

The Administrative Tribunal,

Considering the complaint filed by Mr A. H. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 April 2006, the Organization's reply of 3 August, the complainant's rejoinder of 7 November 2006 and UNESCO's surrejoinder of 8 February 2007;

Considering Article II, paragraph 5, 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 German national born in 1961, joined UNESCO on 15 July 1998 as a Programme Specialist at grade P-3 in the Natural Sciences Sector. He was assigned to UNESCO's Office in Beijing. On 25 November 2003 he submitted to the Director of the Bureau of Human Resources Management (HRM), via the Director of the Beijing Office and the Assistant Director-General for the Natural Sciences Sector, a request for special leave without pay for the period from 1 March 2004 to 28 February 2005. During his leave he wished to take up a position in the Asian Development Bank which, he said, would enable him to broaden his skills and qualifications whilst strengthening professional ties between UNESCO and the Bank.

In a memorandum of 27 November 2003, which he attached to the complainant's request, the Director of the Beijing Office drew attention to the fact that his Office was already lacking two programme specialists, one having taken special leave without pay and another having recently been transferred to Headquarters. He expressed concern at the impact which the complainant's absence would have on his service, adding that to replace him with a consultant or a temporary staff member would not be a satisfactory solution. He therefore stated that he would support the complainant's request for special leave without pay provided that the Natural Sciences Sector would transfer the complainant's post to Headquarters and immediately transfer to Beijing a regular staff member, with a post, either from Headquarters or from another field office. The Assistant Director-General, for his part, indicated on 3 December that he did not support the request.

On 8 December, having not yet received a reply to his request, the complainant renewed it in a memorandum addressed to the Director of HRM. He pointed out that it was necessary for him to make arrangements with a view to taking up his appointment at the Asian Development Bank on 25 February 2004. Consequently, he wrote that, in the event that his request for leave was not granted, his memorandum would have to be considered as his resignation from UNESCO. He emphasised, however, that he was eager to return to UNESCO and hoped that his leave request would be granted.

On 16 December 2003 he wrote again to the Director of HRM, stating that he had been informed of the unfavourable recommendation of the Assistant Director-General and that he assumed that his leave request had been rejected. He therefore confirmed his resignation, but maintained his request for special leave without pay. By a memorandum of 18 December 2003 the Director of HRM informed the complainant that his request had not been approved and that his resignation was accepted.

The complainant challenged this decision by submitting a protest to the Director-General on 11 February 2004, but the Director-General upheld the decision and the complainant therefore initiated an internal appeal on 5 May. The Appeals Board issued a report on 9 December 2005 in which it recommended, by a majority, that the appeal be rejected as unfounded in fact and law. The Director-General decided to accept that recommendation and informed the complainant accordingly by a letter of 30 January 2006. That is the impugned decision.

B. The complainant contends that in deciding not to grant his request for special leave without pay the Director-General exercised his discretionary authority in an arbitrary manner. He asserts that the usual and customary practice of the Organization is to grant such requests, and he asks the Tribunal to order UNESCO to provide details

of all cases where special leave without pay has been granted in the past ten years. He states that he is aware of two cases, in particular, that are almost identical to his, including that of a staff member who was granted special leave without pay to take up salaried employment with the Asian Development Bank. In his view, the work that he carries out for the Bank falls within the category of “research or advanced studies” mentioned in Staff Rule 105.2. Furthermore, it includes participation in training programmes, and in this connection he points out that he was given very little opportunity to participate in training programmes during the time he spent at UNESCO’s Office in Beijing.

Referring to Administrative Circular No. 2191 of 29 September 2003 concerning recruitment, rotation and promotion, the complainant submits that the standard duration of an assignment to Beijing is “4-5 years [...] with a maximum possible extension of 1 year”. He states that although he had completed almost six years in the Beijing Office, no progress had been made on the issue of a transfer to another duty station, which he had requested on several occasions. He argues that this circumstance, and other relevant factors such as his performance record, his lack of training opportunities and the Organization’s usual and customary practice, ought to have been taken into account in deciding whether or not to grant him special leave. Instead, he contends, the impugned decision was unduly influenced by an ongoing conflict over personnel issues between Headquarters and the Director of the Beijing Office, who made incorrect assumptions as to whether suitable arrangements would be made to replace him during his special leave.

The complainant therefore considers that he has been treated unfairly, that he has suffered discrimination and that his professional development has been adversely affected. He asks the Tribunal to set aside the impugned decision and to order UNESCO to reinstate him as from the date of expiry of his contract with the Asian Development Bank. He also claims compensation for professional and moral damages, for “arbitrary procedural delays”, for the expenses he incurred in attending the hearing of the Appeals Board and other costs.

C. In its reply UNESCO submits that the complainant’s request, the purpose of which was to enable him to engage in a salaried activity in a banking organisation, does not satisfy the requirements of Rule 105.2(a), according to which special leave may be granted to staff members “to allow them to pursue research or advanced studies in the interest of the Organization or to face exceptional situations”. It points out that the interest of the Organization is clearly not served where the absence of the staff member concerned would have consequences for the functioning of the service, and in this case the Director of the Beijing Office had indicated that his service would suffer from the complainant’s absence. Referring to the case law, UNESCO adds that the granting of special leave is a matter that lies within the discretion of the Director-General, and he alone can determine the interest of the Organization in such cases.

UNESCO considers that the complainant’s reliance on Administrative Circular No. 2191 is misplaced, since that circular deals with recruitment, rotation and promotion, and not with special leave. Regarding his reference to the cases of other staff members whose requests for special leave were granted, it observes that he is not in the same position as them, insofar as their supervisors supported their respective requests for special leave, whereas his did not. Consequently, it asserts that there has been no violation of the principle of equality of treatment.

The Organization further submits that the complainant’s claim for damages is unfounded: he did not claim damages in the course of his internal appeal, and in any case he has not provided evidence of an unlawful act, actual injury and a causal link between act and injury, as required by the case law.

D. In his rejoinder the complainant presses his pleas. He points out that the assumption that the service would suffer from his absence is one which applies equally to any staff member requesting special leave who has a “reasonably good staff performance”; it does not explain why in his particular case UNESCO arbitrarily departed from its usual practice of granting special leave. He reiterates his request for documents evidencing the Organization’s treatment of other requests for special leave.

E. In its surrejoinder the Organization maintains its position, noting that the arguments put forward by the complainant in his rejoinder add nothing new to the substance of the case. It submits that his request for documents is “unnecessary”, such evidence being “immaterial” in light of the fact that decisions regarding special leave are discretionary.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision, dated 30 January 2006, rejecting his appeal against UNESCO's decision to deny his request for special leave without pay. He indicates in his complaint that he requested the special leave "in order to take up, temporarily, a position at the Asian Development Bank for reasons of professional development and training".

2. It is agreed by both parties that the legal basis for the granting of special leave without pay is Staff Rule 105.2. Paragraph (a) of that Rule, which concerns special leave requested by a staff member, provides as follows:

"Special leave with pay or on half pay or without pay may be granted by the Director-General to staff members, upon their request, to allow them to pursue research or advanced studies in the interest of the Organization or to face exceptional situations."

The complainant argues that his request for special leave without pay satisfied the requirements of Rule 105.2(a). He submits that his work at the Bank fell under the category of "research or advanced studies", and that UNESCO would ultimately have benefited from the experience that he gained whilst working there.

3. A majority of the members of the Appeals Board found that "it would be stretching a bit too far the meaning either of 'research' or 'advanced studies' to equate them with salaried work, even if such work was to include some training". They emphasised in their report that the research or advanced studies need to be in the interest of the Organization and that the "interpretation and application of this requirement falls squarely into the hands of the Director-General". The report also concluded that the Director of the Beijing Office had "explained [...] why and how the Office would be affected if [special leave without pay] were to be granted to the [complainant]", and that after considering the views of that Director, the Director-General had reached the conclusion not to grant the complainant's request as "the interest of the Beijing Office, as expressed by its Director [...] constituted the interest of the Organization". The majority of the members of the Appeals Board rejected the complainant's allegation of unequal treatment on the grounds that the cases that he mentioned were not identical to his in fact and in law, and recommended that the Director-General reject the appeal in its entirety as the impugned decision was not vitiated by any flaw.

4. In a separate recommendation, two of the five members of the Board suggested that the Director-General reconsider his decision not to grant the complainant special leave without pay, on the grounds that, inter alia, the complainant "was a loyal and hardworking staff member" whose performance "was always highly appreciated by his hierarchy during his years of service", and that his supervisor did not "disapprove" his request for special leave without pay *per se*, but was unable to approve it without replacement staff being sent from Headquarters or from another field office. They also noted that the Organization had agreed to grant such requests in the past, regardless of whether or not the staff member concerned would be receiving a salary while on special leave without pay. Lastly, they considered that the complainant had suffered from a form of discrimination due to the lack of representation of the Natural Sciences Sector in the Beijing Office – a situation for which he could not be held responsible.

5. The evidence shows that the Director-General decided that it was not in the Organization's interest to grant the complainant special leave without pay because to do so would leave the Beijing Office understaffed. In other words, he determined, in the exercise of his discretionary authority, that the Organization's interest in keeping the complainant at his post should take precedence over its interest in granting him special leave in order to increase his experience and skills. Firm precedent has it that the Tribunal will not substitute its own assessment of the Organization's interests for that of the Director-General unless the decision is *ultra vires*, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority (see Judgment 1929, under 5). The reasons given by UNESCO to explain why the complainant's request for special leave without pay was denied are reasonable and logical, and there is nothing in the file to suggest that the interests of the Organization were not the Director-General's primary concern.

6. The complainant's argument to the effect that, by granting other requests for special leave without pay, the Organization set a precedent that it is bound to follow, is mistaken. The decision to grant special leave must be made on a case-by-case basis. It is not possible to assume that, because special leave has been granted to one staff member, it must be granted to all, unless all cases are identical in fact and in law. As this is generally not the case, it cannot be considered unfair for some requests to be denied while others succeed. Likewise, contrary to the finding of the minority of the Appeals Board, discrimination cannot be established until it is proved that staff

members in identical situations were treated differently. In this case, it has not been proved that other staff members were in identical situations to that of the complainant and were granted special leave without pay. Nor has it been proved that he has been treated unfairly.

7. The Tribunal also notes that the complainant's arguments about transfers, rotation and the standard duration of assignments are not relevant to this case: special leave without pay is not a means of implementing rotation, and in any case the Asian Development Bank is not part of the Organization and so cannot be considered as a destination for assignment by transfer or rotation.

8. As the Organization has committed no fault nor any unlawful act, there are no grounds for awarding compensation to the complainant for professional or moral damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet