

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

119th Session

Judgment No. 3398

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 28 April 2012 and corrected on 27 July, UNESCO's reply dated 21 November and corrected on 7 December 2012, the complainant's rejoinder of 10 April 2013, UNESCO's surrejoinder of 23 July 2013, the complainant's further submissions of 16 October 2014 and UNESCO's final observations of 22 October 2014;

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 and the pleadings may be summed up as follows:

A. The complainant entered the service of UNESCO in 2006 in the grade D-1 post of Director of the Regional Bureau for Science and Culture in Europe, in Venice (Italy). In January 2010 allegations that the complainant's conduct was unsatisfactory were brought to the attention of the Director-General. The Internal Oversight Service (IOS) therefore investigated the matter. In its report of 26 February 2010, IOS concluded that there was no evidence to substantiate the allegations and therefore decided to close the case. In September 2010, further allegations against the complainant were submitted to IOS. The Director-General instructed IOS to investigate them and the complainant's

case was reopened. In its report of April 2011, the IOS concluded that several of his actions amounted to misconduct and recommended the initiation of disciplinary action against him.

On 27 May 2011 the complainant was informed that he was charged with engaging in actions creating a conflict of interest, violating UNESCO's procurement rules, engaging in unauthorised commercial activities and misusing the Organization's e-mail facilities. He was invited to submit his written comments, which he did on 28 June. On 2 September 2011 he was advised that his case would be referred to the Joint Disciplinary Committee. In a report issued in October 2011 the Committee concluded that, although the complainant had been negligent, he had not caused any damage to the Organization. The Committee therefore recommended that he should receive a written censure.

The complainant was informed by a memorandum of 1 February 2012 that the Director-General had decided to terminate his appointment on 15 February under Staff Rule 110.1 since, in her opinion, the complainant had breached the Standards of Conduct of the International Civil Service, Staff Regulations 1.4 and 1.6 and Staff Rule 101.5(a). On an exceptional basis he would be paid one month's salary in lieu of notice. On 19 March the complainant received a copy of the Joint Disciplinary Committee's report, which he had requested. On 26 March he submitted a protest to the Director-General seeking a review of the decision to terminate his appointment, amongst other relief.

On 28 April he filed his complaint with the Tribunal, impugning the decision of 1 February 2012.

Having been informed on 23 May that the Director-General had decided to uphold the decision to terminate his appointment, he sent, on 25 June, to the Secretary of the Appeals Board a notice of appeal by e-mail. As he had already filed a complaint with the Tribunal, he asked the Chairperson of the Board to stay the internal appeal proceedings *sine die* and said that he would indicate whether he wished to resume those proceedings once the Tribunal had delivered its judgment. As he received no reply, on 2 July 2012 he sent another e-mail containing his notice of appeal to the Board's Secretary. She

replied that his second e-mail had been “the first communication” which she had received from him.

B. The complainant submits that his complaint is receivable. He contends that, as he ceased to be a UNESCO staff member on 15 February 2012, thereafter he had no access to internal means of redress under Chapter XI of the Staff Regulations and Staff Rules, and that “he had no time” to lodge a protest against the decision of 1 February 2012 before he separated from UNESCO. From this he infers that he was entitled to file a complaint directly with the Tribunal. He considers that, as the decision of 1 February 2012 was upheld by that of 23 May 2012, his complaint is receivable in that it is also directed against the latter decision.

On the merits, he submits that in breach of Staff Regulation 9.1.1 the Special Advisory Board did not examine his case, and that the proceedings before the Joint Disciplinary Committee were tainted with several flaws. In particular, he doubts whether the Committee members actually met to discuss his case together before issuing their report which, in his opinion, contains insufficient reasons. In addition, he contends that UNESCO did not respect his rights of defence, accuses the Director-General of having disregarded the Joint Disciplinary Committee’s opinion and complains that he did not receive the latter’s report “immediately, without prompting”. He considers that the decision to terminate his appointment is tainted with errors of fact and that, under Staff Rule 109.6, he was entitled to three months’ salary in lieu of notice.

The complainant requests the setting aside of the decisions of 1 February 2012 and 23 May 2012, his reinstatement or, failing that, the payment of a sum equivalent to that of the contributions which would have been made to the Pension Fund. He also seeks redress for the material and moral injury suffered, plus interest and the product of the capitalisation of that interest. He claims costs in the amount of 10,000 euros. Lastly, he asks the Tribunal to find that, should these various sums be subject to national taxation, he would be entitled to a refund of the tax paid from UNESCO.

C. In its reply, the Organization submits that the complaint is irreceivable, because the complainant has not exhausted the internal means of redress. It states that the complainant was still a UNESCO staff member on 1 February 2012 when he was notified of the decision to terminate his appointment and that, before filing a complaint with the Tribunal, he should have complied with the provisions of the Statutes of the Appeals Board.

On the merits, UNESCO explains that, since the complainant was the subject of a disciplinary procedure, it was Staff Rule 110.2, not Staff Regulation 9.1.1 concerning the Special Advisory Board, which applied. That Staff Rule was correctly implemented. The Organization submits that the proceedings before the Joint Disciplinary Committee were not tainted with flaws and it denies that it breached the complainant's rights of defence. In addition, it contends that the Director-General, exercising her discretionary power, decided to terminate the complainant's appointment after studying the whole file, including the Joint Disciplinary Committee's opinion. In accordance with the case law, she was entitled not to follow the Committee's recommendation, provided the complainant was informed of the precise reasons for her different opinion. She did this in the decision of 1 February 2012. UNESCO emphasises that, pursuant to item 11.3, section K, paragraph 30(g), of the Human Resources Manual, the Committee's report is forwarded solely to the Director-General.

Furthermore, UNESCO, providing some examples, submits that the complainant's allegation that the decision to terminate his appointment rested on errors of fact is unfounded and that Staff Rule 109.6 applies only to staff members whose appointment is terminated under Staff Regulations 9.1, 9.1.1 or 9.1.2. Since the complainant's appointment was terminated on the basis of Staff Regulation 10.2, Staff Rule 109.6 could not be applied to him.

D. In his rejoinder the complainant contends that the texts in force at UNESCO are not sufficiently clear with regard to former officials' access to internal means of redress. He says that "in this somewhat unclear legal context" he filed his complaint on 28 April 2012 as a

precaution. He expands his arguments on the merits. He submits that the disciplinary procedure to which he was subjected was tainted with several flaws and, subsidiarily, that the decision to terminate his appointment was manifestly not in proportion with the Joint Disciplinary Committee's recommendation.

E. In its surrejoinder UNESCO maintains that the complaint is irreceivable for failure to exhaust internal means of redress, since the complainant decided "of his own accord" not to submit a detailed appeal to the Appeals Board. In addition, it considers that the "new claims" related to flaws in the disciplinary procedure are irreceivable, as the complainant did not formulate them in his complaint. Lastly, it seeks to demonstrate that the decision of 1 February 2012 was lawful and proportionate.

F. In his further submissions, the complainant produces inter alia the vacancy notice published on 4 September 2014 for the post of Director of the Regional Bureau for Science and Culture in Europe which he held before his appointment was terminated. The fact that this post has been advertised proves, in his view, that his reinstatement would not pose any problem.

G. In its final observations, UNESCO considers that, since the complainant's appointment was terminated on disciplinary grounds "calling into question his objectivity and professional integrity", he cannot be reinstated in the post which he vacated.

CONSIDERATIONS

1. 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 resisting it as are open to him under the applicable Staff Regulations. The only exception allowed to this rule is where staff regulations provide that decisions taken by the executive head of an

organisation are not subject to the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body, where there is an inordinate and inexcusable delay in the internal appeal procedure, or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see, in particular, Judgment 2912, under 6).

2. Article 7 of the Statutes of the Appeals Board reads in relevant part:

- “(a) A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General [...] within a period of two months if he or she is stationed away from Headquarters or if he or she has been separated from the Organization.
- (b) The Director-General’s ruling on the protest [...] shall be communicated to the staff member [...] within two months if he or she is stationed away from Headquarters or if he or she has been separated from the Organization.
- (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 [...] is [...] two months in the case of a staff member stationed away from Headquarters or who has been separated.”

It is clear from the terms of this provision that the official concerned may challenge termination on disciplinary grounds irrespective of the fact that he has actually separated from the Organization at the end of his period of notice.

3. The Director-General decided to terminate the complainant’s appointment on disciplinary grounds on 1 February 2012. The complainant was immediately notified of this decision, which took effect on 15 February 2012, the date on which he ceased to be a staff member of the Organization. If he intended to challenge this decision, he should have used the internal means of redress defined in Article 7 of the Statutes of the Appeals Board, unless he had obtained the Director-General’s agreement to his direct filing of a complaint with the

Tribunal, a possibility for which provision is made in Staff Rule 111.2. No such agreement was reached in this case.

4. On 26 March 2012 the complainant submitted a protest to the Director-General in which he said that he contested the decision of 1 February 2012 and requested a review thereof. The complainant filed his complaint with the Tribunal on 28 April 2012 before UNESCO had taken a decision on that protest.

5. On 23 May 2012, in other words within the time limit established in Article 7(b) of the Statutes of the Appeals Board, the Director of the Bureau of Human Resources Management apprised the complainant of the Director-General's decision to dismiss his protest and uphold the termination of his appointment.

In his complaint, the complainant asks the Tribunal to set aside both the decision of 1 February 2012 and that of 23 May 2012.

6. The complaint is not therefore receivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal. As UNESCO recognises and as the decision of 23 May 2012 shows, the complainant did have access to the internal means of redress provided by the Statutes of the Appeals Board in order to challenge the decision to terminate his appointment. Contrary to the submissions in his rejoinder, the texts in force at UNESCO which deal with internal appeals are neither obscure nor contradictory. Although they refer to staff members, they make it clear that these terms also apply to persons who are affected by a decision in their capacity as officials, irrespective of whether they thereafter remain in the service of the Organization.

7. It was therefore incumbent upon the complainant to take the action prescribed in Article 7(c) of the Statutes of the Appeals Board. This is what he did when, on 25 June 2012, he filed a notice of appeal against the decision of 23 May 2012, in which he also requested that the proceedings thus initiated be stayed until the Tribunal had ruled on the complaint which he had filed with it. Before the expiry of the two-month time limit laid down in the aforementioned

Article 7(c), he again wrote to the Organization to inform it that it had not acknowledged receipt of his notice of appeal. In her e-mail of 2 July 2012 the Secretary of the Appeals Board merely indicated that she had not received the notice of appeal and that she acknowledged receipt of the copy thereof. There is nothing in the file to show that the Appeals Board took a decision on this request for a stay in proceedings, which it received before the expiry of the prescribed time limit. The Organization is 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 does in its surrejoinder.

In these circumstances, having regard to the Organization's duty to act in good faith and duty of care, UNESCO will 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 this judgment.

8. The complaint must be dismissed insofar as it is directed against the two decisions of 1 February and 23 May 2012. The defendant organisation must, however, be invited to comply with consideration 7, above.

9. All other claims will be dismissed, including the claim for costs.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organization is invited to comply with consideration 7, above.

In witness of this judgment, adopted on 4 November 2014,
Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller,

Vice-President, and Sir Hugh A. Rawlins, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

GIUSEPPE BARBAGALLO CLAUDE ROUILLER HUGH A. RAWLINS

DRAŽEN PETROVIĆ