

V. (No. 2)

v.

UNESCO

128th Session

Judgment No. 4174

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms C. V. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 December 2017, and UNESCO's reply of 18 June 2018, corrected on 28 June 2018, the complainant having failed to file a rejoinder within the allocated time;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision to place her on leave without pay upon exhaustion of her sick leave entitlements.

Facts relevant to this case are to be found in Judgment 4173, also delivered in public this day, concerning the complainant's first complaint. Suffice it to recall that she was informed in March 2014 that the Director-General had decided to relocate the duties and responsibilities of her post from UNESCO's New York Office (United States of America) to the Montevideo Office (Uruguay) to meet programmatic requirements. The Director-General had also decided to assign her to that post effective 1 July 2014. On 28 March she was

informed of the change of her employment conditions, and that her contract was extended for 24 months from her date of transfer.

In May 2014 the complainant wrote to the Director-General requesting her to waive the decision to assign her to Montevideo on the grounds that she and her husband were suffering from a serious illness for which they were undergoing medical treatment in the United States, and that on 17 July 2014 she would be within three years of retirement. The Chief Medical Officer (CMO), to whom the matter had been referred, concluded on the basis of available information that the complainant's assignment to Montevideo was possible although not ideal. On the basis of that conclusion the Director-General confirmed, on 24 June 2014, the decision to assign her to Montevideo. A few days later, the complainant took sick leave for another illness. An exchange of communications ensued between the Administration, the complainant and the CMO, which resulted in postponing the date of her assignment to Montevideo.

In September 2014 the complainant was informed that, on the basis of the new assessment made by the CMO, the Director-General had decided to maintain her assignment to Montevideo. However, she was authorised to stay in New York while on sick leave and for medical reasons for a period of up to one year starting from 1 September 2014. The arrangement did not constitute a rescission or deferment of her assignment. As from 1 September 2014, she was administratively attached to the Montevideo Office.

On 28 April 2015 the complainant was informed that the Director-General, while maintaining the decision to assign her to Montevideo, had decided to authorize her to stay in New York while on sick leave and for medical reasons for another six months, that is to say until 31 March 2016. At the end of December 2015 the complainant's treating physician informed the CMO that she was fit to work provided she stayed in New York.

On 11 February 2016 the complainant was informed that, based on the latest medical information received from her treating physician, the CMO had concluded that she would not be able to report for work at the Montevideo Office within the next six to twelve months. Under these circumstances the Director-General had decided to place her on

leave without pay from the date she exhausted her sick leave entitlements. In the meantime, necessary steps would be taken to initiate her termination for reasons of health.

On 10 April 2016 the complainant submitted a protest to the Director of the Bureau of Human Resources Management (HRM) requesting the rescission of the decision of 11 February. Her request having been rejected, she filed an appeal with the Appeals Board in July challenging the decision of 11 February 2016. She alleged that she was arbitrarily placed on sick leave and sought the “rescission of the Director-General’s decision to place her on sick leave”. By a Notification of Personnel Action bearing the effective date of 7 February 2017 she was informed that, pursuant to the exhaustion of her sick leave entitlements, she was placed on special leave without pay as of that day.

In its report of 28 July 2017 the Appeals Board noted that the complainant did not inform the CMO nor the Administration in a timely manner as to her sick leave situation after June 2015, when her treating physician found that she was fit to carry out her duties in New York. The Appeals Board concluded that she was fit and willing to resume work, albeit in New York, and noted that she would soon reach statutory retirement age. It recommended that she be separated under the terms of her letter of appointment, without prejudice to her pensionable remuneration and her other acquired rights and entitlements. The complainant was notified of the Appeals Board’s report on 29 September after she had retired in July. On 15 December she wrote to the Director-General enquiring about her final decision. Having received no final decision on her appeal, she filed a complaint with the Tribunal on 26 December 2017 against the implied rejection of her claims.

The complainant asks the Tribunal to rescind the decision of 11 February 2016 to place her on special leave without pay from the date she exhausted her sick leave entitlements. She claims compensation for the loss of income and for her “loss of pension”. She asks the Tribunal to order UNESCO to pay the “missed contribution” to her pension. She also claims 9,275.39 dollars as reimbursement of the contributions she paid with respect to her health insurance, moral damages and costs.

UNESCO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress or for absence of a final decision. In the alternative, it asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant impugns what she considers to be the implied rejection of her internal appeal against a decision communicated to her on 11 February 2016. In the letter of that date, the Director of HRM advised the complainant that, having regard to the CMO's conclusion that she would not be able to report for work at the Montevideo Office within six to twelve months and that she was authorised to stay in New York for medical reasons until 31 March 2016, the Director-General had decided to place her on special leave without pay from the date she exhausted her sick leave entitlements. However, this decision would not have a bearing on her entitlement to half-pay benefits pursuant to the Medical Benefits Fund Rules. The letter also informed the complainant that steps were being taken to initiate the termination of her appointment for health reasons. It is convenient to note that by a Notification of Personnel Action of 7 February 2017 the complainant was informed that, pursuant to the exhaustion of her sick leave entitlements, she was placed on special leave as of that day. As an aside the complainant's challenge against this decision was pending before the Appeals Board at the time the reply in the present proceeding was filed.

2. UNESCO submits that the complaint is irreceivable on several grounds, one of which is decisive and will be addressed at the outset. It concerns the fact that the complainant did not exhaust internal remedies, as Article VII, paragraph 1, of the Tribunal's Statute requires, before filing her complaint.

3. UNESCO points out, correctly, that the complainant filed her complaint before having received the Director-General's final decision on her appeal. The complainant relies on Article VII, paragraph 3, of the Tribunal's Statute, which relevantly provides that "[w]here the

Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and her or his complaint shall be receivable in the same manner as a complaint against a final decision". She indicates on the complaint form that UNESCO failed to take an express decision within that sixty-day period on a claim that she notified to it on 28 July 2017. This appears to be a reference to the date of the Appeals Board's report on her internal appeal against the Director-General's decision of 11 February 2016.

4. The complainant's reliance on Article VII, paragraph 3, is misplaced. As the Tribunal recalled in Judgment 3975, consideration 5, it is clearly established in the case law that where the Administration takes any action to deal with a claim, this step in itself constitutes a "decision upon [the] claim" within the meaning of Article VII, paragraph 3, of the Statute, which forestalls an implied rejection that could be referred to the Tribunal. In the present case, the complainant's 10 April 2016 protest against the decision of 11 February 2016 was examined and rejected. Accordingly her complaint cannot be considered receivable under Article VII, paragraph 3, of the Statute. Moreover, although the Director-General's final decision on that appeal was not taken until 26 March 2018, there is nothing in the complainant's submissions that would lead the Tribunal to conclude that the delay in taking that decision, which UNESCO acknowledges, had the effect of paralysing the exercise of her right of appeal (see Judgment 2367, consideration 11).

5. In these circumstances, there is no basis on which the Tribunal can consider that the complainant has satisfied the requirements of Article VII, paragraph 1, of its Statute. Her complaint is irreceivable and must therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 May 2019, 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 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ