

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. Y. (Nos. 1 and 2)

v.

UNESCO

135th Session

Judgment No. 4611

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr I. K. S. Y. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 9 July 2019 and corrected on 16 August 2019, UNESCO's single reply of 6 January 2020, the complainant's rejoinder of 16 April 2020 and UNESCO's surrejoinder of 17 July 2021;

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 refusal to pay him sums due by way of final emoluments and seeks compensation for the harm which he allegedly as a result of the delay in releasing his pension paperwork to the United Nations Joint Staff Pension Fund (UNJSPF).

By decision of the Director-General of 27 July 2018, the complainant – a staff member since 2004 who, at the material time, held the post of Finance and Administrative Officer in UNESCO's Chile Office under a fixed-term appointment at grade P-3 – was dismissed for serious misconduct, with effect from 17 August 2018, following an investigation carried out by the Internal Oversight Service (IOS) in March 2018

which established fraud and conflict of interest on his part. He did not challenge the decision to dismiss him. On 30 July 2018 the Bureau of Human Resources Management sent him a memorandum concerning the administrative separation formalities and invited him to contact the UNESCO Staff Savings and Loan Service (USLS) regarding any outstanding debts. The complainant was informed that no payment could be made to him, including for his final month's salary, until the "check-out" process had been completed. The following day, he contacted the USLS to find out whether he could repay his using the pension entitlements he had accumulated during his 14 years of service. The complainant had in this regard opted for a lump sum payment of the amount due in settlement of his pension rights. The reply he received was that, under the terms of the loan agreement entered into, his debt had to be repaid by offsetting it against the sums owed to him by the Organization. On 1 August the Bureau of Human Resources Management informed him that the debt he owed to the Medical Benefits Fund (MBF) would also be deducted from the final settlement and that the check-out process could not be completed until the Organization had received the necessary information to calculate the amount of his share of medical expenses.

At the same time, during the summer of 2018, UNESCO engaged an external company to carry out a new investigation into other irregularities identified by the IOS in March. An investigation report was finalised on 20 September 2018, in other words, after the complainant had permanently left the Organization. The report found that the complainant had carried out fraudulent manipulations which had caused financial loss to UNESCO in the sum of 242,571.22 United States dollars.

In October 2018 the complainant provided his pension documentation to the Organization. Various exchanges followed concerning the repayment of debts owed by the complainant as a result of his loan from the USLS, in particular through his UNJSPF pension benefits. On 4 January 2019 he was informed that a decision on his situation would be taken soon but that the balance of his debt to the MBF could not yet be finalised as the hospital where he had been treated was refusing to cooperate.

On 8 January 2019 the Bureau of Human Resources Management provided him with information on the status of the debts he owed to UNESCO, amounting to 18,610.58 dollars in total, broken down as follows: 5,876.58 dollars to the USLS and the MBF – following deduction of the sum due to him by way of final emoluments (equivalent to 48,359.59 dollars) – and 12,734 dollars for the financial loss caused to the Organization as a result of the fraud established by the IOS in March 2018. The Bureau explained that the amount which the complainant owed to the Organization at that time was without prejudice to medical claims which had not yet been cleared and the interest on his loan, which continued to accrue. This amount was subsequently reduced to 14,286.58 dollars following a cash remittance of 4,324 dollars made by the complainant to the IOS.

Furthermore, with regard to the new allegations of fraud made against the complainant, he received the investigation report of 20 September 2018 and was invited to provide comments on it, which would form the basis for determining whether he would be held financially liable. The Bureau explained that, once the entirety of the complainant's financial liability was established, UNESCO reserved the right to refer the matter to the national authorities in order to pursue legal action as appropriate, but that it was also prepared to reach an amicable settlement involving payment of the disputed debt through his pension benefits. On 17 January 2019 the complainant submitted his comments on the investigation report of 20 September 2018 and expressed his willingness to reach an amicable settlement.

On 18 February 2019 he received a new statement of his debts, which now amounted to 249,927.58 dollars, due in particular to the fraudulent manipulations revealed by the report, and which had to be paid no later than 28 February 2019, unless an amicable settlement could be reached. The parties began negotiations in February 2019.

On 8 April 2019 the complainant's counsel asked that his client's paperwork be released without delay to the UNJSPF so that they could proceed to pay his client the sum to which he was entitled. He referred to UNESCO's "wrongful failure to act" in this regard, which had caused serious harm to the complainant, estimated at 70,000 euros, subject to

revision. On 15 April 2019 he received a reply stating that negotiations over the recovery of the debt through his pension benefits were still ongoing, but that release of the pension paperwork to the UNJSPF would imply the end of those negotiations. It was also explained to him that the Organization would offset the amount that it owed the complainant by way of final emoluments against the amount that it was claiming from him for fraud.

On 17 April 2019 the complainant's counsel stated that he disagreed with the assertions in the email of 15 April and accused the Organization of unlawfully and unfairly retaining documents in order to intimidate and threaten his client. He warned that the dispute would soon be taken before the Tribunal, unless the Organization changed its stance. Having received no reply, in May 2019 the complainant repeated his request for his paperwork to be released to the UNJSPF. By email of 16 May 2019, he was informed that this had been done and, on 7 June 2019, he received the sum payable to him by way of pension benefits.

The complainant, who was opposed to his pension benefits being used to offset the debt that the Organization alleged he owed as a result of the fraudulent manipulations with which he had been charged, filed a first complaint with the Tribunal on 9 July 2019 against the email of 15 April 2019, which he identifies as the impugned "decision". He asks the Tribunal to set aside that "decision" in that it refuses the payment of sums due by way of his final emoluments and to order UNESCO to pay all sums due, including a repatriation grant and payment in lieu of annual leave, together with compensation for the harm that he alleges to have suffered as a result of his pension paperwork being retained arbitrarily by the Organization and costs of 10,000 euros.

UNESCO considers that the complaint is irreceivable because it was not brought against the "final" decision of 8 January 2019 within the period of 90 days provided for in Article VII, paragraph 2, of the Statute of the Tribunal. UNESCO asks for the complaint to be dismissed as time-barred and, in any event, as unfounded. Subsidiarily, should the Tribunal find that any of the complainant's claims is founded, UNESCO asks the Tribunal to deduct from any sum that it may be

ordered to pay the whole of the debt owed to it by the complainant, namely the sum of 254,570.66 dollars, plus interest.

In his rejoinder, the complainant adapts his claims and states that there is no longer any need to rule on the claims seeking the setting aside of the decision or payment of the sums due by way of final emoluments “provided that the offsetting exercise effected [under] the terms of [the letter] of 8 January 2019 thereby carries the authority of *res judicata*”. He also submits that UNESCO’s counterclaim should be dismissed and, subsidiarily, asks the Tribunal to authorise UNESCO to offset only those sums due by way of medical expenses, taking into account the sum paid by the UNJSPF and the surplus paid on repayment of the loan. In addition, he considers that it is still appropriate for the Tribunal to rule on his claim for damages, which he assesses as at least 15,000 euros, and his claim for costs.

In its surrejoinder, UNESCO maintains its position and quantifies the total debt owed by the complainant at 250,907.90 dollars. It also argues that the new claims made at the time of the rejoinder are irreceivable.

In a second complaint, filed on the same date as the first, the complainant asks the Tribunal to set aside the decision which impliedly rejected his earlier claim of 8 April 2019 seeking compensation for the harm he alleges to have suffered as a result of the delay, which he regards as unjustified, in releasing his paperwork to the UNJSPF and, if it exists, of the earlier “decision” of 15 April 2019 on the same subject, and to order the Organization to pay him damages for the harm allegedly suffered, assessed at 80,000 euros, as well as 10,000 euros in costs.

In its reply, UNESCO sets out the reasons why, in its opinion, it was entitled to delay the release of the complainant’s pension paperwork during the negotiations which were entered into with a view to reaching an amicable settlement with him. It asks the Tribunal to dismiss the complaint as unfounded and repeats the counterclaim it made in its reply to the first complaint seeking the deduction from any sum that it may be ordered to pay of the whole of the debt owed to it by the complainant, plus interest.

In his rejoinder, the complainant maintains that, without valid reason, the Organization failed in its duty to release his pension paperwork promptly to the UNJSPF, which constitutes an abuse of authority. In view of UNESCO's abusive stance, it is clearly not acceptable for it to rely on the supposed agreement of the complainant to this course of action. He submits that the counterclaim should be dismissed and, subsidiarily, as in his first complaint, asks the Tribunal to authorise UNESCO to offset only those sums due by way of medical expenses, taking into account the sum paid by the UNJSPF and the surplus paid on repayment of the loan.

In its surrejoinder, UNESCO maintains its position.

On 26 September 2019, the Organization referred the matter to the Chilean authorities so that the complainant could be held to account for his actions before the national courts.

CONSIDERATIONS

1. UNESCO requests that the two complaints be joined, to which the complainant does not object.

Since the two complaints concern the personal situation of the same individual, relate to disputes which rest on the same facts and were also filed on the same day, the Tribunal considers it appropriate that they be joined to form the subject of a single judgment.

2. In his rejoinder, the complainant, having pointed out that, in its reply, UNESCO adduced evidence in a language other than those that can be used before the Tribunal without appending a translation into French, in breach of Article 8(2) of the Rules of the Tribunal, pleads that all that evidence is inadmissible.

In support of its surrejoinder, the Organization produces a translation into French of one of the annexes to its reply and also submits that there is no need to produce translations of the other items of evidence as they are not actually necessary to rule on the dispute.

The Tribunal finds that the items of evidence for which no translation has been produced by the Organization must be disregarded for non-compliance with the language requirement set out in Article 8(2)(b) of its Rules.

3. On the form relating to his first complaint, the complainant states that the date of the impugned decision is 15 April 2019. On that same form, his primary claim is for the setting aside of “the [impugned] decision in that it refuses the payment of sums due by way of final emoluments”.

The Organization asserts that the email of 15 April 2019 was not intended to modify its final decision, dated 8 January 2019, but was merely a reply to the email of 8 April 2019 from the complainant’s counsel requesting the release of the pension paperwork to the UNJSPF.

4. With regard to the “decision” that was allegedly taken on 15 April 2019, the Tribunal notes the following points.

In its letter of 8 January 2019, the Organization clearly informed the complainant that he owed it the sum of 54,236.17 dollars as a result of the loans from the USLS and his debt to the MBF. That sum would be partially offset by the amount of his final emoluments, namely 48,359.59 dollars. In its letter 18 February 2019, the Organization recalled the content of the letter of 8 January 2019.

In an email of 15 April 2019, in response to an email of 8 April 2019 from the complainant’s counsel demanding that his client’s pension paperwork be released forthwith to the UNJSPF, UNESCO confirmed that the complainant owed it a total of 249,927.58 dollars and recalled that negotiations had been initiated to reach an amicable settlement, which implied, in particular, acceptance by the complainant of the amount due under his pension benefits being offset against the debt. Further to that email, the complainant was informed, on 16 May 2019, that his paperwork had indeed been released to the UNJSPF.

Neither of the aforementioned decisions of 8 January or 18 February 2019 was impugned within the 90-day time limit set out in Article VII, paragraph 2, of the Statute of the Tribunal. Those decisions therefore became final.

The Tribunal finds that the email of 15 April 2019, which, in relation to the question of the payment of final emoluments, merely recalls the content of those decisions, is therefore a purely confirmatory decision which, as such, cannot set off a new time limit for an appeal to the Tribunal (see, in that regard, Judgments 4118, under 3, 3870, under 4, 3002, under 12, and 2887, under 5).

It follows that the first complaint filed by the complainant before the Tribunal is, in any event, irreceivable.

5. In his second complaint, the complainant in essence seeks the setting aside of the rejection of his claim for damages from UNESCO for the harm he alleges to have suffered as a result of the delay, which he regards as unjustified, in UNESCO releasing his pension paperwork to the UNJSPF.

However, the Tribunal notes that, by his own admission, the complainant did not provide the Organization with the documentation relating to his pension until the beginning of October 2018. He was requesting, in that context, the payment of his pension as a lump sum. It is clear from the file that, between October 2018 and January 2019, the complainant and the Organization exchanged various emails concerning repayment of the complainant's debts to the USLS, in particular through his pension benefits. On 17 January 2019, the complainant, while disputing the fraud uncovered by the investigation report of 20 September 2018, showed his willingness to reach an amicable settlement. In February 2019, the parties entered into negotiations with a view to reaching such a settlement, which continued until the complainant's counsel requested on 8 April 2019 that his client's pension paperwork be released forthwith to the UNJSPF and the Organization responded on 15 April stating that it was willing to do so but that it would put an end to the negotiations.

In those circumstances, the fact that the paperwork was not in fact released to the UNJSPF until 16 May 2019 does not, contrary to what the complainant submits, constitute a “wrongful failure to act” on the part of the Organization.

The second complaint must therefore be dismissed as unfounded.

6. It follows from all the foregoing that both complaints must be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 11 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