

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

E. Z.

v.

UNESCO

125th Session

Judgment No. 3934

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. E. Z. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 October 2014 and corrected on 17 November 2014, UNESCO's reply of 11 May 2015, the complainant's rejoinder of 17 July, UNESCO's surrejoinder of 28 October, the complainant's further submissions of 2 December 2015 and UNESCO's final observations thereon of 16 February 2016;

Considering Article II, paragraph 5, 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 complainant challenges the decision not to transfer him and not to extend his appointment beyond the statutory retirement age.

At the material time, the complainant held a post at grade P-5 in UNESCO's Office of International Standards and Legal Affairs (hereinafter "the Office"). In March 2011 he lodged an internal complaint of moral harassment against the Director of the Office with the Director-General. He asked the Director-General to identify an interim measure to resolve this situation, "even outside the service", and requested a "hearing" with a view to "ending the deterioration in [his] working conditions". On 29 March the complainant had a meeting with the Director-General during which, according to him, the possibility of

a transfer was discussed. On 31 March 2011 he asked the Ethics Adviser, to whom the harassment complaint had been forwarded for assessment, to “stay the proceedings” pending the “informal resolution” which, he said, the Director-General was in the process of considering.

On 5 September 2012 the complainant, relying on Staff Regulation 9.5, submitted a request to the Director-General for an extension of his appointment – which was due to expire on 30 June 2013, the date on which he would retire – “until 3 June 2014”. Underscoring the “versatility of [his] skills”, he stated that his request for an extension concerned “any other post” outside the Office. On 17 September 2012 the Director of the Office informed the Director of the Bureau of Human Resources Management that it was not in the Organization’s interests to grant the complainant an extension of his appointment. In fact, she intended to propose that his post be abolished.

Having received no reply to his request of 5 September, the complainant lodged a protest on 11 October. He emphasised that he also wanted his “transfer request” to be considered from the point of view of the Organization’s interests.

On 23 October the complainant wrote to the Director-General to request that the Ethics Office examine his internal complaint of moral harassment against the Director of the Office. As from November 2012, the Ethics Adviser tried to bring about a settlement. On 30 January 2013 the complainant received an agreed separation proposal which provided that his appointment would end the following day and that in addition to a termination indemnity he would receive a sum equivalent to three months’ salary in lieu of notice on the condition, among others, that he withdraw his harassment complaint and waive the right to appeal against his separation. The next day the complainant rejected the proposal and asked the Administration to examine his complaint and his request of 5 September 2012.

In response to that request, on 8 February 2013 the Director of the Bureau of Human Resources Management advised the complainant that in view of UNESCO’s financial situation, the Director-General could only grant an extension of appointment beyond the statutory retirement age under Staff Regulation 9.5 in a very limited number of cases, and

that since no “essential post” that he could have occupied had been identified, he would be retired on 30 June 2013. The complainant thereupon submitted a notice of appeal to the Appeals Board. In his detailed appeal filed in July 2013, he contended that the decision of 8 February 2013 was arbitrary, particularly insofar as it refused him a transfer, that it contravened the principle of equal treatment and that it formed part of a campaign of “full-fledged institutional harassment”. He asked for the decision to be set aside and for his reinstatement until 30 June 2014, failing which he claimed compensation under various heads.

In its opinion of 11 July 2014, the Appeals Board, having heard the parties, recommended that the Director-General declare that the decision of 8 February 2013 complied with the rules governing separation from service, which provided that contract extension beyond the statutory retirement age was not an acquired right for any staff member but was subject to the discretionary powers of the Director-General. On 13 August 2014 the complainant was informed of the Director-General’s decision to follow that recommendation. That is the impugned decision.

In his complaint, the complainant asks the Tribunal to set aside that decision and the decision of 8 February 2013, to find that he has been adversely affected by “other decisions involving unequal treatment” between him and one of his former colleagues whose appointment was extended beyond retirement age, and to order the disclosure of various documents. He also claims compensation for loss of the opportunity to have his request for an extension of his appointment assessed on the same terms as the request submitted by the same former colleague, damages with interest for “loss of income and pension entitlements” since 30 June 2013, damages of 50,000 euros for the moral injury caused by UNESCO’s want of due diligence in his regard, by the “delay in transferring him” and by the violation of his right to appeal without threats or retaliation and, lastly, damages of 15,000 euros for failure to observe due process and on other grounds. He further claims 25,000 euros in costs.

UNESCO submits that the complaint should be dismissed as unfounded. It also asks the Tribunal to order the complainant to pay it 6,000 United States dollars to cover part of the costs it has incurred in connection with the present complaint.

CONSIDERATIONS

1. The complainant challenges the decision taken by the Director-General of UNESCO on 13 August 2014, confirming the rejection, dated 8 February 2013, of the request for an extension of his appointment beyond the statutory retirement age which he had submitted pursuant to Staff Regulation 9.5. That request was submitted against a background of allegations of moral harassment made by complainant against the Director of the Office of International Standards and Legal Affairs, where he was employed, and was inextricably linked to the request concurrently submitted by the complainant for a transfer to another unit of the Organization.

2. In his second complaint, which is also the subject of a judgment delivered in public this day, the complainant requested that his two complaints be joined. However, although they rest partly on the same arguments, their subject-matter is clearly distinct and they raise different questions of law. The Tribunal hence concurs with the defendant that a joinder is not appropriate.

3. In support of his claims concerning the decision of 13 August 2014, the complainant contends, inter alia, that some of the arguments that he had put forward during the internal appeal procedure were not properly examined by the Appeals Board.

This plea is indisputably well-founded.

4. Although the complaint of moral harassment which the complainant had filed against the Director of the Office was the subject of separate proceedings, in his appeal against the decision not to extend his appointment the complainant also alleged that that decision stemmed

from a wish to discriminate and retaliate against him which itself formed part of the harassment. He therefore emphasised in his detailed complaint to the Appeals Board that the decision of 8 February 2013, which he sought to demonstrate was arbitrary, was part of an ongoing campaign of “full-fledged institutional harassment”. However, in its opinion of 11 July 2014 the Appeals Board noted, before recommending that his appeal be dismissed, that “[t]he allegations on discrimination, harassment and punitiveness [were] the subject matters of another appeal and they [would] be decided on in [another] case brought before the Appeals Board” by the complainant.

In adopting that approach, the Appeals Board committed an error of law. If those allegations had proved to be well founded, they would have substantiated the existence of flaws rendering the contested decision unlawful; hence the Appeals Board could not properly recommend that the aforementioned decision be confirmed without first having determined whether they were valid. The Appeals Board could not simply leave the examination of the allegations for other proceedings unless, considering that course to be necessary, it was willing to postpone the issuance of its opinion pending the outcome of those proceedings.

5. The impugned decision of 13 August 2014 is based on the opinion delivered by the Appeals Board, which the Director-General simply endorsed. That decision is hence tainted by the same error of law (for similar cases, see Judgments 2742, under 40, 2892, under 14, and 3490, under 18).

6. The fact that the decision of 13 August 2014 is unlawful on account of the flaw in the appeal proceedings noted above does not imply that the decision of 8 February 2013 refusing to extend the complainant’s appointment was itself unlawful. Accordingly, based on its finding up to this point the Tribunal would ordinarily either refer the case back to the Appeals Board for it to issue a new opinion this time including a consideration of the allegations which it originally refrained from examining or rule directly on all of the complainant’s submissions concerning the contested decision not to extend his appointment.

However, in the decision of 2 December 2016 by which the Director-General in the meantime ruled on the complainant's appeal against the dismissal of his harassment complaint, she acknowledged that the decision to close the harassment case following a preliminary assessment had been wrong. In accordance with the Appeal Board's opinion in that case, she therefore withdrew that decision and, noting that it was no longer possible for practical reasons to carry out an investigation into the alleged harassment, she agreed to compensate the complainant in the amount proposed by the appeals body, thus leaving unresolved the issue of whether the harassment complaint was well founded.

7. It ensues from this highly unsatisfactory situation not only that there would be no point in remitting the case to the Appeals Board – a solution which the complainant in any case has stated he opposes – but also that it is not possible for the Tribunal itself to reach an informed decision on the merits of the complainant's submissions concerning the contested refusal to extend his contract. Indeed, the merit of the pleas forming the main part of these submissions, relating to a breach of the principles of equal treatment and non-discrimination, to retaliation against the complainant and to an abuse of authority, may be assessed only in the light of an appraisal as to the reality of the harassment of which, according to the complainant, these various wrongs formed part. However, neither the parties' briefs nor the evidence tendered allow the Tribunal to conduct such an assessment with certainty; this would be possible only if the findings of an investigation that was duly carried out at the material time were available.

8. However, the Tribunal considers that, since that situation results from a failure on UNESCO's part, the necessary conclusion to be drawn in the present case is that the contested decision not to extend the complainant's appointment was unlawful. Any other finding would breach the complainant's right to an effective means of redress.

9. It is true that the evidence plainly shows that the complainant's request for an extension of his appointment was in fact highly unlikely to be granted.

It should be borne in mind that such an extension beyond the statutory retirement age, which is an exceptional measure over which the Director-General exercises broad discretion, may be granted only if, in the words of Staff Regulation 9.5, the latter "considers it to be in the interest of the Organization". In this case, the complainant's stated wish to leave the Office at this juncture to take up employment in another unit of UNESCO clearly raised a difficulty. Indeed, the interest of the service in retaining staff members beyond the age limit usually lies in the fact that their departure would result in the loss to the employer of their expertise and experience in their role, which cannot be acquired immediately by those who replace them. Conversely, it is less apparent at first sight how the retention of a staff member serves the organisation's interests if she or he takes up a new post which could equally be held by another suitably qualified employee. Furthermore, the promise of a transfer, which the complainant states that the Director-General made during a meeting on 29 March 2011 and the existence of which is disputed by UNESCO, could not in any event have been valid beyond the date when he reached the age limit.

10. Nevertheless, it would have been possible to grant an extension of his appointment, and it is self-evident that the refusal to do so would be illegal if, as the complainant maintains, it stemmed from prejudice linked to the harassment which he claims to have suffered from the Director of the Office. The risk that this might be the case is all the more acute here given that the Director's opposition to the extension undoubtedly played a decisive role in the adoption of the contested decision. Moreover, the complainant's allegations that he suffered discrimination in comparison with other Office staff cannot, in view of the evidence, be regarded as completely unfounded. Indeed, although differences in treatment with regard to extensions of appointment beyond the statutory retirement age may certainly be justified by the particular circumstances of individual cases, the Tribunal cannot but note that other staff of the Office benefited at that

time from the rather liberal use that was being made of the discretion to grant extensions, which is in stark contrast to the rigorous examination to which the complainant's request was subjected.

11. It ensues from the foregoing that the decisions of the Director-General of UNESCO of 13 August 2014 and 8 February 2013 must be set aside, without there being any need to rule on the other pleas nor, given this finding, to order the disclosure of additional documents requested by the complainant or to hold hearings with a view to obtaining witness testimony.

12. The complainant is entitled to financial compensation for the material injury caused by the refusal to extend his appointment, which should be assessed on the basis of an estimation of the loss of income resulting from that decision. The Tribunal notes in this connection that this assessment is irrespective of the complainant's possible transfer to another unit had he been retained in service, since it is clear from the file that this could in any event only have taken the form of a transfer at the same grade.

13. The length of the extension of the complainant's appointment to be taken into consideration for determining material injury will be one year as from 1 July 2013. As the complainant requested an extension of only one year in his request of 5 September 2012, his argument that this calculation should be based on a period of four years, given the possibility of subsequent further extensions, cannot be accepted. Conversely, the Tribunal notes that although the complainant indicated in that request that he sought an extension "until 3 June 2014" and not 30 June 2014, which would have corresponded to the end of that one-year period, this would seem to be a mere typographical error. Fairness therefore dictates that the period up until the latter date be taken into account.

14. Although the refusal to extend the complainant's appointment must be considered unlawful in view of the conditions in which it was decided, there is nothing to show, having regard to the Director-

General's broad discretionary power under Staff Regulation 9.5, that the complainant's request would have been granted had it been lawfully examined. Given that the complainant had linked it to an additional request for a transfer to another unit, the chances that it would have been granted were in fact very slim, for the reasons that have been stated above. Nevertheless, the complainant was deprived of an opportunity – however slight – to have his appointment extended, the loss of which warrants redress.

15. In the light of these various considerations, the Tribunal finds, in the circumstances of the case, that it is appropriate to award the complainant a sum equivalent to three months' pay, calculated on the basis of his final net salary before he left UNESCO, less any payments from his retirement pension (or, as the case may be, from the various retirement pensions which he may draw) in respect of the three months following his departure and any professional earnings during that same period.

As this lump sum must be regarded as compensation for all material injury suffered by the complainant, there is no reason to grant the complainant's claims seeking a recalculation of his pension entitlements, compensation for any other loss of opportunity than that specified above or the payment of interest.

16. The unlawfulness of the decisions of 8 February 2013 and 13 August 2014 caused the complainant moral injury which should also be redressed. That injury was exacerbated in this case by the serious breach of the complainant's right to be heard resulting from the fact that he was prevented from effectively relying, during the internal appeal procedure, on an essential part of the arguments underpinning his claims.

In these circumstances, the Tribunal considers that this moral injury will be fairly redressed by awarding the complainant compensation in the amount of 10,000 euros.

17. As he succeeds in part, the complainant is entitled to costs, which, in view of the fact that he did not engage a lawyer, the Tribunal sets at 1,000 euros.

18. UNESCO has entered the counterclaim that the complainant should be ordered to pay costs. It follows from the foregoing that this claim must obviously be dismissed.

DECISION

For the above reasons,

1. The decisions of the Director-General of UNESCO of 13 August 2014 and 8 February 2013 are set aside.
2. UNESCO shall pay the complainant financial compensation for the material injury resulting from the refusal to extend his appointment as indicated in consideration 15, above.
3. UNESCO shall pay the complainant compensation in the amount of 10,000 euros for moral injury.
4. It shall also pay him 1,000 euros in costs.
5. All other claims are dismissed, as is UNESCO's counterclaim.

In witness of this judgment, adopted on 16 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ