Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session **Judgment No. 3202**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. T. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 3 January 2011 and corrected on 15 March, the Organization's reply of 24 June, the complainant's rejoinder of 30 September 2011 and UNESCO's surrejoinder of 17 January 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Tunisian national born in 1966, entered the service of UNESCO in October 1995 and worked as a consultant, as a supernumerary, and then as the holder of a fee contract in the Natural Sciences Sector until the end of 2002.

From 2 January 2003 the complainant was employed under a temporary appointment which was extended on several occasions. She was assigned to a post of Programme Specialist at grade P-3 in the Social and Human Sciences Sector. She was subsequently given a fee

contract. From 1 January 2004 she again worked as a Programme Specialist in that sector, initially as a supernumerary and then, from 1 January 2006, under another temporary appointment, which was also extended several times, the last extension continuing until 30 June 2007. From 1 July 2007 she was employed on the basis of another temporary appointment, and assigned to a post at grade P-4 which had been created in the same sector following an increase in the responsibilities related to her field. This appointment was likewise extended on several occasions. It was due to expire on 31 March 2010, but the complainant was informed by an e-mail of 1 April that it had been decided, exceptionally, to extend it "on a month-by-month basis".

By a memorandum of 17 August 2010 the Assistant Director-General for the Social and Human Sciences Sector, who had taken up her duties the previous month, informed the complainant that her contract would expire on 30 September 2010, and that she would receive a separation payment equivalent to three months' salary. On 6 September the complainant filed a protest, in accordance with paragraph 7(a) of the Statutes of the Appeals Board. By a memorandum dated 29 September, she was informed that the Director-General had confirmed the decision not to renew her appointment, particularly because the needs of the sector concerned had changed.

On 27 October 2010 the complainant submitted a notice of appeal, in accordance with paragraph 7(c) of the Statutes of the Appeals Board. At her request, the Chairman of the Appeals Board twice extended the time limit for filing her detailed appeal. On 29 March 2011 she requested the Chairman to suspend the proceedings because she had submitted her case to the Tribunal. Since she was no longer a staff member of UNESCO, she considered that she no longer had access to the internal means of redress.

In her complaint form the complainant states that the decision she impugns is that of 29 September 2010.

B. The complainant asserts that the memorandum of 29 September 2010 was communicated to her on 5 October. On that date she was no longer a staff member of UNESCO and, according to Chapter XI of the Staff Regulations and Staff Rules, she no longer had access to the internal means of redress. She concludes that in accordance with the Tribunal's case law, she was entitled to apply to it directly.

On the merits, the complainant states that, contrary to Staff Rule 104.1(b), subparagraph (v), the Advisory Board on Individual Personnel Matters did not advise on the non-renewal of her appointment. She seeks to show that the decision of 17 August 2010 was not a reasoned one, and that there was a breach of due process because she had no opportunity to state her views before the decision was taken not to renew her appointment.

The complainant also accuses the Organization of having failed in its duty of care, especially because it disregarded her interest in remaining a participant in the United Nations Joint Staff Pension Fund (UNJSPF) for a period of five years. She had been a participant in the Fund for four years and six months, so at the time when her appointment came to an end she lacked six months' contributions in order to become entitled, in due course, to a retirement pension from the Fund. Lastly, she considers that by keeping her in a precarious situation and by "concealing" the true nature of her appointments, UNESCO acted unfairly and improperly. From her point of view, she should therefore be considered as having been employed under fixed-term appointments.

The complainant asks the Tribunal to set aside the impugned decision and to make an order requiring UNESCO to reinstate her, so restoring all her rights, both financial and social. She claims interest of 8 per cent per annum, with capitalisation, on the sums due in this respect. Failing that, she asks the Tribunal to order the Organization to "reinstate [her] legally" for a period that would enable her to complete the period of contributory service necessary to entitle her to a retirement pension from the UNJSPF, and to

pay her a sum equivalent to two years' salary in compensation for the injury suffered, together with interest at 8 per cent per annum, plus capitalisation, from 6 September 2010. She also claims 15,000 euros in costs. Lastly, she asks the Tribunal to rule that if these sums are subject to national taxation, she will be entitled to obtain reimbursement from UNESCO of the amounts paid in tax.

C. In its reply the Organization contends that the complaint is irreceivable because the complainant has not exhausted internal remedies. It points out that she was still a staff member of UNESCO when the decision not to renew her appointment was communicated to her on 17 August 2010, and before applying to the Tribunal she should have followed the requirements of the Statutes of the Appeals Board.

On the merits and subsidiarily, the defendant argues that having obtained her second temporary appointment from 1 January 2006, the complainant had served UNESCO for less than five years when she left it. The Advisory Board on Individual Personnel Matters was not therefore required, under Staff Rule 104.1(b), subparagraph (v), to give its advice on the non-renewal of her appointment. By making her a separation payment equivalent to three months' salary, UNESCO had done her a favour, since payments of that kind are normally reserved for staff members who have served continuously for over five years. The defendant considers that she is "completely mistaken concerning the right to a hearing", since she was not subject to any disciplinary procedure, which it contends is the only circumstance in which an international civil servant can exercise that right. It also argues that the complainant was "well aware" that her appointment would not be renewed, and it asserts that the Assistant Director-General for the Social and Human Sciences Sector had not thought it necessary, in the memorandum of 17 August 2010, to recall the reasons for its non-renewal. Lastly, it points out that, according to Staff Rule 104.8(b), a temporary appointment does not carry any right to its extension or conversion to a fixed-term appointment, nor any expectation in that sense, and that since the complainant had accepted and signed all her contracts, they could not be retrospectively altered.

D. In her rejoinder the complainant repeats her arguments. She contends that respect for the rights of the defence is a general principle of law which applies whenever a decision has adverse consequences.

E. In its surrejoinder the Organization maintains its objection to the receivability of the complaint, as well as its position on the merits. It admits that the decision of 17 August 2010 was not very explicit, but points out that the reasons for the non-renewal of the complainant's appointment were communicated to her in the memorandum of 29 September 2010.

CONSIDERATIONS

1. The employment relationship between the complainant and UNESCO began in 1995 and was based on a series of consultancy and supernumerary contracts, with several interruptions. By a memorandum of 17 August 2010 the complainant was informed that the temporary contract under which she had been employed at the Organization's Headquarters since 1 July 2007 would not be renewed after 30 September 2010.

2. Paragraph 7 of the Statutes of UNESCO's Appeals Board relevantly provides:

> "(a) A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Human Resources Management, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters […].
>
> (b) The Director General's ruling on the protest under (a) above shall be communicated to the staff member […] within one month of the date of the protest if the staff member is stationed at Headquarters […].
>
> (c) If the staff member wishes to pursue his or her contestation, he or she shall address a notice of appeal in writing to the Secretary of the Appeals Board. The time-limit for the submission of a notice of appeal, to be counted from the date of receipt of the Director-General's ruling […] is one month in the case of a staff member stationed at Headquarters […]."

3. Paragraph 10 of the said Statutes states that "within one month of the notice of appeal, the appellant […] shall file a detailed appeal". On 6 September 2010 the complainant, referring expressly to paragraph 7(a) cited above, filed a protest against the decision of 17 August 2010.

4. By a memorandum of 29 September 2010, which was sent to the complainant in reply to that protest and which she avers, in her submissions to the Tribunal, that she received on 5 October 2010, she was informed that the Director-General had confirmed the decision not to renew her appointment.

5. On 27 October 2010 the complainant, acting in accordance with paragraph 7(c) of the Statutes of the Appeals Board, as she emphasises, filed a notice of appeal against the decision rejecting her protest, of which she states she was "notified on 29 September 2010".

6. The complainant subsequently twice requested extensions of the prescribed time limit for sending her detailed appeal to the Secretary of the Appeals Board. The Chairman of the Board accepted these requests and extensions were granted, initially until 26 February 2011, and subsequently until 30 March. As the complainant had filed a complaint with the Tribunal in the meantime, on 29 March 2011 she requested a suspension of the proceedings before the Appeals Board, until the Tribunal had ruled upon the complaint now before it, and this was agreed.

7. The defendant contends that the complaint is irreceivable because the complainant has not observed the rule that internal remedies must be exhausted before a complaint is brought to the Tribunal. It considers that the complainant ought to have complied with the relevant provisions of the Statutes of the Appeals Board, by completing the internal appeal procedure. It points out that, according to the Tribunal's case law, as recalled for example in Judgment 995, where there is an internal procedure laid down in the Staff Regulations, that procedure must be followed, and the staff member

concerned "must not only respect the time limits for appeal but also comply with any stipulations as to procedure in the Regulations or implementing rules". It also refers to Judgment 1469, according to which "[t]o satisfy the requirement in Article VII(1) [of the Tribunal's Statute] the complainant must not only follow the prescribed internal procedure for appeal, but follow it properly".

8. In reply, the complainant submits, in substance, that from 1 October 2010 she no longer had access to internal remedies, since her appointment had ended on 30 September 2010, and she therefore had no option but to come directly before the Tribunal, in accordance with the case law established, inter alia, in Judgment 2944, under 20.

9. As the Tribunal recently pointed out in Judgment 3156, under 9, where the Staff Regulations and Staff Rules of an organisation provide that only serving staff members have access to the internal appeal procedures, those who have left the organisation can no longer refer their case to the internal appeal body. They may therefore file a complaint directly with the Tribunal (on this point, see Judgments 2840, under 21, and 3074, under 13).

10. However, this case law does not apply to the instant case. As a matter of fact, the documents on file show that the complainant was informed of the decision not to renew her contract beyond 30 September 2010 by a memorandum of 17 August 2010, and she therefore had enough time, before her employment ended, to lodge a protest in accordance with the provisions cited above. Moreover, she did in fact initiate the internal appeal procedure by filing a protest on 6 September 2010, followed by a notice of appeal on 27 October 2010, and there was nothing to prevent her from pursuing the procedure to the end.

11. The complainant was not therefore justified in requesting the Appeals Board to suspend its proceedings until the Tribunal had made its ruling, and the Board was itself wrong to grant that request. According to the case law, it is not permissible for a staff member, on

his or her own initiative, to evade the requirement that internal means of redress must be exhausted before a complaint is filed. Apart from the fact that this solution would conflict directly with the terms of Article VII, paragraph 1, of the Statute of the Tribunal, it would belie the actual point of making internal appeals obligatory, which is what justifies this provision (see Judgment 2811, under 11).

12. It follows from the foregoing that the complaint is irreceivable for failure to exhaust internal remedies, in accordance with Article VII, paragraph 1, of the Statute of the Tribunal. The case will be remitted to UNESCO for its Appeals Board to issue an opinion on the appeal filed with it by the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed as irreceivable.
2. The case is remitted to UNESCO for action, as stated under 12, above.

In witness of this judgment, adopted on 26 April 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet