

SIXTY-NINTH SESSION

***In re* ROOSENS**

Judgment 1050

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Christian François Roosens against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 30 June 1989 and corrected on 3 August, UNESCO's reply of 15 November 1989, the complainant's rejoinder of 22 February 1990 and the Organization's surrejoinder of 20 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 1.1, 1.2, 4.1 and 4.2, UNESCO Staff Rule 101.01, paragraph 7 of the Statutes of the UNESCO Appeals Board and paragraphs 2205.C and 2445.C and D of the Manual of the Organization;

Having examined the written evidence;

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

A. The complainant, a Belgian born in 1929, joined UNESCO in 1962 as an expert at grade P.4 assigned to a technical assistance project in Morocco. The project and his appointment ended in 1965. In January 1966 he took up duty at headquarters in Paris as a programme specialist at grade P.4 under a short-term appointment. He was assigned to the division in charge of operational programmes in Africa and Asia and he worked there until October 1967. He then served as an expert at a teachers' training institute in Athens, at first at grade P.4 and from 1 June 1968 as chief technical adviser at P.5. In August 1970 he returned to headquarters and held a P.5 post as a programme specialist in the Education Sector until December 1979, when he was transferred to the Director-General's Office and put in charge of personnel matters. On 1 July 1981 the Director-General appointed him Deputy Director of the Bureau of Personnel, still at grade P.5, and in 1984 granted him an indefinite appointment.

In August 1987 the Director-General decided on the recommendation of UNESCO's Executive Board to set up a permanent unit for staff inspection. He intended to appoint the complainant to head the unit and told him so orally. In a letter of 19 September to the Director-General the complainant suggested that the duties warranted a higher grade and that in any event he might not be the right man for the job. But the Director-General ordered that the unit start work soon and confirmed that the complainant would head it. The Deputy Director-General saw him and told him to abide by that decision.

At the end of October 1987 the General Conference of the Organization elected a new Director-General.

In a letter of 6 November to the Director-General-elect the complainant expressed the view that his experience would not be put to best use in the inspection unit, which the Organization's membership as a whole had never approved of and which the staff disliked. In a memorandum of 10 November to the Director of the Director-General's Office he submitted that it would be in UNESCO's interests to leave him where he was. The Assistant Director-General in charge of Administration decided to keep the matter in abeyance until the new Director-General took up duty, on 15 November.

In a circular of 19 November 1987 the new Director-General announced his decision to transfer the complainant to the Division of Development and Co-ordination of Operational Activities (SC/OPS) in the Science Sector as a programme specialist at grade P.5.

By a memorandum of 17 December 1987 he submitted to the Director-General a request for review of the transfer in accordance with paragraph 7(a) of the Statutes of the Appeals Board. The Director-General saw him on 11 February 1988. Having got no answer to his request, he lodged an appeal with the Board on 17 February under paragraph 7(b) of the Board's Statutes.

In its report of 13 February 1989 the Board held that the Director-General had properly exercised his discretion in ordering the transfer but that the complainant had not been given due notice of it. It recommended rejecting the appeal but ensuring that he had the same material conditions as he had had as Deputy Director of the Bureau of Personnel and, since he was about to retire, considering the grant of personal promotion.

By a letter of 6 April 1989, the impugned decision, the Director-General informed him that his appeal was rejected; that he already had the material facilities due to a P.5 official; and that an application from him for personal promotion would be considered according to the criteria the Director-General had laid down for the grant of such promotion towards the end of the official's career. The complainant wrote on 17 May asking what those criteria were. The Director-General refused him the promotion in a letter of 14 June and he retired from the Organization on 30 June 1989.

B. The complainant submits that the decision to transfer him to the Science Sector as a programme specialist was tainted with many flaws.

(1) It was in breach of the principles of equal treatment and good faith. Whereas the new Director-General saw most of the officials who were to be transferred and explained to them the reasons for the move and the nature of their new duties, he did not consult the complainant. He refused the complainant's request for an interview, in breach of Staff Rule 101.1: "Staff members at Headquarters have access to the Director-General, normally through established supervisory channels, but exceptionally and for sufficient reason, directly". The Director-General did not receive him until 11 February 1988. Since the transfer was immediate and he was a senior official, it was in breach of good faith not even to tell him why he was being moved.

(2) There was abuse of authority, the Director-General having acted as if his prerogatives were absolute and in disregard of UNESCO's true interests. Giving staff relations a new "image" is a vague and inadequate reason and makes for arbitrariness. The transfer is a covert disciplinary sanction. His new post was less interesting, less responsible and less important than his post as Deputy Director of the Bureau of Personnel. The Organization sought to humiliate him and to belittle his former duties and position. It could at least have left him the title of Deputy Director. Besides, his new post in SC/OPS was fictitious, as several items of evidence he produces suggest: his administrative position was not corrected until almost a year after transfer, and a staffing table of 15 March 1989 said that he was on a temporary post set up on 1 July 1988 and due to expire on 30 June 1989, the date of his retirement. He never got a post description. The slighting of him, particularly the failure to warn him and the suddenness of the transfer, aggravated the abuse of authority, and, even if proven, the "special circumstances" which the Administration says were due to the change in Director-General afford no excuse. The Director-General acted from improper motives.

(3) The decision is tainted with a mistake of law in that it misapplied Regulation 1.2: "Staff members are subject to the authority of the Director-General, and to assignment by him, with due regard to their qualifications and experience, to any post in the Organization". For one thing his assignment as a programme specialist did not take proper account of his qualifications and experience; for another, it was relegation to lesser responsibilities and to a fictitious and temporary post. The post of Deputy Director of the Bureau of Personnel had usually been held by a D.1 official, and in any event it is wrong to look just at the grade: what matters is the real responsibility he had. As the Appeals Board acknowledged, the post of Deputy Director was more important. The transfer offended against his dignity by putting him under junior and less well-qualified officials, by subjecting him to inferior material conditions and by ignoring his seniority and fine record.

(4) There was a mistake of fact in the refusal of personal promotion. The Director-General said in his letter of 14 June 1989 that he did not meet the criteria in an administrative circular, No. 1663 of 25 May 1989, on the subject, including the requirement of at least 25 years' service for a headquarters official. He did: UNESCO wrongly reckoned that he had only 23 years' service; in fact he joined in August 1962 and so had 26.

(5) There was further breach of good faith in that the Director-General pretended to accept but really dodged the Board's recommendation that he be considered for personal promotion. There was no need for him to apply since the Board had already recommended considering it. There is further evidence of bad faith in the reference in the Director-General's letter of 6 April 1989 to criteria on the subject; the complainant asked on 17 May what the criteria were, and the answer of 14 June cited a text that dated back only to 25 May.

The complainant explains the nature of the moral injury which he has sustained, and which publicity aggravated.

He cites the case law on the nature of redress. He seeks the quashing of the impugned decision, reinstatement in a position identical to that which he held before 19 November 1987, moral damages and costs.

C. In its reply UNESCO gives its own account of the facts of the case.

(1) It submits that there was no defect in the procedure.

(a) It was under no duty to consult the complainant or even inform him before transferring him. Manual paragraph 2445.C requires merely that time should be allowed for the official to make the move, and 2445.D says that the Bureau of Personnel shall consult the official only if he is transferred away from, not within headquarters. Besides, even supposing consultation were necessary, the official's prior consent is not: the case law bears that out.

(b) There was no breach of equality. The complainant offers no evidence in support of his contention that the new Director-General saw most officials who were to be transferred. No prior consultation was necessary, and certainly not by the Director-General himself. The complainant fails to show that he was in the same position in fact and in law as others whom the Director-General did see: some were being sent to the field, others held higher grades. When the Director-General did agree to see someone he did so at his discretion. Nor was there any breach of Rule 101.1: the right of access to the Director-General is conditional; it is exceptional; the Director-General cannot reasonably be held to any particular date for receiving a staff member; and in this case the Director-General was busy at the time, having just taken up duty. He did not refuse a meeting: he saw him in February 1988.

(c) The reasons for the transfer were notified to the complainant beforehand. On the Director-General's instructions the acting Director of his Office saw him some time before 19 November 1987 and explained the reasons to him.

(d) He was given sufficient time before the transfer took effect. The decision that was announced on 19 November did not say when he was to take up his new post. Manual paragraph 2445.C allows twenty days for changing posts at headquarters, and he himself made the change, of his own free will, sooner than that.

(2) UNESCO contends that the transfer was lawful on the merits.

(a) The complainant had no right to keep his post as Deputy Director. As the rules make plain and as the case law bears out, the Director-General assigns staff in the Organization's interests as he sees them, and the decision to transfer the complainant shows no substantive flaw.

(b) The Director-General took due account of his qualifications and experience and he is mistaken in alleging that his new post did not suit them. While at UNESCO he spent almost 14 years in the training of technical staff and in operational work as against only 8 in personnel management. Besides, since he had turned down the post as head of the staff inspection unit the Director-General was free to assume that he wanted work of a more scientific and technical kind that suited his own talents.

(c) The transfer did not cause him any reduction in grade or in pay. To support the contention that it did he has to make the mistaken assumption that his post as Deputy Director deserved the grade of D.1. The Organization explains the nature of his duties as programme specialist and submits that the level of responsibility of both posts corresponded to P.5. He fails to compare the posts according to objective criteria and is merely stating his own preference.

(d) The transfer did not impair the complainant's dignity or good name, and he offers no evidence to suggest that it did. He enjoyed much autonomy as programme specialist and was not dictated to by officials with lesser seniority. He was subordinate to a D.2 official. He had no right to the title of Deputy Director, which went with his former post. The Organization treated him considerately. Had he stayed in the Bureau of Personnel he would have been superseded by a former subordinate; instead he was moved to another Sector. There was nothing demeaning about his new duties. He was not put on the shelf.

(3) There was no abuse of authority.

(a) The transfer was ordered in the Organization's best interests. As he said in a speech to the staff on 16 November 1987 the new Director-General believed that the time had come for reform, particularly in staff management, and prompt changes in the Bureau of Personnel were needed. There were no considerations alien to the Organization's interests.

(b) The transfer was not a disciplinary sanction but warranted for the reasons already stated. Besides, the complainant had committed no fault and the Director-General had no reason to be, and was not, prejudiced against him. He was not put on any fictitious post but given real duties. That the work was temporary did not matter since he had a permanent appointment. The nature of his duties was explained to him orally by his superior before he took them up and must have been clear since he never asked for an explanation while performing them. Publicity caused him no apparent injury, and UNESCO was not to blame for it anyway.

(4) The Director-General acted in good faith towards him.

(a) His working conditions, which the Organization describes, were up to standard. He had an office of the proper size and adequate secretarial help.

(b) The Director-General gave due consideration to personal promotion, but was not bound to grant it and never said he was. He had laid down the criteria when he wrote to the complainant on 6 April 1989 referring to them. It is unreasonable to suppose that he so drafted them as to bar the complainant.

(5) The mistake of fact he alleges - the Organization's contention that he did not meet the criteria for end-of-career personal promotion - is immaterial because such promotion is not one of his claims anyway: the impugned decision is the one of 6 April 1989 confirming his transfer, not the one of 14 June 1989 refusing promotion. The two decisions are unconnected, and his challenge to the later one is irreceivable because he has failed to exhaust the internal means of redress and is too late to lodge an internal appeal now.

(6) He has suffered no injury warranting redress, the transfer not being tainted with any fatal flaw. Besides, even if he could show moral injury UNESCO would not be liable unless it were identifiable and unusually grave and he himself bore no share of the blame. Those conditions are not met.

D. In his rejoinder the complainant enlarges on his earlier pleas and seeks to refute the Organization's. He submits that UNESCO persists in ignoring or misreading many facts and he dwells at length on the issues of fact which in his view show the impugned decision to have been unlawful and which relate in particular to the circumstances surrounding his transfer, his conditions of employment in his new assignment and the refusal of personal promotion. He develops his arguments about procedural flaws, namely the hastiness of the transfer, the lack of information about his new duties and the fictitious nature of the post. He maintains that the Director-General committed a mistake of law in imagining his discretionary authority to be unlimited. He presses his allegations of abuse of authority, observing that UNESCO offers not a shred of evidence as to its best interests. He explains that though his new duties were not in themselves humiliating - he has never argued that - they were demeaning in comparison with his previous post, and he submits that the interests of the Organization consist in using the talents of its staff to the best advantage, which it did not do in his case. He reaffirms his belief that there was prejudice against him and that it is clear from many circumstances he describes.

He submits that the grave injury he has sustained is entirely attributable to the Organization's refusal to let him end his career in a dignified and satisfactory post and he presses his claims.

E. In its surrejoinder the Organization dwells on several issues of fact raised in the complainant's rejoinder and develops its contention that the impugned decision shows no fatal flaw. It maintains in particular that the Director-

General acted in its own true interests, that he complied with the requirements of the Staff Regulations and Staff Rules and with the general principles that govern the international civil service, that it did nothing to harm the complainant's good name or dignity, and that it committed no abuse of authority.

It discusses further the circumstances of his transfer, the conditions of work he had in his post as programme specialist, and the reasons for the refusal of personal promotion. It submits that his allegations on those matters, besides being to a large extent gratuitous and mistaken, have no bearing on the lawfulness of the decision he is actually impugning. It seeks to show the relevance to that decision of the former Director-General's decision to make him head of the proposed inspection unit and of his reluctance to accept that appointment. It explains why his transfer served the Organization's interests and points out that the Director-General is the best judge of what those interests are in any particular set of circumstances.

It enlarges on its contentions that the transfer was decided upon without undue haste and at the right time, that he

knew what duties he was to carry out in his new post, that there was nothing fictitious about it and that he was not discriminated against. It contends that his new assignment did not amount to any sort of downgrading and that, though a transfer should match the official's qualifications and experience as far as possible, it does not need to satisfy his own preference.

Lastly, he fails in his rejoinder to show that he suffered any injury for which it may be held liable.

CONSIDERATIONS:

The facts

1. UNESCO first recruited the complainant in August 1962 at grade P.4 as a specialist in telecommunications and electronics under a project of the United Nations Development Programme (UNDP) which it was carrying out in Morocco. His appointment and the project ended in September 1965.

On 10 January 1966 he was granted a short-term appointment, again at P.4, and assigned at headquarters to the division in charge of operational activities in Africa and Asia as a programme specialist. He was then sent to Athens to work as a specialist in electronics at P.4 on another UNDP project. In June 1968 he was promoted to a P.5 post as chief technical adviser under that project. In August 1970 he was sent back to headquarters, where he worked as a P.5 programme specialist and then as a P.5 officer in the Director-General's Office. On 1 July 1981 he was appointed Deputy Director of the Bureau of Personnel, still at grade P.5. On 1 April 1984 he was granted an indefinite appointment.

On 19 November 1987 the new Director-General of UNESCO announced a decision to transfer him to the Division of Development and Co-ordination of Operational Activities (SC/OPS) as a P.5 programme specialist. On 17 December 1987 he submitted to the Director-General a request for review of the transfer. The Director-General saw him on 11 February 1988 and promised to have another look at his case. But on 17 February 1988 he appealed to the Appeals Board against the transfer. In its report of 13 February 1989 the Board recommended rejecting his challenge to the transfer but ensuring that he had the same material conditions as he had had as Deputy Director of the Bureau of Personnel and, since he was about to retire, a personal promotion.

By a decision of 6 April 1989 the Director-General accepted the Board's recommendation and rejected his challenge to the transfer. As for the other points, the Director-General took the view that he already had the material conditions due to an official in his grade, but promised to consider an application from him for personal promotion according to the relevant criteria. On 17 May 1989 he put to the Director-General claims to his former material conditions, as recommended by the Board, and to an extension of appointment beyond the age of retirement to make him eligible for personal promotion. On 14 June the Director-General rejected his claims and on 30 June he filed this complaint, which impugns only the decision of 6 April 1989.

The Tribunal's power of review

2. The main issue is the lawfulness of the transfer. It was ordered under Staff Regulations 1.1, 1.2 and 4.2 and those provisions are discussed below. All that need be said here is that they allow the Director-General wide discretion and a decision by him is subject only to limited review. It will be set aside only if taken without authority or in breach of a rule of form or of procedure, or if there is an error of fact or of law, or if some essential fact has been overlooked, or if there is abuse of authority or if some clearly mistaken conclusion has been drawn from the evidence. This complaint will succeed only if the decision shows one of those flaws, and indeed the complainant says that it shows nearly all of them.

The complainant's pleas

3. His first plea is that the procedure that was followed broke two cardinal principles, equality of treatment and good faith. Unlike most of the officials who were transferred the Director-General neither saw him nor consulted him beforehand, but received him only three months afterwards.

Regulation 1.2 reads: "Staff members are subject to the authority of the Director-General, and to assignment by him, with due regard to their qualifications and experience, to any post in the Organization".

The Organization contends, and the complainant does not deny, that there is nothing in the written rules about

informing or consulting a staff member before transfer. Manual paragraphs 2445.C and D do lay down such a requirement, but only when the official is transferred from headquarters to the field, and the complainant was not.

The complainant's answer is that consultation comes within the Organization's broader duties to respect the dignity of staff, to avoid harming their good name and at least to let them know what is to become of them.

UNESCO points out that the change of Director-General made for exceptional circumstances and that the new Director-General had to take urgent action to carry out the structural and administrative reforms he had just promised to the General Conference and to the staff. Although his new and pressing obligations meant that he could not see all the officials the reforms affected he did tell the acting Director of his Office to see them, and that official declares that he saw the complainant "before 19 November 1987", the date of the transfer.

There is no reason to doubt that assertion, though the complainant was understandably sorry not to see the Director-General himself.

Such, too, are the circumstances that serve to explain why the impugned decision was taken so quickly, why the complainant was not given notice, and no doubt also why the Director-General did not see him until some time later.

In any event Manual paragraph 2445.C allowed him twenty working days to take up his new duties and in that time he was able to make up his mind about the transfer and even refuse it. His own immediate supervisor, the Director of the Bureau of Personnel, was transferred at the same time as he, and there is no reason to suppose that the Organization acted in breach of the principle of equality or of good faith in its treatment of him.

4. The complainant objects to the construction the Administration put on Regulation 1.2 as to the extent of the Director-General's discretion. He argues that the Director-

General is given authority for the purpose of serving the Organization's interests; yet the Organization's unabashed eagerness to serve those interests by giving relations between staff and management a "new look" was just a pretext for imposing a covert sanction on him, and so the transfer amounted to an abuse of authority.

The greater caution must be shown in interfering with a decision which is founded solely on the Organization's interests because the Director-General must ordinarily be deemed to be the best judge of what they are.

Regulation 1.1 affirms that "By accepting appointment [members of the secretariat] undertake to discharge their functions and to regulate their conduct with the interests of the Organization only in view".

The complainant's case is that his transfer did not serve the Organization's interests. UNESCO answers that the real reasons for transferring him, his supervisor and other staff were objective, namely the changes and reforms decided upon by the Director-General.

The conclusion is that in founding the impugned decision on the protection of the Organization's interests the Director-General did not go beyond the bounds of his discretion or commit any abuse of authority. Though arguably a particularly severe way of treating the complainant, the decision was no hidden sanction.

5. The complainant contests that point of view by arguing that his former post of Deputy Director of the Bureau of Personnel was more important than the one of programme specialist he was transferred to; that his new assignment did not fully match his abilities and injured his dignity; in short, that it was in fact a downgrading.

The plea fails. The impugned decision may have put him in a job with lesser prestige, but Regulation 4.2 provides that the purpose of transfer is to secure "the highest standards of efficiency, competence and integrity". In acting in pursuance of that purpose the Director-General is not precluded from transferring a staff member provided that his intention is, as Regulation 1.1 requires, to serve the Organization's interests and that the staff member's own abilities and interests are not overlooked. Where the Director-General believes that the Organization's interests must prevail he will act accordingly and the staff member will ordinarily have to fall in line unless he prefers resignation.

It was only reasonable, in the particular circumstances of the case, that UNESCO should have put its own interests

above the complainant's. Regulation 1.2 requires the Director-

General only to take account of the staff member's qualifications and experience, not to ensure that the new assignment matches them exactly. Since, as the complainant acknowledges, the post he was put on was of the kind he had had several years earlier, he may not properly plead disregard of his qualifications.

None of his pleas under this head is sound.

6. For the same reasons he is mistaken in further alleging that the post he was put on was fictitious. As a matter of fact his argument is somewhat inconsistent since sometimes he maintains that it was fictitious and sometimes he acknowledges that it was temporary.

In any event, as UNESCO points out, the fact that the terms of his assignment were not sorted out until 1 July 1988 with retroactive effect from 19 November 1987, affords no grounds for treating his post as fictitious: the records describe it as temporary.

7. A more cogent objection is that the Organization failed to give him a post description.

Though Regulation 4.1 sets out in the last sentence the terms of appointment that apply in the event of transfer, it refers only to the "title" and "character" of the post the staff member is appointed to. Though there is no requirement in the Staff Regulations or Staff Rules that a post description be notified beforehand to the transferred official, "terms of appointment" presumably includes the post description so that the staff member will know what sort of duties he is to have. In any event it appears that the complainant was given no post description.

The Organization says that before he took up his new post his supervisor explained to him orally what his duties would be. The complainant denies that and maintains that he did not get any explanation until much later.

There being no reason to take one assertion on trust rather than the other, the evidence needs to be examined.

It was the Appeals Board that first raised the issue proprio motu and held the lack of a post description to be a flaw in the transfer.

In his submissions to the Board and to the Tribunal the complainant acknowledges that his transfer to a P.5 post as a programme specialist took him back to work he had been doing in 1966. So his assertion that he did not know what sort of duties he would have is to be treated with caution. Although they may not have been quite the same as those he had been appointed to at grade P.4 in 1966 and again at P.5 in 1970, when he had been in other divisions, the Organization contends that it was easy to find out what his new duties were, especially since he was to take over some of the work of another official. He must have known what such work amounted to since he was the Deputy Director of the Bureau of Personnel and, under Manual paragraph 2205.C, the Bureau was required to approve descriptions of the main duties and responsibilities of posts.

The conclusion is that, though he did not get any description of his new duties at the time of transfer, he already knew what they were in the main, and that no doubt explains why he apparently did not ask for a description in his internal appeals and why he was able to carry out his work satisfactorily.

Being unsound, the plea fails.

8. The complainant further objects to the action taken on the Appeals Board's recommendation of 13 February 1989 for considering the grant of end-of-career personal promotion.

In his decision of 6 April 1989 on that recommendation the Director-General answered that he had set criteria for such promotion and was willing to consider any application the complainant might make. But by a decision of 14 June 1989 the Director-General told him that he did not qualify for the promotion and, to the complainant's mind, that was a mistake of fact and a breach of good faith.

As the Organization observes, the plea is irreceivable because it is directed not at the impugned decision of 6 April 1989 but at the one of 14 June 1989.

The decision of 14 June 1989 was not, as the complainant seems to make out, just the confirmation of an earlier

one but was a new decision, being taken after a further exchange of papers and on the strength of facts the Director-General had been unaware of at the date of the impugned decision. The complainant's objection to the later decision is irrelevant to the lawfulness of the earlier one. Besides, what he wants is the quashing of the transfer and his objection to the refusal of personal promotion has nothing to do with that.

9. His objection that the Organization injured his dignity by giving publicity to his "downgrading" is rejected because, as the Organization points out and he does not deny, it was not to blame for the publicity.

10. His other pleas are either irrelevant or superfluous and therefore need not be taken up: in any event the complaint fails.

The claims to compensation and to costs

11. Since the complainant's main claims are rejected so too are his claims to compensation and to costs.

The application for oral proceedings

12. The Tribunal rejects the complainant's application for oral proceedings and for the hearing of witnesses because they would shed no further light on the material issues. The full submissions and the evidence entered by the parties afford the basis for a ruling.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner