

**EIGHTY-THIRD SESSION**

***In re Efféian***

**Judgment 1653**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the complaint filed by Mrs. Ginette Efféian against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 December 1996, UNESCO's reply of 22 January 1997, the complainant's rejoinder of 14 February and the Organization's surrejoinder of 24 March 1997;**

**Considering Articles II, paragraph 5, and VII, paragraph 1, 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 French citizen who was born on 25 January 1935, joined the staff of UNESCO on 1 July 1979 as a secretary at grade G.3. She had her fixed-term appointment regularly extended until 31 January 1995, when she took retirement.**

**On 4 April 1990 UNESCO promoted her to grade G.4 as from 1 July 1988 on the regrading of her post, No. BRX-068, in the Bureau of External Relations (BRX). As from 1 February 1991 she performed some of the duties of a vacant post at grade P.1/P.2, No. BRX-067, for an assistant liaison officer (below described as post 67). In accordance with Staff Rule 103.17 the Organization paid her a special post allowance corresponding to grade G.5 from 1 May 1991. On 29 August 1994 it again upgraded her own post to G.5, and it promoted her to that grade as from 1 July 1993.**

**By a personnel action form dated 2 September 1994 it told her it would stop paying the allowance as from 1 July 1993. In a memorandum of 23 September 1994 to the Director of the Bureau of Personnel (PER) the Assistant Director-General for External Relations said that, since the complainant was still performing some of the duties of post 67, she should get the special post allowance at grade P.1/P.2 - adjusted to take account of her promotion to G.5 - as from 1 July 1993 and until the post was filled. In a memorandum of 22 November 1994 the Director answered that, having consulted the classification section of the Bureau of Personnel, she took the view that the duties of post 67 that the complainant was performing warranted only grade G.5; she was therefore refusing the claim. On 10 February 1995 the Assistant Director-General sent the Director a claim to retroactive payment of the allowance to the complainant on the grounds that she had performed "many" of the duties of the post until 31 October 1994, the date at which her section had taken on temporary help. In a memorandum of 3 March 1995 to the Assistant Director-General, the Director confirmed that the duties of post 67 that the complainant was performing were worth only G.5.**

**By a letter dated 19 May 1995 the complainant asked the Director-General to intercede to get "PER to pay the full allowance" retroactively stopped in September 1994. On 7 September 1995 the acting Director-General told her that he was confirming the Director of Personnel's decision of 3 March 1995. On 27 October she gave notice of appeal to the Appeals Board against the decision of 7 September 1995. She put her "detailed appeal" to the Board on 5 February 1996. In its report of 5 July 1996 the Board pointed out that she had not challenged the grading of the duties of post 67 at G.5 on getting the post allowance on 1 May 1991 and that in the assessment of them there was "no apparent error of fact or law"; it recommended rejecting her appeal. By a letter of 4 October 1996 the Director-General told her that he did so, and that is the decision under challenge.**

**B. The complainant says that, bit by bit, her supervisors had her take on almost all the duties of post 67. Since the post itself was graded P.1/P.2, how could the duties warrant only G.5? In her submission UNESCO**

acted in breach of Staff Rule 103.17(b), which is about the grant of the allowance, and of Manual paragraph 2320.33, which is about temporary assignment to higher duties for more than three months. In assessing post 67 the Organization applied the standards for grading General Service category posts, whereas it ought to have taken the Professional grading standards in Appendix 22A to the Manual.

The complainant claims in special post allowance the amount corresponding to a difference of one grade for the period from 1 July 1993 to 31 January 1995, plus interest at the rate of 10 per cent a year on the component sums as from the due dates within that period and on the total as from 31 January 1995; 100,000 French francs in material and moral damages; and costs.

C. In its reply UNESCO pleads that the complaint is irreceivable. It says that the letter which the complainant wrote to the Director-General on 19 May 1995 did not amount to a "protest ... in writing" within the meaning of paragraph 7(a) of the Appeals Board's Statutes. Besides not reading like a "protest", it ought to have been addressed to the Director-General through the Director of the Bureau of Personnel. The complainant had one month in which to challenge the personnel action form of 2 September 1994 stopping the allowance. She also filed her detailed appeal after the expiry of the time limit in paragraph 10 of the Statutes, which was one month following the notice of appeal.

As to the merits the Organization contends that the duties of post 67 that the complainant took on did not warrant paying the allowance after her promotion to G.5. The classification section of the Bureau of Personnel having assessed those duties, the findings were set out in a handwritten note dated 25 October 1994 and in greater detail in a note of 9 August 1996 by the head of the section. The decision to grade the duties at G.5 was in line with those findings and quite sound. Besides, the complainant did not challenge the payment of the special post allowance at that grade when she herself was at G.4.

D. In her rejoinder the complainant observes that the Appeals Board did not acknowledge receipt of her notice of appeal until 9 January 1996, when it asked her to enter her detailed appeal by 9 February. Since she did so on 5 February she met the time limit. She protested at once through her supervisors against the stopping of the allowance when told of it on 2 September 1994.

On the merits she argues that the note of 9 August 1996, though it does take account of the Professional grading standards, came after the Board had reported. The assessment it makes is wrong: although at first she was given only one-third of the duties of post 67 she was actually performing "85 per cent" of them - part time to begin with and then full time - from 1 July 1993 until 31 August 1994. In that period her own grade was G.5. And the post was filled at P.2.

E. In its surrejoinder the defendant presses its objections to the receivability of the complaint and its pleas on the merits. Citing precedent, it submits that grading a post, be it in the Professional or General Service category, is a matter of discretion. The decision in this case shows no fatal flaw.

## CONSIDERATIONS

1. The complainant joined the staff of UNESCO on 1 July 1979 at step 1 in grade G.3. The Organization regularly renewed her fixed-term appointment until 31 January 1995, when she took retirement.
2. Her post, BRX-068, was upgraded to G.4 and then to G.5. She was retroactively promoted to G.4 as from 1 July 1988 and to G.5 as from 1 July 1993. As from 1 February 1991 she was required to perform some of the duties of another post, No. BRX-067, which was graded P.1/P.2 and was vacant. She was accordingly granted the special post allowance provided for in the Staff Rules at grade P.1/P.2 as from 1 May 1991. A personnel action form of 2 September 1994 told her that payment of the allowance would stop as at 1 July 1993.
3. On 9 September 1994 she put to the Director of the Bureau of Personnel a request that she should continue to get the allowance from 1 July 1993 until 31 January 1995. The Assistant Director-General for External Relations interceded in her favour with the Director of the Bureau of Personnel. The Director answered him in a memorandum of 22 November 1994 that according to a technical assessment by the classification section of the Bureau of Personnel the duties of post 67 which the complainant had been performing warranted only grade G.5; so there was no question of letting her have the allowance at any

higher grade.

4. The Assistant Director-General sent another memorandum on 10 February 1995 and the Director of Personnel answered on 3 March that she would not change her decision. On 19 May the complainant wrote a letter to the Director-General asking him to intercede. On 7 September the acting Director-General answered that she was not to get the allowance after 1 July 1993. On 27 October 1995 she filed a notice of appeal with the Appeals Board and on 5 February 1996 her detailed statement of appeal. In its report of 5 July 1996 the Board recommended rejection. By a decision of 4 October 1996 the Director-General endorsed that recommendation, and that is the decision impugned.

5. The Organization submits that the complaint is irreceivable on the grounds that the complainant failed to comply with the rules on internal appeal and in particular with the time-limits for appeal to the Director-General and in the internal appeal proceedings.

6. According to Article VII, paragraph 1, of the Tribunal's Statute, a complaint "shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". So where the staff regulations lay down a procedure for internal appeal it must be duly followed: there must be compliance not only with the set time limits but also with any rules of procedure in the regulations or implementing rules.

7. The Staff Regulations and Staff Rules of UNESCO lay down an internal appeal procedure, and paragraphs 7(a) and (c) and 10 of the Statutes of the Appeals Board go into the particulars. Thus 7(a) reads:

"A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters ..."

In support of its objection to receivability the Organization points out, first, that the complainant failed to address a "protest" to the Director-General through the Director of the Bureau of Personnel but merely sent him her letter of 19 May 1995, which was no "protest" within the meaning of 7(a); and, secondly, that it was out of time anyway.

8. The first argument fails. She duly addressed her letter of 19 May 1995 to the Director-General in the form of a protest within the meaning of 7(a). Although she sent it to him directly and not through the Director of the Bureau of Personnel, Staff Rule 101.1 confers on a staff member the right of "access to the Director-General, normally through established supervisory channels, but exceptionally and for sufficient reason, directly". This was just such an exceptional case. On 9 September 1994 the complainant had addressed an appeal to the Director of the Bureau of Personnel who, instead of forwarding it to the Director-General, passed it on to the Assistant Director-General for External Relations. The Assistant Director-General interceded twice on her behalf, but to no avail. So she was free to conclude that in the circumstances she had no choice but to go directly to the Director-General. Indeed the Director-General did not demur. As for her letter of 19 May 1995, it is hardly arguable that its purpose was to protest against the decision notified in September 1994 to stop paying her the allowance.

9. The defendant's second argument is that she missed the time limit of one month in paragraph 7(a) for addressing her protest to the Director-General. Since the decision to stop the allowance was notified on 2 September 1994 the deadline was long past by 19 May 1995, when she made her protest. The argument is unanswerable. It is true that she did begin with an appeal of 9 September 1994 to the Director of the Bureau of Personnel, who was supposed to forward it to the Director-General: see Judgment 1259 (*in re Camara*) under 4. And the fact that the Director forwarded it instead to the Assistant Director-General for External Relations might conceivably have had the effect of suspending the time-limit. But the Assistant Director-General wrote his memorandum of 10 February 1995 and the Director of Personnel took her decision on 3 March 1995; so the time limit started again to run at the latter date. Even on that assumption the complainant's appeal of 19 May 1995 to the Director-General was too late.

10. The defendant further argues that the complainant failed to supply her detailed appeal within the time limit in paragraph 10 of the Appeals Board's Statutes, i.e. "within one month of the notice of appeal"; she did not supply it until 5 February 1996. She explains that the secretary of the Appeals Board asked her not to enter her detailed appeal before getting acknowledgement of receipt of the notice, and she did not get

such acknowledgement until 31 January 1996. That is borne out by the secretary's letter of 9 January 1996, which says: "... your detailed appeal must reach me by ... 9 February 1996". The Board itself did not take the view that the complainant had been late in filing her detailed appeal. The Organization's plea that the complainant failed to abide by paragraph 10 is therefore not upheld.

11. Yet the conclusion is that the protest against the decision of 2 September 1994 was outside the time limit in paragraph 7(a). So the complaint is irreceivable, the internal remedies not having been exhausted.

## DECISION

For the above reasons,

The complaint is dismissed.

## DISSENTING OPINION BY MR. JEAN-FRANCOIS EGLI

I endorse the decision, but on other grounds.

I have difficulty with the conclusion in 6 above, that the internal remedies were not exhausted as Article VII(1) of the Tribunal's Statutes requires. It is true, as the judgment explains, that the complainant missed the time limits. But her case may be distinguished from earlier ones in which the Tribunal held that the internal remedies had not been exhausted: see Judgments 995 (*in re* Agbo); 1132 (*in re* Bakker No. 2); 1140 (*in re* Rosen); and 1181 (*in re* el Ghabbach No. 3). Here the decision-making authorities of UNESCO did not declare the internal appeals time-barred and therefore irreceivable but rejected them on the merits. In its report of 5 July 1996 the Appeals Board did not rule on the administration's plea that the appeal was out of time but recommended rejection on the merits. And in his decision of 4 October 1996 the Director-General endorsed that recommendation. He did so after seeing a further report made in August 1996 by the head of the classification section of the Bureau of Personnel, and so had all the material evidence at his disposal for deciding on the matter. It is indeed scarcely arguable that as the executive head of the Organization the Director-General was competent to determine whether the staff member had been unfairly treated. Where the system of appeal requires that remedies available in law before some other body be first exhausted, the purpose is to relieve the higher authority of going into the merits of a dispute which could have been put to the lower authority first but has not been and to respect the competence of the lower authority. The requirement is met when the lower authority has gone into the merits even if according to its own rules it was wrong to do so. Any other approach would prove needlessly troublesome to the would-be appellant. Here the Organization pleads failure to exhaust the internal remedies on the grounds that its acting Director-General and then the Director-General ought to have declared the appeals irreceivable. But since its shift in attitude is prejudicial to the other party it is estopped from so pleading: *venire non licet contra factum proprium*.

In any event the complaint is devoid of merit. What the complainant is objecting to is the grading of the duties of post 67 that she was carrying out. According to the case law such grading may be made only by those whose training and experience qualify them for the exercise. The Tribunal will not substitute its own assessment and may exercise only a limited power of review in the matter: see Judgment 591 (*in re* García).

The classification section of the Bureau of Personnel graded the duties that the complainant was performing in line with the relevant grading standards. A fuller assessment which the head of the section had made for the Director-General in August 1996 came to the same conclusion. And the complainant offers no plea to warrant setting the assessment aside.

There is no strict rule as to whether a particular duty belongs to the Professional or to the General Service category. That too is a matter within the discretion of the grading officers, and so is their assessment: see Judgment 606 (*in re* Polacchi). The evidence that the complainant is relying on does not suggest that there was any fatal flaw in the impugned decision.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

*(Signed)*

**Mella Carroll  
E. Razafindralambo  
Egli  
A.B. Gardner**

Updated by PFR. Approved by CC. Last update: 7 July 2000.