

S. (Nos. 1 and 2)

v.

UNESCO

126th Session

Judgment No. 4036

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr M. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 13 November 2015 and corrected on 4 March 2016, UNESCO's reply of 16 June, corrected on 22 June, the complainant's rejoinder of 1 August and UNESCO's surrejoinder of 10 November 2016;

Considering the second complaint filed by Mr M. S. against UNESCO on 3 November 2016 and corrected on 7 December 2016, UNESCO's reply of 10 April 2017, the complainant's rejoinder of 17 May, corrected on 29 May, and UNESCO's surrejoinder of 5 September 2017;

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

Having examined the written submissions;

Considering that the facts of the cases may be summed up as follows:

The complainant contests UNESCO's decisions to abolish his post and to terminate his appointment.

The complainant was appointed on 30 July 2010 to the post of Senior Programme Specialist, at grade P-5, in the UNESCO Office in Venice. His initial two-year fixed-term contract was extended in 2012 and again in 2014 (from 30 July 2014 to 29 July 2016).

Starting in 2011 UNESCO faced financial constraints due to a reduction in available funds. This led its General Conference to adopt a reduced expenditure plan which, in turn, prompted a reallocation of resources and a restructuring. In Administrative Circular AC/HR/28, published on 31 January 2013, the Administration set out the process to be followed for the redeployment of staff in the event that occupied posts were abolished as a result of the restructuring. On 16 October 2013, by Memorandum DDG/2013/13 addressed to all staff, the Deputy Director-General provided information on the process relating to the Staff Restructuring Plan.

On 14 February 2014 the complainant's supervisor and Director of the Venice Office met with the complainant to inform him that his post had been proposed for abolition and that, if the Director-General approved that proposal, the complainant would receive a notification letter. The complainant requested a meeting with the Assistant Director-General of the Science Sector (ADG/SC) who, by an email of 14 March 2014, confirmed that the complainant's post would be abolished "strictly for budgetary reasons".

By a memorandum of 17 April 2014, the complainant was officially informed that, as a consequence of the budgetary reduction, his post would be abolished with effect from 31 August 2014, and that the possibility of re-assigning him through redeployment would be examined. In that context, the memorandum referred the complainant to a list of vacancies published on the Human Resources Management (HRM) website and invited him to express his interest for any of these posts. It indicated that within the next four months the Redeployment Group would aim to recommend at least two offers of redeployment for the complainant but, in the event that his redeployment was not feasible and he refused to accept an agreed separation, his appointment would be terminated.

On 6 May 2014 the complainant expressed his interest in two of the vacant posts listed on the HRM website. His candidature for these posts was considered by the Redeployment Group in May 2014, but he was not selected for either post. On 6 June 2014, in the context of the redeployment process, he was offered a P-4 post in the UNESCO Office

in Abuja, Nigeria, but he declined the offer. In the period between June and November 2014 he applied for four vacant posts but was not selected.

Prior to that, on 21 June 2014, the complainant had submitted a protest against the 17 April 2014 decision to abolish his post, arguing that it was based on an “unconvincing justification”. He asked the Director-General to re-establish his post by removing it from the list of posts to be abolished. By a memorandum of 25 July 2014, the Director of HRM notified the complainant of the Director-General’s decision to reject his protest and to confirm her decision of 17 April 2014 to abolish his post. On 26 September 2014 the complainant submitted a notice of appeal to the Secretary of the Appeals Board, and on 24 October 2014 he filed a detailed appeal contesting the decision to abolish his post. He asked the Appeals Board, *inter alia*, to revise the process followed for identifying the posts to be abolished; to advise the Director-General to re-establish his post and to reinstate him in that post; and, in case of budgetary constraints, to recommend the abolition of another post at grade P-4 in the Venice Office and to reassign the incumbent of that post through staff rotation.

Around the same time, by a memorandum of 22 October 2014, the complainant was informed that, as all redeployment efforts had been exhausted and no suitable post had been identified, the Director-General had decided to terminate his appointment effective 31 October 2014 and to pay him three months’ salary in lieu of notice. The complainant requested that he be allowed to work during the three-month notice period rather than receive the corresponding payment. His request was granted and, by a memorandum of 28 October 2014, he was informed that his separation would become effective on 21 January 2015. The complainant separated from UNESCO on that date. Shortly before his separation, on 19 January 2015, he filed a formal complaint of harassment against the former Director and the Officer-in-charge of the Venice Office. On 12 June 2015 he was informed that the Director-General had found no *prima facie* evidence warranting further investigation and had thus decided to close the case.

In the meantime, on 21 November 2014, the complainant submitted a protest against the decision of 22 October 2014 to terminate his appointment, arguing that there were no grounds to abolish his post and to terminate his appointment, and requesting that the Director-General extend his appointment by re-establishing his former post. Having received no reply, on 20 March 2015 he submitted a notice of appeal to the Secretary of the Appeals Board, and on 18 April 2015 he filed a detailed appeal contesting the decision to terminate his appointment. He asked the Appeals Board to advise the Director-General to reconsider the decision terminating his appointment, to reinstate him effective 22 January 2015, possibly by re-establishing his former post, and to pay him all salaries and related benefits he would have received as from that date.

The Appeals Board issued its opinion and recommendation on the complainant's first appeal in a report dated 9 July 2015. It recommended that the Director-General consider that the decision to abolish the complainant's post was taken in accordance with existing rules and regulations, that the complainant's request for the abolition of another post in the Venice Office was "outside the [complainant's] scope of interest" and that his non-redeployment and eventual separation were the subject of a separate appeal. The Appeals Board also recommended that the inquiry into the complainant's allegations of harassment be finalised so as to shed light into the circumstances surrounding the abolition of his post, and that he be reimbursed his accommodation and travel expenses. By a letter of 18 August 2015, the complainant was notified of the Director-General's decision to accept the recommendations of the Appeals Board. As regards the complainant's formal harassment complaint, the letter confirmed the Director-General's decision to close the case. That is the decision that the complainant impugns in his first complaint.

On 9 May 2016 the Appeals Board issued its opinion and recommendation on the complainant's second appeal. A majority found that the decision to terminate the complainant's appointment was not solely due to budgetary reasons and that not all opportunities for redeployment had been examined. It thus recommended that the

contested decision be annulled and that the complainant be reinstated in any suitable post. A minority of two members recommended that, in the event that the complainant applied for any vacant post with UNESCO, his status as a former staff member be given due consideration when evaluating candidates. By a letter of 1 August 2016, the complainant was notified of the Director-General's decision not to accept the Appeals Board's recommendations with the exception of the minority recommendation that the complainant be given priority consideration should he apply for any vacant posts with UNESCO. That is the decision impugned by the complainant in his second complaint.

In his first complaint the complainant asks the Tribunal to set aside the decision to abolish his post, to re-establish the post and to declare him its incumbent. Alternatively, he asks the Tribunal to order UNESCO to pay him 200,000 United States dollars in compensation for professional and personal damages and for moral harassment. He claims payment of the salaries that he would have received if his post had not been abolished, with effect from the date of the decision to abolish the aforementioned post until the date of his retirement, or the date of his reappointment in said post. He claims 15,000 dollars in costs.

In his second complaint the complainant asks the Tribunal to set aside the decision to terminate his appointment, to order UNESCO to reinstate him in the position of a Senior Programme Specialist, preferably in his former post, and to grant him the corresponding salary and all benefits with effect from 22 January 2015. Alternatively, he asks the Tribunal to order UNESCO to pay him the salaries, allowances and all benefits to which he would have been entitled if his appointment had not been terminated, with effect from the date of termination until the date of his retirement. He claims 500,000 dollars in compensation for professional and personal damages and for moral harassment, and 15,000 dollars in costs.

UNESCO asks the Tribunal to dismiss both complaints in their entirety.

CONSIDERATIONS

1. The complainant commenced employment with UNESCO in July 2010 as a Senior Programme Specialist, at grade P-5. His contract was extended twice and, most recently, was to expire on 29 July 2016.

2. However, on 14 February 2014, the complainant was informed that his post had been proposed for abolition, and on 17 April 2014 he was officially informed that a decision had been taken to abolish it with effect from 31 August 2014 (the abolition decision). The complainant challenged that decision which culminated in a recommendation of the Appeals Board, in a report dated 9 July 2015, that his internal appeal be dismissed on the footing that the decision to abolish his post had been in accordance with existing rules and regulations. The complainant was informed, by letter dated 18 August 2015, that the Director-General had decided to accept this recommendation. The complainant commenced proceedings in the Tribunal on 13 November 2015 by filing a first complaint impugning this decision of the Director-General.

3. Following the decision to abolish the complainant's post, some steps were taken to redeploy him within the Organization but this was not achieved. On 22 October 2014 a decision was taken to terminate his appointment (the termination decision) and that ultimately occurred, effective 21 January 2015. The complainant challenged this decision which culminated in two sets of recommendations of the Appeals Board, in a report dated 9 May 2016, one set from a majority of members and the other from a minority. In a letter dated 1 August 2016, the complainant was informed that the Director-General had not accepted the recommendations of the majority, the central element of which was the reinstatement of the complainant, but the Director-General had accepted the central recommendation of the minority that did not involve reinstatement but involved a form of preferential treatment were the complainant to apply for a position in UNESCO in the future. The complainant filed a second complaint in the Tribunal on 3 November 2016 impugning this decision of the Director-General.

4. An issue that arises immediately is whether the complaints should be joined. The complainant contends they should, UNESCO contends they should not. In the present case, it is desirable that the two complaints be joined in order to render one judgment. If, in some respect, the abolition decision was tainted by illegality, then that may well have consequences concerning the legality of the termination decision.

5. It is convenient to commence the consideration of the complainant's pleas in both complaints by focusing on aspects of the termination decision. As noted earlier, the Appeals Board in the appeal against the termination decision was divided in its opinion about the recommendations that should be made to the Director-General. Three of the five members of the Appeals Board who considered the termination decision had also been members of the Appeals Board that considered the abolition decision. The report of the Appeals Board of 9 May 2016 concerning the termination decision took a familiar form. It commenced with some introductory paragraphs setting out how the appeal had proceeded, the background to the appeal and the subject matter of the dispute. The report then set out in some detail the arguments of the complainant (as the appellant) and those of the Organization. Reference was then made to the applicable provisions in the Human Resources Manual and to the case law of the Tribunal.

6. The Appeals Board then addressed the merits of the arguments under a heading "Considerations and recommendations" and it did so in eleven numbered paragraphs over two pages. The way the report was drafted suggests that the observations and conclusions in those eleven numbered paragraphs represent, with one possible exception, the considered views of all members of the Appeals Board. In his arguments in the internal appeal, the complainant had identified a number of positions to which he could have been redeployed but was not, and the Appeals Board said, in substance, that this was not disputed by UNESCO. The Board also noted that the redeployment process arising from the restructuring that had imperilled the complainant's further employment with UNESCO had been addressed in a Staff Restructuring Plan, which indicated, as an objective, that staff would receive at least

two offers of redeployment. The Board additionally noted that the complainant had been offered redeployment to one post only. In the penultimate paragraph in this section of its report, the Board said: “The Appeals Board considers that the decision to terminate the appellant’s employment was not solely a consequence of budgetary reduction and that not all the opportunities for redeployment were fully exploited or exhausted at the end of the established period, so as to identify a post to him.” In the final paragraph of its report the Board said: “In view of the above considerations, the Appeals Board invites the Director-General to note that not every effort was made to redeploy the appellant as was the case with the other affected colleagues. The Redeployment Group, even if it was not under any obligation, did not strive to recommend at least two post offers, despite the fact that there were available positions for the appellant’s redeployment. He was not even given some of the options cited in paragraph 36 above.” That paragraph, paragraph 36, referred to some staff being treated as priority candidates or being offered work until the expiry of their contract, as well as to the promotion, recruitment and transfers of some staff to vacant positions without any competitive process.

7. There are many judgments of the Tribunal concerning the obligations of an international organisation towards staff whose positions have been abolished as a result of a reorganization or restructuring. A recent one is Judgment 3908. The Tribunal said in considerations 14, 15 and 16 of that judgment:

“14. In the present case, the Principles [an information circular containing procedures governing, inter alia, the redeployment of staff whose positions had been abolished in a restructuring] could not have circumscribed the obligation of the [International Criminal Court] to explore other employment options that may not have involved the application of the express and prescriptive provisions of the Principles (on the assumption they were lawful). This is particular so having regard to the status of the Principles. They are in a circular promulgated by the Registrar notwithstanding that they were formulated in consultation with staff. Nonetheless the Principles are an instrument of the Registrar. The executive head of an organisation cannot, by edict, absolve the organisation from complying with principles of law applying to international civil servants. If it were otherwise, those principles of law would be at material risk of erosion over time.

15. The Principles provided an advantage that was procedural in nature, to staff whose positions had been abolished. That is to say, they were to be considered first for positions but in a process that had the hallmarks of a competition typically used by international organisations to fill positions either by internal candidates only or external candidates as well. However in the context of the abolition of a position, the organisation's duty to explore reassignment transcends simply providing a procedural advantage and requires the application of process biased in favour of the staff member whose position has been abolished and which is likely to promote appointment to another position. The rationale is obvious. A person who has secured appointment or reappointment to a position within an international organisation can ordinarily expect to maintain the position on the agreed terms of the appointment or reappointment putting aside, for example, illness or incapacity, non-performance or misconduct. In practical terms, staff may make adjustments to their circumstances including financial and family arrangements based on the assumption that they will maintain the position on the agreed terms.

16. Nonetheless, the Tribunal has long recognised the right of an international organisation to restructure and abolish positions (see, for example, Judgment 2742, consideration 34). This will imperil the continuing employment of the occupants of those abolished positions. However a concomitant of that right to abolish positions is an obligation to deal fairly with the staff who occupy those abolished positions. That extends to finding, if they exist, other positions within the organisation for which those staff have the experience and qualifications. The Tribunal accepts that there may be other disqualifying criteria. One might be, in a particular set of circumstances, that the number of staff whose positions have been abolished exceeds the number of available positions. However the imprecise concept of 'unsuitability' as assessed by a selection committee as if it were a competition for initial appointment, might not be enough to disqualify a staff member unless it can be demonstrated that there is a real and substantial reason why a staff member in an abolished position will not be able to perform the duties of the available position satisfactorily notwithstanding they have the required qualifications and experience. This would be all the more so, as is the case in these proceedings, where the functions of the new position reflect some of the functions of the position which is being abolished and there has been no material adverse assessment of the performance of the staff member in the performance of those functions in the abolished position."

8. In the present matter, as noted by the Appeals Board and referred to earlier, UNESCO promulgated Administrative Circular AC/HR/28 on 31 January 2013, which addressed the processes which would be adopted to facilitate the redeployment of staff whose positions

had been abolished. Administrative Circular AC/HR/28 was supplemented by a Memorandum dated 16 October 2013 from the Deputy Director-General, Memorandum DDG/2013/13, which, in several relevant respects, was repetitive of the Circular. Administrative Circular AC/HR/28 established a Redeployment Group comprised of eleven individuals whose status was identified in an annexure to the Circular. The Redeployment Group was tasked with identifying positions to which staff whose positions had been abolished might be redeployed. Administrative Circular AC/HR/28 contained two provisions relied on by UNESCO in these proceedings: one provision was that the Redeployment Group would “strive” to make at least two offers of redeployment to any given staff member. Another was a declaration that the Group was under no obligation to make an offer, if such an offer was not available. However, as noted in Judgment 3908, consideration 14, a document such as an Administrative Circular and what it might say about steps to be taken to redeploy staff cannot circumscribe exhaustively UNESCO’s obligations towards staff whose positions have been abolished.

9. The complainant was offered one post in the redeployment process (a grade P-4 position at UNESCO’s Abuja Office), but he declined the offer. UNESCO relies on this offer as part of its argument that it took adequate steps to redeploy the complainant. The complainant expressed interest in two other positions, which had been listed on the HRM website and to which he could have been reassigned as part of the redeployment process set out in Administrative Circular AC/HR/28 and Memorandum DDG/2013/13. He was unsuccessful in securing appointment to those positions, as they were ultimately filled by officials whose positions also had been abolished. No criticism can be made of UNESCO in following this approach (see the observations of the Tribunal in consideration 16 of Judgment 3908 quoted above).

10. However, more problematic was UNESCO’s approach to the complainant’s attempt to secure at least one of four additional positions for which he applied. UNESCO sought to characterise each of these four positions as “outside the Redeployment Process”. This appears to be

a reference to the fact that they were not positions to which the complainant could have been reassigned as part of the redeployment process set out in Administrative Circular AC/HR/28 and Memorandum DDG/2013/13. However, as discussed in Judgment 3908, considerations 14 to 16, an organisation's obligation to find another position for a member of staff whose post has been abolished extends, at least in principle, to any vacant position within the organisation involving duties which the member of staff would be qualified and able to perform. In this context, UNESCO argues that the complainant should have, but failed to, challenge in separate proceedings his non-appointment to any, or all, of these four additional positions. However, for the reasons just given concerning the extent of the organisation's obligation, he is able to challenge his non-appointment as part of a challenge to the termination of his employment arising from his non-redeployment within UNESCO.

11. In its reply UNESCO described the four positions for which the complainant applied and the reason why he was not selected for any of them. One position for which the complainant unsuccessfully applied was the position of Head of Office and UNESCO Representative, Sudan, a grade P-5 position. That was the grade at which he was then employed. Having applied for the position, the complainant was interviewed on 28 July 2014 by a panel described, in UNESCO's reply, as "composed of high-level management". An obvious inference to be drawn from the fact that he applied is that he was interested in the position. Whether his interest was acute, moderate or even marginal was, for present purposes, beside the point. He was sufficiently interested to make the application and submit to interview. In relation to the complainant's application the panel said:

"During the interview, the responses of the candidate were generic and superficial, lacking in-depth argumentation on the various issues raised, such as programmatic priorities of UNESCO in Sudan, cooperation with [the United Nations Country Team] and experience and prospects on fundraising.

The panel considered that although the candidate was meeting the basic requirements and his experience in the Venice Office could be relevant to the post, he failed to develop on his programmatic and managerial experience. He appeared to be lacking real motivation for the post, enthusiasm, and was unable to show any strategic vision for the new job/position he was applying to."

12. It is not the Tribunal's role in a case such as the present to engage in the discretionary evaluation of whether an applicant for a post should be appointed to it. However, the evaluation of the complainant in the preceding commentary does not point to a lack of skills or qualifications that would necessarily preclude appointment. This evaluation was as if the complainant was being assessed in a competitive process and, for present purposes, without paying any regard to the fact that the complainant was then a member of staff whose post had been abolished and was facing the termination of his employment if another post within the Organization could not be found. This failure to pay regard to the complainant's position manifests a material flaw in the redeployment process broadly analogous to the flaw identified in Judgment 3908.

13. In the result, the termination of the complainant's employment was tainted by the failure of the redeployment process. The complainant lost a valuable opportunity to remain employed with UNESCO and to secure further employment when his contract expired in July 2016. An order of reinstatement is now inappropriate given that his contract would have expired in 2016. However, the complainant is entitled to moral and material damages which the Tribunal assesses in the sums of 30,000 and 60,000 United States dollars respectively. It is unnecessary to address other aspects of the pleas concerning the termination decision.

14. It is necessary briefly to address the arguments of the parties in relation to the abolition decision. It is to be recalled that the Appeals Board did not find any flaws in the decision-making. The immediate genesis of the abolition decision was a memorandum of 14 January 2014 from the ADG/SC to the Director-General responding, in part, to a significant reduction in available funds. The January 2014 memorandum explained, in a rational and balanced way, what was proposed and how that might be reflected in the abolition of posts. Annex V to the January 2014 memorandum identified proposed Science Sector staff changes in the Field Offices, including the maintenance of only two of the four posts in the Venice Office and the redistribution of resources to Africa. It was in this context that a proposal emerged to abolish the complainant's

post that was discussed with the complainant on 14 February 2014. A summary of that discussion, the substance of which is not contested by the complainant, is in an email of that date. Again, the reasons given to the complainant at that meeting appear to reflect a rational and balanced proposal, albeit one which would adversely affect the complainant.

15. It is often the case in a challenge to a decision to abolish a post that the aggrieved staff member, in this case the complainant, will develop arguments, often at length, as to how the restructuring might have been done differently and without the consequence of their post being abolished. But whether it could have been done differently is usually, as it is in this case, beside the point. It is sufficient for the organisation to point to legitimate reasons for the action actually taken. UNESCO has done so in this case. The complainant has not demonstrated that the decision to abolish his post was arbitrary or tainted by harassment and discrimination. His pleas are unfounded.

16. The complainant is entitled to an order for costs which are assessed in the sum of 9,000 euros. An oral hearing, as sought by the complainant, is unnecessary as the material provided by the parties has been sufficient to deal with their arguments.

DECISION

For the above reasons,

1. UNESCO shall pay the complainant 30,000 United States dollars by way of moral damages.
2. It shall pay the complainant 60,000 United States dollars by way of material damages.
3. It shall also pay the complainant 9,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ