Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. (No. 8)

v.

UNESCO

134th Session **Judgment No. 4501**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms L. F. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 February 2020, UNESCO's reply of 29 July and the complainant's email of 19 August 2020 informing the Registrar of the Tribunal that she did not wish to file a rejoinder;

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 decision not to extend her fixed-term appointment beyond its expiry date while she was on sick leave.

Facts relevant to this case may be found in Judgments 3505 and 4107, delivered in public on 30 June 2015 and 3 July 2019, concerning the complainant's first and fourth complaints respectively. Suffice it to recall that the complainant joined UNESCO on 3 January 2005 under a fixed-term appointment which was renewed several times. By a memorandum of 2 November 2012, she was informed that her appointment would not be renewed when it expired on 2 January 2013 (the date on which she eventually left the Organization). On 16 November 2012 she was placed on sick leave until 17 December 2012, on the basis

of a certificate issued by her attending physician. She then submitted a new certificate valid until 18 January 2013. On 6 January 2013 the complainant pointed out to the Director of the Bureau of Human Resources Management (HRM) that the Chief Medical Officer of UNESCO had approved her sick leave only until 2 January, which, in her opinion, was inconsistent with Item 6.3, paragraph 34, of the Human Resources Manual according to which "[t]he appointment of a staff member on sick leave due to expire before their sick leave ceiling has been exhausted shall be extended to permit him/her to exhaust his/her sick leave ceiling in full". On 9 January the director replied that, in approving the extension of her sick leave until only 2 January, the date of her separation from service, the Chief Medical Officer had correctly applied Staff Rule 106.1(m), which stipulates that "[e]ntitlement to sick leave shall lapse on the effective date of separation from service". On 14 January the complainant asked the director to explain why UNESCO had decided to apply the less favourable rule to her, but she obtained no answer. On 25 February she requested that "[her] acquired rights to all of [her] leave" be restored, arguing that the provisions of Item 6.3, paragraph 34, of the Manual should prevail in this case. Having received no answer, on 23 March the complainant wrote to the Director-General, repeating her request that her acquired rights be restored. In a "corrigendum" dated 12 April 2013, the complainant explained that she was acting under paragraph 7(a) of the Statutes of the Appeals Board. As she considered that her "protest" of 12 April had been implicitly rejected, on 22 May she sent a notice of appeal to the Secretary of the Appeals Board. On 1 July 2013 she was notified of the Director-General's decision to confirm the Chief Medical Officer's decision to approve her sick leave only until 2 January 2013. On 10 July the complainant lodged a new notice of appeal directed against that explicit decision, and she subsequently asked that it be joined with her notice of appeal of 22 May.

On 30 September 2013 the complainant filed her first complaint with the Tribunal, in which she impugned the decision of 1 July 2013. On 30 October she informed the Secretary of the Appeals Board that she had filed a complaint with the Tribunal since, as she was no longer a UNESCO staff member, she believed that she no longer had access to

the internal means of redress. She therefore requested that the proceedings before the Appeals Board be suspended. As she did not receive an answer, on 8 November she asked the Secretary to confirm that her request for suspension had been granted and to advise her of the extended time-limit for filing her detailed appeal. On 18 November 2013 the Secretary of the Appeals Board informed her that she had been allowed an extra six months to submit her appeal.

In Judgment 3505, delivered in public on 30 June 2015 on that first complaint, the Tribunal considered whether the complainant was a former UNESCO staff member when the challenged decision was taken, in order to ascertain whether she had exhausted the internal means of redress. The complainant contended that the restriction of her leave entitlements resulted from the decision of 1 July 2013, and as that decision had been taken after she had left the Organization, she could not submit the matter to the internal appeal bodies. The Tribunal dismissed that argument, noting that the dispute had been triggered not by the decision of 1 July 2013 but by the decision to reject a protest lodged by the complainant against the Chief Medical Officer's decision to approve only part of her sick leave. It further considered that, in reality, the dispute concerned not so much the Chief Medical Officer's decision, which merely drew the consequences from the expiry of the complainant's appointment, as one which the Organization's Director-General had necessarily taken earlier, albeit implicitly, not to extend the complainant's appointment beyond 2 January 2013, although she was then on sick leave. By definition, the implicit decision not to extend her appointment was taken before the appointment expired, and the Chief Medical Officer's decision was taken on 2 January 2013, when the complainant was still a serving official and therefore had access to the internal remedies available to UNESCO staff members. Since the complainant had not exhausted those remedies, the Tribunal dismissed her complaint as irreceivable and remitted the matter to UNESCO for the Appeals Board to give an opinion on the two appeals submitted to it by the complainant, after taking such steps as might be necessary to ensure that the procedure had been duly followed.

On 6 October 2015 the complainant filed an application for execution of Judgment 3505. Then, on 13 January 2016, she filed her fourth complaint with the Tribunal, mainly directed against the decision not to renew her fixed-term appointment owing to unsatisfactory service. That decision was communicated to her in the initial memorandum of 2 November 2012, confirmed by the Director of HRM on 9 January 2013, and endorsed by a decision of the Director-General dated 27 November 2015, which was taken after the Appeals Board had issued an opinion on the matter.

On 23 March 2016 the complainant filed her detailed appeal against the decision of 1 July 2013 with the Appeals Board. She sought the setting of that decision, the restoration of her leave entitlements, the payment of all salary, emoluments and allowances due, with interest at the rate of 10 per cent, for the period from 3 January 2013 – the day after she left UNESCO – to 19 July 2013 – the date on which her new period of sick leave ended, including contributions to the pension fund and the health, death and disability insurance fund, and moral damages in the amount of 25,000 euros. The Organization filed its detailed reply on 22 September 2016.

In Judgment 3763, delivered in public on 8 February 2017, concerning the application for execution of Judgment 3505, the Tribunal held that UNESCO had correctly implemented the Judgment in question, even though on the date when the Judgment was adopted, the Appeals Board had not yet issued its opinion. However, the Tribunal noted "regrettable negligence" by the Organization in handling the complainant's case, which was apparent in a letter from the Director of HRM dated 23 September 2015 informing the complainant that the Appeals Board had examined both her appeals and that Judgment 3505 "ha[d] therefore been executed". The Tribunal found that this incorrect information was likely to sow confusion in the complainant's mind, in that it implied that Judgment 3505 would not be executed properly, which led to her filing her application for execution. On that account, it ordered UNESCO to pay to the complainant the sum of 1,000 euros in compensation for moral injury and 500 euros in costs.

On 12 April 2019 the Appeals Board issued its opinion on the complainant's appeal against the decision of 1 July 2013 confirming the decision not to extend her sick leave entitlements beyond the expiry of her appointment on 2 January 2013. It recommended that the Director-General restore the complainant's entitlements in accordance with Item 6.3, paragraph 34, of the Human Resources Manual and Staff Rule 106.1(a), reject the remainder of the claims in the detailed appeal and clarify the provisions on sick leave in order to avoid possible ambiguities.

On 3 July 2019 the Tribunal delivered Judgment 4170 on the complainant's fourth complaint. It considered that, in view of the findings of the Appeals Board, the Board should have recommended to the Director-General that she review her decision not to renew the complainant's appointment. The Tribunal set aside the impugned decision of 27 November 2015 since it was based on a flawed opinion and, having decided not to remit the case to the Organization, examined the lawfulness of the decision of 2 November 2012. It found that the Director-General had failed to take account of essential facts, namely the adverse working environment in which the complainant was performing her duties when the Director-General decided not to renew her appointment. The Tribunal therefore set aside that decision as well as the decision of 9 January 2013 rejecting the protest against it. The Tribunal considered it inappropriate to order the complainant's reinstatement but ordered UNESCO to pay her "the equivalent of the salary and allowances of all kinds which she would have received had her contract been renewed for a period of two years starting from 3 January 2013, under the same conditions as previously applied, net of the amount she [had] received in lieu of notice and of any occupational earnings she may have received during that period". The Organization was also ordered to pay her the equivalent of the pension contributions that it would have had to pay during the same period. All these sums were to bear interest at the rate of 5 per cent per annum as from the date on which they fell due until their date of payment. Lastly, UNESCO was ordered to pay moral damages of 10,000 euros for the damage to the complainant's professional reputation and the lack of care with which it had treated her.

By a decision of 24 January 2020, adopted after the Appeals Board had issued its opinion on 12 April 2019, the Director-General rejected the complainant's appeal as irreceivable by application of the principle of *res judicata*. In support of her position, she stated that in Judgment 3505 the Tribunal had determined that the impugned decision was the decision of 2 November 2012 and not that of 1 July 2013; that the decision of 2 November 2012 had been set aside in Judgment 4170; and that, in execution of Judgment 4170, the Organization had already paid the complainant, in compensation for the material injury suffered, the equivalent of the salary and allowances of all kinds which she would have received if her appointment had been renewed for a period of two years from 3 January 2013. That is the decision impugned in the present complaint.

The complainant asks the Tribunal to set aside the impugned decision confirming the decision of 1 July 2013 and to order the retroactive restoration of all her entitlements, comprising the payment of all salary, emoluments and allowances due, including contributions to the pension fund, with interest at the rate of 10 per cent, and to set the end date of her appointment as 19 June or 19 July 2013 in order to take account of the length of her sickness protection. Failing this, she seeks an award of compensation, with interest, for the injury suffered. She also claims moral damages in the amount of 25,000 euros for breach of the duty of care and for delay in the internal appeal procedure, as well as costs in the amount of 8,000 euros.

UNESCO asks the Tribunal to dismiss the complaint as irreceivable. Firstly, it submits that the complainant's protest was time-barred, so the requirement that internal remedies be exhausted before a complaint is filed was not complied with. Secondly, it argues that, since the decision not to renew the complainant's appointment was set aside by the Tribunal in Judgment 4170 and the injury caused by that non-renewal was entirely redressed by awarding her material and moral damages, she has already obtained satisfaction and further compensation would not serve the interests of justice. Subsidiarily, UNESCO asks the Tribunal to find the complaint, including all ancillary claims, to be unfounded in both fact and law and therefore to dismiss it in its entirety.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 24 January 2020 by which the Director-General of UNESCO, in the circumstances set out in the above summary of the facts, confirmed the decision of 1 July 2013 rejecting the complainant's protest against the decision of the Organization's Chief Medical Officer of 2 January 2013 not to approve her sick leave beyond that date because her appointment was expiring.

As the Tribunal noted in Judgment 3505, in which it dismissed as irreceivable the complainant's complaint against the decision of 1 July 2013 and remitted the matter to the Organization for the internal appeal procedure to be completed, in this dispute the complainant seeks to challenge not so much the aforementioned decision of the Chief Medical Officer as the decision which the Director-General had necessarily taken earlier, albeit implicitly, not to extend her appointment beyond 2 January 2013. The complainant submits that, since she was on sick leave on that date, an extension should have been granted automatically under the applicable rules until that sick leave ended on 19 July 2013.

2. UNESCO contends that the complainant lodged her protest against the aforementioned decisions too late and that the present complaint, like the complaint dismissed in Judgment 3505, is therefore irreceivable for failure to exhaust the internal means of redress.

That objection to receivability is unfounded.

Firstly, it should be noted that, contrary to what UNESCO submits, the complainant had two months to lodge a protest in this case, not one. Under Article 7(a) of the Statutes of the Appeals Board, "[a] staff member who wishes to contest any administrative decision [...] shall [...] protest against it in writing. The protest shall be addressed to the Director-General [...] within a period of one month of the date of receipt of the decision [...] if he is stationed at Headquarters and within a period of two months [...] if he or she has been separated from the Organization". Although the complainant was still a serving staff member stationed at Headquarters on 2 January 2013 when the contested decisions were

taken, she subsequently left the Organization and so must nonetheless be regarded as a staff member who "has been separated from the Organization" for the purposes of those provisions. The Tribunal further observes that the reference to the specific time-limit of two months in those provisions must be understood as intended to apply precisely to situations where former staff members challenge decisions taken while they were still employed, as in this case, since former UNESCO staff members cannot in any event avail themselves of the internal means of redress to challenge a decision affecting them that is taken after they have left the Organization (see, for example, Judgment 2944, consideration 20, or aforementioned Judgment 3505, consideration 4).

Secondly, the Tribunal notes that, although the complainant did not formally lodge her protest pursuant to the aforementioned provisions until 12 April 2013, on 25 February 2013, that is, within the aforementioned two-month time-limit, she had sent an email to the Director of HRM in which she already challenged the refusal to extend her appointment until the end of her sick leave in a reasoned, clear and explicit fashion. Under the Tribunal's case law, an email with this type of content must be regarded as an appeal which, even if not submitted in the prescribed manner, must be treated as such and, if need be, forwarded to the authority competent to deal with it (see, in particular, Judgment 3424, consideration 8(a) and (b), and the case law cited therein). Consequently, had the complainant not later submitted a protest in the proper form to the Director-General on 12 April 2013, the email of 25 February, which, moreover, followed on from initial exchanges with the Organization in which the complainant's challenge was already apparent, should have been considered as itself constituting such a protest. In these circumstances, the Tribunal considers that the complainant's protest cannot legitimately be considered time-barred, as UNESCO contends.

3. UNESCO further submits that the present complaint is barred by the *res judicata* authority of Judgment 4170, in which the Tribunal, inter alia, set aside the Director-General's decision of 2 November 2012 not to renew the complainant's appointment on account of services deemed unsatisfactory.

This argument in fact reflects the content of the impugned decision of 24 January 2020 itself, in which the complainant's appeal was rejected, after the Appeals Board had been consulted, because it had "become irreceivable by virtue of the *res judicata* principle".

That objection is, however, legally unfounded.

It is well established by the case law that the principle of *res judicata* operates to bar a subsequent proceeding only where the parties, the purpose of the suit and the cause of action are the same as in the earlier case (see, for example, Judgments 1216, consideration 3, 2993, consideration 6, 3248, consideration 3, 3867, consideration 9, 3950, consideration 6, and 4183, consideration 8).

In this case, although the condition that the same parties be involved in both disputes is clearly met, the same cannot be said of the conditions requiring that the purpose of the suit and the cause of action be the same. As stated above, Judgment 4170 concerned the lawfulness of the decision not to renew the complainant's appointment on account of unsatisfactory service, which was impugned on the basis of a challenge to the lawfulness of the complainant's performance reports, whereas the present dispute concerns a request for that appointment to be merely temporarily extended until the end of her sick leave and relates to the application of the provisions governing staff members' entitlement to such leave. As the two disputes are therefore clearly distinct, the principle of *res judicata* cannot be regarded in itself as barring the complainant's claims in this proceeding.

4. The fact remains that Judgment 4170, which does of course have *res judicata* authority, had certain effects on the parties' rights and obligations which, as will be explained below, are decisive for the outcome of the dispute now before the Tribunal.

5. The complainant's claim seeking the setting aside of the decision of 24 January 2020 must be allowed, on two counts at least.

Firstly, as stated above, that decision was based on the alleged irreceivability of the complainant's internal appeal on account of the application of the *res judicata* principle. However, for the same reasons

as those set out above regarding the objection based on that principle raised before the Tribunal, the *res judicata* authority of Judgment 4170 was not a valid basis for rejecting the internal appeal, and the grounds for its rejection are hence unlawful.

In that regard, the Tribunal further notes that the decision of 24 January 2020 contained an unfortunate error of fact, which is related to that legal flaw, since it incorrectly stated that in Judgment 3505 the Tribunal had identified the decision initially challenged in this dispute as the decision of 2 November 2012 – that is, the decision not to renew the complainant's appointment, which was set aside in Judgment 4170 – whereas, as recalled in consideration 1, above, it was in fact the Chief Medical Officer's decision of 2 January 2013 and a pre-existing implied decision of the Director-General that were identified as such.

Secondly, the impugned decision is irreparably flawed, as are the aforementioned initial decisions and the decision of 1 July 2013, as a result of the setting aside of the decision of 2 November 2012 in Judgment 4170, which retroactively deprived all these decisions of their legal foundation. Indeed, the very basis of these various decisions was the refusal to renew the complainant's appointment since, if it had been renewed, there would have been no need for any decision on possible temporary extension beyond 2 January 2013, nor any reason not to approve days of sick leave after that date. As the complainant rightly observes, a decision that is set aside by the Tribunal is deemed never to have been taken, owing to the retrospective effect of that setting aside (see, for example, Judgment 1306, consideration 6). As the Tribunal has stated, for this reason, "any subsequent or consequential decision based entirely on a decision that has been set aside necessarily lacks legal foundation and is a nullity" (see Judgment 3107, consideration 3). In the present case, that case law is fully applicable to the various decisions taken on the basis of the decision of 2 November 2012, given that the latter decision was set aside by Judgment 4170.

It follows that the decision of 24 January 2020, as well as the decision of 1 July 2013, the implied decision not to extend the complainant's appointment until the end of her sick leave and the Chief Medical Officer's decision of 2 January 2013, must be set aside, without there

being any need to examine the complainant's submissions seeking to challenge the lawfulness of those decisions under the rules governing sick leave entitlements.

6. The complainant seeks to be awarded, either through the retroactive restoration of her entitlements as a result of the setting aside of the contested decisions or, subsidiarily, by way of compensation for the material injury caused by those decisions, the equivalent of the total salary and other financial benefits which she would have received if her appointment had continued until 19 July 2013.

However, there is no reason to grant those claims, since they must be regarded as having already been satisfied by the effect of Judgment 4170. Indeed, under point 2 of the decision in that judgment, UNESCO was ordered, as a consequence of the setting aside of the decision of 2 November 2012, to pay the complainant the equivalent of the salary and allowances of all kinds that she would have received if her appointment had been renewed for a period of two years from 3 January 2013, as well as the equivalent of the pension contributions that the Organization should have paid for the same period, with interest at the rate of 5 per cent per annum on all those sums. In thus determining the elements constituting that award, the Tribunal sought to specify exhaustively the financial benefits to be awarded to the complainant in compensation for the material injury resulting from the fact that her employment relationship did not continue for that period.

The period from 3 January to 19 July 2013 for which the complainant claims various elements of remuneration or material damages in these proceedings is entirely covered by that two-year period. Consequently, the complainant is not entitled to be awarded those additional sums, even though she is claiming them on a different legal basis. Plainly, she cannot receive the equivalent of double remuneration for the same period or be compensated for an injury that has already been fully redressed. On this point, it should be noted, in particular, that the complainant has no grounds for claiming compensation for "loss of opportunity" based on the fact that she was unable to benefit from her sick leave entitlements after 2 January 2013, because she has already

received the remuneration corresponding to the days of leave that she could have taken on that basis as part of the sum that UNESCO was ordered to pay her.

It follows that the complainant's claims for awards of financial benefits or material damages must be considered to have become moot as a result of the orders made in Judgment 4170 and must be dismissed on that ground.

7. The complainant also claims compensation for the moral injury caused by the contested decisions.

Contrary to what UNESCO suggests in its reply, those unlawful decisions were indeed liable, in absolute terms, to have caused the complainant moral injury distinct from that caused by the decision not to renew her appointment which was set aside in Judgment 4170. It was, moreover, partly on account of this claim for compensation for moral injury that the Tribunal considered that the challenge to those decisions themselves could not be regarded as moot, despite the absence of any practical financial consequences resulting from their setting aside in this proceeding.

Nevertheless, in the light of the evidence, the Tribunal finds that those decisions did not cause the complainant any specific moral injury. According to the complainant, that injury mainly arose from the upset caused by UNESCO's "denial of her illness". However, it must be observed that the decision not to extend the complainant's appointment until the end of her sick leave and the Chief Medical Officer's refusal to approve that leave for the period after 2 January 2013 were based solely on the administrative rules that are applicable in such circumstances, as construed by the competent authorities, and not on any denial of the existence or gravity of the complainant's illness. Indeed, the Organization has never questioned the legitimacy of the sick leave prescribed by the complainant's attending physician as such.

Furthermore, while the complainant criticises UNESCO in general terms for displaying a lack of care towards her, the Tribunal points out that the moral injury caused to the complainant by the administrative

decisions reflecting that failing has already been redressed in the judgments concerning the various decisions in question.

8. Lastly, the complainant claims compensation for the moral injury caused by the undue length of the internal appeal procedure.

On this point, however, the Tribunal observes that, although that procedure did indeed last almost seven years, that was mostly due to the numerous requests made to the Appeals Board by the complainant herself for extensions of the time-limits for preparing the case and postponements in scheduling the hearing. She cannot therefore complain of the Appeals Board's slowness in examining her appeal, for which she was primarily responsible.

It is true that the Director-General did not issue her final decision until 24 January 2020, though the opinion of the Appeals Council was issued on 12 April 2019, and that the delay of more than nine months between these two dates is excessive, objectively speaking. However, it should be noted that in the meantime Judgment 4170 had been delivered on 3 July 2019 and that, as the foregoing discussion shows, the content of that judgment had a decisive impact on the outcome of the complainant's appeal. It is therefore understandable that the Organization needed some time to assess the implications of this new element in the file, which could not be taken into account in the Appeals Board's opinion. Moreover, the compensation awarded to the complainant in Judgment 4170, which had the effect of rendering moot the financial claims made in her appeal, had thus removed the essential issue from the dispute, which, under the Tribunal's case law, precludes recognition of injury arising from the undue length of the internal appeal procedure (see, for example, on that point, Judgment 4493, considerations 8 and 9).

In the particular circumstances of the case, the Tribunal does not therefore consider it appropriate to allow the complainant's claim for damages under that head.

As she succeeds to the extent that the impugned decision and the previous decisions that it confirmed will be set aside, the complainant is, however, entitled to costs, which the Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 24 January 2020, as well as the decision of 1 July 2013, the implied decision not to extend the complainant's appointment until the end of her sick leave and the Chief Medical Officer's decision of 2 January 2013 are set aside.

2. UNESCO shall pay the complainant costs in the amount of 500 euros.

3. All other claims are dismissed.

In witness of this judgment, adopted on 26 April 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ