

SIXTY-FIFTH SESSION

***In re* FERNANDEZ-CABALLERO**

Judgment 946

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Carlos Fernandez- Caballero against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 6 January 1988 and corrected on 19 January, UNESCO's reply of 26 February, the complainant's rejoinder of 16 May and UNESCO's surrejoinder of 6 July 1988;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal, UNESCO Staff Regulation 11, Staff Rules 104.6(b) and 111.1, Manual paragraphs 2405.C.1.c and 2420.H.2 and paragraphs 2, 7(a) and 22 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of Paraguay, joined the staff of UNESCO on 1 July 1982 under a fixed-term appointment for two years. He was assigned as a grade P.4 expert in educational information and documentation to the Regional Office for Education in Latin America and the Caribbean (OREALC) in Santiago, Chile. He had his appointment extended by two years from 1 July 1984.

At the end of 1985 the Organization wanted to make savings and the Director of the Regional Office, Mr. Romero Lozano, who was about to retire, proposed downgrading the complainant's post to P.3. In a minute of 13 February 1986 to Mr. Tedesco, the then acting Director of the Office, the personnel officer of the Education Sector said:

"... this downgrading would come into effect on expiry of the incumbent's appointment, on 30 June 1986.

I should therefore like to know whether Mr. Fernandez- Caballero would agree to the downgrading. If so, please let us have your recommendation on the renewal of his contract. If not, we should have to let his appointment end on expiry and pass on his records to the ad hoc Committee on Redeployment to see whether there is any other assignment for him."

The complainant agreed to the downgrading. On 25 June 1986 his records were passed on to the Committee on Redeployment and in its report of 27 June the Committee identified two P.3 posts he might be put on. But on 8 July the Chief of the Staff Administration Division sent a telex asking Mr. Tedesco to tell the complainant that his contract was extended by two months to 31 August 1986 and that he would then leave the Organization. The telex was confirmed by a letter also of 8 July which the complainant says he did not get.

By a minute of 25 August the complainant lodged an appeal with the Director-General in accordance with paragraph 7(a) of the Statutes of the Appeals Board against the termination of his appointment. Having got no answer he appealed to the Appeals Board on 31 October 1986. In its report of 17 September 1987 the majority of the Board recommended rejecting his appeal and by a letter of 6 October 1987, the impugned decision, the Deputy Director-General told him that the Director-General had done so.

B. The complainant submits that the decision not to renew his appointment shows several flaws.

(1) There are procedural and formal flaws. The decision was notified by a mere telex which went to Mr. Tedesco and of which he got only a photocopy. He was given no word of explanation, and indeed Mr. Tedesco himself said that he was unaware of the reasons. The decision was taken a week after the date on which his appointment actually expired. He was denied his right to a hearing and there was no inquiry, although he had had several disputes with

his supervisor. According to Manual paragraphs 2420.H.2 and 2405.C.1.c the decision ought to have been taken, not by the Chief of the Staff Administration Division but by the Deputy Director-General.

The Appeals Board proceedings were flawed. The complainant could not afford to attend the hearings and so was denied his say. Paragraph 22 of the Board's Statutes authorises the Director-General in such circumstances, after consulting its Chairman, to charge the travel costs to the Organization. His right to a hearing was further denied in that several papers were put to the Appeals Board that he was not allowed to comment on, and his arguments were not put to the Board fully and impartially.

(2) The decision rests on an error of law. The Organization failed to renew the complainant's appointment at grade P.3 although he had been promised renewal, and it did not even try to find him another assignment, despite the recommendation from the Committee on Redeployment.

(3) There were errors of fact. Since the Director-General relied solely on the Appeals Board's report, his final decision is tainted with the same flaws as that report. The Board had taken into account misstatements of fact by the representative of the Director-General, in particular that the complainant's case had not been put to the Committee on Redeployment, whereas in fact that Committee had recommended appointing him to one of two posts it identified. The Organization overlooked an essential fact in relying on a performance report by Mr. Tedesco that covered a period in which he was not yet in Santiago. Another mistake of fact was in believing that Mr. Tedesco was in favour of ending the complainant's appointment.

The complainant invites the Tribunal:

(1) to order the disclosure of items of evidence relating to the downgrading of his post from P.4 to P.3, the full records about him put to the Committee on Redeployment, the text of the Committee's recommendation in his case and any other evidence about action to be taken on that recommendation, and the letter mentioned in the telex sent to Mr. Tedesco on 8 July 1986;

(2) to order his reinstatement or, failing that, award him material and moral damages, and in any event award him costs.

C. In its reply UNESCO enlarges on the account of the facts.

It explains that three countries - the United States, then the United Kingdom and Singapore - withdrew from membership and its budget was reduced by nearly a third. There was a first set of savings when the United States left, and that was when the proposal was made for downgrading the complainant's post. The withdrawal of the other two member States made further savings necessary, and they required doing away with the post altogether.

The Organization submits that the decision not to renew the complainant's appointment shows no flaw.

(1) First, it was taken with authority since the Deputy Director-General had duly delegated to the Chief of the Staff Administration Division competence to decide on renewals of contract.

(2) Neither the Staff Regulations and Staff Rules nor the Tribunal's case law lays down any formal requirement for the notification of non-renewal. The reason why the telex was sent was that the matter was urgent, and in any case a letter was sent to the complainant also on 8 July 1986.

(3) The reasons for the decision were the complainant's unsatisfactory performance and the abolition of his post and they were notified to him in the course of the internal appeal proceedings.

(4) The decision was taken in accordance with the proper procedure. The procedure for redeployment of staff was followed and every effort made to find another post for the complainant, but to no avail. The complainant's records were put to the Committee on Redeployment, together with those of other staff members, on 25 June 1985, and in its report of 27 June, which UNESCO produces, the Committee recommended putting him on one of two posts. Unfortunately neither of the posts became vacant and they are still held by the same staff members. The Administration carried out full consultations before taking a decision on the complainant's case. There was no prejudice against him, his disputes with his supervisor being disregarded.

(5) The complainant's right to a hearing by the Appeals Board was fully respected. Travel costs may be refunded

under paragraph 22 of the Statutes of the Appeals Board only if the appellant so asks. Not only did the complainant fail to do so but he took the view that his written submissions to the Board were sufficient.

(6) The mistakes of fact which the complainant alleges the Board made and on which he relies had no effect on the Director-General's decision.

(7) The complainant was granted full safeguards under the redeployment procedure. But since he had spent only a short time in the Organization's employ, since his work was poor, since he had never been promised any renewal of appointment and since the Organization was in sore financial straits, he had no legitimate expectation of renewal. Besides, it is clear from the evidence - including the papers the complainant wants to have disclosed, which UNESCO appends to its brief - that the Director-General was acting in the Organization's interests for the purpose of lowering staff costs.

UNESCO invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant seeks to refute the pleas in the Organization's reply. In particular he maintains that UNESCO has failed to give the real reasons for the decision. In his view that decision did not form part of any plan for staff deployment that the withdrawal of member States required. He was never told that his post had been abolished for financial reasons. He consented to the downgrading of his post according to a proposal that amounted to a promise of renewal, and one the Organization may not get out of by pleading some change in circumstances. In his submission the decision had nothing to do with the quality of his performance, which was always regarded as satisfactory.

The Organization has failed to disprove his charges of breaches of procedure.

He presses his claims and asks the Tribunal to order disclosure of the text of an item of written testimony submitted to the Appeals Board and to invite oral or written evidence from the Board members as to whether they were aware of another item he considers important.

E. In its surrejoinder the Organization contends that no promise was ever made to the complainant when his post was downgraded that his appointment would be renewed. Renewal depended, not on his reaction to the proposed downgrading, but on the quality of his work and on whether some other post was available for him. The two real reasons for the decision were the abolition of his post and the poor quality of his services. The abolition was the direct outcome of the further tightening of finances required by the withdrawal of Singapore and the United Kingdom.

Lastly, UNESCO invites the Tribunal to disallow the complainant's application for the disclosure of further papers.

CONSIDERATIONS:

Receivability

1. By a telex of 8 July 1986 the Organization informed Mr. Tedesco, the acting Director of its Regional Office for Education in Latin America and the Caribbean, where the complainant was stationed, that the complainant's appointment would end, after a two-month extension, on 31 August 1986, the date on which he actually left. The complainant appealed to the Director-General on 25 August 1986 against the decision communicated in that telex and again, on 31 October 1986, appealed to the Appeals Board in accordance with Regulation 11, Rule 111.1 and paragraph 7 of the Board's Statutes. The Board reported on 17 September 1987 and in keeping with the majority recommendation in the last paragraph of its report the Director-General took his final decision on 6 October 1987 to reject the appeal.

The complainant has therefore exhausted the internal means of redress under the Staff Regulations, the decision he impugns - the one of 6 October 1987 - is the final one, and he has met the requirement in Article VII(1) of the Statute of the Tribunal.

The final decision was notified to him on 18 October. Having filed his complaint on 6 January 1988, he respected the time limit in Article VII(2) of the Statute.

The complaint is receivable.

The merits

2. The complainant's original appointment, which began on 1 July 1982, was for a period of two years and he was granted one renewal for another two years. He is appealing against the decision notified in the telex of 8 July 1986 inasmuch as it refused to extend his appointment by a further period of two years from July 1986.

3. According to Rule 104.6(b) a fixed-term appointment does not imply any right to extension or conversion to an indeterminate appointment and shall, unless extended or converted, expire according to its terms, without notice or compensation.

Although renewal of a fixed-term appointment is at the Director-General's discretion and the Tribunal will not replace his judgment with its own, his decision is not immune to review. The Tribunal will consider whether it was taken without authority, whether it was tainted with any procedural or formal flaw or with a mistake of law or of fact, whether any essential fact was ignored, whether any mistaken conclusion was drawn from the evidence, and whether there was abuse of authority.

4. In this case the decision not to renew the complainant's appointment was tainted with several fatal flaws.

5. First, the decision was not taken by the competent authority. UNESCO Manual paragraph 2420.H.2 provides that the decision to extend an appointment shall be taken, according to the staff member's grade, by the Director-General or the official to whom responsibility for the decision has been delegated. Manual paragraph 2405.C.1.c further states that for P.3 and P.4 posts appointment, transfer, promotion and extension of appointment shall be approved by the Deputy Director-General. In this case the decision was taken neither by the Director-General himself nor by the Deputy Director-General, to whom the authority not to renew has thus been delegated, but by the Chief of the Staff Administration Division.

6. What was even more serious was the failure to inform the complainant of the reasons for the decision.

As a rule the reasons for any administrative decision must be stated. Non-renewal is plainly a decision of great consequence to a staff member and, though the Director-General is free to make his own assessment of the material facts, the staff member is entitled to know the reasons for the Director-General's conclusion so that he may, if he chooses, lodge first an internal appeal and then, if need be, a complaint with the Tribunal. There would indeed be no point in having the Tribunal review the lawfulness of a discretionary decision by the criteria set out in 3 above if the staff member could not find out the reasons for it: he must be able to discuss them, or at least to point to the absence of a statement of them, if he is to pursue his claims and if the Tribunal is to exercise its power of review.

In this instance the complainant was not given the reasons for the non-renewal: not only did the telex of 8 July 1986 sent to his supervisor, Mr. Tedesco, give no reason for it, but it is not proven that an explanatory letter addressed to him was ever delivered or that he was given the information in any other way.

7. Thirdly, whatever the reasons for the decision may have been and whatever the efforts made to help the complainant, he was told nothing of what was going on. That is another flaw in the decision, the Organization being in breach of the duty of consideration it owes its staff, of the principle of good faith and of the rule that the staff member has a right to be kept informed of any action that may affect his rights or legitimate interests.

8. Besides, the Appeals Board took account of misstatements of fact, particularly the statement by a representative of the Administration that the Committee on Redeployment had not taken up the complainant's case, whereas in fact the Committee had not only seen his file but identified two posts and recommended putting him on one of them.

The Tribunal holds that the mistakes of fact influenced the Board's recommendations. Since the Director-General relied solely, in taking his final decision, on a recommendation that is tainted with mistakes of that kind, his decision too is flawed with the same mistakes.

9. It is true that at the time UNESCO was in sore financial straits, largely because Singapore, the United Kingdom and the United States had withdrawn from membership and, in pursuance of decisions by its General Conference and Executive Board, it had to make drastic cuts in staff costs. But the need for savings affords no proper excuse

for breach of the principles that protect the staff against arbitrary decision-making.

10. Because of the four flaws identified above the impugned decision cannot stand. In the circumstances of the case there are no grounds for reinstatement, but in accordance with Article VIII of its Statute the Tribunal will award damages for material injury.

Since the complainant had served UNESCO for only four years and the renewal he might have expected would not have been for more than two years, the Tribunal sets the amount at the equivalent of six months' full pay at grade P.4 at the rate applicable at the date of his separation.

11. There is no award of moral damages. Since the Organization was applying a policy of staff retrenchment required by financial constraints the non-renewal cannot be deemed to have harmed the complainant's professional reputation. Nor indeed does he offer any evidence of moral injury.

12. Since the reasons stated above suffice to warrant setting the impugned decision aside, the Tribunal neither rules on the complainant's many other pleas nor orders the further submission of evidence he applies for.

DECISION:

For the above reasons,

1. The Director-General's decision of 6 October 1987 is set aside.
2. The Organization shall pay the complainant in material damages the equivalent of six months' full pay at grade P.4 at the rate applicable at the date of his separation.
3. It shall pay him 3,000 United States dollars in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gros Espiell
A.B. Gardner