

THIRTY-SEVENTH ORDINARY SESSION

***In re* RISBOURQUE**

Judgment No. 283

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Robert Risbourque on 29 August 1975, UNESCO's reply of 24 October 1975, the complainant's rejoinder of 14 January 1976 and UNESCO's surrejoinder of 4 February 1976;

Considering Article II, paragraph 5, of the Statute of the Tribunal UNESCO Staff Rules 104.1(c), 104.1(d), 104.10 and 104.11(d) and Chapters IX and X and Appendix 24A of the UNESCO Manual;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 19 October 1959 the complainant joined the staff of UNESCO on a one-year appointment as a refrigeration technician. His appointment was extended and from 30 October 1961 became one of indefinite duration. His present grade is GS-5.

B. From 1959 until 1969 his performance reports were quite satisfactory. His report for the period from November 1969 to August 1973 expressed reservations about his efficiency, attitude behaviour and technical competence and revealed a decline in his performance since early 1970, when Mr. Bohbot had been appointed head of the complainant's unit, the Air-Conditioning Unit. On 20 September 1973 the head of that unit, the head of the Workshops Section and the head of the Building Management Division signed the report and on 26 September 1973 the Director of General Services (GES), Mr. Leguen, added his own remarks.

C. In signing the report on 9 November 1973 the complainant said he would contest it. He did so by a minute of 13 November 1973 in which he asked the Director of General Services to withdraw the report or else refer the matter to the Junior Personnel Advisory Board. The report was not withdrawn and the matter was referred to the Board under Staff Rule 104.11(d). In its report of 12 March 1974 the Board recommended revising the performance report of September 1973 to take account of its own comments. The Director of the Personnel Office thereupon sent the Board's report to the Director of General Services endorsing the Board's comments and asking him to act accordingly.

D. Having examined the report, in a minute of 5 June 1974 the Director of General Services told the Director of the Personnel Office that, after studying the case with his staff, he felt unable to alter the substance of the performance report of September 1973, "which reflected an objective and moderate assessment of the official's competence, qualities and output"; the delay in preparing the contested report had been due to the unwillingness of the complainant's supervisors to make an unfavourable one and their hope of seeing some improvement in his performance, and for the same reasons they had given him an "A" mark (satisfactory service) when he had received his annual increments from 1970 to 1972. The Director of General Services sent back to the Director of the Personnel Office a report in which only part C had been altered to reflect the Board's comments and parts A and B remained as before. The complainant received the new report on 27 May 1974. On 31 May he contested it and asked for its withdrawal or else referral of the matter to the Junior Personnel Advisory Board.

E. Meanwhile the question had arisen as to whether to grant the complainant a within-grade salary increment on 1 July 1974. On the prescribed form, 218c, the Director of the General Services said that the complainant's work had not been quite up to standard, but nevertheless recommended granting the increment. He appended a minute dated 21 June 1974 in which the head of the Building Management Division said that over the period in question (1 July 1973 to 1 July 1974) the complainant's work had been no better than over the period from November 1969 to

August 1973 but that he should have the increment "as an incentive". The complainant signed form 218c, but said he would contest it, and he did so in a minute he addressed to the Director of the Personnel Office on 4 July 1974.

F. The board met on 9 October 1974 It had before it the complainant's objections, first, to the revised performance report for the period from November 1969 to August 1973 and, secondly, to form 218c on his July 1974 increment. In a statement to the Board a representative of the Personnel Office said he saw no point in the board's examining the performance report, which was the same as the one it had had before it on 12 March 1974. The Board accordingly refrained from comment on the substance of the report. It also held that it could not decide on the second matter before it, which was closely akin, without knowing the decision taken on the first question, and it recommended postponing examination of the second matter.

G. Having taken note of the Board's report, the Director of the Personnel Office took a decision on 25 October 1974 (minute PER/P.74/305) which was notified to the complainant on the same day (minute PER/P.74/305): the revised report for the period from November 1969 to August 1973 would remain unchanged, and four papers would be appended to the complainant's personal file - his minute of 29 October 1973 to the Director of the Personnel Office, the Board's report of 12 March 1974, the complainant's minute of 31 May 1974 to the Director of the Personnel Office, and minute PER/P.74/302 of 25 October 1974. The complainant contested the decision of 25 October 1974 and on 9 January 1975 appealed to the UNESCO Appeals Board. In its report of 10 April 1975 the Board dismissed the appeal but recommended including in the complainant's personal file the general observations in paragraph 8 of its report. The Director-General accepted the Board's recommendation and so informed the complainant by minute of 30 May 1975. The complainant is now impugning the Director-General's decision.

H. While admitting that he has suffered neither loss of salary nor delay in the grant of his increment, the complainant regards the adverse performance report as libellous and harmful. He believes that, unless withdrawn, it could afford grounds for withholding an increment or even transferring him to other duties. It would be to his prejudice if he applied for some vacancy or if it came to the attention of UNESCO bodies or any prospective employer. Procedural improprieties were committed and he cites the failure to produce certain documents, the procedure followed by the Advisory Board before reporting on 9 October 1974, and infringement of his right to a hearing. The decision to confirm the contested report overlooked essential items in the dossier, particularly the Board's recommendation of 12 March 1974. His performance report is tainted with prejudice in view of the position held by one of the officials who signed it, Mr. Bohbot, and the explanations given by the Director of General Services.

I. The complainant asks the Tribunal "to find the complaint receivable, declare itself competent to hear the complaint and recommend the Director-General to quash the decisions in minutes PER/P.74/305 and PER/P.74/302 of 25 October 1974; to remove from his file forms 218A and 218c, which were prepared between 12 July 1973 and 5 June/1 July 1974, together with the explanatory remarks by UNESCO and the complainant which accompany the forms or relate thereto". In his rejoinder the complainant further asks the Tribunal to order production of the file relating to an earlier complaint (the Massé case), which in his view may afford a precedent in support of his case.

J. The Organization rejects outright allegations of infringement of any provision through failure to communicate documents to the complainant or of his right to a hearing. As regards the essential items in the dossier said to have been overlooked it refers to the Advisory Board's findings that the complainant had received within-grade increments during the period in question, that his performance had therefore been differently assessed during that period and that a "conflict of personality" had occurred between the complainant and his immediate supervisor. In their minutes of 5 June and 25 October 1974 respectively the Director of General Services and the Director of the Personnel Office gave full explanations. The Organization therefore cannot see what essential fact in the dossier the Director of the Personnel Office overlooked in taking his decision of 25 October 1974. As regards the allegation of prejudice, the Advisory Board's report of 12 March 1974, which the complainant makes much of, remarked on the appointment of the new head of the Air-Conditioning Unit, on a decline in the complainant's performance and on the fact that the conflict of personality between him and his immediate supervisor - a source of constant tension - had not always been his fault. But in its report the Board had never suggested, be it expressly or by implication, the existence of prejudice or any irrelevant factor. Moreover, the Organization can discern no prejudice in the minute dated 5 June 1974 of the Director of General Services, to which the complainant refers. Lastly, the Appeals Board declared itself unable to accept the allegation that the performance report was tainted with prejudice or showed the influence of any other irrelevant factor.

K. The Organization accordingly asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS:

As to the alleged irregularity of the procedure followed in complainant's case:

The complainant contends that the procedure was irregular in that the Advisory Board's report and certain letters written previously or at the same time as that report were not communicated to him.

As to the first point:

The provisions of the Staff Regulations and Staff Rules, and in particular Article 104.11(d), do not require that a staff member be informed of the recommendations made by the competent advisory board with regard to his claim.

Those recommendations are intended solely to assist the decision-making authority.

The contentious nature of the administrative proceedings is respected by notification to the staff member of the decisions taken by the Administration in the light of the Board's report and by allowing him to reply to those decisions and that report after studying the whole of his file.

The recommendations made concerning the complainant's claims were notified to him in any event in the proceedings before the Appeals Board, and he was given an opportunity to reply and to discuss them.

As to the second point:

The letters which the complainant contends were not communicated to him do not constitute executive decisions which might cause him prejudice but simply interdepartmental minutes of an internal nature - for example, letter PER/P.74/302 of 25 October 1974.

As to the Organization's alleged disregard of the complainant's right to a hearing:

It appears from the foregoing that all the material documents and decisions were notified to the complainant. He was also given an opportunity to make any comments he thought relevant on those documents and decisions. He cannot therefore properly maintain that his right to a hearing was denied.

As to the merits:

Contrary to what the complainant maintains, his superiors amply substantiated the performance report they gave him and did not base their decisions on materially incorrect facts.

Moreover, his contention that the performance report did not take account of essential facts in the dossier is not supported by a shred of evidence.

There is no document in the dossier which suggests that the impugned decision is tainted with abuse of authority.

On the contrary, it appears from the very wording of the observations made by the Director of GES that that senior official gave the complainant's case highly objective consideration.

It is certainly true that the complainant's immediate supervisor, with whom he was on bad terms, assessed his performance even though he was regarded as hostile to the complainant. But his contribution to the performance report did not have a decisive influence, two other superiors made exactly the same judgment, and the deciding assessment was made by the Director of GES.

Lastly, the Tribunal must determine whether the performance report given to the complainant was in all respects properly established, but it may not substitute its own opinion for that of the Administration on the quality of the staff member's performance nor exercise any power of review over the Administration's assessment.

It appears from the foregoing that none of the complainant's arguments is well founded and that the complaint should therefore be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet Registrar of the Tribunal.

Delivered in public sitting in Geneva on 4 October 1976.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet