

STRIKES BY INTERNATIONAL OFFICIALS: SMITH V. THE SECRETARY-GENERAL OF THE UNITED NATIONS

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I. INTRODUCTION

The Charter of the United Nations provides that UN staff "shall be appointed by the Secretary-General under regulations established by the General Assembly."¹ It follows that the employment relationship between the United Nations and its staff is not subject to national law.²

Insofar as the United Nations and other international organizations are concerned, specific regulatory provisions aimed at strikes are a recent innovation.³ As the phenomenon of strikes began to appear in international organizations, a number of those organizations reacted by withholding the salary of striking

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1. U.N. CHARTER, art. 101, para. 1. Article 100, paragraph 2 provides that each member state of the United Nations "undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff . . ."

2. The General Assembly has established Staff Regulations which embody "the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat." (Scope and purpose provision, U.N. Doc. ST/SGB/Staff Regulations/Rev. 12). Staff Regulation 12.2 gives the Secretary-General power to establish Staff Rules to implement the Staff Regulations. The staff are, of course, also governed by applicable provisions in the UN Charter and by applicable resolutions and decisions of the General Assembly, even though the resolutions and decisions are not incorporated into the UN Staff Regulations. The Secretary-General also issues Administrative Instructions, Information Circulars and other general directives dealing with specific matters. The United Nations Administrative Tribunal (see note 29 *infra*) has held that these documents have the same force and effect as the UN Staff Rules unless inconsistent with the UN Staff Regulations. See, e.g., *Powell v. Secretary-General of the United Nations*, Judgments U.N. Ad. Trib. No. 237, U.N. Doc. AT/DEC/237 (1979).

3. Strikes in the United Nations are a relatively recent phenomenon. See note 13 *infra* and accompanying text. The 1954 Report on Standards of Conduct in the International Civil Service prepared by the International Civil Service Advisory Board, although silent on the question of strikes, clearly does not contemplate that such activity would be undertaken by international civil servants. U.N. Doc. COORD/CIVIL SERVICE/5 (1954) (see especially paras. 56 and 57).

officials despite the absence of specific statutory provisions dealing with the consequences of strikes.

The absence of specific statutory authority to withhold the salary of an international civil servant participating in a strike was considered in *Domergue v. Secretary-General of the Organization for Economic Co-operation and Development* (OECD).⁴ The claimant took part in a two-day strike in February 1965 and had two days' pay deducted from his salary. The OECD Appeals Board upheld the action of the Administration. The Appeals Board pointed out that the salary withholding was a necessary consequence of absence from work and, as a result, was not dependent upon the existence of statutory authority or advance warning. It appears that the Appeals Board was importing into the employment relationship a principle which was considered so basic that it did not need to be spelled out in the employment contract or in a staff regulation or other applicable statutory rule; the withholding of salary was a "necessary consequence" of participating in a strike.⁵

A possible foundation for this "necessary consequence" was suggested in *Acton v. The Commission of the European Communities*.⁶ Staff of the various institutions of the European Communities went on strike for five days in December 1972. Eventually the Commission decided to withhold salaries of its staff members for a period of two days. The Court upheld this decision, noting that it was a recognized principle of labour law of the member states of the European Communities that employees had no right to wages and other benefits pertaining to periods when the employees were on strike.⁷ The Commission could therefore apply this principle to its officials. The Court also noted that upholding the salary deduction did not imply any decision on whether the officials had the right to strike. Furthermore, as the withholding

4. O.E.C.D. App. Bd., Decision No. 39 (1965). An English translation appears in 38 I.L.R. 448 (1969).

5. *Id.* at 449.

6. 1975 European Court Rep. 383.

7. *Id.* at 395. The Commission in its submission to the Court provided a detailed comparative analysis of the law of member states which demonstrated that no remuneration is due to officials in the absence of services rendered, particularly as a consequence of participation in an organized stoppage of work. The Commission noted that this "principle is accepted without exception in the Member States, and is of very general application, whether it flows from the law, from case-law or simply from accepted administrative practice." *Id.* at 390.

of salary was merely the consequence of failure to perform official duties, it was not a disciplinary measure calling for the utilization of the procedures in the applicable Staff Regulation.⁸

The application of principles of labour law and the practice of member states of an international organization were elevated onto a somewhat higher level by the Administrative Tribunal of the International Labour Organization (ILO) in the case of *Rempp v. International Patent Institute*.⁹ In that case, the ILO Administrative Tribunal upheld the action of the International Patent Institute in withholding the salary of officials who had participated in a strike, and noted that according "to a principle of international public service salary is generally payable only for services rendered, and so the Institute was right to refuse to pay a staff member who went on strike for the period in which he did not work."¹⁰

II. LEGISLATIVE REGULATION OF THE CONSEQUENCES OF STRIKES BY UN OFFICIALS

There was a serious work stoppage at the United Nations Office at Geneva from 25 February to 3 March 1976. After settlement of the strike by the Secretary-General on terms which included no salary withholding, the Joint Inspection Unit (JIU)¹¹ presented a report¹² on the strike to the Fifth Committee of the General Assembly. The report noted that:

8. It is noteworthy that the Court also held that absences caused by participation in strikes were not within the scope of a Staff Regulation which provided that unauthorized absences should be deducted from annual leave because this provision was aimed at individual absences and not participation in collective actions. *Id.* at 395. This Regulation is similar to U.N. Staff Rule 105.1(d) which was adopted in 1952, a time when it was clear that the Rule was aimed at individual absences and was not aimed at an individual's participation in collective actions such as strikes. See note 18 *infra*.

9. Int'l Lab. Org. Ad. Trib., Judgment No. 314 (1977). The judgment is summarized in [1977] U.N. JURIDICAL Y.B. 174.

10. *Id.* at 6.

11. The Joint Inspection Unit (JIU) is composed of eleven inspectors appointed by the General Assembly who serve in their personal capacity. The JIU has broad powers of investigation in all matters related to the efficiency and functioning of the United Nations and other international organizations within the United Nations system which accept the Statute of the JIU. The present Statute of the JIU (in force from 1 January 1978), is contained in General Assembly Resolution 31/192 of 22 December 1976. G.A. Res. 192, 31 GAOR Annex (Agenda Item 97) 3, U.N. Doc. A/Res/31/192 (1976).

12. Report on some aspects of the strike at the United Nations Office at Geneva from 25 February to 3 March 1976, U.N. Doc. A/31/137 (1976).

the General Assembly of the United Nations and the general conferences of the various organizations have not yet formulated a position of principle concerning the phenomenon of the international civil servants' strike. This situation is in no way surprising considering the relatively recent origin of this form of action: there were no strikes in the international organizations within the United Nations family until 1962 (ILO, UNESCO), and no strikes of any great length (*i.e.*, several days) until 1974 (the strike at FAO, Rome). It is also a well-known fact that there are wide divergences between the domestic laws of Member States relating to the right of civil servants to strike.¹³

The report, nevertheless, recommended that an appropriate response to the phenomenon of strikes be formulated.

In December of that year, the Fifth Committee considered the JIU report on the strike. The representative of Japan proposed that the draft resolution dealing with the report contain the following provision: "no salary shall be paid to staff members in respect of periods of unauthorized absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons."¹⁴ In explaining this proposal, he noted that it was in response to the spreading phenomenon of work stoppages at a number of duty stations and that the proposal was made without prejudice to the question whether international civil servants have the right to strike.¹⁵ This proposal was ultimately adopted by the General Assembly on 22 December 1976.¹⁶ Staff were informed of the terms of the resolution on 17 January 1977.¹⁷

13. *Id.* at para. 58.

14. U.N. Doc. A/C.5/31/L. 52 (1976).

15. U.N. Doc. A/C.5/31/SR.56, para. 81 (1976).

16. The General Assembly adopted the resolution without debate. The Fifth Committee had adopted the Japanese proposal by 77 votes to none with 16 abstentions. 31 U.N. GAOR Annex (Agenda Item 97) 1, U.N. Doc. A/31/457/Add. 1, paras. 9-24 (1976). There was no real opposition to the Japanese proposal in the Fifth Committee. The doubts that were expressed were concerned with the fact that the Secretary-General could deal with absences from work under the existing UN Staff Regulations and Rules, *e.g.*, the statements by the representative of Sri Lanka (U.N. Doc. A/C.5/31/SR.60, para. 7 (1976)) and the representative of France (U.N. Doc. A/C.5/31/SR.60, para. 32 (1976)). The representative of Upper Volta was concerned with the fact that the proposal might be an implicit recognition of the right to strike and that implementation of the proposal might have serious financial implications, principally establishing surveillance systems to record absences (U.N. Doc. A/C.5/31/SR.56, para. 73 (1976)).

17. U.N. Doc. ST/IC/77/3, para. 21 (1977).

The records of the debates contain no explanation for the use of the term "unauthorized absence from work" rather than a more direct term such as "participation in strikes." Perhaps the reason for this was to avoid using the technical legal term "strike" which directly raises the difficult question of framing a definition of a strike. Furthermore, any such exercise may have involved the implicit recognition of the right of international civil servants to strike. A neutral term such as "unauthorized absence" side-steps this issue.¹⁸

The Secretary-General applied the resolution three times in the period 1977-1978.¹⁹

In December 1978, the Japanese representative in the Fifth Committee asked the Director of Personnel "why the General Assembly had not yet been given an opportunity to consider a relevant Staff Regulation, which should have been presented to it in pursuance of General Assembly Resolution 31/193, concerning non-payment of salary to staff members in respect of periods of unauthorized absence from work."²⁰ The Secretary-General in a Note suggested that the text could be incorporated into the Staff Regulations as paragraph 10 of Annex 1.²¹ The General Assembly, on the recommendation of the Fifth Committee, adopted this approach.²² The text of the new Staff Regulation and a description of the actions of the Assembly was communicated to UN staff on 24 January 1979.²³ The Secretary-General subsequently trans-

18. The term "unauthorized absence" already existed in the UN Staff Rules. Staff Rule 105.1(d) provides: "Any absence from duty not specifically covered by other provisions in these rules shall be charged to the staff member's accrued annual leave, if any; if the staff member has no accrued annual leave, it shall be considered as unauthorized, and pay and allowances shall cease for the period of such absence." This rule, however, is aimed at individual absences. See note 8 *supra*.

19. On 9 and 10 February 1977, some locally recruited staff of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in the West Bank went on strike. Two days' salary was withheld from the pay of those staff members.

On 7 December 1977, a one-day strike took place in the United Nations Office at Geneva. A day's salary was withheld.

In November-December 1978, a series of rolling strikes occurred among some UNRWA staff members. Appropriate salary deductions were made.

20. U.N. Doc. A/C.5/33/SR.57, para. 74 (1978).

21. U.N. Doc. A/C.5/33/CRP.9 (1978). Annex I of the Staff Regulations deals with salaries and allowances.

22. General Assembly decision 33/433 of 20 December 1978.

23. U.N. Doc. ST/IC/79/10 (1979). See also U.N. Doc. ST/IC/79/5 (1979) which was dated 22 January 1979 but which was distributed to the Staff at a later date and described

mitted an amended set of Staff Regulations for publication. The amended Regulations were available in printed form in June 1979.²⁴

III. SMITH V. THE SECRETARY-GENERAL OF THE UNITED NATIONS

In December 1978, part of the staff of the Department of Conference Services (DCS) of the United Nations held a one and a half day work stoppage to protest the introduction into DCS of word-processing machines with video display terminals.²⁵ The work stoppage was settled on terms which included payment of salary for the period of the stoppage. However, the underlying problem relating to the introduction of this new technology remained and a further work stoppage occurred from 23 January to 12 February 1979. This work stoppage took the form of a continuous "unit meeting" of the Staff Union,²⁶ interrupted only by two Extraor-

all action taken by the General Assembly on personnel questions during the thirty-third session.

24. U.N. Doc. ST/SGB/Staff Regulations/Rev. 12 (1979).

25. At its thirty-second session the General Assembly approved proposals relating to the introduction of word-processing equipment with video display terminals into the English, French and Spanish Typing Units of DCS. G.A. Res. 207, 32 U.N. GAOR, Supp. (No. 45) ____, U.N. Doc. A/Res/32/207 (1977). During the first half of 1978 concern arose among some of the staff regarding possible health hazards resulting from radiation emissions from the video display terminals. The administration agreed with the staff that independent outside expertise would be obtained to evaluate the safety of the machines. The staff proposed that the evaluation be done by the National Institute of Occupational Safety and Health (NIOSH) of the United States Department of Health, Education and Welfare. The administration agreed to this proposal. The NIOSH study indicated that there were no radiation dangers from the machines. See 33 U.N. GAOR, Annex 1 (Agenda Item 100), U.N. Doc. A/C.5/33/35, paras. 1-7 (1978). However, some of the staff continued to have misgivings. At its 33rd session (1978) the Fifth Committee had before it the results of the NIOSH study, a review of this report submitted by the Staff Union in New York explaining the staff's opposition to the machines based on safety considerations (U.N. Doc. A/C.5/33/CRP.5 (1978)), observations of the Secretary-General on these comments (U.N. Doc. A/C.5/33/CRP.6 (1978)), and heard testimony from the Medical Director of the United Nations (U.N. Doc. A/C.5/33/SR.50, paras. 11-25 (1978)). The Fifth Committee recommended that the project continue and that the Secretary-General continue to ensure that the use of word-processing equipment is monitored adequately and will not involve any health hazards for staff members. See U.N. Doc. A/C.5/33/SR.52, para. 48 (1978). This recommendation was adopted by the General Assembly. G.A. Res. 116 B. II, 33 U.N. GAOR, Supp. (No. 45) 199, U.N. Doc. A/Res/33/116 (1978). Opposition on the part of some DCS staff members to the introduction of the word-processing machines nevertheless continued.

26. The Staff Union at Headquarters has approximately sixty Electoral Units each of which elects a staff representative and alternate. The Electoral Units are required to meet at least once every three months although in practice more frequent meetings are common. See Statute of the Staff Union of the United Nations Secretariat, Chapter IX.

inary General Meetings of all staff²⁷ and by a snow storm on 7 February 1979 which closed the Headquarters building from 2:00 p.m., with the consequent release from duty of all staff members except those engaged in maintaining essential services. The staff on job action returned to work after a settlement had been agreed upon with the Secretary-General. The settlement included the following provision:

The staff of the Units referred to will return to work immediately with the assurance that, without prejudice to the applicability of General Assembly Resolution 31/193 B II, there will be no other penalty, nor will there be any reprisal taken against any staff member for having participated or not participated in staff actions.²⁸

After the return to work agreement, but prior to submission of Ms. Smith's test case to the United Nations Administrative Tribunal,²⁹ the Secretary-General responded to a request for compassion made by the Union on behalf of the staff concerned by allowing an abatement of twenty-five percent of the salary withholding, i.e., each staff member concerned would have only seventy-five percent of his salary withheld in respect of the total period of absence. This concession by the Secretary-General was to influence the outcome of the case.

The Tribunal pointed out that it was indisputable that the staff's attendance at continuous union meetings constituted a work stoppage.³⁰ The Tribunal then examined the UN Staff Regulations and Rules and concluded: "It is therefore apparent that 'work' is the fundamental obligation of staff members. Receipt of salary is, moreover, the essential counterpart to work performed. . . .

27. Extraordinary General Meetings require the written request of at least three hundred staff members or a decision of the Staff Council which consists of the elected representatives of the Electoral Units. *See* Statute of the Staff Union of the United Nations Secretariat, Chapter V.

28. U.N. Doc. ST/IC/79/15, para. 1 (1979).

29. The Statute of the Administrative Tribunal of the United Nations was adopted by the General Assembly by Resolution 351 A (IV) of 24 November 1949 and amended by Resolution 782 B (VIII) of 9 December 1953, and by Resolution 957 (X) of 8 November 1955. Article 2, paragraph 1 of the Statute provides: "The Tribunal shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

30. U.N. Doc. AT/DEC/249, para. II (1979).

The unauthorized absence from work or attendance at the place of work while failing to perform duties removes the basis for payment of salary."³¹

This conclusion is in line with the recognized principles of labour law which were adopted in *Acton*,³² and with the principles of international public service which were applied in *Rempp*.³³ However, although these cases were cited in argument, the Tribunal did not explicitly refer to any general principles of law or practice but confined itself to interpreting the law which governed the employment relationship of UN officials, *i.e.*, regulations established by the General Assembly and by the Secretary-General acting with the authority of the Assembly.

The Tribunal then examined the terms of the resolution upon which the Secretary-General had relied to withhold salaries. The Tribunal, after pointing out that the resolution was aimed at work stoppages,³⁴ turned to the contention of the Applicant that the resolution was not effective until it had been incorporated into the UN Staff Regulations. Insofar as this argument was applicable to all resolutions, it was apparently founded on the contention that paragraph 1 of Article 101 of the UN Charter in using the terms "regulations established by the General Assembly" meant only UN Staff Regulations and not any other applicable decisions of the General Assembly. In relation to this particular resolution, the argument was founded upon the contention that the 1978 decision of the General Assembly to incorporate the resolution into the UN Staff Regulations did not reflect an intention to emphasize the importance of the resolution by incorporating it into the document embodying the "fundamental conditions of service" of the UN Secretariat, but rather indicated that the Assembly had intended the resolution to be operative only upon incorporation into the Staff Regulations. The Tribunal rejected these contentions: "The

31. *Id.* at para. III. The Tribunal relied on (1) UN Staff Regulation 1.2 which provides that the whole time of staff members is at the disposal of the Secretary-General although the Secretary-General is to establish a normal working week; (2) UN Staff Rule 101.2(c) which provides, that a staff member shall be required to work beyond the normal tour of duty when requested to do so; and (3) UN Staff Rule 103.8 which provides that salary increments are subject to satisfactory performance.

32. See note 6, *supra*.

33. See note 9, *supra*.

34. U.N. Doc. AT/DEC/249, para. V (1979). The Tribunal examined the *travaux préparatoires* to confirm that interpretation.

Tribunal has consistently maintained that the resolutions of the General Assembly constitute, as far as the staff members to whom they apply are concerned, conditions of employment to be taken into account by the Tribunal."³⁵ In any case, the Tribunal pointed out that the resolution had been incorporated into the Staff Regulations prior to the commencement of the strike.³⁶

The Tribunal then rejected a series of arguments which attempted to establish that the Secretary-General was estopped from relying on the resolution. The only argument of general interest was the contention that the Secretary-General, by permitting the striking staff members to meet on UN premises and use UN facilities, impliedly indicated to the staff that their attendance at the meetings was not an "unauthorized absence from work" within the meaning of the resolution. The Tribunal tersely disposed of this argument by noting that "the granting of physical facilities for staff meetings by the Respondent cannot reasonably be held to deprive him of the right to apply the General Assembly resolution."³⁷

The Tribunal finally turned to the question of whether the entire period of the strike, *i.e.*, from 23 January to 12 February 1979, constituted an "unauthorized absence from work" within the meaning of the resolution. The Tribunal pointed out that it was clear "that since an impending snow storm in the afternoon of 7 February 1979 caused the Respondent to authorize most of the staff to go home, the Applicant could legitimately avail herself of that authorization".³⁸ Paradoxically, staff members on strike were thus in a better position than staff members who were on authorized leave, since leave credits were still charged in respect to absence during the afternoon.³⁹

The Tribunal was more troubled with the distinction between the various types of union meetings. Had the Respondent not granted an abatement in respect of the Extraordinary General

35. *Id.* at para. VII.

36. *Id.* at para. VI.

37. *Id.* at para. IX.

38. *Id.* at para. X.

39. The Administrative Instruction governing the release of Headquarters staff members in bad weather or other conditions provides, *inter alia*, that "staff who are on sick leave, authorized annual leave or other leave will not be given any additional leave time; their absences will be charged to their leave entitlements." (See U.N. Doc. ST/AI/260, para. 6) (1978).

Meetings of all staff, it is doubtful whether the Tribunal would have considered that attendance at any union meeting during the period of the strike was an authorized absence from work. But in the particular circumstances of this case, the Tribunal apparently felt constrained to make a distinction between the various forms of meetings which took place during the strike:

The meeting on Friday, 26 January 1979, which lasted all day and the meeting during the morning of Monday, 29 January 1979 were, under the terms of the Statute of the Staff Union, "extraordinary staff meetings"; they were undoubtedly particularly long; the Respondent himself, however, held that attendance at those meetings could not be described as unauthorized absence and the Tribunal recognizes that that interpretation, based as it is on provisions concerning staff members' right of association, must be accepted.

With regard to the unit meetings, the Tribunal finds that their objective was in fact organized work stoppage and that accordingly participation could not be considered as authorized absence inasmuch as no provision concerning unit meetings allows for their having such an objective.⁴⁰

IV. CONCLUSION

The judgment of the Tribunal that there is no entitlement to salary for periods of strike is in accord with the conclusions reached by the other international tribunals in *Domergue*, *Acton* and *Rempp*. However, while *Acton* and *Rempp* went beyond the particular international organization's staff rules to reach that conclusion, the judgment of the Tribunal confined itself to the UN Staff

40. U.N. Doc. AT/DEC/249, para. X (1979). It is, with respect, not so readily apparent that the Secretary-General held that attendance at the Extraordinary General Meetings could not be described as an unauthorized absence. On 13 February 1979, the President of the Staff Committee had asked the Secretary-General to exercise compassion in the application of the resolution since, *inter alia*, other staff (i.e., those not participating in the job action) had attended the General Meetings and had not had their salary withheld in respect of that attendance. In granting a 25% abatement of the salary withholding, the Secretary-General stated that there may be room for argument as to the applicability of the resolution to all of the periods of absence of the staff members who had had salary withheld. See U.N. Doc. ST/IC/79/15. Annex (1979). This is hardly a holding that attendance at the General Meetings by striking DCS staff members constituted an authorized absence for which salary was payable.

Regulations and Rules, thereby upholding the traditional view that an international official's employment relationship with an international organization is governed solely by the rules of that organization.

Although the Tribunal held that part of the period on strike was an "authorized absence" from work, it is clear that attendance by striking UN staff members at the extraordinary general meetings of 26 and 29 January was considered an "authorized absence" from work for the purposes of the resolution only because of the particular circumstances of this case. Should a future collective work stoppage take place, and should this stoppage take the form of extraordinary general meetings rather than unit meetings, it can hardly be doubted that the Tribunal would uphold the action of the Secretary-General should he decide to withhold salary, either pursuant to the terms of the resolution or under the more general powers conferred on the Secretary-General by the provisions of the UN Staff Regulations and Staff Rules cited by the Tribunal as establishing the fundamental proposition that receipt of salary is the essential counterpart of work performed.⁴¹

41. See note 31 *supra*.