

SIXTY-EIGHTH SESSION

In re AGBO

Judgment 995

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alexis Agbo against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 February 1989 and corrected on 28 February, UNESCO's reply of 19 April, the complainant's rejoinder of 16 May and UNESCO's surrejoinder of 23 June 1989;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, UNESCO Staff Regulation 9.1, Staff Rules 106.1, 109.6, 109.7, 111.1 and 111.2, paragraphs 7 and 9 of the Statutes of the UNESCO Appeals Board, and Article 33 of the Regulations of the United Nations Joint Staff Pension Fund;

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

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

A. The complainant, a citizen of Benin who was born in 1929, joined UNESCO in Paris in 1975 and was granted a fixed-term appointment in 1978 as a senior clerk at grade G.6. His health being poor, he was often on sick leave; indeed in 1982 and in 1985 he used up his entitlement to sick leave on full pay under Staff Rule 106.1(a).

On 19 December 1985 he applied for termination of appointment by common consent under Regulation 9.1:

"The Director-General may terminate the appointment of a staff member in accordance with its terms, or at any time, ... if he is for reasons of health incapacitated for further service."

(The arrangements for such termination are in circular 1474(II) of 22 November 1985.) The complainant wanted, among other things, an indemnity equivalent to 18 months' pay for termination, a disability pension from the United Nations Joint Staff Pension Fund and continued membership of the UNESCO Medical Benefits Fund. In the ensuing talks a personnel officer told him that he could not have both indemnity and pension.

His application for the pension went ahead. On 5 May 1986 the chief medical officer certified that he was "incapacitated for further service" within the meaning of Article 33 of the Fund Regulations. On 9 May the personnel officer referred his application to the Staff Pension Committee of UNESCO. His appointment was extended to 30 June 1986, the date at which he wanted to leave; but since a staff member may not ordinarily get a disability pension until he has used up entitlement to sick leave and since the pension could not come through in time anyway, he had his appointment extended again, to 31 March 1987.

On 17 July 1986 the medical officer certified that he had been on sick leave from 19 September 1985 to 29 April 1986 - so as to use up retroactively his entitlement to leave on full pay - and put him on sick leave on half pay from 1 July 1986 to 31 March 1987, when his appointment was to end. By a letter of 23 October 1986 the personnel officer explained to him that the purpose was to let him qualify for the pension by 1 April 1987; his pension would come to about 8,000 United States dollars a year for himself and to \$1,300 for each of his two dependent children.

On 12 January 1987 he wrote to the personnel officer objecting and to the Director-General asking for review. On 18 February the officer wrote to explain that he did not qualify for termination by common consent under circular 1474 and in any event would fare better with the pension than with the indemnity, which would come to only a few months' pay and cost him membership of the Medical Benefits Fund. In a letter of 13 April the Director of the Bureau of Personnel answered in similar terms his letter to the Director-General, adding that the decision complied with UNESCO's rules and practice.

On 28 April the UNESCO Staff Pension Committee approved as from 1 April 1987 his application for a pension

for permanent disability in accordance with Article 33 of the Fund Regulations. The Chief of the Personnel Administration Division wrote to him on 12 May to say that on termination he would get under Rule 109.7(a) an indemnity worth nine months' pay less the amount of his disability pension for that period.

His pension not having come through, the personnel officer informed him on 15 May that his contract was extended to 30 June 1987 on special leave without pay; he would continue to get an income after 1 April in the form of a benefit from the Medical Benefits Fund but would later have the amounts docked from his pension. On 24 May he objected to the extension on the grounds that he would still have to contribute to the Pension Fund. By a letter of 2 June the Chief of the Personnel Administration Division explained that he would not and asked him to agree to termination on grounds of health as from 1 April 1987. He did so in a letter of 23 June to the personnel officer and in a telex of 3 July to the Chief of the Division. The Director of the Bureau of Personnel having accepted the termination, a notice of personnel action dated 5 August 1987 informed him of the termination and the grant of compensation for unused annual leave and of nearly nine months' pay in indemnity.

After further correspondence including a letter he wrote on 22 September 1987, his counsel wrote to the Director of the Bureau of Personnel on 10 October seeking to lodge a "protest" under paragraph 7(a) of the Statutes of the UNESCO Appeals Board. The acting Director replied in a letter of 22 December that the complainant must act himself. On 30 December 1987 counsel wrote asking the Director-General to waive the Board's jurisdiction under Rule 111.2(b), but the Director-General conveyed his refusal on 28 January 1988.

By a letter of 29 January 1988 the acting Chief of the Personnel Administration Division confirmed that sums due would be paid once he had completed the formalities of termination.

On 5 February counsel wrote to ask whether the Administration had put the case to the Board and its reply of 22 March was that it was not required to do so.

By a letter of 14 April 1988 counsel invited the Director-General to decide on the case himself and grant the complainant a "lump-sum indemnity"; on the same day counsel appealed to the Board under paragraph 7(c) of its Statutes against the notice dated 5 August 1987.

In its report of 8 November 1988 the Board held the appeal to be irreceivable because the complainant had failed to submit it himself as the rules required, though it made a "compassionate" suggestion in his favour. By a letter of 7 January 1989, the impugned decision, the Director-General informed the complainant that he rejected the appeal and the suggestion.

B. The complainant objects to the terms of the notice dated 5 August 1987, which the personnel officer sent him under cover of a letter of 27 August, but he is not challenging the termination on grounds of health.

(1) He contends that his appeal to the Board was receivable. As he informed the Secretary of the Board by a letter of 7 July 1988, he had given his counsel a power of attorney on 15 September 1987 because he himself was often in hospital. Nothing in the rules required him to sign his appeal himself. His counsel did not attend the Board hearings. The Board's reasoning being flawed, so was the decision which the Director-General based on its report, and which is further flawed because it overlooked the Board's suggestion.

(2) He alleges procedural flaws. (a) The UNESCO Staff Pension Committee merely recommended paying him a pension, and until the United Nations Joint Staff Pension Fund notified acceptance the Fund Regulations precluded termination. (b) The decision provides for the deduction of sums paid to him though the grant of a pension to him had not yet been approved.

(3) As to the merits he submits (a) that at 15 May 1986 he was still entitled to seven months' sick leave on full pay, i.e. up to 15 December 1986, and his nine months' leave on half pay did not run out until 15 September 1987. So in ending his leave on full pay in June 1986 the Administration deprived him of five-and-a-half-months' leave on full pay. (b) His termination indemnity should be reckoned at the rate of full pay from the date of termination. His termination was improper because it was retroactive. The proper date was not 31 March 1987, but at the earliest 30 June 1987, when his appointment expired, or else the date at which the Pension Fund notified approval of the pension. The amounts may not be docked from the indemnity because they were due to him as half-pay benefit from the Medical Benefits Fund. (c) As the holder of a fixed-term appointment he was entitled under Rule 109.6 to three months' notice.

He claims the quashing of the Board's report and of the Director-General's decision of 7 January 1989; a declaration that his sick leave on half pay ended on 30 June 1987 at the earliest; 101,392.50 French francs in arrears of salary; 165,915 francs in termination indemnity, due as from 30 June 1987 at the earliest; a declaration that he got no disability pension before that date; 55,305 francs in lieu of notice of termination; 51,050.76 francs in compensation for unused annual leave; and 320,000 francs in damages.

C. UNESCO replies that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress. He has not made a protest to the Director-General under paragraph 7(a) of the Board's Statutes. The one his counsel purported to make on 10 October 1987 was not valid. Even when so warned, he failed to act. His health did not prevent him from doing so. His letter of 22 September 1987 was not a valid protest.

As the Board held, his appeal was not valid under paragraph 7(c) of its Statute since his counsel did not qualify to represent him under paragraph 9. The Staff Association could have found someone to represent him.

In any event the protest and the appeal against the notice of 5 August 1987 did not respect the one-month time limits in 7(a) and 7(c). The notice was not sent to him by a letter of 27 August: the evidence suggests that he knew of it much earlier. Besides, it merely confirmed earlier decisions notified to him on 23 October 1986 about compensation for unused leave; on 12 May and 9 July 1987 about termination indemnity; on 23 October 1986 and 9 July 1987 about the date of termination; and on 15 and 20 May 1987 about the extension of appointment to 30 June 1987.

Lastly, his complaint is irreceivable as to his claim to indemnity instead of notice because the notice of 5 August 1987 does not touch on that point, there is no decision by the Director-General, and he has not exhausted the internal means of redress.

UNESCO's arguments on the merits are subsidiary. It contends that all its decisions were in line with the rules and safeguarded the complainant's interests. The proper and actual date of his termination was indeed 1 April 1987; the personnel officer's letter of 23 October 1986 gave him over three months' notice, as he acknowledged in a letter of 12 January 1987; by 31 March 1987 he had used up his entitlements to sick leave; he may not have both a disability pension and benefits from the Medical Benefits Fund; his termination indemnity was correctly reckoned; and since the decisions were lawful there are no grounds for any award of damages.

D. The complainant rejoins that UNESCO gives a tendentious account of the facts; he accuses it of bad faith and casuistry.

Seeking to refute its objections to receivability, he submits that the notice of 5 August 1987 was not mere confirmation of earlier decisions, that no text forbids a staff member to let counsel sign on his behalf and that the Tribunal is in any event not required to determine whether all the decisions he received were duly challenged.

He enlarges on the merits, contending that UNESCO's pleas are mistaken, inconsistent and discreditable.

E. In its surrejoinder the Organization goes over the issues of fact. It submits that the complainant's rejoinder does nothing to weaken and often does not even answer its objections to receivability; it treated him in full compliance with the rules, fairly and considerately and its good faith is beyond question.

CONSIDERATIONS:

1. The complainant joined the staff of UNESCO on 1 September 1975 and on 17 April 1978 was granted an appointment as a senior clerk. By 1986, his health being below par, he wanted to leave. The Organization's chief medical officer confirmed that he was unfit and the procedure began for awarding him a disability pension. Though there was no question but that he would leave, there was much discussion about the arrangements, and the upshot of a great deal of correspondence and a series of decisions was a notice of personnel action which a personnel officer sent him on 5 August 1987.

On 10 October 1987 his legal counsel lodged a "protest" against that notice, supported by a brief, under the Staff Regulations and Staff Rules. The case went to the Appeals Board and there was an exchange of submission. In its report of 8 November 1988 the Board declared the appeal irreceivable, though it suggested that "on purely compassionate grounds the Director-General might instruct the administrative services to review the amount

payable to Mr. Agbo to take account of his claim to compensation in lieu of notice, especially since termination was retroactive". In a letter of 7 January 1989, the decision impugned, the Director-General informed the complainant that his appeal was rejected as both irreceivable and devoid of merit and that the Board's suggestion was rejected too.

2. The case raises an issue of procedure.

According to Article VII(1) of the Tribunal's Statute a complaint shall not be receivable unless the impugned decision is final, the complainant having exhausted the means of redress available to him under the Staff Regulations.

That constitutes a requirement to follow any internal procedure laid down in the Staff Regulations: the staff member must not only respect the time limits for appeal but also comply with any stipulations as to procedure in the Regulations or implementing rules.

3. The Staff Regulations and Staff Rules of UNESCO allow internal appeal. Before referring to the Tribunal his dispute with the Organization a staff member must have appealed to an Appeals Board and got a final decision from the Director-General on the Board's report. Rule 111.1 provides that access to the Board shall be in accordance with its Statutes.

Paragraphs 7(a) and (c) and 9 of the Board's Statutes lay down the procedure for internal appeal. According to 7(a) a staff member who wishes to contest any decision shall first protest against it in writing to the Director-General. If he does not get satisfaction he shall then, according to 7(c), address a notice of appeal to the Secretary of the Board. And paragraph 9 reads: "A staff member may have his appeal presented to the Board on his behalf by any other member of the Secretariat, stationed at Headquarters".

4. The complainant is challenging a final decision the Director-General took on the Board's recommendation. So he has apparently complied with the requirement in Article VII(1) that the internal means of redress should have been exhausted. He has also filed his complaint within the time limit in VII(2).

But in the Organization's submission his internal appeal was irreceivable because it bore the signature, not of the complainant or any other member of the Secretariat, but of a lawyer, and the complaint is therefore irreceivable as well.

5. Paragraphs 7 and 9 of the Statutes plainly stipulate that an appeal shall be lodged by the staff member himself or a member of Headquarters staff: the texts are in mandatory and limitative terms.

The reason for the requirement is the very nature of the internal appeal, the intent being that before application is made for a judicial decision there should be a non-judicial encounter between the two sides at which matters of equity and good management can be taken into account. The discussions are not true pleadings and the members of the Appeals Board need not be versed in law.

Although professional counsel do ordinarily have access to any judicial body and the rules in the Board's Statutes would not be admissible before any court of law, they must in the present circumstances be construed strictly.

6. The complainant argues that he gave his counsel a power of attorney and that he was not well enough to go through the appeal procedure himself; indeed that is why he did not attend the Board hearings but, not being allowed to have his counsel, was represented by a member of the Secretariat.

Such pleas might militate in favour of less strict application of the rules had the complainant, by reason of UNESCO's acts or even of its omissions, failed to grasp the consequences of his attitude. But he knew what they would be: when his counsel lodged the internal appeal on 10 October 1987 the acting Director of the Bureau of Personnel replied pointing out that it did not satisfy the requirements of the Board's Statutes and asking him "to get Mr. Agbo himself to write to the Director-General if he wants to pursue his case before the Board".

The general power of attorney he signed on 15 September 1987 in favour of authorising his counsel to act on his behalf cannot make his internal appeal valid: a power of attorney does not have the same effect in law as an appeal bearing the appellant's own signature.

7. The complainant accordingly failed to comply with the procedural rules on internal appeals and the Director-General acted correctly in dismissing his appeal for that reason.

The complaint therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gros Espiell
A.B. Gardner