JUDGMENTS OF THE ADMINISTRATIVE TRIBUNAL OF THE ILO UPON COMPLAINTS MADE AGAINST UNESCO

Advisory Opinion of 23 October 1956

This advisory opinion dealt with the matter of the judgments of the Administrative Tribunal of the International Labour Organisation (ILO) upon complaints made against the United Nations Educational, Scientific and Cultural Organization (Unesco).

By a Resolution adopted on November 25th, 1955, the Executive Board of Unesco decided to submit the following legal questions to the International Court of Justice for an advisory opinion:

"I. Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against Unesco on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

Continued on next page

"II. In the case of an affirmative answer to question I:

"(*a*) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

"(*b*) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of Unesco, 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?

"III. In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?"

Upon the receipt of a Request for an Opinion the Court gave those States Members of Unesco which were entitled to appear before the Court, as well as the ILO and international organizations which had recognized the jurisdiction of the Administrative Tribunal of the ILO, an opportunity to present their views. Several States availed themselves of this opportunity. Unesco did likewise: to its written statements, the Organization appended the observations which had been formulated by counsel acting on behalf of the officials concerned. Adequate information having thus been made available to it, the Court did not hold oral hearings.

The Court having decided by 9 votes to 4 to comply with the Request for an Opinion, gave an affirmative answer to Question I by 10 votes to 3. By 9 votes to 4, the Court was of opinion that Question II did not call for an answer by the Court and, with regard to Question III, by 10 votes to 3, that the validity of the Judgments was no longer open to challenge.

Judge Kojevnikov, whilst voting in favour of the decision of the Court to comply with the Request for an Opinion, and of the final part of the Opinion itself with regard to Questions I and III declared that he was unable to concur in the view of the Court on Question II.

Three Judges, Messrs. Winiarski and Klaestad and Sir Muhammad Zafrulla Khan, appended to the Opinion of the Court statements of their separate Opinions. President Hackworth, Vice-President Badawi and Judges Read and Cordova appended to the Opinion of the Court statements of their dissenting Opinions.

*
* *

In its Opinion, the Court noted that the facts were essentially the same in all four cases and referred solely to the case of Mr. Peter Duberg (Judgment No. 17). He had held a fixed-term appointment with Unesco which was due to expire on December 31st, 1954. In 1953 and 1954 he had refused to answer two questionnaires of the Government of the United States designed to make available to the Director-General of Unesco certain information concerning United States citizens employed by that Organization. Having received an invitation to appear before the International Organizations' Employees Loyalty Board of the United States Civil Service Commission he refused to do so and on July 13th, 1954 so informed the Director-General of Unesco. On August 13th, the Director-General informed Duberg that since he was unable to accept his conduct as being consistent with the high standards of integrity which were required of those employed by the Organization, he would not offer him a new appointment on the expiry of his contract. Previously, in a Memorandum issued on July 6th, 1954, the Director-General had announced his decision that all holders of fixed-term contracts expiring at the end of 1954 or at the beginning of 1955, who had achieved the required standards of efficiency, competence and integrity would be offered renewals of their appointments. Despite the opinion to the contrary given by the Unesco Appeals Board to which Duberg had applied, the decision not to renew his contract was maintained. On February 5th, 1955, Duberg brought his complaint before the Administrative Tribunal of the ILO which, in its Judgment of April 26th, 1955, declared itself competent and adjudicated on the merits. These were the circumstances in which the Executive Board of Unesco, challenging the jurisdiction of the Tribunal in that case and consequently the validity of the Judgment, requested an opinion from the Court in reliance upon the provisions of Article XII of the Statute of the Tribunal.

The Court considered at the outset whether it should comply with the Request. It noted in the first place that under Article XII the Opinion would be binding, an effect which went beyond the scope attributed by the Charter of the United Nations and by the Statute of the Court to an Advisory Opinion. However, the provision in question, which was nothing but a rule of conduct for the Executive Board, in no wise affected the way in which the Court functioned.

Furthermore, the advisory procedure thus brought into being appeared as serving, in a way, the object of an appeal against the Judgments of the Tribunal. The advisory proceedings which thus took the place of contentious proceedings were designed to provide that certain challenges relating to the validity of Judgments rendered by the Tribunal in proceedings between an official and the international organization concerned should be brought before the Court whereas under the Statute of the Court only States may be parties in cases before it. The Court was not called upon to consider the merits of such a solution; it must consider only the question whether its Statute and its judicial character did or did not stand in the way of its participating therein. However, contrary to accepted practice, the advisory proceedings which had been instituted in the present case involved a certain absence of equality between Unesco and the officials concerned. In the first place, under the provisions of the Statute of the Administrative Tribunal only the Executive Board of Unesco was entitled to institute these proceedings. But this inequality was antecedent to the examination of the question by the Court and did not affect the manner in which the Court undertook that examination. In the second place, in connection with the actual procedure before the Court, although the Statute and the Rules of Court made available to Unesco the necessary facilities for the presentation of its views, in the case of the officials, the position was different. But this difficulty was met on the one hand because the observations of the officials were made available to the Court through the intermediary of Unesco and on the other because the oral proceedings had been dispensed with. In view of this there would appear to have been no compelling reason why the Court should refuse to comply with the Request for an Opinion.

The Court then dealt with the first question put to it. It noted that according to the words of the provision of the Statute of the Administrative Tribunal, it was necessary, in order to establish the jurisdiction of the Tribunal to hear a complaint by an official, that he should allege non-observance of

the terms of appointment or of the provisions of the Staff Regulations. It was therefore necessary that the complaint should appear to have a substantial and not merely an artificial connection with the terms and the provisions invoked although it was not required that the facts alleged should necessarily lead to the results alleged by the complainants, for the latter constituted the substance of the issue before the Tribunal.

In the cases in question, the officials had put forward an interpretation of their contracts and of the Staff Regulations to the effect that they had a right to the renewal of their contracts. Was this assertion sufficiently well-founded to establish the competence of the Tribunal? To answer that question, it was necessary to consider the contracts not only by reference to their letter but also in relation to the actual conditions in which they were entered into and the place which they occupied in the Organization. In the practice of the United Nations and of the Specialized Agencies, holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, had often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the Organization. This practice should serve as a warning against an interpretation of fixed-term contracts which, by considering exclusively the literal meaning of their provision relating to duration would mean that on the expiry of the fixed period a fixed-term contract could not be relied upon for the purpose of impugning a refusal to renew. Such an interpretation, moreover, would fail to take into account the nature of renewal of such a contract, which indeed constituted a continuing period of the former contract, with the result that there was a legal relationship between the renewal and the original appointment. This relationship which constituted the legal basis of the complaints of the officials showed itself once more in the Director-General's Administrative Memorandum of July 6th, 1954, cited above. The Court considered that it could be reasonably maintained that an administrative notice framed in such general terms might be regarded as binding on the Organization. If the Director-General thought fit to refuse an official the benefit of the general offer thus extended, any dispute which might arise with regard to the matter fell within the jurisdiction of the Administrative Tribunal.

Furthermore, the Court noted that before the Tribunal both the complainants and Unesco had placed themselves on the ground of the provisions of the Staff Regulations, within whose terms the Administrative Memorandum of July 6th also fell. In the view of the Court the Memorandum constituted a modification of the Staff Rules which the Director-General was authorised to make under the Staff Regulations. It also referred, expressly or by implication, to the text of the Staff Regulations and in particular to the notion of integrity around which centred the controversy submitted to the Administrative Tribunal. Accordingly, whether looked at from the point of view of non-observance of the terms of appointment or of that of non-observance of Staff Regulations the complainants had a legitimate ground for complaint and the Tribunal was justified in confirming its jurisdiction.

For these reasons the Court gave an affirmative answer to Question I. With regard to Question II the Court pointed out that a Request for an Opinion expressly presented within the orbit of Article XII of the Statute of the Administrative Tribunal ought to be limited to a challenge of a decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Since Question II referred to neither of these two grounds of challenge the Court is not in the position to answer Question II.

The Court, having thus rejected the contention relating to the jurisdiction of the Administrative Tribunal, the only contention raised by the Executive Board of Unesco, answered Question III by recognizing that the validity of the four Judgments was no longer open to challenge.