

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

109th Session

Judgment No. 2927

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. T. V. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 9 September 2008 and corrected on 27 and 31 October 2008, UNESCO's reply of 9 February 2009, the complainant's rejoinder of 21 April and the Organization's surrejoinder of 24 July 2009;

Considering Article II, paragraph 5, 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 British national born in 1952, joined the staff of UNESCO in 1984 as a secretary at grade GS-3 in the Operational Programmes Division of the Science Sector. After several postings, she was transferred to the Visitors Reception Unit of the Bureau for External Relations and she was later promoted to grade GS-4. The Visitors Service was subsequently transferred from the Office of Public Information to the Bureau for Support and Services, and in March 1998 she was placed in charge of the Service. Following a desk

audit, her post was reclassified at grade GS-5 with effect from 7 April 1999. When the new seven-grade scale for staff in the General Service category at the Organization's Headquarters entered into force on 1 January 2000, her post was classified at grade G-6. The complainant left UNESCO for health reasons on 7 December 2008.

In January 2003 the Organization published Circular No. 2177 entitled "The revised classification standard for posts in the General Service category". The standard was to serve as a basic tool for the Job Evaluation Committee (JEC) which, according to its terms of reference, was to determine the grade of posts by evaluating the updated job descriptions of staff members in the category concerned. In its recommendations to the Director-General the JEC rated the complainant's post at grade G-6. By a memorandum of 16 December 2003 the Director of the Bureau of Human Resources Management (HRM) informed the complainant of the Director-General's decision to accept the JEC's recommendations.

On 24 December 2003 an ad hoc recourse mechanism was established by Administrative Circular No. 2195 and the Job Evaluation Recourse Committee (JERC) was set up. On 26 February 2004 the complainant filed a complaint with the JERC; it was considered at a hearing held on 7 June. In its report of 30 July 2004 the JERC held that the complainant's post had been correctly classified at grade G-6 and recommended that it should be maintained at that level. By a memorandum of 3 November 2004 the Director of HRM informed the complainant that the Director-General had decided to accept the recommendation. On 1 December the complainant submitted a protest to the Director-General seeking review of that decision. The Director of HRM replied by a memorandum of 15 December 2004 that the decision was final.

On 24 December 2004 the complainant filed a notice of appeal with the Appeals Board. On 26 January 2005 the Director of HRM informed her that the Director-General had confirmed the decision to maintain her post at grade G-6. On 22 February the complainant filed a second notice of appeal with the Appeals Board. On 7 April 2005 she submitted a detailed appeal.

In the context of a mediation procedure sponsored by the Deputy Director-General, a desk audit of the complainant's post was undertaken on 21 March 2006 and the auditor concluded in his report of 28 March 2006 that the post in question corresponded to grade G-6.

In its opinion of 5 July 2007 the Appeals Board recommended to the Director-General that he arrange for a new desk audit of the complainant's post by an independent expert. Noting that the Administration seemed to have taken no action on two memoranda sent by the complainant in 1999 and 2002 concerning the classification of her post, the Board also recommended that the matter should be investigated and that, if the outcome justified the payment of a special post allowance, she should be paid the amount due for the period from June 1999 to November 2002 or an indemnity for moral injury. The Director-General decided to follow these recommendations and the complainant was so informed by a letter dated 13 September 2007. A desk audit of the complainant's functions and responsibilities during the period from June 1999 to November 2002 was undertaken on 14 April 2008; it concluded that the post corresponded to grade G-6. By a memorandum of 9 June 2008 the Director of HRM informed the complainant of the Director-General's decision to maintain her post at grade G-6. That is the impugned decision.

B. The complainant contends that the process of reclassification of her post was seriously flawed and tainted with bias and bad faith on the part of the Administration. She points out that in 1998, following the transfer of her direct supervisor, who held grade GS-6, she was tasked with supervising her Service yet received no special post allowance, and she deplors the fact that the reclassification of her post took effect only on 7 April 1999. She adds that the principle of equal treatment was breached inasmuch as she single-handedly performed duties that had previously been assigned to several officials, including one staff member in the Professional category.

She submits that paragraph 5 of the JERC terms of reference, which, in her view, stipulates that a supervisor of the staff member

whose post is being audited should be present at the JERC hearing, was breached since she attended the hearing on 7 June 2004 alone.

In addition, she points out that, for the audit of 21 March 2006, the auditor relied on a job description that had not been shown to her beforehand. She also claims that the auditor who conducted the audit of 14 April 2008 had before him two job descriptions and carried out the audit without even taking note of the job description used by the Appeals Board in making its recommendation to the Director-General which, according to the complainant, was considered to be “the most reliable”.

The complainant affirms that the Administration failed to substantiate any of the decisions it took on the basis of the JEC and JERC recommendations. As the Administration never provided her with copies of the two Committees’ recommendations, she requests the Tribunal to order the Organization to produce them. Moreover, she alleges that the decision of 9 June 2008 was not substantiated since the Administration failed to provide her at the time with the report of the audit undertaken on 14 April 2008, which was forwarded to her much later and at her request.

Lastly, she emphasises that, although the Director-General agreed to follow the recommendations of the Appeals Board, he failed to undertake an investigation. She affirms in this regard that an international organisation is bound to give reasons when its executive head decides not to follow the recommendation of its internal appeal body.

The complainant requests the Tribunal:

“(a) to declare:

- (i) that her complaint is receivable and well founded;
- (ii) that the three decisions at issue – dated 3 November 2004, 13 September 2007 and 9 June 2008 respectively – are tainted with serious errors of law and of fact, of procedure and of assessment;
- (iii) that the said decisions are not substantiated and are manifestly biased;

- (b) and accordingly to decide:
- (i) to set aside the decision to maintain her post [...] at grade G-6;
 - (ii) to reclassify her post on the basis of [a new audit] by an independent expert;
 - (iii) to award compensation in an amount corresponding to the difference between her current grade and that of the reclassified post with effect from 3 November 2004; [and]
 - (iv) to award compensation for the material and moral damages she has suffered.”

C. In its reply UNESCO asserts that although the complaint was filed within the statutory time limit of ninety days it is irreceivable, inasmuch as it seeks reclassification of the complainant’s post, since the Tribunal is not competent to determine the grade of a post. Moreover, the complainant failed to challenge the retroactive reclassification of her post in 1999, which means that she is now time-barred from doing so.

On the merits and subsidiarily, the Organization points out that, contrary to the complainant’s assertion, her supervisors were represented at the JERC hearing by the deputy chief of security.

UNESCO argues that the Director-General has discretionary authority to determine the grade of a post in accordance with the applicable rules. Citing the Tribunal’s case law, it contends that, while administrative decisions must in principle be properly substantiated, organisations need not, if that is not their practice, state the reasons for all their decisions. While it admits that no copy of the JERC recommendations was forwarded to the complainant, it emphasises that she was nevertheless informed of the content of the recommendations on 15 December 2004. In that respect, it points out that it has annexed the JEC and JERC reports to its reply. It states that in the memorandum of 9 June 2008 notifying the complainant of the Director-General’s decision to maintain her post at grade G-6 pursuant to the conclusions of the desk audit of 14 April 2008, the Director of HRM stated the reasons on which the decision was based. In addition, the complainant herself has admitted that she has received a copy of that audit report.

The Organization affirms that the desk audit of 21 March 2006 was not based on a different job description from the one used for the JEC and JERC evaluations. It contends that the complainant has not established that the April 2008 evaluation which led to the rating of her post at grade G-6 was based on erroneous principles or an error of reasoning, and that she relies solely on the incorrect assertion that the evaluation was not based on the right job description.

UNESCO points out that the new desk audit of the complainant's post recommended by the Appeals Board and accepted by the Director-General was conducted on 14 April 2008 "with all due professionalism". As for the Board's second recommendation, an investigation is currently under way in order to comply with it, and the complainant will be informed of the outcome.

D. In her rejoinder the complainant points out that her complaint concerns the fact that a desk audit and the subsequent review of the audit failed to comply with the rules and procedures in force. She notes that the Organization does not deny the fact that, although she assumed the duties of her former direct supervisor, a GS-6 staff member, in addition to her own duties at grade GS-4, she received no special post allowance. She contends that the Administration showed "persistent unwillingness [...] to reclassify her post at the appropriate grade" and that "the errors and procrastinations which thus accumulated [to her] detriment [...] demonstrate the scale of the discrimination and systematic prejudice to which she has been subjected since 1999".

With regard to the procedural irregularity resulting from the fact that she appeared at the JERC hearing without her supervisors, the complainant submits that UNESCO is basically seeking to challenge a finding of fact before the Tribunal. She disputes the claim that the desk audit of 14 April 2008 was conducted with all due professionalism and she describes the report on that audit as "incomplete and defective".

E. In its surrejoinder UNESCO maintains its plea of irreceivability. It emphasises that in her claims the complainant clearly requests the Tribunal to decide to “reclassify her post”.

The Organization states that it saw no need to mention the special post allowance in its reply because it had no direct bearing on the question of reclassification of the complainant’s post. Moreover, the complainant never filed a protest on this matter with the Director-General.

It affirms that authority had been delegated to the deputy chief of security and consequently he assumed the duties pertaining to the complainant’s supervisors at the JERC hearing.

In its view, the content of the report on the desk audit of 14 April 2008, which has already been forwarded to the complainant, “amply supports the decision to reject her classification request”.

It adds that the competent units have conducted the investigation recommended by the Appeals Board and that the complainant was informed of the outcome by a memorandum dated 16 July 2009.

Asserting that an error of law can ensue only from the erroneous interpretation of a text, UNESCO points out that the complainant has failed to identify the text that was allegedly violated. It further notes that she has simply made allegations without demonstrating how the principle of equal treatment is supposed to have been breached.

CONSIDERATIONS

1. The complainant joined UNESCO in January 1984, at grade GS-3, as a secretary. She was assigned with effect from October 1987 to the Visitors Reception Unit, which subsequently became the Visitors Service, and was promoted in July 1993 to grade GS-4 as a clerk. Following the transfer of her Service from the Office of Public Information to the Bureau for Support and Services, she was assigned responsibility for the Service, whose staff structure had been concurrently reduced, with effect from March 1998. After a desk audit,

her post was reclassified at grade GS-5 from 7 April 1999 and she was promoted to the position of senior clerk from the same date.

2. Following the implementation on 1 January 2000 of a new job classification scale for General Service staff at the Headquarters of the Organization, comprising seven grades instead of the former six, the complainant's post was reclassified at grade G-6.

When Administrative Circular No. 2177 dated 30 January 2003 entered into force, introducing a revised classification standard based on the new scale for posts in the General Service category at Headquarters, the JEC, which was set up on the same occasion, recommended that the complainant's post remain at grade G-6. The complainant was informed by a memorandum of 16 December 2003 that the Director-General was confirming the classification of her post at G-6.

The complainant, who had already asserted in memoranda dated 21 June 1999 and 5 November 2002, that the classification of her post did not correspond to the true level of her responsibilities, then filed a complaint with the JERC, established by Administrative Circular No. 2195 of 24 December 2003. However, as this body recommended that her complaint be rejected, the Director-General confirmed the classification of the post at grade G-6 by a decision of 3 November 2004.

3. After protesting against this decision to no avail, the complainant referred the matter to the Appeals Board. In the context of a mediation procedure sponsored concurrently by the Deputy Director-General, a desk audit of the post in question was undertaken on 21 March 2006. However, the conclusions confirmed the classification at grade G-6.

In its opinion of 5 July 2007 the Appeals Board held that the JERC, for various reasons, had not taken into account or had not fully appreciated certain aspects of the duties pertaining to the complainant's post and that the audit of 21 March 2006 appeared not to have been conducted with the necessary rigour. The JERC therefore

recommended to the Director-General that he arrange for a new desk audit of the post. Moreover, noting that no action seemed to have been taken on the aforementioned memoranda sent by the complainant on 21 June 1999 and 5 November 2002, the Board further recommended that the matter be investigated to determine, *inter alia*, whether the complainant should be awarded an indemnity for any damage she might have suffered as a consequence.

After the Director-General had informed the complainant in a letter dated 13 September 2007 of his decision to act on these recommendations, a new desk audit of the post, covering the period from June 1999 to November 2002, was undertaken on 14 April 2008. However, as this audit also concluded that the post should be classified at grade G-6, the Director-General definitively confirmed the classification by a decision of 9 June 2008.

4. That is the decision impugned before the Tribunal. In addition to requesting that the decision be set aside, the complainant, who in fact left the Organization on 7 December 2008, requests the Tribunal to order, *inter alia*, that her post be reclassified on the basis of a new desk audit. She also claims compensation for the damage she allegedly suffered as a result of the impugned decision.

5. As the Tribunal has consistently held, the grading of posts is a matter within the discretion of the executive head of an international organisation. It depends on an evaluation of the nature of the work performed and the level of the responsibilities pertaining to the post which can be conducted only by persons with relevant training and experience. It follows that grading decisions are subject to only limited review and that the Tribunal cannot, in particular, substitute its own assessment of a post for that of the Organization. A decision of this kind cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or of law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority (see, for example, Judgments 1281, under 2, or 2514, under 13).

6. In the instant case, the complainant essentially contends that the impugned decision is tainted with various formal or procedural flaws and errors of law and stems from discriminatory prejudice against her. These pleas clearly come within the scope of the Tribunal's power to review such a decision.

7. The complainant first asserts that the decisions taken on the basis of the JEC and JERC recommendations and the Director-General's final decision of 9 June 2008 were unsubstantiated. As a result, she claims, the Organization breached its obligation of good faith towards her.

According to the Tribunal's case law, while reasons should, in principle, be given for all administrative decisions, the amount of detail required will depend on the circumstances and the nature of the decision in question. Moreover, the reasons need not be stated in the decision itself but may be contained in other documents communicated to the staff member concerned; they may even be set forth in briefs or submissions produced for the first time before the Tribunal, provided that the complainant's right of appeal is fully respected (see, for example, Judgments 1289, under 9, 1817, under 6, or 2112, under 5).

8. In the present case, the decisions of 16 December 2003 and 3 November 2004, whereby the Director-General maintained the classification of the complainant's post at grade G-6 following the successive deliberations of the JEC and the JERC, referred to the recommendations made by those two bodies. As for the final decision of 9 June 2008, it stated that the classification had been confirmed by the desk audit of 14 April 2008. Given the nature of the decisions involved, the references they made to the technical evaluations supporting the approved classification provided a sufficient indication of the main reasons. Furthermore, although the evaluations were not attached as such to the decisions in question, it is clear from the submissions that the complainant received a sheet, attached to a memorandum of 15 December 2004, showing the JERC's rating of her post based on various relevant evaluation criteria, and that she also

received, on request, the report of the audit undertaken on 14 April 2008. Lastly, although the information thus provided was sufficient to permit the complainant to exercise her right of appeal under satisfactory conditions, UNESCO has produced the full text of the JEC and JERC reports in the proceedings before the Tribunal. It follows from all these circumstances that the Organization's duty to communicate to the complainant the reasons for the decisions concerning the classification of her post was not breached.

9. The complainant also takes the Director-General to task for failing to substantiate the aforementioned decision of 13 September 2007, which, contrary to the terms in which it was couched, only partially reflected the Appeals Board's opinion. She points out that the Organization did not undertake the investigation recommended by the Board concerning the circumstances pertaining to the examination of her protests of 21 June 1999 and 5 November 2002.

It is true that the action that was initially taken, involving a desk audit for the period from June 1999 to November 2002, clearly did not adequately address that recommendation. Consequently, pursuant to the Tribunal's case law, as reflected for instance in Judgments 2092, 2261 and 2355, according to which reasons must be given for any decision by the executive head of an organisation that runs counter to the opinion rendered by its internal appeal body, the Director-General ought to have stated his reasons for not ordering the investigation in question. However, the Organization ultimately agreed, by a decision taken on 5 February 2009, to comply fully with the Appeals Board's recommendation and to undertake the investigation, the outcome of which was communicated to the complainant on 16 July 2009. This new decision must be deemed to have overturned the initial contrary decision in that respect, and in light of this new circumstance, the fact that the decision of 13 September 2007 was not properly substantiated affords no grounds for redress.

10. The complainant also challenges the lawfulness of the JERC hearing of 7 June 2004 at which her case was considered, on the

grounds that neither her direct supervisor nor the Director responsible for her Service was present.

The Tribunal first notes that, contrary to the complainant's assertion, the absence of these two supervisors from the hearing in no way breaches the provisions of section 5(b) of the JERC terms of reference annexed to aforementioned Administrative Circular No. 2195. Those provisions, according to which "[a]ttendance at hearings shall be restricted to the Chairperson, Members and Observers, the Appellant [...], Respondent and/or the overall Manager", are intended to prohibit the attendance at JERC hearings of any person other than those listed, but they do not render the attendance of all the persons listed mandatory. Moreover, it is clear from the submissions that the supervisors in question were represented at the hearing by the deputy chief of security, who exercised authority – at least in theory – over the complainant's Service.

It is correct that, as noted by the Appeals Board, the absence of both the complainant's direct supervisor and her Director might have been detrimental in practice to a full assessment of the characteristics of her post. Nevertheless, apart from the fact that this circumstance does not constitute, strictly speaking, a procedural flaw, the Tribunal notes that it has no impact in any case on the lawfulness of the impugned decision. It should be pointed out that, as recommended by the Appeals Board, precisely with a view to dispelling any remaining doubts concerning the appropriateness of the initial grading, the Organization arranged for a new desk audit to be undertaken on 14 April 2008. The Director-General's final confirmation of the classification of the post concerned at grade G-6 on 9 June 2008 was based on the result of that audit, and any irregularities that might have tainted the previous evaluation procedures are in fact unrelated to his decision.

11. The complainant further asserts that, contrary to the provisions of section 5(d)(vii) of the JERC terms of reference, that body's recommendation was not forwarded to her. She infers therefrom that she was denied the right of reply. However, while it is true that she was initially informed only of the content of the

recommendation on being notified of the aforementioned decision of 3 November 2004, it has already been pointed out that the complainant subsequently received a sheet providing details of the JERC rating of her post. This document contained the substantive data on which the body's recommendation was based. The Tribunal further notes that the complainant was in any case successful in challenging the JERC evaluation, inasmuch as a new desk audit of her post was conducted in response to the Appeals Board's opinion. The circumstances in which she learned about the recommendation in question are therefore irrelevant from the point of view of the lawfulness of the final decision of 9 June 2008.

12. With regard to the complainant's challenge to the desk audit of 14 April 2008, she asserts that she was denied access to a document that was essential from the point of view of her right to a fair hearing, because the Organization failed to attach the audit report itself to the decision of 9 June 2008. However, as already noted by the Tribunal, the complainant, who had been informed in the decision of the content of the auditor's recommendation, subsequently succeeded in obtaining the report. Moreover, there is no evidence in the submissions that this procedure proved detrimental to the defence of her interests.

13. The complainant further contends that the same desk audit was flawed, since it was based on inaccurate job descriptions. According to the complainant, the auditor used those prepared on 19 September 1999 and 6 November 2002, whereas she had proposed that an alternative job description which she had drafted herself should be taken into consideration. However, contrary to the complainant's allegations, the Appeals Board's opinion does not indicate that the latter job description was formally endorsed by the Board or deemed to be "the most reliable". Furthermore, as rightly pointed out by the auditor, the three job descriptions in question were in any case very similar and the description drafted by the complainant differed from the other two only in matters of detail relating to presentation and terminology rather than to the actual substance of the tasks pertaining to the post. Lastly and above all, it appears from the audit report that

the job description advocated by the complainant was in fact analysed and taken into consideration on the same footing as those dating from 1999 and 2002. This argument therefore fails.

14. In further criticism of the desk audit of 14 April 2008, the complainant maintains that it was conducted “summarily” and in a somewhat offhand manner, mentioning, for instance, that the auditor did not ask her any questions and did not even speak with her supervisors. The Tribunal finds this criticism unsound, however, in the light of the audit report. It is clear from the document in question that the auditor spoke at length with the complainant and that, contrary to her allegations, he met with her successive direct supervisors. The inclusion in the file of a “note for the record” written by the complainant herself immediately after her hearing is not sufficient to cast doubt on the accuracy of these facts, especially since it further appears from the report in question that the duties pertaining to the disputed post were subjected by the auditor to a particularly comprehensive and detailed analysis.

15. The complainant considers that the classification of her post at grade G-6 constitutes a breach of the principle of equality or even discriminatory treatment, inasmuch as the post comprised a plurality of functions discharged in the past by several different officials, including a staff member occupying a grade P-3 post in the Professional category. It is clear from the submissions, however, that this change in the structure of the posts in question was due to a substantive reorganisation of the Visitors Service, the staff of which had been replaced for the most part by non-permanent staff members or trainees. If account is taken, for instance, of the reduction in the extent of the training duties assigned to the chief of the Service as a result of this development, the difference in treatment invoked by the complainant cannot be characterised as a breach of equality to her detriment.

16. Lastly, the complainant maintains that the impugned decision was due to prejudice against her. However, as the Tribunal has held,

for instance in Judgment 1775, under 7, mere allegations unsupported by the slightest evidence are not sufficient to establish that such prejudice exists. It must be concluded that the complainant has not submitted any tangible evidence capable of convincing the Tribunal that her allegation is well founded. In particular, the complainant's argument in this connection that the reclassification of her post at grade GS-5 in 1999 should have been implemented as soon as she took up her duties, i.e. in 1998, in no way demonstrates that she was the victim of arbitrary treatment on the part of the Organization. Moreover, neither the fact, which is incidentally debatable, that the desk audit of 21 March 2006 was conducted on the basis of an erroneous job description, nor the Appeals Board's finding that the auditor failed to exercise due rigour, can be viewed as establishing the existence of the alleged prejudice. Moreover, the complainant provides no indication of the possible origin of such prejudice. This argument therefore fails, especially since the fact that classification of the post at grade G-6 was successively confirmed by the JEC and the JERC and then by two audits – the second of which, at least, has not been validly challenged – leads the Tribunal to conclude that the impugned decision is clearly based on verifiable, objective reasons.

17. It may be concluded from the foregoing that the impugned decision is in no way unlawful. All the complainant's claims must therefore be dismissed, and there is no need for the Tribunal to rule on the Organization's objection to the receivability of those concerning reclassification of the post in question.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2010, Mr Seydou Ba, Vice-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 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet