

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P.
v.
UNESCO

121st Session

Judgment No. 3579

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. P. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 July 2013 and corrected on 4 September, UNESCO's reply of 14 January 2014, the complainant's rejoinder of 29 April and UNESCO's surrejoinder of 8 August 2014;

Considering Article II, paragraph 5, 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 complains of a breach of his "procedural rights" before the Appeals Board, the discontinuation of two elements of his mobility and hardship allowance (hereinafter "mobility allowance") and harassment.

On 1 July 2003 the complainant, who held a fixed-term appointment as a Senior Programme Specialist, at grade P-5, in the Culture Sector, at UNESCO's Headquarters in Paris, was transferred to the UNESCO Office in Cairo (Egypt). He then received a mobility allowance. He was informed by a memorandum of 31 January 2007 that, as from the next day, his post would be downgraded from P-5 to P-3 in consequence of the restructuring of the Culture Sector.

On 21 December 2006 the complainant had already stated that, in the context of that restructuring, he was “prepared to consider any proposal [...] regarding a possible transfer”. In an e-mail of 17 December 2007 he asked the Director of the Bureau of Field Coordination to consider the possibility of reassigning him to Headquarters. The reason which he gave for this request was that the state of health of his mother, who lived in Paris, was worrying and that he wished “to take proper care of her”. The following day, the Director replied that she was unable to offer him a post within the aforementioned Bureau and that he should discuss the matter with the Culture Sector. She added that, having regard to his “personal circumstances”, the Administration would “probably examine the terms of a negotiated departure sympathetically”.

The complainant was informed by a letter of 4 August 2008 that the Director-General had decided that “rotation [would] be applicable to all international professional staff” as from 1 October 2008. Since the complainant had exceeded the standard duration of assignment to Cairo, he was asked to name the “place and/or region” to which he wished to be assigned. On 16 September he indicated that he wished to be assigned to Paris.

On 17 December 2008, having noticed that, since July 2008, UNESCO had no longer paid him the mobility and “household non-removal” elements of his mobility allowance, the complainant asked the Administration for an explanation of the reasons for this “disappearance”. On the next day he received the reply that payment of these two elements ceased after five years of continuous service at the same duty station. It was also explained to him that, owing to a technical problem, he had not been informed of this measure in a timely manner, but that a notice of personnel action had just been sent to him.

On 12 January 2009 the complainant wrote to the Deputy Director-General to draw his attention to the fact that he had been requesting a reassignment “for more than a year and a half” without success. He also asked UNESCO to resume the payment of the two above-mentioned elements and to reimburse him for the outstanding amounts of the allowance. On 18 April the Deputy Director-General replied that

payment of the two aforementioned elements had been discontinued on the basis of Staff Rule 103.11(b). Furthermore, he explained to the complainant that no post matching his profile was vacant or likely to become vacant in the near future at Headquarters and that, as he was due to retire within the following 12 months, it was not “a good moment” to contemplate his transfer to another office. He also advised the complainant that, if he so wished, he could write to the Director of the Bureau of Human Resources Management to request early retirement. In an e-mail of 30 April 2009 the complainant pointed out that a competition had been opened for several posts in the Cultural Sector in Paris which might have been suitable for him. In addition, he said that he did not wish to take early retirement which, in his opinion, had been proposed to him “for the last six years with harassing insistence” and he alleged that his assignment away from Headquarters was “disguised vengeance resulting in a form of exile”.

On 17 June 2009 the complainant submitted a protest to the Director-General challenging the decision of 18 April. Having received no reply, he sent a notice of appeal to the Secretary of the Appeals Board on 27 August 2009. He retired on 30 April 2010.

On 24 July 2010 the complainant filed his detailed appeal. He submitted that UNESCO had failed to comply with several provisions of Administrative Circular No. 2191 of 29 September 2003 entitled “Integrated policy on recruitment, rotation and promotion”, and he requested the cancellation of the decision refusing to reassign him to Headquarters and 10,000 euros in compensation for the moral injury suffered on this account. He also contended that the decision to discontinue the payment of the two above-mentioned elements of his mobility allowance was unlawful and he requested that it be rescinded and that he be paid a sum corresponding to the amounts which he should have received until he left Cairo, together with interest. Lastly, referring to the downgrading of his post, the withdrawal from the Draft Programme and Budget for 2006-2007 of the programme for which he was responsible and various other irregularities, the complainant alleged that he had been harassed and requested the payment of moral damages in the amount of 10,000 euros. The

Appeals Board heard the complainant on 15 November 2012 and issued its report on 11 December 2012. It found that in order to arrive at any conclusion in respect of the allegations of harassment, it would be necessary to carry out an investigation, but that the relevance of such an investigation appeared doubtful. However, noting that the complainant had been assigned to Cairo for some 20 months longer than the standard duration of assignment to that city, it recommended that he be granted an *ex gratia* payment corresponding to half of the amount of the mobility allowance for a period of 20 months, plus interest.

The complainant was informed by a letter of 25 March 2013 that the Director-General did not consider that his rights had been infringed and that she could not therefore accept the Appeals Board's recommendation. That is the impugned decision.

The complainant requests the setting aside of the decision refusing to reassign him to Headquarters and 30,000 euros in compensation for the moral injury suffered on this account. He also requests the setting aside of the decision to discontinue the payment of the two above-mentioned elements of his mobility allowance and an amount equal to that which should have been paid to him under this head, plus interest. He claims 15,000 euros in compensation for the moral injury suffered as a result of the downgrading of his post. In addition, he complains that his dignity was undermined by the unilateral withdrawal of the programme for which he was responsible from the Draft Programme and Budget for 2006-2007 and he requests 10,000 euros in compensation for the ensuing moral injury. He also claims compensation for the harassment which he considers that he suffered and, "subsidiarily", 5,000 euros in compensation for breach of his "procedural rights". Lastly, he claims costs in the amount of 5,000 euros.

UNESCO submits that the complaint should be dismissed as unfounded.

CONSIDERATIONS

1. The complainant “subsidiarily” challenges the lawfulness of the procedure followed by the Appeals Board. Since this claim is unrelated to the main issue raised by the complaint, it will be treated separately at the outset.

2. Paragraph 14 of the Statutes of the Appeals Board stipulates that this advisory internal appeal body must hold a hearing as soon as possible, but no later than two months after the final date for making written submissions. In the present case, the exchange of written submissions to the Appeal Board ended with the filing of the Organization’s surrejoinder dated 30 November 2011, which the Secretary of the Appeals Board received no later than on 9 December 2011. The hearing should therefore have been held by 9 February 2012 at the latest, but the date set for it by the Appeals Board was 6 June 2012. At the request of the complainant, who had to undergo a medical examination on that day, the hearing was postponed and it finally took place on 15 November 2012. The complainant states that he would have been able to attend the hearing if the date for it had been set in accordance with paragraph 14, for “[his] health problems did not arise until well after” February 2012.

3. UNESCO does not clearly explain why the hearing was initially scheduled for a date almost four months after the expiry of the time limit laid down in the Statutes. It merely submits that this delay is not unreasonable and that it had no impact on the complainant’s situation, because he had retired some two years earlier. It adds that, since the time limit for filing his submissions had been extended on several occasions at his request, he can hardly “complain about the unreasonable length of the internal appeal proceedings”, which indeed took more than three and a half years from the filing of the notice of appeal until the date of the impugned decision.

These arguments are completely irrelevant, because the status of the complainant as a retired official and his earlier conduct during the appeal proceedings cannot justify extending the time limit established in the Statutes of the Appeals Board for the holding of a hearing.

4. Contrary to the view apparently held by the defendant organisation, an authority which does not abide by a mandatory legal time limit cannot plead in its defence that the staff member concerned remained silent or took no action. It was not therefore incumbent upon the complainant to remind the Appeals Board immediately of its duty to abide by the time limit prescribed by paragraph 14 of its Statutes.

It is true that complainant could have complained of the failure to abide by this statutory time limit before the Appeals Board, but he appears on the contrary to have accepted, at least implicitly, that the hearing would be held after the required date.

Nevertheless, the Tribunal finds that, by failing to convene a hearing within the prescribed two-month time limit, the Organization unlawfully disregarded the provisions of paragraph 14 of the Statutes of the Appeals Board, thereby breaching the principle of *tu patere legem quam ipse fecisti*, which requires every authority to abide by the rules which it has itself established (see, for example, Judgment 3357, under 20).

The complainant is therefore entitled to moral damages under this head.

5. Having been transferred to the UNESCO Office in Cairo on 1 July 2003, the complainant was granted a mobility allowance in accordance with Staff Rule 103.11.

In the version in force on that date, this provision stipulated in subparagraph (b) that “[a]fter five years of continuous service at the duty station, the mobility [...] allowance shall [...] be reduced”. Subparagraph (d) gave the Director-General the possibility, under exceptional circumstances, of extending the payment of the “household non-removal” element of this allowance by two years.

Following an amendment of Staff Rule 103.11 which entered into force on 31 July 2007, subparagraph (b) of this provision stipulated that after five years of continuous service at the same duty station, payment of the mobility element and of the “household non-removal” element would be discontinued. The aforementioned subparagraph (d) was deleted as from that date.

6. The complainant received the mobility allowance for the statutory five-year period, in other words until July 2008. However, from that month onwards, in accordance with Staff Rule 103.11(b) as amended on 31 July 2007, he no longer received the mobility and “household non-removal” elements of the allowance.

Apart from criticising the manner in which he was informed of the decision to discontinue the payment of these two elements – a matter which, for the reasons set out below, cannot be examined here – the complainant submits that, since the deletion of Staff Rule 103.11(d) did not apply to him, he had an acquired right to continue to receive the “household non-removal” element for a further two years.

7. It is unnecessary to determine whether the continued payment of the “household non-removal” element after five years of service in the same duty station constituted a fundamental term of employment, because the plea based on a breach of acquired rights is unfounded for another reason.

It is plain from the clear wording of the former Staff Rule 103.11(d) that the Director-General had the discretion to determine whether exceptional circumstances existed which would warrant extending the payment of the “household non-removal” element for two years. When the complainant was transferred to the UNESCO Office in Cairo he therefore had no guarantee that this element would be paid to him for more than five years. Nor does he claim that he subsequently received any assurance to that effect.

As for the second argument put forward by the complainant with regard to the discontinuation of the two aforementioned elements, it

must be found that, to the extent that it is comprehensible, it is devoid of merit.

8. All the complainant's other pleas are related to the circumstances and consequences of his transfer to the UNESCO Office in Cairo and to the refusal to reassign him to Headquarters before he reached retirement age. The complainant essentially submits that UNESCO's decisions to deny his repeated requests and to downgrade his post undermined his dignity and stemmed from the personal animosity of his supervisors which led them to flout the principles governing rotation policy at UNESCO as set forth in particular in an administrative circular. The complainant does not claim compensation for any material injury which the unlawful decisions in question might have caused him, but only compensation for the moral injury resulting from the unyielding attitude of UNESCO which, he contends, simply wanted to keep him away from Headquarters and to spur him into taking early retirement. Thus formulated, this criticism is identical to that regarding the harassment to which the complainant alleges he was subjected and which, he says, resulted from "all the different administrative decisions in this case".

9. In an e-mail to the Deputy Director-General of 12 January 2009, the complainant had deplored the "surrealistic situation" which he had faced since his assignment to Cairo. On 30 April 2009 he again wrote to him underscoring the fact that he was the victim of "personal animosity" and that he had been urged to take early retirement "for the last six years with harassing insistence". He also held that his assignment to Cairo was "disguised vengeance".

The Appeals Board noted in paragraph 66 of its report dated 11 December 2012 that:

"In order for the Board to be able to pronounce itself on the harassment allegations, a formal investigation under the Organization's Anti-Harassment Policy would need to be carried out."

However, the Board expressed doubt as to the relevance of such an investigation.

The Tribunal finds that the complainant did not follow the rules set out in Administrative Circular No. 2232 entitled “Anti-harassment policy”. In addition, since neither his e-mail of 12 January 2009 nor that of 30 April may be regarded as a complaint of harassment, UNESCO cannot be said to have failed in its duty of care by not implementing the procedure applicable to harassment complaints. Moreover, the complainant has not provided any evidence that the measures he contests before the Tribunal and which form the basis for his allegations of harassment were unlawful. The complaint must therefore be dismissed insofar as it concerns these allegations.

10. The complainant is entitled to damages for the moral injury which he suffered on account of the flaw identified under 4, above. The Tribunal sets them *ex aequo et bono* at 3,000 euros.

11. As the complainant succeeds in part, he is entitled to costs, which will be set at 1,000 euros.

DECISION

For the above reasons,

1. UNESCO shall pay the complainant moral damages in the amount of 3,000 euros.
2. It shall also pay him 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER GIUSEPPE BARBAGALLO DOLORES M. HANSEN

DRAŽEN PETROVIĆ