

SEVENTY-FIFTH SESSION

In re AHMAD (No. 2)

Judgment 1298

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Rashid Ahmad against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 18 December 1992, UNESCO's reply of 19 February 1993, the complainant's rejoinder of 9 March and the Organization's surrejoinder of 4 May 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 4.1 and 9.1.2, UNESCO Staff Rules 104.1, 104.6, 104.11, 104.11 bis, 109.3 and 109.6, UNESCO Manual item 2440, Rule 54.1 of the Rules of Procedure of the Executive Board and paragraph 7 of the Statutes of the Appeals Board;

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

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

A. UNESCO Staff Rule 104.11 (a) provides that "A Reports Board shall be established to advise the Director-General on all performance reports. ..."

Staff Rule 104.11 bis (a) requires that "Reports in a form and by persons prescribed by the Director-General shall be made on each staff member ...".

Rule 54.1 of the Rules of Procedure of the Executive Board provides that "The Director-General shall consult the members of the Executive Board with regard to the appointment or renewal of a contract of officials at D.1 and above ...".

Judgment 1164, which dismissed the complainant's first complaint, sets out under A some facts that have a bearing on this case and sums up his career at UNESCO. As from 22 January 1990 the Organization considered him to be on mission at its headquarters in Paris, and he held grade D.1.

By a memorandum of 3 August 1990 the Organization's Director of the Bureau of Personnel informed him of the Director-General's decision to transfer him to the post of liaison officer in Vienna as from 3 September 1990. In a memorandum of 5 September the Director of Personnel informed him of the Director-General's decision to postpone his transfer to 1 January 1991, when UNESCO's liaison office in Vienna was to open, and that in the meantime he was to serve on a temporary post in the Bureau for External Relations at headquarters in Paris, where his duties would include preparing for the opening of that office. Descriptions of the complainant's post in Vienna were drafted on 6 and 28 September 1990.

In a memorandum of 20 February 1991 the complainant, who was still then in Paris, asked the Assistant Director-General for External Relations to give him "some substantive functions and appropriate facilities at Headquarters" pending his postponed transfer to Vienna. In a memorandum of 27 February 1991 the Deputy Director-General for Management again proposed postponing his transfer "by a couple of months" for financial reasons.

In conversations on 26 and 29 July 1991 the acting Director of the Bureau of Personnel told him that the Director-General was not intending to renew his fixed-term contract, which was to expire at 31 January 1992, and that he hoped that they could agree on a settlement.

In a memorandum of 26 November 1991 the acting Director of Personnel informed the complainant of the Director-General's decision not to renew his appointment beyond 31 January 1992 on the grounds of his unsatisfactory performance and gave him three months' notice, one of them to be discharged by a cash payment.

He protested on 3 December 1991 under paragraph 7 of the Statutes of the Appeals Board, but in a memorandum of 26 December 1991 the acting Director of Personnel informed him that the Director-General upheld the decision. On 30 December 1991 he put his case to the Board.

In a letter of 11 June 1992 the Board advised the Director-General to see him "urgently" to negotiate "an agreed separation" but reserved its opinion on the case. In a letter of 13 July 1992 to the Chairman of the Board the Director of Personnel answered that the Director-General had confirmed the earlier decision. In its report of 29 September 1992 the Board recommended reversing the decision and reinstating the complainant or negotiating separation. But in a letter of 3 November 1992, the decision impugned, the Director of Personnel notified to the complainant the Director-General's rejection of his appeal.

B. The complainant puts forward the following pleas.

(1) There were several procedural flaws in the decision not to renew his appointment. When renewal is refused on the grounds of poor performance prior failure to make an appraisal report is such a flaw. The Organization had not given him a performance report since 1988, and that was in breach of Staff Rules 104.11 and 104.11 bis, administrative circular 1743 of 5 November 1990, UNESCO Manual item 2440 and the Compendium of Administrative Instructions.

UNESCO failed, again as circular 1743 required, to warn him of the decision not to renew his contract on the grounds of unsatisfactory service and it denied him the right of rebuttal prescribed in Rules 104.11 and 104.11 bis.

Lastly, it acted in breach of Rule 109.6(a), which entitled him to three months' notice, and his contract is therefore, by implication, renewed to 31 January 1994.

(2) The Organization overlooked essential facts.

First, it neglected his fine record of service. If his performance was so poor why had the Director-General granted him a within-grade salary increment on 1 April 1990 and commended him in September 1990 in a letter to the Austrian foreign minister? Moreover, as late as 26 July 1991 the acting Director of Personnel told him that there was nothing in his file to suggest the reasons for non-renewal. UNESCO has no valid criteria anyway for assessing his performance. Although in his memorandum of 20 February 1991 he asked for substantive duties, he did not get any. Such denial of work amounted to breach of Regulation 4.1 and of the terms of his contract and constituted an abuse of authority.

The Organization also ignored the fact that its regular extensions of his contract since 1974 had given him legitimate expectation of renewal.

(3) The decision was tainted with personal prejudice on the part of the Director-General. The acting Director of Personnel told him orally on 29 July 1991 that one of the Director-General's reasons for non-renewal was that he then had a case pending before the Tribunal. The Assistant Director-General for External Relations, too, had borne him a grudge for criticisms he had made when Inspector-General. The Assistant Director-General showed prejudice by failing to tell him about the progress of negotiations about the liaison office in Vienna and by proposing to let him leave. The Organization's bad faith is further evident in its refusal to talk things over with him as the Appeals Board had recommended in its letter of 11 June 1992 to the Director-General.

He asks the Tribunal to set aside the Director-General's decision of 3 November 1992, order his reinstatement as from 1 February 1992 in a post at grade D.1 and full restoration of "his salary and allowances and other emoluments and rights accruing through the continuity of service" and award him a fitting amount in moral damages. Alternatively, he claims payment from UNESCO of "full salary and allowances for the period 1 February 1992 to the age of 60 for illegally frustrating his career"; payment of 330,995 United States dollars, which he describes as "the actuarial equivalent of the difference between his deferred pension at the age of 60 and the retirement benefit he would have got ... if his career had not been frustrated"; payment of \$ 80,943, "the actuarial equivalent of the difference between the cost of private insurance to provide the same medical coverage and the applicant's contribution to the Medical Benefits Fund of UNESCO as an associate participant" for "the deprivation of participation in the Medical Benefits Fund after 25 years of contributory service in the system"; a fitting amount in moral damages; and costs.

C. In its reply UNESCO submits that the impugned decision was not tainted with any procedural flaws and was taken in the exercise of the Director-General's discretionary authority, in the Organization's interest and without personal prejudice.

The Organization was under no obligation to make a report on the complainant's performance before letting his contract run out. Though Staff Rules 104.11 and 104.11 bis speak of drawing up reports for "each staff member" those provisions do not apply to senior staff like the complainant. Only if they did would the Reports Board be competent to consider objections from such staff. But it is not. All that the material texts say about reports appraising their performance is that such reports may be made, as indeed they are, when their contracts are renewed. In any event the Director-General did not need a report on the complainant since he was able to observe at first hand how he was likely to perform once he went to Vienna.

Nor was any report needed to tell him of his shortcomings, since the acting Director of Personnel told him the reasons for the Director-General's dissatisfaction in a conversation on 29 July 1991. If he wanted to object he was free to do so to the Director-General.

In keeping with the case law UNESCO gave him timely notice of his separation. He may not rely on Rule 109.6 because it is about notice of termination, and Rule 109.3(b) says that expiry of a fixed-term appointment "shall not be deemed to be a termination".

In answer to his allegation that the Director-General overlooked essential facts UNESCO contends that the facts he cites are immaterial: the Organization did not dispute his fine record up to the Vienna assignment. It denies depriving him of substantive duties, pointing out that the tasks associated with the Vienna post could only be described as substantive.

The case law shows that mere expectation of renewal confers no right to it. Besides, Staff Rules 104.6 and 109.3 state that fixed-term appointments do not carry any expectation of extension or imply any right to it.

The complainant's allegation of personal prejudice is groundless. If the acting Director of Personnel did mention his first complaint to the Tribunal in July 1991 he did so to illustrate the complainant's "negative attitude" towards earlier assignments in the field, not to explain why his appointment would not be extended. The complainant produces no evidence of improper treatment by the former Assistant Director-General for External Relations or of any injury that might warrant compensation.

D. In his rejoinder the complainant observes that the Organization's arguments in the reply are much like those it put to the Appeals Board, which nevertheless recommended reinstating him. He answers those arguments and enlarges on his earlier pleas.

UNESCO was not free to depart from the rules on appraisal reports, which apply to all members of the secretariat. It may not plead limits on the Reports Board's authority to excuse its failure to report on his performance. Nor did the Director-General's impressions of his work afford any proper basis for non-renewal: not since leaving the post of Inspector-General in 1987 had he reported directly to the Director-General.

The Director-General was wrong to assume that he would not settle for anything but a headquarters post. If that were so why had he applied to be Director of the Principal Regional Office in Asia and the Pacific in 1989? The severity of the impugned decision is disproportionate to the reasons the Organization gave for it.

He insists that personal prejudice prompted the Director-General's decision. Not only has UNESCO caused him stress and moral injury: it deprived him of after-service coverage in the Organization's health fund to which he contributed for twenty-five years. He presses his claims.

E. In its surrejoinder UNESCO says that the rejoinder contains no new facts or arguments it need comment on and it enlarges on its earlier pleas. In its submission the complainant's failure to co-operate with the Director-General and the "unsatisfactory" way in which he carried out his most recent duties did not warrant renewal at the senior grade he held. On learning of his position he was free to ask for a report on his performance that he could challenge or to make his views known in some other way. Neither prejudice nor any of the other flaws he alleges taint the Director-General's decision.

CONSIDERATIONS:

1. The complainant, a citizen of Pakistan, joined UNESCO in 1974 under a fixed-term appointment as chief internal auditor at grade P.4. By 1982 he had reached grade D.1 as Inspector-General. Upon departure the former Director-General expressed satisfaction with his performance, competence and loyalty in a personal letter to him of

13 November 1987.

2. The new Director-General decided on 7 December 1987 to transfer him to the Organization's Principal Regional Office in Asia and the Pacific in Bangkok, still at D.1. A report dated 27 October and 21 November 1988 described his services there as outstanding, and indeed the Organization admits that up to that point he had a very fine record. But his assignment to Bangkok and fixed-term appointment were extended by only five months, to 31 May 1989, because, says UNESCO, the Director-General was looking for a suitable post for him at headquarters. He later had his appointment extended to 31 August and then to 31 October 1989.

3. On 2 August 1989 the Director-General decided to transfer him to the Organization's office at Lagos, in Nigeria, as its director at grade D.1 and as from 1 December 1989. His fixed-term appointment was extended by two years, until 31 October 1991. But he never actually went to Lagos. Instead, by a letter of 3 August 1990, the Director-General appointed him liaison officer at an office that the Organization was to set up in Vienna. He was to take up duty there by 3 September 1990. Though informed that he would receive his post description within a few days of that letter, all he got was a draft. On 5 September 1990 his transfer to Vienna was held over to 1 January 1991 and he was informed that he was to be in charge of preparations for setting up the office in Vienna.

4. His appointment was to expire at 31 January 1992. On 26 July 1991, however, the acting Director of the Bureau of Personnel orally informed him of the Director-General's decision not to extend his appointment beyond that date and of the Director-General's desire for an agreed settlement under Staff Regulation 9.1.2. By a memorandum dated 26 November 1991 the acting Director confirmed the Director-General's decision not to renew his appointment on the grounds that the Director-General

"... considers that he no longer receives from you, for more than two years now, collaboration which he could expect from a civil servant of your grade and experience. Indeed he has noted that you have not carried out in a satisfactory manner the function which he had entrusted to you with a view to opening the UNESCO Liaison Office in Vienna."

5. The complainant having contested that decision, the Director-General confirmed it on 26 December 1991. On 30 December he appealed to the Appeals Board. In a letter of 11 June 1992 to the Director-General the Board expressed the opinion that it was a suitable case for agreed settlement and advised negotiating. The Director-General did not accept that advice, however. Ultimately, in its report of 29 September 1992, the Appeals Board unanimously recommended that the Director-General reverse his decision and negotiate an agreed separation. The decision impugned is the Director-General's letter of 3 November 1992 to the complainant saying that he could not accept that recommendation and rejecting his appeal.

6. According to precedent a decision of the kind that the complainant is impugning - not to renew his fixed-term appointment - is at the discretion of the Director-General and is subject only to limited review by the Tribunal. In particular, as was said in Judgment 1154 (in re Bluske) under 4:

"... it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member."

7. The only reason given by the Organization for its decision in this case is the Director-General's view that the complainant's performance was unsatisfactory.

8. The complainant points out that up to 27 October 1988 his performance had been consistently appraised as satisfactory and that, in the absence of the subsequent periodic performance reports that Rule 104.11 bis required, the Director-General cannot properly have reached any unfavourable conclusion about the quality of his services.

9. UNESCO answers that such reports were not required in the complainant's case, and it cites in support Rule 54.1 of the Rules of Procedure of the Executive Board:

"The Director-General shall consult the members of the Executive Board with regard to the appointment or renewal of a contract of officials at D.1 and above ..."

Its consistent practice is, it says, to draw up reports on the performance of officials at grade D.1 and above only when the Director-General intends to renew their appointments; only then, it argues, is he required to consult the Executive Board; and Rule 54.1 means that the Director-General need not consult the Executive Board when he is

not contemplating renewal. It further contends that the composition of the Reports Board is similar to that of personnel advisory boards, which may not deal with matters involving staff members at grade D.1 and above; that in the absence of clear indications to the contrary in Rule 104.11 the Reports Board must therefore be deemed to lack competence in regard to such staff; and that Rule 104.11 bis must be so interpreted as not to require reports on their performance. Lastly, UNESCO pleads that the Director-General was himself able to observe closely how the complainant was carrying out the functions pertaining to his Vienna post and could not but notice his great reluctance to accept any assignment elsewhere than at headquarters. So - says the Organization - it was unnecessary in any event to draw up a formal performance report.

10. Rule 54.1 is explicit enough: it requires the Director-General to consult members of the Executive Board "with regard to the ... renewal of a contract", and that means whether or not to renew an appointment, not just when the Director-General intends to renew it. The provision contains no qualification of the obligation in Rule 104.11 bis(a) to make performance reports. After all, if such a report is deemed necessary when the intention is to renew, it is all the more necessary when the intention is not to renew.

11. Rule 104.11(c) prescribes the composition of the Reports Board. Although it is identical to that of a personnel advisory board the Reports Board has, when duly constituted, the powers and functions conferred on it by Rule 104.11, and they may not be reduced or qualified on the mere pretext that the powers and functions of a personnel advisory board are different. In any event there was a right of appeal to the Appeals Board. The conclusion is that the material rules required the writing of reports on the complainant's performance.

12. The purposes of performance appraisal, as explained in the Organization's administrative circular 1743 of 5 November 1990, includes bringing a staff member's strengths and weaknesses to his attention, guiding his efforts at improvement and helping him to plan his career. The Director-General may himself have had the opportunity to assess the complainant's performance. But that did not dispense with the need to comply with Rule 54.1 of the Rules of Procedure of the Executive Board and Staff Rule 104.11, and whatever oral observations may have been addressed to the complainant about his unsatisfactory performance by the acting Director of Personnel on 26 or 29 July 1991 failed to satisfy the requirements of those rules. The absence of performance reports also deprived the complainant of his right to contest adverse comment, which Rule 104.11 bis guarantees, and was therefore in breach of the *audi alteram partem* rule.

13. The Organization alleges that the complainant was loth to accept an assignment away from headquarters. Yet the latest report that was written on his performance shows that for all his reluctance to stay on in Bangkok he carried out his functions there quite satisfactorily. Insofar as the Director-General inferred unsatisfactory performance from any reluctance to go to Vienna he was clearly mistaken.

14. Again, although the memorandum of 26 November 1991 from the acting Director of the Bureau of Personnel told him that the kind of "collaboration" expected of him had been found wanting for over two years, a confidential form dated 26 February 1990 and headed "Within-grade increment" declared his services to be "satisfactory" and recommended granting him the increment. In September 1990 the Organization informed the Austrian authorities by letter that the complainant was particularly well qualified for his responsibilities in Vienna. What is more, the only specific matter that the Director-General mentioned was the complainant's assignment to Vienna and he reached conclusions on that score without comparing the complainant's performance against a proper post description signed by the complainant and without the benefit of any performance report. The Organization's reply refers to the achievements of the complainant's successor in Vienna in 1992 as indicative of his own unsatisfactory performance in the same post. Yet, even if the point were sound, it was not one that could have been known to the Director-General in 1991, when he took the decision not to renew the complainant's fixed-term appointment.

15. The conclusion is that the decision was seriously flawed in that it was in breach of Rule 54.1 of the Rules of Procedure of the Executive Board and Staff Rule 104.11, drew clearly wrong conclusions from the evidence and overlooked material facts. It must therefore be set aside, there being no need to consider the other grounds the complainant relies on.

16. The complainant claims reinstatement and continuity of employment until retirement in February 1998. In view of his length of service, loss of pension entitlements if he is not reinstated and the difficulty he would no doubt face in finding other employment at his age, the Tribunal holds that it should order his reinstatement since it would not be fair just to award him financial compensation. Accordingly, it will order his reinstatement, not, as he asks, up to the date of retirement, but as from 1 February 1992 in a post at grade D.1 under a fixed-term appointment that will

expire two years from the date of this judgment. He is awarded 3,000 United States dollars in costs. His claim to damages for moral injury is disallowed.

DECISION:

For the above reasons,

1. The Director-General's decision of 3 November 1992 is quashed.
2. The Organization shall reinstate the complainant in accordance with what is said in 16 above.
3. It shall pay him 3,000 United States dollars in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I,

Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner