

L. (No. 4)

v.

UNESCO

123rd Session

Judgment No. 3760

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms L. J. L. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 31 January 2014 and corrected on 21 February, UNESCO's reply of 8 August, the complainant's rejoinder of 22 October 2014 and UNESCO's surrejoinder dated 2 February 2015;

Considering the applications to intervene filed between 31 January 2014 and 20 December 2014 by:

[Names removed]

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 amend the Rules of the Medical Benefits Fund (MBF).

The complainant is a retiree of UNESCO and a participant in the MBF, which is a medical insurance fund. Pursuant to a Resolution of the UNESCO General Conference of late 2011, the Director-General asked an external consulting firm to examine the management of the MBF, in particular with regard to the need to enhance its expertise and independence.

The firm submitted a report to the Director-General in July 2012 recommending in particular that the decision-making process of the MBF be streamlined, and that the General Assembly of Participants of the MBF “no longer vote on new rules, amendments and measures that affect[ed] the MBF”. At the 190th session of the UNESCO Executive Board in October 2012 the Director-General reported the firm’s conclusions. The Executive Board recommended that the Director-General consider the proposed new governance structure with a view to amending the Rules of the MBF in accordance with the procedures established in those Rules.

An extraordinary meeting of the General Assembly of Participants of the MBF was convened on 4 September 2013 after it had received the report of the external consulting firm. In a Resolution it noted that the proposed new Rules would fundamentally change the status of the MBF. It also noted that participants would no longer have anything to do with the decision-making process as the Board of Management and the General Assembly of Participants were to be abolished. It therefore considered that it was premature to take a decision and recommended that UNESCO External Auditor be requested to undertake a full performance audit of the MBF, including the costs and benefits of the proposed changes.

The Director-General reported to the General Conference during its 37th session. In document 37C/38 of 4 November 2013, paragraphs 1 to 8, she indicated that in order to strengthen the financial sustainability of the MBF and the effectiveness of the governance structure, the MBF needed to establish a framework of governance that was independent and objective, which basically entailed a modification of the management of the MBF. She outlined the proposals made by the Administration pursuant to the recommendations of the external consulting firm as well as the fact that the General Assembly of Participants had not approved them as required by Article 5.1, paragraph 7, and Article 5.2, paragraph 6, of the MBF Rules. The proposed amended MBF Rules were set out in an addendum.

On 19 November 2013 the General Conference adopted Resolution 85, point 1, by which it decided to amend the Rules of the MBF as set out in the addendum to the Director-General’s report.

The complainant filed a complaint directly with the Tribunal impugning, on her complaint form, the decision represented by document 37C/38, though in her brief she states that the complaint is directed against paragraphs 1 to 8, 22(1) and (2) of the document and against Resolution 85, point 1.

The complainant asks the Tribunal to set aside the implementation of Resolution 85, point 1, of the General Conference, to order the Director-General to respect the Rules of the MBF and to continue the consultation with the participants of the MBF in accordance with Articles 5.1 and 7.1 of the MBF Rules. She also claims moral damages and costs.

UNESCO asks the Tribunal to dismiss the complaint, and the applications to intervene, as irreceivable or, alternatively, devoid of merit.

CONSIDERATIONS

1. The complainant impugns two alleged decisions: the 4 November 2013 decision, 37C/38, and the General Conference's Resolution 85 taken at its 37th session. The complainant states that the retired UNESCO staff members, all participants in the MBF, are contesting the decisions. On this latter point, it is observed that the complainant is the only retired staff member who filed a complaint. However, there are 100 applications to intervene. UNESCO acknowledges that they are all retirees and participants in the MBF and as such are in the same position in fact and law as the complainant.

2. The determinative issue in this complaint concerns receivability. Relying on Article VII, paragraph 2, of the Tribunal's Statute the complainant submits the "Tribunal has decided that a complainant may plead the unlawfulness of an administrative decision affecting a class of officials, even if it has been subsequently approved by the Governing Bodies of an international organization, i.e. the General Conference and the Executive Board of UNESCO".

3. The complainant also argues that in submitting document 37C/38, comprising the new MBF Rules, to the General Conference for approval

against the decision of the General Assembly of Participants, the Director-General acted *ultra vires* by failing to respect the specific procedure for the review and approval of amendments in the MBF Rules. Therefore, the decision to submit document 37C/38 is unlawful even if the General Conference did approve it later in Resolution 85.

4. Relying on Judgments 1329, under 7, and 2571, under 1, the complainant contends that even if the Director-General's action might not have been *ultra vires*, the Tribunal allows an international civil servant to challenge a decision that affects her or him directly and which is derived from a general measure.

5. The alleged decision of 4 November 2013 has its origins in the instructions the General Conference gave to the Director-General at its 36th session in November 2011. At the time, the Director-General was asked to retain a health insurance consulting firm and, based on the consulting firm's recommendations, conduct a review of the governance of the MBF. The General Conference requested the Director-General to amend the Rules of the MBF accordingly and to report to the Executive Board and to the General Conference at its 37th session. In keeping with the instructions, the Director-General reported to the Executive Board and following additional consultations, for reasons not material to the issue under discussion, submitted the 4 November 2013 document, 37C/38, to the General Conference. As detailed above, the Director-General's report of 4 November 2013 on the actions taken in response to the General Conference's instructions does not constitute a decision. It is an action taken in conformity with the Director-General's duties pursuant to the Organization's regulations, and not an administrative decision.

6. It is not disputed that a UNESCO former staff member may file a complaint directly with the Tribunal. The complainant relies on Article VII, paragraph 2, of the Tribunal's Statute as support for the proposition that a "complainant may plead the unlawfulness of an administrative decision affecting a class of officials". Article VII, paragraph 2, of the Tribunal's Statute reads:

“To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.”

Article VII, paragraph 2, serves to establish the time limit and when the time limit starts to run for filing a complaint against two types of decisions. The Tribunal has recognised that the words “a decision affecting a class of officials” might, viewed in isolation, be treated as a reference to a general decision, whether or not it affects individual rights (see Judgment 1134, under 4). However, any particular provision of the Statute must be construed having regard to the Statute as a whole. The jurisdiction of the Tribunal is, under the Statute construed as a whole, concerned with the vindication or enforcement of individual rights (see, for example, Judgment 3642, under 11). The reference to “a decision affecting a class of officials” is to a decision which may have affected the rights of a number of individual officials in the same or a similar way.

7. At this point it is convenient to observe the complainant’s submission that an international civil servant may challenge a general decision that affects her or him directly. As the Tribunal stated in Judgment 3427, under 31:

“The [...] case law is clear that ‘a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to [the complainant]’ (see Judgment 2953, under 2). And, it is equally clear that a complainant may challenge the lawfulness of a general decision forming the legal basis of the individual decision which the complainant is seeking to have quashed (see Judgment 2793, under 13, and Judgment 3428, under 11, and the judgments cited therein).”

8. The remaining question is whether the complaint in relation to Resolution 85 discloses a cause of action. As the Tribunal reiterated in Judgment 3426, under 16, “[t]o be receivable a complaint must disclose a cause of action”.

9. Although Resolution 85 provided for the amendment of the rules of governance of the MBF, the Resolution was not implemented until 21 October 2014 by Administrative Circular AC/HR/43. Until the

implementation of the Resolution it had no effect on the participants in the MBF. In these circumstances, it is clear that the complaint regarding Resolution 85 does not show a cause of action and is, therefore, irreceivable. It is not necessary in the present case to consider the question as to whether the decision implementing the Resolution directly affected the individual participants in the MBF. As the complaint will be dismissed, the applications to intervene will also be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 2 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ