

**In re FINKELSTEIN**

**Judgment No. 291**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Thomas Learned Finkelstein on 20 October 1975 and the Organization's reply of 5 December 1975;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 1.2, 1.4 and 1.10 and UNESCO Staff Rules 104.6(b), 104.10, 104.11, 109.12(a), 110.1 and 110.2;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

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

A. The complainant was originally appointed for two years from 15 March 1962 as a programme specialist at grade P.3 in the Department of Cultural Activities of UNESCO. His appointment was extended from time to time and he held several P.4 posts from 1 January 1964. On 1 July 1971 he was assigned to a post in New Delhi as liaison officer in the Field Science Office for South East Asia and India (FSOSA). Finally, he was called back to headquarters and left UNESCO on 30 September 1975, the date of expiry of his last temporary appointment.

B. On 2 September 1974 the complainant sent a minute to Mr. Podoinitsin, the Director of the UNESCO office in New Delhi and chief of the UNESCO mission in India. According to the Organization the minute contained "aggressive and insulting statements as well as allegations and insinuations as to Mr. Podoinitsin's integrity and loyalty to the Organization". The minute had been dictated by the complainant to and typed by a secretary on the office staff, i.e. one of Mr. Podoinitsin's subordinates. Mr. Podoinitsin forwarded the minute to the Director-General, who decided on 8 October 1974 to impose a written censure on the complainant under Staff Regulation 10.2 and Staff Rule 110.1. Believing that the complainant's continued presence in New Delhi would be likely to disrupt the UNESCO office there, he also decided to recall him to a post at headquarters .

C. The complainant challenged the Director-General's decision, but it was upheld and he appealed to the UNESCO Appeals Board. The Board held that the complainant's minute of 2 September 1974 did indeed contain defamatory allegations and that it had been improper and disloyal to send it, but that the Director-General ought to have given him a chance to defend and explain his conduct before imposing the written censure. The Board therefore recommended: "(a) that the written censure imposed ... should be rescinded; (b) that when [the complainant] has completed the temporary work on which he is at present engaged, every effort should be made to secure for him an assignment suitable to his qualifications and experience". The Director-General accepted both recommendations and so informed the Chairman of the Board and the complainant by letters of 12 April 1975. In his letter to the Chairman of the Board the Director-General referred to the second recommendation and said: " ... I have given instructions for this official to be assigned to a post at headquarters which is in keeping with his qualifications and experience. This decision holds for the remainder of his contract and in no way prejudices the decision which I shall have to take when that contract expires."

D. Acting on the Director-General's instructions the Director of the Personnel Office informed the complainant by minute of 11 June 1975 that, in accordance with Staff Rule 104.6(b) his fixed-term appointment would not be extended beyond the date of its expiry, viz. 30 September 1975, and that his employment would end on that date in accordance with Staff Rule 109.12(a).

E. On 18 June 1975 the complainant challenged that decision, but it was upheld on 4 July 1975 and he again went to the Appeals Board. The Board heard the appeal on 6 October 1975 and recommended dismissing it. The Director-General accepted that recommendation and so informed the Chairman of the Board and the complainant by letters of 17 October 1975. The complainant now impugns the decision not to renew his appointment.

F. Referring to his favourable performance reports and to his length of service, the complainant contends that his fixed-term appointment ought to have been renewed. In his view the decision did not take proper account of the documents in his dossier. He therefore asks the Tribunal to order his reinstatement in an appropriate post in UNESCO with effect from 1 October 1975 or the payment to him of damages amounting to five years' salary.

G. In its reply the Organization points out that the decision as to whether or not to extend an appointment falls within the Director-General's discretionary authority and is subject only to limited review by the Tribunal. In the present case Staff Rule 104.6 was properly observed and the Director-General's decision does not fall within the limited scope of the Tribunal's power to review. Far from disregarding the complainant's dossier the Director-General gave it careful study. He found in it references to the improprieties committed by the complainant in 1964 and in 1974 and the consequent disciplinary measures and he made a fair assessment of that information in taking the view that retaining the complainant's services would not be in UNESCO's interests. The Organization therefore asks the Tribunal to declare the complaint unfounded and to dismiss it.

#### CONSIDERATIONS:

As to the receivability of the complaint:

The complaint is not presented to the Tribunal in due and proper form and does not contain all the information desired.

While the Tribunal does not hold the complaint irreceivable, it can consider only the pleas made by the complainant in the memoranda before it.

As to the lawfulness of the Director-General's decision of 17 October 1975:

The complainant objects to the decision which the Director-General took on 11 June 1975, and upheld on 17 October 1975 after consulting the Appeals Board, refusing to extend beyond the date of its expiry - 30 September 1975 - the fixed-term appointment which the complainant had held since 1962 and which since then had been renewed several times.

Whether or not to renew an appointment is a matter which falls within the Director-General's discretionary authority, and the Tribunal may interfere with a decision taken by the head of the Organization not to renew the appointment only if that decision was taken without authority, or violates a rule of form or of procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if the decision is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.

In the present case the impugned decision is not tainted with any flaw which entitles the Tribunal to intervene.

Supposing that decision were indeed based on action taken by the complainant on 2 September 1974, when he sent his superior a letter couched in highly improper language which could not be tolerated from any subordinate, the Tribunal would not be entitled to quash a decision to remove from the staff of the Organization one whose attitude was on several occasions plainly at odds with the basic duties of any international official. In any event such an attitude would in law warrant refusing the complainant a further appointment with the Organization.

It appears from the foregoing that the complainant's application for the quashing of the decision of 17 October 1975 and so also his claims for compensation are unfounded and should 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 6 June 1977

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

Updated by PFR. Approved by CC. Last update: 7 July 2000.