

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

SIXTIETH ORDINARY SESSION

In re KLAJMAN

Judgment No. 791

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain Klajman against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 10 January 1986, UNESCO's reply of 14 February, as corrected on 18 February, the complainant's rejoinder of 28 April and UNESCO's surrejoinder of 20 June 1986;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, UNESCO Staff Regulations 2.1, 4.2 and 4.3.2, UNESCO Staff Rules 102.2 and 3, 104.1.c and e and 104.11 UNESCO Manual sections 2205, 2405 and 2415 and paragraph 7 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 Frenchman born in 1949, joined UNESCO in Paris in 1971. From 1979 he served as an administrative assistant at grade G.5 in the Administrative Unit of the Sector of Social Sciences. Early in 1983 the Organization advertised a grade P.3 vacancy, No. IBE-007, for an administrative officer in the International Bureau of Education (IBE), an affiliate body in Geneva. The complainant was one of over 110 candidates. Not until April 1984 did he learn that a Mrs. Fombrun had been appointed to the post, which had since been upgraded to P.4. On 13 April 1984 he wrote asking the Director of the Bureau of Personnel to confirm that his own candidacy had been rejected, to say why a post advertised at P.3 had been filled at P.4 and to give details of the procedure that had been followed. In a letter of 16 April the Bureau told him that another candidate had been chosen. On 14 May he lodged a "protest" under paragraph 7(a) of the Statutes of the Appeals Board. Having got no answer within the one month prescribed in 7(b) he lodged notice of appeal under 7(c) on 13 July and then, on 13 August, the appeal itself. The Organization filed a reply on 12 September. The Board met in late February 1985 and heard the parties. On 1 March the Secretary to the Board wrote to tell the complainant that it was not ready to report. On 8 July he wrote to its Chairman and to the Director-General objecting to the delay. The Chairman did not reply; the Director of the Bureau of Personnel answered on 9 August that the final decision must await the Board's report. The complainant wrote to the Chairman and the Director-General again on 9 October. The Chairman again did not reply; the Director of the Bureau of Personnel replied on 4 November 1985 that he did not know when the Board would report.

B. The complainant is impugning what he regards as the final rejection of his claims implicit in the Board's silence and the Director-General's failure to take a decision.

The complainant alleges breach of the rules and consequent failure to take account of essential facts, flaws in the procedure followed, breach of good faith and abuse of authority. There was breach of Staff Rule 104.1.c: "The Senior Personnel Advisory Board shall advise the Director-General on (i) all appointments and proposals for renewal of appointment in the Professional category...", and of Manual provision 2415.C.2, which requires referral of the best candidates to a Personnel Advisory Board. Since the regraded post was never advertised there was also breach of Regulation 4.3.2: "So far as is practicable selection shall be made on a competitive basis". If a competition was needed for the P.3 post it was needed for the P.4 one as well: instead there was direct recruitment. The complainant's last performance report dates back to 1980, though Rule 104.11 requires reports every two years. The Administration did not have all the relevant facts and could not make a properly impartial appointment. There was breach of Regulation 4.2: "In appointing, transferring or promoting staff members ... the Director-General shall aim at securing the highest standards of efficiency, competence and integrity". Nor has the Organization even acted in good faith: on 16 April 1984 it told the complainant it had given "careful thought to all the relevant factors"; yet in its reply to the internal appeal it admitted it had abandoned the original selection procedure because the post had to be regraded. In fact it expected the regrading even before the post was advertised. Besides, the regrading was

itself improper: for one thing, there was no referral to the Consultative Committee on Classification as Rule 102.3 stipulates. The Organization's abuse of authority is plain from its disregard of the rules and its furtiveness. It gave no reasons for the appointment or for rejecting the complainant. It was moved by prejudice in favour of Mrs. Fombrun, who had not even sought the post, and it did not give the other candidates a fair chance. In particular she was paid subsistence allowance for over thirteen months through misapplication of the Staff Rules in her favour.

The complainant seeks the disclosure of several texts and items of information, including a list of appointments to Professional category posts in the IBE over the last five years.

He invites the Tribunal to order a new selection procedure in which proper account will be taken of the candidates' merits and to award him damages and costs.

C. The Organization does not ask the Tribunal to declare the complaint irreceivable though it believes that, the case being still before the Appeals Board, the internal means of redress have not been exhausted.

In any event the complaint is devoid of merit. The Education Sector considered all the candidates, in accordance with Manual provision 2415.E and found the complainant not to qualify because he knew little of personnel management and fell short on English. Under Rule 104.1.e.ii the competent Personnel Advisory Board "shall not be consulted ... on appointments to posts away from Headquarters" such as the IBE post. There is no contradiction on this point between the Rule and the Manual. There was ample information at the Organization's disposal on the complainant's qualifications and it is not bound to look at a candidate's performance reports anyway. The regrading which took effect from 1 March 1984 and accounted for the cancellation of the competition, was due to an increase in the duties of the post. The regrading procedure complied with Rule 102.2 and Manual provision 2205.F.3. The Director-General was not bound under Rule 102.3(a) to bring in the Consultative Committee on Classification. Correct procedure was followed in filling the regraded post. There is no obligation under Regulation 4.3.2 to hold competitions for all posts, and since the matter was urgent there were sound objective reasons for direct selection. There was no abuse of authority in appointing Mrs. Fombrun, who had already performed the duties satisfactorily. She was entitled to subsistence allowance under the Staff Rules as an official temporarily assigned to a duty station away from Headquarters. There was no need to tell the candidates the reasons for not appointing them. Besides, the Organization has since revealed the reasons for rejecting the complainant and they are beyond reproach. Lastly, even if his pleas were founded, he fails to show that he has sustained any injury.

The Organization is willing to disclose certain confidential texts for the information of the Tribunal.

D. In his rejoinder the complainant maintains that the receivability of his complaint is beyond doubt: he would have preferred to have the case heard by the Appeals Board but the Board could not be expected to report in a reasonable lapse of time, the proceedings being blocked because its Chairman was dissatisfied with the attitude of two of its members. He discusses the matter in detail.

As to the merits he submits that the reply obscures the issues of law by diverting attention to minor matters. He develops his main contentions, which are that the Organization failed to give his candidacy full and objective consideration; that it again deprived him of fair consideration by its improper regrading of the post; that its many breaches of the rules, its whole approach to the matter and the preferential treatment of Mrs. Fombrun constituted abuse of authority, and that he has sustained actionable injury in being denied the possibility of promotion and the right to have his internal appeal examined by the competent body. He asks the Organization to disclose certain items.

E. In its surrejoinder the Organization enlarges on its earlier submissions and discusses many points of fact and of law raised in the rejoinder, particularly in regard to the Appeals Board proceedings. It observes that the complainant had no prospect of getting the post because he did not qualify even for the short list and that he has therefore suffered neither material nor moral injury.

CONSIDERATIONS:

1. In January 1983 the Organization put up for competition a grade P.3 post for an administrative officer in the International Bureau of Education in Geneva. There were over 110 applicants. One of them was the complainant, who had joined UNESCO in 1971 and had been serving since 1979 as an assistant at grade G.5 in the Administrative Unit of the Social Sciences Sector.

The applications went to the Education Sector for screening. As is described below, however, the Sector wanted to have the post upgraded to P.4 and filled by the direct appointment of a P.3 official who had been sent to Geneva on temporary assignment on 1 March 1983. The Director-General having agreed, the regrading and the appointment took effect on 1 April 1984, and the competition became pointless. On 16 April 1984 the complainant and all other applicants were sent a circular saying no more than that "another candidate" had been appointed.

The complainant filed notice of internal appeal on 13 July 1984. He lodged this complaint on 10 January 1986 while his case was still pending in the Appeals Board and before the Director-General had taken a decision. He asks the Tribunal to set the decision of 16 April 1984 aside, order resumption of the procedure for filling the post advertised in January 1983, and award him damages for the unlawful decision and the lapse of his internal appeal.

Receivability

2. Though not expressly pleading that the complaint is irreceivable UNESCO says that the complainant ought to have awaited the outcome of his internal appeal.

The rule in Article VII of the Statute of the Tribunal is that a complaint shall not be receivable unless the official has exhausted the internal means of redress. Since the Staff Regulations of UNESCO do prescribe an appeals procedure and set up a board to hear appeals and report to the Director-General, under the rule the complaint is arguably premature and irreceivable.

But the rule is not a hard-and-fast one, even though the Statute does not expressly allow any derogation from it. The derogation should in all fairness be allowed if the complainant has done his utmost to obtain a decision but on the evidence a decision seems unlikely to be taken in reasonable time.

The derogation is allowed in this case. While the case was pending a dispute arose between the Chairman of the Appeals Board and the Director-General and his staff over the Board proceedings, a matter that both parties dwell on at length in their pleadings.

The complainant is not to blame for the foundering of his internal appeal. Indeed it is clear on the evidence that he did his utmost to get a reply from the Director-General in the 17 months between the filing of the notice of appeal and the filing of the complaint.

The Tribunal will not pass comment on an internal quarrel namely the difficulty over the appeal proceedings, although it is a pity that on that account it does not have before it a report by the Board, which would have been helpful.

In any event Article VII is no bar to entertaining the complaint, and the Tribunal takes that view, not out of consideration towards the complainant, as the defendant suggests but because otherwise there would be a miscarriage of justice.

3. There is an objection to receivability that the Organization does raise. It argues that because the post was regraded the complainant may not now challenge the transfer and the appointment to it of another official: even if the procedure was improper there is not longer any point in his challenging the appointment.

The plea relates only to part of his claims and it fails anyway. As an unsuccessful candidate he may challenge any decision that served to invalidate the holding of the competition.

The claims for relief

4. The announcement of a competition does not mean that it will go through or that any of the applicants will be appointed. The Organization has discretion in the matter and the exercise of it is subject only to limited review. This case shows special features, however, and the Tribunal will consider in detail how an official who had not even applied for the Geneva post in 1983 came to be appointed to it.

5. Early in 1983 the Bureau found itself with neither Director nor administrative officer. There was certainly a threat to the smooth running of the Bureau, and although the competition was already open to fill the administrative officer's post, there were many applicants and it was expected to take some time. A solution was found in the provisional transfer from Paris to Geneva, as from 1 March 1983, of a grade P.3 administrative officer.

That the transfer was provisional shows the intention of carrying on with the competition.

Not until October 1983 was a new Director appointed. He at once warned the Education sector of the great increase in the Bureau's workload and the need for new extra-budgetary resources. He observed that the removal to new premises in June 1984 would call for frequent dealings with the local government and perhaps even for a new headquarters agreement. The Bureau was also to sponsor an international conference on education in October 1984. For all those reasons the Director demanded that his chief assistant -- the administrative officer -- should be graded P.4 instead of P.3 and appointed soon.

Two other reasons were that the work of the temporary replacement was wholly satisfactory and that she felt the prolongation of her provisional transfer to be detrimental to her interests.

Lastly, the Organization observes that the screening of the applicants revealed that none was properly qualified for the job.

Those were the circumstances that prompted the Assistant Director-General for Education to act at once. He got the agreement of the competent divisions and then of the Director-General to the regrading and to the appointment of the temporary replacement without resort to any other formalities and without even announcing a vacancy for a P.4 officer.

6. The complainant's first objection is to the regrading on the grounds that the procedure was improper and the rules on regrading were not complied with.

Regulation 2.1 says that the Director-General shall make provision for "the classification of posts and staff according to the nature of the duties and responsibilities required, in accordance with the decisions of the General Conference". And Rule 102.2 and Manual paragraphs 2205.F.3 and 2205.I empower the Director-General to act if anything happens between Conference sessions that calls for reform in the Organization's structure. Such are the texts that were applied in this case.

The complainant questions the lawfulness of the Manual provisions. But he has no objections to them in law, and his plea fails. If an organisation is to be properly run the executive head should have authority to cope with anything unforeseen that crops up when the conference is not in session. That is the purpose of the two paragraphs and they set restrictions on the Director-General's authority anyway.

The restrictions are both formal and substantive.

As to the formal ones, paragraph 2205.I stipulates that the competent Assistant Director-General and the Bureau of Personnel shall endorse any application for regrading submitted by an Assistant Director-General or a Bureau Director.

The complainant is mistaken in alleging that they did not do so in this case: with its reply the Organization produces evidence to show that they did.

As for the complainant's further plea that there was breach of Rule 102.3(a) (the "Consultative Committee on Classification shall ... advise the Director-General on ... (ii) any post description which the Director-General may submit to the Committee"), the Committee's advice is optional and in failing to seek it the Director-General merely exercised his discretion.

A more difficult point is whether the substantive restrictions were respected.

Manual paragraph 2205.F.3 reads: "Reclassification of a post to a higher grade is based on a substantial increase in the level of duties, responsibilities or qualifications required", and paragraph 2205.I says that a request for reclassification "will be considered by PER [the Bureau of Personnel] only after a substantial modification in the structure or responsibilities of a unit ... has been approved ... where in consequence the duties and responsibilities assigned to the incumbent of a post have been significantly changed".

As the complainant observes, those are guidelines that the Director-General is bound to comply with and indeed they restrict the exercise of his discretionary authority to act in the Conference's stead.

But did the Director-General commit any abuse of authority in this case?

From what UNESCO says in support of the regrading the Tribunal concludes -- and indeed the complainant does not really deny it -- that the Director-General did make proper use of his discretion. That is a necessary condition of the lawfulness of the regrading, but it is not the only one.

The complainant takes a different line. What he says is that long before the competition began the Administration knew how things stood in the Bureau -- the Director-General himself had been told in July 1982 -- and that the regrading was therefore not warranted by any "substantial increase in the level of duties" or "substantial modification in the structure or responsibilities" of the Bureau.

The Organization's answer is, first, that it had been unable to find the funds in 1982 to finance the regrading and, secondly, that the Bureau had no Director from 31 May 1982 until 16 October 1983. The absence of a Director does seem surprising. But, although the situation had been known for some time and there was seemingly no financial problem over filling the Director's post, which was provided for, it was not until the replacement came from Paris that the question of the grading of the administrative officer's post arose.

None of this is material in law. Even though the situation in Geneva had been known for almost two years before the regrading, the Organization was still free to follow the procedure in 2205.F.3 and 2205.I. Work will usually become more urgent or more heavy because of the unexpected, and action will then be needed at once, but there may also have been a change of policy or even a mistake in budgeting by the Administration.

The complainant has therefore failed to establish that the grading was unlawful.

7. His other objection is to the appointment to the regraded post.

He cites Regulation 4.3.2: "So far as is practicable selection shall be made on a competitive basis", and Manual paragraph 2415.D.2, which requires that a vacant post be advertised so that applicants may be found.

His first plea is that the Director-General disregarded both rules and thereby one of UNESCO's founding principles as reflected in Regulation 4.2, which presupposes that the appointing authority should have several candidates to choose from in making appointments or promotions.

His second plea is that there was a procedural flaw in that there was no consultation of the Senior Personnel Advisory Board as required by Rule 104.1.

The second plea fails. Rule 104.1(e) says that the Personnel Advisory Boards "shall not be consulted ..., subject to such further instructions as the Director-General may prescribe, on appointments to posts away from Headquarters, on the renewal, or extension of the probationary period of such appointments, or on promotion in such posts". The complainant would have it that the post of administrative officer in the Bureau is a headquarters post. But there is no basis in law for saying so: UNESCO headquarters are in Paris and nowhere else.

The first plea -- that a competition might have been held for the regraded post -- fails too. Also by virtue of Rule 104.1 there is no need for the Organization to hold a competition on transferring an official, even with promotion and indeed it observes that promotion is a fairly common practice, and a justified one, when the transfer entails a change of residence.

The absence of an announcement is a more difficult matter. Fairness and equal opportunity do require that staff members who are affected by the creation or regrading of a post should be able to assert their rights.

To begin with, UNESCO had it in mind to announce on the notice board the regrading and the resulting vacancy but as it turned out there was no time for that. Senior Administration officials felt that the arguments in favour of regrading the post held good for appointing the temporary incumbent to it: the regrading would serve no purpose if the incumbent were not appointed at once, the two decisions being interdependent.

The Tribunal accepts that view, but it will still determine whether there was any abuse of authority.

8. The complainant's case is that there was a connection between the regrading procedure and the appointment of the incumbent and that the Director-General exercised his authority for purposes other than those it had been

intended for. Even though the letter of the rules was respected the spirit was not.

His first argument is that the facts alone show prejudice on the Organization's part. Although the situation in the Bureau had been known for some time nothing was done until the temporary incumbent protested, and then measures were rushed through quite in disregard of the Organization's usual methods.

He has other arguments. One is that the organization was "oddly secretive and anxious to avoid giving any publicity or explanation about what was going on".

It is true that the Organization did not act as openly as it ought to have done. The matter may have been urgent enough but there was no need to keep the applicants in the dark about the discontinuance of the competition. It was from hearsay that the complainant learnt that the post had been filled, he had to ask for official confirmation, and the answer he got was curt, to say the least. Though it is unusual to tell an applicant why he has been rejected, the Organization could at least have announced that the competition had been abandoned.

What happened before April 1984 would have been better understood but for the Appeals Board's failure to report. Indeed it was not until the case was argued before the Tribunal that the complainant got an adequate idea of the sequence of events.

In further submissions in his rejoinder he relies on facts subsequent to the decision he impugns and the Organization argues that his pleas are irreceivable. But it is mistaken because what is alleged is abuse of authority. Such abuse is commonly revealed by the Administration's subsequent attitude and what is at issue is not so much the actual content of the decision as the motives for it.

In the Appeals Board proceedings the complainant alleged that the Director-General was prejudiced against him. However regrettable that might be, it would afford no proof of abuse of authority. He was only one of many applicants and even if there did exist any prejudice against him, the Organization was still free to appoint someone else to the post. The quarrel between him and the Organization is immaterial to the correctness of the decisions he is objecting to.

What the plea of prejudice really amounts to is that the Organization was predisposed in favour of the official appointed to the post.

UNESCO says in its reply that, while standing in, the temporary incumbent had worked well. That certainly suggests that keeping her on was in its own interest. Admittedly, the fact that the provisional transfer was causing her financial difficulties does not suggest that, but the Tribunal has no reason to suppose that the primary purpose in appointing her was to ease those difficulties. Nor do the complainant's remarks about her subsistence allowance bear out his plea that there was prejudice in her favour.

His most telling arguments are in his rejoinder. The Tribunal will not investigate the position of an official who is not a party to these proceedings and has made no submissions of her own. It merely observes that she left her Geneva post very soon after being promoted and appointed to it and that, though the Organization maintains that her transfer was in keeping with the policy of redeployment and retrenchment required by the withdrawal of three countries from membership, it is just as arguable that her early departure is evidence of some ruse.

There is abuse of authority where the decision was taken for extraneous reasons. In this case there would have been had the Director-General appointed someone out of pure favouritism. But there is no evidence of that. In any event the Organization's own interests seem to have been uppermost. Even where it is conceivable abuse of authority may not be presumed: it must be borne out by the evidence, and since it is not the plea fails.

9. The Tribunal concludes that the regrading and the appointment of the incumbent were correct decisions and that no purpose would have been served by carrying on with the competition. Since no other applicant was preferred to the complainant it is immaterial whether or not his application was properly considered and the procedure was correct.

His claims to resumption of the competition and to damages therefore fail.

10. He seeks compensation for the lapse of the internal appeal proceedings. Being submitted for the first time to the Tribunal, the claim is irreceivable. In any event it is unsound since mere delay caused by the inefficacy of an

internal appeals board affords no grounds for any award of damages.

DECISIONS:

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 Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner