

The Administrative Tribunal,

Considering the second complaint filed by Ms I.A. A.-B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 October 2005 and corrected on 18 January 2006, the Organization's reply of 27 March, the complainant's rejoinder of 19 May, UNESCO's surrejoinder of 20 June, the complainant's additional submissions of 18 July and the Organization's observations thereon of 8 August 2006;

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. Facts relevant to this case are to be found under A in Judgment 2428, delivered on 6 July 2005, concerning the complainant's first complaint. Suffice it to recall that a number of director posts, including the complainant's grade D-1 post, were abolished with effect from 1 October 2000 as part of a restructuring of UNESCO's Secretariat. Some of the staff members concerned were appointed to other director posts at Headquarters. Those for whom no suitable director post could be found at Headquarters – as was the case for the complainant – were given three options: appointment at the same grade to a vacant director post in the field, appointment to a lower-level post, or agreed separation. In April 2002 the complainant accepted, "on a temporary basis", the offer of a transfer to a grade P-5 post at Headquarters, but she then lodged an appeal against that transfer, objecting in particular to her new title and job description. In an Opinion issued on 19 December 2003 the Appeals Board recommended "that every effort be made to promote the [complainant] to a D-1 post at an early date" and that, in the meantime, "she should be placed at a P-5 post where her feeling of marginalization may be removed". However, the Director-General did not accept the Board's recommendations, and he rejected the complainant's appeal by a decision of 23 February 2004, which the complainant challenged in her first complaint. In Judgment 2428 the Tribunal set aside the Director-General's decision on the grounds that it contained no indication of the reasons why he had chosen not to accept the Board's recommendations. The Tribunal therefore sent the matter back to the Organization for a new decision and awarded the complainant 1,000 euros in costs.

On 4 August 2005 the Director-General wrote to the complainant and, referring to Judgment 2428, confirmed his decision to reject the Appeals Board's recommendations. He explained that he considered the Board's recommendations to be devoid of any basis in fact or in law. In particular, he pointed out that the Board's finding that the complainant's "objection to the downgrading of her post [was] not sustainable" was inconsistent with its recommendation "that every effort be made to promote [her] to a D-1 post at an early date". Moreover, he emphasised that there is no individual right to promotion, and that any promotion should be made on a competitive basis, through selection to a vacant post. Consequently, the Organization could not commit itself to giving the complainant preferential treatment in any selection process, but would take into consideration her application to any post in conformity with Staff Regulations 4.2 and 4.3.2. Lastly, the Director-General informed the complainant that, taking into account the explanations thus given, he had decided to instruct the Bureau of Human Resources Management to "seek with [her] an amicable solution on this matter", failing which he authorised her to appeal directly to the Tribunal. That is the impugned decision.

B. The complainant contends that UNESCO failed to act in order to identify a suitable post for her. She recognises that the Organization has a wide discretion in undertaking reforms relating to the structure of the Secretariat, but considers that it has certain obligations towards the staff members affected by such reforms, including an obligation to search in good faith for positions they may be able to fill. She asserts that no formal offer of a field post was ever made to her, and that although she applied for eight grade D-1 posts at Headquarters between 2000 and 2003, no tangible efforts were made to consider her candidature. She asks the Tribunal to order the Organization to produce written evidence of its efforts in this respect, including the evaluation sheets drawn up during the respective selection procedures for the eight posts for which she applied.

The complainant accuses UNESCO of having breached a promise made by the Director-General in a letter of 7 December 2001 addressed to the Minister of Education of the Kingdom of Saudi Arabia, to the effect that her candidature for other posts would be given “every consideration”. She submits that that promise satisfied all the criteria which, according to the case law, had to be met in order for it to be binding on the Organization, and she asks the Tribunal to order UNESCO to furnish written proof that its promise has been followed up.

Recalling Judgment 1756, she states that the Organization is obliged to deal with its staff in good faith and to avoid causing them undue injury. She argues that by transferring her to a post “without any meaningful job description”, whilst leaving one of her subordinates to act as ad interim Chief of her Section, UNESCO committed a breach of good faith. As a further example of the Organization’s failure to show good faith, she submits that despite the statement in the Director-General’s letter of 4 August 2005 that the Bureau of Human Resources Management would be instructed to seek an amicable solution with her, that Bureau has never contacted her.

Lastly, she contends that following the objections she raised concerning her transfer to a lower-grade post, and her subsequent appeal against that transfer decision, she has been subjected to “acts lacking respect for [her] dignity as well as incessant harassment”. She alleges in particular that the Administration consistently refused to provide her with a periodic performance report, despite her repeated requests.

The complainant asks the Tribunal to quash the Director-General’s decision of 4 August 2005 and to order UNESCO to pay her 20,000 United States dollars in moral damages and 4,000 dollars in costs.

C. In its reply UNESCO submits that the complainant’s claim for moral damages is inadmissible to the extent that it is based on issues that are the subject of a second appeal, namely the appointment of a candidate other than herself to a post for which she had applied, her periodic performance report and her new job description. It adds that the Director-General’s final decision on that second appeal is not before the Tribunal.

More generally, the Organization points out that the arguments put forward by the complainant have already been addressed in its earlier submissions before both the Appeals Board and the Tribunal, to which it refers expressly. It considers that her complaint is devoid of any substantive argument which might lead one to question the legality of the impugned decision of 4 August 2005.

UNESCO recalls that in the proceedings before the Appeals Board the complainant challenged not only the legality of the decisions to abolish her grade D-1 post and transfer her to a grade P-5 post, but also her job description and title. It emphasises that the Board found no fault with the challenged decisions. It also draws attention to the fact that the complainant refused two offers of a D-1 position in the field, one in Amman (Jordan), the other in Bonn (Germany), choosing instead to stay at Headquarters.

The Organization asserts that the impugned decision is based on the Staff Regulations and avoids any confusion which might arise from the Appeals Board’s recommendations. It points out that in its report the Board recommended that the Director-General “may consider promoting the [complainant], as permissible, under the Staff Regulations and Staff Rules, to a D-1 post at an early date”. In the light of that statement, the complainant cannot claim that the Board’s recommendation implied that she should be given preferential treatment for a D-1 post at Headquarters, even if in the course of the competition procedure she were not found to be the most suitable candidate. Moreover, the Director-General could not give such preference without breaching Staff Regulations 4.2 and 4.3.2.

UNESCO rejects the complainant’s allegation that it breached a promise made to the Minister of Education of the Kingdom of Saudi Arabia. The so-called “promise” merely entailed giving consideration to her applications, and she has not shown that any such promise has been breached.

Lastly, the Organization draws attention to the fact that the complainant consented to her transfer to a P-5 post, and that her remuneration in her new post is higher than that which she received in her D-1 post. It considers that in the absence of any evidence of an illicit act, her claims for damages and costs should be rejected.

D. In her rejoinder the complainant denies having linked her claim for moral damages to issues that are the subject of her second appeal. Those issues, she says, were mentioned in order to illustrate her personal situation. She maintains that by the time she lodged her complaint, the Organization had still not contacted her with a view to seeking an amicable settlement.

E. In its surrejoinder UNESCO reiterates the arguments presented in its reply. It also produces a statement written by the Director of the Bureau of Human Resources Management, detailing the steps taken by the Administration with a view to reaching an amicable settlement.

F. In her additional submissions the complainant continues to deny that any such steps were taken by the Organization. She points out that the statement of the Director of the Bureau of Human Resources Management is not corroborated by facts or by written evidence.

G. In its final observations the Organization states that it does not wish to comment on the complainant's additional submissions, but it produces a further copy of the statement by the Director of the Bureau of Human Resources Management.

CONSIDERATIONS

1. In Judgment 2428 the Tribunal, referring to Judgment 2092 under 10, held that no further reasons are required when the executive head of an organisation follows the recommendations of an internal appeals body, but that they are necessary when those recommendations are not endorsed.

In the case leading to Judgment 2428, the Appeals Board had recommended "that every effort be made to promote the [complainant] to a D-1 post at an early date", and that, in the meantime, "she should be placed at a P-5 post where her feeling of marginalization may be removed". The Director-General decided not to accept the Board's recommendations and so informed the complainant by a letter dated 23 February 2004, but that decision was quashed by the Tribunal for failure to give reasons.

2. In the new impugned decision of 4 August 2005, the Director-General does provide the reasons for his refusal to accept the Board's recommendations, which he describes as being "devoid of any basis either in fact or in law". In this regard, he draws attention to the incompatibility between the Board's finding that the complainant's "objection to the downgrading of her post [was] not sustainable" and its recommendation that she be promoted "at an early date". Above all, however, he explains that any promotion should be made on a competitive basis, and that no preferential treatment is to be given in any selection process to any particular staff member. This is a legally correct statement which the Tribunal finds sufficient and reasonable.

3. The complainant contends that the original decision to place her in a P-5 post, with a salary slightly higher than that which she received in her previous D-1 post, and her subsequent retention in a P-5 post constituted a downgrading and involved a lack of good faith and failure to respect her dignity. She points to her numerous but unsuccessful applications for D-1 posts at Headquarters and contends that there is no meaningful content to her job description. Additionally, she complains that she was not able to retain the title which pertained to her former D-1 position. She argues that want of good faith is established by UNESCO's failure to honour a promise to the Minister of Education of the Kingdom of Saudi Arabia that "should [she] apply for transfer to any other post, her candidature will again be given every consideration".

It appears that the letter to the Minister of Education falls short of a promise either to promote or transfer the complainant. It simply undertakes to give consideration to any transfer for which she might apply.

4. The complainant's D-1 post was abolished as a result of a restructuring. The Organization offered her two D-1 field-office positions, one in Amman and one in Bonn. She contends that these were not formally offered to her but that is of no consequence. Additionally, she was offered an agreed separation. Instead she elected to accept, on a temporary basis, a P-5 post from January 2002 with a higher salary than in her previous D-1 position. In the meantime, her contract was extended. These actions on the part of the Administration indicate that appropriate steps were taken, in the context of the restructuring, to find a suitable post for the complainant.

5. Doubtless there are aspects of the complainant's present position which she finds uncomfortable. However, it is often the case that the wishes of staff members cannot be fully accommodated in a restructuring. In the present case, the matters which, the complainant contends, indicate bad faith and lack of respect for her dignity are properly to be seen as the consequences of the restructuring. Although she may find that her position is not ideal, the matters of which she complains are adequately taken into account by that aspect of the impugned decision, by which the Director-General indicated that he would instruct the Bureau of Human Resources Management to seek

an amicable solution with her. They are not matters which vitiate the impugned decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet