

THIRTY-THIRD ORDINARY SESSION

In re RONDUEN

Judgment No. 246

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Pedro Ronduen on 22 January 1974, the Organization's reply of 21 March 1974, the complainant's rejoinder of 30 June 1974 and the Organization's surrejoinder of 11 September 1974;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, UNESCO Staff Regulation 6.1, UNESCO Staff Rules 106.4 and 111.1, paragraphs 7, 8, 8 bis and 11 of the Statutes of the Appeals Board of UNESCO, Articles II and II bis of the Regulations of the United Nations Joint Staff Pension Fund in force in 1963 and Article II, paragraphs 1 and 2 of the same Regulations as revised on 1 January 1967;

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. The complainant, who was born on 27 April 1907, was appointed to the staff of UNESCO as an expert under the technical assistance programme and sent to Iran. He held a fixed-term appointment at grade P.4 from 23 November 1963 to 22 November 1964. His appointment was successively extended to 31 December 1965, 31 December 1966, 30 June 1967, 31 March 1968 and 31 May 1968, when he left UNESCO. Seven months later, on 31 December 1968, he was engaged at the same grade and again sent to Iran on a fixed-term appointment which expired on 31 December 1970. His appointment was extended to 31 December 1970, 23 July 1971 and 23 December 1971, when he finally left UNESCO.

B. At the time of his appointment the complainant was informed that he was an "associate" participant of the United Nations Joint Staff Pension Fund. On 27 April 1967, when he reached the age of 60, his associate participation in the Fund terminated, and he was so informed. On being reappointed on 31 December 1968 and on each subsequent extension including the last one he was told that he was "excluded" from the Fund.

C. By letter of 1 October 1971 the complainant asked the Organization whether he would be entitled to a retirement benefit from the Fund when his appointment came to an end in December 1971. By a letter of 18 October, confirmed by another of 28 October 1971, Mrs. Bénard, Chief of the Staff Pensions and Insurance Division, replied that he would not. In answer to a similar request from the complainant on 8 December 1971, Mr. Barnes, Director of the Bureau of Personnel, informed him by letter of 24 January 1972 that he was not entitled to any retirement benefit. The complainant was not satisfied with Mrs. Bénard's letters of 18 and 28 October 1971 and at his request the matter was put to the UNESCO Joint Staff Pension Committee. The Committee upheld the interpretation given by Mrs. Bénard in her two letters and the complainant was so informed by a letter of 15 May 1972 from Mrs. Bénard as Secretary of the Committee. Being unable to accept that interpretation, by letter of 28 June 1972 he lodged an appeal with the United Nations Joint Staff Pension Board. By letter of 28 August 1972 Mr. Liveran, the Secretary of the Board, informed him that after full examination of his case the Board had decided to uphold the decision of the UNESCO Joint Staff Pension Committee: the complainant had never fulfilled the conditions laid down by the regulations of the Fund for becoming a "participant" and he could not expect on separation to be entitled to any allowance from the Fund of the kind available to participants.

D. Wishing to appeal, on the basis this time of the Staff Regulations and Staff Rules, against what he regarded as "administrative decisions", the complainant sent the Director-General a letter dated 7 November 1972 in which he referred to a letter he had addressed to the Appeals Board of UNESCO accompanied by a detailed complaint. This letter, dated 25 October 1972, was not received by the Organization until 11 April 1973. The Appeals Board met to examine the complaint and reported on 27 September 1973. While finding the complaint to contain several

irregularities, the Board declared it receivable but advised dismissing it on the merits. By letter of 22 October 1973 the Director-General informed the Chairman of the Appeals Board that after consideration he endorsed the Board's recommendation to dismiss the complaint on the merits, but not its finding that the complaint was receivable; he accepted the Board's recommendation subject to reservations as to the irreceivability of the complaint and without prejudice to the effects of that irreceivability. On the same date the Director-General informed the complainant of his decision in the same terms as those of the letter to the Chairman of the Appeals Board. The complainant is now impugning, inter alia, the Director-General's decision.

E. In his complaint the complainant maintains that since he had worked for UNESCO for seven-and-a-half years the Organization could and should have made sure that the nature and duration of his appointments entitled him to a retirement benefit. In failing to do so it infringed Staff Regulation 6.1 and Staff Rule 106.4. He asks the Tribunal to quash the Director-General's decision, which has had the effect of denying him a retirement benefit, and to fix the amount of compensation or indemnity, as appropriate.

F. The complainant lodges a further claim for relief. He impugns a decision by the Director-General of 21 December 1973 whereby UNESCO received an indemnity, to which he alleges he himself was entitled, under a medical insurance policy in his name. He asks the Tribunal to quash that decision and to fix the amount of compensation or indemnity, as appropriate.

G. In its memoranda the Organization contends that the complainant's appeal to the Appeals Board was irreceivable in that the statutory procedure was not followed. The complainant, it argues, neither protested against any administrative decision nor requested a hearing by the Appeals Board in accordance with the Statutes of the Board. Instead he took only one procedural step, which he calls a "protest/appeal" and which took the place of a protest, a request for hearing and a detailed appeal. Nor did he respect the statutory time-limits, since the forty-day time-limit had lapsed. The Organization believes that the first question for decision by the Tribunal is whether the Appeals Board was justified in declaring the appeal receivable; in other words, whether the appeal was receivable under the Statutes of the Appeals Board. The Organization argues that in so far as the complainant is asking the Tribunal for a decision on the receivability of his appeal to the Appeals Board his present complaint is receivable, but that the complaint is irreceivable in so far as the complainant is seeking a decision on the merits, since the late filing of an appeal under the internal procedure cannot have the effect of extending the time-limits.

H. Subject to the foregoing the Organization submits the following arguments, among others, on the merits. Staff Regulation 6.1, on which the complainant relies and which provides for the participation of staff members in the Joint Staff Pension Fund "in accordance with the Regulations of that Fund" was correctly applied to the complainant's case in 1963, the date of his appointment, 1967, when he reached the age of 60, and 1968, the date of his reappointment. Neither in 1963 nor afterwards did he receive a permanent appointment or an appointment certified by UNESCO to lead normally to a permanent appointment, nor did he ever hold an appointment of five years or more (Article II of the Regulations of the Fund in force in 1963). Since his age had been 56 years and 7 months at the time, he had not fulfilled the conditions for becoming a participant in the Fund, but only those for becoming an associate participant. He had accordingly been duly registered as an associate participant in accordance with Article II bis of the Regulations of the Fund in force in 1963. Under that provision, to which Article II, paragraph 2, of the Regulations as revised in 1967 referred, the associate participation of the complainant had duly continued until after 1 January 1967, and had duly ended on 27 April 1967, his 60th birthday, i.e. after a period of associate participation of three years and five months. He did not impugn any of those decisions. Lastly, by the time the complainant had been reappointed on 31 December 1968, the conditions for participation in the Fund had been amended, on 1 January 1967, and the one-year fixed-term appointment he then obtained would have entitled him to registration as a full participant. Since he had passed the age of 60, however, such participation was excluded under Article II, paragraph 1, of the revised Regulations. His associate participation - a legal notion which ceased to exist on 31 December 1966 - could not continue or be re-established since his period of service with UNESCO had not been continuous as required by Article II, paragraph 2, of the revised Regulations. The organization further maintains that Staff Rule 106.4, the other provision on which the complainant relies, was also correctly applied to his case. It provides for the registration of a staff member as a participant in the Fund "according to his eligibility under the Regulations of the Fund" - a condition which bears the same meaning as the words "in accordance with the Regulations of that Fund" in Staff Regulation 6.1. Staff Rule 106.4 lays down the further condition - covered by the Regulations of the Fund - that a staff member should be "under sixty years of age at the time of appointment". Thus from 27 April 1967 the complainant was excluded from participation in the Fund. Lastly, Staff Rule 106.4 lays down the further condition that participation should not be "excluded by the terms of [the] appointment", as reelected, for example, in the notices of the personnel action concerning the

appointment or reappointment.

I. As to the complainant's further claim, for payment of a medical insurance indemnity, the Organization observes that it is quite separate from the matter of a retirement benefit and was at no time submitted to or examined by the Appeals Board. "It is therefore evident that the claimant did not exhaust the internal means of resisting the decision, and that, under the very terms of Article VII, paragraph 1, of the Statute of the Tribunal, this point of the complaint is not receivable."

J. The Organization asks the Tribunal:

(a) to declare the complaint not receivable with regard to the medical insurance indemnity, and consequently with regard to any compensation on those grounds;

(b) to declare the complaint receivable as far as it concerns the receivability of the appeal before the Appeals Board of UNESCO, and irreceivable for the rest;

(c) to declare that the appeal was submitted to the Appeals Board after the relevant time-limit, irregular as to the procedures followed, and therefore irreceivable, or, should this part of the complaint be declared receivable, to dismiss it as unfounded in so far as it relates to the grant of a retirement benefit and any compensation in that respect.

CONSIDERATIONS:

As to the complainant's participation in the United Nations Joint Staff Pension Fund:

1. On 18 and 28 October 1971 the Chief of the Staff Pensions and Insurance Division of UNESCO and on 24 January 1972 the Director of the Bureau of Personnel informed the complainant that he was not entitled to a retirement benefit from the United Nations Joint Staff Pension Fund. The UNESCO Joint Staff Pension Committee upheld that decision, the complainant appealed, and in July 1972 the United Nations Joint Staff Pension Board dismissed the appeal. The Board's decision may be impugned before the Administrative Tribunal of the United Nations and has not been referred to this Tribunal. It is not open to review by this Tribunal, whose competence does not extend to disputes between an international official and the organs of the Fund.

2. Hence the sole question for the Tribunal to determine is whether by any alleged infringement of its obligations UNESCO deprived the complainant of entitlements from the Fund. That question should be determined by reference to the provisions relied on by the complainant, namely UNESCO Staff Regulation 6.1 and UNESCO Staff Rule 106.4. Staff Regulation 6.1 provides: "Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the Regulations of that Fund". Staff Rule 106.4 further provides: "A staff member who is under sixty years of age at the time of appointment shall participate in the United Nations Joint Staff Pension Fund according to his eligibility under the Regulations of the Fund, provided that his participation is not excluded by the terms of his appointment". As is clear from those provisions, UNESCO merely provides for the participation of its staff members in the Fund in accordance with the Regulations of the Fund and the terms of their appointments. It is not bound to grant appointments in such terms as to confer on staff members maximum benefit from the Fund. On the contrary, although it is of course required to take account of the legitimate interests of staff members on recruitment, in doing so it cannot overlook its own interests. Moreover, the conclusion and extension of contracts of appointment are matters which fall within the discretionary authority of the Director-General of UNESCO, and the Tribunal exercises over such decisions only the restricted form of review to which discretionary decisions are subject.

3. In the present case, in determining whether UNESCO has fulfilled its obligations three periods of time must be distinguished.

(a) The first period runs from 23 November 1963 to 31 December 1966. During that period the complainant was given three appointments: the first from 23 November 1963 to 22 November 1964, the second from 23 November 1964 to 31 December 1965 and the third from 1 January to 31 December 1966. The decisions to grant the complainant only fixed-term appointments did not infringe any provision of the Staff Regulations or Staff Rules and may not be regarded as being ultra vires or as misuse of authority as indeed the complainant himself acknowledged in accepting the offers of appointment. During this period he was an associate participant in the Fund, as was provided under Article II bis of the Regulations of the Fund then in force for staff members holding

appointments similar to his. UNESCO therefore did not ignore the question of his participation in the Fund.

(b) On 16 August 1966 UNESCO extended the complainant's appointment for six months, from 1 January to 30 June 1967. Although the Regulations of the Fund were amended with effect from 1 January 1967, former Article II bis continued to apply in accordance with new Article II, paragraph 2, to staff members who had been associate participants on 31 December 1966. Thus on 1 January 1967 the complainant was still an associate participant. In accordance with former Article II bis, however, he ceased to be an associate participant on 27 April 1967, when he reached the age of 60. He might have become a participant, that is, a full participant in the Fund, only if between 1 January and 27 April 1967 he had met the conditions laid down in new Article II, paragraph 2(a) and (b); in other words, he would have had to hold a permanent appointment, or an appointment certified by UNESCO to lead normally to a permanent appointment, or an appointment bringing his total length of continuous service to at least five years. At that time, however, he had completed only a little over three years' continuous service with UNESCO. Consequently, UNESCO was neither bound nor entitled, nor could even have been reasonably expected to offer the complainant a permanent appointment, or an assignment which might be assimilated thereto, or even a contract which brought the total length of his service to five years.

(c) According to former Article II bis and new Article II, from the age of 60 the complainant was no longer an associate participant and not entitled to become a participant. Whatever their duration, his subsequent appointments could not change his position. There is therefore no need to consider whether or not their extension would have been warranted.

4. It appears from the foregoing that the complainant's claim to be entitled to participate in the Fund is unfounded. There is therefore no need to decide on the receivability of the memorandum submitted by the complainant to the Appeals Board nor on the consequences of its being declared irreceivable in the present proceedings.

As to the claim for the medical insurance indemnity:

5. In his claim for payment of the medical insurance indemnity the complainant impugns an alleged decision by the Director-General, that is to say an administrative decision which may be referred to the Appeals Board. Since the complainant did not submit his claim to the Appeals Board it is irreceivable by virtue of Article VII, paragraph 1, of the Statute of the Tribunal, which stipulates that the internal means of redress shall first have been exhausted. There is no need to consider whether the Tribunal would have been competent to hear the claims under paragraph 1 or paragraph 2 of Article II of its Statute, since the rule requiring exhaustion of internal remedies applies in both cases.

DECISION:

For the above reasons,

The complaint is dismissed.

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, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 October 1974.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet