

FORTY-FIRST ORDINARY SESSION

***In re* DJOEHANA**

Judgment No. 359

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Akbar Djoehana on 17 October 1977 and brought into conformity with the Rules of Court on 12 December 1977, UNESCO's reply of 9 February 1978, the complainant's rejoinder of 27 April and UNESCO's surrejoinder of 14 June 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the UNESCO Staff Rules, particularly Rules 104.6 and 104.11;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant was appointed to UNESCO in 1960 as a programme specialist and assigned to the division of the major project for mutual appreciation of the cultural values of East and West. He was given a fixed-term appointment at grade P.4 from 1 September 1960 to 31 August 1963. The appointment was later extended to 31 August 1965. After a period of leave without pay he was reassigned on 1 February 1964 to a post in the Department of Education and had his appointment extended to 31 January 1966. On 1 January 1965 he was appointed Director of the regional office in Karachi for reading materials in Asia and as such promoted to P.5. His appointment was then extended to 31 December 1966.

B. In February 1966 the complainant was called back to headquarters and appointed as programme specialist in the Department of Information. He was first transferred to a post in the Department of Cultural Activities on an appointment extended to 28 February 1967, and then to a post in the Department of Social Sciences, Humanities and Culture on 1 March 1967. He had his appointment extended in turn to 31 August 1967, 30 June 1968, 30 June 1971 and 30 June 1973 and was transferred on 1 October 1972 to the Division of Cultural Development. His appointment was extended to 30 November 1973, 31 March 1974 and 31 December 1974. On 1 September 1974 he was transferred to the Division of Policy and Planning of Education and had his appointment extended to 31 March 1975, then to 30 June 1975, 31 October 1975, 31 January 1976, 31 March 1976, 30 June 1976, 30 September 1976 and 31 January 1977. During those periods he worked in turn in the division of pre-university education in science and technology (Department of Programmes, Structures and Methods of Education) and in the Department of Higher Education and Training of Educational Personnel. His period of service ended with the expiry of his final extension of appointment on 31 January 1977.

C. On 15 October 1976 the Director of the Bureau of Personnel told the complainant that his appointment would not be renewed after 31 January 1977. The complainant challenged that decision on 4 November 1976, the Director-General upheld it on 23 November and the complainant went before the Appeals Board. In its report of 28 June 1977 the Board held that in taking the challenged decision the Director-General had respected the limits of his discretionary authority as recognised under the Staff Rules, "and exercise of which is not open to review by the Appeals Board". By a communication of 26 July 1977 the Director-General informed the complainant that he endorsed the Board's opinion that the decision of 15 October 1976 was lawful and correct. That is the final decision now impugned.

D. The complainant believes that the Director-General's decision of 26 July 1977 is unlawful in that it disregards UNESCO's commitments towards him and overlooks essential facts of the case. That there was prejudice against him is shown by the withholding of a "secret file" established by the Administration without his knowledge. He asks the Tribunal (a) to quash the Director-General's decision of 26 July 1977; (b) to order UNESCO to reinstate him and grant him a fixed-term appointment of at least two years, (c) failing that, to award him compensation

amounting to not less than two years' salary, or \$86,308.08; (d) to award him compensation equivalent to three years' salary as damages for the prejudice he has suffered, or \$129,462.12⁽¹⁾ ; and (e) to allow him 15,000 French francs as costs.

E. UNESCO argues that the decision not to renew the complainant's appointment was in strict conformity with Staff Rule 104.6 and that none of the flaws which entitle the Tribunal to interfere may be found in this case. It did not make any promise to keep the complainant on the staff. The reports on his performance in the Division for Educational Policy and Planning in the Department of Planning and Financing of Education "show that he was unfit to perform his duties". "All the essential facts of the case" were taken into account after objective and detailed examination of the dossier by the Director-General, who came to the conclusion that "it was not in the interests of the Organization to keep the complainant on the staff". Lastly, says UNESCO, there was no "secret file" on the complainant. "For some of its officials a unit may draft or receive notes and minutes which there is no reason to put in their personal files and which, in the interests not just of the Organization and third parties but of the officials themselves, there is good cause not to reveal." The items in that "file", which date back some years, had no influence on the Director-General's decision. The complainant's allegation of "malice" is "not only vague but unfounded". UNESCO therefore asks the Tribunal to declare the complaint unfounded in its entirety and to dismiss it.

CONSIDERATIONS:

As to the Tribunal's power of review:

1. The decision to end the complainant's appointment on 31 January 1977, the date of expiry of his last fixed-term appointment, is a discretionary one. Hence the Tribunal may quash it only if it was taken without authority, or tainted with a formal or procedural flaw, or based on a mistake of fact or of law, or if essential facts were overlooked, or if the decision is tainted with abuse of authority or if clearly mistaken conclusions were drawn from the facts.

As to the lawfulness of the impugned decision:

2. On 1 March 1967 the complainant was transferred within the Department of Social Sciences, Humanities and Culture to a post which he held until 16 October 1972. On that date he was transferred to the Division of Cultural Development.

His performance reports for the period from December 1970 to December 1972 were generally favourable. They stressed the wide range of his knowledge, his "really exceptional productive capacity" and varied experience but observed that his analytical sense and fondness for detail might hamper his practical work. Although his last supervisor had had him as a subordinate for only a short time he considered him to be able to perform services which, if properly directed, might continue to be useful to the Organization. The director of the competent department thought that the praise of the complainant was excessive and that he should be given duties and responsibilities suited to his grade.

In September 1973 the complainant received another performance report. His supervisor qualified his praise with criticism but summed him up as "a good international civil servant".

The director of the department put in stronger terms the doubts he had expressed before. At the complainant's requests however, the Director-General had the director's comments deleted.

3. In a minute of 24 November 1973 to the Director of the Bureau of Personnel the Director-General expressed doubts about keeping the complainant on the staff. The complainant had failed in one programme but carried out another with success, and the Director-General was therefore willing to give him "one last chance". His appointment was thereupon extended to 31 March and to 31 December 1974. On 1 September 1974 he was transferred from the Division of Cultural Development to the Department of Planning and Financing of Education. The Director of the Bureau of Personnel had written to him on 2 April 1974: "The Director-General instructs me to explain that in his view this is your last chance and that a final decision on your future will be taken at the end of the year in the light of the reports on your performance in both posts".

The complainant's performance was differently assessed in the two posts he held in 1974. In the Division of

Cultural Development the supervisor largely confirmed his former opinion. In the Department of Planning and Financing of Education, however, where he had spent less than three months, his supervisor said that he was unfit to give satisfactory service.

4. The "last chance" mentioned by the Director-General on 24 November 1973 was in fact followed by several extensions of appointment to 31 March 1975, to 30 June 1975, to 31 October 1975, to 31 January 1976, to 31 March 1976, to 30 June 1976, to 30 September 1976 and to 31 January 1977, when the complainant's appointment terminated. Meanwhile he was transferred in turn to the Department of Programmes, Structures and Methods of Education and to the Department of Higher Education and Training of Educational Personnel. The dossier gives no detailed description of the complainant's final posts. Moreover, he was given no performance report for 1975 and 1976. Only a few items say anything of his work in those years;

- on 1 August 1975 the acting Director of the Bureau of Personnel informed him that because no employment suited to his qualifications could be found his appointment would end on 31 October 1975;

- in a minute of 20 August 1975 concerning the restructuring of the education sector he was included in a list of staff members assigned to the execution of a programme in Asia; unlike the others his name is not given in brackets, which means that the question of his assignment was settled;

- a further minute of 5 November 1975 includes him in a list of staff members transferred to the Operational Programmes Division;

- on 24 June 1976 his supervisor states that he is not suited to "operational work" but should be "redeployed, since his intellectual capacities might be invested more effectively elsewhere";

- in a letter of 15 October 1976 informing him that his appointment would end on 31 January 1977 the Director of the Bureau of Personnel said, among other things: "As you are aware, attempts to find you another assignment in the education sector or somewhere else in the secretariat have come to nothing and your supervisors in the Operational Programmes Division believe that your training and experience are not adequate to the demands of work in the education sector".

5. As appears from the foregoing, UNESCO postponed to 15 October 1976 the final decision about the complainant which it had originally intended to take at the end of 1974. In other words, at the end of 1974 it decided not to dismiss him forthwith but on 15 October 1976 it resolved to get rid of him. The question therefore arises whether in that period he was found to be unfit to give the services required of him. On this critical point the dossier is incomplete.

Having no precise information on the nature of the complainant's work, the Tribunal cannot tell whether UNESCO made vigorous enough efforts to find him a post in which his often acknowledged talents could be put to good use. It cannot even perceive UNESCO's reasons for transferring him on 16 October 1972 from a post which he had held for over five years and in which he had won praise from his immediate supervisors, if not from the chief of department, whose comments the Director-General in any event had deleted.

True, on a strict interpretation of Staff Rule 104.11(a) UNESCO was not bound to give the complainant performance reports for 1975 and 1976, since his appointment was terminated before the end of the latter year. Nevertheless, if it intended not to renew his appointment it needed to rely on decisive facts. Such facts do not appear in the evidence produced by the parties. The Tribunal cannot regard as such either the letter written on 1 August 1975 by the acting Director of the Bureau of Personnel, which became immaterial because of subsequent extensions of the complainant's appointment; or the minutes of 20 August and 5 November 1975 on the complainant's assignments; or the letter of 24 June 1976 in which his immediate supervisor proposed his "redeployment"; or again the letter of 15 October 1976 notifying non-renewal of contract, which does not appear to contain personal comments.

The internal minutes which UNESCO submitted to the Appeals board are immaterial. Apart from three dated 1972 and 1973 they all relate to the complainant's position in 1966, not to the work which he was doing in 1975 and 1976, and on which the decision not to renew the contract ought mainly to have been based. There is no need to consider the complainant's contention that those minutes ought to have been put in his personal file.

Lastly, it appears from the evidence in the dossier that the circumstances in which the complainant's appointment

ended amount to an abuse of authority. In particular, since there is no description of the posts the complainant held in 1975 and 1976 and no detailed comment on his performance during that period, there is reason to believe that the Director-General either failed to take account of essential facts or drew clearly mistaken conclusions from the facts. In either event the impugned decision should be quashed. What makes the conclusion all the more justified is the fact that at the time of non-renewal of appointment the complainant had served UNESCO for nearly 17 years.

As to the claim for reinstatement and damages:

6. It is not desirable to allow the complainant's claim for reinstatement for a period of at least two years. It does not appear from the dossier that UNESCO could at present make use of his services in any vacant post.

Failing reinstatement, the complainant claims payment of at least two years' salary in compensation. He also claims three years' salary in damages. Those claims are excessive.

Since reading in the letter of 2 April 1974 that the Director-General intended to give him one "last chance" he must have known that his position in UNESCO was precarious. The extensions of his appointment in 1975 and 1976 were so short that he should have realised that he stood to lose his employment in a few months' time and that it would therefore be reasonable to look for employment outside UNESCO. In the circumstances the sum of one year's salary will compensate the prejudice for which he is entitled to damages.

As to costs:

7. In view of the importance and complexity of the case the complainant's claim for payment of 15,000 French francs as costs is well-founded.

DECISION:

For the above reasons,

1. The impugned decision is quashed.
2. UNESCO shall pay the complainant compensation amounting to the remuneration which he would have received during one year.
3. UNESCO shall pay the complainant's costs, set at 15,000 French francs.
4. The complainant's other claims for relief are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. This is the sum given in the claims for relief. In the memorandum filed by the complainant's counsel, which purports to quote those claims, the sum is \$129,962.12.