

EIGHTY-FOURTH SESSION

***In re* Byng-Clarke,
Gomes and Wijayadasa**

Judgment 1680

The Administrative Tribunal,

Considering the complaints filed by Mrs. Susan Byng-Clarke, Mrs. Marialda Gomes and Mr. Somaratne Wijayadasa against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 December 1996, UNESCO's replies of 7 February 1997, the complainants' rejoinders of 19 February and the Organization's surrejoinders of 26 March 1997;

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 none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. At the material time the complainants were stationed at UNESCO's Office in New York. On 10 October 1995 the Director of the Office forwarded to them fax memoranda from the Director of the Bureau of Personnel at headquarters in Paris telling them that the Director-General had that very day put them on special leave with pay until further notice. The memoranda to Mrs. Byng-Clarke and to Mrs. Gomes said that the Director-General was "examining the real needs in staff of the New York Office". The one to Mr. Wijayadasa, whose post was to go because of reforms, said that the Director-General was looking into his case. On 11 October the complainants each filed an administrative "protest" but they got no answer. Mr. Wijayadasa went to the Appeals Board on 7 December and Mrs. Byng-Clarke and Mrs. Gomes on the 11th.

By memoranda of 18 January 1996 the Director of the Bureau of Personnel told them of their new assignments. Mrs. Byng-Clarke was to go along with her post as from 1 February 1996 to the UNESCO "desk" on the premises of the United Nations in New York. Mrs. Gomes had her post scrapped and was transferred, also as from 1 February 1996, to UNESCO's Office in Washington D.C. Mr. Wijayadasa's post too vanished and he was to report "in the shortest delay" to UNESCO's Office at Kingston, in Jamaica. He was promoted to grade P.4 as from 1 November 1995, but his transfer did not go through and he was eventually seconded as from 1 March 1996 to the United Nations Programme on AIDS (UNAIDS).

The Appeals Board reported on 5 July 1996. It recommended reversing the decisions, removing any relevant papers from the complainants' personal files and granting them one month's pay each in compensation for "anguish, indignity and prejudice". But by letters dated 4 October 1996 the Director-General rejected their appeals as misconceived both in law and in fact. Those are the decisions under challenge.

B. The complainants contend that the decisions are not substantiated. The Director-General may have been "examining the real needs in staff of the New York Office", but that was no reason to stop them from carrying on as usual. The Organization acted in breach of the rules. Review of the staffing of an office is not akin to any "exceptional circumstances" of the kind mentioned in Rule 105.2(b), which the Organization cited in its submissions to the Appeals Board. In Judgment 809 (*in re* Najman Nos. 1 and 4) the Tribunal said that such a circumstance must be an "unexpected" or "exceptional contingency". The complainants further argue that the impugned decisions were an affront to dignity. The unseemly haste in carrying them out - shortly after two missions by the Inspectorate General to the New York Office - and the want of any basis for them in the rules cast doubt on the standing of staff whose performance had never come under fire. Lastly, they plead breach of due process in that the Organization put them on special leave with pay for the sole purpose, to their mind, of gathering evidence against them of misconduct. Since the inquiries yielded no

such evidence the defendant has had to rely *a posteriori* on Rule 105.2(b).

The complainants ask the Tribunal to join their complaints, set aside the impugned decisions, grant them six months' pay in damages for moral injury, order that any relevant document be struck from their personal files and award them 15,000 French francs in costs.

C. In its replies the Organization does not object to joinder even though the facts are not on all fours, but contends that the complaints are irreceivable on the grounds that they show no cause of action, the impugned decisions having been withdrawn upon the complainants' reassignments.

On the merits it makes out that the review of staffing in New York afforded sufficient cause for the decisions. The decisions to put Mrs. Byng-Clarke and Mrs. Gomes on special leave were intended to spare them "frustration" on hearing of the abolition of their posts and to give management time in which to act and to avoid "the undesirable consequences of an unforeseeable reaction" on their part. In Mr. Wijayadasa's case the decision was the outcome of a lengthy consultation and matched a wish he had himself expressed in a letter of 5 June 1995 to be put on special leave with pay up to the date of his retirement, 31 July 1997, should he fail to find other employment. UNESCO says that it did its utmost to work things out and had no malice against him. In its replies to the complaints from Mrs. Byng-Clarke and Mr. Wijayadasa it says that one other purpose of the decisions was to ensure equality of treatment. It safeguarded the complainants' rights, and the Director-General was exercising his discretion in its interests. There was no affront to the complainants' dignity since the Inspectorate General's investigations did not concern them.

The decisions of 10 October 1995 were not hidden sanctions. The complainants were treated with courtesy and their reputation cannot have suffered. Far from losing status Mrs. Byng-Clarke and Mrs. Gomes kept their grade, title and pay and Mr. Wijayadasa was even promoted.

D. In his rejoinder Mr. Wijayadasa points out that he founds his case solely on the suddenness of the decision in October 1995 to put him on special leave. Although the decision did follow lengthy consultation with him, he does not see why the Organization resolved so swiftly to get rid of him when there was still work to be done.

The complainants contend that their complaints are receivable since they have a cause of action: they want the decisions to be declared unlawful because they suffered injury. The Organization has not withdrawn the decisions but merely ceased to give them effect after ordering transfer. There was the greater need to explain the decisions because they went into effect at once. There is no connection between the decisions and the reasons stated for them. In answer to the defendant's explanation Mrs. Byng-Clarke and Mrs. Gomes say that they suffered "frustration" on account of the suddenness of the decisions. Mrs. Gomes finds the allusion to an "unforeseeable reaction" from her both shocking and insulting. Mr. Wijayadasa contends that the suddenness of the impugned decision belies the contention that there was any "process of consultation".

E. In its surrejoinders the Organization presses its pleas. It says that the application of Rule 105.2(b) was fully warranted, in the Organization's interests and in no way detrimental to the complainants' rights. Its behaviour was that of an employer who cared about its staff by seeing to their rapid transfer.

CONSIDERATIONS

1. All three complainants were employed in UNESCO's Office in New York when, on 10 October 1995, they got notice of summary decisions by the Director-General to put them on special leave with pay. They protested, to no avail. They appealed to the Appeals Board on 7 and 11 December 1995. They were then transferred: as from 1 February 1996 Mrs. Byng-Clarke to UNESCO's desk in the United Nations building in New York and Mrs. Gomes to UNESCO's Office in Washington D.C. and as from 1 March Mr. Wijayadasa to the programme known as UNAIDS. On 5 July 1996 the Appeals Board reported on their appeals. It recommended reversing the decisions to put them on special leave - which it saw as arbitrary - removing all papers on the matter from their personal files and granting them each one month's pay in compensation for moral injury. On 4 October 1996 the Director-General refused to follow those recommendations and rejected their appeals as unsound in fact and in law. Those are the decisions they are impugning.

2. The complainants apply for joinder. The Organization does not object though it rightly points out that the facts differ somewhat from case to case. Since the complaints raise the same issues of law they are joined.

3. UNESCO argues that the complaints show no cause of action since the challenged decisions have been withdrawn. It cites the ruling in Judgment 1394 (*in re* Dietrich), among others, that there is no question of "quashing a decision that no longer exists and therefore has no effect in law". But the precedent holds good only where the decision impugned has been retroactively withdrawn and has had no effect in law. The decisions of 10 October 1995 had both material and moral consequences for the complainants, and the transfers of 18 January 1996 neither withdrew, nor even purported to withdraw, the earlier decisions. So the Organization's objection to receivability fails.

4. The provision which UNESCO relied on is Staff Rule 105.2(b):

"In exceptional circumstances staff members may be required to take special leave with pay, this measure being without prejudice to the rights of the staff member."

The complainants submit that UNESCO misread it because it applies only "in exceptional circumstances". They see the impugned decisions as covert and unexplained disciplinary action that amounted to an intolerable affront and so warrants moral damages.

UNESCO demurs. It wanted, it says, to overhaul its New York Office by doing away with posts and the purpose of the decisions was to relieve management of pressure and neither cause its staff feelings of frustration nor prompt an "unforeseeable reaction" from them. So the decisions squared with the letter and spirit of 105.2(b).

5. Judgment 809 (*in re* Najman, Nos. 1 and 4) of 13 March 1987 explained just what Rule 105.2(b) meant. Its wording "makes it plain that such a decision will be exceptional":

"Unless leave is granted at [the official's] own wish or he is on sick leave - which is just an incident of employment - a paid staff member is entitled to be given work to do that matches his grade. Any exception the Staff Regulations may authorise is to be narrowly construed."

and:

"Leave is granted under Rule 105.2(b) for the sake of efficiency when there is some unexpected or exceptional contingency."

Admittedly efficiency did have something to do with UNESCO's decisions: it wanted to carry out reforms that were probably necessary.

But its pleas are not cogent: it offers no evidence of any exceptional circumstance that might have warranted the drastic action it put into immediate effect. As the Appeals Board observed, it acted in breach of the duty of care it owed the complainants. The Director-General does have discretion, and the Organization seeks to rely on it, but obviously it does not stretch to breach of the rules or of the general principles that safeguard the dignity of an international civil servant.

6. The conclusion is that UNESCO's treatment of the complainants was unlawful. There being no need to entertain their plea that it failed to give a proper explanation, the impugned decisions must be set aside. The unlawfulness of the decisions and manner of giving them effect caused the complainants actionable moral injury. Although, as was said in 2 above, all three were not quite in the same factual position, each of them is entitled to the same amount, and the Tribunal sets it *ex aequo et bono* at the equivalent of three months' pay. They also succeed in their claims to the removal from their files of any document relating to the decisions to put them on special leave.

7. They claim costs, and are awarded 15,000 French francs under that head.

DECISION

For the above reasons,

1. The decisions of 10 October 1995 and 4 October 1996 by the Director-General of UNESCO are quashed.

- 2. The Organization shall pay each of the complainants the equivalent of three months' pay in damages.**
- 3. It shall remove from their personal records any document relating to the quashed decisions.**
- 4. It shall pay them an aggregate sum of 15,000 French francs in costs.**
- 5. Any other claim is dismissed.**

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

**Michel Gentot
Seydou Ba
James K. Hugessen**

A.B. Gardner