

SEVENTY-FIFTH SESSION

***In re* CAMARA**

Judgment 1259

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Sidiki Camara against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 April 1992 and corrected on 1 September, UNESCO's reply of 23 October 1992, the complainant's rejoinder of 6 January 1993 and the Organization's surrejoinder of 5 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rules 104.6(a) and (b) and 109.11(a), and paragraphs 7(a) and 8 of the Statutes of the UNESCO Appeals Board;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a citizen of Burkina Faso who was born in 1941, joined UNESCO on 9 February 1981 as a copy-editor and proof-reader at grade P.2 in the Office of the UNESCO Press, later known as the Office of Publications and Periodicals, in the Production Services Division. He was granted a temporary appointment which was converted to a two-year fixed-term one on 9 August 1982 and extended twice, in 1984 and again in 1986. After 1 December 1988 his appointment was extended by only short periods and the last extension expired at 30 November 1989.

In a memorandum of 28 August 1989 the Director of the Bureau of Personnel told him that his services were unsatisfactory and that, in accordance with Staff Rule 104.6(a) and (b), his appointment would not be extended beyond 30 November 1989. He got that memorandum on 4 September and in a memorandum of 5 October informed the Director that he would be submitting observations. The Director acknowledged receipt on 19 October.

On 29 December 1989 the Organization issued Administrative Circular 1698, which announced staff changes in the Professional category and above in November and December. The complainant's name appeared under the heading "Separations" and against the date 30 November 1989. He wrote to the Director-General on 28 January 1990 objecting to the circular and applying for leave to put his case to the Appeals Board. On 2 March the Director of the Bureau of Personnel answered on the Director-General's behalf that since the memorandum of 28 August 1989 had notified to him the decision not to renew his appointment he ought, according to paragraph 7(a) of the Board's Statutes, to have submitted any protest in writing within one month of the date of receipt of that decision; the time limit in 7(a) could not be extended and it was therefore too late to reconsider the decision.

On 30 March 1990 the complainant lodged notice of appeal against the decision of 28 August 1989 not to renew his appointment and against circular 1698.

In its report of 13 November 1991 the Appeals Board held that the appeal was irreceivable because he had not submitted it within the prescribed time limit of one month, but in the belief that the decision had come about because the complainant and his supervisors were not on good terms and there was a difference of opinion over his way of working the Board recommended reappointing him for a trial period. The Director-General concurred with the Board's finding that the appeal was irreceivable but upheld his decision not to renew the appointment in a letter he sent the complainant on 27 December 1991. That is the decision under challenge.

B. The complainant contends that his appeal was not out of time: he had been unable to substantiate it because he received his performance reports for the period November 1988 to May 1989 only on 7 May 1990 and only after he had asked for them. He contends that the heads of his division and unit disregarded the reporting procedure in establishing his performance appraisals.

He submits that the decision was prompted by racism, prejudice on account of his staff union activities and his applying for the post of head of unit in 1984. He did his work promptly and efficiently and it was always found to be good, but he had difficulty in day-to-day dealings with his supervisors. In October 1989 the Group of African States at UNESCO's General Conference got an assurance from the Director-General, which he confirmed on 13 November, that decisions on the complainant and another official would be suspended until further notice. That that commitment was not met shows that the decision was arbitrary and prompted by racism.

In his submission an official has the right to be told the reasons for a decision that causes him injury. His supervisors never discussed the matter with him and it was not his first-level supervisor who wrote his performance reports, but the head of division.

He asks the Tribunal to set aside the decision not to renew his appointment and to order his reinstatement as from 1 December 1989 or, failing that, to grant him five years' salary as compensation. He also seeks awards of material and moral damages and costs.

C. The Organization replies that the complaint is irreceivable because the complainant failed to observe the time limit for internal appeal. Even if his memorandum of 5 October 1989 may be regarded as a "protest" within the meaning of paragraph 7(a) of the Statutes of the Appeals Board, it was out of time because the decision not to renew his appointment was dated 28 August 1989. When the representative of the Group of African States saw the Director-General on 26 October and 13 December 1989 - almost two months after he had been told of non-renewal - they spoke of the suspension of "measures pending", not of decisions that were already final, such as the one now under challenge.

Turning to the merits, UNESCO observes that non-renewal of fixed-term appointments is governed by Rule 104.6(b):

"A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity."

The Organization denies breach of the reporting procedure in appraising the complainant's performance from November 1988 to May 1989. He himself admitted in a memorandum of 9 June 1989 to the head of division that his first-level supervisor had offered to go over the appraisal with him but he had answered that he wanted to speak to counsel first. In the same memorandum he acknowledged having got a preliminary draft of his performance report. The Organization produces several memoranda showing that his first-level supervisor, the head of division and the Director of the Office of Publications and Periodicals failed to get him to discuss their appraisals with them. Like his reports for 1984, 1986 and 1988, the draft described him as a slacker, and he reacted evasively. After December 1988 his appointment was extended by way of warning by short periods - of two, one, six and three months - because his work was poor.

Since the decision he challenges shows no flaw his claim to damages is groundless.

D. In his rejoinder the complainant describes in detail how strained the atmosphere in his unit became after the appointment of his new supervisor, whom he brands as inefficient and ill-educated. His supervisors held it against him that his many union and cultural activities kept him sometimes out of his office. He produces good reports on him by former supervisors and other staff.

He was not sent in time a copy of his performance report for the period from November 1988 to May 1989. He contends that he did exhaust all the internal means of redress since the Appeals Board ruled on the merits of his appeal by recommending the offer of a new appointment. He presses his claims.

E. In its surrejoinder the Organization develops its pleas on receivability and on the merits.

CONSIDERATIONS:

1. UNESCO recruited the complainant on 9 February 1981 under a temporary appointment for six months as a copy-editor and proof-reader. In 1982 he was granted a fixed-term appointment for two years. He had it extended in 1984 and in 1986 and then by short terms. He got the last extension by virtue of a decision of 28 August 1989 which was that on the grounds of unsatisfactory service his appointment would not be renewed beyond 30

November 1989. He acknowledged receipt of that decision on 4 September 1989 and by a memorandum of 5 October conveyed to the Organization what he called his "initial reply to the letter of dismissal".

A UNESCO circular went out on 29 December 1989 announcing among other things his departure at 30 November 1989. On 28 January 1990 he submitted a written protest to the Director-General. In a decision of 2 March 1990 the Director of the Bureau of Personnel informed him on the Director-General's behalf of the rejection of his protest on the grounds that he had failed to submit it within the one-month time limit set in paragraph 7(a) of the Statutes of the Appeals Board. He appealed to the Appeals Board. In a report of 13 November 1991 the Board recommended declaring his appeal irreceivable on the same grounds but granting him a new appointment "on probation".

In a letter to him of 27 December 1991 the Director-General endorsed the first of the Board's recommendations, but not the second, though he added that any application from the complainant for an advertised vacancy would be "duly considered". That is the decision under challenge.

2. The material issue is whether the complainant's protest against non-renewal was receivable.

The Director-General endorsed the Board's recommendation for rejection, which it based "on the clear and precise terms of paragraphs 7 and 8 of its Statutes and on the Director-General's refusal to let the complainant have any extension of the time limit".

According to paragraph 7(a) of the Statutes a protest -

"... shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters and within a period of two months if he is stationed away from Headquarters or if he has been separated from the Organization."

3. The complainant's plea for the quashing of the impugned decision is that his memorandum of 5 October 1989 to the Director of the Bureau of Personnel protested against the decision of 28 August 1989 not to renew his appointment. He said "Because of the many flaws in the decision your letter calls for point-by-point refutation" and he concluded: "I should be grateful if in the meantime you would convey my decision to the Administration". He contends that his memorandum was indisputably a "protest" within the meaning of paragraph 7(a) and stated his intention of challenging the non-renewal.

In its reply the Organization does not question that his memorandum of 5 October 1989 protested against the decision, but it puts forward pleas about the way in which he lodged his protest and the date of lodging it.

4. One is that he failed to submit it to the Director-General himself.

That objection fails because the memorandum was correctly addressed to the Director of the Bureau of Personnel, whom he asked to convey to the Administration his decision to appeal. So it was incumbent on the Director to forward it to the Director-General.

5. The Organization's second plea is that the protest was out of time.

The plea succeeds. The complainant received on 4 September 1989 the decision of 28 August, and he had one month from that date in which to address a written protest. His protest, which was dated 5 October, was not received until 11 October. Since he has failed to show that he addressed it before 11 October that is the relevant date for determining whether he met the time limits in paragraph 7(a). The conclusion is that his protest was out of time.

6. He makes out that since by the time he made his protest he had left the Organization his case was covered by the last phrase of paragraph 7(a) - "or if he has been separated" - and so he had two months in which to protest. He says that his appointment was to end at 31 August 1989 on the expiry of the six-month extension he had been granted on 23 March 1989 and that the sole purpose of the decision of 28 August 1989 was to let him make arrangements for leaving.

His argument fails.

Although the Organization had told him on 23 March 1989 that his appointment would end at 31 August it reversed that decision on 28 August by granting him one last three-month extension to 30 November. According to Rule 109.11(a) the "effective date of separation from service" is that of expiry of the appointment. So on 11 October the complainant was still a member of the staff.

7. Lastly, he pleads new facts which he says warranted reopening the time limit for making his protest. In his submission an appraisal report he got after separation, on 7 May 1990, would have given him an opportunity of refuting the charge of poor performance; by "dismissing" him before he got it the Organization acted in breach of due process and of his right to defend his interests.

The plea fails.

The time limit in paragraph 7(a) of the Board's Statutes for protest is a matter of objective fact and so may be extended only for some exceptional reason.

In any event the new facts the complainant relies on have no direct link with the grounds on which the Director-General rejected his protest against non-renewal. Without making any assessment of his performance the Director-General simply pointed out that his protest dated 5 October 1989 had been late.

8. The complaint being irreceivable, there is no need to entertain his pleas on the merits. Since his main claim is irreceivable his claims to damages and costs cannot but fail too.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-

President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner