Registry's translation, the French text alone being authoritative.

FORTY-EIGHTH ORDINARY SESSION

In re GAUJAL VAN-ESPEN

Judgment No. 487

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mrs. Marie-José Gaujal Van-Espen on 19 June 1981, UNESCO's reply of 31 July, the complainant's rejoinder of 28 September and UNESCO's surrejoinder of 5 November 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Rules 105.5, 106.1 and 110.1 and Chapter X of the UNESCO Staff Regulations and Staff Rules;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant is an assistant documentalist holding grade G.3 on the staff of UNESCO. At her request she was given annual leave from 7 to 11 July 1980, but on 2 July she fell ill and sent the Organization a medical certificate from her own doctor, which UNESCO accepted. She was to return to work on 15 July, but her doctor prescribed extensions of the sick leave from 15 to 20 July and then to 27 July. On 18 July the Personnel Office summoned her by telegram to undergo a medical examination at headquarters on the same day at 5.30 p.m. She says that she was not well enough to go, and it was not until Monday, 21 July, that the UNESCO doctor examined her. He took the view that the sick leave was not warranted, and she was so informed. She went back to work on 28 July. On 1 August the Personnel Office sent her a minute declaring that she had been absent without leave from 9 to 11 and from 21 to 25 July. It was later admitted that her absence from 9 to 11 July had been authorised as annual leave. On 19 September the representative of the Director-General confirmed that her absence from 21 to 25 July would be deducted from her annual leave. She appealed against that decision to the Appeals Board. On 18 February 1981 the Board recommended that the Director-General should treat the period in question as sick leave. By a letter of 15 April 1981, which contains the impugned decision, the Director-General informed the complainant that he did not endorse the Board's recommendation.

B. The complainant submits that either her sick leave was justified, and in that case the decision was in breach of the Staff Regulations and Staff Rules and therefore unlawful, or else she was absent without leave and the procedure set out in Chapter X of the Staff Regulations and Staff Rules ("Disciplinary measures") should be followed. She maintains that she had a "disciplinary measure" imposed on her and that, not being provided for in the Staff Regulations and Staff Rules, it constituted an abuse of authority. Moreover, the Organization's attitude was tantamount to wilful harassment since the allegedly unwarranted leave covers the period of extension of her sick leave, which UNESCO accepted. She did not get the summons from the medical service on 18 July 1980 until just a few hours before her appointment. UNESCO refused to let her undergo another medical examination which would have enabled her to explain why she was absent from 21 to 25 July. She invites the Tribunal to quash the Director-General's decision and award her 6,000 French francs in costs.

C. In its reply the Organization observes that, contrary to what the complainant seems to think, sick leave is not granted by its medical officer. His opinion is not binding on the Organization. Rule 106.1(f)[(1)] is silent on the consequences of sick leave which is not authorised ex post facto. Moreover, that provision does not refer to Rule 105. 5 and therefore does not assimilate such absence to mere unauthorised absence, for which Rule 110.1 lays down sanctions. Rule 106.1(d), which governs the position of a staff member who is absent on sick leave without providing a medical certificate, provides in some instances that such leave shall be deducted from annual leave or counted as leave without pay. Thus the two provisions - 106.1(d) and (f) - cover very similar positions and it was by analogy that in this instance the Organization took the same measure as that provided for by Rule 106.1(d). This, then, is the provision which served as the basis for the impugned decision. Moreover, such reasoning is more

favourable to the staff member since deduction from annual leave is less severe a penalty than those laid down in Chapter X. Subsidiarily, UNESCO rejects the complainant's argument that her absence ought to have been sanctioned under Chapter X. It was under no obligation, when there were alternative possible interpretations, to pick the one which was less valid and less favourable to the complainant. The argument based on abuse of authority is also immaterial since the impugned decision was not disciplinary within the meaning of Chapter X. Lastly, the complainant affords no valid proof of wilful harassment by the Organization. Nor can it be said that the medical officer's opinions may go unchecked or unchallenged. UNESCO therefore invites the Tribunal to dismiss the complaint and the application for costs as unfounded.

D. In her rejoinder the complainant gives further information on certain points of fact on which she maintains that the Organization's reply is mistaken. As to its legal arguments, she submits that Rule 106.1(d) is not applicable since the facts of her case are radically different from those envisaged in that provision. UNESCO therefore misapplied the text and committed abuse of authority. Moreover, it is not authorised to take a decision by analogy where the Staff Regulations and Staff Rules are silent. Its decision was not more favourable to her since the Chapter X procedure provides for referral to a joint disciplinary committee before which she could have argued her case. She therefore presses her claims for relief.

E. In its surrejoinder UNESCO points out that the rejoinder does not put forward any new fact or argument, and it therefore merely enlarges on the arguments in its reply. In particular it submits that, contrary to the complainant's contention, and in accordance with the Tribunal's case law, interpretation may be by analogy where there is a lacuna in the text and that when two texts are applicable the one which is more favourable to the staff member should be preferred. The decision impugned in this case fulfils both conditions. Moreover, according to the general principle of law whereby poenalia sunt restringenda, UNESCO ought not to apply a disciplinary measure to the set of facts covered by Rule 106.1(f). It therefore presses the arguments it put forward in its reply and invites the Tribunal to declare the complaint unfounded.

CONSIDERATIONS:

The complainant's application for oral proceedings

1. The complainant applies for oral proceedings to follow the written proceedings on the grounds that her case is of general interest and raises matters of concern to the whole staff of UNESCO. In a letter of 31 July 1981 UNESCO states that in its view the case may be heard on the written evidence and that it is therefore not in favour of oral proceedings.

Neither the allegedly general nature of the case, nor the fact that it is of concern to the whole staff is conclusive in determining whether to order oral proceedings. Where the Tribunal can reach its decision on the evidence filed by the parties, it will normally, in accordance with Article 12 of the Rules of Court, dispense with oral proceedings.

The merits

2. The complainant is asking the Tribunal to quash the Director-General's decision of 15 April 1981 on the grounds that it is unlawful, tantamount to wilful harassment and, being in fact a disciplinary measure, tainted with abuse of authority.

3. The decision to set against the complainant's annual leave her absence from duty from 21 to 25 July 1980 is not in breach of any of the provisions of the Staff Regulations and Staff Rules. Since the medical officer of UNESCO thought the application for sick leave unjustified, it was for the Administration to rant or to reject the application under Staff Rule 106 .1(f).

Neither the regulations nor the rules state what provisions apply when absence from duty which is claimed as sick leave is not authorised ex post facto. In particular the conditions for applying Rule 105.5, which relates to unauthorised absence and prescribes disciplinary action, are not fulfilled. Accordingly, a case in which sick leave is not authorised ex post facto need not be assimilated to one of ordinary un absence.

Since ex post facto refusal to authorise sick leave is not expressly covered by the rules, there is no legal objection in principle to applying Rule 106.1(d)(ii) by analogy.

Where, by reasonable oversight, there is a lacuna in the rules it is not unlawful to make good the omission by

drawing an analogy, provided there is no breach of any of the staff member's rights and provided the case is truly analogous.

In the circumstances of this case the application of Rule 106.1(d)(ii) by analogy and the consequent exclusion of Rule 105.5, which would have entailed disciplinary action under Regulation 110.1, constitutes no abuse of authority, since that authority was not exercised for any unlawful purpose.

4. The plea that the decision of 15 April 1981 amounted to wilful harassment also fails.

The Tribunal finds wilful harassment neither in the refusal to extend the period of sick leave granted from 15 to 20 July, nor - on account of the considerations relied on by the Administration - in the summons which the Personnel Office sent to the complainant on 18 July to see the medical officer on the same day, nor in the refusal to hold an independent medical examination - a procedure for which there is no provision in the Staff Regulations and Staff Rules. On the contrary, the Organization acted in the normal exercise of its authority.

5. The Organization's medical officer, Dr. Gariepy, who examined the complainant on 21 July 1980, delayed until 28 July before reporting in writing to the Personnel Office and it is true that the administrative process is open to criticism on that account, even supposing that because of doubts over the case he decided after 21 July to telephone Dr. Duong, the complainant's own doctor, who had authorised the previous periods of sick leave. But the administrative delay does not in itself constitute a flaw which warrants quashing the decision.

6. As the Appeals Board stated in its report, the UNESCO Staff Regulations and Staff Rules do not provide for review of the medical officer's technical findings, and in cases like the complainant's he must therefore proceed with the greatest caution. The omission is the more striking in that the United Nations Staff Regulations and Staff Rules do make provision for such review.

7. It appears from the foregoing that the decision is neither unlawful, nor tantamount to wilful harassment, nor tainted with abuse of authority. The Tribunal therefore disallows the complainant's application for the award of 6,000 French francs as costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

H. Gros Espiell

A.B. Gardner

1. "If the Medical Officer is not satisfied that sick leave is or was justified, such leave may be refused. The Medical Officer may, in addition, investigate any claim for such leave which, in his opinion, is open to doubt and make appropriate cheeks during any period of approved sick leave."