

**SEVENTY-FIFTH SESSION**

***In re* ENAMONETA**

**Judgment 1289**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sandra Enamoneta against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 3 April 1992 and corrected on 5 June, UNESCO'S reply of 28 August, the complainant's rejoinder of 16 November 1992 and the Organization's surrejoinder of 22 January 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Rule 104.1 as in force in 1990, paragraph 13 of the Rules of Procedure of UNESCO's Personnel Advisory Boards and paragraph 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written submissions and decided not to order hearings, 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 citizen of the United States who was born in 1945, joined UNESCO on 21 February 1972 under a temporary appointment. She later got a fixed-term appointment and in 1975 had it converted to an indeterminate one. At the material time she was serving in the Office of Public Information as a secretary at grade G.3, in which she had held the top step since March 1986.

On 17 November 1988 she applied for a post, No. COL-054, as a clerk in the Spanish Translation Section of the Translation and Records Division at grade G.4. The post was advertised from 10 to 25 November. The Bureau of Personnel recorded sixteen other applications by the closing date and sent them on to the Division for assessment.

On 24 January 1989 the Bureau of Personnel came upon another application, dated 14 November 1988, by Mrs. Dinorah Delgado d'Imperio. It had gone astray along with other items left uncollected in a letter-box on premises that the Bureau had formerly occupied. To make good the oversight the Bureau sent the Translation and Records Division that application as well, on 20 February. Having assessed all the candidates by 1 June 1989, the Division drew up a short list of three in which Mrs. Delgado d'Imperio ranked first and the complainant second.

On 21 June 1989 the Junior Personnel Advisory Board (JPAB), to which the matter was referred, ruled out Mrs. Delgado d'Imperio's application as time-barred and recommended making a new short list that included only those who had applied by the closing date.

But on 20 July 1989 the acting Director of the Bureau decided, in exercise of authority delegated by the Director-General, to appoint Mrs. Delgado d'Imperio to the post as from 1 August 1989. In a letter of 31 July the Bureau informed the complainant that she had not been successful.

She approached the Mediator and then the Deputy Director-General for Management, who told her in a memorandum of 9 August 1989 that there were no grounds for reversing the decision of 20 July. On 29 August she protested to the Director-General through the Director of Personnel under paragraph 7(a) of the Statutes of the Appeals Board. She asked for resumption of the process of selection and redress for the injury sustained, such as personal promotion to G.4 or financial compensation equivalent to the additional earnings she had forfeited through not being promoted.

In a memorandum of 21 September 1989 the Director of Personnel reminded her that the proceedings of personnel advisory boards were privileged and he asked her to explain how she had come by the information on which she based her protest before he passed it on to the Director-General. In a memorandum of 30 October she objected to what she saw as an attempt by the Director to deny her right of appeal and observed that he had a duty to transmit her protest to the Director-General. Having got no answer from the Director-General within the time limit in

paragraph 7(b) of the Statutes of the Appeals Board, she appealed to the Board by a memorandum of 27 November against the implied rejection of her protest in pursuance of paragraph 7(c) of the Statutes.

In its report of 20 November 1991 the Board declared the appeal receivable and referred to flaws in the appointment procedure. In its view, the JPAB should, after striking out one of the applications as time-barred, have commented on the applicants on the short list so as to enable the Director-General to make an impartial choice. The Board acknowledged that though the Director-General was not to blame, the mistakes had caused the complainant moral injury and it therefore recommended treating her appeal as receivable and bearing in mind any future application from her for a G.4 post.

In a letter of 6 January 1992, the decision she impugns, the Director-General expressed doubts about the Board's reasoning in its report about both receivability and the merits and pointed out to the complainant that she might apply for any vacancy.

B. The complainant submits that the impugned decision is tainted with several flaws: (1) there were breaches of procedure; (2) it is not substantiated; (3) it rests on blatant misappraisal of evidence and overlooks material facts; and (4) it constitutes misuse of authority.

(1) Staff Rule 104.1(d) said at the material time:

"The Junior Personnel Advisory Board shall advise the Director-General in respect of General Service category staff:

(i) on all appointments of six months or longer at grades higher than the normal career entering grade and at such entering grades when the candidatures of two or more staff members are to be considered for a particular post ..."

In this case the JPAB observed that the name of someone whose application had come in after the closing date was on the short list; it called for a revised list that named only those who had applied on time and it made no recommendation. Yet the Organization went ahead with the appointment of the very applicant the JPAB had declared ineligible.

(2) UNESCO gave no reasons for its decision of 31 July 1989. Neither in reply to the objections she put to the Deputy Director-General on 4 August 1989 nor in the appeal proceedings did it give any explanation for rejecting her.

(3) She submits that the successful candidate joined the Organization in 1982 as a mere typist and spent most of her career in the Spanish Translation Section, whereas she herself had performed a wide range of duties since recruitment in 1972 and won praise in her performance reports over the years. Having been at the top step in her grade since March 1986, she wants promotion.

(4) She pleads misuse of authority and discrimination in favour of Mrs. Delgado d'Imperio, to whom the Organization gave the duties of the post pending an appointment to it, thereby letting her show her mettle. Though it makes out that her application - which she sent in months after the prescribed closing date - went astray it never gave that explanation to the Mediator or to the JPAB.

She seeks the quashing of the impugned decision, suitable redress and costs.

C. In its reply UNESCO submits that the complainant's internal appeal was out of time and that her complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute because of her failure to exhaust the internal means of redress. The time limit for internal appeal could have been suspended only if she had supplied at once the information which the Director of Personnel asked for in his memorandum of 21 September 1989. He wanted to know before passing on her protest to the Director-General how she had got hold of the JPAB's report, a privileged text. She did not answer; she let over a month go by before objecting in her memorandum of 30 October to the Director's demand.

On the merits UNESCO seeks to refute the complainant's allegations. Rule 104.1(d), in the version then in force, required the Director-General to consult the JPAB, not to follow its advice. The JPAB reported on the applicants on 21 June 1989 in keeping with paragraph 13 of the Rules of Procedure of Personnel Advisory Boards, which says that "the advice and recommendations of each Board to the Director-General shall be constituted by the signed

report of the proceedings". Mrs. Delgado d'Imperio's application was lodged in time and the procedure was therefore correctly followed. So there was no breach of procedure and the Director-General was free at his discretion to pick the best candidate for the post. His choice was neither against the Organization's interests nor prejudiced. Besides, the complainant offers no evidence to back up her allegation that it was.

She does not qualify for personal promotion since she has not been at UNESCO for at least twenty years and is not over fifty years of age.

Since the Director-General's decision caused her no injury she is not entitled to redress.

D. In her rejoinder the complainant observes that para-

graph 7(a) of the Appeals Board's Statutes does not say how soon a written protest must be forwarded to the Director-General, but just that it "shall be addressed to the Director-General through the Director of the Bureau of Personnel". By failing to pass on her protest the Director of the Bureau of Personnel suspended the time limit for filing her appeal in the hope of getting her to drop it. She points out that the JPAB's report is not marked confidential.

She enlarges on her pleas on the merits. She challenges UNESCO's assurance that Mrs. Delgado d'Imperio made her application in time: though stamped with two dates - 24 January and 20 February 1989 - it does not, like other incoming correspondence, bear the usual registry number. The JPAB held it to be out of time.

E. In its surrejoinder the Organization presses its objections to receivability.

It appends to its surrejoinder a written statement by the former secretary of the Director of the Bureau of Personnel that on 23 January 1989 the permanent representative of Iran came to her office to ask about an application put in a letter-box on the Bureau's former premises. That was when she discovered that some forty letters of application for posts had been left there for months after the Bureau's move.

The Organization denies discriminating against the complainant and observes that by putting her second on the short list those in charge of the Division acknowledged her good record.

#### CONSIDERATIONS:

1. After giving her a temporary contract in 1972 UNESCO appointed the complainant in 1973 as a clerk/typist at grade G.2 under a fixed-term contract for one year. She was granted an indeterminate appointment in November 1975.

On 17 November 1988 she applied for a G.4 post, COL-054, for a clerk in the Spanish Translation Section of the Translation and Records Division. On 14 December 1988 the list of applications received by the closing date was forwarded to the Division for assessment. On 24 January 1989 the Bureau of Personnel noticed that one application, that of Mrs. Delgado d'Imperio, though dated 14 November 1988, had "inadvertently been misplaced" and not duly forwarded. In agreement with the Division, however, the Bureau forwarded it too on 20 February 1989 for assessment. On 1 June 1989 the Director of the Division sent the Director of the Bureau of Personnel a memorandum commenting on the filling of the post and recommending that the appointment of Mrs. Delgado d'Imperio would be "in line with the aim of securing the highest standards of efficiency".

The Junior Personnel Advisory Board met on 21 June 1989 to consider all the applicants. It came to the view that Mrs. Delgado d'Imperio, though first on the short list, "was a late entrant and is therefore out of the running". It asked for a revised short list made up only of applicants who had been in time.

The acting Director of the Bureau decided on 20 July 1989 to appoint Mrs. Delgado d'Imperio instead of acting on the Board's recommendation. On 31 July the complainant heard that she had been unsuccessful. She got in touch with the Mediator. Then she saw the Deputy Director-General for Management, but on 9 August he sent her a memorandum confirming the acting Director's decision.

On 29 August she submitted a written protest to the Director-General through the Director of the Bureau of Personnel. In a memorandum of 21 September the Director wrote to ask her to reveal at once where she had got her information about the Board's recommendations, which were privileged; he would forward her protest to the

Director-General as soon as he had her reply. In a reply of 30 October she objected to that memorandum and asked the Director-General to answer her protest of 29 August 1989. Having got no answer, she went to the Appeals Board on 27 November 1989. The Board reported on 20 November 1991. In a letter of 6 January 1992 the Director-General told the complainant that he questioned the Board's reasoning and confirmed that her application had been duly rejected. That is the decision under challenge.

2. The Organization submits that the complaint is irreceivable because the complainant was out of time in appealing to the Appeals Board.

But there is no need to entertain the plea since in any event her objections to the decision of 6 January 1992 are devoid of merit.

3. Her case is that that decision shows defects which, whether taken singly or together, warrant setting it aside: (1) there was a mistake of law because the procedure was gravely flawed; (2) she was given insufficient reasons for the decision; (3) there was blatant misappraisal of the evidence and essential facts were overlooked; and (4) there was misuse of authority.

The alleged breach of the Staff Rules

4. First, she argues that UNESCO acted in breach of Rule 104.1(d)(i), which says that the Junior Personnel Advisory Board "shall advise", among other things, on "all appointments of six months or longer at grades higher than the normal career entering grade and at such entering grades when the candidatures of two or more staff members are to be considered for a particular post".

The outcome of the Board's meeting of 21 June 1989, when it looked at the applications for the post, was summed up in its report under the heading "Recommendation":

"The members of the JPAB are unanimous that the applicant at the top of the short list, Mrs. Delgado d'Imperio, was a late entrant and is therefore out of the running. They want a revised short list of those who applied in time."

By merely asking for a new short list the Board failed, in the complainant's submission, to "advise", so the Organization ought to have made a new and proper list or at least accounted for the oversight.

5. The Organization's reply is that the word "advise" in Rule 104.1 refers to consultation of the Board; the Director-General is bound to get advice before taking his decision but not to follow it. What is more, according to paragraph 13 of their Rules of Procedure personnel advisory boards submit their advice and recommendations to the Director-General in the form of signed reports on their deliberations.

6. As the Organization says, the outcome of the Board's meeting of 21 June 1989 amounted to "advice" not just as a matter of form but on the substance as well. For one thing, the advice is headed "Recommendation" and appears in a report duly signed by all members. It comments on the application of Mrs. Delgado d'Imperio, who was at the top of the short list, and says it is out of time and irreceivable. That is beyond doubt a final, not a provisional, point of view, and to the complainant's detriment too. So the Director-General was bound to take forthwith a decision on the Board's recommendation. To have him draw up a new and proper short list, as the complainant wants, would be to say that the Board's advice on that score is binding on him, something that the complainant herself does not contend.

Insofar as the Director-General failed to follow the Board's advice that Mrs. Delgado d'Imperio's application was irreceivable he was not required to account for the oversight the Board had identified.

Nor was he bound under Article 13 of the Rules of Procedure to remit the matter to the Board, nor to ask it to alter its advice on the grounds that its recommendation was ambiguous or incomplete: it was at his discretion whether or not to follow that recommendation.

7. At all events the purpose of the advisory procedure is to afford the Director-General a sound basis for making up his mind, and so the issue is whether it did so here. It is plain on the evidence that before reaching his decision of 6 January 1992 the Director-General had at his disposal not only the Board's recommendation but also the memorandum of 1 June 1989 from the Director of the Division, which gave the full list of applicants and a technical assessment of them.

So it was indisputably in the light of such evidence and in knowledge of all the material facts that the decision of 31 July 1989 was taken on the Director-General's behalf to reject the complainant's application and to uphold that decision on appeal.

The conclusion is that the impugned decision shows no procedural flaw or mistake of law and that the complainant's first plea must fail.

The alleged lack of reasons for the decision

8. Secondly, she objects that the decision was not properly substantiated, and one point she makes is that the reference in the text of the decision of 31 July 1989 to thorough review of all material points did not amount to a sufficient explanation.

9. She is mistaken. As the Tribunal has said before, many decisions by international organisations that prompt complaints are unsubstantiated. Yet the staff member is still able to defend his rights. Though not stated in the actual text, the reasons for the decision may be discerned from earlier correspondence between the parties or in the last resort from the Organization's brief in reply to the complaint, which the staff member may comment on in his rejoinder. Unless there is express derogation the rule is that the Organization need not, if that is not its practice, state the reasons for all its decisions: what matters is that the absence of a statement should not be to the staff member's detriment.

In this case the complainant has appended to her complaint the text of the Appeals Board's report of 20 November 1991. It contains an account of the facts which explains how Mrs. Delgado d'Imperio's application came to be belatedly sent on to the Director of the Division for appraisal. In the course of the proceedings before the Tribunal she has seen the list of applicants the Bureau of Personnel forwarded on 14 December 1988, the memorandum which the Director of the Division sent the Bureau on 1 June 1989 and the technical assessment of all the applicants. UNESCO has appended those texts to its reply. She has accordingly had the opportunity of enlarging in her rejoinder on her original submissions and has not suffered from the lack of a statement of the reasons for the impugned decision.

The complainant's other pleas

10. Lastly, she maintains that the Organization overlooked essential facts and committed an obvious mistake of appraisal. She says that the Director-General merely endorsed the views of the Director of the Division and she questions the Director's objectivity on the grounds that he: (1) said that the "functions of the post (COL-054) are the highly specific ones of secretary (in all but name) of a translation section"; (2) failed to say whether Mrs. Delgado d'Imperio had taken the United Nations tests of "language proficiency"; and (3) was guided solely by her lack of familiarity "with the specifics of COL/T operations", which was not a requirement in the post description.

11. Her arguments fail.

First, it is hard to infer from what she says in (1) any lack of objectivity that might have been to her detriment.

As to (2), the description of the post says nothing of tests of "language proficiency": the only language requirement is a command of Spanish and a sound knowledge of English or French. What is more, the Director of the Division says that Mrs. Delgado d'Imperio "has more than sufficient educational and linguistic (English, French, Italian and Portuguese, in addition to native Spanish) qualifications".

As to (3) the Director's remark seems to refer not to a requirement but to express "reservations ... on grounds mainly of unfamiliarity with specifics of COL/T operations". The choice of Mrs. Delgado d'Imperio was warranted by "a number of reasons" which he sets out in paragraph 5 of his memorandum.

In sum there is no reason to accept the complainant's view that in endorsing the Director's opinion the Director-General overlooked any essential fact or made any obvious misappraisal.

12. The complainant sees misappraisal of the facts as one proof of misuse of authority and personal prejudice.

There being no such misappraisal, the plea is that much weaker, and the other evidence is no more cogent.

The complainant alleges that Mrs. Delgado d'Imperio, though not particularly well qualified, was asked to carry out the duties of the post before the process of selection started, that in all likelihood she did not file her application until months after the deadline and that the Mediator was misinformed.

Such allegations are not borne out by any evidence of misuse of authority but are gratuitous speculation. In fact she is merely trying to question the Director-General's discretion in the matter and has failed to show that the impugned decision was taken for reasons extraneous to the Organization's interests or efficiency. The evidence does not prove that Mrs. Delgado d'Imperio was to blame for the Organization's not finding her application until two months after the closing date.

13. Since her objections to the impugned decision fail so do her claims to awards of damages and of costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

Mella Carroll  
E. Razafindralambo  
Mark Fernando  
A.B. Gardner