

DISSENTING OPINION OF PRESIDENT HACKWORTH

I concur in the conclusion of the Court that it is competent to give an Advisory Opinion in response to the request from the United Nations Educational, Scientific and Cultural Organization, and that it should do so.

I regret that I am unable to concur in the Opinion which has been given in response to the questions presented by the Organization. On these questions I am in agreement with the conclusions reached by the Vice-President, Judge Badawi, and Judge Read. My reasons, in summary form, are as follows:

The request for an Opinion relates to judgments given by the Administrative Tribunal of the International Labour Organisation against the United Nations Educational, Scientific and Cultural Organization in favour of four of its former officials—Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein—who had been serving under fixed-term appointments which had expired, and which the Director-General of the Organization had declined to renew.

The request for an Opinion is presented in the form of three questions:

The first of these questions is whether the Tribunal was competent, under Article II of its Statute, to hear the complaints of these former officials.

The second question, which is divided into two parts, and which is to be answered only in the event of an affirmative answer to the first question, inquires (*a*) whether the Tribunal was competent to determine whether the power of the Director-General not to renew fixed-term appointments had been exercised for the good of the service and in the interest of the Organization, and (*b*) whether the Tribunal was competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State.

The third question inquires concerning the validity of the decisions given by the Tribunal in its judgments in behalf of these four officials.

* * *

In considering the first of these questions, namely, that relating to the competence of the Tribunal to hear the complaints, it is necessary to look to the Statute of the Tribunal by which its jurisdiction is defined.

From Article II, paragraph 5, of the Statute, we find that the Tribunal is competent to hear complaints in two classes of cases. One of these relates to "non-observance, in substance or in form, of

the terms of appointment of officials", and the other relates to the "non-observance of provisions of the Staff Regulations".

The Tribunal is not clothed with plenary jurisdiction. Its jurisdiction is wholly statutory and of a limited character. It is not authorized to hear and to pass upon any and every kind of controversy that may arise in connection with the administration of the Organization. On the contrary, its competence, as just stated, is limited by paragraph 5 of Article II of its Statute to the two categories of complaints there mentioned. Being a Tribunal of specifically delegated and limited jurisdiction it follows that it must keep within the orbit of that jurisdiction. Our first task, therefore, is to determine whether the complaints here in question fall within the compass of either of the two categories of complaints to which the competence of the Tribunal extends.

It is not necessary here to consider the various forms of contracts in use by Unesco for engaging members of its staff, such as those relating to temporary appointments, indeterminate appointments, etc., all of which are governed by special rules. It is sufficient for our purposes to examine only those contracts under which the four officials here in question were serving. These contracts are described in the Staff Regulations of Unesco as fixed-term contracts. Appointments under such contracts are to run for a definite period of time at the end of which period, unless renewed, they automatically terminate.

This is very clearly stated by Staff Rule 104.6 (*d*) which reads :

"A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term unless a renewal is offered and accepted three months before the expiry date in the case of an initial fixed-term appointment of one year, and six months before the expiry date in other cases."

It will be noted that such fixed-term appointments expire, "without notice or indemnity"¹, upon completion of the fixed term unless a renewal is offered and accepted six months (in these cases) before the expiry date. The appointments of these four officials were not renewed. The gravamen of the complaints is that they should have been renewed and that by reason of this failure to renew the complainants became the victims of unwarranted discrimination.

¹ These words were added to the old text, and that text as thus amended entered into force November 1, 1954. The text as amended was quoted by the Tribunal in its decision on competence.

The Staff Rules and Regulations are made an integral part of contracts of employment. Staff Rule 104.3 provides that :

“(a) A candidate selected for appointment shall receive a Letter of Appointment signed by the Director-General or his authorized representative, specifying the terms of the appointment.

(b) There shall be annexed to the Letter of Appointment a copy of the Staff Regulations and Staff Rules, and a copy of the Declaration of Office.

(c) In accepting an appointment, the candidate shall declare in writing that he has taken cognizance of the Staff Regulations and Staff Rules and that he accepts their conditions.

(d) The Letter of Appointment with its annexes and the Letter of Acceptance, with the Declaration of Office, duly signed, shall constitute his contract of employment.”

Had the contracts of appointment in these cases been terminated by the Director-General prior to the expiration of the period for which they were to run, another Rule—Rule 104.6, paragraph (b)—concerning reasons for the action taken, notice, and indemnity, would have been applicable, and there might have been grounds for complaint by the employees of which the Tribunal would have had jurisdiction. But we are not here concerned with a situation of that character. Such questions could not arise in these cases. The contracts of appointment were not terminated before their completion. They ran their full term. They were not terminated by the Director-General. They terminated automatically by virtue of their own terms and the applicable Staff Rule, *supra*. All that the Director-General did was to notify the officials, well in advance of the terminal dates, that on the expiration of the fixed-term appointments he would not be able, for reasons stated by him, to offer them further appointments. Requests by the complainants that the Director-General should reconsider his decision were denied.

* * *

Following certain preliminary measures which need not here be related, the complainants filed petitions with the Administrative Tribunal. They did not allege non-observance of the terms of their appointments. Taking the complaint of Peter Duberg as an example (all the complaints followed the same general pattern), we find that the complainant, after a preliminary recitation of facts and allegations, was content to request the Tribunal to rescind the decision of the Director-General and to enjoin him to renew the contract and to pay the petitioner the sum of one franc in respect of damages and legal costs.

In affirming its competence to hear the case, the Tribunal did not base its action on the "non-observance" of the terms of appointment. It impliedly admitted that there was no subsisting contract of appointment for it ordered the Director-General to rescind his decision not to offer a new appointment, and in the alternative to pay an indemnity.

Conclusions with respect to the second basis of jurisdiction under Article II, paragraph 5, of the Statute, namely, "non-observance of provisions of the Staff Regulations", are equally vague.

The Tribunal did not say that a complaint of this character was before it. What it said was that the question before it was "a dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organization".

It is not clear whether this somewhat imprecise statement as to the nature of the dispute was regarded by the Tribunal as tantamount to a complaint alleging "non-observance of provisions of the Staff Regulations". It is not difficult to imagine that many situations might arise in an Organization such as Unesco in which divergent views would develop regarding the interpretation and application of Regulations and Rules. But it does not follow that such differences may form the basis of a complaint falling within the competence of the Administrative Tribunal.

In order to engage the competence of the Tribunal it must be shown not only that there is a dispute but that the rights of the complainant have been impinged through non-observance of the Regulations or Rules.

Now what rights of the complainant were violated by action of the Director-General in this case?

We find that the so-called dispute, as it developed, revolved around two documents: One was an Administrative Memorandum dated July 6, 1954, from the head of the Bureau of Personnel and Management, acting under the direction of the Director-General, concerning the renewal of appointments of staff officials expiring at the end of 1954 and in early 1955. The other was a letter from the Director-General to Mr. Duberg stating that he would not offer him a further appointment.

✓ The Administrative Memorandum mentioned referred to Staff Regulation 4.5.1 providing that renewals of fixed-term contracts should be, "(a) without limit of time, or (b) in the light of programme requirements, for further fixed periods of not less than one year up to a maximum period of service of five years, at the discretion of the Director-General".

The Memorandum reveals that the principles to be applied to the renewal or non-renewal of fixed-term appointments due to expire

during the then current year and in the first few months of the succeeding year had been a subject of discussion within the Organization ; that views had been expressed by the Advisory Council on Personnel Policies, by the Directors of Departments, and by the Staff Council. The Director-General thought that there was general agreement on personnel policy but he was troubled regarding the interpretation to be given to the phrase, "in the light of programme requirements". He said that the General Conference in approving Regulation 4.5.1 had given no interpretation of it and that various interpretations had been proposed. He decided that the matter was of such importance that he must consult the General Conference at its forthcoming eighth session on the concept of "programme requirements". He added that pending action by the Conference "all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments". All such appointments, he said, would be reviewed by him before April 30, 1955, in the light of the decisions and instructions of the General Conference.

This Memorandum was no more than the announcement of an interim measure with respect to personnel. It obviously was designed to allay the apprehensions of those members of the Staff whose appointments were due to expire within a short time, and to bridge a gap with which the Director-General felt that he was confronted in giving effect to a regulation which he considered required clarification by the General Conference.

At the time the Memorandum was issued the period within which the fixed-term contracts in three of the cases here in question might have been renewed under Staff Rule 104.6 (*d*), *supra*, had already expired.

The statement in the Memorandum that one-year renewals would be offered was a qualified one. It was subject to the required standards of efficiency, competence, integrity, and the needs of the service. It did not constitute an offer of renewals. It merely announced a purpose to extend offers. Such offers were to be left to the future and were not to be extended *ipso facto* and in any and all events. They depended upon the satisfying by the employee of the four considerations mentioned in the Memorandum. There was no change in the procedure required by the Staff Rules and Regulations for

entering into new contracts of employment, namely, an offer and acceptance. Nor could the statement be deemed to constitute a new Staff Rule. It was nothing more than an *ex parte* statement of policy of a temporary character which the Director-General intended to pursue pending further enlightenment on the course which he should follow. But even if it be denominated a new Rule, the legal situation would not be changed. It was yet a qualified statement. It may well have created in the minds of members of the staff, as stated by the Tribunal, a legitimate expectancy that they would be continued in the service, but there was no resulting vested right. Expectations and rights are not synonymous terms. The statement placed the Director-General under no legal obligation *vis-à-vis* members of the staff to offer new appointments, nor did it give the officials a legal right to demand such appointments.

When, therefore, the Director-General informed the four officials by letters that it was "with a deep sense of my responsibilities that I have come to the conclusion that I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the Organization", he was acting within the compass of the Administrative Memorandum and of his prerogatives, as the Chief Administrative Officer of the Organization. Both the Constitution and the Regulations of Unesco feature throughout the importance of a high degree of integrity in the selection and maintenance of the staff. The Director-General was charged with the duty of effectuating this purpose. In declining to renew the appointments, he was exercising a discretionary power given him by the Constitution and by the Staff Regulations. It was for him to determine whether the action of the individuals was incompatible with the high standards required of them, and it was for him to determine whether their actions were capable of harming the interests of the Organization.

In the absence of evidence that the Director-General had acted in bad faith, i.e. that his action was arbitrary or capricious, it was not for the Tribunal to say that the reasons assigned by him were not justified. It was not for the Tribunal to substitute its judgment in this administrative field for that of the Director-General. He, acting under the authority of the Executive Board and of the General Conference, and not the Tribunal, was charged with responsibility. There was no obligation to renew the appointments. He could have allowed the contracts to lapse without assigning reasons or he could have told these officials that their

terms of employment would not be renewed without stating reasons. He stated reasons because he was asked to do so. The fact that he did state them did not invest the officials with a right which they previously did not have. By the same token his statement of reasons did not invest the Tribunal with jurisdiction which it previously lacked. That jurisdiction, as already stated, was confined to two classes of cases, i.e. (1) non-observance of terms of appointment and (2) non-observance of provisions of the Staff Regulations.

The terms of appointment were not interfered with by the Director-General. They expired automatically, hence jurisdiction could not attach on the first named ground.

The Regulations did not require renewal of the appointments and the Director-General violated no regulation in declining to offer new appointments. In consequence jurisdiction did not arise on the second ground. The fact that appointments of other officials holding fixed-term contracts were renewed, and that under the general practice of Unesco renewals were ordinarily to be expected by worthy officials, did not alter the legal situation—there was no resulting legal right to renewals.

* * *

My conclusion is that the first question presented by Unesco on which the opinion of the Court is requested—"Was the Tribunal competent, under Article II of its Statute, to hear the complaints..."—must be answered in the negative.

Having thus answered the first question it becomes unnecessary to consider the second question.

The third question presented by the Organization relates to the validity of the decisions given by the Tribunal in its judgments awarding damages to each of the four officials.

It must be obvious that judgments given by a Tribunal which is without jurisdiction over the subject-matter can have no validity.

(Signed) GREEN H. HACKWORTH.