

NINETY-FOURTH SESSION

Judgment No. 2201

The Administrative Tribunal,

Considering the complaint filed by Mr H. W.-S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 January 2002 and corrected on 26 February, the Organization's reply of 10 June, the complainant's rejoinder of 5 August and UNESCO's surrejoinder of 30 August 2002;

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

Having examined the written submissions;

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

A. The complainant, an Ethiopian national born in 1941, joined UNESCO in 1974 as a consultant. He obtained a temporary appointment in July 1977, then a fixed-term appointment in January 1978. At the material time he was Chief of the Administrative Unit in the Social and Human Sciences Sector at grade P.5. In the margin of a memorandum of 18 May 1999 from the Director of the Bureau of Personnel - concerning a request by the Assistant Director-General for the Social and Human Sciences Sector for promotion of the complainant - the Director-General had written, on 22 May: "personal and end of career promotion for the last year of his services to UNESCO", and on 28 May: "for action". By a note of 22 October 1999 the Director-General announced a number of personal promotions, including that of the complainant, which was to take effect on 1 April 2000.

A new Director-General was appointed on 12 November 1999 and took up office on 15 November. That same day, the General Conference adopted resolution 30 C/72, inviting the new Director-General, among other things, "to review, with the aim of ensuring that the financial impact has been taken into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". By a note dated 26 November the Director-General informed the senior officials of the Organization that he had "decided to suspend temporarily the implementation of the most recent decisions - i.e. those taken as of 1 October 1999 - relating to appointments, reclassifications and promotions". He added that these "holding measures, which [were] taken in the interests of the Organization, neither prejudge[d] the legitimacy of such decisions nor [...] entail[ed] any automatic cancellation. Each case [would] be examined in the context of the overall review mentioned above, the conduct of which [would] be entrusted to a Task Force on the Secretariat's structure and staffing to be set up shortly. Priority [would] be given to the consideration of those decisions which [had] been suspended, so as to arrive at a rapid conclusion". This task force was set up under the name "Task Force on Secretariat structure, staffing and management systems".

By a note dated 22 February 2000 the Director-General informed senior officials that, further to the recommendations of the Task Force, he had decided that since personal promotions had not existed as such since 1994, they should be treated as post reclassifications, and that end of career promotions should be granted only where the conditions set out in Administrative Circular No. 1883 of 6 July 1993 were satisfied. Those conditions were the following:

"a. 25 years of completed service in the Secretariat of UNESCO or of another Organization of the U.N. common system of Organizations, before the date of retirement, or fifteen years of completed service for local staff away from Headquarters;

- b. the candidate must have reached the age of 59, or 54 in the case of early retirement, at the time of granting the promotion;
- c. the absence of an earlier personal promotion;
- d. an overall "A" or "B" rating in the last two performance reports;
- e. the absence of a promotion during the five years preceding the date of retirement." [\(1\)](#)

On 20 March 2000 the acting Director of the Office of Human Resources Management (formerly the Bureau of Personnel) informed the complainant that he did not fulfil all these conditions. On 10 April the complainant sent a written protest to the Director-General. Having received no reply from the latter he submitted a notice of appeal to the Appeals Board on 11 May. On 17 May the acting Director of Human Resources informed the complainant that the Director-General had confirmed the decision of 20 March. On 2 June 2000 the complainant filed a "detailed appeal" with the Appeals Board in accordance with Article 10 of its Statutes. In its report dated 12 July 2001, the Appeals Board recommended that the complainant's appeal be allowed. It noted that the complainant's career amply justified his personal promotion, which would not be an end of career promotion, and that since the annotations by the Director-General had been written in May 1999, the complainant's promotion was not one of the decisions that were to be suspended. The Board considered that the complainant had suffered discrimination, given that heads of administrative units in other sectors had obtained such promotions. By a letter of 24 October 2001, which is the impugned decision, the Director-General dismissed the appeal.

B. The complainant argues that the Director-General's annotation of 22 May 1999 was a final decision to promote him to grade D.1. In support of this view he points out that the decision was communicated to him and that the UNESCO governing bodies were informed of it. This was not merely a preparatory act and, as noted by Appeals Board, the case law cited by the defendant in the context of the internal appeal is irrelevant. The complainant adds that the decision was never revoked in accordance with the principle that similar acts require similar procedures. Furthermore, the administration breached its duty to state the reasons for its decision, since it did not specify which of the conditions listed in Administrative Circular No. 1883 were not fulfilled. In any case, that circular concerned end of career promotions whereas he was to be given a personal promotion, which is a matter for the discretion of the Director-General. The complainant also argues that he suffered discrimination, since he is the only person in his situation not to have been promoted. Lastly, he emphasises that his promotion satisfied the criteria "of competitiveness, expertise, efficiency and universality" mentioned in resolution 30 C/72 of 15 November 1999.

The complainant asks the Tribunal, in particular, to declare that the Director-General's acts of 22 and 28 May 1999 constitute an operative legal decision, to declare that he should be promoted to grade D.1 with effect from 1 April 2000 and to award him costs for the proceedings before the Appeals Board and for those before the Tribunal.

C. In its reply UNESCO submits that the Director-General's annotations of 22 May 1999 did not constitute an administrative decision with legal effects. It was a "decision of principle" which was not intended to be communicated to the complainant. Referring to the Tribunal's Judgments 1560 and 2112, the Organization observes that a decision will necessarily be preceded by administrative formalities. In the interests of transparency the staff member may be informed of these formalities but he should not see this as notification of a decision. It argues that if a decision had been taken on 22 May, there would have been no need for the note of 22 October 1999. It also points out that the implementation of the decision contained in that note had yet to begin when the decision was suspended by the note of 26 November 1999. Regarding its duty to state the reasons for the decision, the Organization points out that the complainant himself acknowledged, in the "detailed appeal" he submitted to the Appeals Board, that the acting Director of Human Resources had informed him that he did not fulfil the condition concerning the number of years' service (25 years of service in the Organization). The defendant notes that he also failed to fulfil the condition regarding age at the time of promotion, and that an end of career promotion is granted for the last six months of service, and not for the last year, as in the complainant's case.

The Organization adds that the instructions given by the previous Director-General in his annotations of 22 May and in his decision of 22 October 1999 contravened Administrative Circular No. 1883, and that the new Director-General, in accordance with the request by the General Conference, could not implement them. The fact that such measures may have been taken for other staff members is not decisive because, as the Tribunal stated in Judgment 1536, "[e]quality of treatment means equality in the observance of the law, not in the breach of it".

D. In his rejoinder the complainant reiterates his arguments. He asserts that the case law cited by UNESCO is irrelevant and refers to the report of the Appeals Board.

E. In its surrejoinder the defendant maintains its position, including with regard to the cited case law.

CONSIDERATIONS

1. The complainant challenges the Director-General's decision of 24 October 2001 rejecting his appeal against the decision not to promote him to grade D.1.

He asks the Tribunal, *inter alia*, to declare that the Director-General's acts of 22 and 28 May 1999 constitute an operative legal decision, to declare that he must be appointed to grade D.1 with effect from 1 April 2000 and to award him costs.

In support of his complaint he submits that the decision not to give effect to his promotion has no legal basis. According to the complainant, the "decision" to promote him was both legal and final.

2. In the complainant's view, the fact that the Director-General announced, in a note of 22 October 1999, that he had decided to promote him to grade D.1, and that the Executive Council was informed of this decision - although the latter step could be deemed purely formal - makes it legitimate to infer that his promotion was necessarily the subject of an individual decision recognised as such by UNESCO itself. The decision in question could only have been that of 22 May 1999, by which the Director-General gave a clear instruction, confirmed on 28 May 1999, to grant him a "personal [...] promotion [to grade D.1] for the last year of his services to UNESCO".

Thus, the complainant considers that it was on 22 May 1999 that the promotion decision was validly taken by the Director-General and that he acquired the "individual right to be promoted" to grade D.1 with effect from 1 April 2000.

He adds that the "decision" of 22 May was never expressly revoked in accordance with the principle that similar acts require similar procedures. The acts done in his favour cannot be considered merely as "preparatory acts", as it was in the case which gave rise to Judgment 1560.

He also considers that he suffered discrimination and injustice since he alone, amongst several staff members of the same grade, was ultimately not promoted to grade D.1. He points out that other staff members who, theoretically, were equally eligible were subsequently granted personal promotions to grade D.1.

3. In its reply the defendant asserts that the Director-General's annotations of 22 May 1999 did not constitute an administrative decision with legal effects. They amounted to a "decision of principle" which was not intended to be communicated to the complainant.

It argues that the said annotations could not constitute a final decision, otherwise the decision contained in the note of 22 October 1999 would have been redundant. It adds that even if the decision to grant the complainant an end of career promotion for his last year of service at UNESCO, which the Director-General had envisaged, had been contained in the above-mentioned note, that decision was suspended by the note of 26 November 1999 before its implementation had begun.

Regarding the complainant's argument that the Director-General's "decision" to promote him was not revoked in accordance with the principle that similar acts require similar procedures, the defendant submits that this principle applies to rules and not to decisions.

In response to the complainant's allegations of discrimination and injustice, the defendant emphasises that if an administrative circular establishes a certain number of conditions governing the eligibility of staff members for personal and end of career promotions, the aim is to avoid arbitrariness, favouritism and discrimination, although the Director-General still retains a discretion to select, amongst deserving staff members who satisfy the stipulated conditions, those whom he feels able to promote in view of budgetary constraints. The defendant adds that even if they fulfil all the stipulated conditions, staff members do not acquire a right to promotion.

4. The main issue to be resolved is that of whether in the present case, as the complaint asserts, a legal, final decision binding the Organization was taken in his favour.

In Judgment 2112, which refers to the earlier Judgment 1560, the Tribunal stated that a decision affecting an official will always be preceded by administrative formalities, but it will become binding on the Organization only when it is notified to the official in the prescribed manner; such notification may also take some other form as long as it can be inferred from it that the Organization intended to notify the decision.

In the light of these precedents, the Director-General's annotations of 22 May 1999 on a memorandum concerning a request for promotion of the complainant to grade D.1 clearly cannot be considered as a decision binding the Organization, regardless of the fact that on 28 May 1999 instructions "for action" had been given to the Director of Personnel, and that the Director-General had announced his decision to promote the complainant in a note of 22 October 1999 specifying that the Executive Council had been duly informed.

Indeed, as in the case which gave rise to Judgment 1560, these internal administrative instructions are not decisive since they were not conveyed to the complainant as declarations of the Organization.

Neither the annotations of 22 May 1999 nor the instructions of 28 May 1999 were communicated to the complainant in a form enabling him to consider that the Organization had intended to notify him of a promotion decision.

The note of 22 October 1999 was addressed to the Deputy Director-General for Education, the Assistant Directors-General, the Directors of Bureaux, Offices and Divisions at Headquarters and the Directors and Heads of Established Offices away from Headquarters. It was not notified to the complainant as a decision binding the Organization, within the meaning of the case law cited above; rather, it was an internal measure prior to such a decision. Furthermore, in accordance with the procedure laid down by the Organization, this "decision", the implementation of which had yet to begin, was suspended by the note of 26 November 1999 pursuant to the instructions of the General Conference.

Consequently, the Tribunal considers that the complainant could not invoke a final decision granting him a promotion to grade D.1.

5. The complainant asserts that the Director-General's decision concerning his promotion was never revoked by another formal decision in accordance with the principle that similar acts require similar procedures.

In view of its findings under 4, above, the Tribunal considers that there was no need to revoke an act which, in the light of the applicable provisions and of the Tribunal's case law, was not in fact a decision binding the Organization.

6. The complainant submits that the defendant wrongly considered the "decision" of 22 May 1999 to be illegal in that it contravened the provisions of Administrative Circular No. 1883 of 6 July 1993, that circular having been initiated and approved by the Director-General, who had acted advisedly in deciding to promote him. The complainant is surprised that the defendant did not notice until 2000 that the decision taken in 1999 was illegal in the light of Administrative Circular No. 1883 of 1993, and refers to the firm principle that a disputed situation must be evaluated at the time of the facts and that the applicable legal texts and principles are those which were in force at that time.

The Tribunal notes that, apart from these assertions, the complainant has not identified any legal bar to the application of a circular which remains in force.

7. The complainant submits that the defendant did not specify which of the conditions listed in Administrative Circular No. 1883 were not fulfilled by him. He criticises the Organization for making it impossible for him to ascertain the exact reasons for the impugned decision, in breach of the rule that clear and precise reasons must be provided for any decision.

This plea cannot succeed. Indeed, contrary to his assertions, the complainant was well aware, as he acknowledged in his "detailed appeal" of 2 June 2000 before the Appeals Board, that the impugned decision was based in particular on the fact that he did not fulfil the requirement of 25 years' service.

8. The complainant submits that he suffered discrimination and injustice. However, the evidence on file shows that the reason for the fact that he was not promoted in accordance with the wishes of the previous Director-General was that he did not satisfy the conditions laid down in Administrative Circular No. 1883 governing such promotions.

It is the Tribunal's view that under those circumstances, although a number of staff members may have been granted promotions in breach of the provisions of the above-mentioned circular, the halting of such irregularities cannot be considered as discrimination or injustice against the complainant. Indeed, as stated in Judgment 1536, the Tribunal considers that equality of treatment means equality in the observance of the law, not in the breach of it.

Although it is not disputed that the complainant had a long and meritorious career, which led his supervisors to seek his promotion, the fact remains that any promotion must be granted in accordance with the applicable rules.

9. The complainant argues that it is abundantly clear from the evidence on file that he satisfied the criteria of competitiveness, expertise, efficiency and universality as defined in the new staff management policy. He criticises the defendant for having relied on mere administrative instructions which had no regulatory authority, were not legally binding and were not issued until after the initial decisions concerning him, in order to deny him the promotion to which he was entitled.

However, it has been established above that no procedurally valid decision, conferring on the complainant an acquired right which he could assert against the challenged administrative instructions, was taken in his favour.

10. In view of the foregoing considerations, and since the complainant's pleas are entirely unfounded, the complaint must be dismissed and there is no need to grant the request for hearings.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2002, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Jean-François Egli

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet

1. Registry's translation