

SEVENTY-FOURTH SESSION

In re TUFFUOR

Judgment 1251

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kwame Amoako-Tuffuor against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 5 March 1992, UNESCO's reply of 2 July, the complainant's rejoinder of 6 September and the Organization's surrejoinder of 16 October 1992;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal, UNESCO Staff Regulations 1.4, 1.9, 10.1 and 10.2, UNESCO Staff Rules 109.9(f), 110.1(a), 110.2, 110.3 and 111.2(b) and paragraphs 5(a) and 7(a) of the Statutes of the UNESCO Appeals Board;

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 citizen of Ghana, joined UNESCO on 30 June 1983 under a two-year fixed-term appointment as a programme specialist at grade P.4. Though he came under the Organization's Regional Office for Science and Technology for Africa, known as ROSTA, at Nairobi, he was stationed in the Regional Office for Education in Africa, known as BREDA, at Dakar. He got two extensions of contract, the second to expire on 30 June 1990. He was in charge, among other things, of organising meetings on water resources, three of which are material to the present dispute: one in Zambia in 1987, one in Malawi in 1988, and one in Guinea also in 1988. He was to be transferred in the spring of 1989 to ROSTA.

In a memorandum dated 28 April 1989, of which the complainant got a copy, two inspectors from the Office of the Inspector-General reported to the Director of BREDA cases of suspected fraud they had discovered during an inspection mission to Dakar from 19 to 28 April. They said that the complainant might have committed forgery and they referred to his "unacceptable contracting procedures"; since he had been absent on mission at the time they had not put their findings to him, but they recommended postponing his transfer to Nairobi.

In a memorandum of 9 May 1989 to the Assistant Director-General in charge of the Science Sector the complainant denied the inspectors' allegations and expressed the hope that investigation would not hold up his transfer. According to the evidence the transfer had gone through by January 1990.

In a report of 19 June 1989 to the Inspector-General one of the two investigating officers sent out to Dakar charged the complainant with forging signatures and figures for his own financial gain. He was suspended on full pay under UNESCO Staff Rule 110.3 as from 21 July 1989. In keeping with Rule 110.2 the Director-General referred his case to a Joint Disciplinary Committee. On 2 August 1989 the Director of the Bureau of Personnel asked the Committee to determine whether he had derived unlawful gain from the meetings he had organised in 1987 and 1988 and whether his conduct had been such as was expected of international civil servants under Staff Regulation 1.4 and the declaration in Regulation 1.9, and to advise the Director-General, in particular whether to order his summary dismissal under Regulation 10.2 for serious misconduct.

In its report of 30 October 1989 the Committee said that the evidence did not suffice to establish the complainant's liability. It deplored the fact that "at no stage during ... or after the investigations" had he been given a hearing and it observed that UNESCO had failed to submit original documents, the only sort of evidence that might make it possible to determine who had made changes and when. The Committee found BREDA's handling of financial claims remiss and recommended awaiting an inquiry into its practices.

By a telex of 19 January 1990 the Director of the Bureau of Personnel told the complainant that the Director-General had decided to dismiss him without notice for serious misconduct under Regulation 10.2 and Rule 110.1(a). By a letter of 25 January 1990 the Director confirmed the terms of the telex and instructed him to pay back sums totalling 15,529.30 United States dollars which he was accused of having embezzled from funds allotted for the meetings.

The complainant protested by a letter of 26 January 1990 under paragraph 7(a) of the Statutes of the Appeals Board. On 6 March 1990 he applied to the Director-General under Rule 111.2(b) for leave to appeal directly to the Tribunal. Leave was refused and he was informed by a letter of 21 March of the Director-General's decision to uphold the sanction of summary dismissal. Meanwhile, on 15 March, he had appealed under paragraph 5(a) of the Board's Statutes.

In its report of 18 July 1991 the Board recommended reversing the decision of 21 March 1990 and reinstating him on the grounds that there had been breach of his right to a hearing and that he might not be found guilty on the evidence. By a letter of 22 November 1991, the decision impugned, the Director-General rejected the Board's recommendation.

B. The complainant submits that his dismissal was unlawful. He cites the findings of the Joint Disciplinary Committee and the Appeals Board and observes that both of them held that the Administration had failed to prove the charges against him. He submitted the original receipts and other material statements about the three meetings to the Director and senior officers at BRED A, and they consistently approved his statements of account. Any forgeries must have been the work of those who had access to those documents. He was denied access to the originals and throughout the internal inquiry was given no opportunity of seeing the inspectors or answering the charges.

He was made a scapegoat for the corruption at UNESCO's Dakar office, which had become a matter of "public knowledge". By disregarding the recommendations from the Committee and the Board the Director-General drew mistaken conclusions from the facts.

The complainant seeks payment in full of his salary and allowances from the date of his dismissal in January 1990 "to the present"; reimbursement of the costs of his repatriation from Nairobi to Accra and the grant of repatriation allowance; damages for material injury in an amount equivalent to five years' salary and allowances; and damages for moral injury in an amount to be determined by the Tribunal.

C. In its reply UNESCO gives its own version of the facts and produces receipts, claims and other documents to show that the complainant misappropriated funds allotted for the meetings.

It maintains that it fully complied with the prescribed procedures. The recommendations by the Joint Disciplinary Committee and the Appeals Board were merely advisory and not binding on the Director-General. Far from denying the complainant his right to a hearing UNESCO told him of the charges before the Committee met, and he had the opportunity of submitting oral and written comments both to the Committee and to the Board. It was "premature" for him to deny the charges of forgery in his memorandum of 9 May 1989, before the investigators had even reported their findings. That suggested that he might not balk at tampering with evidence and so UNESCO decided to wait until it had sufficient proof before asking him to comment.

Both the Committee and the Board made mistakes of fact. The Committee wrongly rebuked the Organization for disclosing none of the originals: the inspectors had in fact supplied all the originals they could find at BRED A. The Board too was wrong to charge the Organization with denying the complainant's right to a hearing. In any event the Director-General could hardly act as if he was innocent when the Board itself had acknowledged the facts on which the decision was based.

Though the complainant tries to blame his superiors for forging receipts, he offers no proof to suggest that anyone else gained from the resulting overpayments, the simple reason being that he alone did so. It was only reasonable that BRED A should have approved his accounts and receipts since the administrative assistant originally responsible for checking them was his "proven accomplice". That official too was summarily dismissed.

The complainant has failed to rebut the charges or show that UNESCO drew mistaken conclusions from the evidence. Whether corruption at BRED A was common knowledge or not, he was still under a duty to the Organization. At the very least he failed to alert it to discrepancies he must have noticed between the amounts he paid out on its behalf and those he claimed from it.

D. In his rejoinder the complainant presses his pleas and seeks to refute the arguments in the Organization's reply. He contends that it has not proved its charge of serious misconduct: it is wrong to say that he was the one who stood the most to gain from forgery and did so. Collusion, if any there was, must have been between the

administrative officer and the assistant he relied on for six years. He points to evidence of arbitrary accounting practices in a document the Organization produces and submits that UNESCO is trying to pass off documents he has never seen as his own.

As to the denial of his right to a hearing, UNESCO confuses the period of investigation with his defence before the Disciplinary Committee. The inspectors, who were aware of his mission plans, avoided meeting him and giving him a chance to set the record straight. How could he alert the authorities to discrepancies he did not know about? Only the Administration had the means to detect errors in payment.

E. In its surrejoinder UNESCO says that the complainant's rejoinder merely trots out the same groundless accusations as before and attempts to shift the blame to others. It observes that, although the rules do not provide for payment of termination or repatriation allowances in cases of summary dismissal, it paid them less the sum of \$15,529 which he owed it.

CONSIDERATIONS:

1. The complainant was stationed in UNESCO's Regional Office for Education in Africa (BREDA), at Dakar, and was there required to organise meetings in countries in the region. After investigations into allegations of fraudulent accounting in BREDA he was summarily dismissed with effect from 23 January 1990 for misconduct over three meetings that had been held at Lusaka, in Zambia, from 12 to 17 October 1987, at Lilongwe, in Malawi, from 26 September to 7 October 1988 and at Conakry, in Guinea, from 21 November to 2 December 1988.

2. The complainant was granted sums of 14,900 United States dollars, \$18,800 and \$24,500 to finance those three meetings. UNESCO alleges that he falsely claimed to have spent \$12,932, \$18,519 and \$25,705. On that basis he was obliged to refund to it \$1,968 and \$281 for the first two meetings and was entitled to the reimbursement of \$1,205 for the third. But UNESCO alleges that the actual expenses came to \$5,280, \$5,799 and \$4,450 less than the sums claimed by him and that he had thus misappropriated a total of \$15,529. He had, says the Organization, claimed expenses which were inflated, or fictitious, or incurred for items not normally allowed; he had obtained receipts signed in blank and inserted amounts higher than the actual, altered receipts and committed forgery; and he had failed to obtain receipts on standard UNESCO forms.

3. UNESCO describes the accounting practices in BREDA as follows:

"... the programme specialist responsible for a meeting receives ... money necessary to pay normal expenses foreseen for the meeting, including daily subsistence allowance (DSA) for participants. It is expected that the programme specialist will make the necessary payments and obtain receipts for the money spent. In the case of payments to participants, the procedure is for a list to be submitted indicating the amounts to be received by each participant. Participants then sign the list indicating that they received the money. ... Upon returning to BREDA, the programme specialist provides the administration with the receipts for the funds disbursed. The administration prepares a Financial Statement for the meeting, totalling the expenditures, and settles the account with the programme specialist by paying him for any overpayment or receiving from him any funds remaining.

Receipts (or other proof) were required for all expenditures ... the Programme Specialist was expected to submit all receipts and other supporting documents to the Administrative Officer. ... The Administrative Assistant ... prepared a statement of expenditures for the meeting and verified to the best of his ability that the receipts submitted were legitimate."

The Organization explains that if the complainant had spent more than the sums advanced to him he would ordinarily have been reimbursed by a cheque, countersigned by the Director of BREDA. That would have been done after the accounts had been verified, and the appropriate documents and the cheque would have been prepared by the administrative assistant and approved and signed by the administrative officer.

4. The complainant's case is that, first, the available evidence does not establish that he was responsible for the inflation of expenses; secondly, there was no fair and proper investigation of the allegations against him; and thirdly, the Director-General misdirected himself in rejecting the recommendations of both advisory bodies and in deciding to dismiss him summarily.

5. The Organization has produced three financial statements which show expenditures of \$12,932, \$18,519 and \$25,705. It alleges that the complainant submitted each of them together with a covering letter. The complainant

denies that; he says that he submitted only receipts and supporting documents, and that each of the statements had been prepared by someone in BREDA and later appended to his covering letter. According to the financial statements the sums of \$1,968 and \$281 were due from him for the first two meetings and he was entitled to reimbursement of \$1,205 for the third.

The Organization has produced no evidence to establish that the sums of \$1,968 and \$281 were demanded or received from him. He says that he returned all the balances to BREDA and that receipts were not issued to him; it is thus possible that sums in excess of \$1,968 and \$281 were returned. The second statement was certified on 2 December 1988, the documents in respect of the third meeting were submitted by the complainant only on 25 January 1989, and the date of certification of the third statement is unknown. The Organization submits that the sum of \$281 was set off against the \$1,205 due to him according to the third statement and that he was paid the balance of \$924 by cheque. A cheque for that amount was put to the Joint Disciplinary Committee, and showed that the complainant had encashed it.

The complainant does not deny the receipt of that sum, but argues that having parted with the documents he had no way of checking the accuracy of the balances due. The Organization has not produced the receipt or the supporting documents relating to this payment; there is only a note in the impugned financial statement as to the set-off; and - in this instance as in many others where the mass of documents the Organization produces fails to turn the scale - it is thus not possible to conclude what exactly they represent.

6. The Organization confirms that financial statements are prepared by the Administration. If its allegation that the financial statements in question were submitted by the complainant is correct, then in each case there should have been another statement prepared by the Administration. No such statements have been produced, and that supports the complainant's version that he did not submit the three statements. He did, it is true, submit the original receipts and documents, some of which have not been produced and seem to have been destroyed. But there are photocopies of some of the missing originals, and they show alterations which, he says, were made after he had submitted the originals to BREDA.

So there is no telling whether the expenses shown in each financial statement correspond exactly with or are more or less than what was shown in the original documents submitted by the complainant. Had there been a receipt or other document constituting acknowledgment by the complainant of the receipt or payment of the difference between the sums advanced to him and the total expenses, it might have been possible to infer that he had said he had incurred the full amount of those expenses. But since the Organization has failed to produce the material documents, no such inference may be drawn.

7. There are many unsatisfactory features in the documents relied on by the Organization. One such document is a bill from a hotel for 8,854 Zambian kwachas for a cocktail party held on 16 October 1987 during the meeting at Lusaka. The sum consists of charges for food - 5,000 kwachas - and drink - 3,854 kwachas - and the bill is stamped "Paid 16 October 1987".

The complainant asserts that that was the amount actually charged and paid; the Organization contends that the total charge for food and drinks was 5,000 kwachas, and it relies on a telex dated 13 October 1989 from the hotel to that effect.

But the telex refers to payment corresponding to a receipt No. 13764 dated 15 October 1987 and does not mention, let alone explain, the stamped bill, which is not serially numbered and was apparently issued and paid on 16 October 1987. No copy of receipt 13764 has been produced. It is therefore not reasonably possible to conclude that the bill for 8,854 kwachas was a fabrication.

Another document refers to the renting of a conference hall from 12 to 16 October 1987 and contains obvious alterations. It is stamped 3 October 1987. The complainant pleads that it has been substituted for the document actually submitted by him and points out that he was not in Zambia on 3 October 1987.

There is no need to refer in detail to all the other defects referred to by the complainant, especially in view of the findings by both the Joint Disciplinary Committee and the Appeals Board that it was not clear when the forgeries and alterations had occurred and that responsibility for them could not be attributed with certainty to anyone.

8. The foregoing shortcomings in the evidence have to be considered in the light of the complainant's second plea,

that there was no fair or proper investigation.

On a mission to BREDA UNESCO's inspectors discovered two suspected cases of fraud which they referred to in their memorandum of 28 April 1989.

One involved the administrative assistant and the possible forgery of signatures of participants at a meeting at Lagos, in Nigeria. The inspectors took the view that his performance had been unacceptable in other respects and recommended his dismissal, and he was dismissed.

The other case involved the complainant and the possible forgery of signatures of participants at the Conakry meeting. The inspectors "uncovered unacceptable contracting procedures" on his part, suggested that his imminent transfer to Nairobi be stopped and, as they had not been able to present their findings to him because he had at the time been absent on mission, said they wanted to see him on 1 May 1989. They conveyed that wish to him by sending him a copy of their memorandum. On his return from mission he became aware of their allegations but was unable to go to Nairobi. Instead he tried unsuccessfully to speak to the inspectors on the telephone, as he explained in a memorandum dated 9 May 1989 protesting his innocence, suggesting ways of investigating the allegations of forgery, and urging that his transfer to Nairobi be allowed to go through.

Further investigations were carried out by the inspectors from 2 to 10 May 1989, and a report was submitted by one of them to the Inspector-General on 19 June 1989. One result was the complainant's suspension on full pay on 21 July 1989. The inspectors having failed, in April 1989, to reach the complainant, the Organization made no effort to give him an opportunity of controverting or explaining the several matters which resulted in his dismissal.

The Organization seeks to justify that by explaining that its intention was to prevent the complainant from tampering with the evidence and observes that the complainant's assertion of innocence in his memorandum of 9 May 1989 was premature because the inspectors had not even submitted a report of their findings.

That explanation is quite unacceptable since the inspectors had already made their allegations of forgery and recommended the blocking of his transfer. Since the complainant could not see them on 1 May 1989 to discuss their findings it was quite proper for him to state his point of view on 9 May 1989. Indeed, as it turns out, his fears were justified because they concluded their work on 10 May 1989 without any further attempt to get his comments on their findings.

Thus up to the time that the Joint Disciplinary Committee was appointed under Regulation 10.1 he had no opportunity of explaining his position.

The Committee was requested to examine the charge that he had made unlawful gains from funds entrusted to him and to advise the Director-General whether his conduct was tantamount to serious misconduct and to recommend disciplinary action. The specific charges against him were set out in three memoranda dated 2 August 1989, 6 September 1989 and 12 October 1989. By a memorandum of 18 August 1989 he gave background information and pointed out the failure to hold a proper investigation. By his memoranda of 10 and 27 September 1989 he replied to the memoranda of 2 August and 6 September.

The Committee met on 16 and 21 October 1989 and submitted its report on 30 October 1989 to the Director of the Bureau of Personnel. It held that no controls had been exercised by those in authority in BREDA and that there had been laxity in financial matters. Many of the original texts the complainant had submitted to the Organization were not available to the Committee. Under the circumstances a proper investigation was well-nigh impossible without obtaining clarifications and explanations from the complainant. The report of 19 June 1989 to the Inspector-General sums up the evidence against him but recognises that the falsification could have been done, without his knowledge, by the administrative assistant or by others in BREDA. The only reason that report gives for suggesting that the complainant was responsible for the falsification is that he alone would have benefited from it; but to warrant that inference proof is necessary of the exact amounts returned by him or refunded to him. Such proof is lacking. The report of 19 June 1989 did not contain sufficient evidence to support the Director-General's finding that the complainant was guilty.

9. The complainant's third plea is that the Director-

General misdirected himself in rejecting the recommendations by the Joint Disciplinary Committee and the Appeals Board and in deciding to dismiss him summarily. In his letter of 22 November 1991 to the chairman of the Appeals

Board the Director-General stated that he was unable to accept the "presumption of innocence" because the facts on which he had based his decision had been found by the Appeals Board itself.

Yet, though the Board recorded in its report the Organization's submissions on the facts, it did not come to any conclusion on them and indeed said it was "extremely difficult to impute the misfeasances committed to the complainant or to any other person ...". The Director-General's decision is thus flawed with the wrong assumption that the Board had made findings adverse to the complainant. Moreover, he himself did not independently come to a conclusion of guilt upon consideration of the available material.

10. Because of the flaws referred to in 8 and 9 above in the impugned decision, the complainant is entitled to relief.

Since he does not seek reinstatement, the Tribunal will exercise its authority under Article VIII of its Statute and grant him financial relief instead.

First, he claims payment of full salary and allowances from the date of his termination up to the date of his complaint. The Tribunal awards him damages for wrongful termination and sets the amount at the equivalent of two years' salary and allowances.

Secondly, he claims further damages in an amount equal to five years' salary on account of the injury to his professional career and to his prospects, as well as damages for moral injury caused by the postponement of his transfer to Nairobi and his dismissal. Under this head the Tribunal makes a further award of damages, again equivalent to two years' salary and allowances.

Thirdly, the complainant claims the payment of repatriation costs, consisting of the cost of air tickets for travel by himself and his family from Nairobi to Accra and of the removal of his personal effects. He also claims repatriation allowance.

Upon his summary dismissal under Rule 109.9(f) the complainant was not entitled to repatriation costs. In the exercise of the Director-General's discretion, however, the Organization agreed to pay those costs by deducting them from the sum of \$15,529 which he allegedly owed it. Since the dismissal was wrongful and the Organization has failed to prove that the complainant owes it that sum, the claim succeeds.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant the equivalent of two years' salary and allowances, reckoned at the rates prevailing in January 1990, in damages for wrongful termination.
2. It shall further pay him the equivalent of two years' salary and allowances, reckoned at the same rates, in damages under the other heads of injury.
3. He is entitled to any sums due for himself and his family in respect of repatriation from Nairobi to Accra.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

Mella Carroll
Mark Fernando
Michel Gentot
A.B. Gardner