

FORTY-FIRST ORDINARY SESSION

***In re* SHALEV**

Judgment No. 354

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Moshe-Amram Shalev on 12 September 1977 and brought into conformity with the Rules of Court on 14 October, UNESCO's reply of 16 November, the complainant's rejoinder of 30 March 1978 and UNESCO's surrejoinder of 25 May 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulation 10.2 and UNESCO Staff Rules 104.6, 109.3 and 110.1;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

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

A. In 1963 UNESCO appointed the complainant, an Israeli citizen, to its field staff and assigned him to a United Nations Special Fund project in Nigeria. He was given a fixed-term one-year appointment at grade P.4 and then 16 successive extensions of appointment. The last extension expired on 31 July 1976, when he left UNESCO.

B. On 1 August 1964 the complainant was transferred from Nigeria to Bamako, in Mali. On 1 October 1970 he was transferred to Bujumbura, in Burundi, and promoted to P.5. On 21 February 1974 he was promoted to D.1 as chief technical adviser. In 1975 he was called back to headquarters.

C. On 5 March 1975 the complainant sent a letter to Mr. Kaboré, the then Director of the Department of Higher Education and Training of Educational Personnel, in the Education Sector. He sent a copy to the Director-General. In the letter he made serious charges against Mr. Kaboré and others, who, he said, had hatched an "anti-Semitic racist plot" and taken steps to bring about a "monstrous perversion of justice". After a lengthy correspondence with the Administration the Director of the bureau of Personnel wrote to him, on 28 May 1975, saying that the Director-General had decided to set up a special committee of inquiry, asking him to go to headquarters for the inquiry and informing him that, the Government having asked for his withdrawal, he should regard his departure from Burundi as final.

D. The committee of inquiry was to report to the Director-General: "1. on the facts and circumstances which led Mr. Shalev to formulate the accusations contained in his letters of 5 March 1975 to Mr. Kaboré and to the Director-General... 2. on the events which led the Burundi authorities to request the recall of Mr. Shalev to Headquarters". The committee found that the complainant was convinced that he was the "victim of a machination", but held that his accusations were "unjustified". It also concluded that the reason why the Government of Burundi had asked for his recall was that he had "continued to apply directives of the former Minister of National Education and did not accept the change in orientation desired by the new Minister".

E. In the light of that report the Director-General decided to refer the case to a Joint Disciplinary Committee. The Committee took the view that the complainant's attitude, "although explicable by reason of certain extenuating circumstances", had not been such as was expected of a member of the UNESCO staff. It recommended demoting him from D.1 to P.5. The Director-General endorsed that recommendation and so informed him on 13 October 1975.

F. The complainant challenged that decision, but it was upheld on 21 October. He then appealed to the Appeals Board. On 4 June 1976 the Board expressed the view, which the Director-General endorsed, that the appeal was time-barred and therefore irreceivable.

G. On 25 June 1976 the Director of the Bureau of Personnel informed the complainant that the Director-General had decided not to renew his fixed-term appointment after 31 July 1976, the date of its expiry. The complainant challenged that decision on 6 July. The decision was upheld on 27 July. He appealed to the Appeals Board. On 23 May 1977 the Board recommended dismissing the appeal. The Director-General endorsed that recommendation and so informed him by a letter of 15 June 1977. That is the final decision now impugned.

H. The complainant contends that incorrect facts were taken into account, that mistaken conclusions were drawn from the facts, that essential facts were not taken into consideration and that the Director-General took his decision on grounds "extraneous to the Organization's interests". The decision was an abuse of authority and therefore unlawful. Lastly, the decision not to extend the complainant's appointment was in fact dismissal which was disguised as a disciplinary measure and carried out in breach of the relevant procedural rules. He therefore asks the Tribunal to quash the Director-General's decision not to extend his appointment; to order UNESCO to reinstate him in a post corresponding to his grade and qualifications; to declare him to be entitled to payment of his salary from 31 July 1976 to the date of reinstatement; subsidiarily, to award him compensation amounting to five years' gross salary; and lastly, and in any event, to award costs against UNESCO, including part of his lawyer's fees.

I. In its reply the Organization contends that the decision not to renew the complainant's fixed-term appointment comes under Staff Rule 104.6, which expressly states that the holder of such an appointment may not rely upon any right to extension or conversion of his appointment. Such a decision falls within the Director-General's discretionary authority and the exercise of that authority was not tainted with any of the flaws which entitle the Tribunal to interfere in such cases. The Director-General did not ignore the facts of the case; indeed he gave it careful thought, made a fair judgment and decided in the Organization's interests not to renew the complainant's appointment. UNESCO therefore asks the Tribunal to declare the complaint unfounded and to dismiss it.

CONSIDERATIONS:

1. The complainant is impugning the Director-General's decision of 25 June 1976 not to extend beyond 31 July of that year his fixed-term appointment which expired on that date, and the Director-General's further decision of 15 June 1977 upholding that decision on the recommendation of the Appeals Board.

2. According to Staff Rule 104.6, which relates to "fixed-term appointment",

"(a) A fixed-term appointment shall be an appointment for a continuous period of not less than one year, ending on a date specified in the Letter of Appointment.

(b) A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity."

It appears from the wording of that rule that it is within the Director-General's discretionary authority to decide whether or not to renew a fixed-term appointment.

Because that authority is discretionary the complainant has no right to extension of his appointment, and where it is not extended the Tribunal's power of review is limited. The Tribunal may interfere with the Director-General's exercise of his discretionary authority only if the decision not to extend the appointment was taken without authority or violated a rule of form or of procedure, or was based on a mistake of law or of fact, or if essential facts were overlooked, or if the decision was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

3. The nub of the complainant's case is that the impugned decision was the consequence of an earlier disciplinary decision, taken by the Director-General on 13 October 1975, to demote him from D.1 to P.5.

The Organization replies that that decision became final because it was not challenged within the prescribed time limit. Although for that reason the Tribunal may not quash that decision - and in any event the complainant does not ask that it be quashed - the Tribunal may nevertheless consider whether the Director-General did not base the impugned decision mainly on the disciplinary sanction suffered by the complainant on 13 October 1975 - in other words, whether the decision not to extend his appointment is not really a further disciplinary sanction based on the same facts, and on that account a mistake of law.

In deciding whether or not to extend a staff member's appointment the Director-General will consider whether the extension is in the Organization's interests in the broad sense, for example by taking account of all the facts in the dossier, all the staff member's performance reports since he joined the staff and any observations made about him.

In particular, where a staff member has suffered a disciplinary sanction in the course of his employment the Director-General is bound to keep a balance between that adverse fact and other facts in the staff member's favour and should take such facts into account in reaching his decision, in the Organization's interests alone. A clear distinction must be drawn between imposing a covert disciplinary sanction on a staff member - which is unlawful - and taking into account in reaching a decision of different purport the fact that in his career the staff member has suffered a disciplinary sanction - which, save in exceptional circumstances, is perfectly lawful.

It is not easy to draw the distinction between the two but it should be observed that the covert disciplinary sanction may constitute an abuse of authority and should be borne out by the documents in the dossier.

In the present case, in deciding whether to renew the complainant's contract of appointment, the Director-General states that he made a full review of the complainant's dossier and took account of all factors, whether favourable or adverse, which might be relevant. Inasmuch as it was based on appreciations of fact his decision is not subject to review by the Tribunal.

It does not appear from the documents in the dossier that the decision may be quashed on any of the grounds which entitle the Tribunal to interfere. In particular there is no proof of the allegation of abuse of authority.

It appears from the foregoing - arguments which have no bearing on the dispute being set aside - that none of the complainant's arguments is well-founded and that the complaint must therefore be dismissed.

Since the Organization has committed no fault, the claims for compensation should also be 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 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 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet