

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M.
v.
UNESCO

129th Session

Judgment No. 4224

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. S. E. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 28 April 2017 and corrected on 23 June, UNESCO's reply of 2 November, the complainant's rejoinder of 11 December 2017 and UNESCO's surrejoinder of 21 March 2018;

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 disciplinary measure of summary dismissal imposed on him.

At the material time, the complainant held a grade P-2 post in the Division of Knowledge Management and Information Systems under a fixed-term appointment. On 23 March 2016 he was informed that the Internal Oversight Service (IOS) had initiated an investigation into allegations of unauthorized outside activities and conflict of interest against him.

In a memorandum of 19 September, the Director of the Bureau of Human Resources Management informed him that, in the report submitted to her on 16 August, IOS had revealed beaches of his

professional obligations. Specifically, IOS had found that in violation of Staff Rule 101.5(b), he was working, without having obtained prior approval from the Director-General, as president of an association registered under French law whose aims or activities were closely related to those of UNESCO. Furthermore, IOS had established that in breach of paragraph 23 of the Standards of Conduct for the International Civil Service, he had a conflict of interest. Indeed, in December 2015, acting on behalf of the abovementioned association, he had signed an agreement with another staff member whereby computer equipment belonging to UNESCO was transferred to the association free of charge. As these actions could give rise to the imposition of a disciplinary measure, the Director of the Bureau of Human Resources Management invited the complainant to comment, which he did on 6 October.

By a letter of 8 November 2016, which was handed to him on 10 November, the complainant was informed that the Director-General considered that the charges against him were proven and that there were no mitigating circumstances with respect to the allegations against him, and she had therefore decided to dismiss him summarily for serious misconduct. On 7 December 2016 the complainant lodged a protest against that decision, in accordance with paragraph 7(a) of the Statutes of the Appeals Board, challenging “the lawfulness, the legitimacy and the proportionality”^{*} of the measure imposed on him.

By a letter of 14 February 2017, the complainant was informed that the Director-General had decided to uphold the decision to dismiss him summarily. She considered that this measure was proportional to the charges against him, which constituted serious misconduct. That is the decision impugned.

The complainant asks the Tribunal to set aside this decision. He also asks to be reinstated, to be paid his salary and all entitlements that he should have received between the date of his dismissal and that of his reinstatement, and for the impugned decision and all documents relating to it to be removed from his personal file. Failing this, he asks to be paid three years’ salary in damages for wrongful dismissal, and

^{*} Registry’s translation.

redress for all of the material and moral injury he considers he has suffered.

UNESCO submits that since the complainant did not file an appeal with the Appeals Board against the decision of 14 February 2017, his complaint is irreceivable for failure to exhaust the internal means of redress. Subsidiarily, it submits that the complaint is without merit.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside the decision of 14 February 2017 confirming the decision of 8 November 2016 whereby the Director-General of UNESCO summarily dismissed him for serious misconduct.

2. The defendant Organization submits that the complaint is irreceivable because the impugned decision is not final. In its view, the complainant still had the possibility of lodging an appeal with the Appeals Board in order to exhaust all available means of redress.

3. The complainant, on the other hand, submits that the decision of 14 February 2017 is a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. He explains that since, as a former staff member, he did not have access to the internal appeal procedure, he was entitled to proceed directly to the Tribunal.

4. In Judgment 3505, on a complaint filed by another UNESCO staff member, the Tribunal found as follows:

“1. Article VII, paragraph 1, of the Statute of the Tribunal states that ‘[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such means of resisting it as are open to him under the applicable Staff Regulations’. The only exception allowed to this rule is where staff regulations provide that the decision in question is not such as to be subject to the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body, where there is an inordinate and inexcusable delay in the internal appeal procedure, or, lastly, where the parties have mutually agreed to forgo this requirement that internal

means of redress must have been exhausted (see, in particular, Judgment 2912, under 6, and the case law cited therein, or Judgment 3397, under 1).

2. Paragraph 7 of the Statutes of the Appeals Board reads in relevant part:

- ‘(a) A staff member who wishes to contest any administrative decision [...] shall first protest against it in writing [...] to the Director-General [...] within a period [...] of two months if he or she [...] has been separated from the Organization.
- (b) The Director-General’s ruling on the protest [...] shall be communicated to the staff member within [...] two months [...] if he or she has been separated from the Organization.
- (c) If the staff member wishes to pursue his or her contestation, he or she shall address a notice of appeal in writing to the Secretary of the Appeals Board. The time-limit for the submission of a notice of appeal, to be counted from the date of receipt of the Director-General’s ruling (or, if no ruling was communicated to the staff member within the time-limit under (b) above, from the expiry of that time-limit), is [...] two months in the case of a staff member [...] who has been separated.’

3. The Tribunal’s case law establishes that, when under an organisation’s Staff Rules and Staff Regulations only serving staff members 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, under 21, 3074, under 13, or 3156, under 9).

4. 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, for example, that former staff members could not avail themselves of the internal means of redress to challenge a decision taken after they had left the Organization (see Judgment 2944, under 20).

5. However, the wording of the aforementioned 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. Thus, as the Tribunal explained in Judgment 3398 under 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 his or her capacity as an official, even if he or she 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 he or she wishes to challenge a decision taken before his or her separation. It must be noted that, although

in such a case this rule will also have the effect of depriving the former staff member of the possibility of filing a complaint directly with the Tribunal, it provides that person with the essential safeguard constituted by the right of officials to pursue an internal appeal against any decision harming their interests.

[...]

11. It may be concluded from the considerations set out above that, in the instant case, the complainant had access to the internal means of redress available to UNESCO officials.

Since the disputed decisions could plainly have formed the subject of an internal appeal, and as no agreement has been reached with the Director-General to exempt the complainant from submitting her case to the Appeals Board, as is permitted by Staff Rule 111.2, she was therefore obliged to exhaust internal means of redress before bringing the case to the Tribunal.”

5. This case law is fully applicable to the present case. The complainant was, by definition, still a serving staff member when he received notification of the decision to dismiss him summarily.

He ought therefore to have resorted to the internal means of redress prior to filing a complaint with the Tribunal.

However, the documents in the file show that, although he lodged a protest against the decision of 8 November 2016, which was dismissed by a decision of the Director-General of 14 February 2017, he then refrained from bringing the matter before the Appeals Board and filed a complaint directly with the Tribunal.

This complaint is, therefore, irreceivable for failure to exhaust the internal means of redress offered by the Staff Regulations and Staff Rules of the Organization. For this reason, it must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 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