

## NINETY-FIRST SESSION

*In re Tekouk*

**Judgment No. 2066**

The Administrative Tribunal,

Considering the complaint filed by Mr Mohamed-Larbi Tekouk against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 17 November 2000, UNESCO's reply of 21 December 2000, the complainant's rejoinder of 31 January 2001 and the Organization's surrejoinder of 13 March 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Algerian who was born in 1938, is a former employee of UNESCO. He joined the Organization in October 1973 on a temporary appointment as a messenger at G.1 at UNESCO's headquarters in Paris. In March 1974 he was given a fixed-term contract and assigned to another post at the same grade. He was promoted to G.3 in July 1977 and then to G.4 in January 1981. He was awarded an indeterminate appointment on 1 April 1984.

In response to his wish to move closer to his family, then resident in Peru, UNESCO transferred him to Caracas (Venezuela) and promoted him from 4 September 1989 to grade P.1, step 3, as an assistant programme specialist for the promotion of publications. The corresponding "notice of personnel action" bears the date 17 August 1989. Citing a "serious reduction" in pay as a result of his transfer, the complainant wrote on 30 October to the chief administrative officer for personnel serving in the field asking to benefit under a circular allowing officials transferred away from headquarters to be awarded three additional within-grade steps. The chief administrative officer rejected that request in a memorandum of 4 December 1989 on the grounds that the complainant had been promoted to grade P.1. He was promoted to P.2 on 1 September 1991 and in September 1997 resumed service at headquarters.

In a letter of 9 January 1998 the complainant explained to the Director-General that, at the time of his transfer to Caracas he had accepted the grade and step attributed to him because what mattered most was to move closer to his family. However, he now realised the serious consequences of his grade for his salary and pension. He therefore asked the Director-General to restore his rights with regard to salary and pension entitlements as from the date of his transfer and to promote him to grade P.3 with retroactive effect. In a memorandum of 10 March the Director of the Bureau of Personnel informed him that the Director-General rejected his requests.

The complainant wrote to the Director-General on 4 April; he sought an end-of-career promotion to grade P.3 and wanted his career reconstituted as from the date of his transfer to Caracas, when, he says, the Organization ought to have promoted him to grade P.2, step 6. The Director of Personnel wrote to him on 15 July confirming on the Director-General's behalf that the grade and step assigned to him on transfer were the right ones. On 23 July the Director-General had a talk with him. By a memorandum of 9 September the Assistant Director-General for Management and Administration asked the Director of Personnel and Director of the Office of International Standards and Legal Affairs to prepare a recommendation for the Director-General in order to settle the dispute once and for all. By a letter of 9 November 1998 the complainant asked the Director-General what he had decided as a result of their talk. In a letter of 5 January 1999 the Director of Personnel replied that the Director-General upheld the rejection of his claim to the reconstitution of his career and that he should regard that decision as final.

On 3 February the complainant wrote a letter of protest to the Director-General asking him to reconsider his decision of 5 January and to sort his position out. By a memorandum of 16 April 1996 the Director of Personnel told him that the Director-General "yet again" upheld his decision of 10 March 1998. On 4 June 1999 the complainant sent a notice of appeal to the secretariat of the Appeals Board. The Board reported on 29 June 2000. It stated that it would not entertain the merits of the case since the appeal was time-barred. It did find, however, that the Organization might have assigned the complainant the wrong grade and step in 1989 and, to clear up any doubts, recommended that the Director-General have a report written on the matter and then take a final decision. By a letter of 28 August 2000, the impugned decision, the Director-General rejected the complainant's appeal.

In the meantime, in a letter of 8 October 1999 the Director-General informed the complainant, who had been in retirement since 31 May 1998, of his decision to grant him an end-of-career promotion to grade P.3 backdated to six months before the date of his retirement.

B. The complainant contends that a promotion ought to involve an increase at least equivalent to one within-grade increment. His transfer to Caracas incurred an annual loss in salary of 7,170 United States dollars whereas had he been promoted to P.2, step 6, the level of his pay would at least have been maintained. He further submits that the decision to transfer him at P.1, step 3, was arbitrary and disregarded the practice in similar cases. To illustrate his point he observes that Mr V. - who, like himself, had held grade G.4 step 9 at the time of his transfer to Latin America - had been promoted to P.2, step 11. Furthermore, Mr Z., another colleague who was, he says, in a position similar to his, had sought a review of his salary and been granted a lump sum in damages in 1991. Lastly, he points out that at 9 September 1998 the Director-General had still not taken a decision about him. That, in his view, is clear proof of "discriminatory measures" and "dilatory measures" on the part of the Organization.

He asks the Tribunal to acknowledge that UNESCO took "dilatory and arbitrary measures" against him, to quash the decision of 28 August 2000 and to order that his career be reconstituted as from the date of his transfer to Caracas, on the basis of grade P.2, step 6.

C. In its reply the defendant objects to the receivability of the complaint on two counts. First, the complainant exceeded the statutory time limits for challenging the decision of 30 June 1989 to set his grade as P.1, step 3: his request of 9 January 1998 for reconsideration was time-barred. Secondly, that same request was rejected on 10 March 1998 and the complainant's letter of protest of 3 February 1999 was also time-barred. Furthermore, it challenged the decision of 5 January 1999 which merely confirmed the one of 10 March 1998 and so could not set off a new time limit.

In subsidiary pleas on the merits the Organization argues that the Director-General's decision setting the complainant's grade at the time of his transfer was lawful. He took it on the basis of a proper assessment of the facts, within the bounds of his prerogatives and in accordance with the applicable rules and regulations. Until 1989 UNESCO took the post adjustment multiplier applicable at the relevant duty station as the basis for calculation, but that method had given rise to blatant disparities in the grades and steps established for General Service staff promoted to the Professional category and assigned away from headquarters. The method was therefore changed in 1989: henceforth, the scales corresponding to a single duty station, Paris in this case, were to be applied before such staff members were transferred from headquarters to the field. The new methodology having been applied consistently since that date, the principle of equal treatment has been observed. Lastly, UNESCO explains that a lump sum was paid to Mr Z. as redress for an error of reckoning linked to the multiplier.

D. In his rejoinder the complainant observes that in his letter of 30 October 1989 he asked the Director-General to "render [him] justice", so he did challenge in time the decision to transfer him of 4 September 1989 - that being the date on which the notice of personnel action of 17 August 1989 "took effect". He again observes that at 9 September 1998 the Director-General had still not taken a final decision about him, so he was not in a position to appeal. He further observes that UNESCO failed to answer his plea that he was not treated on a par with Mr V., and adds that his salary in 1989 was based on a miscalculation linked to the choice of multiplier.

E. In its surrejoinder UNESCO asserts that, even if the complainant's letter of 30 October 1989 was a written protest, the complaint would nonetheless be irreceivable for failure to comply with the procedural rules. Furthermore, he may not cite the memorandum of 9 September 1998 to explain the lateness of his protest because it contains no challengeable decision and was not addressed to him. UNESCO explains that it did not mention Mr V.'s case in its reply because his position was quite different from that of the complainant. Lastly, the complainant has misread the Administration's calculations of 1989, which were indeed based on the multiplier for

Paris.

## CONSIDERATIONS

1. In September 1989 the complainant, who at the time was employed by UNESCO, was transferred from headquarters in Paris to Caracas at his request and had accepted the terms of the transfer. After resuming his duties at headquarters as from September 1997 he asked the Director-General to pay him, with retroactive effect for the period he spent in Venezuela, the equivalent either of the salary he would have earned had he stayed in Paris or of the salary paid to colleagues in like case. The Director-General rejected his request. He filed an internal appeal, but the Director-General upheld the rejection of his claim. That is the decision he is now impugning.

He seeks the quashing of the Director-General's decision of 28 August 2000 rejecting his appeal, and wants his career reconstituted as from the date of his transfer to Caracas, on the basis of grade P.2, step 6.

UNESCO seeks the dismissal of the complaint as irreceivable.

### *The application for hearings*

2. The complainant asks the Tribunal to hear as a witness Mr B., former Director of the Office of Statistics and a former mediator at UNESCO, for the purpose of establishing that the Administration "refused to recognise its miscalculation of the complainant's salary at the time of his promotion and to compensate him for the injuries sustained".

Such a hearing would serve no purpose because the issues it would address are immaterial to the settlement of the dispute. Since it is not alleged that the complainant's salary was set on the basis of an oral agreement or oral statements, the written evidence will suffice to determine any amount to be awarded to the complainant and to establish whether there was any mistake on the part of UNESCO. The application for the hearing of a witness is therefore disallowed.

### *Receivability*

3. The basis of the complainant's transfer to Caracas with a promotion from grade G.4 step 9 to P.1 step 3 is a notice of personnel action dated 17 August 1989 and taking effect from 4 September 1989.

On 30 October 1989 the complainant asked to benefit from a circular under which staff members transferred away from headquarters were eligible for the grant of three additional within-grade steps. His application was refused.

On 9 January 1998 he asked the Director-General to reconsider his decision of 17 August 1989 and claimed among other things the restoration of his rights with regard to salary and pension entitlements as from the date of his transfer, and promotion to P.3 with retroactive effect. By a letter of 10 March 1998 the Director of the Bureau of Personnel informed him that the Director-General rejected his claims. From subsequent correspondence and an interview the complainant was able to infer that the Administration's position as set out in the letter of 10 March was not necessarily final. Not until 5 January 1999 did the Director of Personnel inform him that the Director-General rejected his claims and that he was to treat that decision as final.

4. The decision of 17 August 1989 was not impugned in time. It has therefore become final and is now beyond challenge.

The same applies to the later decisions changing the complainant's administrative position, since he failed to challenge them in time.

5. Good faith requires that a time limit shall not start to run until an organisation has taken a final decision deemed to affect a staff member adversely (see among others Judgment 1694, *in re Benaïssa*, in which the Tribunal found that the complainant "suffers no injury from having to wait for a challengeable decision"). As to the decision of 5 January 1999, precedent has it that when an organisation hints that it will reconsider a decision affecting a staff member, it cannot reasonably expect the latter to challenge that decision. Nor may the staff member lodge an appeal against it unless the Administration expressly states that the appeal procedure will take its course despite

attempts to settle the case. In such instances, the rule that confirmation of an earlier decision sets off no new time limit for appeal does not apply.

The conclusion is that the complainant exercised his right of appeal within the time limit set off by the Director-General's final refusal. There is therefore no substance to the Organization's plea that the complaint was time-barred.

### *The merits*

6. The complainant observes that at the beginning of his assignment to Caracas his yearly pay at grade P.1, step 3, was 7,170 United States dollars less than the amount he would have received in Paris at grade G.4, step 9. To earn the equivalent, he would have had to be promoted to P.2, step 6. He explains that, having accepted the assignment abroad and the terms of the transfer, he later realised that he was earning less than was customary and less than colleagues in a similar position, i.e. officials in the General Service category transferred away from headquarters with a promotion to the Professional category.

The Organization argues that the complainant's salary was calculated according to the rules in force, and that he accepted it. Until 1989 the calculation was based on the post adjustment multiplier of the relevant country, but the results varied greatly from one case to another. UNESCO therefore amended the methodology in 1989. Since then, it has used the scales in force for a single duty station, Paris in this case, before transferring General Service officials away from headquarters with a promotion to the Professional category. That was the methodology it applied to work out the complainant's salary in Venezuela and has applied consistently ever since. Consequently, the complainant may not plead breach of equal treatment: the colleagues he refers to had their pay set according to the old methodology.

7. The rule in force at the time, namely Rule 104.13(b)(ii) of the Staff Rules, said:

"Promotion from General Service to Professional category.

A staff member shall, upon promotion, be placed in the first step of the new grade, where such a promotion produces an increase in the total of annual net salary and post adjustment at the without-dependant rate of not less than one full increment in the new annual net salary scale over his previous pay ..."

The complainant does not show - or even allege - in his complaint that UNESCO broke that rule. On the contrary, he asserts that there was no specific rule.

In his rejoinder, however, he contends that in reckoning his salary the Organization did not apply the new methodology but used a multiplier of 17, applicable to Caracas, instead of 55, which was the multiplier for Paris. In rebuttal the Organization refers to the document used to work out the complainant's salary and a circular in force at the time, to show that, contrary to the complainant's assertion, it applied a multiplier of 53.8 - in other words the multiplier for Paris.

The figures in the notice of personnel action do not match those in the document used as a basis for reckoning his initial salary in Venezuela, so the Tribunal is unable to ascertain whether his new status brought him an increase or a reduction in salary. In any event, it did bring him important benefits (a duty station closer to his family, as he wished, and a promotion from the General Service to the Professional category), and he accepted that status. In the circumstances, the Tribunal fails to see anything unlawful or any breach of the Staff Rules and Regulations in that new status.

8. The complainant's main plea in support of his claims is that colleagues in the General Service category transferred away from headquarters with a promotion to the Professional category were given a higher grade than he. Citing his right to equal treatment, he seeks the same benefit with retroactive effect.

The defendant has explained in detail that the examples cited by the complainant all concern officials who were transferred before the methodology was revised in 1989. Since the complainant has not denied that assertion, it can be taken as established. UNESCO indicated that one official who was transferred under the old methodology had obtained retroactive application of the new methodology and hence an award of a lump sum in damages.

There is breach of equal treatment only where staff members in an identical or comparable position in fact and in

law receive different treatment from the organisation. Consequently, the right to equal treatment does not preclude amendment of a rule or the way in which it is applied. A new rule could be less favourable than the old one, and hence be subject to challenge, without necessarily impairing the right to equal treatment.

Since he has failed to prove that the new methodology was unlawful, the complainant may not cite unequal treatment on the grounds that, under the new methodology, some officials got better pay than he. In particular, he may not cite the compensation applied retroactively to a staff member because the old methodology was less favourable to him than the new one. The plea is therefore devoid of merit.

9. Since he failed to prove that the measures he challenged were unlawful, there was no reason for the Director-General to allow his request for reconsideration. There is, therefore, no need to entertain the complainant's other claims.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet