

SEVENTY-SEVENTH SESSION

***In re* BLINKER**

Judgment 1350

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lesley Blinker against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 21 October 1993 and corrected on 4 November, UNESCO's reply of 20 December 1993, the complainant's rejoinder of 7 February 1994 and the Organization's surrejoinder of 15 March 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Regulations 1.2 and 9.1, UNESCO Staff Rules 103.19, 104.1(b)(iv), 104.6, 104.11 bis, 104.15 and 109.6, and paragraph 7(a) 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 Suriname who was born in 1961, joined UNESCO on 15 October 1989 under a one-year appointment at grade P.1. His letter of appointment of 11 September 1989 stated, among other things, that he would be assigned at first to several units by way of training. He served as a probationer in the Environmental Education Unit (ED/STE/ENV) of the Education Sector from 2 January to 31 March 1990; in the Water Sciences Division (SC/HYD) from 2 April to 30 June; and in the Ecological Sciences Division of the Natural Sciences Sector (SC/ECO) from 2 July to 30 September 1990.

By a memorandum of 18 October 1990 a personnel officer informed him that he was to be an assistant programme specialist at grade P.1, step 2, as from 1 October in the Coordination and Evaluation Unit of the Sector of Communication, Information and Informatics (CII) and that his appointment was being extended from 15 October 1990 to 14 October 1992.

In accordance with Rule 104.11 bis the head of the unit wrote a report on 5 July 1991 about his performance from October 1990 to 14 June 1991 and it spoke of some shortcomings. He signed it on 22 July but said that he intended to challenge it. The matter went to the Reports Board, which recommended leaving the report as it stood. The Director-General endorsed the recommendation and so informed the complainant on 15 October 1991.

By a memorandum of 11 December the Chief of Personnel (PER/ADM) told the complainant that in accordance with Regulation 9.1 the Director-General had decided to terminate his appointment at 31 December 1991 and pay him three months' salary in lieu of notice.

On 10 January 1992 the complainant sent the Director-General through the Deputy Director-General for Management and the Director of the Bureau of Personnel a memorandum asking for review of the termination under paragraph 7(a) of the Statutes of the Appeals Board. By a memorandum of 18 March 1992 the Director of Personnel informed him that the Director-General upheld the decision and on 23 March he appealed against the confirmation of termination.

In its report of 9 June 1993 the Appeals Board recommended that the Director-General reject the appeal. The Director-General endorsed the recommendation and so informed the complainant in a letter of 22 July 1993, the impugned decision.

B. The complainant challenges the decision to terminate his appointment inasmuch as it rests on his alleged incompetence. In his submission he had the right training and qualifications for a job in the field of science. While on probation in the Education Sector he was found quite satisfactory, as was plain from the performance appraisal

of 9 May 1990. But his job in the Communication Sector did not suit his qualifications, so it was only to be expected that he would get a poor report on his work there. That report not only prompted his dismissal but has blighted his prospects of finding work elsewhere.

The decision to dismiss him, which came out of the blue just before Christmas, caused him serious injury: his salary was blocked, not until much later did he get the three months' salary in lieu of notice, and his wife had to pay for his Christmas holiday in Suriname.

His termination caused him moral injury because his wife was also an employee of UNESCO.

He asks the Tribunal to quash the report on his performance from October 1990 to 14 June 1991 and the "decision of the UNESCO Appeals Board" of 9 June 1993 and to order his reinstatement in a suitable post in the Sciences Sector or, failing that, some other suitable post. He seeks material and moral damages in the amount of 100,000 United States dollars or the equivalent in French francs.

C. In its reply UNESCO submits that it terminated the complainant's appointment because he was unable to perform his duties, i.e. for reasons that related to its own requirements and interests. In any event the decision was taken by the Director-General at his discretion and in accordance with the rules.

The complainant could have appealed against the Director-General's decision endorsing the Reports Board's recommendation, in accordance with Rule 104.11 bis (f) and paragraph 7(a) of the Statutes of the Appeals Board. He failed to do so. His claim to the quashing of his performance reports is therefore irreceivable because he has not exhausted the internal means of redress. The report criticised not so much his technical shortcomings as his unwillingness to adapt to his duties. So it is mistaken for him to say that the reason why his work was found unsatisfactory was that his job in the Coordination and Evaluation Unit of the CII Sector did not match his qualifications.

His claim to reinstatement in the Sciences Sector is irreceivable: having again omitted to challenge his assignment to CII, he has not exhausted the internal means of redress, as Article VII(1), of the Tribunal's Statute requires. In any case the discretion conferred on the Director-General by Regulation 1.2 precludes any entitlement to choice of sector.

Lastly, UNESCO denies that it caused the complainant any actionable injury.

D. In his rejoinder the complainant submits that it was a mistake for the performance report for the period from October 1990 to 14 June 1991 and for the Reports Board to say that he was then on probation. He held a fixed-term contract from 1 October 1990 to 14 October 1992. So according to Rule 104.11 bis (a) no performance appraisal was due until six months before the end of his appointment. The appraisal therefore shows errors both of fact and of law.

As Regulations 1.2 and following and circular 1743 of 5 November 1990 required, the complainant's supervisor ought to have written a description of his duties and let him have it promptly. But despite his repeated reminders the Bureau of Personnel and his supervisor did not sign and date his job description until five or six months after the start of his fixed-term appointment.

The reason why he did not challenge the report on his performance from October 1990 to 14 June 1991 was that he did not want to make "relations with his employer worse". UNESCO "misled" him: had he realised it meant to terminate his appointment he would certainly have challenged the report.

The Organization did cause him injury: not until 11 December 1991 did it tell him that his appointment was to end on 31 December; it blocked his pay for December 1991 and January 1992 in breach of Rule 103.19, which requires monthly payment; and in breach of Rule 104.15 it left him in doubt for 24 months about whether it might take him back.

E. In its surrejoinder the Organization asserts that the complainant's job description was made out in reasonable time. Not only was he told what his job entailed as soon as he took up duty in CII but he had also got the final version of the job description, though he had refused to sign it. And, as circular 1743 requires, his performance was "the subject of on-going dialogue" between him and his supervisor and he was given constant guidance.

The Organization may not be held liable for his failure to exhaust the internal means of resisting the decision of 15 October 1991 not to alter his performance appraisal.

It denies that it infringed Rule 104.11 bis by not producing a performance report six months before the end of his appointment: 104.11 bis (a) says that such reports may also be made at any time by the Division or Bureau concerned. UNESCO maintains that it did observe the reporting procedure.

Referring to the case law, it submits that the complainant's claim to the quashing of the "decision of the Appeals Board" is irreceivable.

It again asserts that it caused him no injury warranting redress. It paid him salary in lieu of notice within a reasonable period after termination. It could not have done so any earlier because its usual practice is to take precautions to cover any debts a staff member may owe to its loans service and because there were terminal formalities he had to complete.

CONSIDERATIONS:

1. The complainant joined UNESCO on 15 October 1989. He was granted an appointment for one year and in that year was assigned as a probationer to the Environmental Education Unit of the Education Sector, then to the Natural Sciences Sector, spending three months in the Water Sciences Division and another three in the Ecological Sciences Division. At the end of the initial period he was transferred to the Coordination and Evaluation Unit of the Sector of Communication, Information and Informatics and granted him an extension of his fixed-term appointment which was to expire on 14 October 1992. A report dated 5 July 1991 on his performance from October 1990 to 14 June 1991 found it unsatisfactory. He challenged the report. His case went to the Reports Board, which confirmed the assessment and recommended that "the Bureau of Personnel should take the consequential action". On 11 December 1991 the Chief of Personnel notified to the complainant a decision of the Director-General to terminate his appointment at 31 December 1991, i.e. nine-and-a-half months before the date of expiry. On 22 July 1993 the Director-General upheld that decision on the recommendation of the Appeals Board. The complainant is asking the Tribunal to quash the termination, the performance report and the Appeals Board's "decision", order his reinstatement and award him damages.

2. Since the complainant failed to challenge the unfavourable assessment of his performance in an appeal to the Appeals Board the Tribunal will not entertain his objections on that score. Besides, he offers no evidence to suggest that they are plainly wrong.

3. Nor may he seek the quashing of what he calls the "decision" of the Appeals Board: according to the Staff Regulations the Board merely gives an opinion that is not binding on the Director-General.

4. But his claim to the quashing of the termination is receivable and he may properly challenge any feature of proceedings prior to that decision. On the evidence there were several mistakes or omissions that caused him injury.

5. First, as the Appeals Board pointed out, he was on probation for one year and was assessed after transfer to the Education Sector, but not on his performance in the Natural Sciences Sector from 2 April to 30 September 1990. His original letter of appointment of 11 September 1989 said that his appointment would be renewed for a fixed term in accordance with Rule 104.6 if his performance was deemed satisfactory at the end of probation. Though there was no objective assessment of him at the end of probation as both UNESCO's interests and his own required, it did offer him a two-year appointment. That led him reasonably to suppose that it found his services satisfactory. But in fact it did not, as became plain from the report made on 5 July 1991, i.e. after the grant of the fixed-term appointment.

6. Secondly, that report, which was so poor as to prompt dismissal, purports to be a "probationary" one on the period from October 1990 to 14 June 1991. The authors and the head of the General Administration Sector, who in comments dated 18 July 1991 referred to the "evaluation of the Sector at the end of the probationary period", plainly intended to apply Rule 104.6. That rule says in (c) that "all initial fixed-term appointments shall be subject to a period of probation" and that the period is nine months when the appointment is for less than two years. At the end of that period the Administration may terminate if appraisal reveals unsatisfactory performance.

7. The Organization was free to assess the complainant's merits and skills at any time; on that score he is mistaken.

But it was not free to treat him as still on probation. A memorandum that a personnel officer wrote to him on 18 October 1990 described his appointment from 15 October 1990 to 14 October 1992 as an "extension" of the earlier one for one year and so it was not an "initial" appointment. And although in its surrejoinder the Organization asserts the Director-General's discretion to extend probation and says that the complainant was still on trial, there is no evidence to bear out the contention that when it extended his appointment it meant to keep him on probation.

8. Thirdly, UNESCO was required by Staff Rule 104.1(b)(iv) to consult the Senior Personnel Advisory Board (SPAB) before termination and indeed it did so. But the letter asking the complainant and the Board's members to attend stated that the matter was the "non-renewal" of his contract. What in fact was at issue was termination.

9. The Organization pleads that the mistake was just an unintentional slip. The Tribunal accepts that; indeed, when the Board met, the Administration's report made it plain that the subject was the termination of a fixed-term appointment before the date of expiry. Yet it was not the first error in a serious case and it affords yet further evidence of the Organization's failure to act with the degree of care its employees may expect of it.

10. The conclusion is that there were several mistakes that flawed the termination proceedings. Regulation 9.1 does empower the Director-General to terminate "if the services of the individual concerned cease to be satisfactory". But a decision as important as termination before expiry of a fixed-term appointment on other than disciplinary grounds must scrupulously observe due process and the safeguards that an appointment with an international organisation affords, whether under the contract or under the rules. In this case the procedure was flawed and the safeguards were not observed. The impugned decision to terminate the complainant's appointment therefore cannot stand, and UNESCO must pay him damages in an amount equivalent to the pay he would have been entitled to had his appointment expired on 14 October 1992, less the three months' pay he was granted in lieu of notice under Rule 109.6.

11. He has a further claim to damages for the allegedly late remittance of the three months' pay. It fails. Redress for all the other forms of injury he pleads, including moral injury, lies in the quashing of the decision and the award of damages reckoned as set out in 10 above.

12. He is also unsuccessful in his claim to reinstatement in a post in the Natural Sciences Sector or, failing that, any other suitable post. Despite the Organization's mistakes it is plain on the evidence, particularly the assessment in the report of 5 July 1991 - of which the factual elements are convincing - that the complainant would have had no prospect of renewal on normal expiry of his prematurely terminated appointment.

DECISION:

For the above reasons,

1. The Director-General's decision of 11 December 1991 terminating the complainant's appointment at 31 December 1991 and the confirmatory decision of 22 July 1993 are quashed.

2. UNESCO shall pay him damages in an amount equivalent to the pay he would have been entitled to had his appointment expired at the scheduled date, 14 October 1992, less the three months' pay he was granted in lieu of notice.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas
P. Pescatore
Michel Gentot
A.B. Gardner

