

NINETIETH SESSION

In re Donaldson

Judgment No. 2006

The Administrative Tribunal,

Considering the complaint filed by Mr John Donaldson against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 4 January 2000 and corrected on 13 April, UNESCO's reply of 30 May, the complainant's rejoinder of 27 July, and the Organization's surrejoinder of 13 October 2000;

Considering Articles II, paragraph 5, and VII 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, an American national born in 1950, joined UNESCO in 1977 as an Assistant Legal Officer at grade P.1 in the Office of International Standards and Legal Affairs (LA). On 1 July 1994 he became a Legal Officer at grade P.4.

On 16 July 1996 the Director-General announced the reorganisation of LA with effect from 1 July 1996. One of the changes was the creation of a Division of General Legal Affairs (LA/GEN). With the authorisation of the Director-General, on 25 July the Director of LA appointed the complainant as Chief of LA/GEN. The complainant was officially assigned the duties corresponding to the new post description and the Director of LA requested the Bureau of Personnel to take the administrative measures necessary to reclassify his post.

On 5 August 1997 the Director of the Bureau of Personnel informed the complainant that his post had been reclassified at grade P.5 with effect from 17 July 1997, and that he would be eligible for promotion on 17 January 1998 if he fulfilled the conditions stipulated in Administrative Circular No. 1240 (II) of 28 August 1981. Under the terms of that circular the complainant would need to have completed five years in the same grade (P.4) and six months of satisfactory service in the post after the reclassification date. Since he had already been carrying out the duties of the post for one year, the complainant discussed the matter of his promotion with the Director of LA. On 21 August 1997 the Director wrote to the Director-General asking him to make an exception in the complainant's case to the five-year seniority period and to promote him as from 1 January 1997, that is to say, six months after the creation of the new Division and the post of Chief of that Division. On 5 February 1998 the Director of Personnel informed the Director of LA that the Director-General had refused the request, but that, in accordance with the circular, the complainant would be granted a special post allowance from 17 January 1998, i.e. six months after the date of the upgrading of his post to grade P.5.

On 1 April 1998 Administrative Circular No. 2052 announced that the five-year period in the same grade had been reduced to six months. Accordingly, on 6 April a personnel officer sent the complainant notification of his promotion to grade P.5 as of 1 April, the date on which Circular No. 2052 took effect.

On 30 April 1998 the complainant appealed against this decision and on 30 June 1999 the Appeals Board submitted its report to the Director-General. It recommended awarding the complainant retroactive compensation for the difference in salary between grades P.4 and P.5. On 6 October 1999 the Director-General informed the complainant that he rejected the appeal. That is the impugned decision.

B. The complainant contends that there was a long administrative delay in processing his post description and reclassifying his post, but that nonetheless he had been performing P.5-level duties since July 1996. He makes five pleas. First, the decision to make 1 April 1998 the effective date of his promotion is arbitrary. The date has no relationship to the date on which he was assigned the duties corresponding to grade P.5.

Secondly, the decision is discriminatory and constitutes unequal treatment. The complainant submits that some staff members have received promotions resulting from the reclassification of posts without completing the five-year requirement, whereas he was not granted the pay and benefits of grade P.5 until nearly two years after being assigned duties at that level.

Thirdly, the general principle of "equal pay for equal work" has been violated because he has been working at the P.5 level since 25 July 1996 without being paid accordingly. Furthermore, the Administration has recognised that the five-year requirement violated this principle, which is why they have since abolished that requirement.

Fourthly, the decision violates the general principle of law against unjust enrichment. The Organization has benefited by requiring him to work at the P.5 level while paying him a salary at the P.4 level. He claims that, except for less than three months in early 1998, he did not even receive a special post allowance.

Fifthly, he argues that the Tribunal's case law supports his claim that his promotion should be retroactive to the date on which he officially assumed his new duties.

He requests the Tribunal to: (1) find that 1 April 1998 "was not an appropriate and lawful date" for his promotion to grade P.5; (2) quash the decision concerning the date of his promotion; (3) order the Organization to "reconstitute" his career with effect from 25 July 1996 - the date he was officially assigned duties at grade P.5; (4) order the Organization to pay an appropriate rate of interest on the sums due as a result of the retroactive promotion; (5) order the Organization to reimburse him for any taxes, plus interest, late fees, and penalties that he may be required to pay to the French authorities and which he would not have been required to pay had he been promoted on 25 July 1996; and (6) award any other relief that the Tribunal deems appropriate.

C. In its reply UNESCO objects to the receivability of the complaint inasmuch as it impugns any decisions prior to 6 April 1998 regarding his promotion. The complainant did not challenge before the Appeals Board the decision of 5 August 1997 which initially set his promotion date. Therefore the remedy sought by the complainant is time-barred. The intervention by the Director of LA did not forestall the time limits allowed for filing his appeal.

The choice of date for his promotion was not arbitrary: it was the date on which the applicable rules changed. There were no delays in processing the complainant's new post description, and all the applicable rules were followed. Additionally, UNESCO submits that the complainant has relied on case law that is not applicable to the present case.

There is no "right" to promotion. Promotion is a matter that falls within the discretionary authority of the Director-General. Therefore, the complainant's grade remained unchanged until the Director-General agreed to promote him; promotion does not have to be effective from the date on which the duties are assigned.

There has been no breach of equal treatment as the individuals referred to by the complainant are in different positions in fact and in law.

Finally, there was no unjust enrichment. The complainant was awarded a special post allowance with effect from 17 January 1998.

D. In his rejoinder the complainant refutes UNESCO's argument that his claims are irreceivable. First, the decision of 5 August 1997 was not a final decision and the Director of LA had offered to resolve the issue with the Director-General. So, the complainant acted in good faith by waiting for the Director-General's final decision before filing an appeal.

Secondly, the decision of 6 April 1998 superseded the decision of 5 August 1997. Therefore the Organization errs when it argues that he should have contested the first decision, as only the second decision remains subject to challenge.

He notes that UNESCO did not deny in its reply that the Appeals Board found his appeal receivable and recommended that he be awarded retroactive compensation.

E. In its surrejoinder the Organization presses its objections to receivability. Regarding the complainant's comments concerning the Appeals Board, it notes that the Board consists of staff members who do not necessarily have a legal background; in addition, the Tribunal is not bound by the recommendations of the Board. On the other issues

it presses the pleas in its reply.

CONSIDERATIONS

1. The complainant joined UNESCO in 1977 as Assistant Legal Officer at grade P.1 in the Office of International Standards and Legal Affairs (LA). After periodic promotions during his career he was eventually promoted on 1 July 1994 to grade P.4.

Pursuant to a reorganisation of LA, the complainant was appointed as Chief of the Division of General Legal Affairs, one of the three newly created sections, on 25 July 1996, and was assigned duties corresponding to his new post description.

2. Following a desk audit of his post, the complainant was informed by the Director of the Bureau of Personnel on 5 August 1997 that the Director-General had decided to upgrade his post from P.4 to P.5 with effect from 17 July 1997 and that he would be eligible for promotion on 17 January 1998 if he satisfied the requirement of five years of seniority in the same grade contained in Administrative Circular No. 1240 (II) of 28 August 1981. Moreover, he should have completed six months of satisfactory service in the reclassified post.

3. The complainant apparently acquiesced to this decision, inasmuch as he filed no appeal against it within the time limit provided in the Statutes of the Appeals Board, paragraph 7(a) of which states:

"A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters ..."

4. Since the complainant lacked the required five years of seniority in his grade, the then Director of LA recommended in a memorandum dated 21 August 1997 to the Director-General that he should make an exception in the complainant's favour by making his promotion retroactive to 1 January 1997, that is six months after the date on which the Office had been reorganised.

However, in a memorandum of 5 February 1998 the Director of Personnel affirmed that the Director-General had decided to apply the provisions of the above-mentioned circular to the complainant in respect of the five-year period, but that, in accordance with the same circular, he would receive a special post allowance at grade P.5 with effect from 17 January 1998, that is six months after the date of the upgrading of his post to grade P.5.

5. Subsequently, in the interests of all staff members, the Director-General decided to abolish the condition of five years of seniority in the grade. Hence, the complainant was informed by a memorandum of 6 April 1998 that his promotion to grade P.5 would take effect from 1 April 1998.

6. The complainant filed a protest against this decision with the Director-General on 30 April 1998 claiming that his promotion to grade P.5 should be made retroactive to 25 July 1996. On 30 June 1999 the Appeals Board submitted a report to the Director-General recommending that retroactive compensation be made by paying the complainant the difference in salary between his former and his new grade.

7. On 6 October 1999 the Director-General informed the complainant that he had "decided to dismiss the appeal for the reasons mentioned in the Administration's detailed reply to [his] appeal". In his complaint lodged with the Tribunal on 4 January 2000, the complainant impugns that decision.

8. The complainant asks the Tribunal to make a finding that the date of 1 April 1998 "was not an appropriate and lawful date on which to make effective [his] promotion to P.5" and, therefore, to quash the decision concerning the date of his promotion, to order the Administration to make his promotion retroactive to 25 July 1996 and to pay him whatever amounts are due to him as a result of his assuming duties at the P.5 level as from the same date.

On the arbitrariness of the date of promotion

9. The complainant alleges that the date fixed for his promotion - 1 April 1998 - was arbitrary. Instead, it should

have been 25 July 1996 which is when he assumed the duties of his new post as Chief of the Division of General Legal Affairs.

10. The date - 1 April 1998 - was the date of the publication of Circular No. 2052 which abolished the requirement of five years' seniority in the same grade. Moreover, it informed staff members of the promotion, with immediate effect, of all those whose posts had been reclassified more than six months earlier and who, not having the necessary number of years of seniority in the grade, had been receiving a special post allowance. This applied also to the complainant as he belonged to this category. However, to give retroactive effect to this circular would not be possible since "According to customary methods of interpretation any action prescribed in a text is deemed to be of immediate effect. There is no presumption of retroactive effect". (Judgment 742, *in re* Francese and Guastavi). Indeed, there can be no retroactive application of the rights sought by the complainant, and his status results only from the publication of the circular in question. The charge of arbitrariness would be tenable if there were no basis for applying the circular to the case of the complainant, but, as shown above, the scope of the text explicitly covered his situation.

Moreover, the promotion, initially scheduled for 17 July 1998, took effect three and a half months earlier, that is on 1 April 1998.

11. The date of promotion of an employee does not depend on his wishes or on what he thinks is his right. It is within the discretion of the administrative authority to adopt rules and determine the policy relating to promotion as well as the time at which a promotion will take place. (Judgments 199, *in re* Lee, 262, *in re* Lamadie, and 263, *in re* Andary.)

12. Hence, even if the employee is of the opinion that he meets the necessary qualifications and statutory conditions for a promotion, it does not follow that he can demand that the Administration grant him the benefits of the promotion from a particular date. As the Tribunal said in Judgment 1207, *in re* Boungou, under 8, "no staff member has any right to promotion".

On whether the impugned decision is discriminatory and constitutes unequal treatment

13. The complainant cites the case of other staff members who received the pay and benefits of the grade as soon as they took up their duties at the P.5 level.

14. What he overlooks is that the staff members he mentions are not in the same position, either in fact or in law. His case is about reclassification of a post and it is a fact that he was treated in the same manner as the Chief of the Division for Administrative Legal Affairs - one of the other new sections in LA - whose post was similarly reclassified from P.4 to P.5. Therefore, the plea fails.

On the breach of the principle of equal pay for equal work

15. The complainant asserts that although he had been performing P.5-level work since 25 July 1996, he did not receive the same job-related benefits as those at grade P.5.

16. The Administration, in an effort to rectify the alleged contradiction between the principles of in-grade seniority and equal pay for equal work, specifically abolished one of the conditions for promotion in a reclassified post, namely, the condition of five years of seniority in the grade.

17. Since the complainant did not meet the requirement of five years of seniority in the grade, the Director-General granted him a special post allowance at grade P.5 with effect from 17 January 1998, that is six months after the date on which his post was upgraded. So, this plea too fails.

On the breach of the principle against unjust enrichment

18. The complainant maintains that the Organization saved on costs by assigning new and higher-level duties to staff members while at the same time refusing or postponing their promotion to the corresponding grade.

19. As stated previously, the point of time at which a promotion is granted is a matter within the discretionary authority of the Director-General.

20. There was no abuse in choosing the date for promoting the complainant since he was not eligible for promotion until 17 July 1998 because of the condition relating to in-grade seniority.

Besides, after the upgrading of the post, a special post allowance was granted to him as from 17 January 1998.

21. As is evident from the foregoing, the complainant's claim to quash the decision concerning the date of his promotion as from 1 April 1998 and make it retroactive to 25 July 1996 has no basis in law and should be dismissed.

22. As the complaint fails on the merits, there is no need to deal with the issue of receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

Flerida Romero

Catherine Comtet