

SIXTY-THIRD SESSION

***In re* LEPRINCE**

(Interlocutory order)

Judgment 876

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Georgette Leprince against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 29 December 1986, UNESCO's reply of 9 March 1987, the complainant's rejoinder of 10 April and UNESCO's surrejoinder of 4 June 1987;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, UNESCO Staff Regulations 1.2, 10.2 and 11.1 and 2, UNESCO Staff Rules 110.2(a) and 111.1 and 2, paragraph 5 of the Statutes of the UNESCO Appeals Board and Article 18 of the Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the Organization;

Having examined the written evidence;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Shortly after joining the staff of UNESCO in Paris in 1969 the complainant, a Frenchwoman, moved to the Director-General's Executive Office. She reached grade G.5 in 1977 on becoming senior secretary to the director of the Office.

She reported for duty at 9 a.m. on Monday, 6 May 1985, after a fortnight's leave. Mrs. Fatimata Diarra, a citizen of Niger, had, during her absence, been made secretary to the deputy director of the Office, Mr. Lijadu, and was to share a room with her and a third secretary. Mrs. Diarra set about moving the furniture and a quarrel broke out in which they came to blows. The complainant snatched from a drawer of her overturned desk a tear-gas spray she kept there to protect herself with should she go home late at night. She turned on the spray and the scuffle ended just as an attendant, having heard cries, rushed up. The medical service gave the complainant first aid and found bruises and swellings on her head, arms and back and a scratch on her leg. They prescribed six days' sick leave, and so did her own doctor, who saw her that evening. On the strength of later X-rays she was granted another week's leave.

The very same day she had written a minute to the director of the Executive Office, Mr. Békri, about what had happened. On 3 June she sent the Director-General a letter citing that minute, alleging physical and moral injury and asking for support in suing Mrs. Diarra in the French courts or, if immunity was not waived, proper redress. The Director of the Bureau of Personnel saw her on 10 June and handed over a minute dated 7 June upbraiding her for "untoward" and "reckless" behaviour. On 24 June a personnel officer informed her in writing that as from 1 July she would hold another G.5 post, SHS.038, as senior secretary to the Assistant Director-General for Social and Human Sciences. Mrs. Diarra was transferred too and she too got a minute dated 7 June from the Director of Personnel that spoke of her "untoward" and "reckless" behaviour. On 17 July the complainant wrote to the Director-General objecting to the transfer. On 19 July the Director of Personnel wrote in answer to her letter of 3 June that "the inquiry carried out" had been inconclusive. On 16 August she wrote again to the Director-General pointing out that she had not yet had her say and asking for a proper inquiry and "help and protection" in the suit she meant to file with the French courts. On 28 August the Director confirmed her transfer and on 20 September refused her demands of 16 August.

On 20 August 1985 she had claimed under the Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the Organization. In a report of 3 February 1986 the Advisory Committee on Compensation recommended an award but on 31 October 1986 its acting secretary wrote to say the Director-General had refused on the grounds that the quarrel had been a personal one. On

12 November she applied for reconsideration by the Advisory Committee under Article 18 of the rules on compensation.

The complainant lodged two internal appeals, one on 10 October 1985 against her transfer and the other on 18 January 1986 seeking an inquiry. In a report of 12 September 1986 four of the five members of the Appeals Board held that it was not competent under paragraph 5 of its Statutes to hear the later appeal, and they recommended rejecting on the merits the challenge to the transfer. The fifth member recommended a full inquiry and reinstatement. By a letter of 1 October 1986, the decision impugned, the Director-General told the complainant he endorsed the majority report.

B. While acknowledging the Director-General's right under Staff Regulation 1.2 to transfer staff, the complainant submits that in this case there were fatal flaws in his exercise of it.

(1) He overlooked essential facts and drew wrong conclusions from the evidence. Mrs. Diarra's account in a minute dated 6 May 1985 to her supervisor is untrustworthy. She showed no injuries and got no sick leave whereas the complainant was so unwell as to be off work for a fortnight. In a statement he signed on 6 May the attendant affirmed that Mrs. Diarra had been holding her down on the floor. Mrs. Diarra is aggressive whereas the complainant is eventempered, as is plain from her annual reports and other evidence. She acted in reasonable self-defence, as a proper inquiry would have shown. Mrs. Diarra was so enraged she upset the complainant's desk, which weighed a hundredweight.

(2) The Director-General misused his authority by imposing a hidden disciplinary sanction. The transfer damaged her dignity, honour and career prospects. That it was punitive is clear from the Director of Personnel's minute of 7 June 1985 - in itself a censure, even though allegedly not put in her personal file - from his talk with her on 10 June; from the gentler treatment meted out after other quarrels in the Organization; and from the precariousness and lesser distinction of her new assignment. The rules on sanctions in Chapter X of the Staff Regulations and Staff Rules were disregarded. Mrs. Diarra has been treated with undeserved leniency and has fared better than her victim: for example, the Director of Personnel asked whether she agreed to a transfer.

(3) The procedure followed was improper. (a) There ought to have been an impartial inquiry in which the complainant was given her say. The Director-General may not evade inquiry on the grounds that the sanction is not covered by the rules. The complainant was denied the safeguard of Staff Rule 110.2(a):

"No disciplinary measure, other than written censure or summary dismissal shall be imposed on a staff member until the case has been referred by the Director-General to a Joint Disciplinary Committee for advice ...".

The inquiry the Director of Personnel made was not impartial since the complainant was never even told of it beforehand, let alone given a hearing. The Joint Committee is a responsible body that could have carried out a thorough and proper investigation. Its proceedings are confidential and would not have aggravated the scandal. Besides, whatever the rules say, the complainant has a fundamental right to a hearing. She did not even see Mrs. Diarra's minute dated 6 May 1985 until 12 September 1986. (b) Even supposing the transfer was not punitive she ought in all fairness to have been consulted before the decision was taken. The Director of Personnel announced it to her as final but did not even tell her what post she would get. That was unfair and off-hand treatment of someone with her record, especially when Mrs. Diarra was duly consulted and there were 27 G.5 vacancies at the time. (c) The chairman of the Appeals Board made serious procedural mistakes in the proceedings before it.

(4) The Organization failed to respect the complainant's dignity and good name. It let doubt linger about the seemliness of her behaviour, refused an inquiry that would have cleared her, treated her more roughly than Mrs. Diarra, overlooked her record and was inconsiderate and unkind. Even if the decision were lawful she would be entitled to redress under this head.

She seeks disclosure of the report by the Advisory Committee on Compensation, the quashing of the impugned decision, such damages as the Tribunal sees fit and her full costs.

C. The Organization gives its own account, observing that since no-one saw the quarrel break out it is hard to find out what happened.

The Director-General did not overlook any essential fact; after thorough inquiry he found it scarcely possible to allot blame. Mr. Lijadu questioned the complainant and Mrs. Diarra, and so did the Director of Personnel, who also

saw Mr. Lijadu, Mr. Békri and an administrative assistant. Since there were no eye-witnesses there was no point in further questioning the complainant and Mrs. Diarra, who would have held to their original, contradictory, versions. The complainant's contention that Mrs. Diarra was to blame does not hold water. Her own record of service is immaterial, even though it was one reason for not following the disciplinary procedure. Besides, Mrs. Diarra too has a good record, her annual reports praising her as patient, good-tempered and conscientious. Since the complainant did get hold of the spray how could Mrs. Diarra have been holding her on the floor, as the attendant said? In any case the use of tear gas indoors constituted unwarranted bodily assault. Mrs. Diarra suffered injuries besides the grievous effects of the tear gas, only they showed up less clearly on her black skin: in any case blame does not turn on the degree of injury inflicted. A woman of her height and weight could not have lifted the complainant's desk.

To the complainant's other arguments UNESCO replies as follows. (1) There was no obligation to refer the matter to the Joint Disciplinary Committee, which is not an investigating body. It is ordinarily brought in only when the Director-General has disciplinary action in mind, and in this case he decided that it was neither in the Organization's interests nor in the complainant's to add to the publicity. (2) The transfer was ordered in the Organization's interests because the incident had threatened its good name and efficiency. Since both officials were at fault both were transferred. Though the complainant would no doubt rather have stayed where she was, the Organization's own interests had to prevail. (3) The complainant was not punished. The Director of Personnel's minute of 7 June 1985, which is not in her personal file, was not a sanction. Neither was the transfer, as is plain from the minute of 24 June informing her of it: its sole purpose was to protect UNESCO's interests. There have been no similar cases in UNESCO. (4) The transfer has caused her no injury. Her new duties carry the same grade; she has taken to them well, as her annual report shows; and her post is not precarious. (5) There was no discrimination in Mrs. Diarra's favour. Both officials were given a say in the administrative inquiry; both received a minute reproving their behaviour; and both were transferred, and on the same day. (6) The procedure followed was correct. The Organization held an inquiry in which it heard both officials and their supervisors. At their meeting on 10 June 1985 the Director of Personnel told the complainant she was to be transferred. She had no right to choose her new assignment, nor to withhold her consent to it, and the Organization abided by the rules on transfer. The proceedings in the Appeals Board were quite proper: in particular its chairman scrupulously respected the parties' rights. (7) The Organization treated the complainant considerately and leniently. Despite her behaviour it refrained from disciplining her and it dealt with her case impartially. So she has no right to redress for moral injury. (8) The report of 3 February 1986 by the Advisory Committee on Compensation is immaterial to the complaint but the Organization will disclose it if the Tribunal so orders.

D. In her rejoinder the complainant objects to the defendant's account as in many respects mistaken, tendentious or inconsistent and she answers in detail the arguments in the reply. In her submission it is odd to say that the transfer was no sanction when the Organization apparently still believes she committed an assault that went beyond the demands of self-defence: if she did, the Organization had a duty to punish her. Mr. Lijadu summoned her on 7 May, not to give her a hearing, but to chide her, and the transfer was the outcome of such an unfair attitude. Though it was punitive there is no provision for such a sanction in the rules, and the disciplinary procedure ought to have been followed.

As to the issues of fact, which she goes into in detail, she maintains that the testimony of two eye-witnesses, the administrative assistant and the attendant, shows that it was Mrs. Diarra who provoked the quarrel. Mrs. Diarra herself has never said she was struck, nor did anyone in the medical service say so at the time or later: UNESCO puts accusations into her mouth. The spray was not the dangerous weapon the Organization makes out. Mrs. Diarra did not "lift" the desk: she tipped it over, the more easily because, the drawers having fallen out, it was lighter. The reports that praise Mrs. Diarra's calm temper were signed on or about the date when the complainant lodged her internal appeal and their wording is strikingly similar to that of the complainant's own reports. Mrs. Diarra is a notoriously bad-tempered woman.

The complainant develops her submissions that there were procedural irregularities, mainly the lack of an impartial inquiry and the failure to consult her on her transfer; that her transfer was punitive; and that she was denied due process. She observes that on 31 March 1987 her supervisor, the Assistant Director-General for Social Sciences, retired and he has not been replaced: her own position and future are under threat.

E. In its surrejoinder the Organization observes that the complainant is turning her complaint into a personal dispute with Mrs. Diarra, a matter that falls outside the Tribunal's competence; that the incident caused it real injury; and that, whatever further inquiry might have revealed, the Director-General had the right and duty to act in

the Organization's interests and indeed did so in transferring the two officials.

The Organization enlarges on its own main contentions, namely that the Director-General saw no need to take disciplinary action or to consult the Joint Disciplinary Board on a decision that was no sanction. The complainant's allegations of vicious assault are eccentric. It is immaterial who overturned the desk: the Organization merely wished to show up the complainant's tendency to exaggerate. The Organization explains further why to its mind there were no procedural flaws and the complainant has suffered neither material nor moral injury. It observes in particular that she has been given an assurance that her employment is not in jeopardy; besides, she may not seek redress for injury she merely fears.

CONSIDERATIONS:

1. The complainant seeks the quashing of a decision that was notified to her on 24 June 1985 and confirmed on 28 August 1985. After referral to the Appeals Board the final decision of 1 October 1986 was notified on 6 October, and the complainant filed her complaint on 29 December 1986.

The complaint is therefore receivable under Article VII(1) and (2) of the Statute of the Tribunal, UNESCO Staff Regulations 11.1 and 11.2 and UNESCO Staff Rules III.1 and 111.2.

2. The complainant does not actually apply for oral proceedings in her original complaint but seeks permission to make an application later to that effect should she wish to do so.

She also seeks disclosure of a report of 3 February 1986 by the Advisory Committee on Compensation, and in its reply the Organization suggests that the Tribunal decide whether to order such disclosure.

In her rejoinder the complainant asks the Tribunal to order disclosure by the Organization of the full report on the administrative inquiry it says was carried out and of the Advisory Committee's report and the full records put to that Committee.

In an application dated 10 April 1986 she asks the Tribunal to hold oral proceedings.

In its surrejoinder the Organization invites the Tribunal to decide at its discretion as to disclosure both of the Advisory Committee's report and the report by the Personnel Department and as to the application for oral proceedings.

3. A ruling on the lawfulness of the impugned decision requires disclosure of the papers the complainant cites and indeed the Organization is not against disclosing them.

4. The Tribunal orders further submissions as follows:

(a) The Organization shall disclose, within thirty days of the date of notification of this judgment, the full records of the inquiry into the incident that prompted the complaint, and the report dated 3 February 1986 of the Advisory Committee on Compensation and the material records.

(b) The Registrar shall forward those papers to the complainant's counsel, who may submit comments thereon within sixty days.

(c) The Organization shall file its final submissions within a further time limit of sixty days.

5. All other questions are reserved.

DECISION:

For the above reasons,

The Tribunal orders the further submissions set out in 4 above.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner,

Registrar.Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mella Carroll
H. Gros Espiell
A.B. Gardner

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