

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K.
v.
UNESCO

138th Session

Judgment No. 4878

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 January 2022, UNESCO's reply of 9 May 2022, the complainant's rejoinder of 12 June 2022 and UNESCO's surrejoinder of 12 September 2022;

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 implied refusal to grant him a bonus for working on Sunday.

The complainant joined UNESCO on 2 December 2002 as a grade G-3 security officer, assigned to the Security Unit within the Security and Safety Section, under a two-year fixed-term appointment that was renewed several times until 5 November 2021, when he was dismissed by the Organization on disciplinary grounds.

On 13 September 2021, having noticed that some of the Organization's staff received additional pay for weekend work (known as the "Sunday work bonus"), the complainant wrote to his supervisor – the Assistant Chief of the Security Unit – to request that he be granted

the pay in question retroactively from the beginning of his career at UNESCO. On the same day, he was informed that his request would be forwarded to the Chief of the Operational Support Unit. On 15 September 2021 the complainant contacted the latter to enquire about the status of his request. As he did not receive a reply, he wrote to the Director of Human Resources Management (HRM) on 24 September 2021 to reiterate his request. The HRM secretariat acknowledged receipt of the email on the same day.

On 1 November 2021 the complainant, taking issue with the lack of response from his management and the Administration, wrote to the Director of HRM again.

On 5 November 2021, the day on which he received notification of his separation from service, the complainant sent the Deputy Director-General, pursuant to paragraph 9 of the Statutes of the Appeals Board, a request for the administrative review of the Administration's refusal – arising, according to him, from the “non-responses” to his multiple reminders – to grant him a “Sunday work bonus”. He alleged that the principle of equal treatment had been breached and sought the retroactive payment of that bonus, as well as an award of damages to compensate him for the injury he considered he had suffered. The next day, he forwarded the request to the Director of HRM, who acknowledged receipt thereof on 8 November.

On 22 January 2022, referring to Article VII, paragraph 3, of the Statute of the Tribunal, the complainant filed the present complaint against the “Administration's failure to take a decision on [his] request [of 5 November 2021] within a 60-day period”. He seeks material and moral damages for the injury he submits he has suffered, and an award of costs.

UNESCO considers that the complaint is irreceivable for lack of a cause of action and failure to exhaust the internal means of redress. It therefore asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant challenges “the Administration’s failure to take a decision”, within the 60-day period prescribed in Article VII, paragraph 3, of the Statute of the Tribunal, on his request for an administrative review submitted on 5 November 2021 – his last day in the Organization’s service – for the retrospective payment from the date of his recruitment of a “Sunday work bonus” allegedly paid to other UNESCO staff members holding the same grade as him but performing other functions, such as those of electrician or plumber. He therefore seeks compensation for the material and moral injury he submits he has suffered, and an award of costs.

2. The complainant considers that the entitlement to additional pay in the form of a “Sunday work bonus” stems, *inter alia*, from the provisions contained in paragraph 98 of Item 4.10 of the Human Resources Manual, entitled “Allowances and grants”, which relates to the definition of overtime, and from paragraph 4(d) of Item 11.2 of the Manual, pursuant to which discrimination constitutes misconduct, but also from the Organization’s compliance with the Flemming principle, to which Item 4b.7 of the Manual expressly refers, and the principle of equal treatment.

3. As regards the reference to the Flemming principle, the complainant relies on the provisions of Articles L. 3132-3, L. 3132-27 and R. 3135-2 of the Labour Code applicable in France (the Organization’s host State), which provide, firstly, that weekly rest is to be given on Sundays in the interests of employees; secondly, that “[e]ach employee deprived of Sunday rest shall receive remuneration at least equal to double the remuneration normally due for an equivalent period, as well as an equivalent amount of compensatory rest”^{*}; and, thirdly, that failure to observe Sunday rest is “a criminal offence, punishable by a fifth class fine”^{*}.

^{*} Registry’s translation.

However, under the Tribunal's settled case law, as a rule, the conditions of employment of staff of an international organisation are subject exclusively to the organisation's own Staff Rules and Regulations and to the general principles of the international civil service, and national laws – such as those of the organisation's host State – apply only where there is express reference thereto (see, in particular, Judgments 4401, consideration 6, 3915, consideration 4, 3484, consideration 12, and 1311, consideration 15). UNESCO's Staff Regulations and Staff Rules make no reference to national law in the area to which the complainant's request relates. The French legislation quoted by the complainant therefore does not apply in this case.

4. It is true that, in addition to his argument concerning the application of Articles L. 3132-3, L. 3132-27 and R. 3135-2 of the French Labour Code itself, the complainant refers before the Tribunal to the Flemming principle – so called after the Chairman of the United Nations Working Group that first stated it in 1949 – according to which the conditions of service for locally recruited staff of international organisations should reflect the best prevailing conditions found locally for similar work. The complainant submits that, pursuant to this principle, UNESCO is required to pay security officers the “Sunday work bonus”.

In support of this argument, the complainant makes particular reference to Item 4b.7 of the Human Resources Manual, which, after expressly stating in paragraph 2 that “[t]he salaries and allowances for locally recruited staff are based on the Flemming [p]rinciple”, provides in paragraphs 3 and 4 that “[t]he salaries, allowances and conditions of employment of [these] staff members are established through periodic, comprehensive local salary surveys [...] [which] are conducted to identify the best prevailing conditions in the area”. The complainant also relies on Judgment 1000, in which the Tribunal, when deciding a dispute concerning the level of pay of an organisation's locally recruited staff, referred to the same principle and to the “general methodology” for comparing conditions of employment designed by the International Civil Service Commission to apply the principle (see considerations 4 to 6 of that judgment).

However, as the Tribunal has already observed in its case law, the Flemming principle, which aims to offer a guide for setting general levels of pay for local staff, offers no basis for claims about any particular component of pay (see Judgments 4090, consideration 10, and 1334, consideration 24). Neither the aforementioned provisions of Item 4b.7 of the Manual nor the considerations set out in Judgment 1000 – which, moreover, predates these precedents – contradict this case law. It is therefore not appropriate to isolate, as the complainant seeks to do, one element of the salary or employment arrangements of UNESCO security officers and compare it with local conditions of employment, and his line of argument on this point therefore cannot be accepted.

5. Paragraph 98 of Item 4.10 of the Human Resources Manual, which the complainant also alleges has been breached, states that “[o]nly in exceptional circumstances shall staff members at Headquarters be required to work overtime on Sundays”. He infers from this provision that it would be perfectly logical for this “exceptional” work to be remunerated in an “exceptional” manner by the allocation of the “Sunday work bonus” intended to compensate for the exception to the “principle of Sunday rest”.

However, the Tribunal, which agrees with UNESCO’s observations on this point, does not identify any rule that would grant entitlement to a “Sunday work bonus” for any work performed at weekends or on Sundays. In this respect, the complainant, referring to paragraph 98 of Item 4.10 of the Manual, manifestly confuses the issue of the possible payment of such an allowance with that of the arrangements for paying overtime, whether that overtime is worked during the week or at the weekend. Contrary to what the complainant submits, consultation of the D.O.N.U.T.S. (Daily Overtime and Night Differential UNESCO Tracking System) platform, used by the Organization to record overtime and night differential allowances, confirms that there is no such distinction.

To meet the Organization’s needs, security officers work in shifts and their working week may include weekend or Sunday work. In this case, under paragraph 105 of aforementioned Item 4.10, weekend or

Sunday work will not be considered as overtime, except when the total time worked exceeds the normal working day or the normal working week specifically applicable to security officers.

In this respect, the Tribunal considers as valid the Organization's explanation concerning the operation of the D.O.N.U.T.S. platform that its purpose is to enable overtime and night differential allowances to be paid, which does not prevent it from also indicating the context to which this work relates, namely, in particular, work performed during the weekend or on Sunday.

It follows that, contrary to what the complainant submits, no provisions applicable within the Organization provide for security officers to be paid a "Sunday work bonus".

Similarly, the complainant's assertion, repeated in his rejoinder, that the payment of a "Sunday work bonus" originates from a practice established by the Organization does not rest on any tangible *prima facie* evidence, whereas, under the Tribunal's case law, it is for the complainant to discharge the burden of proving the existence of a practice on which she or he relies (see, for example, Judgment 4716, consideration 11, and the case law cited therein).

It follows that this plea is unfounded.

6. The complainant also alleges that security officers are treated differently from other staff members of the Organization who are in the same class (G) and have the same status, in particular electricians and plumbers.

However, the Tribunal notes first of all that it is plain from consideration 5 above that the complainant is mistaken in considering that these other categories of staff receive a "Sunday work bonus", which is factually incorrect.

Moreover, a breach of the principle of equal treatment presupposes that the staff members to be compared are in the same position in law and in fact (see, for example, Judgments 4767, consideration 5, 4712, consideration 5, 4681, consideration 9, and 4498, consideration 27).

The complainant maintains that such is the case here, as no provision in his terms of appointment has the effect of differentiating him from the Organization's other staff members in respect of working time.

However, the Tribunal has already pointed out (see consideration 5 above) that security officers are, by the very nature of the functions they are required to perform, subject to specific working arrangements covering the whole week. UNESCO also submits, rightly, that the shift system for security officers is organised "in shifts of 8 hours and 35 minutes" and that the working week lasts 40 hours, duly remunerated, whereas, for the Organization's other staff members and pursuant to paragraph 97 of Item 4.10 of the Human Resources Manual, the normal working week is 37 hours and 30 minutes, the length of a normal working day is 7 hours and 30 minutes and working days are generally only from Monday to Friday.

Lastly, the reference made by the complainant in his rejoinder to a "duty" roster for electricians covering seven days a week is also irrelevant, since it merely involves a "duty" system allowing the electricians concerned to be called upon if an incident occurs outside normal working hours, which is not incompatible with the fact that "duty" electricians who have been called in at weekends may, if appropriate, be paid for the overtime worked.

The complainant is therefore not in the same situation in law and in fact as the other staff members to whom he compares himself.

Accordingly, this plea must also be dismissed.

7. It follows from the foregoing that the complaint must be dismissed as unfounded in its entirety, without there being any need to rule on UNESCO's objections to its receivability.

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