

SIXTY-NINTH SESSION

Judgment 1039

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Y. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 May 1989 and corrected on 25 September, UNESCO's reply of 15 December 1989, the complainant's rejoinder of 15 January 1990 and the Organization's surrejoinder of 15 March 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Regulation 9.1, UNESCO Staff Rules 104.6(b), 104.11(a) and 109.5(b) and paragraphs 7 and 8 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a citizen of the United States, took up a one-year appointment with UNESCO in Paris in 1981. She held a grade G.3 post - PH-018 - as a clerk in the Division of Philosophy and Human Sciences. She had several extensions of appointment up to 30 April 1986.

Three States having withdrawn from membership in 1985, and almost a third of the budget being lost, UNESCO had to save on staff. One thing it did was to "freeze" the complainant's post as from 30 April 1986. As from 1 April she was put on a temporary post with the Intergovernmental Oceanographic Commission (IOC) in the Natural Sciences Sector (SC) and she had her appointment extended to 30 June 1986. A special joint committee on redeployment recommended putting her on post SC-339 in IOC when it became vacant.

As from 1 August 1986 she was transferred to post 339 in IOC as a secretary and had her appointment extended to 31 December. In a minute of 1 September to the Director of the Bureau of Personnel (PER) she said that she was worried about her future, upset about changing from clerk to secretary and anxious to have the matter reviewed. In a reply dated 25 September a personnel officer told her that she was on the only available post and must make the best of it.

In keeping with Staff Rule 104.11(a) ("Reports on staff members") her supervisors reported on 17 October on her performance from 1 April to 30 September 1986 and recommended her transfer. In a minute of the same date to the Director of PER the Assistant Director-General in charge of SC said that she lacked the skills needed and should be put elsewhere. She herself applied on 5 November for transfer and in her comments of 26 November on the appraisal report said that she was not qualified for her post. In a minute of 10 December the personnel officer urged her to try harder, extended her appointment to 30 June 1987 and promised to look for another job for her, but warned that if none was found and if she did no better a further extension would be difficult. Several divisions were approached but refused to take her on.

On 30 April 1987 the Secretary of IOC declared her services "unsatisfactory" and recommended withholding her within-grade increment. She objected in a minute of 20 May to the Director of PER.

Her appointment was extended to 31 July and then to 31 August 1987.

The acting Director of PER wrote to her on 4 September extending her appointment to 31 December 1987 and warning that, "failing a last-minute solution", she would get no further extension. A minute of 1 December from the personnel officer said that PER had found no other job and she would therefore leave on 31 December. On 18 December she submitted a protest in writing to the Director-General under paragraph 7(a) of the Statutes of the Appeals Board. On 25 January 1988 the acting Director informed her that her post SC-339 had been abolished for budgetary reasons as from 1 January 1988 but that on compassionate grounds the Director-General granted her one

last extension to 31 March 1988. She was later put on special leave with pay up to that date, at which she left the Organization.

On 18 February she appealed to the Appeals Board under paragraph 7(c) of its Statutes. In its report of 3 November 1988 the Board recommended rejecting her appeal as devoid of merit and by a letter of 7 January 1989, which reached her on 23 February and is the decision impugned, the Director-General informed her that he had accepted the recommendation.

B. The complainant contends that UNESCO's objections to the receivability of her internal appeal are mistaken. They were that she failed to make her protest of 18 December 1987 within one month of receiving the minute of 4 September 1987, as paragraph 7(a) of the Statutes of the Appeals Board required, that that minute was not actionable anyway since the decision of 25 January 1988 superseded it, and that she did not challenge the decision of 25 January at all. In fact the decision of 4 September 1987 was not final since, by speaking of a "last-minute solution", it suggested that UNESCO was still looking for other work for her. But the personnel officer's minute of 1 December was a final decision in that it eliminated that possibility and her protest of 18 December was therefore in time. The minute of 25 January 1988, which merely confirmed the earlier decision and granted another three months only on compassionate grounds, did not need to be challenged as well.

As to the merits, she submits that the decision not to extend her appointment, though discretionary, shows fatal flaws.

It was taken in breach of procedural rules. She describes the procedure for redeploying displaced staff as set out in Administrative Circular 1583 of 23 February 1988. By 1988 another joint committee had been set up to make recommendations to the Director-General about officials whose posts had been "frozen" or abolished in 1985-86 or 1988 and who had not yet been placed. The complainant was doubly covered: post PH-018 was frozen in 1986 and post SC-339 abolished in 1988, and the many extensions of her appointment and the consensus that she would not do in post SC-339 show that she had not been finally placed. On 1 March 1988 she wrote to the Director-General asking for the benefit of the procedure prescribed in the circular, but the Assistant Director-General for General Administration refused in a letter to her of 8 March on the grounds that her case had already had "thorough review". But the procedure must have been thought out before 25 January 1988, when the acting Director of PER told her that her post was abolished; so UNESCO acted in bad faith in denying her the benefit of it on the grounds that that decision went out just before the circular.

There was a mistake of law in that the Organization acted in breach of the principle of equal treatment. The Bureau of Personnel put the cases of 30 other General Service category officials, but not hers, to the joint committee: 24 posts, like hers, had been frozen or abolished in 1988, and 6, like hers, had been done away with in 1986.

UNESCO treated her inconsiderately by putting her in a job it knew she was not trained for and telling her that if she could not do it she would be got rid of. In particular the personnel officer acted in bad faith by writing a minute to the secretary of the joint committee on 23 March 1988 which, by giving misinformation about her case and withholding relevant facts misled the committee into thinking that her case fell outside its remit. The same minute probably afforded the basis for the Assistant Director-General's letter of 8 March 1988, which, too, was therefore tainted with a mistake of fact.

She seeks the quashing of the decision of 7 January 1989, reinstatement in a suitable post as from 31 March 1988 or, failing that, an award of damages, and costs.

C. In its reply UNESCO gives its own version of the facts.

It submits that the complaint is irreceivable. The personnel officer's minute of 1 December 1987 merely confirmed the decision notified to the complainant on 4 September. Since her internal appeal of 18 December 1987 against the minute was misdirected and she did not challenge the decision of 4 September in time, she omitted to exhaust the internal remedies.

Besides, the Director-General allowed her appeal in that on 25 January 1988 he extended her appointment to 31 March and on 29 January put her on paid leave. Since she is still challenging the decision not to extend her appointment after 31 December 1987 she shows no cause of action. The decisions of 25 and 29 January 1988 did not confirm that decision but reversed it and since she failed to challenge them she again failed to exhaust the

internal means of redress.

Her complaint is devoid of merit anyway. The Director-

General acted under Rule 104.6(b): "A fixed-term appointment may, at the discretion of the Director-General, be extended ... it shall not, however, carry any expectation of, nor imply any right to, such extension ...". The Director-General's exercise of his discretion was proper. There were objective financial reasons, which she does not even challenge, for the policy of staff retrenchment. The Director-General also made a correct assessment of the facts in concluding that the complainant had failed to adapt to her post in IOC. Her main fault was not, as she suggests, lack of the skills her post required, but her recalcitrance and unwillingness to learn. The evidence suggests that her behaviour actually grew worse; she was unpunctual and often unavailable in office hours, and her output was low. The post partly matched her qualifications since she had worked as a secretary.

The Director-General had discretion not to renew her appointment under Regulation 9.1 and Rule 109.5(b) on the strength of such criteria as competence and length of service.

Her case fell outside the joint committee's remit since her redeployment to post SC-339 had been final. Besides, she may not now object to the Assistant Director-General's decision of 8 March 1989 that her case had already had thorough review since she has never before challenged it.

She was not discriminated against: the Director-General had reason not to put her case to the joint committee in that her performance had been poor, and UNESCO had no duty to find work for a fixed-term official it was dissatisfied with.

She was fairly treated. Efforts were made to find her suitable employment, she had almost four months' notice of nonrenewal, and she got paid leave for another three months. She offers no evidence in support of her charges of bad faith against the personnel officer, who was not competent to get rid of her anyway.

Since the non-renewal was lawful she has no right to redress.

D. In her rejoinder the complainant enlarges on her pleas on receivability and the merits and dwells on several issues of fact she sees as material. She presses her contentions that the Director-General's decision was tainted with breaches of procedural rules, the principle of equal treatment, good faith and the duty to treat her with respect. She describes the injury she has sustained and presses her claims.

E. In its surrejoinder UNESCO seeks to refute the complainant's pleas as developed in her rejoinder, maintaining that her complaint is irreceivable because of her failure to exhaust the internal remedies insofar as it challenges the decision of 1 December 1987, and that it shows no cause of action insofar as it impugns the decision not to renew her appointment beyond 31 December 1987. The impugned decision shows no fatal flaw: the Director-General properly exercised his discretion with due regard to all the material facts and the Organization's interests, and with no taint of prejudice.

CONSIDERATIONS:

1. The complainant joined the staff of UNESCO on 4 March 1981 and was assigned to a post as a clerk, No. PH-018, under a one-year appointment. She had her appointment extended several times. On 1 August 1986 she was transferred to post SC-339 and had her appointment extended to 30 June 1987. She was warned at the time that if she continued to show a negative attitude and lack of interest and if no suitable post could be found for her her appointment would not be extended after that date. She was nevertheless granted two further extensions even though the termination still stood. A minute of 4 September 1987 told her that her appointment was extended for the last time to 31 December 1987; no suitable post had been found for her and she had made no effort to adapt to her new duties; "failing a last-minute solution" she would have to leave. UNESCO confirmed that decision by a minute of 1 December 1987, its attempts to work out a solution having failed.

On 18 December 1987 the complainant lodged a protest against that minute. In UNESCO's submission the minute was mere confirmation of an earlier decision, the one of 4 September 1987, and her protest was out of time. Her retort is that the decision of 4 September 1987 neither took effect nor was final since it was subject to the condition that no "last-minute solution" should be found, and such a solution could have consisted only in finding her other employment; it was the minute of 1 December 1987 that told her that the search for other employment had failed

and that her appointment would therefore not be renewed.

2. The complainant is right: the minute of 4 September 1987 cannot be treated as the final decision not to renew her appointment. What the acting Director of the Bureau of Personnel said in that minute was that, "failing a last-minute solution", no further renewal of her contract might be envisaged beyond 31 December 1987. The meaning is clear and unambiguous: whether her appointment was to be renewed depended on finding a last-minute solution which would have been none other than giving her some other assignment. The acting Director's intent is borne out by the records of a meeting which the Junior Personnel Advisory Board held on 12 August 1987 and at which it made a recommendation the acting Director was following. The Board's recommendation was even more explicit than the acting director's minute: it was that the complainant's appointment should be "extended until 31 December 1987, on which date, failing any other solution, her separation from the Organization may be envisaged".

So there can be no doubt that the decision of 4 September 1987 was not final and that the final decision was yet to come.

It is, moreover, clear from its wording that the minute of 1 December 1987 was the logical and necessary sequel to the one of 4 September 1987 and made the non-renewal final. The personnel officer who signed it took the view that the condition in the minute of 4 September 1987 about finding a last-minute solution had not been fulfilled - as he said, "endeavours to obtain for you an alternative assignment have not been successful" - and so he told her that she would leave on the expiry of her appointment, on 31 December 1987.

The conclusion is that she proceeded correctly in challenging the decision of 1 December 1987 and that her protest of 18 December was receivable.

3. The Organization further submits that in any event the letter sent to her on the Director-General's behalf on 25 January 1988 in answer to her appeal makes her complaint devoid of substance.

That letter began by explaining that the original decision not to extend her appointment after 31 December 1987 had been prompted by the need to do away with post No. SC-339 on 1 January 1988 for financial reasons. The letter went on to say, however, that as an exceptional concession and on compassionate grounds the Director-General was granting her one last extension, of three months, to 31 March 1988.

The Organization contends that the second part of the letter, by granting her one last extension, amounted to a favourable answer to her appeal of 18 December 1987 and that the complaint therefore discloses no cause of action insofar as it seeks the quashing of the decision not to renew her appointment after 31 December 1987.

4. That contention is unsound.

First, it disregards the context, particularly one sentence in the letter which, so far from reversing the original decision not to renew after 31 December 1987, actually confirms it with an explanation of the need to abolish her post for financial reasons.

Secondly, the statement in the letter that the earlier instructions about arrangements for termination hold good confirms the non-renewal: so on that score the letter was mere confirmation and could not affect the outcome of the appeal of 18 December 1987.

Thirdly, the last extension is said to be an exceptional concession made on compassionate grounds: that is a further reason for holding that the letter neither allowed the appeal nor granted a new fixed-term appointment.

5. The extension of the complainant's appointment did, however, make the letter a new and challengeable decision.

Contrary to what the Organization contends, the evidence is that the complainant did make two appeals.

But the first, the one of 18 February 1988, she put directly to the Appeals Board, and by virtue of paragraph 7(a) of the Board's Statutes it was irreceivable because she ought first to have addressed her claim to the Director-General.

The second appeal, which she did address in the form of a protest to the Director-General and which sought "review" of the decision on her contractual status, was lodged on 1 March 1988.

But paragraph 7(a) of the Board's Statutes sets a time limit of one month for filing such protest and by 1 March 1988 that time limit had expired. Since the decision she challenged had come to her notice on 28 January 1988 the deadline for appeal was 29 February. Her appeal of 1 March was out of time unless the Director-General waived the time limit under paragraph 8 of the Board's Statutes. She has not even alleged such waiver, let alone proved it. The decision of 25 January 1988 therefore became unchallengeable, and since she failed to exhaust the internal means of redress her complaint is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the afore-mentioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner