

EIGHTY-FIRST SESSION

***In re* BARDI CEVALLOS**

Judgment 1525

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hugo Bardi Cevallos against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 8 November 1995 and corrected on 10 November, UNESCO's reply of 11 December 1995, the complainant's rejoinder of 15 January 1996 and the Organization's surrejoinder of 12 February 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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 El Salvador who was born on 19 August 1937, joined UNESCO in January 1981 as Deputy Chief of the Buildings Division in the Bureau of General Services (GES/BM), at grade P.4.

The Organization put his post "in reserve" in January 1986 as part of an exercise of staff retrenchment prompted by the withdrawal of some countries from membership of the Organization. On 1 May 1986 it transferred the complainant to a temporary post financed from the Headquarters Utilization Fund. On 1 March 1988 it again transferred him, to post GES-951, which it financed from the same Fund and created for the purpose of redeploying him.

In April 1990 he alleged irregularities in the management of the maintenance contracts under his supervision: two firms, he said, had failed to work the full number of hours they had been paid for.

The Organization abolished his post and on 1 December 1990 assigned him to a post of administrative officer in the Bureau for Coordination of Operational Activities, which is now known as the Bureau for Relations with Extra-Budgetary Funding Sources (BER). That post too - BER-951 - it financed from the Headquarters Utilization Fund. To pay for building maintenance work from the Fund it adopted a policy of cutting staff costs. That is how it came to abolish post BER-951 at 31 December 1993.

The Senior Personnel Advisory Board (SPAB) was asked to look into the complainant's case. It met on 15 February 1994. It found that the Organization had not done its utmost to find him another suitable post and asked the Bureau of Personnel (PER) for a full list of vacancies. The Bureau failed to do so and after two further meetings the Board therefore held over review of the case.

As from 1 January 1994 UNESCO granted the complainant extensions of his appointment every three months. By a memorandum of 29 July the Director of the Bureau of Personnel told him that his appointment would end at 30 September 1994 and offered him agreed termination including a 50 per cent increase in the amount of the termination indemnity, which the rules allow. In return he was to surrender any further claim against the Organization. He declined in a memorandum of 4 August and on the same day wrote to the Director-General protesting against the decision not to renew his contract after 30 September 1994.

He had a talk with a personnel officer. The Director of Personnel then told him in a memorandum of 30 September 1994 that his appointment would be extended to 31 December 1994; that he was being given the required three months' notice; and the offer of agreed termination held good.

In a memorandum of 28 October to the Director-General the complainant protested against the decision not to renew his contract beyond 31 December 1994. Having got no reply, he appealed on 2 December against that

decision to the Appeals Board. In its report of 27 June 1995 the Board recommended reversing the decision and renewing the complainant's appointment as from 1 January 1995. But the Director-General confirmed his decision by a letter of 22 September 1995, the decision the complainant is impugning.

B. The complainant submits that the Organization showed prejudice against him. Shortly after he brought to light the irregularities in managing the maintenance contracts under his supervision, the Administration abolished his post for the sole purpose, he believes, of ending his appointment. It would not even look into his charges. His second-level supervisor, the Director of the Bureau of General Services, had already tried in June 1990 to get rid of him by proposing an extension of only two months. The offer of agreed termination in return for waiver of his right of appeal was an attempt to cover up misuse of authority.

UNESCO failed to do its utmost to redeploy him and did not associate him in any attempt to do so.

Lastly, there was breach of due process. The SPAB was prevented from doing its job properly: it held his case over three times for lack of information and in the end was unable to report. Though precedent says that when an advisory body makes no recommendation it is for the Director-General to take the final decision, it does not apply to his case.

He asks the Tribunal to set aside the impugned decision, order his reinstatement as from 1 January 1995 and renewal of his appointment up to 19 August 1997 when he reaches the age of 60, and award him 2,000 United States dollars in moral damages and 15,000 French francs in costs.

C. UNESCO submits that the reasons why it decided not to renew the complainant's appointment were objective. His old post, GES-951, was abolished in an operation to reduce posts at headquarters. The reason why he said no more of irregularities over maintenance contracts was that they had been set right. Besides, UNESCO's auditor found no such irregularities. The complainant did not at the time object to the abolition of his post or his transfer and it is now too late for him to do so. The Director of the Bureau of General Services proposed a two-month extension of his appointment pending the outcome of a review by the Director-General of the Organization's general situation.

Citing several posts it considered him for, UNESCO asserts that it did do its utmost to find him another job but found none to suit a civil engineer.

As to the procedure of termination the SPAB was acting *ultra vires* and the precedent the complainant cites does apply. Though a fixed-term appointment may be terminated without notice or payment of indemnity, the Director-General saw fit to offer him a termination indemnity; besides, Regulation 9.1.2, which is about separation from service, bars protest against termination.

D. The complainant rejoins that he had no cause of action until he learned of non-renewal; so he is not out of time. He does see a link between his disclosure of irregularities over the contracts and the abolition of his post. There is no merit in the argument that the auditor found no irregularities: it is not the auditor's job to ascertain whether contracts are properly executed. The Administration made no adequate effort to redeploy him and the termination procedure was flawed. The Director-General tried to "buy" his silence.

E. UNESCO maintains in its surrejoinder that the complainant's supervisors had no reason to punish him and that the Organization decided to transfer him for objective reasons and as part of general restructuring. Post BER-951 was originally funded from extra-budgetary resources and was then abolished for financial reasons. The complainant is out of time for challenging those measures. Had there been any disparity between the obligations laid down in the maintenance contracts and the bills sent in, the auditor would have reported it. The Organization did make every effort to find the complainant a suitable post and even extended his appointment until 31 December 1994 in the hope of keeping him on. There was nothing wrong with the termination procedure.

CONSIDERATIONS:

1. The complainant's first plea is that the abolition of the post - GES-951 - which he held in December 1990 was unlawful: he invites the Tribunal so to hold.

Not having been challenged at the time, the decision has become final: whether it is lawful is no longer an open question. Nor did it form the subject of the internal appeal that the complainant lodged and that has led to this

complaint.

So in any event he has failed to meet the requirement in Article VII(1) of the Tribunal's Statute that he first exhaust the internal remedies. His plea is therefore irreceivable, though he may still rely on the facts that form the background to the decision he is impugning.

UNESCO purports to make claims which are but pleas and which the Tribunal need not entertain, counterclaims not being receivable.

2.The complainant is challenging a decision by the Director-General not to renew his fixed-term appointment.

Consistent precedent has it that, like the abolition of a post, such a decision is discretionary. It may therefore be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority: see for example Judgment 1492 (in re Perkins) and the others cited therein.

Though aware of those restrictions on the Tribunal's power of review, the complainant submits that the impugned decision shows misuse of authority, on the grounds that its purpose was not to serve the Organization's interests, and grave breach of due process.

Since the latter plea succeeds there is no need to take up the first.

3.According to Staff Rule 104.1(b)(x) the Senior Personnel Advisory Board (SPAB) advises the Director-General on the "non-renewal of appointments after five or more years of service in the Organization".

Rule 104.1(n) reads as follows:

"The report of each Board shall contain the recommendation or recommendations formulated by the Board and a brief account of the reasons of each recommendation. Minority votes and dissenting opinions shall be recorded in the report, should one or more members so wish. The report shall be signed by the chairman and the members of the Board."

Rule 104.1(o) requires the Director-General to establish rules of procedure for the boards.

The Rules of Procedure of Personnel Advisory Boards - the version dated 20 November 1967 being the one in force at the material time - contain the following provisions:

"5.A Board may if it deems necessary interview the persons whose cases it is considering, and other staff members whom it considers to be in a position to furnish relevant information.

...

10.When a Board decides that adequate discussion has taken place, the Chairman shall declare the discussion closed: non-members present, other than the Secretary, shall withdraw while the Board deliberates.

11.The Secretary shall draw up a report of each meeting, setting out the Board's conclusions and, where necessary, the reasons therefor. This report shall be signed by the Chairman and countersigned by the members. It shall indicate, inter alia,

(a)whether a conclusion has been reached unanimously or by majority vote;

(b)any dissenting opinion which the member concerned wishes to have recorded.

...

13.The advice and recommendations of each Board to the Director-General shall be constituted by the signed report of the proceedings, which shall be transmitted by the Chairman of the Board concerned to the Director of the Bureau of Personnel. The Director-General may, before taking a decision on the matter on which a Board has

given him advice, refer it back for further consideration to a Board composed as far as practicable of the same members."

It is common ground that those are the material provisions.

According to the minutes the SPAB took up the complainant's case three times. On 15 February 1994 it found that the Organization had failed to do its utmost to redeploy him and asked the Bureau of Personnel for a list of vacancies at headquarters and in the field to see whether he could be offered one of them. On 5 April it adjourned the case for want of information from the Administration. On 14 June it concluded that it had not received enough information to determine whether all reasonable efforts to redeploy him had been made; it regretted in particular that no one in the Bureau of Personnel had been able to give any information on involvement of the complainant in attempts to redeploy him; and it formally suspended his case. The Director-General then took a decision in the absence of the recommendation he had asked the Board to make.

It is clear from the foregoing that the Board did not refuse to make a recommendation: it merely suspended proceedings until it could do so.

UNESCO contends that according to the case law - it cites Judgments 969 (in re Navarro) and 1289 (in re Enamoneta) - the Director-General was free to act in the absence of a recommendation because the advisory body failed to make one and that in any event the Board was acting *ultra vires*.

The Organization misreads the judgments it is relying on. Judgment 969 was about a case of dismissal for serious misconduct. The Board of Appeal, which was required to make a recommendation, reported the views of its members and the Tribunal held - in 21 - that that report had sufficed to enable the Director-General to reach a decision once he had taken it "into account". Judgment 1289 was about another case against UNESCO and the report of a senior personnel advisory board. The Tribunal held, in 6, that the Board's report included "advice" under the heading "Recommendation" and that the advice had been "a final, not a provisional, point of view". So in both cases the advisory body had in fact made final recommendations, whereas in this case the SPAB suspended the proceedings in order to get further information from the Administration, rather than report without it.

UNESCO is further mistaken in contending that the Board was acting *ultra vires*: indeed the Organization does not even seek to show in what way that might be so. The rules quoted above plainly require the Board to review the material issues properly. So it is hard to see how it was *ultra vires* for the Board to ask about means of redeploying him or how far he had been involved in attempts to sort out his case.

Having failed to await the outcome of the Board's review of the case, the Director-General acted prematurely. Consulting such a board is no idle formality: it is supposed to afford a means of working out a fair solution. In this case it offered the hope of redeploying someone with a long record of service. Several judgments have stressed the importance of advisory boards: see for example Judgment 352 (in re Peeters No. 2) under 5. Judgment 232 (in re Díaz) said that the senior personnel advisory board at UNESCO "was free to determine whether it had enough information at its disposal and whether or not in establishing the truth it would serve any purpose to hear witnesses". Again, in Judgment 1298 (in re Ahmad No. 2) on a related matter the Tribunal held that the Organization was in grave breach of a rule of procedure by failing to ask for the performance report that the Staff Rules required before deciding whether to renew a contract, such a report being - see under 10 - "all the more necessary when the intention is not to renew".

Because of the breach of due process the impugned decision cannot stand, there being no need to go into the merits.

4. For want of a valid decision to terminate his appointment, the contract between the complainant and the Organization is still in force and he is entitled to payment of salary and allowances as from the purported date of termination. UNESCO must also decide whether to reinstate him. In view of his seniority his appointment would not have been bound to end if due process had been observed. In deciding whether or not to renew his contract the Organization must comply with any procedural and substantive rules that are material.

The breach of due process caused him moral injury that warrants redress. But he has sufficient redress in the award of full pay from the date of his departure without having had to provide any services in return: see, on that issue, Judgments 1371 (in re Ortiz) and 1447 (in re Berg); on reinstatement after wrongful termination, Judgments 1317 (in re Amira) under 38; 1323 (in re Morris No. 2); 1342 (in re Baliga); 1350 (in re Blinder); 1351 (in re Li); 1298

and 1361 (in re Ahmad Nos. 2 and 4); 1362 (in re Bluske); 1376 (in re Mussnig); 1384 (in re Wadie); 1386 (in re Bréban) and 1395 (in re Walter).

5. Having succeeded in the main, the complainant is entitled to costs in the amount he claims, which does not seem unreasonable.

DECISION:

For the above reasons,

1. The Director-General's decision of 22 September 1995 is set aside.
2. The complainant is referred back to UNESCO for reconsideration of his right to renewal of appointment.
3. The Organization shall pay him salary, allowances and any other benefits due as from 1 January 1995 until the Director-General takes the decision required in 2 above.
4. It shall pay him 15,000 French francs in costs.
5. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner