

SEVENTY-FIRST SESSION

In re BOURGI

Judgment 1129

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Albert Bourgi against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 19 March 1990 and corrected on 5 June, UNESCO's reply of 10 August 1990, the complainant's rejoinder of 7 March 1991 and the Organization's surrejoinder of 2 May 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulation 9.1, UNESCO Staff Rule 104(c)(i) and paragraph 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence;

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

A. The complainant, a Frenchman who was born in 1942, took up as from 7 October 1987 a fixed-term appointment for two years at UNESCO headquarters in Paris. He held a post, No. REX-011, as Director of the Division of Analysis, Co-ordination and Evaluation (ACE) in the External Relations and Information Sector (REX) at grade P.5/D.1.

In 1987 UNESCO was short of funds and in November of that year its General Conference adopted a resolution, No. 24C/21, urging the Director-General to keep any rise in expenditure on staff within the limits of the approved budget for 1988-89. Having accordingly resolved to keep down such expenditure, the Director-General decided to stop all ordinary recruitment. In December he set up a working party under the Deputy Director-General to advise on which posts to abolish or to leave vacant. In a memorandum of 17 December 1987 to the Assistant Directors-General the Deputy Director-General set at mid-January 1988 the deadline for making detailed proposals about the posts to be declared vacant from July 1988.

By a memorandum of 14 January 1988 the acting Director of the Bureau of the Budget informed the Assistant Director-General in charge of REX that 11 established posts in REX had to be declared vacant.

In a memorandum of 21 January to the Deputy Director-

General the Assistant Director-General listed 11 budget posts in REX to be made vacant. In a memorandum of 5 February to the Director-General about the reform of REX he proposed doing away with ACE altogether. In an appendix to a report dated 19 February 1988 about the structure of REX and another sector the Inspector-General too proposed abolishing ACE and making the task of co-ordination over to two executive assistants, graded P.5 and P.1/2, responsible to the director of the reshaped unit.

In a memorandum of 22 February 1988 to senior officers the Deputy Director-General listed the budget posts that were to be vacated and the ones in REX included the complainant's; the period during which it was to be blocked ran from 1 July 1988 to 31 December 1989. On 23 February 1988 he issued an administrative circular, No. 1583, to inform the staff of what was being done and of the appointment of joint bodies to ensure fair and objective consideration of the case of everyone under threat of termination. He set up a Joint Co-operation Committee to consider the proposals and make recommendations to him and a Mediation Committee to hear objections from individual staff members to his decisions.

On 25 March the Joint Co-operation Committee wrote to the Assistant Director-General in charge of the Sector for Culture and Communication proposing that the complainant be transferred to a post in that Sector for a programme specialist, but the Assistant Director-General's reply was that the complainant was not qualified for the post. Instead he proposed that the Committee put forward the complainant's name for a post as chief of section in the Sector, but in a report of 30 March the Committee in turn said that he was not suitable for that post either and that it had no solution to offer.

By a memorandum of 30 May 1988 the acting Director of the Bureau of Personnel offered the complainant the possibility of an agreed termination, which would have given him a larger termination indemnity. He refused.

In mid-June 1988 the Director-General submitted to the Joint Professional Advisory Board, in accordance with Staff Rule 104.1(c)(i), a proposal for terminating the complainant's appointment on the grounds of abolition of his post under Staff Regulation 9.1.

By a memorandum of 24 June the acting Director of the Bureau of Personnel informed him that after consulting the Advisory Board the Director-General had decided to terminate him under Regulation 9.1 at 23 September 1988.

Meanwhile the Director-General referred his case to the Mediation Committee, but in a report submitted on 12 July 1988 to the Director-General the Committee said that it had found no suitable post for him and recommended agreed termination.

On 21 July the complainant submitted an appeal to the Director-General under paragraph 7(a) of the Statutes of the Appeals Board; the acting Director of the Bureau of Personnel informed him on 29 August that the Director-General rejected it; meanwhile he filed notice of appeal on 22 August under paragraph 7(c) of the Statutes.

In its report of 27 November 1989 the Board recommended confirming the decision and by a letter of 29 December 1989 the acting Director-General informed him of the rejection of his appeal. That is the decision he is impugning.

B. The complainant gives a detailed narrative of the facts that culminated in the decision he is impugning. He has two main pleas. One is that the procedure followed in his case failed to comply with the procedure laid down by the Director-

General, and the other, that there was misuse of authority in that the decision was taken not in the Organization's true interests as objectively determined but from personal hostility towards him as a close adviser of the former Director-General.

He submits that there was a procedural flaw in that the proposal to abolish his post in REX was not made by the Assistant Director-General in charge of his sector, who, according to the arrangements set out in the circular of 23 February 1988, was the only authority competent to make such a proposal.

He submits that it is plain on the evidence that he was discriminated against because of the Organization's determination to get rid of him at all costs and to avoid the several opportunities that existed for finding him suitable alternative employment.

Lastly, he observes that none of the duties he was discharging in REX had been done away with and that they have simply been shifted to another unit.

He seeks the quashing of the impugned decision and his reinstatement.

C. In its reply UNESCO gives its own full account of the facts of the case and seeks to correct what it sees as misrepresentation, distortion or misconception in the complainant's narrative. It submits that each of his pleas is unsound.

First, the whole of the division known as ACE, including the complainant's post as head of it, was abolished in keeping with a proposal made by the competent Assistant Director-

General and the reasons for that abolition were both plain and objective, namely radical changes in the structure of REX and a drastic cut in staff in the Sector.

Secondly, the complainant's post was done away with for financial reasons in furtherance of the General Conference's policy decision. That decision was bound to have effects throughout the secretariat of the Organization and entailed a far-reaching exercise of redeployment and retrenchment of staff, the complainant's termination being only one of many. The two joint bodies set up to safeguard the staff's rights and interests did their utmost to find a suitable post for the complainant but were agreed that there was none for which he had the right experience and qualifications.

Lastly, the complainant offers not a shred of evidence to bear out his charges that he fell foul of senior officers in the Administration. On the contrary all the evidence confirms that his dismissal was decided on for objective financial reasons and as part of the reform of the whole secretariat.

UNESCO invites the Tribunal to dismiss his claims as devoid of merit.

D. In his rejoinder the complainant dwells further on several issues of fact raised by the reply and enlarges on his main contentions. UNESCO failed to follow the procedure it had laid down in its own circulars. The proposal to abolish his post came, not, as it ought to have come, from the Assistant Director-General in charge of REX but from the Deputy Director-General himself. After the abolition of that post another with the same duties was created in the Sector. There was also abuse of authority in that what dictated the decision was not the Organization's own best interest but an arbitrary desire to discharge him because he had been a close adviser to the former Director-General.

E. In its surrejoinder the Organization develops the case made out in its reply. It maintains in particular that the decision to abolish the complainant's post was taken by the competent authority; that the new post in REX which the complainant refers to did not have the same duties as his former post; that every effort was made to find him other employment and to treat him considerately; and that the reason for the decision was a desire to serve the Organization's best interests, there being no evidence to support the contention that the grounds were other than objective.

CONSIDERATIONS:

1. The complainant served UNESCO at its headquarters in Paris as from 7 October 1987 under a fixed-term appointment. He was head of the Division of Analysis, Co-ordination and Evaluation (ACE) in the External Relations and Information Sector (REX) on a grade P.5/D.1 post. He had his appointment terminated by a decision of 24 June 1988, after three months' notice, at 23 September 1988 on the grounds of abolition of his post and in the circumstances that are summed up in A above. His internal appeals having been rejected, he is impugning the final decision, notified to him by the acting Director-General in a letter of 29 December 1988, to confirm the termination of his employment.

The complainant's application for oral proceedings

2. The parties have had ample opportunity to address in their written submissions all the issues of fact and of law that the Tribunal holds to be material and to answer each other's pleas. Oral proceedings would therefore serve no useful purpose, and the complainant's application for such proceedings, including the hearing of witnesses, is rejected.

The complainant's pleas

3. The complainant puts forward two main pleas in support of his claims to the quashing of the impugned decision and to reinstatement. One is that the procedure followed in reaching the decision failed to comply with the guidelines the Administration had itself laid down in circulars and other texts. The other is misuse of authority.

The alleged breach of procedure

4. The complainant cites paragraph 3 of administrative circular No. 1583 of 23 February 1988, which said that the Assistant Directors-General had been asked to identify posts to be abolished at 1 July 1988. He says that on 22 February 1988, when told that his name was on the list of officials to be dismissed, he asked his supervisor, the Assistant Director-

General in charge of REX, how that decision had been reached. He alleges that the Assistant Director-General said that for his part he had "made no proposal in writing". The complainant concludes that his termination fails to comply with the requirement in paragraph 5 of circular 1583 that final decisions to abolish posts must be based on the proposals from the Assistant Directors-General inasmuch as the competent Assistant Director-General had never had his name put on the list to be drawn up in accordance with the procedure prescribed in the circular.

5. On 21 January 1988 the Assistant Director-General in charge of REX sent the Deputy Director-General a memorandum listing 11 posts in the Sector which he proposed should be "vacated by July 1988". The list was

incomplete because the aim for the Sector was to abolish 11 posts under the regular programme and two under a programme known as COCA, so that another two posts had yet to be added to the list. In his memorandum the Assistant Director-General further suggested awaiting the findings of a study to be carried out by the Inspector-General on the functions of REX since the study would serve to identify the two further posts.

In a memorandum of 5 February 1988 the same Assistant Director-General submitted to the Director-General a set of detailed proposals for the reform of REX. One of his proposals was as follows:

"... it is proposed to abolish the REX/ACE Division because present and future circumstances call for services of a sort different from those provided in the past ... two or three Professional category officials, with help from a few General Service category staff, are likely to be able to cope with the workload."

The Inspector-General issued on 19 February 1988 the anticipated study on the structure of REX (and of another division). It recommended what the Assistant Director-General had already proposed on 5 February, namely the abolition of ACE, saying that the function of co-ordination might be "filled by the Executive Assistants of the Director" of a new Bureau of External Relations. It proposed that that Director should have two executive assistants, one at grade P.5 and the other at grade P.1/2. There was to be no post at grade P.5/D.1. In accordance with the Assistant Director-General's proposal and the Inspector-General's recommendation, the complainant's post as the head of ACE was added, on 22 February 1988, to the list of posts to be abolished and in a memorandum to the Deputy Director-General of 30 March 1988 the Director-General approved the proposed restructuring of REX and the suppression of ACE.

The Tribunal is satisfied on the evidence that UNESCO did meet the requirements of circular 1583. It is immaterial that the competent Assistant Director-General did not actually identify the complainant's post in a written proposal to the Deputy Director-General. The essential point is that in his memorandum of 5 February 1988 he did propose doing away with ACE altogether, because that implied a proposal to abolish the complainant's post as well, which was that of the Director of the Division. That is indeed borne out by the addition of the post to the list after the Inspector-General's report had also recommended doing away with REX/ACE.

6. The complainant's retort is that such an interpretation of the Assistant Director-General's proposal mistakenly assumes that he was proposing the abolition of all posts in REX. But the argument is unconvincing: posts other than the Director's could be more readily moved to other UNESCO units and their abolition was therefore not the inevitable consequence of the proposal to do away with ACE, whereas the Director's post could survive only if there was a division to direct. What the circular called for was proposals, not to dismiss named officials, but to abolish posts.

The alleged misuse of authority

7. The complainant's second plea is that the main reason for not keeping him on in a senior post was that he had been a close and trusted adviser to the former Director-General: since the decision was prompted, not by a desire to serve the Organization's best interests but by personal hostility it constituted misuse of authority. In support of the charge he observes that UNESCO made little or no genuine effort to find him another position.

8. There will indeed be misuse of authority where an administration acts for reasons that are extraneous to the organisation's best interests and seeks some objective other than those which the authority vested in it is intended to serve.

But the Tribunal is satisfied on the evidence that the complainant has failed to establish the charge of personal hostility. On the contrary, as the following account shows, far from seeking to get rid of him at all costs UNESCO was at pains to follow the prescribed procedure for seeking alternative employment for him.

On 25 March 1988 by a memorandum to the Assistant Director-General for the Cultural Communication Sector the Joint Concertation Committee proposed assigning him to a post as a programme specialist in the secretariat of the Cultural Development Decade. That post would have entailed a reduction neither in grade nor in pay and did not rule out further future reassignment anyway. But the Cultural Communications Sector turned down the proposal and proposed appointing him to post CC-080 as a programme specialist at P.5 instead. The Committee then turned that proposal down on the grounds that he was not qualified for the post, which called for experience he did not have in certain areas. The Committee added, for good measure, that it had already rejected two other candidates for

the post though they were better qualified for it than the complainant. Although the Assistant Director-General in charge of the Cultural Communications Sector had proposed the complainant for the post, that was not enough to secure it for him: appointment lay with the competent authority.

The Mediation Committee, the other body set up to try to find solutions for officials whose posts had been abolished, also failed to find any suitable post for the complainant and therefore recommended negotiating with him the terms of his termination. But he did not agree, and instead went to the Appeals Board, which did not report in his favour.

The conclusion is that the Administration did its utmost to comply with the requirements of circular 1583 and look for a suitable post for the complainant, and that the procedure it followed was in line with the material rules.

9. In further support of his plea of misuse of authority the complainant points out that although his own post as Director of ACE (REX-011) was abolished another one for an executive assistant - REX-051 - was created with the same responsibilities. The Tribunal is satisfied, however, from the comparative analysis of the two posts which the defendant has supplied with its reply that his argument is mistaken in fact; the posts do not have the same responsibilities. The complainant's former post was graded P.5/D.1 whereas the new one is P.5. The holder of REX-011 was "responsible" for the analysis, co-ordination and evaluation of REX activities whereas the official on post REX-051 has only to "assist" the Assistant Director-General in co-ordinating and planning them. The Director of REX had 17 subordinates but the Executive Assistant has only one.

10. The complainant's later appointment as a consultant serves further to rebut his charges of personal hostility.

11. To sum up, there is no evidence to suggest that the complainant was dismissed for any but objective and proper reasons: the need to serve UNESCO's best interests and the financial crisis the Organization was in at the time.
DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux
Mohamed Suffian
José Maria Ruda
A.B. Gardner