Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K. (No. 2)

v.

UNESCO

124th Session **Judgment No. 3837**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs G. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 21 May 2015 and corrected on 24 June, UNESCO's reply of 15 October 2015, the complainant's rejoinder of 12 February 2016 and UNESCO's surrejoinder of 23 May 2016;

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 contests the decision not to extend her fixed-term appointment.

The complainant joined UNESCO in July 2010 as Assistant Director-General, Natural Sciences Sector. She was initially appointed for two years but her appointment was subsequently extended several times.

On 25 November 2013 she was informed that the Director-General had decided to extend her appointment for a further two months, that is to say from 1 January 2014 until 28 February 2014, and that the latter date was her effective date of separation. She accepted the extension on 10 December 2013.

The complainant discussed with the Director-General the possibility of being offered another employment, and wrote to her on 30 January 2014 requesting an extension of her appointment until the end of May 2014. The Director-General replied the following day, 31 January 2014, that she could not consider any further extension beyond the expiry date of her appointment.

On 26 February the complainant requested the Director-General to reconsider the decision of 31 January. Having received no reply, she wrote again to the Director-General on 27 March indicating that she planned to file an appeal against the decision not to extend her appointment. The complainant considered the decision to be unlawful. She also argued that the way she had been treated at UNESCO constituted moral harassment. She asked the Director-General to examine the proposals she had made concerning the possibilities of extending her appointment, or in the alternative to treat her letter as a formal complaint of moral harassment and refer the matter to the Ethics Adviser to open an investigation pursuant to Administrative Circular AC/HR/4 concerning the changes to the Anti-Harassment Policy (hereinafter "the Anti-Harassment Policy").

At the request of the Director-General, the Director of the Bureau of Human Resources Management (HRM) replied to the complainant on 10 April 2014 that the decision not to extend her appointment was made for programmatic and financial reasons. The Director explained with respect to the absence of appraisal reports that as for any other staff member at the complainant's level, the Director-General had acknowledged verbally her appreciation of the complainant's work. Concerning the alleged moral harassment, the Director noted that the issue was raised for the first time and therefore invited her to follow the procedure set out in the Anti-Harassment Policy.

On 23 April 2014 the complainant filed a notice of appeal with the Appeals Board challenging the decision of 31 January 2014. She explained that although she had filed a protest against that decision with the Director-General on 26 February 2014, she had received no decision within the prescribed one-month time limit. In its report of 15 January 2015, the Appeals Board recommended rejecting the appeal as time-

barred. In its view, the complainant should have contested the decision in the memorandum of 25 November 2013, which explicitly referred to her separation from service, within one month from its notification. It also held that even if one considered that the email of 31 January 2014 was the contested decision, she had failed to comply with the prescribed time limits.

By a letter of 5 March 2015 the complainant was notified of the Director-General's decision to endorse the Appeals Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to order UNESCO to reinstate her or, to award her, in lieu of reinstatement, material damages equivalent to all salaries, emoluments, allowances, benefits and pension benefits from the date of her separation "for a period of 2 years, with interest from due dates". She also seeks an award of material damages in the amount of the "value of lost pension benefits or UNESCO's contributions from the date of separation for a period of two years, with interest from due dates", together with 100,000 euros in moral damages. She further claims costs. In her rejoinder, she asks the Tribunal to order UNESCO to produce the report of the Internal Oversight Service "implicating the former Director [of HRM]'s honesty and integrity".

UNESCO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress or as devoid of merit.

CONSIDERATIONS

1. The following statements from the complainant's letter to the Director-General, dated 27 March 2014 and under the caption "RE: Settlement of Grievances", provides a fitting perspective for the present complaint:

> "I refer to my letter of 26 February [...] 2014 requesting you to re-consider your decision not to extend my appointment, which you communicated to me in your email of 31 January 2014. I have not yet received a response to that letter and therefore plan to file an appeal to the Appeals Board as I believe I have a strong case that the non-extension of my appointment [...] was unlawful since it was based on my national origin, and retaliation for the withdrawal of

> US funding (many other ADGs were extended). You have indeed acknowledged to me verbally in a number of meetings that my performance has been excellent, that you regret not being able to renew me, but that it would be 'politically difficult' for you to do so, given the current relations between the US and UNESCO. I must also add that to my knowledge I have never received a performance appraisal since I joined UNESCO.
>
> [...]
>
> In the first place, failure to re-appoint me on the basis of national origin is clearly unethical and illegal behaviour;
>
> [...]
>
> I would prefer to resolve my grievances informally and make the following proposals in lieu of reinstatement to my ADG post."

2. In the impugned decision dated 5 March 2015 the Director-General accepted the recommendation of the Appeals Board and dismissed the complainant's internal appeal against the decision not to extend her appointment on the ground that it was time-barred.

3. The complainant has requested that this complaint be joined with her first complaint alleging moral harassment, which is the subject of Judgment 3836 also delivered on this day. However, as these complaints raise issues which are largely different, the Tribunal will not grant that request. Neither will it grant the request which she makes in her rejoinder to order UNESCO to produce the report of the Internal Oversight Service "implicating the former Director [of HRM]'s honesty and integrity". That report was not before the Appeals Board and it bears no relevance to the issues raised in this complaint.

4. UNESCO raises receivability as a threshold issue. It submits that the complainant failed to abide by the procedures set out in Article 7 of the Statutes of the Appeals Board, and, accordingly, did not exhaust the internal remedies as Article VII, paragraph 1, of the Tribunal's Statute requires thus rendering her complaint in the Tribunal irreceivable.

5. In Judgment 3311, considerations 5 and 6, the Tribunal observed that time limits for internal appeal procedures and the time limits in the Tribunal's Statute serve the important purposes of ensuring

that disputes are dealt with in a timely way so that the rights of parties are known to be settled at a particular point of time. The consistently stated principle that time limits must be strictly adhered to has been rationalized by the Tribunal in the following terms: time limits are an objective matter of fact and strict adherence to them is necessary for the efficacy of the whole system of administrative and judicial review of decisions. An inefficacious system could potentially adversely affect the staff of international organisations. Flexibility about time limits should not intrude into the Tribunal's decision-making even if it might be thought to be equitable or fair in a particular case to allow some flexibility. To do otherwise would "'impair the necessary stability of the parties' legal relations'. This general principle applies in relation to internal appeals even if the internal appeal body considers the appeal on its merits notwithstanding that time limits have not been complied with by the complainant. As early as Judgment 775 [...], the Tribunal decided that if an internal appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal would not entertain a complaint challenging the decision taken on a recommendation by that body."

In consideration 6 of Judgment 3311, the Tribunal noted the following qualifications to the application of this general approach, as follows:

> "One is that if the question of receivability was not raised by the organisation in the internal appeal then it cannot be raised in the Tribunal (see Judgment 3160). Another is if the defendant organisation has misled the complainant or concealed some paper from the complainant and thus deprived the complainant of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see, for example, Judgment 2722, consideration 3)."

6. Article 7(a) of the Statutes of the Appeals Board requires a staff member stationed at UNESCO headquarters who wishes to contest an administrative decision to first protest against it in writing "within a period of one month of the date of receipt of the decision [...] contested". Article 7(b) requires a ruling on that protest to be communicated to the staff member within one month of the date of that protest. Under Article 7(c), a staff member who wishes to contest that ruling to the Appeals Board may do so by filing a notice of appeal in writing with the Secretary of the Appeals Board. Where a ruling is not received

within one month of the protest, the staff member has an additional month within which to address the notice of appeal to the Secretary.

7. The complainant was informed by the memorandum dated 25 November 2013 that the 28 February 2014 would have been the effective date of her separation from UNESCO. No reasons for that decision were stated in that memorandum. In her email of 31 January 2014 in response to the complainant's email of 30 January 2014 following their meeting, which the complainant had requested, the Director-General stated, among other things, that upon her re-election to that post, she had met individually with each member of her senior management team and explained her intention to change the composition of that team for programmatic and financial reasons. She also stated that she had met personally with the complainant and explained that it was her intention to change the leadership of the Natural Sciences Sector.

The complainant's protest, addressed to the Director-General, for which Article 7(a) provides, is contained in her communication dated 26 February 2014. In it, she requested the Director-General to "reconsider [her] decision not to give [her] an extension of time in [her] ADG position beyond the end of February". The complainant purported to protest against the email of 31 January 2014. Having received no response within one month of her protest, the complainant addressed a letter to the Director-General entitled "RE: Settlement of Grievances" dated 27 March 2014. She subsequently lodged her "Notice of appeal pursuant to paragraph 7(c) of the Statutes of the Appeals Board" on 23 April 2014 and filed the detailed appeal on 21 May 2014.

8. UNESCO submits that the final decision not to extend the complainant's contract was communicated to her by the Director of HRM's memorandum dated 25 November 2013, which rendered her protest dated 26 February 2014 out of time. The Tribunal observes that the memorandum of 25 November 2013 is entitled "Your Administrative situation: [...] extension of your contract at ADG level[,] effective date of separation from the Organization". The following is stated therein:

> "1. I refer to memos HRM/DIR/2013/115 and HRM/SBL/BNF/PBL/2013/61 dated 2 and 23 October 2013 respectively regarding your administrative situation.
>
> 2. The purpose of this memo is to confirm the Director-General's decision to extend your contract for a two-month period that is, from 1 January to 28 February 2014, the latter being your effective date of separation from the Organization.
>
> 3. In order to proceed with the administrative actions related to this decision, your confirmation of receipt of this memo and acceptance of this extension period is appreciated, preferably before 2 December 2013."

9. On the other hand, the complainant insists that since the memorandum of 25 November 2013 contained no reasons for the decision not to extend her contract it was not a final decision, and that the final decision against which her protest should have been made was contained in the Director-General's email of 31 January 2014 which contained the reasons for the non-extension.

10. In light of these submissions, the Tribunal recalls that, according to its case law, while valid reasons must be given for the non-extension of a contract to permit the person concerned to exercise the right of appeal, the case law does not require that the reasons be stated in the text that gives notice of the non-extension (see, for example, Judgment 1750, consideration 6). The Tribunal also stated, in Judgment 2916, consideration 2, that "even though 'notification of non-renewal is simply notification that the contract will expire according to its terms [...], the Tribunal's case law has it that that notification is to be treated as a decision having legal effect for the purposes of Article VII(1) of its Statute' [...]. Accordingly, it may be challenged in the same way as any other administrative decision." The case law makes it clear that the reasons may emerge at some later time and even during the course of the appeal proceedings so long as the staff member is fittingly permitted to reply (see, for example, Judgment 1817, under 6). Further, it is sufficient if the reasons emerge orally in a meeting or discussion (see, for example, Judgment 3729, under 8 to 11). Moreover, it is sufficient if, as in the present case, programmatic and financial reasons are given

for the non-extension. Accordingly, the following was relevantly stated in Judgment 3582, consideration 9:

> "In the instant case, the letter [...] referred to the complainant's earlier discussions with various senior officials regarding the financial and programmatic situation which had led [the organisation] to abolish her post and, for that reason, not to extend her appointment. Though succinct, this indication of the reasons for the decision was sufficient to enable the complainant to challenge the decision in full knowledge of the facts (see Judgment 3290, under 15)."

On these bases, the memorandum of 25 November 2013 by which the complainant was notified that her separation date was 28 February 2014 was the final decision which she should have challenged by way of protest. That decision was delivered to the complainant's office on 26 November 2013. After a reminder to acknowledge receipt of it, dated 4 December 2013, she responded with the acknowledgement on 10 December 2013. Her protest of 26 February 2014 was therefore outside of the time within which Article 7(a) of the Statutes of the Appeals Board required her to have lodged it. It was inadmissible, as the impugned decision stated. Accordingly, the complaint is irreceivable in the Tribunal as the complainant did not exhaust the internal remedies. The Tribunal does not accept her submission that the communications from the Administration misled her. Her complaint will therefore be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ