

SEVENTY-FIRST SESSION

In re ROMAIN

Judgment 1114

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ralph Irving Romain against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 18 April 1990 and corrected on 15 June, UNESCO's reply of 27 August, the complainant's rejoinder of 4 October and the Organization's surrejoinder of 20 November 1990;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, UNESCO Staff Rules 104.6, 109.3, 109.6 and 109.7 and paragraph 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. A Memorandum of Understanding which UNESCO and the International Bank for Reconstruction and Development - the World Bank - signed in 1964 provided for a Co-operative Programme and for setting up a unit to run it at UNESCO headquarters in Paris. The unit was known as the Educational Financing Division (EFD).

The complainant, a citizen of Trinidad and Tobago who was born in 1932, was employed at the Bank, in Washington D.C., in 1986. The Director-General of UNESCO made him an offer dated 12 November 1986 of an appointment as the Director of EFD. In a letter of 10 December 1986 to the Director of the Bureau of Personnel he said he would have a guarantee of "reabsorption" by the Bank if he left UNESCO. Having accepted the offer, he took up duty on 6 January 1987 under a fixed-term appointment that was to expire at 31 December 1988.

By a letter of 22 August 1988 the President of the Bank informed the Director-General that the Bank would end the Co-operative Programme at 30 June 1989. On 31 October 1988 the acting Director of the Bureau of Personnel asked the complainant to confirm that the Bank would take him back. He did so on 2 November. By a memorandum of 10 November the acting Director informed him that the Director-General would not renew his appointment. In a memorandum of 17 November he asked whether that decision was "being reconsidered". The acting Director confirmed the decision in a memorandum to him of 21 November. On 22 November he wrote to the acting Director objecting to the non-renewal and to the period of notice. On 23 November he filed notice of appeal with the Appeals Board. In a memorandum of 8 December the acting Director offered him special leave with pay to 5 February 1989 so that he could make his own arrangements. In his reply of 16 December he turned down the offer on the grounds that he had not applied for such leave and was to take up another job anyway in January.

In its report of 22 November 1989 the Appeals Board held that the Director-General had properly exercised his discretion and it recommended rejecting the appeal on the merits. In a letter of 29 December 1989, which the complainant says he got on 19 January 1990 and which is the final decision impugned, the acting Director-General accepted the Board's recommendation, though he expressed reservations about the receivability of the appeal.

B. The complainant gives his own version of the facts. He alleges that both before and after he got word of the non-renewal many UNESCO officials treated him rudely and disparagingly and that in August 1989 UNESCO did away with papers of his that he had left behind for possible use in his internal appeal.

He alleges breach of UNESCO Staff Rule 109.6(a), which says that a staff member whose fixed-term appointment is terminated shall be given three months' notice. The notice he got did not leave him enough time in which to dispose of his house and belongings, see to the shipment of household goods, make family arrangements, alter his work programme and find new employment. The offer of special leave was worthless since by the time he got it he had arranged to go back to the Bank at 1 January 1989.

In his submission the non-renewal was an arbitrary decision and an abuse of the Director-General's discretion: the Bank's ending the Co-operative Programme was not a sufficient reason. The Programme was not to end until June

1989 whereas his appointment ended at 31 December 1988. Co-operation was not to end altogether but merely to take another form. The Bank did not finance his post as Director of EFD and his duties went beyond the scope of the Programme. UNESCO discriminated against him in that it tried to save the jobs of other Programme staff and indeed with the Bank's consent gave one of them an extension of appointment up to June 1989. The Bank did not mind UNESCO's exercising control over Programme posts provided that it did not itself incur expense after June 1989. The decision caused him material and moral injury. It harmed his professional reputation and career. He suffered financial loss, which he sets out in detail, over the sale of his house and the disposal and shipment of household goods. He had to incur expense on travel to try to sort things out at too short notice. He claims damages.

C. UNESCO replies that the complaint is irreceivable under Article VII(2) of the Tribunal's Statute because the complainant failed to follow its appeal procedure properly and so to exhaust the internal means of redress. Paragraph 7(a) of the Statutes of the Appeals Board says:

"A staff member who wishes to contest any administrative decision ... shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision ...".

Not until the Director-General has ruled on such a protest may the staff member appeal to the Board under 7(c).

The complainant's memorandum of 22 November 1988 constituted his protest under 7(a). Yet the very next day he filed an appeal with the Board under 7(c). The answer to his 7(a) protest was the acting Director's memorandum of 8 December, which offered an extension of appointment up to 5 February 1989 and so gave him another five weeks' notice. In a memorandum of 20 December to the Director-General he made what must be read as a second protest under 7(a). He did not leave the Director-General time to answer his protest of 22 November, and the one of 20 December was wrong to protest against the decisions of 10 and 21 November: it ought to have challenged the memorandum of 8 December, which offered an extension and so was a new decision. He acted inconsistently in rejecting the offer yet continuing to object to the non-renewal.

In any event his complaint is devoid of merit. His appointment was not terminated but expired in accordance with Rule 104.6(b):

"A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity."

The formal requirement of three months' notice in Rule 109.6 did not apply. For the sake of sound management UNESCO nevertheless gave the complainant almost two months' notice.

As for the actual decision, he had no legitimate expectancy of renewal. He shows no flaw in the Director-General's exercise of discretion. The decision was not taken for any reason but the objective one he was given, the ending of the Programme. According to the Memorandum of Understanding EFD and the Programme were inextricably linked. Once the Programme was ended and the Division disbanded there was no need for the complainant's post. It took the last six months to wind the Programme down.

Even if the case is treated as one of abolition of post the complainant was given adequate notice since he was offered the extension up to 5 February 1989, making a total of three months' notice as required by Rule 109.6(a)(ii). He was granted his full entitlements. UNESCO first made sure that he had a job to go to; indeed it treated him throughout considerately and in good faith. His allegations of discourtesy are not proven. He should have taken away all his personal papers and could not expect UNESCO to keep them in store for him.

The reasons for the non-renewal being objective, it did not harm his reputation. His claim to damages for material injury is also unsound: he is liable for the expenses he wittingly incurred in the circumstances.

D. In his rejoinder the complainant maintains that his complaint is receivable. He points out that the Board declared his internal appeal receivable and submits that, having rejected it on the merits, UNESCO may not plead that it was not. Moreover, what he filed on 23 November 1988 was just notice of appeal; he filed his actual appeal on 4 January 1989, not more than thirty days after he got the memorandum of 8 December from the acting Director of Personnel and after lapse of the month the Director-General had in which to answer his protest. In any event the Organization was itself to blame for confusion over deadlines.

The complainant comments on the issues it raises as to the nature of his appointment, the requirement of notice, the length of the notice he was given and the material and moral injury he suffered. There was no "winding down" of the Programme that had to take place in his absence, the Bank set no ban on extensions of appointment and the real reason for getting rid of him was that senior officers disliked him. He was treated with discourtesy, senior staff were vengeful, and the papers he lost were of a personal kind that UNESCO had no business to meddle with.

E. The Organization presses its pleas in its surrejoinder. It reaffirms that the complaint is irreceivable because the complainant failed to exhaust his internal remedies and that in any event the decision was validly taken in keeping with the material rules, on the strength of correct appraisal of the issues of fact and in good faith.

CONSIDERATIONS:

1. While he was employed at the World Bank UNESCO offered the complainant a fixed-term appointment at grade D.1 as the Director of the Educational Financing Division (EFD). His appointment, which was for two years, was to expire at 31 December 1988. Before accepting the offer he informed the acting Director of the Bureau of Personnel in a letter of 10 December 1986 that the Bank guaranteed his "reabsorption" if he left UNESCO. He took up duty with the Organization on 6 January 1987 and was put in charge of the execution of education projects financed by the Bank.

On 22 August 1988 the President of the Bank informed the Director-General that the Bank would terminate its Co-operative Programme as from 30 June 1989 and that the Organization should impose an immediate freeze on the recruitment and extension of appointments of staff under the Programme. The Organization checked with the complainant that the guarantee of reinstatement at the Bank held good and he confirmed on 2 November 1988 that it did. By a memorandum of 10 November the acting Director told him that his appointment would not be renewed. No-one was appointed to replace him as Director of EFD and the savings were used to finance a new post in the field.

On 17 November the complainant wrote to the acting Director to ask whether he was right in assuming that the decision in the memorandum of 10 November was being reconsidered. The acting Director's answer of 21 November 1988 was that the decision was maintained. In a letter of 21 November the acting Director also asked the Bank to "initiate the necessary procedure to reintegrate" the complainant, adding that UNESCO was willing to extend his contract by a few weeks until the Bank was ready to take him back.

On 23 November the complainant filed with the Appeals Board notice of appeal against the Director-General's decision of 10 November. He had also written a long memorandum to the acting Director the day before protesting against the decision.

He received a reply dated 8 December offering him an extension of appointment to 5 February 1989 but he refused the offer by a memorandum of 16 December 1988.

Though he had already appealed to the Appeals Board he again wrote to the Director-General on 20 December protesting against the decision of 10 November as confirmed by the acting Director on 21 November. Ten days later, on 30 December, he submitted a detailed appeal to the Secretary of the Board against the decision notified to him on 10 November.

Receivability

2. The Organization submits that his complaint is irreceivable because he failed to follow the internal appeal procedure correctly: his internal appeal to the Director-General was not lodged within one month of the date of receipt of the challenged decision and he ought to have waited for a reply from the Director-General or the expiry of the time limit for such reply before appealing to the Board.

Since for the reasons set out below the complaint fails on the merits anyway, there is no need to rule on the Organization's objections to receivability.

The merits

3. The complainant contends that the real motive for the non-renewal was not a desire to serve the Organization's

best interests but a determination to get rid of him as persona non grata. He sets out instances of what he regards as discourtesy towards him. He submits that the reason given for the decision, the Bank's termination of the Co-operative Programme, was inaccurate: the end of the Programme in its then form did not mean the end of all co-operation with the Bank and future co-operation would have to be negotiated. He alleges that the work programme up to 30 June 1989 was heavy and required the presence of a director. The post came, not under the Co-operative Programme, but under UNESCO's regular programme, and so did not depend on the Bank for funding. Though the Director-General assured the staff of EFD, whose jobs were financed to the extent of 75 per cent from extra-budgetary sources, that every effort would be made to keep them on, he himself was allowed to go. He submits that his professional reputation has suffered and that the inadequate period of notice caused him serious financial loss. He seeks an award of damages for the loss and injury he suffered because of the decision, the inadequacy of the notice of non-renewal and the Organization's other injurious acts.

4. The main issue is whether in deciding not to renew the complainant's appointment the Director-General took an inaccurate position on the facts of the case or acted arbitrarily and committed an abuse of authority tantamount to wrongful dismissal.

5. The Tribunal is satisfied on the evidence before it that the reason for non-renewal was that the World Bank was going to end its Co-operative Programme at 30 June 1989. The particular job the complainant had been recruited for was to head EFD, and the Division was dissolved on termination of the Programme. The Director-General had authority to decide in the Organization's interests not to renew his appointment even though his post came under the regular programme and was not funded by the Bank. The Director-General was also free to decide that there was no need to keep him on to wind up the Programme, that his post was redundant and that the funds should be released to create another one.

6. The decision was not taken without regard for the complainant's position. The Organization confirmed beforehand that he could be reinstated in the Bank and even suggested both to him and to the Bank a short extension of the period of notice if need be. But the complainant turned down the offer of extension since he had arranged his reinstatement as from 1 January 1989.

7. The complainant had no entitlement to any extension since according to Staff Rule 104.6 a fixed-term appointment ends automatically on expiry, without notice or indemnity, and carries no expectation of renewal: his mere expectation of renewal did not confer any right on him in law.

8. He accuses the Organization of acting arbitrarily because it made no effort to find a position for him, though it did seek to place other members of EFD. But the explanation is that he had the possibility of reinstatement in the World Bank - and indeed he himself arranged before the end of November 1988 to go back to the Bank - whereas the other members of EFD presumably had no such alternative to fall back on. In the circumstances there was no abuse of authority or arbitrariness in the Organization's stand.

9. Citing what he sees as various acts of discourtesy, the complainant maintains that he was persona non grata. There is no proof, however, of any lack of good faith in the Director-General's decision not to renew his appointment or in the manner in which the decision was made: it is one for which, as has been said above, there were ample objective grounds.

10. As for the matter of notice, he actually turned down UNESCO's offer to extend his appointment to 5 February 1989. In point of fact, as Staff Rule 109.3(a) makes clear, there is no requirement of notice and in the circumstances he was given sufficient warning.

11. Lastly, the abolition of his post on the expiry of his fixed-term appointment gave him no right to any indemnity. As Rule 109.7(g) provides:

"No termination indemnity shall be payable to:

...

(ii) a staff member whose fixed-term or temporary appointment expires on the date specified in his letter of appointment."

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.