

EIGHTY-FIRST SESSION

In re MORENO DE GOMEZ

Judgment 1553

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Yocasta Moreno de Gómez against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 October 1994 and corrected on 20 December 1994, UNESCO's reply of 3 March 1995, the complainant's rejoinder of 8 January 1996 and the Organization's surrejoinder of 12 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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 Colombian citizen who was born in 1944, started work at UNESCO in 1976 under a one-month contract as a trainee in the Education Sector at its headquarters in Paris. She continued under similar contracts for short periods.

On 1 December 1980 UNESCO offered her a temporary three-month appointment as Spanish language editor at grade P.3 in the Publications Unit of the Sector and extended it until 31 October 1981. On 1 November 1981 it granted her a fixed-term appointment and extended it regularly until 30 June 1993, when her last contract was to expire. By a letter of 12 February 1991 the Director-General informed her that as from 1 July 1987 her post was one of principal editor and upgraded to P.4, and that she was to be promoted to that grade as from 1 January 1988.

On 30 March 1992 the head of the Publications Unit gave her oral notice of the abolition of her post. By a memorandum dated 11 May the acting Director of the Bureau of Personnel confirmed that her post had been abolished in "the 1992/93 Staffing Table Review".

In June 1992 the Director-General set up a Senior Personnel Advisory Board (SPAB) to see about placing redundant staff. On 30 June the Board recommended appointing the complainant to any one of three posts it thought would do, including one - No. ED-634 - for a programme specialist. That post having been put up for competition, a second SPAB met on 20 July to assess the candidates. It recommended appointing the complainant but the Director-General preferred an outside candidate.

By a memorandum of 24 September the Bureau of Personnel informed her that, having found no other assignment for her, it was asking the Director-General to terminate her appointment. A third SPAB met on 29 September to consider that proposal. In a report it submitted the following month it recommended that the Inspectorate General should review the duties of Spanish language editor at UNESCO. It also recommended postponing the abolition of her post or, failing that, putting her on a temporary one.

In a memorandum of 29 December 1992 the acting Director of Personnel informed her that her post was going to be abolished on 1 January 1993 and that her appointment would end on 31 January 1993 under Staff Regulation 9.1 on grounds of "necessities of the service"; until then she would be on a temporary post.

By a memorandum of 28 January 1993 she lodged a protest with the Director-General against that decision. Having got no reply, she put her case to the Appeals Board on 16 March 1993. In its report of 16 June 1994 the Board recommended reinstating her. In a letter of 25 July the Director-General told her that he had ordered further attempts to place her. That is the first decision she impugns. By a letter of 10 November 1994, which she is also challenging, the Director of the Director-General's office told her that the Bureau of Personnel had found no other assignment for her.

B. The complainant submits that the purpose of abolishing her post was to get rid of her for want of any proper grievance against her. The reference in UNESCO's decision of 29 December 1992 to Regulation 9.1 is too vague.

The reasons the Organization offered in correspondence and to the Appeals Board were (1) a scant workload, (2) restructuring of the Education Sector, (3) cost-cutting and (4) the policy of decentralisation of editing in Spanish. Those reasons are, she says, wrong and partly inconsistent.

She points out that the refusal to reinstate her ignored the recommendations of 30 June and 20 July 1992 by the senior personnel advisory boards. The process of redeployment was tainted with misappraisal of the facts and diverted from its proper purpose. UNESCO was wrong to refuse her reassignment on the grounds that she was unqualified. She had training in the science and technology of education and had shown her versatility in other areas too. Her reports from 1980 to 1991 were all good. The process was misapplied in that the supposedly vacant posts of which the Bureau of Personnel had given the advisory boards a list were not free, or else the Education Sector saw that they were not.

Lastly, abolition and termination were both due to the hostility of a senior officer with whom she had disagreed at work in 1984.

She seeks the quashing of the decision of 29 December 1992, reinstatement as from 1 February 1993 in a post at grade P.4 and in life insurance coverage, cancellation of interest on overdue debts to UNESCO's savings and loans service, awards of material and moral damages and costs.

C. In its reply UNESCO contends that the abolition of the complainant's post was the outcome of an overhaul of the Education Sector required by scarcity of funds. Citing Judgment 351 (in re Pibouleau), it pleads that the Tribunal may neither assess policy set by its governing bodies nor review decisions that give effect thereto. The abolition of the post was due to "necessities of the service" and a proper exercise of the Director-General's discretion.

UNESCO says it did its utmost to place her as the senior personnel advisory boards and the Appeals Board had recommended. Her own sector and others considered appointing her to the posts the competent board had suggested or to others. But none of them matched her background and qualifications. In the competition to fill post ED-634 she was not even put on the short list.

In answer to the charge of misuse of authority, UNESCO says that the evidence does not bear out her charge of hostility. She fails in particular to show that the senior officer she mentions acted to her detriment.

D. The complainant rejoins that in discarding the recommendations by the three senior personnel advisory boards the Director-General ignored her qualifications and drew mistaken conclusions from the evidence. The preference he gave an outside candidate for post ED-634 was in breach of Regulation 4.4, which grants priority to serving staff for appointment to vacant posts, which reads:

"Subject to the provisions of Regulations 4.2, 4.3, 4.3.1 and 4.3.2 and without prejudice to the recruitment, at all levels, of fresh talent, staff members (and former staff members with at least one year's service, separated during the previous two years owing to the abolition of posts) shall be given priority of consideration for vacant posts.

Next priority shall be given, subject to reciprocity, to applicants already in the service of the United Nations and other Specialized Agencies."

E. In its surrejoinder the Organization restates its pleas. In its submission the case law recognises the Director-General's broad discretion to assess candidates for a vacancy. Besides, the complainant had no right to priority over an outside candidate. In any event she failed to appeal in time against the appointment of someone else to ED-634.

CONSIDERATIONS:

1. After serving the Organization under short-term contracts from 1976 until 1981 the complainant was granted a fixed-term appointment as from 1 November 1981 on a post, No. ED-598, for a Spanish editor in the Publications Unit of the Education Sector. Her grade was P.3. Her post became that of senior editor in Spanish and was upgraded to P.4, and she was promoted accordingly, as from 1 July 1987. Her fixed-term appointment was extended several times. The last extension was to expire at 30 June 1993.

2. On 30 March 1992 the head of the Publications Unit told her orally that her post was to be abolished. On 22 April 1992 she wrote to the Director-General pointing out that her post was "intersectoral" in that though it belonged to the Education Sector she edited texts for units in other sectors. She cited resolutions in which the General

Conference of UNESCO had declared Spanish to be the language of over a score of member States and their peoples; she asked the Director-General to reverse the decision on the grounds that it might conflict with the Organization's interests; and she suggested that there would anyway be no difficulty over transferring her because she was qualified in the science and technology of education.

3.The complainant's qualifications and competence are not in dispute. She has, among other educational attainments, a diploma and a degree from institutions in Colombia, training in the application of audio-visual techniques to education and in educational television, and a degree of master of educational sciences from the University of Paris VIII. In the reports on her performance her supervisors commended her for carrying out heavy responsibilities efficiently and conscientiously and with professionalism.

4.The Organization's "staffing table" for 1992-93 provided for the abolition of her post, ED-598, and for her redeployment. Rule 104.1(b) reads:

"(b)The Personnel Advisory Boards, each for the category of staff with which it is concerned and except with regard to the cases specified in paragraph (c) below, shall give advice on the following matters:

...

(xii) such other cases as the Director-General may request."

The Director-General accordingly consulted a Senior Personnel Advisory Board (SPAB). The Board was to see whether redundant officials qualified for any of the posts vacant, of which it was given descriptions. It recommended considering the complainant for three posts, which were numbered ED-634, CII-133 and CEU-249. Post ED-634 was in the Education Sector and applications for it were invited from 22 January to 22 April 1992. In a letter of 22 April to the Director-General the complainant said that she thought she was qualified for it.

5.The question of recruitment to post ED-634 was referred to a SPAB, which recommended the complainant, and her alone, for the post.

6.In a memorandum dated 24 September 1992 the Bureau of Personnel told her that since it had found no suitable post for her the Director-General would be convening another SPAB to consider the question of termination of her appointment.

7.In a report dated 21 October 1992 the new SPAB observed that though recommended for three posts she had not been interviewed for any of them. It recommended "in-depth study" of the duties of a Spanish editor and either postponing abolition of post ED-598 or else putting her on a temporary one to allow time in which to see whether she could be transferred to any of the nine posts that she herself thought would suit her.

8.Having seen the Board's report, by a memorandum of 29 December 1992, the acting Director of Personnel informed her on the Director-General's behalf that her appointment was terminated at 31 January 1993. On 28 January she appealed to the Appeals Board.

9.In its report of 16 June 1994 the Appeals Board observed that of the twelve posts that were being abolished in the Education Sector six were at the time vacant and there were officials on the other six. Of those six officials three were to retire. One of the remaining three had agreed to termination and another was being redeployed. The complainant was the only one to have to go. The Board held that in filling post ED-634 there had been disregard of her academic qualifications, her experience of education, her very good record of performance, and the priority she had deserved on account of the abolition of her post. It believed that, having a consistently good record over ten years, she should have proved suitable for redeployment. It recommended reappointing her as from the date of termination, on a temporary post if necessary, until a suitable established one was found.

10.Paragraph 20 of the Statutes of the Appeals Board required the Director-General to take a decision on the Board's report "as soon as possible". By a letter of 25 July 1994 he told her that after considering the report and the records of her case he was ordering further attempts to find a suitable post for her.

11.On 5 August 1994 the Bureau of Personnel circulated a memorandum to sixteen units telling them of the Director-General's instructions and supplying information about the complainant's qualifications and experience.

12. On 10 November 1994 the Director of the Director-General's Office informed the complainant that despite many inquiries and consultations the Bureau had been unable to find a post for her, but the Director-General was willing to treat the termination of her appointment as agreed separation under Regulation 9.1.2 and Rule 109.7(e) and in accordance with the Rule to raise her indemnity by half.

13. The complainant is impugning the Director-General's decision of 25 July 1994 and the final decision conveyed in the Director's letter of 10 November 1994. Her pleas are that the termination was flawed by a mistake of law, mistakes of fact and the failure to consider essential facts, misappraisal of the evidence, breach of due process, bias and abuse of authority.

The abolition of the complainant's post

14. The complainant argues that the abolition of her post, ED-598, was a subterfuge calculated to get rid of her for want of any legitimate grievance. In her submission the decision was irrational in that not enough consideration was given to the importance of publications in Spanish. Since the post was "intersectoral" the workload did not depend merely on the needs of the Education Sector. Yet that sector recommended doing away with the only post of Spanish editor in the whole secretariat and at the same time creating two posts for English editors. She contends that the reasons given for the restructuring - the need to reduce costs and the "decentralisation" of editorial services - were unsound. She asks the Tribunal to declare the abolition of her post an abuse of authority.

15. Many judgments - for example 1131 (in re Louis) - have declared that the Tribunal will not review an organisation's policy but only an individual decision taken to give effect thereto and the actual application of substantive rules.

Its power of review is limited. It may not supplant an organisation's view with its own on such matters as policies of restructuring or redeployment of staff intended to make savings or improve efficiency. It will interfere only when a decision was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or neglected some essential fact, or constituted an abuse of authority, or drew mistaken conclusions from the factual evidence.

16. In a memorandum of 31 July 1992 to senior officers both at headquarters and in field offices the Director-General stated that in accordance with the Programme and Budget approved by the Organization's General Conference at its twenty-sixth session he was making several changes in the Education Sector. He cited the plans of work and staffing tables for 1992-93 and the consequent recommendation to abolish post ED-598 and reassign the complainant. The Tribunal is satisfied that the restructuring of the Education Sector, entailing the abolition of post ED-598, was not aimed at the complainant herself: there were objective goals that the Organization was seeking to attain and the Tribunal will not review the reasons of policy underlying the decision to restructure the Sector.

The charge of bias

17. The complainant alleges that the bias which the Administration has shown towards her goes back to 1984, when she co-operated in an inquiry carried out by the Inspectorate General. One finding of the inquiry - she says - "nearly created difficulties" for the head of the division in which she was working. That official was later promoted to high office in the Organization and she alleges that countless disguised sanctions were imposed on her after the inquiry.

18. In the absence of direct evidence she is asking the Tribunal to infer some connection between the inquiry and later incidents and impute some ulterior and malicious motive to those who took decisions which affected her. The incidents are too remote, however, and the evidence she offers too tenuous for the Tribunal to be satisfied that her charge of bias against the Administration is sound.

The failure to reassign

19. The complainant contends that, as the Appeals Board held, there was a general misconception in the Organization of her qualifications and specialised training though her appraisal reports had commented on her versatility and ability to work on her own in clarifying specialised publications.

20. It seems indeed strange that as late as 6 November 1992 the complainant had to write to inform the Assistant

Director-General in charge of the Education Sector of her qualifications and experience in education. In a memorandum of 18 September 1992 to the Director-General the Deputy Director-General for Management reported on meetings he had held with staff representatives about redeployment and termination and sought the Director-General's confirmation of the decisions he set out. In an appendix to his memorandum the complainant's duties were described as "editing manuscripts" and "translation"; the date of her recruitment was wrong; and she was said to have been born in 1937, not in 1944. Yet the nature of her qualifications, the duties assigned to her former post and her age were all crucial considerations in deciding whether, and to what posts, she could be reassigned.

21. The complainant contends that in selecting an external candidate for post ED-634 the Director-General acted in breach of Regulation 4.4, which entitled her to priority for assignment to a vacant post, and thereby denied her the benefit of the Regulation, the text of which appears in D above.

22. The Appeals Board stated:

"... the duty of the Administration for the reintegration of an employee is paramount. That is why Regulation 4.4 states that 'staff members shall be given priority of consideration for vacant posts'. After carefully looking at all the documents and the facts and circumstances of the case, the Appeals Board is of the opinion that the Administration has not pointed out how it tried to fulfill this duty."

There is indeed conflicting evidence about some of the efforts the Organization made to redeploy the complainant. In a letter dated 29 January 1993 the Director-General informed the president of the Staff Association that the Education Sector had considered her for nine posts and had turned her down for every single one. Yet in a memorandum of 4 November 1992 to the Chief of Human Resources Development, Bureau of Personnel, the Sector had stated that of the nine posts one had been abolished; two, including ED-634, were filled; one was not available because the occupant had been transferred elsewhere with it; two were frozen until 1 January 1994; one was to be abolished on the retirement of the incumbent; one was highly technical and the complainant's fitness for it had to be assessed; and an assessment of her fitness for post ED-924 which was graded P.3 had been sent to the Deputy Director-General for Management.

23. The only answer the Organization offers to the complainant's plea about Regulation 4.4 is in its surrejoinder:

"The complainant is plainly mistaken in thinking that she has any right of priority over an outside candidate whatever their merits may be."

The Organization has in fact fallen into error in construing 4.4. The true scope of the protection it affords is to be explained in Judgment 133 (in re Hermann) on another case that was brought against UNESCO:

"... as a general rule, the procedure laid down by Articles 4.1 to 4.4 of the Staff Regulations and by Staff Rules 104.1 and 104.2 will be followed; in other words, after consulting the competent Advisory Board and comparing the merits of the various candidates, the Director-General will assign the staff member whose post has been abolished to another post only if he appears to be at least as competent as the other applicants in competition with him. However, it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

24. The Tribunal is satisfied on the evidence that despite the unanimous recommendations by the senior personnel advisory boards and by the Appeals Board the Organization failed to give the complainant priority for vacant posts. It put the wrong question to its units and to its Bureau of Personnel. The right question was not whether there was a post that fitted her qualifications and experience but whether there was a post of which she was capable of fulfilling the duties competently. Even after the Director-General had written her the letter of 25 July 1994 mentioned in 10 above no instructions went out that she should be given priority for any vacant posts. So the decision to terminate her services rested on a misinterpretation of Regulation 4.4 and so on a mistake of law.

That decision must therefore be set aside, there being no need to entertain the complainant's other pleas.

25. The termination has had disastrous results for the complainant and her family. Because of loss of income she had put up her flat in Paris for sale by public auction and it fetched a fraction of its market value. She cannot meet her obligations to the Savings and Loans Service of UNESCO. She has found no other employment. Her right of residence in France is in doubt. She has accordingly claimed damages for both material and moral injury.

26. The Organization must adopt one of two options. One is to reinstate her and pay her full entitlements as from 1 February 1993 plus interest but less any sums she received by reason of termination, and to grant her an appointment for two years, again at grade P.4, from the date of this judgment. If the Organization does not adopt that option, it must pay her the equivalent of her salary and allowances for four years and six months at the rates prevailing at 31 January 1993, plus interest. She is also entitled to an award of half a million French francs in damages for the grave material and moral injury she has suffered and to an award of 50,000 francs in costs.

DECISION:

For the above reasons,

1. The Organization's decisions of 29 December 1992, 25 July 1994 and 10 November 1994 are quashed.

2. The Organization shall either, within sixty days of the date of publication of this judgment:

(a) reinstate the complainant at her former grade as from 1 February 1993 and up to the date of this judgment;

(b) pay her salary, allowances and any other benefits accordingly, less any indemnities she may have received on termination;

(c) pay her interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due; and

(d) grant her a contract of appointment for a period of two years from the date of this judgment at the same grade and in a post matching her qualifications and experience;

or, failing that:

(a) pay her damages in an amount equivalent to her salary and allowances for four years and six months at the rates prevailing at 31 January 1993, less any indemnities she may have received on termination; and

(b) pay her interest on the net amount at the rate of 10 per cent a year as from 20 December 1994, the date of correction of her complaint, up to the date of payment.

3. The Organization shall pay the complainant a total of 500,000 French francs in damages for material and moral injury.

4. It shall pay her 50,000 French francs in costs.

5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas
E. Razafindralambo
Egli
A.B. Gardner

