

## THIRTIETH ORDINARY SESSION

### ***In re* KHELIFATI**

#### **Judgment No. 207**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Abdel Kader Khelifati on 15 April 1972, brought into conformity with the Rules of Court on 9 May and 6 July 1972, the Organisation's reply of 9 October 1972, the complainant's rejoinder of 14 November 1972 and the Organisation's surrejoinder of 15 December 1972;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 9.1 and 10.2 and UNESCO Staff Rules 109.6(b), 109.7(d), 110.1 and 110.3;

Having examined the documents in the dossier, oral proceedings having been neither requested by the complainant nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. While employed by UNESCO as a storeman, Mr. Khelifati received a written censure on 31 October 1966 for disobeying his supervisor's instructions and a further censure and warning on 31 October 1970 for coming to work in a drunken condition. The Organization accuses him of having again come to work in a drunken condition on 2 and 8 April 1971. He was thereupon suspended from his functions in accordance with Staff Rule 110.3, pending the report of the Joint Disciplinary Committee. On 30 June 1971 he was dismissed under Staff Regulation 10.2. Although such dismissal did not entitle him to any period of notice or termination indemnity the Director-General decided to pay him salary and allowances for the period of notice and the termination indemnity to which he would have been entitled had his appointment been terminated under Staff Regulation 9.1.

B. After hearing Mr. Khelifati and his counsel the Appeals Board held that the correct procedure had been followed and that the impugned decision respected the relevant Staff Regulations and Staff Rules. It accordingly recommended dismissing the appeal, and the Director-General informed the complainant on 1 February 1972 that he accepted that recommendation.

C. In his complaint Khelifati asked the Tribunal to quash that decision and, subsidiarily, to order a further investigation, including the hearing of witnesses. His rights of defence were denied, he maintains, in that he was shown none of the material documents before appearing before the Joint Disciplinary Committee and was given very little time to prepare his defence. As to the substance, he maintains that the facts have been misrepresented, that they would not in any case warrant his dismissal, and that the decision violates the principle of equal treatment by the Administration of all staff members, since others have been found drunk without suffering such penalties.

D. By letter of 3 August 1972 the Registrar of the Tribunal forwarded the complaint to the defendant Organization informing it:

1. that he had received from the complainant's counsel a letter posted in Paris on 15 April 1972 which stated the complainant's intention of instituting proceedings against UNESCO, with a "Plea for Rescission" appended which merely stated that the impugned decision was the decision to dismiss the complainant and that he was impugning it because he had been denied his rights of defence and the facts were incorrect and did not warrant his dismissal;

2. that he appended to his letter a copy of the "Plea for Rescission";

3. that on 18 April 1972 he had sent a registered letter to the complainant's counsel asking him to bring the complaint into conformity with the Rules of Court within thirty days;

4. that in return he had received six copies of the complaint posted in Paris on 9 May 1972;
5. that he had sent another registered letter to the complainant's counsel on 22 May 1972 asking him to complete the dossier by supplying within ten days additional copies of several appendices to the complaint and several items mentioned in the list of documents which were not appended;
6. that, having received from the complainant's counsel neither acknowledgement of receipt of that registered letter nor a reply, he had sent him another registered letter on 29 June 1972 asking him to send the documents within ten days; and
7. that the documents had been posted to the Registry from Paris on July 1972.

E. In its reply the Organization contends that the complaint is irregular in form and irreceivable and, subsidiarily, that it should be dismissed on its merits. It points out that the date attributed in the complaint to the impugned decision is incorrect and maintains that the undated "Plea for Rescission", received by the Registrar in a letter dated 15 April 1972 and forwarded by him to the Organization, cannot be regarded as constituting a valid submission of a complaint. The letters of 9 May and 6 July 1972 from the complainant's counsel were not received within the time-limit of ninety days set by Article VII of the Statute of the Tribunal. The complaint was not brought into conformity with the Rules of Court within the period of thirty days prescribed in Article VII, paragraph 4, of the Rules of Court. Moreover, the complaint does not fully meet the formal requirements of that article. As to the merits, the Organization observes that the complainant merely makes groundless and legally unfounded allegations, cites certain general principles of law, and adduces no arguments in support of his allegations. It is incumbent upon the complainant to prove his contentions. Finally, he does not maintain that the impugned decision infringed the terms of his contract of appointment or the Staff Regulations .

F. In his rejoinder the complainant states that in his letter to the Registry of 15 April 1972 he clearly stated his intention of instituting proceedings, that he had brought his complaint into conformity with the Rules of Court by 9 May 1972, i.e. within the thirty days~ time- limit, and that the failure to send the additional documents in time did not make the proceedings in any way irregular, since by a general principle of law procedural irregularities have a substantive effect only in so far as they involve denial of the rights of defence or are against the interests of the other party - and they do not do so in the present case. As to the merits, he points out that his allegations were in fact substantiated since he stated that the account of the facts was incorrect. It is for the Organization to prove its charges against him. Since it has produced no documents or records of hearings, he cannot be expected to disprove unsubstantiated charges. The Organization cannot properly refer, in support of its contentions, to the censure imposed as a result of an incident that occurred several years earlier, in 1966; moreover, the circumstances which led to his being censured in 1970 were formally contested by him and never proved by the Organization. He again maintains that the principle of equal treatment was not observed, since other staff members charged with similar misbehaviour have not been dismissed. Finally, he points out that the Director-General did not fully carry out the Appeals Board's recommendations, which included a recommendation for transferring him on the grounds that after sixteen years with UNESCO at the same grade he was suffering from frustration.

G. In its surrejoinder the Organization repeats its arguments. In particular, it points out that the complainant was represented by two other staff members before the Joint Disciplinary Committee and the Appeals Board and that the former heard many witnesses and was able to establish the truth beyond doubt.

#### CONSIDERATIONS:

Without its being necessary to consider the receivability of the complaint:

In the first place, the Director-General accepted the recommendation of the Appeals Board; neither he nor the Appeals Board was bound by the recommendations of the Joint Disciplinary Committee and he could lawfully impose a penalty more severe than had been recommended by those bodies.

Secondly, it is clear from the minutes of the meeting of the Joint Disciplinary Committee, which have not been challenged, that before the meeting was held Mr. Khelifati was invited to acquaint himself with the contents of his file; that he participated in the meeting of the Committee; and that, assisted by his representative, he was given the opportunity of submitting oral observations to the Appeals Board; and that the principle of respect for the rights of defence was thus respected.

Thirdly, as an international official Mr. Khelifati cannot validly claim before the present Tribunal the protection of a law of amnesty adopted by the French Parliament.

Fourthly, the complainant is not legally obliged, particularly in a disciplinary case, to disprove the charges against him, since it is materially impossible for him to do so, and it is for the Tribunal to judge, in the light of the evidence submitted by the two parties, whether proof of the charges emerges from the documents in the dossier.

In the present case the complainant simply asserts that the charges against him are false, but no document in the dossier provides the slightest evidence in support of his allegations.

On the contrary, the Joint Disciplinary Committee accepted the allegation that the complainant was drunk on two occasions only after hearing several witnesses. That being so, and in the absence of any serious argument put forward by Mr. Khelifati, the Director-General was legally entitled to consider that the charges against the complainant had been established.

Those charges were such as to warrant a disciplinary measure. It was within the sole discretion of the Director-General to decide upon the appropriate penalty, and the Administrative Tribunal cannot substitute its judgment for that of the head of the Organization unless it finds that the penalty imposed is clearly out of proportion with the gravity of the offence, which is not so in the present case.

Lastly, the complainant's contention that the decision impugned violates the principle of equal treatment for all public servants, inasmuch as several of his colleagues who were found to be drunk were not subjected to disciplinary measures, would, even if it were proved, not be such as to invalidate the decision on the grounds of illegality. It is true that officials enjoy the protection, among other things, of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1973.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet