

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
UNESCO

125th Session

Judgment No. 3941

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. S. against the United Nations Educational Scientific and Cultural Organization (UNESCO) on 28 May 2015, UNESCO's reply of 21 September, the complainant's rejoinder of 31 October 2015, UNESCO's surrejoinder of 5 February 2016, UNESCO's additional submissions of 24 May 2017 and the complainant's final comments of 30 June 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, and Article 13 of its Rules;

Considering the applications to intervene filed by Ms H. C., Ms A. A. M. C., Mr S. A. C., Ms N. D., Ms M.-F. D., Ms S. E. J., Mrs R. J., Ms A. N. D. L., Miss M. J. R., Mrs F. R., Mr C. T., Ms P. T. and Ms P. W.-V. on 23 February 2016, and UNESCO's comments thereon of 1 August 2017;

Having examined the written submissions;

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

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

Facts relevant to this case are contained in Judgments 3760, 3761 and 3762, delivered in public on 8 February 2017. Suffice it to recall that the Director-General reported to UNESCO's General Conference during its 37th session concerning the governance of the MBF. In document 37C/38 of 4 November 2013, paragraphs 1 to 8, she indicated that 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 emphasised that the MBF Rules provided that proposed amendments to any provisions concerning the management of the MBF (Sections V, VI and VII of the Rules) must be approved by the General Assembly of Participants, but that the latter had not approved them. Consequently, she had not been able to amend the Rules. She nevertheless included in an addendum the proposed amendments to the MBF Rules. On 19 November 2013 the General Conference adopted Resolution 85, point 1, by which it took note of the information contained in document 37C/38 concerning the modification of the governance of the MBF and decided to amend the Rules of the MBF as proposed.

On 21 October 2014 UNESCO issued Circular AC/HR/43 (hereinafter Circular No. 43) stating that the changes to the governance structure of the MBF approved by the General Conference and relating to Sections V, VI and VII of the MBF Rules were highlighted in the attached amended version of the MBF Rules. Key changes were explained briefly in the Circular.

On 18 November 2014 the complainant, who is an employee of UNESCO and a participant in the MBF, initiated internal appeal proceedings challenging Circular No. 43. According to the complainant, these changes were not made in accordance with Article 7.1 of the MBF Rules and prevented him from participating in the decision-making process of the MBF given that the management of the MBF was no longer within the General Assembly of Participants. On 11 March 2015 the complainant was informed that the Director-General considered that an appeal against Circular No. 43 was irreceivable, however she had decided "not to prevent [him] from appealing" against the Circular

directly before the Tribunal. The complainant filed his complaint with the Tribunal on 28 May 2015 impugning the decision of 11 March 2015.

In May 2017, following the public delivery of Judgments 3760, 3761 and 3762, UNESCO was authorised to enter additional submissions on this case. It contests therein the Tribunal's competence, arguing that the decision to amend the MBF Rules was taken by the General Conference and not by the Director-General and that that decision therefore fell outside the scope of the Tribunal's jurisdiction.

In his final comments the complainant points out that in Judgment 3761 the Tribunal held that the responsibility for the operation of the MBF rested with the Director-General.

The complainant asks the Tribunal to quash Circular No. 43 and the amended MBF Rules it comprises. He also asks the Tribunal to consider that the rights enshrined 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. Lastly, he claims moral damages and costs.

UNESCO asks the Tribunal to reject the complaint as irreceivable because the Circular is not an administrative decision, and because the Tribunal lacks competence. In its view, the complainant has no cause of action and the complaint is devoid of merit.

CONSIDERATIONS

1. The complainant, a UNESCO employee and a participant in the MBF, challenges Circular No. 43 issued by UNESCO on 21 October 2014. As well, 13 employees and participants in the MBF filed applications to intervene. UNESCO objects to the applications to intervene "insofar as the Complainant's claim [was] unfounded".

The complainant seeks an oral hearing, however, the Tribunal is satisfied that the parties' briefs and the evidence they have produced are sufficient for the Tribunal to reach an informed decision.

2. Circular No. 43 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 highlighted in the attached amended version of the MBF Rules. The key changes were explained briefly in the Circular. In November 2014 the complainant initiated internal appeal proceedings challenging the Circular. He took the position that the changes introduced by the Circular were introduced in breach of Article 7.1 of the MBF Rules and prevented him from participating in the decision-making process of the MBF given that the management of the MBF was no longer within the General Assembly of Participants. On 11 March 2015 the complainant was informed that the Director-General considered that an appeal against Circular No. 43 was irreceivable, however she had decided “not to prevent [him] from appealing” against the Circular directly before the Tribunal. The complainant filed his complaint with the Tribunal on 28 May 2015.

3. On 8 February 2017 the Tribunal delivered in public Judgments 3760, 3761 and 3762 concerning amendments made to Circular No. 43. In summary, in Judgment 3761 the Tribunal found that the Director-General in issuing Circular No. 43 did not comply with an amendment provision in the MBF Rules. In particular, she did not obtain the approval of the General Assembly of Participants. The Tribunal held that the Circular was unlawful and set it aside.

4. On 13 March 2017 UNESCO applied for leave to enter additional submissions in the present complaint on the grounds that Judgments 3760, 3761 and 3762 “contain[ed] findings, which [were] directly relevant [...] to the case filed by the Complainant, and constitute[d] new jurisprudence upon which [UNESCO] was unable to comment at the time of its Surrejoinder”. The President of the Tribunal having authorised UNESCO to enter additional submissions, UNESCO did so on 24 May 2017.

5. It is observed that in its additional submissions, UNESCO is contesting the Tribunal’s competence to consider the complaint. Essentially, UNESCO argues that the decision to amend the MBF Rules

was taken by the General Conference and not by the Director-General. Thus, the decision taken in Judgment 3761 was beyond the scope of the Tribunal's competence and cannot stand. In support of its position UNESCO relies on Staff Regulation 11.2. It reads:

“The Administrative Tribunal approved from time to time by the General Conference shall be the final court of appeal for staff members against a decision of the Director-General alleged to conflict with their terms of appointment, or with any relevant regulation.”

6. In its pleadings in the case leading to Judgment 3761, UNESCO grounded its challenge concerning the Tribunal's competence to consider that complaint on the same assertion that the decision to amend the MBF Rules was taken by the General Conference. In Judgment 3761, consideration 12, based on a review of the MBF's governance structure, the Tribunal found that “the authority to amend the MBF Rules is vested in the Director-General”. In the same Judgment, the Tribunal also found that Circular No. 43 was the publication of the Director-General's decision to amend the MBF Rules which was not taken in compliance with the amendment provisions in the MBF and was, therefore, unlawful. Consequently, the amendments to the Rules were of no force and effect. Thus, it can be seen that UNESCO's additional submissions in the present case are an attempt to challenge the Tribunal's reasoning in a judgment that is final.

7. As the cause of action in the present complaint is the same as in Judgment 3761, the Tribunal adopts and applies the reasoning and the findings and conclusions in that case in the present complaint. As in Judgment 3761, the complainant is entitled to an award of moral damages for UNESCO's complete disregard of the MBF's statutory provisions and the resulting unlawful decision. As the interveners are in the same position in fact and in law as the complainant, their applications to intervene are accepted and they are also entitled to moral damages. UNESCO will be ordered to pay the complainant and each intervener moral damages in the amount of 5,000 euros. The complainant is entitled to costs in the amount of 500 euros. In the circumstances, a consideration of the complainant's request in relation to acquired rights is unnecessary. As the Director-General's 21 October 2014 decision

was set aside in Judgment 3761, no further order is necessary in relation to the complainant's claim to quash Circular No. 43 and the amended MBF Rules it comprises. The request to order UNESCO to resume the consultation process with the participants in the MBF is beyond the Tribunal's authority and will be dismissed.

DECISION

For the above reasons,

1. UNESCO shall pay the complainant and each intervener moral damages in the amount of 5,000 euros.
2. UNESCO shall pay the complainant costs in the amount of 500 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ