

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

## FORTY-NINTH ORDINARY SESSION

In re NIETO ALVAREZ-URIA

Judgment No. 516

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Ramon Nieto Alvarez-Uria on 27 January 1982 and brought into conformity with the Rules of Court on 1 March, UNESCO's reply of 14 April, the complainant's rejoinder of 18 June and UNESCO's surrejoinder of 6 July 1982;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 11 of the Rules of Court, and Rule 104.6 of the UNESCO Staff Regulations and Staff Rules;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a Spaniard born in 1934, took up duty on 1 August 1976 at grade D.1 as Director of the UNESCO Press Office. His original two-year appointment was extended to 31 July and then to 31 December 1980. In November 1980 he suffered a heart attack and went on sick leave. On 12 December 1980 his appointment was extended to 31 March 1981. On 7 January 1981 he wrote asking the Director-General to review the decision not to grant him a longer extension. The decision was confirmed on 2 February, and he went to the Appeals Board on 2 March. He was given an extension to 11 May. In its report of 22 October 1981 the Board concluded against review but pointed out that with an extension to 31 July 1981 he would have completed five years' employment and so qualified for a pension. By a letter addressed to him on 3 November 1981 the Director-General, while endorsing the Board's conclusion, granted him a retroactive extension to 31 July 1981. That is the decision he impugns.

B. While not challenging the Director-General's discretion under Staff Rule 104.6(b) to refuse renewal, the complainant contends that the exercise of it must not be arbitrary and must take account of the Organization's interests. He sees no explanation for the decision. His performance reports show that he had all the makings of an outstanding senior official and led him to expect a long career with UNESCO. The Director-General not only overlooked essential facts, namely his fine record, but drew a clearly mistaken conclusion from the dossier, which consisted mainly in performance reports confirming his fitness for his post. If other facts were taken into account he knew nothing of them. He invites the Tribunal to quash the decision of 3 November 1981 or award him damages equivalent to three years, pay from the date on which he left UNESCO, and 10,000 French francs as costs.

C. In its reply UNESCO contends that the complaint is irreceivable because the complainant suffered no prejudice from the decision of 3 November 1981, which extended his appointment retroactively to 31 July 1981. Moreover, he ought to have challenged the last renewal of his appointment, the decision of 3 November 1981, before the Appeals Board, and he has not exhausted the internal means of redress. UNESCO further contends that the complaint discloses no cause of action: the complainant's appointment merely expired and according to Rule 104.6(b) he had no expectation of its renewal. All the Director-General's decisions were to extend it, including the one impugned, which caused no prejudice. In any case the complaint is devoid of merit. The Director-General's exercise of his authority was correct. No essential facts were overlooked. The performance reports in fact reveal some dissatisfaction. On 15 January 1980 the Deputy Director-General in charge of publications wrote in one report that more needed to be done to improve the distribution of publications, and in a minute of 22 September 1979 he had spoken to the Director-General of "serious problems" in their production and distribution. Even if the complainant's reports were beyond reproach that alone would not entitle him to an extension, and in fact the decision did not rest solely on those reports. The Director-General was not bound by his subordinates' opinion of a senior official, but was free to form his own judgment. Nor may the Tribunal substitute its own appraisal.

D. In his rejoinder the complainant maintains that the substance of the impugned decision is non-renewal and that he does have a cause of action. What he is challenging is not the denial of any right to renewal but arbitrary exercise of discretion. The criticisms of him cited by UNESCO are trifling and do not detract from the generally favourable appraisal. His achievement may be inferred from the rise in sales of publications between 1976 and 1980 from 1.6 to 3.25 million dollars. The figure in 1981, after he had left, fell by \$1 million. If his professional competence alone had counted his appointment ought normally to have been extended. If the Director-General himself formed a less favourable opinion he ought to have explained why, particularly since the complainant was a senior official. There is no evidence of such an opinion in the dossier. The Director-General did give him a short interview in Belgrade on 13 October 1980 at which he expressed dissatisfaction with the running of the Press Office. The complainant advocates oral proceedings to throw light-on this matter.

E. In its surrejoinder UNESCO maintains that the complaint is irreceivable. As to the merits, the Director-General did not take account of the performance reports alone. An inquiry carried out in 1979 into the publications programme revealed serious mistakes in the complainant's running of it such as large deficits, stocks unsold, printing delays and the lack of a sound promotion policy. The rise in proceeds - partly accounted for anyway by changes in exchange rates - is illusory. That the Director-General never criticised the complainant is untrue and indeed at odds with his own reference to the interview in Belgrade. The dissatisfaction then expressed by the Director-General was based on the report on the inquiry, which, in any event, had been notified to the complainant the year before. The Director-General also chaired the publications board, of which the complainant was a member, and at its meetings himself criticised the programme's shortcomings. The decision was therefore justified, and the reasons for it clear, and there is no need for oral proceedings.

#### CONSIDERATIONS:

The application for oral proceedings

The Tribunal takes the view that the issues raised by the complainant have been fully discussed in the written submissions. No purpose would be served by hearing the complainant and the Director-General give evidence regarding the interview which took place between them on 13 October 1980, not only in view of the further evidence in the dossier but also because non-renewal of a fixed-term contract is a matter of discretion. No suggestion is made that the Tribunal hear witnesses on any particular point which would serve to shed light on the case. There are, accordingly, no grounds for allowing the application for oral hearings in accordance with Article 11 of the Rules of Court.

The receivability of the complaint

The complainant is challenging the Director-General's decision of 3 November 1981.

The decision is in two parts. In the first part it accepts the Appeals Board's recommendation in its report of 22 October 1981 to the Director-General not to review the decision of non-renewal. The second part of the decision, which gave effect to a recommendation in paragraph 56.2 of the Board's report, was to extend the complainant's appointment retroactively up to 31 July 1981. Interpreting the first part of the decision in context by taking account of the second, the Tribunal observes that the Director-General decided against any further extension of appointment beyond 31 July 1981, the date of expiry of the retroactive extension. Previous extensions had been granted on 12 December 1980 up to 31 March 1981 and on 1 April 1981 up to 31 May 1981.

The complainant lodged his appeal with the Appeals Board on 2 March 1981. On 1 April 1981, i.e. after the lodging of the internal appeal, he was granted a further extension up to 31 May, and this extension was taken into account by the Appeals Board in its report of 22 October 1981. It is also true that on 3 November 1981 he was given a further retroactive extension from 31 May to 31 July 1981. None of this means, however, that the appeal was allowed or that the present complaint is therefore without substance. The two short extensions were granted for compassionate reasons, and they were not tantamount either to acceptance of the appeal or to an offer of any further short-term appointment. Accordingly the complainant still has a cause of action and the Tribunal will hear his claims for relief.

Since the impugned decision is final, the internal means of redress having been exhausted, and since it was filed within ninety days from the date of notification, the Tribunal holds the complaint to be receivable under Article VII of its Statute.

The merits

(a) The Director-General's decision of 3 November 1981, on the Board's recommendation of 22 October, not to grant the complainant any further short-term extension was the outcome of a lengthy administrative process. From the fact that the Director-General gave the complainant very short renewals of contract - for reasons which were explained in detail - it is clear that the Director-General had no desire to give him any further appointment like the original two appointments, each of which had been for two years.

Renewal is a matter of discretion, and the Tribunal will quash the decision only if it was taken without authority, or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if essential facts were left out of account, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

The Tribunal finds no such defect in this case.

In particular, no essential facts were overlooked. Although different views had been expressed about the complainant's professional qualifications, his performance reports and appraisals of his work, it is for the Director-General to take account of such questions, and the Tribunal will not replace the Administration's assessment with its own in so far as that assessment is not flawed.

The Tribunal may, it is true, determine whether the performance reports have been properly established, but it may not freely pass judgment on the supervisor's evaluations.

Where a staff member of the complainant's grade (D.1) is concerned, i.e. someone who is primarily concerned with the achievement of the purposes of the Organization, it falls to the Director-General, under his own responsibility, to take into account all factors which may have a bearing on the question of renewal, and of these the performance reports are only one.

Nor is it established that clearly mistaken conclusions were drawn from the evidence in arriving at the impugned decision, nor that the Director-General took into account matters irrelevant to the running of the Organization, i.e. that his decision was tainted with abuse of authority.

(b) The Director-General's decision of 3 November 1981 retroactively extended the complainant's appointment to 31 July 1981 for compassionate reasons.

With his rejoinder the complainant produces an official medical certificate dated 1 June 1981 recommending the extension of the interruption of his appointment for at least ninety days, i.e. up to 29 August 1981. The certificate was notified to the Director of Personnel on 5 August 1981.

The complainant was an honourable and useful official and committed no misconduct. Moreover the non-renewal was a personal decision taken by the Director-General at his discretion. The same compassionate reasons which warranted retroactive extension of the appointment to 31 July 1981 may therefore justify a further and final retroactive extension to 29 August 1981. Be that as it may, it is not a matter for the Tribunal to decide.

DECISION.

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.