

114th Session

Judgment No. 3177

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. F.-A. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 19 November 2010 and corrected on 13 December 2010, UNESCO's reply of 17 March 2011, the complainant's rejoinder of 8 June and the Organization's surrejoinder of 2 September 2011;

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 national of Ecuador born in 1949, joined UNESCO in 1989 as a consultant. In 1992 he obtained a fixed-term contract at grade P-4 as Regional Adviser for the General Information Programme for Latin America and the Caribbean, which was then based in Caracas, Venezuela. As a result of a restructuring of Field Offices, he was transferred at the same grade as a regional information officer to the new Regional Office for Communication and Information based in Quito, Ecuador, in 2002. Following the closure of the Quito Office in November 2005, he was transferred to

the new Cluster Office in Kingston, Jamaica, still at grade P-4, as Adviser for Communication and Information in the Caribbean. He reached the statutory retirement age in November 2011.

The complainant's supervisors requested on several occasions that he be promoted to grade P-5, or that his post be reclassified at that grade. Indeed, the Director of the UNESCO Office in Caracas first requested that his post be reclassified at grade P-5 in January 2000. He then requested that the complainant be granted a merit-based promotion to the P-5 grade in January 2001. Subsequently, upon the complainant's transfer, the Director of the Quito Office requested that his post be reclassified at grade P-5 on account of an increase in his duties and responsibilities. He renewed this request in April 2004, attaching a new job description. By a letter of 17 June 2004 the Assistant Director-General for the Communication and Information Sector replied that, while he supported the upgrading of the complainant's post, the reclassification was not possible at that time for budgetary reasons, but it would be considered when financial means permitted. In August 2005 the Director of the Quito Office again sought a reclassification of the complainant's post at grade P-5, but he received no reply to his request.

Prior to his transfer to the Kingston Office in February 2006, the complainant himself submitted a request to the Director-General to reclassify his post, pursuant to Staff Rule 102.2. He received no reply, and subsequently refused to sign the job description for his post dated March 2006. Lastly, in April 2008 the Director of the Kingston Office requested that the complainant be granted a merit-based promotion. This request likewise went unanswered.

In July 2008 the complainant applied for a P-5 position at UNESCO Headquarters, for which a vacancy notice had been published both internally and externally. He was invited for an interview in December 2008, but an external candidate was eventually appointed to the post. In May 2009 he contested this appointment, arguing that the Organization had not complied with the recruitment process. He was informed by letter of 18 August 2009 that the Director-General had decided to confirm the appointment, as the external applicant was

deemed to be the best qualified candidate for the post and the recruitment process had been carried out in accordance with the applicable rules.

In October 2009 the complainant appealed against this decision to the Appeals Board. He contended that the recruitment process was flawed because the P-5 post for which he applied ought to have been advertised internally before being opened to external candidates, and because his candidature ought to have been given priority on the basis of the Organization's rotation policy and his experience gained in the field. He requested that the disputed appointment be cancelled and that he be appointed to the post instead of the selected candidate. Failing that, he requested that the promotion to grade P-5 that he had been "promised" in 2005 be implemented with retroactive effect and that he be reassigned to Headquarters "in accordance with the rotation policy". He also claimed moral damages.

In its report of 2 June 2010 the Appeals Board dismissed the Administration's argument that promotion being granted only on a competitive basis is outside its jurisdiction. It found itself competent under paragraph 5(c) of its Statutes to consider all aspects of the appeal considering the length of time involved. On the merits, the Board held that the recruitment process had not been flawed and recommended dismissing the complainant's claims in this regard. However, it noted that the complainant did not have a valid job description, that he had been in Field Offices for 18 years without benefiting from the rotation policy set out in Administrative Circular No. 2191 of 29 September 2003 on the Integrated policy on recruitment, rotation and promotion, and that, despite a duly recognised increase in his responsibilities and several recommendations from his supervisors, he had remained at the same grade since his appointment in 1992. It also noted that the complainant was due to retire in 2011 and that his pension would be affected by this situation. The Board pointed out that financial implications should not be a criterion for the non-reclassification of a post. It recommended that the complainant be evaluated for a possible reclassification to grade P-5 or considered for a merit-based promotion with retroactive effect from 2005 and that he

be compensated for his accommodation and travel costs associated with the appeal, but that his claim for moral damages be dismissed.

By a letter of 23 August 2010 the complainant was informed of the Director-General's decision to reimburse the expenses he had incurred when attending the Appeals Board hearing but to dismiss his claims concerning the recruitment process, the appointment to the P-5 post and the compensation for alleged prejudice, in accordance with the Board's recommendation. However, with respect to the reclassification of his post, the Director-General rejected the Board's recommendation on the grounds that it had been classified at grade P-4 in accordance with the International Civil Service Commission's standards and that evaluations conducted in 2004 and 2006 had confirmed its grade at the P-4 level. The Director-General also rejected the Board's recommendation concerning a merit-based promotion, considering that this was a separate issue from the case examined by the Board and one which was subject to specific rules and procedures. That is the impugned decision.

B. The complainant contends that the recruitment procedure for the P-5 post was flawed. In particular, he submits that the Staff Regulations and Staff Rules as well as Administrative Circular No. 2191 provide that professional posts must first be advertised internally, and that it is only where a qualified candidate has not been identified either internally or within the United Nations system that the vacant post may be advertised externally. In his view, had the Organization complied with this requirement, he would have been considered as a qualified internal candidate. The complainant recognises that the Director-General may in specific cases exceptionally authorise simultaneous internal and external advertising of a professional post, but he points out that this requires a fully documented request providing the reasons for derogating from the principle that vacancies should first be advertised internally. Since no such request was issued in the instant case, the recruitment procedure is tainted with procedural irregularity.

Further, the complainant argues that the Organization failed to take into account his successful field assignments, in breach of Administrative Circular No. 2191, which gives priority in the appointment process to staff who have already completed two assignments in field duty stations or spent ten years in the field, and which also provides that successful field assignments are considered when deciding whether to promote a staff member to grade P-5.

He also contends that the impugned decision is tainted with a procedural defect, in that no desk audit was ever undertaken to evaluate the tasks and responsibilities of his post. He points out that the performance of a desk audit is a consistent administrative practice in UNESCO and should therefore be regarded as a legal obligation, which was not respected in his case. The alleged evaluations of his post in 2004 and 2006, which are referred to in the impugned decision, actually concern the classification procedure undertaken by the Administration to determine the Staff Establishment at the beginning of each biennium, and they do not guarantee that a specific post has been reviewed.

The complainant considers that the impugned decision is not properly substantiated, since it refers only to the ICSC standards for classification, according to which posts of regional advisers are normally classified at grade P-4. He contends that the job title alone cannot predetermine the overall grade of a post. Given that he did not have a valid job description and that he had various functional titles for his post, the Director-General's assertion that posts of regional advisers are normally graded P-4 is clearly devoid of merit.

Moreover, he alleges that he has been treated unequally, as colleagues who held posts in various Field Offices performing similar or even fewer tasks and having the same responsibilities were graded at the P-5 level. Referring to the Tribunal's case law, he contends that the impugned decision was taken by the Director ad interim of the Bureau of Human Resources Management (HRM) without proper delegation of authority. He further alleges undue delay in the processing of his claim for reclassification.

The complainant asks the Tribunal to set aside the “impugned decisions”, including the disputed appointment to the P-5 post, and to order that UNESCO reclassify his previous posts at the P-5 grade with retroactive effect from 2001, or at least from 2004. He seeks material damages equivalent to the difference between what he would have earned since 2001 (or 2004) at grade P-5, and what he actually earned during that period, with interest. Alternatively, he asks the Tribunal to order a desk audit by an external expert according to the procedures applicable in 2001 or in 2004. He claims 30,000 euros in moral damages, as well as costs in the amount of 5,000 euros.

C. UNESCO submits that the complaint is partly irreceivable. It contends that the complainant’s claims regarding implicit or explicit decisions with respect to post reclassification and merit-based promotion are both time-barred and outside the competence of the Tribunal. In its view, the Appeals Board breached its Statutes and acted *ultra vires* by examining matters other than the recruitment procedure for the P-5 post. Indeed, the only decision challenged by the complainant in his internal appeal was the recruitment decision regarding the P-5 post at Headquarters, and that is the only one capable of review by the Appeals Board and the Tribunal. Moreover, it is not within the competence of the Tribunal to direct that a particular post be reclassified at a higher level.

On the merits, UNESCO argues that the complainant is mistaken in contending that the recruitment procedure did not respect the provisions of the Staff Regulations and Staff Rules and Administrative Circular No. 2191. He fails to take into account Staff Rule 104.2*bis*(b) and paragraph 19(c) of Administrative Circular No. 2191, which clearly state that the Director-General may exercise his discretionary authority to authorise, in specific cases, that Director posts be advertised internally and externally at the same time. The defendant explains that the Director-General did so in this case in order to widen the scope of candidates whose profiles would correspond to the very specific requirements of the post.

Concerning the complainant's argument that it overlooked an essential fact, UNESCO underlines that the principle of giving priority to internal candidates applies only where their qualifications are equal to those of other candidates. Further, there is no exception for staff members serving in duty stations in the field. The Organization stresses that, according to the selection panel, the complainant did not meet the required criteria, whereas the external applicant was deemed to be the best qualified candidate for the post. Consequently, the complainant's competence was not equal to that of the appointed candidate and he cannot avail himself of the provisions granting priority to staff members. This was explained to him in the letter of 18 August 2009 rejecting his appeal, and it is also consistent with the conclusions of the Appeals Board. The defendant adds that his application was considered in good faith and in keeping with the basic rules of fair and open competition, as required by the Tribunal's case law.

As regards his request for the retroactive reclassification of his post, UNESCO points out that the complainant has not put forward any arguments in support of this plea. The fact that he completed several successful field assignments, that his evaluation ratings were favourable and that he was proposed for merit-based promotion by his supervisors does not confer on him a right to such promotion, as such a decision lies within the discretionary authority of the Director-General.

The Organization denies that the decision impugned was not properly substantiated, as it clearly stated that the evaluations undertaken in 2004 and 2006 resulted in confirming its grade at the P-4 level. It points out that the complainant never requested a desk audit of his post and that, in the absence of such a request to this effect, the Organization had no obligation to conduct a desk audit on its own initiative.

Lastly, UNESCO considers that the complainant's claim that the Director ad interim of HRM had no authority to sign the impugned decision on behalf of the Director-General is manifestly devoid of merit.

D. In his rejoinder the complainant presses his pleas. He asserts that his complaint is receivable and that he has exhausted all internal means of redress. He stresses that, pursuant to paragraph 5(b) and (c) of its Statutes, the Appeals Board was competent to consider his claims concerning reclassification and promotion. Consequently, these matters are properly before the Tribunal. On the merits, he adds that he was denied due process in the internal appeal proceedings, as certain documents were never made available to him.

E. In its surrejoinder UNESCO maintains its position in full. Concerning the complainant's argument that he was denied due process, it points out that the documents in question were annexed to its reply in the present proceedings.

CONSIDERATIONS

1. Throughout his career in UNESCO the complainant held positions at grade P-4 in Field Offices. He made several requests for reclassification of the posts he occupied to grade P-5. His supervisors also submitted recommendations and requested his reclassification or that he be given a merit-based promotion. These requests were all rejected.

2. In 2008, in another attempt to be upgraded, the complainant applied for a P-5 position at Headquarters open to internal and external candidates. The complainant was interviewed for the position but was unsuccessful. The successful candidate was one of the external candidates. The complainant appealed the decision to appoint the external candidate to the Appeals Board. In his appeal he also raised arguments regarding his past history and the fact that he had not been promoted. UNESCO challenged the receivability of the promotion and reclassification claims on the grounds that they were time-barred and that the complainant's initial appeal was confined to the competition for the P-5 position.

3. The Appeals Board decided that having regard to paragraph 5(c) of its Statutes it was competent to hear all aspects of the complainant's claims given the length of time involved. The Board was sympathetic to the complainant who had "faithfully served the Organization with duly recognized greater responsibility" and yet "remained at the same grade since his nomination in 1992". It drew attention to the fact that the complainant was about to reach retirement age in 2011 and his pension was going to be affected by this situation.

4. The Appeals Board recommended that the appeal against the recruitment process be dismissed; that the complainant's claim for 4,000 euros as compensation for the prejudice he suffered be rejected; that he be evaluated for a possible reclassification to grade P-5 or be considered for a merit-based promotion with retroactive effect from 2005 given that he had been recognised to have performed higher duties; and that he be compensated for his accommodation and travel costs associated with the appeal.

5. By a letter of 23 August 2010 the complainant was informed that the Director-General had agreed to reimburse him for the accommodation and travel expenses he had incurred when attending the Appeals Board hearing. The Director-General also agreed with the Appeals Board that there were no errors in the recruitment process for the P-5 position and declined to award compensation for the prejudice he allegedly suffered. However, the Director-General rejected the recommended relief that the complainant be evaluated for a possible reclassification or a merit-based promotion. This is the decision impugned before the Tribunal.

6. In addition to challenging the selection procedure to the P-5 position in this complaint, the complainant introduces claims in relation to earlier reclassification and merit promotion decisions. The Tribunal accepts the Organization's position that none of these claims are receivable, in particular because the complainant has not exhausted the internal means of redress as required by Article VII of the Statute of the Tribunal.

7. The complainant's argument that pursuant to paragraphs 5(b) and (c) of its Statutes the Appeals Board concluded it was competent to consider the reclassification and promotion matters and, by inference, these matters are properly before the Tribunal is without merit.

Paragraph 5 of the Board's Statutes reads:

"Jurisdiction of the Board

5. (a) The Board shall consider appeals against an administrative decision or against any disciplinary action where a staff member alleges that it conflicts either in substance or in form with the terms of his or her contract, or with any Staff Regulation or Staff Rule relevant to his or her case.
- (b) In cases in which the decision appealed against is based on grounds of inefficiency or relative efficiency, the Board shall not have jurisdiction to determine the substantive question of efficiency, but only the question as to whether the decision was affected by prejudice or other extraneous factor.
- (c) In case of doubt, the Board shall itself decide whether it is competent in accordance with these terms of reference."

8. Paragraph 5(b) only applies to decisions concerning unsatisfactory performance and limits the competency of the Board to the issue whether the substantive question of unsatisfactory performance was affected by prejudice or other extraneous factors.

9. The complainant also points out that the Appeals Board relied on paragraph 5(c) to say it was competent to deal with the matters of the reclassification and merit promotion. However, the Board erred in law in so doing. Paragraph 5(c) does not permit the Board to expand its jurisdiction beyond its terms of reference and to consider matters that were clearly irreceivable and were not the subject of the internal appeal as required by paragraph 5(a) of its Statutes.

10. Accordingly, the only matter to be considered on its merits is the challenge to the decision concerning the selection procedure for the P-5 position.

11. The complainant alleges first that the Director-General did not properly delegate the authority to make the final decision at issue. The impugned decision was signed by the Director ad interim of HRM and not the Director-General.

12. This is not a question of delegation of authority. Contrary to the complainant's arguments, the authorised decision-maker does not have to be the signatory to the final decision. In Judgment 2028, relied on by the complainant, the decision was flawed because no evidence was adduced that the person with authority had actually made the decision or properly delegated it (see Judgment 2028, under 8(3)). It is not a matter of who signed the decision, but rather who made the decision itself.

13. On reviewing the documentation provided to the Director-General, it is evident that the latter was provided with all of the information required to make an informed decision. It is also noted that the Director-General approved the draft copy of the final decision. In these circumstances, the Tribunal is satisfied that the decision was taken by the Director-General and was simply conveyed to the complainant by the Director ad interim of HRM.

14. The complainant also alleges that the Director-General's reasons were insufficient, particularly in relation to the rejection of the Appeals Board's recommendation that he be evaluated for a possible reclassification to grade P-5 or be considered for a retroactive promotion. In the impugned decision, it was explained that according to the ICSC classification standards the post held by the complainant was normally classified at grade P-4. As well, the evaluations of the post in 2004 and 2006 confirmed its grade at P-4. It was also indicated that the recommendation concerning the retroactive promotion was a separate issue subject to specific rules and procedures. It was therefore clear that the Director-General expressed the view that it was beyond the jurisdiction of the Appeals Board. The Tribunal finds that these reasons gave the complainant a sufficient basis to decide whether the decision should be challenged and to challenge the decision properly.

15. As to the competition for the P-5 position, the complainant submits that the process was procedurally flawed. The vacancy notice for the post was advertised internally and externally simultaneously instead of in a two-stage process where the post is advertised internally for one month and, if a qualified candidate is not identified internally or within the United Nations, then the vacant post can be advertised for a period of two months externally. In order to depart from the usual two-stage advertising of the post, the Director-General's authorisation is required. The complainant argues that, in the present case, the requisite procedure to obtain the authorisation was not followed. Additionally, the reasons given for the request were inadequate.

16. The Organization does not dispute that a two-stage advertisement of the vacancy is the general rule but stresses that the decision to select a simultaneous advertising procedure is a discretionary decision of the Director-General and, as such, is open to only limited review by the Tribunal. In particular, it is not the Tribunal's role to engage in a critical analysis of the reasons given for external advertising. Staff Rule 104.2*bis*(b) provides that the Director-General has "the discretionary power [...] to authorize in specific cases that other posts be also advertised externally" and, in accordance with Administrative Circular No. 2191, paragraph 19(c), the Director-General has the power to authorise simultaneous advertisement externally and internally. In the present case, the Director-General authorised the simultaneous advertising in writing: the Director-General wrote "ok" on the draft letter and signed it in keeping with the usual administrative practice at UNESCO and HRM was given a copy of the letter and an opportunity to provide comments.

17. While it is true that the Tribunal has a limited power of review in relation to discretionary decisions, this does not preclude review in the case of a procedural flaw. The Table of Delegated Authority

and Accountability found in Administrative Circular No. 2244 sets out in paragraph 5.4 a specific procedure for the authorisation of simultaneous external-internal advertisement of a vacancy. In summary, the Assistant Director-General for the Communication and Information Sector sends the request to HRM with reasons for the request. HRM then makes a recommendation to the Director-General and the Director-General authorises simultaneous external-internal advertisement. In this case, there is no evidence that HRM made a recommendation. The Organization does not claim that a recommendation occurred. Instead, it states that “HRM was in copy of the memorandum and has therefore been duly consulted and had the opportunity to provide its comments in accordance with the established procedure”. However, Administrative Circular No. 2244 requires more than mere consultation or an opportunity to provide comments, it requires HRM to make a recommendation. That was not done.

18. In summary, the rationale of the new two-stage selection process is to support the career development of internal staff members by giving them priority consideration and only seeking candidates externally when none are available internally. Although it is true that for the competition at issue only three of the 238 candidates were internal candidates, this does not justify the Administration’s failure to adhere to its own procedure established for the benefit of internal staff. Indeed, the principle of *tu patere legem quam ipse fecisti* forbids the Administration to ignore the rules it has itself defined (see Judgment 3073, under 4, and the case law cited therein). Given that this alone is sufficient to set aside the competition decision, a consideration of the other alleged flaws is unnecessary.

19. In conclusion, the complainant is entitled to moral damages for the flawed selection procedure in the amount of 5,000 euros and, in light of his partial success in this complaint, an award of costs of 1,000 euros.

DECISION

For the above reasons,

1. The decision of 23 August 2010 is set aside, as is the prior decision of 18 August 2009.
2. UNESCO shall pay the complainant moral damages in the amount of 5,000 euros.
3. It shall also pay him 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet