Registry's translation, the French text alone being authoritative.

FIFTY-THIRD ORDINARY SESSION

In re NIELSEN (No. 2)

Judgment No. 611

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the United Nations Educational Scientific and Cultural Organization (UNESCO) by Mr. Evald Nielsen on 3 September 1983, UNESCO's reply of 8 December, the complainant's rejoinder of 19 January 1984 and UNESCO's surrejoinder of 14 March 1984;

Considering Articles II, paragraph 5, and V of the Statute of the Tribunal and UNESCO Staff Regulations 1.2, 1.2.1 and 1.9 and Rule 101.9;

Having examined the written evidence and disallowed UNESCO's application for oral proceedings;

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

A. This case is the sequel to one on which the Tribunal delivered a judgment -- No. 522 -- on 18 November 1982, and the facts and some of the parties' submissions are summed up therein. UNESCO employed the complainant from 1971 to 1978 as manager of a United Nations Development Programme (UNDP) project for protection of the coast of Egypt, and the case concerns the contents of the "final technical report" on the project (and not the terminal or administrative report, which is not in dispute). In Judgment No. 522 the Tribunal directed the UNESCO Appeals Board to proceed forthwith to hear the appeal on the merits. On 23 February 1983 UNESCO filed a reply on the merits with the Board. The Board's report of 6 June 1983 said that the majority held that the complainant's claims fell outside its competence but that all its members rejected them. The Director-General informed the complainant by a letter of 11 July 1983 that he endorsed the Board's recommendation, and that is the decision impugned.

B. The complainant submits a detailed brief supplementing his original complaint. In his view UNESCO had no right to alter the text of the report without his consent. He alleges flaws in the Appeals Board proceedings in 1983, which he says were incomplete, irregular and detrimental to his interests. For example, he ought to have been allowed to submit a rejoinder to UNESCO's reply of 23 February 1983. The Director-General knew of those flaws and therefore should not have endorsed the Board's recommendation. As to the merits, the complainant contends that by abandoning the report UNESCO have robbed him of international recognition for his work. There are many shortcomings and even errors in the altered version, but since 1978 UNESCO have intransigently refused even to discuss them; indeed the dispute has prevented him from pursuing his scientific work. There are no provisions in the project agreement or in the Organization's internal agreement with the UNDP which confer sole responsibility for the report on UNESCO. They have infringed his contractual rights by taking the report out of his hands. Staff Rule 101.9 ("All rights, including title copyright and patent rights in any work produced by a staff member as part of his official duties, shall be vested in the Organization") does not entitle UNESCO to tamper with his work as it pleases. He has inalienable rights in the results of his scientific work and a vested interest, destroyed by UNESCO, in the publication of the report. There is breach of his copyright in the passages he wrote in his spare time and for which he drew on knowledge of subjects other than those UNESCO employed him to study. The report, never published, is out of date. He asks the Tribunal to quash the decision of 11 July 1983 and award him in full the costs he has incurred since 6 September 1981, compensation for injury equivalent to the remuneration of a consultancy appointment at grade D.1, step 6, since 22 November 1978, and compensation for damage to his professional interests and reputation amounting to 500,000 United States dollars or such sum as the Tribunal determines.

C. In their reply UNESCO contend that the claims are unfounded. They give their own account of the facts. As project manager the complainant was subject, under Regulation 1.2, to the Director-General's authority. Thus in drawing up the report he was performing an official duty. All along it was understood that though the manager would write the report UNESCO would take full responsibility for it. Their position is supported by their guidelines

on publications, RMO 4/74/4628. There is nothing in the altered text which would harm the reputation of any UNESCO expert. Besides, it is a UNESCO report and only UNESCO's reputation is at stake. The complainant had no right to forbid alterations and singlehanded block a report on a project in which many others have invested money, time and work. A project report may be altered, postponed or dropped as needs and circumstances change: this is precisely what Rule 101.9 is intended to allow. The complainant has no property rights in any part of the report and UNESCO were not bound to seek his approval of the many changes required. His brief betrays misunderstanding of the rules and regulations. It is impossible to distinguish passages on the grounds that they did not come within his official duties. Since Regulation 1.2.1 says that "the whole time of a staff member shall be at the disposal of the Director-General", he cannot contend that writing connected with his normal work though done in his spare time was not part of his official duties. Besides, UNESCO never asked him to write passages in his spare time and he has not proved he did so. He was duly paid up to the end of his appointment and has no further claim on the Organization. His allegations of loss of reputation are unfounded: he was treated in keeping with the rules and normal practice and was not barred from doing scientific work after leaving UNESCO. Much of his brief is taken up with polemics and unfounded allegations. Oral proceedings, which UNESCO apply for, would, they believe, shed light on the relevant facts.

D. In his rejoinder the complainant presses his claims and urges the Tribunal to reject the application for oral proceedings, which he believes are unnecessary. In his view the material issue is straightforward: it is wrong to meddle with a scientist's work since his professional reputation and integrity are at stake. Headquarters staff arbitrarily substituted their own scientific views for those of experts like himself who had spent years doing research on the spot. The guidelines on publications are not binding on the Egyptian Government. He recounts the dispute again in detail and says it has caused him years of distress. The reply distorts the facts and misrepresents his arguments, which he develops at length. He discusses the changes in the report and seeks to show that the new version suffers from error, omission and misconception. He contends that the Tribunal's case law, which he cites, supports his claims. He submits that Rule 101.9 cannot justify the Director-General's abuse of authority

in ignoring his rights as author. He alleges that UNESCO's treatment of him was actuated by prejudice, which he infers from the circumstances of the case.

E. In their surrejoinder UNESCO enlarge on the arguments in their reply in the light of the submissions in the rejoinder. Their main contentions are (1) that the claims are tainted with bad faith because in his complaint he has altered the basis of his appeal; (2) that UNESCO are entitled to all rights in the technical report, including the parts based on the complainant's drafts; (3) that publication of the report in the final form approved by UNESCO constituted no breach of the terms of his appointment or any provision of the Regulations and Rules; and (4) that such publication has not caused him any actionable prejudice or damage. UNESCO also reject his criticisms of the Appeals Board proceedings and observe that it could on no account accept his wholly unreasonable demand that he have the last word on the content and form of the report.

CONSIDERATIONS:

Competence

1. The complainant submits that UNESCO have infringed his copyright. Though not expressly alleging non-observance of a provision of the Staff Regulations or Staff Rules or a clause of his contract, he is objecting to the Organization's treatment of him as a staff member on the grounds that they have not respected his status as such. The Tribunal is therefore competent to hear the case under Article II(5) of its Statute, as indeed was implicit in its previous decision in Judgment No. 522 to refer the case back.

Procedure

2. In the original proceedings before the Appeals Board the parties filed three briefs: the complainant's memorandum of appeal, UNESCO's reply, which merely challenged the receivability of the appeal, and the complainant's rejoinder, which replied on receivability.

In Judgment No. 522 the Tribunal directed the Appeals Board to consider the appeal on the merits. In the further proceedings before the Board its chairman authorised UNESCO to put in a second brief in reply, but he did not allow the complainant to file a second rejoinder.

The complainant suggests that it was a breach of his right to a hearing not to let him file a rejoinder on resumption of the proceedings, but the Tribunal need not rule on the point: any defect there was must be deemed to have been removed by the present proceedings before the Tribunal. The Tribunal is concerned mainly with issues of law and, to a lesser degree, with issues of fact; not with what may be fitting. Its competence to hear issues of law and of fact is unrestricted and therefore at least equal to that of any internal appeal body. Since the complainant is free to comment on any such issue before the Tribunal he has had sufficient opportunity to put his case properly, even if the Appeals Board did not fully respect his rights as a party.

3. UNESCO apply for oral proceedings, and the complainant objects on the grounds that they would serve no purpose.

By virtue of Article V of its Statute the Tribunal decides in each case whether oral proceedings shall be public or in camera. But its practice is to order such proceedings only in exceptional circumstances where evidence from the parties or witnesses may help in resolving the issues. No such purpose would be served in this case since in all likelihood evidence of that kind would add nothing of value to the large body of material already before the Tribunal.

The merits

4. At the end of his appointment the complainant drafted two reports for UNESCO: a final administrative report, described below as the "administrative report", and a final technical report, described as the "technical report". The dispute turns on the copyright in the technica1 report, with UNESCO claiming it in whole and the complainant in part.

The Organization rely mainly on Staff Rule 101.9: "All rights, including title, copyright and patent rights, in any work produced by a staff member as part of his official duties, shall be vested in the Organization." The complainant challenges the correctness of the rule and the construction put on it by the Organization, and his pleas are taken up in turn below.

5. As the complainant observes, 101.9 is a Staff Rule and not based on any provision of the Staff Regulations. But where he is mistaken is in saying that that makes it unenforceable.

Under the heading "implementation" the Introduction to the Staff Regulations and Staff Rules says that "the Director-General in his capacity as Chief Administrative Officer of the Organization, ... shall lay down ... rules and provisions consistent" with the Regulations. A Staff Rule will therefore be valid provided it is consistent with the Regulations. Such a rule is 101.9, which prescribes the Organization's rights in work produced by its staff.

6. The complainant submits that 101.9 infringes the staff's legitimate rights as nowadays acknowledged generally and indeed in UNESCO's own publications. The plea fails on several grounds.

First, UNESCO have adhered to 101.9, invariably it appears, in their relations with the many staff members to whom they have given drafting work. Their purpose is obviously not to set aside in their publications a rule they consistently abide by, and the complainant is putting on the publications a construction at variance with their authors' intent.

Secondly, in two of its judgments the Tribunal has already ruled on a text akin to Rule 101.9 and upheld it as valid. The precedents bear out UNESCO's interpretation of that rule.

Thirdly fairly similar provisions are to be found in legislation in several countries. Accordingly, even if the rule does not reflect any universally acknowledged concept it must be given some weight.

In any event, as appears from 11 below, 101.9 does not confer unlimited rights on UNESCO.

7. The anti-erosion project formed the subject of an Agreement concluded on 27 August 1975 between the Organization the United Nations Development Programme and the Egyptian

Government. The complainant contends that according to the Agreement any decision about its execution was to be jointly taken by the three parties and that in seeking to publish the technical report under their own sole responsibility UNESCO are therefore assuming a right which is not theirs.

The plea does not square with a report which the complainant himself drew up and which was approved in December 1976 by the project Co-ordinating Committee, the body competent to act on behalf of the three parties. The report provided, among other things, that (1) the administrative and technical reports should be drafted by the project manager, viz. the complainant; (2) together they should constitute UNESCO's report to the Government and be classified in category I, which meant that UNESCO was to take full responsibility for their contents; (3) no author other than UNESCO should be shown; and (4) after accepting the complainant's drafts UNESCO should submit the reports in their final form to the Egyptian Government through the UNDP Resident Representative. It is thus evident from what the Co-ordinating Committee agreed that the three parties acknowledged the Organization's copyright in the technical report as prescribed in Rule 101.9. The arrangements UNESCO entered into with the other two parties are no bar to strict enforcement of the rule.

The very text of the technical report refutes the complainant's argument. A note on the first page describes it as a report prepared for the Government of the Arab Republic of Egypt by UNESCO as executing agency for the UNDP. Had that description been inaccurate the Government and the UNDP might ordinarily have been expected at least to say so. Yet there is no evidence of any objection from either of them.

UNESCO's position is consistent with their published guidelines on the subject, RMO 4/74/4628. Although the complainant says the guidelines are not binding on the Egyptian Government, they do define the procedure the Organization will follow in cases like the present, and there is no reason to make any exception in this instance.

8. The complainant observes that he drafted half of the technical report in his own spare time and to do so drew on knowledge of matters other than those UNESCO employed him for. His conclusion is that he drafted that part of the report outside the scope of his "official duties" within the meaning of Rule 101.9 and that he alone has the copyright in that part the Organization having none. Again, the plea fails.

It is in conflict with the report's real purpose. Contrary to what the complainant imagines a technical report is not complete in itself. It supplements, and affords the scientific basis for, the administrative report. In law the two reports are therefore equally important. If the complainant does not have copyright in the administrative report -- and he never says he does -- neither does he have copyright in the technical report. It is immaterial that he wrote some of the technical report in his own time or that it contains data he obtained from outside his official area of knowledge: whenever it was written, and whatever it contains, its nature remains unchanged. Nor is it material that a technical section was put in the administrative report: there is no evidence to suggest that that did away with the need for a separate technical report. It was part of the complainant's official duties to draft the technical report and UNESCO have the rights in the report which Rule 101.9 confers on them.

Besides, to allow the complainant copyright in one half of the report and UNESCO copyright in the other would be to let them issue in separate parts a text which was designed as a whole and which, if not a whole, is of less value.

9. The complainant alleges that UNESCO altered the text of the report without his consent, and UNESCO do not deny they made changes of form and substance without his approval. But they were fully entitled by virtue of their rights under Rule 101.9 to endorse or to reject his draft: they were under no duty either to seek comments from him or to act on any he made.

The complainant is a man of parts and gave UNESCO years of distinguished service. UNESCO would have done well to treat him with greater consideration. Whatever attitude he may have taken on the termination of his appointment UNESCO had no imperative reason to reject the offer of help he made them on 25 August 1978. Yet, though they were not as understanding as they might have been, they did not exceed their rights under the Staff Regulations and Staff Rules.

10. The complainant takes the view that UNESCO are under an obligation to publish the technical report, subject only to editing, in the form in which he submitted it. There is a point which the evidence does not elucidate: whether the technical report has actually been published. The complainant says it has not, UNESCO say that from the point of view of the law it has. The Tribunal need not make a finding.

In any event, as the holder of the copyright UNESCO were free to publish or not to publish. Since they had discretion to alter the draft, they had discretion also not to publish the report at all.

11. Although 101.9 states no restriction on UNESCO's rights, that does not relieve the Organization of respect for

the staff member's personal rights.

First, as the Tribunal has held, where the Organization state the authorship of a publication, the principle of equal treatment requires them to name all of the authors.

Secondly, they may not, where there are several authors mislead as to the contribution each has made. They may not declare that someone has written the whole of a report when he has written only part of it. But such rules were not disregarded in this case. UNESCO name the complainant at the head of the list of project experts, but the wording does not suggest his text has been reproduced in full. What is said is that the technical report incorporates the findings of the experts and other staff: in other words, what they wrote has just been taken into account, not reproduced word for word.

The Tribunal's decision

12. The complainant invites the Tribunal (1) to quash the impugned decision, (2) to award him the relief sought in his internal appeal of 3 July 1980 and (3) to award damages against the Organization. Those claims would succeed only if UNESCO had acted unlawfully. Since they did not, the complaint fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

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