

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. R. (No. 5)

v.

UNESCO

125th Session

Judgment No. 3936

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Ms A. L. F. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 10 March 2016 and corrected on 27 April, UNESCO's reply of 7 September, corrected on 19 September, the complainant's rejoinder of 22 December 2016 and UNESCO's surrejoinder of 10 April 2017;

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, who at the material time held the grade P-5 post of Head of UNESCO's National Office in Kinshasa, Democratic Republic of the Congo, challenges the decision to transfer her to Paris.

On 23 November 2012 the complainant gave birth to a son in Paris. She was on maternity leave until March 2013.

By a memorandum of 18 February 2013 the Director of the Bureau of Human Resources Management informed the complainant that she could no longer be assigned to Kinshasa – because it was a non-family duty station – and that as from 1 March 2013 she would be temporarily assigned to UNESCO Headquarters in Paris as a *chargée de mission*

in the Bureau of Field Coordination. The Director added that, as an exceptional measure, the complainant would receive the rental subsidy on her house in Kinshasa until 30 April 2013. On the same day the complainant filed a protest in which she requested the Director-General to reconsider the decision to transfer her to Paris and extend the notice that she had been given to leave Kinshasa. By a first memorandum of 1 March the complainant was informed that her transfer was prompted by security concerns and that the short notice she had been given had already been “compensated” by the extension of the payment of her rental subsidy. She was hence invited to make arrangements to assume her new functions in Paris.

In a second memorandum of 1 March, the complainant was advised of the conditions of service that were offered to her. In particular, she would be transferred as of that date and would retain the grade and step that she held in Kinshasa. On 28 March she accepted in writing her transfer to Paris on the terms specified in the aforementioned memorandum.

On 18 April 2013 the complainant lodged a notice of appeal with the Appeals Board, challenging the decision of 18 February. Then, on 29 April, she lodged another notice of appeal directed against that same decision – which had been confirmed on 1 March – requesting that the two appeals be joined. In her detailed appeal she requested the cancellation of both decisions and redress for the material, moral and psychological injury that she considered she had suffered. The Appeals Board delivered its opinion on 21 September 2015 after hearing the parties. It considered that since the complainant had accepted that her transfer to Paris would take effect on 1 March 2013, she should be regarded as having been stationed at UNESCO Headquarters as from that date; she thus had a time limit of one month to submit her appeal pursuant to paragraph 7(c) of the Statutes of the Appeals Board. Since she had not done so until 18 April 2013, the Board recommended that the Director-General reject the appeal – which was, in its view, directed against the decision of 18 February 2013, confirmed on 1 March – as time-barred. By a letter of 10 December 2015 the complainant was informed of the Director-General’s decision to endorse that recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside that decision as well as the contested transfer decision, and to order UNESCO to pay her, with interest, the salary and allowances that she would have received had she remained assigned as Head of the Kinshasa Office until her retirement at the end of March 2014. She also claims 150,000 euros in compensation for moral and professional injury, 50,000 euros in compensation for physical injury, and costs. In her rejoinder, she seeks redress for injury flowing from the lack of normal notice, arguing that she was obliged to take two months of annual leave to arrange her move from Kinshasa to Paris.

UNESCO submits that the complaint is irreceivable for failure to exhaust internal means of redress. Subsidiarily, it argues that the complaint is unfounded.

CONSIDERATIONS

1. The complainant challenges the decision of 10 December 2015 by which the Director-General dismissed as time-barred the appeal that she had lodged on 18 April 2013 against the decision to transfer her to Paris, taken on 18 February 2013.

2. UNESCO submits principally that that appeal was time-barred and that, consequently, the complaint is irreceivable for failure to exhaust internal means of redress.

3. Article VII, paragraph 1, of the Statute of the Tribunal provides that a complaint is not receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable staff regulations. In accordance with the Tribunal's case law, to satisfy this requirement a complainant must not only follow the prescribed internal procedure for appeal but must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure (see, for example, Judgment 3296, under 10).

4. Paragraph 7 of the Statutes of the Appeals Board reads in relevant part:

“(a) A staff member who wishes to contest any administrative decision [...] shall first protest against it in writing [...] to the Director-General [...].

(b) The Director-General’s ruling on the protest under (a) above shall be communicated to the staff member by the Director of the Bureau of Human Resources Management within one month of the date of the protest if the staff member is stationed at Headquarters, and 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 (or, if no ruling was communicated to the staff member within the time-limit under (b) above, from the expiry of that time-limit), is one month in the case of a staff member stationed at Headquarters and two months in the case of a staff member stationed away from Headquarters or who has been separated.”

5. The complainant endeavours to show that she submitted her notice of appeal within the prescribed time limit. She argues that the first memorandum sent to her on 1 March 2013 cannot be deemed a reply under paragraph 7(b) of the Statutes of the Appeals Board to her protest of 18 February 2013 since it did not come from the Director-General. She therefore considers that she did not receive a reply to her protest within the two-month period specified in paragraph 7(b) and that she filed her appeal with the Appeals Board within the prescribed time limit. Lastly, she adds that even if the aforementioned memorandum were considered to be a reply to her protest of 18 February 2013, her appeal would be receivable since she submitted it within the two-month time limit that applied to her as a staff member stationed away from UNESCO Headquarters.

UNESCO maintains that the decision of 1 March 2013 constituted the reply of the Director-General to the complainant’s protest of 18 February 2013 and that, consequently, 1 March was the date on which the time limit prescribed for submitting an appeal to the Appeals Board began to run. However, since her transfer to Headquarters took effect on 1 March 2013, she became a staff member stationed at Headquarters on

that date and therefore had one month to refer the matter to the Appeals Board pursuant to paragraph 7(c) of the Statutes of the Appeals Board.

6. The first question is whether the first memorandum of 1 March 2013 constitutes the Director-General's ruling on the protest of 18 February 2013, within the meaning of paragraph 7(b) of the Statutes of the Appeals Board. While the memorandum does not expressly indicate that it came from the Director-General, that defect does not lead the Tribunal to conclude, as the complainant does, that the ruling which it contained could not be the subject of an internal appeal.

It is clear from the content of the memorandum that it constituted the ruling on the complainant's protest, as it began "I acknowledge receipt of your email of 18 February 2013 to the Director-General" and contained replies to her grievances. It explained why she could not remain assigned to Kinshasa and hence why she had to make arrangements to assume her new functions in Paris. It also explained why her request for an extension of the notice period could not be granted.

Since the complainant states that she received the memorandum of 1 March 2013 that same day, the time limit for contesting the decision of 18 February 2013 before the Appeals Board ran from that date.

7. The second question is whether the complainant had a time limit of one month or two months to submit her appeal to the Appeals Board.

The Tribunal observes that at the time when she submitted her protest, and indeed when she received a reply to it, the complainant, who was initially assigned to Kinshasa, was on maternity leave. Thus she had not actually taken up her duties as *chargée de mission* in the Bureau of Field Coordination, to which she had theoretically been assigned from 1 March 2013, and could not in any event be regarded as "stationed" at Headquarters for the purposes of paragraph 7(c) of the Statutes of the Appeals Board.

It follows that the Director-General wrongly dismissed the complainant's appeal as time-barred, since it was submitted within the two-month period running from her receipt of the memorandum of 1 March 2013.

8. It ensues from the foregoing that the Director-General's decision of 10 December 2015 must be set aside.

9. The case will be remitted to UNESCO for the Appeals Board to examine the appeal that had been submitted to it by the complainant.

10. The unlawful nature of the impugned decision caused the complainant moral injury which may be redressed by an award of 10,000 euros in compensation.

11. As she succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 10 December 2015 is set aside.
2. The case is remitted to UNESCO, which shall proceed as indicated in consideration 9, above.
3. UNESCO shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay her 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ