

FIFTH ORDINARY SESSION

***In re* NIESTLE**

(Arbitral Jurisdiction)

Judgement No. 16

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint made against the International Institute of Intellectual Co-operation on 3 December 1954 by Madame Alice Niestlé, formerly an official of the Institute from 1926 to 1939, the said complaint having as its object the reparation of prejudice resulting from the complainant: (1) from the non-payment of a termination indemnity; (2) from failure to reappoint her at the time of the resumption by the Institute of its activities at the beginning of 1945 and until the end of 1946; (3) from failure to present her candidature to UNESCO at the time of the transfer to that Organization of the functions of the Institute;

Considering the memorandum of reply deposited on 6 January 1955 on behalf of the Institute represented by its liquidator, M. Jean Burnay, Councillor of State;

Considering the conclusions exchanged by the representatives of the parties during the hearing and in particular the additional submission of the complainant concerning the revalorisation of the sum claimed to be due as a result of her termination;

Whereas the facts in the case are the following:

(1) By letter of 14 April 1926, the Director of the Institute appointed the complainant to the post of clerk, pointing out that "cette désignation, comme toutes celles des fonctionnaires de l'institut de cette catégorie, avait un caractère provisoire et révocable" and that in case of termination, she had a right to two months' notice only; these conditions were accepted by the complainant by letter of 15 April 1926;

(2) By letter of 20 September 1939, M. Henri Bonnet, Director of the Institute, informed Madame Niestlé that to his regret he was obliged to terminate her, circumstances requiring him to maintain only a limited staff in the Institute; the Director accordingly communicated to her the two months' notice provided in her letter of appointment and addressed to her a cheque representing two months' salary; the letter of the Director was accompanied by a certificate stating in particular that the complainant had served in the Institute in the post of clerk; this letter also contained the following passage:

"Lorsque l'activité de l'Institut permettrait de reconstituer ses services existants, il demeure entendu que votre poste vous serait offert de préférence à toute autre candidature. Je conserve le ferme espoir que cette éventualité se réalisera, même au cours de la période exceptionnelle qui vient de commencer."

(3) Four days later, namely the 24 September 1939, Madame Niestlé acknowledged receipt of the said letter, of the cheque and of the certificate without protest except in so far as she requested that the certificate be corrected since she considered that she had the right to the title "chief clerk";

(4) By letter of 3 October 1939, the Director replied to the complainant that this correction could not be made, since she had enjoyed no such promotion; (it is to be observed that Article 5 of the Staff Regulations of the Institute requires the approval of the Directors' Committee for the appointment of officials of the grade of chief clerk; the Tribunal has not been informed that such a decision was taken);

(5) By letter of 15 February 1939, the complainant again protested, referring to a certificate delivered to her on 17 February 1937 by the Head of the Administrative Services of the Institute and by virtue of which she had been employed as a chief clerk;

(6) By letter of 24 March 1939, the Director of the Institute replied to the complainant that this certificate, issued for a purpose which he ignored (it appears that the certificate was issued to accommodate her) could not be considered as being an appointment;

(7) By letter of 27 February 1940, the complainant reluctantly acquiesced, thus annulling the only reservation made by her at the time when she was notified of her termination;

(8) In 1940, the Ministry of Foreign Affairs of France, which undertook the administrative management of the Institute, had allocated to all terminated officials an indemnity of 100 francs for each year Of service; there was therefore available to the complainant the sum of 1,600 French francs which were placed to her credit but which could not be transferred to the beneficiary since in the meantime she had left France for Switzerland without giving her new address;

(9) At the end of hostilities an agreement negotiated between the Director of the Institute and the Secretariat of the League transferred to the latter, for transmission to the United Nations and eventually to UNESCO, the assets which under the Regulations of the Institute were to devolve upon the League should the Institute be dissolved; another agreement between the Institute and UNESCO specified that the latter organization would give particular consideration to the candidatures of former officials of the Institute with a view to appointments to its own staff; from 1945 to the end of 1946, during which period the liquidation began, the activities of the Institute were temporarily resumed; Madame Niestlé did not offer her candidature either to the Institute or later to UNESCO;

(10) In 1947 only, following an audit and on the basis of information received, it appears, from the Institute's Auditor, the residence of the complainant became known to the Institute and it became possible to transmit to the complainant the cheque for 1,600 francs mentioned above;

(11) The complainant gave a receipt on 25 May 1947 "sans préjudice des dispositions qui pourraient être prises pour le dédommagement équitable des fonctionnaires lors du vote de loi (française) qui devra consacrer la suppression de l'Institut". This cheque was however only paid in 1953, together with interest from 1947, since the bank account of the Institute had been blocked by a sequestration executed on the request of certain creditors;

(12) The complainant protested both to the liquidator as well as to the Director-General of UNESCO, averring the contemptuous nature of the sum paid to her; the former replied that it was not for him to give a decision as to a termination indemnity, having limited himself to determination of the amount of a cheque which had not been cashed and the latter that there could be no question of reconsideration of the conditions of the termination in 1939 without any reservation on the part of the complainant, the 1,600 francs representing only unpaid salary for the year 1940.

IN LAW:

A. Considering that by acquiescing on 27 February 1940 in the reply given to her by the Director of the Institute (according to which reply the claim made by the complainant at the time of her termination that the termination certificate should state her grade as that of chief clerk was not founded), the complainant abandoned the only grievance which she claimed at the time against the Institute;

That in so doing she waived the means of appeal open to her under the Staff Regulations of the Institute.

B. Considering that the existence of the promise made to the complainant in 1947 is proven, under which promise it remained understood that her post would be offered to her in preference to any other candidature at such time as the activities of the Institute should permit it to reconstitute its existing services;

That this appointment was subject: (1) to the resumption by the Institute of its activities; (2) to the re-establishment to the service to which the complainant belonged;

That if the Institute resumed its activities temporarily from 1945 to 1946, it has not been shown that the service to which the complainant belonged was re-established, the defendant denying this allegation and the complainant basing her arguments solely upon a declaration of the witness Weiss which is not in conclusive terms;

That if it is true that the Institute did not seek out its former collaborators in 1945 it is besides demonstrated that in not notifying to the Institute her changes of address the complainant failed to show a continuing desire to take

advantage of the promise of favourable treatment made to her at the time of her termination, this failure compromising the realisation of such promise;

That it is shown that it was by chance, in 1947 only, that the Institute was tardily informed of the address of the complainant;

That even at that time the complainant did not present the claims which she now submits concerning her employment, and limited herself to making reservations as to the amount of the indemnity;

That even in 1952, when it became known to her through a notice in the press that a liquidator appointed by UNESCO invited any persons who considered that they were so entitled, to present their claims within as short a period as possible, she took certain steps but again limiting herself to raising the question of the small amount of the sum granted to her as an indemnity, without mentioning her alleged right to re-employment;

That the complainant does not, at any moment, appear to have thought of putting her candidature to the Institute on her own initiative, at the time that the latter temporarily resumed its functions, nor later to UNESCO;

That therefore the request for an indemnity on the grounds of failure to re-employ her is not founded.

C. Considering that, as regards the indemnity of 1,600 francs accorded to the complainant in French francs, the salary of the complainant whilst in the Institute's service was equally fixed in French francs and was regularly paid to her in that currency; that there can therefore be no question of substituting Swiss francs for French francs as was submitted during the hearing, the complainant invoking her Swiss nationality and the fact that she had transferred her domicile to Switzerland;

That, on this point, the submission of the complainant, as presented today, is entirely without basis;

That besides, the devaluation of currency is a state of things to which all are subject and remains subject, in law, to the principle that in the absence of a revalorisation clause - such a clause soon being considered in many countries as contrary to public policy and therefore invalid - the currency agreed upon or adopted remains such, "le franc reste le franc" (see Judgment No. 19 of the Administrative Tribunal of the League).

Considering besides that the delay incurred in the disposal of the small sum due to the complainant results from the fact that her address was not known to the Institute for a reason engaging the responsibility of the complainant herself.

D. Considering, finally, that the complainant now submits that she had a right to the application of Article 35 of the Staff Regulations of the Institute, which reads as follows:

"An official whose contract of service is terminated under Article 30 or Article 31 of the present Regulations shall be allowed compensation calculated on the basis of two months' salary per year's service, but the said compensation shall not be less than three months' salary or more than a year's salary.

The provisions of this article shall not affect the application of the Regulations regarding the granting of pensions or retired pay provided for in Article 26 of the present Regulations."

That she can not seriously claim to have ignored the existence of these Regulations up to the time that she brought her complaint before the Tribunal;

That, in general, the Regulations were applicable to all officials of the Institute from the time of their adoption by the Governing Body of the latter, in 1931;

That in her statement, the complainant, claiming the grade of chief clerk, states in error that in this capacity the Regulations gave to her the right to termination with an indemnity proportional to the duration of her services calculated on the basis of Article 35 quoted above; that the Regulations apply to officials of all grades;

That in strict law, the complainant was entitled to receive the indemnity provided for in the said Article 35;

But that her complaint submitted today is clearly out of time;

That the Tribunal expresses however the wish that, respecting equity, the Institute accord to the complainant the indemnity provided for in Article 35;

ON THE GROUNDS AS AFORESAID:

The Tribunal,

Declares that in law, the action is unfounded;

And

Rejecting any wider or contrary conclusions consequently dismisses the claims of the complainant

In witness of which judgment, pronounced in public on 25 April 1955 by His Excellency M. Albert Devèze, President, Professor George Scelle, Vice-President and Jonkheer van Rijkevorsel, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Wolf, Registrar of the Tribunal.

Signatures:

Albert Devèze
George Scelle
A. van Rijkevorsel
Francis Wolf