

NINETY-SEVENTH SESSION

Judgment No. 2366

The Administrative Tribunal,

Considering the complaint filed by Mr M. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 6 May 2003, UNESCO's reply of 1 September, the complainant's rejoinder of 17 September, the Organization's surrejoinder of 22 December 2003, the complainant's further statement of 16 January 2004 and UNESCO's comments thereon of 9 April 2004;

Considering Articles II, paragraph 5, and VII 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 Tanzanian national born in 1948, joined the service of UNESCO in May 1981 as an Internal Auditor at grade P-4. At the material time he was assigned to the Bureau of the Budget as Senior Budget Officer at grade P-5.

A proposal had been made in a memorandum dated 7 April 1999 from the Assistant Director-General to the Director General that the complainant be transferred to the post of Deputy Inspector-General in the Inspectorate General. On 15 April the Director-General indicated his agreement on the memorandum, adding that the complainant should benefit from a personal promotion to grade D-1, as of 1 January 2000. The transfer took place with effect from 1 April 2000; however he remained at grade P-5.

By a note of 22 October 1999 the Director-General had announced a number of personal promotions, including that of the complainant, which were to take effect on 1 November 1999. A new Director-General was appointed on 12 November 1999 and took up office on 15 November. That same day, the General Conference adopted Resolution 30 C/72, inviting the new Director-General, among other things, "to review, with the aim of ensuring that the financial impact has been taken into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". By a note dated 26 November the Director-General informed the senior officials of the Organization that he had "decided to suspend temporarily the implementation of the most recent decisions – i.e. those taken as of 1 October 1999 – relating to appointments, reclassifications and promotions". He added that these "holding measures, which [were] taken in the interests of the Organization, neither prejudice[d] the legitimacy of such decisions nor [...] entail[ed] any automatic cancellation. Each case [would] be examined in the context of the overall review mentioned above, the conduct of which [would] be entrusted to a Task Force on the Secretariat's structure and staffing to be set up shortly. Priority [would] be given to the consideration of those decisions which [had] been suspended, so as to arrive at a rapid conclusion". This task force was set up under the name "Task Force on Secretariat structure, staffing and management systems".

By DG/Note/00/3 dated 22 February 2000 the Director General informed senior officials that, further to the recommendations of the Task Force, he had decided that since personal promotions had been discontinued since 31 December 1994, they should be "assimilated to post reclassifications and re-examined as such". The note set out the procedure to be followed, namely, for each request, a revised job description would be submitted and a desk audit would be conducted. The classification of the complainant's post was consequently reviewed and on 12 December 2000 the Director of the Bureau of Human Resources Management (HRM) informed him, on the Director General's behalf, that his post was maintained at grade P-5.

The complainant appealed against this decision to the Appeals Board and in its report dated 12 December 2002 the

Board found that the decision to promote the complainant had been confirmed in a memorandum of 19 April 1999 and communicated to the Executive Board for information on 30 September 1999; consequently, it was erroneous on the part of the Administration to include the complainant's promotion among the suspended cases. The Board recommended that the complainant's promotion to grade D-1 be granted. In a letter dated 21 February 2003 the Director-General informed the complainant that he had decided to reject the Board's recommendation insofar as it inferred the existence of a binding decision – taken before 1 October 1999 – to promote the complainant. He added that he had instructed HRM to review the situation of the complainant's post and ensure that a desk audit be completed in accordance with the procedures outlined in DG/Note/00/3 of 22 February 2000. That is the impugned decision.

On 2 December 2003 the complainant was informed in writing by the Director of HRM that, following a desk audit of his post carried out by an external evaluator, the Director General had decided to maintain the complainant's grade at P-5. He was told to consider this as a final decision.

B. The complainant submits that he is contesting the arbitrary and discriminatory measures taken by the Administration to implement Resolution 30 C/72. The Resolution did not specify "a cut-off date", but instead instructed the Director-General to review all promotions and appointments made during the 1998–99 biennium. The Director-General acted arbitrarily by reviewing only those made after 1 October 1999. Furthermore, the Organization does not attempt to explain this date, other than saying that it lies within the Director-General's discretionary authority to interpret the Resolution.

There have been several breaches of the principle of equal treatment. First, only those promotions and appointments made after 1 October 1999 were suspended and reviewed, and not those made during the entire biennium as required by the Resolution. Secondly, the Administration has contradicted itself on the subject of personal promotions, stating that the decisions regarding these were "irregular and unlawful" yet it only cancelled one personal promotion granted during the biennium. In order to treat all staff members equally, it should have cancelled the other 20 that had been granted, or granted the complainant his personal promotion. Furthermore, one staff member had her name taken off the list of suspended promotions after she informed the Administration that the decision to promote her had been taken prior to 1 October. The complainant took a similar initiative but his name was not removed from the list.

He also argues that there was a mistake of fact, and that an essential fact was overlooked. The decision to promote him was made by the Director-General on 15 April 1999 and was confirmed in an official memorandum four days later from the Director of Cabinet to various senior officials; other decisions in the same memorandum were subsequently implemented. In accordance with Article 54 of the Rules of Procedure of the Executive Board, the latter was consulted in September 1999 regarding the complainant's promotion and other appointments and promotions. The Board had taken note of the document submitted to it, entitled "Information for the Executive Board on decisions taken more recently by the Director-General on the appointment, promotion and extension of appointments of staff members at grade D-1 and above" and it gave its agreement. Thus the decision to suspend his promotion was based on an error of fact. He distinguishes his case from two earlier judgments by the Tribunal and says that in those cases there was not an official memorandum confirming the Director-General's decision. He contends that he was officially notified, having been orally informed and congratulated by his supervisor.

Lastly, he submits that there was a failure by the Administration to abide by its own procedure, as set out in DG/Note/00/3 of 22 February 2000 for reviewing the suspended cases. He claims that neither was a job description submitted for his post, nor was a desk audit conducted. Even if it could be argued that the Administration was correct to suspend his personal promotion, it still had to follow its own rules; but there were contradictory statements made in the memorandum informing him that his post was being maintained at the P-5 level. For instance, the Administration stated that a desk audit could not be conducted because he was absent from work at the time, while saying that the desk audit did not confirm the validity of the reclassification of the post. He accuses the Administration of bad faith.

He requests the Tribunal to find that UNESCO acted unlawfully in suspending and subsequently cancelling his promotion and to quash the decision. He asks that the Organization be ordered either to promote him retroactively to 1 January 2000 or to cancel all other staff promotions granted between 1 January 1998 and 15 November 1999. He claims damages for professional and moral injury as well as an award for "exemplary punitive damages". He also claims costs and interest on any sums due. He makes a general claim for "such other relief as the Tribunal may deem appropriate".

C. In its reply the Organization states that although the complaint is receivable *ratione temporis* it is not receivable *ratione materiae*. Since the Director-General ordered a review of the complainant's post, the letter of 21 February 2003 does not constitute a final decision; however, that letter has replaced the old decision dated 12 December 2000. In addition, UNESCO says that, as the complainant has expanded some of his claims, and even added new ones, these are not receivable.

On the merits, it points out that the complainant has referred to procedural flaws made in a desk audit carried out on his "old" post in 2000 during which he could not be interviewed. As a result, no promotion could be confirmed unless a final decision had concluded that the audited post was at the level corresponding to the promotion. The decision of 21 February 2003 ordering a new assessment of the complainant's post took account of the recommendation of the Appeals Board. It is on the basis of the results of the desk audit that the Organization will take a final decision.

UNESCO denies bad faith or having taken any arbitrary or discriminatory measures. Not only was it within the Director General's discretion to decide how to implement the General Conference Resolution, but, it notes, the Executive Board had expressed its support at its 159th Session for the manner in which the Director-General had decided to proceed. Additionally, the decision to suspend promotion was only a provisional measure, allowing a review of each case to be carried out subsequently. Nor was there any breach of the principle of equal treatment. The Organization refers to the Tribunal's case law on this issue. This principle only applies to lawful measures and it cannot give rise to a right to benefit from an unlawful measure. All staff members in the same situation were treated equally, depending on the nature of the suspended promotion. It points out that the staff member, who according to the complainant was treated differently, was not in the same situation in fact or in law.

There was not a mistake of fact, nor was an essential fact overlooked. The steps taken in April 1999 did not constitute a decision binding the Organization and nothing had been communicated to the complainant in such a way as to enable him to consider that UNESCO had intended to notify him of a promotion decision.

D. In his rejoinder the complainant asserts that his complaint is receivable, as are all his claims for relief. He says that UNESCO has tried to confuse the Tribunal by making it appear as if his complaint is about "a simple case of reclassification" and he notes that UNESCO dwells on this aspect rather than addressing his arguments. He reiterates that he has never been given an explanation why 1 October 1999 was chosen as the cut-off date; this, he says, is surely arbitrary. He presses his plea that, in order not to be discriminatory, all personal promotions made during the biennium should have been reviewed. He denies that he is trying to benefit from an irregular and unlawful decision of the former Director General. He maintains his position that the decision to grant him a personal promotion was made on 15 April 1999 and confirmed in an official memorandum four days later.

E. In its surrejoinder UNESCO maintains that the complaint is not receivable *ratione materiae*. The complainant has filed his complaint prematurely, without waiting for a final decision on the matter. It informs the Tribunal that the Director-General made a final decision on the matter on 2 December 2003, rejecting the complainant's request for a promotion. It asks the Tribunal not to find the absence of a new complaint to be an obstacle in ruling on this one. Therefore, it requests the Tribunal to allow the complainant to comment on this new decision before it rules on the complaint. It says that this new review of the post was carried out by an external evaluator following the proper procedures. There has been no mistake of fact, as there had been no official decision taken before 1 October 1999 regarding the complainant's personal promotion. Furthermore, UNESCO notes that the complainant has not produced any evidence to the contrary.

F. In his further statement the complainant reiterates that the decision giving rise to his complaint was the decision of 12 December 2000, which he appealed against to the Appeals Board. Furthermore, had he not filed his complaint against the Director-General's decision on his appeal, the matter would have been considered closed by the Administration. He contends that the desk audit recently conducted was both formally and procedurally flawed. The Organization should have conducted the audit in June 2000. Instead, it was conducted in August 2003, and there are elements and conditions that had existed earlier that could no longer be re-created. The external evaluator was not impartial and the results of his report cannot be independently verified.

G. In its final comments, UNESCO presses its pleas. It maintains that the reclassification review was carried out properly. The Director-General's decision following the complainant's appeal was not a final one, because he had requested that a new desk audit be carried out on the complainant's post. It was the decision on 2 December 2003, following the desk audit, which should be considered as the final decision.

CONSIDERATIONS

1. The complainant has been employed by UNESCO since 1981. In October 1991 he was appointed Senior Budget Officer in the Bureau of the Budget at grade P-5. In March 2000 he was transferred to the Inspectorate-General as Deputy Inspector-General, a post also classified as P-5. The memorandum dated 7 April 1999 containing a proposal for his transfer also indicated that he was to be considered for personal promotion to grade D 1 in January 2000.
2. By a note of 22 October 1999 the Director-General notified various senior officials that he had decided, amongst other things, to grant personal promotions to grade D 1 to certain staff members. The complainant's name was included in the list of persons to be so promoted. The note indicated that the promotions were to take effect from 1 November 1999 but it was not accompanied by a direction that steps be taken to give effect to them. And although the decision came to the attention of the complainant, it was not personally notified to him.
3. A new Director-General was appointed with effect from 15 November 1999. On the same day the General Conference invited the Director-General to review all promotions and appointments made during the 1998-99 biennium. In consequence, the Director-General informed senior officials on 26 November that he had "decided to suspend temporarily the implementation of [...] decisions [...] taken as of 1 October 1999 [...] relating to appointments, reclassifications and promotions" and that each case would be examined in the context of an overall review. The decision granting the complainant a personal promotion was treated as a decision taken after 1 October and, accordingly, its implementation was suspended.
4. Subsequently, on 22 February 2000, the Director-General announced that the personal promotions which had been temporarily suspended were to be treated as reclassifications. The note set out the procedure to be followed, including revised job descriptions and desk audits, to determine whether the posts of those who had been included in the former Director-General's list of personal promotions should be reclassified.
5. The complainant was informed by a memorandum dated 12 December 2000, but not received until 24 January 2001, that the decision to grant him a personal promotion to grade D-1 would not be implemented and that his former post was maintained at grade P 5. He then appealed to the Director-General and, having received no reply, later appealed to the Appeals Board.
6. In his appeal the complainant raised three distinct issues. The first was that the decision to grant him a personal promotion had not been taken after 1 October 1999, but in April of that year. The second was that the decision not to implement his promotion involved unequal treatment. The third was that the review procedures announced with respect to reclassification of the posts occupied by those whose personal promotions had been suspended were not properly applied in his case.
7. On 12 December 2002 the Board recommended that the complainant be granted promotion to grade D-1 with effect from 27 March 2000, the date on which he was transferred to the Inspectorate-General. The recommendation was based on the Board's opinion that the decision to grant the complainant a personal promotion was taken prior to 1 October 1999 and, thus, should not have been included in the suspended cases. Additionally, the Board expressed the view that the procedure relating to the desk audit and reclassification of the complainant's post was "faulted with substantial illegalities and irregularities". However, the Board rejected the complainant's contention that the course adopted by the Director-General was discriminatory.
8. The Director-General informed the complainant on 21 February 2003 that he had "decided to reject partially the [Appeals Board's] recommendation insofar as it infers the existence of a binding decision relating to [his] promotion before 1 October 1999". He also informed the complainant that he had instructed that a review of his post be "duly completed by a regular desk audit [...] in order to assess [his] eligibility for promotion to grade D-1". That is the decision which is the subject of the complaint.

The complaint

9. The complainant raises before the Tribunal the same issues that were raised before the Appeals Board, albeit with slightly different emphasis and arguments. He again argues that the Director-General has mistaken an essential fact in that the decision to grant him a personal promotion was taken prior to 1 October 1999. He contends

that the Director-General acted in an arbitrary and discriminatory fashion by suspending and cancelling only some of the promotions granted in 1998-99 and, also, by cancelling only some of the personal promotions to grade D-1. He also raises the issue of the desk audit but contends that his situation could not be remedied by one and that, as the proper procedures were not observed, his promotion to grade D-1 should be confirmed.

10. By way of relief, the complainant seeks an order granting him retroactive promotion to grade D-1 with effect from 1 January 2000 or, in the alternative, an order cancelling all other staff promotions granted between 1 January 1998 and 15 November 1999. Additionally, he claims moral and professional damages, exemplary punitive damages, costs and interest on any sums due.

The issues

11. UNESCO submits that the complaint is not receivable *ratione materiae* as the Director-General had ordered a review of the complainant's post, which was in progress at the time the complaint was filed, and only when that review was completed and a decision made on the question whether to promote him would there be a final decision. By the time UNESCO filed its surrejoinder, that review had been completed and a decision made, on 2 December 2003, not to promote the complainant. UNESCO then invited the Tribunal to "consider the link between the final decision dated 2 December 2003 and the impugned decision dated 21 February 2003" and to confirm "the legality and validity of the procedure applied for the review of the [c]omplainant's posts". This course is opposed by the complainant in his further statement which he was given leave to file. Nonetheless, he criticises the desk audits, as well as maintaining that the situation regarding his post cannot be remedied by the conduct of those audits.

12. As a subsidiary issue relating to receivability, UNESCO also points out that the claims with respect to moral, professional and "exemplary punitive damages" were made for the first time before the Tribunal and, on that account, are not receivable.

13. Additionally, UNESCO asserts that the decision to grant the complainant a personal promotion was not taken prior to 1 October 1999. It also denies the allegation of discrimination and contends that the procedures laid down with respect to the review of personal promotions are applicable to the complainant notwithstanding the time that has elapsed since those procedures were announced.

Receivability

14. Article VII(1) of the Tribunal's Statute provides:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

15. If the decision of 21 February 2003 partially rejecting the recommendation of the Appeals Board was not a final decision, the complaint is not receivable. And that is so notwithstanding the request in UNESCO's surrejoinder that the Tribunal consider the link between it and the subsequent decision of 2 December 2003 and confirm the legality of the procedures adopted with respect to the latter decision.

16. Ordinarily, the process of decision making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint to the Tribunal. Occasionally however, what appears to be a single and final decision may embody more than one decision. That will be the case if separate and distinct issues have to be decided. So, too, a decision which does not resolve an entire dispute may nonetheless constitute a final decision if it is a decision on a separate and distinct issue. The present is such a case.

17. By the time of the Director-General's first decision not to promote the complainant to grade D-1, communicated in a memorandum dated 12 December 2000 and received on 24 January 2001, two distinct issues had emerged. The first was whether the complainant's promotion should be confirmed without reclassification of his post. The second, which arose only if the first issue was decided against him, was whether he should be granted a promotion in consequence of reclassification.

18. The decision to reject partially the recommendation of the Appeals Board and to review the complainant's

post by a proper desk audit was necessarily a decision not to promote him to grade D-1 unless his post was reclassified. Because that was a distinct issue that had emerged, primarily by reference to the question whether a decision to promote the complainant had been taken prior to 1 October 1999, that was also a final decision. To that extent, the complaint is receivable. However, and to the extent that there is a question whether the complainant's post should have been reclassified, that issue was not decided until 2 December 2003, well after the complaint was lodged. That being so, that latter question cannot be considered in the present proceedings.

Date of promotion decision

19. In support of his contention that the decision to grant him a personal promotion was taken prior to 1 October 1999, the complainant points to two documents that came into existence prior to that date. The first is a memorandum to the Director General, dated 7 April 1999, proposing, amongst other things, to transfer the complainant to the Inspectorate-General. It was stated in that document that the complainant's "seniority and experience would seem to qualify him for a personal promotion to D-1 level early in the next biennium". In the margin, next to the proposal to transfer the complainant, there appear these words in the handwriting of the former Director-General: "and with personal promotion to D-1, with effect from 1.1.2000".

20. The second document on which the complainant relies is a report, dated 30 September 1999, from the Director-General to the Executive Board of UNESCO concerning "decisions [...] taken since the previous session regarding the appointment and the extension of appointments [...] at grade D-1". The document records the promotion, amongst others, of the complainant in a personal capacity "with effect from 1 November 1999". In that report, the complainant is described as "Principal Administrator (Budget)/Head of Division (Bureau of the Budget)". There is no reference to any intended transfer to the Inspectorate-General.

21. The first matter that should be noted is that the handwritten note on the memorandum of 7 April 1999 and the report of 30 September 1999 are concerned with different situations. The former is concerned with a promotion "with effect from 1.1.2000" and is linked to the transfer of the complainant to the Inspectorate-General. The latter is concerned with a promotion "with effect from 1 November 1999" and refers specifically to the complainant's post, at the material time, in the Bureau of the Budget. It was the latter decision that was communicated to senior officials on 22 October 1999.

22. It was explained by the Tribunal in Judgment 2112 that there is a difference between administrative formalities, involving internal documents, and the notification of a decision so as to bind an organisation to that decision. Even if the handwritten note on the memorandum of 7 April may be regarded as a decision – as distinct from an "*aide mémoire*", which it more closely resembles – it cannot be regarded as anything more than a tentative decision linked to the complainant's transfer to the Inspectorate-General. More to the point, the decision was replaced by a decision to grant a personal promotion with effect from an earlier date and not in any way linked to the complainant's transfer. It was that latter decision that was reported to the Executive Board, not the former. Having regard to these matters, it is impossible to treat the handwritten note on the memorandum of 7 April as a decision binding on UNESCO.

23. It is clear from Judgments 1560, 2112, 2201, and 2213 that a decision becomes binding on an organisation only when it is notified to the official concerned in the prescribed manner or in some other manner that gives rise to an inference that it was intended to notify the official of the decision. In the present case, there never was any formal notification to the complainant of his personal promotion to grade D-1. The only document from which it might possibly be inferred that it was intended to notify him of that promotion is the Director-General's note on 22 October addressed to the Deputy Director-General, Assistant Directors-General, Directors and Bureau Heads. Had that note included a direction to take the necessary steps to implement the decisions recorded in the note, it might be possible to infer that it was intended that the officials concerned should be informed of them. However, in the absence of any directive of that kind, that inference cannot be drawn. It follows that there is nothing to indicate that the decision mentioned in the Director-General's note of 22 October became binding on UNESCO with respect to the complainant. Of more immediate consequence, the decision with respect to the complainant was taken after 1 October 1999 and his contention to the contrary must be rejected.

Alleged discrimination

24. The complainant advances three different arguments in support of his contention that the decision not to grant him a promotion to grade D-1 without reclassification of his post is discriminatory. The first is that the

decision to select only those promotions and appointments decided after 1 October 1999 in the face of the General Conference Resolution with respect to all appointments and promotions in the 1998-99 biennium is arbitrary and discriminatory. The argument is mistaken. It may safely be assumed that a number of the relevant decisions taken in the biennium in question were formally notified to the officials concerned and, thus, had become binding on UNESCO. The appropriate point of comparison is not the entire body of promotions and appointments decided in that period, but those that had not become binding as at 15 November 1999. To establish discrimination, the complainant must show that, from within that class, some promotions were confirmed without reclassification and that that was a proper course which was also applicable in his case. In this last regard, it is sufficient to repeat what was said in Judgment 1536, namely that, “[e]quality of treatment means equality in the observance of the law, not in the breach of it”. That aside, however, the complainant’s argument fails at the first step. He does not show that decisions to promote officials which had not taken effect at 15 November 1999 were implemented without reclassification.

25. The second argument advanced by the complainant is that of the 21 personal promotions decided during 1998-99, his was the only one that was not confirmed. This argument suffers from the same defects as his first argument and must be rejected for the same reasons.

26. In his third argument the complainant points to a particular staff member whose personal promotion was decided “at more or less the same time” as his and was initially included in the list of suspended cases but removed when she pointed out that her promotion was decided prior to 1 October 1999. As already pointed out, the complainant’s promotion was decided after that date. He thus does not establish unequal treatment by referring to a particular case which was decided prior to 1 October and which, as UNESCO points out, was personally notified to her and a directive issued to the Director of Personnel to give effect to it.

27. The complainant’s arguments with respect to discrimination must be rejected.

Desk audits

28. As already explained, the question whether the complainant’s post should have been reclassified is not before the Tribunal. It is, therefore, not part of the Tribunal’s function to decide whether or not the procedures relating to possible reclassification were properly followed. The issue is whether if, as the complainant contends, his situation cannot be remedied by conducting a desk audit, that should result in his promotion to grade D-1. His argument to that effect must be rejected. If desk audits cannot or could not be conducted in such a way as to determine whether the complainant’s post should have been reclassified – a matter on which the Tribunal expresses no opinion – the proper course is for UNESCO to devise some other procedure.

DECISION

For the above reasons,

1. The complaint is dismissed insofar as it concerns the decision not to promote the complainant without reclassification of his post.
2. The complaint is otherwise dismissed as not receivable.

In witness of this judgment, adopted on 19 May 2004, Mr James K. Hugessen, Vice President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Ms Mary G. Gaudron, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

James K. Hugessen

Florida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.