

D. and R.

v.

UNESCO

123rd Session

Judgment No. 3761

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr G. J. D. and Ms M. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 January 2015, UNESCO's single reply of 8 June, the complainants' rejoinder of 12 September and UNESCO's surrejoinder of 23 December 2015;

Considering the applications to intervene filed between 25 March 2015 and 12 September 2015 by:

[Names removed]

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 complainants challenge a Circular that implements amendments to the Rules of the Medical Benefits Fund (MBF).

The complainants are retirees of UNESCO and participants in the MBF, which is a medical insurance fund. Pursuant to a Resolution of the UNESCO General Conference of late 2011, the Director-General asked an external consulting firm to examine the management of the MBF, in particular with regard to the need to enhance its expertise and independence.

The firm submitted a report to the Director-General in July 2012 recommending in particular that the decision-making process of the MBF be streamlined, and that the General Assembly of Participants of the MBF “no longer vote on new rules, amendments, and measures that affect[ed] the MBF”. At the 190th session of the UNESCO Executive Board in October 2012 the Director-General reported the firm’s conclusions. The Executive Board recommended that the Director-General consider the proposed new governance structure with a view to amending the Rules of the MBF in accordance with the procedures established in those Rules.

An extraordinary meeting of the General Assembly of Participants of the MBF was convened on 4 September 2013 after it had received the report of the external consulting firm. In a Resolution it noted that the proposed new Rules would fundamentally change the status of the MBF. It also noted that participants would no longer have anything to do with the decision-making process as the Board of Management and the General Assembly of Participants were to be abolished. It therefore considered that it was premature to take a decision and recommended that UNESCO External Auditor be requested to undertake a full performance audit of the MBF, including the costs and benefits of the proposed changes.

The Director-General reported to the General Conference during its 37th session. In document 37C/38 of 4 November 2013, paragraphs 1 to 8, she indicated that in order to strengthen the financial sustainability of the MBF and the effectiveness of the governance structure, the MBF needed to establish a framework of governance that was independent and objective, which basically entailed a modification of the management of the MBF. She outlined the proposals made by the Administration pursuant to the recommendations of the external consulting firm as well as the fact that the General Assembly of Participants had not approved them as required by Article 5.1, paragraph 7, and Article 5.2, paragraph 6, of the MBF Rules. The proposed amended MBF Rules were set out in an addendum.

On 19 November 2013 the General Conference adopted Resolution 85, point 1, by which it decided to amend the Rules of the MBF as set out in the addendum to the Director-General’s report.

On 21 October 2014 UNESCO issued Circular AC/HR/43 (hereinafter Circular No. 43) which stated that the General Conference had approved

changes to the governance structure of the MBF relating to Sections V, VI and VII of the MBF Rules. The amendments and consequential changes were highlighted in the attached amended version of the MBF Rules. The key changes were explained briefly in the Circular. Both complainants filed a complaint directly with the Tribunal impugning the Circular.

The complainants ask the Tribunal to quash Circular No. 43 and the amended MBF Rules it comprises. They also ask the Tribunal to consider that the rights enshrined especially in Articles 1, 4.3.2, 4.4, 4.5, 4.9, 4.11, 4.12, 4.13, 5.1, 5.2, 5.3(e), 5.5, 6.2.4, 6.4, 6.9 and 7.1 of the MBF Rules of 2008 are acquired rights and to order UNESCO to resume the consultation process with the participants in the MBF. Lastly, they seek an award of moral damages together with costs.

UNESCO asks the Tribunal to dismiss the complaints, and the applications to intervene, as irreceivable or, alternatively, devoid of merit.

CONSIDERATIONS

1. The complainants, UNESCO retirees and participants in the MBF, impugn Circular No. 43 dated 21 October 2014. As well, 36 participants in the MBF filed applications to intervene. UNESCO acknowledges that they are all retirees and participants in the MBF and, as such, are in the same position in fact and law as the complainants. It is also acknowledged that since the complainants as former staff members do not have access to the internal appeal procedure, they are entitled to file a complaint directly with the Tribunal.

The complainants seek the same redress and the complaints rest on the same pleadings. It is therefore appropriate that they be joined to form the subject of a single judgment.

The complainants seek an oral hearing but the Tribunal is satisfied that the parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainants' application for oral hearings is rejected.

2. The Organization submits that Circular No. 43 does not constitute an administrative decision taken by the Director-General that may be challenged before the Tribunal.

First, the decision to amend the MBF Rules was taken by the General Conference on 19 November 2013 and published in the General Conference's Resolution 85. Circular No. 43 refers specifically to Resolution 85. It was published pursuant to that Resolution and includes in an annex the amendments to the MBF Rules as adopted by the General Conference. The purpose of Circular No. 43 was to simply inform participants in the MBF of the amendments adopted by the General Conference.

Second, Circular No. 43, "which merely transposes the amendments to the MBF Rules adopted by the General Conference in [...] Resolution 85", is not a general decision that gives rise to or could give rise to an individual decision that affects them adversely. Moreover, the complainants have not demonstrated any loss, damage or injury stemming from the Circular.

3. In summary, the complainants contend that Circular No. 43 modified the MBF Rules. Moreover, the modifications were to their detriment. That is, the new Rules prevent them from participating in the decision-making process. They add that this is not a general decision that requires an individual decision before it can be challenged. Rather, it is a general decision that immediately affects individual rights and, therefore, may be contested.

4. The subject matter of the present dispute, the amendments to the MBF Rules, has its origins in the General Conference's November 2011 36C/Resolution 99. In Resolution 99 the General Conference "[i]nvite[d] the Director-General to review the governance of the [MBF], taking into account the recommendations made by the external consulting firm, in particular with regard to the need to enhance its expertise and independence". The General Conference also "[r]equest[ed] that the Rules of the [MBF] be amended accordingly" and "invite[d] the Director-General to report [...] on this matter". At the General Conference's plenary session on 4 November 2013, the Director-General reported on the external

consulting firm's recommendations for a new governance structure and the drafting of proposed amendments to the MBF Rules for the establishment of a new governance structure that was independent and objective. In her report, the Director-General also noted the "specific procedure for the review and approval of amendments to the Rules". The report stated "[c]onsequently, the approval of both the General Assembly and the Director-General would be required in order to amend Sections V, VI and VII of the MBF Rules. This has been confirmed by the Office of International Standards and Legal Affairs (LA)." The report went on to state:

"As explained above, the General Assembly of Participants did not take a decision on the proposed amendments of the MBF Rules and therefore did not approve them. The Director-General, therefore, was not able to proceed with the amendments of the Rules of the MBF, which were requested by the General Conference at its 36th session and the Executive Board at its 190th session. In the light of the above and taking into consideration the addenda to this document, the General Conference may wish to provide further recommendations regarding the review of the MBF Rules."

5. In his 19 November 2013 oral report to the plenary session regarding the requested review of the governance of the MBF, the Chairperson of the Commission for financial, administrative and general questions, programme support and external relations noted the clarification sought by Member States as to whether the General Conference had the authority to amend the MBF Rules and the Legal Advisor's opinion in that regard. The Legal Advisor advised that since the General Conference had established the MBF in 1948 it was within its prerogative to amend the Rules. The Legal Advisor grounded the opinion on the general principle of law that a body which adopts a law also has the authority to amend it. The Chairperson summed up stating that the Conference had the authority to take the decision to amend the MBF Rules.

6. On 19 November 2013, the General Conference adopted Resolution 85 in which it takes note of the information provided in various documents concerning the revisions to the governance structures and "decides to amend the Rules of the [MBF] as set out in Part 3" of the Director-General's report. Part 3 contains the proposed draft amendments

to the MBF governance structure. Subsequently, on 21 October 2014 Circular No. 43 was published.

7. At this point, a brief overview of the MBF's governance structure is useful. In 1948, the General Conference established the Medical Benefits Scheme, now the MBF, with the objective of providing for the medical care of the staff. At that time, the General Conference approved the Statutes and Rules of the Scheme. Early on, the Statutes and Rules were merged into one statutory instrument, the MBF Rules. At the time the facts giving rise to the present complaints unfolded the 2008 MBF Rules were in force.

8. Pursuant to the delegation of authority in Staff Regulation 6.2, the Director-General is charged with the responsibility of "[operating] a system of social security for the staff, including provisions for the preservation of health, sick leave and maternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duty on behalf of the Organization". Although accountable to the General Conference, the responsibility for the operation of the MBF rests with the Director-General.

9. As stated in Article "premier" of the 2008 MBF Rules, the MBF is a "mutually financed and autonomous health-insurance scheme based on principles of solidarity". The autonomy of the MBF is reflected in its governance structure. Pursuant to Article 5.2, the Board of Management is responsible for the administration of the MBF. In addition to its management function, among other things, the Board of Management must also define the policy of the MBF and "examine any proposed amendments to the Rules of the [MBF] and its annexes and transmit them to the Director-General". However, for proposed amendments to the provisions and annexes of Sections V (Management of the Fund), VI (Financial Provisions) and VII (General Provisions), the Board of Management must first submit the proposal(s) to the General Assembly of Participants with its observations. Under Article 5.1, any amendments recommended by the Board of Management to these three sections must be approved by the General Assembly of Participants. Lastly, Article 7.1

states that proposed amendments to any of the provisions or annexes in the three sections must be approved by the General Assembly of Participants. It goes on to provide that after the vote by the General Assembly of Participants, the proposed amendments are to be submitted to the Director-General “who shall take such action as he/she considers necessary”. The same article also provides that the Director-General on the recommendation of the Board of Management may amend any other provisions contained in any other sections of the Rules.

10. The General Assembly of Participants meets once a year in Ordinary General Assembly and upon instructions from the Board of Management. The General Assembly of Participants is responsible for making recommendations to the Director-General on the MBF’s general policy and on the improvements it would like to see made to its operation. It must also examine and approve the Board of Management’s reports on the MBF’s activities and its financial situation. An Extraordinary General Assembly may be convened by the Board of Management or at the request of at least 200 participants.

11. Thus, it can be seen that under the 2008 MBF Rules to amend any of the provisions and annexes in the above noted three sections, the proposed amendment(s) must first be examined by the Board of Management, then forwarded, together with the Board of Management’s observations, to the General Assembly of Participants for its approval. Lastly, the proposed amendment is transmitted to the Director-General.

12. Based on the above review of the MBF’s governance structure, the authority to amend the MBF Rules is vested in the Director-General. It may also be observed that given the autonomy the MBF enjoys and the specific provisions dealing with amendments to the Rules, although the General Conference could recommend or request an amendment to the MBF Rules, it lacked the authority to amend the Rules and any steps taken to do so would be of no force or effect.

13. Returning to Resolution 85, although the General Conference decided to amend the Rules, no date was fixed for the coming into force

of the amendments. Indeed, no additional steps were taken with respect to the amendments until 21 October 2014, the date on which Circular No. 43 was published. In this light, the Organization's position that the Circular simply informed the participants of the amendments to the MBF Rules premised on its assertion that the Rules had already been amended is rejected. This is further reinforced by the fact that the amendments to the Rules found in the 2014 Rules of the MBF are materially different from the proposed amendments considered by the General Conference.

14. Although the wording of Circular No. 43 is not entirely clear, the Circular appears to be the publication of the Director-General's decision to amend the MBF Rules. As such, in the context of determining the receivability of the complaints, it is an administrative decision of general application. In general, this type of decision is not subject to challenge until an individual decision adversely affecting the individual involved has been taken. However, there are exceptions where the general decision does not require an implementing decision and immediately and adversely affects individual rights. In the present case, the impugned decision directly and adversely affects the complainants' rights as it precludes the complainants' important right to participate in the decision-making process within the MBF. As the complaints satisfy the requirements of Article II of the Tribunal's Statute, they are receivable.

15. As the decision of the Director-General to amend the MBF Rules was not taken in compliance with the amendment provisions in these Rules as detailed in consideration 11 and, in particular, did not obtain the approval of the General Assembly of Participants, the decision was unlawful and will be set aside. It follows that the amendments to these Rules are of no force or effect. The complainants are entitled to an award of moral damages for the Organization's complete disregard of the MBF's statutory provisions and the resulting unlawful decision. As the interveners are in the same position in fact and in law as the complainants, their applications to intervene are accepted and they are also entitled to moral damages. The Organization will be ordered to pay each complainant and intervener moral damages in the amount of 5,000 euros. The complainants are entitled to costs in the amount of 500 euros each.

In the circumstances, a consideration of the complainants' request in relation to acquired rights is unnecessary. Their request to order UNESCO to resume the consultation process with the participants in the MBF is beyond the Tribunal's authority and will be dismissed.

DECISION

For the above reasons,

1. The Director-General's 21 October 2014 decision is set aside.
2. UNESCO shall pay each complainant and intervener moral damages in the amount of 5,000 euros.
3. UNESCO shall pay each complainant costs in the amount of 500 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ