

EIGHTY-FIRST SESSION

In re RAOOF

Judgment 1536

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Abdul Raoof against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 November 1994 and corrected on 29 September 1995, the Organization's reply of 8 November 1995, the complainant's rejoinder of 7 February 1996 and UNESCO's surrejoinder of 21 March 1996;

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, a citizen of India who was born in 1923, retired on 30 June 1985 after spending over 15 years with UNESCO, all in field service. His last duty station, where he served from November 1976, was Samchi, in Bhutan and by then he was at step 4 in grade D.1.

He was a participant in the Organization's Medical Benefits Fund. The Fund's Rules provide that a staff member who retires at or after the age of 55 with at least ten years' participation in the Fund may retain coverage for himself and his dependants as "associate" participants. Article 5.3 of the Rules requires the participant to apply for such status within three months of the date of retirement.

By a letter of 20 May 1987 to the health insurance unit the complainant applied for continuing coverage, offering to pay any amounts he might owe by way of premium since July 1985. In a reply dated 9 July 1987 the Chief of the Staff Pensions and Insurance Division said he was referring the matter to the Fund's Board of Management.

In a letter dated 26 July 1987 the complainant told the Chief of the Division that he had not learned until mid-May of the possibility of after-service coverage and he asked for special treatment on compassionate grounds.

By a letter of 29 December 1988 the Chief of the Division informed him that the Board of Management had rejected his application as time-barred.

The complainant sought review but the Secretary of the Board told him in a letter of 10 October 1990 that the Board had again rejected his request.

In a letter of 26 November 1990 he appealed to the Director-General. The Director of the Bureau of Personnel told him on the Director-General's behalf in a letter of 10 January 1991 that he was not competent to decide such matters.

On 2 March 1991 the complainant gave the Appeals Board notice of appeal. In a report of 11 June 1992 the majority recommended inviting the Board of Management to reconsider.

By a letter of 20 July 1992 the Director-General informed the complainant that at the Appeals Board's recommendation he was sending the case back to the Board of Management for "reconsideration".

In a letter of 28 October 1992 the Secretary of the Board of Management informed him that it upheld its earlier decision.

By a letter of 29 November 1992 the complainant appealed anew to the Director-General and sought leave to put his case to the Tribunal in the event of rejection.

The Director of Personnel told him in a letter of 18 January 1993 that the Director-General lacked competence as to decisions by the Board of Management and saw "no need ... to take any decision" on his application for waiver of

the internal appeals procedure.

On 15 April 1993 he filed another appeal seeking action on the majority recommendation of 11 June 1992.

In a further report dated 13 June 1994 from the Appeals Board the majority recommended rejecting his appeal but amending the Fund's rule on the time limit.

By a letter of 12 August 1994 the Director-General rejected his appeal as "inadmissible" and devoid of merit "in law or on the facts". That is the decision under challenge.

B. The complainant submits that the Director-General's decision shows mistakes of law and fact.

Citing the case of another retired official who had applied, but successfully, for readmission to the Fund as an associate participant after expiry of the time limit in Article 5.3 of the Rules, he alleges that the Organization has authority to extend or waive the time limit and has discriminated against him in refusing to do so.

He pleads neglect of essential facts. Stranded at a remote duty station, he relied on wrong information UNESCO had given him earlier that he could not stay in the Fund for more than six months after retirement. But as soon as he learned he might have the status of associate participant he applied for it.

He seeks the quashing of the decision of 12 August 1994, readmission to the Medical Benefits Fund as an associate participant and costs.

C. In its reply UNESCO argues that the complaint is irreceivable *ratione temporis*. Since the complaint raises the same issues as his first internal appeal, the time limit in Article VII(2) of the Tribunal's Statute began at the date when he received the Director-General's letter of 20 July 1992 or, at the latest, when he got the letter of 28 October 1992 from the Secretary of the Board of Management telling him that the Board had "upheld the time-limit".

On the merits the Organization points out that by implication the Fund's Rules do not allow waiver or extension of the time limit in Article 5.3. That the Board wrongly made an exception in another case confers no right on the complainant.

UNESCO met its duty to inform him of the material rules by sending them to him at the time of recruitment. Besides, his acknowledgement in his letter of 20 May 1987 that he "forgot" to apply for continuing coverage shows that he already knew that he ought to have applied sooner.

D. In his rejoinder the complainant seeks to refute UNESCO's pleas in its reply. Although UNESCO sent him the Rules of the Fund in 1976 among some 16 annexes to a letter of appointment it was unfair to expect him still to have them to hand after spending many years in far-flung places. He presses his claims.

E. In its surrejoinder UNESCO enlarges on the pleas in its reply.

CONSIDERATIONS:

1. The complainant joined the staff of UNESCO on 10 October 1970 and, apart from a break of 10 months in 1976, served until 30 June 1985, when he retired.

2. Under Article 5.3 of the Rules of the Medical Benefits Fund he had the option of applying for admission to the Fund as an associate participant within three months of separation from service. He did not then exercise the option. Not until 20 May 1987 did he write a letter applying for admission, saying that he had forgotten to apply in time. The Board of Management refused his application on the grounds that it was late and so informed him by a letter dated 29 December 1988.

3. After he had made further requests and received further explanations the Board agreed to reconsider his case and did so on 4 October 1990. But, having again decided to reject his application, it so informed him by a letter dated 10 October 1990.

4. By a letter of 26 November 1990 he asked the Director-General of the Organization in accordance with paragraph 7(a) of the Statutes of the Appeals Board to review the Board of Management's decision. The Director of the

Bureau of Personnel replied on 10 January 1991 that it was not within the Director-General's competence to decide on an application for admission to the Fund, let alone overrule a decision by the Board of Management; according to Article 22.3 of the Rules of the Fund sole responsibility lay with the Board.

5. On 2 March 1991 the complainant filed appeal with the Appeals Board. In its report of 11 June 1991 the Board held by a majority that the Board of Management had treated inconsistently the complainant's case and another similar one; it suggested that the Director-General invite the Board of Management to reconsider, on the grounds that that would "only be consistent with equity and equality of treatment". The case that the majority of the Appeals Board cited by way of comparison was that of another retired official, who was three months late in applying but whom the Board of Management admitted as an associate participant nevertheless.

6. The Director-General put the majority opinion to the Board of Management so that it might reconsider the complainant's case, and the Board duly did so. It cited the express rule that no application "shall be receivable" beyond the time limit, observed that there was no provision for waiver and that the rule had been strictly applied except in the one case, a wrong precedent not to be followed; confirmed its decision; and so informed the complainant by a letter of 28 October 1992.

7. By a letter dated 29 November 1992 the complainant asked the Director-General to review the decision in that letter or else give him leave under Staff Rule 111.2(b) to appeal directly to the Tribunal on the grounds that further review by the Appeals Board would serve little purpose.

8. By a letter of 18 January 1993 the Director of Personnel informed the complainant on the Director-General's behalf that applications for admission to the Fund and changes in decisions by the Board of Management were not within his competence. The Director-General did not - the letter went on - grant leave for direct appeal to the Tribunal: "all relevant elements of your case considered, there is no need for him to take any decision on that request".

9. On 15 April 1993 the complainant appealed again to the Appeals Board, this time claiming entitlement to action on the majority recommendation of 11 June 1992. He said that the recommendation, having been accepted by the Director-General, was binding on all administrative bodies of the Organization; that the Board of Management had no authority to question the Appeals Board's conclusions; and that it was under a legal obligation to act on the recommendation and admit the complainant as an associate participant.

10. The Appeals Board reported on 13 June 1994. It rejected his contention that the earlier recommendation by the majority that the Board of Management reconsider his case meant revision in his favour. All that the Board of Management had to do was take into account all the circumstances and come to a decision, which might be yes or no. In the event the Board had said no and explained why. The Appeals Board did feel that there should be no compulsory rule that allowed of no derogation and that left no discretion to the Board of Management, and it recommended amending Article 5.3 accordingly. But by a majority it recommended dismissing the complainant's appeal. The Director-General did so by a letter to him of 12 August 1994 on the grounds that his appeal was both inadmissible and devoid of merit in law and on the facts. That is the decision he is impugning in this complaint, which he lodged on 14 November 1994.

Receivability

11. The Organization pleads that the complaint is irreceivable on the grounds that it is in substance identical to his first appeal to the Appeals Board. The decision that the Director-General took on the Board's majority recommendation of 11 June 1992 was in the letter of 20 July 1992. So the limit of ninety days set in Article VII(2) of the Tribunal's Statute for filing a complaint began at the date of notification of that decision, or at the latest of the confirmation of its decision by the Board of Management in the letter of 28 October 1992. The Organization argues that if the complainant was dissatisfied with any decision taken on his first appeal his remedy was to lodge a complaint in time with the Tribunal.

12. The Organization is mistaken. The complainant had no fault to find with the Appeals Board's majority recommendation of 11 June 1992, which the Director-General endorsed, and could not be expected to lodge a complaint against a decision by the Director-General that was in his favour. His second appeal did not raise the same issues as had his first. The relief he was seeking, namely admission to the Fund as an associate participant, was no doubt the same, but his arguments were different and raised a new issue: was the Board of Management

bound to act on the majority recommendation accepted by the Director-General?

13. Since the Director-General did not give leave for direct appeal to the Tribunal the complainant had no choice but to go through the internal appeal procedure yet again and so get the final decision of 12 August 1994 he is now impugning. The defendant does not contend that he filed this complaint over ninety days after the date at which he received its letter of that date. The conclusion is that the complaint is receivable.

The merits

14. Article 5.3 of the Fund's Rules reads:

"A retired member ... who opts for admission to the Fund as an associate participant must request such admission on separation. No application shall be receivable beyond three months from that date ..."

The complainant addresses two issues:

(1) whether the Board of Management has discretion to allow an exception to Article 5.3 of the Rules of the Fund; and

(2) if so, whether it exercised that discretion properly in his own case.

He gives an account of the case of the other retired official mentioned in 5 above. In September 1989, he says, the Board rejected that other official's application for waiver of the time limit, but in February 1990 it agreed to reconsider and granted waiver after all. He argues that the Board of Management thereby recognised it might waive the time limit in Article 5.3 and he claims equality of treatment. In the complainant's submission the recommendation by the majority of the Appeals Board could mean only that the Board of Management should reverse its original decision. But it is immaterial whether that is so or the Appeals Board was right to think that the Board of Management could decide either way: what matters for the purpose of his argument is that the Appeals Board allowed the possibility of admitting him to associate participation. By accepting the recommendation the Director-General too recognised implicitly that the Board of Management had that power. He does not say that Article 5.3 is obsolete; merely that the Board of Management recognised it had the right in certain circumstances to waive the time limit.

15. The text of 5.3 does not allow of any exception. Even if it did, the complainant could not properly argue that his own case is exceptional. He twice received copies of the Fund's Rules, in 1970 and again in 1976, and the Organization was under no duty to draw any particular provision to his notice. That is a principle that the Tribunal affirmed in Judgment 167 (in re Taylor Ungaro) under 3.

16. The answer to the complainant's plea of breach of equality is that the admission of the other retired official as an associate participant was a wrong decision. It should not be followed, and the Board of Management was right to refuse to follow it. Equality of treatment means equality in the observance of the law, not in the breach of it.

17. The recommendation by the majority of the Appeals Board on the complainant's first appeal was explained in the Board's report on the second one: the Board of Management was supposed to look at the case again and reach a decision, whatever that decision might be. It is immaterial whether the Appeals Board or the Director-General believed that the Board of Management had the power to waive the time limit: the Board lacks such power because the wording of Article 5.3 excludes it. That being so, the second issue that the complainant raises is not material.

18. Lastly, the complainant pleads that there was a procedural irregularity in that a representative of the Director-General attended the meeting that the Board of Management held on 7 October 1992. The material issue in this case is the refusal by the Board of Management, not by the Director-General, to admit the complainant to associate participation on the strength of its interpretation of the Article. That is an issue that has been fully argued before the Tribunal. The attendance of the Director-General's representative at the Board's meeting was not a material factor and did not lead to any miscarriage of justice. The plea therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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