Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

116th Session **Judgment No. 3281**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. B. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 4 June 2011, the Organization's reply of 12 September, the complainant's rejoinder of 17 December 2011, UNESCO's surrejoinder of 5 April 2012, the complainant's additional submissions of 4 June, and the Organization's final comments of 5 October 2012;

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;

A. Facts relevant to this case are to be found in Judgment 2255, delivered on 16 July 2003, concerning the complainant's first complaint. Suffice it to recall that, by way of an amendment to Staff Rule 103.18(b), the Organization's system for income tax reimbursement changed, with effect from the 1999 tax year, from being a "last-income" system to being a "first-income" system. Staff members who, like the complainant, had United States citizenship, were specifically informed of this change in January 2000. The

complainant and two other staff members challenged the amendment, arguing that it violated legal principles and their contractual and acquired rights. In addition, they asserted that it was not being applied fairly, thereby creating inequalities between similarly situated staff members. The Tribunal concluded that the amended version of Staff Rule 103.18(b) breached the fundamental principle under which the remuneration of international civil servants must be exempt from national taxes and that, consequently, it could not be applied to the complainants. The Tribunal ordered UNESCO to refund to the complainants in that case any and all taxes paid by them over and above what they would have paid on the application of the "last-income" method, and it awarded each of them costs.

Further to Judgment 2255, on 10 November 2003 the Organization amended Staff Rule 103.18(b) so as to implement the "last-income" system for the reimbursement of income tax. The amended rule relevantly provides as follows:

> "(a) Income tax levied by the authorities of the country of which the staff member is a national on salaries and emoluments received by him or her from the Organization shall, subject to the provisions of (b) below, be reimbursed by the Organization.
>
> (b) The amount of reimbursement shall be the difference between the tax payable on the staff member's total income, including UNESCO earnings, and the tax which would be payable on his or her income excluding UNESCO earnings."

Subsequent to the aforementioned amendment, the Administration recalculated the complainant's tax reimbursements for the material time in accordance with the "last-income" system and remitted to him 5,333 United States dollars, based on those calculations.

Under the law of the United States of America, US nationals who have paid or accrued foreign taxes to a foreign country on foreign source income and are subject to US tax on that income, may, in specified circumstances, claim a credit ("foreign tax credit") for those taxes on their US income tax returns.

The complainant retired from UNESCO on 31 March 2004. On 19 July he wrote to the Organization's Comptroller regarding the reimbursement of his federal income tax for the period from 1998 to

2002. He attached to his letter amended US income tax returns for the years 2001 and 2002 and stated that those returns took into account a "Foreign Tax Credit for French income tax". He also attached amended returns for the years 1999 and 2000 and two amendments for 1998. He set out mathematical formulae regarding his tax reimbursements for the period from 1998 to 2002. The formula for each year included a foreign tax credit derived from a calculation which included his UNESCO income and a foreign tax credit derived from a calculation which excluded that income. He concluded that, for the period from 1998 to 2002 (subject to any changes "by [the] IRS [Internal Revenue Service]" and subject to his future entitlements to foreign tax credit carry-overs), he owed the Organization 7,073.51 US dollars and he enclosed a cheque for that amount. He requested confirmation that he would be able to seek reimbursement from UNESCO in respect of any unused tax credits attributable to UNESCO income arising in future tax returns not including such income.

The Deputy Assistant Director-General for Administration and Comptroller replied on 13 September 2004. He acknowledged receipt of the complainant's cheque and requested, in the event that the complainant qualified for a foreign tax credit in the future and the IRS reimbursed him for tax paid on his UNESCO income for the remaining two years that he was a staff member, that he reimburse the amount due to UNESCO.

In a letter of 26 February 2007, the complainant referred to his letter of 19 July 2004 and stated that he had received UNESCO income in 2005 in the form of the second part of his repatriation grant, which had been paid to him in February 2005, the year after his retirement. He indicated that under US law, he was allowed to treat the grant as income for the year in which it was actually received, i.e. 2005. He set out mathematical formulae similar to those he had provided in his letter of 19 July 2004 regarding his tax reimbursements, this time for the period from 2003 to 2005, and concluded that, as at the date of his letter, he owed UNESCO 2,081.46 US dollars. However, referring to an IRS publication of

2004, he explained that, pursuant to a change in US law, unused foreign taxes arising in tax years beginning after 22 October 2004 could be carried back one year and carried forward for ten years. In addition, the carry-over period for foreign tax credits had been extended from five years to ten years for unused foreign taxes that could be carried forward under the previous five-year rule to tax years ending after 22 October 2004. He provided a table (covering the period from 1998 to 2005) in which he set out, for each year, two amounts of foreign tax which, in his view, might qualify for a foreign tax credit in the future. One amount was calculated including his UNESCO income and the other amount was calculated excluding that income. He repeated his request of 19 July 2004 that the Organization provide him with a confirmation that it would reimburse him in respect of any tax credits attributable to UNESCO income to which he might be entitled in future tax returns.

By a letter of 9 March 2007, the complainant provided what he referred to as a "[c]orrected table of past foreign taxes still available for carry-over". In its reply of 29 March, UNESCO indicated that his request for possible reimbursement related to future tax credits attributable to UNESCO income had been referred to the Bureau of Human Resources Management (HRM) for consideration and that he would be kept informed of any decisions taken in this respect.

By a letter of 30 December 2007, appended to which was a copy of his 2006 income tax return, the complainant set out a mathematical formula and stated that UNESCO owed him a tax reimbursement for that year in the amount of 1,017.83 US dollars. Thus, based on his previous calculations as of 30 December he concluded that he owed the Organization 1,063.63 US dollars. He included an updated table of what he considered to be his available foreign tax credits and stated that, in his view, UNESCO's maximum additional liability related to his entitlement to carry over foreign tax credits was 3,320.12 US dollars. He asked for an "administrative decision" regarding his request for a tax reimbursement for 2006.

In a letter of 24 January 2008, UNESCO informed the complainant that the Bureau of the Comptroller could not take an

administrative decision on payroll entitlements, including those related to tax reimbursement, but that the matter had been referred to HRM, the Office of International Standards and Legal Affairs, and an external tax consultant.

The complainant wrote to UNESCO again on 14 June 2009. He appended a copy of his 2007 federal income tax return and a second amendment to his 2006 return and set out calculations regarding his reimbursements for those years. He stated that UNESCO owed him 3,412.16 US dollars and that upon payment to him of this amount the Organization would fully discharge its liability to him regarding his tax reimbursements.

On 16 September 2009 the complainant submitted a protest to the Director-General. He referred to his letter of 14 June and indicated that, as he had received no response, he assumed the Administration's reply was negative. He therefore challenged the Organization's refusal to reimburse him 3,412.16 US dollars. Having received no reply to his protest, on 10 January 2010 he filed a notice of appeal with the Secretary of the Appeals Board. On 14 January he submitted a detailed appeal in which he requested reimbursement of "the remaining underpayment of […] 3,412.16 [US dollars] of United States income tax due to UNESCO income in the years 1998 to 2004, which could not have been calculated before 2007".

In its report of 2 December 2010 the Appeals Board recommended that the complainant's request for reimbursement be reviewed by an independent tax consultant familiar with US and French law and the common practice within the United Nations in order to enable UNESCO to reach a full and final settlement of the complainant's claims. The Board further recommended that the Organization examine the impact of foreign tax credit on the income of US nationals employed by the Organization, with a view to ensuring tax equalisation and reimbursement.

By a letter of 18 February 2011, which is the impugned decision, the complainant was informed that the Director-General had decided not to accept the Appeals Board's recommendations. Appended to the letter was a note for the file from the Bureau of the Comptroller

dated 9 March 2010 which contained a summary of the findings of an external consultant who had been asked by the Administration to examine the complainant's case.

B. The complainant submits that Staff Rule 103.18 does not specify that the UNESCO earnings in question must be received during the corresponding tax year. Also, because US nationals are able to carry over foreign tax credits to future years, the income tax reimbursements he received from the Organization were, in essence, calculated on the basis of "preliminary data". Since UNESCO accepted the principle of foreign tax credit carry-back and carry-over for the years from 1998 to 2005 and the reasoning he provided for the operation of foreign tax credits on the amount of his corresponding tax reimbursements, the Organization should apply the same principles and reasoning for the reimbursements owed to him for 2006 and 2007.

He asserts that the issue of the application of foreign tax credits has not been considered with appropriate seriousness by the Organization. He contends that, despite the fact that he has dealt with the Organization fairly, it has taken advantage of his honesty and it should not have waited nearly seven years before communicating its position on the issue to him.

Lastly, he challenges the opinion of the external consultant engaged by UNESCO to examine his case. In particular, he points out that this consultant is associated with another international organisation which has the same interest as UNESCO in reducing its tax reimbursement burden and, consequently, he cannot be considered independent. Furthermore, his analysis lacks credibility.

The complainant asks the Tribunal to quash the impugned decision. He requests that it find UNESCO liable to reimburse him for income tax paid on UNESCO earnings for years in which it made no direct payments to him of salaries and related emoluments, provided that such reimbursement is in accordance with Staff Rule 103.18(b); in other words, in final settlement of his case, the Organization shall reimburse him the sum of 3,412.16 US dollars in respect of his claims for the tax years 2006 and 2007. In the event that the Tribunal does

not accept his "conclusion", he nevertheless seeks reimbursement in the sum of 3,412.16 US dollars on the basis of unreasonable delay between his request of 14 June 2009 and the Director-General's final decision of 18 February 2011 and also on the basis that the Organization implicitly accepted his calculations regarding his tax reimbursement for the year 2006. In the alternative, he asks the Tribunal to order the Organization not to pursue a claim for reimbursement of 1,017.13 US dollars, which was "implicitly paid [to him] by UNESCO on 30 December 2007". He seeks interest at the rate of 5 per cent per annum on any amounts due to him, with effect from 14 June 2009. He also claims costs.

C. In its reply UNESCO contests the receivability of the complaint on several grounds. First, the decision by the Appeals Board that the complainant's appeal was receivable is not founded in law given that a retired staff member cannot submit tax returns for the years following her or his separation from the Organization. Second, as from 2009 the complainant was time-barred from making claims regarding his tax reimbursement because the request form for reimbursement includes a provision that no claims will be entertained one year after the last day on which a staff member must file his or her tax return without an extension for time of filing. Third, the administrative decisions related to the complainant's tax reimbursements for the period from 1998 to 2004 are final decisions taken in full execution of Judgment 2255 and are not subject to challenge before the Appeals Board or the Tribunal on the basis of the principle of *res judicata*. Fourth, UNESCO considers that the complainant's claims are hypothetical in nature and do not permit it to take a final decision regarding settlement. Thus, they violate the principle of legal certainty. Fifth, the Appeals Board went beyond its competence when it recommended that the Organization further examine the impact of foreign tax credit on the income of US nationals employed by it.

Subsidiarily, on the merits, UNESCO points to the opinion of the external consultant summarised by the note for the file of 9 March 2010. It states that the complainant's claims for 2006 and 2007 relate

to a time when he was no longer employed by the Organization and its tax reimbursement system does not apply to periods of time in which a staff member has no earnings from UNESCO. In addition, the system of tax reimbursement set out in Staff Rule 103.18(b) is based on the "last-income" method and on a true copy of the income tax returns submitted to the competent fiscal authority. Amended tax returns must be verified by that authority for the year during which a staff member earned UNESCO income. The Organization emphasises that staff members have a responsibility to submit all evidence in support of their claims.

UNESCO contends that it has no duty to compensate staff members for future economic loss resulting from their employment with the Organization. There is no legal basis for the complainant's claims in the Staff Regulations and Staff Rules or in his letter of appointment. Referring to the Tribunal's case law, it asserts that the complainant does not have an acquired right to link his tax reimbursement claim for 2006 and 2007 to the principle of full tax exemption of his UNESCO earnings recalculated retroactively on the basis of amended tax returns. It contends that the complainant has failed to demonstrate that the impugned decision was flawed by any mistake of fact or law.

The Organization asserts that there was no unreasonable delay in its treatment of his case and that all the internal procedures were followed in accordance with the Statutes of the Appeals Board. Lastly, it denies that it has treated the complainant unfairly.

D. In his rejoinder the complainant develops his pleas. He argues that UNESCO has no legal basis upon which to deny a retired staff member the right to submit tax returns related to tax years following her or his separation from service. Furthermore, the fact that the Tribunal confirmed that UNESCO must use the "last-income" method to calculate tax reimbursement does not restrict a staff member's right to challenge the Organization's application of that method. In

addition, he asserts that, for US nationals living abroad, the last date for filing a tax return in a given year without an extension of time is 15 June of the year following the year in which the income is received. Therefore, his tax returns were filed and his claims for reimbursement were submitted within the prescribed time limits.

E. In its surrejoinder UNESCO maintains its position. It contends that the complainant's claims are without merit because he did not earn any income from the Organization in 2006 and 2007. It states that he failed to provide evidence to support the amounts indicated in his letters of 30 December 2007 and 14 June 2009. Furthermore, it asserts that his arguments regarding his entitlement to tax reimbursements on the basis of foreign tax credit are flawed, and in support of this assertion it appends a copy of a report dated 5 April 2012 which is authored by the same expert it previously consulted regarding the complainant's case. It denies that it implicitly waived its right to contest his claims.

F. In his additional submissions the complainant challenges the report of 5 April 2012. He also asserts that he provided evidence in support of his claims.

G. In its final comments the Organization emphasises that the complainant was not entitled to tax reimbursement with regard to the years subsequent to his separation from service. It reiterates that he has failed to submit sufficient evidence to support his claims.

CONSIDERATIONS

1. The complainant, a United States national, is a retired UNESCO staff member now living in France. He retired in 2004. In 2005 the complainant received his repatriation grant which was the last taxable income he received from UNESCO.

2. This complaint concerns an amount the complainant claimed pursuant to UNESCO Staff Rule 103.18. This Rule requires the Organization to reimburse staff members for the national tax they pay on the UNESCO income. If the national government refunds the staff member for the taxes they have paid on the UNESCO income, the staff member is expected to refund that amount to UNESCO.

3. At this point, it is convenient to note that at the material time there was no tax treaty between the United States of America and UNESCO. The United States has introduced a foreign tax credit that it modified in 2004. There was extensive correspondence between the complainant and the Organization as detailed above concerning the amount the complainant owed to the Organization and his assertions of entitlement to reimbursement. In light of what follows, a detailed recital of the exchanges is unnecessary.

4. Suffice it to say that, ultimately, the complainant claimed that the Organization owed him a reimbursement of 3,320.12 US dollars for the 2007 tax year and 92.04 dollars for an error in his calculations for the 2006 tax year.

5. In 2009 the complainant wrote to the Organization asking for a reimbursement for his tax credit in 2007, with a correction to the amount he claimed for 2006. The Organization did not respond. The complainant submitted a protest to the Director-General contesting the implied decision. When the Director-General did not respond, the complainant submitted an appeal to the Appeals Board.

6. The Appeals Board recommended that:

(1) The request for further reimbursement be reviewed by an independent tax consultant familiar with UN common practice, and US and French taxation laws and that the complainant's claim be verified for a full and final settlement with the Organization.

(2) UNESCO further examine the impact of foreign tax credit on the income of US nationals employed by the

Organization to ensure tax equalisation and reimbursement in this area.

7. On 18 February 2011 the acting Director of HRM wrote to the complainant informing him that the Director-General had decided not to accept the recommendations made by the Appeals Board for the following reasons: (a) the request had already been carefully reviewed by an independent tax consultant familiar with UN practice and US and French taxation laws, and (b) there is no mechanism to calculate a reimbursement of income tax when a staff member receives no income from the Organization. This is the impugned decision.

8. As stated above under C, UNESCO disputes the receivability of the complaint on a number of grounds. Only two require brief consideration.

9. The principle of *res judicata* applies where the parties, the purpose of the suit and the cause of action are the same (see Judgment 1263, under 4). In the present case the complainant is claiming reimbursement of an amount corresponding to a portion of his foreign tax credit. In Judgment 2255, the issue concerned the method of calculation for tax reimbursements, namely, the "last-income method" or the "first-income method". Accordingly the principle does not apply as the purpose of the suit is not the same. The assertion by UNESCO that any decision rendered would be hypothetical is based on a misunderstanding of the claim.

10. As the Appeals Board observed, the "tax equalization and reimbursement scheme for US nationals employed by the UN [system] is complicated, complex and cumbersome". A resolution of the present complaint requires a complex calculation in an area beyond the Tribunal's expertise. With its surrejoinder, the Organization submitted a report from an individual with significant experience in the area of tax reimbursement for staff members of international organisations. Leaving aside the question of the individual's specific expertise, the report does not address the question

as to what amount, if any, is actually due by either party. Instead, the report is directed at the methods and assumptions made in the complainant's calculations. This report does not assist in the resolution of the dispute. Similarly, the earlier report by the same individual referred to by the Director-General in the impugned decision does not, based on an actual calculation, determine what, if anything, is due by either of the parties.

11. In the circumstances, the impugned decision will be set aside so that the Organization may engage a new external independent tax consultant having expertise in the area of the taxation of international civil servants and US and French taxation laws. The Organization shall notify the complainant of the name and contact information of the consultant within 45 days of the delivery of this judgment. The Organization is to instruct the tax consultant to determine based on calculations the amount, if any, of any reimbursement due to the complainant for the tax years 2006 and 2007. The tax consultant is also to be instructed to submit her or his report simultaneously to the Organization and the complainant no later than 30 June 2014. The complainant, within 20 days of receiving the relevant contact information, is required to provide the tax consultant with copies of all documentation and information necessary to make the calculation.

DECISION

For the above reasons,

1. The Director-General's decision of 18 February 2011 is set aside.
2. The case is remitted to the Organization in accordance with consideration 11.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet