Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P. (No. 2)

v.

UNESCO

138th Session **Judgment No. 4886**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C. V. P. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 3 June 2022, UNESCO's reply of 29 September 2022, the complainant's rejoinder of 31 October 2022 and UNESCO's surrejoinder of 21 February 2023;

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 deferral of his application for clearance to carry a service weapon.

The complainant joined UNESCO on 1 June 2005 as a grade G-3 supernumerary security officer, assigned to the Security Unit within the Security and Safety Section. From 16 October 2007 he held a two-year fixed term appointment, which was renewed several times.

On 1 December 2015, following the terrorist attacks in Paris in November 2015, the Director-General issued Note DG/15/31, entitled "Reinforcing security in UNESCO", in which she requested the Assistant Director-General for External Relations and Public Information to present her with a "Plan of Action for Security" within the

Organization. This plan envisaged for the first time that a very limited number of security officers would be armed before summer 2016. In December 2017 France – UNESCO's host State – published a decree providing that international organisations with headquarters in the country could be authorised to acquire and hold weapons with a view to issuing them, under their responsibility, to their staff to perform tasks ensuring the security of persons and property on their premises.

In order to select the most qualified security officers to carry firearms, on 12 January 2018 the Security and Safety Section published a memorandum creating within UNESCO a "Firearms Clearance Committee", whose task was to issue opinions for the attention of the Chief of Section – who alone had authority to decide what equipment was to be carried by the Section's staff – on the applications submitted. The Committee consisted of the Assistant Director-General for External Relations and Public Information, the Chief of the Security and Safety Section and his Assistant Chief, a doctor from the Organization and a representative of the Bureau of Human Resources Management.

On 31 January 2018 the Committee examined several applications for clearance, including that of the complainant, which it saw fit to defer. The Chief of the Security and Safety Section endorsed this opinion on the same day, and his Assistant Chief informed the complainant accordingly by email of 5 February 2018.

On 16 February 2018 the complainant asked the Ethics Adviser and the Director of the Bureau of Human Resources Management (HRM) to open an investigation into this "administrative decision, [which he considered to be] contrary to ethics and to the provisions of UNESCO's Staff Regulations and Staff Rules" on the basis, inter alia, of allegations of harassment and retaliation. On 5 March he sent the Director-General an "[i]nformal protest against the administrative decision to defer [his] carrying of a weapon", and on 3 April he filed a notice of appeal. On 2 May and 23 July he requested the Chairperson of the Appeals Board for extensions of the time limit to submit his detailed appeal, which were granted.

On 11 May 2018 the Chief of the Security and Safety Section confirmed to the complainant that, "in accordance with an opinion of the [Firearms Clearance] [C]ommittee", he had taken the decision not to submit his file, "as matters [stood]", to the relevant government department of the host State for consideration of his application to carry a firearm. The complainant submitted a further protest to the Director-General against that decision on 22 May, then on 22 June he filed a second notice of appeal. On 22 July he requested an extension of the time limit to submit his detailed appeal, which was granted.

On 27 July 2018 he was informed that his protest of 22 May had been rejected as irreceivable on the ground that the decision of 11 May did not affect the rights arising from his terms of appointment or the applicable rules.

The complainant submitted two similar detailed appeals to the Appeals Board against the decisions of 5 February and 11 May 2018. He requested the joinder of his two appeals – which was granted – and the setting aside of the contested decisions, alleging, in particular, errors of law and of procedure, as well as "harassment in various forms"[*] by the Chief of the Security and Safety Section.

On 25 October 2018, following an audit of the Security Unit, the Internal Oversight Service (IOS) recommended that the Director-General suspend the process of arming security officers, which she agreed to do.

On 14 November 2018 the Ethics Office informed the complainant that, after a preliminary assessment of his harassment complaint of 16 February, the Director-General had decided to close the file. The complainant submitted a separate internal appeal against that decision, which was rejected on 24 June 2022.

In its opinion of 31 January 2022 – delivered in a context of national lockdown owing to the Covid-19 pandemic, and after having granted the parties' numerous requests for extensions of time limits – the Appeals Board recommended that the appeal be dismissed as irreceivable on the ground that it was not directed against a decision relating to the complainant's terms of appointment or the provisions of

[*] Registry's translation.

the Staff Regulations and Staff Rules, and observed that, in any event, the Organization had broad discretion to reorganize its services. By a letter of 14 March 2022, the complainant was informed that the Director-General had decided to accept the Appeals Board's recommendation and that she further considered that his appeal was unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the decision not to submit his file to the competent French authorities, and to recognise, firstly, that UNESCO's decisions constitute harassment "by abuse of authority and dominant position" and, secondly, that the length of the internal appeal procedure was excessive. He also requests that his employer comply with an article in the Headquarters Agreement concluded by UNESCO and France, as well as with certain provisions of national law in respect of harassment. Lastly, he claims damages of 30,000 euros for the moral injury he considers he has suffered.

UNESCO submits that, insofar as it is directed against the decision to defer the application to carry a weapon, the complaint is irreceivable *ratione materiae* for lack of a cause of action and, in any event, moot since the arming process has been suspended. In respect of the decision to close the complainant's harassment complaint, resulting from the request of 16 February 2018, it observes that he had not yet received the Director-General's decision when he referred the matter to the Tribunal. It therefore asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 14 March 2022 by which the Director-General of UNESCO, in accordance with the recommendation of the Appeals Board, dismissed his appeal against the deferral of his application for clearance to carry a service weapon.

That application was submitted in the context of a UNESCO plan – made possible by a decree promulgated in December 2017 by France, the Organization's host State – to equip some of its security officers with firearms with a view to enhancing the security of persons and property on the Organization's premises.

Pursuant to a memorandum of 12 January 2018, the mechanism introduced to select staff that would carry such weapons consisted of the Chief of the Security and Safety Section granting clearance on the basis of an opinion issued by a "Firearms Clearance Committee", with the reservation that the grant of the authorisation to carry a weapon to the staff selected ultimately depended on an approval procedure conducted by the French authorities.

2. In view of the particular circumstances in which the challenge to the decision on the complainant's application for clearance arose, the Tribunal considers it useful at the outset to clarify the scope of the present dispute.

By an email of 5 February 2018, the complainant was informed by the Assistant Chief of the Security and Safety Section that, in accordance with the opinion of the Firearms Clearance Committee – which had discussed the matter at its first meeting, held on 31 January – his application for clearance had been "defer[red]"[*].

After he had challenged that decision in a protest and then before the Appeals Board, on 11 May 2018 the complainant received an email from the Chief of Section in which, referring again to the Committee's aforementioned opinion, the Chief "confirm[ed] [having] taken the decision not to submit [his] file, as matters [stood], to the competent government department of the host State for consideration of [his] application to carry a firearm"[*]. The complainant then challenged this new decision by submitting another protest and by filing a second appeal with the Appeals Board, which, at the request of both parties, was joined to the first.

[*] Registry's translation.

The Tribunal considers that the decisions of 5 February and 11 May 2018 are, in fact, inseparable. The aforementioned memorandum of 12 January 2018 stated, in paragraph 14, that "[t]he grant of clearance [would] result in the holder's inclusion in the list sent to the ministerial authorities responsible for issuing the [h]ost State's approval"[*]. It is clear that, conversely, the refusal or deferral of an application for clearance would *ipso facto* exclude the staff member concerned from being on that list. Consequently, the email of 11 May 2018 informing the complainant that his application for authorisation to carry a weapon would not be forwarded to the host State merely stated an automatic corollary of the deferral of his application for clearance notified in the email of 5 February. Therefore, the two decisions in question are in fact one and the same, and the emails of 5 February and 11 May 2018 merely provided notification thereof in different forms. The Tribunal further notes that the complainant was told in the decision of 27 July 2018 rejecting his second protest that the decision of 11 May had "cancel[led] and replace[d]" the decision initially notified on 5 February.

3. However, UNESCO is correct to submit that the issue in dispute, as thus clarified, disappeared in its entirety shortly after the internal appeal procedure was initiated, and that the complaint is therefore moot.

The evidence shows that on 25 October 2018, in the findings of an audit report on security at UNESCO Headquarters, the Internal Oversight Service (IOS) had recommended that the process of arming security officers should "stop" until the "numerous weaknesses" relating to security which were identified in the report and rendered this process "premature" according to IOS had been addressed. This recommendation was followed by the Director-General and the implementation of the reform in question was suspended *sine die*.

[*] Registry's translation.

It is settled case law that, "[a]s a matter of law, a claim is moot when there is no longer a live controversy", bearing in mind that "[w]hether or not there is a live controversy is a matter to be determined by the Tribunal" (see Judgments 4060, consideration 3, 3583, consideration 2, and 2856, consideration 5). This case law cannot be construed to mean that the Tribunal must confine itself to determining whether there is still disagreement between the parties as to the claim in question – which, unless the complainant withdraws the complaint or the claim supporting it, must normally be the case. It is of course for the Tribunal to assess in the specific case, over and above that determination, whether the dispute objectively retains a reason for existence.

In the present case, although the complainant persists in challenging the decision refusing to grant him the clearance to carry a weapon that he had requested in the context of the reform that was initially undertaken, the Tribunal considers that the dispute arising from that decision has in fact been rendered moot by the abandonment of that reform.

4. In this respect, the Tribunal notes that, even if the process of arming security officers was theoretically only suspended and not stopped, its implementation simply ceased following the Director-General's decision to that effect and, in view of the evidence on file, has never been resumed since. Moreover, given the age of the clearances issued to some security officers before the process was suspended, it is hardly conceivable that they could still be considered valid should that process be restarted in the future.

In addition, it should be noted that the contested decision of 5 February 2018 was merely a deferral of the complainant's application for clearance, and not a final rejection of it, as was subsequently confirmed by the Chief of the Security and Safety Section in his email of 11 May 2018, stating that the complainant's file would not be submitted to the French authorities "as matters stand".

It follows from these findings that the contested decision had no tangible bearing on the complainant's situation, since the security officers who were cleared in 2018 were not actually equipped with a firearm. Furthermore, setting aside that decision would not have any practical effect, since it would not allow the complainant to be armed.

Lastly, the circumstance referred to by the complainant in his written submissions that the decision to defer his application for clearance was not formally withdrawn by the Organization is not determinative in this case, since that decision's lack of effect has had the same practical consequences as a withdrawal and, as stated above, the question here is to determine whether the challenge to that decision objectively retains a reason for existence in this particular case.

Consequently, the Tribunal considers that the complainant's claim for the setting aside of the deferral of his application for clearance must be regarded as moot.

5. The dispute may nevertheless have retained a purpose insofar as it concerns the award of moral damages, which the complainant claims on account of the alleged unlawfulness of the impugned decision.

However, the file shows that this is not the case.

Under the Tribunal's case law, an unlawful decision does not entitle the staff member concerned to moral damages unless that decision has caused her or him more severe injury than that resulting from the unlawfulness itself (see, in particular, Judgments 4156, consideration 5, and 1380, consideration 11).

In the present case, and bearing in mind that the contested decision had no tangible effect, the Tribunal considers that any flaws tainting that decision are not, in any event, such as to have caused the complainant such particular injury.

The position would only be different if the complainant were to establish that the deferral of his application for clearance had been motivated, as he submits, by malicious bias against him that formed part of a pattern of moral harassment and retaliatory measures of which he accuses his supervisors. However, it should be noted that the

complainant's allegations in this regard were the subject of a request for an investigation – which should be considered as a harassment complaint – which he had submitted, by a memorandum dated 16 February 2018, in particular to the Ethics Adviser. The preliminary assessment of the merits of that complaint led to it being closed, in accordance with the recommendation of the Ethics Office, by a decision of the Director-General of 14 November 2018.

Although it is true that the complainant challenged that decision in the internal appeals procedure, the Director-General did not take a final decision on his appeal to the Appeals Board on this matter (nor on the appeals concerning other harassment complaints that he had filed) until 24 June 2022, that is after he had filed the present complaint. This complaint is thus irreceivable insofar as it seeks to criticise that decision to close his harassment complaint, because the complainant failed to comply with the requirement to exhaust internal means of redress set out in Article VII, paragraph 1, of the Statute of the Tribunal. Moreover, in these circumstances, it cannot be found, in the examination of the present case, that the malicious bias alleged by the complainant has been proven. Although it must be noted that the decision of 24 June 2022 was impugned by the complainant in his third complaint, which will be ruled on at a later date, if the Tribunal were to uphold that complaint, it would not fail to draw all the consequences in terms of compensation for the injury caused by that decision.

Lastly, although the complainant also contends that the decision to defer his application for clearance damaged his reputation and well-being, the Tribunal considers that, in the circumstances of the case, the alleged injury cannot in any event be regarded as substantial. As regards the complainant's allegation that this decision also damaged his health, this has clearly not been proven, in particular since the only document submitted as evidence on this point, namely a statement of sick leave for 2018, does not establish that the medical problems justifying this leave were specifically linked to the decision in question.

6. Since the sequence of events recalled above shows that the complaint was already moot when it was filed with the Tribunal on 3 June 2022 – and not that it became moot during these proceedings, in which case the Tribunal would have found that there was no longer any need to rule on it – the complaint must simply be dismissed (see, in particular, Judgment 4635, consideration 6).

7. The complainant requests that UNESCO be ordered to pay him damages for the excessive delay in the internal appeal procedure.

As an exception to what has just been stated, this claim must be examined because international civil servants are, as a matter of principle, entitled to expect that their case will be dealt with by the internal appeal bodies within a reasonable time (see, for example, Judgments 3510, consideration 24, or 2116, consideration 11). A failure to comply with this need for expeditious proceedings, where wrongful, warrants compensation, the amount of which, under the Tribunal's case law, ordinarily depends on two essential considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4178, consideration 15, 4100, consideration 7, or 3160, consideration 17).

In this case, the delay of nearly four years between the submission of the first internal appeal to the Appeals Board on 3 April 2018 and the adoption of the final decision of 14 March 2022 is, in absolute terms, clearly excessive.

However, firstly, the Tribunal notes that the complainant, who asked the Appeals Board three times to extend the time limit for filing his submissions, for a total period of nine months, himself caused some of the delay in the procedure, and, moreover, it may seem reasonable, in view of the extensions obtained by the complainant, that they were also granted to the Organization. Moreover, the Organization explains, convincingly in the Tribunal's view, that the functioning of the Appeals Board was considerably disrupted, in 2020 and 2021, by the successive lockdowns ordered by the French authorities owing to the Covid-19 pandemic, which, in particular, affected the Board's capacity to hold its hearings as usual. Lastly, it must be pointed out that, given the

abandonment of the process of arming security officers following the delivery of the IOS report of October 2018, the complainant's internal appeals had become moot shortly after their filing, with the result that the procedural delay was not liable to cause him substantial moral injury (see, in this connection, Judgments 4727, consideration 14, and 4635, consideration 8).

This being so, the Tribunal considers that, in the particular circumstances of the case, there is no reason to order UNESCO to pay compensation to the complainant under that head.

8. In the light of the foregoing, the complainant's claims must be dismissed in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER