

NINETY-FIFTH SESSION

Judgment No. 2229

The Administrative Tribunal,

Considering the second complaint filed by Mr R. A.-O. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 April 2002 and corrected on 30 April, the Organization's reply of 7 August, the complainant's rejoinder of 17 September and UNESCO's surrejoinder of 18 December 2002;

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 Spanish national born in 1947, joined UNESCO in 1980 as a translator and minute writer at grade P.3. At the material time he was Head of the Spanish Translation Section and held grade P.5.

During the first half of 1999, anonymous documents written in Spanish circulated in the Division of Conferences, Languages and Documents (CLD). They were of a defamatory nature and concerned several staff members. By a memorandum of 29 July 1999 the Inspector-General informed the Director of CLD and the Director of the Bureau of Personnel that he had conducted an inquiry amongst members of the Spanish Translation Section and that witness statements identified the complainant as the author of the documents in question. By a memorandum of 22 September 1999 the Director of Personnel informed the complainant that the Director-General had decided that he was to be "provisionally relieve[d], with immediate effect, of the supervisory functions attached to [his] post" and that his case would be referred to a Joint Disciplinary Committee. The Committee met four times between January and April 2000. Its report was disclosed neither to the complainant nor to the Appeals Board, and it has not been produced before the Tribunal. According to UNESCO, the Committee concluded unanimously that there was insufficient evidence to prove the allegation that the complainant was the author of the anonymous documents; however, it considered that the complainant had failed to take the necessary immediate measures when these documents were brought to his attention, particularly in order to identify their author and stop their circulation, and consequently recommended that the complainant be transferred immediately to another sector.

By a memorandum of 13 July 2000 the acting Director of the Office of Human Resources Management (formerly the Bureau of Personnel) informed the complainant that the Director-General had "decided to approve the [...] Committee's recommendation that [he] be transferred from CLD to another sector" and that he was to be seconded, with immediate effect, to the Office of Monthly Periodicals (OMP) for a period of three months during which the Office of Human Resources Management would examine the possibility of transferring him to another sector.

On 31 July the complainant submitted a written protest against that decision to the Director-General; having received no reply to his protest, on 14 September he filed a notice of appeal, followed by a "detailed appeal" on 4 October 2000. In its report dated 12 July 2001 the Appeals Board noted that the refusal to disclose the Joint Disciplinary Committee's report to the complainant and even to the Appeals Board - which had expressly requested it - was tantamount to depriving the complainant of the means to defend himself, violated the principle of natural justice as well as the fundamental principles of law, equity and justice and invalidated the impugned decision, which was based on the Committee's report. It considered that the defendant's interpretation of Staff Rule 110.2(f) [\(1\)](#) was erroneous insofar as the confidential nature of the report did not justify withholding it from the staff member concerned, nor from the statutory members of the Appeals Board, nor indeed from staff members

who needed to have access to it in the exercise of their functions. It recommended that the Director-General should retract the disputed memorandum of 13 July 2000, without prejudice to any appropriate measures which the Administration might decide to take, in accordance with the Staff Regulations and Staff Rules and with the requirements of due process, after having provided the complainant with a copy of the Joint Disciplinary Committee's report.

On 1 August 2001 the complainant's contract was extended for a period of two years. The notice of personnel action that was sent to him indicated that he remained a Head of Section within CLD. By a memorandum of 15 September the Deputy Director of Human Resources informed the complainant that his secondment to OMP was extended "until further notice".

On 24 October 2001 the Director-General informed the complainant that, having studied the opinion of the Appeals Board, he had asked the Administration "to reconsider [the complainant's] administrative situation prior to a decision [by him] on the matter". Finally, by a memorandum of 11 March 2002, the acting Director of Human Resources informed the complainant that the Director-General had decided to transfer him, at the same grade, to the Culture Sector. That is the impugned decision.

B. The complainant asserts that his post is that of Head of the Spanish Translation Section in CLD and that he has been technically redundant since November 2001, when OMP ceased to exist. As for his transfer to the Culture Sector, this was in fact a sanction motivated by the desire to oust him from his post. He accuses the Administration of "having attempted to buy his hasty departure from the Organization". He considers that UNESCO's refusal to produce the Joint Disciplinary Committee's report is suspicious, and he believes that the Committee in fact discovered a number of irregularities within CLD and made several recommendations, only one of which was followed by the Director-General, thus distorting all of them. He criticises the defendant for failing to comply with the provisions of the UNESCO Manual concerning disciplinary measures, particularly with regard to the production of documents and the right to be heard by the Director-General prior to any sanction. He also submits that the Organization disregarded Staff Rule 110.3,⁽²⁾ since the decision to suspend him was taken without "*prima facie* evidence of serious misconduct".

The complainant asserts that he has suffered an unjust and arbitrary sanction amounting to abuse of authority and seriously harming his reputation, career and health. He considers himself to be the victim of mobbing by his supervisors. He complains about his conditions of work in OMP. Thus, UNESCO failed in its duty as recognised by the case law, to protect the dignity and reputation of its staff members and to abstain from unnecessarily placing them in difficult personal situations.

The complainant seeks reinstatement in his functions as Head of the Spanish Translation Section, with a penalty for default of 1,524 euros per day with effect from the date of the delivery of the present judgment, a public apology by the Administration, 150,000 euros in moral damages and 3,000 euros in costs.

C. In its reply the Organization begins by explaining that, in view of the confidential nature of the Joint Disciplinary Committee's report, it cannot produce a copy of it.

It asserts that the decision to suspend the complainant complies with Staff Rule 110.3: it is based on the findings of the inquiry conducted by the Inspector-General, who relied on several concurring witness statements as *prima facie* evidence; the drafting and circulation of the documents in question constitute serious misconduct; and since they directly concerned staff members of the same division, the mere presence of the complainant jeopardised the smooth running of the division and was prejudicial to the interests of the Organization.

With regard to the lawfulness of the decision to transfer the complainant, UNESCO submits that it did not wish to entrust him with supervisory functions since he had demonstrated that "he was not capable of performing them at all times". Furthermore, it declares that its aim "was to distance the complainant from his professional environment, because even though it had not been possible to prove the allegations levelled at him, the suspicions he aroused within his Division were such that harmonious working conditions could not be guaranteed, which would have been detrimental to the interests of the Organization". It also points out that transfer decisions are at the discretion of the Director-General and are subject to only limited review by the Tribunal.

Lastly, regarding the claim for moral damages, the defendant considers that the complainant has established neither the existence of an unlawful act nor any injury. As for his request for a public apology, this lies beyond the

competence of the Tribunal.

D. In his rejoinder the complainant reiterates his arguments. He maintains that the suspension measure was unlawful given that the Inspector-General's findings were not the result of any serious adversarial inquiry, but were merely based on defamatory remarks made by one staff member. He asserts that all the work performed by the Inspector-General was dismissed as invalid by the Joint Disciplinary Committee, which restarted the inquiry from scratch and concluded unanimously that the accusations levelled at him had not been proved.

The complainant argues that the refusal to produce the Committee's report prevents him from knowing the reason for the decision to transfer him, which amounts to a breach of his fundamental right to be informed. He explains that he initially made no comment on the circulation of the documents in question - which occurred during a period of heavy workload - so as not to perpetuate what he considers to be an attempt to "sabotage" the Spanish Translation Section. He states that he is shocked by the defendant's statement that the aim "was to distance [him] from his professional environment" despite the fact that he had been found not guilty by the Joint Disciplinary Committee. He adds that although the Director-General is entitled to transfer staff members, Staff Regulation 1.2 stipulates that he must take their qualifications and experience into account - which was not the case - and that, according to the Tribunal's case law, a transfer decision can be set aside if it is based on a "mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence". According to the complainant, the impugned decision is tainted by all of those defects. Lastly, he submits that the decisions to transfer him to OMP and then to the Culture Sector amount to genuine mobbing, and that the causal link between the mistakes committed by the Organization and the moral damage he suffered is obvious.

E. In its surrejoinder UNESCO categorically denies the complainant's allegations regarding the Inspector-General: it considers that, on the contrary, the latter conducted a meticulous inquiry. It denies that the impugned decision is flawed and maintains that the Joint Disciplinary Committee had recommended that the complainant be transferred to another sector, which was done in order to ensure appropriate and harmonious working conditions in CLD.

CONSIDERATIONS

1. During the first half of 1999 anonymous defamatory documents circulated within CLD. On 29 July 1999 the Inspector-General of the Organization sent a memorandum to the Director of CLD and the Director of the Bureau of Personnel concerning his inquiry into these documents; in it he stated that witnesses had directly implicated the complainant as being responsible for the first distribution of the documents in question, and that other witnesses had been more evasive. He concluded "that a strong disciplinary measure [was] required". By a memorandum of 22 September 1999 the complainant was informed by the Director of Personnel that, in view of the results of the inquiry, the Director-General had decided provisionally to relieve him, with immediate effect, of the supervisory functions attached to his post and, given the serious nature of the facts at issue, to refer the matter to a Joint Disciplinary Committee in accordance with Staff Rule 110.2.

Having examined the case, the Committee prepared a report for the Director-General. However, despite the complainant's numerous requests, the report was never made available to him, the Organization having refused to disclose it for reasons of confidentiality.

On 31 July 2000 the complainant submitted a protest against the decision to second him to the OMP. Denying that he was the author of the anonymous documents, he asked for the decision to be set aside and to be reinstated in his previous functions. Having received no reply he filed an appeal with the Appeals Board. In its report dated 12 July 2001 the Board recommended that the Director-General should retract the disputed memorandum dated 13 July 2000, without prejudice to any appropriate measures which the Administration might take after having provided the complainant with a copy of the Joint Disciplinary Committee's report.

On 24 October 2001 the Director-General informed the complainant that he had decided to ask the Administration to review his administrative situation before taking a decision.

On 11 March 2002 the acting Director of Human Resources sent a memorandum to the complainant stating the following:

"Having examined the various proposals submitted to him, the Director-General has decided, in accordance with Staff Regulation 1.2 to transfer you at the same grade to the Culture Sector with effect from 22 March 2002 [...]."

That is the decision which the complainant challenges before the Tribunal. He seeks reinstatement in his functions as Head of the Spanish Translation Section, with a penalty of 1,524 euros per day for default with effect from the date of delivery of the present judgment, a public apology, 150,000 euros in moral damages and 3,000 euros in costs.

The subject-matter and receivability of the complaint

2. The complaint concerns only the decision of 11 March 2002, implicitly confirming that of 13 July 2000 by which the Director-General decided to transfer the complainant to a different sector.

The decision of 22 September 1999, by which he was "provisionally relieve[d]" of the supervisory duties attached to his post, is not impugned.

The impugned decision of 11 March 2002 does not cancel that of 13 July 2000, but extends it by changing the sector to which the complainant is transferred, which the Administration had reserved the right to do in its earlier decision. There is no dispute as to the choice of sector to which the complainant has been transferred, but only as to the principle of transferring him out of CLD. Consequently, in this respect the internal means of redress can be considered to have been exhausted.

The complainant's claims for reinstatement in his previous functions and for moral damages are likewise receivable with regard to the requirement that internal remedies be exhausted.

3. (a) According to the Tribunal's case law, transfer decisions, which have been initiated by the Administration and not at the staff member's request, may be disciplinary, non-disciplinary (in the interests of the organisation, independently of any fault) or even mixed in nature.

A transfer of a non-disciplinary nature is subject to the general principles governing all decisions affecting an official's status. It must show due regard, in both form and substance, for the dignity of the official concerned, particularly by providing him with work of the same level as that which he performed in his previous post and matching his qualifications (see, for example, Judgments 1496, 1556, 1972 and the cases cited therein; and Staff Regulation 1.2, which provides that an assignment to a post must show due regard for the qualifications and experience of the individual concerned). The transfer may be motivated by the need to eliminate tensions compromising the functioning of a department (see, for example, Judgments 132, 1018 and 1972).

By contrast, a transfer of a disciplinary nature must afford the staff member the safeguards available in the case of disciplinary sanctions, that is the right to be heard before the sanction is ordered, with the opportunity for the staff member concerned to participate in the full processing of the evidence and to make all his pleas. It matters little in this respect whether or not transfer is envisaged amongst the disciplinary sanctions set out in the Staff Regulations. What is decisive is whether the transfer appears to be the consequence of alleged professional shortcomings of the staff member which may, by their nature, give rise to disciplinary sanctions (see Judgments 1796, 1929 under 7, 1972 under 3 and 4, and the cases cited therein).

A transfer dictated by the interests of the organisation but which is also disciplinary in nature must clearly also comply with the specific rules protecting staff members in the case of disciplinary decisions (see Judgment 1929, mentioned above).

(b) Whether or not the transfer arises from disciplinary proceedings, the right of a staff member to be heard must be guaranteed (the only difference being that in the former case he must be able to exercise that right before the sanction is decided, whereas in the latter case he may be heard after the decision has been taken). According to general principles of law, the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. Under normal circumstances, such evidence cannot be withheld on the grounds of confidentiality.

In accordance with the principles relating to the protection of information, staff members are entitled, even outside the context of a dispute, to have access to significant information concerning them which is in the possession of the administration (see Judgment 1756, under 10(b), and the cases cited therein). This applies *a fortiori* in the context

of a procedure in which such information is used to support a decision affecting a staff member. There are, however, special cases in which higher dictates preclude its disclosure (on this issue, see Judgment 1756, under 10(b)).

A provision such as Staff Rule 102.2(f) which stipulates that the reports of joint disciplinary committees or other boards of enquiry are confidential, cannot be construed as preventing the disclosure of such reports to a staff member adversely affected by a measure taken against him. Otherwise, the higher principle of the right to be heard would be violated. Although consideration 4 of Judgment 1116 might be interpreted differently, it cannot be followed. As for Judgment 557, cited by the Administration before the Appeals Board, it concerned the disclosure of the minutes of the Reports Board, in other words a different case on which the Tribunal need not comment. It should be noted that the Tribunal held in Judgment 1228, under 4, that where the report of a disciplinary committee had been submitted to the Joint Appeals Committee, it had to be disclosed to the complainant as well, as an "elementary rule of due process".

4. (a) In the present case, the disputed transfer could conceivably have been dictated by the interests of the Organization, but it bore the outward appearance of a disciplinary sanction, even though a transfer at the same grade is not mentioned as a disciplinary measure in the Staff Regulations. Indeed, the transfer occurred in the context of a disciplinary procedure, which had begun with provisional measures of a disciplinary nature and with the convening of the Joint Disciplinary Committee, and the decision of 13 July 2000 confirms that it was that Committee which had recommended to the Director-General that the complainant be transferred. Moreover, the complainant was not informed that the disciplinary inquiry had proved inconclusive, or that the transfer had been ordered solely in the interests of the Organization, since he was even denied access to the Joint Disciplinary Committee's report. Yet the Organization would have been obliged to provide such information had it intended to transfer the complainant for non-disciplinary reasons alone.

Since that was not the case, the specific rules governing the disciplinary procedure ought to have been observed, but clearly they were not.

(b) Even if the disputed transfer could be considered to have been dictated solely by the interests of the Organization, independently of any sanction in respect of a shortcoming of the staff member, the complainant's right to be heard would be breached by the Organization's refusal to grant him access to the Joint Disciplinary Committee's report on which the Director-General based his decision. The Appeals Board rightly reached the same conclusion.

5. (a) In view of the procedural flaw thus established, the impugned decision must be set aside. The Director-General shall make a new decision, after having resumed the procedure at the point where it became flawed.

If the Director-General wishes to render his decision entirely non-disciplinary in nature, he shall mention that fact clearly, as indicated under 4(a), above. Failing that, the specific rules governing disciplinary measures will have to be observed.

In any case, if the transfer is to be maintained, the report of the Joint Disciplinary Committee will have to be disclosed to the complainant, who will then be entitled to submit his observations and evidence in accordance with due process.

(b) In view of the violation established above, the complainant shall be entitled to 10,000 euros in damages. A ruling on his claims for reinstatement and for the payment of additional sums would be premature. These issues shall also be addressed by the Director-General's new decision.

6. Since he succeeds, the complainant is entitled to an award of costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons:

1. The impugned decision of 11 March 2002 is set aside.

2. The matter is sent back to the Director-General for a new decision in accordance with consideration 5, above.
3. The Organization shall pay the complainant 10,000 euros in moral damages.
4. It shall pay him 3,000 euros in costs.
5. All other claims are rejected.

In witness of this judgment, adopted on 16 May 2003, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Jean-François Egli

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet

1. Staff Rule 110.2(f) reads as follows: "Proceedings of the [Joint Disciplinary] Committees and their reports together with their recommendations to the Director-General shall be confidential."
2. Staff Rule 110.3, entitled "Suspension pending investigation", reads as follows: "If the Director-General considers that there is *prima facie* evidence of serious misconduct by a staff member and that the staff member's continuance in service pending a decision by him would prejudice the interests of the Organization, the Director-General may suspend the staff member from his functions, without prejudice to his acquired rights, with pay or, in exceptional cases, without pay."