

SEVENTH ORDINARY SESSION

***In re* GARCIN**

Judgment No. 32

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organisation drawn up by Mr. William Garcin on 4 June 1957, received and registered in the Registry on 9 July 1957 under No. 57.24;

Considering the reply drawn up by the respondent organisation;

Considering the special application for the hearing of witnesses deposited by complainant and the remarks of the organisation regarding the said application;

Considering the application to intervene made by Mr. Martin Ennals, Chairman of the U.N.E.S.C.O. Staff Association, dated 3 March 1958, and the remarks of the organisation regarding the said application;

Considering the Statute of the Tribunal, the Staff Regulations and Staff Rules of the organisation and, in particular, Staff Regulation 4.5.1 and Staff Rules 104.1, 104.6(c) and 109.3 of 1 September 1956, as well as Staff Rule 104.15 of 1 November 1954;

Having heard Maître Mercier, counsel for complainant, and Mr. Saba, agent of the organisation, in public sitting on 8 and 9 September 1958;

Considering that the facts of the case are the following:

1. Complainant, who entered the service of the organisation on 25 April 1949, held a fixed-term appointment of one year, which was regularly renewed, together with annual increments, until 31 December 1956.
2. Under the provisions of Staff Regulation 4.5.1, complainant was not entitled to a further renewal of his fixed-term appointment after 31 December 1956, when he would have served for a period of five years. Unless an indeterminate appointment were granted to him on that date, his service with the organisation would come to an end upon the expiration of his last fixed-term appointment.
3. On 26 March 1956 the Chief of the Bureau of Personnel of the organisation notified complainant that it was not proposed to offer him an indeterminate appointment and that therefore his employment would end on 31 December 1956. However, the Chief of the Bureau of Personnel offered to discuss the matter with complainant and that he be heard by the Establishment Committee.
4. On 4 April 1956 complainant protested against the notice of the Chief of the Bureau of Personnel and submitted that since 20 May 1955, when favourable performance reports preceding the renewal of his appointment on 9 June 1955 were drawn up, there had been prepared no further performance reports which might have served as a basis for the decision not to grant him an indeterminate appointment, notwithstanding that Staff Rule 104.11 required the drawing up of such reports. After having stressed the value of his services, complainant requested that instead of performance reports drawn up after the event, which might be influenced by the decision which had already been taken, he should be judged on the basis of his activities in the months to come. In the event of a refusal to give effect to this proposal, complainant requested that he be heard by the Establishment Committee,
5. On 9 May 1956 the Chief of the Bureau of Personnel wrote to complainant stating that according to Staff Rule 104.11 it would have been normal for him to have received a performance report in relation to the proposal not to grant him an indeterminate appointment. In the same communication, it was confirmed that at the time when the Director-General discussed complainant's position with those who had been most directly concerned with his work during 1955, no performance report had been written and none could be written until after the date by which the

Director-General wished all staff members to be informed, so far as was possible, of proposals affecting their future employment. The Chief of the Bureau of Personnel, in the same communication, transmitted to complainant the performance reports which had been drawn up post hoc and stated that he would place before the Director-General any comments made by complainant on these performance reports or any other comments that he might wish to make so that the Director-General would be in a position to consider them before he took a final decision, unless complainant preferred that the matter be placed before the Establishment Committee.

6. In a letter to the Chief of the Bureau of Personnel, dated 17 May 1956, complainant noted that the Chief of the Bureau of Personnel had taken cognizance with him of the fact that Staff Rule 104.11, which dealt with the drawing up of performance reports, had not been complied with, refused to accept performance reports drawn up after the notification that it was not proposed to offer complainant an indeterminate appointment, claimed that there had been a further breach of Staff Rule 104.11 in that complainant's supervisor had failed to show him the performance reports for information and comments before their signature and transmittal to the Bureau of Personnel, and challenged the substance of these reports. Finally, complainant requested that he be heard by the Establishment Committee.

7. Having heard complainant on 26 June 1956, the Establishment Committee examined his case on 26, 27, 28 and 29 June 1956. In the report of the Committee, which was later transmitted to the Director-General, three members recommended that every effort should be made before the end of 1956 to find a post suited to complainant's abilities and qualities to which he could be transferred, in which case he should be given an indeterminate appointment, while two members recommended that, taking into account the qualities recognised by his superiors and the importance of his specialised knowledge, complainant should be retained by the organisation and that he be given an indeterminate appointment, preferably in a different post.

8. In a letter of 18 September 1956 the Chief of the Bureau of Personnel notified complainant that the Director-General, to whom the report of the Establishment Committee had been transmitted on 14 August 1956, had in turn decided not to offer him an indeterminate appointment. Following a protest by complainant, this decision was finally confirmed on 15 October 1956.

9. On 6 November 1956 complainant appealed against the decision of the Director-General to the Appeals Board.

10. On 31 December 1956 complainant's fixed-term appointment came to an end and complainant left the organisation.

11. On 14 February 1957 the Appeals Board stated its recommendation that the decision of 16 September 1956 should be annulled as a consequence of the irregularities which the Appeals Board found to have taken place in the course of the procedure as a result of which the Director-General decided not to grant to complainant an indeterminate appointment and that, for the period running from 1 January 1957 to the date on which the Director-General would take a new decision regarding complainant on the basis of a proper procedure, complainant should receive, by way of compensation, a sum equal to the amount of the salary, including allowances, which complainant would have received under his contract if he had remained in the service of the organisation.

12. On 7 March 1957 the Director-General notified to complainant his decision regarding the recommendation of the Appeals Board. Since the Appeals Board had considered that complainant should be awarded compensation for the moral and material prejudice which he might have suffered as a result of the procedure followed, the Director-General accepted the recommendation of the Appeals Board on this point. However, considering that complainant had ceased to be in the employment of the Secretariat of the organisation after 31 December 1956, the Director-General considered that he could not be subject to the provisions of the Staff Regulations and Rules nor be the subject of an administrative decision on the basis of the said Regulations and Rules after that date. For these reasons, the Director-General considered that he could not follow to the letter the recommendation of the Board, but, in order to take account of the spirit of this recommendation, offered to pay to complainant, by way of compensation, a lump sum equivalent to the amount of the salary, together with allowances, which he had received during his last three months with the organisation.

13. On 4 June 1957 complainant submitted his complaint to the Tribunal, requesting that the decision not to grant him an indeterminate appointment be annulled, that the decision of 7 March 1957, following the recommendation of the Appeals Board, be annulled, that he be granted damages equivalent to the amount of the salary and allowances that he would have received had he remained in the service of the organisation during the period from 1

January 1957 to the date of such further decision as the Director-General might take, and that, if the Director-General refused to apply to him the procedure laid down in the Staff Regulations and thus to take legally a new decision on the basis of a proper procedure, compensation equivalent to five years' salary be granted.

As regards the hearing of witnesses:

Considering that since the evidence to be given by the witnesses, whose hearing has been requested by complainant, would have related to the professional competence of complainant, which is not in issue before the Tribunal, the hearing of these witnesses should be rejected as not being relevant to the cause.

As regards the intervention by Mr. Martin Ennals:

Considering that the Tribunal has put it that an intervention by Mr. Martin Ennals was not receivable in so far as it would have been exercised by the person of the Chairman of the U.N.E.S.C.O. Staff Association, who did not have this right;

Considering that the Tribunal has further put it that an intervention by Mr. Martin Ennals was, moreover, not receivable if made in a personal capacity, since the intervenor, the holder of an indeterminate appointment, did not possess any right liable to be affected by a judgement upon a complaint by a holder of a fixed-term appointment;

Considering that when invited to reply to these points counsel for the U.N.E.S.C.O. Staff Association withdrew the claim to intervene, and the Tribunal has taken notice thereof.

On the substance

Considering that under the provisions of Staff Rules 104.6(c) and 109.3 of 1 September 1956 complainant's fixed-term appointment expired upon its completion on 31 December 1956 without notice or indemnity, that the separation from service resulting from the expiration of a fixed-term appointment is not deemed to be a termination within the meaning of the Staff Regulations; and Rules, and that therefore there is no recourse by that fact alone against complainant's separation from service on that date;

Considering that the Director-General's recognised right to grant or refuse an indeterminate appointment under Staff Regulation 4.5.1 is sovereign and that it is not for the Tribunal to seek for or judge his reasons for so doing;

Considering on the other hand that the negative decision of the Director-General is particularly serious because it deprives the official concerned of the possibility of making a career within the organisation which a lengthy period of satisfactory service had entitled him legitimately to expect; that therefore such a decision should be taken only while fully respecting the provisions of the Staff Regulations and Rules in order to surround the free decision of the Director-General with the guarantees imposed in the interests both of the organisation and of the official concerned;

Considering that in the case under consideration it is established that complainant had been advised, without performance reports having been previously drawn up, that it was not proposed to grant him an indeterminate appointment; that after complainant had objected to their absence the Chief of the Bureau of Personnel recognised that it would have been normal first to draw up such reports and that performance reports were subsequently drawn up but without being shown to complainant before being signed and transmitted to the Bureau of Personnel, a breach of Staff Rule 104.11(b);

Considering that from the moment when the Chief of the Bureau of Personnel recognised the substance of complainant's claim and drew up subsequently such reports it is immaterial that the organisation now alleges that the Staff Regulations and Rules do not require performance reports to be drawn up before the person concerned is informed that it is not proposed to grant him an indeterminate appointment;

Considering moreover that the Chief of the Bureau of Personnel likewise suggested submitting the case to the Establishment Committee and that since that Committee had met in order to consider the case its recommendation should have been drawn up within the required conditions;

Considering that it is proven that one of the members of the Establishment Committee did not take part in all the meetings of the Committee and neither saw nor read the report, and that another member of the Committee, who

also was not present at all the meetings, signed a text handed to him for his approval which contained a single recommendation only, while certain members had drawn up a recommendation more favourable to complainant and which, according to the member concerned, would most probably have been preferred by him had he had cognizance thereof;

Considering that even in the absence of rules of procedure these facts constitute serious irregularities surrounding the recommendation of the Establishment Committee;

Considering that the irregularities set out above have resulted in depriving complainant of the opportunity of effectively discussing the appreciations made by his superiors, a fact aggravated by reason of the irregularities by which the procedure of the Establishment Committee was tainted, resulting in complainant being unable to avail himself of a procedure under which he might have been able to emphasise the qualities he claimed with a view to possibly obtaining an indeterminate appointment; that in this manner complainant was deprived of the possibility of having the decision taken modified, a possibility available to him under the Staff Regulations and Rules;

Considering that it results from these circumstances that the decision of the Director-General is in itself tainted by irregularity;

Considering that the organisation maintains that since complainant is no longer a member of its staff it is now impossible to remedy these irregularities by the fictitious reconstitution of a regular procedure;

Considering that this impossibility cannot be disputed, that the decision complained against should not be annulled, and that hence complainant's right to compensation is a matter of damages calculated at the date of expiry of his appointment;

Considering that the Director-General himself has admitted that complainant should be awarded compensation for the material and moral injury suffered by him but that the amount of the compensation offered should be equitably reassessed;

Considering that the information available to the Tribunal is sufficient to enable it to decide that the injury to complainant would be indemnified by increasing the amount of the compensation offered by the Director-General up to the sum of twelve thousand United States dollars;

ON THE GROUNDS AS AFORESAID

THE TRIBUNAL,

Rejecting any wider or contrary conclusions,

Declares the complaint to be receivable and well founded,

Orders that the respondent organisation pay to complainant, by way of compensation, a sum of twelve thousand United States dollars, together with interest at 4 per cent per annum from 31 December 1956; and

Orders that the respondent organisation pay to complainant, by way of participation in the cost of his defence, the sum of six hundred United States dollars.

In witness of this judgment, delivered in public sitting on 23 September 1958 by His Excellency Albert Devèze, President, Sir John Forster, K.B.E., Q.C., Vice-President and Mr. Jason Stavropoulos, Deputy Judge acting as Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

(Signatures)

Albert Devèze
John Forster
Jason Stavropoulos
Jacques Lemoine

