

108th Session

Judgment No. 2898

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr K.-W. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 29 July 2008, UNESCO's reply of 25 March 2009, the complainant's rejoinder of 22 April and the Organization's surrejoinder of 25 May 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a German national born in 1956, is a former staff member of UNESCO. He separated from service on 30 June 2004 following a negotiated settlement. In September 2007 he filed a first complaint with the Tribunal seeking to have his separation set aside. In Judgment 2765, delivered on 9 July 2008, the Tribunal summarily dismissed that complaint as clearly irreceivable. On 29 July 2008 he filed a second complaint with the Tribunal, seeking again to have his separation set aside, that is impugning the "decision" of 30 June 2004.

B. The complainant states that he is filing a new complaint based on new elements. He alleges that he suffered from serious health problems between 2004 and 2007 and that he was not in a position to make a decision concerning his professional situation. In support of his allegation he provides two medical certificates.

He asks the Tribunal to quash the agreed separation of 30 June 2004, to order the reimbursement of his “lost salaries” since July 2004, minus the sums he received pursuant to the separation agreement, which he wishes to use as contributions to the United Nations Joint Staff Pension Fund. He also asks the Tribunal to order UNESCO to pay its share of his contributions to the Pension Fund as from July 2004.

C. In its reply UNESCO contends that the complaint should be dismissed as clearly irreceivable. The complainant did not submit a protest to the Director-General challenging the separation agreement of 30 June 2004. Nor did he seek the latter’s agreement to waive the jurisdiction of the Appeals Board before appealing directly to the Tribunal. Consequently, he has failed to exhaust the internal means of redress. It adds that, in the event that the separation agreement is considered as a final decision, the complaint is in any case time-barred.

The Organization further submits that the complainant’s second complaint is identical to his first one, which the Tribunal dismissed summarily in Judgment 2765 as clearly irreceivable. In its view, the complainant is in fact requesting a review of that judgment. It argues that the two medical certificates produced by the complainant do not constitute new facts justifying a request for review, since the opinions expressed therein do not add any new elements to the file. Moreover, the physicians who established the medical certificates did not indicate that they had examined the complainant between April and July 2004, when he was negotiating the contested agreement. UNESCO points out that no medical certificates were ever forwarded to it, either before or after the separation agreement was signed. It

adds that the complainant was given time to examine the agreement before signing it and that it was stipulated therein that in accepting that offer he undertook not to exercise any claim or lodge any appeal against the Organization.

D. In his rejoinder the complainant stresses that he is not seeking a review of Judgment 2765. He contends that the impugned decision is a final decision and he points out that following his separation from service in 2004 he was unable to obtain information or guidance from the Administration on the procedure to follow in order to challenge his separation.

E. In its surrejoinder the Organization maintains its position.

CONSIDERATIONS

1. In June 2004, following a negotiated settlement, the complainant separated from UNESCO. In September 2007 he filed a first complaint with the Tribunal seeking, among other things, to have the separation set aside. In that complaint he stated that, at the time of his separation in 2004, he was not in a condition to make decisions to safeguard his employment. It was only after the intervention of friends and family, and with the help of his psychiatrist, that he realised what had transpired. In Judgment 2765 the Tribunal concluded that, as the requirements of Article VII of its Statute had not been met, the complaint was clearly irreceivable and summarily dismissed it.

2. On 29 July 2008 the complainant filed a second complaint with the Tribunal seeking, among other things, to have the separation set aside. In his brief, he states that he is introducing a new complaint with new elements. He states that between 2004 and 2007 he was unable to deal with matters relating to his employment due to health problems. He also states that his new complaint is based on medical certificates which he submitted to the Tribunal with his brief. In his pleadings, the complainant stresses that he is not seeking a review of the Tribunal's decision in Judgment 2765.

3. In his second complaint, the complainant attempts to raise against UNESCO the same issues that were raised in the earlier complaint which led to Judgment 2765. The principle of *res judicata* applies and the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet