

SEVENTY-FIRST SESSION

In re DIALLO

Judgment 1116

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Cheick Diallo against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 September 1990 and corrected on 18 October, UNESCO's reply of 28 December 1990, the complainant's rejoinder of 10 March 1991 and the Organization's surrejoinder of 18 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 9.1 and 9.1.2, UNESCO Staff Rules 104.6, 104.8, 109.5 and 110.2(e) and paragraphs 7(a) and 7(c) of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence;

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

A. The complainant, a Senegalese citizen, began working for UNESCO under a temporary appointment in September 1977. On 1 March 1980 he got a one-year appointment in the Operations Control Unit (COL) as a statistics clerk at grade G.3 and on 1 March 1981 had his appointment extended by two years. On 24 February 1983 he quarrelled with another member of staff and the matter was put to the Joint Disciplinary Committee. On 16 May 1983 the Director-General transferred him to a temporary post in the Press Office (PUB) financed from vacancies in PUB and the credits for his former post in COL. The Organization kept extending his appointment by periods ranging from one to six months. On 6 February 1984 the Joint Disciplinary Committee recommended no disciplinary action over the "incident" of February 1983.

After the United States had withdrawn from membership on 31 December 1984 UNESCO's finances were in dire straits and called for retrenchment of its staff. On 30 June 1985 the Organization abolished the complainant's old post in COL and on 30 January 1986, after another two member States had left, it warned him that it would have to do away with his temporary post in PUB.

The Director-General set up two bodies to deal with staff problems caused by the budget squeeze, a Special Committee on Redeployment and a Select Mediation Committee. The Special Committee took up the complainant's case and in its report of 27 March 1986 recommended reassigning him. But the post it had in mind for him went to someone else and by a letter of 30 April 1986 the chief of the Division of Personnel Administration told him to expect to be leaving at the end of June 1986 and offered him termination benefits.

The complainant put his case to the Select Mediation Committee, which reported on 20 June 1986 that it had found no suitable post for him. In June 1986 the Special Committee on Redeployment took up his case for a second time. This time it recommended half-a-dozen posts but for one reason or another the Organization was unable to offer him any of them. The Special Committee then referred the matter to two working parties and the complainant had notice of termination extended several times pending some solution.

UNESCO went on looking for a suitable post. In a minute of 29 October 1986 to the Director-General the Deputy Director-General passed on a proposal from the working party on staff reduction and redeployment that the complainant be transferred on trial to a post in the archives. The Director-General agreed but the complainant wanted to stay in PUB and turned the offer down.

In November 1987 the General Conference of UNESCO adopted a resolution, No. 24C/21, urging the Director-General to keep down staff costs. In December the Director-General set up a working party under the Deputy Director-General to suggest the posts to be abolished or left vacant. The Organization circulated questionnaires to

find out who might be willing to leave under one of the voluntary procedures. The Director-General also set up a Joint Co-operation Committee to consider the working party's proposals and make recommendations to him and a Mediation Committee to hear objections from individual staff members to his decisions.

The Co-operation Committee took up the complainant's case at a meeting in March 1988. Though it suggested two posts, one had to be left vacant and he was not qualified for the other. The Committee also recommended offering incentives to voluntary termination for anyone whose case could not be settled otherwise.

By a letter of 30 May 1988 the acting Director of Personnel explained that, since no suitable post could be found for him and his present one had to go for financial reasons, the Director-General could not extend his appointment beyond 31 August 1988; but, though he was leaving because his fixed-

term appointment was to expire, the Director-General was willing to apply Regulation 9.1.2 so as to let him have the largest possible sum in termination indemnity.

The Mediation Committee, to which the Director-General had referred his case, submitted its final report on 12 July 1988. Though it had identified two posts he seemed to be fit for, the competent senior officers disagreed, and so it recommended "negotiated termination". By a letter of 16 August 1988 the Director of Personnel confirmed the Director-General's decision not to extend his appointment beyond 31 August 1988, the date of expiry.

On 29 June 1988 the complainant had submitted an appeal to the Director-General against non-renewal under paragraph 7(a) of the Statutes of the Appeals Board and on 12 August he filed notice of appeal under paragraph 7(c). In its report of 23 April 1990 the Board recommended rejecting his appeal but letting him leave on the same favourable terms as had been granted to those separated by mutual consent.

By a letter of 25 April 1990 to the Chairman of the Board the complainant objected to the Board's report on the grounds of breach of due process.

By a letter of 12 June 1990 the Director-General informed the complainant of his acceptance of the Board's recommendation and that is the decision he impugns.

B. The complainant submits that UNESCO impaired his exercise of his right of appeal. There were relevant papers it would not let him see, such as a minute of 7 August 1984 about his case from the Director of the Director-General's Office to an Assistant Director-General. For reasons he does not know it let him have that minute in the end, but not the report the Joint Disciplinary Committee made in 1984. The Appeals Board changed the date of its meeting without telling everyone he wanted it to hear, and the failure to hear his witnesses was therefore a flaw in the proceedings.

Turning to the merits, he alleges a mistake of law in UNESCO's reading of Rules 104.6 and 104.8, which distinguish between fixed-term and temporary appointments. Between March 1983 and August 1988 the Organization extended his appointment 25 times, often for short stretches, keeping him in suspense and holding up his pay. Since his work at the time was up to standard its failure to sort out his status must be set down to the prejudice of officials who were anxious to thwart the Director-General's declared intent of keeping him on. By stringing him along for so many years it was in breach of its duty to treat its staff considerately and with respect.

As the Mediation Committee observed, the Organization shirked its responsibility by keeping him in an administratively improper position for eight years. The Administration did not care that at the age of 51 he had little hope of going back to his old job.

He asks the Tribunal to quash the Director-General's decision not to renew his appointment and order his reinstatement as from 1 September 1988 in a suitable post under an indeterminate or two-year fixed-term appointment or, failing that, award him damages in the amount of nine years' salary and post adjustment and other allowances. He claims costs.

C. In its reply UNESCO denies the complainant's allegations of flaws in the appeal proceedings. He acknowledges having had a copy of the minute of 7 August 1984. The report by the Joint Disciplinary Committee is irrelevant since his termination was not disciplinary. Besides, Rule 110.2(e) says that the Committee's reports shall be confidential.

There was no formal defect in the appeals procedure. As precedent makes plain, the calling of witnesses is at the Board's discretion. The reasons the complainant gave for calling two of the witnesses on his list were vague, inconsistent and irrelevant. Besides, he did not object when his witnesses failed to appear at the hearings.

On the merits UNESCO submits that his separation was in line with the rules and with work requirements. Though he might have been separated under the rules on expiry of fixed-

term appointments he was granted the better terms that go with abolition of post.

His original post having been done away with in June 1985 he would have gone three years earlier if the Director-General had not put him on a temporary post as he had asked in letters of December 1982 and February 1983. UNESCO made no mistake of law in extending his appointment until some suitable post turned up. The material issue is the lawfulness not of those extensions but of the non-renewal. Such a decision is at the Director-General's discretion and he took it in this case after full appraisal of the evidence and with the Organization's interests in mind.

The Administration showed neither prejudice nor ill-will in its treatment of him. He offers not a shred of evidence to suggest that the extensions he got constituted misuse of authority. Like the abolition of his temporary post, the shortness of the extensions was due to the financial crisis prompted by the withdrawal of three member States. The Organization's good faith is clear from its looking for another post for him and keeping him abreast of what it was doing to sort out his position. When its efforts proved of no avail it offered him special indemnities. Even after he had left UNESCO continued to look for a suitable vacancy for him.

D. In his rejoinder the complainant seeks to refute the Organization's arguments in its reply, contests its interpretation of the facts and enlarges on his pleas. He objects to its mentioning the difficulties which he faced in 1982 and 1983 and which are irrelevant to this case. He denies turning down several offers of reassignment. The Organization thwarted his legitimate expectations of a stable job. He presses his claims.

E. In its surrejoinder UNESCO disputes several statements of fact in the rejoinder. It was the complainant himself, it says, who spoke of problems that arose earlier in his career: the impugned decision has nothing to do with matters of discipline. UNESCO cites written evidence of the complainant's rejection of posts in two sectors. UNESCO never aroused unreasonable expectations; on the contrary, it warned him that his appointment would end, explained why and offered him generous compensation. It asks the Tribunal to dismiss his claims as devoid of merit.

CONSIDERATIONS:

The facts

1. UNESCO appointed the complainant on 1 March 1980 for one year on post COL-009 as a statistics clerk. He had his appointment extended on 1 March 1981 by two years and on 23 February 1983 by six months. He had a dispute with another official on 24 February 1983 and the incident was referred to the Joint Disciplinary Committee. He was transferred to a temporary post, PUB-750, on 16 May 1983 and had his appointment extended to 31 December 1983. The Committee did not report until 6 February 1984 and it recommended no disciplinary action.

UNESCO went on renewing his appointment for spells of one to six months to let the joint advisory bodies that had his case under study look for another suitable posting for him. For financial reasons post COL-009 was abolished on 30 June 1985 and, the search for a suitable vacancy having proved of no avail, the Organization informed him on 30 May 1988 of its decision to end his appointment on 31 August 1988 upon the abolition of his temporary post, formerly PUB-750, later renumbered UPP-750.

He appealed, his appeal was rejected, and he went to the Appeals Board. The Board recommended rejecting his appeal and the Director-General did so by the decision of 12 June 1990 that he is now challenging.

2. In informing the complainant of termination on 31 August 1988, at the end of a last three-month extension, the Organization explained that it had had to do away with his temporary post for financial reasons.

According to consistent precedent the Director-General has discretion to extend a fixed-term appointment or

convert it into an indeterminate one and his decision will be set aside only if taken without authority or in breach of a formal or procedural rule, or if there is a mistake of fact or of law or abuse of authority, or if some essential point has been overlooked or a patently wrong conclusion drawn from the evidence.

The complainant raises both procedural and substantive objections to the impugned decision.

The alleged procedural flaws

3. The complainant submits that flaws in the procedure for hearing witnesses tainted the Appeals Board's report: the Board failed to hear his witnesses either because it chose not to summon them or because, though summoned, they were not told of a change in the date of the hearings.

The evidence shows that the reason why some of them were not summoned was that the Chairman of the Board decided against it; in his view the complainant's explanation for wanting evidence from them was vague and obscure and what they had to say was immaterial. As for the witnesses whom the Board did summon, the secretary to the Board affirms that they were duly told of the adjournment.

The conclusion is that the procedure for the hearing of witnesses was quite proper, the more so since, as the Board said, though the complainant had asked it to hear witnesses, "he did not press the point on finding they had not turned up".

4. The complainant contends that UNESCO prevented him from exercising his right of defence by refusing to let him have the text of a minute of 7 August 1984 and a copy of the 1984 report by the Joint Disciplinary Committee.

His objections again fail.

He himself acknowledges that, "against all the odds", the Administration has let him have the minute, and he has been able to cite it in his submissions to the Tribunal.

As for the Disciplinary Committee's report, Rule 110.2(e), on which UNESCO relies, says that such reports "shall be confidential" and that only "the action taken by the Director-General, and the reasons for it, shall be transmitted to the staff member concerned". The complainant was duly informed, and UNESCO may not be taken to task for strict compliance with that rule. Besides, the report is immaterial, even in the present context, because the Committee recommended no disciplinary action and the stated reasons for termination were financial stringency and abolition of post.

The merits

5. The complainant says that UNESCO kept him on by means of many short extensions of appointment long after it needed to do so to safeguard its interests, failed to draw the distinction in Rules 104.6 and 104.8 between fixed-term and temporary appointments, and so committed a mistake of law. He argues that, though those rules lay down no minimum or maximum period of extension, UNESCO's practice is not to extend fixed-term appointments by less than a year at a time.

The Organization's answer is that the material rules are the ones on termination for abolition of post. What the Director-General did was dismiss the complainant because of "the necessities of the service" in exercise of his authority under Regulation 9.1 and Rule 109.5.

Such grounds for termination are valid as from the date of abolition: in this instance post COL-009 was abolished on 30 June 1985 and, more important, temporary post UPP-750 on 1 September 1988.

But that does not make the earlier short extensions improper. As the complainant himself says, there is no rule binding the Organization to a minimum or maximum period of extension. Nor does he offer a shred of evidence of the practice he says it followed in earlier cases, and he fails to show any constant practice constituting a general rule.

His allegation of a mistake of law cannot be sustained.

6. But does the impugned decision show - as he says it does - any other flaw warranting the limited sort of review

set out in 2 above?

He alleges misappraisal of the facts. In his submission financial stringency and redundancy were not the true reasons for abolishing post UPP-750 and terminating his appointment: what was at work was a subjective factor, a desire to get rid of someone there was no sound reason to dismiss. In other words, there was abuse of authority.

As evidence of the desire to get rid of him he cites UNESCO's habit of giving him short extensions over five years, often belatedly and every time with "empty promises" it seemingly had no mind to keep. He cites the Mediation Committee's description of his administrative status as improper and anomalous. In his view his status was improper before the withdrawal of three member States brought on the financial crisis and consequent staff retrenchment and redundancies in 1986 and 1988. That crisis, he says, is no explanation of the treatment he was getting in 1984-85.

7. The complainant's line of argument is unconvincing.

The crisis did come only after the three member States had left, the first of them at 31 December 1984. But UNESCO has never pleaded the crisis to account for its treatment of the complainant up to that date. It was the "incident" of 24 February 1983 that set off the disciplinary proceedings against him and led to his transfer to the temporary post pending a report from the Joint Disciplinary Committee, which came out on 6 February 1984.

8. It is plain from the foregoing that the Organization is not liable. He accuses it, without adducing any evidence in support, of animosity, vindictiveness and bad faith. On the contrary, as the Organization points out, it gave him several years' extensions though it could have dismissed him much earlier.

Moreover, in keeping with the rules and with its practice, it did its utmost to look for other employment for him. It put his case to many joint advisory bodies and working parties and they proposed posts for him; the only reason why nothing came of that was that the sectors which had those posts felt that he was not qualified, or that the posts had since been filled, or else that the complainant himself turned the posts down, as he did posts SC-946, SC-947, SC-948 and LAD-133. Though the Mediation Committee found his status improper and anomalous it did not question the financial reasons for abolishing his post and merely recommended negotiating the terms of termination.

9. He is therefore mistaken in accusing UNESCO of slighting and inconsiderate treatment of him. He himself acknowledges that the Director-General showed understanding and wanted to keep him on (minute of 7 August 1984). The reason why in the end the Director-General let him go was that the attempts to find him a vacant post had failed and the Organization's interests had to prevail.

10. There being no need to go into his pleas in detail, the conclusion is that none of his objections is sound and the impugned decision must be upheld.

Since his principal claim to the quashing of the decision fails so do his claims to damages and costs.

The complainant's application for oral proceedings

11. The complainant submits that evidence from four witnesses is essential and he asks the Tribunal to hear them.

Such evidence would serve no particular purpose. Had the Director-General really wanted to get rid of him for reasons other than financial ones he would have done so much sooner, when the financial crisis was only just starting, and would have made no attempt to find other employment. As was said in 2 above, the power of review is limited in this area, and allowing the application would foreshadow replacing the Director-General's view of the matter with the Tribunal's. To warrant the taking of oral evidence the complainant would at least have to offer some evidence of abuse of authority. He has not done so.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.