

NINETY-FIRST SESSION

In re Valitov

Judgment No. 2049

The Administrative Tribunal,

Considering the complaint filed by Mr Roustem Valitov against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 August 2000 and corrected on 5 September, UNESCO's reply of 23 October 2000, the complainant's rejoinder of 4 February 2001 and the Organization's surrejoinder of 5 April 2001;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Russian citizen who was born in 1945, joined UNESCO in August 1983. At the material time he held a fixed-term appointment which was due to expire on 31 May 1996. In 1994 UNESCO terminated its "Science, Technology and Society" programme and the unit that ran it, with the result that the complainant's post was abolished as from 1 September 1995. The Director of the Bureau of Personnel so informed him officially in a memorandum of 7 July 1995, explaining that the Organization's efforts to find him another post had been unsuccessful. She offered him a separation from service by mutual agreement which would have the effect of increasing his termination indemnity by 50 per cent, on condition that he undertook not to challenge the decision to separate him before either the Appeals Board or the Tribunal. On 19 July the complainant asked the Director-General to intervene on his behalf and, on 7 August, submitted a written protest against the above decision. However, he did not follow up a notice of appeal he had sent to the Secretary of the Appeals Board on 6 October 1995 by a "detailed appeal" within one month, as required by Article 10 of the Board's Statutes.

Following an accident on 28 August 1995 the complainant was put on sick leave. On 11 October in answer to the complainant's request of 19 July for intervention the Assistant Director-General for Management and Administration informed him on the Director-General's behalf that the decision to separate him stood but that the abolition of his post would be postponed to take account of his absence on sick leave.

By a memorandum of 7 November 1995, the Director of Personnel again sent the complainant the decision to separate him as from 30 November and proposed conditions for a separation by mutual agreement. His sick leave having been extended until 17 December 1995, that memorandum was cancelled and replaced by another of 12 January 1996 in which the Director of Personnel confirmed the decision, this time with effect from 31 January, and renewed her proposal. On 29 January the complainant sent in a further medical certificate to the medical service. His sick leave was renewed several times. On 5 April the Chief Medical Officer, having reservations about a depression the complainant was now alleging, asked for an opinion by a medical expert. The expert found the complainant to be fit to resume work as from 13 June 1996.

By a memorandum of 28 June, the Director of Personnel again sent the complainant an offer of separation by mutual agreement as from 15 July 1996. As before, she set a date by which he was to accept. Failure to do so would be treated as a refusal of the offer. On 9 July she informed the complainant that, since he had not accepted the offer in time, the matter would be referred to the Senior Personnel Advisory Board. The following day the Secretary of the Board told him that his case would be heard on 22 July and that the Director of Personnel had accordingly decided to extend his appointment until 31 July. The complainant replied on 16 July that there had been a misunderstanding and that he agreed to the offer of separation by mutual agreement as from 31 July 1996. The

Director of Personnel accepted his explanation but gave him until noon on 19 July to sign a memorandum setting out the arrangements for separation. The complainant signed the memorandum, dated 19 July 1996, and wrote on it by hand: "Read and approved - my acceptance is firm, final and irrevocable". The Advisory Board meeting was accordingly cancelled.

B. The complainant contends that the decision is flawed by a lack of consent, since he was not in possession of his mental faculties when he signed the offer of a negotiated separation. In subsidiary pleas he argues that it also shows formal flaws because UNESCO failed to comply with the procedure set in Article 9.1.1 of the Staff Regulations: a special advisory board should have examined his case. He asks the Tribunal to find that the memorandum of 19 July 1996 notifying the separation by mutual agreement to be flawed by lack of consent and therefore to "declare the said memorandum null and void", or else to find that UNESCO committed "a breach of process in terminating [his] appointment" and accordingly to "declare the said memorandum null and void".

C. In its reply UNESCO contends that the complaint is irreceivable because the complainant failed to exhaust the internal remedies, not having complied with the Statutes of the Appeals Board. Furthermore, it is now too late to challenge the agreement of 19 July 1996.

In subsidiary pleas the Organisation submits that the complainant was in full possession of his faculties when he signed the separation from service agreement mentioned above. He himself had asked for the agreement and negotiated the date of his separation. As to procedure, UNESCO points out that the complainant's appointment expired on 31 May 1996 (though it was extended on compassionate grounds), so his termination was not a dismissal but a non-renewal of his appointment. The Administration nonetheless decided to let him benefit from the separation by mutual agreement procedure so that he would receive a larger indemnity. There was no longer any reason for the Special Personnel Advisory Board to meet because the complainant had accepted the Organization's offer of separation. Lastly, UNESCO points out that by signing the agreement the complainant undertook not to challenge the negotiated separation either before the Appeals Board or the Tribunal.

D. The complainant rejoins that the Organization never supplied a job description and made no effort to find him another post. He accuses the Chief Medical Officer of influencing the medical expert, and concludes that the report declaring him to be fit for work as from 13 June 1996 was flawed.

On receivability, the complainant affirms that the separation agreement put an end to the proceedings before the Appeals Board. In any event the latter has no authority to quash a settlement; besides, there is no time limit for challenging settlements.

On the merits, he contends that UNESCO wittingly put him in a precarious financial situation - by suspending payment of his salary - so that he would have to sign the challenged agreement. That, compounded by his depression, led him to agree to a separation though he deemed it not only unjust, but vexatious as well. Consequently, UNESCO may not plead that he waived his right of appeal. In his submission, the non-renewal of his appointment can be construed as a dismissal, particularly at UNESCO where fixed-term contracts, which account for the great majority of appointments, are "systematically renewed".

The complainant enlarges on his claims. He asks for awards of 583,336.80 United States dollars to offset the loss of his salary until the age of retirement, 720,917 dollars in damages for wrongful dismissal, 100,000 dollars in moral damages and 10,000 dollars in costs.

E. In its surrejoinder UNESCO retorts that, though there should be an up-to-date description of duties for every post, the lack of one has no consequences for a decision to separate a staff member by mutual agreement. In addition, the complainant is barred from contesting the duties that had been assigned to him. The Chief Medical Officer gave information to the medical expert not to influence him but to help him accomplish his task.

UNESCO presses its pleas on receivability and adds that, on the basis of the complainant's reasoning in his rejoinder, the complaint is irreceivable because it does not challenge a decision as Article VII, paragraph 1, of the Tribunal's Statute requires.

On the merits, it points out that non-renewal of an appointment is at the Director-General's discretion. Lastly, the complainant has no grounds for alleging injury because his separation from the Organization is based on conditions that were mutually agreed. His claim to redress is therefore unfounded.

CONSIDERATIONS

1. The complainant joined UNESCO in 1983 and was working in the unit in charge of the "Science, Technology and Society" programme when it was abolished in 1994. He was seconded on 21 June 1994, with his post, to the Division of Policies and Sectoral Analysis in the Bureau for Relations with Extra-Budgetary Funding Sources. But it was decided that his post would be abolished as from 1 September 1995. By a memorandum of 7 July 1995 the Director of the Bureau of Personnel informed the complainant that it was unable to find a suitable alternative post. It offered him separation from service by mutual agreement under the conditions set in Staff Regulation 9.1.2 and Staff Rule 109.7(e). The complainant rejected the offer and asked the Director-General to intervene on his behalf "in view of [his] professional and personal position". The Assistant Director-General for Management and Administration replied on 11 October 1995 that the Director-General was unable to comply with his request but that, since the complainant had been put on sick leave, his post would be "extended accordingly". As a result of further authorised periods of sick leave, the decision to separate him was postponed first until 30 November 1995, then to 31 January 1996 and again, to 15 July 1996, in other words after the normal expiry date of his fixed-term appointment - 31 May 1996. The complainant having objected to 15 July, the Administration gave him a further extension until 31 July "to preserve his rights" while arranging for the Senior Personnel Advisory Board to examine his case on 22 July. The complainant sent UNESCO two letters: one on 11 July informing it that he construed the further extension as moving the deadline for separation by mutual agreement to 31 July; and another on 16 July saying that although he found his "dismissal" not only unjust, but vexatious, he had decided to accept the offer of a negotiated separation as from 31 July. The Administration asked him to report on 19 July to formalise his acceptance. He was handed a memorandum setting out the benefits he was to get on condition that he undertook not to appeal, in particular to the Tribunal. He signed it having written on it by hand "Read and approved - my acceptance is firm, final and irrevocable".

2. The complainant is asking the Tribunal to declare void the memorandum of 19 July 1996 containing his acceptance of separation from service by mutual agreement. In his complaint, he contends that his termination of appointment cannot be viewed "as the result of a freely concluded agreement, but rather as a unilateral action disguised as an 'mutual agreement'". In his rejoinder, he argues that his complaint is in fact an application to have the settlement he allegedly accepted on 19 July 1996 declared void. In any event he contests the validity of his consent since the sole reasons for it were his precarious financial situation engineered by UNESCO and his medically certified depression.

3. The Organization replies that the complaint is irreceivable on several counts: the complainant failed to exhaust his internal remedies; it is time barred because he did not take it to the Tribunal until 1 August 2000; the Tribunal is not competent to entertain an application to have an agreement declared void; and by agreeing to the settlement the complainant waived his right to appeal. The complainant considers that his application to have the agreement voided did not lie with the Appeals Board and was not subject to any time limits.

4. The Tribunal will not take up this issue, except to note that the complainant appealed on 6 October 1995 against the Director-General's implied rejection of his challenge to the abolition of his post and the decision to terminate him. The memorandum of 19 July 1996 put an end to that dispute. The only remaining issue, therefore, is whether the complainant's acceptance of the agreement shows lack of consent. The Tribunal is competent to rule on the circumstances in which an international civil servant's appointment is terminated, and it will do so without going into the Organization's objections to receivability.

5. The complainant cites financial difficulties and a "reactive anxio-depressive clinical context" to demonstrate that he was in no state to consent freely. But the evidence shows that he had been examined by an expert chosen by mutual agreement between his doctor and the Chief Medical Officer of UNESCO and that he had been found fit to resume work as from June 1996. There are no grounds for doubting that the complainant had all his mental faculties when, after lengthy negotiations, he finally accepted an offer which afforded him significant financial benefits. He has neither proved that his consent to the negotiated termination was deficient nor provided any evidence to cast doubt on its validity. That being so, the Tribunal need not rule on whether his termination was unlawful or entertain his claims to compensation, which must consequently be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet