

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

FIFTY-SECOND ORDINARY SESSION

In re VERRON

Judgment No. 607

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Michel Verron on 28 June 1983 and corrected on 18 July, the complainant's letter of 29 July to the Registrar of the Tribunal, UNESCO's reply of 17 October, the complainant's rejoinder of 25 November 1983 and UNESCO's surrejoinder of 31 January 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rules 104.6(b), 106.1(h) and 109.3 of the UNESCO Staff Regulations and Staff Rules and paragraph 7 of the Statutes of the UNESCO Appeals Board;

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 French citizen, first worked for UNESCO in 1970. After spells in Madagascar and Iran, from 1977 he served in Kabul on a United Nations Development Programme (UNDP) project for adult education. Work became difficult because of events in Afghanistan, and his fixed-term appointment was allowed to expire on 31 March 1981. Shortly before he had had a bout of sciatica, but was able to drive to New Delhi, whence he returned to France. There he was operated on for a slipped disc. To cover his medical expenses his membership of the Medical Benefits Fund was extended to 30 September 1981. On 30 October he wrote to the Director of the Bureau of Personnel asking that on the grounds of his ill health his contract be retroactively extended from 1 April 1981 to 22 January 1982, or that he be put on unpaid leave, or else given temporary employment. On 9 December the head of recruitment refused: under Rule 106.1(h) sick leave lapsed on termination and besides, when his contract had expired on 31 March 1981, he had not been certified unfit; though he had been off work in March his absence had been covered by annual leave. On 28 December he addressed a protest to the Director-General. On 12 March 1982 an Assistant Director-General replied that, the project being financed by the UNDP, any extension of his contract required the Afghan Government's consent, an unlikely prospect. On 8 April he wrote again to the Director-General accusing staff in the Education Sector of prejudice and asking him in accordance with paragraph 7(a) of the Statutes of the Appeals Board to reverse the decision of 12 March. On 17 June the Director of Personnel replied that the final decision had been the head of recruitment's letter of 9 December 1981. On 28 June the complainant filed notice of appeal. In its report of 11 February 1983 the Appeals Board held that his appeal was time-barred and that even if it were not, there was no breach of his contract or any rule. In a letter of 24 March, which he received on 30 March and which is the decision impugned, the Director-General endorsed the Board's conclusions.

B. The complainant argues that his appeal was not time-barred. The letter of 9 December was not clearly to be taken as the final decision, whereas the one of 12 March, which he did challenge in time, was: it did not just confirm the earlier letter, but was broader in scope, reviewed the case and gave a different reason -- lack of government consent -- for the non-renewal. Besides, he should not suffer for the lack of clarity in UNESCO's position. As to the merits, he alleges fatal flaws in the decision. (1) When a staff member is ill at the expiry of his contract UNESCO policy -- as confirmed by a memorandum of 9 May 1980 from the Director-General's Office to the Director of Personnel -- is to extend the contract to cover the period of illness. Since the complainant was ill on 31 March 1981 there was breach of that policy and therefore an error of law. UNESCO committed a further such error by acting in breach of the duty of fair treatment which any organisation owes to its staff: it failed to give him the ten years' service which would have brought him a pension or to take him up to the early retirement age of 55; it also ruled out "hiatus financing", a UNDP arrangement for keeping on, between assignments, someone with expertise which would be hard to come by at short notice. (2) In so neglecting his legitimate interests it disregarded essential facts. (3) There was abuse of authority since, for want of any other explanation, the decision must have

been actuated by prejudice, to be inferred from many circumstances he describes. He attributes it to staff in the Education Sector, especially the chief, a citizen of the Soviet Union, and ascribes it to his views about what was going on in Afghanistan. UNESCO had given him reasonable expectation of renewal and on his return a formal commitment. He has been refused suitable vacancies. The Appeals Board made an error of procedure by declining to hear evidence in support of his charges of prejudice. He invites the Tribunal to hold oral proceedings to hear witnesses or else to hear their evidence under oath. He seeks the quashing of the decision of 24 March 1983, the retroactive extension of his appointment or damages amounting to not less than the amount he would have been paid had his contract been renewed, with compensation for loss of pension rights, an order that UNESCO make an effort to find him suitable employment, and costs.

C. UNESCO replies that the complaint is "clearly irreceivable" within the meaning of Article 8(3) of the Rules of Court. The complainant failed to exhaust the internal means of redress because he did not act within the time limits in the Statutes of the Appeals Board. He could have appealed against non-renewal as early as 1 April 1981, but he did nothing for seven months. Even supposing the final decision was the letter of 9 December 1981, he failed again to appeal in time. He is confusing renewal of contract -- a matter settled in that letter -- with the grant of a new appointment. The fact that UNESCO might consider the latter did not mean it had not already refused the former. The letter of 12 March 1982 merely confirmed the one of 9 December: it gave no new explanation or information about the non-renewal. Nor did it reflect any review of the case giving rise to a new time limit, since no new fact warranted review. In any event the complaint is devoid of merit. There was no error of law. According to Rule 104.6(b) a fixed-term appointment carried no expectation of extension and shall, unless extended, expire without notice or indemnity, and under Rule 106.1(h) the right to sick leave lapses on expiry of the appointment. The memorandum of 9 May 1980 cited by the complainant cannot therefore confer a right, but merely indicates how the Director-General may exercise his discretion. In any event the complainant was not on sick leave when his contract expired, nor did his condition even prevent him from leaving Kabul by car. There was no breach of the duty of fair treatment. UNESCO must also consider its own interests and could not grant a long retroactive extension without breaking its own rules and setting a dangerous precedent. Extension by "hiatus financing" is not a right, in any event it is not intended for the purpose the complainant had in mind, and is granted only for a short while. His allegations of prejudice are groundless, and there is no reason to suppose the Director-General was influenced by the prejudice, even if there was any. The hearing of witnesses would serve no purpose. UNESCO has done its utmost, though not bound to do so, to find him a suitable assignment.

D. In his rejoinder the complainant develops his original pleas at length and, with many references to the case law, seeks to refute the arguments in the reply. He again submits that his internal appeal was not time-barred: what he was and is challenging is not the lawfulness of his termination but UNESCO's later position as finally set out in the letter of 12 March 1982, which he contested in time. He accuses UNESCO of misapplying the rules on extension of contracts of sick officials, disregarding medical opinion on his condition in 1981, failing in its duty towards him by unaccountably refusing hiatus financing, and making no real attempt to find him work. He restates and presses his claims.

E. In its surrejoinder UNESCO enlarges on its reply and rejects the complainant's submissions. It reaffirms, in particular, that the complainant erred in failing to challenge in time the original decision not to renew his appointment and his subsequent demands do not remove the time bar. Subsidiarily, it submits that the complaint is in any event irreceivable because he has failed to challenge in time the only challengeable decision, that of 9 December 1981. The claim to a new appointment has been put forward for the first time in the complaint and is therefore, in the absence of a final decision, irreceivable. Besides, the complaint is devoid of merit because UNESCO has correctly applied its usual policy on extension of contracts of officials on sick leave, evidence of which it appends to its brief. To benefit from that policy it is not enough for the official to be ill or have a medical certificate: the sick leave must be approved. The conditions for hiatus financing were not met. As for the claim to a new appointment, UNESCO has made real efforts to find him an assignment, but there is none suitable.

CONSIDERATIONS:

1. The complainant joined UNESCO in 1970. After a short spell in Madagascar he served in Iran from 1971 to 1977, and in Afghanistan from 1977 to 1981 as an expert in methods of teaching literacy. He held fixed-term appointments, and the last one expired on 31 March 1981. By that date the Afghan Government had no further desire for his services and he returned to France with no prospect of going back.

On arriving in Paris at the end of April 1981 he went to headquarters to report on his assignment and discuss the

possibility of being sent somewhere else. At the time he made no claim in writing and UNESCO took no decision.

Months went by and in July 1981 he underwent an operation. He nevertheless kept in touch with UNESCO, trying to get his position sorted out and keep his career going. His contacts in UNESCO gave him hope of its continuance, though he never saw anyone of senior rank. Not until 30 October 1981 did he make a formal request to UNESCO to sort out his administrative position, when he wrote a letter to the Deputy to the Assistant Director-General for General Administration, the Director of the Bureau of Personnel. This marked the start of lengthy administrative proceedings which culminated, on 24 March 1983, in the Director-General's deciding, on the recommendation of the Appeals Board, to reject his claims as time-barred.

That is the decision impugned, and the complaint was filed within the time limit in Article VII of the Statute of the Tribunal.

2. The complainant seeks the quashing of the decision. He believes that he is entitled to extended sick leave. He submits that UNESCO acted in bad faith in deciding, for no reason, to break off the arrangements undertaken to give him an appointment by means of a UNDP procedure known as "hiatus financing" and in making no attempt to find him a suitable new assignment. He seeks fair compensation for the wrong he has allegedly suffered.

The Organization's main plea is that the complaint is time-barred. It argues subsidiarily that the claims are devoid of merit.

Receivability

3. In support of its plea that the complaint is not receivable UNESCO has several lines of argument.

4. The first is based on Staff 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."

UNESCO observes that the complainant knew his contract had expired on 31 March 1981, and according to 104.6(b) he had no reason to expect to get any decision on renewal. He should therefore have challenged in time the decision not to renew which was implicit in the expiry of his appointment. Instead, for no sound reason, he did nothing for seven months.

The argument fails on both legal and practical grounds.

The complainant's appointment did expire on 31 March 1981 -- he does not deny it -- but that is not a material point. The real issue is quite different. At 31 March 1981 no renewal of his appointment had been sought or refused, no renewal had been offered or accepted. But -- notwithstanding the unqualified wording of 104.6 -- that does not mean that where the provision applies there is automatic extinction of all connection between employer and employee. The mere expiry of the term of appointment cannot be so absolute in its effect. There may be other questions, quite apart from that of renewal, for the Director-General to settle. To allow UNESCO's plea would enable its competent officers to resolve to deal with such questions only if they thought fit. That would make for an increase in the number of claims dealt with *ex gratia* on the grounds that they had not been lodged on expiry of the appointment, and so administration would become arbitrary. The only construction that can reasonably be put on 104.6 is that in the matter of renewal the Director-General has wide discretion and the Tribunal's power of review is limited. This relates to questions of substance, but not procedural rules, which are never applicable at discretion.

To rule otherwise would increase the risk of dispute. To avoid being time-barred staff members would make a practice of filing claims, although very often the cumbersomeness of administration is wholly to blame for the tardy decision.

5. UNESCO has a further argument: the time that elapsed between expiry of the complainant's appointment and the first filing of his claim.

Although the complainant made no formal claim for seven months after his appointment expired, there were several things that happened during that period. He showed no indifference about his position and kept in touch with the

Organization. He knew he had no prospect of going back to Afghanistan, but he applied for posts in Turkey in May 1981 and Mauritius in June. UNESCO considered his applications. In September a form was completed by the Bureau of Personnel for extension of his contract. The Organization's chief medical adviser, who gave him check-ups in April and August 1981, even signed a certificate saying, mistakenly as it happened, that he was on sick leave. All this goes to show that he believed, and those he was in touch with rather encouraged him to believe, that things would come right.

The Organization's principle plea of irreceivability is therefore rejected.

The Tribunal has rejected the Organization's arguments. It could, however, have founded its decision on questions of principle. A staff member whose fixed-term appointment has expired may not be declared out of time so long as his former employer has not informed him of the non-renewal. Normally the non-renewal will be an explicit decision. Only where a staff member has expressly applied for renewal will rejection of his application be implied on the expiry of the time limits set in the Staff Regulations.

6. There is a subsidiary plea of irreceivability. What it says is that the only challengeable decision was a letter written to the complainant on 9 December 1981 and received by him a few days later, that its other decisions merely confirmed that letter and gave rise to no new time limit, and that since he did not make his appeal to the Appeals Board until 20 August 1982 the Board was right to hold it out of time.

7. In hearing this plea the Tribunal will take account of what occurred in the course of the appeal proceedings.

As it stated in 1 above, the complainant first lodged his formal claim on 30 October 1981. He asked UNESCO to propose to the Director-General extending his appointment by means of "hiatus financing", if possible up to 22 January 1982, or, failing that, granting him unpaid leave from some earlier date. He also said that though not in good health, as any medical check-up would show, he was willing to resume work for the Organization.

The Chief of the Recruitment and Field Staff Division replied by letter of 9 December 1981. He did not give a straight answer to the complainant's claims. What he said was that the material rules did not permit renewal on grounds of illness. But he aroused hope of a later and favourable reply by adding that if the complainant was shortly reappointed the Bureau of Personnel would consider ways of increasing the period of his membership of the Pension Fund.

On 28 December the complainant wrote to the Director-General. He asked him to review the decision, which he found "incomprehensible and unwarranted, at odds with the findings of the study which you had the Bureau of Personnel carry out of renewal in the event of illness and, worst of all, a breach of the standards of correct behaviour and humanity an organization like UNESCO ought to observe". He asked for an interview with the Director-General to put his case.

The answer came in the form of a letter of 12 March 1982 from the Assistant Director-General for General Administration. He reminded the complainant of a conversation they had had a month earlier, on 9 February, and added that his application for renewal could not be granted even from 1 April to 7 September 1981.

The complainant wrote again to the Director-General on 8 April 1982, citing paragraph 7 of the Statutes of the Appeals Board and asking him to review the decision of 12 March. The Director of the Bureau of Personnel rejected that request as time-barred on 17 June 1982, and the complainant finally lodged his appeal with the Appeals Board.

8. The parties have dwelt at great length on the meaning of the letters of 9 December 1981 and 12 March 1982.

To determine whether the internal means of redress were exhausted the Tribunal must consider whether the time limits set in the Statutes of the Appeals Board were observed. An administrative appeal will be receivable only if a later decision was a new one and did not merely confirm the earlier one.

But it is not every claim that marks the preliminary stage of appeal proceedings. A staff member may reasonably expect to have the matter examined first and perhaps even discussed. In this case the letter of 30 October 1981 was not even addressed to the Director-General. The reply of 9 December offered a prospect of solving the matter by assigning the complainant to some other country, and at the time the possibility did not seem mere supposition. His letter of 28 December 1981, addressed this time to the Director-General, describes the letter of 9 December as a

"decision". But the context shows that the word is not to be taken in any legal sense. He was still hoping for a new assignment and did not want to sacrifice the possibility. He therefore sought an interview and that indeed shows his desire to settle short of filing a formal appeal. He had the interview, not with the Director-General, but with a senior official, and only then did the letter of 12 March 1982 confirm the rejection of his claims. What is more, the letter was written after the matter had been further "explored".

Proper administration requires the setting of time limits. But they are not supposed to be a trap or a means of catching out a staff member who acts in good faith.

9. UNESCO's last argument is that the complainant did not raise the matter of renewal in his appeal, that he therefore failed to exhaust the internal means of redress on this point, and that to this extent his complaint is irreceivable. The plea fails. Without going further into the matter, the Tribunal need merely cite paragraph 10 of the brief the complainant submitted to the Appeals Board to dispose of this point.

10. The Tribunal concludes by rejecting the pleas of irreceivability.

The alleged defects in the Appeals Board's report

11. The complainant alleges that the Appeals Board misconstrued its own competence in declining to hear the witnesses he had asked it to call.

The Board had discretion to refuse to hear the parties' witnesses if it thought their evidence would serve no purpose. That is a right the complainant does not challenge. But he contends that in this instance the decision taken by the Chairman of the Board was mistaken because he based it on the common law, which allows the parties full freedom in the matter.

The Tribunal will not take up this point. The complainant repeats his application for the hearing of witnesses, and the Tribunal will consider it on coming to the merits. Whatever its ruling may be, the effect will be to remedy the alleged defect, whether there was any or not.

Grant of sick leave

12. Staff Rule 109.3(a) reads: "A fixed-term appointment or a temporary appointment shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment." This repeats, in slightly altered wording, Staff Rule 104.6(b), cited above. Relying on both texts, UNESCO says that renewal of a fixed-term appointment on the grounds of illness is not a right but is at the Director General's discretion: the right to sick leave lapses on the expiry of the appointment.

13. In support of his claim to sick leave the complainant cites international administrative case law, UNESCO practice and instructions from the Director-General.

The applicable text in cases where a fixed-term appointment may be renewed on the grounds of illness is the Director general's memorandum of 9 May 1980. It sets three conditions for renewal.

The first is length of service. The complainant fulfils this condition, and the Tribunal need not comment further.

The second relates to the nature of the illness. What is required is that the staff member should be suffering from an illness described as serious by the chief medical adviser or, in the case of staff in the field, by a medical board.

The third condition is that the full suspension of work must be considered necessary and the initial period of suspension determined and, if necessary, extended. The memorandum adds, by way of explanation, that in the event of renewal the third condition is to be applied with "the good sense required of a personnel policy which serves a social purpose, even though the scope of the rule is clearly and precisely defined".

UNESCO submits that the purpose of the memorandum was not and could not have been to counter the Staff Regulations. It does not confer any right on staff but merely sets the limits within which discretion may be exercised.

14. Although renewal for a fixed term is at the Director-General's discretion -- and the Staff Regulations leave no

doubt on that score -- the decision is not immune from review. According to precedent the Tribunal may quash a decision if it was based on a mistake of fact or of law or overlooked essential facts, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

The Director-General was well aware of the material and moral objections to invariably rejecting claims to sick leave for a period subsequent to expiry of the appointment. An international organisation may not treat departing staff in that way, and it was only right for the Director-General to issue the memorandum the complainant relies on. The policy forms part of the Organization's administrative practice, as is borne out by a statement signed by a retired UNESCO personnel manager.

15. The memorandum is therefore material evidence, even though it is not part of the Staff Regulations, and the Tribunal will hold that the Director-General overlooked essential facts if he refused renewal despite the complainant's fulfilling the conditions set in the memorandum.

First, the medical adviser's certificate of 4 August 1981 shows that the complainant's illness was identified long before his appointment expired. The memorandum does not require, as UNESCO contends, that he should have actually been on sick leave before 1 April 1981: all it requires is that he should have been ill before that date.

Whether his illness may be described as serious is a more difficult question. The certificate does not say it was. But the circumstances of the case allow of the conclusion that it was. The medical adviser says, and UNESCO does not challenge the statement, that treatment had proved unsuccessful and he would have to be operated on. His illness was of the degree of seriousness required by the memorandum. The other conditions set in the memorandum are undoubtedly fulfilled and do not call for comment.

16. In refusing sick leave from 1 April 1981 the Director-General accordingly overlooked essential facts. There being no need to consider the further pleas on this claim, the decision must be set aside.

17. There is one further point: the duration of the sick leave. This may be determined only after medical inquiry. But the Tribunal will not order the submission of further evidence. When UNESCO comes to execute this judgment the parties should be able to reach agreement, if only by having regard to the spirit of the memorandum of 9 May 1980, which is sensibly worded. Failing that, the complainant may always come before the Tribunal again.

Extension by means of "hiatus financing"

18. There is no need to deal with this question in view of the Tribunal's ruling on the matter of sick leave. In any event the complainant may not have both an extension of sick leave and an extension by means of hiatus financing.

Refusal of further appointment

19. As is stated above, the complainant held a fixed-term appointment. On the expiry of each period of appointment the Organization may, under the provisions cited above, decide against renewal. But the existence of the provisions constitutes no bar to applying the case law. Otherwise all an organisation need do to evade review by the Tribunal and deprive a fixed-term official of a form of protection he is entitled to would be to provide that he had no right to renewal.

The scope of review is not unlimited where, as here, the Director-General has exercised his discretion. The complainant acknowledges this and, to establish that what UNESCO did was unlawful, he submits two pleas which are really just one: abuse of authority, and breach of the duty of fair treatment.

He ascribes the refusal of another assignment to personal prejudice and to motives extraneous to the Organization's business and at variance with its interests and independence. To his mind the prejudice originated in "views he aired or was supposed to have aired about politics in Afghanistan".

20. The complainant worked for UNESCO for over ten years, to his employer's satisfaction. The performance reports put in as evidence bear out the quality of his work. To quote the one signed in 1980, he served in hardship posts "with devotion, courage and considerable good humour". In his last year he took over a project to encourage the non-formal education of adults in Afghanistan. He says, too, that in 1980 UNESCO people told him that if he was unable or unwilling to stay on in Afghanistan he would be offered another assignment or, failing that, a

temporary posting at headquarters.

This was highly encouraging, but everything changed when he got back to France. By his account what happened was this. In its edition of 2 April 1981 a French daily newspaper published an article about Afghanistan under the heading "Report from an international expert". Written by the newspaper's correspondent in New Delhi, the article quoted word for word the expert's harsh criticisms of the turn of events in the country. The article, says the complainant, annoyed a senior UNESCO official and although the expert was not mentioned by name some thought it might be the complainant, who had been in New Delhi, on his way back to France, at the end of March 1981.

The complainant invites the Tribunal to call senior UNESCO officials to give evidence, which he believes will bear out his contention and his charge of abuse of authority.

21. UNESCO replies on the merits. It is not against calling witnesses. It maintains that it was far from indifferent about the complainant's future: it invited him to apply for any field vacancy that matched his qualifications. He was considered for four posts, in Mauritius, Niger, Turkey and Upper Volta, and for three of them was actually the Administration's choice. Unfortunately, for various reasons which the Organization explains and which had nothing to do with prejudice against him, nothing came of any of this. Where one requirement is the consent of the country of assignment there can be no certainty. As for other posts, the reason why UNESCO did not appoint him was that he was not qualified for them.

UNESCO denies he was promised any assignment at headquarters in Paris: his administrative status during his successive appointments did not entitle him to any such assignment.

UNESCO's conclusion is that he was not the victim of prejudice. It adds that in any event the Director-General was not influenced by whatever may have been the attitude towards him of a senior UNESCO official. There is therefore nothing but unproven allegations to bear out the accusation of abuse of authority.

22. On the evidence before it the Tribunal can only reject the accusation. There is no proof of malice. As regards the possibility of a new assignment, although none of the complainant's applications was successful the Director-General gave reasons each time for refusing them, the reasons are legitimate and the decisions were in UNESCO's interests. There was objective study of the possibilities of reassignment.

In pressing his claims the complainant himself does not challenge UNESCO's explanations. He thinks it essential to call witnesses, and the question is whether their evidence would be material.

The Tribunal believes not. If the Director-General had really wanted to let the complainant go for good, nothing would have been done to find him another assignment. As was stated above, something was done. In this area the Tribunal's power of review is limited. If it allowed the complainant's claim it would be at risk of substituting its own views for the Director-General's. If the Tribunal were to look into the matter further the complainant would have to offer at least some evidence in support of his allegations of abuse of authority. The Tribunal therefore holds that the witnesses would provide no evidence which would cause it to take a different view. There is no defect in this respect which warrants setting aside the decision. The pleas accordingly fail.

Compensation

23. The Tribunal takes the view that pay for the period of sick leave will adequately compensate the complainant for the injury caused by the unlawful decision, and there should be no further damages.

24. He is entitled to 10,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed in so far as it refused the complainant sick leave with effect from 1 April 1981.
2. He is referred to the Director-General for review of his entitlements.

3. UNESCO shall pay him 10,000 French francs in costs.

4. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 April 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner