

SEVENTY-FOURTH SESSION

In re DER HOVSEPIAN

Judgment 1235

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tony Der Hovsépian against the Universal Postal Union (UPU) on 19 December 1991;

Considering the interlocutory order in Judgment 1177 of 15 July 1992 for the disclosure of items of evidence;

Considering the UPU's additional comments of 28 July 1992, the complainant's further brief of 20 August 1992 and the Union's final brief of 3 September 1992;

Having examined the written submissions;

A. In response to the Tribunal's order that the Union supply the table showing the Appointment and Promotion Committee's ratings of the complainant it explains that to preserve confidentiality the Committee's secretary always destroys the handwritten ratings after its meetings. Instead of the table the Union produces the Appointment and Promotion Committee's report containing a short-list it drew up on the strength of the ratings. As ordered by the Tribunal the Union also supplies, with observations, the report of the Joint Appeals Committee.

The UPU points out that the Appointment and Promotion Committee failed to take account of information in the complainant's personal file showing that he was not fit for a position that might confer diplomatic status. If the Director-General had to take the first name on the short-list, why should the Committee have given three or four?

The Union maintains that the Joint Appeals Committee misread the evidence, in particular by overlooking office notice 37/1976, which provides for concurrent internal and external competitions when a P.5 post is vacant. The UPU denies the procedural flaws the Joint Appeals Committee based its recommendation on.

B. In his further brief the complainant submits that the secretary of the Appointment and Promotion Committee does not, to his knowledge, systematically destroy tables of ratings. He asks the Tribunal to hear witnesses who might clarify that and other points of fact.

C. In its final brief the UPU insists that the Appointment and Promotion Committee's ratings are systematically destroyed, and affidavits from its regular secretary and his replacement bear this out. No-one outside the Committee - not even the Director-General - is informed of the actual ratings.

CONSIDERATIONS:

1. By its interlocutory order in Judgment 1177 the Tribunal ordered the Universal Postal Union to produce a table showing the ratings of the complainant by the Appointment and Promotion Committee and the report of the Joint Appeals Committee. It has complied only in part by producing the latter and in its further submissions has disclosed for the first time that the table of ratings no longer exists.

The Tribunal deplores the attitude that that disclosure reveals: if the text no longer existed the Union should not have claimed privilege for it.

2. For his part the complainant rejects the Union's contention that such texts are systematically destroyed and he asks the Tribunal to take oral evidence on the issue. With its final submissions, however, the Union tenders two statements, one by the official who commonly serves as secretary to the Appointment and Promotion Committee and the other by the official who was acting as its secretary in this case, that it is normal procedure to destroy such texts and that the table was in fact destroyed in this instance.

It appears that the ratings were not disclosed to the Director-General, who was given a list of recommended candidates in order of preference and no further information. Since in the circumstances no useful purpose would

be served by pursuing the matter of ratings by the Committee, the Tribunal will base its ruling on the evidence it has before it. There is no need for hearings.

3. Although the Director-General is not of course bound to appoint the candidate the Committee puts first and has discretion in making the choice, the reasons for his decision must be stated so that the Tribunal may properly exercise its power of review.

4. In July 1991, at his first interview with the complainant, the Director-General said that the decision had been prompted by considerations of geographical distribution of the Union staff and observed that since he was only 53 years old and might retire at 65 he still had fair prospects of appointment to a P.5 post.

5. In his letter of 13 September 1991, however, the Director-General shifted ground.

In that letter he said that he had not wished to wound the complainant's feelings at the interview by speaking of his misconduct or the shortcomings in his performance and had hoped that he would understand the real reasons for the decision by "reading between the lines". The letter then referred to his past conduct and in particular to incidents that had involved an au pair girl and another staff member in 1985. In a letter of 3 April 1985 to the Director-General the Permanent Mission of Switzerland to the International Organisations in Geneva had spoken of complaints that had been made to the Berne cantonal police about the complainant's behaviour. There had also - the Director-General went on - been an altercation in a lift on UPU premises in December 1985 between the complainant and the other staff member.

As to the former charge the investigating magistrate in Berne dismissed charges against the complainant and awarded him costs. For the second incident - the quarrel in the lift - the Director-General imposed sanctions on him and on the other official: both of them lost a within-grade step increment.

6. The complainant was promoted to grade P.4 in July 1985. In his letter of 13 September 1991 the Director-General further remarked that he had got that promotion despite his poor work record and conduct damaging to the Union's prestige. The letter cited an assessment by his first-level supervisor in May 1990 expressing dissatisfaction with the quality and the quantity of his work; that was why, although he had been granted his step increment, there had been the rider that he "must improve the quality and quantity of his work".

His first-level supervisor at the time was the head of section, who retired on 1 July 1990 and with whom he had not got on well. In spite of the assessment the Director-General appointed the complainant on the retirement of his supervisor to replace him for eight months. His work was completely satisfactory and he received additional pay for it.

7. In his letter of 13 September 1991 the Director-General also referred to consultations he had had with three heads of section in May 1990 to determine whether any of them would accept the complainant's transfer to his section as deputy head. They had all answered no.

Those heads of section are not identified in the letter. In contrast the members of the Appointment and Promotion Committee, who put the complainant first, are known: they included the Vice Director-General, the head of Section E, the heads of Divisions II and III and the head of Personnel.

8. The Joint Appeals Committee, whose full report the Tribunal now has before it, recommended that the Director-General reverse his decision. It held that the criterion of geographical distribution applied only to recruitment, not to promotion. It saw no reason to go back over the events of 1985: the conduct of the complainant had since been blameless.

9. In his final decision of 28 November 1991 the Director-General lists from the complainant's file adverse comments - even criticisms of his time-keeping - that go back to 1967. He says that the complainant got all his promotions and step increments in spite of his behaviour and the quality and quantity of his work and output, none of which had since improved, and that there was no question of further promotion, especially to a managerial post that conferred diplomatic privileges and immunities on the holder.

10. As to geographical distribution the Director-General observes in the same decision that two outside candidates were recommended by the Appointment and Promotion Committee, both for the P.5 post in Section C. So as to comply, he says, with Regulation 4.3 and not to prejudice "the recruitment of fresh talent" it was possible to take

only one of them; that was where the principle of geographical distribution came in, and it applied solely to the choice between the two outside candidates.

11. Regulation 4.1 states that "The paramount consideration in the recruitment of staff ... shall be the necessity of securing for the Union the highest standards of efficiency, competence and integrity"; Regulation 4.2 stipulates that "Due regard must be paid to the importance of recruiting the staff on as wide a geographical basis as possible"; and Regulation 4.3, which is headed "Promotion", provides that:

"Without prejudice to the recruitment of fresh talent at all grades, full account shall be taken in making appointments to vacant posts of the qualifications and experience which persons already in the service of the Union may possess. Seniority shall be a determining factor only when other qualifications are equal."

The Union argues that it was for reasons relating to the complainant's personal qualities and professional qualifications as well as to personnel management policy that his candidature was unsuccessful. It maintains that, when three posts as head of section fell vacant at the same time, there had to be at least one successful outside candidate so as not to impede "the recruitment of fresh talent" that Regulation 4.3 requires.

But that is not at all what 4.3 says. Equitable geographical distribution is a criterion that plainly is to apply only to recruitment, not to promotion, and there is no requirement in the Staff Regulations or Rules that the Director-General recruit "fresh talent" just because three posts as head of section have to be filled at the same time. The Director-General was obviously wrong in putting that construction on the rule.

12. Furthermore, the reasons given by the Director-General in his final decision contradict those he gave when he took the original one. It was inconsistent to tell the complainant at his interview with him in July 1991 that time was on his side for promotion to grade P.5 and then, in the final decision, make out that because of his conduct he could not be promoted to a managerial position conferring diplomatic privileges and immunities.

13. It is also impossible to understand how anyone in staff management could at an interview with a staff member refrain from voicing personal criticism, yet still expect him to infer it.

14. The incident of 1985, for which the complainant incurred a sanction, belonged to the past; there had been no recurrence of "unbecoming conduct"; and that sanction should have put an end to the matter. Instead the Director-General said that it was the reason for not promoting him, that it would be contrary to Regulation 4.1, and that it might set a bad example for other staff.

That reflects misunderstanding both of the facts and of the law. Regulation 4.1 deals only with recruitment, not promotion, and it was sheer exaggeration to say that an incident that had occurred over six years earlier, and was over and done with, would still set a bad example. The conclusion is that the Director-General's reasons for appointing someone from outside the Union were those he gave the complainant at the interview. They were not sustainable reasons anyway, and he has since steadily piled on the criticism and unfairly resurrected an old lapse in support of his statement that the complainant would never get promotion at all.

15. The Director-General's decision of 28 November 1991 must be set aside: (a) because he put a mistaken construction on Regulation 4.3; (b) because he drew obviously mistaken conclusions from the evidence; and (c) because he took irrelevant matters into account. The complainant is entitled to an award of damages for the moral injury that that decision caused him and to costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 28 November 1991 is quashed.
2. The Universal Postal Union shall pay the complainant 25,000 Swiss francs in moral damages.
3. It shall pay him 10,000 Swiss francs in costs.

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

Delivered in public in Geneva on 10 February 1993.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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