

## **EIGHTY-FIRST SESSION**

### ***In re* NDEDI**

#### **Judgment 1560**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Gisèle Ndédi against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 29 November 1995, UNESCO's reply of 27 January 1996, the complainant's rejoinder of 1 March and the Organization's surrejoinder of 5 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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 Cameroon who was born in 1958, held a traineeship with UNESCO in the Bureau of Personnel (PER) from May to September 1991. The Organization employed her under a supernumerary appointment in the Bureau of the Comptroller from February 1992 to September 1993. She then applied for a post - PER 239 - as a salary officer at grade P.3 in the Division of Staff Policy and Procedures (PPR) of the Bureau of Personnel.

A Senior Personnel Advisory Board (SPAB) looked into her qualifications and on 15 September 1993 recommended appointing her to post 239. The same day UNESCO granted her a supernumerary appointment for two months from 20 September.

In a letter of 18 November the chief of the recruitment section told her that the Administration had stopped the process of recruitment, the post having been upgraded to P.4.

But after speaking to the chief of PPR the Director-General told the Director of the Bureau of Personnel in a handwritten note dated 20 December 1993 that he was appointing the complainant to post 239. She was to hold grade P.3. The Director having so asked in a memorandum of 4 January 1994, the Director-General agreed in the end to have the post readvertised at P.4. In her memorandum the Director suggested, if no other vacancy could be found for the complainant, creating a suitable one for her in the Bureau. On 7 February 1994, she was put on another post, PER 238, as a planning officer at P.3 under a temporary appointment for six months. Her performance proved generally satisfactory in that period and she had the appointment extended by six months.

On 30 October 1994 UNESCO issued a notice of vacancy about the post she was temporarily holding. By a memorandum of 4 November she applied for it, purportedly "reserving all [her] rights".

The Chief of the Administration Division (PER/ADM) saw her on 25 January 1995 and said she would have her appointment extended, by only 22 days, to 28 February 1995. The same day he gave her written notice of his decision by means of a personnel action form. In a memorandum of 6 February a personnel officer confirmed the decision.

By a letter of 7 February the complainant appealed to the Director-General against the "three implied administrative decisions" in the memorandum of the 6th: the extension of her appointment to only 28 February; the refusal to convert her temporary appointment into a fixed-term one; and the refusal to confirm her appointment to post 238. Having got no reply within the time limit of one month in the rules, she went to the Appeals Board on 8 March.

The Board reported on 3 July 1995. Citing the Director-General's handwritten note of 20 December 1993 and the memorandum of 4 January 1994 from the Director of Personnel, it held that the refusal to extend her appointment

beyond 28 February 1995 was at odds with the Director-General's instructions. So it recommended reversing that decision and seeing whether the temporary appointment should be extended or converted into a fixed-term one.

In a letter of 10 October 1995, which she impugns, the Director-General upheld the "decision not to extend the temporary appointment beyond 28 February 1995 and not to convert it into a fixed-term one".

In a letter of 21 December 1995 UNESCO informed her that she had not been appointed to post 238.

B. The complainant submits that the impugned decisions were ultra vires: the Director-General had by a note of 21 November 1994 delegated authority to the Assistant Director-General, who was not free to delegate further: *delegatus non potest delegare*.

She sees bad faith in UNESCO's failure to fulfil its "implied promise to put her where she would have been had she got post 239". Instead of terminating her appointment it should have applied Rule 104.8(b), which says that: "A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment ..."

She further pleads, among other flaws, failure to give reasons for the impugned decisions and to consult the SPAB, misuse of authority, and breach of equity and natural justice.

She seeks the quashing of the decisions; reinstatement as from 1 March 1995 in post 238 or another at grade P.3 under a two-year appointment as from the date of the judgment or, failing that, a fixed-term appointment; an award of 100,000 French francs in material and moral damages and costs, which she puts at 30,000 francs.

C. UNESCO replies that there were no implied decisions not to convert her temporary appointment into a fixed-term one or not to confirm her appointment to post 238. According to precedent no decision may be implied unless a formal claim has been put to the Administration. The complainant put none.

The Organization objects on the merits to her challenge to the decision to extend her appointment to 28 February 1995. It never promised her post 239. The process of selection had to stop because reasons of policy required the upgrading of the post to P.4. The Organization never promised her a permanent appointment on post 238 or a fixed-term appointment, even supposing that the Director-General's consent to creating a P.3 post for her might be treated as a promise.

The challenged decisions were not ultra vires. Precedent acknowledges the delegation to be the ordinary means of exercising administrative authority. Besides, the Director-General said in a note of 26 February 1988 that the authority he had delegated to the Assistant Director-Generals should flow down from top to bottom.

Under Staff Regulation 4.3.2 staff are recruited so far as possible by competition. Paragraph 20 of administrative circular 1722 of 8 November 1990 says that a temporary appointment may be converted into a fixed-term one only after following the ordinary procedure for recruitment to vacancies. So no personal prejudice prompted the decision to put post 238 up for competition.

Lastly, UNESCO says that Rule 104.1(b)(iii) laid no duty on it to consult the SPAB, the complainant not having spent more than a total of 12 months under temporary contract in UNESCO's employ in the last two years.

D. In her rejoinder the complainant observes that the memorandum of 6 February 1995 confirming the extension to 28 February 1995 also contained the two "implied decisions" she referred to in her appeal of 7 February 1995 to the Director-General. The Director-General's silence implicitly confirmed all three. She disagrees that there can be no implied decision unless the official has first lodged a formal claim. Besides, the Director-General's letter of 10 October 1995 confirming the decision not to convert her appointment into a fixed-term one proves that there had indeed been such a decision.

The delegation of the Director-General's authority related only to the programme for 1988-89: that is plain from another note of the Director-General's dated 14 December 1987. The plea that the complainant's appointment could not be converted into a fixed-term one is wrong in law. The Director of Personnel herself said, in her minute of 11 January 1994 to the acting Deputy Director-General, that she wanted to avoid the process of recruitment by appointing the complainant to post 238. Lastly, the complainant seeks the disclosure of information about the grant of appointments to temporary employees and the conversion of such appointments into fixed-term ones.

E.UNESCO presses its pleas in its surrejoinder. The Director-General's silence meant no more than rejection of her appeal against the decision not to extend her appointment beyond 28 February 1995. The consequences - and they were not decisions as such - were that her appointment was not converted into a fixed-term one and she was not put on post 238. The downward flow of authority by delegation is consistent practice at UNESCO in all areas. The Organization is under no duty to give reasons for a decision not to extend a temporary appointment. By saying in her memorandum of 11 January 1994 that she did not want a process of recruitment the Director of Personnel was merely affording justification for the grant of the temporary appointment.

#### CONSIDERATIONS:

1.The complainant studied law at the University of Paris I, where she obtained a degree in law and a master's degree in law in 1984.

From May to September 1991 she was a trainee with UNESCO at its headquarters in Paris in the operational projects section of the Division of Management and Administration. In February 1992 she took up duty under a supernumerary contract in the Bureau of the Comptroller at grade G.2, step 3. From 5 February to 5 May 1993 UNESCO advertised a competition for a grade P.3 post, PER 239, for a salary officer in the Division of Staff Policy and Procedures (PPR). The complainant applied.

On 15 September 1993 the Senior Personnel Advisory Board (SPAB), to which the matter had been referred, recommended her for the post. Also on 15 September she was granted a further supernumerary appointment for two months from 20 September 1993. A letter of 18 November informed her of a decision to upgrade the post from P.3 to P.4 and to halt the process of selection. On 20 November she left UNESCO.

In a handwritten note of 20 December 1993 to the Director of the Bureau of Personnel the Director-General said that, as the Advisory Board had recommended, he was appointing the complainant to post 239. But it is not alleged, let alone shown, that she had formal notice of the decision or even heard of it. On 21 December the Chief of Staff Policy and Procedures spoke by telephone to the Director-General. In a memorandum of 4 January 1994 the Director of Personnel told the Director-General that she thought the complainant under-qualified for the technical requirements of the post. The process of selection was accordingly stopped so that the post could be upgraded to P.4. With the Assistant Director-General's approval a new competition was announced, the deadline for applications being 8 February 1994. The Director-General was invited: (a) to go ahead with the process of selection; (b) to consider other positions for the complainant; and (c) if no vacancy could be found to establish a P.3 post for her in the Bureau of Personnel. The Director-General wrote "OK" against (a) and (c). Again it is neither alleged nor proven that the complainant had notice of the text at the time.

In a memorandum of 11 January 1994 to the acting Deputy Director-General the Director of the Bureau of Personnel suggested reviving another post, PER 238, for the complainant and she went on:

"In order to act as quickly as possible and avoid the recruitment procedure, I propose to appoint Ms. Ndedi on the above-mentioned post on a temporary basis for a preliminary period of six months."

The acting Deputy Director-General having agreed, the complainant was offered appointment to post 238 as a grade P.3 planning officer for six months from 7 February 1994. She accepted the offer; though the appointment was temporary, she hoped it might later be changed to a fixed-term one. Her performance was rated C on a scale ranging from A (exceptional), B (very good), C (satisfactory) and D (acceptable) down to E (unsatisfactory). She was told the rating on 30 June 1994 and said she was not challenging it. She got a six-month extension of appointment from 7 August. The Organization put post 238 up for competition by a notice it issued on 30 October. On 4 November she applied. At a meeting of 25 January 1995 she learned that the Bureau of Personnel was to end her temporary appointment. She commented in a memorandum of 26 January 1995 and got a reply of even date. By a memorandum of 6 February a personnel officer confirmed that the Organization would not be keeping her on after 28 February 1995 and told her about arrangements for separation. In a letter of 7 February she appealed to the Director-General to reverse the decision on compassionate grounds. She said she inferred three decisions:

one, not to extend her appointment beyond 28 February 1995:

another, not to convert her temporary appointment into a fixed-term one;

and a third, not to confirm her appointment to post 238.

In her submission those decisions showed procedural and substantive flaws.

She left the Organization for good on 28 February 1995.

On 10 April UNESCO interviewed her for post 238. The Senior Personnel Advisory Board reported on 30 October: the majority recommended someone else. On 21 December 1995 the Organization told the complainant that she had not been successful but that other posts were up for competition in which she might be interested. The Director-General appointed the recommended candidate. It is neither alleged nor proven that the complainant challenged those decisions.

In its report of 3 July 1995 the Appeals Board recommended putting the records to the Director-General in view of the instructions he had already given for handling of the case. The Board was also in favour of converting her temporary appointment into a fixed-term one.

By a letter of 10 October 1995 the Director-General informed her that he was upholding his decision not to extend her temporary appointment or convert it into a fixed-term one. He advised her to watch out for announcements of suitable vacancies.

2. The parties disagree about what the purport of the challenged decision is in law. In the complainant's view it consists of a decision not to extend her temporary appointment beyond 28 February 1995 and of implied decisions not to convert it into a fixed-term one and not to confirm her appointment to post 238. In its reply UNESCO says that there were no such implied decisions.

That the Director-General did rule expressly on the first two matters is plain enough from the wording of his decision of 10 October 1995, and it would be in bad faith to deny that. But the complainant could not reasonably construe his decision as refusing to appoint her to post 238: that depended on the outcome of the competition which she had entered, which was not over by the date of filing this complaint. Since she has failed to exhaust her internal remedies that matter is irreceivable under Article VII(1) of the Tribunal's Statute and the present ruling will be confined to the first two points.

3. The complainant asks the Organization to say how often it has stopped a competition in order to change the duties of the vacant post and regrade it. There is no need for evidence on that score since the issue is not decisive: if the procedure is lawful it is immaterial how often UNESCO may have followed it before: see 6 below.

4. The complainant had a temporary appointment. The Staff Regulations and Rules distinguish such an appointment both from a permanent and a fixed-term one and from a traineeship and supernumerary employment. It differs in particular from a fixed-term appointment in that it is expected from the outset to be a fairly short stint, with no more than a few brief extensions, whereas the fixed-term appointment is commonly extended and may even afford the basis of a career in the Organization: see Judgments 1116 (in re Diallo) under 5 and 444 (in re Alexis) under 1. Thus Rule 104.8 reads:

"(a) A temporary appointment shall be an appointment for a continuous period of less than one year, ending on a date specified in the Letter of Appointment.

(b) A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term 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."

Administrative circular 1722 of 8 November 1990, which is about "Temporary help and outside experts", says:

"17. A temporary appointment is an appointment for a continuous period of at least six months and less than one year, including extensions ...

...

19. The total duration of temporary appointments, including any extensions, offered to an individual by all units of the Secretariat may not exceed 24 months within a period of 35 consecutive months.

20. A temporary appointment may no longer be directly converted into a fixed-term appointment. Such a conversion will only take place after appointment to a vacant established post following normal recruitment procedures. This measure is necessary to ensure that all permanent staff members are recruited through open and competitive procedures."

5. The complainant's first plea in support of her claim to the quashing of the impugned decision is that the official who decided not to grant her an extension beyond 28 February 1995 - the chief of the Administration Division (PER/ADM) - acted ultra vires for want of proper delegation of authority.

The plea is receivable: see, for example, Judgments 292 (in re Molloy) under 18, 869 (in re Hill), 1184 (in re Mangeot) and 1185 (in re Mermier). But it is devoid of merit.

In a note dated 26 February 1988 the Director-General invited senior officers to delegate in turn whenever circumstances so warranted. By note 95/45 of 21 November 1994 the Director-General delegated authority to extend an appointment to the Assistant Director-General for Management and Administration (ADG/MA), who in turn delegated it to the Director of the Division of Personnel (PER) in a minute of 25 November 1994. By a minute of 19 January 1995 the Director empowered the chief of the Administration Division (PER/ADM) to take such decisions.

The complainant contends on various grounds that such delegation was either improper or of no effect.

Two of her arguments are: delegatus delegare non potest, and the Director-General's note of 26 February 1988 applied to an earlier period. They fail. The authority delegated in this case was for the taking of administrative decisions, not for the approval of rules. As was held in Judgment 805 (in re Aras and others), delegation is the ordinary way of exercising authority, and the larger the administration the more authority must be passed down. Though the Director-General's note of 26 February 1988 was about the programme for 1988-89, the heading - "Efficiency in the secretariat" - and the substance of it show his intent not to confine it to that period. So there was nothing wrong with the further delegation at the material time of authority to take administrative decisions.

The complainant further pleads that the Assistant Director-General could not properly delegate authority on 25 November 1994 because the delegation to himself by the Director-General did not take effect until 1 December 1994. There is no substance to the plea: obviously the further delegation became valid as soon as delegation by the Director-General took effect.

True, further delegation by the Assistant Director-General did not cover "delicate cases" and the complainant says that hers was such a case. But there was no abuse of the Bureau of Personnel's discretion in not treating her case as a delicate one: it fell squarely within current practice and the rules about expiry of a temporary appointment and possible conversion into a fixed-term one.

She further contends under this head that not only was her case a delicate one but for the sake of formal consistency it should have gone to the Director-General himself for a decision since he had himself ordered her appointment to post 238. The Tribunal is not satisfied on the evidence that it had been the Director-General's own decision to grant her a temporary appointment even though he had so ordered. In any event, since the appointment was temporary it was obviously seen as short-lived, and the refusal to extend was not a reversal of the appointment; there was no need for the same person to act and the Bureau of Personnel did not go against the Director-General's wishes. Indeed the Director-General confirmed its decision by his later rejection of her appeal.

Her last argument is that the Director of the Bureau had delegated to the chief of the Administration Division authority only to grant an extension of appointment or promotion, not to terminate an appointment. That is a mere quibble: the grant of an extension means that the appointment will expire at the end of the further period; refusal of it means that it will expire anyway. So the chief of division did not act ultra vires.

6. The complainant next pleads misuse of authority by the Director of the Bureau of Personnel and endorsement of it by her superiors. In the complainant's submission there were no reasonable grounds for the impugned decision; its purpose was to do her down and favour someone else, and as proof she cites the rejection of her applications for posts 239 and 238, and the identity of the successful applicant for 238.

Yet what the Organization did appears lawful.

The competition for post 239 was stopped when the Bureau of Personnel came to the view that it required highly technical skills and that the complainant was not fit for it. For the sake of efficiency it was thought best to raise the requirements, upgrade the post and announce a new competition. That was in line with Manual provision 2415.D.7(d). The complainant has not argued, let alone shown, that those were not the true reasons. So her plea of misuse of authority fails.

Her temporary appointment to post 238, which she has not challenged, appears in no way improper. It was in the Organization's interests not to put her for good on the post because it might find someone better by competition. And the grant of the temporary appointment gave her no rightful expectancy of later appointment.

As for the competition, the complainant not only did not challenge it but actually entered it. The procedure complied with circular 1722, the purpose of which is beyond reproach.

Ending her temporary appointment after just over a year was also in keeping with the nature and purpose of such appointments, especially since the post was to be filled by another sort of appointment.

Lastly, although she failed in the end to get post 238, UNESCO says - and she does not demur - that the reason was that she did not have full command of English and French. So it was only reasonable for the Director-General to pick someone else.

The plea fails.

7. The complainant is again mistaken in contending that UNESCO gave her no reasons for its decision. She learned them when she saw the chief of the Administration Division and from the ensuing correspondence: time had already gone by; the post had already been put up for competition, she had applied for it; and she had as good a chance of winning as anyone else. Those explanations of UNESCO's reasons were sufficient to let her see where she stood and how she might proceed if she so wished.

8. Staff Rule 104.1(b) reads as follows:

"The Personnel Advisory Boards, each for the category of staff with which it is concerned ... shall give advice on the ... renewal of temporary appointments of staff members whose successive contracts exceed twelve months during the two preceding years."

Where the rules require consultation of an advisory board the formal requirement must be met before any decision is taken: see Judgment 1525 (in re Bardi Cevallos), also delivered this day.

The complainant maintains that the Senior Personnel Advisory Board ought to have been consulted and that because it was not the decision is flawed. UNESCO answers that the rule did not apply because in "the two preceding years, i.e. 1993 and 1994", she did not have "successive temporary contracts" of a total duration of over 12 months.

UNESCO is construing the rule to make the words "during the two preceding years" mean the two preceding calendar years. That construction is wrong: what the text must be referring to is the two full years - 730 or 731 days - immediately before the material date. Only that construction obviates the risk of discrimination where decisions occur at different times of the calendar year. It appears right also because Rule 104.8(a) defines a temporary appointment as one "for a continuous period of less than one year" and because the lapse of time in the current year must count.

The relevant appointments are obviously temporary ones, not traineeships or supernumerary contracts, and the relevant date is the one at which the appointment is to end or beyond which the extension is to be granted. It is immaterial whether further extension is granted before the appointment eventually ends.

On that interpretation of Rule 104.1(b)(iii) consultation of the Senior Personnel Advisory Board was unnecessary because the complainant had held temporary appointments for fewer than twelve months.

The complainant's plea is devoid of merit.

9. She pleads bad faith on the grounds that stopping the competition for post 239 after the Advisory Board had

recommended her was intended to prevent her getting it, and putting her on post 238 instead gave her rightful expectations of the permanent appointment she would have got if the Bureau of Personnel had not interfered; so she could expect to get an equivalent appointment.

As was held in Judgment 782 (in re Gieser) under 1, good faith requires an organisation to keep a promise subject to certain conditions: the promise must be substantive, i.e. to act or not to act or to allow; it must come from someone competent or deemed competent to make it; the breach of it must cause injury to the person who relies on it; and the position in law must not have altered between the date of the promise and the date at which fulfilment is due. It does not matter, however, what form the promise takes.

Here there is no inkling of any promise UNESCO may have made and failed to keep. Comments that various officials may have made about the complainant's case are immaterial inasmuch as they were never addressed to her on the Organization's behalf. She had no right to appointment to post 239, only to compliance with the rules of the competition. Understandably enough, stopping the competition, proper though it was, upset her, the more so since the Senior Personnel Advisory Board had recommended her; and, understandably too, the Director-General was willing to help out by letting her have eventually the temporary appointment. She was happy enough to have it at the time and indeed did not demur. But that was all she got: UNESCO made her no promise, either to convert her appointment into a permanent one or to do anything else. It was UNESCO's policy and sound management to try to get the most competent possible staff by means of competition. That is the policy underlying circular 1722 on the conversion of temporary appointments. So the complainant was not entitled to infer from UNESCO's treatment of her any promise that she would eventually get another sort of appointment.

It is, moreover, worth observing that she did not demur at UNESCO's putting post 238 up for competition.

Since she has failed to show the existence of a promise, her plea fails.

10. She submits that the decision not to renew her appointment caused her such serious injury by damaging her future career as to be treated as unlawful or at least to warrant damages.

Under Staff Rule 109.7(g)(ii) no termination indemnity shall be payable to a staff member whose temporary appointment expires at the date set in the letter of appointment: see Judgment 1114 (in re Romain) under 11.

In any event the complainant's reasoning is at fault. Though she doubtless suffered distress, the Organization is not to blame. The appointment it gave her, being temporary, offered her no promise whatever of any more lasting one. She must have realised that UNESCO could not have granted her a longer appointment without first reviewing her case. It was only to be expected, and indeed only reasonable, that it would put the posts up for competition, even though she already held one of them on a temporary appointment. Disappointed though she must have been by the interruption of the competition to fill post 239, for which she had the Advisory Board's recommendation, she had no firm assurance of getting it until the decision to fill the vacancy was taken. There was no breach of the material rules. Nor may UNESCO be held liable for not putting her permanently on post 238 without competition or - after the impugned decision - for her not winning the competition.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas  
E. Razafindralambo  
Egli  
A.B. Gardner

