

NINETEENTH ORDINARY SESSION

***In re* KIRKBIR**

Judgment No. 116

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization drawn up by Mrs. Nazan Emine Kirkbir on 12 October 1965, and the Organization's reply dated 17 December 1965;

Considering the replies furnished by the Organization in a memorandum dated 29 August 1967 to the questions put by the Administrative Tribunal, the reply of Mrs. Kirkbir to that memorandum dated 23 November 1967, and the communication from UNESCO dated 20 December 1967;

Considering Articles II and VII of the Statute of the Tribunal and Articles 11.1 and 11.2 of the UNESCO Staff Regulations, together with the Statutes of the UNESCO Appeals Board;

Considering Staff Rule No. 104.6(b) of UNESCO;

After examining the dements in the dossier, oral proceedings having neither been requested by the parties nor ordered by the Tribunal;

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

A. Complainant entered the service of UNESCO on 5 October 1960 as a secretary, and was assigned to a United Nations Special Fund project, namely the Middle East Technical University at Ankara. Her original contract of one year's duration was twice renewed; subsequently, on 4 October 1963, she was informed that her appointment had been extended only to 31 December owing to a falling off in the quality of her work, and was urged to try to improve her work performance, since any further extension of her appointment would depend on such improvement. On 9 January 1964 a further extension was granted until 30 June 1964, that being the end of the academic year. By letter of 8 July 1964 complainant was then informed that her appointment was extended to 4 October 1964 after which date her service would terminate.

B. Meanwhile complainant was awaiting a reply to a letter despatched by her on 11 July before receiving notification of her extension, in which she drew attention to the uncertainty of her position and to the attitude of her chief. On 5 August 1964 she acknowledged receipt of the communication of 8 July and asked for reconsideration of the decision not to extend her appointment beyond 4 October, having regard particularly to the fact that the project to which she was assigned was to continue until the end of 1966. As no reply was made to these two letters, complainant wrote to the Director-General on 27 October 1964 protesting against the non-renewal of her contract and setting out her grievances against her former chief, whose hostility she regarded as being responsible for the loss of her employment. She indicated further that her letter was to be regarded as an appeal to the Appeals Board.

C. On 1 December 1964 the Director of the Bureau of Personnel of UNESCO wrote to the complainant in reply to her letter to the Director-General, explaining that the termination of her appointment was not due to dismissal but to the expiration of her contract; in those circumstances he wondered whether Mrs. Kirkbir wished to maintain her appeal, and if so on what grounds, and requested her to let him know her decision in that respect. On 16 December 1964 complainant restated her complaints against her former chief, alleging that it was his unfavourable report, accepted without examination, that had led to her termination; she therefore considered that it was desirable for the Appeals Board to examine her case and urged that it should be referred to the Appeals Board without delay. This was done, and in reply to a letter from the Secretary of the Appeals Board dated 19 January 1965, Mrs. Kirkbir submitted an appeal dated 1 February 1965.

D. In the proceedings before the Appeals Board the Director of Personnel argued that the complaint was time-barred, and subsidiarily that it should be rejected as ill-founded, the decision not to renew Mrs. Kirkbir's

appointment having been in order. On 28 June 1965 the Appeals Board found that the appeal had not been lodged within the prescribed time-limits, that UNESCO was therefore justified in maintaining that the appeal was inadmissible, and that it should be rejected. On 19 July 1965 the Director-General accepted the recommendation of the Appeals Board and so informed complainant.

E. In her submission to the Tribunal complainant prays for the rescinding of the decision by which the Director-General accepted the Appeals Board's opinion that the complaint should be rejected as time-barred; secondly, for her reinstatement in her former post, and for the payment of arrears of salary for the period between 4 October 1964 and the date of her reinstatement; and for the payment of compensation commensurate with the prejudice she has suffered. In support of her first contention, complainant points out that she could not have observed the prescribed time-limits because she was unaware of the existence of the Statutes of the Appeals Board. She also submitted a note addressed by the Appeals Board to the Director-General on the day on which the Board issued its opinion, this note being referred to in the memorandum of the Organization only in so far as the Organization contests complainant's interpretation of it.

F. In the note referred to above, the Appeals Board states that, presented with the conclusions of the Director of Personnel which expressed opposition to the appeal on the ground of non-observance of the prescribed time-limits, it had had no option, in the light of the regulations in force, but to declare the appeal inadmissible without going into the substance of the case. However, the Appeals Board regretted the fact that in the given circumstances, with the appellant serving in Ankara and perhaps having difficulty in obtaining precise information, the administration had invoked inadmissibility after leaving appellant's letter of 5 August 1964 unanswered. The Board further expressed the opinion that while the prescribed time-limits seemed reasonable for staff employed at Headquarters, they should be substantially extended in respect of the increasing numbers of staff serving outside Europe so as to bring them into line with those prescribed under various internal regulations. Accordingly the Board suggested that the competent authorities should make what it regarded as the very necessary amendments to its statutes in respect of the time-limits applicable to staff serving away from Headquarters. Lastly, the Appeals Board having been informed that every person entering the service of the Organization received a copy of the Staff Regulations and the Staff Rules but not of the Statutes of the Appeals Board, it suggested that a copy of these Statutes should henceforth be given to every new staff member at the time of appointment.

G. The Organization submits that the complaint is receivable insofar as it bears on the receivability of the appeal instituted before the Appeals Board of UNESCO, but is ill-founded in this respect, and that for the remainder it is irreceivable and should be dismissed. In support of these submissions the Organization contends, in the first place, that in accordance with the Statutes of the Appeals Board, in order for an appeal to be receivable it is necessary that the administrative decision concerned should be contested in writing within 15 working days of the date of notification of such decision, and that a hearing before the Board should be requested within 15 working days of either the ruling of the Director-General on the protest, or of the expiry of the initial 15 working-day period, if the Director-General has not ruled on the protest, failure to comply with either of these time-limits entailing irreceivability of the appeal. Secondly, the Organization maintains that under Article VII of the Statute of the Tribunal, a complaint is not receivable before the Tribunal unless two conditions are fulfilled, namely that all internal means of recourse have been exhausted, and furthermore that the complaint has been filed within 90 days after complainant was notified of the decision impugned. It follows that, apart from the fact that the Appeals Board did not examine the substance of the appeal but treated it from the sole point of view of its receivability, the complaint now referred to the Tribunal for a decision on its merits was not presented within the time-limits prescribed. The tardy submission of an internal appeal cannot have the effect of opening new time-limits, and "any other interpretation which would permit, by a deliberate tardy appeal to the Appeals Board, the examination by the Tribunal, after the expiration of the statutory time-limit, of the merits of administrative decisions taken several months before, could only lead to abuses incompatible not only with the exigencies of sound administration but also with the regular exercise of judicial power".

H. The Organization in fact contends that the decision impugned is that of 8 July 1964, and even assuming that complainant's protest of 5 August 1964 was filed within the first of the time-limits prescribed by the Statutes of the Appeals Board, complainant did not intimate her intention of submitting her complaint to the Appeals Board until 27 October 1964, i.e. after the expiry of the further time-limit of 15 days following the 15 days subsequent to her protest of 5 August without any reply having been received. In regard to complainant's plea of not being aware of the Statutes of the Appeals Board, the Organization contends that at the time of her appointment complainant had received the Staff Regulations and Staff Rules, the first providing for the setting up of the Appeals Board, while the second provides under Rule 111.1 that staff members may institute an appeal before the Appeals Board in

accordance with the Statutes of the Board. Complainant must be taken to have known that this appeal procedure was open to her, that the right to appeal had to be exercised in accordance with the Statutes, and that if she was not in possession of the Statutes she could apply to the Administration for a copy. Furthermore, by asking in her letter of 27 October 1964 that her case should be referred to the Appeals Board complainant had shown that she was aware of her right of appeal, and she therefore had only herself to blame for her negligence. Lastly, although the Statutes of the Appeals Board provide for the possibility of an extension of the time-limits, complainant made no request to this effect.

I. After considering the dossier at its 17th Ordinary Session the Administrative Tribunal requested the respondent organization to furnish particulars of its internal procedure and time-limits for appeals, and subsidiarily to submit its defence on the merits of the case. The replies to these questions were communicated to the Tribunal in a memorandum dated 29 August 1967; this was transmitted to complainant who submitted a memorandum in reply.

J. In its observations on the merits made in its memorandum of 29 August 1967, the Organization stated that it had refused to renew Mrs. Kirkbir's contract after the expiration of the last renewal on 4 October 1964 because complainant's supervisor had reported that her performance was unsatisfactory as regards punctuality and that the quality of her work was not up to standard. Complainant was so informed in October 1963 and had had the opportunity of expressing her own views on the subject. While requesting Mrs. Kirkbir to improve her performance, the Organization had nevertheless renewed her engagement on two occasions from 1963 to 1964. The Director-General's final decision not to renew her contract was taken completely within his administrative discretion and is neither tainted by an error of law nor based on incorrect facts. While maintaining its position in regard to the irreceivability of the complaint, therefore, the Organization submits subsidiarily that it should in any case be dismissed on its merits.

K. In her reply on the merits of the case, Mrs. Kirkbir categorically denies the Organization's allegations concerning her unsatisfactory work performance. She asks why her engagement was renewed on several occasions if those allegations were well founded. She claims that the decision not to renew her engagement is tainted by an error of law because the Director-General had challenged the expectation of continuity of service to which international officials were entitled; furthermore, the decision was based on a completely wrong assessment of the facts and on wrong conclusions. Mrs. Kirkbir therefore maintains the submissions made in her complaint.

L. In its communication of 20 December 1967 the Organization merely confirms, insofar as this might be necessary, the position stated in its memorandum of 28 August 1967.

CONSIDERATIONS:

Without it being necessary to consider whether Mrs. Kirkbir's protest to the Appeals Board was in fact time-barred, and therefore irreceivable, as the Director-General had decided:

1. Mrs. Kirkbir held a fixed-term appointment at UNESCO and thus fell within the terms of Rule 104.6(b) of the Staff Regulations.
2. This rule provides that "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".
3. It is clear from this provision that a staff member holding a fixed-term appointment is not entitled to the renewal of the appointment and that any such renewal is within the discretion of the Director-General of the Organization. It follows that the power of the Administrative Tribunal to review a decision of the Director-General refusing such renewal is limited to considering whether the decision in question is tainted by an error of law or based upon materially incorrect facts, or whether essential material elements have been left out of account, or obviously wrong conclusions have been drawn from the evidence in the dossier.
4. It appears from the evidence in the dossier that because complainant's work performance was regarded by the Director-General as unsatisfactory, her contract, hitherto granted for periods of one year, was renewed from 4 October 1963 for only three months, then for six months, and finally for three months, and that on the occasion of each of the first two partial renewals Mrs. Kirkbir was expressly advised to improve her performance. In

concluding, by his decision of 8 July 1964, that complainant's performance was still unsatisfactory and that her appointment should not be extended beyond the following 4 October, the Director- General gave a ruling which does not appear to be tainted by any of the errors which would bring it within the Tribunal's power of review. In particular, it has not been established that the critical observations made on Mrs. Kirkbir's work in 1963 and 1964 were based on materially incorrect facts.

5. The above-mentioned decision of 8 July 1964 was therefore in order. It follows that complainant has no ground for complaining that her protest was rejected by the Director-General on 19 July 1965.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment, delivered in public sitting in Geneva on 18 March 1968 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, Lemoine, Registrar of the Tribunal.

(Signed)

M. Letourneur
André Grisel
Devlin
Jacques Lemoine