

TWENTY-SEVENTH ORDINARY SESSION

***In re* PODNIESISKI**

Judgment No. 181

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Antoni Podniesiski on 7 January 1971, brought into conformity with the Rules of Court on 18 January 1971, the Organization's reply of 26 March 1971, the complainant's letter of 14 April 1971 and the Organization's comments thereon of 3 June 1971;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Rules 111.1, 111.2 and 103.21(h), and paragraphs 7, 8 and 8 bis of the Statutes of the Appeals Board of UNESCO;

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

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

A. Mr. Podniesiski, who is of Polish nationality, joined UNESCO in 1966 and was assigned to Aleppo (Syria). Following renewal of his appointment he was transferred first to Delhi and then to Djakarta, and repatriated to Warsaw on the expiry of his appointment on 15 August 1969.

B. On being transferred from Delhi to Djakarta he sent some of his personal effects from Delhi to Warsaw. On leaving Djakarta he made a second despatch of personal effects to Poland. The Organization reimbursed his expenses up to the maximum amount to which he was entitled by reason of his transfer from Delhi to Djakarta and his repatriation from Djakarta. These payments nevertheless fell far short of the total cost, and on 8 September 1969 he submitted a claim for full reimbursement of his transport costs and for payment of his repatriation grant in a convertible currency. He was informed that his request for reimbursement of the costs of transporting his personal effects had been met by payment of the maximum amount to which he was entitled. He protested against this decision in a letter of 29 October 1969 to the Assistant Director-General for Administration and received a reply from the Bureau of Personnel dated 20 November 1969 confirming that he had received his full entitlement and pointing out that earlier payments had been made in Polish currency in accordance with Staff Rule 103.21(h), which provides that the repatriation grant should be paid in the currency of the duty station or of the official's recognised home. On the same day, 20 November 1969, Mr. Podniesiski repeated his claims in a letter to the Director-General, and on 10 December 1969 the Director of the Bureau of Personnel replied, on the Director-General's instructions, that he had nothing to add to the letter of the Bureau of Personnel of 20 November referred to above.

C. Mr. Podniesiski appealed to the Appeals Board against the decision of 20 November 1969, confirmed on 10 December. Before the Board the Organization contended that the appeal was time-barred and therefore irreceivable. The Appeals Board held that the letter of 20 November constituted the impugned decision and that the time limit of thirty working days set in paragraph 8 of the Statutes of the Appeals Board had started to run from that date. The Board held, however, that in calculating the period "allowance must be made for a reasonable additional period by the end of which it may be assumed that the communications of the Bureau of Personnel have reached the recipient", and that in default of any provision to that effect in its own statutes it must apply by analogy the provisions of Article 6, paragraph 2, of the Rules of Court of the present Tribunal: "a communication of a document or a notification shall be deemed to have been duly effected eight days after its despatch to the address of the person concerned, provided it is sent by registered post and the fee paid for a certificate of delivery". The Appeals Board accordingly held that the period had started to run from 29 November 1969 and found that the number of working days between that date and 15 January 1970 (the appeal to the Appeals Board on 23 January 1970 was dated 15 January) did not exceed thirty. Since the Organization had not argued the merits, the Board simply held, in its report of 15 July 1970, that the appeal had been lodged within the time limit and was admissible,

and did not make a recommendation with regard to the merits of the complainant's claims. On 19 October 1970 the Director-General pointed out to the Appeals Board, in a communication of which a copy was sent to the complainant, that, even if the date from which the period had started to run was deemed to be 29 November 1969, more than thirty working days had elapsed between that date and 15 January 1970, and that accordingly he could not endorse the Board's view.

D. In the complaint before the present Tribunal the complainant seeks the following relief:

1. reimbursement of the cost of transporting his personal effects and those of his family from Djakarta to Warsaw according to the bills presented to the Bureau of Personnel of UNESCO, or approximately US\$1,900;
2. payment of his repatriation grant in the currency of his last duty station, i.e. Indonesia, or in any convertible currency other than Polish currency which he can deposit in his dollar bank account in Poland or France;
3. payment in full of the daily subsistence allowances due to him because of the involuntary delays in his official schedule on the way from Djakarta to Paris at the end of his mission in Indonesia;
4. payment of a sum equivalent to 25 per cent of the payments claimed under the above-mentioned three heads in respect of the delay in normal payment to cover all losses incurred by him and forming the subject of claims on his part for over a year.

E. In its reply the Organization contends that the complainant was informed during the few days he spent at headquarters from 8 to 12 August 1969 that his claim for reimbursement of transportation costs had been refused and that accordingly the time limit of thirty working days for lodging an appeal with the Appeals Board had started to run from that date. Even if, as the complainant maintains and as the Appeals Board held, the impugned decision is deemed to be the refusal notified to the complainant on 21 October 1969 by express communication from the Bureau of Personnel in reply to the complainant's letter of 8 September, subsequently confirmed by the letter of the Bureau of Personnel of 20 November in reply to the complainant's protest of 29 October, the time limit expired long before 15 January 1970, the date of the appeal to the Appeals Board. The complainant's second claim, for payment of the repatriation grant in a convertible currency, was first made in his letter of 8 September and its rejection is contained in the letter from the Bureau of Personnel of 20 November. Here again the time limit expired before 15 January 1970. The Organization maintains that the Appeals Board committed an error of law and of fact in applying by analogy Article 6, paragraph 2, of the Rules of Court of the Tribunal. Moreover, paragraph 3 of Article 6 states that in the application of paragraph 2 of Article VII of the Statute "the date of despatch of the complaint shall alone be taken into account". The time limit in question was increased to thirty days in 1966 for field staff precisely so as to take account of the distance from headquarters. Finally, even if the time limit is calculated in the manner adopted by the Appeals Board, it expired on 13 January 1970, i.e. two days before the lodging of the appeal (inasmuch as, according to Administrative Circulars No. 466 of 16 December 1968 and No. 533 of 24 December 1969, the only statutory holidays other than Saturdays and Sundays which fell within the period in question were Thursday, 25 December 1969, and Thursday, 1 January 1970). As to the third claim, for payment of an additional daily subsistence allowance by reason of the delays in the schedule of the return journey to Poland, the Organization points out that the complainant first made this claim in a letter of 20 November 1969 to the Director-General and that the Bureau of Personnel rejected it on the latter's behalf on 10 December 1969. As the complainant did not contest that administrative decision as provided in Article 7 of the Statutes of the Appeals Board, his appeal on this claim was irreceivable by the Board. Finally, as to the fourth claim, for payment of a sum equivalent to 25 per cent of the payments claimed under the first three heads, the Organization considers that the Tribunal is not called upon to decide upon this claim, since it depends on the merits of the three other claims, whose merits the Appeals Board did not examine. In conclusion, the Organization prays the Tribunal to find the complaint receivable in so far as it relates to the receivability of the appeal lodged with the Appeals Board and irreceivable as to the remainder, to hold that the appeal lodged by the complainant with the Appeals Board was irreceivable and, in consequence, to dismiss the complaint.

CONSIDERATIONS:

1. The complaint must be examined in the light of the following provisions of the Statutes of the Organization's Appeals Board:

"7. A staff member who wishes to protest against any administrative decision or disciplinary action shall do so in

writing within 15 working days of the date of notification of such decision or action if serving at Headquarters, and within 40 working days if serving away from Headquarters, through appropriate channels (Director of Department, Service or Bureau and the Director of the Bureau of Personnel). The protest shall be addressed to the Director-General, who shall give a ruling within 15 working days of the date of the protest if the staff member is serving at Headquarters, or within 30 working days if he is serving away from Headquarters.

8. If the staff member wishes to appeal against the ruling, or if no ruling is made within 15 working days in the case of a staff member serving at Headquarters, or within 30 working days in the case of a staff member serving away from Headquarters, such staff member may request a hearing by reporting these facts in writing to the Secretary of the Board within an additional period of 15 working days if serving at Headquarters, or within an additional period of 30 working days if serving away from Headquarters. The staff member shall briefly state the issue, indicating his grade, and his Department, Service or Bureau.

8 bis. When circumstances preclude observance of the time-limits set for staff members under paragraphs 7 and 8 above, the Director-General may grant an extension."

2. It is clear from the text cited above that protests against administrative or disciplinary decisions made by lower authorities may be lodged with the Director-General, whose rulings or failure to give a ruling are alone referable to the Appeals Board. Hence, as neither the decision notified to the complainant by telegram on 21 October 1969, nor that communicated to him by letter on 20 November 1969, were decisions of the Director-General, no appeal against them could be lodged with the Appeals Board. In accordance with its Statutes, the Board could deal only with the decision taken on 10 December 1969 by the Director of the Bureau of Personnel on the instructions of the Director-General, i.e. on his behalf. The Appeals Board was therefore wrong in accepting an appeal against the letter of 20 November 1969.

3. The question at issue, therefore, is whether the appeal was receivable in so far as it impugned the decision of 10 December 1969.

As regards the starting point of the time limit laid down by Article 8, cited above, the Appeals Board considered that the period allowed should be available in full to the complainant; it therefore applied Article 6, paragraph 2, of the Rules of Court of the present Tribunal by analogy and fixed the starting point of the time limit at eight days after the notification of the decision impugned. As the Organization rightly observes, this is not in accordance with the sense of Article 8 of the Statutes of the Appeals Board. That provision, by setting a time limit for staff members employed away from headquarters twice as long as that for those employed at headquarters, takes account of the time required to transmit headquarters decisions to staff members in the field. To extend by a further eight days the time limit of thirty days already granted to such staff members would therefore mean taking account twice over of the time required for the communication of decisions. It follows that in the case at issue the time limit must be held to run as from and including the morrow of the date on which the decision appealed against was notified, namely 11 December 1969.

The Appeals Board considered that the complainant, having despatched his complaint on 15 January 1970, was within the time limit. The Organization, for its part, maintains that the relevant date was not the day of despatch, but 23 January 1970, the day on which the appeal was received. Of these two alternatives the first must be adopted. It is more in keeping than the second with Article 8 of the Statutes of the Appeals Board which, in laying down that staff members must submit their appeal in writing to the Secretary of the Appeals Board within fifteen or thirty days, implies that the decisive date is that on which the appeal is despatched. If the Organization's view were to prevail, the appellant would be at the mercy of postal delays and could never be sure of acting in time; furthermore, unless he despatched his appeal by registered envelope, which is not required by any of the provisions, it would be impossible for him to prove that it had been delivered before the expiry of the time limit. These considerations must prevail over the argument set out above, based on the two different time limits laid down because of the length of time required for postal communication.

Thus, in order to determine the question of the observance of the time limit for appeals, the dates to be taken into account are 11 December 1969 as the starting point and 15 January 1970 as the date of expiry. The number of working days comprised between these two dates is less than thirty, whatever may be the statutory holidays which must be taken into account. The appeal was therefore receivable, in accordance with the view of the Appeals Board and contrary to the method of calculation adopted by the Organization.

4. It is not necessary to consider whether the complainant submitted his protest to the Director-General within the time limit of forty days laid down by Article 7 of the Statutes of the Appeals Board. If this time limit had expired, the Director-General could indeed have refused to consider the complainant's protest. However, the ruling given on 10 December 1969 on his instructions makes no reference to the expiry of the time limit. Failure to observe a time limit laid down by the above-mentioned Article 7 is not an irregularity which can be pleaded at a later stage in the procedure. In these circumstances the Organization cannot plead the non-observance of the above-mentioned provision before the present Tribunal.

It is also immaterial that the complainant first submitted his claim for a subsistence allowance directly to the Director-General. In giving his ruling on 10 December 1969 on all the claims submitted, the Director-General implicitly waived the requirement that the complainant should submit his request for a subsistence allowance to a lower authority, and the position thus taken is binding on the Organization in the present proceedings.

5. It follows from the considerations set forth above that the Director-General was at fault in ruling that the complainant's appeal to the Appeals Board was time-barred, and that the decision impugned must accordingly be quashed.

The Organization did not argue the merits of the case before the Appeals Board, and the Board in turn did not make any recommendation in that respect. In the present procedure the Organization has also left aside the substantive questions. The case must therefore be referred back to the Organization for a new decision. It will be for the Director-General to refer the case back to the Appeals Board for a recommendation on its merits, and then to take a decision which can be impugned before this Tribunal.

DECISION:

For the above reasons,

1. The decision of the Director-General of 19 October 1970 is quashed.
2. The case is referred back to the Director-General for a decision on the merits after reference to the Appeals Board.

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, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 November 1971.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy