

## FOURTEENTH ORDINARY SESSION

### *In re* GALE

#### Judgment No. 84

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organisation, drawn up by Mr. Hubert Philip Gale on 26 June 1964 together with the addendum thereto dated 21 August 1964, the Organisation's reply of 12 October 1964, complainant's rejoinder dated 19 January 1965, and the Organisation's further reply of 19 March 1965;

Considering article II of the Statute of the Tribunal, article 9.1 of the Staff Regulations and articles 104.6 and 109 of the Staff Rules of UNESCO;

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

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

A. The complainant was appointed as a member of the staff of UNESCO, for a period of five years beginning on 20 September 1962, subject to a period of probation of nine months, and was assigned to the duties of Principal of a Secondary Teacher Training College being established at Zaria in Nigeria with the assistance of UNESCO. After he had taken up his duties, doubts were expressed as to his ability to carry out successfully the tasks of an administrative nature which appertained to his functions as Principal. It had been intimated to the complainant that, upon the expiry of his probationary period, unless he chose to resign, his appointment would be terminated. The complainant declined to resign, and, on 20 June 1963, his appointment was terminated under Staff Rule 109.6 on the grounds that the responsible officials in the Secretariat of UNESCO did not find that his performance as Principal was such as to warrant the maintenance of his appointment beyond the probationary period.

B. After being granted one month's sick leave pay upon his return to Europe, the prescribed one-month's period of notice was extended to three months, in order to take into account the fact that the complainant had been ill, and to allow further time to attempt to find another appointment in UNESCO for which he would have been suitable. The complainant's appointment came to an end on 13 September 1963. In the meanwhile he had, on 3 August 1963, brought his case before the UNESCO Appeals Board. The Board submitted its report on 26 February 1964, and recommended the Director-General either to offer the complainant within three months a new appointment for which he would be suitable, or to award him an indemnity of five months' salary, of which two had already been paid. On 11 May 1964, the complainant was advised that efforts had been made to find a suitable new post for him ever since he left Nigeria, but without results, and that it was unlikely that such a post would become available. He was therefore awarded, in accordance with the recommendation of the Appeals Board, compensation equivalent to three months' salary which was duly paid. On 26 June 1964, Dr. Gale filed a complaint praying for the quashing of the decision of the Appeals Board and the award of an indemnity amounting to four years' salary as compensation for the injury and damage caused by the termination of his appointment. The Organisation submits that the complaint should be dismissed as not receivable or, subsidiarily, as not well founded.

#### CONSIDERATIONS:

##### On admissibility

1. The Organisation submits that the complaint is without cause and inadmissible on the ground that the complainant, having accepted the compensation fixed by the Appeals Board as an alternative to the offer of a suitable new post, cannot now contest the Director-General's decision to dismiss him. The Tribunal rejects this submission. There is nothing to show that the complainant accepted the compensation in full settlement of his claims and so he is not thereby precluded from contending that it is insufficient.

##### On the merits

2. In accepting his appointment the complainant declared that he had taken cognisance of the Staff Regulations and Rules and that he accepted their conditions. His appointment was an initial fixed-term appointment which, by virtue of Rule 104.6 (c) was subject to a period of probation of nine months. By virtue of Regulation 9.1 the Director-General may terminate the appointment of a staff member at any time if his services cease to be satisfactory. A staff member whose appointment is terminated under this regulation and who holds a fixed-term appointment and has not completed the probationary period, is by virtue of Rule 109.6 (a) (iii) entitled to one month's notice. It was in accordance with these regulations that the Director of the Bureau of Personnel gave to the complainant on 20 June 1963 one month's notice of termination.

3. The decision of the Director-General was therefore based upon his conclusion that the services of the complainant had ceased to be satisfactory. In arriving at this conclusion the Director-General was exercising his discretion. Therefore, while the Tribunal is competent to review this decision in so far as, on the one hand, it may have been taken by a person without authority, or in an irregular form, or if there may have been a failure to comply with recognised procedure or, on the other hand, if it may be tainted by an error of law or based on materially incorrect facts, or if essential material elements had been left out of account or if obviously wrong conclusions had been drawn from the evidence in the dossier, the Tribunal cannot substitute its own opinion for that of the Director-General. In accordance with this principle the only matters which in the circumstances of this case the Tribunal can investigate is whether there may have been a failure to comply with recognised procedure, or whether the decision may have been based upon materially incorrect facts or essential material elements left out of account.

4. The academic qualifications of the complainant have never been questioned. The reason why in the Director-General's opinion the services of the complainant were unsatisfactory was that he lacked the qualities of character necessary to overcome the difficulties admittedly to be encountered in the creation of the college. The material which the Director-General had before him in reaching this conclusion is as follows:

(a) A letter (referred to in the Organisation's response but not produced) from the Minister of Education of Northern Nigeria to Mr. Wilson, the Head of the UNESCO Mission in Nigeria, written two or three weeks after 6 October 1962, the date when the complainant arrived in Zaria, stating that he had doubts regarding the capacity of the complainant to cope with the difficulties encountered and resolve them and about his fitness to carry out his mission with success.

(b) A report from Mr. Wilson made after a visit to the complainant in December 1962. In this report (quoted from but not produced) Mr. Wilson doubted the capability of the complainant to be "incisive, to make firm decisions, to execute these vigorously and to grip the situation firmly, both professionally and administratively" and he expressed the opinion that the complainant lacked the robustness and strength of character and power of leadership necessary to make a complete success of the undertaking.

(c) A letter of 17 January 1963 (which is produced) written by Mr. Dartigue, the Head of the African Division of the Department of Education of UNESCO to the complainant in which Mr. Dartigue told the complainant that he was increasingly disturbed by reports concerning the state of affairs in Zaria; and that he hoped that the complainant would ensure that the pioneering work of the college took root by the end of his probationary period.

(d) A report (which is not produced) made by Mr. Lightfoot, the official of the Department of Education of UNESCO in charge of the project made as a result of a visit to Zaria on 5 and 6 February 1963.

(e) Other verbal and written reports (unspecified and not produced) received from Nigeria in April and May 1963.

(f) A letter of criticism (quoted from but not produced) written by the Nigerian Minister of Education on 26 April 1963.

(g) An oral report by Mr. Wilson made as a result of a visit to the complainant on 23 May 1963 at which he suggested to the complainant that at the end of his probationary period he should resign and at which the complainant said that he did not intend to resign.

5. The complainant has pointed out that Rule 104.11 of the Staff Regulations provides that copies of reports on a staff member must be supplied to the individual concerned and he must be given the opportunity of discussing them. Furthermore, before a decision to his detriment is taken, every official should have the opportunity of

acquainting himself with the elements taken as the basis for this decision and of explaining himself with regard to them. It is not clear to what extent Rule 104.11, if it was applicable, and this fundamental principle of the right to be heard, were observed in the case of the reports referred to above and therefore without making further inquiries the Tribunal is not in a position to decide whether there may have been a failure to comply with recognised procedure.

6. It is also an important part of the complainant's case that the Director-General did not give full weight to the initial difficulties with which the complainant was faced. It is possible therefore that in this respect the Director-General left essential matters out of account in reaching his decision. Without seeing the full text of the reports on which the Director-General acted the Tribunal cannot pronounce on this.

7. If therefore the Tribunal had to decide whether or not to quash the decision of the Director-General, it would be necessary for it to demand further evidence. But the substantial claim which the Tribunal has to consider is a complaint that the compensation which the complainant has already received is inadequate. In accordance with Rule 109.7 the complainant has received an indemnity amounting to 120 days' salary. Furthermore, the Director of the Bureau of Personnel by letter dated 8 August 1963 extended the period of notice from one month to three months; while granting leave to the complainant during the extended period. Finally, the Director-General, in accordance with the opinion of the Appeals Board, paid to the complainant as compensation a sum equivalent to a further three months' salary. Thus the complainant has received in all by way of compensation a sum equal to nine months' salary. Taking into account the fact that the appointment was terminated when it was still in the probationary period, the Tribunal considers that this compensation would be adequate even on the assumption that the decision to terminate the complainant's appointment was wrongful. Therefore an inquiry into whether the decision was wrongful or not would be without object.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment, delivered in public sitting in Geneva on 10 April 1965, by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Hon. Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

M. Letourneur  
André Grisel  
Devlin  
Jacques Lemoine