

FIFTH ORDINARY SESSION

(PART II)

***In re* BERNSTEIN**

Judgment No. 21

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organisation on 28 June 1955 by Mrs. Kathryn Bernstein, a former official of that Organisation, asking that the Tribunal be pleased to rescind the decision of 18 February 1955 and to enjoin the Director-General to renew her contract for an indefinite period, or in default of reinstatement to pay to the complainant by way of damages a global sum equivalent to three years gross salary, namely 4,665,000 French francs, together with interest at 4 per centum from the date of termination until payment of the said damages;

Considering the memorandum of reply to the said complaint submitted by the defendant Organization on 22 July 1955;

Having had referred to it a statement submitted in his own name on 3 October 1955 by M. Pierre Henquet, Chairman of the Staff Association of UNESCO;

Considering the pleadings exchanged by the representatives of the parties during the hearing;

Considering that the complaint is receivable in form;

Considering that the facts of the case are the following:

- 1) The complainant took up her duties with the defendant Organization in August 1951;
- 2) At the time when the decision complained of was taken, the complainant was the holder of a contract of one year's duration expiring on 14 February 1955;
- 3) In February 1953 the complainant received from the representative of the United States to the defendant Organisation a questionnaire to be completed and returned in application of "Executive Order No. 10,422 of the President of the United States dated 9 January 1953 prescribing procedures for making available to the Secretary-General of the United Nations certain information concerning United States citizens employed or being considered for employment on the Secretariat of the United Nations", whose provisions apply to the defendant Organisation by virtue of Part III of the Order in question, the complainant answered this questionnaire;
- 4) In March 1954 the complainant received an interrogatory from the International Organisations Employees Loyalty Board of the United States Civil Service Commission set up by Executive Order No. 10,459 of 2 June 1953 amending Executive Order No. 10,422 of 9 January 1953, interrogatory to which the complainant did not however reply;
- 5) In June 1954 the complainant received an invitation to appear as from 9 July 1954 before the Loyalty Board meeting at the United States Embassy in Paris;
- 6) By letter dated 13 July 1954 the complainant informed the Director-General of the reasons of conscience on which she based her refusal to appear;
- 7) By letter dated 13 August 1954 the Chief of the Bureau of Personnel and Management recalled to the complainant that her appointment would expire on 14 February 1955 and informed her that she would not be offered a new contract. By letter dated 30 August 1954 the Director-General confirmed the above stating inter alia:

"... In the light of what I believe to be your duty to the Organization, I have considered very carefully your reasons for not appearing before the International Employees Loyalty Board where you would have had an opportunity of dispelling suspicions and disproving allegations which may exist regarding you. It is with a deep sense of my responsibilities that I have come to the conclusion that I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the Organization.

I have therefore, to my regret, to inform you that I shall not offer you a further appointment when your present appointment expires ..."

8) By letter dated 31 August 1954 the complainant requested the Director-General to reconsider his decision;

9) The Chief of the Bureau of Personnel and Management informed the complainant in a letter dated 7 September 1954 of the Director-General's refusal to do so;

10) By a letter of 10 September 1954 the Director-General received a communication of the report of the Loyalty Board (advisory determination), in which it was stated :

"It has been determined on all the evidence, that there is a reasonable doubt as to the loyalty of Kathryn Bernstein to the Government of the United States" and that "this determination, together with the reasons therefore, in as much detail as security considerations permit, are submitted for your use in exercising your rights and duties with respect to the integrity of the personnel employed by the United Nations Educational, Scientific and Cultural Organisation";

11) On 23 September 1954 the complainant submitted an appeal to the UNESCO Appeals Board asking that the above-mentioned decision should be rescinded.

12) On 11 February 1955 the Appeals Board by a majority expressed the opinion that the decision should be rescinded.

13) By a letter dated 18 February 1955 the Director-General of UNESCO informed the Chairman of the Appeals Board that he could not act in accordance with this opinion.

14) The complainant having been transferred to hospital on 11 February 1955 consequently could not take cognizance of the foregoing decision until leaving hospital on 28 March 1955;

15) Before the Appeals Board had taken its decision the Director-General, on 28 September 1954, set up a Special Advisory Board consisting of members of the staff whose task was to "examine the cases of certain staff members on the basis of certain information which has been brought to the knowledge of the Director-General and in the light of the standards of employment and conduct prescribed by the Constitution and Staff Regulations";

16) By reason of her ill-health the complainant was not questioned by the Advisory Board at a sitting, but by the Chief of the Bureau of Personnel and Management;

17) On 10 December 1954 the complainant was placed on special leave. The complainant having brought a further appeal against this decision before the UNESCO Appeals Board, the said Appeals Board on 8 June 1955 stated the opinion that the said decision should be withdrawn; the Director-General on 24 June 1954 rejected this advice. The complainant notified the Tribunal that in view of her termination she did not intend to formally appeal to the Tribunal against this second final decision, but she requested that this factor be taken into consideration as an issue of moral prejudice;

ON RECEIVABILITY :

Considering that whereas the complaint was not submitted within the period of time of 90 days provided in the Regulations running from the date on which the decision impugned was taken (18 February 1955), such was due to the transfer of the complainant to hospital on 11 February 1955;

That whereas the complainant could only take cognizance of this decision at the conclusion of her hospitalization, namely 28 March 1955, she brought her complaint in due form within ninety days from that date;

Considering furthermore that the defendant Organization does not take issue against these facts and does not plead non-receivability following the late notification of the complaint;

Considering that the delay is clearly due to vis major and that, besides, the complainant fulfilled the requirements of the ninety-day period from the time that it was physically possible for her to introduce an appeal;

That under these circumstances the complaint must therefore be considered as receivable.

ON COMPETENCE

Considering that the character of a fixed-term appointment is in no way that of a probationary appointment, that is to say of a trial appointment;

That while it is the case that UNESCO Staff Rule 104.6 issued in application of the Staff Regulations stipulates that: "A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term ...", this text only deals with the duration of the appointment and in no way bars the Tribunal from being seized of a complaint requesting the examination of the validity of the positive or negative decision taken regarding the renewal or the said appointment;

That it is established in the case that the Director-General by a general measure, of which the whole staff was informed on 6 July 1954, indicated that staff in the general service category who had given satisfactory service and whose services were required would receive an indefinite appointment unless otherwise provided in their terms of appointment.

That the complainant, having been made the object of an exception to this general measure, holds that the Director-General could not legitimately thus make an exception of her on the sole ground which he invoked against her as justification for the view that she did not possess the quality of integrity recognised in those of her colleagues whose contracts had been renewed, and in the absence of any contestation of her qualities of competence and efficiency;

That the complainant requests that this decision be rescinded and, alternatively, that an indemnity be granted;

Considering that the question is thus a dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organisation;

That by virtue of Article II, paragraph 1, of its Statute, and in accordance with the precedents established by the Tribunal in Judgments Nos. 17, 18 and 19 dated 26 April 1955 the Tribunal is competent to hear the said dispute;

ON THE SUBSTANCE

Considering that the facts in the case are similar the Tribunal considers itself bound to follow the precedents established in the above-mentioned Judgments Nos. 17, 18 and 19;

A. Considering that the defendant Organisation holds that the renewal or the non-renewal of a fixed-term appointment depends entirely on the personal and sovereign discretion of the Director-General who is not even required to give his reason therefor;

Considering that if this were to be so, any unmotivated decision would not be subject to the general legal review which is vested in the Tribunal, and would be liable to become arbitrary;

Considering that, in fact, it may be conceived that this might exceptionally be the case when, for example, it is a matter of assessing the technical suitability of the person concerned for carrying out his duties;

Considering, however, that in this matter the question does not affect the issue inasmuch as the Director-General has not only given the reason for the decision taken by him but has also made it public in a communiqué issued to the press;

That this reason is based solely on the refusal of the complainant to co-operate in the measures of investigation provided in respect of certain of its nationals by the Government of the State of which she is a citizen, and in

particular on her refusal to appear before a commission invested by that Government with the power to investigate her loyalty to that State;

That the Director-General declares that he concludes from this that he can no longer retain his confidence in the complainant and offer her a new appointment, her attitude being incompatible with the high standards of integrity required of those who are employed by the Organisation and being, furthermore, capable of harming the interests of the Organisation;

Considering in relation hereto that it is necessary expressly to reject all uncertainty and confusion as to the meaning of the expression "loyalty towards a State" which is entirely different from the idea of "integrity" as embodied in the Staff Regulations and Rules; and that this is evident and requires no further proof;

B. Considering that if the Director-General is granted authority not to renew a fixed-term appointment and so to do without notice or indemnity, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organisation;

Considering that it is in the light of this principle that the facts in this case should be examined;

Considering that Article 1.4 of the Staff Regulations of the defendant Organisation, as it stood at the moment when the complainant was notified that her appointment would not be renewed, was as follows:

"Members of the Secretariat shall conduct themselves at all times in a manner consonant with the good repute and high purposes of the Organization and their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties. They shall avoid any action, and in particular any kind of public pronouncement, which would adversely reflect upon their status. While they are not expected to give up religious or political convictions or national sentiment, they shall at all times exercise the reserve and tact incumbent upon them by reason of their international responsibilities."

Considering that, in thus clearly establishing the entire freedom of conscience recognised to international officials in respect of both their philosophical convictions and their political opinions, the Regulations impose on them the duty to abstain from all acts capable of being interpreted as associating them with propaganda or militant proselytism in any sense whatever;

That this abstention is rigorously imposed on them by the overriding interest of the international organisation to which they owe their loyalty and devotion;

C. Considering that, when consulted by the Staff Association of the defendant Organisation on the obligation incumbent on members of the staff to reply to questionnaires issued by authorities of their respective countries, the Director-General declared that the answer must depend only on the conscience of the individual, except that he should not lie and should have regard to the consequences which the refusal to reply might have for him.

Considering, however, that in respect of the invitation to appear before the Loyalty Board, it is established that the complainant simply informed the Director-General after the date on which she had been called on to appear, of her decision not to appear;

Considering that it is desirable to determine whether the attitude adopted by the complainant in this respect may be considered as justifying the loss of confidence alleged by the Director-General;

D. Considering that it is undoubtedly true that if the Director-General has been informed that a member of his staff has acted in a manner prohibited by Article 1.4 of the Staff Regulations, the Director-General has a duty to check the accuracy of such information either himself or through persons appointed by him from within his Organisation, in order that he may take decisions or even sanctions, if necessary, in the full knowledge of the facts;

That in this light the enquiry procedure within the Secretariat to which the Director-General resorted in the present case in full exercise of his authority can in no sense be subject to criticism; that it is in accordance with the undertaking made with the State Member concerned under arrangements approved by the Executive Board and General Conference of the defendant Organisation; that this was solely an undertaking that any information which the Government of the State concerned might desire to submit to the Director-General would "be studied with care" and that he would "certainly give every consideration to it, in the light of the Constitution of UNESCO and all

other relevant provisions and policies which may have been or may be laid down by the appropriate organs of UNESCO";

Considering that it is quite different when the ground for complaint of the Director-General is based solely on the refusal of the official to participate in measures of verbal or written enquiry to which his national Government considers it necessary to subject him;

That the Director-General of an international organisation cannot associate himself with the execution of the policy of the government authorities of any State Member without disregarding the obligations imposed on all international officials without distinction and, in consequence, without misusing the authority which has been conferred on him solely for the purpose of directing that organisation towards the achievement of its own, exclusively international, objectives;

That this duty of the Director-General is governed by Article VI, paragraph 5, of the Constitution of the defendant Organisation, in the following terms:

"The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties."

Considering that the fact that in this case the matter involved is an accusation of disloyalty brought by a Government which enjoys in all respects the highest prestige, must be without any influence upon the consideration of the facts in the case and the determination of the principles whose respect the Tribunal must ensure;

That it will suffice to realise that if any one of the seventy-four States and Governments involved in the defendant Organisation brought against an official, one of its citizens, an accusation of disloyalty and claimed to subject him to an enquiry in similar or analogous conditions, the attitude adopted by the Director-General would constitute a precedent obliging him to lend his assistance to such enquiry and, moreover, to invoke the same disciplinary or statutory consequences, the same withdrawal of confidence, on the basis of any opposition by the person concerned to the action of his national Government;

That if this were to be the case there would result for all international officials, in matters touching on conscience, a state of uncertainty and insecurity prejudicial to the performance of their duties and liable to provoke disturbances in the international administration such as cannot be imagined to have been in the intention of those who drew up the Constitution of the defendant Organisation;

Considering therefore that the only ground for complaint adduced by the Director-General to justify the application to the complainant of an exception to the general rule of renewal of appointments, that is to say her opposition to the investigations of her own Government, is entirely unjustified;

Considering that it is in vain that it is alleged that the terms of renewal set forth in the Director-General's circular of 6 July 1954, provide that the services of the person concerned must be needed; that this expression cannot mean that the person concerned must be irreplaceable, in that no successor can be found; that it means only that the requirements of the service to which the person concerned is assigned must be permanent and that the said person must give full satisfaction therein and otherwise in all manner in the performance of his or her duties; that on this last point the appreciations contained in the annual reports of the complainant are entirely laudatory;

Considering that it results therefrom that the decision taken must be rescinded; but that nevertheless the Tribunal does not have the power to order the renewal of a fixed-term appointment, which requires a positive act of the Director-General over whom the Tribunal has no hierarchical authority;

That in the absence of such a power and unless the Director-General should consider himself in a position to reconsider his decision in this manner, the Tribunal is none the less competent to order equitable reparation of the damage suffered by the complainant by reason of the discriminatory treatment of which she was the object;

F. Considering that it results from the documents produced by the parties during the hearing that the enquiry made

by order of the Director-General himself within the defendant Organisation, the legitimate and regular character of which has been shown above, did not bring any evidence to show that the complainant failed in her duties, as defined in Article 1.4 of the Regulations, during the period that she was an official of the defendant Organisation;

That this Special Board considered that it could find no evidence either in the reports of the Loyalty Board or as a result of its own enquiries that the complainant, during her employment in the Secretariat of the defendant Organisation, had engaged in or was engaging in activities that could be shown to constitute misconduct under the terms of the Staff Regulations and Rules;

Considering that it is irrelevant to seek whether or not the complainant was engaged in militant political activities before being appointed to the international service and at a time when she was not bound by the obligations involved in joining this service, unless it has been proved that she had been guilty of dishonourable or criminal acts (*actes déshonorants ou criminels*);

That any accusation of this nature could only be admitted if drawn up both in due form and with all the precision required to ensure respect for the right of the accused person to defend herself,

That it is not so in this case;

Considering that it has been shown above that the attitude of the complainant towards the Loyalty Board in no way justifies the existence of serious doubts as to her integrity, judgment and loyalty towards the defendant Organisation;

That it does not therefore appear that the complainant placed her own interests above the true interest of the Organisation, which interest consists above all in safeguarding *erga omnes* its independence and impartiality;

ON PREJUDICE

Considering that an official who combines all the necessary qualities has a legitimate expectancy of being offered a new appointment in the position which he or she occupied, and that this expectancy was fulfilled for all the persons concerned, with the exception of a certain number, of whom the complainant;

That not only is such an almost absolute *quod plerumque fit* but also that in thus acting the Administration of the defendant Organisation has as its objective to create a permanent body of officials experienced in their duties, who are destined to follow a career in the Organisation concerned;

That the decision not to renew the appointment is one which should not only be rescinded in the present case, but also constitutes a wrongful exercise of powers and an abuse of rights which consequently involves the obligation to make good the prejudice resulting therefrom; that this prejudice was aggravated by the publicity given to the withdrawal of confidence as being due to lack of integrity, this ground having been given in a press communiqué issued by the defendant Organisation, without it being possible seriously to maintain the view that there could have existed the slightest doubt as to the identity of the persons to which the said communiqué referred;

Considering that it is to no purpose that they have been reproached with having communicated the measures of which they were the object to the Staff Association recognised by the defendant Organisation, as the upshot of a procedure to which the said Association was a party with the knowledge and consent of the Director-General himself;

Considering that should the defendant Organisation not rescind the decision taken, there should be ordered the payment of damages in order to compensate the complainant for material and moral prejudice caused to her by the exception of which she was the object;

That in evaluating such prejudice account may not be taken, as the complainant requests, of her placing on special leave with salary on 10 December 1954, the Director-General having the right within his powers to take such a measure, and which may not be considered in the circumstances as having increased the prejudice suffered;

That the state of health of the complainant may also not be taken into consideration since it is not possible for the Tribunal to determine in what measure her state of health, which was previously delicate, may have been aggravated by the measures taken against her, and since in any case she is at present enjoying the entitlements of

the Sickness Fund and continues to have the right to an eventual invalidity benefit;

ON THE GROUNDS AS AFORESAID

THE TRIBUNAL,

Rejecting any wider or contrary conclusions,

Declares the complaint to be receivable as to form;

Declares that it is competent;

Orders the decision taken to be rescinded and declares in law that it constitutes an abuse of rights causing prejudice to the complainant;

In consequence, should the defendant not reconsider the decision taken and renew the complainant's appointment, orders the said defendant to pay to the complainant a sum equal to two years' net salary, excluding non-resident's allowance, that is to say 2,600,000 French francs, together with interest at 4 per centum from 15 February 1955;

Orders the defendant Organisation to pay to the complainant the sum of US\$300 by way of participation in the costs of her defence;

PRONOUNCING on the application to intervene made by M. Henquet;

Considering that such intervention is receivable in so far as it is made by M. Henquet in his own name;

That in this instance the fact that the intervener holds an indeterminate appointment and not a fixed-term appointment does not prevent the present dispute from bearing on principles applicable to the legal position of the whole staff;

Considering that the intervener is however entitled to bring into issue solely his own interest in the case;

Considering that the intervention is founded only in so far as recognized by this judgment;

Orders the defendant Organisation to bear the expenses for which justification is provided by the intervener up to a maximum of US\$40.

In witness of which judgment, pronounced at the Palais des Nations, Geneva, in public sitting on 29 October 1955, by His Excellency M. Albert Devèze, President, Jonkheer van Rijckevorsel, Judge, Acting Vice-President, and M. Iasson Stavropoulos, Deputy Judge called upon to sit owing to the inability of a titular judge to attend, the aforementioned have hereunto subscribed their signatures as well as myself, Wolf, Registrar of the Tribunal.

Signatures:

Albert Devèze
A. van Rijckevorsel
Iasson Stavropoulos
Francis Wolf