

NINETY-SEVENTH SESSION

Judgment No. 2345

The Administrative Tribunal,

Considering the complaint filed by Mr E. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 18 April 2003, the Organization's reply of 25 August, the complainant's rejoinder of 6 October 2003 and UNESCO's surrejoinder of 9 January 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Algerian national born in 1942, joined UNESCO in 1979 at grade G-1. He was promoted to grade G-2 on 1 February 1981 and then to grade G-3 on 1 February 1983. In 1997, having remained stationary for two years at the last step of his grade, he asked the Director of the Office of the Director-General to bring his administrative situation to the latter's attention. On 23 January 1998 the Director-General decided to upgrade the post to G-4 effective 1 January 1998. The complainant was promoted to that grade on 1 July 1998.

His post description was brought up to date in March 1998 and then again in August 1999. A provisional evaluation carried out in October 1999 according to the new classification standards graded the post at G-3, but it was decided to maintain it at grade G-4 in accordance with the Director-General's decision of 23 January 1998. The complainant refused to sign his post description and asked the Chief of the Classification Section of the Bureau of Personnel, on 21 January 2000, to review it "according to the relevant classification standards". In an e-mail dated 24 January, the latter replied that since the result of the evaluation was still below G-4, the Director-General's former decision had been maintained, after which he met the complainant to explain the method used. He informed him that a post classification exercise was to be undertaken on the basis of the revised standards using the new seven-grade salary scale, and that once it had been completed he would be notified of the decision taken regarding his case.

On 7 February 2000 the complainant asked the Chief of the Classification Section to refer his case to the Junior Personnel Advisory Board (JPAB). On 16 May, following a reminder sent by the complainant, the Office of Human Resources Management (formerly the Bureau of Personnel) invited him to refer to a number of circulars and memos. On 25 May the complainant reminded the acting Director of Human Resources Management that only the classification standards in force at the time the new post description was submitted were applicable and asked the latter therefore to let him have "a clear and final reply" as soon as possible. Having received none, he submitted a protest to the Director-General on 26 June and then filed a notice of appeal with the Appeals Board on 18 August 2000. In its opinion dated 13 December 2001, the Appeals Board found that there had been "an inexcusable delay" in reclassifying the complainant's post and recommended to the Director-General that his case be referred to the JPAB, which would review the matter under the former six-grade scale. The Director-General accepted that recommendation and notified the complainant accordingly on 21 March 2002.

On 7 May 2002 the complainant was informed that a desk audit of his post, carried out in accordance with the new seven-grade scale, had resulted in the post being graded G-4. The JPAB met on 21 October to consider the complainant's request on the basis of the former six-grade scale, as recommended by the Appeals Board. It evaluated the post as G-3. The Director-General decided nevertheless to maintain the complainant's post at grade G-4, of which the complainant was informed by the acting Director of Human Resources Management in a memorandum dated 20 December 2002. That is the impugned decision.

The complainant retired on 1 January 2003. On 27 February 2003 he wrote to the Director-General requesting leave to appeal to the Tribunal. Having received no reply, he filed his complaint on 18 April 2003.

B. The complainant contends that, despite his efforts to obtain a decision within a reasonable time, UNESCO did all it could to delay consideration of his case by the JPAB. He considers that he suffered from discriminatory treatment because the Organization used two different methods to evaluate his post. He draws the Tribunal's attention to Administrative Circular No. 2066 of 17 December 1998, where it is specified that the six-grade scale will remain applicable until 31 December 1999. He maintains that, by remaining silent, the Administration showed a total disregard for his fundamental rights, and that the manner in which his case was treated was discriminatory and amounted to a denial of his rights.

The complainant requests an upgrading of his post to G-5 as from September 1999, the grant of five additional steps effective 1 January 2000 in compensation for the harm done to his career, 20,000 euros in damages for "frustration and discrimination" and costs.

C. In its reply UNESCO submits that the complaint is time-barred because the complainant did not file it within ninety days after the notification of the impugned decision.

Subsidiarily, it draws attention to the fact that several evaluations graded the complainant's post at G-3 and that the Organization always protected his interests by keeping the post at grade G-4. It adds that, in accordance with the Tribunal's case law, the grading of a post is a technical exercise, which lies at the Organization's discretion and over which the Tribunal exercises only a limited power of review. It argues, moreover, that reclassification of the complainant's post would not necessarily have led to a promotion for its incumbent. It maintains that its failure to reply to some of the complainant's requests was due to the proliferation of those requests and the need to reduce the volume of internal litigation. As for the alleged denial of rights, it points out that the complainant was free to exercise his right of appeal before both the Appeals Board and the Tribunal.

D. In his rejoinder the complainant maintains that his complaint cannot be time-barred since he wrote to the Director-General "on 27 February 2002 [*recte* 2003]".

He reiterates his allegations of denial of rights and unequal treatment, accusing UNESCO of showing ill will and of causing long delays. He expresses doubts regarding the impartiality and consistency of the various evaluations of his post and maintains that the classification standards that were used were not applicable at the time the new post description was submitted. He considers he was treated with contempt and accuses the defendant of having withheld certain documents. He points out that the members of the JPAB were chosen by the Chief of the Classification Section, which, in his view, casts doubt on the fairness of the procedure.

He changes his claims and raises his request for damages to 50,000 euros.

E. In its surrejoinder the Organization reiterates the view that the complaint is irreceivable. The time period provided for in Article VII, paragraph 2, of the Statute of the Tribunal must be strictly adhered to and the fact that the complainant wrote to the Director-General in no way relieved him of that requirement.

UNESCO considers that the complainant has produced no evidence in support of his allegations of bias, contempt and discrimination. It offers explanations regarding the various post evaluations, but makes it clear that the decision in any case lay within the Director-General's discretionary authority.

CONSIDERATIONS

1. (a) According to paragraph 2 of Article VII of the Statute of the Tribunal, to be receivable, a complaint must have been filed within ninety days after the complainant was notified of the decision impugned. In the present case, the impugned decision is dated 20 December 2002 and was notified the same day to the complainant, but the latter alleges that it reached him only on 30 December 2002 when he returned from sick leave, a fact which in itself is not denied by the Organization. The complaint was filed with the Tribunal on 18 April 2003 and is therefore out of time.

The complainant refers, however, to the fact that he wrote to the Director-General on 27 February 2003 in order to inform him that he intended to appeal to the Tribunal in accordance with Staff Rule 111.2(b) and requested his

“authorisation to do so”.

The Organization did not reply to that letter but later relied on the late filing of the appeal in its defence.

(b) According to the case law, an internal appeal lodged with the wrong authority in an organisation may serve to meet a deadline; that authority will simply forward it to the competent body. On the other hand, that reasoning does not apply in relations between an organisation and the Tribunal (see Judgments 1734 and 2017).

Regardless of the fact that it does not contain the essential elements of an appeal, the letter of 27 February 2003 did not have the effect of ensuring that the appeal deadline was met.

(c) The case law also has it that an organisation, as part of its duty of care for its staff, is expected to help any staff member who is mistaken in the exercise of a right, if such help will enable the staff member to take useful action. If it is not too late, the organisation should also provide the staff member with procedural guidance.

In this case, as soon as it received the letter of 27 February 2003, the Organization should have realised that the complainant was mistaken and that he did not need to wait for an authorisation before filing a complaint with the Tribunal. It had enough time to point out to him that his complaint against the Director-General’s decision of 20 December 2002 should be filed directly with the Tribunal within ninety days after the notification of the decision.

As the complainant was not given that guidance, he failed to act in time and the complaint should be declared irreceivable. Such a ruling would not, however, be compatible with the requirements of good faith which the parties and the Tribunal must observe.

The plea of irreceivability for late filing of the complaint therefore fails.

2. The complainant asks for his post to be reclassified at grade G-5.

According to well-established precedent, decisions concerning the grading of a post require technical skills and are undeniably discretionary. Consequently, such a decision is subject to review by the Tribunal only on limited grounds, if it was taken without authority or in breach of a rule of form or of procedure, if it was based on an error of fact or of law, if it overlooked some essential fact or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. The Tribunal will not substitute its own assessment for that of the Director-General (see, for instance, Judgments 1152, under 2; and 1281, also under 2).

In the case in hand, the complainant merely runs through the different stages of the procedure and the positions adopted by the parties, but fails to show that the evaluation of his post on which the impugned decision rests is tainted with any of the above-mentioned flaws.

The complaint must therefore be dismissed on the merits.

3. On the other hand, the complainant is right to object to the excessive procedural delays.

In view of its duty of care towards its staff, an organisation must spare them the material and psychological drawbacks of endless procedures. The explanations given in this case by UNESCO are not sufficient: while an organisation cannot avoid an occasional overload of work, it must take appropriate measures to avert the drawbacks of a massive and foreseeable increase in legal disputes.

The Tribunal considers that in the circumstances compensation for moral injury of 2,500 euros is justified. The complainant’s other claims under this head fail.

4. All further claims must therefore be dismissed. Since the complainant succeeds only partially, he will be awarded only limited costs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant 2,500 euros in compensation for moral injury.
2. It shall pay him 500 euros as an award of partial costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2004, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

James K. Hugessen

Jean-François Egli

Seydou Ba

Catherine Comtet