

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

J.
v.
UNESCO

125th Session

Judgment No. 3939

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. J. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 19 October 2015 and corrected on 6 November 2015, UNESCO's reply of 7 March 2016, the complainant's rejoinder of 26 April and UNESCO's surrejoinder of 4 August 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not 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 not to extend his appointment beyond the statutory retirement age.

On 8 December 2011 the complainant, who held a post at grade G-6, was elected Treasurer of the International Staff Association of UNESCO (ISAU) for the period 2012-2013.

On 13 February 2013 he asked the Director-General whether his appointment, which was due to expire on 30 June 2013, the day on which he was to retire, could be extended until 31 January 2014 to enable him "to serve out" his term of office in the ISAU, in the interests of both the Organization and the members of the ISAU. On 30 May

2013 the Director of the Bureau of Human Resources Management (HRM) replied that, having regard to Staff Regulation 9.5, which provides that staff members may be retained in service beyond the statutory retirement age in the interest of the Organization, his request could not be granted.

On 28 June the complainant lodged a protest in which he contended that the decision of 30 May had been taken “for a hidden or purely arbitrary reason”, emphasising that the President of the ISAU had obtained an extension of his appointment beyond retirement age. He requested the cancellation of the decision of 30 May, the extension of his appointment until the end of January 2014 and redress for all the material and moral injury suffered. Having received no reply to this protest, he submitted a notice of appeal to the Appeals Board on 25 August 2013. On 9 September the Director of the HRM, replying to the protest of 28 June, advised the complainant, who had retired on 30 June, that the Director-General, having considered all aspects of the case, had decided to maintain the decision of 30 May. The complainant filed his detailed appeal on 19 December 2013.

After hearing the parties, the Appeals Board delivered its opinion on 26 June 2015. It found that the fact that the complainant held the office of Treasurer of the ISAU did not confer on him any particular right to the extension of his appointment. It therefore recommended that the impugned decision be upheld as being in accordance with the Staff Regulations and Staff Rules and that the complainant’s other claims be rejected. The complainant was informed by a letter of 23 July 2015 that the Director-General had decided to accept the Appeals Board’s recommendation and she therefore confirmed that the date of his separation was 30 June 2013. That is the impugned decision.

In his complaint, the complainant seeks the setting aside of the impugned decision and the payment, with interest, of the remuneration and benefits to which he would have been entitled had his appointment been extended until the end of January 2014. He also seeks the restoration of his pension rights for the period from 1 July 2013 to 31 January 2014 and compensation for material and moral injury.

UNESCO requests that the complaint be dismissed as unfounded.

CONSIDERATIONS

1. The complainant challenges the rejection of his request that his appointment be extended beyond the statutory retirement age – in his case 60 – for a period of seven months to enable him to complete his term of office as Treasurer of the ISAU.

2. Staff Regulation 9.5 in the version applicable to this case reads:

“Staff members shall not be retained in the service of the Organization beyond the age of sixty, or the age of sixty-two if recruited on or after 1 January 1990, except that when the Director-General considers it to be in the interest of the Organization, he may authorize extension of these limits in specific cases.”

3. As the Tribunal has consistently held, a decision to retain an official beyond the normal retirement age stipulated in a provision of this kind is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1143, under 3, 2845, under 5, 3285, under 10, or 3765, under 2).

4. In support of his complaint, the complainant first submits that the impugned decision is tainted with errors of fact and law as regards the interpretation and application of the aforementioned Staff Regulation 9.5. In essence he considers that, since the purpose of the extension of appointment that he requested was to enable him to serve his full term of office as Treasurer of the ISAU, in this case the Director-General could not exercise the discretion which she normally has in this sphere and was, on the contrary, obliged to grant his request. In fact he considers that he was “entitled *ipso jure*” to this extension by virtue of Appendix 9 B to the Human Resources Manual, which reproduces the

Constitution of the ISAU and thus specifies inter alia that the term of office of its Treasurer is two years.

5. The Tribunal cannot accept the complainant's line of argument.

(a) It must first be emphasised that, contrary to the complainant's submissions, the provision of the Constitution of the ISAU setting the Treasurer's term of office (which is Article V, paragraph 1, and not Article IV, paragraph 1, as he erroneously states in his written submissions) does not constitute a "statutory requirement" established by the Organization's authorities. Since, in accordance with the principle of trade-union freedom, the ISAU is an entity separate from the Administration of UNESCO, its Constitution, although subject to the Director-General's approval, cannot be regarded as an integral part of the rules and regulations governing the Organization, and the fact that its text is reproduced as an appendix to the Human Resources Manual for ease of consultation by staff members does not by any means have the effect of incorporating it therein.

For this reason, contrary to the complainant's statements, a breach of the Constitution contained in the aforementioned Appendix 9 B could not in any case constitute a breach by the author of the impugned decision of the principle *tu patere legem quam ipse fecisti*, according to which the Administration is bound by the rules it has itself established. Similarly, the complainant's attempt to give precedence to the Constitution by relying on the principle *specialia generalibus derogant*, according to which a special rule should be construed as a derogation from a general rule, is irrelevant, since plainly it applies only within the same set of rules.

(b) The complainant is also wrong in submitting that an extension of an appointment which is requested with a view to completing a term of office as a trade-union official should be granted *ipso jure* under Staff Regulation 8.1, which states that "[m]achinery shall be provided by the Director-General to ensure continuous contact between the staff and himself or herself through duly elected officials of the association or associations representative of the staff". Clearly this provision has neither the purpose nor the effect of automatically exempting the staff

representatives to whom it applies from the provisions of the aforementioned Staff Regulation 9.5 and entitling them to remain in service beyond the age limit until their term of office ends.

The Tribunal notes in this connection that espousing the complainant's argument would mean that a trade-union official who, having obtained an extension of her or his appointment on this basis, was re-elected thereafter, could automatically be granted further extensions and thus remain indefinitely within the Organization after having reached the statutory retirement age. That this interpretation of the applicable texts is wrong is confirmed by what would obviously be an unacceptable consequence thereof.

6. The Director-General would certainly have committed an error of law and failed to take account of an essential fact if, when taking her decision on the complainant's request for an extension of his appointment, she had ignored the fact that he was Treasurer of the ISAU. As the Tribunal has already emphasised, it is in the interests of an international organisation to ensure that the trade unions or associations representing its staff operate in good conditions (see Judgment 496, under 17). Hence, in order to determine whether retaining an official in service beyond the age of retirement is in the organisation's interests, it is necessary to take account of any staff representative work carried out by the person in question (see, with respect to a similar case, Judgment 3521, under 1 to 3 and 5).

The wording of the decisions of 30 May 2013 and 9 September 2013, respectively rejecting the complainant's request for an extension of appointment and dismissing his protest against that rejection, might in fact give rise to some doubts in this respect. It must be noted that the reasons set out in those decisions, which basically consisted of a recital of the text of Staff Regulation 9.5 coupled with a statement to the effect that there were no grounds for granting his request to remain in service having regard to that provision, contained no reference to the fact that the complainant held the office of Treasurer of the ISAU, which was the basis for his request. The complainant therefore has some cause to criticise the inadequacy of those reasons in his rejoinder.

7. However, it is clear from the explanations supplied by UNESCO in its written submissions to the Appeals Board and in those filed with the Tribunal that the complainant's argument regarding his term of office was in fact taken into account by the Director-General when assessing the merits of his request. The Organization explained, first, that the financial constraints which it faced at the material time had led it to adopt a very restrictive policy on extending appointments and, secondly, that the complainant's separation would not jeopardize the proper functioning of the ISAU, because the latter could take steps to appoint a new treasurer, or fill the position of deputy treasurer which was vacant at that time.

It follows from the foregoing that the Director-General's decision was not tainted with an error of law, nor did it disregard an essential fact.

In addition, this decision will not be censured for the inadequacy of its initial reasoning, since the Tribunal's case law accepts that the reasons for an administrative decision may be supplied or supplemented a posteriori during appeal proceedings (see, in particular, Judgments 1817, under 6, 2194, under 7, or 3660, under 3). This was the case here, and the complainant is wrong to submit that when UNESCO subsequently provided explanations, it modified the original reasons for the contested decision, since it merely clarified them.

8. The Director-General's finding that there were no grounds for granting the complainant's request, notwithstanding that he held the office on which he relied, clearly involved the exercise of her discretionary power, which may be reviewed solely in the case of a manifest error.

The complainant holds that the extension of appointment which he requested would have enabled him to round off the management of the ISAU's resources and draw up the management reports for which he was responsible as Treasurer of the Association. However, in the Tribunal's opinion, the Director-General did not commit a manifest error of judgement in considering, for the above-mentioned reasons, that the ISAU would not really be prevented from functioning and,

more generally, that the complainant did not have to be retained in service in the interests of the Organization.

9. The complainant submits that he was the victim of discrimination because the President of the ISAU who held office during the same period had been retained in service beyond the statutory retirement age. However, quite apart from the fact that the extension of that person's appointment had been granted, not as requested by him for the full length of the outstanding term of office, but only for six months mainly in order to enable him to deal with day-to-day matters, the President and the Treasurer of the ISAU are not in an identical situation with regard to the application of Staff Regulation 9.5. Article V of the Constitution and Article XII of the Rules of Procedure of the Association make the President of the ISAU the most senior officer of the Association's Executive and her or his responsibilities are very different to those of the Treasurer whose duties are of a less sensitive nature for the Association. Moreover, it is plain from the file that, unlike the Treasurer, the President was released from all official duties in order to be able to devote himself on a full-time basis to his duties as an officer of the ISAU, which again means that the two officials were not in the same situation with regard to the Organization's staff management policy.

At best, the position of these two persons could be said to be somewhat similar, but it was far from being absolutely identical. For this reason, the fact that their respective requests received different responses cannot be deemed discriminatory in any way.

10. The complainant submits that the impugned decision, which was taken at a time when the relationship between the ISAU and the Administration of UNESCO was fraught, is tainted with abuse of authority in that it stemmed from a wish to harm the interests of the Association and the members of its Executive.

However, as the Tribunal has repeatedly stated, misuse of authority may not be presumed and the burden of proof is on the party that pleads it (see, for example, Judgments 2116, under 4(a), 2885, under 12,

or 3543, under 20). While some documents in the file show that there was a certain amount of tension between the ISAU and the Organization's services, they are not sufficient to establish that the decision to deny the complainant's request was based on reasons connected with that tension.

Moreover, the Tribunal notes that the complainant's contentions in this connection tend to contradict the argument examined earlier, that he was the victim of discrimination compared with the President of the ISAU. Indeed, if, as he submits, the Director-General intended to take retaliatory action against the members of the Executive of the Association, it is hard to understand why the President's appointment was extended.

11. Neither does the complainant have any grounds for submitting that the impugned decision constituted unlawful interference in the internal affairs of the ISAU, or that it violated trade-union freedom and the freedom of association. As stated earlier, the fact that the impugned decision had the effect of cutting short the complainant's term of office is merely the consequence of a normal application of Staff Regulation 9.5, and there is no evidence that the purpose of this decision was to harm the Association or its leaders.

12. The complainant's plea in his rejoinder that UNESCO breached its duty of care towards him must also be dismissed.

The complainant believes that such a breach occurred because the Organization took more than three months to reply to his request for an extension of his appointment. However, he is mistaken in contending that he should have received this reply within the one-month deadline mentioned in paragraph 7(b) of the Statutes of the Appeals Board. This provision, which concerns responses to protests lodged by staff members against administrative decisions, does not apply here, because the complainant's request for a decision in his favour did not constitute a protest against an existing decision.

It is true that the Organization was nevertheless bound to reply to this request within a reasonable period of time. However, while it would have been preferable in this case that a decision was taken sooner,

UNESCO cannot be deemed to have disregarded this requirement, as the decision containing the reply was taken one month before the complainant reached the statutory retirement age and he does not contend that it was adopted too late for him to make adequate arrangements for his private life after he had attained the normal retirement age.

The complainant is also wrong in arguing that UNESCO's duty of care precluded the rejection of his request since, as stated above, the fact that his term of office as Treasurer of the ISAU would be cut short did not, of itself, signify that his request for an extension of appointment had to be granted.

13. Lastly, the complainant's criticism of the Appeals Board's opinion on his internal appeal and his questioning of that body's impartiality are completely misplaced. The alleged errors or omissions which, according to him, taint that opinion are by no means proven and, contrary to what the complainant seems to think, it cannot be inferred from the mere fact that the Appeals Board accepted UNESCO's arguments that it "allowed itself to be unduly influenced by the Administration".

14. It may be concluded from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ