

SIXTY-THIRD SESSION

***In re* KIRKOV (No. 2)**

Judgment 871

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Pance Kirkov against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 October 1986 and corrected on 14 March 1987 and UNESCO's reply of 23 June 1987;

Considering Articles II, paragraph 5, VII, paragraph 1, and VIII of the Statute of the Tribunal, UNESCO Staff Rules 103.4(b), 104.1, 104.6(b) and 104.11(b) and point 3205 C of the Manual of the Organization;

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

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

A. As the Tribunal recounted in Judgment 723, under A, the complainant joined UNESCO in Paris in 1976. At the material time he was a programme specialist at grade P.4 in the Division of Operational Programmes of the Science Sector (SC/OPS). He had his within-grade salary increment withheld for four months on the strength of a report that said his performance in 1981-82 had not been entirely satisfactory and on 1 September 1983 he was transferred from the Asian to the European section of SC/OPS. By Judgment 723 of 17 March 1986 the Tribunal dismissed his first complaint, which appealed against the report, the withholding of the increment and the transfer.

On 25 April 1984 Mr. Pinilla, the head of the European section, signed a report on the complainant's performance from September 1983 to March 1984. Though he was said to have "satisfactory mastery of the field covered by his functions", sometimes his output was insufficient and his judgment unreliable, he missed essential points and his relations with others were unsatisfactory. Though the period had been too short, said Mr. Pinilla, to allow of any final assessment, the impression was that he could not give of his best in the section. The Director of SC/OPS endorsed the report on 27 April. The competent Assistant Director-General, Mr. Kaddoura, recommended withholding for three months another increment due on 1 September 1984; the Senior Personnel Advisory Board, to which the matter had been put, rejected the complainant's objections; and by a minute of 13 December he was told that the Director-General had endorsed the recommendation.

On 23 August 1984 a personnel officer had written to tell him that his appointment, which was to expire on 31 August, would be extended for the last time to 31 December 1984.

On 29 January 1985 he appealed to the Appeals Board against the withholding of his increment and the decision not to renew his appointment beyond the end of 1984. In its report of 10 April 1986 the Board recommended rejecting the appeal on all counts and by a letter of 24 April the Director-General informed the chairman of the Board that he did so. That letter is the decision which the complainant says in the complaint form he is impugning, and he alleges that he got it on 1 October 1986.

B. The complainant submits that Mr. Pinilla's report was a prejudiced and wrong assessment of his performance. There was breach of Staff Rule 104.11(b), which says that a staff member shall be shown the report and given the opportunity of discussing it with his supervisor. The report failed to state his mother tongue and was therefore incomplete. It afforded no sound basis for the decision to withhold his salary increment. Besides, the Assistant Director-General recommended the withholding at a time when he was absent on mission and he was not asked to comment. The penalty was part of the pattern of harassment which he accused UNESCO of in his first complaint and which he believes to be proof of its prejudice against him.

He further alleges that the Organization has failed to return to him books, manuscripts and other belongings.

He asks that the report be set aside; that he be awarded damages amounting to 51,000 United States dollars, a sum equivalent to fifteen months' salary; \$41,000, or the value of five years' pension rights; interest on those sums; that UNESCO return his belongings or pay him their monetary value; and that he be awarded \$5,000 in costs.

C. In its reply the Organization submits that the complaint is irreceivable. Although in the complaint form the complainant purports to be impugning a decision by the Director-General, what he objects to in his brief is the Appeals Board's report, which is not a challengeable decision. His claim to have the performance report set aside is in any event irreceivable under Article VII(1) of the Statute of the Tribunal because he has failed to exhaust the internal means of redress: he did not challenge the report in his internal appeal, which related only to the increment and the non-renewal.

As to the merits, the Organization observes that, though the burden is on the complainant to bear out his objections to the report, he fails to show any misrepresentation. Indeed his charges are far too vague to be entertained. As to the increment and the non-renewal, he adduces not a shred of evidence of any formal or substantive flaw that would warrant setting the decisions aside. The increment was properly withheld under Rule 103.4(b) on the grounds of unsatisfactory performance, and renewal was refused in proper exercise of the Director-General's discretion and on the same grounds.

The complainant's belongings were sent to him on 20 January 1986. If he did not get all of them he must show he did not and may claim compensation under Manual point 3205 C if he so wishes.

CONSIDERATIONS:

The pleadings

1. The Organization having filed its reply to the complaint on 23 June 1987, the Registrar of the Tribunal sent the complainant's counsel a copy on 25 June, setting a time limit of thirty days for putting in a rejoinder. Counsel applied for an extension and the Registrar told him on 27 July that the new time limit was 14 September. He again asked for more time, and by a letter of 9 September which he got on the 17th the Assistant Registrar informed him that the final deadline was set at the 24th. But in a letter which was dated the 22nd but not posted until the 29th counsel said he could not meet that deadline.

The submissions in the complaint and in the Organization's reply being properly before it, the Tribunal will not forbear to rule for want of a rejoinder the complainant has failed to file even after two extensions of the time limit.

There has been strict compliance with Article 9 of the Rules of Court. In particular the President of the Tribunal considered the dossier to be "sufficiently complete" and therefore instructed the Registrar to put the case on the list. His decision was in keeping with the Rules, which give him broad authority to direct written proceedings.

There is no breach of the equality of the parties. The Tribunal has a brief from each side, and the lack of further submissions, which in any event the Rules do not require, is immaterial to the observance of that principle.

The application for oral proceedings

2. By an application dated 21 January 1987 the complainant asks the Tribunal to order oral proceedings and to hear witnesses.

In keeping with Article 12 of the Rules of Court the Tribunal disallows the application because the written submissions already before it, in the complaint and in the reply, enable it to rule on all the material issues.

Receivability

3. The complainant states in points 6 and 7 of the complaint form that the impugned decision is dated 24 April 1986 and that he got notice of it on 1 October 1986.

He had lodged a timely internal appeal against two decisions by UNESCO: one deferring for three months a within-grade salary increment that he would ordinarily have been granted from 1 September 1984, and the other refusing renewal of his fixed-term appointment, which had expired on 31 December 1984.

In its report of 10 April 1986 the Appeals Board recommended rejecting his appeal as devoid of merit, and it was by the decision of 24 April 1986 mentioned above that the Director-General endorsed that recommendation. Since the complainant has exhausted the internal means of redress the decision he challenges is the final one.

Moreover, he filed his complaint on 2 October 1986, thereby observing the time limit of ninety days from the date on which he got that decision.

The complaint is therefore receivable under Article VII of the Statute of the Tribunal.

4. What the complainant claims in point 11 of the complaint form is several awards totalling 92,000 United States dollars in damages, the return of papers, the cancellation of the appraisal of his performance from 1 September 1983 to 1 March 1984, and an award of 5,000 dollars in costs: he does not apply for the quashing of the decision he impugns.

But there is an implied claim to the quashing of that decision. The reason is that it is the quashing of the decision impugned that Article VIII of the Statute empowers the Tribunal to order.

5. Yet the Tribunal will not look beyond the decision of 24 April 1986. It will entertain neither the claim to cancellation of the performance appraisal nor the claim to the return of papers because the decision does not cover those two matters.

The merits

6. The impugned decision confirmed an earlier one, notified to the complainant in a minute of 13 December 1984, to defer a salary increment for three months.

As the Appeals Board held in its report, that decision was properly taken in pursuance of Staff Rule 103.4 and showed neither a formal nor a substantive flaw. On 27 July 1984 the complainant's supervisor, Mr. Kaddoura, had proposed withholding the increment. In keeping with Rule 104.1 the recommendation was put to the Senior Personnel Advisory Board, and in a report on a meeting it had held on 27 November 1984 the Board recommended that the Director-General "authorise the Bureau of Personnel to tell Mr. Kirkov that Mr. Kaddoura's proposal of 27 July 1984 was valid in form and that the salary increment due on 1 September was deferred, for three months, to 1 December 1984". And it was the minute of 13 December that informed the complainant that the Director-General had accepted that recommendation.

The Tribunal holds that there was no breach of the Staff Regulations nor any other flaw and it therefore disallows the complaint insofar as it relates to the relevant part of the decision of 24 April 1986.

7. That decision also confirmed the refusal to renew the complainant's fixed-term appointment, which a personnel officer had notified to him on the Director-General's behalf by a letter of 23 August 1984.

The decision not to renew was based on Rule 104.6 and taken by the Director-General in the exercise of his discretionary authority. He may not, of course, act arbitrarily, and the Tribunal will review his decision against certain principles that are well-defined by precedent and that in particular brook no abuse or perversion of authority. But there is no reason whatever to suppose that in declining to renew the complainant's appointment the Director-General exercised his discretionary authority for any improper reason.

Costs

8. Since the complaint fails so does the complainant's application for an award of costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, 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 10 December 1987.

(Signed)

Jacques Ducoux
Mella Carroll
H. Gros Espiell
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.