

A. B. and H.

v.

UNESCO

123rd Session

Judgment No. 3762

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs F. A. B. and Mr K. J. W. H. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 January 2015, UNESCO's single reply of 8 June, the complainants' rejoinder of 12 August and UNESCO's surrejoinder of 30 November 2015;

Considering the applications to intervene filed between 25 March 2015 and 12 August 2015 by:

[Names removed]

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

Having examined the written submissions;

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

The complainants challenge a Circular that implements amendments to the Rules of the Medical Benefits Fund (MBF).

The complainants are retirees of UNESCO and participants 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 consultant 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.

On 21 October 2014 UNESCO issued Circular AC/HR/43 (hereinafter Circular No. 43) which stated that the General Conference had approved changes to the governance structure of the MBF relating to Sections V, VI and VII of the MBF Rules. The amendments and consequential changes were highlighted in the attached amended version of the MBF Rules. The key changes were explained briefly in the Circular. UNESCO subsequently published, on 3 November 2014, Circular IC/HR/73 (hereinafter Circular No. 73) calling for nominations for the election of members of the new Advisory Board of the MBF for a three-year period from 2015 to 2017. On 22 January 2015 the complainants filed a complaint directly with the Tribunal impugning Circular No. 73 which informed them that all MBF participants could stand for election to the Advisory Board of the MBF.

The complainants ask the Tribunal to quash Circular No. 43 and the amended MBF Rules it comprises. They also ask the Tribunal to consider that the rights enshrined especially in Articles 1, 4.3.2, 4.4, 4.5, 4.9, 4.11, 4.12, 4.13, 5.1, 5.2, 5.3(e), 5.5, 6.2.4, 6.4, 6.9 and 7.1 of the MBF Rules of 2008 are acquired rights and to order UNESCO to resume the consultation process with the participants in the MBF. They also ask the Tribunal to set aside Circular No. 73 together with the changes made to the MBF Rules of 2008, "especially those affecting the composition and responsibilities of the Advisory Board". Lastly, they seek an award of moral damages together with costs.

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

CONSIDERATIONS

1. The complainants, UNESCO retirees and participants in the MBF, impugn Circular No. 73 dated 3 November 2014. As well, 33 participants in the MBF filed applications to intervene. UNESCO submits that they are all retirees and participants in the MBF and, as

such, are in the same position in fact and law as the complainants. It also acknowledges that since the complainants as former staff members do not have access to the internal appeal procedure, they are entitled to file a complaint directly with the Tribunal.

The complainants seek the same redress and the complaints rest on the same pleadings. It is therefore appropriate that they be joined to form the subject of a single judgment.

The complainants seek an oral hearing but the Tribunal is satisfied that the parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainants' application for oral hearings is rejected.

2. Circular No. 73 informed MBF participants that they could stand for election to become a member of the MBF Advisory Board and invited nominations. The Advisory Board is a new MBF body under its alleged new Rules. Two retired participants in the MBF together with a number of interveners challenged Circular No. 43 that the Tribunal found, in Judgment 3761, also delivered this day, was the publication of the Director-General's decision to amend the MBF Rules. In that Judgment the Tribunal concluded that as the decision to amend the MBF Rules was not taken in compliance with the amendment provisions in these Rules, the decision was unlawful and it would be set aside. As well, the Tribunal ruled that it followed that the amendments to the Rules were of no force or effect.

3. The Tribunal finds that the impugned decision in the present case is an administrative decision which adversely affects the complainants and does not require any implementing measure. As the decision to amend the MBF Rules was found to be unlawful and the amendments to be of no force or effect, the impugned decision stemming from those amendments is unlawful and must be set aside.

4. Each complainant, as a former elected member of the MBF Board of Management, is entitled to moral damages in the amount of 5,000 euros and costs in the amount of 500 euros.

5. As the interveners have not established that they are in a situation in fact and in law similar to that of the complainants, as required by Article 13 of the Tribunal's Rules, in terms of being former elected members of the MBF Board of Management, their applications will be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 3 November 2014 is set aside.
2. UNESCO shall pay each complainant 5,000 euros in moral damages.
3. UNESCO shall pay each complainant 500 euros in costs.
4. All other claims are dismissed.
5. The applications to intervene are dismissed.

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