

The Administrative Tribunal,

Considering the complaint filed by Mr S.A. R. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 February 2007 and corrected on 18 March, UNESCO's reply of 27 June, the complainant's rejoinder of 4 October and the Organization's surrejoinder of 17 December 2007;

Considering Article II, paragraph 5, 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, a Pakistani national born in 1960, joined UNESCO on 6 May 2003 as a National Professional Officer for Culture in the Organization's Office in Islamabad (Pakistan), under a two-year fixed-term appointment, which was subject to satisfactory completion of a one- year probationary period.

In a letter of 24 September 2003, his supervisor, the then Director of the Islamabad Office, expressed her dissatisfaction with the complainant's performance, in particular his "lack of understanding and professional and timely execution of small and bigger tasks". That same day, the complainant replied that he had been compelled to work under the most trying conditions due to the heat and the lack of oxygen in the office he had been given. He complained about what he described as lack of cooperation and communication and appealed to the Director of the Office for advice and encouragement. By a letter of 30 October the Director maintained her position regarding the complainant's performance and asserted that he had been thoroughly briefed upon his arrival and offered guidance constantly thereafter. She added that, if his performance did not improve within the next few weeks, she would have no option but to terminate his contract.

In a performance report issued on 5 April 2004, the Director of the Office gave the complainant the global rating "E", which indicates a "quality and quantity of work well below the level required for the performance of most of [the] assigned tasks". The complainant signed the report on 15 April but stated his disagreement with the appraisal and indicated that he had not been given the opportunity to discuss it with his supervisor prior to signature. He contested the report by letter of 19 April and the matter was subsequently brought before the Reports Board in accordance with Staff Rule 104.11 *bis* (d). In his observations on the report, dated 10 May 2004, the Assistant Director-General for Culture confirmed the "E" rating and recommended that the complainant's appointment be terminated.

In its report of August 2004, the Reports Board unanimously recommended that the "E" rating be maintained. However, it also requested that supervisors be reminded to discuss with staff members issues pertaining to their performance. In July 2004 the new Director of the Islamabad Office became the complainant's supervisor. On 8 September the Director of the Bureau of Human Resources Management (hereinafter "Director of Human Resources Management") informed the complainant in writing that the recommendation of the Reports Board had been approved.

The complainant appealed on 9 October 2004 to the Director-General against that decision. On 4 November the Senior Personnel Advisory Board, which was convened in accordance with Staff Rule 104.1, concluded that the complainant did not have the required qualities for a position within the Organization and recommended unanimously the non- confirmation of his appointment for unsatisfactory service. The Director-General endorsed that recommendation and the complainant was informed by a letter of 25 November from the Director of Human Resources Management that he would be separated from the Organization with effect from 30 November 2004. This decision, which the complainant contested by an e-mail of 22 January 2005 to the Director of Human Resources Management, was confirmed by the Director-General in a letter dated 2 May 2005.

On 28 June the complainant submitted an appeal to the Appeals Board. In its opinion of 20 July 2006, the Board

found that the complainant had not been provided with adequate guidance or proper briefings and that the person who was the Director of the Office until June 2004 had not taken adequate and early steps to bridge the communication gap between herself and the complainant, as a result of which the latter was not properly exposed to office procedures, policies and projects. It also found that the person who was appointed Director of the Office in July 2004 had made no attempt to improve the situation, that he had given preference to a consultant and that he had directed the complainant to work with her. It considered that the persistent negative approach by the complainant's supervisors constituted "discrimination or prejudice by way of neglect and marginalization". It recommended that the contested performance report be cancelled, that the decision not to confirm his appointment be set aside, that he be reinstated, that he be paid salary and related benefits from the date of separation until the date of reinstatement and that the amount of compensation for damages he might have sustained be negotiated.

In October 2006 the complainant rejected the Administration's offer to pay him by way of settlement the equivalent of three months' salary on condition that he withdrew his appeal. By a letter of 21 November 2006, which is the impugned decision, the Director- General informed the complainant that he had decided to reject the Appeals Board's recommendations and to maintain his initial decision not to confirm his appointment. He expressed the view that the Appeals Board had acted *ultra vires* in that it had substituted its own judgement regarding the evaluation of his performance for that of other advisory bodies and of the Head of the Organization. The Director-General indicated that, on an exceptional basis, he had instructed the Bureau of Human Resources Management to offer the complainant compensation equivalent to three months' salary in lieu of notice for his separation and to continue its efforts for an amicable settlement. By a letter of 12 December 2006 the complainant rejected the offer and urged the Director- General to endorse the Appeals Board's recommendations. He sent a reminder letter on 23 January 2007.

B. The complainant submits that although he "won [the] case" before the Appeals Board, the Administration has refused to reinstate him and has tried to keep him out of the Organization for a meagre compensation of three months' salary.

He contends that from the moment he joined the Office he had to work under the most trying conditions because of the heat and the lack of oxygen in the office he was put in, and also because of the biased behaviour of the Director of the Office. He argues that his premeditated separation served the latter's plans, namely to appoint a friend of hers to the post for which he had been selected, notwithstanding the fact that that person did not possess the required qualifications. In the same vein, he considers that his negative performance report was intended to serve as the basis for his separation. In support of his contention, he alleges that the Director of the Office appointed her friend as National Professional Officer for Culture without having re-advertised the post beforehand.

He asks the Tribunal to order the Organization to implement the recommendations of the Appeals Board, namely, to quash the performance report which formed the basis of his unlawful separation, to confirm him in his position as National Professional Officer for Culture in the Islamabad Office, to pay him salary and related benefits from the date of separation until the date of reinstatement and to pay him reasonable compensation for the humiliation, embarrassment, mental torture and professional damage he and his family sustained due to the prejudiced decisions of the Director of the Office and other UNESCO officials.

C. In its reply the Organization asserts that the Director-General's decision of 21 November 2006 rejecting the Appeals Board's recommendations is in conformity with UNESCO Staff Regulations and Staff Rules and the Tribunal's case law. It emphasises that the recommendations of the Appeals Board are not binding and hence cannot limit the Director-General's discretionary authority in matters relating to performance and termination of appointments. It argues that by making its own assessment of the complainant's performance and recommending that his performance report be cancelled, the Appeals Board exceeded its competence, which according to Article 5(b) of its Statutes does not extend to substantive questions of efficiency.

Recalling that the Tribunal's power of review in respect of discretionary decisions is limited to cases in which there is evidence of procedural defects, mistakes of fact or law, or non-consideration of essential facts, the defendant contends that the Appeals Board's report has not provided any evidence in that respect. It holds that the conclusions of the Appeals Board are unfounded, because the Board proceeded on the basis of a presumption of prejudice and bad faith on the part of the complainant's supervisors, and also because it overlooked the fact that the assessment of the former Director of the Office was subsequently endorsed by other supervisors and by the advisory bodies competent to make recommendations to the Director- General.

UNESCO considers that the complainant's performance report does not bear any flaws. It points out that his "E" performance rating was maintained after the contestation of the report. The complainant was on several occasions informed about the unsatisfactory level of his performance and was even warned that, unless he improved, his appointment would not be confirmed. The Organization contends that the decision not to confirm the complainant's appointment is lawful. It emphasises its discretionary character and recalls that, according to its case law, the Tribunal may not substitute its own assessment of a staff member's performance, conduct, work or fitness for international service for that of the executive head of an organisation. It indicates that the procedure leading to the impugned decision was not flawed and that it complied with Staff Rule 104.1 according to which the case should be reviewed by the Senior Personnel Advisory Board. It further dismisses the complainant's allegation that he was made to work under the most trying conditions and denies the accusations of prejudice, discrimination and favouritism on the part of his supervisors.

The defendant considers that it would be inappropriate to reinstate the complainant, first, because he is not qualified for the post, second, because he does not meet the highest standards of conduct and has lost its confidence – UNESCO argues that he spread false rumours compromising the reputation of the Organization and its officials, and that he showed contempt towards his supervisors and female colleagues in particular –and, third, because the post in question has already been filled through a competitive selection process. According to the Organization, the claim for payment of salary, related benefits and compensation must fail, in light of the fact that the Director-General's decision is lawful and valid. Emphasising its attempts to reach an amicable settlement, the defendant asserts that the claim for compensation is without legal basis, given that the Administration has fully complied with the applicable rules and that the complainant has failed to substantiate his allegations of bad faith and discrimination. UNESCO also points out that in light of his unsatisfactory service, the complainant could not have reasonably expected his appointment to be confirmed or renewed.

D. In his rejoinder the complainant submits that the impugned decision is tainted with serious procedural and substantive flaws and bias. He contends that he was not given an opportunity to discuss with his supervisor the draft of his performance report or to improve his performance, and that he was not provided with a performance improvement plan as required by Administrative Circular No. 2205. In addition, the performance report was incomplete as it did not bear the name and title of the Director of the substantive division at headquarters and was neither dated nor signed. In the complainant's opinion, UNESCO violated its fundamental obligation to provide proper conditions for his probation, to guide him in the performance of his duties, to warn him in specific terms regarding his performance, and in general to act in good faith and to respect his dignity. He also contends that the terms of reference of his appointment were not observed, as he was only given clerical assignments.

The complainant argues that the Director-General's decision not to confirm his appointment must be set aside by virtue of the *patere legem quam ipse fecisti* principle, first, because it is based on an unlawful performance report and, second, because the Organization failed to observe the procedure for termination of appointments provided for in the Administrative Manual. He asserts that the impugned decision rests on an error of law because it departs, without convincing justification, from the recommendations of the Appeals Board. Accordingly, he considers that the Tribunal is competent to review its lawfulness. He argues that by looking into the question of whether the impugned decision was affected by prejudice or other extraneous factors, the Appeals Board acted in accordance with its Statutes, which provides that it shall itself decide whether it is competent to consider an appeal. He maintains that the decision not to confirm his appointment was largely motivated by his supervisors' bias and personal hostility towards him.

E. In its surrejoinder UNESCO dismisses the complainant's allegations of bias as wholly unsubstantiated. It contends that the Director-General's decision to depart from the Appeals Board's recommendations was properly reasoned. It emphasises that the latter overlooked the recommendations of both the Reports Board and the Senior Personnel Advisory Board and maintains that its conclusions were based on an erroneous assessment of facts and were unfounded in law. In its opinion, the complainant has not countered the statements made by his supervisors regarding his unsatisfactory service and conduct. The defendant rejects as unfounded the allegations that the complainant's supervisors failed to brief him properly and guide him in the performance of his duties and that they only assigned clerical tasks to him. In its view, by distorting the facts, the complainant is showing bad faith. It denies that his performance report is incomplete and that it is tainted with procedural flaws. Furthermore, it refutes the assertion that the impugned decision is unlawful by virtue of the *patere legem quam ipse fecisti* principle, noting that Administrative Circular No. 2205 does not apply to performance report processes that were engaged prior to 23 March 2004, or to probationers. UNESCO submits that the complainant was familiar with his draft performance report prior to signature and that he was given ample opportunity to improve his performance.

CONSIDERATIONS

1. The complainant's letter of appointment specified the period of his contract as 6 May 2003 to 5 May 2005. His services were terminated early, for reasons of unsatisfactory service during probation, by letter of 25 November 2004 and he was informed by letter of 2 May 2005 of the Director-General's rejection of his appeals.

That letter of rejection stated:

"the Director-General found that your performance appraisal concerned was legally valid, accurate and without prejudice. Besides, the Director-General's decision taken in the light of the performance reports in question, and in the interest of the Organization, intended not to confirm your appointment for unsatisfactory service during your probationary period."

2. The complainant appealed that decision. The Appeals Board found for him on the grounds of discrimination ("or other extraneous factors"), "discrimination or prejudice by way of neglect and marginalization", yet specifically *not* on what it terms "the substantive question of efficiency".

It mentioned no new evidence, just a different view of the merit of the evidence already on file, and even if it did not contradict the findings relating to the "efficiency" of the complainant, and clearly said so, it drew anyhow five different conclusions, all in favour of the complainant:

- (i) cancellation of his performance report,
- (ii) setting aside of the impugned decision,
- (iii) reinstatement,
- (iv) payment of salaries and related benefits from his date of separation until the date of reinstatement, and
- (v) damages.

3. If the Director-General had chosen to follow this recommendation, the case law of the Tribunal would not have required him to provide grounds for his decision.

However, as established in Judgment 2699, under 24, "the case law makes it clear that when rejecting a recommendation of an internal appeals body that favours a complainant, the final decision-maker must give clear and cogent reasons for such a decision (see Judgments 2092, 2261, 2347 and 2355)".

4. The Director-General indeed did not follow the recommendations of the Appeals Board, and in explaining why, he also made reference to various former documents indicating that there was sufficient cause in support of the first decision and concurring recommendation for unsatisfactory performance, and not of the last recommendation proposing reinstatement – and more – by invoking "discrimination or prejudice by way of neglect and marginalization".

The difference of assessment relies to a great extent on documents to which the Director-General specifically referred and which he considered the Appeals Board had unjustifiably "ignored".

The situation is thus quite different from that described for example in Judgment 306: "What makes it all the harder to account for such a difference in assessment [...] is that there is not a single document in the dossier which reveals the true reasons and no particular fact which explains why the assessment of the complainant was so utterly different".

Or, as said in Judgment 1817, under 6, "[h]ow ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore".

5. Internal recommendations held opposing frontal positions: the initial Reports Board and the Senior Personnel Advisory Board both found against the complainant, the Appeals Board, on the contrary, found for him.

In order to determine whether the Director-General gave “clear and cogent” reasons to dismiss the Appeals Board’s recommendations and stand by the recommendation given by the Senior Personnel Advisory Board and its supporting documentation, it is helpful to extend the analysis to the latter.

The gist of the matter, in any case, is not whether the complainant’s contract was terminated early because of acceptable reasons or because of discrimination “or other extraneous factors”, but rather whether the grounds provided by the Director-General were or not satisfactory to sustain his decision to reject the Appeals Board’s recommendations, thus standing by the Senior Personnel Advisory Board’s recommendation and corresponding justification, to which he referred.

6. The Director- General’s grounds for the decision, as explained in the letter of 21 November 2006, were the following:

(a) Firstly, “the legality of the decision not to confirm your appointment for unsatisfactory services for the reasons given in the written reply of the Respondent to your detailed appeal”. That is the first link of the decision to previous evidence on file, in this case to a document which contains a large and comprehensive line of reasoning.

(b) The Director-General added as a second line of reasoning “that the report of the Appeals Board”:

(i) “did not provide any evidence of ‘discrimination or prejudice by way of neglect and marginalization’ and”

(ii) “ignored the recommendations of the Reports Board and the Senior Personnel Advisory Board [...] recommending unanimously the non-confirmation of [the complainant’s] contract for unsatisfactory service after a due hearing of [his] case”.

As regards the second point, the Director-General emphasised that the Appeals Board had just “ignored” it. The criterion to be applied, as noted in Judgment 1673, under 6, is that the “duty [to explain a decision] will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower one or a recommendation by some advisory body”.

(c) A third reason given by the Director-General in his decision was:

“the recommendation of the Appeals Board for your reinstatement based on its evaluation of your performance and of the management of the Islamabad Office was *ultra vires* since the Board may not substitute its own judgment for that of the other advisory bodies or for that of the head of the Organization”.

The argument of the Appeals Board acting *ultra vires* is not necessary for the disposition of the case and the Tribunal will therefore not dwell on it, although it finds that all its assertions are based only on a different reading and interpretation or perception of the evidence on file at the time of appeal, which need not be explained here. The focus of the Tribunal’s decision is not to ascertain whether the Appeals Board was right or wrong, *ultra vires* or not, but rather to determine whether the Director-General had a “clear and cogent” basis in deciding not to follow such recommendation.

While the Director-General decided to keep the emphasis on the unsatisfactory performance, the Appeals Board appeared not to contradict the claims against the “efficiency” of the complainant, but instead to find exculpatory explanations for it, by reason of discrimination or other extraneous factors.

(d) Two additional reasons were provided by the Director-General, when stating “that the present decision should be considered as a final decision rejecting your request for reinstatement [...]”

(i) “since it is not mandatory for the Organization to confirm the appointment of a staff member at the end of a probationary period or initial appointment and”

(ii) “because I share the conclusions of the other advisory bodies establishing that your experience as a National Professional demonstrated that you were unsuitable for the post to which you were assigned”.

Since the Director-General thus specifically referred to such recommendations and documentation, particularly “the

reasoning of a lower one or a recommendation by some advisory body” (see Judgment 1673, under 6), the crux of the matter lies partly therein. For that reason the Tribunal will additionally dwell on these documents under 8 to 10, below.

7. Since the Director- General provided several reasons that directly refer to the same file which served for both opposing recommendations, it is useful to consider the documents themselves that the Director-General considered to reach his decision, in order to better illustrate whether he thus made a reasonable, “clear and cogent”, decision or not.

As explained in Judgment 2427, under 2, “the Tribunal is competent to review the lawfulness of any decision by the Director-General to terminate a staff member’s probation. [...] The Tribunal may not, however, replace with its own the executive head’s opinion of a staff member’s performance, conduct or fitness for international service (see Judgment 318, considerations).”

8. Starting at the beginning of his employment, the complainant’s successive immediate supervisors, and others higher in the hierarchy, had at all times a negative impression of his professional and personal qualifications to be an international public servant.

(a) That began almost from the inception of his nomination, as proven by the fact that the complainant was the third choice in a competition to fill a new vacancy for a two-year contract, and was only appointed because the first two candidates did not, for various reasons, accept the nomination.

Other supporting documentation is variously on file, emanated not only from his supervisors but also from many different consultants and other officials, in different places, to the same effect.

(b) One of the documents on file relates, on 15 September 2003, “grave concerns” regarding the conduct of the complainant. It is indicated that he made statements “highly inappropriate” and “compromising” the image of UNESCO and that he “betrayed a complete lack of understanding” of fundamental issues in ignorance of management guidelines. Also it was considered “extremely inappropriate” for the complainant to “disparage” the Organization in public, “casting doubt on the project aims, relevance and ability to perform”. It was concluded that the work of the Office was being undermined by the complainant’s “unprofessional behaviour”, and the image of UNESCO would also suffer as a result.

(c) On 24 September 2003 the Director of the Office informed the complainant as follows:

“I continue to find your performance unsatisfactory. [...] I would expect however that UNESCO’s overall ethical and intellectual mission would be understood as well as the main priorities of the Organization [...]. What gives a serious concern is the lack of understanding and professional and timely execution of small and bigger tasks given to you [...] as well as negative responses to your interventions from external partners.”

(d) Another document of 18 October 2003 states:

“You will recall the concern I have expressed for the questionable attitude towards the project by [the complainant]. He has tried to create divisions and to undermine the work [...]. I have been greatly disturbed that [he] has tried to run down the Department personnel, informing me that nothing should be expected from the Department officers. He has been particularly negative about Mr [...]. There have been other instances when he has tried to thwart the progress by delaying delivery of items for the project from the Head Office. [...] Since [he] represents UNESCO, this negative and divisive attitude will be detrimental and can greatly harm the project. It will also undermine the efforts being carried out at Lahore [...].”

(e) On 18 December 2003 a document from yet another official brings the following testimony: “efforts from one of your staff member to disgrace you and some other members of your staff”. These remarks about fellow professional female colleagues included calling them – in another language – by “a word commonly used for house maids”. The complainant is to have said, by the way, “I will fix these two women”.

It was added that:

“His attitude reflects that he has no respect for his senior colleagues and he should be discouraged for it as such kind of attitude would certainly damage the reputation of [the Organization]. Earlier he had tried to create mistrust

[...] saying that she was trying to hijack the project [...] he was propagating such views in other people also [...] as it may result in the discouragement of dedicated people associated with this project.”

(f) The same Director who had commented on the complainant’s performance, as explained under point (d), above, also informed him in detail, on 30 October 2003, of the various aspects of his answer and his work, and concluded:

“If, as I have already informed you orally a month back, I do not see serious ameliorations in your performance over the coming weeks, I will have no other option than to terminate your contract”.

(g) The complainant’s performance report of 5 April 2004 concludes that his

“performance falls below expectations primarily due to lack of fit between what is professionally required, be it simple or complex tasks and his actual performance as well as a divisive attitude with partners. Both factors risk harming the image of UNESCO in Pakistan. Requirements to reliability and punctuality in carrying out work are not met in a satisfactory manner. His linguistic proficiency in English is good both orally and writing.”

These conclusions are borne by four previous evaluations of the same official, in the same performance report, all giving strong negative signals. No single quality is highlighted of the complainant, except his command of the English language. That will also be important as a later document, referenced below, will demonstrate.

(h) The Assistant Director-General for Culture stated on 10 May 2004:

“After having studied the written contestation by [the complainant] on his performance evaluation, I have had a telephone conversation with [the Director of the Islamabad Office] and [the complainant] to discuss the serious disagreement on the latter’s performance report, in presence of [...] and [...]. Based on [the Director’s] justifications and on the hearing with [the complainant], I confirm the E rating and recommend that the [National Professional Officer’s] contract be terminated.”

9. The Director- General, when making the impugned decision not to follow the recommendations of the Appeals Board, also specifically referred to the unanimous recommendation of the Reports Board, in a report of August 2004 which is itself quite detailed, reasoned and substantive, and gives ample credence and support to the Director- General’s decision.

It is stated therein that:

· The Organization “had received some warnings, which should have been taken more seriously at the time”.

· The Director of the Office “checked with three of previous supervisors who had exactly the same problems as she had with [the complainant’s]: total lack of professionalism, superficial knowledge, posturing, and untrustworthy and unethical behaviour, providing [...] information [...] in bits and pieces, manoeuvring and manipulations, lack of integrity, speaking badly about others”.

· “[The complainant] made different excuses. He either had too much to do, too little to do or the situation was not appropriate for him to work (the office was not good enough, his son was ill, problem with the servants). [His supervisor] has spent a lot of time providing advice and backstopping, trying to find out why he was incapable of working. [...] He never managed to understand what was asked of him. [...] [He] informed his supervisor that he was not interested in doing this”.

· “To conclude, [the complainant’s] performance falls below expectations primarily due to lack of competency, be it simple or complex task. His relations with partners are also problematic. [...] the Board took note of the evidence (letters) from different partners of [the Organization] concerning the dividing attitude of [the complainant], harming the image and projects of [the Organization].”

· “The Board heard the arguments submitted by [the complainant] in support of his claim that the global performance rating ‘E’ did not objectively reflect the level of his performance. [...] [h]is suggestions were always ignored because of personal prejudice against him.”

10. The Reports Board took notice, too, of his claims of harassment and added to its conclusions that his

“complaint should have been brought up at the appropriate time, and not now when his performance report is currently under review”.

The Reports Board not only unanimously recommended that his global “E” rating be maintained, but also considered it fit to chastise his supervisors for their hiring practice, advising that “[d]uring the recruitment process, the file of candidates should be consulted carefully, as far as his/her previous professional experience is concerned, in view to draw the appropriate or necessary conclusions”.

The Director-General’s reliance on this recommendation is therefore so far quite sufficiently and reasonably grounded.

11. But there is more: the complainant’s subsequent supervisor (who later gave a very comprehensive negative written testimony on him, which simply corroborates previous evidence) wrote to him on 11 October 2004 referring to the complainant’s “present workload, overall performance, and the various minutes of ‘Staff’ and ‘Programme Coordination’ meetings in [the] Office which record decisions taken at these meetings” and that “[he had] been invited and attended most, if not all, of these meetings”.

He stated:

“I approved your mission to Lahore [...]. As a direct follow-up you were expected to submit [...] a project proposal [...] and step-by-step guidelines. [...] Unfortunately, both documents have not been submitted to date. I will encourage you to prepare both soonest with a new extended deadline [...].

You will see from the various minutes that amongst the various responsibilities entrusted to you, you were supposed to [...]. To date and in spite of repeated reminders, no action has been taken, except a letter that I had to edit and send to the Ministry myself. [...] I will therefore encourage you to take action and produce concrete results at the earliest, with a new deadline [...].

From the same set of minutes, you will also notice that you have been requested to contribute for [...]. This is an important event [...]. I have made clear in several occasions that there is an urgent need to [...]. I have postponed the deadline for this submission several times with a final deadline on 25 October 2004. To avoid any possible misunderstanding, this is to kindly remind you to comply with it.

If any of the above is not clear, I will be pleased to discuss it further.”

12. As partly explained under 6(c), above, the Tribunal should not and will not judge whether or to what extent the Appeals Board could have had sufficient reasons to reach such an opposite conclusion than that drawn from the same file by the Director-General, on the complementary grounds given by many public officials and two advisory bodies, all of which acted unanimously throughout different times.

13. There may be a touch of perplexity as to such a direct contradiction between the Appeals Board’s and the Director-General’s findings on the same file, and this is enhanced by the ulterior conduct of the complainant calling the Director-General’s administration “nefarious”, claiming 500,000 United States dollars as compensation and thus unwittingly justifying the negative personal judgement made about him by his two former immediate supervisors, and the concurring Reports Board and the Senior Personnel Advisory Board plus other documented testimony.

14. If there had been only the recommendations of the Appeals Board, or if it had somehow upheld previous determinations or added substantive proof of its own, the need for the Director-General to provide reasons not to follow its position might have been more stringent. As it happens, there was already on record the very substantive recommendations of two other advisory bodies, plus the two immediate supervisors at different times, all very coherent and absolutely unanimous in a way that the Appeals Board did little to counter or abate, despite its numerous recommendations.

The Appeals Board did not offer any evidence of discrimination “or other extraneous factors”.

15. To sum everything up, the Director-General did not need, under the circumstances, to provide a complete refutation of every single argument the advisory body proffered, only reasonable arguments for not following such recommendations.

In the instant case, the direct reference to the lack of new evidence introduced by the Appeals Board and even more, the Director-General's reliance on previous unanimous and very coherent opinions and recommendations of other public officials and consulting bodies, were more than adequate reasonable explanations as to why he felt the need not to follow the last recommendation received, as it was contrary to his own perception of what he understood to be shown by the file.

The above-mentioned documents sustain the reasonableness of that perception, and the Tribunal will not, in the circumstances, counter the Administration's choice of reasons to substitute them for its own or the Appeals Board's.

Not only were the Director-General's reasons sufficient by themselves, but even more, their reliance on evidence on file pointed to the same conclusion. Such evidence, expressly referred to by his decision, is added proof of the objective grounds he invoked for not following the apparent turnabout of the Appeals Board on the merits of the evidence on file, and for sustaining his initial decision.

16. For the above reasons the impugned decision stands. That decision, in accordance with the last five lines of the letter of 21 November 2006, incorporates the offer that the complainant be compensated for the remaining period of his two-year contract with the Organization i.e. from 1 December 2004 to 5 May 2005 plus three months' paid notice which would represent a global amount of more than eight months' salary and allowances.

CONCURRING OPINION BY JUDGE MARY G. GAUDRON

1. I agree with the orders proposed in the joint majority judgment. I would, however, prefer to state my own reasons.

2. The first question that arises is whether the Director-General was right to reject the factual findings made by the Appeals Board. For present purposes, these findings may be summarised as follows:

- the complainant was provided with neither adequate guidance nor proper briefings;
- the person who was the Director of the UNESCO Office in Islamabad and the complainant's supervisor until June 2004 did not take adequate and early steps to bridge the communication gap with the complainant with the result that he was not properly exposed to office procedures, policies and projects;
- the subsequent Director of the Islamabad Office made no attempt to improve the situation but, instead, made the situation even more difficult;
- the subsequent Director gave preference to a consultant and required the complainant to work with her; and
- the persistent negative approach by the complainant's supervisors constituted "discrimination or prejudice by way of neglect and marginalisation".

By reference to the above findings, the Appeals Board recommended that the complainant's performance report with rating "E" be cancelled, that the decision not to confirm his appointment be set aside and that he be reinstated and granted other consequential relief.

3. In deciding not to accept the recommendations of the Appeals Board, the Director-General stated that it "did not provide any evidence of 'discrimination or prejudice by way of neglect and marginali[s]ation'" and, also, that it "ignored the recommendations of the Reports Board and the Senior Personnel Advisory Board [...] recommending unanimously the non-confirmation of [the complainant's] contract for unsatisfactory service after a due hearing of [his] case". Additionally, the Director-General stated that the recommendation for reinstatement was *ultra vires* as the Appeals Board could not substitute its evaluation of the complainant's performance for that of the Reports Board and of the Senior Personnel Advisory Board.

4. The Director-General was clearly right in stating that the recommendation for reinstatement was *ultra vires*. A recommendation to that effect could only be made on the basis that the complainant's performance was satisfactory – a finding that the Appeals Board did not and could not make. In this last regard, the Appeals Board, itself, noted that paragraph 5(b) of its Statutes precluded it from pronouncing on the efficiency of a staff member.

5. The Director-General was also correct in stating that the Appeals Board had ignored the recommendations of the Reports Board and of the Senior Personnel Advisory Board. This has particular significance in that, save for one matter, the various acts relied upon by the Appeals Board for its conclusion of "discrimination or prejudice by

way of neglect and marginali[s]ation” were acts involved in the performance of managerial and supervisory functions by the Directors of the Islamabad Office. In those circumstances, it was necessary, at the very least, to consider whether their acts were appropriately proportionate responses to the complainant’s performance and related behaviour before any conclusion could be reached as to whether they constituted prejudice, neglect or marginalisation. As this was not done, the finding of prejudice, neglect and marginalisation was fundamentally flawed and the Director-General was right to reject it.

6. Further, the Appeals Board’s adverse findings against the Directors with respect to their guidance, briefings and lack of communication with the complainant were inconsistent with the recommendations of the Reports Board and the Senior Personnel Advisory Board. Moreover, they were made without supporting analysis and without hearing evidence from the Directors. Quite apart from any question of fairness to those persons, those findings were also flawed and the Director-General was right to reject them.

7. Although the Director-General was right to reject the findings made by the Appeals Board and its recommendation with respect to reinstatement, it does not automatically follow that he was right to maintain the earlier decisions with respect to the complainant’s performance rating and the termination of his appointment. The Director-General was required to decide whether to allow or dismiss the complainant’s internal appeal based on allegations of “victimi[s]ation and] personal prejudices”. In effect, because of the decision to allow compensation in lieu of notice, he was dismissing the appeal with respect to the complainant’s performance rating, and allowing the appeal with respect to the non-confirmation of his appointment in part, but dismissing the substance of that appeal.

8. The fact that, in the circumstances, the Appeals Board’s findings were fundamentally flawed, did not necessarily mean that there was no victimisation or prejudice, only that its findings could be rejected. Even if the Board’s findings were rejected, there remained the question whether there was evidence on which such findings could properly be made. If there was, the proper course was for the Director-General to remit the matter to a differently constituted Appeals Board for further consideration. Only in that way could the complainant’s appeal rights be protected. And only if there was no evidence to support a finding of victimisation or prejudice, could the Director-General properly decide to dismiss the complainant’s appeal with respect to his performance rating and the substance of the appeal with respect to the non-confirmation of his appointment.

9. As already noted, the Director-General stated in his reasons for not accepting the recommendations of the Appeals Board that its report “did not provide any evidence of ‘discrimination or prejudice by way of neglect and marginali[s]ation’”. It was not the function of the Appeals Board to provide evidence, and, the fact that it did not was an irrelevant consideration. As already indicated, the relevant question was whether there was any evidence on which a finding of victimisation or prejudice could properly be made. The Director-General did not consider that question. His failure to do so was an error of law and, ordinarily, would result in his decision being set aside and the matter remitted to a differently constituted Appeals Board for further consideration. However, that course would be futile if there was no evidence on which a finding of victimisation or prejudice could properly be made.

10. As earlier indicated, the Appeals Board was obliged to consider the question whether the conduct of the Directors of the UNESCO Office in Islamabad – conduct which, for the most part, clearly took place in the course of the discharge of their supervisory and managerial duties – was appropriate and proportionate to the complainant’s performance and related behaviour. It was said in Judgment 2370 that conduct that “had a valid managerial purpose” did not constitute harassment. Similarly, conduct that has a valid managerial or supervisory purpose does not constitute victimisation or prejudice, although a claim that the conduct in question had a proper managerial purpose may be rejected if there is other “evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken” (see Judgment 2524, under 25). It is for the person alleging an improper motive or lack of proportionality to prove that that is the case.

11. Before turning to the conduct of the Directors that took place in the course of their managerial and supervisory duties, it is convenient to note one matter that may be said to be in a somewhat different category. That is the question of the complainant’s office accommodation. It is not disputed that his accommodation was unsatisfactory. However, that was the result of a scarcity of proper accommodation. The complainant was not the only person to suffer on that account and the fact that others, including consultants, had better office accommodation establishes neither victimisation nor prejudice.

12. The complainant’s claim in relation to victimisation and prejudice is based on the following:

- the lack of briefings in relation to “ongoing and pipeline projects”;
- assignment of clerical rather than professional duties for which he was recruited; and
- his negative performance report.

13. The unsatisfactory nature of the complainant’s performance is well documented and was the subject of a warning as early as one month after he joined the Islamabad Office. There is no evidence that what was stated in the performance report was not factually based and was not the honest expression of the then Director’s opinion. That being so, the performance report provides no evidence of victimisation or prejudice.

14. In the complainant’s performance report, the then Director referred to the “lack of fit” between his performance and the requirements of his post, in relation to both simple and complex tasks. She noted that the complainant had “a divisive attitude with partners” and expressed her view that these matters risked “harming the image of UNESCO in Pakistan”. She also noted that his work was performed neither reliably nor punctually. Moreover, the Senior Personnel Advisory Board subsequently found that attempts to remedy these deficiencies were explored but failed due to the complainant’s behaviour. Given that situation, the failure to brief the complainant or to assign professional duties to him – failures which, in any event, are denied and are contrary to the weight of the evidence – is explicable on the basis that that was an appropriate and proportionate response to his poor and unreliable performance, and, even, necessary to avoid harm to the Organization that might otherwise result from his divisive behaviour. Certainly, there is no evidence to suggest to the contrary. That being so, there is no basis on which findings of victimisation or prejudice can properly be made. It follows that the decisions with respect to the complainant’s performance rating and the non-confirmation of his appointment must stand and that the complaint must be dismissed.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The impugned decision stands with the consequences set out in this judgment, under 16.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet