

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. R. (No. 7)

v.

UNESCO

135th Session

Judgment No. 4609

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms A. L. F. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 May 2020 and corrected on 8 May 2020, and UNESCO's reply of 7 August 2020;

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 impugns the new decision taken by UNESCO pursuant to Judgment 3936 in the context of her appeal against the decision to transfer her to Paris.

The essential facts relevant to the present case are set out in Judgment 3936, delivered in public on 24 January 2018, which concerned the complainant's fifth complaint, and in Judgment 4284, delivered on 24 July 2020, which concerned her application for execution of Judgment 3936. Suffice it to recall that, in the context of the proceedings that led to Judgment 3936, the complainant – who retired on 31 March 2014 and who at the material time held the grade P-5 post of Head of UNESCO's National Office in Kinshasa (Democratic Republic of the Congo) – impugned the decision of 10 December 2015 by which the

Director-General had rejected as time-barred the appeal she had lodged on 18 April 2013 against the decision to transfer her to Paris (France), which was taken on 18 February 2013 and confirmed, after she had challenged it by means of a protest, on 1 March 2013. In that complaint, the complainant asked for the decision of 10 December 2015 to be set aside and for payment, with interest, of the salary and allowances that she would have received had she remained assigned as Head of the Kinshasa Office until her retirement at the end of March 2014. She also claimed 150,000 euros in compensation for moral and professional injury, 50,000 euros for the physical injury allegedly suffered, and redress for the injury which, in her view, had been caused by the lack of normal notice, arguing that she had been “obliged” to take two months of annual leave to arrange her move from Kinshasa to Paris. Lastly, she claimed costs. In Judgment 3936, the Tribunal set aside the Director-General’s decision of 10 December 2015 on the grounds that the complainant’s appeal had been wrongly dismissed as time-barred, remitted the case to UNESCO for the Appeals Board to examine the appeal, awarded the complainant moral damages and costs, and dismissed all other claims.

Having examined the appeal as required by Judgment 3936, the Appeals Board recommended to the Director-General, in an opinion of 18 December 2019, that a further two months’ rental subsidy should be paid to the complainant for her house in Kinshasa – in addition to the two months’ rental subsidy previously awarded to her under the transfer decision of 18 February 2013 – and to dismiss the remainder of her claims. On 12 February 2020 the Director of the Bureau of Human Resources Management informed the complainant that the Director-General had decided to follow the recommendation of the Appeals Board. That is the decision impugned in the seventh complaint brought by the complainant before the Tribunal.

In Judgment 4284, the Tribunal noted that the decision of 12 February 2020 taken pursuant to Judgment 3936 was adopted more than 24 months after that judgment was delivered in public and ordered UNESCO to pay the complainant 7,000 euros in moral damages on account of that delay, as well as costs.

The complainant requests that the decision of 12 February 2020 be set aside. She again claims payment, with interest, of the salary and allowances that she would have received had she remained assigned as Head of the Kinshasa Office, 150,000 euros in compensation for moral and professional injury, 50,000 euros for the physical injury allegedly suffered and a “fair award” of costs. She also claims reimbursement of the expenses resulting from the decision to transfer her to Headquarters, including the use of two months of annual leave to arrange her move from Kinshasa. In addition, she asks the Tribunal to order UNESCO to pay a fine of 25,000 euros for each month of delay in executing the present judgment.

UNESCO asks the Tribunal to reject the complaint as irreceivable on the grounds that the complainant failed to correctly follow the procedure set out in paragraph 7 of the Statutes of the Appeals Board. Subsidiarily, it submits that the complaint is unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 12 February 2020 by which the Director-General of UNESCO, acting in accordance with the opinion of the Appeals Board, dismissed, for the most part, the appeal which the complainant had brought against the decision of 18 February 2013 transferring her to Paris to take up a post at the Organization’s Headquarters with effect from 1 March 2013.

The reason for the transfer was that the complainant, who until then had held the post of Head of UNESCO’s National Office in Kinshasa, had given birth to a child on 23 November 2012 and, as Kinshasa was classified as a non-family duty station due to security concerns, it was not legally possible for the complainant to remain in her post. As the Organization, following discussions with the complainant, was not able to transfer her to a new post agreed on by both parties, she was eventually assigned, by the decision of 18 February 2013, as a *chargée de mission* in the Bureau of Field Coordination.

2. As recalled in the summary of facts set out above, by Judgment 3936, delivered in public on 24 January 2018, the Tribunal set aside a decision of the Director-General dated 10 December 2015 which had, incorrectly, initially rejected the internal appeal brought by the complainant against the decision of 18 February 2013 as time-barred. Consequently, the decision of 12 February 2020 which is impugned in the present proceedings addressed the merits of that appeal, bearing in mind that when the Tribunal came to examine an application for execution of Judgment 3936, it had found, in Judgment 4284, delivered in public on 24 July 2020, that there had been undue delay in taking that final decision.

3. UNESCO raises an objection to the receivability of the complaint on the grounds that the complainant unlawfully extended her claims during the internal appeal process. According to UNESCO, in her initial protest directed against the transfer decision of 18 February 2013, which was dismissed on 1 March 2013, the complainant simply asked the Director-General to postpone the implementation of that decision. Thus, UNESCO argues, inasmuch as she subsequently requested the cancellation of that decision in her appeal before the Appeals Board, the complainant extended the scope of the dispute, whereas paragraph 7(c) of the Statutes of the Appeals Board only permits a staff member, at that stage of the proceedings, to “pursue his or her contestation”. Accordingly, the complainant did not properly exhaust the internal means of redress available to her under the Organization’s staff regulations, which renders her complaint irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal.

However, the Tribunal notes that, although the complainant’s protest lodged on 18 February 2013 against the decision of that date was, admittedly, rather clumsily headed “Request to postpone an administrative decision”, and although the complainant stated in that protest that she “[did] not dispute the reason” for the decision (namely, that it was impossible for her to remain in her post as Head of the Kinshasa Office due to the birth of her child), it is clear from the wording of the protest that the complainant was not simply challenging the effective date of her transfer but was also criticising the fact that she

was required to transfer to Headquarters. Indeed, she also stated, in that regard, that she would have preferred to be appointed as the Head of another field office and that her transfer to Paris would be unnecessarily costly to the Organization, and she asked the Director-General to “reconsider the decision of which [she] [had] been notified”, which was tantamount to requesting that the decision be revoked, and not merely that its implementation be postponed.

UNESCO’s argument that, by challenging the validity of her transfer before the Appeals Board, the complainant unlawfully extended the scope of the dispute, is therefore unfounded and, accordingly, the objection to receivability must be dismissed.

4. It is well established in the case law of the Tribunal that a decision to transfer an employee of an international organisation, which, as with any appointment decision, lies within the discretion of the executive head of the organisation concerned, is, for that reason, subject to only limited review. Therefore, such a decision may be set aside only if it was taken *ultra vires*, if it shows formal or procedural flaws or a mistake of fact or law, if some material fact was overlooked, if there was abuse of authority or if a clearly wrong conclusion was drawn from the evidence (see, for example, Judgments 4451, consideration 6, 3488, consideration 3, 2635, consideration 5, 1556, consideration 5, and 883, consideration 5).

The complainant’s arguments will be examined in the light of this case law.

5. The Tribunal notes first of all that, in this particular case, UNESCO was obliged to end the complainant’s assignment as Head of the Kinshasa Office following the birth of her child. Non-family duty stations, which are determined for all organisations in the United Nations system by the International Civil Service Commission on the basis of recommendations from the United Nations’ Department of Safety and Security, and a list of which appears, in the case of UNESCO, in Annex 4 C to the Human Resources Manual, are places considered unsuitable for the assignment of staff members who are

accompanied by their family due to the security situation in the States where they are located. Since Kinshasa was, at the material time, classed as a duty station in this category, the Tribunal considers that the Organization was therefore obliged to transfer the complainant to a post compatible with her new family status. Had it not done so, UNESCO would not only have failed to follow its own rules but also and above all would have put the complainant and her child in danger, which would have been a serious breach of the duty that all international organisations have pursuant to the Tribunal's case law to adopt appropriate measures to ensure the safety of their staff members and, more generally, a breach of the duty of care towards them (see, *inter alia*, Judgments 4239, consideration 21, 3689, consideration 5, and 3025, consideration 2).

It must, however, be pointed out that, even though the Organization was thus obliged to transfer the complainant to a different duty station, that did not, of itself, predetermine the choice of the new post to be assigned to her, nor did it relieve the decision-making authority from the obligation to comply with the legal and procedural rules governing decisions of that kind.

6. Among the many pleas set out by the complainant in support of her complaint, there are two which fall within the Tribunal's limited power of review as defined above, since they allege a procedural flaw and a mistake of law respectively, and which are decisive for the outcome of the present dispute.

They are the pleas alleging, first, a lack of prior consultation with the complainant about the duties that would be assigned to her in her new post and, secondly, the unduly short period of time between notification of the transfer decision and the date on which it was to take effect.

7. The evidence shows that, following discussions with the complainant about the need for her duty station to change, which mainly took place by telephone in November 2012, the UNESCO Administration noted that it was not possible to identify a mutually agreeable post to

which to assign her. The complainant had refused the offer of a transfer to the post of Head of the Organization's Office in Brazzaville (Democratic Republic of the Congo) and her own assignment preferences could not be accommodated given that they essentially related to two other Head of Office posts in Africa, one of which was likewise located in a non-family duty station whilst the other was classified at a grade higher than hers. In addition, the fact that the complainant – who was almost 59 years old when her child was born – was due to retire on 31 March 2014 made it difficult, from the Organization's point of view, to appoint her to a new operational post since she would occupy the post for barely a year. It is in that context that the Director of the Bureau of Human Resources Management finally recommended to the Director-General on 12 February 2013 that the complainant be appointed to a "floating post" in the Bureau of Field Coordination and the decision of 18 February 2013 was taken, which stated that her job title would be "[c]hargé[e] de [m]ission".

8. In view of the train of events summarised above and the related evidence, the Tribunal considers that it must be recognised that, in all probability, the complainant had been made sufficiently aware, given the lack of agreement reached with her over a new assignment, that she might be appointed to a post at Headquarters when her maternity leave came to an end, and thus had an opportunity to submit comments both on that duty station and on the date – at least an approximate one – envisaged for the transfer. But the Tribunal's case law also requires that a staff member who is to be transferred be informed in advance of the nature of the post proposed for her or him and, in particular, of the duties involved, so that she or he is able to comment on those new duties as well (see, for example, Judgments 4451, consideration 11, 3662, consideration 5, 1556, considerations 10 and 12, and 810, consideration 7). This is also a requirement under paragraph 7 of Item 5.10 of UNESCO's Human Resources Manual, in the version applicable in the present case, which states that "[b]efore a transfer decision is taken, the staff member concerned shall be consulted", since the consultation referred to must, if that provision is to be meaningful, relate to the content of the new post to be assigned to the staff member in question.

9. It is clear that the complainant had not been informed of the duties she would have to assume in her new post prior to the decision of 18 February 2013 being taken and, a fortiori, had not been consulted about them. That omission is all the more obvious given that the Administration had not actually defined those duties itself at the date of the decision in question. Indeed, it is apparent from the emails exchanged between the Director of the Bureau of Human Resources Management and the Director-General on 12 and 18 February 2013 that, when handling the complainant's situation, the attention of the Organization's authorities was then entirely focussed on identifying a budgetary post for the complainant's remuneration following her transfer to Headquarters and that ascertaining the tasks she was to perform in her new role was not mentioned at all in the course of that internal discussion. Furthermore, as UNESCO itself acknowledges in its reply, the duties pertaining to that post were, in fact, only determined afterwards. In that regard, UNESCO cannot successfully argue that it nonetheless ensured that a description of the complainant's conditions of service in her new role was provided to her on 1 March 2013 since, quite apart from the fact that this occurred after the contested decision, the document in question only covers entitlement to pay and other material benefits together with the ethical obligations imposed on the complainant in the exercise of her duties, rather than the actual content of those duties. In fact, the duties pertaining to the post of *chargée de mission* to which the complainant was appointed were only defined when a job description was sent to her on 2 July 2013, in other words, several months after her appointment to the role.

The procedural flaw arising from the failure to consult the complainant in advance on these matters is sufficient to render the contested transfer decision unlawful.

10. Furthermore, the complainant is correct in contending that the period of time between notification of the transfer decision, which occurred on 18 February 2013, and the date on which it took effect, being 1 March 2013, was unduly short. The Tribunal's case law shows that an organisation that is intending to transfer a staff member is obliged to ensure that the implementation of that measure is preceded by proper

notice enabling the staff member to make the necessary arrangements for the change in her or his duty station (see aforementioned Judgment 1556, consideration 12, Judgment 1496, considerations 11 and 13, and aforementioned Judgment 810, consideration 7). In the present case, the period of 11 days given to the complainant under the decision of 18 February 2013 to take up her new post at Headquarters clearly fell short of that requirement, particularly given that in practical terms the transfer in question involved moving from Kinshasa to Paris.

11. The Tribunal does of course recognise that, as stated above, the complainant had in all probability been informed through previous exchanges with the Administration of the possibility of a transfer to Headquarters at the end of her maternity leave – which, at the date of the contested decision, was anticipated to be on 1 March 2013. But the choice of that duty station and the effective date of the transfer were still only hypothetical until it was actually announced. In addition, it must be noted that although, in the event, the date of the complainant taking up her new post was subsequently postponed, for various reasons, to 2 July 2013, that does not affect the assessment of the lawfulness of the decision of 18 February 2013, which, at the time when it was taken, referred to the complainant being required to take up her post on 1 March 2013.

12. In an attempt to justify the shortness of the period between notification of the decision and the date on which it was to take effect, the Organization submits that the Bureau of Human Resources Management was only informed of the complainant's pregnancy at a very late stage and that UNESCO then found itself in a situation of great urgency due to the legal impossibility of the complainant remaining in her post in Kinshasa when her maternity leave came to an end. However, the Tribunal notes that UNESCO itself confirms that the Bureau of Human Resources Management was finally made aware of the complainant's pregnancy on 20 September 2012. At that date, the Organization still had almost five and a half months before the deadline of 1 March 2013 to transfer the complainant to a new post, which does

not point to a situation of great urgency, and there was no insurmountable obstacle preventing the relevant decision from being taken sooner.

It follows that the decision of 18 February 2013, insofar as it provided for such a short timescale, is also tainted with an error of law.

13. It follows from the foregoing that the Director-General's decision of 12 February 2020, together with the decisions of 18 February 2013 and 1 March 2013, must be set aside, without there being any need to rule on the complainant's other pleas.

14. As a consequence of these decisions being set aside, the complainant claims payment of all the salary and allowances that she would have received had she remained assigned as Head of UNESCO's Kinshasa Office until her retirement, together with interest thereon. However, the Tribunal notes that the complainant, who was transferred to a post of the same grade and who retained the same step as she had held previously, thus continued to receive the same index-related remuneration on her appointment to Headquarters as she had received in her previous post. In addition, given that, as previously stated, the complainant would have had to leave the post of Head of the Kinshasa Office in any event, any financial benefits she received that were specifically linked to that post would necessarily have ceased. As a result, the complainant has not, in terms of her remuneration, suffered any loss attributable to UNESCO and the claim for compensation under this head must therefore be dismissed.

15. Neither will the Tribunal grant the complainant's request for compensation for the "physical injury" that she alleges she suffered. Although the complainant has submitted medical certificates as evidence of conditions which, at the material time, justified her taking sick leave, there is nothing to show that those conditions were attributable, as she maintains, to the consequences of the contested decision or to the Organization's conduct towards her.

16. On the other hand, the complainant is right in contending that the unlawfulness of the impugned decision caused her moral injury. The lack of advance information provided to the complainant about the content of the new duties she was to assume and the unduly short period of time she was given to take up her new post in Paris were such as to cause her stress and anxiety and adversely affected her rights and her dignity, which is characteristic of that form of injury.

17. The complainant also suffered a certain professional injury in that she had to change job in irregular and highly uncomfortable circumstances. In that regard, it must, however, be noted that UNESCO's responsibilities concerning the choice of post to which the complainant was to be assigned on her inevitable departure from Kinshasa were significantly lessened by the fact that, in practice, the Organization – which, contrary to the complainant's assertions, had no obligation to reassign her to a post as Head of a field office – undoubtedly had, for the reasons set out above, no viable alternative to the solution it adopted.

18. The complainant claims the reimbursement of various expenses resulting from her transfer to a post in Paris.

In this regard, the Tribunal notes that, since, in the event, the complainant only assumed her new duties at Headquarters on 2 July 2013 – rather than on 1 March 2013, as envisaged in the decision of 18 February 2013 – she cannot validly claim that she suffered any loss due to it being impossible to comply with the three month notice period required to terminate the lease of her accommodation in Kinshasa. Having received two months' rental subsidy pursuant to the decision of 18 February 2013 itself, followed by a further two months awarded by the Director-General in the impugned decision of 12 February 2020, the complainant effectively continued to occupy her accommodation until the end of June 2013 under the same financial conditions as before, so that she did not suffer any financial loss for that period.

It is not, however, disputed by the Organization that the complainant was subsequently obliged to return to Kinshasa in order to arrange her move, which – for reasons which, on the evidence, appear to be partly attributable to UNESCO services – could not take place until the end of September 2013, and, accordingly, to retain her former accommodation until then. Although the complainant cannot in any event be awarded the compensation she claims for the use of two months of annual leave which she alleges she spent in preparing for the move, the Tribunal notes that she did, nonetheless, suffer a certain financial loss, which must be redressed.

19. Lastly, the complainant claims moral damages due to the excessive length of the internal appeal procedure. The Tribunal notes that this procedure, which lasted seven years overall, was therefore subject to an unreasonable delay. But it should be noted that the injury caused by this excessive delay has, in fact, already been entirely redressed by the award to the complainant, pursuant to Judgment 3936, of moral damages in the amount of 10,000 euros, the purpose of which was to compensate her for, amongst other things, the delay in examining her appeal caused by UNESCO's initial error as to the receivability thereof, and also by the award to the complainant, in Judgment 4284, of damages of 7,000 euros in view of the further delay that ensued before the final decision of 12 February 2020.

20. In the light of all the foregoing considerations, the Tribunal considers that the various injuries invoked by the complainant which she is found to have actually suffered but for which she has not already been compensated may be fairly redressed by awarding her, in addition to the various sums that she has already received since the start of the case, the payment of damages in the amount of 15,000 euros, for injury under all heads.

21. As she succeeds for the most part, the complainant is entitled to costs, the amount of which – in view of the fact that she did not engage a lawyer in the present proceedings – will be set at 1,000 euros.

22. The complainant claims that, in view of the “obvious reluctance” shown by UNESCO in performing the obligations previously imposed on it by the Tribunal, the awards made under this judgment should be accompanied by a fine. But it must be noted that, although the Organization undeniably took an excessively long time in determining the complainant’s appeal once the case had been remitted to the Appeals Board, by contrast it immediately complied with the financial awards imposed upon it under Judgment 3936, as indeed the Tribunal pointed out in Judgment 4284, consideration 6, and there is no evidence to suggest that it failed in its obligation to make prompt payment of the sums awarded against it by that latter judgment. As there is no reason to suppose that UNESCO will behave any differently when executing the similar awards made under this present judgment, it is not appropriate to grant the request for a fine.

DECISION

For the above reasons,

1. The decision of the Director-General of UNESCO of 12 February 2020 and the decisions of 18 February 2013 and 1 March 2013 are set aside.
2. UNESCO shall pay the complainant damages of 15,000 euros for injury under all heads.
3. The Organization shall also pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 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 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ