

FIFTH ORDINARY SESSION

PART I

In re DUBERG

Judgment No. 17

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organisation on 5 February 1955 by Mr. Peter Duberg, an official of that Organisation, asking that the Tribunal be pleased to rescind the decision taken by the Director-General on 13 August 1954 and to enjoin the Director-General to renew the contract of the complainant and to pay him the sum of one franc in respect of damages and legal costs;

Considering the memorandum of reply to the said complaint submitted by the defendant Organisation on 19 March 1955;

Having had referred to it a statement submitted in his own name on 20 April 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 and in particular the statement by the complainant that his alternative claim for damages would amount to the sum of US\$67,300;

Considering that the complaint is receivable in form;

Considering that the facts of the case are the following:

- 1) The complainant took up his duties with the defendant Organisation on 2 June 1949;
- 2) At the time when the decision complained of was taken, the complainant was the holder of a fixed-term contract of one year's duration expiring on 31 December 1954;
- 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 did not answer this questionnaire;
- 4) In February 1954, the complainant received an interrogatory from the International Organizations 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 also did not reply;
- 5) In June 1954, the complainant received an invitation, dated 18 June, to appear on 15 July 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 he based his refusal to appear;
- 7) By letter dated 13 August 1954, the Director-General informed the complainant that he would not offer him a new contract on the expiry of the contract at that time in force. This letter stated, 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 a letter dated 23 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 30 August 1954 of the Director-General's refusal to do so;

10) By a letter of 10 September 1954, the Director-General received communication of the report of the Loyalty Board (advisory determination) in which it was stated that: "it has been determined on all the evidence, that there is a reasonable doubt as to the loyalty of Norwood Peter Duberg to the Government of the United States" and that "this determination, together with the reasons therefor, 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 Organization";

11) The complainant was himself informed of the conclusions of the Loyalty Board by letter of the Chairman of the Loyalty Board dated 10 September 1954 and was also informed of the fact that the report of the Loyalty Board had been transmitted to the Director-General of the defendant Organisation;

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

13) On 2 November 1954, the Appeals Board, by a majority opinion, expressed the opinion that the decision should be rescinded;

14) By a letter dated 25 November 1954, the Director-General informed the Chairman of the Appeals Board that he could not act in accordance with this opinion;

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) The complainant appeared and explained his position before this Special Advisory Board. However, in a letter to the Director-General dated 4 October 1954, he expressed certain reservations to the procedure followed and asked for any measures affecting him which might result from this procedure to be cancelled;

17) By a letter dated 11 October 1954, the Chief of the Bureau of Personnel and Management informed the complainant of the rejection of this request;

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 of 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, "decided that all professional staff members whose contracts expire between now and 30

June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments";

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 him on the sole ground which he invoked against him as justification for the view that he did not possess the quality of integrity recognised in those of his colleagues whose contracts had been renewed, and in the absence of any contestation of his 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, the Tribunal is competent to hear the said dispute;

ON THE SUBSTANCE

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 its nationals by the Government of the State of which he is a citizen, and in particular on his refusal to appear before a commission invested by that Government with the power to investigate his 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 him a new appointment, his 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 decision complained of was taken, 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 sentiments, 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 approached the Director-General only at a late date, so that the latter would not have been able to give him advice in sufficient time;

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";

That the objection raised in this regard by the complainant is totally unfounded;

E. 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-two 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 his opposition to the investigations of his 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, after enumeration of the standards required, 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 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 he 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 his duties, as defined in Article 1.4 of the Regulations, during the period that he 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 his 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 he was not bound by the obligations involved in joining this service, unless it has been proved that he 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 himself;

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 his integrity, judgment and loyalty towards the defendant Organisation;

That it does not therefore appear that the complainant placed his 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 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;

That redress will be ensured ex aequo et bono by the granting to the complainant of the sum set forth below;

Considering that, on the one hand, there should be granted to the complainant the amount of the salary which he would have received had he not been subject to the measure of exception of which he complains, that is to say one year's basic salary;

That, on the other hand, there should be granted to him a second year's basic salary in order to compensate for the moral prejudice and in particular the difficulties which he will encounter in seeking new means of subsistence;

That, in this calculation, there should be added to the salary the statutory amount of children's allowance;

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 the sum of US\$15,500, plus children's allowance for two years, the whole together with interest at 4 per centum from 1 January 1955;

Orders the defendant Organisation to pay to the complainant the sum of US\$300 by way of participation in the costs of his 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 intervention is founded, in so far as recognised by the present 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 in public sitting on 26 April 1955 by His Excellency M. Albert Devèze, President, Professor George Scelle, Vice-President, and Jonkheer van Rijckevorsel, Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Wolf, Registrar of the Tribunal

Signatures:

Albert Devèze
George Scelle
A. van Rijckevorsel
Francis Wolf

Updated by SD. Approved by CC. Last update: 30 May 2008.