

NINETY-NINTH SESSION

Judgment No. 2428

The Administrative Tribunal,

Considering the complaint filed by Miss I.A. A.-B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 May 2004 and corrected on 4 June, UNESCO's reply of 20 September, the complainant's rejoinder of 27 October and the Organization's surrejoinder of 9 December 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a national of Saudi Arabia born in 1946, joined the service of UNESCO on 13 January 1997 under a fixed-term appointment at grade P-5 as a Senior Programme Specialist in the Education Sector. On 1 May 1999 her post was reclassified from P-5 to D-1 and she was promoted to grade D-1 with effect from 1 November 1999.

The General Conference, at its 30th Session between 26 October and 17 November 1999, and the Executive Board, at its 159th Session between 15 and 26 May 2000, both invited the Director-General to reduce the number of posts at the highest levels in order to achieve a more balanced post structure. On 3 July 2000 the Director-General issued a note on the restructuring of the Secretariat at Headquarters setting up a new post structure. The note provided that all director posts which did not correspond to the new structure in terms of functions and/or grade would be abolished on 1 October 2000. Director posts which had no equivalent in terms of functions and/or grade in the current structure would be opened to recruitment with internal recruitment being preferred. A transitional period was introduced during which appropriate solutions could be found for staff concerned by those measures; that transitional period ended on 31 December 2001. The note further stated that individual consultations would be held with all the directors affected by the measures with a view to identifying possible solutions: appointment at equal grade in a vacant director post at Headquarters or in the field, redeployment to a lower-level post, or separation. The new structure took full effect on 1 October 2000.

By a further note of 1 October 2000 the Director-General appointed a number of directors and stated that directors whose posts were not mentioned therein were invited to apply for the posts in the new structure. The cases of holders of director-level contracts who had not been appointed to director posts at Headquarters at the end of the restructuring procedure would be examined in consultation with the staff concerned, so as to find – as far as possible – a satisfactory solution (such as appointment at equal grade in a vacant director post in the field, appointment to a lower level or agreed separation).

By a memorandum of 30 July 2001, the Director of Human Resources Management informed the complainant that, since she had declined two offers of a D-1 post in the field, she would be offered a transfer to a post at the grade immediately below her grade at that time if an appropriate post at Headquarters were not found for her by 31 December 2001. The memorandum requested a written confirmation from her to the effect that she was willing to accept a P-5 post at Headquarters and informed her that if that were not acceptable, an agreed separation might be the remaining option.

The complainant replied to the Director of Human Resources Management in a memorandum of 9 August 2001 that she had no recollection of any formal definitive offer of a post in the field. She applied for several advertised D-1 level posts between 2001 and 2003 but all these applications were unsuccessful.

By a memorandum dated 22 November 2001, the Director of Human Resources Management notified the complainant that the Administration had been unable to identify a Principal Officer vacant post at Headquarters corresponding to her profile, to which she could be transferred at equal grade, and that the Director-General had no alternative but to keep her in the post that she occupied at grade P-5 with effect from 1 January 2002. The

memorandum also stated that if she accepted, she would undertake not to exercise any claim or lodge any appeal to the Appeals Board or the Tribunal. The Director of Human Resources Management confirmed this decision in a memorandum of 19 February 2002 in which he reminded the complainant that, since she had declined two offers of a D-1 post in the field, the remaining option was an agreed separation.

The complainant protested against that decision in a memorandum of 14 March to the Director-General in which she reiterated that she had never been formally offered any D-1 post in the field and indicated that she “could accept a [P-5 post] on a temporary basis in order to facilitate the restructuring process”. In a memorandum of 27 March to the complainant the Deputy Director-General requested that she confirm her acceptance of a transfer to a P-5 post. In a memorandum of 2 April to the Deputy Director-General, the complainant accepted a P-5 post on a “temporary basis” and, by a memorandum of 17 April to the Director of Human Resources Management, she requested that a job title be included in her job description before signing it.

In a memorandum of 28 May, the complainant protested to the Director-General; she considered that her job description had been “emptied of its previous professional content and replaced with more secretarial duties”. By a memorandum of 22 July, the Acting Director of Human Resources Management rejected the complainant’s protest of 28 May on behalf of the Director-General. On 6 August she filed a Notice of Appeal against the decision of 22 July followed by a Detailed Appeal on 22 October 2002. In its Opinion dated 19 December 2003, the Appeals Board recommended “that every effort be made to promote the [complainant] to a D-1 post at an early date” and that, in the meantime, “she should be placed at a P-5 post where her feeling of marginalization may be removed”.

The Director-General informed the complainant by a letter of 23 February 2004 that he had decided not to accept the Board’s recommendation and to reject her appeal. That is the impugned decision.

In a letter of 27 February 2004 to the Saudi Minister of Education, the Director of Human Resources Management stated, on behalf of the Director-General, that the complainant’s application to a director-level post would “be given every consideration in the evaluation process”.

B. The complainant firstly contends that the Director-General did not provide any reason when rejecting her appeal, thereby breaching established case law.

Secondly, she submits that UNESCO did not comply with its duty to act in order to identify a suitable post for her. She states that she never received a formal offer of a field post and requests that the Tribunal order UNESCO to produce written evidence of efforts made to that effect.

Thirdly, the complainant considers that UNESCO breached the promise it made to the Saudi Minister of Education in a letter of 7 December 2001, and reiterated on 27 February 2004, to the effect that her application would be given due consideration. She asserts that the Organization breached its duty of good faith by transferring her to a post without a meaningful job description and no clear assignment.

Fourthly, the complainant declares that her personal dignity was injured and that the series of events related to her transfer and treatment demonstrates a continuing pattern of harassment. She adds that she was not individually consulted during the restructuring and that her right to exercise appropriate legal and judicial remedies was violated by the memorandum of 22 November 2001.

The complainant claims 20,000 United States dollars in moral damages and 4,000 dollars in costs.

C. In its reply UNESCO firstly submits that every staff member has the “enshrined” right to be considered for promotion, therefore the acceptance or rejection of the recommendation of the Appeals Board would have had the same effect. It may have been remiss of the Organization not to enunciate the reason for its decision in the letter to the complainant but she had been informed of it at every stage of the internal proceedings.

Secondly, the Organization contends that it showed special solicitude in identifying a suitable post for the complainant but unfortunately did not succeed in finding her a director post at Headquarters. The two offers of a director post in the field were made to her in accordance with the applicable provisions which did not require that any offer be formal; they only called for individual consultation, and this took place. The Organization considers that, as the complainant rejected both offers of an assignment in the field, she had to choose between an appointment at a lower level at Headquarters and an agreed termination. The Organization states that it made it clear to the complainant that her transfer to a P-5 post would be effective until such time as she was selected to a

higher-level post following a competitive recruitment process.

Thirdly, it asserts that even if the statement contained in the letter of 27 February 2004 to the Saudi Minister of Education can be considered a promise, a breach of that promise has not been shown by the complainant: her applications for transfer or promotion were indeed given due consideration.

Fourthly, UNESCO states that the complainant's allegations of bad faith on its part have not been proved. The Organization has always dealt with her in good faith and has striven not to cause her any undue injury.

D. In her rejoinder the complainant says that UNESCO did not reply to a number of her arguments, mainly the lack of justification for the impugned decision, its failure to identify a suitable post for her, the breach of its promise and its lack of good faith.

E. In its surrejoinder UNESCO contends that it responded to the complainant's arguments to the extent that they relate to those issues that properly form the subject of her complaint.

CONSIDERATIONS

1. The complainant appealed against a decision by the Acting Director of Human Resources Management, taken on behalf of the Director-General, notified to her in a memorandum dated 22 July 2002. The Appeals Board recommended "that every effort be made to promote the [complainant] to a D-1 post at an early date", and that, in the meantime, "she should be placed at a P-5 post where her feeling of marginalization may be removed". The Director-General decided not to accept the Board's recommendations and so informed the complainant by a letter dated 23 February 2004. That is the impugned decision, which as the complainant rightly points out, has not been duly substantiated, be it in fact or in law.

2. As the Tribunal held in Judgment 2092 under 10, no further reasons are required when the executive head of an organisation follows the recommendations of an internal appeal body, but they are necessary when those recommendations are not endorsed. This is the case here. UNESCO had the duty to give reasons for its decision affecting the interests of a staff member; it has therefore breached its duty vis-à-vis the complainant.

3. As the question whether to reject or allow the complainant's appeal must be considered further by the Director-General and as there are some other outstanding grievances which are not before the Tribunal, there is no need to entertain the complainant's claim for moral damages. She is, however, entitled to an award of costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed and a new decision will have to be made stating its reasons.
2. UNESCO shall pay the complainant 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 6 May 2005, Mr James K. Hugessen, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

James K. Hugessen

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.