Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. d. J. (Nos. 2 and 3)

v.

UNESCO

129th Session **Judgment No. 4222**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms L. K. d. J. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 October 2016 and corrected on 13 December 2016, UNESCO's reply of 10 April 2017, the complainant's rejoinder of 27 July and UNESCO's surrejoinder of 6 November 2017;

Considering the third complaint filed by Ms L. K. d. J. against UNESCO on 10 September 2018 and corrected on 4 October 2018, UNESCO's reply of 21 January 2019, the complainant's rejoinder of 25 February and UNESCO's surrejoinder of 6 June 2019;

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 challenges the refusal of UNESCO to award full compensation for the injury suffered as a result of an accident recognized as being service-incurred.

On 27 January 2011 the complainant fractured her ankle on the Organization's premises. On 21 February she was informed that the Advisory Board on Compensation Claims (hereinafter the Advisory Board) had recognised that the accident that had caused her injury was

work-related and that, consequently, all medical expenses directly related to the injury would be settled by UNESCO under the Staff Compensation Plan.

On 5 July 2011 the complainant sent the Director-General a letter in which she requested appropriate compensation for physical pain suffered as a result of the accident and which she might suffer in the future, for moral injury since the accident and for the impact that it had had on her family members. She also requested lump sum compensation for non-medical expenses incurred as a result of her accident. By a letter of 31 October, which was her last day of service before she retired, the complainant lodged a protest with the Director-General seeking a review of the implied decision to reject her request of 5 July. In addition, she supplemented that request by specifying that she was claiming "full redress for the injury suffered" as a result of her accident, in order to cover "the diminution of [her] quality of life and disruption of [her] living conditions", "the scars caused to [her] leg" and the "loss of the opportunity to work after [her] retirement". The Director of the Bureau of Human Resources Management (HRM) replied on 30 November 2011, informing the complainant that under the terms of Article 4 of the Staff Compensation Plan, the compensation payable under those Rules was the sole compensation to which she was entitled in respect of any claim falling under the provisions thereof. Having expressed her disagreement with this decision, the complainant was notified, on 1 February 2012, that steps had been taken to assess the extent to which she could be awarded compensation "over and above that of the Staff Compensation Plan"[*]. On 2 March 2012 the complainant filed her first complaint with the Tribunal, impugning the decision of 30 November 2011.

On 11 September 2012 the complainant's treating physician issued a medical certificate stating that she had fully recovered. By a letter of 20 September 2012, the complainant was notified that her work-related accident file was closed.

In Judgment 3397, delivered in public on 11 February 2015, the Tribunal dismissed the complainant's first complaint as premature and,

[*] Registry's translation.

as such, irreceivable. The matter was remitted to the Organization for it to pursue, without delay, the internal appeal procedure initiated on 31 October 2011, if it had not been completed in the meantime. In execution of that judgment, on 23 October 2015 the complainant's case was presented to the Advisory Board for review and recommendation to the Director-General. By a letter of 18 February 2016, the Secretary of the Advisory Board informed the complainant that the Director-General had endorsed the recommendation of the Board, which had concluded that additional compensation – such as that claimed by the complainant on 5 July 2011 – did not fall under the scope of the Staff Compensation Plan.

On 7 March 2016 the complainant asked the Director-General to reconsider the decision conveyed by the letter of 18 February. She recalled that she was claiming full compensation for the injury caused by her accident and indicated that, if such compensation could not be obtained under the Rules of the Staff Compensation Plan it must be obtained "on the basis of liability for negligence", since the Organization had failed to comply with its obligation to ensure the safety of its staff. In accordance with article 18 of the Staff Compensation Plan, the Advisory Board reconsidered the complainant's case on 24 May. On 25 July 2016 the Secretary of the Board informed the complainant that after reconsideration of the case the Board maintained its position, that the Director-General had endorsed its recommendation and, consequently, that her file was closed. By a letter of 26 July 2016 addressed to the Secretary for the Advisory Board and copied to the Director of HRM, the complainant announced her intention to challenge the decision of 25 July and asked what means of appeal were available to her. On 7 October 2016 the Director of HRM informed her that an internal administrative decision could be challenged before the Appeals Board, and that staff members had the right to appeal to the Tribunal against a decision of the Director-General taken after reference to the Appeals Board. On 12 October, considering that this advice was not relevant to her situation, the complainant asked to be sent the version of the Staff Regulations and Staff Rules applicable on 25 July 2016. This was sent to her on 14 October.

On 22 October 2016 the complainant filed a second complaint with the Tribunal, impugning the decision of 25 July 2016.

On 28 October 2016 the complainant challenged that same decision before the Appeals Board. In addition to the setting aside of the decision and full compensation for the injury suffered as a result of the accident of January 2011, she sought compensation for the injury resulting from the Organization's refusal to grant her request and for the way in which the proceedings had been conducted; she also claimed costs. In its opinion of 12 April 2018, the Appeals Board recommended that the Director-General should dismiss the appeal as irreceivable on the grounds that the complainant had not lodged a protest with the Director-General challenging the decision of 25 July 2016, contrary to paragraph 7(a) of the Statutes of the Appeals Board. It also indicated that, despite the information communicated by HRM, the complainant had not lodged an appeal with the Appeals Board within the allocated time. By a letter of 3 August 2018, the complainant was informed that the Director-General had endorsed the recommendation of the Appeals Board to dismiss her internal appeal as irreceivable. This is the decision impugned in the complainant's third complaint.

In her second complaint, the complainant requests that the decision of 25 July 2016 and the initial decisions be set aside, and claims full compensation for the injury suffered as well as 10,000 euros in costs. In her third complaint, she requests that the decision of 3 August 2018 and the initial decisions be set aside, and claims full compensation for the injury suffered as well as 12,000 euros in costs. In each case, the complainant requests that an amount corresponding to the fees and taxes which she has undertaken to pay to her counsel be deducted from any monetary awards made to her and that such amount be paid to her counsel.

UNESCO requests the joinder of the two complaints. Its asks the Tribunal to declare the second complaint irreceivable for failure to exhaust internal means of redress on the basis that the complainant did not lodge a protest with the Director-General challenging the decision of 25 July 2016 and considering that her appeal of 28 October 2016 was pending before the Appeals Board when she filed the complaint with

the Tribunal. It also asks the Tribunal to declare the third complaint irreceivable on the grounds that the complainant did not lodge a protest with the Director-General challenging the decision of 25 July 2016. Furthermore, UNESCO invites the Tribunal to dismiss both complaints as unfounded in law and in fact, as well as all claims for compensation for alleged injury and for costs as ill-founded, excessive and entirely unjustified.

CONSIDERATIONS

1. This judgment concerns the complainant's second and third complaints.

2. In the second complaint, the complainant impugns before the Tribunal the decision of 25 July 2016 whereby the Director-General dismissed her compensation claim made following a service-incurred injury consisting of a fractured ankle on 27 January 2011.

In the third complaint, she asks for the decision of 3 August 2018, whereby the Director-General endorsed the recommendation of the Appeals Board declaring her internal appeal against the decision of 25 July 2016 irreceivable, to be set aside.

3. The Tribunal, noting that the two complaints are essentially based on the same facts, involve the same parties and raise the similar legal issues, considers it appropriate to join them so that they may form the subject of a single judgment.

4. The defendant organization submits that the complaints are irreceivable, under Article VII, paragraph 1, of the Statute of the Tribunal, for failure to exhaust the internal means of redress available to officials of UNESCO. The complainant responds to this argument that as a former official, she did not have access to those internal means of redress.

5. In accordance with Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be 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".

6. The case law of the Tribunal establishes that, when under an organization's Staff Rules and Staff Regulations only serving officials have access to the internal appeal procedures, former officials have no possibility of using them and they are then entitled to file a complaint directly with the Tribunal (see, for example, Judgments 2840, consideration 21, 3074, consideration 13, or 3156, consideration 9).

7. In the case of UNESCO, the Tribunal has already held that Staff Regulation 11.1, Staff Rule 111.1 and the Statutes of the Appeals Board confine access to internal means of redress to "staff members", in other words solely to serving officials. In pursuance of this case law, it held that a former staff member could not use the internal means of redress to challenge a decision taken after she had left the Organization (see Judgment 2944, consideration 20).

8. However, the wording of the provisions of paragraph 7 of the Statutes of the Appeals Board makes it clear that a staff member who "has been separated" may submit an appeal to the Board. As the Tribunal explained in Judgment 3398, considerations 2 and 6, the internal means of redress established by the Staff Regulations and Staff Rules are open to any person who has been affected by a decision in her or his capacity as an official, even if she or he has since left the Organization. A staff member of UNESCO whose appointment has ended is therefore still entitled to use the internal means of redress if she or he wishes to challenge a decision taken before her or his separation.

9. It may be concluded from the foregoing considerations that, in the instant case, the complainant had access to the internal means of redress available to UNESCO officials. She was therefore obliged to

exhaust those internal means of redress before bringing the case to the Tribunal (see Judgment 3505, considerations 1 to 5 and 11).

In the instant case, the procedure laid down in paragraph 7(a) of the Statutes of the Appeals Board, which provides for the lodging of a protest prior to referring the matter to the Board, does not apply. Indeed, as regards compensation claims, the Staff Compensation Plan provides in paragraph 18.1 that "[a] person claiming under these Rules may, within thirty days of receiving notice of the Director-General's decision, apply in writing for a reconsideration of such decision [...]. The Advisory Board shall examine such request and make appropriate recommendations to the Director-General whose decision shall then be deemed to be an administrative decision for the purposes of appeals under Chapter XI of the Staff Regulations and Rules." These provisions, combined with those of Chapter XI of the Staff Regulations and Staff Rules to which they refer, make clear that an official whose request for reconsideration has been rejected must, if she or he wishes to pursue her or his contestation, appeal to the Appeals Board. In the circumstances for which this particular procedure provides, the request for reconsideration takes the place of the protest provided for under the abovementioned paragraph 7(a) of the Statutes of the Appeals Board.

In this case, the Tribunal notes that although the complainant's challenge was mainly founded, as noted below, on an alleged fault on the part of the Organization, she had asked, on 7 March 2016, for a reconsideration of the decision of 18 February 2016, thereby placing herself within the scope of the Compensation Plan. She should therefore, before referring the matter to the Tribunal, have challenged the decision of 25 July 2016 before the Appeals Board, as the Director of HRM rightly indicated in her reply of 7 October 2016 to the complainant's request for information of 26 July 2016.

10. It follows from the foregoing that the second complaint, which is not directed against a final decision taken on the recommendation of the Appeals Board, is irreceivable for failure to exhaust internal means of redress. It must, therefore, be dismissed for this reason.

11. However, the third complaint is directed against a decision taken following a recommendation of the Appeals Board, with which the complainant had lodged an appeal on 28 October 2016, after having filed her second complaint with the Tribunal. As stated above, the complainant was not required to lodge a protest against the Director-General's decision of 25 July 2016 taken after her request for reconsideration. The Appeals Board, in its opinion of 12 April 2018, and the Director-General, in her decision of 3 August 2018, hence wrongly considered the complainant's appeal to be irreceivable on the grounds that it was not preceded by such a protest.

12. The Appeals Board, in the same opinion of 12 April 2018, and the Director-General, in her decision of 3 August 2018, also wrongly considered that the appeal submitted by the complainant was time-barred.

Firstly, it should be noted that in the case of an official who, like the complainant, has separated from service, the applicable time limit for submitting an appeal is, under paragraph 7(a) of the Statutes of the Appeals Board, two months, not one month as was wrongly indicated in the abovementioned opinion and decision.

Secondly and above all, the Tribunal notes that the Director of HRM took more than two months to reply to the complainant's letter of 26 July 2016 in which she expressed her wish to challenge the decision and sought information on the means of appeal available to her in her situation. In these circumstances, it would be contrary to the principle of good faith, which required that the complainant should receive a timely reply, to considering her appeal as time-barred.

It follows from the above considerations that, contrary to the Organization's view, the third complaint is receivable.

13. It also follows that the decision of 3 August 2018, whereby the Director-General, endorsing the recommendations of the Appeals Board, dismissed the complainant's internal appeal, is unlawful and must, therefore, be set aside.

14. At this stage of its findings, the Tribunal should normally refer the case back to the Organization for the Appeals Board to examine the complainant's appeal. However, given the length of time since the events and the fact that the case has already been remitted to UNESCO by Judgment 3397, the Tribunal will not do so again in the instant case and will itself examine the merits of the complainant's claims.

15. According to article 4 of the Staff Compensation Plan:

> "The compensation payable under these Rules shall be the sole compensation to which any person shall be entitled as against the Organization in respect of any claim falling within the provisions thereof".

Contrary to the defendant organization's submissions, these provisions do not preclude a staff member from claiming compensation for the consequences of negligence on the part of the Organization. Such a claim cannot be regarded as being based on the provisions of this plan (see, for similar cases, Judgments 3689, consideration 5, and 3946, consideration 17).

16. The evidence shows that the complainant fractured her ankle on 27 January 2011 while climbing the steps to a podium set up for a seminar that she was to lead. She lost her balance when she stepped into a hole, approximately 7 centimetres long and 1 centimetre deep, that was concealed under the carpet on the floor. The complainant submits that the existence of this hole is indicative of negligence on the part of the Organization.

According to the Tribunal's case law, an organization may incur liability in negligence where it fails to take reasonable steps to prevent a foreseeable risk of injury (see Judgments 2804, consideration 25, 3215, consideration 12, and 3733, consideration 12). In the instant case, it is apparent from the file that the floor of the podium set up for the seminar was defective and should have been repaired or, at least,

signposted, as evidenced by the occurrence of the accident. The Tribunal also notes that the floor in question was fully refurbished after this accident, which shows that the Organization itself considered it to be defective.

17. According to the Tribunal's case law, an international organization has a duty to provide a safe and adequate environment for its staff, and they in turn have the right to insist on appropriate measures to protect their health and safety (see Judgments 3025, consideration 2, 2403, consideration 16, and 3689, consideration 5).

In the instant case, the Organization, which had ordered the construction of the podium in which the hole was found, should have ensured that this work was properly carried out. It must therefore be recognized that the Organization is at fault.

Pursuant to the principle that full compensation is due in respect of injuries caused by negligence on the part of the Administration, the complainant is entitled to compensation for injuries not already compensated under the Staff Compensation Plan.

It follows that the decisions of 18 February 2016 and 25 July 2016 whereby the Director-General denied such compensation as a matter of principle must be set aside.

18. The complainant alleges various material injuries involving costs incurred in relation to the accident. However, it must be noted that she does not produce any invoices substantiating the actual amounts concerned and does not provide any reasons why those documents might not be in her possession. The Tribunal cannot therefore award compensation for the injuries in question.

While the complainant also alleges that she has lost the opportunity to be offered a consultancy contract by the Organization after her retirement, this injury, which is purely hypothetical, cannot give rise to compensation.

With regard to moral injury, the accident caused the complainant physical suffering and disruption to her living conditions that were not compensated under the Staff Compensation Plan.

The complainant further alleges specific moral injury resulting from the excessive length of the internal appeals procedure. It is true that this procedure, which spanned some seven years for reasons mostly attributable to the Organization, was unreasonably long. The Tribunal considers, however, that this excessively long period did not in itself cause serious injury to the complainant.

Contrary to the complainant's submissions, it does not appear from the file that the Organization behaved in a "particularly disgraceful and unfair" manner towards her.

Lastly, with regard to the other moral injuries alleged by the complainant, these appear, in the Tribunal's view, to be negligible and therefore do not warrant substantial compensation.

In view of all the circumstances of the case, the Tribunal considers that the moral injuries suffered by the complainant will be fairly compensated by awarding her, in addition to the sums already awarded under the Staff Compensation Plan, compensation in the amount of 15,000 euros.

19. Since the complainant succeeds in part, she is entitled to costs, the amount of which the Tribunal sets at 5,000 euros.

20. The complainant's counsel requests the Tribunal to deduct certain amounts for his benefit from the monetary awards made to the complainant. However, it is not for the Tribunal to concern itself with private arrangements made between complainants and their counsel (see Judgment 4072, consideration 21). This request must therefore be rejected.

DECISION

For the above reasons,

1. The second complaint is dismissed.
2. The decision of the Director-General of UNESCO of 3 August 2018, as well as those of 18 February 2016 and 25 July 2016, are set aside.
3. The Organization shall pay the complainant 15,000 euros in moral damages.
4. It shall also pay the complainant 5,000 euros in costs.
5. All other claims under the third complaint are dismissed.

In witness of this judgment, adopted on 14 November 2019, Mr Patrick Frydman, 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 10 February 2020.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ