**SIXTY-SIXTH SESSION**

## *In re* MEYLER

**Judgment 978**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Carol Ann Meyler Yeziglian against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 August 1988, UNESCO's reply of 20 October 1988 as corrected on 26 October, the complainant's rejoinder of 16 January 1989 and UNESCO's surrejoinder of 21 February 1989;

Considering the applications to intervene filed by:

Mrs. E. Amsellem

Mrs. A. Anderson Briez

Mrs. L. Bellaiche

Mrs. J. Boulmer

Mrs. M. Corcellut

Mrs. S. Cousin

Mrs. J. Frehel

Mrs. J. Klajman

Mrs. P. Linares

Mrs. M. Melville

Mrs. R. Quenardel

Mrs. M. Sabin

Mrs. Y. Torre

Mrs. J. Wright

and the Organization's observations of 6 April 1989 on those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rules 103.8 and .14 and 112.2 and paragraph 7 of the Statutes of the UNESCO Appeals Board;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. At the material time UNESCO Staff Rule 103.14 read:

"(a) Subject to the provisions of (b) below, a staff member in the General Service category whose recognized home is, under the terms of Rule 103.8, in a country other than that of the duty station shall be entitled to a pensionable non-resident's allowance.

(b) The non-resident's allowance shall not be paid, or shall cease to be paid, to a staff member:

...

(ii) who acquires the nationality of the country of the duty station;

(iii) whose husband* is a national of the country of the duty station ... (*Administrative circular 1598 of 29 April 1988 announced the amendment of 103.14(b)(iii) to replace "husband" with "spouse" and, in the French version, "époux" with "conjoint".)

...

(h) If a staff member loses entitlement to the non- resident's allowance under the terms of (b)(iii), (iv) or (v) above, his eligibility for home leave, family visit, education grant, travel expenses in respect of dependants, separation travel, repatriation grant and removal of household goods shall be reviewed and a decision as to his subsequent entitlement shall be taken by the Director-General."

Although by circular of 1 March 1984 the Organization did away with the allowance for staff stationed in Paris, that did not change the rights of those who were already receiving it.

The complainant, a British citizen, joined UNESCO in 1979. She is in the General Service category and her duty station is Paris. Her "recognised home" being in England, she used to get the non-resident's allowance, besides other benefits and allowances due to expatriate staff.

On 3 October 1986 she married a French citizen, Mr. Jean- Claude Yeziglian. She so informed the Organization in writing on 6 October, adding that she did not wish to acquire French nationality. She received a "notice of personnel action" dated 4 November which referred to "suppression of the non-resident's allowance". By a minute of 29 May 1987 the head of a division (PER/HFA) of the Bureau of Personnel informed her that she had "lost" the allowance on marriage and that the Director-General had decided under 103.14(h) to maintain her entitlement, on separation from service, to repatriation grant, travel and removal of household goods but not to home leave, "family visit", education grant or other travel provided for in the Rules. In a minute of 22 June 1987 she objected, but the Director-General upheld his decision on 21 August. She appealed on 21 September under paragraph 7(c) of the Statutes of the Appeals Board. In its report of 12 April 1988 the Board recommended allowing her the full benefits provided for in 103.14(h), but by a letter to her of 27 May 1988, the final decision impugned, the Director-General confirmed his decision to maintain on separation her entitlement only to repatriation travel and removal of her household goods.

B. The complainant observes that the final decision is more detrimental to her interests than the one of 29 May 1987 because it does not maintain the repatriation grant.

The decision discriminates against women staff. That is plain from the text of 103.14(b)(iii) as in force at the material time. While other rules speak of the staff member's "spouse", that text referred to the "husband", so that only a woman staff member lost the allowance on marriage. She may challenge the validity of the rule which the individual decision she challenges was based on. Discrimination on grounds of sex is contrary to the Constitution of UNESCO, international instruments on human rights, the general principles of law and the principles that govern the international civil service. The Tribunal will not give effect to the material rule if it offends against a higher one, as does 103.14(b)(iii).

Her subsidiary plea is breach of the principle of equal treatment. Though the Director-General has discretion under 103.14(h) his decision may not be arbitrary. Other women on the staff who have forfeited the non-resident's allowance on marriage have nevertheless kept some of the other benefits the complainant has lost, such as home leave. She invites the Organization to supply details.

She seeks the quashing of the impugned decision and an award of costs.

C. In its reply the Organization acknowledges that the decision of 27 May 1988 left out the repatriation grant, a mistake it put right in a minute it sent the complainant on 5 October 1988.

It submits that the complaint is irreceivable. Its letter of 29 May 1987 confirmed the loss of the non-resident's

allowance under 103.14(b)(iii) and informed the complainant of the loss of other benefits under 103.14(h). Her challenge to the loss of the allowance is irreceivable because she failed to object in her minute of 29 June 1987 to the Director-General and in her appeal of 21 September 1987, which challenged the withdrawal of the other benefits under 103.14(h). Her claim to the allowance is a new one; indeed it is plain that she intended all along to waive it. She failed to exhaust the internal means of redress. Besides, she missed the time limit for internal appeal. It was the notice of 4 November 1986 that first told her of the "suppression" of the allowance, and she ought to have appealed within two months. The confirmatory decision of 29 May 1987 set off no new time limit.

Her claim to the other benefits is subsidiary to her first claim and is therefore irreceivable.

In any event her claim to the allowance is devoid of merit. Steps were taken years ago to put the sexes on an equal footing, and the word "husband" was replaced by "spouse" in the rules. Unfortunately it was overlooked in 103.14(b)(iii) until the complainant's own claim alerted attention to the oversight. She is not entitled to an allowance which was paid to others only because of a mistake of law.

Her claim to the other benefits is devoid of merit for the same reasons. Moreover, there was no flaw in the DirectorGeneral's exercise of his discretion under 103.14(h). He acted according to objective criteria and UNESCO policy in the matter. The policy is reflected in instructions set out in the record - PER/PPC.1/80/405 of 3 November 1980 - of a policy staff meeting held on 31 October 1980 to discuss the allowance and related benefits. That the policy was consistent is plain from a list, which the Organization supplies, of those who have lost the allowance and other benefits on marriage. The policy is to maintain entitlements on repatriation but do away with recurrent benefits such as home leave. Only two women on the staff since 1980 have kept the right to home leave: one for exceptional reasons in accordance with Staff Rule 112.2, the other by mistake.

D. In her rejoinder the complainant objects to several points in the Organization's version of the facts, but notes that the Organization recognises the former text of 103.14(b)(iii) to be unlawful.

As to receivability, she submits that it is artificial to split the decision of 29 May 1987 into two parts, one about the allowance and the other about related benefits: the single purpose was to state the consequences of her marriage. After all, 103.14(h) does not come into play until (b)(iii) does. Her claim to the allowance is not new. In her appeal to the Board she challenged the lawfulness of (b)(iii) and sought reversal of the decision of 29 May 1987 based on that rule. As the Board itself held, she never waived her right to the allowance. Nor is the claim time-barred. It is doubtful whether a notice of personnel action can amount to a challengeable decision; but in any case the withholding of the allowance might be challenged every month it was not paid. The Director- General is estopped from pleading irreceivability because that was not the reason he gave for his final decision.

The internal means of redress were exhausted: the complainant appealed in turn and in time to the Director-General and to the Appeals Board.

Her claim to the other benefits is receivable. It is not subsidiary to the first one: it is her plea of discrimination between women that is subsidiary to her plea of discrimination against women. In any event, even if the withdrawal of the allowance were beyond challenge she could plead the unlawfulness of such withdrawal to challenge the loss of the other benefits.

The decision of 29 May 1987 is flawed in that it was taken, not by the Director-General as 103.14(b)(iii) requires, but by a head of division in the Bureau of Personnel.

The complainant enlarges on her main plea on the merits, namely that she lost allowance and benefits solely on the grounds of sex. She develops her subsidiary plea that, as to the benefits, she fared worse than other women who lost the allowance on marriage. The Director-General did not exercise his discretion objectively and consistently. The record of the meeting held in 1980, hitherto unrevealed, may be used whenever the Bureau finds it convenient, but otherwise easily ignored. Even supposing that the Director-General's discretion may be so fettered, which is doubtful, the most senior official at the meeting was the Director of the Bureau and the rules were not made, as 103.14(h) requires, by the Director-General himself. Even the incomplete information supplied shows that practice is arbitrary. Rule 112.2 affords no justification for any inconsistencies.

E. In its surrejoinder UNESCO enlarges on its pleas and, with copious reference to the case law, seeks at length to refute the arguments developed in the complainant's rejoinder.

As to the issue of receivability it maintains in particular that she has not exhausted her internal means of redress in pursuing her claim to the allowance; that her claims as stated in the complaint in regard to that allowance are new; that the claim to reinstatement of it is in any event time-barred; and that in consequence the other claims are irreceivable too.

Turning to the merits, it discusses the effects of the Director-General's remarks on the discriminatory character of 103.14(b)(iii) and of his commitment to amending the rule. It submits in particular that the Director-General was bound by his own recognition of the unlawfulness of the former text, that the complainant may therefore not rely upon that text and that equality in law does not mean equality in the breach of it. It further mentions that the decision under challenge - the one of 27 May 1988 - was taken by the competent authority, the Director-General, and that the decision signed on 29 May 1987 by the head of a division of the Bureau of Personnel was also taken by someone to whom authority had been delegated for the purpose in keeping with the rules in the Organization's Manual, with his post description and with UNESCO usage. The decision to do away with the recurrent benefits was correct in law because it complied with recommendations of the International Civil Service Commission, was taken by the competent authority, was based on the relevant rules and usage, and was not in breach of the principle of equality between staff members of the same sex. As for the only two women for whom exceptions have been allowed since 1980, the complainant herself concedes that continuing to grant them certain benefits was not unlawful.

CONSIDERATIONS:

1. At the material time UNESCO Staff Rule 103.14(b)(iii) provided that "the non-resident's allowance shall not be paid, or shall cease to be paid, to a staff member ... whose husband is a national of the country of the duty station ...". Thus before 29 April 1988, when the text was amended to replace the word "husband" ("époux" in the French version) with "spouse" ("conjoint"), a woman staff member who had been entitled to payment of the allowance ceased to be entitled if she married a national of the country of the duty station.

Rule 103.14(h) further provides on loss of the non- resident's allowance under (b)(iii) for review of the staff member's eligibility for home leave, "family visit", education grant and travel expenses in respect of dependants, which are recurrent benefits during the period of service, and for "separation travel, repatriation grant and removal of household goods", which are benefits paid on retirement; a decision on subsequent entitlement is to be taken by the Director-General.

2. The complainant, a British citizen, was entitled to payment of the non-resident's allowance at her duty station, Paris, up to 3 October 1986, the date of her marriage to a French citizen. She was so entitled by virtue of an acquired right, the allowance having been abolished on 1 March 1984 for those stationed in Paris, but not with retroactive effect. Payment to her of the allowance ceased on 1 November 1986, as a notice of personnel action informed her on 4 November. By a letter dated 29 May 1987 the head of a division of the Bureau of Personnel informed her that she had lost the non-resident's allowance on marriage by virtue of 103.14(b)(iii); under 103.14(h) she would keep the benefits due on separation but would lose the recurrent ones. In a letter of 22 June she protested against the loss of the recurrent benefits and asked for the decision to be withdrawn on the grounds that it was based on a rule that was discriminatory and contrary to the general principles of law, in particular the principles governing the international civil service. She added that if her claim was refused it should be treated as an appeal to the Appeals Board under paragraph 7(a) of the Board's Statutes.

3. By a letter dated 21 August the Director-General confirmed the decision of 29 May and disallowed her claim. On 21 September she gave notice of appeal against the decision to deprive her of the recurrent benefits. It was at that point that the Organization split the appeal into a claim to non- resident's allowance and a claim to the recurrent benefits.

4. The Organization objected to the receivability of her appeal against the loss of the allowance on the grounds that she had not challenged it earlier. The Board held that according to consistent precedent a claim to the allowance could not be time-barred because the decision was of continuing effect; that the complainant had never surrendered her right to the allowance; and that the appeal was therefore receivable in respect of all the decisions in the letter of 29 May 1987.

5. As to the merits, though the Organization sought to refute the charge of discrimination, the Board was inclined to consider the rule discriminatory. It recommended that the Director-General reverse the decision of 29 May 1987

and grant the complainant the recurrent benefits mentioned in 103.14(h). It further recommended that he consider whether the provision should be amended to remove any element of discrimination and so bring it into line with the general principles of law and with the law of the international civil service. It did not recommend payment of the non-resident's allowance since no claim was before it.

6. By a letter dated 27 May 1988, the decision impugned, the Director-General informed the complainant that, taking the Board's report into consideration, he had decided to confirm the decision taken in conformity with 103.14(h) to maintain only her entitlement to the cost of travel on separation and of the removal of household goods. By an oversight there was no mention of the repatriation grant, but the omission was made good by a minute of 5 October 1988 and is no longer at issue.

Receivability

7. The Organization contests the receivability of the complainant's claim to the non-resident's allowance on the grounds:

(a) that she did not protest against the original decision not to pay it;

(b) that she showed an intention of surrendering her right to the allowance from 4 November 1986 up to 21 September 1987, the date of her appeal to the Appeals Board;

(c) that she was not free to add an appeal that was time-barred to the appeal against the decision originally challenged;

(d) that an appeal against the decision not to pay the non-resident's allowance is time-barred because she failed to appeal within one month of receiving notice of the withholding of it, viz. 4 November 1986. Being mere confirmation, the decision of 29 May 1987 did not set off any new time limit; and

(e) that she had not exhausted the internal means of redress.

8. What was before the Appeals Board and what had been before the Director-General was a claim to the recurrent benefits that was based on the discriminatory character of 103.14(b)(iii). The claim brought the lawfulness of the rule into question and so raised the issue of entitlement to the non-resident's allowance.

The Appeals Board held that it might properly entertain an appeal against the loss not only of the recurrent benefits but also of the allowance because appeal against a decision which has recurring effects cannot be time-barred: each month in which the non-resident's allowance was withheld there was a new cause of action.

That view is the correct one and is indeed clearly supported by the case law: Judgments 292 (in re Molloy), under 13, and 323 (in re Connolly-Battisti No. 5), under 23 and 24. The Organization's plea that the complainant's claim to the non-resident's allowance is barred because of her failure to challenge the first deduction in November 1986 is not sustainable. The effect of the delay is, however, that she may not claim any payment of the allowance falling due more than one month before the lodging of her claim in accordance with the rules.

9. The "preliminary procedure" to be followed before submitting an appeal to the Appeals Board is set out in its Statutes in Annex A to the Staff Regulations and Staff Rules. Paragraph 7 of the Statutes stipulates that a staff member at headquarters shall first address a written protest to the Director-General within one month of the date of receipt of the decision. If he receives no reply within a prescribed time limit or if he does not find the reply acceptable, he may then appeal to the Board.

10. The Organization is correct in its submission that the complainant never protested to the Director-General against the decision not to pay her the non-resident's allowance. Since she did not do so she did not exhaust the means of internal redress and in order to claim payment she must initiate the correct preliminary procedure.

11. Payment is not, however, the same thing as entitlement, and the Organization has not established that the complainant surrendered her entitlement to the allowance. Surrender requires on her part action showing an unequivocal intent to surrender. It cannot be held that when she appealed against the decision to withdraw her recurrent benefits on the grounds of discrimination she was at the same time surrendering her right to the allowance and acquiescing in the loss of it.

12. The Organization further submits that the claim to the recurrent benefits is irreceivable because it is subsidiary to the time-barred claim to the allowance.

Since the rule was unlawful it could never become lawful by lapse of time or by acquiescence and a claim could therefore never be barred. Even though a claim to actual payment of the allowance cannot succeed in these proceedings because of the complainant's failure to follow the proper internal procedure, the question of her entitlement to the allowance must be considered because of its bearing on the matter of the recurrent benefits.

The merits

13. What is impugned is the decision the Director-General took on 27 May 1988 to confirm the earlier one withdrawing payment of the recurrent benefits under 103.14(h).

The Organization does not deny that 103.14(b)(iii) discriminates against women on its staff. Indeed it amended the offending text with effect from 29 April 1988, the word "husband" having seemingly been allowed to survive in the text only by oversight. In other provisions of the Staff Rules "husband" was amended to "spouse" in 1974. That does not, however, relieve the Organization of liability. The old text of 103.14(b)(iii) was not enforceable because it was discriminatory: it offended against UNESCO's constitutional objectives, the Charter of the United Nations, the general principles of law and the law of the international civil service, all of which condemn discrimination on the grounds of sex.

That being so, the Director-General should have confirmed the complainant's entitlement to the recurrent benefits. Since he failed to acknowledge the discriminatory and therefore unenforceable character of the provision his decision was based on a mistake of law and must be quashed.

14. The Organization believes that because the effect of the amendment was to bring the treatment of men into line with that of women she has derived no benefit from it at all. The notion is mistaken. She was entitled to be treated at the time of her marriage in the same way as a man in receipt of the

non-resident's allowance and married to a Frenchwoman would have been. For as long as such a man was entitled to the non-resident's allowance and consequential benefits, so was she.

15. The Organization submits that because of its failure to amend 103.14(b)(iii) the payment of the allowance to men was a mistake and the complainant may not claim the benefit of equality in breach of the law.

There was, however, no breach of the law in paying the allowance to a man regardless of the nationality of his wife. On the contrary, it was paid in accordance with 103.14(a) and not by mistake. What was unlawful was the Organization's failure to pay the allowance to women on the same basis and the mistake, such as it was, was its failure to amend the offending provision. The complainant is claiming the benefit of equality not in breach of the law but in the observance of it.

16. As to her claim to reinstatement of the recurrent benefits, Rule 103.14(h) - under which the Director-General took his decision to withhold them - comes into play only if the right to the allowance is lost under 103.14(b)(iii), (iv) or (v). Since, as was said above, (b)(iii) is unenforceable insofar as it was discriminatory, it could have no effect. Since it had no effect, 103.14(h) did not come into play and there was no authority to withhold the benefits.

17. The complainant's subsidiary argument that she was treated less well than other women need not be entertained since she succeeds in her main contention that the Organization was wrong in the first place in treating women differently from men.

18. Lastly, the Organization submits that the Director- General exercised his discretion in accordance with objective criteria.

The applicability of the criteria in the exercise of his discretion depends on whether the non-resident's allowance has been validly withdrawn. In this case the allowance was wrongly withdrawn and the Director-General did not have authority to exercise his discretion under 103.14(h) at all.

The applications to intervene

19. Fourteen women officials lodged applications to intervene on 21 February 1989. All of them were formerly paid the non-resident's allowance but lost it on marriage. Some of them also lost some or all of the recurrent and the retirement benefits.

20. None of the interveners is barred by any lapse of time from claiming entitlement to the non-resident's allowance and to the other benefits. Being unlawful, the discriminatory provision in 103.14(b)(iii) was unenforceable. Acquiescence is not a valid plea open to the Organization and a woman staff member may at any time object to discriminatory treatment.

21. Even though they may not lose entitlement to the non-resident's allowance by virtue of the discriminatory element of 103.14(b)(iii), the interveners must, in order to benefit from this judgment, be in the same legal and factual situation as the complainant.

22. The interveners are not all in the same legal and factual situation as the complainant and for that reason the applications cannot be allowed. But those who have not yet made claims may do so, while those who have an appeal pending before the Appeals Board should pursue it. The Board will presumably apply the principles set out in this judgment.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 May 1988 is set aside.

2. The Organization shall pay to the complainant all sums due from the date of her marriage in respect of home leave, family visit, education grant and travel in respect of dependants which it would have paid to a man receiving the non-resident's allowance and married to a Frenchwoman.

3. The Organization shall pay the complainant the sum of 15,000 French francs in costs.

4. The applications to intervene are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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