

TWENTY-THIRD ORDINARY SESSION

***In re* McMULLAN**

Judgment No. 146

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. James Norman McMullan on 17 February 1969, the Organization's reply of 23 June 1969, complainant's rejoinder of 11 July 1969, the Organization's reply thereto of 9 October 1969, complainant's observations received by the Registrar of the Tribunal on 6 November 1969 concerning a letter addressed to him by the Director-General of UNESCO on 24 June 1969, the Organization's reply of 16 December 1969 to those observations, complainant's supplementary memorandum concerning paragraph IV(8) of his complaint and the Organization's observations of 4 March 1970 on that memorandum;

Considering Article II, paragraph 5, and Article VII, paragraph 1, of the Statute of the Tribunal, the provisions of Chapter XI of the Staff Regulations and Rules of UNESCO, of Staff Regulation 9.1 and Staff Rules 109.7(b) and 111.2(b);

Having examined the written evidence, 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. Mr. McMullan was appointed by UNESCO on 2 April 1967 to teach commercial subjects in a college in Lagos (Nigeria) under a United Nations Special Fund project. His appointment was to terminate on 31 December 1968. On 4 November 1967, a few months after he had started work, Mr. McMullan had to be sent to Paris, following a stroke, and the medical officer of UNESCO secured his admission to the International Hospital of the University of Paris. On 10 November 1967 he was authorised to return to his home in Baden-Baden on sick leave with full pay until 1 February 1968. On 27 February 1968, Mr. McMullan claiming to have recovered, the medical officer of UNESCO had him examined and authorised him to resume work in Lagos on 1 March 1968. On 2 April 1968 he suffered a further stroke and on the next day was taken back to Paris. His doctor in Nigeria then stated in writing that the climate might prove fatal for him and advised against his return. Mr. McMullan underwent a series of tests at the International Hospital of the University of Paris from 4 to 16 April 1968 and the medical officer of UNESCO found that his state of health made his return to Nigeria inadvisable. He was placed on sick leave with half pay from 4 to 16 April 1968, in accordance with Staff Rule 106.1(a)(ii).

B. On the advice of the medical officer of UNESCO - no other assignment having been found for him in the meantime - the Senior Personnel Advisory Board recommended the termination of his appointment for health reasons in accordance with Staff Regulation 9.1 and Staff Rule 104.1(c)(I). The Director-General endorsed this recommendation and so informed complainant on 22 May 1968. It was understood that the period of three months' notice provided for in Staff Rule 109.6(a)(ii) should run from 1 June 1968 and that on 31 August 1968 complainant should receive a termination indemnity amounting to thirty days' pay, in accordance with Staff Rule 109.7(b). By a letter of 4 June 1968 the Field Staff Division of the Bureau of Personnel gave him full details of his entitlements upon termination.

C. Complainant consulted a neurologist in Baden-Baden, Dr. Bernsdorff, who found, on the basis of neurological and psychiatric tests, that complainant was fully capable of resuming work, even in tropical countries. Without identifying the origin of the ailments suffered by complainant on several occasions in Lagos, Dr. Bernsdorff expressed the view that he was suffering from slight and temporary ailments which did not in any way warrant his urgent transfer to Paris. Mr. McMullan sent this medical report, which was written in German, to the Organization on 8 June 1968 and asked that he be returned to Lagos or assigned elsewhere if that was no longer possible. On 25 June 1968 the UNESCO Staff Pension Committee approved the payment to Mr. McMullan, from 1 September 1968, of a disability pension of US\$1,000 a year plus an allowance of US\$300 a year in respect of his infant son.

On 13 September 1968 the medical officer, having examined the French translation of Dr. Bernsdorff's report, wrote to Dr. Bernsdorff informing him that he had considered it impossible to subject complainant to further risk by authorising his return to Africa. Nevertheless, in view of Dr. Bernsdorff's report the medical service refused to issue a certificate to the effect that Mr. McMullan was still on sick leave. On 19 December 1968 the Staff Pension Committee re-examined complainant's case and cancelled its decision of 25 June 1968 to award him a disability pension. Complainant was so informed on 10 January 1969, the decision being confirmed on 5 March 1969.

D. Complainant had written to the Director-General, however, on 14 December 1968 informing him that, having received no answer to his letter of 8 June 1968, he had no alternative but to appeal to the Administrative Tribunal and asking to whom he must write for details of the procedure. On 17 January 1969 the Director of the Bureau of Personnel replied to complainant's letter of 14 December 1968, stating simply that the competent tribunal was the Administrative Tribunal of the ILO and attaching a copy of the Statute and Rules of Court of the Tribunal. During a conversation which he had with complainant on 4 March 1969 the Director warned that his letter of 17 January did not constitute any authorisation to appeal directly to the Tribunal without first submitting his case to the Appeals Board of UNESCO. (According to Staff Rule 111.2(b) a staff member may, in agreement with the Director-General, waive the jurisdiction of the Appeals Board and appeal directly to the Administrative Tribunal.) The Director of the Bureau of Personnel repeated his warning in a letter to complainant of 6 March 1969. On 13 March 1969 he informed complainant in reply to the letter addressed by the latter on 8 June 1968 to the Director-General and confirmed in his letter of 14 December 1968, to which a reply had been delayed by the translation of Dr. Bernsdorff's report and by the correspondence between the medical officer of the Organization and complainant's own doctor, that the Organization considered, after a careful re-examination of his case, that there was no reason to modify the decision communicated to him on 22 May 1968.

E. On 25 February 1969 the Registrar of the Administrative Tribunal had meanwhile received a complaint drawn up by complainant on 17 February 1969 against the Organization. In a letter of 22 February 1969, however, complainant announced to the Registrar his desire to suspend proceedings. By a letter of 27 February 1969 he informed the Registrar that he had changed his mind about suspending the proceedings and asked that they should continue normally. He confirmed this letter by a cable dated 4 March 1969. The Registrar forwarded his complaint to the Organization on 12 March 1969.

F. In his complaint Mr. McMullan asks the Tribunal:

1. (a) to quash the decision to terminate his appointment for health reasons;

(b) to order the payment to him of his full field salary from 11 June to 31 December 1968;

2. to order the renewal of his appointment as from 1 January 1969 or, if that is not possible or advisable, to order the payment of a repatriation grant and award him compensation for loss of employment, employment prospects and pension rights. On 27 February 1969 complainant informed the Registrar that since the Organization had paid him a repatriation grant he wished to delete the words "the payment of a repatriation grant and" from point 2 of the relief claimed.

G. In its reply of 23 June 1969 the Organization maintains that the complaint is irreceivable since the complainant failed to exhaust the internal appeal procedure. It points out that complainant was aware of the relevant provisions of the UNESCO Staff Regulations and Rules, that he was clearly warned by the Organization that he was not authorised to appeal directly to the Administrative Tribunal and that he was fully aware of the position when he decided to submit his complaint to the Tribunal. Subsidiarily, it prays that the complaint be dismissed as unfounded.

H. Towards the end of May 1969 complainant had accepted a post as director of a college in Benin (Nigeria) offered to him by the Government of the state of South-Western Nigeria. On 24 June 1969 the acting Director of the Bureau of Personnel of UNESCO informed him that the decision of 22 May 1968 was quashed and that he would therefore receive his full salary for the period from 17 April 1968 to 31 December 1968, the normal date of expiry of his appointment. He added that the Director-General had decided that complainant's appointment should not be renewed beyond 31 December 1968.

I. In his rejoinder complainant disputes the allegation that his complaint is irreceivable. First, the Senior Personnel Advisory Board and the UNESCO Appeals Board were, in his view, mutually exclusive. Since his case had been

examined by the Senior Personnel Advisory Board, there was no need for it to be examined by the Appeals Board. Secondly, the Appeals Board should have met before expiry of notice of termination. Yet he had asked the Director-General by a letter of 8 June 1968 to reconsider the decision to terminate his appointment. In that letter, which he had written from Baden-Baden, he had explained that he was not fully aware of the proper procedure for submitting his appeal because he had left his copy of the Staff Rules in Lagos. If the Director-General had not wished to reconsider his decision, he should at least have informed complainant that he must appeal to the Appeals Board. In fact, the Director-General had not replied until 13 March 1969, long after the date of expiry of notice of termination. Complainant maintains that he had thus been allowed to appeal directly to the Tribunal. Thirdly, complainant claims furthermore that he received permission to appeal directly to the Tribunal because the letter of 17 January 1969 from the Director of the Bureau of Personnel, sending him the Staff Regulations and Rules, but containing no further information, did not explicitly state that the Director-General did not agree to his appealing directly to the Tribunal. Mr. McMullan also reaffirms his views concerning the substance of his complaint. In his view, since he had been appointed under the terms of a letter of 27 June 1966 to which was appended a job description containing, under the heading "Duration of Appointment", the words "The initial appointment is for two years ... with the possibility of an extension for the project's duration", his appointment was not a fixed-term appointment but one subject to renewal. Since his ability to resume work in Africa had been established he was entitled to expect renewal of his contract by the Organization after 31 December 1968.

J. In its reply the Organization states that the Director-General's letter of 24 June 1969 deprived of all substance point 1(a) and (b) of the complaint. As regards point 2, concerning the non-renewal of his appointment, his complaint became relevant only on 24 June 1969 when the Director-General had explicitly decided that his contract should not be renewed. Complainant should therefore have appealed against this second decision in accordance with the procedure laid down in the Staff Regulations and Rules. He failed to do so and, not having contested the decision before the Appeals Board of the Organization, he has no grounds for contesting it before the Administrative Tribunal. The Organization also rejects complainant's contention that his appeal to the Tribunal is receivable, since it is based on a mistaken hypothesis that the Senior Personnel Advisory Board and the Appeals Board are mutually exclusive or that the Appeals Board must meet before expiry of notice of termination. As regards complainant's allegation that he was authorised to appeal directly to the Tribunal, the Organization maintains that complainant neither requested nor received such authorisation at any time. Finally, it points out that complainant's appointment was a fixed-term appointment, as was clearly stated in a letter which it addressed to complainant on 25 January 1967 and which constituted the formal offer of employment, as well as in the staff movement notice of 6 April 1967. When he accepted that offer complainant had a copy of the Staff Regulations and Rules and was therefore aware of his position. The renewal of an appointment falls within the Director-General's discretion.

K. In his observations on the letter of 24 June 1969, which he submitted on 6 November 1969, complainant points out that he agreed to the offers made in that letter, namely the payment of his salary until 31 December 1968 and of a repatriation grant, only on the condition that he would receive satisfaction of his request for renewal of his appointment. He maintains that the Director-General was wrong to take the decision of 24 June 1969 since at that date he was no longer a UNESCO official and his case was pending before the Administrative Tribunal. In particular, he alleges (1) that by virtue of Staff Rule 104.1© the Director-General was not entitled to take such a decision without first consulting the Senior Personnel Advisory Board, which he had failed to do; and (2) that he could not therefore appeal to the Appeals Board against what was not in fact a decision, particularly since the Appeals Board is not competent with regard to complaints by persons who are not officials of the Organization. In any case it was impossible for him to appeal to the Appeals Board since he had had to accept employment elsewhere. In the same memorandum and in his supplementary memorandum concerning paragraph IV(8) of his complaint, complainant elaborates his arguments concerning the non-renewal of his appointment. He alleges that the words "the initial appointment is for two years ... " in the job description had formally led him to expect renewal of his contract. Since Staff Rule 104.6(b) concerning fixed-term appointments states that such an appointment does not carry any expectation of extension, his appointment cannot be regarded as fixed term. Moreover, his contract entitled him to a pension, whereas only officials appointed for at least five years are so entitled. Finally, the date of expiry of his contract, 31 December 1968, fell in the middle of the school year and it would therefore have been absurd to fix such a date had it not been intended to extend his appointment.

L. In its reply to the complainant's two memoranda mentioned above, the Organization rejects his arguments as unfounded and refers to its earlier explanations. In particular, it states that (1) the Organisation admits to membership of the Staff Pension Fund any staff member with an appointment of one year, in accordance with Article 2(1) of the regulations of the United Nations Joint Staff Pension Fund and that (2) all contacts relating to

the project to which complainant was assigned were based on the calendar year and not on the school year. The Organization therefore continues to maintain that the complaint is irreceivable and, subsidiarily, that it should be dismissed as unfounded.

CONSIDERATIONS:

As to the claim for the quashing of the termination:

By a letter of 24 June 1969 sent while the complaint was pending before the Tribunal the Director-General of UNESCO informed Mr McMullan that he was reversing his decision to terminate the latter's appointment and was transferring him to UNESCO headquarters until 31 December 1968, the date of expiry of his contract.

By this decision the Director-General over-ruled the impugned decision to terminate Mr. McMullan's appointment. Complainant's claim is therefore deprived of substance and it is no longer necessary to pronounce upon it.

As to the claim for payment of salary in full from 11 June to 31 December 1968:

It appears from the written evidence that as a result of the decision of 24 June 1969 complainant received his salary in full from 1 June to 31 December 1968, that he thus obtained full satisfaction and that this claim is therefore also void of substance.

As to the claim for renewal of contract with effect from 1 January 1969:

According to the provisions of Article VII, paragraph 1, of the Statute of the Tribunal, a complaint shall not be receivable unless the official concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

Under the provisions of Chapter XI of the Staff Regulations and Rules of UNESCO, which concerns appeals, before appealing to the Administrative Tribunal officials of the Organization must submit an appeal to the Appeals Board of the Organization.

Mr. McMullan did not submit any such appeal before submitting his complaint to the Administrative Tribunal on 17 February 1969. He had therefore failed to exhaust the internal procedure available to him before appealing to the Tribunal.

Although it is true that under Staff Rule 111.2(b) a staff member may, in agreement with the Director-General waive the jurisdiction of the Appeals Board and appeal directly to the Administrative Tribunal, it appears from the written evidence that the Director-General, contrary to Mr. McMullan's allegation, did not at any time agree to his appealing directly to the Tribunal in the present case.

The above-mentioned claim, which is not directed against any decision taken by the Director-General on the recommendation of the Appeals Board, is therefore irreceivable.

DECISION:

For the above reasons,

1. It is no longer necessary to pronounce upon complainant's claim for the quashing of the decision to terminate his appointment and for the payment to him of his salary in full from 11 June to 31 December 1968.
2. The remainder of the complaint is rejected as irreceivable.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and Mr. A.T. Markose, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 26 May 1970.

(Signed)

M. Letourneur
André Grisel
A.T. Markose
Bernard Spy

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