

SIXTH ORDINARY SESSION

***In re* MAUCH**

Judgment No. 27

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Telecommunication Union drawn up by Mademoiselle Madeleine Mauch on 12 December 1955, the reply of the defendant organisation dated 6 January 1956, the additional statement of the complainant submitted with the authorisation of the President on 24 February 1956 and the rejoinder to the said statement submitted by the defendant organisation on 8 March 1956;

Considering the Staff Regulations of the International Telecommunication Union and in particular Articles 31, 33, 36, 40, 48, 58, 59, 60, as well as the provisions of the complainant's contract of appointment; Considering the regulations of the Staff Superannuation and Benevolent Funds of the said Organisation, and in particular Articles 2(3), 4 and 5;

Having heard the parties in public hearing on 29 June 1957;

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

The complainant was engaged by the Organisation on 1 April 1953 as a supernumerary official for a period of three months. This contract was followed by a similar one extending from 13 July to 30 September 1953 and subsequently prolonged until the end of 1953. On 1 January 1954 the complainant received a contract as a temporary official for a period of one year. All temporary officials are members of the Organisation's Staff Superannuation and Benevolent Funds, the regulations of which provide that admission shall be conditional on a medical examination carried out by a doctor approved by the Management Board of the Funds. The complainant underwent such an examination in January 1954. It was given by the Medical Adviser of the Organisation, who is also the physician approved by the Management Board for the purposes of the regulations of the Funds. As a result of this examination the physician made certain reservations concerning the complainant's state of health. The complainant appealed against these reservations to a committee consisting of the Medical Adviser of the Organisation, a physician designated by the complainant and a presiding physician co-opted by the latter two. The committee unanimously confirmed the reservations on 11 May 1954. In a certificate dated 15 May 1954, the physician designated by the complainant expressed the opinion that the committee's decision had in the main been dictated by questions of an administrative nature brought in issue by the Medical Adviser. On 14 October 1954 the Medical Adviser submitted a report as a result of which the Secretary-General of the I.T.U. decided on 23 December 1954 to offer the complainant a new contract, established initially for a period of six months, which was to constitute a new period of probation, medically speaking, without prejudice to the complainant's future position, provided that her state of health were found satisfactory at the expiry of this contract, which was fixed at 30 June 1955. On 1 April 1955 a scuffle took place between the complainant and another official on the premises of the Organisation. The Secretary-General immediately placed the two officials involved on leave with pay in accordance with Article 58 of the Staff Regulations and ordered an administrative inquiry. On the basis of the results of the inquiry the Secretary-General considered that he could not return the complainant to her duties with the I.T.U. and that her conduct warranted her dismissal. However, the conclusions of the inquiry left some doubt regarding the complainant's state of health, which might possibly have explained her conduct. The Secretary-General decided to call for a medical investigation and by a letter dated 4 May 1955 invited the complainant to report to a medical expert. The complainant protested on the grounds that the expert had refused to undertake to communicate his report to her and was under the influence of the Medical Adviser of the Organisation whom she considered as being especially prejudiced against her. The Secretary-General of the Organisation reminded the complainant by a letter dated 6 May 1955 that it was for him to designate medical experts and reiterated his instructions to report to a prominent specialist, Professor Naville, at a specified time. The complainant reported late and was not received. On 26 May 1955 the Secretary-General once again invited the complainant to report to another expert. This she refused to do on the grounds that the expert had rejected her conditions, namely that she be provided with a copy of

the findings. As the complainant's contract was due to expire on 30 June 1955 the Secretary-General on 14 June 1955 took the decision which is now before the Tribunal, i.e. maintenance of the complainant on leave with pay until 15 June 1955, placing her on ordinary leave from 16 to 30 June 1955, payment of 17 1/2 days' salary corresponding to 13 1/2 days' accumulated unused leave and 29 1/2 hours of overtime not compensated on 30 June 1955, and payment on expiry of contract of an amount equal to twice the contributions made by the complainant to the Staff Superannuation and Benevolent Funds. On 5 July 1955 the complainant appealed through administrative channels. The Secretary-General maintained his decision and the complainant appealed to the Appeal Board on 11 July 1955; the Chairman advised her on 10 August 1955 that the Appeal Board would meet on 16 August to consider her case. On 23 October 1955 the complainant, not having been called before the Appeal Board, informed the Chairman of her intention of lodging a complaint with the Administrative Tribunal and, relying on the provisions of paragraph 3 of Article VII of the Statute of the Tribunal, which deems the failure of the Administration to take a decision within a period of sixty days from the notification of a claim to be equivalent to a rejection of the claim, submits the present complaint, which is thus receivable in the same manner as a complaint against a final decision.

Considering that the complainant requests that, for the purposes of inquiry, the Tribunal order the presiding physician of the Medical Committee which confirmed the reservations formulated by the Medical Adviser of the Organisation, and the member of the Committee designated by the complainant, to be heard as witnesses; that she requests the Tribunal to order a medical investigation by a joint committee; that she also asks the Tribunal, in regard to the substance, to order payment of her salary for the period 15 to 30 June 1955 and the rescinding of the impugned decision of 14 June 1955, to grant her an indemnity for the prejudice suffered by her, in an amount to be determined by the Tribunal, and to order the payment of all legal costs by the Organisation;

Considering that the complainant submits the following arguments: the Medical Adviser of the Organisation is the chief of a medical service which is common to the European office of the United Nations and the specialised agencies with headquarters in Geneva and, as such, also acts as Medical Adviser to the pension and sickness insurance funds of the said organisations; the complainant alleges that the Medical Adviser's attitude towards her is one of hostility, traceable to an earlier dispute having arisen out of a diagnosis established by him in connection with a sickness contracted by the complainant when she was employed by the United Nations in Libya; that this practitioner, taking undue advantage of his position, improperly sought to hinder the engagement of the complainant by organisations established in Geneva; in particular, he formulated reservations at the time of the complainant's engagement by the International Telecommunication Union, on the basis of medical records established when she was employed by the United Nations. This practitioner brought pressure to bear on the Medical Committee with a view to obtaining confirmation of the said reservations; similarly, without further medical examination, he induced the Organisation, through his report of 14 October 1954, to limit the extension of the complainant's engagement to a period of six months; as a result, following the incident of 1 April 1955, the Organisation used the said reservations as a basis for considering that the complainant's state of health might constitute an argument against her re-engagement; the medical examinations which the complainant was invited to undergo after the incident were without statutory foundation; the Organisation illegally placed the complainant on leave for the period 15 to 30 June 1955, instead of returning her to her duties at the end of the period of suspension, as it should have done; that in consequence she requests that the said period be counted as unused leave and that an amount equivalent to her salary in respect thereof be paid to her;

Considering that the Organisation submits that the complaint should be rejected and bases its contention on the following arguments: the earlier dispute submitted to the Administrative Tribunal of the United Nations is res judicata and may not therefore be brought before this Tribunal; the incident of 1 April 1955 would have justified the complainant's dismissal, and it was in a spirit of fairness that the Organisation sought to have her undergo a medical examination in order to determine whether her state of health constituted an extenuating circumstance; quite apart from the complainant's state of health, the Organisation could not reinstate her owing to her serious misconduct; before ordering such reinstatement, which was within the discretionary powers of the Secretary-General, the Organisation had to ascertain that the complainant's state of health would not constitute an obstacle to such reinstatement; the Secretary-General is empowered to prescribe a medical examination by physicians of his choice before engaging or re-engaging an official; the Secretary-General is fully empowered to place officials on leave before the expiry of their contract and no provision of the Staff Regulations was therefore violated;

Considering that the facts previous to the engagement of the complainant by the defendant organisation have already been the subject of a decision by the United Nations Administrative Tribunal and may therefore not be considered, in keeping with the principle of res judicata pro veritate habetur;

Considering that the Medical Adviser, when formulating his reservations, acted within his powers and that these reservations were unanimously confirmed by a properly constituted Medical Committee on which the complainant was represented; that they were legitimately communicated to the Secretary General;

Considering, on the other hand, that while no statutory provision was violated, it is nonetheless regrettable that the Medical Adviser should have participated as a full member of the Medical Committee to which his own decision was appealed, and it appears highly undesirable that the Medical Adviser should thus have become a judge in his own cause; that the resulting situation was such as to raise doubts in the complainant's mind concerning the impartiality of the Committee, and that such doubts could have been aggravated by the subsequent declarations of the physician designated by her;

Considering that, without in any way confirming the legitimacy of these doubts, and having regard particularly to the fact that the decision of the Committee was unanimous, the Tribunal regrets the misgivings aroused in the complainant's mind; that, nevertheless, there is nothing in the present case which would justify addressing a reproach to the Organisation for having, on the basis of an opinion thus formulated, limited the extension of the contract offered in December 1954 to a period of six months;

Considering, however, the important fact that there is no evidence to suggest that following the temporary suspension ordered after the incident of 1 April 1955 and the inquiry carried out in connection therewith, any decision was taken concerning the responsibility incurred by the complainant owing to the part played by her in the incident, and that, notwithstanding the presumptions to which the Organisation refers, the matter remained in suspense, in spite both of the seriousness of the incident and of the professional worth and previous conduct of the complainant, to which the Organisation willingly paid public tribute; and considering further that there is no evidence to show that the health of the complainant constituted either an actual or a potential risk such as might have raised an obstacle to her re-engagement;

Considering that the only fault which can be attributed to the Organisation is that it did not establish these points clearly and precisely but left open to grave doubt the reasons which motivated the failure to re-engage the complainant, that the explanations given both in the letter from the Secretary-General to the complainant dated 14 June 1955 and in the written reply and oral submission of the Organisation concerning the exercise of a power which is in principle discretionary, require the Tribunal to test the validity of the explanations but do not provide it with the necessary material for doing so; that the complainant should therefore be awarded an indemnity in compensation for the moral prejudice resulting from the equivocal explanation given of the failure to re-engage her, for which prejudice the award of a sum of U.S.\$1,000 will give her full relief;

Considering that the leave provided for in Article 40 of the Staff Regulations is required to be taken during the engagement in the course of which entitlement to such leave has been acquired, except where the necessities of the service prevent this, in which case - and in which case alone - a cash payment must be granted in lieu of leave; that, in the present case, there was nothing to prevent the Secretary-General from placing the complainant on leave before the expiry of her contract; that consequently the decision of 14 June 1954 not only did not violate the provisions of the Staff Regulations, but was in strict accordance therewith, and that the complainant's claim in this connection is without legal foundation;

ON THE GROUNDS AS AFORESAID

THE TRIBUNAL,

Rejecting any wider or contrary conclusions,

Orders the Organisation to pay to the complainant, as compensation for the moral prejudice suffered by her, a sum of U.S.\$1,000, and rejects all of the complainant's other claims.

In witness of which judgment, delivered in public sitting on 13 July 1957 by His Excellency Albert Devèze, President, Professor Georges Scelle, Vice-President, and Sir John Forster, K.B.E., Q.C., Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

(Signatures)

Albert Devèze
Georges Scelle
John Forster
Jacques Lemoine

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