

The Administrative Tribunal,

Considering the second complaint filed by Mr P. W. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 March 2003, the Organization's reply of 15 May, the complainant's rejoinder of 12 June and UNESCO's surrejoinder of 30 June 2003;

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. The complainant, an American national born in 1944, joined UNESCO in 1982 as a Senior Clerk at grade G-4 in the Organization's New York Office. Since January 1985 he has held grade G-5.

In May 1999 the post of Administrative Officer (grade P-1/P-2) at the New York Office became vacant when its incumbent was transferred to another post, at headquarters in Paris. The complainant was instructed by his Director to assume the functions of the vacant post as an interim measure pending the appointment of a new Administrative Officer.

Staff Rule 103.17(b) of the UNESCO Staff Rules provides for a non-pensionable special post allowance to be paid, subject to certain conditions, where a staff member temporarily assumes additional duties and responsibilities attached to a higher-grade post.

The complainant was granted a special post allowance with effect from 17 August 1999. However, on 17 January 2002 he was informed that this allowance would cease as of 1 January 2002 owing to the transfer of the post of Administrative Officer to headquarters.

By a letter of 28 January 2002 the complainant protested to the Director-General against the termination of his special post allowance. In May 2002, having received no reply within the statutory time limit, he filed an internal appeal. On 1 May the Director of the New York Office had written to the Assistant Director-General of the Sector for External Relations and Cooperation to explain why he felt that the New York Office should retain an Administrative Officer post. He also indicated that he had instructed the complainant "to perform the administrative duties of the office, on a temporary basis".

In its report dated 10 December 2002, the Appeals Board recommended that the Director-General should grant the complainant "appropriate remuneration based on the measure of the special post allowance for the additional work carried out by [him] in a higher grade". By a letter of 26 February 2003 the Director-General informed the complainant that he had decided not to accept the Board's recommendations, which he considered to be legally unfounded. That is the impugned decision.

B. The complainant points out that he received the special post allowance for more than 28 months, whereas Item 2320.42(a) of the UNESCO Manual stipulates that this allowance can in no case go beyond 12 months. Yet the vacant post in question was never opened to recruitment by the Organization, even after the expiry of that 12-month period.

He asserts that when the Administrative Officer post was transferred to headquarters, he was instructed by his Director to continue performing the duties attached to that post, despite the fact that he could not be paid for these additional functions. This, he states, caused him considerable financial losses, as well as emotional and moral injury.

The complainant argues that the decision to transfer the post of Administrative Officer to headquarters was unlawful on two counts: firstly, it is wrong to abolish a post where its duties still exist, and secondly, the transfer decision was taken for reasons irrelevant to the service requirements of the Organization. Referring to the case law, he recalls that although the abolition of a post is a matter for the discretion of the Organization, the Tribunal will "exercise its usual power of review in this area so as to ascertain whether the staff's rightful interests have been safeguarded". He submits that in this case UNESCO totally disregarded his basic right to receive a fair and just remuneration for the additional higher-grade work he was required to perform.

The complainant also cites a judgment in which the Tribunal upheld a staff member's right to receive a special post allowance where a post had been abolished but the staff member continued to carry out the functions of the post.

He asks the Tribunal to set aside the decisions terminating the payment of his special post allowance and to order UNESCO to pay him compensation corresponding to the special post allowance at grade P-1/P-2 as from 1 January 2002, in accordance with Staff Rule 103.17(b). He also claims damages for emotional and moral injury in an amount equivalent to one year's gross pay and 4,000 United States dollars in costs.

C. The Organization replies that the Director-General abolished the Administrative Officer post in the exercise of his discretionary authority and in the interests of the Organization. It adds that since it was not the complainant's post that was abolished, the latter does not have *locus standi* to challenge that decision.

It emphasises that under Manual Item 2320.42(f), the granting or continuation of a special post allowance presupposes that the post in respect of which it is granted is available. Consequently, the complainant's entitlement to the allowance ceased when the post in question was abolished.

The defendant denies that the complainant was "made to perform double duties without additional remuneration". According to UNESCO, "the fact is that the Complainant was requested to perform additional duties and was duly compensated for that with [a special post allowance] in accordance with the Staff Rules".

D. In his rejoinder the complainant maintains that he is still performing the functions attached to the Administrative Officer post, and he produces his performance report for the period from April 2001 to March 2003 to support that view. He submits that there is no evidence of any change in his duties subsequent to the transfer of the post and that he therefore remains entitled to the special post allowance.

E. In its surrejoinder UNESCO submits that if the complainant believes that he is still performing the duties of the abolished post, the proper recourse for him is not to claim a special post allowance for this post, but to apply to the Director-General for classification of his own post, in accordance with Staff Rule 102.2.

## CONSIDERATIONS

1. The complainant has been employed by UNESCO since 1982. He was initially appointed at grade G-4 as Senior Clerk in the Organization's New York Office. He later obtained grade G-5 and at the material time held step XII of that grade.

2. On 17 May 1999 the post of Administrative Officer in New York became vacant when its incumbent was transferred to another post at UNESCO headquarters in Paris. The complainant was then instructed by the Director of the New York Office to assume the functions of that post as an interim measure until the post was filled. He was granted a special post allowance as of 17 August 1999 and continued to receive that allowance until 31 December 2001, the post being transferred to headquarters on 1 January 2002. It appears that the post was later abolished but the parties' submissions do not reveal precisely when that occurred.

3. Notwithstanding efforts by the Director of the New York Office to have the post of Administrative Officer filled before the end of 2001, the post was never opened to recruitment. Upon transfer of the post to Paris, the Director of the New York Office wrote unsuccessfully to the Assistant Director-General of the Sector for External Relations and Cooperation requesting either the reinstatement of the post or the creation of an equivalent post in New York. In the same letter, he stated that he had "instructed [the complainant], Senior Clerk, to perform the administrative duties of the office, on a temporary basis".

4. It is not in dispute that the complainant has continued to perform the duties of the post of Administrative Officer from the time it was transferred to Paris, even though the post no longer exists.

5. The complainant was advised by a memorandum dated 17 January 2002 that his special post allowance had been terminated with effect from 1 January of that year "as a result of the transfer of [the post] to Headquarters". On 28 January he submitted a protest to the Director-General, asking him to transfer the vacant post of Administrative Officer back to the New York Office and to pay him the special post allowance until the post was filled. No reply was received to that letter and on 1 May 2002 the complainant filed a notice of appeal with the Appeals Board. In his detailed appeal, dated 7 May, he sought reinstatement of his special post allowance from 1 January 2002 for so long as he continued to perform the extra duties as instructed by his director. He also requested that the allowance be included in his pensionable remuneration.

6. The complainant travelled from New York to Paris to present his appeal to the Appeals Board. The Board expressed the view, in line with the argument submitted on behalf of the UNESCO Administration, that "according to Staff Regulations and Staff Rules and Manual Item 2320.42, there is no provision for payment [in respect of the] additional work [performed by the complainant]". This notwithstanding, the Appeals Board was of the view that it was "just, fair, equitable and consonant with human rights that [he] be paid the remuneration for the additional duties performed by him". The Board concluded that the complainant's claim that the special post allowance be included in his pensionable remuneration could not be sustained. However, it recommended that he be paid "appropriate remuneration based on the measure of the special post allowance for the additional work carried out by [him] in [the] higher grade" together with travel expenses and per diem allowance for travelling to Paris to present his appeal.

7. On 26 February 2003 the Director-General informed the complainant that he had "decided not to accept the recommendations of the Appeals Board on the grounds that they are legally unfounded". That is the impugned decision.

8. Before turning to the complaint, it is convenient to note that it seems, from the use of the words "legally unfounded", that the Director-General has misunderstood the recommendations of the Appeals Board. The Board did not recommend the continued payment of the special post allowance. Rather, and as already noted, it recommended the payment of "appropriate remuneration based on the measure of the special post allowance".

9. The complainant contends that the decision of the Director-General to transfer the post of Administrative Officer to Paris was unlawful because the duties of the post continue to exist, and because the decision was taken for reasons irrelevant to the service requirements of UNESCO. Further, he claims that the Organization has acted with "total disregard to [his] basic rights [...] to receive a fair and just remuneration for the additional work and the increased level of the tasks [he is required to perform]". In consequence, he requests that the decision terminating the special post allowance be set aside and that compensation for the allowance be awarded "from 1 January 2002 to date in accordance with Staff Rule 103.17(b)". Lastly, he seeks damages for emotional and moral injury equivalent to one year's gross pay, and 4,000 dollars in costs.

10. In its reply UNESCO contends, as it did before the Appeals Board, that as the post of Administrative Officer was transferred from New York to Paris and subsequently abolished, the Staff Rules simply do not permit the payment of a special post allowance to the complainant beyond 31 December 2001. Further, in its surrejoinder, it contends that the proper course for the complainant is "to explore the possibility of the reclassification of his post instead of seeking the payment of a special post allowance on an abolished post".

11. UNESCO Staff Rule 103.17(b) provides:

"When a staff member is called upon to assume temporarily the functions of a post of higher grade for a period of more than three months, he shall be granted, with effect from the beginning of the fourth consecutive month of such service, except as provided in (c) and (d) below, a non-pensionable special post allowance:

(i) equivalent to the increased pay he would have received had he been promoted to the grade of the post, if he assumes the full duties and responsibilities of the post; or

(ii) in an amount to be determined by the Director-General, if he assumes only certain of the duties and responsibilities of the post."

12. Likewise, Rule 103.17(d) relevantly provides that where a staff member, "who has already carried out all or part of the functions of a higher-graded post for a period of more than three months", is called upon "to carry out all or part of the functions of the same post for any further period of three months or more", he is to receive the special post allowance payable under Rule 103.17(b)(i) from the first day of any such further period.

13. Item 2320.42 of UNESCO's Manual provides that a special post allowance may not continue beyond 12 months save in exceptional circumstances and subject to special authorisation by the Deputy Director-General. As the complainant was paid a special post allowance for more than 12 months, it must be assumed that his was an exceptional case and that payment was specially authorised.

14. Manual Item 2320.42(f), upon which UNESCO places particular reliance, provides that an "allowance [...] ceases whenever the post for which it has been granted is abolished and the cessation of the allowance takes effect upon the date of abolition".

15. It is convenient to refer also to Staff Rule 102.2 which provides:

"Any staff member who considers that the nature of the duties or the level of responsibilities required of him are not compatible with the classification standards or criteria applicable to the grade of his post may, at any time, submit to the Director-General a request for the reclassification of the post, provided that there has been a substantial modification in the structure and responsibilities of the unit to which the post belongs, and consequently in the responsibilities of the claimant."

16. Although the complainant submits that the Director-General's decision to transfer the post of Administrative Officer from New York to Paris was unlawful, he does not challenge that decision. He challenges only the decision to terminate payment of the special post allowance, pointing out that the duties of the post of Administrative Officer still have to be performed and that he continues to perform them.

17. It should at once be noted that Manual Item 2320.42(f) prohibits the payment of a special post allowance only if the post in question has been abolished. It does not apply if a post has merely been transferred to another office. In this case, the Director-General's decision to terminate the allowance was "as a result of the transfer of [the] post [...] to Headquarters". However, it is clear that transfer of the post has at all times been treated as equivalent to its abolition. Thus, for instance, in its surrejoinder, UNESCO states that "following the abolition of the post on 1 January 2002 [...] the Complainant is no longer entitled to [the special post allowance]".

18. The post of Administrative Officer was not abolished on 1 January 2002 when it was transferred to Paris. As already indicated, it is not clear precisely when it was abolished, but it was some time after it was transferred.

19. There is nothing in the Staff Rules or in the Manual to require cessation of the payment of a special post allowance merely because the post in question has been transferred. It must be taken from the approach of the Administration before the Appeals Board and from the reply and surrejoinder filed in the present proceedings that the Director-General has at all times taken the view that transfer is equivalent to the abolition of the post in respect of which the complainant was receiving a special post allowance. That was an error of law and the decision to terminate the allowance, based as it was on the transfer of the post, must be set aside.

20. The conclusion that the Director-General's decision to terminate the special post allowance should be set aside leaves unresolved the question whether the subsequent abolition of the post has the consequence that the complainant is not thereafter entitled to payment of the special post allowance. He contends that it does not have that consequence, pointing out that in Judgment 1677 this Tribunal held that a person performing the duties of a post of a higher grade was entitled to the continued payment of a special post allowance, even after the post was abolished.

21. Although the staff regulation considered in Judgment 1677 provided for the payment of a special post allowance when an employee was "temporarily required to assume the responsibilities and duties of an existing post in a higher grade", unlike UNESCO Manual Item 2320.42(f) it did not expressly prohibit the payment of a special post allowance when the post for which it was granted was abolished. It may be assumed, for present purposes, that Manual Item 2320.42(f) does prohibit payment of a special post allowance when a post has been abolished. However, it does not and cannot relieve an employer of its duty to ensure proper remuneration for extra duties and responsibilities discharged by an employee over and above those of the substantive post which he or she

holds. More precisely, it does not and cannot authorise a breach of the principle of equality.

22. The principle of equality directs equal pay for work of equal value. An employer is not absolved from the requirement to ensure equal treatment and equal pay for work of equal value merely because an employee has the right to seek reclassification of his or her post. UNESCO Staff Rule 102.2 does not provide otherwise.

23. As it is not in dispute that, notwithstanding the abolition of the post of Administrative Officer, the complainant continues to perform all the duties and discharge all the responsibilities of that post, he is entitled to remuneration commensurate with the value of that work. And consistently with what was said by the Tribunal in Judgment 1677, the special post allowance payable before the post was abolished must be the "main yardstick" for measuring the value of that work. That is not to say that the Director-General may not reorganise the work of the unit in which the complainant is employed or redistribute the functions associated with the abolished post of Administrative Officer in such a way that the work then performed by the complainant is properly to be assessed at some lower value. Nor is it to deny the possibility that a proper and current evaluation of the work performed by the complainant may result in some different remuneration from that which would result from the payment of an amount equivalent to the special post allowance. However, the principle of equal pay for work of equal value requires that, until a proper evaluation of the work performed by the complainant is carried out, he should be remunerated at a rate equivalent to that which he would have received by way of special post allowance for so long as he continues to perform all of the duties and responsibilities of the abolished post.

24. As UNESCO failed to observe the principle of equality, it should pay the complainant moral damages in the sum of 1,000 dollars.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. UNESCO shall pay the complainant the special post allowance for the post of Administrative Officer from 1 January 2002 until the date of its abolition.
3. Unless and until a proper evaluation is effected of the work performed by the complainant, but only for so long as he continues to perform all the duties and responsibilities of the abolished post of Administrative Officer, UNESCO shall pay him, by way of remuneration, the amount he would have received had he continued to be granted a special post allowance.
4. UNESCO shall pay the complainant interest at the rate of 8 per cent per annum on the moneys payable under points 2 and 3 above, calculated from the date on which they ought to have been paid until the date of payment.
5. It shall pay him 1,000 United States dollars in moral damages.
6. It shall also pay him 1,500 dollars in costs.
7. If it has not already done so, UNESCO shall pay the complainant's travel expenses and per diem allowance for travelling to Paris to present his appeal to the Appeals Board.

In witness of this judgment, adopted on 13 November 2003, Mr James K. Hugessen, Vice-President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

James K. Hugessen

Florida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.