

## SEVENTY-FOURTH SESSION

### *In re* STULZ

#### Judgment 1232

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Percy Stulz against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 6 April 1992, UNESCO's reply of 29 May, the complainant's rejoinder of 24 August and the Organization's surrejoinder of 9 October 1992;

Considering Articles II, paragraphs 5 and 6, and VII, paragraph 2, of the Statute of the Tribunal, UNESCO Staff Rules 104.5 and 109.2, paragraph 7 of the Statutes of the UNESCO Appeals Board and Article 29(a) of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a citizen of the former German Democratic Republic who was born in 1928, joined UNESCO's staff at headquarters in Paris in January 1975 as Director of the Division of Cultural Studies at grade D.1. He was transferred in August 1977 to the post of Director of the Division of Cultural Heritage. He had his fixed-term appointment extended several times and the last extension he got was to expire on 31 August 1985.

While he was on a private trip to East Berlin in March 1980 the East German authorities arrested him. He was charged with threatening national security and sentenced to three years in prison. Despite efforts by the Director-General and UNESCO's Executive Board to secure his release he was held in custody until 17 November 1981. Even after his release, however, he was not allowed to leave the country.

In a letter of 21 March 1980 he informed the Director-General that he wanted to resign. The Director-General doubted the genuineness of his resignation, one reason being a message dated 10 March 1980 which the complainant managed to have delivered to say that he had been "hospitalised" against his will. The Director-General therefore refused his resignation. Though he twice repeated his offer of resignation, he was kept on the staff and had his appointment duly extended until 31 August 1985.

By a letter to the Director-General dated 20 June 1984, forwarded to Paris by the East German foreign ministry, he applied for leave to take early retirement. Such retirement is provided for in Article 29(a) of the United Nations Joint Staff Pension Fund's Regulations.>(\* "An early retirement benefit shall be payable to a participant whose age on separation is at least 55 but less than 60 and whose contributory service was five years or longer".) After consulting the Organization's Executive Board in camera on 18 June 1985 the Director-General, by a letter of 5 July 1985, gave the complainant leave to take early retirement as from 1 November 1984. In ensuing correspondence with the Secretary to the Board of the Pension Fund the complainant applied for and was granted a withdrawal settlement in a lump sum which the Fund paid him on 11 August 1987.

He was allowed to leave his country and on 2 September 1989 sent a letter to the Director-General thanking the Organization for its support in his recent tribulations and explaining the sore straits he was in. After a talk with the Director-General on 4 September he was granted a contract as a consultant from 1 March to 31 August 1990.

In a letter of 29 April 1990 to the Director-General that raised several issues he stated: "My complaints concern three different and separate items which however are all linked with the question of the responsibility of the Organization vis-à-vis the international civil servant". The three items were: (a) UNESCO's acceptance of his application for early retirement; (b) the fact that it took effect before he had completed ten years' service and three years and nine months before he reached the normal age of retirement; and (c) UNESCO's instructing his bank to make his pay over to his wife.

On 28 August 1990 he sent the Director-General a "written protest" under paragraph 7(a) of the Statutes of the UNESCO Appeals Board saying that he took the absence of a reply to his letter of 29 April as implied rejection. Having got no answer he wrote again to the Director-General on 6 November seeking leave to appeal directly to the Tribunal. Meanwhile, in a letter dated 5 November, the Director-General turned down the claims in his letters of 29 April and 28 August 1990. By a letter of 21 November, the Director of the Bureau of Personnel refused his application for leave to appeal directly to the Tribunal.

On 27 December 1990 he submitted notice of appeal to the Appeals Board against the Director-General's letter of 5 November and the implied rejection of his written protest of 28 August. In its report of 18 November 1991 the Board held the appeal to be "formally irreceivable" but on the merits recommended treating his application for early retirement as invalid and restoring his status as an official up to the normal age of retirement. By a letter of 6 January 1992, the impugned decision, the Director-General informed him of his rejection of the Board's recommendations.

B. The complainant asks whether in 1985, when the Director-General decided to grant him early retirement, he was really able to challenge the decision. He submits that whether his complaint is receivable and has merit turns on the answer to that question. He contends that the answer to it is no, and in support he gives a detailed account of his imprisonment and sufferings, and the consequences, which he says went on long after his release.

Because so much time went by from the Director-General's decision to grant him early retirement, in 1985, to the time when he "recovered his freedom of action", in July 1989, he had no choice but to try to elicit a new decision from the Organization. Had he appealed forthwith the Organization would have argued that he was out of time. That was why by his letter of 29 April 1990 he tried to get a final decision from the Organization and it was just the last of many steps he took from July 1989 on. He was late in getting a final decision because the Organization went on fobbing him off and making promise after promise that it never kept. It may not take him to task on that account now. His complaint is receivable because what he is challenging is a final decision the Director-General took, in his own words, after "a further review of all the evidence".

The complainant puts forward three pleas on the merits. First, the Director-General's acceptance of his alleged application for early retirement was unlawful. Several UNESCO bodies considered his letters of resignation to be null and void, as is recorded in many documents. They did so for reasons, not of equity or expediency, but of law. Since he was not acting freely the Organization was bound in law to disregard any action he took under duress. His lot hardly changed on his release from prison. Moreover, neither of the two conditions for tendering resignation was met. His resignation should have been offered from his duty station, Paris, and gone through the appropriate channels. In fact his letter of 20 June 1984 was sent from East Berlin through the East German foreign ministry.

Secondly, the decision under challenge caused him serious material and moral injury. It cost him the salary and allowances he should have been paid for the period from 1 November 1984 - the date of his termination - to 22 July 1988 - his sixtieth birthday. Since he got a divorce in 1981 and married again in 1985 his second wife has lost any future entitlement she might have had as the widow of a serving or former official. Being put on early retirement twelve weeks before completing ten years of service, he failed to qualify for associate membership of UNESCO's Medical Benefits Fund.

Lastly he submits that UNESCO acted in disregard of his explicit instructions and therefore improperly in arranging with his bank to let his former wife have his pay for the period from July 1980 to August 1982. By way of alternative and subsidiary relief he claims repayment to him of those sums.

He seeks the quashing of the impugned decision, suitable compensation and costs.

C. In its reply the Organization rejects the complainant's argument that he could not defy the Government of his country and that since there was therefore "force majeure" his claims should be treated as both receivable and sound in law.

The complaint is irreceivable *ratione materiae* because his letter of 29 April 1990, which was just a sequel to his letter of 2 September 1989, did not make it plain what he was objecting to or what he wanted the Director-General to do. So he may not infer any challengeable rejection, insofar as the case law defines it, from the Director-General's failure to reply.

The complaint is also irreceivable *ratione temporis*. For one thing, nearly five years went by between the decision which allegedly caused him injury, and which was taken on 5 July 1985, and his letter of 29 April 1990. The time limit for appealing against that decision had passed long ago, his own want of diligence was wholly to blame for the excessive lapse of time. For another thing, the decision he inferred from the absence of a reply by the Director-General to his letter of 29 April 1990 was not a new decision setting off a new time limit. Lastly, the Director-General's reply of 5 November 1990 - if that is what he is challenging - merely confirmed decisions taken in 1980 and 1985 and the implied one of 1990 and so affords no grounds for appeal.

On the merits the Organization refutes the complainant's plea that it was unlawful for the Director-General to accept his application for early retirement because of the circumstances in which it was made. It submits that if he was acting under duress he could easily have got a message through, as he had managed to do before, even from prison. Although the rules do say that notice of resignation must generally be submitted at the duty station and follow the proper channels, there may still be individual derogations if the Director-General thinks them warranted. The complainant's case was unique and the Organization could scarcely refuse him, since by doing so it would have impaired his acquired rights under the Pension Fund Regulations.

The Organization challenges his allegation that the impugned decision caused him injury. As to reinstatement and compensation for loss of pay, he had always held fixed-term appointments and so had no certainty of staying on until 1988. The date of his early retirement was set in accordance with Staff Rule 109.2. He himself did not raise the point that he had not completed ten years of service, and so cannot hold the Organization liable for preferring its own interests when he was largely to blame. Lastly, since he did not marry again until 14 October 1985, his present wife's medical insurance coverage would have been no different even if the date of his early retirement had been deferred to 31 August 1985, when his last contract expired.

Thirdly, the Organization contends that the Administration was right to have his pay made over to his wife. His bank accounts were closed and in a message of 10 March 1980 to the Director-General he authorised his wife to handle all his affairs and sign on his behalf. That was understandable enough since on recruitment he had named his wife as "beneficiary" under Staff Rule 104.5, and he did not change that until 26 July 1989. The Organization, for its part, gave no instructions to his bank.

Lastly, the Organization concludes that, none of its actions being unlawful, his claims should fail.

D. In his rejoinder the complainant maintains that, contrary to what the Organization makes out, the matters he raised in his letter of 29 April 1990 were obviously grievances that engaged the Organization's liability and for which he was seeking compensation. By failing to answer, the Organization declined to take a decision, and that implied rejection.

As to receivability *ratione temporis*, he submits that if a staff member cannot meet a deadline his claims are not time-barred: *nemo tenetur ad impossibile*. Just as he did not apply for early retirement of his own free will, so he was unable to challenge the Organization's decision and therefore not required to respect a time limit he could not meet. Besides, it is not the decision of 5 July 1985 he is challenging, but the implied one later confirmed by the express one of 5 November 1990.

He denies lack of diligence. The charge betrays utter incomprehension of what was happening to him in the German Democratic Republic. The decision of 5 November 1990 was not purely confirmatory: it was a new one taken after review of his case and appeal therefore lay against it.

On the merits he submits that the Director-General has a duty to fulfil the "legitimate trust" the staff put in the Organization and ensure that it protects them. That was the principle that led him to refuse the complainant's offer of resignation in 1980, and there was no reason why he should react differently in 1985. In support of his argument he cites two UNESCO documents of the material period which make it clear that an offer of resignation may not be accepted if submitted elsewhere than at the duty station. He could not, without exposing himself to serious danger, let the Organization know that his letter of 20 June 1984 had been written under duress. By failing to consult the Executive Board properly before responding to his application the Director-General was in breach of a legal obligation. The Director-General's unwarranted change of attitude was prompted by reasons irrelevant to the case.

As regards the injury he suffered, the complainant submits that, contrary to the Organization's assertion, his

appointment would ordinarily have been extended until 1988. As for the charge that he had been negligent in not mentioning himself the ten-year period of service, that is precisely what ought, among other things, to have aroused the Administration's suspicions and alerted it to the "hidden flaw" in his supposed application.

He gave no instructions to the Organization to pay his salary to his former wife. He merely gave her leave to use his bank account, then revoked it when he learnt of her part in his misfortunes. After his divorce, on 24 September 1981, the Organization should at least have shown some caution and tried to ascertain that he really was divorced or kept some of his assets. It did neither.

E. In its surrejoinder UNESCO disputes the new facts the complainant relies on in his rejoinder to excuse his letting five years go by before lodging an appeal. There was no force majeure within the meaning of the case law. His allegation that the impugned decision came after a review of his case is mistaken. The decision was mere confirmation and, UNESCO maintains, lawful. It never caused him injury that might warrant compensation.

#### CONSIDERATIONS:

1. The complainant, a citizen of what was then the German Democratic Republic, joined the staff of UNESCO on 15 January 1975. He served first as Director of the Division of Cultural Studies and then as Director of the Division of Cultural Heritage. On 8 March 1980, while visiting East Berlin at the invitation of the chairman of the National Committee of the Republic for UNESCO, he was put under arrest. He was forced to sign a statement that he had had a heart attack and been taken to hospital, but he at once withdrew it in a message he managed to have delivered to the Director-General. He later twice informed the Director-General of his intention of resigning, but the Director-General felt unable to accept the offer of resignation because it had not been duly tendered and because he had serious reason to doubt whether it was genuine.

A military tribunal tried the complainant in secret and sentenced him on 20 August 1980 to three years' imprisonment.

On 15 June 1981 he again notified his wish to resign but the Director-General held to his original view that the complainant was still a UNESCO official.

He was released from prison on 17 November 1981 but he was not allowed to leave the country and so was unable to go back to work. On 20 June 1984 he sent a letter from East Berlin applying for early retirement. After due reflection the Director-General decided on 5 July 1985 and as from 31 November 1984 to grant his application. One point worth mentioning, though it is immaterial to the ruling on his case, is that he had to opt for a lump-sum settlement of his pension entitlements and to surrender the sum to the Ministry for Foreign Affairs of the Republic.

Not until July 1989 was he able to leave the country. He then got in touch with UNESCO, which offered him a fixed-term appointment for six months as a consultant. In a letter of 29 April 1990 to the Director-General he expressed gratitude for the appointment, raised several matters arising out of the acceptance of his application for early retirement, explained that it caused him injury and asked how his salary had come to be paid to his former wife until August 1982. Having got no answer he challenged the rejection he inferred from the Administration's silence in a letter of 28 August 1990 which he described as a "protest". On 6 November 1990 he challenged the implied rejection of it, but in the meantime the Director-General had written him a letter dated 5 November expressly rejecting it. Having been refused leave to go straight to the Tribunal he went to the Appeals Board on 27 December 1990.

The Board held that his appeal was "formally irreceivable" but because of the unusual circumstances recommended treating his application of 20 June 1984 for early retirement as null and void and reinstating him up to the normal age of retirement. But on 6 January 1992 the Director-General rejected the recommendation on the grounds that the appeal was irreceivable. The complainant is asking the Tribunal to quash that decision and award him damages for the injury attributable to the Organization's acceptance of an application he made under duress. By way of alternative and subsidiary relief he seeks damages for the injury he suffered because UNESCO instructed his bank to make over to his former wife his salary and allowances from July 1980 to August 1982.

#### Receivability

2. The Organization argues that the complaint is irreceivable. It contends that neither the letter of 2 September 1989 nor the one of 29 April 1990 asked the Director-General to decide on any particular issue and that the complainant

might not infer rejection of any claim from failure to answer it. In UNESCO's submission the complainant is seeking to challenge the decision it took in 1985 to grant him early retirement, and incidentally the ones it took in 1980 about the payment of his salary and allowances to his wife, even though those decisions became final long ago and are no longer challengeable. The further implied and express decisions that followed his letters of 1990 set off new time limits for appeal. Even supposing that, being under duress, he was not free to act in time to safeguard his interests, that ceased to be so in July 1989, when he left the German Democratic Republic.

3. The complainant's letter of 2 September 1989 thanked UNESCO for its support during his many years' confinement, explained some of the difficulties he was facing and sought an interview with the Director-General. It did refrain from making any particular claims and indeed may not be treated as having given rise to any implied rejection. But his letter of 29 April 1990 explicitly sets out his grievances against the Organization and asks the Director-General in so many words to take action to afford him relief. Though his tone is polite and the text somewhat vague about just what sort of action he wants, he makes it quite clear he is expecting redress for injury he blames on the Organization. His letter therefore meets the requirements of the precedents actually cited by the defendant, which say that the staff member may infer rejection only when he has put formal claims plainly stating the nature of his demands. UNESCO's failure to answer the complainant's letter of 29 April 1990 implied rejection of his various grievances.

Did that implied decision - and the later express rejections of his written protest of 28 August 1990 - merely confirm earlier final decisions? The defendant would have it that they did: in its submission the decision of 5 July 1985 accepting his application for early retirement and the decisions of 1980 on payment of his salary had become final and unchallengeable.

But what the complainant wanted was quite plainly not the quashing of the decision of 5 July 1985 or of any decisions about payment of his salary, but that the Organization should bear in mind that he had been sent to prison and then detained in the German Democratic Republic and forced to apply for early retirement. The issue that was before the Appeals Board and is still before the Tribunal was the Director-General's refusal of redress for the injury he says he sustained in the material period. It would be quite unfair to put a pedantic construction on his claims and take it that what he is really challenging is the decision of 5 July 1985 and other final ones. It would offend against the whole purpose of time limits, which is to make relations stable in law. Indeed it would be tantamount to requiring a staff member who supposedly lacked free exercise of will to appeal in time against a decision on an application he had made under duress.

The defendant contends that he could have filed his internal appeal as soon as he had left the German Democratic Republic, in July 1989, and was negligent in pursuing the matter. There is no doubt some merit in the point. But the delay was understandable in the unusual circumstances of his case: his difficulty in taking up life again, his fears for the future at a time when the political forces that had led to his detention were still firmly entrenched, and his desire to settle out of court with the Organization. The conclusion is that he was not out of time. At all events there is no evidence before the Tribunal to bear out the Organization's suggestion that he is not in good faith. The defendant's objections fail: his complaint is receivable.

The merits

4. The Tribunal is satisfied that the complainant's application of 20 June 1984 for early retirement was written and signed under duress. Indeed it was the Government of the German Democratic Republic that forwarded it to the Organization, in breach of the rule that the staff member must submit such an application at his duty station and through his own supervisor. This case brings out how important it is to abide by the rule.

So as soon as he was able to show that he had acted under duress UNESCO had the duty, according to the general principles that guarantee the independence of international civil servants, to grant relief. Such independence means that a staff member may not be put on early retirement where a member State has ordered him to apply for it. That indeed is the very reason why UNESCO refused the resignation he tendered against his will in 1980 and 1981.

There is specific corroborative evidence in support of his contention that he wrote his letter of 20 June 1984 under duress. Even after release from prison he was kept under close scrutiny by the then Government, was forbidden to leave the country and was not free to correspond with the Organization. Early retirement was to his serious detriment, especially since the East German authorities forced him to opt for lump-sum withdrawal of his pension entitlements and to make the proceeds over to them. His application was, understandably enough, not submitted

through his supervisors, and the Organization itself betrayed grave doubt at the time about whether it was genuine. UNESCO says in its surrejoinder that "the Director-General waited a year before granting his application and the utmost was done to get Mr. Stulz to come to headquarters to submit his application in person". For that purpose it approached the East Germans time and time again, but to no avail. It explains that in its own interests it had to grant him early retirement, even though it was not sure that he had made his application quite freely. Yet, whatever its reasons may have been, it had the duty to reinstate the complainant or grant him compensation as soon as he had adduced evidence to show that he had acted under duress.

5. By way of redress the complainant asks UNESCO to reinstate him as from 1 November 1984, the date of termination of his appointment, up to 22 July 1988, his sixtieth birthday, and restore pension entitlements for him and his wife. He also seeks moral damages and costs.

On the evidence he was a good employee and he had his appointment constantly renewed from the start of his imprisonment until the date of consent to his early retirement. He might therefore have reasonably expected renewal of appointment up to the age of retirement. So the Organization must reinstate him as from 1 November 1984 up to 22 July 1988 and restore pension and sickness insurance entitlements for himself and his dependants. It shall pay him damages reckoned according to the amount of the salary and allowances he would have been entitled to in that period, less any sums he has been paid by way of pension or fees for his consultancy, which, as he acknowledges, he was granted in partial redress. Since the payment is due as from the date, not of termination of his appointment, but of this judgment, he is not awarded the interest he claims as from the date of consent to his early retirement. But the particular circumstances of the case warrant an award of damages for moral injury, and the amount is set *ex aequo et bono* at 50,000 French francs.

In view of the foregoing the Tribunal will not entertain the alternative and subsidiary claims to redress for the Organization's payment of his salary and allowances to his former wife from July 1980 to August 1982.

#### DECISION:

For the above reasons,

1. The Director-General's decision of 6 January 1992 is set aside.
2. The Organization shall reinstate the complainant as from 1 November 1984 up to 22 July 1988, restore his pension entitlements and sickness insurance coverage both for himself and for his dependants, and pay him the sums to be reckoned as set out in 5 above.
3. It shall pay him 50,000 French francs in moral damages.
4. It shall pay him 20,000 French francs in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

Mella Carroll  
P. Pescatore  
Michel Gentot  
A.B. Gardner