

TWENTY-FOURTH ORDINARY SESSION

***In re* KAUSHIVA**

Judgment No. 155

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Brahma Swarup Kaushiva on 6 June 1969, and brought into conformity with the Rules of Court on 23 July 1969, the reply of the Organization dated 6 October 1969, the complainant's rejoinder dated 4 April 1970, the Organization's surrejoinder dated 26 May 1970, the complainant's additional comments dated 10 August 1970, and the observations in reply thereto made by the Organization on 2 September 1970;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Rules 101, 104, 105, 109 and 110 of the Staff Rules of the Organization;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

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

A. Mr. Kaushiva was appointed by UNESCO on 4 August 1966 as Senior Lecturer in Zoology at the University College of Cape Coast in Ghana. His appointment was to terminate normally on 31 August 1968. The first report on Mr. Kaushiva's work, dated 7 March 1967, having contained some reservations regarding his competence, his probationary period was extended for a further three months; it ended on 31 May 1967 and the complainant's appointment was confirmed.

B. On 15 November 1967 the Chief Technical Adviser of the College and the United Nations Resident Representative in Ghana informed UNESCO that the project was being seriously prejudiced by the tension resulting from the hostile attitude adopted by Mr. Kaushiva. The latter was summoned to Paris, and after he had been heard he was reminded of the requirements of his post and the conduct required of him. This warning was repeated in a letter addressed to the complainant on 18 December 1967. The situation continued to deteriorate, however, and on 7 February 1968 the acting head of the Zoology Department addressed a memorandum to the Principal of the University College infirming him that Mr. Kaushiva's conduct had not improved and that he had, in addition, grossly neglected his duties in respect of the practical classes assigned to him. The acting chief considered that this made it undesirable for him to remain in the Department. On the same day the Principal of the College addressed a letter to the Director of the Bureau of Relations with Member States at UNESCO headquarters, transmitting the memorandum cited above and stating that he had himself verified the complaints and found them justified. He recommended that Mr. Kaushiva should leave the University College as soon as possible. On 14 March 1968 the Resident Representative informed headquarters that the Minister of Education of Ghana had agreed that the complainant should be withdrawn from the project. On 9 May he reported to UNESCO that the complainant had recently become more irascible than ever.

C. Meanwhile, however, Mr. Kaushiva had applied to take his home leave in India, having an entitlement of sixty-five days of accumulated leave at that time, as from 1 May to 15 July 1968. On 25 March 1968 the acting director of the Bureau of Personnel of UNESCO informed the complainant that as the Director of the Bureau of Relations with Member States, on his return from an inspection mission in Ghana, had confirmed the serious deterioration of the complainant's relations with the college authorities and with his colleagues, the Organization had decided to grant him early repatriation and that he would accordingly be placed on annual leave as from the Easter vacation and when his annual leave entitlement was exhausted on 24 July 1968 he would be placed on special leave with pay up to the date of expiry of his contract on 31 August 1968.

D. On 8 May 1968 the Chief Technical Adviser, on a request which the complainant had made in April 1968, drew up a periodical report on the complainant's work performance, criticising him for gross neglect of the practical

work, failure to provide satisfactory instruction in his theoretical classes, and delaying the completion of the syllabus by unduly prolonging his theory classes. The report added that the complainant's relations with his colleagues were very unsatisfactory. On 9 May 1968 the UNESCO official in charge of the project endorsed this report, adding that in spite of repeated warnings Mr. Kaushiva's behaviour had not improved, that there was general agreement that he was in the wrong, and that after his departure there had been an immediate improvement in the situation. He added that the complainant appeared to be excessively self-centred and difficult to deal with, and to be suffering from a persecution complex. Mr. Kaushiva having challenged this report, he was allowed to submit his comments in writing and an ad hoc committee was set up to consider the matter. The ad hoc committee recommended that the Director-General should maintain the performance report made by the complainant's chiefs, and on 11 September 1968 the Director-General informed Mr. Kaushiva that he confirmed the performance evaluation made in the periodical report.

E. Mr. Kaushiva submitted two appeals to the UNESCO Appeals Board. The first, dated 16 August 1968, contested the decision to repatriate him dated 25 March and confirmed on 25 July 1968, and the second, dated 8 October 1968, challenged the decision of 11 September 1968 confirming the terms of the periodical report. In its report dated 11 March 1969 the Appeals Board found that the decision to repatriate the complainant, although justified by the thorough investigation made by headquarters, was in fact equivalent to suspension of the complainant from his duties and that such a measure ought not to have been taken except under Staff Rule 110.3. Considering, however, in particular that the Organization had not terminated the complainant's appointment before the normal date of expiry, and that consequently the complainant had not suffered any loss and had received the salary and allowances to which he was entitled up to 31 August 1968, the date of the expiry of his contract, the Appeals Board found that in so far as it sought to secure a re-evaluation of his performance and a new appointment Mr. Kaushiva's appeal was not receivable, and in so far as it sought to secure the annulment of the repatriation measure it had become purposeless. On 24 March 1969 the Director-General informed the complainant that he had accepted the Appeals Board's recommendation. In its report on the second appeal, the Appeals Board, after considering the memoranda submitted by the parties and hearing the oral representations of Mr. Kaushiva, found, having regard in particular to the fact that the Personnel Advisory Board had concluded that apart from some errors of form the periodical report had not been proved to be inaccurate, and considering moreover that the author of the report, in criticising the complainant's professional shortcomings, had not been guided by motives other than the interests of the Organization, that the complainant's request for the withdrawal of the periodical report dated 9 May 1968 from his file should be rejected. The Director-General informed the complainant that he accepted this recommendation on 24 March 1969.

F. Mr. Kaushiva's complaint to the Administrative Tribunal attacks the decision of 25 March 1968, confirmed on 25 July 1968, concerning his repatriation, the decision of 22 May 1968, confirmed on 11 September 1968, concerning the periodical report of 9 May 1968, and also the two confirmatory decisions taken by the Director-General on the recommendation of the Appeals Board on 24 March 1969. Mr. Kaushiva submits that the decision to place him on annual leave was independent of his own application for leave and was accordingly equivalent to a measure of suspension, and that the Organization had deprived him of any means of defending himself by failing to take that measure in accordance with the relevant provisions of the Staff Rules. He does not deny that the renewal of an appointment is normally within the Director-General's discretion, but he maintains that at the outset he had been given reason to hope that his appointment would be renewed and that its non-renewal had undeniably resulted from the formally incorrect decision to repatriate him. He considers that he is entitled to compensation on that account. Furthermore, he claims that the whole of the procedure followed in his case was tainted by serious irregularities; in particular he had been kept in ignorance of all the correspondence concerning him exchanged between his duty station and headquarters and he had had no opportunity of contesting the unfounded statements it contained. The complainant denies all the charges made against him, stating that they are entirely without foundation and are due to the personal animosity of the Chief Technical Adviser, who drew up the periodical report, and to his influence on the Resident Representative and on the Ghanaian authorities in charge of the University College. He requests:

- (1) annulment of the order for early repatriation;
- (2) payment for sixty days of leave because he was forced to exhaust his entitlement of annual leave;
- (3) damages in the amount of US dollars 14,760 in compensation for loss of salary due to the failure to renew his contract to 31 August 1969, and allowances (assignment allowance, 1,200 dollars; family allowance, 1,300 dollars; education grant, 1,360.90 dollars and post-adjustment, 960 dollars);

- (4) reimbursement of travel expenses from India to Paris and back, and living expenses in Paris from 5 August 1968 to 22 October 1968 in connection with his visit to UNESCO headquarters to submit his case to the Appeals Board and to attend the meeting of the Personnel Advisory Board;
- (5) reopening of the investigation by a disciplinary committee in accordance with the Staff Rules and Regulations and/or annulment of the periodical report of 9 May 1968;
- (6) payment towards the expenses in connection with the case;
- (7) damages of 20,000 dollars in compensation for damage to his career and his health;
- (8) finally, and most important of all, exoneration of the complainant of all the charges levelled against him but never fully investigated by due process.

G. The Organization submits that the complainant's claims should be dismissed.

CONSIDERATIONS:

As to the claims made in respect of the decision of 25 March 1968, confirmed by the decision of 25 July 1968:

Contrary to the complainant's allegations, the decision of 25 March 1968 had neither the purpose nor the effect of prematurely terminating the complainant's employment at UNESCO and constitutes neither dismissal nor suspension prior to the initiation of disciplinary proceedings. According to its actual terms the decision had three purposes:

1. to remind Mr. Kaushiva, who had a fixed-term contract for two years from 4 August 1966, that his contract expired on 31 August 1968;
2. to terminate his employment at the Institute of Education, University College of Cape Coast in Ghana;
3. to settle his administrative position from the date of his repatriation until 31 August 1968.

As to the first point, the Director-General's refusal to renew an official's contract on its expiry is not a disciplinary measure in the terms of the Staff Rules. It falls within his full discretion and is not open to criticism by the Tribunal unless it is taken without authority, is in irregular form or tainted by procedural irregularities, or based on an error of law or fact, or if essential facts have not been taken into consideration, or again, if conclusions which are clearly false have been drawn from the documents in the dossier. It appears from the documents in the dossier that the decision of 25 March 1968 is not tainted by any of these irregularities.

As to the second point, the decision to withdraw an official from specific functions without terminating his contract is in no way disciplinary the official should, however, be informed of the decision beforehand so that he can submit his case.

In the present case Mr. Kaushiva, who had already been admonished by the extension of his probation, had been summoned to headquarters in December 1967 to discuss with the Director of the Personnel Office the comments made on his work performance and behaviour. By a letter of 18 December, the Director reminded him of the duties of his post and of the behaviour expected of him as a field official. Moreover, the decision of 25 March 1968 was finally confirmed on 25 July 1968 by the Director-General only after a thorough investigation had been carried out and an ad hoc committee had given an opinion in the light of a memorandum prepared by the complainant.

As to the third point, following the leave thus granted to the complainant on 24 July 1968 at his own express request, the Director-General was obliged to regularise his position. He did so by granting Mr. Kaushiva special leave with pay from 25 July 1968 to 31 August 1968, the date of expiry of his contract. In law this decision is beyond reproach. Moreover, though not called upon to judge the desirability of such a decision, the Tribunal notes by the way that the solution adopted was the most favourable one to the complainant and that his return to Ghana for five weeks was clearly not in the Organisation's interests.

As to the claims made in respect of the decisions of 22 May and 11 September 1968 and of 24 March 1969 relating to the complainant's performance reports:

Contrary to the complainant's allegations, he was given notice of his three performance reports of 7 March 1967, 1 June 1967 and 9 May 1968 and had every opportunity to discuss them with full knowledge of the facts.

Moreover, the report of 9 May 1968 was made at the complainant's own request the Personnel Office was entitled under Staff Rule 104.11 to ask for the preparation of such a report at any time.

Finally, it does not fall to the Administrative Tribunal to order any alteration of a report made on an official of the Organization by the competent authorities or the withdrawal from the dossier of any part of such report.

As to the other claims:

Mr. Kaushiva received his full salary until 31 August 1968, the date of expiry of his contract. He cannot therefore properly maintain that he lost a year's salary.

He also received his full leave entitlement. His claim for monetary compensation for accumulated leave is accordingly unfounded.

No article in the Staff Rules provides for the reimbursement of travel expenses and the payment of a subsistence allowance to an official coming to Paris to attend meetings of the Advisory Board and the Appeals Board at which his claims are examined. Mr. Kaushiva had no right to such payments. UNESCO voluntarily undertook to pay his travel expenses for the purpose of his appearance before the Appeals Board.

Finally, as stated above, Mr. Kaushiva completed the full period of his two-year contract and the Organization had entered into no commitment as regards possible renewal of this contract. Thus his statement that the decision of 25 March 1968 terminated his legitimate expectations is quite false; hence, whatever the consequences of that decision may have been, the claim for damages which he bases on that statement is accordingly dismissed.

Mr. Kaushiva has failed to prove any general malice towards him on the part of the Organization and in fact was treated by it with understanding. His complaint is accordingly unfounded and is dismissed.

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 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 6 October 1970.

(Signed)

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