

## THIRTY-SECOND ORDINARY SESSION

### *In re* DIAZ

#### Judgment No. 232

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Antonio Diaz on 21 February 1973 and brought into conformity with the Rules of Court on 31 March 1973, the Organization's reply of 7 June 1973, the complainant's undated rejoinder received by the Registrar on 12 July 1973, the Organization's surrejoinder of 7 September 1973, the complainant's further memorandum of 10 December 1973 and the Organization's further memorandums of 11 January and 18 March 1974;

Considering Article II, paragraph 5, of the Statute of the Tribunal and UNESCO Staff Rules 104.10 and 104.11;

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. After holding appointments as an expert with UNESCO in several places (Madagascar and Burundi), on 21 November 1970 the complainant received a final appointment at grade P.4 as an expert in the application of sociology to education at the National University for Teachers' Training in Bogota, Colombia. He was given a fixed-term appointment for one year which expired on 20 November 1971, when he left UNESCO. On 10 June 1971 a report was made on the complainant's work performance in Bogota by the manager of the project to which he was assigned, and supplemented on 30 June 1971 by the project officer at headquarters. The report was communicated to the complainant on 26 July 1971. He contested it and lodged an appeal with the Senior Personnel Advisory Board under Staff Rule 104.11(e).

B. The Board met on 9 November 1971 and after studying the dossier and hearing several officials, one of whom represented the complainant, held that "the expert has serious difficulties in working in a team" and there was no call for revision of the contested performance report. The Administration accepted the Board's recommendation and so informed the complainant by a letter of 2 December 1971. He contested that decision on 17 January 1972. The decision of 2 December 1971 having been upheld, he appealed to the Appeals Board claiming deletion of the contested performance report. On 23 October 1972 the Appeals Board advised dismissing the appeal, but recommended that the performance report should be neither taken into account in deciding whether to reappoint the complainant nor communicated to any third party. By a letter of 1 December 1972 the Director-General informed the Chairman of the Appeals Board that, having noted the Board's report, he endorsed its opinion that the complaint should be dismissed, but could not accept the accompanying recommendation. On the same date he sent the complainant a copy of his letter to the Chairman of the Appeals Board and thus informed him of his decision on the Board's report. The complainant is appealing against the decision of 1 December 1972.

C. The complainant maintains that the performance report which he contests was inspired by the animosity of the project manager and by the hostility which he faced during his mission in Bogota. He also alleges procedural irregularities in that he was never given any real opportunity to discuss his report with his supervisors. In particular he maintains that the report was inspired by prejudice; that it was irregular; that the procedure followed in drawing it up ran counter to Staff Rule 104.11; that his right to be heard was denied when it was made, when it was submitted, when he was given no opportunity to discuss it and when it was discussed in the Senior Personnel Advisory Board (the Board met in Paris while the complainant was in Bogota, and there was no communication between him and his representative); that the hearings before the Appeals Board were irregular since the Board saw documents of which he did not receive copies; and that Mr. Bolla, who as Chief of Personnel had appointed the complainant to his previous posts, was a member of the Appeals Board.

D. In his claims for relief the complainant asks the Tribunal to declare:

- that the performance report communicated to him on 26 July 1971 should be deleted;
- that he should be awarded compensation of US\$11,000 for the prejudice to his career and his unemployment since December 1971;
- that, failing his reappointment within three months he should be awarded a sum equivalent to three years' final salary, including allowances and any increments he might have received from the date of his separation;
- subsidiarily, that the Director-General of UNESCO may not accept the Appeals Board's advice of 23 October 1972 without also accepting the recommendation which is inseparable therefrom;
- subsidiarily, that the performance report of 30 June 1971 should not be taken into account in deciding whether to reappoint him and should not be communicated to third parties, including United Nations agencies and subsidiary bodies, other organisations belonging to the United Nations system and others;
- that he should be awarded a sum to be determined in the light of a memorandum to be submitted later to the Tribunal or, failing that, to the President of the Tribunal, to cover the costs of typing and reproduction of documents and sundry expenses incurred by the complainant in preparing his complaint.

E. In its reply the Organization points out that the complainant adduces no evidence to suggest that the evaluation of his work by the project manager or the project officer at headquarters was influenced by any considerations other than the quality of his work. The Organization replies as follows to the complainant's allegations that the preparation of the contested report was irregular, that he was denied his right to a hearing, and that the applicable procedures were not properly observed. All the means of redress afforded by the Staff Regulations and Staff Rules were available to him and he used them. His objections to the performance report were submitted to the Senior Personnel Advisory Board. His appeal against the decision taken by the Director-General on 2 December 1971 after consulting the Board and on the advice of the Board, before which he was represented by another official, was lodged with the Appeals Board. He appeared in person before the Appeals Board and was assisted by his representative. The Organization adds that not only were these procedures properly applied but it did everything to enable the complainant to exercise his rights to his own best advantage. It therefore categorically rejects the suggestion that he was denied his right to a hearing. In answer to the allegation of impropriety in preparing the performance report the Organization contends that only after the complainant had signed the report and so had had a chance to discuss it with his supervisor was the report forwarded to the Bureau of Personnel in accordance with Staff Rule 104.11, which gives staff members an opportunity to discuss their performance report after it has been prepared by their department, but before it is submitted to the Bureau of Personnel. That provision was strictly observed in this case.

F. In reply to the complainant's claim for payment of US\$11,000 as compensation "for the prejudice to his career and his unemployment since December 1971", the Organization states that, in so far as the claim is based on the decision not to reappoint the complainant, it was neither submitted to nor examined by the Appeals Board, and the complainant has therefore not exhausted all internal means of redress. The claim is therefore irreceivable. The Organization points out that the complainant's performance report is marked "confidential"; it has not been communicated to any third party, and outside the Organization only the complainant has received a copy. The Organization has done nothing to cause prejudice to his career and cannot accept any liability for his unemployment since December 1971. The claim is therefore unfounded as well as irreceivable.

G. In reply to the complainant's claim for award of a "sum equivalent to three years' final salary, including allowances and any increments he might have received from the date of his separation", the Organization points out that he submitted no such claim to the Appeals Board, he has thus not exhausted the internal means of redress open to him, and the claim is therefore irreceivable. In any case the Organization cannot accept any liability whatever for the complainant's failure to find employment, be it imputed to his performance report or to its own subsequent attitude.

H. In reply to the claim that the Tribunal should declare that the Director-General may not endorse the Appeals Board's opinion "without also accepting the accompanying recommendation which is inseparable therefrom", the Organization states that the Director-General "made a decision" as provided for in paragraph 20 of the Statutes of the Appeals Board and without infringing any provision of the Statutes. In reply to the claim that the Tribunal should order that the performance report of 30 June 1971 should be neither taken into account in deciding whether

to reappoint the complainant nor communicated to any third party, the Organization points out that the Director-General fully endorsed and applied the Senior Personnel Advisory Board's advice of 9 November 1971 (by inserting in the complainant's file the report and all the documents mentioned by the Board) and in future in determining whether to reappoint the complainant the Organization may lawfully take into account all the documents mentioned in the Board's recommendation concerning the performance report of June 1971. It therefore sees no reason why it should be ordered to disregard the report. Besides - the Organization repeats - it has not communicated the report to any third party and does not intend to do so. Lastly, it invites the Tribunal to reject the claim for award of costs on the grounds that the complaint is unfounded and should be dismissed.

I. In conclusion the Organization asks the Tribunal

- to declare the complaint irreceivable in so far as it concerns the claims:

(a) for payment of US\$11,000 as compensation for prejudice to his career and his unemployment since December 1971; and

(b) for payment of a sum equivalent to three years' final salary including allowances, failing his re-employment within three months;

or, should the complaint be declared receivable, to dismiss the above claims on the merits;

- to declare the complaint unfounded and dismiss it in so far as it concerns the claims:

(a) for deletion of the performance report of 30 June 1971;

(b) for a declaration that the Director-General may not accept the advice of the Appeals Board of 23 October 1972 without also accepting the accompanying recommendation which is inseparable therefrom; and

(c) for an order that the performance report of 30 June 1971 should be neither taken into account in deciding whether to reappoint him nor communicated to any third parties, including the United Nations agencies, other organisations belonging to the United Nations system and others.

J. In his rejoinder the complainant adds a further claim, namely that the Tribunal should order the production of any letters relating to the complainant exchanged by UNESCO with the UNDP, the ILO, UNCTAD, UNICEF, UNIDO, the World Bank, the office of the High Commissioner for Refugees, the United Nations Institute for Development Research and all bodies which have asked for information on the complainant.

K. In its surrejoinder the Organization replies that it has held no correspondence concerning the complainant with any of the organisations which he mentions in his further claim or with any "other body which hae asked for information on the complainant". It therefore maintains the conclusions in its reply of 7 June 1973.

L. The Tribunal ordered the Organization to produce the two telegrams mentioned in paragraph 2 of its surrejoinder. The Organization did so. In the first telegram the United Nations asks UNESCO for information about the complainant. In the second, UNESCO answers that the complainant is well qualified for research, but temperamentally not suited for team work.

#### CONSIDERATIONS:

As to the procedure for preparing the complainant's performance reports:

Mr. Diaz complains that his performance reports, written by the manager of the project to which he had been assigned, were forwarded for comment to the headquarters official in charge of the programme before he received them himself.

Such a procedure is in accordance with Staff Rule 104.11. In any case Mr. Diaz cannot properly complain of the procedure, which enabled him to discuss all the comments made on his performance before they were sent to the Bureau of Personnel.

As to the Proceedings in the Advisory Board:

First, the Advisory Board which examined the complainant's case was set up in accordance with the Staff Rules.

Secondly, the Director-General was not bound by any provision of the Staff Regulations or Staff Rules to summon the Board to meet at or near the place of the complainant's residence.

Thirdly, at no point during the proceedings did the complainant declare his intention of attending the meeting at which the Board was to examine his case. He himself named four persons who might represent him at that meeting, from among whom the Director-General appointed the one who was in Paris at the time.

Fourthly, since the complainant had let it be clearly understood that he would not attend the meeting and would be represented at it, the fact that he was not told of the exact date is immaterial to the propriety of the proceedings.

Fifthly, the Advisory Board was free to determine whether it had enough information at its disposal and whether or not in establishing the truth it would serve any purpose to hear witnesses in the course of proceedings which by their very nature should be and are mainly written.

Sixthly, Mr. Diaz had received all the documents in the dossier submitted to the Board, had had every opportunity to comment, and cannot properly maintain that his right to a hearing was disregarded.

As to the proceedings in the Appeals Board

The fact that Mr. Bolla was a member of the Appeals Board although as Chief of Personnel he had previously appointed the complainant to his posts in Madagascar and Burundi cannot taint the composition of the Board with irregularity nor afford grounds for debarring that senior official.

Although Mr. Diaz complains that certain documents were communicated to the Appeals Board at its request during the hearings without his having seen them beforehand, they were communicated immediately to his representative. The complainant made no comment at the time and in particular did not ask for copies or for an adjournment or postponement of the meeting.

Finally, the Appeals Board is competent to advise the Director-General on claims submitted by UNESCO staff members. In the present case it made "recommendations" as well as giving advice; but, like the advice, they had no binding force.

As to the formal propriety of the Director-General's decision:

The allegation that the Director-General took the view that the complainant's performance report might be communicated to third parties has not a shred of evidence to support it and can only be rejected.

As to the lawfulness of the Director-General's decision under the Staff Regulations:

In writing or endorsing a performance report on a staff member the Director-General exercises his discretion as the head of the Organization responsible for its efficient running. The Administrative Tribunal has only a limited right to review the lawfulness of decisions taken by the Director-General in the exercise of his discretion. The Tribunal may interfere with the impugned decision only if it was taken without authority, is irregular in form or tainted by procedural irregularities or by illegality, or is based on incorrect facts, 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, or finally, if authority has been exercised for purposes foreign to the Organization's interests.

A careful study of the documents in the dossier and the facts of the case shows that the impugned decision is not tainted with any of the irregularities which entitle the Tribunal to interfere with it.

As to the complainant's other claims:

No general principle of law bars one organisation from communicating to another information on its former employees, provided that such information is materially correct and relates to the employees' professional qualifications and is not given with malicious intent. It appears from examination of documents in the dossier that in the present case UNESCO did no more than exercise strictly the above-mentioned right of any international organization.

As to the claim for compensation:

There being no need to consider the receivability of the claim:

It appears from the foregoing that the Director-General's decision of 2 December 1971 is not tainted with illegality. Mr. Diaz cannot therefore properly claim compensation on account of the decision and of its consequences.

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 6 May 1974.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet