

Judgement No. 53

Case No. 36 :
Wallach

Against: **The Secretary-General
of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. Sture Petré, Vice-President ;

Whereas the application of Eugene Wallach, filed on 17 February 1953, was considered by the Tribunal and pronounced upon in its Judgement No. 28 of 21 August 1953 ;

Whereas the Tribunal found in the said Judgement that the submission of the case was not in accordance with article 7 of the Statute of the Tribunal and that the case should be the subject of proper and appropriate procedure through the Joint Appeals Board ;

Whereas the Secretary-General informed the Applicant by letter of 16 February 1954 that the Joint Appeals Board had submitted its report on his case and that he had decided to adopt the findings of the majority of the Board and therefore to reaffirm the Applicant's summary dismissal ;

Whereas the Applicant filed a further application to the Tribunal on 17 May 1954, incorporating therein the application which was filed on 17 February 1953, and making the following additional claims :

- " 1. Rescission of the dismissal.
2. Full salary from the date of the dismissal, 20 June 1952, to the date of its rescission.
3. Termination indemnities which applicant would have received had he not been dismissed summarily, and which should include the United Nations contribution to the Pension Fund payment.
4. Full salary from the date of the dismissal until the date of the Appeals Board conclusions and recommendations.
5. The costs of this appeal.
6. The Secretary-General had rejected applicant's request for payment of the \$300 in costs heretofore ordered by the Tribunal. The applicant requests a supplementary order directing satisfaction of this aspect of its judgement."

Whereas the Respondent filed his reply to this application on 21 May 1954 ;

Whereas the facts as to the Applicant are as follows :

The Applicant entered the service of the United Nations as a verbatim reporter in the Editorial Division of the Department of Conference and General Services on 20 August 1946. After serving on a temporary (later, temporary-indefinite) contract, the applicant received a permanent contract on 21 August 1947. At the time of his dismissal, the Applicant held the post of editor-verbatim reporter. The Applicant appeared as a witness before a Federal Grand Jury on several occasions between 9 and 19 June 1952. Arising out of press reports that at these meetings the Applicant had invoked the privilege under the Fifth Amendment to the Constitution of the United States and refused to reply to certain of the questions put to him, the Applicant was questioned on 17, 18 and 20 June 1952 by the Administration as to the accuracy of statements on the application form submitted by him in 1946 with a view to employment by the United Nations. The Applicant having refused to answer certain of the Administration's questions, the Secretary-General, by letter of 20 June 1952, notified the Applicant that his refusal constituted serious misconduct and that he was therefore summarily dismissed under the terms of Staff Regulation 10.2. On 30 June 1952, the Applicant requested the Administration to cancel its decision of summary dismissal or, if the request was not granted, that the Secretary-General should waive any procedure before the Joint Appeals Board and that he should agree to a hearing directly before the Administrative Tribunal. On 9 July 1952, he was informed that the summary dismissal was confirmed and that the Secretary-General did not approve the Applicant's request to waive the Appeals Board's hearing. The Applicant was thus obliged to follow the regular procedure and filed his appeal with the Secretary of the Appeals Board. After receiving the Board's report on the case, the Secretary-General informed the Applicant, on 23 October 1952, that he reaffirmed his decision of summary dismissal. On 9 December 1952, the Applicant filed an application to the Tribunal which was returned to him for completion in accordance with the new Rules. On 17 February 1953, the Applicant filed his completed application to the Tribunal requesting reinstatement in the post previously held by him.

In accordance with Judgement No. 28, the Joint Appeals Board reconsidered the case and, on 7 January 1954, submitted its conclusions and recommendations to the Secretary-General who, on 16 February 1954, reaffirmed the Applicant's summary dismissal for serious misconduct.

Whereas the Applicant's principal contentions, as set forth in Judgement No. 28, are that:

(a) The procedure employed by the Secretary-General prior to dismissal of the Applicant was irregular and his failure to refer the case to the Joint Disciplinary Committee violated the terms of Staff

Rule 140 (c) of the Staff Rules issued in July 1951 which the Applicant claims are applicable to him ;

(b) The dismissal resulted from an illegal agreement between the Secretary-General and the United States State Department to eliminate staff members on political grounds and was therefore in violation of the Charter and the Staff Regulations ;

(c) The dismissal resulted from pressure improperly exercised by United States agencies upon the United Nations in violation of the Charter ;

(d) The dismissal violated the Applicant's right to independent political convictions as guaranteed to staff by the Staff Regulations and infringed the rights set forth in the Universal Declaration of Human Rights ;

(e) The Applicant denies conduct which is unsatisfactory and contends that in any case summary dismissal cannot be justified under the Staff Regulations unless the misconduct is of an obviously flagrant and reprehensible nature ;

(f) The Secretary-General's action constituted denial of due process of law ;

(g) The Secretary-General's action constituted an infringement of the Applicant's acquired contractual rights.

(h) In addition, it is pointed out in the application filed on 17 May 1954 that the failure of the Secretary-General to make the Applicant whole for the financial losses which he suffered as the result of the invalid Appeals Board decision is wholly at odds with the precedents of this Tribunal and transfers to the Applicant responsibility for the Secretary-General's default.

Whereas the Respondent's answer as advanced in his original brief is that :

(a) The Secretary-General was obliged to inquire into the question whether the Applicant had deliberately withheld material information in his application for employment by the United Nations ;

(b) The Applicant's refusal to answer questions put by his superior officers gave rise to the inference of fraud and constituted serious misconduct justifying summary dismissal ;

(c) The Secretary-General is empowered to decide upon summary dismissal for serious misconduct without reference to the Joint Disciplinary Committee under the powers given him by the new Staff Regulations. The Applicant cannot in any case invoke the protection of acquired rights with respect to matters of procedure ;

(d) There was no improper connexion between the action taken by the Secretary-General and the investigation by the Federal Grand Jury with respect to matters of procedure ;

(e) Respondent added in the answer of 21 May 1954 that

modifications of procedure which were introduced subsequent to the appointment of the Applicant fall into the "statutory" category, as expressed in Tribunal Judgement Nos. 19-25 and 27 and that therefore "acquired rights" cannot be invoked.

The Tribunal having deliberated until 29 May 1954, now pronounces the following judgement:

1. Under its Statute the Tribunal is not competent to pass judgement on the validity, in relation to the Charter, of an agreement made between the Secretary-General and a Member State, whatever influence this agreement may actually have had on the decision taken in regard to the Applicant. It is the Tribunal's duty, however, to consider whether the termination of the Applicant's appointment is in conformity with the provisions of the Staff Rules and Regulations.

2. The Applicant contends that his employment contract included Staff Regulation 23 (a) and Staff Rule 140 (c) which did not permit the Secretary-General to take any disciplinary action without prior submission to the Joint Disciplinary Committee.

Even if Staff Rule 140 (c) was no longer effective in consequence of the new Staff Regulation 10 adopted at the sixth session of the General Assembly and in force on 1 March 1952, the Applicant contends that he had acquired the contractual right to the procedures and guarantees established by the terms of Staff Rule 140 (c). He submits that relations between the United Nations and its staff are contractual in nature and that consequently the two parties are bound by the contract and neither party may change its provisions without the consent of the other.

He points out in addition that Regulation 28 of the former Staff Regulations states that: "These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of members of the staff"; and that this provision was reproduced in Regulation 12.1 of the new Staff Regulations.

Accordingly the principles of contract law as well as the express provisions of the Secretariat employment contract preclude any deprivation of Applicant's established rights to the Joint Disciplinary Committee safeguards.

3. The Tribunal considers that relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature.

Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them.

The General Assembly under that Article established new Staff Regulations and decided that these new Staff Regulations should become effective on 1 March 1952 and supersede all previous staff regulations.

It follows from the foregoing that notwithstanding the existence of contracts between the United Nations and staff members, the legal regulations governing the staff are established by the General Assembly of the United Nations.

In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements :

All matters being contractual which affect the personal status of each staff member, e.g., nature of his contract ; salary grade ;

All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning, e.g., general rules that have no personal reference.

While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members.

The Tribunal interprets the provisions of Regulation 28 of the Provisional Staff Regulations and article XII of the new Staff Regulations in this manner.

With regard to the case under consideration the Tribunal decides that a statutory element is involved and that in fact the question of the procedure to be followed in the case of disciplinary measures is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked.

Consequently Staff Regulation 10.2 which gives the Secretary-General the power to make summary dismissal for serious misconduct has been immediately binding on all members of the staff.

4. The Applicant submits that the extreme summary dismissal penalty could be justified only when the proven misconduct obstructs the work or endangers the safety of the Secretariat organization or when acts of immorality are perpetrated in the course of official duties.

In earlier judgements the Tribunal has stated that the conception of serious misconduct enabling the Secretary-General to inflict summary dismissal without disciplinary procedure was introduced at the revision of the Staff Regulations to deal with acts obviously incompatible with continued membership of the staff.

Except in cases of agreement between the person concerned and the Administration, the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent and where the interest of the service requires immediate and final dismissal.

5. In the present case, the Applicant contends that the interviews which led to his dismissal were merely a repetition of the hearing he had undergone before the Federal Grand Jury, and concerned only his past political affiliations, without any connexion with the performance of his professional duties. He states that he failed to answer the

questions on the grounds, *inter alia*, of his apprehension that the answers given by him to a staff member who was a United States national then subject to interrogation by the United States authorities might be communicated to those authorities in the course of the interrogation.

The Tribunal notes that the Applicant's summary dismissal took place after three interviews with the principal Director of his Department and the Director of Personnel. In the course of these interviews, the Applicant had certain questions put to him, which concerned primarily the accuracy of the information supplied by him in the application form he had completed before entering the service of the United Nations. In this connexion, he was examined about his appearance before the Grand Jury and as to allegations that he had worked for the Communist Party in 1945 or 1946.

The Tribunal notes that the Applicant in fact failed to answer such questions.

6. The Tribunal observes that the questions put to the Applicant were related to certain replies given by him in his original application form completed before entering the service of the United Nations.

This document is purely administrative. It is clear that, for an international organization, the accuracy of the information thus supplied by candidates applying for a post is most important.

In these circumstances, it is to be expected that any suspicion of inaccuracy should be the subject of an administrative inquiry which the Secretary-General, in his capacity as Chief of the Administration, is entitled to prescribe, and to which the interested parties are obviously bound to submit.

7. The Applicant had been warned that his attitude might entail serious consequence to his administrative career.

He had been reminded that he had signed a declaration at the foot of his application form (the text of which had been recalled to his attention during the interviews) in the following terms:

"I, the undersigned, certify that the statements made by me above are full and true to the best of my knowledge and belief. I understand that any wilful mis-statement renders me liable to instant dismissal, if employed."

Prior to the last interview on 20 June 1952, the Applicant received a written notice from the Director of Personnel, stating that "your continued failure to answer questions bearing on the truth or falsity of statements which you have made in your employment application to the United Nations constitutes serious misconduct and cause for summary dismissal."

The Applicant's persistent refusal to answer, and his demands for specific guarantees in the course of an Administrative inquiry of this

nature could properly have been considered by the Secretary-General as "acts obviously incompatible with continued membership of the staff" which accordingly justify the summary dismissal of the official concerned.

8. Now, therefore, the Tribunal rejects the Applicant's claim.

9. As to costs, the Tribunal has nothing to add to the terms of its Judgement No. 28 on this matter.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

Sture PETRÉN
Vice-President

Mani SANASEN
Executive Secretary

Paris, 29 May 1954

Judgement No. 54

Case No. 56 :
Mauch

Against: **The Secretary-General
of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Sture Petré, Vice-President; Mr. Jacob Mark Lashly, alternate member;

Whereas Marie-Madeleine Mauch, former member of the Library staff of the United Nations European Office, filed an application to the Tribunal on 21 January 1954 requesting:

(a) The rescission of the decision of 25 February 1953, confirmed by the Secretary-General on 21 October 1953, whereby the Applicant was separated from the service of the United Nations;

(b) The rescission of the decision by the Assistant Secretary-General in charge of Administrative and Financial Services taken on 1 December 1953 whereby the Applicant was refused a new medical examination;

(c) Compensation and costs;

(d) as preliminary measures

(i) The communication of the Applicant's administrative file;

(ii) The communication of the file containing the various documents