FORTY-NINTH ORDINARY SESSION

In re NIELSEN

Judgment No. 522

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational, Scientific and Cultural organization (UNESCO) by Mr. Evald Nielsen on 30 November 1981, UNESCO's reply of 15 January 1982, the complainant's rejoinder of 12 February and UNESCO's communication of 25 March 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 11.1, Rules 101.1 and 111.2(b) and Annex A (Statutes of the Appeals Board) of the UNESCO Staff Regulations and Staff Rules;

Having examined the written evidence, 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. The complainant, a Danish citizen, was appointed to UNESCO in 1971 and assigned to Alexandria to manage an anti-erosion project in the Nile Delta. His appointment expired in early 1978. Before he left UNESCO, however, disagreement had arisen over the final technical report he and others had drafted on the project, and he maintained, in particular in letters of 11 September and 14 October 1978, that headquarters had no right to alter the text without his consent and that he owned the copyright in parts he had written in his spare time. The Assistant Director-General for Science wrote to him on 22 November 1978 saying that UNESCO was "solely responsible" for the final text and rejecting his claim to copyright, "all rights to the work" being vested in the Organization. After further correspondence the complainant's counsel repeated his claims in a letter of 3 July 1980. on 18 September the Administration answered that the new claims were in substance the same as those made in 1978, and it confirmed its refusal. On 4 November the complainant protested under paragraph 7(a) of the Statutes of the Appeals Board. On 27 November the Director of the Bureau of Personnel replied that the decision of 18 September 1980 confirmed that of 22 November 1978, that the one-month limit set in paragraph 7(a) ran from the latter date and that the claims were time-barred. On 12 January 1981 the complainant asked the Director-General, in accordance with Rule 111.2(b), to agree to waiver of the Appeals Board's jurisdiction and allow direct appeal to the Tribunal. The Director-General having refused, on 18 March he appealed to the Board under paragraph 7(c). In its report of 10 September the Board held the appeal to be time-barred, but recommended that the Director-General either extend the time limit in exercise of his discretion under paragraph 8 of the Statutes, or else allow direct access to the Tribunal. By a letter of 15 October 1981, which is the decision impugned, the Director-General informed the complainant that he accepted the Board's view that the appeal was time-barred but rejected its recommendation.

B. The complainant argues, first, that he has inalienable rights in the text of the project report and that there can be no time bar to his assertion of them. Secondly, the Assistant Director-General's letter of 22 November 1978 was not an "administrative decision" challengeable before the Board under Regulation 11.1. It was just a technical communication from headquarters to a project manager. Thirdly, the decision has denied him a fundamental guarantee embodied in the Staff Regulations and exposed him to further stress and costs. Fourthly, that UNESCO has sole responsibility for the report is belied by the terms of the project agreement; nor can it claim exclusive property rights in the text. The complainant accordingly asks the Tribunal to quash the decision of 15 October 1981; to grant his claims of 3 July 1980 or, subsidiarily, examine the appeal he filed with the Appeals Board on 18 March 1981 as if it had been filed directly with the Tribunal and to grant his claims; and to award him compensation for the expense and injury he has incurred.

C. In its reply UNESCO gives an account of the facts of the case and contends that the internal appeal was time-barred because its letter of 18 September 1980 confirmed the decision of 22 November 1978 and gave rise to no new time limit. if the complainant does not regard the earlier letter as an administrative decision, he can hardly regard the later one as such. Besides, even if it were, he should have appealed against it, in accordance with paragraph 7 of the Board's Statutes, by 4 March 1981. There were no exceptional circumstances justifying

discretionary extension of the time limit under paragraph 8. Moreover, it was not within the Board's competence as defined in paragraph 5(a) to recommend exercise of the Director-General's discretion under paragraph 8 or authorisation of direct access to the Tribunal under paragraph 6. Besides, it is not the purpose of waiver to rescue the litigant from the consequences of his oversight, and the Director-General was not wrong to withhold consent to it. UNESCO reserves the right to argue the merits should the Tribunal hold the complaint to be receivable.

D. In his rejoinder the complainant corrects and supplements in detail the organization's version of the facts. In developing his arguments he repeats his contention that the letter of 22 November 1978 did not constitute an administrative decision and that in any case none of the claims in his letter of 3 July 1980 can be time-barred because what he claims are inalienable rights. He explains in what way he believes his professional interests and reputation to have suffered by reason of what he terms the organization's "intransigent" attitude over the project report and adds a claim under this head to damages amounting to 500,000 United States dollars, or such sum as the Tribunal may determine.

E. In a further communication UNESCO maintains that the rejoinder raises no new relevant issues and it confirms the arguments in its reply. It observes that the President of the UNESCO Staff Association informed the complainant in June 1980 that the Association could not support any legal action he might take.

CONSIDERATIONS:

Separation of issues

1. The Statutes of the Appeals Board of the Organization provide in paragraph 7 that a staff member who wishes to contest any administrative decision shall address a protest to the Director-General within a period (in the case of the complainant) of two months; that the Director-General's ruling on the protest shall be communicated to him within two months; and that if he wishes to appeal to the Appeals Board he shall address a notice within two months.

2. By letter of 3 July 1980 to the Director-General the complainant claimed compensation on grounds that will hereinafter appear. By letter of 18 September the Director of Legal Affairs told the complainant that the complaints on which his claim was based had been rejected by a letter of 22 November 1978 and that the Organization "confirms its position as stated in that letter". On 4 November 1980 the complainant protested against the administrative decision stated in the letter of 18 September. On 11 December the Director of Personnel wrote to the complainant that the administrative decision against which he wished to protest was communicated to him in the letter of 22 November 1978 and accordingly that his protest was out of time.

3. This put the complainant in a position to address a notice of appeal to the Appeals Board. But Staff Rule 111, which gives to the staff member a right to appeal to this Tribunal against a decision of the Director-General, taken after reference to the Appeals Board, provides also that the staff member may, in agreement with the Director-General, waive the jurisdiction of the Appeals Board and appeal directly to this Tribunal. By letter of 9 January 1981 the complainant asked the Director-General to agree to the waiver, but by letter of 11 February 1981 the Director-General refused to agree. On 18 March the complainant submitted his appeal to the Appeals Board, claiming compensation for extreme inconveniences and strains and for the violation of his copyright. In its reply to the appeal on 27 April the organization relied on the time bar and concluded:

"In view of the clear case to the effect that the appeal is time-barred, it is not considered necessary at the present stage to examine any other aspect of the appellant's submissions. The Organization, however, reserves its right to submit further argument on all or any other questions raised by the appeal in the event that the Board should not wish to dismiss it in limine as requested."

4. The complainant had submitted a detailed appeal in accordance with paragraph 10 of the Statutes. Paragraph 12 requires the Director of Personnel to submit a detailed reply. If he chooses not to examine any part of the appellant's submission, he has no right to reserve. No doubt the Appeals Board (unless there is a rule to the contrary which in this case there is not) has, by virtue of the inherent power in any judicial body to regulate its own procedure in the interests of justice, a judicial discretion in exceptional cases to separate issues and hear and decide one of them before the other. In relation to an issue on receivability such a discretion ought not to be exercised unless, first, the receivability issue is quite distinct from the issues on the merits, and, second, either there is full understanding and consent by the complainant (whose appeal on the merits will thus be delayed) or it is clear to the

Board that the separation is highly likely to result on balance in a substantial saving of costs. In the present case neither of these conditions is fulfilled. Nevertheless, the Board accepted the position created by the Director of Personnel and, in the absence of any protest from the complainant, heard the appeal and said that it felt bound to hold that the complainant was out of time. The Board nevertheless recommended that the Director-General should either exercise the power given to him by paragraph 8 of the Statutes to extend the time in exceptional circumstances or reconsider his refusal to agree to the waiver. By letter of 15 October 1981 to the complainant the Director-General decided that the appeal was out of time and declined to accept either recommendation. This is the decision which is now contested before the Tribunal.

5. The present case is quite unsuitable for considering in two parts since it is necessary, in order to understand the complainant's argument on receivability, to examine the nature of his claim on the merits. The Tribunal need not indicate what course it would take if such a case were to be presented to it again. In the peculiar circumstances of the present case the Tribunal considers that it would not be in the Interests of either party to remit the case to the Appeals Board so that the appeal may be considered as a whole. It will therefore proceed to state from the material in the dossier the facts that relate both to the merits of the claim and to the issue of receivability. These facts are inevitably taken from the uncontradicted assertions of the complainant and so are not conclusive and binding on the parties if and when questions on the merits fall to be decided.

Facts

6. In or about 1971 UNESCO joined with UNDP and the Egyptian Government (acting in conjunction with the Egyptian Academy of Science and Technology) in a project to assist the Government in carrying out a comprehensive scientific study of the causes of coastal erosion in the Nile Delta area and in the preparation of a plan for coastal protection works. These bodies formalised their arrangements in a document referred to as the project agreement. The cash was to come partly from UNDP and partly from the Egyptian Government. There was likewise a division of the obligation to provide the necessary services, equipment and facilities, UNDP's obligation being discharged through UNESCO. The Government in consultation with UNESCO was to appoint a project manager, whose responsibilities were to be assigned to him by the Government but who was also under the direction of UNESCO, to be responsible for its participation and who was to supervise an expert international staff of four selected by the Government in consultation with UNESCO. There was a co-ordinating committee of twelve members, eight of them being Egyptian Government officials or nominees including the President of the Academy, who was the chairman. The other four consisted of the project manager and a co-manager and a representative of UNDP and UNESCO respectively.

7. The complainant, a coastal engineer who was already in the employ of UNESCO, was given by UNESCO on 7 January 1971 a contract as project manager. He had published a comprehensive work on coastal morphology and evolution and received a doctorate in recognition of it. His contract was originally for three years but in the course of time was extended to 31 January 1978. In 1977 the project was drawing to an end and the form of the terminal report was under discussion by the Co-ordinating Committee and the Reports Section of UNESCO. The project agreement provided that the report should be reviewed and published by UNESCO. During the contract period the complainant had devoted all his spare time to the preparation of an interdisciplinary work on the Nile sedimentary system. The complainant proposed that besides the official Terminal Report it might be useful for the project and for future work by the Academy to have a comprehensive inter-disciplinary report covering the Nile sedimentary system. He offered to prepare it himself in his spare time and to make use of reports prepared by the other experts and citing their contributions by name; a draft of what came to be called the Final Technical Report was sent by the complainant to UNESCO on 15 January 1978.

8. It would have been normal practice for the project manager's appointment to be extended for four months while the draft reports were being reviewed. But funds were running short. The contract was allowed to expire on 31 January 1978 and UNESCO asked the complainant to give any further help that might be needed, offering to pay for it by means of consultancy fees.

9. In August 1978 the complainant, who had been asked by the Reports Section about some drawings in the Final Technical Report, observed that their number had been changed. When he returned them on 17 August he pointed out that the project staff was responsible for the contents of the report. In reply he was told by letter of 23 August that both the Terminal and the Technical Reports had been edited and retyped and would be issued as reports for which UNESCO assumed responsibility. The complainant replied on 25 August that a question of the standing of high class professional experts was involved. He asked for a draft of the revised report, offering alternatively to

come to Paris at his own expense.

10. He received no reply. He thought it wrong that the reports of experts should be amended without consultation with them and he would not have offered his own work if he had supposed that UNESCO was not merely reproducing but amending. On 11 September he wrote a letter to the Director-General in which he distinguished between the Terminal Report, which, he said, "fulfils all the official reporting requirements of UNDP" and the Final Technical Report "to which UNESCO does not have the property rights". He wished to settle the matter amicably and proposed that the Report should be in a form approved by him or that UNESCO should confine itself to the parts in which it had property rights. He received a reply from the Assistant Director-General for Science dated 22 November 1978. Mr. Kaddoura said that the Director-General had taken note of his complaints and that he, Mr. Kaddoura, had made a re-examination of them and now made "the following remarks". He appreciated that the draft Final Technical Report had been prepared in hours outside the normal week, but this constituted work done during overtime and not in spare time; hence all rights to it were vested in UNESCO. UNESCO were solely responsible for the quality and accuracy of the final version; extensive editorial work had to be carried out and several passages had to be omitted because not sufficiently supported. A visit to Paris was not necessary at this stage. On 29 November 1978 the complainant replied that he was shocked that work written by scientists was being changed without prior consultation; he would discuss the matter with UNDP and the Egyptian Academy and keep Mr. Kaddoura informed. There was, he said, the possibility that he might find the revised edition acceptable and he was willing to let the matter rest until he had seen it.

11. On 7 December 1978 the Reports Section sent to the complainant a copy of the UNESCO edition of the Final Technical Report. The complainant found a considerable number of scientific errors in it. He spent nearly a year in the correction of errors and in correspondence with the Academy. On 22 October 1979 the complainant addressed to the Director-General what he described as an appeal according to Staff Rule 101.1. This rule provides that staff members may, exceptionally and for sufficient reason, have direct access to the Director-General. This letter was not answered. On 3 July 1980 the complainant wrote the letter cited in paragraph 2 above.

Letter of 22 November 1978

12. The validity of the Organization's objection to receivability turns in the first place upon whether the above letter contains an effective administrative decision within the meaning of paragraph 7 of the Statutes of the Appeals Board, this being the provision that imposes the time bar. As to this the complainant contends or can contend:

(1) that an administrative decision can be given only in answer to a claim by a staff member as a staff member and that the complainant's letter of 18 September 1978 to which the above letter was a reply contains no such claim;

(2) that the terms of the above letter were not such as to convey an administrative decision;

(3) that the principle of good faith should in the circumstances prevent the Organization from relying on the above letter as an administrative decision.

The Tribunal will consider each of these contentions separately in the next three paragraphs.

13. Staff Regulation 11.1 requires the Director-General to maintain an Appeals Board to advise him when a staff member lodges an appeal against an administrative decision, "alleging that it conflicts with the terms of his appointment or with any relevant regulation or rule". A decision therefore which is not in conflict with the complainant's terms of appointment or with any regulation or rule is not appealable. The complainant contends that in his letter of 18 September he was writing to the Director-General not as a former staff member with a complaint but as a former project manager and inviting him to resolve difficulties that had arisen in the execution of the project. He says that it was not until a later stage that he determined to assert his rights as a staff member. The object of the letter was to seek an amicable settlement and to persuade UNESCO to desist from publishing an amended Report. It is true that the complainant clearly asserted in the letter his copyright in parts of the Report. But, he maintains, he was not making any claim for compensation; he was using it as an argument to deter UNESCO from the proposed publication. There is force in this contention. But the Tribunal considers that the letter is in this respect ambiguous and so will not decide the point on this ground. The Tribunal will therefore assume that in this letter the complainant was by implication asserting that the publication of an amended Report in which he held the copyright would without his consent be a breach of the terms of his appointment.

14. When a staff member takes his complaint to the Director-General he does not necessarily view it simply as a preliminary step to appeal proceedings. He may reasonably hope first for consideration and perhaps discussion. Likewise a Director-General does not invariably wish to give a decision at once without further discussion. So a Director-General's first letter is not necessarily his last word. The argument of the organization refers with some exaggeration to "a barrage of letters ... fruitlessly exchanged", after which "the Organization decided that it was time the dispute was settled". Certainly it is open to a Director-General to settle a dispute at any time so long as he uses language which shows clearly that he is giving his final decision. A formula that is commonly used by a number of executive heads is to say plainly that what has been written is a final decision, that it is hoped that it will be accepted but that, if it is not, the staff member can appeal against it within the specified period: this has the advantage not only of form and clarity, but also of avoiding the sort of situation which will be dealt with in paragraph 16 below. It is not of course necessary to follow exactly the words of the formula, but in the letter of 22 November there is nothing remotely resembling it. The word "decision" is not used: the contents are described as "remarks": they are not the Director-General's remarks but the writer's made after a re-examination which the Director-General had instructed. There is certainly an opinion expressed by the writer that the complainant had no copyright, but this does not get to the heart of his grievance. obviously he had been willing that his work should form part of the Report. His complaint was that, copyright or no, the work of scholars distinguished in their own fields should not be amended or corrected without reference to them. The Tribunal concludes that the letter of 22 November 1978 does not contain an administrative decision.

15. Time bars are essential to efficient administration, but they are not devised as a trap for what the organization in its argument describes as the "legally non-vigilant person". If the letter of 22 November was intended as a decision, the complainant's letter of 29 November (see paragraph 10 above) made it plain that he did not so regard it. The good faith that is part of the link between the organization and its members requires that neither side should take advantage of an obvious misconstruction by the other of its intentions. The silence of the Organization when it must clearly have seen that the complainant was (on its view) misreading the letter of 22 November prevents it from setting up that letter as a decision.

The alternative objection

16. The Organization in its reply suggests that if the letter of 22 November 1978 was not a decision, then the letter of 11 December 1980 cannot have been a decision either, since it merely repeats the former letter. The point is specious but unsound. The organization does not develop it, preferring to assume for the purpose of this alternative (without admitting) that the latter letter was a decision. The Tribunal holds the assumption to be correct.

17. The consequences of this assumption were not discussed before the Appeals Board. The first sentence in the opinion of the Board is: "The Board has given very careful consideration to the letter of 22 November 1978 upon which the Administration based their entire case." The complainant had appealed under Rule 7 of the Statutes against the decision of 11 December 1980. The whole of the Organization's reply was that the appeal was irreceivable because the letter of 11 December was not an administrative decision within the meaning of the rule, but merely confirmatory of the earlier decision of 22 November. No question of a time bar ever arose. If the letter of 22 November 1978 was the true decision, the appeal was obviously out of time: if on the other hand the letter of 11 December 1980 was the true decision, the Organization did not take the point that it was out of time because it was not filed until 18 March 1981. The delay, as explained in paragraph 3 above, was partly due to the fact that the complainant desired under Rule 111.2(b) to waive the jurisdiction of the Board; on 9 January 1981 he sought to obtain in from the Director-General the consent to the waiver which this rule requires. The Director-General, whether by accident or design, took a month to reply to this request with the result that the refusal was dated on the very day when the time allowed for appeal to the Board expired. The Organization wishes now to take the time bar point for the first time before the Tribunal.

18. The function of the Tribunal is to do justice between the parties according to the merits of the case but subject to the rules of procedure by which it is governed. The rules as to receivability, which are procedural rules, are designed to protect the organisation against what might be a greater injustice to it if access to the Tribunal was totally unrestricted. While it is generally to be expected that an organisation will lay its whole case on the merits before the Appeals Board so as to enable that body to give the best and most complete advice to the Director-General, its omission to take a particular point will not as a general rule prevent the consideration of that point by the Tribunal. This is because it is the duty of the Tribunal to arrive in so far as it can at a just decision on all the merits. If however the failure of the organisation does not go to the merits but is a failure to take advantage at the appropriate time of a procedural provision framed for its benefit, the position is not the same. There can be no

doubt that the appropriate, if not the only, time to take the point was before the Appeals Board, since it is the proceedings before the Board that are said to be out of time (with the result that the complainant failed to exhaust his internal remedies) and not the proceedings before the Tribunal itself. The Tribunal has therefore now to consider whether or not justice requires that the Organization should be given a second opportunity to take the point. Three factors ought to be considered. The first is whether the point is a clear and compelling one. The second is whether there is an adequate explanation of the Organization's failure to take it. The third is whether the complainant may be prejudiced by the Organization's failure.

19. As to the first, the point is by no means sure of success. It is easy to say that on the admitted dates the complainant was more than a month out of time. But the situation is complicated by Rule 111.2(b). This permits a staff member, in agreement with the Director-General, to waive the jurisdiction of the Appeals Board. It is not possible for a party to waive a jurisdiction which he has himself invoked: by the invocation he abandons his right of waiver. If the rule had made the right unconditional, there would have been no difficulty. The complainant would simply have to make up his mind within the period of two months prescribed by paragraph 7 of the Appeal Statutes which jurisdiction he wanted. But under the rule he cannot waive without the consent of the Director-General and no time limit is prescribed for the giving of the consent. it would at least in theory be possible for the Director-General to deprive the complainant of all right to appeal by withholding his denial of the waiver until after the time for appealing to the Board had expired. It would therefore be not at all easy to determine how the time limits in paragraph 7 should be applied to the situation created under Rule 111.2(b). The just solution may be that, provided that the complainant is not dilatory in applying for the consent of the Director-General, time does not begin to run until after the Director-General has communicated his decision.

20. The Organization does not in its submission offer any argument upon the application of Rule 111.2(b). Neither does it offer any explanation of its failure to take the point at the appropriate time. This may be due to an oversight in which case it is as guilty of a procedural fault in this case as is the complainant. Its action in resting its whole case upon the decision of 22 November may have been intended to secure a tactical advantage. Some advocates think, particularly if they are appealing before a lay tribunal, that the suggestion of an alternative weakens the force of the primary argument. This would not in the opinion of the Tribunal be a good ground for failing to take the point.

21. If the Organization had been successful in persuading the Appeals Board that the appeal from the decision of 11 December was out of time, the Director-General would have had to consider whether or not to exercise his discretion under paragraph 8 of the Appeals Statutes to extend the time limit in exceptional circumstances. The position of the complainant would therefore be prejudiced unless the Tribunal were to decide that it would exercise a similar discretion.

22. In brief, the Tribunal is being asked by the organization to overlook its failure to present the point at the appropriate time so as to enable it to take advantage of the complainant's failure to present his appeal within the appropriate time. The Tribunal does not consider that justice requires this course to be taken.

Conclusion

23. The Tribunal, having decided that the effective decision from which the complainant is entitled to appeal is contained in the letter of 11 December 1980 and being of the opinion that justice does not require the admission of the new point, holds that the objection to receivability fails. The Tribunal will quash the decision of 15 October 1981 as requested. It will not as requested examine the appeal on the merits; this must first be done by the Appeals Board. The Tribunal will compensate the complainant for his legal costs incurred to date. The other remedies requested do not arise for consideration at this stage.

DECISION:

For the above reasons,

1. The decision of 15 October 1981 is quashed.

2. The Appeals Board is directed to proceed forthwith with the consideration on the merits of the complainant's appeal.

3. The Organization is ordered to pay to the complainant $4,000 in respect of his legal costs.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.