

SEVENTY-SECOND SESSION

In re AHMAD

Judgment 1164

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rashid Ahmad against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 15 January 1991 and corrected on 4 February, UNESCO's reply of 22 March, the complainant's rejoinder of 23 April and the Organization's surrejoinder of 28 May 1991;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Regulation 1.2, UNESCO Manual items 2405.C.1.a and 2445.D and paragraph 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a citizen of Pakistan who was born in 1938, joined the staff of UNESCO at headquarters in Paris in 1974. He was employed as chief internal auditor at grade P.4 in the Bureau of the Comptroller. He had his post upgraded and was promoted to P.5 in 1977. He held fixed-term appointments.

In 1981 he was given the duties of Inspector-General and in 1982 was appointed to the post, at grade D.1.

By a minute of 7 December 1987 the Director-General transferred him with immediate effect to the Principal Regional Office for Education in Asia and the Pacific, known as PROEAP, in Bangkok. He was assigned at grade D.1 to the office of the Director of PROEAP and was to help with regional co-ordination and management. He himself went to Bangkok but his family stayed in Paris. A notice of personnel action dated 1 February 1988 stated "06/12/88" against the heading "Expected duration of assignment", with a footnote which read: "Subject to Staff Regulation 1.2". Regulation 1.2 makes staff subject to assignment by the Director-General with due regard to their qualifications and experience, to any post in the Organization.

By a telex of 21 November 1988 the Bureau of Personnel extended his assignment to Bangkok by over five months, to 31 May 1989. In a letter of 22 December to the Director-General he expressed surprise at that decision and said that he wanted to go back to "a suitable post at headquarters". In his reply of 21 February 1989 the Director-General said that no suitable post had yet been found for him and suggested that transfer to another agency might be "the best course of action". In a letter of 7 March 1989 to the Director-General the complainant again expressed a wish to go back to headquarters but also interest in an inter-agency transfer or in the directorship of PROEAP. By a telex of 1 June the Director of the Bureau of Personnel informed him that the Director-General had extended his assignment to Bangkok by another three months, to 31 August, "pending new examination of his transfer request".

By a letter of 2 August 1989 the Deputy Director-General for Management informed him that for want of a suitable post at headquarters he was to head the Organization's office at Lagos, in Nigeria, still at D.1. In a letter dated 11 August to the Deputy Director-General he asked the Director-General to reconsider. In a letter of 28 August the Deputy Director-General answered that the Lagos post matched his qualifications and experience. By a telex of 1 September the Director of the Bureau of Personnel informed him of yet another extension in Bangkok, to 31 October. By a memorandum of 25 September to the Director-General he protested against transfer to Lagos. He returned to Paris. On 30 November the Director of the Bureau of Personnel informed him that the Director-General confirmed the transfer. He filed notice of appeal with the Appeals Board on 13 December claiming reinstatement as Inspector-General or in some other suitable headquarters post and material and moral damages.

In mid-December 1989 the Director-General informed the Nigerian Government of his intention of appointing the complainant to Lagos as from 1 December 1989. The Government having given clearance, the Administration asked him by a memorandum of 30 March 1990 when he could take up duty. By then he was in poor health. On 1

April he sent the Director of the Bureau of Personnel a medical certificate dated 29 March which said that he had a heart ailment and for an indefinite period would be unfit to go abroad. On 5 June a professor of medicine at a heart clinic in Paris declared him unfit for any extended stay in Nigeria. In a minute of 9 July to the Deputy Director-General the Chief Medical Officer declared him to be fit for work in any one of the field offices on an appended list "provided there is not too much professional stress involved". Lagos was on the list.

By a memorandum of 3 August the Director of the Bureau of Personnel informed the complainant that "in view of the medical problems encountered for [his] assignment to Nigeria" the Director-General had decided to make him liaison officer in Vienna, where he should take up duty by 3 September.

The Appeals Board was so informed. It reported on 2 October 1990. In its view the complainant showed no cause of action since he was to go to Vienna anyway instead of Lagos, and it recommended rejecting his appeal. By a letter of 19 October 1990, the decision impugned, the Director-General informed the complainant of the rejection of his appeal.

B. The complainant observes that since the purpose of his internal appeal was reinstatement at headquarters he still has a cause of action even after the replacement of Lagos with Vienna.

He submits that he was not consulted before transfer to Bangkok but was just informed of a decision already taken. That was in breach of the Organization's duty of prior consultation as prescribed in the Tribunal's case law and in UNESCO Manual items 2405.C.1.a and 2445.D. There was further breach of 2445.D.1, which says, as to "transfers from headquarters to the field", that "if the period of transfer does not exceed two years, the Organization normally gives the staff member a guarantee that he will be reintegrated in the post held before transfer" or at least in "a post at headquarters at the grade held before transfer". The complainant was given no description of his duties in Bangkok and only nebulous duties from October 1988 until August 1990. In view of his fine record the treatment of him was blatantly discriminatory and actuated by personal prejudice caused by his giving offence in his work as Inspector-General. Like many other senior staff since 1987, he has been victimised.

The decision to send him out to Lagos was even more deeply flawed. Again he was not consulted beforehand. It was a hidden disciplinary sanction. He got no guarantee of reinstatement at headquarters. There was personal prejudice against him. The suggestion that he leave UNESCO altogether was harassment. The Organization had a duty to look for someone else who was fit and willing to go to Lagos. Had it consulted its medical service earlier it would have learned of the medical objections to sending him.

He claims reinstatement in the post of Inspector-General or in another permanent D.1 post at headquarters and an award of damages for serious professional, material and moral injury.

C. In its reply UNESCO recounts the complainant's career and the circumstances surrounding its decisions of 7 December 1987 to transfer him to Bangkok, of 2 August 1989 to send him to Lagos and of 3 August 1990 to move him to Vienna. The only decision he has challenged under paragraph 7 of the Statutes of the Appeals Board is the transfer to Lagos. As to the other two he has failed to exhaust the internal means of redress and his objections are therefore irreceivable under Article VII(1) of the Tribunal's Statute. His challenge to the decision of 2 August 1989 is irreceivable because the Director-General reversed it and he never actually went to Lagos: he shows no cause of action.

UNESCO's pleas on the merits are subsidiary. It submits that the impugned decision complied with the material rules and was taken in keeping with the proper procedure. As Staff Regulation 1.2 recognises, the Director-General has discretion to transfer staff in the Organization's interests and his exercise of it in this case shows no fatal flaw. The Tribunal may not replace with its own the Director-General's assessment of the complainant's qualifications and experience and his fitness for the post he was assigned to. Besides, the Director-General was right to regard him as qualified for the Lagos post. UNESCO acted in good faith and in its own interests in that the complainant's transfer was intended to further its policy of decentralisation. It paid due regard to his own interests. It was under no duty to consult him beforehand, such a duty being inferred only from the circumstances of each case. It is mistaken to construe Manual item 2445.D so as to restrict the Director-General's discretion under Regulation 1.2. For several years the established practice has been to transfer staff from one field situation to another without necessarily reinstating them at headquarters. The Organization gives illustrations of recent practice.

Since the complainant has failed to show personal prejudice, discrimination or the injury he alleges his claim to

damages is groundless.

D. In his rejoinder the complainant points out that in his internal appeal he claimed not just reversal of the decision of 2 August 1989 to transfer him to Lagos but also reinstatement at headquarters and an award of damages: the two latter claims hold good notwithstanding the reversal of the decision and his complaint therefore does show a cause of action. He refrained from challenging at the time his transfer to Bangkok because he wanted to show his good faith and devotion to the Organization. Had he been brought back to headquarters at the end of his stint in Bangkok he would probably never have appealed at all.

He enlarges on his pleas on the merits, maintaining in particular that, whether or not there was a written requirement, the Organization had the duty to consult him about each of his transfers. Many aspects of its treatment of him, which he describes at length, show abuse of authority and malice. Between November 1987 and the end of 1990 there were many D.1 vacancies at headquarters that he could have been appointed to. He presses his claims.

E. In its surrejoinder the Organization seeks to refute the pleas in the rejoinder and develops its reply. In its submission the complaint is irreceivable because the only decision the complainant impugns is the superseded one transferring him to Lagos; the other two decisions on transfer, which he has not formally appealed against, are not under challenge. Many of the issues he raises are irrelevant on that score.

By several acts which UNESCO describes he relinquished any right he might have had, when it was decided to post him to Lagos, to be reinstated instead at headquarters. It showed good faith, acted in its own interests and paid due regard to the complainant's as well. He fails to bear out his charges of prejudice.

CONSIDERATIONS:

1. The complainant joined the staff of UNESCO at headquarters in Paris in 1974. He held fixed-term appointments. In 1981 he was given the duties of Inspector-General and in 1982 was appointed to the post, at grade D.1.

In the circumstances that are described under A above three decisions were taken that affected the complainant's career:

- (a) a decision of 7 December 1987 transferring him from headquarters to Bangkok;
- (b) a decision of 2 August 1989 transferring him from Bangkok to Lagos; and
- (c) a decision of 3 August 1990 cancelling his transfer to Lagos and transferring him to Vienna instead.

2. On 13 December 1989 he filed notice of appeal with the Appeals Board seeking the quashing of his transfer to Lagos; reinstatement in the permanent post he had held at headquarters before his transfer to Bangkok, or failing that, in a permanent post at headquarters at grade D.1; and compensation for professional, material and moral injury. In its report of 2 October 1990 the Board recommended rejecting his appeal, and by a letter of 19 October 1990, the decision impugned, the Director-General accordingly rejected it.

Receivability

3. Any challenge by the complainant to his transfers to Bangkok and to Vienna, and any related claims, are irreceivable because he failed to lodge an internal appeal against either of those decisions in accordance with the Staff Regulations and Staff Rules. To that extent his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

4. As to the decision to send him to Lagos and his related claims, his complaint is again irreceivable insofar as he is objecting to that assignment because the decision was reversed: since he never actually went to Lagos, he can show neither any cause of action nor any material or moral injury on that account.

5. He is, however, right in contending that since one purpose of his internal appeal was to claim reinstatement in a post at headquarters - a claim which he presses in his complaint to the Tribunal - he still has a cause of action even after the reversal of the transfer to Lagos. To that extent his complaint is receivable. The only remaining issue is therefore whether he had any right to reinstatement at headquarters on the termination of his assignment to

Bangkok.

The complainant's claim to reinstatement at headquarters

6. The complainant relies on Manual item 2445.D in support of his claim to such reinstatement, and the relevant passages read:

"Transfers from headquarters to the field ... A staff member who, at the time of transfer, holds an indeterminate appointment or a fixed-term appointment that will expire after the end of the period of transfer, is given a guarantee in accordance with the following provisions:

1. if the period of transfer does not exceed two years, the Organization normally gives the staff member a guarantee that he will be reintegrated in the post held before transfer. If, in exceptional circumstances, the department director requests, and Director PER [the Bureau of Personnel] agrees that the post should not be held open for such reintegration, the staff member is given a guarantee that, upon expiry of the period of transfer, he will be assigned to a post at headquarters at the grade held before transfer ...

4. the related Notice of Personnel Action (form 170) specifies the nature of the guarantee accorded to the staff member."

The complainant held a fixed-term appointment at the time of his transfer to Bangkok, and the total period of that transfer, which began at 7 December 1987 and ended some time in November 1989, was under two years.

7. UNESCO Staff Regulation 1.2 reads:

"Staff members are subject to the authority of the Director-General, and to assignment by him, with due regard to their qualifications and experience, to any post in the Organization. They are responsible to him in the exercise of their functions."

Relations between the Organization and its staff are governed primarily by the Staff Regulations, of which that provision forms part, the Staff Rules and the Manual. The introduction to the Regulations says that the Rules must be consistent with them. The Rules are elaborated on in the Manual, which in turn must yield to the Regulations in the event of conflict.

So Manual item 2445.D.1 must not be so construed in this instance as to conflict with Regulation 1.2. It would unduly hamper the Director-General's exercise of his discretion if it were so interpreted as to compel him to reinstate a staff member at headquarters even if the Organization's interests required his remaining in the field.

8. Manual item 2445.D.1 confers no absolute right on the staff member since it merely says that the Organization "normally" gives a guarantee of reinstatement. Nor, in this particular case, does the complainant cite any personnel action form - such as clause 4 of the item requires - which "specifies the nature of the guarantee" granted to him on transfer to Bangkok; indeed the form he does produce actually cites Regulation 1.2, the provision that vests broad authority in the Director-General to transfer staff.

9. The Tribunal has held - for example in Judgment 608 (in re Macchino Farias) - that the intent of a rule "is not invariably to be found in a strict grammatical construction of the language used. The nature and purpose of the [text] must be considered; also its history and the manner in which it has been applied".

The Organization explains in its reply that the text of Manual item 2445.D does not reflect its present practice. It says that, when introduced in 1966, the item was intended to encourage holders of appointments under its regular programme to take up posts for technical assistance in the field by guaranteeing their reinstatement at headquarters. It takes the view, however, that the Manual item does not require it to reinstate staff at headquarters where the Director-General considers that it is in the Organization's interests that they should not be so reinstated. It has thus, where its interests so warrant, been transferring staff from one field station to another without first reinstating them at headquarters. It gives examples of that practice, which it says the Director-General's policy of decentralisation has confirmed in recent years.

In his rejoinder the complainant neither denies that such is the Organization's consistent manner of construing Manual item 2445.D nor establishes that the refusal to reinstate him at headquarters was not in the Organization's

interests.

10. In view of the foregoing the Tribunal holds that the Director-General committed no mistake in considering that the complainant had no right to reinstatement at headquarters on leaving Bangkok. There is therefore no need to entertain the Organization's plea that he is estopped by his own acts from asserting any such right.

11. Lastly, the complainant offers not a shred of evidence to bear out his allegation that the decision not to reinstate him at headquarters was prompted by personal prejudice.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
P. Pescatore
A.B. Gardner