

NINETY-FIFTH SESSION

Judgment No. 2258

The Administrative Tribunal,

Considering the complaint filed by Mr K. C. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 18 June 2002, the Organization's reply of 27 September 2002, the complainant's rejoinder of 10 January 2003 and UNESCO's surrejoinder of 10 April 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1948, joined UNESCO in Paris in 1978. At the time of the relevant facts he held grade G.4 and had reached the sixteenth and last step within that grade since 9 September 1999.

By Administrative Circular No. 2090 of 11 November 1999 the Administration informed the General Service category staff that a new seven-grade salary scale (replacing the previous six-grade scale) would enter into force on 1 January 2000. In Administrative Circular No. 2094 of 17 January 2000 it pointed out, in particular, that with effect from 1 January 2000 each staff member would be placed in the new scale "in the step of his/her grade corresponding to a salary level immediately below that of 31 December 1999, with a transitional indemnity representing the difference between his/her salary at 31 December 1999 and at 1 January 2000".

Also on 17 January 2000, the Administration sent the complainant an individual notification informing him that, pursuant to the two circulars mentioned above, he had been placed in grade G.5, step 11; that the "presumed date of next step" was 1 September 2000; and that since his current net annual remuneration was reduced from 258,307 to 252,499 French francs, he would receive a "transitional allowance" to compensate for the loss of income. On 25 July the Director of the Office of Human Resources Management recommended that the complainant be granted an additional step. By a notice of personnel action dated 8 August 2000 the complainant was informed that with effect from 1 September he would be granted an additional step in his grade and that the "temporary personal allowance" would be eliminated.

Considering that the elimination of that allowance negated the effect of his move to the next step, the complainant submitted a protest to the Director-General on 7 September 2000. Having received no reply, he submitted a notice of appeal on 6 November 2000 followed by a "detailed appeal" dated 5 February 2001. UNESCO then contended, as its main argument, that the appeal was irreceivable because the notice of personnel action of 8 August 2000 merely confirmed the individual notification of 17 January, which implemented the two administrative circulars and which was not challenged within the applicable time limit. In its report dated 13 December 2001 the Appeals Board recommended that the Director-General should "grant the [complainant] the salary adjustments by maintaining the personal transitional allowance until he gains a complete step in which he suffers no loss", and "enforce uniformity and universality in making the salary adjustments in the new seven-grade scale system". By a letter of 21 March 2002, which constitutes the impugned decision, the Director-General rejected these recommendations, referring to the reasons put forward in the Organization's reply to the complainant's internal appeal.

B. The complainant disputes the fact that the individual notification of 17 January 2000 was confirmed by the notice of personnel action of 8 August, whereas the former informed him that he was to receive a transitional

allowance, and the latter notified him of the "discontinuation of the temporary personal allowance". Citing the Tribunal's case law, he argues that even if the decision had amounted to confirmation, he would have been entitled to seek its annulment, because that was the only administrative decision adversely affecting him, and "regular payments by an employer, whether in the form of salary or of some other benefit, amount to decisions that may be challenged at the time". He adds that the recommendation of 25 July 2000 that he should be granted an additional step is a new fact on which the notice of 8 August is based.

On the merits, the complainant refers to the three pleas he put forward in the internal appeal proceedings: breach of the Staff Rules, erroneous application of Administrative Circulars Nos. 2090 and 2094, and violation of the principle of equity. Firstly, he points out that the Staff Rules and the UNESCO Manual clearly indicate that progression to the next within-grade step implies an increase in salary equal to the value of a step in the corresponding grade. He was therefore entitled to that "actual increase". Secondly, the complainant argues that by taking advantage of the fact that he was moving up to the next salary step in order to suspend his "temporary personal allowance", UNESCO committed an obvious error of appraisal, since he does not belong to the category of staff to which that measure was applicable. He adds that the Administration was plainly confused, since the notice of 8 August 2000 refers to "discontinuation of the temporary personal allowance", whereas the allowance he had been granted in the notification of 17 January 2000 was a "transitional allowance", and these two expressions are used in different paragraphs of the two circulars mentioned above. Furthermore, the circulars referred extensively to the principle "no gain, no loss" and to "prospects of a salary increase", yet the contested measure is contrary to both of these notions. Thirdly, he contends that the principle of equity has been violated, since a staff member who, like him, has given satisfactory service (a prerequisite for obtaining an additional within-grade step) receives virtually the same remuneration as a staff member who, as a result of unsatisfactory performance or a disciplinary measure, is not entitled to an additional step.

The complainant also points out that a text must be interpreted according to its purpose and taking into account all aspects of its context. Circular No. 2090 was drafted in particularly difficult circumstances, which may account for certain imperfections in the text. Nevertheless, it is clear that paragraph 23⁽¹⁾ of that circular applies only to a particular category of staff, namely staff members who are at the beginning of the old salary scale. Circular No. 2094, which applies the first circular and is therefore more specific, can depart from a text which is general in scope. The complainant argues that if any doubt arises, the texts should be interpreted against their authors, that is, in this case, in favour of staff. Lastly, the complainant refers to Administrative Circular No. 2145 of 15 November 2001, concerning retroactive adjustments and the revision of salary scales for the period from 1997 to 1999. He explains that the actual figures will differ from those mentioned in his complaint, but that the subject-matter of the complaint remains unchanged in principle.

The complainant asks the Tribunal to:

"1. set aside the decision taken by UNESCO's Office for Human Resources Management concerning the 'discontinuation of the temporary personal allowance' with effect from 1 September 2000;

2. order UNESCO to restore the transitional allowance to which he is entitled following the change to a seven-grade scale, until such time as his annual remuneration reaches the upper limit for remuneration in his grade, [that is] G5, step 16;

3. grant him any further compensation that the Tribunal may consider appropriate."

C. In its reply UNESCO objects to the receivability of the complaint on the grounds that the decision of 8 August 2000 merely confirms the decision of 17 January, which has not been challenged. The decision of 17 January represented the individual application of Administrative Circulars Nos. 2090 and 2094. Paragraph 23 of the former circular provides for elimination of the temporary allowance on the anniversary of the step. The notice of personnel action of 8 August 2000 was merely the formal document evidencing the materialisation of that elimination pursuant to the decision of 17 January. Moreover, the recommendation of 25 July 2000 cannot constitute a new fact, since the anniversary of a step is a foreseeable event. Regarding the complainant's reference to Circular No. 2145, the defendant submits that insofar as that argument results in an alteration of the claims submitted to the Appeals Board, the complaint is irreceivable for failure to exhaust the internal remedies. Otherwise, the alleged imbalance caused by the introduction of the new seven-grade scale would have to be deemed to have been corrected by that circular, in which case the complainant would have no cause of action.

On the merits, UNESCO asserts that the distinction drawn by the complainant between the words "transitional" and "temporary" is irrelevant, since these words are synonyms. Furthermore, since the alleged terminological ambiguity has no serious effect on the outcome of the dispute or on the comprehensibility of the applicable provisions, the principle that texts should be interpreted against their author is irrelevant. The Organization argues that paragraph 23 of Circular No. 2090 is in fact applicable to the complainant. It takes the view that texts should be interpreted in such a way that they are given a useful and coherent meaning. Thus, the two circulars should be interpreted in their context and in the light of all their provisions. It is therefore impossible to conclude from them that the transitional allowance is intended to be "immutable".

UNESCO considers that the opinion of the Appeals Board is based more on equity than on the applicable texts. The application of the statutory provisions to the complainant's case showed neither an error of law nor any material error of calculation. On this issue, it points out that the complainant knew, as early as 17 January 2000, what his net annual remuneration would be on 1 September, because the salary scale was provided as an annex to Circular No. 2094, and it was clear that the rise to the next step would result in the elimination of the transitional allowance.

Lastly, it submits that the application of Circular No. 2145 compensated for the "minimal increase incurred by the complainant on gaining a step" and that the principle of "no gain, no loss" was complied with.

D. In his rejoinder the complainant accuses the defendant of "amalgamating the words 'transitional' and 'temporary'" so as to justify the discontinuation of the allowance, whereas the circulars in question are very clear on this issue. The only challengeable decision was, according to him, that which was conveyed in the notification of 8 August 2000: it was that notification which informed him of the elimination of the allowance. It could not have confirmed the decision of 17 January 2000, because its subject-matter is different: one concerns the implementation of the new scale, whereas the other concerns the salary step. Furthermore, their effective dates are also different and the decision of 8 August is necessarily based on the decision to grant him an additional step, which was taken on 25 July, after the decision of 17 January. He considers it "absurd" to assert that a decision granting an allowance is confirmed by the decision suspending that same allowance. It is wrong to say that he knew in January 2000 that the allowance would be eliminated on 1 September 2000, since the individual notification of 17 January does not mention that elimination. He points out that the elimination of an allowance is an important decision, since it directly affects the level of remuneration. Consequently, it must be expressly indicated.

Replying to UNESCO's remarks on his reference to Administrative Circular No. 2145 and the implications thereof for the receivability of his claims, the complainant observes that the issues concerning that circular were examined by the Appeals Board. However, he does not consider that the circular in question "corrected" anything: his loss of income remains, even though it is reduced.

According to the complainant, the temporary adjustment mentioned in paragraph 23 of Circular No. 2090, which is a negative adjustment effected by means of a salary deduction, is the only adjustment which ought to be eliminated when an additional step is gained. Moreover, the fact that paragraph 25 of that same circular refers to "staff members referred to in paragraph 23" shows that paragraph 23 concerns only a particular category of staff members. He emphasises that he never asked for the allowance to be maintained indefinitely. In his view, although the decision of 17 January 2000 complied with the principle of "no gain, no loss", the same does not apply to that of 8 August, which resulted in a substantial "loss" of income. Lastly, he points out that staff members whose length of service differs by only a few months may be treated very differently, to the extent that one may be granted a whole step more than the other.

E. In its surrejoinder UNESCO maintains its objections to the receivability of the complaint. It denies having amalgamated the words "temporary" and "transitional"; on the contrary, it gave each word its exact meaning since they are synonyms. It adds that no allowance is invariable and rejects the complainant's view that paragraph 23 of Circular No. 2090 is applicable only to a particular category of staff. It considers that the complainant's attempt to interpret the text in a manner which is contrary to "the unequivocal intention of its authors" is unacceptable. It asserts that the decision of 17 January 2000 respected the complainant's acquired right to a specific and appropriate remuneration level which, even after the elimination of the transitional allowance, was never lower than its level prior to the implementation of the seven-grade scale. That is why it considers the complainant's claims to be unfounded. It takes the view that the complainant could have understood that the reference in that decision to the presumed date of his next step was a clear reference to the elimination of the transitional allowance.

The Organization contends that the complainant is committing an error of law by trying to establish a hierarchy

between two circulars which are complementary. It denies that any discrimination occurred, since the difference in treatment to which the complainant referred stems from different factual and legal situations. It points out that no other staff member has challenged the measures applying the circulars in question, which, in its view, shows that no error has been committed. Lastly, the defendant asserts that the complainant has abused the means of redress and that the Tribunal should only be seised in connection with serious faults where it can be established that the Administration has done nothing to remedy the situation. That is not the case here, particularly since the complainant would have been blocked at the top of grade G.4, at step 16, had the new scale not been implemented.

CONSIDERATIONS

1. Following the publication of a report by the International Civil Service Commission (ICSC) in which it was found that an adjustment of the salaries of employees in the General Service category ought to have led to a reduction in those salaries, a dispute arose with the unions representing the staff members concerned. In that context, the Organization issued Administrative Circulars Nos. 2090 and 2094, introducing a new salary scale comprising seven grades, instead of six, which provided prospects of an increase in remuneration, either immediately or in the future. In short, the increases were designed to compensate, on the basis of the principle of "no gain, no loss", for the reductions which ought to have been imposed. On this issue Circular No. 2090 states the following:

"20. The scale in Annex 2 will be applied to General Service staff in service on 31 December 1999 in accordance with the following provisions determined by the Director-General:

Placing of staff in the new scale on a 'no gain, no loss' basis

21. In order to improve career prospects in future and to reduce the number of staff blocked at the top of their grade, all staff will be placed in the new scale at the same distance from the top of the scale, in terms of grade and salary, as they are in the present scale.

22. Each staff member will be placed in the step of his/her new grade corresponding to a salary level immediately below that of 31 December 1999, with a transitional pensionable allowance representing the difference between his/her salary at 31 December 1999 and at 1 January 2000.

23. In the few instances in which the application of this system results in a salary higher than that of 31 December 1999 - this will apply to staff members in steps 1, 2 or 3 of the current six-grade scale - a temporary personal adjustment will be deducted from their salary in compliance with the principle of 'no gain, no loss'. The temporary allowances and adjustments will be reduced or eliminated on the anniversary of the steps, which will continue to be granted in accordance with the current rules."

Administrative Circular No. 2094, which supplemented Circular No. 2090, provided, *inter alia*, that:

"5. With effect from 1 January 2000, all staff members shall be placed in the new salary scale at the same distance, in terms of grade and salary, from the top of the scale in force on 31 December 1999. Each staff member shall be placed at the step within his/her new grade corresponding to a level of remuneration immediately below that of 31 December 1999, with a transitional allowance representing the difference between his/her remuneration on 31 December 1999 and that on 1 January 2000."⁽²⁾

By an individual notification of 17 January 2000 the complainant was informed of the effects, in his case, of the implementation of the new seven-grade salary scale.

On 8 August 2000 the Administration sent him a notice of personnel action informing him that with effect from 1 September he would be granted an additional within-grade step and that the "temporary personal allowance" would be eliminated.

2. On 7 September 2000 the complainant submitted a protest to the Director-General challenging the elimination of the "temporary personal allowance". He stated that he had been informed on 17 January 2000 that a "transitional allowance" would be paid to him, and on 8 August 2000 that "the temporary personal allowance" would be eliminated, which, in his view, negated the effect of his transition to the next step. He assumed that there had been

confusion between paragraph 22 of Administrative Circular No. 2090, which applied to him, and paragraph 23 of that same circular, which concerned staff members in the first steps of the previous six-grade scale.

Having received no reply, the complainant filed a notice of appeal followed by a "detailed appeal" with the Appeals Board. In its report, the Board recommended that the Director-General should, *inter alia*, "grant the [complainant] the salary adjustments maintaining the personal transitional allowance until he gains a complete step in which he suffers no loss".

On 21 March 2002 the Director-General rejected the Board's recommendations, referring to the reasons stated in the Organization's reply to the complainant's internal appeal.

On 18 June 2002 the complainant filed a complaint with the Tribunal. His claims are summarised under B, above.

The Organization argues that the complaint is irreceivable and, subsidiarily, that it should be dismissed.

3. The defendant asserts that the protest directed against the notice of personnel action of 8 August 2000 should be considered time-barred, because the real decision on this matter was notified to the complainant on 17 January 2000, so that the notice of personnel action was merely a confirmation which could not be challenged. In support of that view the Organization refers to Judgments 442 and 698 (see also, on the confirmation of prior decisions, Judgments 270, 586, 759, 1490 and 1983).

Communications from an organisation to a staff member must be interpreted according to the meaning that their addressee can reasonably ascribe to them. Since it owes a duty of care to its employees, an administration which intends to take a compulsory decision binding the person concerned must express its decision clearly so as to remove from its action any potentially harmful ambiguity.

In this case, the individual notification of 17 January 2000 undoubtedly contains elements of a decision concerning the change of salary scale, the classification of the complainant and his salary as determined by the new scale. That notification is unclear as regards the nature and duration of the transitional allowance payment. The notification - like the defendant's submissions - refers to a "transitional allowance" of 5,808 French francs, as if the complainant were entitled to that amount; however, it may be inferred from the fact that the allowance is shown as an "annual amount" that it is merely a basis for calculation, and that the allowance is intended to compensate for the reduction in salary *pro rata temporis* for the period to be taken into consideration. Nevertheless, the notification contains no indication as to the duration of the payment of the allowance; nor can it be inferred from the indication of the "presumed date" of the next step that the allowance (which, for eight months, would amount to less than 5,808 francs) would cease at that date.

The scope of a decision can, of course, be clarified by reference to other documents or facts, provided that the person concerned by the decision may reasonably be expected to be aware of them. That is clearly not the case here. Although Administrative Circulars Nos. 2090 and 2094 were certainly published, the meaning to be attributed to them must not have been obvious to all General Service staff. This is confirmed by the fact that in the present proceedings the parties do not share the same interpretation of paragraphs 22 and 23 of Circular No. 2090 and that, from a formal point of view, the possibility that the second sentence of paragraph 23 might be interpreted as referring only to the eventuality mentioned in the first sentence cannot be excluded.

The conclusion to be drawn from this is that no valid decision concerning the duration of the transitional allowance was notified to the complainant prior to the notice of personnel action of 8 August 2000. The transitional allowance appeared, by its very nature, to be limited in duration, but the expiry date or the condition for its expiry should, if necessary, have been the subject of a new decision to be notified to the complainant. Consequently, the complainant's protest was not time-barred.

The Organization's objection to receivability on this ground must therefore be rejected.

4. The Organization also asserts that the complaint is partially irreceivable, because the complainant relies before the Tribunal on the application of Administrative Circular No. 2145, whereas he did not do so during the internal appeal proceedings. Consequently, it says, the internal remedies have not been exhausted within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal.

However, the complainant has clearly submitted neither a new claim nor even a new plea on this issue. Moreover,

the disputed measure and the circulars on which it is based have not been cancelled and the Organization itself does not contend that Circular No. 2145 has the effect of eliminating the disputed measure.

The plea fails in both respects.

5. (a) During his internal appeal, the complainant relied not only on the interpretation of Circulars Nos. 2090 and 2094, but also on his statutory right to obtain an actual increase in salary when he was granted an additional salary step, and on the principle of equity.

In his submissions to the Tribunal he continues to rely on the interpretation of the said circulars. Indeed, whilst the defendant refers to the second sentence of paragraph 23 of Circular No. 2090 to support the view that the temporary allowance also ceases at the anniversary of the step in the complainant's case (which is one of the most common cases), the complainant, on the contrary, construes the second sentence of paragraph 23 as referring only to the eventuality mentioned in the first sentence of the paragraph, namely the few instances in which the application of the new scale results in a higher salary than that of 31 December 1999, which does not apply to the complainant. From this, he infers that payment of the transitional allowance ought to cease not on the anniversary of the step but only when his remuneration reaches the upper limit for his grade and step. The complainant also considers that where a text is ambiguous it should be interpreted against its author (*contra proferentem*) and in favour of the staff member (see Judgment 1755, under 12).

The Organization puts forward the opposite argument: it submits that the second sentence of paragraph 23 of Circular No. 2090 concerns all cases and is applicable to the complainant. That, indeed, was the substance of an agreement reached with the staff representatives. This compromise solution made it possible to preserve nominal salary levels, despite the existence of reduction factors, by means of the advantages attached to the introduction of the seven-grade scale: in the majority of cases, the change of scale would entail a formal reduction in salary which would subsequently be compensated by the effects of the ordinary evolution of salary which staff members could claim. The transitional allowance would be designed to avoid a reduction in salary until such time as an additional salary step was granted. Thus, the principle of "no gain, no loss" would be complied with.

(b) Statutory provisions must be interpreted in such a way that their true meaning is preserved, taking into account, *inter alia*, the actual letter of the provision, its origin, its aim and its place within the legal framework of an organisation, and without necessarily dwelling on inaccurate or inappropriate terms.

At first sight, a purely literal interpretation of paragraph 23 of Circular No. 2090 suggests that the second sentence refers only to the eventuality mentioned in the first sentence. However, the second sentence casts doubt on that interpretation, since it also refers to "allowances" that are not included in the eventuality envisaged in the first sentence.

As both parties acknowledge, the disputed provisions were adopted in particularly difficult circumstances. A survey by the ICSC had shown that a reduction in salaries was justified. Aware that their interests could be threatened, General Service staff had gone on strike. The Administration and staff representation agreed to a compromise solution which was embodied in the two circulars mentioned above. These circumstances may explain certain instances of inaccurate drafting, but they also show that the solution that was expressed reflected the common intention of the parties concerned.

The aim was to reduce salaries slightly at the time when the scale changed, whilst demonstrating to employees that future increases resulting from granting of steps and from the implementation of the seven-grade scale would make up for the reduction in salary, since the compensatory allowance (provided for in the majority of cases) was intended to avoid any reduction in nominal salary levels in the meantime. This was expressed by the principle of "no gain, no loss", which referred to nominal salary levels (and not to a comparison with what would have occurred had the old scale been retained without any reduction in salary). In that context, and taking into account the Organization's need to establish a financial plan, it is inconceivable that the duration of the transitional allowance payment was not mentioned and determined. Since the circulars contain no other rule fixing the duration of the transitional allowance payment, it is necessary to infer, *a contrario*, that the issue is governed by the second sentence of paragraph 23 of Circular No. 2090.

6. (a) In his rejoinder the complainant reiterates his plea based on a breach of Staff Rule 103.4(a) and of item 2305.8 of the UNESCO Manual, both of which concern the granting of within-grade salary steps for

satisfactory performance. He satisfied the conditions for obtaining a step on 1 September 2000 and was therefore entitled, at that time, to an actual increase in salary of 6,407 French francs. He asserts that the elimination of the transitional allowance would in fact unlawfully deprive him of a substantial part of that increase.

This argument is unconvincing. Circulars Nos. 2090 and 2094, which were approved by the General Conference, departed from the ordinary provisions of the Staff Rules and of the UNESCO Manual. There is no rule providing for a constant rise in salary levels, and in this case the aim was precisely to deal with the effects of what was, in principle, a reduction in salary. Moreover, the principle of "no gain, no loss" referred to the fact that nominal salary levels were to remain unchanged and did not imply any guarantee that the staff member would be entitled to retain benefits he would have enjoyed had the previous scale been kept (especially since the old scale would not have enabled him to obtain a further step by promotion).

The plea is therefore likewise unfounded.

(b) The complainant also contends that the elimination of the transitional allowance was contrary to the principle of equity.

This argument fails for the same reasons as those stated above.

(c) In his submissions to the Tribunal, the complainant mentioned the fact that staff members who had been at the top of their grade since 31 December 1998 or earlier would eventually be in a more favourable position than him because, simply by virtue of having accumulated some eight months' more service than him, they could ultimately gain one more step than him, even after he had made up the difference in length of service.

The Tribunal need not examine this issue any further, since it has not been put forward as a plea. In any case, the factual situation of these staff members is not the same, and the placing of staff in different salary grades necessarily implies a degree of schematisation and certain distortions. As the case stands, it is not possible to examine whether the difference in treatment is justified by a difference in fact.

Since it is entirely unfounded, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 2003, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Jean-François Egli

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet

1. Paragraph 23 reads as follows: "In the few instances in which the application of this system [placing staff in the new seven-grade scale] results in a salary higher than that of 31 December 1999 - this will apply to staff members in steps 1, 2 or 3 of the current six-grade scale - a temporary personal adjustment will be deducted from their salary in compliance with the principle of 'no gain, no loss'. The temporary allowances and adjustments will be reduced or

eliminated on the anniversary of the steps, which will continue to be granted in accordance with the current rules."

2. Registry's translation.

Updated by PFR. Approved by CC. Last update: 23 July 2003.