

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

W. (No. 2)

v.

UNESCO

133rd Session

Judgment No. 4458

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms J. W. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 15 June 2018 and corrected on 8 August, UNESCO's reply of 12 November, the complainant's rejoinder of 22 December 2018, UNESCO's surrejoinder of 15 April 2019, the complainant's further submissions of 18 December 2020 and UNESCO's final observations thereon of 18 March 2021;

Considering the letter of 8 April 2021 – forwarded to the Organization on 28 September 2021 – in which counsel for the complainant responded to UNESCO's final observations;

Considering the applications to intervene filed by Ms C. B., Ms D. C., Ms D. D. D'I., Mr N. D., Ms J. D., Ms C. E., Ms A. E., Ms M. L., Ms M.-C. M., Ms M. M. L., Ms M. R., Ms M. R. and Ms P. R. on 2 February 2021, and UNESCO's observations thereon of 18 March 2021;

Considering the application to intervene filed by Mr B. d. P. on 8 April 2021 and UNESCO's observations thereon of 30 April 2021;

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 complainant seeks the setting aside of the information circular which, according to her, announced the closure of the UNESCO Commissary.

In September 1947, the UNESCO General Conference instructed the Director-General to establish a "Commissariat" with a view to improving the living conditions of the staff by enabling them to buy goods and articles free of duty and/or taxes under the privileges extended to the Organization by the authorities of France, the host State. On 3 October 1949 the Commissary took on the form of a cooperative society with limited liability and variable capital which could be joined by subscribing to a share. It was provided that in the event of a dissolution and liquidation, losses would be borne by members in proportion to their shares and that, conversely, if the liquidation showed a net profit, members would be entitled to a refund of their shares as a preferential claim.

By Instruction of the Director-General of 24 October 1958, the Organization announced that the UNESCO Staff Service had been set up as the successor to the Cooperative, which had ceased to exist. The Service was financed by a special Trust Fund established by the Director-General that received the Cooperative's assets and obligations. Use of the Trust Fund and any over-earnings accruing to it in the course of operations was to be limited to purposes beneficial to UNESCO staff in accordance with the wishes of the users as expressed in general meeting and assented to by the Director-General. The purpose of the Trust Fund was inalienable. Moreover, the Financial Regulations of the Trust Fund authorised it to require users of the Commissary to make a deposit that would be repaid to them in the event of liquidation.

On 1 July 1967 new Regulations of the UNESCO Commissary were adopted replacing the UNESCO Staff Service with the UNESCO Commissary. The Commissary continued to operate under the authority of the Director-General, who established a Fund to finance it, to which its predecessor's assets and liabilities were transferred. The provision

on the inalienability of the purpose of the Fund was deleted, but membership deposits were still to be repaid in the event of liquidation.

On 10 May 1968 the complainant – who had entered UNESCO’s employment a few months earlier – joined the Commissary by paying a deposit of 50 French francs.

New Regulations of the UNESCO Commissary were adopted in 1973. These confirmed the Director-General’s overall authority and deleted the provision regarding use of the Fund in accordance with users’ wishes.

By Administrative Circular No. 2158 of 14 June 2002, the staff were informed of the Director-General’s decision to suspend the application of Item 1250 of the UNESCO Administrative Manual concerning the Commissariat’s functions, structure and mode of operation.

On 12 November 2009 the Director-General adopted the new version of the Administrative Manual, including, inter alia, Item 12.6 to replace Item 1250, and abolished Administrative Circular No. 2158. Paragraph 1.2 of the new Item 12.6 stated that the item and its annexes – namely the Commissary Regulations, its Financial Regulations and the rules for implementing the Financial Regulations – were under revision. The institutions responsible for managing the Commissary consisted of a General Assembly, charged with determining the general policy subject to the authority of the Director-General; a Management Committee which assisted the Director-General in the general operation; and an Administrative Board, tasked with taking decisions concerning personnel or financial matters. UNESCO’s Director of the Bureau of Human Resources Management or Chief Financial Officer could exercise a veto on a decision which, in the Director-General’s opinion, was contrary to the Organization’s interests. Under paragraphs 1.2 and 4.1 of the Regulations of the Commissary, the Commissary was an integral part of the UNESCO Secretariat and, as such, subject to the Director-General’s authority.

Between 2011 and 2013 two audits were carried out on the Commissary’s management. The second identified several options for its future, namely: outsourcing to an appropriate operator, an internal relaunch of its activity, or closure. A feasibility study was then conducted. On 24 February 2015, on the basis of this study, the General Assembly

requested the Director-General to take all measures necessary to ensure that the Commissary was relaunched internally, while taking account of the financial stability of its operations. The Headquarters Committee – a committee of the UNESCO General Conference that is tasked with framing and coordinating with the Director-General the management policy of the Headquarters – invited him to present a progress report on an outsourcing plan at no cost to the Regular Budget.

A review of the Commissary's situation was carried out in October 2015. A plan of action was proposed for closing the Commissary and outsourcing its operations with a view to providing a useful service at no cost to the Organization's Regular Budget. On 25 November 2015 the Director-General decided to close the Commissary and initiate a plan for the redeployment and voluntary separation of employees. On 16 March 2016 the Commissary's Administrative Board, meeting in the presence of several members of the Management Committee, confirmed that the Commissary would close on 31 March 2016. A communication to all staff was to be posted to the Organization's intranet by 18 March, which was done. On 23 May 2016 Information Circular IC/AM/29 informed the persons concerned that they were entitled to request the reimbursement of membership deposits before 31 October 2016.

On 9 January 2017 the complainant – who had left the Organization on 31 March 2003 when she retired – complained that, as a former staff member, she had not been informed of the decision to close the Commissary or of Information Circular IC/AM/29. She asked the Director-General for the reimbursement of at least 60 euros on the basis of the Commissary Fund's remaining financial assets instead of the eight euros proposed by the Administration. She was informed on 1 February 2017 that, although her claim was out of time, she would be granted a refund of eight euros, the equivalent of her membership deposit.

On 20 March 2018 Information Circular AC/AM/56 notified UNESCO staff and Commissary users of the removal of Item 12.6 and its appendices from the Administrative Manual following the Commissary's closure. That is the impugned decision.

The complainant requests the Tribunal to set aside the impugned decision, to order UNESCO to consult the General Assembly of the Commissary or, in the alternative, to order the pro rata reimbursement to staff of the Commissary Fund's remaining financial assets. She also seeks compensation for the moral injury she considers she has suffered, which she estimates at 5,000 euros, as well as the sum of 10,000 euros in costs.

UNESCO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant impugns the Information Circular of 20 March 2018 announcing the removal from the Administrative Manual of Item 12.6 and its appendices concerning the UNESCO Commissary as a result of the Commissary's closure on 31 March 2016.

In addition to her request for that circular to be set aside, the complainant asks the Tribunal to order UNESCO to consult the General Assembly of the members of the Commissary on the cessation of its activity or, in the alternative, to order the reimbursement to members, in proportion to their deposits, of the remaining financial assets held by the Commissary Fund at the time of its concomitant closure.

In essence, she contends that the Commissary's closure was rendered unlawful by the failure properly to consult the bodies responsible for administering the Commissary in the interests of its members, and that UNESCO neither owned nor was entitled freely to dispose of the Fund's assets, the remainder of which should ordinarily have been shared among those members.

2. UNESCO contends that the Tribunal should declare the complaint irreceivable and, subsidiarily, dismiss it on the merits.

3. Fourteen applications to intervene have been filed during the proceedings.

4. The Tribunal will not, however, rule on either the receivability or the merits of the complaint since it must find at the outset that, as UNESCO correctly submits, it does not have jurisdiction to rule on this dispute.

5. Pursuant to Article II, paragraph 5, of its Statute, the Tribunal “shall [...] be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations of any [...] international organisation” recognising its jurisdiction.

6. In this case, the contested measure affects the complainant not in her capacity as a former official of UNESCO, but in her – legally distinct – capacity as a member of the Commissary. The complainant herself makes this clear in her complaint by submitting that the decision to end the Commissary’s activity “directly breaches [her] entitlements as a member of the Commissary”, and the nature of the arguments raised in her submissions confirms that she intends to file a complaint with the Tribunal in that capacity.

However, the opportunity to use the services of the Commissary, which was merely a facility offered to UNESCO staff members – and indeed to other categories of persons, as will be discussed below – was not covered by the provisions of the complainant’s employment contract when she retired nor by the provisions of the Organization’s Staff Regulations (for a comparable case of a complainant contesting an increase in the fee for parking in the garage provided for the staff of the international organisation of which he was an official, see Judgment 2783, considerations 10 to 15).

7. The Commissary – which in 1958 lost its previous status, granted in 1949, as a cooperative society – was undoubtedly an integral part of the UNESCO Secretariat, and the aforementioned provisions in its regard appeared in the Administrative Manual until they were removed by the contested circular. However, in the absence of any reference to this facility in the employment contracts of UNESCO officials or the provisions of the Staff Regulations, this does not imply

that entitlement to use the Commissary's services may be regarded as a term of employment the alteration of which can be challenged before the Tribunal.

8. In this respect, it should be noted that, although the opportunity to purchase consumer goods free of duty or tax was plainly financially advantageous to the officials who joined the Commissary, it cannot be regarded as part of their remuneration. As the Tribunal has already held, the benefits of access to a commissary cannot be so classified, since they result from a tax privilege granted directly to the officials concerned by the host country and not from an expense borne by the organisation concerned (see Judgments 1000, consideration 16, and 1001, consideration 16).

9. The complainant is wrong to submit that this case is similar in that respect to the case leading to Judgment 3761, in which the Tribunal declared unlawful a circular implementing amendments to the Rules of UNESCO's Medical Benefits Fund. The obligation to provide staff members with sickness coverage is in fact provided for in Article 6.2 of the UNESCO Staff Regulations, and, more generally, the Tribunal's case law makes plain that international civil servants' social protection forms an integral part of their terms of employment (see, *inter alia*, Judgment 3506, consideration 9), which is why the Tribunal was competent to hear that other case.

10. Lastly, the Tribunal observes that it is unsurprising that access to the UNESCO Commissary is not one of the benefits granted to staff members listed in their employment contracts or the Staff Regulations. Indeed, from the time of its creation, and despite the fact that this occurred against the backdrop of the consumer goods shortage prevailing in France at the time owing to the economic devastation wreaked by the Second World War, entitlement to use the Commissary's services was not conceived as a term of employment of UNESCO staff but merely as a facility offered with a view to enabling them – in the words of the resolution adopted by the General Conference in September 1947 on this matter – to “improve [their] living conditions” by obtaining items

necessary for their “personal comfort”. In the decades that followed, and until the closure of the Commissary, the fact that it existed merely as a facility became all the more obvious as the supply problems that had originally justified its establishment disappeared.

It should also be noted that the opportunity to join the Commissary was not restricted to serving UNESCO staff members, since it was also open, *inter alia*, to former UNESCO staff members, members and staff of permanent delegations to UNESCO and officials of the United Nations and specialised agencies assigned to Paris, which confirms that this benefit was not conceived as a term of employment attaching to the status of UNESCO staff member.

11. It follows from the foregoing that this dispute does not fall within the scope of the provisions of Article II, paragraph 5, of the Statute of the Tribunal.

12. In his aforementioned letter of 8 April 2021 responding to UNESCO’s final observations, counsel for the complainant submits that a decision to decline jurisdiction would result in “a flagrant denial of justice on account of the lack of alternative remedies”. However, even though it may prove impossible to settle the dispute in another jurisdiction, that risk cannot allow the Tribunal to rule on a complaint which does not fall within its own jurisdiction. It should be borne in mind that, as the Tribunal has always made clear since its earliest judgments, its jurisdiction is limited and, as such, it is “bound to apply the mandatory provisions governing its competence” (see Judgment 67, consideration 3, or, more recently, Judgment 2657, consideration 5).

13. The complainant has applied for oral proceedings. However, in view of the Tribunal’s lack of jurisdiction, which renders any discussion of the receivability or merits of the complaint pointless, this request must be dismissed as being without object.

14. UNESCO has requested that the complainant’s further submissions and the appended documents be disregarded. It argues that their submission, as an exception to the rule under which proceedings

before the Tribunal are ordinarily limited to the filing of two briefs by each of the parties, is not warranted by exceptional circumstances, as required by the precedent set, in particular, by Judgment 1684. This request cannot be granted, since the submission in question was, in this case, duly authorised by the President of the Tribunal. Moreover, the fact that the Tribunal does not have jurisdiction to hear the complaint has the effect of depriving the request of any practical significance, given that the submissions and documents in question related to the merits of the case.

15. In his aforementioned letter of 8 April 2021, counsel for the complainant requested the Tribunal to disregard various arguments put in UNESCO's final observations on the ground that those arguments, relating to the receivability of the complaint and the Tribunal's jurisdiction to hear it, were not specifically intended to respond to the aforementioned further submissions. However, while it would certainly not have been permissible for UNESCO to raise new objections to receivability at that stage of the proceedings, it cannot be considered improper for it to have used this final submission, as it did in this case, to expand its arguments relating to the objections raised in its previous submissions, since the President of the Tribunal did not require it to restrict the scope of its final observations to the new points contained in the complainant's further submissions. It should also be pointed out that those observations could not have had a decisive influence on the outcome of this case, because in any event it is for the Tribunal to ascertain of its own motion whether it has jurisdiction to hear the complaints submitted to it.

16. Since the Tribunal, as explained above, does not have jurisdiction to hear this case, it must dismiss the complaint and all applications to intervene.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 2 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ