

TWENTY-EIGHTH ORDINARY SESSION

In re BALLO

Judgment No. 191

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Fédor Ballo on 14 February 1972 and the Organisation's reply of 31 March 1972;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations and Staff Rules, and in particular Staff Rules 104.11 and 109.3;

Having heard in oral proceedings, on 8 May 1972, Mr. Hoggart, Mr. Seydou, Mr. Fulchignoni and Mr. Bolla, UNESCO officials, as sworn witnesses, together with Mr. Jacques Mercier, counsel for the complainant, and Mr. Lussier and Mr. Perrenoud, agents of the Organisation;

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

A. Mr. Ballo, who is of Czechoslovak nationality, received a two-year appointment with UNESCO on 29 July 1968 and began work at grade P.5 on 28 August 1968 as Chief of the Cultural Policy Section in the Social Sciences, Human Sciences and Culture Sector. On 4 May 1970 he was orally informed by the Permanent Delegate of the Czechoslovak Socialist Republic to UNESCO that he was to return to Czechoslovakia on the expiry of his appointment, on 31 August 1970. He immediately informed his superiors and the Director of the Bureau of Personnel and on 9 May 1970 wrote to the Permanent Delegate asking for the decision to recall him to be reconsidered. In a minute of 5 May 1970 to the Assistant Director-General for Social Sciences, Human Sciences and Culture (Mr. Hoggart), of which he sent a copy to the Director of the Department of Studies, Development and Dissemination of Cultures (Mr. Seydou), the Director-General criticised preparatory work being done by a team of officials comprising Mr. Ballo for a Conference of Ministers of Culture to be held in Venice from 24 August to 2 September 1970; changes were required, he said, in the team's composition. Mr. Hoggart replied on 19 May 1970 that the team had merely followed its brief and was not to be blamed. The complainant's superiors having shortly after submitted to the Director-General a proposal for a two-year extension of his appointment, the Director-General wrote the following minute, dated 19 May 1970:

"I cannot endorse the laudatory assessment made by Mr. Caillois and Mr. Seydou of Mr. Ballots performance. I have not yet noticed anything specific which redounds to his credit in the execution or programming of the Organisation's work in the field of cultural policy.

To take account of Mr. Ballots performance report, I am extending his appointment for one year until 31 August 1971. He must realise, however, that unless I receive more conclusive proof of his efficiency, I regard this measure as final. I shall reach my final opinion on his work at the Conference of Ministers of Culture in Venice."

In confidential minutes addressed to each other at the time Mr. Hoggart and Mr. Seydou expressed the view that the Director-General's opinion of Mr. Ballo was unfounded and unfair. His appointment was nevertheless extended by only one year, until 31 August 1971.

B. In February 1971 Mr. Ballo received a highly commendatory performance report from his immediate supervisor (Mr. Fulchignoni), from the Director of his Department (Mr. Seydou), and from the responsible Assistant Director-General (Mr. Hoggart). They all praised his competence, scrupulous concern for efficiency, dedication to the Organisation and intellectual integrity. On 12 March 1971 the Senior Personnel Advisory Board unanimously recommended granting him a three-year extension of appointment. In a minute of 30 April 1971 the Director-General described this appraisal as "unduly laudatory" and said he could not endorse it. Referring to the doubts he had felt the previous year about Mr. Ballo's competence, he went on:

"... My assessment of Mr. Ballots work over the past year is decidedly unfavourable.

I base this opinion on a fair amount of experience and each occasion served as a test. I have personally seen Mr. Ballo at work in the preparation and servicing of the International Conference in Venice, in discussion of the PADs of the Cultural Development Division and in the preparation of the Conference of European Ministers of Culture. On every occasion he has proved quite inadequate for his assignments."

He therefore refused to renew the complainant's appointment, but authorised him to apply for other UNESCO posts. On 18 June 1971 the Director of the Bureau of Personnel told Mr. Ballo that his appointment would terminate on 31 August 1971 in accordance with UNESCO Staff Rule 104.6(b). The complainant having fallen ill in August, however, his appointment was extended to 15 September 1971 and then, since he continued to be ill, successively to 30 November 1971, 15 January 1972, 14 March 1972 and 31 May 1972. Since 17 February 1972, therefore, he has been on half-pay in accordance with Staff Rule 106.1(a) and (b).

C. Meanwhile, on 11 May 1971, the acting chargé d'affaires of the Permanent Delegation of the Czechoslovak Socialist Republic to UNESCO had written to the Director-General as follows:

"Sir,

With reference to our meeting of 4 May 1971, I have the honour to inform you that the Government of the Czechoslovak Socialist Republic cannot agree to extension of the contract of Mr. Fédor Ballo of the Culture Department of the Secretariat. Mr. Ballo's present contract expires on 31 August 1971 and he has been informed of his Government's decision.

I have the honour to be, Sir, etc."

The Director-General replied on 14 May that an offer of extension of appointment to a serving staff member was a matter within the Director-General's entire discretion and must be made solely on account of the official's merits or qualifications and his usefulness to the Organisation. He went on:

"In Mr. Ballo's case, these are the criteria on which I have based my decision not to extend his appointment to his present post beyond the date of expiry of his current contract (31 August 1971)."

D. On 7 July 1971 the Director-General confirmed the decision of 18 June 1971 not to renew the complainant's contract, despite his protests. The complainant appealed to the Appeals Board. At his request the above-mentioned minutes of 19 May 1970 and 30 April 1971, the letters of 11 and 14 May 1971 referred to in paragraph C above and the advice of the Senior Personnel Advisory Board of 12 March 1971 were communicated to the Appeals Board by the Organisation for the purposes of his defence. The Director of the Bureau of Personnel assured the complainant that the Director-General had not written any further letters to the Czechoslovak authorities regarding him since his appointment and refused to let him have copies of several minutes the production of which he had asked for because they concerned proposals for the organisation of the Department with no direct bearing on his position and were consequently irrelevant to his appeal against non-renewal of contract. In its report of 1D December 1971 the Appeals Board held that under paragraph 5(b) of its Statutes it was not competent to decide on the merits of the question whether the complainant's services were satisfactory, but had simply to determine whether the decision regarding him was due to prejudice or any other extraneous factor. It held that the complainant had not adduced any proof that the impugned decision was due to prejudice or to extraneous factors and that the Director-General had in no way misused his authority. It recommended the Director-General to reject the appeal, but considered that it would be highly desirable that the Organisation should keep Mr. Ballo in a post suited to his qualifications and experience. On 5 January 1972 the Director-General informed Mr. Ballo that he accepted the Appeals Board's recommendation.

E. In his complaint Mr. Ballo asks the Tribunal:

"(1) to order production by UNESCO of every document in the complainant's file, whether it concerns correspondence between the Organisation and the Czechoslovak Government regarding his services or attempts by his superiors to obtain his reclassification in UNESCO;

(2) for the reasons given at the end of the memorandum (Appendix I) to quash the Director-General's decision of 18 June 1971, confirmed on 5 January 1972 (the Director-General's decision on the Appeals Board's

recommendation, Appendix 47) and, should the Director-General fail to grant him a new three-year appointment at grade P.5, to award him compensation equivalent:

(a) to the salary which he would receive over a period of three years;

(b) to a fair financial indemnity for the moral prejudice he has suffered, amounting to two years' salary, account being taken of his state of health, the fact that he cannot return to his own country, and his family responsibilities;

(c) a sum amounting to Sw.frs.12,000 to cover the sundry expenses and fees occasioned by the present complaint."

In support of his claim the complainant argues that the Director-General's decision was due to prejudice against him and to extraneous factors and that no objective consideration warranted his taking such a decision in disregard of the opinion of all the complainant's supervisors. He therefore maintains that the decision constitutes a definite misuse of authority on the Director-General's part. Moreover, it was taken in disregard of the letter and spirit of Staff Rule 104.11. Finally, it was tainted by reason of the Administration's refusal to produce essential documents.

F. The Organisation rejects these three arguments. It points out that a decision not to renew an official's appointment falls within the Director-General's entire discretion and contends that there was neither prejudice nor any extraneous factor underlying it. It maintains, among other things, that in May 1970, when the Director-General first expressed doubts about the complainant's competence, he was quite unaware of the attitude of the Czechoslovak Government. He had based his criticisms of the complainant on full knowledge of the facts and had personally had several opportunities to see him at work. In accordance with the Constitution of UNESCO and with the case law of the United Nations Administrative Tribunal the Director-General has sole power to decide whether the quality of a staff member's performance justifies renewal of his fixed-term appointment, even if his own opinion of the staff member differs from that of the latter's supervisors. Nor did the Organisation infringe Staff Rule 104.11, under which staff members shall be informed of statements or opinions on their performance so that they may contest them; that rule relates only to appraisals which are not made by the decision-making authority, and on which its decisions may be based, and does not relate to the actual grounds for the decisions. An administrative measure cannot be both an appraisal of performance and a decision. The Director-General's decisions, for which he gave reasons, were not a preliminary appraisal of the complainant's work performance and therefore did not have to be communicated to him for comment. As for the documents the production of which is claimed by the complainant, the Organisation maintains that all relevant documents were made available to him for his appeal before the Appeals Board. It accordingly prays that the complaint be dismissed.

CONSIDERATIONS:

The complaint must be held to impugn also the Director-General's decision dated 30 April 1971, of which the letter to the complainant dated 18 June 1971 is merely a brief notification.

As to the production of the documents requested by Mr. Ballo:

Since the Organisation refused to include these documents in the dossier on the grounds that they had no bearing on Mr. Ballo's situation and that some of them were confidential, the Tribunal ordered them to be produced and took cognizance of them in camera. Noting that the documents were indeed of a confidential character, it decided not to communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them, namely that, under proposals for reorganisation made by the Assistant Director-General responsible and rejected by the Director-General, it was possible to retain the complainant in the Organisation's service in another post. After further consideration, however, the Tribunal reached its decision without relying on these documents.

As to the legality of the impugned decision:

It appears from the formal provisions of Staff Rule 104.6 that the Director-General's decision not to renew a fixed-term appointment lies within the discretionary authority enjoyed by the head of the Organisation as the person responsible for its smooth running. Accordingly, the complainant cannot claim any right to have his appointment renewed, and, so as not to impair the Director-General's authority, the Tribunal's power of review is limited.

Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, in regular form, whether

the correct procedure has been followed and, as regards its legality under the Organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.

In refusing to extend Mr. Ballo's appointment contrary to the unanimous recommendation of the high-ranking officials who were the complainant's supervisors and to the equally unanimous recommendation of the Senior Personnel Advisory Board, the Director-General based his decision of 30 April 1971 - as appears from its actual terms - solely on the fact that on every occasion on which he had personally seen the complainant at work the latter had shown himself quite inadequate for his assignments. He thus made a general assessment of Mr. Ballo after observing the latter's behaviour only in special circumstances and failed to take account of the quality of Mr. Ballo's day-to-day work, on which his immediate supervisors had laid great stress. He formed a general opinion on Mr. Ballo which took account merely of a very small part of his work.

While the Director-General, as head of the Organisation, was entitled to differ from the opinion expressed by the high-ranking officials responsible for Mr. Ballo's performance reports, he should, before reaching the final decision which he alone was competent to make, have taken into account not only the complainant's attitude on the particular occasions on which he had "personally seen him at work", but also the quality of the complainant's general performance of his duties as attested by his immediate supervisors in highly favourable terms.

The Director-General fell into the error of supposing that because the limited part of the complainant's work which he himself saw was bad in his opinion therefore the complainant's work as a whole was to be condemned. In treating as of no account the unanimous opinion of those who were familiar with the whole of Mr. Ballo's performance, the Director-General failed to take into consideration essential facts of the case. His decision must therefore be quashed.

In view of all the circumstances of the case and, in particular, of the assessment of the complainant's performance by his supervisors and the Senior Personnel Advisory Board's recommendation, Mr. Ballo should have his appointment renewed for three years with effect from 31 August 1971. If it is so renewed, he will receive his salary from that date, subject to deduction of the sums he has been paid in respect of sickness leave. Should his appointment not be renewed, the damages to which he is entitled will be fairly assessed at 100,000 French francs.

DECISION:

For the above reasons,

1. The decision of the Director-General of UNESCO dated 30 April 1971 together with the notification of that decision dated 18 June 1971 and the decision confirming it dated 5 January 1972 are quashed.
2. Mr. Ballo is entitled to renewal of his appointment for three years with effect from 31 August 1971, unless the Director-General should prefer to pay him compensation amounting to 100,000 French francs as full and final settlement. Should his appointment be renewed, the sums paid to Mr. Ballo in respect of the sickness leave which he was granted shall be deducted from the salary payable to him with effect from 1 September 1971.
3. Mr. Ballo is awarded a sum of 10,000 French francs in respect of costs. 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, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 15 May 1972.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

