

EIGHTY-FOURTH SESSION

In re Cabral (No. 2)

Judgment 1673

The Administrative Tribunal,

Considering the second complaint filed by Mr. Nelson Cabral against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 March 1997, UNESCO's reply of 20 May, the complainant's rejoinder of 12 June and the Organization's surrejoinder of 17 July 1997;

Considering Article II, paragraph 5, 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 Cape Verde who was born in 1940, joined the staff of UNESCO in 1981 as a programme specialist at grade P.3. He was promoted to grade P.4 as from 1 January 1988, and since 1 April 1994 has held post SHS-298 in the Cooperation for Development Unit. The Bureau of Personnel approved the post description on 3 November 1994 and the complainant signed it on 22 November.

On 21 March 1995 the complainant asked for a "desk audit" of his post on the grounds that when created it had been too lowly graded. The desk audit was done in June and the findings went to the Senior Personnel Advisory Board (SPAB). In its report of 12 December 1995 the Board was unanimous, after hearing the complainant and a representative of the Bureau of Personnel, that his post had been properly graded P.4. In her memorandum to him of 18 December the Director of the Bureau confirmed that grade on the Director-General's behalf. On 16 January 1996 he protested to the Director-General against that decision. Having got no reply within a month he went to the Appeals Board on 29 February. In its report of 27 November 1996 the Board recommended quashing the impugned decision and ordering another desk audit with a hearing of the complainant's supervisors. By a letter of 22 January 1997, the impugned decision, the Director-General rejected his appeal.

B. The complainant has two pleas. One is that the decision to keep his post at grade P.4 showed two procedural flaws. First, having omitted to question his supervisors, the Director of the Bureau of Personnel could have had no clear or objective idea of the nature of his duties. Secondly, the SPAB proceedings were not adversarial: the grading officer who had assessed his post attended the Board's meeting, whereas he himself was told to leave once it had heard him. Furthermore, the SPAB's report was unsubstantiated.

His second plea is that the Administration overlooked essential facts: "sweeping changes" in his unit have greatly increased his responsibilities, and the desk audit overrated one of the seven factors of assessment.

He asks the Tribunal to declare the Director-General's decision of 22 January 1997 unlawful and to award him 15,000 French francs in costs.

C. In its reply the Organization first submits that the complainant provides no evidence of any great change in the structure and functions of his unit between 20 November 1994, when he signed the post description, and 21 March 1995, when he asked for a desk audit. So he had no reason to seek review of the grading.

Secondly, it denies procedural flaws. For one thing, there was no point in hearing his supervisors since the post description was clear and he himself was able to answer all the questions from the grading officer, who was in no doubt about his duties and responsibilities. He asked neither the SPAB nor the Appeals Board to hear his supervisors. For another thing, the Staff Rules allow the grading officer, as representative of the

Director of the Bureau of Personnel, and representatives of the Staff Associations, to attend SPAB meetings. But the grading officer did not take part in the ensuing talks. In any event the complainant was given ample opportunity to have his say orally or in writing. His plea that the SPAB failed to substantiate its recommendation is immaterial since the Board, being unanimous, was endorsing the reasoning of the report on the desk audit.

The post evaluation was proper and took account of all the criteria, and in any case the Tribunal has only limited powers of review over decisions of this kind.

D. In his rejoinder the complainant submits that by signing the post description he simply acknowledged that he had seen it. Only after several months on the job did he realise that the post had been underrated. At no time did the SPAB check the grading officer's assessment and hearing his supervisors would not have been pointless.

Contrary to what the Organization says, though they may not vote, the Administration's representatives do take part in the SPAB's deliberations: they answer questions, whereas staff representatives do not. Lastly, the SPAB's unanimity does not make up for its failure to account for the recommendation.

E. In its surrejoinder the Organization presses its pleas. It asserts that by signing the post description the complainant acknowledged having been "informed of the duties and responsibilities attached to the post". It points out that the representative of the Director of the Bureau of Personnel took technical questions from the SPAB in accordance with the Staff Rules but did not "join" in the talks that followed.

CONSIDERATIONS

1. The complainant, a citizen of Cape Verde who was born on 3 May 1940, has been on UNESCO's staff since 25 May 1981. He was on post SHS-031 and held grade P.3. In March 1991 his post was upgraded to P.4 as from 1 July 1987, and he was promoted to that grade as at 1 January 1988. Though his post used to belong to the Social and Human Sciences Sector it - and he - were transferred by a decision of 22 December 1993 to the Bureau for External Relations. But the Director-General decided that he should go back to Social and Human Sciences. He has been there, on post SHS-298, since 1 April 1994 in a unit that used to be called Operations (SHS/OPS) but later became Cooperation for Development (SHS/CFD). The staff of that unit consists of him, his supervisor, who is at grade P.5, and a secretary.

The Bureau of Personnel approved the description of his post on 3 November 1994. A grading officer of the Bureau rated the post according to the standards of the United Nations common system. The range of points required to qualify a post for P.4 is 1670 to 2039; the complainant's post got 1855 points; and the Bureau graded it at P.4. His supervisors had approved the description of it. The complainant received copies of the description, scoring sheet and classification and put his signature to them on 22 November 1994. He failed to challenge them in time.

He later contended that the reason why he had not then appealed to the Appeals Board was that the Bureau had "not yet committed any breach of due process but had erred in assessing the grade according to the grading standards of the International Civil Service Commission".

On 21 March 1995 he asked to have post SHS-298 upgraded to P.5 and applied for a desk audit. The Bureau replied that it saw no call for one in the absence of any significant new facts. On 31 March 1995 the complainant applied for reclassification under Staff Rule 102.2 and the Director-General agreed to a desk audit. The audit was done, by another grading officer, on 7 June 1995. This time the post got 1912.5 points.

The complainant did a rating of his own and came up with a score of 2445, enough to make his post P.5.

As the procedure required, his case then went to the Senior Personnel Advisory Board (SPAB). In its report of 12 December 1995 the Board unanimously recommended keeping the post at P.4. By a decision of 18 December 1995 the Bureau of Personnel did so.

On 16 January 1996 the complainant protested to the Director-General. In a report dated 27 November 1996 the Appeals Board recommended another desk audit, but on 22 January 1997 the Director-General rejected his appeal and upheld the decision.

2. The complainant pleads procedural and substantive flaws:

(1) The Bureau of Personnel failed to speak to his supervisors, whose opinions were crucial.

(2) The SPAB too committed mistakes of procedure in that:

(a) it failed to consult his supervisors;

(b) the proceedings were not adversarial; and

(c) its finding was not substantiated.

(3) On the merits the impugned decision overlooked material facts:

(a) The duties and responsibilities of his unit had greatly altered. Thus its name changed from "Operations", which denoted mere support to other units in the Sector, to "Cooperation for Development", a unit that was in direct touch with senior civil servants and government departments in member States. So his own duties and responsibilities rose to P.5.

(b) Undue weight was given to "managerial responsibilities" and "authority to sign official documents", which together make up one of the seven relevant factors of assessment.

UNESCO rejects both his rendering of the facts and his pleas.

3. Any exercise in grading calls for familiarity with the sort of work that is being done and involves value judgments that only someone with proper training and experience can make. In other words grading is at discretion and the Tribunal will interfere only on limited grounds, namely a formal or procedural flaw, a mistake of fact or of law, neglect of some material fact, misuse of authority, a plainly wrong conclusion from the evidence or action taken *ultra vires*. In the absence of one of those defects the Tribunal will not replace the Organization's assessment with its own or order a change in grading: see Judgments 1067 (*in re Glenn*) under 2; 1152 (*in re Korolevich*), also under 2; and 1647 (*in re Bombo N'Djimbi*) under 7.

4. The complainant cites the reasoning in Judgment 1557 (*in re Sethi*) under 3 to show that the Administration should have consulted his supervisors. In that case the Tribunal did find evidence of an obvious oversight in that the complainant's supervisors had not been questioned because both of them had approved his own assessment of his duties and had therefore called for reclassification. But the Tribunal did not make a general ruling that supervisors should get a hearing.

This case is quite different. The complainant's first- and second-level supervisors both endorsed the post description and grading approved in November 1994, some four months before he asked for review. There is no evidence to suggest that any great change occurred in his duties and responsibilities in those four months. Nor is there any suggestion of such change in the explanation he offered in his rejoinder to the Appeals Board as to why he had put off filing an appeal. In any event he did not ask that his supervisors be heard and his unit saw no reason to have anyone speak for it in the internal proceedings. If the complainant had expected support from his supervisors he would no doubt have got them to speak on his behalf. In the circumstances neither the grading officer nor the SPAB was required *proprio motu* to consult his supervisors.

The plea fails.

5. The complainant pleads breach of his own right to a hearing by the SPAB. He says that according to the rules on procedure the staff member and a representative of the Administration may attend its meetings. But whereas the staff member has to leave when it starts deliberating, the representative may stay on and in his absence answer questions from the SPAB. The complainant pleads that that amounts to disparity between the parties and that the proceedings are not properly adversarial.

Though UNESCO does not challenge his account of the procedure, it says there is no breach of the staff member's right to a hearing since he may have his say without hindrance.

Whether proceedings are judicial or disciplinary, due process requires adversarial proceedings and the evenhanded treatment of both parties. It would in general be a breach of due process to let one of the parties address issues of fact or of law without letting the other attend and comment. Likewise, it may be unfair - for example, in the event of appeal - to let one party attend deliberations and not the other.

But the Tribunal need not consider here how far such principles must apply in internal appeal proceedings that culminate in a final decision.

The SPAB meets at an earlier stage, and how it functions is ordinarily for the Organization to determine. Besides, the staff member does have the opportunity of stating his case, and the representative of the staff on the Board affords a further safeguard of his interests. The procedure does not in itself impair the staff member's rights.

The plea is devoid of merit.

6. The complainant pleads a further procedural flaw in that the SPAB failed to account for its endorsement of the grading by the Bureau of Personnel.

There is a duty to explain a decision or a conclusion because everyone concerned has to know the reasons for it: the staff member, so that he may exercise his right of appeal, and the appeals body or, later, the Tribunal, so that it may exercise its power of review. But the duty will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower one or a recommendation by some advisory body.

In this case the SPAB's recommendation obviously endorsed the grading and the reasons for it approved by the Bureau of Personnel. So, though implied, the SPAB's reasoning was quite plain.

The plea again fails.

7. The complainant's internal appeal and complaint both rely on Staff Rule 102.2 and on Manual item 2205. The text of 102.2 that came into force on 9 March 1994 reads:

"Any staff member who considers that the nature of the duties or the level of responsibilities required of him/her are not compatible with the classification standards or criteria applicable to the grade of his/her post may, at any time, submit to the Director-General a request for the reclassification of the post, provided that there has been a substantial modification in the structure and responsibilities of the unit to which the post belongs, and consequently in the responsibilities of the claimant."

Item 2205, which came into force on 27 October 1976, says:

"F. ...

3. Reclassification of a post to a higher grade is based on a substantial increase in the level of duties, responsibilities or qualifications required ...

H. 1. Claims for reclassification made by staff members under Staff Rule 102.2:

a. at the beginning of the biennium ...

b. during the biennium: such claims will be considered by PER after a substantial modification in the structure or responsibilities of a unit not foreseen in the Approved Programme and Budget has been approved by the ADG/ADS and where in consequence the duties and responsibilities assigned to the incumbent of a post have been significantly changed."

In a "Manual issue note" of 19 February 1990 UNESCO announced that item 2205 and others were being updated and the revised texts would be announced shortly. But 2205 had been neither revised nor announced by the time the complainant made his claim: see Judgment 1556 (*in re* Leprince No. 2) under 8 for a similar point.

As worded that note neither repealed nor suspended item 2205: a rule is not impliedly repealed unless there is a higher one with which it conflicts.

There is no conflict between 2205 and 102.2: both provisions require "substantial modification in the

structure and responsibilities" of the post for the application for regrading to succeed.

8. So was there such "substantial modification" between the last grading of the complainant's post, in November 1994, and his application of 21 March 1995 for review?

He scarcely contends that there was. Indeed in the second brief he submitted to the Appeals Board he said:

"I never made out that the actual level of my post changed between 1994, when Personnel approved the desk audit description and March 1994 [*recte* 1995], when I applied for a desk audit."

Yet he offers several reasons why the requirement does not apply:

(a) General principle has it that administrative law must invariably be strictly observed.

Yet by common consent legal relations must be stable, in international organisations as elsewhere, and so the scope for review of grade must be limited. There is no objection to the requirement that the complainant is challenging.

(b) The complainant says that he misunderstood the position when he learned of the grading of his post on 22 November 1994. For one thing, he says he believed he was free to ask for review at any time. For another, he did not then grasp how important his duties and responsibilities were. There was, he argues, a "substantial modification" as against what he had been expecting.

Staff Rule 102.2 is plain enough: there must have been "substantial modification" since the last grading. Besides, the mistakes which he relies on, and which are his own, do not bar the application of the rule to him. And that conclusion is perfectly acceptable since he will be free to apply for regrading once the requirement is met.

(c) He argues that to see whether there has been "substantial modification" the comparison must be with his job as it was in April 1994, when his unit did different work and was known as Operations. It has, he says, since undergone big changes that warrant regrading his post.

The argument is not a cogent one. The decisive date was that of the last grading, by which time the new duties and responsibilities of his post had been determined.

If there was no great change in them there are no grounds for review. Even supposing that the grading was questionable, the complainant may not try to challenge it now by making out that the points on which it was based were too low.

Whatever the Administration's representative may have said to the SPAB, the Director-General did not misuse his wide discretion in taking the view that the requirement for review of the grading was not met.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

