

TWENTY-NINTH ORDINARY SESSION

***In re* TEWFIK**

Judgment No. 196

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Salah El Din Tewfik on 8 November 1971 and brought into conformity with the Rules of Court on 9 December 1971, the Organisation's reply of 10 February 1972, the complainant's rejoinder of 27 April 1972 and the Organization's reply thereto dated 26 June 1972;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulation 1.2, Staff Rules 102.3, 104.14, 104.3, 104.6, 111.1, and 112.2(b), UNESCO Manual section 2205 H and paragraphs 7 and 8 of the Statutes of the Appeals Board of UNESCO;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Tewfik was appointed to UNESCO on 1 December 1967 as Director of the Regional Centre for Science and Technology for South Asia on a contract expiring on 30 November 1969. His appointment was later extended to 30 November 1971 and again to 31 December 1972. On 1 January 1971 the complainant was transferred to headquarters in Paris, but obtained postponement of his transfer to 1 April 1971. In a letter of 20 November 1969 the Director-General, confirming the terms of an interview which he had had with him shortly before, had informed him that when transferred to headquarters in Paris he would have a post of the same grade as his post in New Delhi. On 23 February 1971, however, the Director-General informed him that the post in Paris to which he had been transferred was a P.5 post in the Field Science Office and Planning Unit, but that the complainant would continue to be graded at D.1 and to receive the remuneration corresponding to that grade. As an exceptional measure it was also understood that he would retain the title of Director. On 17 March 1971 the Director-General informed him that after consulting the Executive Board on the transfer and appointment he was able to confirm the latter and inform him that his appointment would be extended to 31 December 1972.

B. By telex of 29 March 1971 Mr. Tewfik, dissatisfied with this arrangement, asked the Director-General to reconsider his decision or to refer it for recommendation to the Consultative Committee on Classification in accordance with Staff Rule 102.3, and finally to authorise him to appeal to the Administrative Tribunal without prior recourse to the Appeals Board. On 1 April 1971 the Director-General replied that the complainant could request reclassification of his post up to 31 May 1971, but refused to allow him to appeal directly to the Tribunal. On 7 April 1971 Mr. Tewfik lodged with the Director-General, through his supervisor, an appeal under Staff Regulation 11.1 and Staff Rule 111.1 against the Director-General's administrative decision of 17 March 1971 to transfer him to a post of lower category and grade. On the same day he sent a request for a hearing to the secretary of the Appeals Board, whom he informed that at the same time he had lodged an official protest with the Director-General through the appropriate channels.

C. On 27 April 1971 the complainant lodged with the Appeals Board a request that his post be reclassified or that he be reassigned to his old post in New Delhi and that his appointment be renewed for six years to March 1977. He also asked for an apology and for the payment of suitable compensation for the prejudice to his career as an international official and as a seconded official of the Egyptian civil service. In its opinion of 19 July 1971 the Appeals Board rejected the Organization's allegation of irreceivability and held that the complainant should be authorised to submit a request for the reclassification of his post through the normal administrative channels, despite any exceeding of the statutory time-limits, and that the remainder of his appeal should be dismissed. On 11 August 1971 the Director-General informed Mr. Tewfik that he accepted that opinion, although he had reservations as to the receivability of the appeal, and set a time-limit of one month for submission of the request for

reclassification.

D. On 10 September 1971 the complainant submitted his request for reclassification. On 8 November he appealed to the Administrative Tribunal requesting it to order the Organization:

(a) to reclassify the post to which he had been transferred at the D.1 grade or to transfer him to any other D.1 post compatible with his qualifications and experience,

(b) to guarantee him a normal professional future,

or to pay him equitable compensation for the damage suffered by him. In his letter he explained that his complaint was essential to preserve his rights inasmuch as he did not know how long the reclassification procedure which he had initiated would take.

E. In its reply the Organization maintains that the complaint is irreceivable and should be dismissed as to the substance. According to paragraphs 7 and 8 of the Statutes of the Appeals Board the complainant should first have appealed to the Director-General for review of his decision and awaited his reply or, failing a reply, waited for thirty working days to elapse before appealing to the Appeals Board. He had, however, submitted his request for review of the Director-General's decision and appealed to the Appeals Board on the same day, namely 7 April 1971. The Organization maintains that the Appeals Board was wrong in holding that the time-limit had started to run from 23 February 1971, the date of the Director-General's letter, of which the decision of 17 March was merely the confirmation. The Organization therefore contends that by reason of this procedural error on the part of the complainant his appeal to the Appeals Board was time-barred and that he therefore failed to exhaust all means of redress within the Organization and is therefore not entitled to appeal to the Tribunal.

F. The Organization puts forward subsidiary argument on the substance. When he accepted his appointment Mr. Tewfik knew that under Staff Regulation 1.2 the Director-General was empowered to assign him to any post in the Organization, with due regard to his qualifications and experience, to which indeed his assignment in Paris does correspond. Moreover, he was notified of his transfer in good time. Transfer to a post of lower grade is expressly provided for in Staff Rule 104.14. The Director-General's broad discretion in this regard is based on programme and budget requirements and on the need for sound administration. Mr. Tewfik's post in India having been abolished under the Programme and Budget for 1971-72 and another having been created in the Science Sector at headquarters, he was transferred to the latter post under an administrative reorganisation pursuant to the decisions of the General Conference. The classification of a field post is often higher than that of a similar post at headquarters. Moreover, Mr. Tewfik has not asked for the quashing of the decision to transfer him, but merely for the reclassification of his post. As regards this request for reclassification, according to its own case law the Tribunal never substitutes its own judgment for that of the Director-General in the case of post classifications. The Organization points out that the complainant has suffered no material, moral or professional prejudice by reason of his transfer. He has been kept at grade D.1 and paid the corresponding salary and has lost no annual increments. Finally, he cannot invoke any obligation on the part of the Organization to support his claim that it should transfer him to another D.1 post. As regards his request that his professional career should be guaranteed, the Organization points out that the conditions governing the renewal of fixed-term appointments are determined by Staff Rule 104.6, except that officials at grade D.1 and upwards are not given indeterminate appointments and proposals for renewal of their appointments are governed by a procedure involving consultation of the Executive Board. The Organization therefore maintains that since the complainant's claims are unfounded his request for compensation for the prejudice which he has allegedly suffered must be dismissed.

G. As regards the argument of irreceivability put forward by the Organization, the complainant points out in his rejoinder that, although he did lodge an appeal with the Director-General and the secretary of the Appeals Board on 7 April 1971, the Director of the Bureau of Personnel informed him on 15 April that the appeal to the Director-General had been dismissed, whereas on 14 April the secretary of the Appeals Board invited him to submit a detailed complaint to the Board. The secretary was therefore aware of the Director-General's decision at that time. The purpose of paragraphs 7 and 8 of the Statutes of the Appeals Board, which is to give the Director-General an opportunity of reviewing his decision before the Appeals Board receives the appeal, was therefore fulfilled in the present case. Moreover, on 29 March 1971 the complainant had invited the Director-General to review his decision and the Director-General had refused to do so in a communication of 5 April 1971. As to the substance, Mr. Tewfik maintains that the letter of appointment of 26 September 1967 constitutes a binding contract between him and the Organization. That letter stated: "I have pleasure in offering you, for an initial period of two years, the post

of Director (D.1) of the Regional Centre for Science and Technology for South Asia and Chief of Mission in India". In his letter of 20 November 1969 the Director-General informed the complainant: (a) that his appointment was renewed to 30 November 1971; and (b) that he would be transferred to a headquarters post at the same grade as that of his post in New Delhi. The complainant considers that (a) and (b) form a whole and constitute the second contract, which confirmed his entitlement to a D.1 post. He also maintains that his transfer was decided solely in order to remove him from a post to which a successor had already been appointed. Contrary to what the Organization maintains in its reply, it was not his post which was abolished in New Delhi, but the post of "Director of Field Operations in India", of which the incumbent was his subordinate. After the complainant had left for Paris the incumbent of that abolished post was promoted to the post which he had vacated. His transfer was therefore a deliberate demotion and harmful to his career in the Organization and in his own country. It was based on an exchange of correspondence between the Director-General and the members of the Executive Board of which neither the Appeals Board nor the complainant himself was informed, and the Organization is wrong in asserting that that correspondence was confidential. The demotion was tantamount to a disciplinary measure and the Organization is in error in attempting to justify it by invoking Staff Rule 104.14 relating to the powers of the Director-General in regard to transfers and Staff Rule 112.2(b) relating to the exceptions which the Director-General may make to the Staff Rules. The latter provision expressly provides that exceptions may not prejudice acquired rights. The fact that the last renewal of appointment was for only one year demonstrates that it amounted to a demotion. Since lodging his complaint the complainant has also learnt that his post will in fact be abolished on 31 December 1972, after which date his contract will not be extended. His transfer has therefore curtailed his career with UNESCO. The complainant adds that after the initiation of the present proceedings his request for reclassification was rejected, on 24 February 1972. Although the Appeals Board had simply recommended that he be allowed to make a request for reclassification, it did recognise in its report that his claim to reclassification of his post was well founded. The complainant also points out that in informing him, on 23 February 1971, that his post in Paris would be at grade P.5, the Director of Personnel stated in his letter that Staff Rule 104.14 was "not at all applicable in this case since the Director-General has assured you that you will keep your present grade of D.1". In view of this statement the complainant had not, as he might have done, claimed his termination of service entitlements under Staff Rules 104.14 and 109.5. As to the Organization's remark that headquarters posts are often of a lower grade than the equivalent field posts, the complainant maintains that it is true only of transfers from headquarters posts; the transferred official is then assigned to a higher grade during the period of detachment in the field. The complainant, however, had been directly appointed to a grade D.1 post in the field. He considers that the Organization is wrong in maintaining that in his complaint he has not asked for the decision to transfer him to be quashed, since in asking the Tribunal to order the Organization to assign him to a post corresponding to his grade he has by implication asked it to quash the decision to transfer him to a lower grade. Finally, the arguments which the Organization bases on the Tribunal's case law regarding post classification are irrelevant, since in the present case there is no question of determining whether the functions of the post in Paris correspond to the D.1 grade since the Appeals Board found that there was "an undoubted equivalence between the two posts" (the one in New Delhi and the one in Paris). The complainant has not asked the Tribunal to make any such comparison but to order that he be assigned to a post at a grade corresponding to his own. For all these reasons the complainant maintains that he has suffered real material prejudice since the transfer was in fact a disguised disciplinary measure harmful to his reputation and future prospects, particularly since in his written explanations to the members of the Executive Board, who had expressed surprise at his transfer to a lower-grade post, the Director-General had cast doubt on the complainant's professional competence. Finally, the complainant submits new arguments as to the receivability of his complaint and asks that his transfer to a lower-grade post should be annulled, that he should be restored to his former post in New Delhi with a new contract for a duration equivalent to the longest duration given following the consultation of the Executive Board on 26 January 1971, or, if his present post is not upgraded to D.1 or upgraded and later abolished, he should be transferred to another D.1 post or be paid a suitable indemnity.

H. In its surrejoinder the Organization points out that the decision of 24 February 1972 rejecting the request for reclassification was not appealed against by the complainant any more than was the decision of 15 March 1972 concerning the abolition of his post and the non-renewal of his contract. These two decisions have therefore become final. The Organization considers that the documents and correspondence relating to the consultations with the Executive Board are irrelevant and strictly private in character. It denies that the Director-General made an exception to the Staff Rules either in maintaining the complainant's title of "Director" or in transferring him to a lower-grade post, and cites several cases of staff members appointed directly to field offices and subsequently transferred to lower-grade posts at headquarters. It maintains its arguments in its reply and asks the Tribunal to dismiss the complainant's claims in respect both of his complaint of 8 November 1971 and of his rejoinder of 27 April 1972.

CONSIDERATIONS:

As to the claims submitted in the rejoinder:

1. The Tribunal cannot go beyond the claims submitted to it by the complainant within the time-limit of ninety days laid down by Article VII, paragraph 2, of its Statute. It follows that the claims put forward subsequently by the complainant, either in his rejoinder or in another memorandum, can be considered only in so far as they do not go beyond the claims submitted within the prescribed time-limit, since otherwise the purpose of the rule requiring the complainant to take action within ninety days on pain of irreceivability would be frustrated.

In his complaint Mr. Tewfik submitted claims within the prescribed time-limit for the reclassification of his present post at grade D.1 or his transfer to a post in that grade, together with guarantees of his professional future, or, subsidiarily, for equitable compensation for the injury suffered by him.

In his rejoinder, submitted after the expiry of the time-limit, he made the following claims: cancellation of his transfer to his present post with retroactive effect to 1 April 1971; reinstatement in his former post for a period equivalent to that of the longest appointments given to other officials; in the event of his present post not being regraded or being abolished, transfer to a D.1 post at headquarters for the period indicated above; in the event of dismissal of the foregoing claims or of termination of his appointment, the award of damages.

It is clear from the examination of these claims that those submitted in the rejoinder either duplicate those in the original complaint or go beyond them. In the first case, therefore, they are superfluous, and in the second, irreceivable.

As to the receivability of the claims submitted to the Appeals Board:

2. Article VII, paragraph 1, of the Statute of the Tribunal provides that a complaint to the Tribunal is not receivable unless the person concerned has exhausted all other means of resisting the decision impugned which are open to him under the Staff Regulations of his organisation. In the present case the Organization claims that the decision impugned is that taken on 17 March 1971, that under paragraphs 7 and 8 of the Statutes of the Appeals Board it could not be submitted to the Board until it had been confirmed by the Director-General following a request for its reconsideration, and that in submitting the matter both to the Director-General and to the Appeals Board on 7 April 1971 the complainant committed a procedural error in the case of the latter, having disregarded the rule concerning the exhausting of internal means of resisting the decision. If the decision impugned was that dated 17 March 1971 the approach to the Appeals Board on 7 April 1971 was in fact premature, since it was not preceded by a decision by the Director-General on a request for reconsideration. However, the appeal addressed to the Director-General on 7 April 1971 had already been dismissed on 15 April 1971. Whatever the date at which the decision impugned was made, therefore, the complainant could properly file an appeal as from 15 April 1971, and consequently the claims he submitted to the Appeals Board on 27 April 1971 were receivable. It is immaterial that the request for a hearing by the Appeals Board was made before 15 April 1971, since this was implicit in the claims submitted thereafter. Hence the argument that the appeal was irreceivable affords no grounds for contending that the internal means of resisting the decision were not exhausted.

As to the claim for reclassification:

3. The claim for reclassification of the complainant's present post is irreceivable because it was submitted contrary to the principle set forth above. Before this claim could be filed with the Tribunal it had to be submitted to the Consultative Committee on Classification in accordance with UNESCO Manual section 2205 E. In compliance with the recommendation of the Appeals Board and with the impugned decision itself, the claim was in fact submitted to the Consultative Committee on 10 September 1971. In these circumstances, in asking the Tribunal in his complaint, filed on 8 November 1971, to rule on the question of reclassification before two successive decisions had been obtained from the Director-General - one on the recommendation of the Consultative Committee on Classification, and the second on the recommendation of the Appeals Board - the complainant has failed to observe the rule requiring that all internal remedies should have been exhausted.

Although, on the recommendation of the Consultative Committee on Classification, the Director-General, by a decision communicated on 24 February 1972, refused the request which had been submitted to that Committee, the Tribunal is not competent to rule on the legality of that decision, which is not the subject of the present complaint.

Moreover, as that decision was not resisted by the internal means available, it has become final and can no longer be impugned before the Tribunal.

As to the claim for transfer:

4. The claim for reclassification having now been finally dismissed, there remains for consideration the alternative claim for the complainant's transfer to any D.1 post consistent with his qualifications and experience. In the terms in which it is submitted this claim too must be dismissed. In principle, when an appointment is made it must be assumed that the authority making it has had the opportunity of choosing between a number of possible candidates. While, therefore, the complainant is entitled to resist the refusal to appoint him to a specific post which has been put up for competition, he cannot claim to be appointed to any D.1 post without the appointing authority having had the opportunity to appraise the various candidates who might have applied. Any other procedure would be justified only if the complainant had been deprived of his post after serving the Organization for a particularly lengthy period, and this does not apply in the complainant's case.

As to the claim for guarantees:

5. The complainant's claim for guarantees of his professional future is premature and therefore irreceivable. The Tribunal's competence is limited to reviewing the Director-General's decisions and it can entertain a complaint only if it seeks to resist such a decision. At the date when the request for guarantees was addressed to the Tribunal the Director-General had not yet decided whether to keep the complainant in the service of the Organization after the expiry of his current contract on 31 December 1972. Consequently the Tribunal cannot deal with this claim.

It is true that on 15 March 1972, when the case was pending before the Tribunal, the Director-General informed the complainant that, failing his appointment to another post, and in the event of the proposal to abolish his unit being approved by the General Conference, his contract would be terminated on 31 December 1972. While this communication may be regarded as a decision, it cannot be impugned before the Tribunal since the complainant has not availed himself of the internal means of resisting it.

As to the claim for damages:

6. The claim for payment of damages could be accepted only if the Organization had caused injury to the complainant by violating its obligations. The Tribunal has not found that any such violation occurred, and therefore the complainant's claim for damages is without foundation.

DECISION:

For the above reasons,

The claims put forward in the complaint and the rejoinder are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1972.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy