

FIFTH ORDINARY SESSION

(Part II)

***In re* PANKEY**

Judgment No. 23

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organization on 13 September 1955 by Mrs. Kathryn Pankey, a former official of that Organization, asking that the Tribunal be pleased to rescind the decision taken on 20 June 1955 terminating the complainant's appointment and, in default of reinstatement, to enjoin the defendant Organization to pay to the complainant by way of damages a sum equivalent to three years salary, together with an indemnity of US\$10,000;

Considering the memorandum of reply to the said complaint submitted by the defendant Organization on 6 October 1955;

Having had referred to it a statement submitted in his own name, in his status as an official of the defendant Organization, holder of an indeterminate appointment, on 3 October 1955 by M. Pierre Henquet, Chairman of the Staff Association;

Having heard, on oath, in public sitting on 20 October 1955 Edward Joseph Phelan, witness cited by the complainant, whose deposition, certified true, is in the dossier;

Considering the pleadings exchanged by the representatives of the parties during the hearing;

Considering that the complaint is receivable in form;

Considering that the facts of the case are the following:

- 1) The complainant took up her duties with the defendant Organization on 17 March 1952;
- 2) At the time when the decision complained of was taken the complainant was the holder of an indeterminate appointment, subject to a five-year review on 5 May 1958;
- 3) In February 1953 the complainant received a questionnaire to be completed and returned in application of "Executive Order No. 10422 of the President of the United States dated 9 January 1953 prescribing procedures for making available to the Secretary-General of the United Nations certain information concerning United States citizens employed or being considered for employment on the Secretariat of the United Nations" whose provisions apply to the defendant Organization by virtue of Part III of the Order in question; the complainant did not complete this questionnaire;
- 4) In March 1954, the complainant received an interrogatory from the International Organizations Employees Loyalty Board of the United States Civil Service Commission set up by Executive Order No. 10459 of 2 June 1953 amending Executive Order No. 10422 of 9 January 1953 interrogatory to which the complainant also did not reply;
- 5) In June 1954, the complainant received an invitation to appear on 9 July 1954 before the Loyalty Board, meeting at the United States Embassy in Paris;
- 6) By letter dated 16 July 1954 the complainant informed the Director-General of the reasons of conscience on which she based her refusal to appear;
- 7) Subsequently the Director-General received communication of the report of the Loyalty Board (advisory determination) dated 27 August 1954 in which it was stated that:

"... the Board concludes that on all the evidence, there is a reasonable doubt as to the loyalty of the employee, Kathryn Pankey, to the Government of the United States."

8) The complainant was herself informed of the conclusions of the Loyalty Board by letter of the Chairman of the Loyalty Board dated 15 September 1954, and was also informed of the fact that the report of the Loyalty Board had been transmitted to the Director-General of the defendant Organization;

9) On 28 September 1954 the Director-General set up a Special Advisory Board consisting of members of the staff whose task was to "examine the cases of certain staff members on the basis of certain information which has been brought to the knowledge of the Director-General and in the light of the standards of employment and conduct prescribed by the Constitution and Staff Regulations"; the complainant appeared and explained her position before this Special Advisory Board;

10) The complainant was informed by a note dated 10 December 1954 that she was suspended from her functions with pay until further notice in application of Rule 109.11 of the Staff Rules;

11) By a note dated 16 December 1954 the complainant requested the Director-General to reconsider his decision;

12) The Director-General declined to reconsider his decision and the complainant submitted an appeal to the UNESCO Appeals Board on 10 February 1955, asking that the decision to suspend her be rescinded;

13) On 25 July 1955 the Appeals Board, by a majority expressed the opinion that the decision of the Director-General dated 10 December 1954 by which the complainant had been suspended from her functions with pay should be rescinded;

14) Before the Appeals Board had taken its decision the Special Advisory Board, referred to in paragraph 9.1.1 of the Staff Regulations and appointed by the Director-General in accordance with Rule 109.10 of the Staff Rules, heard the complainant in March 1955;

15) By letter dated 20 June 1955 the Director General informed the complainant that her appointment was terminated on the same date. This letter stated inter alia:

"The Special Advisory Board which I appointed in accordance with Staff Regulation 9.1.1. has submitted its report to me on the matter concerning you.

I have studied this report very carefully.

I regret to inform you that I have come to the conclusion that your conduct indicated that you do not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations.

I have come to this conclusion because of the attitude you have adopted to the investigation undertaken by the United States Government under Executive Order 10422, as amended by Executive Order 10459, which found its principal expression in your refusal to respond to the invitation to appear, in July 1954, before the International Organizations Employees Loyalty Board of the United States Civil Service Commission, and because, at no time up to this date, have you taken any steps or shown any desire to repair, or at least to mitigate, the harm done to the Organization by your refusal to appear before the Board.

You could not have failed to realise that the attitude you have adopted gravely prejudiced the interests of the Organization.

I have indicated, and in particular, at the Eighth Session of the General Conference, the seriousness of the consequences of such an attitude.

In adopting and maintaining such an attitude, you have shown that you are not willing to regulate your conduct with the interests of the Organization only in view.

I am therefore obliged to terminate your appointment with effect from the end of the day, 20 June 1955, under the provisions of Staff Regulation 9.1.1.

In accordance with the terms of your indeterminate appointment you will receive an indemnity equivalent to [two] months pensionable remuneration.

You will be paid salary and allowances in lieu of three months' notice.

You will also receive any other payments to which you are entitled upon separation.";

16) By letter dated 24 June 1955 the complainant requested the Director-General to reconsider his decision to terminate her appointment;

17) By letter dated 27 June 1955 the Director-General informed the complainant that he adhered to his decision;

18) On 1 July 1955 the complainant submitted an appeal to the UNESCO Appeals Board asking that the Director-General's decision dated 20 June 1955 be rescinded;

19) On 29 July 1955 the Appeals Board, by a majority, expressed the opinion that the decision of 20 June 1955 by which the complainant's appointment was terminated should be rescinded;

20) By letter dated 31 August 1955 the Director-General informed the Chairman of the Appeals Board that he could not act in accordance with this opinion,

ON THE SUBSTANCE

A. Considering that the decision of 20 June 1955 terminating the appointment of the complainant was taken in application of Regulation 9.1.1 of the Staff Regulations, as adopted by the UNESCO General Conference in Montevideo on 8 December 1954, this Regulation being in the following terms:

"The Director-General may also, giving his reasons therefor, terminate the appointment of a staff member:

(a) If the conduct of the staff member indicates that the staff member does not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations;

(b) If facts anterior to the appointment of the staff member and relevant to his suitability or which reflect on his present integrity come to light, which, if they had been known at the time of his appointment should, under the standards established in the Constitution, have precluded his appointment.

No termination under the provisions of this Regulation shall take effect until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General.";

Considering that where the Director-General acts within the provisions of Regulation 9.1.1 he has only the statutory powers conferred on him by the General Conference; that in a particular case the Tribunal's appreciation and review of the exercise of this power consists in examining whether in fact the circumstances of the case are such as to justify the application thereof; that if this were not to be the case the application of this power would be at the Director-General's sole pleasure;

Considering that Regulation 9.1.1 expressly provides that reasons must be given for taking the measures set forth therein and that the matter be first reported on by a Special Advisory Board appointed for that purpose by the Director-General;

B. Considering that in this case the decision is expressly motivated by the attitude taken by the complainant with respect to the measures of investigation provided by the Government of the United States in application of Executive Orders No. 10422 and 10459, this attitude consisting principally in the refusal of the complainant to accede to the invitation to appear before the Loyalty Board in July 1954, and by the fact that after that date the complainant took no steps nor showed any wish to repair or mitigate the harm which was deemed to have been suffered by the Organization as a result of her refusal to appear, when she could not ignore the gravity of such harm;

Considering that the submissions of the defendant oblige the Tribunal, in order to carry out its functions under the provisions of Article II of its Statute, to seek in what manner and to what extent the interests of the Organization

may have been prejudiced;

Considering that the difficulties having arisen within the defendant Organization are that one Member State, in default of obtaining the removal of those of its citizens being officials finding themselves in a situation similar to that of the complainant, appeared to be considering withdrawing its participation and support from the Organization; that in particular an express statement in this sense was made before the Sub-Committee on Appropriations of the House of Representatives of this State by one of the members of the delegation of the said State at the Montevideo Conference;

That it is significant that the Director-General, on 10 December 1954, that is to say on the date following that on which the Staff Regulations conferred upon him the new power, invoked such power against the three parties concerned, in order to suspend them from their duties and to take those procedural measures against them arising out of which the decisions to terminate them, now before the Tribunal, were taken;

That besides there is no indication that there was any other reason for considering that the interests of the Organisation were imperilled;

That the safeguarding erga omnes of the independence and impartiality of the Organisation is also vital and must not be lost sight of;

C. Considering that the complainant could, in conscience, be persuaded that she was within her rights, that besides it has never been alleged that the complainant had been the object of legal proceedings in her own country by reason of the attitude complained against, since a purely administrative procedure was involved; that exception could not be taken against her, for having failed in her employment to determine precisely the gravity and imminence of the danger which may have imperilled certain interests of the Organization;

Considering that no exception can be taken against her on such grounds nor could she be reproached with having abstained from taking steps for which no particulars were given and in addition never requested of her, in order to repair or mitigate the difficulties to which the Organization was subject;

Considering that the Director-General adduces however from the complainant's attitude and from the maintenance of this attitude that the complainant showed that she did not wish to regulate her conduct with the interests of the Organization only in view;

That in consequence on 20 June 1955 the Director-General terminated the complainant's appointment with immediate effect (at the same time according to her those indemnities to which she was entitled under Regulation 9.3 of the Staff Regulations and Rule 104.7 e) of the Staff Rules), after having consulted the Special Advisory Board set up in Regulation 9.1.1 of the Staff Regulations and after carefully studying, as he states, the report of this Board;

D. Considering that it must be observed that the decision taken is based solely on paragraph (a) of Regulation 9.1.1 of the Staff Regulations which gives to the Director-General the power to terminate an official's appointment "if the conduct of the staff member indicates that the staff member does not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations";

That, on the basis of this wording, the clear distinction between the notions respectively of integrity and loyalty is henceforward not in issue; that the grounds adduced are based on the duty of officials "to conduct themselves at all times in a manner befitting their status as international civil servants", "to bear in mind the reserve and tact incumbent upon them by reason of their international status." and at no time to lose sight of the interests of the international organization for which they serve;

Considering that paragraph (b) of Regulation 9.1.1 deals only with facts anterior to appointment or facts which, if they had been known at the time of the appointment should have precluded the appointment, such facts not having been demonstrated and not being in issue in this case;

E. Considering besides that there is no other motive in the case which can be invoked in justification of termination;

That the Special Advisory Board which had been voluntarily set up by the Director-General within the defendant

Organization, as early as September 1954, expressly stated that it could find no evidence either in the reports of the Loyalty Board or as a result of its own enquiries that the complainant, during her employment in the Secretariat of the defendant Organization, had engaged in or was engaging in activities that could be shown to constitute misconduct under the terms of the Staff Regulations and Rules;

That it results from the complainant's performance reports that she has never been the subject of any reproach; that on the contrary the appreciations contained therein were entirely laudatory as regards her work and performance and that she was promoted;

That the Director-General was therefore entirely correct in not invoking against her any misconduct, breach of professional duty or unsatisfactory service; that on the contrary the representative of the defendant Organization has pointed out on several occasions that termination for disciplinary reasons was not in issue and that the sole issue was the termination of an appointment, with payment of indemnities, under the new Regulations on which the Director-General relies;

F. Considering that the defendant Organisation objects to the production of the report of the Special Advisory Board which was set up in 1955 on the basis of the amended Regulations adopted by the General Conference;

That this objection is motivated by a text inserted by the Director-General himself in the rules which he drew up in order to give effect to the new provisions of the Staff Regulations by virtue of the powers conferred on him under the said Regulations; that this text stipulates (Staff Rule 109.10) that the proceedings and reports of the Board shall be secret and confidential;

That if this provision made by the Director-General in application of the regulations adopted by the General Conference were to be considered as lawful, it would have as its effect to remove from the Special Advisory Board its principal object; that in reporting to the Administrative Commission of the General Conference (document 8C/ADM/14, paragraph 11), the author of the text declared himself on the subject of this Advisory Board as follows: "This is one way in which it is considered that staff members may be protected from the possibility of arbitrary decisions"; that where the opinion given is confidential to the Director-General alone, such additional guarantee promised against arbitrary decisions is unavailing;

That where the competent jurisdiction for reviewing the decision of the Director-General is not able, any more than the complainant, to have cognizance of the opinion of the Special Advisory Board, and where, besides, the Director-General is entirely free not to take account of such opinion and is thereby not subject to any outside review, it would have sufficed to permit the Director-General to be counselled accordingly thereon by such adviser as he thought fit; that this cannot be imagined to have been the impression which led to the vote in the General Conference, the Conference being manifestly desirous to effectively protect staff members whose appointments would be terminated under Staff Regulation 9.1.1, from arbitrary decisions;

Considering that the deposition made under oath by Mr. Phelan, Chairman of the said Board, cited as a witness, shows that the members of the Board did not, in accepting to serve, impose a condition of secrecy; that they questioned the Director-General on his intentions in this regard, which was proper, but did not have as a legal result to deprive the Director-General from disposing of the report as he thought fit;

That the objection to the production of the report of the Board which was available to the Director-General removes an element from the appreciation of the Tribunal competent to pronounce on the regularity of the decision taken; that the regulations having been observed in the latter the Tribunal may not order thereon, but that in any event it was unable in its consultations to take into account this unknown element;

G. Considering that the complainant submits that the provisions of the new Regulations adopted in December 1954 are not applicable in her case since the facts set up against her took place prior to such adoption;

That this submission is unfounded, the Director-General having been accorded the power to review the conduct of a staff member, the appointment of whom is to be terminated, solely with regard to the high standards required of an international official, and that he is free in this respect to take into account those elements on which he considers his decision may be based;

That without doubt, the granting of such a power opens the door to a great extent to arbitrary decisions; that it fully justifies the preoccupations of those desirous of providing at the same time sure and effective guarantees; that the

Administrative Tribunal must watch over the jurisdictional review which it exercises; but that the texts exclude the submission based on their retroactive application;

H. Considering that where the Director-General has the power to terminate an indeterminate appointment, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organization;

Considering that it is in the light of this principle that the facts in this case should be examined;

Considering that Regulation 1.4 of the Staff Regulations of the defendant Organization is as follows:

"Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organization. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status, while they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status".

Considering that, in thus clearly establishing the entire freedom of conscience recognized to international officials in respect of both their philosophical convictions and their political opinions, the Regulations impose on them the duty to abstain from all acts capable of being interpreted as associating them with propaganda or militant proselytism in any sense whatever;

That this abstention is rigorously imposed on them by the overriding interest of the international organization to which they owe their loyalty and devotion;

I. Considering that, when consulted by the Staff Association of the defendant Organization on the obligation incumbent on members of the staff to reply to questionnaires issued by authorities of their respective countries, the Director-General declared that the answer must depend only on the conscience of the individual, except that he should not lie and should have regard to the consequences which the refusal to reply might have for him;

Considering, however, that in respect of the invitation to appear before the Loyalty Board it is established that the complainant approached the Director-General only at a late date, so that the latter would not have been able to give her advice in sufficient time;

J. Considering that, in order to review all factors, it is necessary to enquire whether the acts or omissions of the complainant could be considered as justifying the application of paragraph (a) of Regulation 9.1.1 of the Staff Regulations, on the grounds that in themselves they caused doubt to exist as to whether she fulfilled the highest standards required of an international official;

Considering that the complainant does not challenge the legitimate character of the enquiry made within the staff by the Special Advisory Board set up by the Director-General on 28 September 1954, following the submission to the Director-General of the report made against her by the Loyalty Board in default of her appearance;

That this measure is in accordance with the undertaking made with the State member concerned under arrangements approved by the Executive Board and General Conference of the defendant Organization; that this was solely an undertaking that any information which the Government of the State concerned might desire to submit to the Director-General would "be studied with care" and that he would "certainly give every consideration to it, in the light of the Constitution of UNESCO and all other relevant provisions and policies which may have been or may be laid down by the appropriate organs of UNESCO";

That the Special Advisory Board set up on 28 September 1954 expressed the opinion, as referred to above, that it could find no evidence that the complainant had engaged or was engaging in activities during her employment, that could be shown to be misconduct under the Staff Regulations and Staff Rules; the Board concluding however that the attitude adopted by the complainant as well as the reasons given for her attitude gave rise to serious doubts about the degree of confidence that could be placed in her integrity, judgment and loyalty to the Organization; that the Board found justification for this opinion in stating that in a situation which, in its opinion, was clearly harmful to the Organization, the complainant maintained that adherence to her own personal views was more important than the interests of the Organization;

That this opinion restates in different terms the reasons invoked for the decision taken;

K. Considering however that when requested to give an opinion on the decision itself, the Appeals Board, presided over by an eminent magistrate enjoying the confidence of all parties and composed jointly of members appointed by the Director-General and members appointed by the Staff Association, came unanimously to a diametrically opposed conclusion; that after a full hearing and a thorough study of all the facts in the case, it unanimously concluded that the complainants had not failed in the high standards required of members of the Secretariat, had not committed acts incompatible with the integrity required of them and had not disregarded the true interest of the Organization; that, as a consequence, the decisions to terminate them had no basis in law and that the said complainants had shown cause for requesting reinstatement; that the Tribunal fully agrees with this particularly authoritative opinion;

That the Court must besides take into consideration the due care required of it in appreciating the validity of the decision taken, by reason of the striking and indefensible disproportion between the alleged attitude of the complainant and the measure taken against her, putting an end to the career on which she based her future, when no complaint regarding her work had been alleged; that from this standpoint it is of no moment that the termination was not a disciplinary action in the formal sense of the Regulations and that certain indemnities were accorded, when the fundamental result is to deprive the party concerned of her employment by exposing her to all the risks and distress of an uncertain future;

L. Considering that it is thus established that the ground for complaint of the Director-General is based solely on the refusal of the official to participate in measures of verbal or written enquiry to which his national Government considers it necessary to subject him;

That the Director-General of an international organization cannot associate himself with the execution of the policy of the Government authorities of any State member without disregarding the obligations imposed on all international officials without distinction and, in consequence, without misusing the authority which has been conferred on him solely for the purpose of directing that Organization towards the achievement of its own, exclusively international objectives;

That this duty of the Director-General is governed by Article VI, paragraph 5, of the Constitution of the defendant Organization in the following terms:

"The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties";

Considering that the fact that in this case the doubts raised as to the loyalty of the complainant to her own Government brought by a Government which enjoys in all respects the highest prestige, must be without any influence upon the consideration of the facts in the case and the determination of the principles whose respect the Tribunal must ensure;

That it will suffice to realize that if any one of the seventy-four States and Governments involved in the defendant Organization brought against an official, one of its citizens, an accusation of disloyalty and claimed to subject him to an enquiry in similar or analogous conditions, the attitude adopted by the Director-General would constitute a precedent obliging him to lend his assistance to such enquiry and, moreover, to invoke the same disciplinary or statutory consequences, the same withdrawal of confidence and the same application of Regulation 9.1.1 of the Staff Regulations, on the basis of any opposition by the person concerned to the action of his national Government;

That if this were to be the case there would result for all international officials, in matters touching on conscience, a state of uncertainty and insecurity prejudicial to the performance of their duties and liable to provoke disturbances in the international administration such as cannot be imagined to have been in the intention of those who drew up the Constitution of the defendant Organization;

M. Considering that it has been shown above that the attitude of the complainant towards the Loyalty Board in no

way justifies the existence of serious doubts as to the high standards required of an international official;

That neither does it appear that the complainant placed her own interests above the true interest of the Organization, as defined above;

Considering therefore that the only ground for complaint adduced by the Director-General to justify the application to the complainant of Regulation 9.1.1 of the Staff Regulations, that is to say her opposition to the investigations of her own Government, is entirely unfounded;

N. Considering that it results therefrom that the decision taken must be rescinded, the said decision not resting on any provision of the Staff Regulations; that nevertheless the Tribunal does not have the power to order reinstatement, which requires a positive act of the Director-General, over whom the Tribunal has no hierarchical authority;

That in the absence of such a power and unless the Director-General should consider himself in a position to reconsider his decision in this manner, the Tribunal is none the less competent to order equitable reparation of the damage suffered by the complainant by reason of the measure of which she was the object;

ON PREJUDICE

Considering that should the complainant not be reinstated with full rights, she should be compensated for the material and moral prejudice which she has suffered by reason of the decision taken;

That such prejudice may be assessed ex aequo et bono at two years' base salary, without any set off of the indemnities which she has been accorded;

Considering that the annual base salary of the complainant amounted to 819,000 French francs;

That there are no grounds for allocating a supplementary indemnity by reason of the suspension with salary dated 10 December 1954, a measure which the Director-General was entitled to take within the limits of his authority and which cannot be considered in the circumstances as having increased the prejudice suffered;

ON THE GROUNDS AS AFORESAID

THE TRIBUNAL,

Rejecting any wider or contrary conclusions,

Declares the complaint to be receivable as to form;

Declares that it is competent;

Orders the decision taken to be rescinded and declares in law that a legal basis therefor cannot be found in the Staff Regulations;

In consequence, should the defendant not reconsider the decision taken and reinstate the complainant, orders the said defendant to pay to the complainant an amount equal to two years' base salary, namely 1,638,000 French francs together with interest at 4 per centum from 20 June 1955, without any set off of the indemnities accorded to her at the time of termination of her appointment;

Orders the defendant Organization to pay to the complainant the sum of US\$300 by way of participation in the costs of her defence;

PRONOUNCING on the application to intervene made by M. Henquet;

Considering that such intervention is receivable in so far as it is made by M. Henquet in his own name, an official of the defendant Organization, holder of an indeterminate appointment;

Considering that the intervention is founded, in so far as recognized by this judgment;

Orders the defendant Organization to bear the expenses for which justification is provided by the intervener up to a maximum of US\$40.

In witness of which judgment, pronounced at the Palais des Nations, Geneva, in public sitting on 29 October 1955, by His Excellency M. Albert Devèze, President, Jonkheer van Rijckevorsel, Judge, Acting Vice-President, and M. Iasson Stavropoulos, Deputy Judge called upon to sit owing to the inability of a titular judge to attend, the aforementioned have hereunto subscribed their signatures as well as myself, Wolf, Registrar of the Tribunal.

(Signatures)

Albert Devèze
A. van Rijckevorsel
Iasson Stavropoulos
Francis Wolf

Updated by SD. Approved by CC. Last update: 30 May 2008.