Registry's translation, the French text alone being authoritative.

EIGHTY-FIRST SESSION

In re RANDRIAMANANTENASOA

Judgment 1546

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Charles Randriamanantenasoa against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 September 1995 and corrected on 11 October, UNESCO's reply of 21 November, the complainant's rejoinder of 26 December 1995 and the Organization's surrejoinder of 8 February 1996;

Considering Article II, paragraph 5, 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 Madagascar who was born in 1941, joined UNESCO in 1980 at grade P.1. At the material time he was employed in the Division of Youth and Sports Activities of the Organization's Sector of Social and Human Sciences. He held a fixed-term appointment at grade P.4.

His supervisors had always found his work satisfactory until his last performance report, for the period from 1 October 1991 to 30

April 1993, in which they gave him an "E" rating ("unsatisfactory"). He was admitted to hospital on 2 February 1993 and on 5 March underwent a quadruple heart bypass operation. He was on sick leave until 20 June and learned of his performance rating on going back to work. He signed the report on 13 August saying that he intended to challenge it, contrary to what he had said in a "self assessment" written on 9 July.

He took annual leave from 13 July to 1 October 1993. On his return he learned that his post was to be abolished at the end of the year. On 21 October the Bureau of Personnel told him that he was soon to appear before the Senior Personnel Advisory Board (SPAB) to consider the proposal by the Assistant Director-General in charge of the Sector that his contract should not be renewed. But the Bureau postponed the meeting on the grounds that the Reports Board had not yet seen his objections to the report. The Reports Board met on 7 December 1993 and its recommendation, which the Director-General approved on 6 January 1994, was to confirm the E rating. By a memorandum of 4 February 1994 the complainant made a protest against that decision to the Director-General and on 30 March filed notice of appeal to the secretary of the Appeals Board.
On 1 January 1994 the complainant had been put on a temporary post, his former one having been abolished. The SPAB met on 5 April 1994. It recommended assigning him to a suitable post and writing a new report to cover the normal two-year period. But by a memorandum of 31 May the Director of the Bureau of Personnel informed him that the Director-General had decided on grounds of unsatisfactory service not to renew his appointment after 30 June. By a memorandum of 30 June he protested to the Director-General and on 1 August 1994 filed a second notice of appeal with the secretary of the Appeals Board.

By a memorandum of 4 August 1994 the Director of the Bureau of Personnel told the complainant that the Director-General was upholding the decision not to renew his contract beyond 30 June.

On 30 September 1994 he filed a single brief with the Appeals Board appealing against both the decision of 6 January 1994 confirming his performance rating and the decision of 31 May 1994 not to renew his appointment. The Appeals Board met on 28 June 1995. It advised the Director-General to disregard his last performance report and reinstate him in a suitable post. By a letter of 13 July he asked the Director-General to reinstate him in accordance with the Appeals Board's recommendation. On 11 September 1995 he filed this complaint with the Tribunal.

B. The complainant accuses UNESCO of abuse and misuse of authority, and in support he cites four "measures" taken by his first-level supervisor: the E rating, which may warrant dismissal; the abolition of the programme he was in charge of, in an attempt to show that his post was redundant; the abolition of his post as a pretext for creating another almost identical one; and the charge of serious misconduct in an arbitration case in which UNESCO had to pay 236,000 French francs to an outside consultant. The measures were, he believes, all part of "a plot by the reporting officer to get rid of him" because of a conflict of interest between them.

The decision not to renew his appointment shows an error of law in that it is not properly substantiated.

The Bureau of Personnel and the Director-General drew mistaken conclusions from the evidence: the Bureau of Personnel wilfully overlooked the error of judgment by the

reporting officer, who later acknowledged in public that the complainant's health might well have adversely affected his work; and the Director-General ignored the comments on his health.

Lastly, he alleges breaches of due process. First, contrary to the instructions in administrative circular 1743, the reporting officer failed to discuss the performance report with him and gave him no warning before writing the final text. Secondly, the decision not to renew his appointment followed neither a written warning nor a relegation in step, which point 7 of the circular lists as one of the possible consequences of an E rating. So he lost the "right to a another chance".

He asks the Tribunal to quash the decision not to renew his appointment and order UNESCO to reinstate him as from 1 July 1994 in a post that matches his qualifications and experience, award damages for the material and moral injury to himself and to his family, and at least 210,000 French francs in damages for loss of earnings due to the non-renewal. He seeks costs.

C. UNESCO replies that in refusing to renew the complainant's appointment the Director-General exercised his discretion in the Organization's interest. He took that decision on the grounds that the complainant's service was unsatisfactory, an assessment fully substantiated in the last performance report. Besides, the complainant did not challenge the substance of the report. The duties of the new post are different from those of the complainant's former one.

The reporting officer never said that his health might explain or excuse his poor performance. His own doctor did not take him

off work. He himself admits that "not until January 1993 was his work affected by serious nervous and heart disorders". UNESCO concludes that the many shortcomings in his performance before January 1993 had nothing to do with his ailments.

There was no breach of due process. The reporting officer had often drawn the complainant's attention orally and in writing to his professional shortcomings, and he himself admitted in the self-assessment that he had discussed his ratings before the final report was drawn up; so he may not say that they took him aback. As for the written warning that usually precedes non-renewal, the case law shows that such a warning is not always necessary.

D. In his rejoinder the complainant submits that the real reason for the non-renewal of his appointment is unclear. He challenges the adverse appraisal of his performance in the last report. His health did affect his work: his doctor wanted to put him on sick leave but he refused out of a sense of professional duty.

He repeats that the reporting procedure was flawed. He may not have challenged the ratings in the self-assessment, but he did ask to have the proposed sanctions lifted and the conclusions of the appraisal reviewed. Since the conclusions were not changed he challenged the appraisal on 13 August 1993 in accordance with the procedure set out in the form. He got no written warning.

The appraisal of his performance from March 1992 to April 1993 is tainted with prejudice and therefore should not count.

E. In its surrejoinder UNESCO maintains that the complainant's unsatisfactory performance is the sole reason for the non-renewal. The Reports Board found the reporting procedure proper. The reporting officer did give the complainant several opportunities to do better.

CONSIDERATIONS:

1. It is not clear from the complainant's muddled brief whether he is impugning one or more decisions. The Director-General took a decision on the appraisal of his performance and a distinct one not to renew his appointment on the grounds of unsatisfactory performance. The Appeals Board joined his two appeals against those decisions and made a single report. He challenges the Director-General's implied rejection of his appeals. His claims before the Tribunal appear to relate only to the decision not to renew his appointment; yet in his brief he alleges mistakes of fact and of law in the appraisal. The Organization's reply takes up all the complainant's pleas and asks the Tribunal to uphold both decisions. Lastly, the complainant submits in his rejoinder that "the performance appraisal ... must be rejected".

To treat the appraisal as final on the grounds that it had never been challenged would be to take from the complaint much of its substance. The complainant could no longer challenge the charge of unsatisfactory performance that affords the grounds for non-renewal. That is certainly not what he intends.

To assume that he is not impugning both decisions would be pedantic.

2. The gist of the complaint, then, is a challenge to two separate decisions by the Director-General: one about the appraisal and the other the non-renewal. Since the issues are linked the Tribunal will make but one ruling but it will take up each issue separately on the merits.

3. Some of what purport to be the complainant's "claims" are in law just pleas and the Tribunal need not entertain them as such. They are in any case irreceivable since he may in any event claim the quashing of the decisions or any other redress.

Likewise, what purport to be the Organization's "claims" are in law merely pleas for dismissal, and again the Tribunal need not entertain them as such. In any event counter-claims are irreceivable.

4. Some of the complainant's pleas seemingly relate to both decisions, some to only one of them.

In his submission the purpose of both decisions is to get rid of him and they show abuse of authority, calculated first and foremost to serve the interests of his first-level supervisor. The procedure of appraisal was flawed, he believes, because he was not given his say on the draft report before it became final. There were abuse of authority and mistakes of fact and of law in that he did not deserve the rating he got, and in particular he was wrongly accused of serious misconduct in an arbitration, known as the Commaille case, in which UNESCO had been ordered to pay 236,000 French francs to an outside consultant. The decision not to renew his appointment shows abuse of authority: though it was taken on grounds of unsatisfactory service, he was not given the proper written warning that precedent required. He

had spent years in the Organization's service and earlier reports had been good; so it was wrongful to heed only an appraisal that covered a short period, especially when he was ill at the time and the ratings were unreliable.

5. Consistent precedent has it that a decision on an official's performance and a decision not to renew a fixed-term appointment are discretionary. They may be set aside only if they were taken without authority or in breach of a rule of form or of procedure, or if there was 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) under 4 and the case law cited therein.

The Tribunal will entertain the complainant's pleas in the light of those criteria.

Pleas that challenge both decisions

6. The complainant pleads misuse of authority in both decisions. In his submission his first-level supervisor, with approval by senior officers, made improper use of appraisal and non-renewal to serve purposes alien to the Organization's interests, namely to get rid of a troublesome or even dangerous contender for being put in charge of important work for an intergovernmental committee. His ratings, he says, are proof of that. The Organization denies it.

The evidence does not suggest that the complainant's case is true or even plausible. There is no specific proof of any hostility or spirit of rivalry in his first-level supervisor. The confirmation by

every single supervisor of the appraisal of his performance and the endorsement of the proposal to end his appointment tend to refute his charges of such hostility. The Director-General took the view, in proper exercise of his discretion, that the complainant's services were quite unsatisfactory, that he was unlikely to do any better and that the Organization's interests demanded termination. The decisions that ensued were the next logical step in the procedure. After all, everyone concerned knew that the appraisal of his performance might influence the decision on renewal; so it was only reasonable that the decision should follow the appraisal.

7. The complainant pleads that the Organization abolished his old post - No. SHS-259 - to make out that his duties were pointless, and created another one - No. SHS-292 - with much the same duties, which it gave to someone else.

But the Organization provides cogent evidence to show that that post was created in the context of restructuring and carried quite other duties. His plea lends no weight to the charge of hostility.

8. The complainant pleads breach of due process in that before the Reports Board had seen his objections to the appraisal his case went to a Senior Personnel Advisory Board (SPAB) that was considering his separation from the Organization.

The Organization admits as much, blames administrative oversight and says that because it had acted prematurely it withdrew his case from the SPAB.

There is no reason to doubt what the Organization says. Being

put right in time, its mistake caused the complainant no injury.

9. The gist of his case is that the use of the comprehensive term "unsatisfactory service" did not warrant the consequences he suffered.

He is plainly wrong on that score. The decision on appraisal stated quite clearly what had been expected of him and how he had fallen short. Since the decision not to renew his appointment was taken on the same grounds, there is no merit in his plea that the decision rested on too general assessment.

Pleas that challenge the reporting procedure and the final appraisal

10. The complainant pleads breach of due process in that, in disregard of circular 1743 of 5 November 1990, the reporting officer failed to discuss his performance with him before writing the final text of his report.

On 3 February 1993 the Bureau of Personnel asked his supervisors for a report on his performance so that it could come to a decision about the renewal of his appointment, which was to expire at 30 September 1993. His first-level supervisor drafted the report while the complainant was on sick leave and the draft is dated 19 April 1993. The complainant was sent the report on 9 July 1993, on return from sick leave, and commented: "With hindsight I can see why AG's assessment of me was so unfavourable, and so I will not contest it ...". He asked to have "the proposed sanctions against me lifted and the conclusions of the report reviewed". He went on to acknowledge: "I was given the opportunity to discuss the above appraisal with my supervisor before he signed this report". His first-level

supervisor therefore saw no reason to make any changes, signed the report and sent it to his own supervisor.

So the complainant did have the opportunity of discussing the text with the reporting officer and the procedure was not flawed. Indeed it seems only reasonable in view of his long absence that his first-level supervisor should have had the draft report ready to show him as soon as he came back to work.

11. The complainant observes that according to circular 1743 UNESCO should have sent him a written warning before giving him a poor report, but it did not.

He makes the same plea in challenging the decision not to renew his appointment. It is taken up below under 18.

Whatever effects the absence of a written warning may have on extension of appointment, the Organization is entitled in accordance with Staff Rule 104.11 bis (a) to assess an employee's performance.

12. The complainant submits that his supervisors failed to realise that poor health may have impaired his performance; the reporting officer did not acknowledge as much until the matter had gone to the SPAB.

By any objective criterion the reason why performance is unsatisfactory is irrelevant; yet poor health may explain and excuse shortcomings and leave hope of better performance of like duties in future. The complainant's supervisors knew that he was ill and there is no evidence to suggest that the reporting officers were unaware of that. In his memorandum of

25 October 1993 to the Reports Board the complainant himself spoke of his poor health, but only by way of answer to one criticism of his performance, the bad drafting of a report. That is also how the Director-General came to be informed of the state of his health. But how far did it affect his work? He himself says in his complaint that "until 31 December 1992 the quality of his work continued to be excellent". If so, then on his own admission his health is the less likely to have had any adverse effect.

There is therefore no reason to conclude that the Director-General ignored the fact of his illness or that his decision was flawed by a mistake of fact or of law on that account.

13. In assessing the complainant's reliability the performance report cited the Commaille case. On that case there was an award by an arbitrator which became known in the course of the reporting period. The arbitrator ordered UNESCO to pay fees to an outside consultant. The arbitrator rejected the Organization's contention that no contract had been concluded with the consultant and founded the existence of the contract on a letter that the complainant had written to the consultant, though the Organization said that his supervisors had not given him leave to do so. The Organization had also taken an ambiguous stance, said the arbitrator, by failing to answer letters from the consultant. The upshot was that UNESCO thought the complainant had failed to look after its interests properly.

He gave no account of his conduct in his memorandum to the Reports Board but in his complaint he seeks to refute the charge of misconduct, citing, among other things, the Appeals Board's

report. He contends that, having failed to bring disciplinary proceedings against him, UNESCO is no longer free to level the charge.

Even if an organisation does not intend to charge an employee with misconduct in disciplinary proceedings, it is still free to consider whether his conduct warrants action of some other kind: see Judgment 1501 (in re Cesari) delivered this day and Judgment 1405 (in re Moore) under 3. Indeed in assessing performance before deciding whether to extend an appointment an organisation may not ignore conduct that suggests unsatisfactory service: see Judgment 1052 (in re James) under 5. Besides, the complainant had ample opportunity to have his say on the matter before a decision was taken: he stated his views before the text of the report had become final, before the Reports Board had taken up the matter, and again to the Appeals Board and to the Director-General.

He does not seriously contest the facts. In any event the Director-General had grounds for relying on them and concluding that the complainant's performance was unsatisfactory. In assessing the evidence and applying the rules to the facts he did not exceed his wide discretionary authority.

The complainant further pleads that the Appeals Board found nothing to blame in his conduct. The plea is unconvincing. The Organization's liability towards a third party may well be the fault of one of its employees. Even though the Organization corrected the outside consultant's contractual status during a period which is not material to this case, it was still bound to look at the complainant's conduct since then.

14. The complainant challenges other specific objections to his behaviour that appeared in the report approved by the Director-General. The Organization presses them.

On those issues too there was and is evidence against the complainant, particularly his first reaction on seeing his report and his admissions to the reporting officer's supervisor.

Again, in assessing the evidence and applying the rules the Director-General acted within the bounds of his discretion.

The charges against the complainant are so telling that even if there were inaccuracies on lesser, unimportant points the Tribunal is satisfied that the Director-General's conclusion was correct.

15. What the complainant is seeking to show is that the low rating of his performance is unlawful because the Director-General misused his discretion.

In determining fitness for duty the Tribunal will not replace the Organization's assessment with its own and has only limited powers of review: see Judgment 1052 under 4 and see 5 above.

The conclusion is that the Tribunal will not review the finding of unsatisfactory performance and insofar as the complaint impugns the decision on the appraisal it must fail.

Pleas challenging the non-renewal

16. The complainant is mistaken in saying that the Organization changed the grounds for not renewing his appoint-

ment. In fact it consistently relied on his unsatisfactory performance. Though it also says in its reply that he was stubborn and never going to behave otherwise in future, its purpose is simply to prove that it had no hope of seeing any improvement in the poor quality of service recorded in the report. Likewise, it mentions the injury caused by the Commaille case only as further evidence of poor performance.

17. Insofar as the reason for non-renewal is unsatisfactory performance the decision is the consequence of the appraisal, which is now beyond challenge.

So the only remaining issue is whether, notwithstanding his unsatisfactory service, there were special reasons for taking action of some other kind.

18. The complainant contends that the Organization failed to give him the written warning required by circular 1743 - referred to in 10 and 11 above - and so he lost the last chance that the circular required.

In Judgment 90 (in re Prasad) the Tribunal ruled on a case in which the defendant organisation's Manual provided for a written warning. It held:

"A warning is different from a reprimand. It is not enough that the employer should be able to point to several occasions in the course of a long service when a rebuke has been administered. What is contemplated by the provision is that the employee should be told in what respects his service as a whole has proved unsatisfactory and warned that if he does not give better service, he faces the possibility of dismissal."

In Judgment 112, although it is not stated that the organisation's rules required a written warning, the Tribunal held in 4 that "even if they were not frequent, the criticisms made of [the complainant's] work were nonetheless such as to make him aware of the failings of which he is accused", and that termination for unsatisfactory performance was justified. In Judgment 241 (in re Santoni), the Tribunal held in 2 that the termination was not unlawful because "despite written and oral warnings [the complainant's] work performance had not improved".

UNESCO's rules require written warning of a finding of unsatisfactory service. But the shortcomings pointed out in the warning need not be exactly the same as those the Organization identifies later: all that is needed is that the official should realise that on the whole he is not up to standard. Nor need the warning actually say that failure to improve may mean termination: that is implied in the very fact of the warning.

The complainant's first-level supervisor sent him memoranda, one on 10 June and the other on 16 June 1992, which left him in no doubt as to what was expected of him. The memorandum of 10 June took him to task for poor time-keeping, rudeness to his supervisor and to delegates, poor drafting of documents and acting without his supervisor's approval. The memorandum of 16 June followed a talk with his supervisor and again was about his "performance". The gist of it was that for the Organization's sake his supervisor would trust him and would "shelve", though not withdraw, "the criticisms about your attitude and behaviour and indeed warnings that I have had to address to you orally and in writing since I became acting head of division". Comments

about the quality of his work had also been written on documents sent back to him. The conclusion is that he had quite sufficient warning about shortcomings in his performance and the risk of non-renewal. So it is immaterial whether the earlier criticisms are the same as those on which the decision rests. Furthermore, although the Organization's warning was sufficient, it was at liberty to cite prior incidents as well. It is plain on the evidence it adduces that even after being warned he did not improve. Even after the facts recorded in the appraisal report, that is after his return from sick leave, his work was no better. Late in June 1994, in considering whether he was to get a step increment the Assistant Director-General in charge of the Sector stated that "on returning from sick leave and annual leave, he did not carry out satisfactorily the tasks entrusted to him". The Reports Board confirmed that.

The plea about absence of warning is therefore without merit.

19. His other pleas about non-renewal may be taken together.

In his submission there were insufficient grounds for concluding so hastily that his appointment should be terminated in the Organization's interest. The Director-General overlooked the possibly adverse effects of his illness on his work; the shortness of the period covered by the appraisal, which included his sick leave; his long record of good service; the duty to treat him considerately; and the comments of the Appeals Board, the SPAB and the mediators in his favour. The Director-General forgot that he had even been in line for promotion. He was discriminated against in that other staff had done the Organization a disservice, yet got off scot-free. And - he concludes - someone with such seniority could have been let off

with no more than relegation instead of suffering all the hardship of termination.

The Director-General was fully aware of those circumstances when he took the decision. He overlooked no essential facts and committed no mistakes of law or of fact. Even if, as the complainant says, UNESCO did not apply the rules in another case, that does not in itself entitle him to the same treatment. It is immaterial that promotion was contemplated but never came through.

The Director-General was free in exercising his discretion to weigh all the material circumstances of the case. He took the view that it was vital to maintain the quality and efficiency of the Organization's work. He did not misuse his authority in concluding that he had enough evidence at his disposal to suggest that there would be no improvement in performance and that termination was warranted.

The complaint is therefore quite devoid of merit.

DECISION:

For the above reasons,

The complaint is 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