

## FORTY-FIRST ORDINARY SESSION

### *In re* FOURNIER D'ALBE

#### Judgment No. 364

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Edward Michael Fournier d'Albe on 14 October 1977 and brought into conformity with the Rules of Court on 21 October, UNESCO's reply of 9 January 1978, the complainant's rejoinder of 10 February and UNESCO's surrejoinder of 9 March;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, the UNESCO Staff Regulations, particularly Article 6.1, and the UNESCO Staff Rules, particularly provisions 106.4 and 111.1;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 27 February 1951 the complainant, a British subject born on 21 September 1921, was appointed as a field expert by UNESCO on a one-year appointment which took effect on 23 April 1951. His appointment was renewed several times and finally converted into an appointment of indefinite duration. On 1 May 1977 he was promoted to D.1 and is now Director of the Division of Earth Sciences at headquarters.

B. On his appointment the complainant signed, on 23 April 1951, a "notice of personnel action" which set out the terms of his appointment and said, among other things, that the provisions of the Staff Pensions Fund were not applicable. By a memorandum of 15 October 1957 the Director of the Bureau of Relations with Member States informed the field staff that they would be admitted as full participants to the United Nations Joint Staff Pension Fund on 1 January 1958, but without retroactive effect. That memorandum was confirmed by a letter of 1 April 1958 from the Bureau of Personnel. By a letter of 10 April addressed to the complainant in person the Secretary of the UNESCO Staff Pension Committee, Mrs. Bénard, told him that he had been admitted as a participant to the Fund as from 1 January 1958 but that his service up to that date would not count. The complainant took no action either on that letter or on the memorandum of 15 October 1957 confirmed on 1 April 1958.

C. On 27 October 1976 the complainant wrote to the Director-General claiming validation of his service prior to 1 January 1958. On 1 December the Director-General answered that since the complainant had not challenged the decision of 23 April 1951 within the prescribed time limits his claim was time-barred. On 20 December the complainant wrote a minute to Mr. Rigaud, Assistant Director-General for Programme Support and Administration, challenging Mrs. Bénard's letter of 10 April 1958. By a minute of 28 February 1977 Mr. Rigaud replied that the Director-General had "nothing to add to the information" in his minute of 1 December 1976. On 4 March the complainant sent a minute to the Director-General saying that he regarded Mr. Rigaud's minute of 28 February as a decision and wished to appeal against it to the Appeals Board. On 1 April he asked the Board for a hearing and on 15 April he filed a claim for validation by the Joint Staff Pension Fund of his service prior to 1 January 1958. The Appeals Board held itself to be competent and in its report of 23 June held the appeal to be irreceivable on the grounds that the decisions challenged dated back to 1951 and 1958 and that no new decision had since been taken. While expressing reservations about the Board's competence, the Director-General told the complainant by a letter of 26 July 1977 that he endorsed the Board's view that the claim was irreceivable. The complainant thereupon lodged his complaint.

D. The complainant asks the Tribunal:

(a) to instruct the Director-General to take whatever action may be necessary to allow the complainant to make contributory to the United Nations Joint Staff Pension Fund the period of his service with UNESCO from 23 April 1951 to 31 December 1957, including the payment by UNESCO to the Fund of the part of the appropriate actuarial costs normally paid by the employer organisation;

(b) if the above action be impossible or inadvisable, to award the complainant as compensation for the injury caused to him the sum of US\$110,000, that being the estimated cost of an annuity adjustable to the cost of living and equal to the loss of pension suffered by him as a result of the impugned decision, less the sums which the complainant would have been called upon to contribute to the Pension Fund in order to make the period of his service prior to 1 January 1958 contributory.

E. UNESCO maintains that the Tribunal is not competent in so far as the complaint relates to pension matters, as to which appeal lies to the Fund and then to the United Nations Administrative Tribunal. Besides, the appeal to the Appeals Board was irreceivable, and for that reason so also is the present complaint. UNESCO therefore asks the Tribunal to declare that it is not competent to hear the complaint and, should it declare itself competent, to declare the complaint irreceivable.

## CONSIDERATIONS:

### Nature of the complaint:

1. The essence of the complaint is that by the fault of the Organization the complainant's pension under the United Nations Joint Staff Pension Fund (hereinafter referred to as "the Fund") will be substantially less than it should have been. On 27 February 1951 the complainant signed a contract with the Organization under which he was to go as an expert on a mission to Pakistan; it was to run for a year from the date he left Paris on the mission. The contract has subsequently been extended and is now one of indefinite duration. On 23 April 1951 the complainant was given a notice of personnel action containing particulars as to his "present status" which he signed as "accepted". Opposite the heading "Provident Fund Pension Scheme" there is noted "Not applicable". The complainant contends that the body, if there was one, in charge of this scheme is not the same body as the Fund, and there is no evidence in the dossier that it is.

2. In January 1953 the Regulations of the Fund were amended to provide by Article II for the admission to the Fund of members of affiliated organisations under contract for a year or more and whose contracts did not exclude participation in the Fund. There was also an Article III which provided that under certain conditions previous service with the affiliated organisation might be counted in the calculation of benefits. Article 6.1 of the Staff Regulations of the Organization requires that there should be provisions to make certain of the participation of staff members in the Fund. The complainant was not informed of this development and the Organization took no action in respect of it.

3. On 10 April 1958 the Secretary of the UNESCO Staff Pensions Committee wrote to the complainant, who was then in Mexico, to tell him that he had been admitted as a full participant to the Fund as from 1 January 1958. The letter added: "Please note that you are not allowed to avail yourself of the provisions contained under Article III of the Regulations as the services which you have completed prior to 1 January 1958 as an expert of the Technical Assistance Programme were specifically excluded from participation in the Fund." Article III provided that certain participants might under certain conditions elect within one year of the commencement of participation to have prior service included in contributory service, provided that in his prior service the participant was not employed under a contract of employment which specifically excluded his participation in the Fund.

4. In June 1974 the Director-General was authorised by the UNESCO General Conference to put forward proposals for allowing prior service to count in the case of those experts who were apparently not covered by Article III as summarised above. At the General Conference in 1976 the Director-General said that he would not make any recommendation in favour of any validation operations. This caused the complainant, he says, in October 1976 to search the archives of UNESCO for "any legally validated text" justifying the exclusion in 1958 of his prior service: he found none. On 27 October 1976 he wrote to the Director-General a letter in which he complained of UNESCO's refusal to validate his pre-1958 service and in which he put forward the contention "that the Administration was at fault in not allowing me to avail myself of the provisions contained under Article III". The Director-General replied on 1 December that the complainant had failed within the prescribed time limits to appeal against the decision "Not applicable" given on 23 April 1951; on the other point the Director-General said that no rights were given to the complainant by the authorisation of June 1974.

5. On 20 December 1976 the complainant wrote to an Assistant Director-General a letter in which he put forward the argument that his contract (as distinct from the notice of personnel action) did not exclude his participation in the Fund; and that even the notice did not exclude his participation in the Fund as distinct from the Provident Fund

Pension Scheme. He claimed that the statement quoted in paragraph 2 above was misleading and untrue and that he had been illegally and unjustifiably deprived of his pension rights. The Assistant Director-General replied on 28 February 1977 that the Director-General had nothing to add to his letter of 1 December. The complainant appealed to the Appeals Board, where the Organization objected to the complaint on the grounds of incompetence and irreceivability. At the request of the Organization, which was not opposed, the Appeals Board agreed to give a preliminary decision on the objections. The Appeals Board decided that it was competent to adjudicate upon the complaint but that the complaint was irreceivable. On 26 July 1977 the Director-General accepted the opinion of irreceivability while reserving his position on competence. From this decision the complainant appeals to the Tribunal.

As to the jurisdiction:

6. The heads of complaint are conveniently summarised in the rejoinder. One of them is based on the refusal of the Director-General to reconsider the complainant's case in the light of the authorisation given to him in June 1974. It does not appear that this ground of complaint was pursued before the Appeals Board but in any event it is clearly outside the competence of the Tribunal.

7. The other heads of complaint allege specifically the Organization's failure to supply the complainant with information in 1953 as mentioned in paragraph 2 above, the giving of false and misleading information in 1958 as mentioned in paragraph 3 above and generally non-observance of the Staff Regulations and of the terms of the complainant's contract. The Organization objects on the ground that, since the complaint alleges a failure to observe the Statutes of the Fund, notably Articles II and III, it is within the jurisdiction of the United Nations Administrative Tribunal. It is however the object of the complaint to obtain compensation from the Organization for its alleged breach of duties owed by it to the complainant and that is the way it is formulated. This objection is disallowed.

As to receivability:

8. The complaint was filed with the Tribunal within the time limits imposed by Article VII, paragraph 2, of its Statute. But paragraph 1 of the Article declares that a complaint shall not be receivable unless the person concerned has exhausted such other means of resisting it as are open to him in the applicable Staff Regulations. This means that where, as here, the Staff Regulations provide for an appeal committee, the person concerned must bring his complaint before that body within the time limits allowed by the Regulation. Thus the question for the Tribunal is whether the Appeals Board was right in rejecting the complaint on the ground that it was not brought before it in due time.

9. If, as the Organization contended and the Appeals Board decided, the statement "Not applicable" quoted in paragraph 1 above and the similar but longer passage quoted in paragraph 3 above are administrative decisions affecting the rights or duties of the complainant, then the decision of the Appeals Board that the complaint was irreceivable is right. For there is nothing in the correspondence that began with the letters quoted in paragraphs 4 and 5 above and ended with the letter of 28 March 1977 (from which the complainant appealed within the prescribed time) that does anything other than affirm the decisions of 1953 and 1958. Time runs from the latest effective decision. If it has run out from that decision, it does not begin to run again from a later decision which does no more than affirm the earlier one.

10. The question is therefore whether the 1951 and 1958 statements were decisions. The 1958 statement is the one most in point. It cannot be decisive unless the Organization had the power to give a decision binding on the complainant as to whether or not the provisions of Article III were available to him. It is not suggested that the Organization had such power. Without it the statement must be construed as advice about the way in which the writer of the letter considered that the matter would be decided by the body which had the power, or, if it had been decided, as information. This leaves it open to the complainant to contend that such advice and information were erroneous and misleading and that by giving such advice and information the Organization failed to observe some regulation such as Article 6.1 or 106.4, or to fulfil a duty arising out of the contract of service.

11. It is true that the complainant, who does not appear to have been advised by a lawyer, is not always clear and consistent about the way in which he puts his claim. Sometimes he writes as if he was complaining of an adverse decision by the Organization not to admit him to the Fund and sometimes as if he was blaming them for erroneous advice. But in his letter of 20 December 1976 he puts the latter point quite clearly. Also, in their summary of his arguments before them, the Appeals Board notes that "not only has the Administration failed to observe the Staff

Regulations, but it has not furnished the complainant with the information which would have enabled him to exercise his rights directly".

12. It is of course open to argument whether there is any duty upon the Organization to give correct information in matters relating to a staff member's rights in the Fund, and if so, whether the information given is correct or not. The Organization devotes most of the surrejoinder to the argument that it was correct. But this is an issue that goes to the merits and is one on which the Director-General has never pronounced. It cannot be suggested that this issue was decided in 1951 or 1958; it was one which called for a new decision.

#### DECISION:

For the above reasons,

1. The complaint, in so far as it is based on the Director-General's refusal to reconsider the case in the light of the matters referred to in paragraph 4 above, is rejected as outside the jurisdiction of the Tribunal.
2. The complaint, in so far as it is based on the alleged breach of an alleged obligation upon the Organization to give correct information to the complainant in matters relating to his rights in the Fund, is receivable.
3. The Director-General's decision of 26 July 1977 is quashed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

M. Letourneur  
André Grisel  
Devlin

Roland Morellet