

EIGHTY-SECOND SESSION

In re de Assis

Judgment 1589

The Administrative Tribunal,

Considering the complaint filed by Miss Sérafina de Assis against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 30 January 1996 and corrected on 22 April, UNESCO's reply of 17 May, the complainant's rejoinder of 16 July and the Organisation's surrejoinder of 27 August 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a citizen of Angola who was born in 1940, joined UNESCO on 6 October 1977. She held a one-year appointment at grade P.2 in the Division of Human Settlements and Socio-Cultural Environment and had it extended several times. In 1988 UNESCO froze her post for lack of money. Having failed to find her another job, it decided on 23 September 1988 to end her appointment but postponed doing so because she was by then in poor health.

By a memorandum of 15 November 1988 the acting Director of the Bureau of Personnel offered her on the Director-General's behalf six months' special leave with pay and then agreed separation as from 15 May 1989. She accepted the offer on 21 November 1988 but reneged in letters of 9 February and 14 April 1989. On 5 May 1989 she submitted a doctor's certificate. The upshot was that UNESCO gave her several short extensions. Having used up her entitlements to annual leave and to sick leave on full pay, she was put from 27 April 1990 on sick leave at half pay and from 8 December 1990 on special leave without pay. Under Article 15.1.1 of its rules, however, the Medical Benefits Fund paid her the equivalent of half pay.

On the advice of its medical officer UNESCO asked its Staff Pension Committee on 28 February 1991 whether she might get a disability benefit. The Committee decided to grant her the benefit as from 8 December 1990. The Organization informed her in a letter of 27 July 1992 signed by the chief of the Personnel Administration Division that her case would be put to a personnel advisory board to see whether her appointment was to be terminated on grounds of ill health.

By a letter of 14 August 1992 the complainant said she would like to appear before the board, but the chief of the Personnel Administration Division told her in a letter of 18 November that on medical advice her request was refused. The Senior Personnel Advisory Board (SPAB) met on 27 November and recommended the termination of her appointment on grounds of ill health.

By a letter of 14 December 1992 the Director of the Bureau of Personnel informed her that her appointment was to be terminated under Staff Regulation 9.1 for reasons of health as from 7 December 1990, the disability pension having been granted to her as from the 8th; he said that she was also entitled under Staff Rule 109.7(a) and (b) to a termination indemnity equivalent to "eleven and one-twelfth months of pay, less the amount of the disability pension paid for the corresponding months by the United Nations Joint Staff Pension Fund".

By a letter of 9 February 1993 she lodged an internal "complaint" with the Director-General against that decision. By a memorandum of 26 February she filed notice of appeal with the secretary of the Appeals Board. By a letter of 5 March the Director of the Bureau of Personnel told her that the Deputy Director-General confirmed the decision on the Director-General's behalf. In her brief dated 29 October 1993 she also said that the Organisation had downgraded her post from P.3 to P.2 and refused her any further step in grade. In its report of 27 June 1995 the Appeals Board recommended that the Director-General reverse his decision on the grounds that Staff Rule 109.7(b)

did not allow retroactive termination. In a letter of 30 October 1995 -- the impugned decision -- the Director-General rejected that recommendation but in a departure from practice allowed her claim to the refund of the costs of travel on home leave in 1984.

B. Citing Rule 109.11(a), which is about the date at which termination takes effect, the complainant objects to the retroactive termination of her appointment. The regular extensions she got after 27 April 1990 and her correspondence with UNESCO show that there was never any question of retroactive termination.

To dock the termination indemnity offends against the rules of the international civil service. Such indemnity being a form of compensation, UNESCO may not make deductions from it which have nothing to do with compensation, particularly since she has to pay back to the Medical Benefits Fund the sums it let her have from 8 December 1990, when she went on half pay.

She asks the Tribunal to quash the impugned decision, save as to the refund of the costs of her travel on home leave in 1984; to award her compensation in lieu of three months' notice, termination indemnity equivalent to twelve months' pay, two months' pay in lieu of home leave, fourteen weeks' pay by way of repatriation grant, and the "amounts set out in her original claim".

C. In its reply the Organization submits that the complainant's claims that are not directly linked to the impugned decision are irreceivable, both because they are time-barred and because she has failed to exhaust her internal remedies.

It denies owing her three months' pay in lieu of notice: the indemnity due to her is for three months' leave without pay. The termination indemnity she is entitled to under Rule 109.7(a) is not twelve months', but eleven and one-twelfth months' pay since she had only thirteen years and two months' service. The repatriation grant she claims was refused because she failed to qualify for it under Rule 109.9(h). As for compensation for accrued annual leave, it came to 18 days and UNESCO has already made it over to her.

The Organization ended her appointment under Regulation 9.1 and Rule 109.7(b), which allow retroactive termination from the date from which disability benefit was due. Rule 15.1.3 of the rules of the Medical Benefits Fund requires her to pay back to the Fund the sums it let her have in half pay from 8 December 1990.

D. The complainant enlarges on her pleas in her rejoinder. She describes the retroactive termination as "monstrous". There was breach of due process in not letting her attend the SPAB's meeting. She acknowledges, however, that she no longer has any reason to claim the repatriation grant.

E. In its surrejoinder UNESCO presses its pleas, maintaining that she was refused leave to appear before the SPAB by virtue of paragraph 8 of its own rules and on medical advice. As for the docking from the termination indemnity of the amount she owed in disability pension under Rule 109.7(b), UNESCO points out that it is bound to apply the Staff Rules and Regulations: *patere legem quam ipse fecisti*.

CONSIDERATIONS

The facts

1. The complainant joined UNESCO on 6 October 1977. She held several posts at grade P.2 and reached step 10 in that grade.

In 1988 her health declined. Having used up her entitlements to sick leave at full pay, she was put on leave with half pay as from 27 April 1990. As from 8 December 1990 she was on leave without pay but got amounts equivalent to half pay from UNESCO's Medical Benefits Fund. On 9 February 1992 she signed the following statement:

"I, Serafina de Assis, hereby promise to pay back to the UNESCO Medical Benefits Fund any amounts paid to me under Article 15 of its rules if the United Nations Joint Staff Pension Fund grants me retroactive payment of periodic benefits."

Rule 15.1.3 of the Fund's rules reads:

"The half remuneration provided for under this Article in the event of temporary incapacity shall not be paid concurrently with an early

retirement pension or a disability benefit from the United Nations Joint Staff Pension Fund; however, if that pension or benefit amounts in full to less than half the remuneration of the participant concerned, the Fund shall grant a benefit to make up the difference."

By a letter of 27 July 1992 the Personnel Administration Division told the complainant that UNESCO proposed ending her appointment on grounds of ill health after consulting a personnel advisory board since its Staff Pensions Committee was granting her a disability benefit under Article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

In correspondence it reminded her -- and she did not object -- that in keeping with usual practice she would have to pay back the sums made over in half pay from the Medical Benefits Fund if she received disability benefit for the same period.

The Senior Personnel Advisory Board (SPAB) met on 27 November 1992. On the chief medical officer's advice the complainant was not allowed to attend.

2. A letter of 14 December 1992 from the Director of the Bureau of Personnel and a personnel action form (93-HQ/02) told her that her appointment was terminated for reasons of health under Staff Regulation 9.1 as from 7 December 1990. Ten notices of personnel action having been retroactively reversed, she became entitled to:

18^{1/2} days' pay in lieu of annual leave;

11^{1/12} months' pay as termination indemnity under Rule 109.7(b), less the amounts paid by the United Nations Joint Staff Pension Fund in disability benefit for the corresponding months;

4^{1/3} weeks' pay as repatriation grant for the period from 6 October 1977 to 30 June 1979, payment of any further amount due under this head up to 7 December 1990 (11^{2/3} weeks) being subject to Rule 109.9(h).

Rule 109.7 states:

"Indemnity of termination

(a) Upon termination under Regulation 9.1 of an indeterminate appointment, or of a fixed-term appointment after six years or more of service, owing to the abolition of a post or reduction of staff, a termination indemnity, calculated on the basis of the number of years and months of service completed, shall be payable in accordance with the following schedule ...

(b) The same indemnity shall be payable in the case of termination for reasons of health under Regulation 9.1, except that its amount shall be reduced by the amount of any disability benefit the staff member receives for the corresponding months from the United Nations Joint Staff Pension Fund."

The complainant lodged an internal appeal against the decision of 14 December 1992.

Against the Appeals Board's recommendation the Director-General rejected the appeal in a letter he sent her on 30 October 1995. But he said that in the circumstances he agreed to the Organization's refunding the costs of her travel to Lisbon and back on home leave in 1984, political unrest and civil war having prevented her from going to Angola.

3. She is now challenging the decision of 14 December 1992 as confirmed on 30 October 1995 on appeal. She submits that the retroactive termination of her appointment was unlawful. Though she does not object to termination on grounds of ill health, she believes that she should have been given due notice. She claims payment of the full termination indemnity without deduction of the disability benefits from the United Nations Joint Staff Pension Fund. UNESCO still owes her sick leave. She admits that she is too late to claim repatriation grant; she contends that the Medical Benefits Fund did not cover the costs of her medical treatment from 1990 to December 1992. She believes that the Organization ought to have granted her promotion.

The Organization submits that her claims to promotion are irreceivable because they are out of time and she has therefore failed to exhaust her internal remedies. Several claims cannot be at issue. Thus the Director-General has agreed to meet the costs of her travel on home leave in 1984. She has accepted liability for repayment of the disability benefits from the Medical Benefits Fund. And she has acknowledged she is out of time in claiming the repatriation grant. As for her objections to retroactive termination, the Organization answers that it is required by

Rule 109.7 and is in line with precedent: Judgment 595 (*in re* Benyoussef).

Receivability

4. The complainant's claim to promotion is irreceivable because it is out of time and she has failed to exhaust the internal means of redress. UNESCO has met her claim to repayment of the costs of travel to Lisbon and back. And refund of the sums made over to her in half pay by the Medical Benefits Fund is no longer at issue since she has undertaken to repay them.

So the only material issues are her objections to retroactivity, her claim to compensation in lieu of notice, the reckoning of her termination indemnity -- as to the relevant period and the sums to be deducted -- and compensation for accrued leave.

The SPAB proceedings are irrelevant since she is not challenging termination as such. So there is no need to entertain her objection to not letting her appear before the SPAB.

The merits

5. There is a rule of international civil service law that forbids retroactive change in the legal status of staff save in circumstances that are immaterial here. A decision may alter their status only for the future and after they have had due notice: see Judgments 51 (*in re* Poulain d'Andecy) under 5; 963 (*in re* Niesing, Peeters and Roussot), again under 5; 1012 (*in re* Aelvoet No. 2 and others) under 6; 1020 (*in re* Saunoi) under 12; 1130 (*in re* Godin and others) under 2; 1530 (*in re* Haenni and Perruchi-Haenni) under 8; and 1531 (*in re* Wassef No. 9) under 8. That, too, was the thrust of Judgment 595: the rule meant -- said the Tribunal -- that termination for reasons of health affected only the complainant's future and must be duly notified; yet an organization might go back to a date prior to that of termination to see whether it was warranted for reasons of health, since that was obviously an issue it had to determine before taking its decision to terminate.

That rule holds good here. Indeed Rule 109.7 is quite in line: it does not say that the date of termination and the start of disability benefit must coincide, let alone that the termination must be retroactive as from the date already set for the start of the benefit. Rule 15.1.3 of the rules of the Medical Benefits Fund actually makes it plain that the two may overlap.

Confirming as it does the retroactivity of the termination of the complainant's appointment the impugned decision cannot stand. The termination as such is not at issue. The mere fact that the date set for termination was not the right one does not invalidate the whole decision: it may take effect from the date at which termination was valid. UNESCO must therefore set a new date for termination that observes the prescribed period of notice and reckon the complainant's entitlements accordingly. She does not deny liability for repayment to the Medical Benefits Fund of the sums it let her have in half pay. On that score she is right: the repayment is not an exception to the rule against retroactivity but the consequence of a decision that was conditional from the outset. But she argues that Rule 109.7(b) is unlawful in that it prescribes the deduction of disability benefit from the termination indemnity. On that score she is wrong: there is no rule requiring an organisation to pass on insurance benefits to a member of its staff.

One further comment is worth making about compensation for the period of notice: no compensation can be due for loss of pay in any period for which the Organization was not required to pay the staff member anyway.

The parties still disagree on the issue of accrued leave. The complainant says it came to two months, UNESCO to 18 days. In its surrejoinder the Organization submits that the burden is on her to show that it owes her for the greater number of days. Since the case is sent back, that issue too is referred so that the Organization may offer her the opportunity of discharging that burden.

6. The complainant is entitled to an award of costs, and the amount is set at 15,000 French francs.

DECISION:

For the above reasons,

1. The impugned decision is set aside insofar as it took effect at 7 December 1990.

2. The case is sent back for the Organization to determine the complainant's entitlements under this judgment and to reconsider the issue of accrued leave.

3. The Organization shall pay her 15,000 French francs in costs.

4. Her other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

Michel Gentot
E. Razafindralambo
Egli
A.B. Gardner