

**NINETY-NINTH SESSION**

**Judgment No. 2473**

The Administrative Tribunal,

Considering the third complaint filed by Mr B. d. P. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 July 2004, the Organization's reply of 8 November and the letter dated 15 December 2004 by which the complainant informed the Registrar that he would not file a rejoinder;

Considering Articles II, paragraph 5, and VII 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, a French national born in 1946, joined UNESCO in 1976. At the material time he held a P-5 post at the Office of Management Co-ordination and Reforms.

By a note of 22 February 1999 (DG/Note/99/7) addressed to the Deputy Director-General for Education, Assistant Directors-General and other directors, both at Headquarters and away from Headquarters, the Director-General announced that he had decided to create a Task Force on Cyberspace Law and Ethics which would be headed by the complainant. It was specified that the decisions contained in the note would take effect immediately. On 1 March the complainant was transferred to the Unit for Special Projects of the Communication, Information and Informatics Sector (CII). On 12 November the Director-General sent another note (DG/Note/99/74) to the same addressees informing them that he was reclassifying the post of Chief of the Task Force to D-1 with retroactive effect from 1 May 1999 and that the incumbent of the post was promoted to the corresponding grade with effect from 1 November 1999. In this note he gave a synopsis of the complainant's career and also mentioned that he had notified the Executive Board of his decision at its 157th Session.

In a resolution adopted on 15 November 1999 in the course of its 30th Session, the General Conference considered that there had been "too many exceptions in the application of personnel policy and the personnel management system" and invited the Director-General to "review" all posts that had been reclassified and all promotions and appointments that had been made during the 1998-99 biennium. Following that resolution, the new Director-General, who had taken office on 15 November, announced in a note of 26 November 1999 (DG/Note/99/5/KM) that he had decided to suspend temporarily the implementation of decisions taken as of 1 October 1999 relating to appointments, reclassifications and promotions.

On 20 December 1999 the complainant filed a protest against the decision to suspend the promotion he had been granted. In a memorandum of 16 January 2001 the Director of the Office of Human Resources Management informed him that since the desk audit had not confirmed the validity of the reclassification of his post, the Director-General had decided to maintain it at grade P-5. The complainant filed a second protest on 9 February 2001, this time against the "downgrading" of his post and his "demotion" from D-1 to P-5.

In its report dated 12 August 2003, the Appeals Board recommended by a majority to the Director-General firstly to accept the appeal and therefore to cancel the annulment of the reclassification and subsequent promotion, and secondly to consider redeploying the appellant as soon as possible to a D-1 post corresponding to his qualifications and aspirations. In a dissenting opinion, the Chairman of the Appeals Board, referring to the Tribunal's Judgment 2201, recommended rejecting the appeal. By a letter of 21 November 2003, which the complainant alleges he received on 28 April 2004, the Director-General notified the complainant that he had decided not to accept the majority recommendation of the Appeals Board. That is the impugned decision.

B. The complainant argues that the decisions to suspend and then to annul the reclassification of his post and his promotion were vitiated by substantive and procedural flaws. According to him, those decisions conflict with several principles, including the principle of continuity of the civil service, which implies in particular that the new

Director-General should assume responsibility for all his predecessor's decisions. Furthermore, the principles governing the international civil service were breached. In his view, Judgment 2201 does not apply and the decision to reclassify his post and to promote him, having been taken by the appropriate authority, notified to the Executive Board and published in the note of 12 November 1999, constituted a final, binding and legally valid decision conferring rights on him.

He contends further that the suspension decision does not comply with the instructions of the General Conference. He emphasises that only appointment and promotion decisions taken after 1 October 1999 were suspended and then cancelled, whereas the irregularities found in many appointments and promotions taking effect between 1 January 1998 and 30 September 1999 did not affect the staff members concerned. He considers that this amounts to discrimination in breach of Article 7 of the Universal Declaration of Human Rights as well as abuse of authority, and argues that the date of 1 October 1999 was chosen arbitrarily. In any case, since the reclassification of his post and his promotion were decided before that date, they could not be suspended. The complainant maintains that no preliminary review of the situation was undertaken prior to the suspension, which was not justified by any "legitimate needs" or "unavoidable constraints" and which in itself constitutes an act of harassment and even of defamation.

He contends that an abuse of procedure arose from the fact that the validity of the reclassification of his post was verified by means of a "retrospective" desk audit, whereas the reclassification reflected not the recognition of an increase in responsibilities assumed in the past but a policy decision that took account of the duties and responsibilities he would be assuming in the future. Since the author of the desk audit did not consider the duties performed after the post reclassification, the Organization was in breach of its own established rules.

For the complainant, the fact that the desk audit was based on a draft job description and not on the description he had himself prepared and which had subsequently been revised and signed by his supervisor constitutes a procedural flaw. Since he did not receive the report of the desk audit until a year later, that is, ten months after notification of the annulment, his right to be informed was breached. He complains that he was not notified of the annulment of his promotion, which left him in limbo in that respect without justification.

He contends that he suffered discrimination and harassment on account of his union activities and his stand on the ethics of cyberspace. Thus he considers that the suspension of the reclassification and of his promotion for more than a year, and his subsequent exclusion from programme activities within the CII Sector amounted to "blatant harassment". By acting in this way, the Organization maintained him without justification in a professionally and morally difficult situation, which damaged his authority, his reputation, his honour and his health. He blames the Director-General for not trying to find a compromise solution, such as a new appointment, and points out that he applied for several D-1 and D-2 posts and requested transfers to P-5 posts without success.

The complainant asks the Tribunal:

- a. to quash the decision explicitly annulling the reclassification of his post and implicitly annulling his promotion from grade P-5 to D-1;
- b. to take steps as rapidly as possible to implement the Director-General's decision, notified in DG/Note/99/74 of 12 November 1999, retroactively as at 1 May for the reclassification of his post and as at 1 November 1999 for his promotion, with accrued interest of 10 % on the increase in salary due;
- c. to award [him] the sum of 50,000 euros in compensation for moral injury;
- d. to redeploy [him] as soon as possible to a grade D-1 post that is vacant and corresponds to his qualifications and aspirations, provided that he has not already retired."

C. The Organization contends that the complaint is irreceivable on the grounds that it was filed outside the ninety-day time limit allowed under Article VII, paragraph 2, of the Statute of the Tribunal. As the impugned decision was notified to the complainant on 21 November 2003, he should have filed his complaint with the Tribunal by 19 February 2004. The complaint was in fact filed only in July 2004. The complainant is obviously alleging that he did not receive the impugned decision until 28 April 2004 purely for the sake of avoiding being time-barred.

Subsidiarily, the defendant submits that the complaint is without merit. In its view the note of 12 November 1999

merely informed the addressees of a decision in principle, which could have no legal effects. The administrative measures required to give effect to the decision were never taken, since the complainant received neither an individual notification of the decision nor a notice of personnel action. It therefore constituted not an appealable final decision but an internal measure prior to a final decision.

Referring to the Tribunal's case law, the Organization argues that even if a final decision had been taken, it could still be reconsidered by the competent authority. Indeed, a suspension decision had been taken before implementation began, and the complainant had no acquired right, since a decision to reclassify a post, according to Rule 102.2 of the Staff Rules, must be taken only if there has been "a substantial modification in the structure and responsibilities of the unit to which the post belongs, and consequently in the responsibilities of the claimant" and, according to the Manual, only if the post description has been altered. Since the decision in principle to reclassify was taken without any alteration in the post description, it had no legal basis and therefore could not create any rights.

The defendant submits that the decision of 26 November 1999 was in fact taken in accordance with the resolution of the General Conference and that the Executive Board had expressed its support for the measures to suspend staff movements decided after 1 October 1999. It recalls that when he took office the former Director-General had likewise suspended some of his predecessor's decisions concerning staff movements. Putting an end to abuse and applying the rules of the Organization cannot be construed as a breach of a principle or rule, and the principle of the continuity of the international civil service cannot restrict the new Director-General's right to reorganise the Secretariat.

With regard to the desk audit, the defendant considers that the accusation of abuse of procedure is irrelevant. Although the Director-General can indeed take a "policy decision" to delegate higher authority to a staff member, he can only do so where the latter holds a "policy-making" post, which is not true of the complainant. At any event, there was no reason not to perform a desk audit, considering that the Director-General had decided to do so for all the posts concerned by a suspension decision. The Organization further contends that the desk audit was not flawed and that the accusation of abuse of authority is unfounded. It recalls that the reclassification of a post lies at its discretion and points out that the person who carried out the desk audit – an external consultant – used a draft post description which the complainant himself had prepared and forwarded to the Office of Human Resources Management, and even allowed the complainant the possibility of clarifying his draft.

With regard to the alleged failure to notify a decision concerning promotion, the defendant states that it considered it obvious that the complainant would not be promoted since the reclassification of his post had been annulled and his promotion was a consequence of the reclassification.

Lastly, the Organization submits that the complainant has not mentioned any precise facts to support the charge of harassment. It maintains that since the Task Force was abolished as a result of restructuring, it had to find a new appointment for the complainant which was suited to his professional abilities and skills, which it did by transferring him to the Natural Sciences Sector, where he had spent a substantial part of his career. As for the complainant's comments concerning the fact that he applied for several vacant posts, they are in no way directly related to the impugned decision.

## CONSIDERATIONS

1. The complainant joined UNESCO on 1 July 1976. At the material time he held grade P-5.

On 12 November 1999 the Director-General announced that he had "decided to reclassify [the complainant's] post from P-5 to D-1 as of 1 May 1999 and to promote [him] to the corresponding grade with effect from 1 November 1999".

At its 30th Session held from 26 October to 17 November 1999, the General Conference of UNESCO, considering that there had been too many exceptions in the application of personnel policy and the personnel management system and that this policy had to be reviewed taking fully into account the need for competitiveness, expertise, efficiency and universality, invited the new Director-General, who had taken office on 15 November 1999, to review, with the aim of ensuring that the financial impact had been taken into account and that the criteria enumerated above had been satisfied, all posts that had been reclassified, and all promotions and appointments that

had been made during the 1998-99 biennium.

On the basis of those instructions of the General Conference, the new Director-General decided, in his note of 26 November 1999, “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”, on the understanding 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 was to be examined by “a Task Force on the Secretariat’s structure and staffing to be set up shortly”.

On 20 December 1999 the complainant sent a protest to the Director-General asking him to annul the suspension measure taken on 26 November 1999 and to give the required administrative effect to his promotion as rapidly as possible. As no ruling was communicated to him within the time limit provided for in paragraph 7(b) of the Statutes of the Appeals Board, the complainant submitted a notice of appeal on 3 February 2000 in accordance with paragraph 7(c) and asked to be allowed until 7 April 2000 to lodge his “detailed appeal”.

On 22 February 2000 the Director-General published a note (DG/Note/00/3) concerning the implementation of measures relating to personnel actions decided between 1 October and 15 November 1999. The note stated, *inter alia*, that a desk audit should be conducted for each reclassification and promotion request with a view to assessing whether there was an increase in job responsibilities justifying the upgrading of the post, and that in order to ensure that such desk audits would be carried out in an independent and objective manner, they were to be entrusted to external consultants.

The desk audit for the complainant’s post was carried out on 21 September 2000 by an external consultant, who concluded that the post should be maintained at grade P-5.

The complainant was informed that his post was being maintained at grade P-5 in a memorandum dated 16 January 2001, which was handed to him on 18 January during a meeting with the Director of the Office of Human Resources Management.

On 9 February 2001 he filed a further protest against what he considered to be the “downgrading” of his post and his “demotion” from D-1 to P-5. As no ruling was communicated to him within the applicable time limit, he filed a further notice of appeal on 27 March 2001.

The Chairman of the Appeals Board accepted the complainant’s request to join the two appeals, one concerning the suspension measure and the other the annulment of the post reclassification and of the promotion from P-5 to D-1.

In its report of 12 August 2003, the Appeals Board, by a majority of four out of five members, recommended to the Director-General to accept the appeal, to cancel the annulment of the complainant’s post reclassification and promotion, and therefore to promote the latter to grade D-1 with effect from 1 May 1999. The Chairman of the Appeals Board expressed a dissenting opinion based, he stated, on the Tribunal’s Judgment 2201.

The Director-General decided not to accept the recommendation of the Appeals Board and notified the complainant accordingly in a letter of 21 November 2003, which constitutes the impugned decision.

2. The complainant’s claims are set out under B above.

He argues that the reclassification of his post and his promotion from P-5 to D-1, which had been the subject of a final, binding and public decision of the Director-General acting within his constitutional powers and within the administrative rules and practices governing posts at grade D-1 and above, were suspended on the basis of an arbitrary date criterion, and then cancelled more than a year later on the basis of a retrospective desk audit of his post, which was unsuited to the future-oriented nature of the said decision, and on the basis of a post description which was not that which had been approved and signed by his supervisor, all of which constituted abuse of authority and abuse and flaws of procedure.

He also accuses the Organization of violating his right to be informed by “withholding” the desk audit report on his post for more than ten months.

3. The defendant first of all raises the issue of the receivability of the complaint, then goes on to argue that it should be dismissed.

## *Receivability*

4. The Organization contends that since the impugned decision was notified to the complainant on 21 November 2003, he should have filed his complaint with the Tribunal, according to Article VII, paragraph 2, of its Statute, within ninety days after the date of notification, that is to say by 19 February 2004 at the latest and not in July 2004 as was the case.

Contrary to the defendant's allegation, the complainant asserts that he received the decision dated 21 November 2003 only on 28 April 2004 following a request he made to the Director-General on 15 April 2004. Since the defendant, which bears the burden of proof in this respect, has not proved that the notification actually occurred on 21 November 2003, the Tribunal must accept the date of 28 April 2004 indicated on the note transmitting a copy of the impugned decision to the complainant, and it will therefore consider that the complaint he filed on 26 July 2004 fell within the required time limit.

## *The merits*

5. The complainant contends *inter alia* that the suspension and annulment by the new Director-General of a reclassification and promotion decided by his predecessor, after they had been made public, conflict with the principles of the continuity of the civil service, of the "depersonalisation of the civil service", of the binding nature, security and stability of decisions taken by the Director-General acting within his statutory authority, and of the respect owed by the Organization to its staff.

In his opinion, a note by the Director-General concerning an appointment, a reclassification and/or a promotion always conveys a final, binding decision brought to the notice of all members of staff. The Director-General's decision to reclassify his post and to promote him to grade D-1 should therefore be assumed to be legally valid, and it conferred rights on him.

Referring to Judgment 2201, the complainant comments that in describing a note by the Director-General as an "internal measure", the Tribunal was relying on information supplied to it which, he submits, appears to have been both inaccurate and incomplete, leading it to misunderstand the scope of the distribution of such a note, of which in fact more than 1,600 copies are circulated within the Secretariat and among the member States, not to mention all the staff members who have access to the Intranet. He adds that, unlike in the case dealt with in Judgment 2201, DG/Note/99/74 explicitly and exclusively concerned his own administrative situation. He submits that the suspension of his post reclassification and of his promotion did not comply with the instructions of the General Conference, as the Director-General maintains, since the Conference merely asked the latter to "review [...] all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". In any case, he adds, neither the General Conference nor the Executive Board has the power to decide the reclassification or downgrading of an established post or to promote or demote an individual staff member, since such decisions are constitutional prerogatives of the Director-General, in accordance with the principle of the independence of the international civil service. He contends that the choice of 1 October 1999 as the date at which the Director-General's decision to suspend staff movements decided by his predecessor should be implemented is unlawful as well as arbitrary and discriminatory. The absence of any preliminary review of the situation, particularly from a legal point of view, confirms in his opinion the arbitrary nature of DG/Note/99/5/KM.

He argues that the suspension of the implementation of the reclassification and promotion decision for over a year, even without the subsequent annulment of that decision, constitutes in itself a measure of harassment or even defamation, which warrants compensation. As far as the annulment in particular is concerned, he considers that the methodology of a desk audit is unsuited to the "future-orientated evaluation" of a reclassification decided by the Director-General and that the retrospective evaluation conducted to verify the validity of the reclassification of his post from P-5 to D-1 constitutes abuse of procedure. In his view a desk audit cannot be used to evaluate a reclassification that was decided in order to raise the level of duties and responsibilities of a post in the future, unless the incumbent has performed those duties for a sufficient period of time prior to the evaluation, as proposed in the memorandum HRM/CLA/00/89 of 30 June 2000 addressed to the Chairman of the Task Force on Secretariat Structure and Staff by the acting Director of the Human Resources Management Office. In failing to abide by this principle, he points out, the Organization breached its own rules.

He adds that the evaluation was based on an unsigned draft job description rather than the one actually revised and signed by his supervisor, which in his view constitutes a procedural flaw.

He further submits that, although the annulment of the reclassification of his post and of his promotion has been made public, particularly through the staffing table and the Secretariat's telephone directory, the reasons for the annulment and downgrading are not known to his colleagues and professional partners.

He notes that the memorandum by which he was notified that his post was being maintained at grade P-5 makes no mention of the confirmation or reversal of his promotion as of 1 November 1999, which left him in a position of uncertainty.

Lastly, the complainant comments on his professional situation, emphasising the obstruction and blocking of the Task Force on Cyberspace Law and Ethics and the attempts to dismantle it in 1999, as well as the fact that he was left without work from January 2000 to September 2002, in the light of which he considers himself a victim of discrimination and harassment. He concludes that the contested decision has seriously damaged his professional reputation and honour within the Secretariat of the Organization and among the member States.

6. According to the defendant, DG/Note/99/74 of 12 November 1999 was not a final administrative decision which was intended to be notified to the complainant and which would produce legal effects with respect to the Staff Regulations and Rules.

It contends that the Director-General's decisions contained in his notes DG/Note/99/5/KM and DG/Note/00/3 of 26 November 1999 and 22 February 2000, respectively, challenged by the complainant, were not tainted with any flaw, since they were taken pursuant to resolutions of the General Conference, "approved by the Executive Board's decision 159 EX/3.1.2 in accordance with the relevant case law of the Tribunal".

It contends lastly that the evaluation of the complainant's post was not flawed in any way.

7. The fact that both parties refer to the case law and in particular to Judgment 2201 gives the Tribunal the opportunity to explain that in that judgment it did not intend to give a general and definitive ruling regarding the nature of the Director-General's notes. In Judgment 2201 the Tribunal had to determine in a specific context whether the complainant could point to a final decision binding the organisation because the decision in question had been notified in the prescribed form, bearing in mind that notification may take some other form so long as it may be inferred from it that the organisation intended to notify the staff member of its decision (see Judgment 2112).

In this case, the same question arises as to whether a decision satisfying the above conditions was taken concerning the complainant.

8. The Tribunal notes that the Director-General had already informed the Executive Board at its 157th Session, in accordance with Article 59 of the Board's Rules of Procedure, of the decision to reclassify the complainant's post from P-5 to D-1, with effect from 1 May 1999, and to promote him to the corresponding grade on 1 November 1999; that subsequently, in his DG/Note/99/74 entitled "Director of the Cyberspace Task Force [...]", he notified the Deputy Director-General for Education, Assistant Directors-General, Directors of Bureaux, Offices and Divisions at Headquarters and Directors and Heads of Established Offices away from Headquarters of his decision; that the complainant maintains without being contradicted that, as was common practice for all the Director-General's notes, "[the above-listed] senior officials circulated DG/Note/99/74 to all their subordinates"; and that he had begun to perform his duties as Chief of the Task Force.

If one takes account of the fact that the Director-General's note concerned solely the reclassification of the complainant's post and his promotion, it may be deduced from the above elements that the Administration had in fact taken a final decision notified to the complainant by his supervisor, even though the implementing measures, particularly the personnel action form, had not been undertaken by the duly authorised officials.

That being so, the Director-General could not, on the basis of a resolution of the General Conference, which had no authority in the matter, suspend a decision reclassifying a post and promoting an official which had become final. The suspension decision and all subsequent measures, particularly the annulment of the reclassification, must therefore be set aside and the complainant's rights must be restored by reclassifying his post from P-5 to D-1 as from 1 May 1999 and by promoting him to grade D-1 as from 1 November 1999. All sums due as a result of the salary increase shall bear interest at the rate of 8 per cent per annum as from each date at which a payment was due.

9. The complainant claims 50,000 euros in compensation for moral injury.

Without taking into account any submissions concerning facts which arose after the matter had been referred to the Appeals Board, the Tribunal evaluates the moral injury suffered by the complainant as a result of the circumstances and the unlawfulness of the impugned decision at 15,000 euros.

10. The complainant has not claimed any costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The defendant shall reinstate the reclassification of the complainant's post from P-5 to D-1 as from 1 May 1999 and his promotion to grade D-1 as from 1 November 1999.
3. The sums due to the complainant arising from his increased salary shall bear interest at the rate of 8 per cent per annum as from each date at which a payment was due.
4. The defendant shall pay the complainant 15,000 euros in compensation for moral injury.

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