

**NINETY-NINTH SESSION**

**Judgment No. 2445**

The Administrative Tribunal,

Considering the complaint filed by Mr M.A. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 April 2004, the Organization's reply of 30 July, the complainant's rejoinder of 9 September and UNESCO's surrejoinder of 26 November 2004;

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 joined UNESCO in 1978. At the material time he was Chief of Section in the Sector for External Relations and Cooperation, at grade P-5.

On 19 November 2001 a vacancy notice was issued advertising an internal competition to fill the D-1 post of Director of the Headquarters Division, in the Sector for Administration. With the deadline for applications being set at 19 December 2001, the complainant applied on 17 December 2001. On 15 January 2002 the complainant and four other candidates were interviewed by a selection panel chaired by the Assistant Director-General for Administration, which included as one of its members Mr E., Director of the Executive Office of that Sector. The panel concluded that only one candidate, Mr B., "[had] the requisite profile" and recommended to the Director-General that "in the eventuality of the non-designation of that candidate, it would be desirable to re-advertise the post for a period of three months in the specialised press". In a letter of 21 January 2002 the Director-General notified the chairperson of the panel that, since Mr B. had been appointed to another post, he had decided to transfer Mr E. at the same grade to the post of Director of the Headquarters Division. In a note of 25 February the Director-General informed the management of UNESCO of his decision to transfer Mr E. to the post in question.

On 22 March 2002 the complainant filed a protest against the above-mentioned appointment and on 15 May was informed that his protest was rejected. Meanwhile, on 30 April, he had filed a notice of appeal, which he followed up on 29 May 2002 with a detailed appeal. In its report dated 12 December 2003, the Appeals Board expressed the view that the recruitment process was vitiated by flaws and recommended unanimously to the Director-General that he consider transferring the complainant to another post at D-1 level, or else upgrading his post with effect from 1 March 2002. Failing either of those options, it recommended granting the complainant three extra steps in his grade also with effect from that date. In a letter of 23 January 2004, which constitutes the impugned decision, the Director-General informed the complainant that he had decided not to accept the recommendation of the Appeals Board.

B. The complainant puts forward eight pleas. Firstly, the Director-General's decision to reject the Appeals Board's recommendation gave no reasons.

Secondly, the contested appointment is flawed since, in breach notably of the principle of good faith, the selected staff member, Mr E., was directly involved as "judge and party" in the selection process. In support of his argument, the complainant refers to Judgments 1479, 1526 and 1756 of the Tribunal.

Thirdly, the appointment of a person who had not applied for a post which it had been decided should be filled by "open competitive recruitment" constitutes, according to the case law, a fatal procedural flaw. In this respect the complainant refers to Judgment 1549.

Fourthly, Regulations 4.2\* and 4.3.2 of the Staff Regulations and Rules were breached.

Fifthly, according to both the current regulations and the practice of the Organization, all pre-selected, shortlisted

candidates are eligible to fill an advertised post and the evaluation panel should therefore have made a choice. Maintaining, as the Organization did during the internal proceedings, that none of the candidates had the requisite profile amounts therefore to a “denial of the selection procedure which the Administration itself initiated”.

Sixthly, while the Administration can invoke the legitimate interests of the Organization in order to justify the need to consider other qualified candidates for the post in question, a new procedure should have been launched to seek other potential applicants who would be subjected to competitive evaluation based, as precedent unambiguously demands, on the principle of equal opportunity (see Judgment 1223).

Seventhly, the Organization fails to distinguish between discretionary power and arbitrary power.

Lastly, the contested appointment is tainted with many procedural flaws, caused him considerable injury and seriously affected the development of his career.

The complainant claims the following relief:

“[The quashing] of the Director-General’s unsubstantiated decision of 23 January 2004 and application instead of the unanimous recommendation of the Appeals Board of UNESCO, namely implementation of one of the three following options:

- transfer [...] to a D-1 post with due regard to his qualifications, experience and profile, effective 1.3.2002;
- the upgrading of [his] current post from P-5 to D-1, effective 1.3.2002;
- the grant of three extra steps in [his] present grade, effective 1.3.2002.

In addition payment of 50,000 euros in compensation for material and moral injury and 5,000 euros in costs.”

C. In its reply UNESCO argues that the decision of 23 January 2004 merely confirmed that of 15 May 2002 and that it was taken after “examination of the entire dossier relating to [the complainant’s] appeal”. The complainant was therefore informed of the reasons why his protest against the transfer of another staff member to a post for which he had applied had been rejected. The lack of reasons given in the letter of 23 January 2004 is an oversight which does not vitiate that decision.

The defendant recognises that Mr E., a member of the panel which interviewed the candidates for the post of Director of the Headquarters Division, never applied for the post. In fact the panel had recommended re-advertising the post if it was decided not to appoint the best placed candidate (who was not the complainant). It was only after the decision was taken not to follow the panel’s recommendation that the defendant opted to transfer Mr E., who was not a candidate, to the above-mentioned post. The complainant’s allegation that Mr E. was “judge and party” is therefore groundless.

The Organization maintains that the complainant is confusing a decision to appoint and a decision to transfer. Judgment 1549 concerned a decision to appoint: an application had been accepted and examined after the deadline for the acceptance of applications. The complainant’s case is not the same as that dealt with in Judgment 1549 because the post for which he had applied was filled by transfer and not by appointment of a candidate who had applied too late.

UNESCO denies that it abused its discretionary power by transferring a person who was not a candidate to the post after reaching the conclusion that none of the candidates had the requisite profile.

The defendant denies that there was a breach of Regulations 4.2 and 4.3.2 of the Staff Regulations and Rules. Prior to being amended, those regulations referred to “a competitive process” and were intended to apply to promotion transfers and not to transfers at the same grade. They were amended, however, in order to avoid the sort of wrong interpretation that emerges from the complainant’s accusation, namely the confusion between a promotion subject to a competitive process and a transfer at the same grade which does not require that process. It is therefore, according to the defendant, “pure sophistry” on the part of the complainant to argue that the regulations concerned were breached, considering that as an experienced senior official he is perfectly aware that a transfer at the same grade does not require a competitive process and that he himself benefited on several occasions from that kind of transfer without a competition being held.

UNESCO further argues that the mere fact of being shortlisted for a post does not mean a candidate can expect to be appointed to that post. There is nothing either in the Organization's legal texts or in the Tribunal's case law to suggest that a candidate is entitled to be appointed merely because he appears on a shortlist: the staff member's only legitimate right is to have his application considered for appointment and not to be appointed.

The defendant admits that it might have been possible to open a new recruitment procedure, but points out that the complainant is not competent to decide what is in the best interests of the Organization.

D. In his rejoinder the complainant denies that he was given any reasons whatsoever for the Director-General's rejection of the Appeals Board's recommendation and cites several judgments in support of his arguments.

He also points out that Regulations 4.2 and 4.3.2 of the Staff Regulations and Rules were approved only on 16 October 2003 in their amended version, in other words 22 months after the events of January 2002. He recalls that according to the older version of Regulation 4.2, "[i]n appointing, transferring or promoting staff members [...] the Director-General shall use a competitive process in order to secure the highest standards of efficiency, competence and integrity".

According to the complainant, the Organization fails to distinguish between transfers at the same grade to posts which have not been advertised and appointments to posts which have been advertised and are therefore subject to a competitive selection process.

Lastly, he maintains that every effort was made to ensure that no person other than Mr E. would be appointed to the post of Director of the Headquarters Division.

E. In its surrejoinder UNESCO explains that it was only at the Director-General's insistence that the selected staff member agreed to be transferred at the same grade to the post in question, and that his transfer could not be considered part of the "process of recruitment, which had ended well before he was transferred".

It recalls that a post which is "open to recruitment" need not necessarily be filled by one of the shortlisted candidates.

## CONSIDERATIONS

1. At the material time the complainant was employed as Chief of Section at grade P-5.
2. On 17 December 2001 he applied for the D-1 post of Director of the Headquarters Division for which a vacancy notice was published on 19 November 2001. The selection panel concluded that only Mr B. "[had] the requisite profile". As this candidate had been appointed to another post, however, on 25 February 2002 the Director-General announced his decision to transfer Mr E., who had been a member of the selection panel, to the advertised post.

When it examined the case, the Appeals Board recommended to the Director-General that he should consider transferring the complainant to another post at the D-1 level or reclassifying his post with effect from 1 March 2002. Failing that, it recommended granting the complainant three extra steps.

3. In a letter of 23 January 2004, which constitutes the impugned decision, the Director-General informed the complainant that he had decided not to accept the Appeals Board's recommendation.
4. The complainant puts forward eight pleas in support of his complaint, starting with the fact that "no reasons are given" for the Director-General's decision even though it goes against the Appeals Board's recommendation.
5. In its reply the Organization recognises that the letter of 23 January 2004 does not give specific reasons for rejecting the Appeals Board's recommendation.

It contends nevertheless that the impugned decision merely amounted to a confirmation of the decision of 15 May 2002 and that it was taken after "examination of the entire dossier relating to [the complainant's] appeal", so the complainant cannot allege that he was unaware of the reason for the decision of 23 January 2004 or that he was

prevented from defending his rights. It adds that the lack of reasons in the letter of 23 January 2004 is an oversight which does not vitiate the decision.

6. The Tribunal has consistently stressed the requirement that where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated (see Judgment 2339, under 5, and the other judgments referred to). In the case in hand the final decision of 23 January 2004 does not meet this requirement. It is drafted as follows:

“After careful consideration of the report of the Appeals Board dated 12 December 2003 [...] and examination of the entire dossier relating to your appeal, I have decided not to accept the recommendation of the Appeals Board.”

It contains no indication which would allow the Tribunal to review the real reasons that led the Director-General not to accept the Appeals Board's recommendation. Merely asserting that it was after examination of the entire dossier relating to the complainant's appeal that the impugned decision – which according to the defendant merely confirmed an earlier decision – was taken in no way justifies not giving reasons.

7. It follows from the above that the decision of 23 January 2004 must be set aside on the grounds that no reasons were given for the decision.

As the Tribunal cannot take an appropriate decision in the Director-General's stead, the case must be sent back for him to take a new decision taking into account the Appeals Board's recommendation.

8. The complainant claims the sum of 50,000 euros in compensation for alleged moral and material injury.

The Tribunal has no means of evaluating the complainant's material loss. On the other hand, he suffered moral injury which may be compensated with payment of the sum of 5,000 euros. He is also entitled to receive 2,000 euros in costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back to the Director-General for a new decision to be taken as stated under 7 above.
3. The Organization shall pay the complainant the sum of 5,000 euros in moral damages and 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2005, Mr James K. Hugessen, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

James K. Hugessen

Seydou Ba

Claude Rouiller

Catherine Comtet

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      \* At the material time, Regulation 4.2 provided inter alia that “in appointing, transferring or promoting staff members [...] the Director-General shall use a competitive process”.

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