

## **EIGHTY-FIRST SESSION**

### ***In re* GREENE-CHAMBERLAIN (No. 2)**

#### **Judgment 1516**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Lillian Greene-Chamberlain against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 27 February 1995 and corrected on 7 July, UNESCO's reply of 25 October, the complainant's rejoinder of 22 December 1995 and the Organization's surrejoinder of 31 January 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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's career at UNESCO and the background to the present dispute are summed up under A in Judgment 1233 of 10 February 1993. She had claimed, among other things, the quashing of a decision on the degree of permanent invalidity she was suffering from on account of assault on the premises of UNESCO on 12 July 1979. The judgment dismissed her claims on the grounds that she had failed to exhaust the internal means of redress.

As the judgment explained, the acting chief of the Staff Pensions and Insurance Division informed her on 17 January 1990 that the Director-General had endorsed a recommendation from the Advisory Board on Compensation Claims to set at 18 per cent the degree of her permanent partial invalidity. That entitled her, according to the scale of compensation, to payment of 24,166.80 United States dollars.

Under Article 18 of the Rules of the Staff Compensation Plan a claimant may apply for "reconsideration" within thirty days of getting notice of the Director-General's decision. If the claimant does so on medical grounds a medical board is set up and reports to the Advisory Board on Compensation Claims, which in turn reports to the Director-General.

By a memorandum of 16 February 1990 the complainant told the acting chief of the Staff Pensions and Insurance Division that she wanted to be paid the amount on offer but had reservations about it. In another memorandum of even date to the Director-General she challenged the decision of 17 January under paragraph 7 of the Statutes of the Appeals Board. By a memorandum of 7 May she informed the acting chief of the division that she was pressing the "claim put to the Director-General" on 16 February 1990. In a memorandum of 31 July she submitted to the acting chief the name of a doctor who should represent her if there was another medical enquiry. After the Director-General had rejected her claim of 16 February she went to the Appeals Board on 25 June 1990. The Board recommended rejecting her appeal, the Director-General did so on 16 May 1991, and on 14 August 1991 she lodged her first complaint impugning that decision.

On 4 November 1991 her doctor named a specialist to sit on the medical board, and by a letter of 8 September 1992 her counsel submitted the name of another to the chief of the Staff Pensions and Insurance Division and asked that the board meet as soon as possible. In her reply of 14 September 1992 the chief of division said she would put the two names to the Organization's chief medical adviser and the board could then meet.

On 7 January 1993 the complainant lodged a claim with the Director-General pointing out that UNESCO had neither given her a final decision on compensation nor convened the medical board; she sought waiver of the internal procedure and leave to go straight to the Tribunal to challenge what she described as "non-decision". On 25 March the Director of the Bureau of Personnel told her that the Director-General had refused her claim of 7 January. On 1 May she gave notice of appeal to the Appeals Board against that decision and the "implied rejection"

of her claim. In its report of 14 June 1994 the Board unanimously recommended setting up the medical board within one month in line with Article 18.2.1 of the Rules of the Staff Compensation Plan. By a letter of 12 August 1994, which she impugns, the Director-General rejected her appeal.

B. The complainant says that she is challenging the Director-General's refusal to take a final decision on compensation for the consequences of the assault she suffered in 1979. For all her efforts UNESCO has taken no action to settle the case. It refused to act on the request for review she put to the acting chief of the Staff Pensions and Insurance Division on 16 February 1990 and confirmed on 7 May. It then obstructed the setting up of the medical board even though as early as 31 July 1990 she had named a doctor to represent her.

Because of UNESCO's bad faith and lack of diligence the Tribunal should now declare the amount of compensation she is entitled to. Pressing the pleas she put forward in support of her first complaint, she contends that the decision of 17 January 1990 setting at 18 per cent the degree of her permanent invalidity was tainted with procedural flaws and mistakes of fact, neglected material facts and rested on an obvious misappraisal of the evidence.

She invites the Tribunal to set aside the decision of 12 August 1994, to declare that the defendant has failed to act, to make its own ruling on the degree of her invalidity and to award her damages for the unusually serious material and moral injury she has sustained. She claims costs.

C. In its reply UNESCO argues that her complaint is irreceivable.

First, it contends, she has never sought review within the meaning of Article 18.1 of the Rules of the Staff Compensation Plan. The "claim put to the Director-General" which she says she pressed on 7 May 1990 is none other than the one she made on 16 February 1990 under the Statutes of the Appeals Board. Nor does the letter of 31 July 1990 constitute such request for review. Even if it did it would have been time-barred. Since she failed to exhaust the available means of redress the Director-General may not be deemed to have refused a final decision on compensation. Though he may under Article 18.1 waive the time limit, her case is not such as to warrant waiver.

Secondly, the claims she put to the Appeals Board on 1 May 1993 differ from those in her letter dated 7 January 1993, just as the claims in her complaint go beyond those she put to the Board.

Thirdly, by claiming the quashing of the decision of 17 January 1990 without following the procedure in Article 18.1 she disregards Judgment 1233. Her claims offend against *res judicata*.

In subsidiary argument on the merits the Organization contends that the decision of 17 January 1990 was fully warranted and shows no fatal flaw.

D. In her rejoinder the complainant answers the Organization's objections to receivability and presses her case on the merits.

As the Tribunal acknowledged in Judgment 1233 under 8 she duly submitted a request for reconsideration of the decision of 17 January 1990. Having consistently acknowledged that she did make that request, UNESCO is estopped from denying its existence. And having itself held up the internal proceedings it may not properly argue that she has failed to exhaust her remedies.

E. In its surrejoinder UNESCO maintains that it got no request for reconsideration of the decision of 17 January 1990. Appeal lies only against a "non-reply", not the meaningless "non-decision" she alleges. Besides, as Judgment 1233 said under A, the Appeals Board observed in its report of 4 April 1991 that she had failed to make a request to the Director-General under Article 18.1.

## CONSIDERATIONS:

1. UNESCO first employed the complainant in 1978 as chief of the Unit of Physical Education and Sport in its Education Sector. On 12 July 1979 another member of the staff assaulted her and UNESCO treated the assault as a service-incurred accident. Her health grew steadily worse, as was recounted in Judgment 1233 of 10 February 1993 on her first complaint. The Organization dismissed her for reasons of health at 31 March 1988. There ensued disputes about the lawfulness of dismissal and the reckoning of her pension rights and compensation. In Judgment 1233 the Tribunal dismissed her various claims.

2. One of those claims was to the quashing of a decision by the Director-General to set at 18 per cent the degree of her permanent invalidity attributable to the assault in 1979 and to grant her 24,166.80 dollars in compensation. The Tribunal allowed the Organization's objections to the receivability of the claim on the grounds of her failure to exhaust her internal remedies: to determine how the assault had affected her health and the extent of UNESCO's liability, she had first to put a request for reconsideration to the Advisory Board on Compensation Claims in accordance with Articles 18.1 and 18.2.1 of the Rules of the Staff Compensation Plan.

3. Believing that the Organization was able "neither to take a decision nor even to set up the medical board", she filed a claim with the Director-General by a letter of 7 January 1993. She sought leave to file a complaint directly with the Tribunal against what she described as "non-decision", or rather, in her view, rejection of her claim to a decision on the amount of compensation. In his reply of 25 March 1993 the Director-General refused her leave to go directly to the Tribunal. She then went to the Appeals Board. The Board declared her appeal receivable and recommended asking the Advisory Board on Compensation Claims to convene a medical board within one month under Article 18.2.1 of the Rules of the Staff Compensation Plan. The Director-General chose not to do so and rejected her appeal in a letter dated 12 August 1994. It is that letter, which she seems not to have got until 28 November 1994, that she is now impugning.

#### Receivability

4. UNESCO argues that the complaint is irreceivable on three counts: the impugned decision is not challengeable; her claims are new ones; and she is in breach of *res judicata*. The pleas fail for the following reasons.

5. On 25 March 1993 the acting Director of the Office of International Standards and Legal Affairs wrote a letter to her counsel and the Director of the Bureau of Personnel sent another to the complainant herself. The letters gave notice of the Director-General's refusal to waive the internal appeal procedure and let her go straight to the Tribunal. The reasons were substantive and the letters cannot but be construed as rejecting her request of 7 January 1993. So the Director-General's decision is indeed challengeable before the Tribunal.

6. The Organization is again wrong to argue that she has never sought reconsideration, as required under the Rules of the Staff Compensation Plan, of the decision setting the degree of her invalidity at 18 per cent and so has no adverse decision to impugn on that score.

7. It is true that as worded her original claims were not about the degree of her invalidity but challenged, among other things, the amount of compensation. But there is much evidence to show that the competent units of the Organization did realise she was seeking review on medical grounds and that they began the process of setting up the required medical board. Thus on 28 May 1990, in reply to a letter she had written on 7 May, the acting chief of the Staff Pensions and Insurance Division referred her to Article 18.2.1 of the Rules of the Staff Compensation Plan and asked her to reply before the submission of her "appeal for reconsideration" to the competent board. Her reply of 31 July 1990 was that she would undergo further medical examination if the Organization thought it necessary, but only provided that that would not prolong unduly an already lengthy procedure, and she named a doctor to sit on the board. In a further letter of 29 January 1991 UNESCO sought to dissuade her from having a medical board set up. But she answered on 13 February that she was pressing her appeal under Article 18.2.1 of the material Rules and wanted the entire case records to go to that board. In a reply dated 29 March 1991 the Organization told her that the medical board would meet as soon as possible; it would be made up of the doctor she had named, the chief medical officer and a third doctor to be appointed by the other two; and it would examine her at a time and at a place in the United States that it would itself decide. The process of setting up the medical board crept on. Thus a letter of 14 September 1992 told her that it could be set up after the chief medical officer had got back from several days' leave.

8. The upshot is that both the complainant and senior officers believed that review was on the way. Indeed the Organization said in its reply to her first complaint that reconsideration under Articles 18.1, 18.2.1 and 18.2.3 of the Rules of the Staff Compensation Plan was "now under way", and it was for that very reason that the Tribunal upheld the plea that her first complaint was irreceivable for failure to exhaust her internal remedies. So it is odd to find the defendant now arguing that she had to get an express decision before seeking review: the months and months of correspondence gave her sound reason to believe that UNESCO was reviewing the case and even making the required arrangements.

9. UNESCO's second objection must also fail. It argues that the claims she has put to the Appeals Board and to the

Tribunal were not covered by her application of 7 January 1993 for leave to come straight to the Tribunal. As was said in 3 above, her letter of 7 January 1993 expressly objected to the Organization's "failure to take a decision, or even convene the medical board it had itself demanded", and she sought leave to put her case to the Tribunal and challenge UNESCO's refusal to entertain her claim to the determination of compensation. So the plea about receivability under this head is mistaken.

10. The plea of *res judicata* cannot succeed either. The reason that Judgment 1233 gave for dismissing her claims about the degree of her permanent invalidity was that, as UNESCO acknowledges, an 18.1 reconsideration was under way and she had therefore failed to exhaust her internal remedies. Things have since changed: though the process of review is not over, the reason for that is the Organization's own refusal even to acknowledge that the process ever began, let alone carry it out and reconsider the determination of her invalidity. Quite obviously Judgment 1233 cannot arrest the case so as to frustrate her right to due process.

#### The merits

11. The answer to the complainant's case follows from what has just been said about receivability. Merely on the strength of the medical records a doctor set the degree of her permanent invalidity at 18 per cent, the process of review of that determination has begun and there is no reason not to complete it. As the Appeals Board observed in its unanimous report, clinical examination of the complainant is indispensable and the Advisory Board on Compensation Claims should be asked to call the medical board at once to carry out that examination so that the process of review can be completed.

12. The complainant wants the Tribunal to "declare that UNESCO has failed to act and itself make the final determination that the Organization has for years been refusing" her. Having put up with years of dilatoriness and prevarication, she is understandably anxious to have her entitlements speedily determined. Being unable, however, to rule on the medical aspects of her case, the Tribunal has no choice but to send the case back to the Organization for completion of the process of review in keeping with the rules.

#### Damages

13. The complainant seeks not just review of compensation but also damages for the material and moral injury she has sustained on account of UNESCO's refusal to take up her claim. The Tribunal is satisfied on the evidence that the defendant has been guilty of wrongful dilatoriness and shifts of position. It will award her damages for moral injury on that count, and in the light of all the circumstances of the case it sets the amount *ex aequo et bono* at 5,000 dollars.

#### Costs

14. She is awarded costs, and the figure is set at 15,000 French francs.

#### DECISION:

For the above reasons,

1. The Director-General's decision of 12 August 1994 is set aside.
2. The case is sent back to UNESCO for reconsideration of the complainant's claim to compensation under Articles 18.1 and 18.2.1 of the Rules of the Staff Compensation Plan.
3. UNESCO shall pay her 5,000 United States dollars in moral damages.
4. It shall pay her 15,000 French francs in costs.
5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas  
Michel Gentot  
Egli  
A.B. Gardner

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