

SEVENTY-FIRST SESSION

***In re* LOUIS**

Judgment 1131

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Frantz Marceau Louis against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 13 September 1990 and corrected on 26 September, UNESCO's reply of 30 November 1990, the complainant's rejoinder of 8 February 1991 and the Organization's surrejoinder of 5 April 1991;

Considering Articles II, paragraph 5, and Article VIII of the Statute of the Tribunal, UNESCO Staff Regulations 4.4 and 9.1.2, UNESCO Staff Rules 104.6 and 109.5, paragraph 7 of the Statutes of the UNESCO Appeals Board and paragraph 2910.C of the Manual of the Organization;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a citizen of Haiti, joined UNESCO in 1975 under a fixed-term appointment for one year at grade P.2. He had his appointment extended at the same grade but by different lengths of time. In April 1978 UNESCO transferred him to Dakar, in April 1982 to Bridgetown, in Barbados, and finally on 15 April 1987 to the Organization's New York office on a post, No. USA/REX/007, as an assistant administrative officer in the External Relations and Information Sector (REX) for one year. On 21 January 1988 REX filled up a staff requisition for extension of his appointment by two years, but nothing came of it.

In 1987 UNESCO had run into serious financial difficulties and in November of that year its General Conference adopted a resolution, No. 24C/21, asking the Director-General to keep any rise in expenditure on staff within the limits of the approved budget for 1988-89. So as to keep down such expenditure the Director-General decided to stop regular recruitment. In December he set up a working party under the Deputy Director-General to advise on which posts to abolish or leave vacant. In a memorandum of 17 December 1987 to the Assistant Directors-General the Deputy Director-General set at mid-January 1988 the deadline for making specific proposals on the posts to be declared vacant by July 1988.

In a memorandum of 21 January to the Deputy Director-General the Assistant Director-General in charge of REX listed 11 budget posts in the Sector to be made vacant and suggested that "a new study be undertaken when the Inspector-General finishes his study of REX's functions and workload to determine which two posts should be added to the present list". The Deputy Director-General commented on the proposed list in a memorandum of 22 January and said: "The Director-General will be able to determine in the light of the Inspector-General's findings which two posts to add to the list". The Inspector-General submitted on 19 February 1988 his report on the structure of REX and another sector.

In a memorandum of 22 February 1988 to senior officers the Deputy Director-General listed the budget posts to be declared vacant and the ones in REX included the complainant's; the period during which it was to be blocked ran from 1 July 1988 to 31 December 1989. On 23 February 1988 he issued an administrative circular, No. 1583, informing the staff of what was being done and of the appointment of joint bodies to ensure fair and objective consideration of the case of everyone under threat of termination. He set up a Joint Co-operation Committee to consider the proposals and make recommendations to him and a Mediation Committee to hear objections from individual staff members to his decisions.

The complainant got notice in a telex dated 11 March 1988 of the provisional extension of his appointment to 30 June 1988. At a meeting it held from 16 to 30 March 1988 the Joint Co-operation Committee proposed assigning him to a vacant post for a translator in the General Programmes and Programme Support Sector. But in a

memorandum of 23 March 1988 the Assistant Director-General in charge of that Sector answered that the complainant was not qualified. In its report of 30 March 1988 the Committee recommended keeping him on in the same post in New York and letting REX "find other ways to compensate". By a memorandum of 27 May 1988 the acting Director of the Bureau of Personnel informed him that as neither the Committee nor the Administration had a suitable post to offer him the Director-General could not keep him on beyond 31 August 1988; though he was to be separated on the expiry of his appointment the Director-General was willing to apply Staff Regulation 9.1.2 so that he would get the largest possible termination indemnity.

The Director-General then decided to refer his case to the Mediation Committee. In the report it submitted on 12 July it suggested a post it thought was in line with his qualifications. But the post was not vacant and the Director-General turned down the suggestion.

On 29 July he submitted an appeal to the Director-General under paragraph 7(a) of the Statutes of the Appeals Board against his separation from service. By a telegram dated 17 August 1988 the acting Director of the Bureau of Personnel notified him that the Director-General had, in the light of the Mediation Committee's report, ordered the Committee to review his case at its September meeting; in the meantime his appointment was extended to 30 September 1988.

By a memorandum of 29 August in answer to the complainant's appeal the acting Director told him that the Director-General was "unable to accept the Mediation Committee's recommendations" and restated the terms of the telegram of 17 August.

On 26 September 1988 the complainant filed notice of appeal with the Appeals Board. At the end of September a telegram informed him that his appointment was being extended one last time to 15 October. In its report of 17 April 1990 the Appeals Board unanimously recommended rejecting his appeal, though it did call attention to a number of mistakes "in the handling of Mr. Louis' case"; for example, the decision to keep his post vacant had been taken by the Deputy Director-

General and not by the Assistant Director-General in charge of REX. By a letter of 12 June 1990, the decision impugned, the Director-General informed the complainant that he had decided to accept the Board's recommendation.

B. The complainant submits that the decision to separate him from service is unlawful on several counts.

It is tainted with misuse of authority: he got no notice of the real grounds for termination and was never given copies of the documents he had asked for. The decision was not taken in UNESCO's interests. The only reason given in the letter of 27 May 1988 was "budget restrictions" and it is not valid in law. Besides, it is mistaken in fact because UNESCO recruited and promoted people during the material period, and after he had left his duties were given to others.

The Director-General acted in breach of Staff Rule 109.5(b) by failing to take account of such essential facts as his efficiency, competence, integrity and length of service. Other points he overlooked were that no post was abolished and no staff were made redundant, he was denied his right to a hearing, and the Joint Co-operation Committee and Mediation Committee both recommended other assignments for him.

The decision he is impugning is based on mistakes of fact and of law and on a misreading of Resolution 24C/21 and the material rules. Contrary to what the Organization makes out, his separation was not due to the expiry of his appointment since by the date of its expiry, 15 April 1988, no formal decision had yet been taken not to extend it.

The Appeals Board too erred in fact and in law. The procedure it followed offended against elementary standards of justice. It did not meet for 15 months after he had lodged his appeal; and its delaying caused him moral and financial injury. All it did was to endorse the Director-General's decision: that, and its failure to draw the proper conclusions about the Organization's liability, reveal how prejudiced it was.

The decision shows formal and procedural flaws. UNESCO made no attempt, as was its duty under paragraph 2910.C of its Manual, to look for another assignment for him. Nor did it comply with Staff Regulation 4.4, which says that "staff members (and former staff members with at least one year's service, separated during the previous two years owing to the abolition of posts) shall be given priority of consideration for vacant posts". The Joint Co-operation Committee and the Mediation Committee suggested several posts but the Director-

General took no account of them.

UNESCO broke its promise of 21 January 1988 to keep him on for another two years.

There was a procedural flaw in that the decision to make his post vacant was taken by the Deputy Director-General, not by the Assistant Director-General in charge of REX, who, according to the circular, was the only officer competent to take the decision.

Lastly, UNESCO's disgraceful and callous treatment put him under endless stress. The injury he sustained is moral as well as financial. His professional reputation at UNESCO and in the United Nations system at large has suffered.

He asks the Tribunal to quash the decision of 27 May to dismiss him, as confirmed on 12 June 1990; to order UNESCO to pay him the equivalent of five years' net base salary and allowances - his reinstatement being neither possible nor desirable - plus the equivalent of two years' salary and allowances in damages and other sums under various heads. He claims interest at the rate of 10 per cent a year on all the amounts due him as from 27 May and an award of costs. The total he claims comes to 500,397.71 United States dollars.

He also requests the production of various documents including the recommendations of the Joint Co-operation Committee and the Mediation Committee and the submissions both parties made to the Appeals Board.

C. In its reply UNESCO contends that the complaint is devoid of merit.

It submits that there was nothing wrong with the procedure which led to the "freezing" of his post. UNESCO applied the procedure laid down in circular 1583. After seeing the Inspector-General's findings the Director-General himself decided at his discretion which two posts in REX were to be added to the list. So obviously there was no further need for proposals from the Assistant Director-General. Besides, the circular went out after the complainant's post had been picked.

The complainant was granted all the safeguards the redeployment scheme afforded. No effort was spared either in the Joint Co-operation Committee or in the Mediation Committee to find him another posting, but the Joint Co-operation Committee's recommendation of 30 March 1988 came at a time of severe strain on the Organization's finances, and the posts found by the Mediation Committee did not match his qualifications and were at a higher grade than his. UNESCO complied with Staff Rule 109.5(b) and Manual paragraph 2910.C.

There was no flaw in the Appeals Board's proceedings. He is wrong to object to the delay: since he filed his brief only on 31 January 1989 the pleadings took only a year, a fairly reasonable period considering how many cases were on the list.

UNESCO submits that the decision not to renew his appointment was lawful. There were objective reasons for it. Budget restrictions called for savings under Resolution 24C/21, a text that only the Director-General was competent to put into effect.

The non-renewal did afford grounds for separation. The complainant was granted extensions of appointment by the Director-General in pursuance of Rule 104.6(b), and the staff requisition form REX had filled in was certainly not a promise to renew.

Since the treatment of him was fair and wholly lawful he is not entitled to redress. Besides, he himself turned down the Organization's offer of additional benefits by virtue of termination under Regulation 9.1.2. His claim to damages for alleged material injury is a new one and therefore irreceivable; as for moral injury it was no more than the consequence of the non-renewal.

UNESCO appends to its reply documents the complainant has requested.

D. In his rejoinder the complainant seeks to refute the pleas in the reply and enlarges on his own. Resolution 24C/21 was, he says, not binding on the Director-General. The procedure in circular 1583 was not followed. For one thing, the Joint Co-operation Committee never gave him a hearing and that was in breach of paragraph 9 of the circular. The defendant has failed to show that it did its utmost to place him. In fact it did all it could to get rid of

him, throwing out every one of the suggestions the Committees made. At no time did the Organization inform him that it intended to terminate him, and that too was in breach of his right to defend his interests. His performance reports were good, he had reached agreement with his supervisors, and so he had reasonable expectations of renewal. The grounds for dismissal were not financial and had nothing to do with UNESCO's interests.

E. The Organization maintains in its surrejoinder that the impugned decision shows no flaws. It observes that the Joint Co-operation Committee had no duty under paragraph 9 of circular 1583 to give everyone a hearing, that being a matter at its discretion. UNESCO explains why despite the Committees' recommendations, its attempts to reassign the complainant came to nothing. It repeats its contention that the Director-

General acted in the lawful exercise of his discretion, in the Organization's interest and after proper and impartial appraisal of the evidence.

CONSIDERATIONS:

1. The complainant joined UNESCO in 1975 as an assistant to programmes for communication on population questions. For over 13 years he had his fixed-term appointment regularly renewed. By January 1988 he held a grade P.2 post as assistant administrative officer in UNESCO's office for liaison with the United Nations, his appointment was to expire at 15 April 1988, the head of the Sector he belonged to again asked for another extension of his appointment, for two years.

The extension did not go through, however. A few weeks earlier the General Conference had decided at its 24th Session that more posts should be "frozen" because of the sore financial straits the Organization was then in. A circular accordingly went out on 23 February 1988 announcing the decision to take exceptional action to raise the number of vacant posts from 90 to 180. For that purpose the Director-

General established a procedure for co-operation on new arrangements for staff redeployment, which would of course mean dismissals.

The whole business was done at great speed. The complainant had his appointment provisionally extended to 31 August 1988, but after consulting a Joint Co-operation Committee the Director-General decided not to renew his appointment beyond that date and so informed him at the end of May.

The Mediation Committee to which his case was thereupon referred heard evidence from him and recommended solving the problem by putting him on a post which was not vacant but which matched his qualifications. But the Director-General turned down that recommendation and confirmed the "non-renewal" of his appointment, and he left UNESCO on 30 September 1988.

He lodged an internal appeal with the Appeals Board seeking the quashing of the Director-General's decision and reinstatement. Though it did state some misgivings the Board was unanimous in recommending that the Director-General confirm his decision, and he did so by the one now impugned, on 12 June 1990.

The receivability of the complaint is not at issue.

2. The reason for the retrenchment of staff was the Organization's grave financial difficulties. Though the wording of the Conference's decision may be open to interpretation for grammatical reasons the meaning is beyond doubt, and according to the definition of its competence in its Statute the Tribunal will not review the policy followed by the Director-General in furtherance of the Conference's decision. It will, however, consider whether there was any flaw in the Director-General's exercise of his authority in an individual case.

3. To forestall criticism and make an inevitable but difficult exercise as impartial as he could the Director-General decided to make the arrangements he announced in the circular of 23 February 1988 for bringing in all units of the Organization, the staff themselves and the staff associations.

The first step was for the Assistant Directors-General to identify the posts to be kept and the ones to be declared vacant and to arrange for the redeployment of staff. They were to study the matter and make proposals.

Then came the exercise itself, and for that purpose the Director-General set up joint advisory bodies to report to him on the action to be taken. There were two such bodies. One was a Joint Co-operation Committee with eight

members, including elected staff representatives, and its task was to go over all the relevant files. The other was a Mediation Committee with five members, including two elected staff representatives, and it was to hear applications from staff for review of individual decisions that had been notified to them.

The staff were still free to follow later the internal appeal procedure prescribed in the Staff Regulations.

4. The effect of establishing the special procedure was to put everyone on a par, whatever sort of appointment he might have. UNESCO's intent in establishing the procedure must have been to enhance efficiency by choosing from among the whole staff, without regard to the sort of appointment they had, those who were to be made redundant. That is why the complainant is wrong to contend that for want of notice of non-renewal in January 1988 his appointment was by implication extended by two years and that the Organization could not end it within that period.

5. Another point will serve to conclude these more general considerations. Although the Director-General alone has authority and wide discretion to take decisions he must abide by any procedural and other rules he has himself chosen to make. The Tribunal will not review a policy set by the General Conference, but it does review individual decisions taken to give effect to such policy and indeed also the application of certain substantive rules. But its power of review is limited. It may not supplant an organisation's view with its own on such matters as a restructuring of posts or redeployment of staff intended to make savings or improve efficiency. Nor may it consider whether abolishing a post was the right thing to do. But it will interfere with any decision that was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or overlooked some essential fact, or constituted abuse of authority, or drew mistaken conclusions from the factual evidence.

6. The complainant's case is that UNESCO failed in several respects to abide by the rules in the circular of 23 February 1988.

7. The circular says that the Assistant Directors-General are to identify a specific number of posts to be kept or declared vacant. Once the list was made a broad procedure for co-operation was to be followed "on the basis of proposals by the Assistant Directors-General and recommendations by the Joint Committee". The final decisions were then to be taken on "the posts to be frozen and the officials to be redeployed or terminated".

The Joint Co-operation Committee met from 16 to 30 March 1988. It looked at 65 cases, including those of 35 officials in the same staff category as the complainant, and UNESCO has supplied the text of its report.

The report begins by citing the papers the Bureau of Personnel has put at the Committee's disposal and they include "the list of officials whose posts will be frozen or abolished in 1988". The Bureau updated the list several times.

The Committee makes a recommendation on each case. It proposes a dozen transfers of staff with the consent of the competent sector and half a dozen against the sector's advice; for 17 cases, including the complainant's, it makes no proposal, and the consequence is dismissal. In an appendix it lists without comment the names of those whose posts are to be "frozen or abolished" in 1988.

Nowhere does the text of the report as disclosed by the defendant mention any discussion of the proposals by the Administration on the complainant's case. Yet the appointed task of the Joint Co-operation Committee was to discuss them and make recommendations: it was not a rubber stamp but, as its title denoted, a committee intended to foster a concerted approach.

What is more, the proposal to freeze the complainant's post came, not, as the circular of 23 February 1988 required, from the competent Assistant Director-General, but from the Deputy Director-General. The Organization has produced the relevant text. The Appeals Board's report of 17 April 1990 says that "the decision to freeze Mr. Louis' post was taken by the Deputy Director-General not, as it ought to have been, by the Assistant Director-General in charge of the External Relations and Information Sector". The flaw matters because the Assistant Director-General and the Deputy Director-General do not hold the same rank in the hierarchy. So in two ways the circular was disregarded.

Although the Joint Committee does not report any discussion on the complainant's case - bar saying that there was no post for him - the Organization reveals that at the outset there was a proposal for "triangular redeployment" but the Assistant Director-General in charge of general programmes and programme support turned the idea down. But

there is no evidence to suggest that any discussion took place on the Assistant Director-General's view of the case. In any event that was yet another breach of the circular, which says that the possibilities for redeployment are to be proposed to the Director-General himself. The conclusion is that the Organization was guilty of serious procedural errors. Making detailed rules on how to respect staff rights in carrying out a difficult exercise does not go far enough and, although the Tribunal's power of review is limited in this area, it will at least ensure strict compliance with rules of the Director-General's own making.

Since the procedure that led to the complainant's dismissal was improper there is no need to take up any of the other pleas. The procedural flaws alone being fatal, the Tribunal will neither rule on the complainant's many other pleas nor order the production of evidence he has applied for.

8. He is not seeking reinstatement and it is not warranted. In keeping with Article VIII of its Statute the Tribunal will grant him redress for the injury. It has wide discretion in the matter and there can be no valid objection to an award of damages.

As to the material injury, he had asked for a two-year extension, but his last fixed-term appointment was for only one year, and the amount of damages is therefore set at the equivalent of one year's full pay at grade P.2 at the rate prevailing at the date of termination.

9. His other claims fail.

The answer to his claim to moral damages is that such a claim will not lie just because the decision was unlawful. In this case the purpose of the impugned decision was quite proper and there was nothing demeaning about it.

His other claims are to redress for heads of injury that are plainly not the direct consequence of the impugned decision.

10. The complainant is awarded 2,000 United States dollars under that head.

DECISION:

For the above reasons,

1. UNESCO shall pay the complainant material damages in the amount of one year's full pay at grade P.2 at the rate prevailing at the date of termination.

2. It shall pay him 2,000 United States dollars in costs.

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

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner