

## SEVENTY-SECOND SESSION

### *In re M'BOW*

#### **Judgment 1138**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Babacar M'Bow against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 5 February 1991 and corrected on 11 March, UNESCO's reply of 10 May, the complainant's rejoinder of 16 July and the Organization's surrejoinder of 27 August 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rules 110.1, 103.4, 104.6, 104.11 and 106.1 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. The complainant, a Senegalese born in 1943, joined UNESCO in 1977 as a senior clerk at grade G.5 in a section of the Bureau of Data Processing Services (DTP) of the General Administration Sector (ADM). In 1978 he was granted a fixed-term appointment for one year and in odd-numbered years had it extended by two years at a time from 1979.

UNESCO Staff Rule 104.11 requires periodic reporting

on the performance and conduct of staff. In a report on the complainant's performance from October 1983 to April 1985 his supervisors pointed out many shortcomings and called for improvement. His report for 1985-87 asked him to be more punctual, expeditious and productive.

By a memorandum of 28 April 1987 a personnel officer told him that his appointment was extended from 1 October 1987 to 30 September 1989 but that the Director of the Bureau of Personnel wanted him to improve his output and time-keeping.

On 24 June 1988 the head of his section sent him a memorandum saying again that he was too often absent for no good reason and his output was negligible: he must record what he had been doing in May and June 1988 and report by "electronic message" every day both on arriving at the office and on leaving. Yet again on 16 August the head of section wrote to him to say that attempts to get him to keep proper hours had failed and his services were far below par. By a memorandum of 23 August to the acting Director of Personnel the Director of DTP recommended withholding his within-grade salary increment under Rule 103.4 for unsatisfactory service. The complainant signed the recommendation on 31 August without challenging it.

In a memorandum of 15 September 1988 the acting Director of Personnel said to him:

"For some time now, the Organization has received complaints against you concerning the non-payment of debts you have contracted from persons or institutions outside of UNESCO."

Since he had failed, the Director went on, to behave as befitted an international civil servant a censure would be put on his personal file for one year under Rules 110.1(a)

and (b).

His next report, which was dated 21 April 1989 and covered the period from October 1987 to April 1989, was downright bad: it spoke of his irresponsible attitude, constant absences without leave or cause, poor time-keeping, low output, apathy and insubordination. He submitted seven pages of comment which were put to the Junior Personnel Advisory Board in keeping with Rule 104.11(d). On 12 July the Board recommended putting him on

another three months' trial.

In a memorandum of 4 September 1989 the Director of Personnel told him that his appointment, which was to expire

at 30 September, would not be renewed as before. The Director cited his "unsatisfactory services, as disclosed by your latest performance report" and by the ones for 1983-85 and 1985-87, and went on:

"... an additional ground is unsatisfactory conduct constituted by your numerous financial commitments which you have failed to respect with the result that creditors and the competent authorities of the French Government have had to seek the assistance of the Organization in their attempts to compel you to respect your financial obligations. ..."

The Director gave him three months' notice as from 15 September 1989.

He protested to the Director-General by letter of 20 September under paragraph 7(a) of the Statutes of the Appeals Board. The Director answered on 30 November confirm-

ing the decision on the grounds of "unsatisfactory services" but making no further mention of unsatisfactory conduct.

On 17 November the complainant had filed notice of appeal with the Appeals Board under paragraph 7(c) of its Statutes. He left UNESCO on 14 December 1989. He lodged his appeal on 30 January 1990. In its report of 4 October 1990 the Board observed that his reports were poor and he had not even challenged the withholding of his increment; it recommended rejecting his appeal. The Director-General did so in a letter of 5 November 1990 which he got on 8 November and which is the decision impugned.

B. The complainant submits that the non-renewal, though a discretionary decision, shows fatal flaws.

(a) He recounts his career, observing that, although unlike others in DTP he was given no proper training, from

1978 until 1987 he got satisfactory reports and regular increments. But things changed with his report for 1987-89, which was fabricated to back up the Director-General's decision. The Junior Personnel Advisory Board rejected the substance of the report by recommending three months' trial and, if he passed muster, training to update his skills. His supervisors gave him little or nothing to do in 1987-89 so that they could accuse him of low output and deny him the chance to prove himself. Their allegations of unsatisfactory service were trumped up.

(b) Although UNESCO dropped the charge of unsatisfactory conduct it did not explain why. In fact there was no substance to the charge, which was an intrusion in his private life. There was no censure of him. Besides, even supposing that there was, he may not be punished twice on the same charge.

(c) There were flaws in the procedure followed. The Junior Personnel Advisory Board was not allowed to comment on all the charges against him or on the non-renewal. He was never told of the Director-General's decision on its recommendations.

(d) His supervisors and the Director of Personnel acted from improper motives. The sudden change in assessment after ten years' good service shows malice.

(e) The Director-General overlooked essential facts by failing to obtain a further appraisal of his performance after the Board had reported and before the decision. Since he was not given the full three months' trial his supervisors had no proper opportunity of reviewing their assessment of him.

He seeks the quashing of the impugned decision, reinstatement and damages for material and moral injury.

C. In its reply UNESCO gives its own account of the complainant's career and observes that his supervisors were dissatisfied as early as 1983 with the quality and quantity of his work. Though the language of their reports is cautious and inoffensive the meaning is plain enough. At all events after he got his last extension, in October 1987, there was a sharp deterioration in his performance and that was why the decision was taken in 1988 - and he did

not challenge it - to withhold his increment. His report for 1987-89 rebuked him for low output, incompetence, irresponsibility, unpunctuality and frequent absences without leave.

(a) Under Rule 104.6(b) a fixed-term appointment, though it may be extended at the Director-General's discretion, shall not "carry any expectation of, nor imply any right to, such extension ...". The decision not to extend the complainant's appointment shows no flaw, and in particular none of the kind he alleges.

(b) The proper procedure was followed. The complainant's report for 1987-89, which he had challenged, was duly referred to the Junior Personnel Advisory Board as Rule 104.11(d) required. There was no reason to put to that Board the matter of his financial indebtedness, which was irrelevant to his performance. The Administration never endorsed the Board's recommendations, and indeed the acting Director of Personnel made it clear in a memorandum of 28 July 1989 to an Assistant Director-General that he was to leave despite those recommendations. The acting Director was exercising authority delegated by the Director-General in deciding not to renew his appointment and took due account of the contents of the report, which the Board found no good reason to challenge.

For reasons which the Organization sets out at length it rejects his allegations of procedural flaws.

(c) In its view there was no substantive flaw either. Since the non-renewal was based solely on unsatisfactory service his comments on the matter of his conduct are immaterial. There was no "sudden change" in his supervisors' assessment of his services but an aggravation of the shortcomings they had been objecting to for years. Their earlier leniency did not bar more drastic steps. Nothing in the Advisory Board's report questioned the report for 1987-89,

and the Board just makes recommendations anyway: only the Director-General could have had the report withdrawn.

It is wrong to say that his supervisors left him idle to prevent him from showing his mettle. He offers not a shred of evidence of malice, which is belied anyway by their indulgence in not stopping his increments until 1988. He was given less to do than others because his work was less reliable. The decision was taken solely on account of the poor quality of

his performance and in the Organization's interests.

D. In his rejoinder the complainant submits that the Organization's account of the facts of his case is tendentious or wrong and affords further evidence of bad faith and malice towards him. He seeks to correct what he sees as its misrepresentations as to the quality of his services, the relevance and substance of its charges of unsatisfactory conduct and the outcome of the Junior Personnel Advisory Board's recommendations of 12 July 1989. He submits that he worked well, despite a lack of formal training and the complexity of his duties, and often worked long after official hours. What he did could never have been accomplished had his record of attendance been as poor as UNESCO makes out. He produced medical certificates to cover any absences exceeding three consecutive working days, as Rule 106.1(e) requires. There was no leniency or indulgence on his supervisors' part. His private life cannot and does not amount to unsatisfactory conduct. The Advisory Board did find fault with the report for 1987-89; else it would not have recommended the three months' trial.

In a memorandum of 20 June 1989 to the Director of Personnel the Assistant Director-General in charge of ADM said that it was essential to know the Director-General's decision on the Advisory Board's recommendations before deciding not to renew his appointment. That was a commitment which the acting Director disregarded in his memorandum

of 28 July 1989. In fact he had made up his mind even before the Board had made its recommendations. What is more, he had no authority to take the decision not to renew the appointment: only the Director-General was empowered to do so. The complainant enlarges on his charges of malice, abuse of authority and breach of due process and presses his claims.

E. In its surrejoinder the Organization seeks further

to refute the complainant's pleas and develops its own. It corrects what it sees as his misrepresentations of fact. It addresses several issues he dwells on in his rejoinder, namely the assessment of his services, the relevance of his unsatisfactory conduct as additional grounds for the non-renewal, and the consequences of the Advisory Board's recommendations, and it maintains that the impugned decision is not tainted with any mistakes of fact. It challenges at length his contentions that it was actuated by malice, that there was abuse of authority and that there was breach of due process. It submits that the decision was taken in proper exercise of the Director-General's discretion, with due regard to all the material facts and on valid grounds, namely the need to safeguard its own interests.

#### CONSIDERATIONS:

1. The complainant joined UNESCO as a senior clerk

at grade G.5 in 1977 and in 1978 was granted a fixed-term appointment for one year. From 1979 on he was granted successive two-year extensions of appointment. On 4 September 1989 he was given three months' notice as from 15 September 1989 and told that his contract would not be further renewed. He appealed to the Appeals Board. The Organization originally based its decision not to renew on unsatisfactory performance in service and unsatisfactory conduct, but it dropped the grounds of unsatisfactory conduct in the course of the appeal proceedings and thereafter relied solely on the grounds of unsatisfactory performance. The Appeals Board recommended rejecting his appeal and on 5 November 1990 the Director-General accepted that recommendation. That is the decision impugned.

2. By virtue of UNESCO Staff Rule 104.6(b) a fixed-term contract may at the Director-General's discretion be extended or converted into an indefinite appointment, but the staff member has neither any right to an extension nor any legitimate expectancy of one. In keeping with precedent - see for example Judgment 1127 (in re Verlaeken-Engels), under 30 - the Tribunal will not interfere with the discretionary decision not to extend an appointment unless it was made without authority or in breach of a rule of form or procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or drew an obviously mistaken conclusion from the facts, or amounted to an abuse of authority. The complainant alleges that the decision not to renew his contract shows several such flaws.

3. The complainant contends, first, that the charge of unsatisfactory service was trumped up and that until 1987 he had satisfactory performance reports and regular within-grade salary increments.

His contention is not borne out by the evidence. The report on his performance in the period from October 1983 to April 1985 refers to shortcomings which he was called upon to make good. Again, after issue of his performance report for 1985-87 he got a memorandum of 28 April 1987 from a personnel officer informing him that though his contract was renewed for two years he would have to improve his output and time-keeping. After the head of his section had written two memoranda to him in June and August 1988 rebuking him again for poor time-keeping and performance, a decision was taken, on 18 August 1988, to withhold his within-grade salary increment. He did not challenge that decision. His next performance report, for the period from October 1987 to April 1989, was very bad. The Junior Personnel Advisory Board (JPAB), to which his case was referred, recognised that there were still serious problems about his work despite the warning given to him in 1988 by the withholding of his increment, though it recommended putting him on trial for another three months and reassessing his performance after that period.

The conclusion is that the unsatisfactory nature of his services is well-documented, was the conclusion of objective assessment and amply justified the decision not to renew his contract.

4. The complainant objects that the Organization did not explain to him why it had dropped the charge of unsatisfactory conduct.

The matter is irrelevant to the decision he impugns since his conduct outside work was not relied on by the Organization to justify its decision.

5. He alleges procedural flaws in that the Advisory Board was not allowed to comment on all the charges against him or on the non-renewal and that he was never formally told of the Director-General's decision or the Board's recommendations.

The Advisory Board's role under Rule 104.11 is to consider contested observations in a performance report and

make recommendations. The Board made its recommendations on 12 July 1989. On 4 September 1989 the Director of the Bureau of Personnel wrote the complainant a memorandum saying that "following the contestation" of his latest performance report his case had been "carefully reviewed" and the conclusion was that he would not be granted renewal. He replied by a memorandum of 20 September to the Director-General referring to the Advisory Board's recommendations and asking for reconsideration. He wrote again to the Director-General on 17 November citing the Board's recommendations and received a reply dated 30 November 1989 from the Director of Personnel confirming the non-renewal. So he cannot possibly maintain that he was never told of the Director-General's decision or of the Board's recommendations.

6. His charge that his supervisors and the Director of Personnel acted from improper motives appears baseless.

He alleges that his performance reports were satisfactory for ten years. He is mistaken. His shortcomings were pointed out in writing as early as 1985 and, as was said in 3 above, were well-documented over a period of years. He never challenged any report until the very bad one of April 1989. He did not challenge the decision to withhold his increment. The evidence does not disclose any malice on his supervisors' part: on the contrary, they gave him many warnings which he failed to heed.

7. Lastly, he alleges that the Director-General overlooked essential facts by omitting to get a further appraisal of his performance after the trial period of

three months as recommended by the Advisory Board.

He is mistaken in thinking that the Director-General

was bound to accept the Board's recommendations. What it offered was advice that there should be further assessment of him at the end of the three months. But that advice was not accepted: the Director-General decided instead to abide by the decision not to renew his contract. That cannot be construed as the overlooking of any essential fact.

8. Since none of the complainant's objections is sustainable his complaint must fail.

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. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner