains that from 27 May to 30 September 1988, pending a recommendation from the Joint Co-operation Committee, he and the Organization concluded no agreement on termination. Since he was still working then and indeed up to 15 October 1988, the period of notice cannot have begun before 15 October. So UNESCO owes him payment in lieu of three months' notice under Rule 109.6(d).

In a memorandum of 27 May 1988 the acting Director of Personnel promised that the Organization would increase his termination indemnity by 50 per cent. But it never did so, though he claimed the increase both in his appeal to the Appeals Board and in his first complaint. In his submission it was in breach of good faith.

Alleging breach of equal treatment, he cites the case of staff who were dismissed in similar circumstances but got all the indemnities provided for in the rules or more. UNESCO was at great pains to find suitable jobs for some of them or offer them new contracts or put them on paid leave.

He asks for disclosure of information on the number of UNESCO staff dismissed or put on pension.

He seeks the quashing of the decision taken on 27 May 1988 and upheld on 12 June 1990 to dismiss him; a 50 per cent increase in his termination indemnity, or \$15,325.52, and payment of \$14,446.02 in lieu of three months' notice, plus 10 per cent interest a year from the date of termination to that of judgment; three years' salary in material and moral damages, plus 10 per cent interest a year from the date of termination to that of judgment; and costs and the repayment of sundry expenses.

C. In its reply UNESCO submits that his claim to three months' notice is time-barred: it told him on 27 May 1988 that his appointment would not be renewed and by telex of 29 September 1988 how much his indemnities came to.

On 10 May 1989 it notified to him the final amount of his entitlements. Neither in his internal appeal nor in his first complaint did he claim payment in lieu of three months' notice.

UNESCO argues that his other claims are barred under the res judicata rule because they formed part of his first complaint.

On the merits it points out that since on 9 November 1988 he had turned down its offer of a termination agreement that offer was no longer open. As to the three months' notice, it gave him notice of non-renewal on 27 May 1988, over four months before his termination on 15 October. So his claim to compensation under that head is without merit. Rule 109.6(d) lays no duty on the Director-General; it merely says that "The Director-General may authorize payment of salary and allowances in lieu of notice or in part thereof".

D. In his rejoinder the complainant maintains that UNESCO did not strictly comply with its Regulations and Rules and was in grave breach of duty in refusing to pay the full amounts due to him.

It is wrong to say that his claim to payment in lieu of notice is time-barred. The period of notice began only after he got a telex dated 26 September 1988 saying that the Director-General could not keep him on beyond 30 September 1988. He never surrendered entitlement to notice under Rule 109.6.

As to the receivability of his other claims he observes that although the Tribunal rejected his claims to compensation which were not directly related to dismissal it implied that UNESCO must meet any that were.

UNESCO's denying him the benefit of circular 1474 of 22 November 1985 was discriminatory. Other staff who were affected by the first set of reductions fared better: unlike him they got offers of action to alleviate the consequences.

E. In its surrejoinder UNESCO denies mistreating the complainant and observes that its reason for extending his contract for the last time, from 1 to 15 October 1988, was to allow him to arrange for repatriation.

It offered to increase his termination indemnity provided that he agreed not to challenge the Director-General's decision. So he has only himself to blame for rejecting the offer in memoranda of 7 June and 10 October 1988.

He is wrong to assume that the options in circular 1474 applied to him. It was about the exercise of redeployment in 1985, not the staff cuts made in 1988, which were the subject of circular 1583 of 23 February 1988. The cases he cites in support of his charge of discrimination came before 1988 or relate to officials in different circumstances.

UNESCO maintains that his claim to payment in lieu of three months' notice is time-barred and that his other claims are also irreceivable.

CONSIDERATIONS:

1. Judgment 1131 of 3 July 1991 ruled on the complainant's first complaint, which challenged UNESCO's decision of 27 May 1988 not to renew his appointment. On 16 December 1991 he filed an application for interpretation. It was about one specific issue, the amount of the one year's full pay which UNESCO had been ordered to pay him, and the Tribunal ruled on it in Judgment 1173 of 15 July 1992.

Some time before, on 27 April 1992, he had again put to the Organization a claim to full payment of the sums allegedly due to him on account of its decision of 27 May 1988. On 15 June 1992 the Director of the Bureau of Personnel answered that, since the Tribunal had already entertained the claim and dismissed it along with other claims of his to awards of compensation, it was res judicata. That is the decision he now impugns.

Receivability

2. The Organization contends that his complaint is irreceivable either because he has failed to exhaust the internal means of redress or because the matter is res judicata.

3. In its submission his claim to payment of three months' pay in lieu of notice is irreceivable for the former reason; although it is a challenge to the final settlement of his entitlements that was made on 10 May 1989, he never made a written protest on that score or an appeal to the Appeals Board, or even raised the matter in the

original complaint that Judgment 1131 ruled on.

He does not deny that he made no internal appeal: he just asserts that it was discriminatory and unlawful not to grant him the three months' pay in lieu of notice.

So his complaint is indisputably irreceivable under this head.

4. The Organization pleads that his other claims are irreceivable because they are res judicata.

The res judicata rule will apply where the parties, the purpose of the suit and the cause of action are the same as in the earlier case.

The parties being the same in this case, there is no difficulty over the first condition.

Identity of purpose means that what the complainant is seeking is what he would have obtained had his earlier suit succeeded. And it is not the actual wording of the decision that matters but the complainant's intent.

How far do the complainant's present claims match the ones that Judgment 1131 ruled on?

His claims now are:

(1) the disclosure by UNESCO of a memorandum showing, among other things, the number of staff dismissed or pensioned off;

(2) the quashing of the dismissal notified by letter of 27 May 1988 and confirmed on 12 June 1990;

(3) the payment of 15,325.52 United States dollars corresponding to a 50 per cent increase in the termination indemnity mentioned in UNESCO's telex of 29 September 1988 and of \$14,446.02 corresponding to the three months' notice, plus interest on both sums at the rate of 10 per cent a year from the date of termination to that of judgment;

(4) awards of three years' full pay, again plus interest, in moral damages for distress and in material damages for the Organization's failure to grant the 50 per cent increase in the indemnity and the three months' pay in lieu of notice and its failure to distribute circular 1474;

(5) an award of \$5,000 in costs; and

(6) the repayment of sundry expenses amounting to \$1,000.

5. Claims (2) and (3) have the same purpose and show the same cause of action as the claims that were numbered 11.5 and 11.13(v) in the first complaint. Since Judgment 1131 ruled on them they cannot but fail under the res judicata rule.

6. As to claim (4), what the complainant asked for in his first complaint was compensation for the premature and unlawful termination of his career, and he sought no more than the equivalent of two years' pay under that head. He also claimed, under a point numbered 11.14, interest on the amounts due, including the 50 per cent increase, as from the date of publication of the judgment. His claims presumably covered both the material and the moral injury, or at least the material injury due to failure to pay the 50 per cent increase.

The conclusion is that, though somewhat differently stated, claim (4) has much the same purpose as his corresponding claims in the first complaint. Since Judgment 1131 dismissed them, under 9, together with his other claims to compensation, claim (4) too fails under the res judicata rule.

Since his claim to three months' pay in lieu of notice is irreceivable for the reason stated in 3 above, so too is his claim to damages for the alleged injury due to the failure to pay that sum.

His claim to material damages for failure to distribute circular 1474 is made for the first time in this complaint and did not form the subject of prior appeal to the Director-General. It is irreceivable because he has failed to exhaust the internal means of redress.

7. Lastly, claims (1), (5) and (6) are receivable either because they raise an issue that Judgment 1131 did not rule on or because they relate to the costs of the present proceedings.

Claim (1)

8. The complainant asks the Organization to disclose a comprehensive memorandum stating, among other things, its policy on dismissals under Regulation 9.1.2 and Rule 109.7 and on early retirement and giving detailed information on some features of that policy.

The purpose of the decision of 27 May 1988, upheld on 12 June 1990, was to refuse renewal of the complainant's appointment. As the text made plain, there was no question of any dismissal under Regulation 9.1.2 conferring on him entitlement to termination indemnity under Rule 109.7. Nor was he put on early retirement. Besides, Judgment 1131 rejected his claims to compensation under this head.

The conclusion is that the information he wants from the texts is irrelevant and his claim must fail.

Claims (5) and (6)

9. Since his main claims fail so do his claims to costs and sundry expenses.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
E. Razafindralambo
A.B. Gardner