

*Registry's translation,
the French text alone
being authoritative.*

106th Session

Judgment No. 2790

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 5 September 2007 and corrected on 9 October 2007, the Organization's reply of 4 February 2008, the complainant's rejoinder of 12 March and UNESCO's surrejoinder of 30 June 2008;

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, an Algerian national born in 1948, joined UNESCO in 1980 at grade P-5 in Port-au-Prince (Haiti). He was subsequently posted in Dakar (Senegal) and then in Beirut (Lebanon). On 1 February 1998 he was promoted to grade D-1 shortly before being transferred to the Organization's Headquarters to take up the position of Director of the Emergency Educational Assistance Unit in the Education Sector.

In July 2000, at the invitation of the General Conference and Executive Board of UNESCO, the Director-General restructured the Secretariat, an exercise which entailed the abolition of several directors' posts, including that of the complainant. A transitional period was foreseen until 31 December 2001 in order to find solutions appropriate to the situation of the staff concerned, including appointment at the same grade to a vacant director's post, redeployment in a post at a lower grade, or separation. On 1 October 2000 the Director-General published a list of director posts to be filled by internal recruitment and he invited all directors whose posts had been abolished to apply for them; the complainant was not selected. In November 2000 the Director-General suggested that he be transferred at the same grade to Jordan, but he declined this offer since he preferred to remain at Headquarters for family reasons. The complainant was notified in July 2001 that, if no suitable post was found, he would be transferred to a post at one grade lower. By letter of 22 November 2001 he was informed of the Director-General's decision, effective as of 1 January 2002, to keep him in his post but at grade P-5; he was granted an allowance in order to maintain the level of his remuneration. The complainant accepted this offer on 30 November 2001. He continued to apply for several D-1 posts, but was not selected.

On 22 June 2004 the complainant asked the Director-General to review his situation. On 29 December he was informed that the decision to abolish posts was dictated by restructuring requirements, that the decision to reclassify directors at grade P-5 was general in scope and that the proper recruitment procedure had been followed. The complainant lodged an appeal with the Appeals Board on 20 January 2005. In its report of 12 December 2005 the Board considered that the appeal was inadmissible and recommended that it be rejected. It likewise recommended the establishment of mechanisms to ensure that a selection committee could properly determine whether the qualifications of internal candidates were equal to those of external candidates and, if so, to give priority to the former.

Lastly, it recommended that the merits of the complainant should be carefully considered in the event that merit-based promotion was reinstated. The Director-General accepted these recommendations and informed the complainant accordingly by a letter of 16 January 2006.

On 11 April the complainant asked the Director of the Bureau of Human Resources Management what action had been taken on this decision. He was informed on 23 May that, since there was no merit-based promotion at UNESCO, various options were being examined with a view to making recommendations to the Director-General.

A few weeks later the complainant learnt that his post at Headquarters was to be abolished and on 20 November 2006 the Deputy Director-General confirmed that he was to be transferred at the same grade to another department as of 1 December 2006. The complainant was informed on 11 April 2007 that his title had changed. On 10 May 2007 he asked the Director-General to review his situation and to place him in grade D-1 for pension purposes from 1 April 2005 until his retirement on 31 March 2008. He was informed on 22 June 2007 that the Director-General felt unable to grant his request because he considered that this would be tantamount to giving the complainant personal promotion, whereas this form of promotion had been abolished. That is the impugned decision.

B. The complainant emphasises that throughout his 27 years of employment he served UNESCO with dedication, integrity and commitment. He asserts that when the restructuring measures were introduced he did not enter into dispute out of loyalty to the Director-General, the Organization and its member States. He thought that his case “was just a slip” because, in his opinion, the measures concerned only recent appointments, whereas he had been promoted to grade D-1 on 1 February 1998 and had carried out the duties of acting Director for several years.

In addition, he considers that he had no choice but to accept the downgrading of his post. He argues that the circumstances in

which this took place made it a deliberate abuse of process through unjust coercion and intimidation contravening the principles of the international civil service and human rights. In this connection he draws attention to the fact that in the letter of 22 November 2001 he was specifically asked to undertake not to lodge any kind of challenge or appeal against UNESCO, particularly before the Tribunal. He states that the decision to downgrade his post amounts to a veiled disciplinary measure which has been rigorously applied for six years in the form of unremitting administrative pressure and moral harassment characterised by the methodical dismantling of his programmes and resources, a refusal to send him on any missions and his professional isolation.

The complainant submits that, through an abuse of authority, the Organization has denied him his legitimate right to career development and promotion. When he submitted his seven applications for D-1 posts for which, he maintains, he was amply qualified, he was systematically denied the benefit of the Staff Regulations and Staff Rules, and UNESCO disregarded the principle of equal treatment as well as his acquired rights. He claims that the Administration was clearly expecting him to take early retirement as part of its policy of recruiting younger staff and that it did not respect the principle of continuity of public service.

Moreover, he considers that most of the measures concerning him are humiliating and vexatious and that they undermine his reputation, his honour and his dignity as an official and a human being. In his opinion these measures can be explained only by his involvement in Staff Union activities, his integrity, his ethical attitude to the Organization's mandate and the values of the United Nations, and by his outspokenness.

He states that he has suffered "huge" administrative, professional and moral injury and injury to his family, and he emphasises that the personal allowance he was granted after downgrading was not taken into account when calculating his pension.

The complainant asks to be “rehabilitated” and reinstated in grade D-1. He requests the restoration of his administrative and financial rights and compensation in the amount of 90,000 euros for the moral injury suffered.

C. In its reply UNESCO contends that the complaint is irreceivable for two reasons. Firstly, the complainant has not complied with the rule that he must exhaust the internal means of redress available under the Statutes of the Appeals Board and, secondly, the complainant has not identified the impugned decision, but refers to several different documents. It further submits that some of the complainant’s claims are new.

The defendant replies subsidiarily on the merits. It holds that the decision to abolish the complainant’s post was lawful, since the Director-General was entitled to restructure the Secretariat. Furthermore, this restructuring complied with the decisions of the Organization’s governing bodies, and the staff members concerned were informed of how it would be done, its consequences and the possibilities open to them.

UNESCO underlines that the complainant’s transfer to a post at a lower grade was in conformity with the Staff Regulations and Staff Rules. He refused a transfer at the same grade to a field post, but agreed to stay in his lower grade post while keeping his full salary.

The Organization submits that the complainant had no acquired right to retain his director’s post and that the decision to abolish it was within its discretion. It also asserts that the complainant is mistaken in regarding the impugned decision as a veiled disciplinary measure, because his post was abolished as part of a rationalisation exercise during which several director posts were abolished regardless of their incumbents’ merits and personality. UNESCO rejects the complainant’s allegation that he was systematically denied the right to equal treatment, since his applications, like all the others, were always carefully examined, but he did not have the minimum qualifications

required in order to be given priority over the other candidates. Moreover, in accordance with the Appeals Board's recommendations, the Administration has made doubly sure that the provisions giving priority to staff members when filling vacancies are respected.

UNESCO asserts that the compensation claimed for the moral and financial injury allegedly suffered by the complainant has not been requested earlier and, what is more, the complainant has not proved the existence of any injury linked to an unlawful act.

D. In his rejoinder the complainant argues that he has exhausted the available means of internal redress and submits that the impugned decision is the Director-General's final decision of 22 June 2007. He adds that his claims are identical to those presented in his internal appeal. He gives his version of the facts and terms the Organization's assertion that he did not possess the minimum qualifications to be given preference for appointment to the posts for which he had applied "unspeakable". He presses his pleas and maintains that the fact that the personal allowance he received was not taken into account either in the post adjustment or in the calculation of his pension causes him considerable injury.

E. In its surrejoinder UNESCO maintains its position. It states with regard to receivability that if the disputed decision is that of 22 June 2007, it ought to have formed the subject of an internal appeal in accordance with the Statutes of the Appeals Board. On the merits the Organization draws attention to the fact that the clause whereby the complainant agreed to forgo any challenge or appeal against UNESCO formed part of the conditions of the offer that he accepted. It further explains that when applications are examined, priority is given to internal candidates only if they possess the required qualifications for the posts in question and their skills are at least equal to those of the other candidates. The complainant's profile did not match the D-1 posts which had fallen vacant, a fact which he never disputed when the appointments were made to the posts for which he had applied.

CONSIDERATIONS

1. The complainant had been successively posted in Port-au-Prince and Dakar, before becoming Head of the Regional Office for Education in the Arab States in Beirut. As the latter post was reclassified, the complainant was promoted to grade D-1 as from 1 February 1998. He was then transferred to the Organization's Headquarters in Paris as Director of the Emergency Educational Assistance Unit in the Education Sector.

The complainant's post was, however, abolished following the adoption, on 15 November 1999, by the General Conference of UNESCO of a major resolution inviting the Director-General to restructure the Organization's Secretariat and, in particular, to reduce the number of posts at the highest levels.

The complainant was then offered a post at the same grade in Jordan, which he had to decline for family reasons. He consequently accepted the offer made to him in a letter of 22 November 2001 to retain his post, and hence to be reclassified at grade P-5 as from 1 January 2002, subject to the payment of a personal allowance enabling him to keep his previous salary.

2. Although when agreeing to this proposal the complainant expressly reiterated his wish to be reappointed to a D-1 post at Headquarters as soon as possible, none of his six subsequent applications for such a post proved to be successful.

In a letter of 22 June 2004 the complainant therefore asked the Director-General to "review [his] situation" and "reinstate [his] D-1 grade". As this request met with a negative reply, he submitted the case to the Appeals Board set up under Staff Regulation 11.1. In its report of 12 December 2005 the Board expressed the view that careful consideration should be given to the complainant's entitlement to merit-based promotion in the event that this form of advancement – which had been abandoned by UNESCO for several years – was reinstated, but it recommended that his appeal should be rejected. Indeed, the Board

found no proof of any irregularity in the selection procedures for the D-1 posts for which the complainant had applied.

In a decision of 16 January 2006 the Director-General chose to endorse this recommendation in its entirety and to reject the complainant's appeal.

3. Following this decision, the complainant, whose post had been abolished as part of the restructuring of the Education Sector and who had been reassigned to a P-5 post in the Africa Department as of 1 December 2006, again applied for a D-1 post, but this application, his seventh, was again turned down.

Realising that he had little prospect of obtaining a D-1 post before he retired, on 10 May 2007 the complainant asked the Director-General to "place [him] in grade D-1 [...] for 3 years (from 1 April 2005 to 31 March 2008, [his] retirement date)". This request was expressly submitted "for pension purposes", because the allowance paid to the complainant to offset his loss of salary since his reclassification in grade P-5 was not taken into consideration for the calculation of his retirement pension. However, this request was rejected by a decision of 22 June 2007, of which he was notified by a memorandum from the Deputy Director-General.

4. The complainant, who as at the date of this judgment has indeed reached retirement age without receiving the promotion thus requested, asks the Tribunal to quash that decision and to order "[his] rehabilitation and reinstatement in grade D-1" with all the legal consequences thereof.

He submits *inter alia* that the refusal to grant him the disputed promotion, which took the form of the rejection of his successive applications for D-1 posts, violated his acquired rights, the applicable Staff Regulations and Staff Rules, the right of any official to career advancement and the principle of equal treatment. He further submits that this decision undermined his dignity, reputation and honour, that it constituted a veiled disciplinary measure and that it epitomised unremitting administrative pressure and moral harassment. Lastly, he

alleges that it constituted unlawful discrimination and stemmed from an abuse of authority on account of his participation in Staff Union activities.

He accompanies his challenge of the impugned decision with various claims for redress, including a claim that UNESCO be ordered to pay 90,000 euros in compensation for the moral injury he believes he has suffered.

5. The Organization pleads that the complaint is irreceivable because the impugned decision has not been clearly identified.

Its line of argument in this connection is unfounded. The complainant clearly indicated in the complaint form that he was challenging the decision of 22 June 2007 which had been taken in the above-mentioned circumstances, and the content of his written submissions does not introduce any serious ambiguity in this respect.

6. However, the claim to the quashing of this decision and the related claim seeking the complainant's reinstatement in grade D-1 are irreceivable for another reason.

The complainant did not, within the ninety-day time limit to which he was entitled under Article VII, paragraph 2, of the Statute of the Tribunal, challenge the decision of 16 January 2006 by which, as stated above, his first request for promotion to grade D-1, submitted in June 2004, had already been rejected. That decision has therefore become final and the complainant may not therefore again claim the same advantage which was thus denied him. Yet that is in fact the true purpose of this complaint.

7. If the purpose of the new request submitted to the Director-General by the complainant had been different to that of the previous request, the decision to reject this second request would have been different in scope to that of 16 January 2006. This would have been the case, for example, if the complainant had challenged the decision rejecting his last application for a D-1 post, or that reassigning him to another P-5 post on 1 December 2006. Nevertheless, the decision

rejecting this new request could have been challenged before the Tribunal only after he had first lodged an internal appeal against it in accordance with Staff Rules 111.1 and 111.2 and paragraph 7 of the Statutes of the Appeals Board; but no such action was taken with respect to the decision now being challenged.

8. In reality, the purpose of the complainant's second request that he should be granted a grade D-1 appointment with retroactive effect from 2005 is scarcely any different to that of his request for promotion to the same grade, the rejection of which had been previously challenged before the Appeals Board. Contrary to the defendant's assertion, this was not therefore a new request. Hence the decision of 22 June 2007 rejecting this second request indeed merely confirms the decision of 16 January 2006 by which the complainant's previous request had already been turned down at the end of the first review. This new decision does not alter the previous decision in any way and is completely identical to it in substance. As the Tribunal has consistently held (see, for example, Judgments 698, 2011, 2100 and 2449), a decision which merely confirms a final decision cannot set off a new time limit for an appeal. In fact, allowing the converse solution would result in artificially reviving the possibility of challenging the initial decision and, by thereby calling into question a final decision, would conflict directly with the need to maintain legal certainty.

9. It is true that, according to that same line of precedent, a second decision whose purpose is identical to that of a previous decision may nevertheless constitute a new decision and set off a new time limit for an appeal if it provides further justification, relates to different issues or is based on new grounds.

However, none of these conditions is met in the present case. The Tribunal notes in particular that while the decision of 22 June 2007 focused on the possibility of attaining grade D-1 by promotion on merit and that of 16 January 2006 dealt rather with the lawfulness of the rejection of the complainant's applications for the D-1 posts which had been advertised, the complainant's claim that he should be given immediate promotion on merit had already been clearly dismissed in

the first decision. Similarly, the issue of the impact of the requested measure on the complainant's pension rights had already been raised by him in his appeal to the Appeals Board against the decision rejecting his first request. The second decision does not provide further justification beyond that which was provided by the first and is not based on new grounds; as the Director-General followed the Appeals Board's recommendation in its entirety, his decision of 16 January 2006 must be deemed to have been based on the grounds set forth in this recommendation.

10. Moreover, the Tribunal notes that – apart from the claim for compensation which will be examined below – the claims submitted in this complaint are identical to those presented in the complainant's appeal to the Appeals Board against the decision rejecting his first request, and that these various claims rest on very similar arguments. This finding confirms that in point of fact the decisions of 16 January 2006 and 22 June 2007 were challenged for the selfsame purpose.

11. The complainant's claim that he should be paid compensation in the amount of 90,000 euros was never included in the claims he submitted to the Organization or the Appeals Board. By definition it was not therefore covered by the negative decision of 16 January 2006. However, since prior to the filing of this complaint it was not submitted to the appeal bodies provided for in the Staff Regulations and Staff Rules, it is irreceivable, because the internal means of redress have not been exhausted as required by Article VII, paragraph 1, of the Statute of the Tribunal.

12. As the complaint is therefore irreceivable in its entirety, it must be dismissed without there being any need for the Tribunal to rule on its merits.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet