

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

FIFTY-EIGHTH ORDINARY SESSION

In re KIRKOV

Judgment No. 723

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Pance Kirkov on 1 March 1985 and corrected on 27 March, UNESCO's reply of 30 April, the complainant's rejoinder of 29 November 1985 and UNESCO's surrejoinder of 31 January 1986;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, UNESCO Staff Rules 103.4(b) and 104.11(b) and paragraphs 7, 8 and g to 20 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of Yugoslavia, held fixed-term appointments with UNESCO from 1976. From 1979 he held P.4 posts in the Division of Operational Programmes of the Science Sector (SC/OPS) at headquarters. On 3 January 1983 he received a draft report from his supervisor, the chief of the Asian section of SC/OPS, on his performance from 1 June 1981 to 31 December 1982. He refused to sign it on the grounds that it wrongly stated his mother tongue to be Serbian. He also objected to criticisms of his performance he was said to be lacking in logic, judgment and team spirit, sometimes unproductive, and unfit for operational work. He addressed his objections on 21 March to the Director of the Bureau of Personnel. On 20 April he was told the report had been corrected to state that his mother tongue was Macedonian. The report was referred to the Senior Personnel Advisory Board. The Board found that his performance had been "not entirely satisfactory", but recommended giving him "a last chance" and a contract for another year. On 7 July the Director informed him that his contract would be extended until 31 December 1984 and that as required by Staff Rule 104.11(b) he should sign the report to show he had seen it. He refused. On 11 July the Assistant Director-General for Science recommended postponing his within-grade salary increment from 1 September 1983 to 1 January 1984 on the grounds of "not entirely satisfactory" performance. This matter too went to the Board, which on 6 October upheld the recommendation. The Director-General accepted it. Meanwhile the complainant had been transferred from the Asian to the European section of SC/OPS as from 1 September 1983. He appealed to the Appeals Board against the performance report, the postponement of the increment and the transfer. On 24 October 1984 the Board recommended rejecting his appeal, and by a letter of 20 November the Director-General informed him that he did so. That is the final decision impugned, and the complainant says he received it on 5 December. He left UNESCO on 31 December 1984.

B. The complainant challenges the report on the grounds of unfair disparagement of his abilities and performance. He submits evidence of his academic qualifications and success in Operational work. In breach of Staff Rule 104.11(b) he was given no opportunity of discussing the report with his supervisor. The criticisms were at odds with earlier, favourable, reports. Only four months elapsed between his getting an increment on the strength of satisfactory performance and the drafting of the bad report. His transfer was a wrongful exercise of discretion: (a) it was based on a malicious report; (b) its purpose was not to use his talents in UNESCO's interests; and (c) it was part of a pattern of harassment. The error over his mother tongue was evidence of that pattern. His mail was also censored, the contents of his office moved without his consent, and valuable books and notes of his were lost.

He asks the Tribunal to set aside the report and to order UNESCO to pay him 480 United States dollars, plus interest, representing the value of the increment for the four months during which it was withheld, \$20,000 as moral damages, and \$5,000 as costs.

C. UNESCO replies that the complaint is time-barred. It was filed over 90 days after the notification of the decision of 20 November 1984, which "shall be deemed to have been received one day after" under paragraph 7(e) of the Statutes of the Appeals Board. The complainant says in the complaint that the decision was notified on 24

December, but he has failed to prove it.

As to the merits, UNESCO argues that the three decisions challenged -- the report, the withholding of the increment, and the transfer -- are discretionary and show no fatal flaw. The report fairly reflected his serious shortcomings, which the Advisory Board also acknowledged. The innocent mistake over his mother tongue was put right, but he used it as a pretext for refusing to sign. He steadfastly declined to discuss the report unless the criticisms were deleted -- a quite unacceptable condition. He produces no proof of harassment. For example, the reason why his papers had to be moved on his transfer was that he himself refused to change offices. His poor performance justified the short postponement of the increment. His transfer was an honest attempt in which he refused to co-operate, to put him where his incompetence would be less harmful.

D. In a lengthy rejoinder the complainant submits that his complaint was filed in time. He received the impugned decision on 5 December 1984, as he states in the complaint form, and he filed his complaint on 1 March, within the 90 days' time limit. Paragraph 7 of the Statutes of the Appeals Board cannot prevail over the Tribunal's rulings that the date of receipt stated by the complainant will stand in the absence of evidence to the contrary.

As to the merits he seeks to correct the Organization's account of the facts, which he submits is unfair and tendentious. It portrays him as a poor performer, whereas he was dedicated and showed steady improvement. For example, a report dated 24 October 1979 was highly favourable. His supervisors repeatedly refused discussion of the criticisms. It took far too long to correct the factual error. He develops at length his charges of harassment and malice. His transfer was a high-handed measure whose purpose was to expose him to another bad report. There were also many procedural defects, which he describes. He presses his claims.

E. In its surrejoinder the Organization enlarges on its contentions that the complaint is irreceivable and in any event devoid of merit.

It observes that the Tribunal's ruling that the burden of proof is on the author of a decision to establish the date of its receipt constitutes the general rule. But the general rule has been supplanted in UNESCO by the recent inclusion of paragraph 7 in the Statutes of the Appeals Board. The complaint is therefore time-barred.

As to the merits, it seeks to refute the arguments in the rejoinder and to correct the complainant's version of the facts. It reaffirms that the decisions were a proper exercise of discretion and, in particular, untainted with any procedural defects, error of fact or abuse of authority.

CONSIDERATIONS:

Receivability

1. Article VII(2) of the Statute of the Tribunal states that to be receivable a complaint must be filed within 90 days of the notification of the impugned decision or, in the case of a decision affecting a class of officials, after the decision was published.

The decision the complainant is impugning is dated 20 November 1984.

On the complaint form he gives 5 December 1984 as the date on which he had notice of it, not, as UNESCO says, 24 December. The Organization submits that there is no evidence anyway to confirm the date he gives and it pleads that his complaint is out of time by virtue of paragraph 7(e) of the Statutes of the UNESCO Appeals Board.

2. The paragraph reads: "Unless the staff member concerned provides proof to the contrary, notice of any ruling or action shall be deemed to have been received one day after the date on which it was sent in the case of a staff member stationed at Headquarters and one week in the case of a staff member stationed away from Headquarters".

The Organization's argument is that for want of proof that the complainant had notice of the Director-General's decision on the Appeal Board's report as late as 5 December, as a headquarters official he must be deemed to have received it one day after the date of despatch, presumed to be the date it bears, i.e. on 21 November. By 1 March 1985, the date of filing, the 90-day time limit had long passed, and the complaint is therefore irreceivable.

In his rejoinder the complainant submits that paragraph 7 relates only to the preliminary internal procedure for contesting any administrative decision or disciplinary action.

His argument is sound.

3. Paragraph 7 is headed "Preliminary procedure" and deals with the procedure prior to the appeal proceedings as such, which are covered by paragraphs 9 to 20 and described as "Procedure before the Appeals Board". Paragraph 7(a) permits protests to the Director-General; 7(b) relates to the Director-General's ruling and its notification within stated time limits, which may be one or two months; and 7(c) provides for appeal against that ruling to the Appeals Board, again within time limits. Paragraph 8 adds that the Director-General may extend the time limits in exceptional circumstances.

Such is the context of 7(e), and its purpose is to determine the date from which to reckon the time limits set in the foregoing subparagraphs.

Quite plainly paragraph 7 and its clauses have no bearing on the date of notification of the Director-General's decision on the Appeals Board's report. The Tribunal need not therefore rule in this case on the validity of 7(e).

4. At what date, then, was the decision notified in this case?

The rules on the Appeals Board procedure do not, like 7(b), set deadlines for notifying a decision. All that paragraph 20 says is that the Director-General shall make a decision "as soon as possible" and notify it to the Chairman of the Board and the staff member.

According to the general rules on the burden of proof it is for the sender to establish the date on which a communication was received. If he sends a letter by registered post or an official notice of acknowledgment for completion by the addressee he can easily furnish the proof. If he sends it by the ordinary mail he may be unable to do so, and then, for want of evidence of the actual date of receipt, the Tribunal will accept what is said by the addressee.

That is the rule to be applied here. The decision was sent neither by registered post nor with an official notice of acknowledgment, and there is no telling the date of delivery from the evidence either. The Tribunal takes the complainant's word for it that he received the decision on 5 December. Filed on 1 March 1985, his complaint was not out of time.

Nature of the claims

5. In the complaint form the complainant impugns the Director-General's decision of 20 November 1984 and seeks (1) the quashing of his performance report for the period from 1 June 1981 to 31 December 1982 and (2) damages for moral injury and for the material injury due to the postponement of his within-grade salary increment for four months from 1 September 1983 to 1 January 1984.

In his original brief he further contends that his transfer from the Asian to the European section of SC/OPS was unfair. In his rejoinder he repeats this and sums up his claims: the quashing of the approval of his report, the postponement of his increment, and his transfer. The brief was not filed at the same time as the complaint, but all it does is to enlarge, in different though exact terms, on grievances already stated, the pleas submitted at various stages of the written proceedings are clearly complementary, and the Tribunal will entertain all three claims.

The Tribunal's power of review

6. The Director-General's implied endorsement of the performance report, his postponement of the increment and the transfer are all discretionary decisions and, moreover, ones that fall within an area in which the Tribunal will not ordinarily interfere.

First, for a report to be worthwhile the reporting officer must be allowed great freedom of expression. In some cases the staff member's comments on the report may remedy any error there may have been.

Secondly, the withholding of an increment will be a valid decision if based on unsatisfactory performance as required by Rule 103.4(b).

And thirdly, a "transfer", as the Staff Rules call it, will be unchallengeable if it takes account of the staff member's

qualifications, skills and experience and is ordered solely in the Organization's interests.

Such decisions may be set aside only if taken without authority, or tainted with a formal or procedural defect, or based on some mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if mistaken conclusions were drawn from the evidence. The complainant's pleas are mainly concerned with procedural defects and mistakes of fact.

The performance report

7. The complainant's main objection to his report is breach of Rule 104.11(b), which says that a staff member shall be given "the opportunity of discussing" his report. The Tribunal observes -- he says so himself -- that he told his supervisors orally several times about the mistake over his mother tongue. He therefore had the opportunity, if he wanted it, of discussing with them other statements in the report. Besides, even if he had not had the opportunity of discussing it with them, he submitted a protest and an appeal and so had every possibility of self-defence.

8. He likewise had every opportunity of challenging in the same way any amendments, corrections and additions he says were made to the report.

Nor does the absence of his signature suffice to annul the report, which is a valid assessment of his work at UNESCO. His signature would be proof only of his having read the report, and in point of fact he obviously did see it, else he would not have challenged it.

He alleges that he was subjected to pressure and threats from his supervisors. In fact all they did was urge him to sign the report, and that in any event made no difference to its actual content.

9. The complainant pleads other defects both in the reporting procedure and in the internal proceedings.

His pleas fail.

One allegation is that the deadline marked on the report form for sending it to Personnel was not respected. As a matter of fact the copy of the report for 1981-82 in the dossier gives no date at all in the relevant space in the report form. At all events, even if there had been such a defect, it would not have caused the complainant any injury since he had every opportunity to resort to the internal means of redress. There is no rule requiring the notification of the Senior Personnel Advisory Board's recommendations to anyone but the Director-General. As for the appeal proceedings, the time limits in paragraphs 9 to 17 of the Statutes of the Appeals Board are not binding. There is therefore no substance to the objection that the Board took eight months to report.

10. The complainant further alleges that the impugned decision was based on mistakes of fact. He points to the error over his mother tongue, stated to be Serbian but in fact Macedonian. In his submission the mistake is so serious as to justify his refusal all along to sign. But the objection no longer holds good since the mistake, which he pointed out in a minute of 21 March 1983, was corrected on 20 April, within a lapse of time the Tribunal finds not unreasonable, let alone an abuse of authority.

The complainant's main quarrel is with his supervisors' assessment of the facts, which he finds tendentious, and with the method of their appraisal, which he says is unsupported by the facts and disregards his record. He contends that the report was served up "ready-made" for his signature.

The complainant confines himself to just the sort of general comments that he objects to in his supervisors and he fails to cite any specific misrepresentation in the report. What is more, all the facts he is relying on, including his performance record, his supervisors' assessments and the conclusions they drew from the evidence, were submitted either by him or by UNESCO to the Senior Personnel Advisory Board in accordance with the rules. The Advisory Board found, on the oral and written evidence before it, that his performance had been "not entirely satisfactory". The Appeals Board, too, rejected his charges of bias on the part of the reporting officers, found no evidence to suggest that any of the challenged decisions had been "affected by prejudice or other extraneous factor", and recommended rejecting his appeal.

The complainant is challenging the Director-General's exercise of his discretion and has failed to show that in approving the report the Director-General made any error of fact.

The postponement of the increment; and the transfer

11. In the concluding sections of his original brief and his rejoinder the complainant maintains that the decision to defer his increment and the decision to transfer him were both based on the challenged report. He has made much of the link between the report and the two decisions, particularly before the Appeals Board, which records the submission in its report.

The main grounds for both postponement and transfer were undoubtedly the remarks in the report, especially the finding that his performance had been not entirely satisfactory. But the validity of those two decisions depends on that of the report, and since the report is upheld so too must they be. The Senior Personnel Advisory Board likewise held that there was nothing improper about the postponement and the Appeals Board found no fault with any of the three decisions.

The Tribunal sees no reason to disagree with those bodies and rejects in their entirety the complainant's objections to the decisions.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner