

**C., C. D. C., D. M., I.,
L. and T. (No. 2)**

v.

UNESCO

129th Session

Judgment No. 4220

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr M. C., Ms D. C. D. C., Mrs G. D. M., Ms L. I. and Ms A. L. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 February 2018 and corrected on 9 April, UNESCO's single reply of 7 September, the complainants' rejoinder of 14 December 2018 and UNESCO's surrejoinder of 26 March 2019;

Considering the second complaint filed by Ms R. T. against UNESCO on 14 February 2018, UNESCO's reply of 28 May, Ms T.'s rejoinder of 18 September, corrected on 1 October, and UNESCO's surrejoinder of 28 December 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 none of the parties has applied;

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

The complainants challenge the rejection of their requests for an agreed separation.

Starting from 2011, UNESCO faced a challenging financial situation due to the decision of a major contributor to withhold its funding. In this context, the Organization launched four voluntary separation programmes in 2011, 2013, 2014 and 2015. The last of these was announced on 23 March 2015 in Administrative Circular AC/HR/46, entitled “Voluntary Mutual Separation Programme” (VMSP), which provided an opportunity for eligible staff members on fixed-term contracts who were due to retire during 2017 or later, to separate in 2015 by mutual agreement. The Circular provided that “[a]greed separations [were] not an entitlement. Decisions [were] solely at the Director-General’s discretion, based on the best interests of the Organization” and “the number of agreed separations that [would] be approved [would] depend on the budget envelope decided by the Director-General and the number of requests received and supported by respective managers”. Under paragraph 20 of the Circular, dealing with the implementation procedures, “[e]xpressions of interest [had to] be submitted before the close of business on 31 July 2015” and the Director of the Bureau of Human Resources Management (HRM) would review all applications and “make recommendations to the Director-General, for her approval”. “Upon the Director-General’s decision, [the Director of] HRM [would] send offers of agreed separation to the staff [...] within 21 calendar days of receipt of the expression of interest” and the staff member would have 21 calendar days “to review the offer, and to accept or reject it”.

At the material time, the complainants held fixed-term appointments at the International Centre for Theoretical Physics (ICTP) in Trieste, Italy. The ICTP is one of the “category I Institutes and Centres” of UNESCO and was established as an integral part of the Organization. As such, it has functional autonomy and holds a Special Account governed by specific Financial Regulations.

Between 19 May and 29 June 2015, the complainants, who were due to retire at various dates between 28 February 2017 and 31 March 2019, submitted an expression of interest for the purpose of the 2015 VMSP, which was also open to ICTP staff members. HRM acknowledged receipt of these expressions of interest and between 21 May and 3 July

contacted the Director of ICTP and the ICTP Human Resources Officer to inform them of the complainants' applications and gather their views.

On 3 June the Director of ICTP, who had received several expressions of interest, decided to form an *ad hoc* Committee to review all the applications. Having met on 12 June and on 28 and 29 July, the *ad hoc* Committee recommended rejecting the complainants' applications on the grounds that Mr C. and Ms C. D.C.'s services were indispensable for the ICTP and that, if they separated, they would have to be replaced, "which would go against the spirit of the [VMSP]"; that, even though Ms T.'s services were not totally indispensable, in case of separation, someone would have to replace her at least at a lower level and the savings for the ICTP, if any, would be negligible; that Mrs D.M. and Ms I.'s separations "would require hiring a replacement"; and that Ms L. was in a position to take normal retirement if she so wished. In a subsequent exchange of emails with HRM, one of the Committee members clarified that these recommendations were also based on financial reasons.

On 21 July the Director of HRM announced to all staff the closure of the 2015 VMSP.

On 23 July and 2 September the complainants were informed that the Director-General considered that "it would not be in the best interest of the Organization to grant [their] request[s] for an agreed separation under [the] VMSP [for] 2015". Between 23 September and 15 October they each submitted a protest requesting the Director-General, inter alia, to reverse her decisions and pay them moral damages for the alleged errors and delays committed in processing their applications. They also requested "copies of all documents [...] pertaining to [their] application[s]" and some of them asked for details of the number of expressions of interest received and granted, including the duty station of each applicant. On 29 October and 11 November the Director of HRM informed them that the Director-General maintained her decisions and rejected the requests for documents on grounds of confidentiality.

On 10 and 11 December 2015 the complainants lodged an appeal with the Appeals Board mainly reiterating the claims in their protests and requesting an award of costs. The Organization submitted its replies

on 10 January 2017, having obtained a number of extensions of the time limit for submission. In its reports dated 21 July 2017, the Appeals Board, which had heard the complainants, found that the complainants had not been treated differently from other colleagues and that their applications had been lawfully declined, though it noted that the ICTP Administration's delay in informing Headquarters of the lack of budgetary envelope to finance agreed separations and indemnities had raised false expectations for the complainants. However, the Board considered that the complainants should have been provided with the relevant documents they had requested, and for this reason it recommended that they be granted damages in the amount of 1,000 euros, as well as 2,000 euros in costs. By letters of 15 November 2017, which constitute the impugned decisions, the complainants were individually informed of the Director-General's decision to dismiss their internal appeals.

The complainants ask the Tribunal *inter alia* to set aside the impugned decisions and to order UNESCO to redress the moral injury resulting, in particular, from the delay in the internal appeal proceedings and the material injury which they claim to have suffered. They also request an award of costs for the internal appeal proceedings and the proceedings before the Tribunal.

UNESCO asks the Tribunal to dismiss the complaints in their entirety as unfounded.

CONSIDERATIONS

1. In response to financial constraints, on 23 March 2015 UNESCO launched a VMSP with the issuance of Administrative Circular AC/HR/46. The purpose of the 2015 VMSP was "to enable staff members who wish[ed] to leave UNESCO under conditions which [were] mutually beneficial to both staff and the Organization, and in the Organization's interest, to do so". The program was "open to all staff members on fixed-term contracts who [were] expected to retire during 2017 or later, whether the post they occup[ied] was financed through the regular programme or by extra-budgetary funding" (original emphasis).

2. At the relevant time, the six complainants all held fixed-term appointments with UNESCO at the ICTP, a “category I” Centre. Their applications for the 2015 VMSP were submitted on 19 May 2015 (by Mr C.), 29 May 2015 (by Ms C. D. C.), 9 June 2015 (by Ms T.), 23 June 2015 (by Mrs D. M.), 25 June 2015 (by Ms L.) and 29 June 2015 (by Ms I.). They were rejected by individual but identical memorandums from the Director of HRM dated 23 July 2015 (addressed to Mr C., Ms C. D. C. and Ms T.) and 2 September 2015 (addressed to Mrs D. M., Ms L., and Ms I.) which stated, *inter alia*, that: “[t]he Administrati[ve] Circular launching [the] VMSP [for] 2015 (AC/HR/46) noted that agreed separations were not an entitlement; and that all decisions were solely at the discretion of the Director-General, who has the authority to terminate an appointment ‘[i]f such action would be in the interest of the good administration of the Organization’ (Staff Regulation 9.1.2). Individual requests were, therefore, examined on their own merits. The Director-General considered that it would not be in the best interest of the Organization to grant [their] request[s] for an agreed separation under [the] VMSP [for] 2015.”

3. Staff members of “category I Institutes and Centres”, such as the ICTP, were eligible to apply but the budget envelope mentioned in Administrative Circular AC/HR/46 did not apply to “category I Institutes and Centres”, which were financially autonomous. A memorandum dated 16 July 2015 from the Bureau of Financial Management informed the Director-General, in relevant part, that “some Institutes (including [the] ICTP) have a special reserve in their books to finance their separations. As in the previous programmes [i.e. the VMSPs for 2011, 2013 and 2014], these institutes have been financing termination packages through their own available funds and it is likely that their number of requests have also reached the point at which the separations can be funded”.

4. The Director of ICTP formed an *ad hoc* Committee to review all the 2015 VMSP applications from ICTP staff members. As most of the staff members would have to be replaced or were due to retire soon, and in light of the ICTP’s financial situation, the Committee considered

that none of the applications could be approved. A 29 June 2015 email from an officer of HRM to a member of the Committee referred to a conversation that had taken place between them and recounted the content of such conversation according to which “the requests [from ICTP staff members] [were] not supported for financial reasons as [the] ICTP ha[d] no budget envelope for separation indemnities (as confirmed by [the Bureau of Financial Management] the envelope set aside for [the 2015] VMSP [did] not cover staff from [the] ICTP)”. In another email of the same day, the Committee member also noted that “some of the staff members concerned would have to be replaced which [would go] against the spirit of the [VMSP]”.

5. The 21 July 2015 email from the Director of HRM stated inter alia that the 2015 VMSP “was launched on 23 March 2015. As of today 33 offers have been accepted by staff members, 2 offers are still under consideration by the respective staff members and 16 are being processed. If all the submitted requests are favorably considered and offers are accepted by the staff members, the established budget envelope would be reached. Therefore, as of today, no new agreed separation requests under the [2015 VMSP] can be considered” (original emphasis). The complainants argue that, as they had already submitted their applications prior to receiving this email, it obviously meant that there was a budget envelope for their agreed separations.

6. The complainants submitted their protests requesting the review of the decisions rejecting their 2015 VMSP applications on 23 September 2015 (Mr C., Ms C. D. C. and Ms T.), 29 September 2015 (Ms I.) and 15 October 2015 (Mrs D. M. and Ms L.) and received decisions rejecting the September protests on 29 October 2015 and rejecting the October protests on 11 November 2015. The complainants then lodged their individual internal appeals on 10 and 11 December 2015, which were treated together. Following several extensions of the time limit for written submissions, the Organization submitted its replies to the appeals on 10 January 2017, the Appeals Board delivered its identical recommendations on 21 July 2017 and the Director-General’s final decisions were communicated to the complainants by

the Director of HRM in individual but nearly identical letters dated 15 November 2017. The complainants filed individual complaints before the Tribunal on 14 February 2018.

7. The Appeals Board considered that paragraph 20(g) of Administrative Circular AC/HR/46, which provides that “[u]pon the Director-General’s decision, [the Director of] HRM will send offers of agreed separation to the staff where these have been approved within 21 calendar days of receipt of the expression of interest”, does not place an obligation on the Administration to communicate a decision to unsuccessful applicants within that time frame. However, it also found that to avoid “nourishing false expectations” it would have been better if the ICTP Administration had informed the applicants earlier that it had no budgetary envelope to finance the 2015 VMSP. It found no evidence of discrimination but the complainants were entitled to the relevant documents “relating to the challenged decision[s]”. Therefore it invited the Director-General to note that the complainants were not discriminated against; that their applications were lawfully declined on the basis that there was no budget envelope for agreed separations in the ICTP; that the complainants were misled (into thinking that they met all the requirements for an agreed separation) by the ICTP Administration’s delay in informing Headquarters of the lack of budgetary envelope; and that the complainants should have been provided with the relevant documents requested. The Appeals Board recommended *inter alia* that the complainants be paid 1,000 euros each for failure to provide them with the requested documents, and 2,000 euros in costs.

8. By six letters dated 15 November 2017, the Director of HRM informed the complainants of the Director-General’s decision “[to agree] with the Appeals Board findings that [the complainants’] request[s] for an agreed separation under the 2015 [VMSP] [were] lawfully declined [...] as [ICTP] had no budget envelop[e] available for [the 2015] VMSP” and “not to accept the recommendations made by the Appeals Board [to pay damages and costs]” as the complainants “did not have a right to internal confidential documents”. “The grounds for the decision[s]

[to reject their protests] were the absence of a financial envelop[e] for [the] ICTP, therefore, information regarding applications from other staff members [were] not relevant to [the complainants'] case[s].” Finally, in the letters it was noted that “[i]n addition, the Appeals Board does not have the power under its Statutes, or any other rule of the Organization, to recommend awarding costs and there is no practice to that effect”.

9. The complainants based their complaints on the following main grounds:

- (a) the Appeals Board’s reports are flawed;
- (b) the Organization did not provide any financial documents to support its argument that there was a lack of budget envelope for the ICTP;
- (c) the argument that some of the complainants would need to be replaced was unsubstantiated;
- (d) ICTP staff members should have been notified in advance that there was no budget envelope to finance the 2015 VMSP;
- (e) the 21 July 2015 email gave staff members false hopes that their applications would be approved;
- (f) in breach of the Organization’s duty of care, three of the complainants were notified in July that their applications had been rejected, but the Organization waited until September to notify the other three complainants of the rejection of their applications even though it already knew in July that there was no budget for any ICTP staff member to participate in the 2015 VMSP;
- (g) the motivation for the decisions not to approve the complainants’ applications, based on financial constraints, was not given until the Organization filed its replies before the Appeals Board;
- (h) the Organization breached its duty of care by not providing the documents requested by the complainants;
- (i) the Organization breached its duty of good faith, mutual trust, and transparency;

- (j) there was an egregious delay in the internal appeal proceedings; and
- (k) Ms T. additionally argues that UNESCO did not apply correctly the principle of equal treatment and that the impugned decision was not signed by the Director-General, which raises legitimate doubts as to who made the decision.

10. As the six complaints raise similar issues of fact and law, they are joined to form the subject of a single judgment.

11. The complainants argue that the Appeals Board's reports are flawed as the Board accepted the Organization's submissions at face value without requiring the submission of official financial documents to support the argument that there was a lack of budget envelope for the ICTP. They also submit that the Organization was wrong to assert that some of them would have had to be replaced if they were permitted to take part in the 2015 VMSP, as, for most of them, they were not replaced after they reached their retirement dates. The Tribunal notes that the 16 July 2015 memorandum from the Bureau of Financial Management to the Director-General concluded that it was likely that the ICTP had reached the point at which the separations could not be funded due to the funding of the previous VMSPs in 2011, 2013 and 2014, and that the Director of ICTP followed the conclusions of the *ad hoc* Committee which he had formed to review all the 2015 VMSP applications from ICTP staff members in not recommending that their applications be approved. To further support the argument that the complainants' applications were denied due to lack of funding, the Organization also submitted communications from the *ad hoc* Committee which confirmed that there was no funding for ICTP staff and that most of the staff members would need to be replaced. The complainants' assertion that they would not have had to be replaced, as evidenced by the fact that most of them were not replaced after their retirement, is unconvincing. Their normally scheduled retirements would naturally give the Organization time to prepare and reorganize the work the complainants were doing, but it does not follow that the ICTP would be equally ready for the simultaneous early separation of six staff members. It is credible that the Organization

thought that it might need to hire people to replace them at that time. Moreover, there is no element which leads the Tribunal to question this organizational evaluation of what is in the best interest of the Organization which is within the knowledge and the competence of the executive head (see, for example, Judgments 3858, consideration 12, and 2377, consideration 5).

12. The complainants argue that the Organization breached its duty of care by not notifying them in advance that there was no budget envelope to finance the 2015 VMSP; by raising their hopes with the 21 July 2015 email; by notifying some of them only in September of the rejection of their applications when it was already established in July that there was no budget for any ICTP staff to participate in the 2015 VMSP; and by not informing them of the budgetary reasons for the denial of their 2015 VMSP applications until the internal appeal proceedings. Given that a budget envelope was not available to fund the VMSP for staff of ICTP for 2015, the expressions of interest should not have been called in relation to those staff. This constituted a breach of the Organization's duty of care which entitles each complainant to an award of moral damages in the amount of 1,000 euros.

13. The requests for damages in respect of the delay in the internal appeal proceedings are unfounded. The Tribunal considers that the delay was not egregious taking into account that the Appeals Board dealt with six appeals together. Moreover, the requests lacked substantiation as the complainants sought moral damages but advanced no evidence, or even argument, to support their claims.

14. Ms T. contends inter alia that the fact that the impugned decision was not signed by the Director-General raises legitimate doubts as to who made the decision. This argument must be rejected. The letter from the Director of HRM dated 15 November 2017 clearly states that “[t]he Director-General has asked me to inform you of the following [...]”. As the Tribunal stated in Judgment 3177, consideration 12, the authorized decision-maker does not have to be the signatory to the

final decision and it is not a matter of who signed the decision, but rather who made the decision itself.

15. Finally, the requests for costs for the internal appeals are unfounded. There is no provision which allows for an award of legal costs for the internal appeal proceedings and there are no exceptional circumstances in these cases which could justify such an award.

The conclusion that there was a breach of the duty of care renders all other arguments irrelevant.

As the complainants succeeded in part, they are entitled to an award of costs. Mr C., Ms C. D. C., Mrs D. M., Ms I. and Ms L., who are represented by counsel, will be awarded costs in the aggregate amount of 5,000 euros. Ms T., who is self-represented, will be awarded 700 euros.

DECISION

For the above reasons,

1. UNESCO shall pay each complainant moral damages in the amount of 1,000 euros.
2. UNESCO shall pay Mr C., Ms C. D. C., Mrs D. M., Ms I. and Ms L. costs in the amount of 1,000 euros each. It shall also pay Ms T. costs in the amount of 700 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ