

The Administrative Tribunal,

Considering the complaint filed by Mr T.R. F. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 August 2005 and corrected on 3 January 2006, UNESCO's reply of 1 March, the complainant's rejoinder of 22 July and the Organization's surrejoinder of 19 October 2006;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a citizen of the United States of America born on 18 March 1944, is a former staff member of UNESCO. He joined the Organization on 1 August 1984. From 1987 to 2000 he worked in the Office of the Director-General. In May 2000 he was hurt in a terrorist incident while on mission in Bogotá, Colombia, and was later diagnosed with post-traumatic stress disorder. At the material time he was Head of the Sub-Unit for Knowledge and Values, in the Social and Human Sciences Sector (SHS), and held grade P-5.

On 21 May 2002 a copy of an article about the funding of the "Extreme Right" was found pushed under the door of the offices of the International Staff Association of UNESCO. Two Permanent Delegates to UNESCO also received copies. Because of doubts as to the accuracy of statements made in the article, the Internal Oversight Service (IOS) was asked to conduct a preliminary investigation to establish whether the document was defamatory against the Director-General, and to determine who the author was and who circulated it.

After office hours on 29 May 2002 the complainant met with the Assistant Director-General in charge of the Social and Human Sciences Sector. The Director of Human Resources Management (HRM) and the Director of IOS were also present. The complainant was questioned about his possible involvement with the production or dissemination of the anonymous article. All three officials then accompanied the complainant to his office, where they conducted a brief search. They took away a plastic bag containing documentation, and had a computer technician make a copy of the hard disk of the complainant's computer. By a memorandum of 30 May 2002 the Deputy Director-General informed the complainant that the IOS was to undertake an in-depth investigation into the "preparation and dissemination" of what was deemed to be "defamatory information and materials", and that because of the complainant's "possible personal involvement", and pending completion of the investigation, the Director-General was placing him on suspension with pay, with immediate effect. The complainant was also informed that during the period of his suspension he would not have access to the Headquarters premises. On 31 May 2002 the complainant went to a local police station and made a statement alleging aggressive behaviour on the part of the three UNESCO officials who had interviewed him and searched his office on 29 May. The police drew up a *procès verbal*.

On 20 June the Deputy Director-General sent the complainant a memorandum headed "Charges against you". It stated that the charges against the complainant constituted unsatisfactory conduct under Staff Regulation 10.2, and "serious misconduct" violating Staff Regulations 1.4, 1.5, 1.7 and 1.9 as well as the Standards of Conduct for the International Civil Service. The complainant submitted comments in reply to those charges. By a memorandum of 17 July he was informed that the matter was being referred to the Joint Disciplinary Committee (JDC). On 20 August 2002 the Director of IOS issued a report on the review conducted by the IOS.

On 23 August the Deputy Director-General sent the complainant a further memorandum headed "Additional charges against you". That document referred to the fact that the complainant had made a statement to the French police on 31 May 2002. He was accused of making false allegations against the three staff members who had searched his office on 29 May and of circulating defamatory material against UNESCO officials. The complainant again submitted comments in reply to those additional charges.

Having heard his case, the JDC issued its report on 18 November 2002. It recommended that, pursuant to Staff Rule 110.1(a), the disciplinary measure of termination be imposed on the complainant. The Deputy Director-General informed the latter by memorandum of 16 December 2002 that the Director-General had decided to accept the Board's recommendation, and that his service would be terminated with effect from 20 December 2002. The complainant sent a protest to the Director-General on 9 January 2003, seeking a review of that decision. By a letter dated 25 February 2003 the Director of HRM informed the complainant that the Director-General was confirming the decision to impose the disciplinary measure of termination on him.

The complainant filed an internal appeal on 8 September 2003 against the disciplinary measure imposed on him. The Appeals Board issued its report on 24 February 2005. It recommended: (i) conducting a thorough evaluation of the complainant's state of health from before the time when the charges were first raised against him; (ii) considering in the light of that health evaluation the rescinding of the disciplinary measure that took effect on 20 December 2002; and (iii) considering replacing the termination measure with "a comprehensive negotiated agreement". One member of the Board put forward a dissenting opinion, recommending maintaining the disciplinary measure against the complainant but paying him "appropriate financial compensation" in recognition for his contribution to the Organization's work, and on condition that he refrained from further appealing his case. The Deputy Director-General informed the complainant, by a letter of 23 May 2005, that taking into account that the Board was "manifestly divided" in its recommendations, he had decided to maintain the previous decisions made on the complainant's case based on the recommendation of the Joint Disciplinary Committee. That is the impugned decision.

B. The complainant raises three main issues. Firstly, he objects to the action taken against him, including the suspension, contending that it was too severe for the alleged offence. In his opinion, the Organization could not have been so damaged by the distribution of an anonymous document to three individuals; furthermore, it did not warrant his suspension and termination. By suspending him from duty and having him accompanied by a guard everywhere he went at Headquarters, the Administration was making a clear announcement that it considered him to be "guilty", even at a stage when the IOS investigation had only just begun. As a result of his suspension he was deprived of due process and a fair hearing.

Secondly, he submits that the Organization has no proof of the allegations made against him. It has never produced any evidence to prove that he either wrote or distributed the article in question. He was neither interviewed nor present during the gathering of evidence, and argues that the Administration's case against him is based on "prejudice and false assumptions". Key elements were withheld from both him and the JDC. In particular, he claims that when it dealt with his case the JDC did not have before it either the document of 23 August containing the additional charges, or his reply to those charges.

Thirdly, he takes issue with the fact that no consideration was given to the medical context. Recommendations that his case should be seen in a medical light were simply ignored. He refers to a "pattern of prejudice and harassment that began in 2000".

The above-mentioned factors, in his opinion, amount to a denial of his right to the presumption of innocence and also of his right to be treated with respect and dignity, especially given that he was a senior and long-term official. With regard to the recommendations made by the Appeals Board, he says he is willing to participate in the procedure recommended by the Board and is prepared to cooperate fully in "the medical evaluations and negotiations" it referred to.

The complainant claims the quashing of the Administration's rejection of the recommendations made by the Appeals Board. He seeks material damages in respect of loss of "salary, pension and children's benefits" for the period from 26 [sic] December 2002 to 18 March 2004 (when he would have reached the mandatory retirement age), as well as moral damages and costs.

C. In its reply the Organization submits that the complainant's claim concerning the recommendation made by the Appeals Board is not admissible *ratione materiae*. It gives reasons why it considers the Appeals Board exceeded its powers in recommending a negotiated agreement. First, the Board's report has to be in conformity with the Staff Regulations and Rules, and nothing in the internal rules allows the Board to recommend a negotiated separation from service. Second, the complainant had already been given the opportunity to negotiate his separation, but had refused as a matter of principle. He could also have disagreed with his case being referred to a Joint Disciplinary Committee, but did not do so. By recommending a negotiated separation from service on a

disciplinary matter the Appeals Board exceeded its powers by denying the JDC's competence. Furthermore, the question of the complainant's health condition was not properly before the Appeals Board nor is it properly before the Tribunal. The Organization states that it will address the complainant's arguments to the extent that they concern whether the disciplinary action taken against him conflicted with the terms of his appointment or with any Staff Regulation or Staff Rule.

Concerning the complainant's suspension from duty, it points out that it was essentially an interim measure, taken in the interests of the Organization, and, as is clear from the case law, such a measure is subject to only limited review by the Tribunal. It submits that the proportionality principle was respected.

Regarding the termination decision itself, it notes the complainant's argument that there was no proof that he was the author of the anonymous article. It points out that the JDC in fact allowed him the benefit of the doubt on this point, but not on any of the other charges against him. It was shown that he was "seriously implicated and closely associated with" the preparation of the article. The charge of misconduct was proven and warranted termination. The document that was circulated on 21 May reflected "total non-compliance" with the standards of conduct expected of staff members, and there were clear links between that document and the documentation that was found in the plastic bag removed from the complainant's office on 29 May. There was "precise and concurring evidence" that the complainant defamed the Director-General and harmed the reputation of the Organization. UNESCO argues that the impugned decision was lawful, and there are no grounds for granting the damages claimed by the complainant.

The Organization dismisses his arguments that the document containing the "additional charges" was not disclosed to the JDC. The JDC's discussion on those charges was reflected in its report, and the complainant has not shown that there were any flaws in the proceedings before the JDC. The document containing those "additional charges" was clear evidence of "aggravated new misconduct". It revealed that despite his suspension, the complainant had contacted another Permanent Delegate to UNESCO in order to make known that in the statement he made to the French police he had pressed criminal charges against the three officials who interviewed him in the evening of 29 May. It denies that there was breach of due process and maintains that the complainant's right to be heard was safeguarded throughout the disciplinary procedure as well as during the procedure before the Appeals Board.

It rejects the complainant's allegations of harassment, noting that they relate to matters that were anterior to the disciplinary facts at issue in the complaint and that he puts forward no evidence to substantiate them.

D. In his rejoinder the complainant does not agree that he was given the opportunity to negotiate his separation. Rather, he was offered a sum by the Administration on the understanding that he would forego his right to appeal, and as a matter of principle he refused to do that.

He notes that although UNESCO claims that the additional charges were discussed before the JDC, it refrains from affirming that the document in question was in the JDC file. Alleging further breach of due process, he points out that the Deputy Director-General was his accuser and yet also acted as "judge of last resort". He claims that the Deputy Director-General ignored any notion of proportionality. The complainant reiterates his view that there was not sufficient evidence against him, that it was not shown that he damaged the Organization and that the sanction of termination was inappropriate.

E. In its surrejoinder the Organization maintains its view regarding the proportionality of the sanction imposed on the complainant. It points out that the JDC had found the evidence against him compelling enough and the misconduct serious enough to recommend termination.

It holds that at no point in the procedure was there any breach of due process. It emphasises that the complainant was given the opportunity to respond to the two sets of charges brought against him, and had the opportunity to reiterate his arguments at the hearing before the JDC.

CONSIDERATIONS

1. The complainant joined UNESCO in 1984. For many years he worked in the Office of the Director-General. He worked there until shortly after the appointment of a new Director-General in 1999. In May 2000, while he was in Bogotá, Colombia, as part of a UNESCO peace mission, he was the target in a terrorist incident.

He was subsequently diagnosed with post-traumatic stress disorder. In 2002 he was Head of the Sub-Unit for Knowledge and Values in the Social and Human Sciences Sector, at grade P-5.

2. On 21 May 2002 a copy of an article was provided to the International Staff Association of UNESCO. The identity of the sender was unknown. Amongst other things, the article made serious allegations against the Director-General. Two Permanent Delegates to the Organization also received copies. This is the triggering event that ultimately led to the complainant being informed by the Deputy Director-General of the termination of his service with effect from 20 December 2002.

3. The Internal Oversight Service was unable to determine conclusively who had authored the article but ventured that the complainant was the author because there was a reference to him in the article. On 29 May 2002 the complainant was confronted with the article. He denied having authored, distributed or ever having properly seen the document. The next morning, after a consensual search of his office and computer hard drive, the complainant was suspended with pay. During the course of the search, the investigators found papers in a plastic bag and materials on the hard drive that could be linked to the content of the article, although there was nothing linking him to the circulation of the article.

4. A few days after his suspension, apparently on the advice of his physician, he made a statement to the police with respect to his treatment by the three officials who had conducted a preliminary investigation in his office. A *procès verbal* was drawn up and the complainant gave a copy of it to the President of the General Conference who was also a Permanent Delegate to UNESCO.

5. In early June 2002 an Observer to UNESCO informed the Administration that the complainant had made similar allegations to those in the article to her orally. Later, a Permanent Delegate to UNESCO also informed the Administration that the complainant had made similar allegations to him.

6. On 20 June 2002 charges were brought against the complainant to which he replied in early July. In mid-July the complainant was informed by memorandum that his case would be referred to the Joint Disciplinary Committee (JDC). He was also informed of his right to representation at the JDC hearing. His suspension with pay was extended for three months or until the completion of the disciplinary proceedings. On 23 August 2002 another memorandum was sent to the complainant detailing additional charges made against him. He replied to these charges in early September.

7. The complainant appeared before the JDC on 5 November 2002. The Committee found several of the charges to be founded and considered that the acts inflicted damage upon the reputation of the Organization and constituted unsatisfactory conduct in breach of the Staff Regulations and Rules; it recommended imposing the disciplinary measure of termination on him. The Committee also expressed concern about the complainant's state of health and the way the Organization handled that aspect of his case.

8. By memorandum dated 16 December 2002 the Organization terminated the complainant's services, with effect from 20 December 2002. A few days later, the complainant was presented with an offer of 11 months' salary on the condition that he did not appeal.

9. The complainant protested the termination decision on 9 January 2003. As notified to the complainant on 25 February 2003, the Director-General upheld his decision. The complainant appealed the ruling to the Appeals Board. The Board met on 16 November 2004 and its opinion and recommendations were forwarded to the complainant on 18 April 2005.

10. The majority of the Board found that the complainant had not acted in bad faith in his interactions during the investigation process, and expressed concern that his behaviour was related to his health. The Board found:

(i) That the complainant likely did not deliberately try to withhold evidence because such action stood in contradiction to his general cooperativeness in the process.

(ii) That in accordance with Staff Regulations 1.1, 1.4 and 1.9, the standard of conduct to be applied in relation to the possession of derogatory materials is whether by having the materials in his possession the complainant disregarded the interests of the Organization or neglected the reserve and tact incumbent upon him by reason of his international status. However, the Regulations did not set out whether simple possession constituted misconduct, and possession alone was insufficient to establish that the complainant was either the author of, or had

disseminated, the materials.

(iii) That with regard to the oral allegations made to the Observer to UNESCO – and repeated in subsequent e-mails to her – and the similar allegations made to the Permanent Delegate, although they were made in the context of private conversations, it was proper and fair to assume that staff members have a responsibility to exercise reserve and maintain a degree of loyalty and discretion towards the Secretariat including the necessary deference to the head of the Organization. Furthermore, although the JDC appeared to conclude that the charge relating to the oral allegations was well founded, it should be noted that neither of the two individuals concerned thought that they were getting involved in Secretariat affairs and both dismissed the allegations as untrue or fabrications.

(iv) That reporting matters to the police instead of going through internal channels might be attributed to nervousness and agitation, and that giving a copy of the *procès verbal* to the President of the General Conference was also done “under the weight of depression and anxiety”.

(v) That, although recognising that the state of the complainant’s health was not before the Board, it could not be ignored if his behaviour and the charges were to be understood properly.

11. A majority of the Board concluded, inter alia, that there was an absence of specific provisions in the Staff Regulations and Staff Rules dealing with the method and manner of conducting an investigation of a disciplinary nature. It recommended:

(i) that the Organization should “pursue through the appropriate channels, a thorough evaluation of the state of health of the [complainant] since before the time the charges were first raised against him up to the present”;

(ii) that the Organization should consider, in light of the results of the health evaluation and in light of the considerations of the Appeals Board, rescinding the disciplinary measure imposed upon the complainant; and

(iii) that the Organization should “consider replacing the [...] termination with a comprehensive negotiated agreement”.

12. One Board member dissented and recommended the maintaining of the disciplinary measure. The dissenting member also recommended that the Director-General define “an appropriate financial compensation” to the complainant in recognition of his work (as a “subtle gesture” to the question of his health and the need for restoration of his dignity), on the condition that he refrain from further appeal.

13. On 23 May 2005 the Deputy Director-General informed the complainant that the Organization was rejecting the Appeals Board’s recommendation in light of the fact that the Board was manifestly divided in its recommendation. He also informed the complainant that the earlier decision to terminate his service without compensation was maintained.

14. In his pleadings, in addition to other relief, the complainant asks the Tribunal to set aside “the UNESCO Administration’s rejection of the recommendation made by [the] Appeals Board”. The complainant states that he is willing to participate in the procedure recommended by the Board and to cooperate in a medical evaluation and negotiations. In effect, the complainant appears to be asking the Tribunal to restore the Appeals Board’s recommendation. The Organization takes the position that it was beyond the Board’s jurisdiction to consider health issues or to recommend a negotiated settlement. With respect to this specific claim for relief, the Tribunal wishes to reiterate certain principles articulated in the earlier case law concerning the role of the Tribunal.

15. In Judgment 158, a complainant had asked the Tribunal to endorse the recommendations of a Board of Inquiry and Appeal. The Tribunal explained that the Board, as an advisory body, was entitled to take into account considerations of expediency. However, the Tribunal, a judicial body, was confined to determining whether the impugned decision was in conformity with the applicable rules.

16. Later, in a case ruled on in Judgment 513, another complainant sought the quashing of a report of the same Board of Inquiry and Appeal. In that report the Board had recommended rejecting an appeal he had filed against his dismissal for misconduct, and its recommendation was subsequently accepted by the Director-General. The Tribunal held that in accordance with Article VII of its Statute it was only the final decision of the Director-General that could be impugned before the Tribunal.

17. For these reasons, it is unnecessary to examine whether the Appeals Board exceeded its jurisdiction in considering the health issues or in recommending a negotiated settlement. As well, it is beyond the competence of the Tribunal to restore the recommendations of the Appeals Board.

18. As noted earlier, the complainant seeks the quashing of the Deputy Director-General's decision in which the Appeals Board's recommendations were rejected. Since in rejecting the recommendations of the Appeals Board, the Deputy Director-General reaffirmed without modification the decision of 16 December 2002 to terminate the complainant's service, it is that earlier decision that is the subject of scrutiny in this proceeding.

19. In the December 2002 decision, the Director-General accepted the findings of the JDC that certain acts of the complainant – identified by the numbering given to the charges against him in the relevant correspondence – inflicted damage upon the reputation of the Organization and amounted to unsatisfactory conduct in breach of the Staff Regulations.

The Director-General dealt with the specific acts in two groups. The acts identified in the first group as amounting to unsatisfactory conduct may be summarised as follows:

- (a) attempting to remove incriminating documents from his office;
- (b) being closely associated with the preparation of the defamatory article;
- (c) making defamatory oral allegations, similar to those in the defamatory article, to the Observer to UNESCO as well as to a Permanent Delegate; and
- (d) being in possession of material containing derogatory remarks about UNESCO, the dissemination of which could damage the interests of the Organization.

The acts identified in the second group consisted of the making of false allegations to the French police and the communication of the *procès verbal* to the President of the General Conference. In this regard, the Director-General accepted the JDC's finding that the complainant had disseminated false allegations against UNESCO officials, had involved officials of the host country in the internal affairs of the Secretariat and had lobbied representatives of Member States seeking their support for resolving a personal matter.

20. The Tribunal concludes, for the following reasons, that the decision of 16 December 2002 to terminate the complainant's service involved an error of law.

21. With regard to being closely associated with the preparation of the offending article, the Tribunal notes that this finding was based solely on the fact that papers in the complainant's possession and on his computer hard disk could be linked directly to the content of that article. While findings may be based on reasonable inferences drawn from known facts, given that there are a number of plausible explanations (other than having collaborated in the preparation of the document) for being in possession of materials having a direct link to the content of another document, the linkage attributed to the complainant on this fact alone amounts to no more than mere conjecture. In its own report, the IOS stated that this evidence "suggests" the linkage. Conjecture or suggestion are insufficient to support a finding that the complainant was "closely associated" with the preparation of the article.

22. With respect to attempting to remove incriminating material, this is an evidentiary matter. That is, it is a piece of evidence from which an adverse inference may be drawn with respect to other conduct but, in and of itself, is not unsatisfactory conduct as contemplated in the Staff Regulations. As with all evidence, it must be evaluated in light of all the surrounding circumstances to ascertain the weight it ought to be accorded and the inference, if any, that may be drawn.

23. With regard to the finding of being in possession of material containing derogatory remarks about the Organization, there is no evidence to support the charge that the possession of the material in any manner inflicted damage on the reputation of UNESCO.

24. In terms of the findings in connection with the *procès verbal* issued by the police and the communication of its contents, the failure of the JDC and, in turn, the Director-General to take into account the highly relevant evidence as to the complainant's health also constitutes an error of law.

25. The only remaining matter is that of the oral communications to both an Observer to UNESCO and a Permanent Delegate. There is no doubt that these communications constitute a breach of the Staff Regulations. However, given that neither of the recipients believed the allegations and that one of the recipients was of the view that one communication was motivated by the state of the complainant's mental health, the possible damage to the reputation of the Organization could only be minimal at best.

26. The findings that the complainant's acts amounted to unsatisfactory conduct involved errors of law, and it is impossible to determine whether the same sanction would have been imposed with respect to the oral communications but for the errors of law. The termination decision in its entirety must therefore be set aside. As the decision of 23 May 2005 confirms the decision of 16 December 2002, which is fundamentally flawed, it involves the same error of law. Both must therefore be set aside. The effect is that the complainant continued in employment.

27. As the complainant has since retired, the Organization shall pay him his salary and all related benefits, including pension entitlements, for the period from the date of his termination, namely 20 December 2002, to the date on which he would have retired but for his termination, namely 18 March 2004, together with compound interest at the rate of 8 per cent per annum. The Organization shall be entitled to set off against this amount any earnings the complainant has received in this period and the amounts, if any, paid by the Organization pursuant to the Staff Rules governing payment upon termination. However, as the finding of misconduct in relation to the oral communications is undisturbed by these reasons, it is not appropriate to award moral damages. Having partially succeeded, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros. All other claims for relief are dismissed.

DECISION

For the above reasons,

1. The Organization's decision dated 23 May 2005 is quashed as is the decision dated 16 December 2002.
2. UNESCO shall pay the complainant his salary and all related benefits, including pension entitlements – for the period from the date of his termination, namely 20 December 2002, to the date on which he would have retired but for his termination, namely 18 March 2004 – together with compound interest at the rate of 8 per cent per annum. The Organization shall be entitled to set off against this amount any earnings the complainant has received in this period and the amounts, if any, paid by the Organization pursuant to the Staff Rules governing payment upon termination.
3. The Organization shall also pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2006, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Mary G. Gaudron

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet

