

EIGHTY-FOURTH SESSION

Judgment 1694

The Administrative Tribunal,

Considering the complaint filed by Mr. R. B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 April 1997, UNESCO's reply of 15 July, the complainant's rejoinder of 8 September and the Organization's surrejoinder of 20 October 1997;

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, an Algerian born in 1942, joined the staff of UNESCO in 1978. At the material time he was employed as a reviser at grade P.4.

In March 1993 he applied for the reimbursement of expenses he had incurred for his five children to have private tuition in the first two terms of the 1992-93 academic year. The tuition was in Arabic, French, management, economics, mathematics, physics, chemistry and natural sciences. The expenses came to 176,160 French francs for 1,468 hours of coaching in all, including 690 hours for Arabic and 778 for the other subjects.

After he had made two enquiries about his claim the Bureau of Personnel sent him a memorandum of 10 May 1994, asking, in accordance with Staff Rule 103.12(m), for proof that the tutoring had been indispensable and for bills certified by some "statutory authority". On 8 June he submitted to the Director-General a protest under Article 7(a) of the Statutes of the Appeals Board. By a memorandum of 19 July 1994 the Director of the Bureau told him on the Director-General's behalf that the one of 10 May did not constitute an "administrative decision" that affected him adversely within the meaning of Article 7(a). On 23 June the Bureau had told him in writing that it was refusing to pay for his eldest daughter's education costs on the grounds that she had already had four years' post-secondary studies and no longer met the requirements of Rule 103.12(b).

On 19 July 1994 he gave notice of appeal under Article 7(c) of the Statutes of the Appeals Board and on 19 September filed a detailed brief. In its report of 4 December 1996 the Board recommended reimbursing all "duly receipted" expenditure for his four younger children. As for his eldest daughter, it recommended considering her case "on the merits" and in view of her poor health granting her half of the annual amount payable under the Staff Rules as a "reasonable" sum. By a letter of 22 January 1997, which he impugns, the Director-General rejected his appeal.

B. The complainant submits that UNESCO broke Rule 103.12(b) by taking account of his eldest daughter's first two years of higher education, in which she failed. The provision authorises payment of the education allowance for up to four years for a course of study, and so he was entitled to reimbursement in full.

He argues that the conditions set out in Rule 103.12(m) were met: the only way of learning Arabic in Paris is through private tuition. Supplementary tuition in the other subjects was warranted by the academic problems his children had been facing. As for the certified bills the Administration wanted, the condition was a new one, at odds with long-standing practice and impossible to meet.

Lastly, he objects to having fared less well than other staff, to UNESCO's failure to tell him why it would not pay up and to delays in the internal appeals proceedings.

The complainant seeks the quashing of the "decision" dated 10 May 1994 and of the one the Director General took on 22 January 1997, and asks the Tribunal to order the Organization to pay him the amount claimed, the cost of later tuition incurred up to the date of the judgment and interest thereon. He also claims material and moral damages and costs.

C. In its reply the Organization says that his complaint is irreceivable for failure to abide by the internal procedure. The memorandum of 10 May was not a final decision; it did not affect him adversely; and appeal did not lie against it. What is more, he failed to challenged the memorandum of 23 June as required under Article 7(a) of the Board's Statutes before lodging his appeal with that body.

Subsidiarily, UNESCO refutes his interpretation of Article 103.12(b). As to the memorandum of 10 May 1994, it submits that the purpose of the education grant is to help in coping with expatriation and it is up to the claimant to prove that it is warranted. His claim being "dubious", the Organization was entitled to ask him to substantiate it. In any event it would have been quite right to turn him down since his claim showed "a host of inconsistencies".

D. In his rejoinder the complainant points out that the Director of the Bureau of Personnel invited him by a memorandum of 13 May 1997 to put his case to the Tribunal if he wanted to challenge the decision of 22 January and did not then mention any problem of receivability.

On the merits he contends that even if the Organization's interpretation of 103.12(b) is right the Director-General may still take account of such special circumstances as his daughter's health. He presses his other pleas and charges the Administration with breach of good faith, several of his claims having remained in abeyance for over a year even though they were in order.

E. In its surrejoinder UNESCO denies that the only way of picking up Arabic in Paris is private tuition and it lists thirty institutions there offering classes in the language.

In its memorandum of 13 May 1997 telling the complainant about the appeals procedure the Organization did not waive its right to challenge receivability. Although the Director-General may relax certain conditions the Tribunal will not order him to do so. Lastly, it accuses the complainant of acting in bad faith by objecting to delays in handling his claims after it had told him they would not be settled until it got a ruling from the Tribunal.

CONSIDERATIONS

1. The complainant, an Algerian who was born on 16 April 1942, has served UNESCO at its headquarters in Paris since 21 June 1978. He started out as a translator and minute writer at grade P.3 and is now a reviser at grade P.4, step 12.

He has four daughters and a son:

Kawthar, born on 12 May 1971;
 Amina, born on 15 August 1975;
 Asma, born on 26 April 1978;
 Mohamed, born on 16 November 1980;
 Myriam, born on 25 November 1985.

In March 1993 he put to UNESCO a claim to repayment of the costs of private tuition in the first two terms of the 1992-93 academic year, i.e. from September 1992 to March 1993:

	hours	French francs
Kawthar (university) management, economics and Arabic	267	32 040
Amina (secondary) physics, chemistry and Arabic	273	32 760
Asma (secondary) physics, chemistry and Arabic	273	32 760

Mohamed (secondary) mathematics, natural sciences, French and Arabic	379	45 480
Myriam (primary) spelling, French and arithmetic	276	33 120
Total	1 468	176 160

Of the total number of hours 690 were for lessons in literary Arabic and 778 for additional coaching in subjects with which the children were having difficulty.

Since the claim was a large one the Organization asked for more information.

2. In answer to a letter from the complainant the Bureau of Personnel sent him a memorandum on 10 May 1994 which said:

"2. With regard to your charge about 'the blocking of the payment of school fees' I wish to point out that only your claim to repayment of the costs of private tuition has not been met. As you will have seen, the other costs were repaid promptly.

3. In answer to your request: 'Please explain why you have so far refused to repay my children's school fees', I refer you to Staff Rule 103.12(m). Please read it very carefully and provide evidence to show that the private lessons -- the only costs not yet met -- were indispensable. The costs will not be met unless you produce bills certified by some statutory authority."

On 8 June 1994 the complainant wrote to the Director-General objecting to the reply and saying that unless his claim was met his letter should be treated as an appeal.

3. On 23 June 1994 the Bureau of Personnel told the complainant that his claim for Kawthar was rejected because, under Staff Rule 103.12(b), the education grant could not be paid beyond the end of the fourth year of post-secondary studies, and Kawthar had started her degree course in the 1988-89 academic year.

4. On 19 July 1994 the Director of the Bureau of Personnel wrote to the complainant on the Director-General's behalf pointing out that the memorandum of 10 May 1994 was not a decision adversely affecting him within the meaning of Article 7(a) of the Appeals Board's Statutes but simply a request for proof of payment.

5. The case nonetheless went to the Board. The Administration retorted that the memorandum of 10 May 1994 was not a decision. As to the claims for Kawthar and for the four other children the Board recommended accepting the claims for the four on the grounds that they were properly documented; as to Kawthar it held that the material rule was open to interpretation and suggested paying half of the annual amount payable under the Staff Rules. The Director-General dismissed the appeal outright in a decision of 22 January 1997.

6. The complainant seeks the quashing of that decision and of the "decision" of 10 May 1994 and asks the Tribunal to order the Organization to pay him the amount claimed, the costs of later education incurred up to the date of the judgment, interest thereon, material and moral damages, and costs. He accuses the Organization of mistakes of law, abuse of discretion and misuse of authority.

The Organization asks the Tribunal to rule that the complaint is irreceivable or, failing that, to dismiss it on the merits. It submits that the complainant failed to lodge an internal appeal against the decision of 23 June 1994 and that the memorandum of 10 May 1994 was not a decision that affected him adversely and so not challengeable in an internal appeal or complaint. Even if it were receivable the complaint would be without merit. For one thing the decision on Kawthar's costs is lawful and, for another, even supposing the memorandum of 10 May 1994 were a decision, its sole purpose was to ask for supporting evidence which was indispensable in view of the wide discretion that the rule allows the Director-General.

Receivability

7. According to Article VII(1) of the Tribunal's Statute a complaint is receivable only when the internal means of

redress have been exhausted.

(a) The claim to repayment of any education costs incurred since the lodging of the claim of March 1993 is new and so irreceivable.

(b) There was no specific internal appeal against the decision of 23 June 1994 on Kawthar's costs. But when that decision was taken the claim for Kawthar was already in dispute: it had been submitted to the Director-General along with those for the other four children, so it too was examined by the Appeals Board. The Director-General then dismissed the appeal, without stating any particular reason. A memorandum of 13 May 1997 from the Director of the Bureau of Personnel told the complainant that he could go to the Tribunal. So he was entitled to take it that the claim for Kawthar had been entertained by the Board and dismissed by the impugned decision. Good faith requires that the internal means of redress be deemed to have been exhausted and on that score the complaint is receivable.

(c) Precedent has it that a complaint is irreceivable when the communication at issue is not a decision that adversely affects the complainant. A decision is an action by an officer of an organisation which has a legal effect on the staff member: see Judgment 532 (*in re Devisme*). It is not a letter that merely acknowledges receipt of an appeal and says that a decision will come later (*ibidem*), nor an inference drawn from the absence of a reply to a letter calculated to "initiate a discussion": see Judgment 336 (*in re Hayward*). The complainant suffers no injury from having to wait for a challengeable decision, for example when an organisation says that it will meet a claim to costs as soon as it has proper supporting evidence: see Judgment 1506 (*in re Delos*) under 7 to 9. Likewise, appeal and complaint will be irreceivable where the organisation's rules prescribe some prior formality: see Judgment 468 (*in re Jadoul*), which cites the example of "something which is only one step in a complex procedure and of which only the final outcome is subject to appeal".

In this case the memorandum of 10 May 1994 was plainly not a decision on the complainant's claim.

Indeed it may not amount even to a subsidiary decision on the matter of supporting evidence, since it sets no time limit, does not affect the complainant adversely and so has no legal effect on his position. Even if it were a decision he would, as the case law says, suffer no injury from having to await a refusal which he might challenge on the grounds of breach of the rules on the award of education costs.

His claims other than those concerning Kawthar are therefore irreceivable.

The merits

8. Rule 103.12(b) says:

"The [education] grant shall be payable up to the end of the fourth year of post-secondary studies, but cannot be paid beyond the award of the first recognised degree or beyond the end of the academic year during which the child reaches the age of 25."

9. In the complainant's submission the phrase "the end of the fourth year of post-secondary studies" in 103.12(b) may be taken to mean, not the number of years actually spent in study, but a stage in the school curriculum that is identified by reference to school year. If so, and if the student changes courses, time spent on the first course does not count. Nor should it count if the student repeats a school year.

Citing a judgment of the United Nations Administrative Tribunal (No. 301, *in re Sanchez*), the Organization rejects that view and submits that it does not have to go on paying for any child who keeps failing.

That judgment is of course right: it properly interprets the rule. Although Rule 103.12 does not ignore difficulties altogether, there is no compelling reason why the Organization should have to go on paying costs beyond the fourth post-secondary year for a student who has chosen to change courses.

So the decision rejecting the claim for Kawthar is quite lawful.

The complaint must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Jean-François Egli
James K. Hugessen

A.B. Gardner