

THIRTY-NINTH ORDINARY SESSION

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

***In re* ZIMMER**

Judgment No. 327

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mrs. Régine Mauricette Zimmer on 18 October 1976, UNESCO's reply of 10 January 1977, the complainant's rejoinder of 3 February 1977 and UNESCO's surrejoinder of 25 February 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rules 104.6 and 111.1 and the Statutes of the UNESCO Appeals Board;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. From 11 January 1967 until 6 October 1972 the complainant was employed in the commissary (ECU) of UNESCO, under contract and without the status of a UNESCO staff member. Her employment was governed by a contract of appointment and by works rules: the contract laid down that UNESCO Staff Regulations and Staff Rules did not apply to her; the works rules stated the French labour law was applicable. On 6 October 1972 the management board of the commissary abolished three posts including the complainant's. She was paid the dismissal compensation prescribed by French labour law and three months' wages in lieu of the notice due under her contract of appointment.

B. On 13 November 1972 the complainant became a member of the UNESCO staff proper and as such was subject to the Staff Regulations and Staff Rules. She was given a one-year appointment at grade G.1, step 1. It was extended once and once only, for two years, to 12 November 1975. On that date it ended and she left UNESCO.

C. In January 1974, while employed in the subscriptions division of the documents and publications office, she asked for a transfer on the grounds that her work - using "addressograph" and "graphotype" machines - was damaging her hearing. A physician confirmed her contention. UNESCO maintains that apart from a temporary transfer there was nowhere her services could be used. She therefore stayed on in her old post and, says UNESCO, was allowed to work as far away as possible from the premises where the machines were used, although "that made her much less useful to her unit". Being unable to find her another post - mainly, in UNESCO's view, because she was unskilled - the Director of Personnel decided not to renew her appointment on its expiry, and she was so informed on 23 October 1975.

D. UNESCO says that the complainant "did not challenge the decision not to renew her appointment, the only decision which might properly be challenged under paragraph 7 of the Statutes of the Appeals Board. She did, however, apply to the Appeals Board on 18 November 1975 for a hearing and on 17 December made a detailed application. The Board noted that she had committed errors and that her 'protest' was irregular, but dismissed UNESCO's plea of irreceivability. As to the merits, it recommended dismissing her appeal against the decision not to renew her appointment on its expiry on 12 November 1975". The Director-General reserved his position on receivability but endorsed the Board's recommendation on the merits and so informed the complainant by letter of 27 July 1976. That is the decision she now impugns.

E. The complainant apparently sees part of the reason for the decision not to extend her appointment, which she describes as "dismissal", in a "special" performance report which she alleges to be mistaken. To bear out her case she also refers to her length of service: she worked for nine years "for the same employer" and so it cannot be said that she had only "a fixed-term appointment". She asks the Tribunal (a) to rule on the merits of the decision not to extend her appointment; and (b) to award her as damages for "dismissal" a sum equivalent to ten years' wages,

including allowances and pension fund contributions.

F. UNESCO argued before the Appeals Board and still maintains that the complainant's internal appeal was irreceivable because she did not follow the proper procedure. "The first point on which the Tribunal has to rule is whether the Board was right to treat the appeal as receivable." In so far as the complaint seeks a ruling on that point it is receivable. In so far as it seek, a ruling on the merits - the correctness of the administrative decision in the complainant's case - it is irreceivable. "Any other construction would lead only to abuses incompatible with the demands of sound administration and the proper exercise of judicial authority."

G. Assuming its arguments on receivability were rejected, UNESCO would argue, on the merits, that the complainant cannot base her protest against the decision not to renew her appointment on her performance report "since she does not impugn that report before the Tribunal and should therefore be deemed to have accepted it". Besides, she objected to it in her internal appeal and neither the Junior Personnel Advisory Board nor the Appeals Board saw any reason to strike it out.

H. UNESCO observes that the complainant's employment in the commissary was governed by a contract, by works rules and by French labour Law, UNESCO Staff Regulations and Staff Rules being expressly excluded. She was dismissed from the commissary on 6 October 1972 and on 12 November was given a staff appointment governed by the Staff Regulations and Staff Rules. No account was taken of her earlier contract. Her acceptance of the offer of appointment of 26 October 1972 gave rise to a fixed-term contract of one year. The letter of appointment said nothing whatever of earlier service, continuity of service or transfer. Contrary to what she suggests, the Director of Personnel made her no oral promise in November 1972. There was no "negotiation", no "friendly understanding", no "reinstatement", no "transfer", and no contract "regarded as an extension of the contract of appointment to the commissary". Staff Rule 104.6 defines a fixed-term appointment of the kind the complainant was given as "an appointment for a continuous period of less than one year, ending on a date specified in the letter of Appointment". "A fixed-term appointment", the Rule goes on, "may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according, to its terms, without notice or indemnity". Lastly, UNESCO maintains that the decision not to extend the complainant's appointment - which had already been extended by two years - is not tainted with any of the flaws which entitle the Tribunal to interfere in exercise of its limited power of review.

I. UNESCO accordingly asks the Tribunal to declare the complaint receivable in so far as it bears on the receivability of the appeal to the UNESCO Appeals Board and irreceivable as to the remainder; to declare that the appeal to the Appeals Board was procedurally irregular and so irreceivable, or, should the complaint be declared receivable, to dismiss it as wholly unfounded.

CONSIDERATIONS:

As to the receivability of the complaint:

1. Under Article VII, paragraph 1, of the Statute of the Tribunal a complaint is receivable only if the internal means of redress have been exhausted. The Tribunal accordingly has to consider whether a complainant correctly followed the internal procedure which was open to him. A complainant may, for example, properly contend that the internal appeals bodies wrongly refused to hear an appeal submitted to them and that the complaint lodged with the Tribunal is therefore receivable; or an organisation may correctly argue that those bodies acted improperly in ruling on the merits of an appeal and that the complaint is therefore irreceivable.

In ruling on such contentions the Tribunal does not, as the Organization appears to believe, admit the receivability of the complaint itself but merely settles a preliminary point on which the receivability of the complaint depends.

2. In this case, contrary to what the Organization maintains, the complainant properly submitted her appeal to the Appeals Board, the internal appeals body. She has therefore met the requirement that the internal means of redress should have been exhausted.

On 14 October 1975 a personnel officer reminded her that her appointment was to expire on 12 November. After touching on matters of insurance he asked her to sign a "termination form". On 21 October she asked the Director-General to quash the decision to end her appointment. On 23 October the Director of Personnel told her that her

appointment would not be extended and said that his letter alone, and not that of 14 October, might give rise to an appeal. On 3 November she appealed to the Director-General against the decision of 23 October and asked that if it did take effect it should not do so until the Appeals Board had given its ruling. On 4 November she again wrote to the Director-General asking him to disregard her letter of 3 November and confirming her letter of 21 October. On 14 November she asked when the period for lodging an appeal would start to run and on 15 November she appealed to the Appeals Board. On 24 November the Director of Personnel confirmed the terms of his letter of 23 October.

As is stated in the letter of 24 November, the period of fifteen working days within which, according to paragraph 7 of the Statutes of the Appeals Board, the complainant had to protest against the decision not to extend her appointment started to run on 23 October. Her protest to the Director-General on 3 November was therefore within the time limit. It is true that on 4 November she withdrew her letter of the day before. Her reasons for doing so may not be clear, but on 4 November she did expressly repeat her request of 21 October and that again showed her desire to obtain a decision from the Director-General. Since the Director-General made no decision, under paragraph 8 of the Statutes of the Appeals Board the complainant had another fifteen working days in which to appeal to the Appeals Board. She did so within the time limit, on 15 November. Hence she exhausted the internal means of redress and, the other conditions of receivability being met, the Tribunal has to consider the merits of the complaint.

As to the merits:

3. The complainant's case is that while employed in the commissary of UNESCO - from 15 June 1966 to 6 October 1972 - she held an indeterminate appointment and that her staff appointment, at first limited to one year from 13 November 1972 and later extended by two years, was merely an extension of her original appointment. She therefore contends, or at least implies, that on being appointed to the staff she was still employed under a contract of indeterminate duration - in other words, that the decision not to extend her appointment was in fact dismissal.

This reasoning does not square with the facts. The complainant's appointment to the commissary differed in nature from her staff appointment. It is true that under the two appointments she had the same employer. But up to 6 October 1972 she was subject not to UNESCO Staff Regulations and Staff Rules but to works rules and had the status of a "contractual" employee. From 13 November 1972, however, she was a member of the staff proper and as such subject to the Staff Regulations and Staff Rules. The second appointment is therefore to be seen not as a mere extension of the first but as a quite separate, fixed-term appointment. In other words, she was not dismissed: her appointment was not extended.

That conclusion stands despite the statements made by the trade union official who represented the complainant when she changed from one appointment to the other. Not only were those statements denied by the then Director of Personnel but they are not borne out by any other document in the dossier.

4. Being of a discretionary nature, the decision not to renew the complainant's appointment may be quashed only if it was taken without authority, or violated a rule of form or procedure, or was based on a mistake of fact or of law or if essential facts were not taken into consideration, or if the decision was tainted with abuse of authority or if clearly mistaken conclusions were drawn from the facts.

In particular, the complainant's performance report for 1973-74 says that she sometimes failed to show the professional conscientiousness expected of a UNESCO staff member, was unco-operative and was remiss in her work; nor did her somewhat negative attitude make for the efficiency of her unit. That is an adverse assessment and what gives it all the greater weight is the fact that, after contesting it to no avail before the Junior Personnel Advisory Board and then the Appeals Board, in her complaint to the Tribunal she no longer contends that it was incorrect. Hence she does not allege the existence of any flaw which entitles the Tribunal to interfere in exercise of its limited power of review.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right

Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 November 1977.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

Updated by PFR. Approved by CC. Last update: 7 July 2000.