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

SEVENTY-NINTH SESSION

In re HAMOUDA, KIGARABA (No. 5), MJIDOU, RANAIVOSON (No. 2), SEBAKUNZI, SUPRAPTO (No. 2) and TALLON (No. 2)

Judgment 1451

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed against the Universal Postal Union (UPU) by Mr. Ahmed Hamouda, Mr. Richard Kigaraba (No. 5), Mr. Abderrahmane Mjidou, Mr. Henri Ranaivoson (No. 2), Mr. Ngabo Sebakunzi, Mr. Martosuhardjo Suprapto (No. 2) and Mr. Renatus Tallon (No. 2) on 23 June 1994 and corrected on 16 August, the UPU's reply of 19 October, the complainants' rejoinder of 22 December 1994 and the Organisation's surrejoinder of 10 February 1994;

Considering the application to intervene filed by Mr. Tony Der Hovsépian on 29 November 1994 and the Union's observations thereon of 16 December 1994;

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 none of the parties has applied for;

Considering that the case is about the lawfulness of amendments which the Management Board of the Provident Scheme of the Universal Postal Union made to Article 19, on the settlement of disputes, of the Regulations of the Scheme and that the parties claim:

The complainants:

1. The quashing of the Board's decision to amend Article 19 of the Regulations so as to (a) reduce to 30 days the time limit for internal appeal and (b) confer on the insurance tribunal of the Canton of Berne sole jurisdiction over disputes as prescribed by Swiss law;

2. the reinstatement of the old text of Article 19, which set a time limit of 60 days for internal appeal and conferred jurisdiction over disputes on this Tribunal;

3. costs.

The defendant:

The rejection of the complaint as irreceivable or, failing that, as devoid of merit.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 25 March 1994 the Deputy Director-General of the International Bureau of the Union, which is in Berne, issued an office notice, No. 35/1994. The notice informed the staff that the Management Board of the Union's Provident Scheme had decided to amend Article 19 of the Regulations of the Scheme, which was about the settlement of disputes. The effect was to remove from this Tribunal the jurisdiction which the UPU had recognised in a declaration of 25 May 1965 and to vest it in the insurance tribunal of the Canton of Berne. The amendment also reduced the time limit for internal appeal from 60 to 30 days. By a letter of 22 April 1994 to the secretary of the Scheme the complainants asked that the Board restore the old text of Article 19. In a letter of 20 May 1994 the

deputy secretary of the Scheme refused on the grounds that their internal appeal was a "collective" action and, besides, challenged a decision to amend rules; it was therefore irreceivable. That is the decision they are impugning.

B. The complainants reject the Board's objections of 20 May 1994 to receivability. On the merits they point out that the Scheme has personality under international law and that appeal to an international jurisdiction is therefore an essential term of their employment. The impugned decision impairs their acquired rights and even puts their international status in jeopardy.

C. In its reply the UPU maintains that the complaint is irreceivable for the reasons the Management Board gave. It was the Swiss authorities that required that the insurance tribunal of the Canton of Berne should have jurisdiction. There is no breach of any acquired rights: the complainants may still appeal to an independent jurisdiction.

D. In their rejoinder the complainants maintain that their complaint is receivable and enlarge on their pleas.

E. In its surrejoinder the Union presses its pleas on receivability and on the merits.

CONSIDERATIONS:

1. The Universal Postal Union has its headquarters at Berne and employs the complainants. On 20 October 1992 the Management Board of its Provident Scheme amended Article 19 of the Scheme's Regulations. The Swiss Federal Social Insurance Office (OFAS) endorsed the decision on 2 November 1993 and the Executive Council of the UPU on 18 February 1994. Office notice 35/1994 of 25 March 1994 announced it to the staff. The complainants seek the quashing of the decision. They contend that the new text of Article 19 impairs in two ways the rights they used to have as to jurisdiction: first, by shortening the time limit for internal appeal from 60 to 30 days and, secondly, by removing jurisdiction from this Tribunal and vesting it instead in the insurance tribunal of the Canton of Berne.

2. The background to the decision under challenge may be summed up as follows. The Provident Scheme was set up as a foundation within the meaning of sections 80 and following of the Swiss Civil Code. The deeds were made out at Berne on 24 December 1963. The signatories were the Chairman of the Union's Executive Council, the Director of its International Bureau and a representative of the Swiss Federal Council, i.e. the Federal Government of Switzerland.

3. The deeds define the object and aims of the Provident Scheme and give details of its initial assets and its funding, which comes mainly from the UPU and its staff. Management is in the hands of a Board of three: the Chairman of the Executive Council, the Director of the Bureau and a member appointed by the staff. Under clause 7 of the deeds the Management Board makes the regulations subject to approval by the "supervisory authority" of the Scheme and the Council. Clause 8 declares the Swiss Federal Council to be the supervisory authority, and the evidence is that in practice the Federal Council acts as such through the OFAS.

4. The Management Board made the Regulations of the Scheme in accordance with clause 7 of the deeds. Article 19 of the Regulations, which is about the settlement of disputes, used to read:

"1. A participant or any other person able to show that he is entitled to rights under these Regulations by virtue of the participation in the Provident Scheme of a staff member who considers that a decision of the Management Board is prejudicial to him may, within 60 days of its notification to him, submit a written request to the Board asking it to review the decision.

2. If the Management Board maintains its decision or takes no action on the request within 60 days, the member concerned may file a complaint with the Administrative Tribunal of the International Labour Organisation in accordance with the Statute of that Tribunal and with the declaration recognizing its jurisdiction."

5. The UPU accordingly refers to the "Regulations of the Provident Scheme" in the declaration it made on 25 May 1965 recognising this Tribunal's jurisdiction, which the Governing Body of the International Labour Office accepted on 19 November 1965.

6. By a letter of 25 July 1985 the Federal Ministry of Foreign Affairs of Switzerland informed the Union that since 1 January 1985 there had been a new section of the Swiss Civil Code - 89 bis(6) - on staff pension schemes. It

asked the UPU to check that the Regulations of its Provident Scheme squared with the new section and to submit all necessary amendments to the OFAS.

7. The Management Board thereupon set up a working party to look into the matter. In its report of 11 February 1987 the working party concluded that, with slight adjustments, the Regulations were in keeping with the new section of the Civil Code. The one point of difficulty was section 73 of a Federal Act of 25 June 1982 - known as the "LPP" - on occupational old-age, survivors' and invalidity insurance. Section 73, to which 89 bis(6) refers, says that the cantonal insurance tribunal shall entertain any dispute and that appeal shall lie to the federal insurance tribunal. The working party was in favour of keeping the jurisdiction of this Tribunal and so recommended negotiating exemption from section 73 with the Swiss authorities.

8. The Executive Council agreed and at its ordinary session of 28 April 1987 the Management Board decided to negotiate with the Swiss. In a letter of 1 June 1987 the secretary of the Scheme told the OFAS that the UPU wanted this Tribunal to remain competent and was seeking exemption from section 73 for that purpose.

9. Despite several reminders by the Scheme the OFAS did not reply for over five years. In a letter of 7 October 1992 it refused exemption on the grounds that what section 73 said about jurisdiction was "compulsory", that the Scheme had been set up as a foundation under Swiss law, and that the Agreement concluded with the United Nations on 11 June and 1 July 1946 on the subject of privileges and immunities and later extended to the Union did not allow of such exemption. In sum, said the letter, jurisdiction must be removed from this Tribunal and the Scheme must bring its Regulations into line with Swiss law.

10. The Management Board accordingly resolved to amend Article 19 of the Regulations so as to confer jurisdiction on the insurance tribunal of the Canton of Berne instead. Since the supervisory authority had asked that proceedings be swifter the Board further decided to amend paragraph 1 of Article 19 to reduce the time limit for internal appeal from 60 to 30 days.

11. It is common ground that the amendments to Article 19 were made in line with the procedure that the deeds of the Scheme lay down in clause 7. They were as follows:

In paragraph 1 "60" was replaced with "30".

Paragraph 2 now reads:

"If the Management Board maintains its decision or takes no action on the request, the matter may be referred to the insurance tribunal of the Canton of Berne in accordance with Section 73 of the Federal law on occupational old-age, survivors and invalidity insurance (LPP)". (Registry's translation).

12. The amendments were announced in office notice 35/1994 of 25 March 1994, and on 22 April the complainants wrote in protest to the secretary of the Scheme. Their letter pointed out the drawbacks for staff of the tighter deadline for internal appeal and of the change in jurisdiction and asked the Board to reverse its decision and restore the old text of Article 19.

13. The deputy secretary of the Scheme refused in a letter of 20 May 1994 which he wrote on the Board's orders. His letter says that the Board regards the appeal as irreceivable on two counts:

being filed by several staff members and therefore a "collective" action, it is incompatible with the system of appeal, which provides only for individual appeal;

being a decision to amend rules, the impugned measure is not subject to review; the complainants fail to show how it offends against their individual rights and interests.

On the merits the letter says that, the Scheme being a private foundation under Swiss law, the Board may not object to the jurisdiction that is compulsory under that law and that neither the shorter time limit for internal appeal nor the rules of procedure of the competent Swiss jurisdiction create insuperable difficulties for UPU staff. The complainants filed this complaint on 23 June 1994 against the Board's refusal of their claims.

The pleas

14. The complainants' pleas may be summed up as follows. On receivability they point out that though Article 19(2) of the Regulations of the Scheme confers jurisdiction on the insurance tribunal of the Canton of Berne the Union has not withdrawn its recognition of the jurisdiction of the ILO Tribunal over matters relating to the Scheme. So staff may still appeal to this Tribunal against the removal from the rules of a safeguard which they see as an essential term of their employment. As for the Board's objection to receivability, the Staff Regulations do not forbid "collective" appeal and according to the Tribunal's case law a decision does not have to be individual for appeal to lie. They cite Judgments 626 (in re Giroud No. 3 and Caspari) and 669 (in re van Voorthuizen), both under 2.

15. On the merits the gist of the complainants' pleas is as follows:

(a) The amendments to Article 19 of the Regulations did not comply with the requirements of the founding deeds of the Scheme. According to clause 7 any amendment is subject to approval by the supervisory authority. Instead of putting the matter to the Swiss Federal Council the Management Board turned to a subordinate technical body, the OFAS, which may not rule on such matters of principle as the determination of the proper forum. Although the OFAS makes out that the jurisdiction of a cantonal tribunal is "compulsory" there is no guarantee that in the event of dispute that tribunal will declare itself competent: not only does the Scheme have personality under international law but the organisation of which it is the affiliate, the UPU, enjoys immunity of jurisdiction. The staff may eventually fall foul of a conflict in which both the municipal and international tribunals decline jurisdiction; they will then have no judicial safeguards whatever.

(b) The staff were not consulted about the amendments but were suddenly presented with a fait accompli on learning of them from office notice 35/1994.

(c) Although the Scheme is a foundation under Swiss law it is still inherently a person under international law. So an essential safeguard that the complainants derive from the terms of their employment is that an international tribunal should protect their rightful interests. Replacing this Tribunal with a municipal one impairs their acquired rights.

(d) In the context of the international civil service the shorter, thirty-day deadline for internal appeal and the many constraints of proceedings in municipal courts make it hard for staff to defend their rights properly and even harder for retired staff, who may be living anywhere in the world. Moreover, the cantonal tribunal has particular language requirements and litigants have to engage Swiss counsel.

16. The Union maintains that the complaint is irreceivable, though it offers no pleas beyond those the Management Board put forward in answer to the internal appeal. It warns of the danger of quashing a general measure on the application of individual officials on the grounds that the rights of other staff who want no change may suffer.

17. On the merits the Union has the following pleas:

(a) Retracing the history of its Provident Scheme, it contends that any international organisation is free to provide social security as it sees fit. When it set up its own Scheme it decided to have a foundation under Swiss law. In so doing it agreed to be subject to that law and to waive immunity of jurisdiction. One particular consequence was the acceptance of supervision by the OFAS as the competent Swiss authority. Being anxious not to forfeit the benefit of such supervision, it opted for the jurisdiction of the competent Swiss tribunal on realising that the new Swiss law made that compulsory and the Swiss would grant no exemption. But since the staff are not of one mind on the subject it has not yet removed jurisdiction over the Scheme from this Tribunal. So it may still resume negotiation with the Swiss to see whether it can keep both their supervision of the Scheme and the Tribunal's jurisdiction.

(b) The staff members' right to a hearing remains unimpaired: under clause 6 of the founding deeds one of the Board's three members must be appointed by the staff of the Bureau.

(c) As to the procedural requirements, the Union suggests that since the foundation is subject to Swiss law and since the deeds expressly put a Swiss body in charge of the supervision they require, it is only right that Swiss courts should hear any dispute. The complainants have no good reason to object to the shorter time limit for internal appeal: according to Staff Rule 111.3 the normal time limit for such appeal is thirty days.

Receivability

18. The Union's first objection is that the complaint is a "collective" one. What it says by way of explanation shows that it means thereby a suit filed in the general interests of the civil service by representatives of staff associations. In Judgment 1392 (in re Raths No. 2) - submits the Union - the Tribunal held under 18 and 24 that such a suit, of which the hallmark is action by staff associations or agents professing to represent them, does not form part of the system of individual appeal that the organisations which have recognised the Tribunal's jurisdiction commonly provide for in their rules and that the Tribunal's own Statute contemplates. The Tribunal need not revert to that case law since this is not such a complaint. It has been filed by several officials with the commendable aim of making the proceedings simpler, and each of them is defending his own individual interests, even though they are the same as the others'. The objection fails.

19. More difficult is the Union's objection that the impugned decision makes amendments to the Regulations and is therefore a general one about the tenor of rules. As was said in Judgment 1393 (in re Cook), under 6 to 8, the Tribunal has often ruled on the issue, especially for the purpose of determining when the time limit starts for appeal. It has held that where a general decision gives rise to decisions affecting individuals the time limit is set off only on notification to the official of an individual decision that affects him. Moreover, as was held in Judgment 1000 (in re Clements, Patak and Rödl), under 12, the employee may, when impugning an individual decision that touches him directly, "challenge the lawfulness of any general or prior decision ... that affords the basis for the individual one". In sum, the staff member need not ordinarily impugn at once a general decision he believes has caused him injury but may, without any risk of being time-barred, wait until the general decision affects him in the form of an individual one.

20. But that is not how things stand in this case. The impugned decision is not of a kind that need give rise to implementing provisions, save in unforeseeable circumstances and in an unforeseeable future. The new wording of Article 19 strikes out of the terms of employment ipso facto the safeguard of international judicial review and vests jurisdiction in municipal courts instead. The amendment brings about an immediate and almost irreversible change in the system of appeal. So whatever the merits of such change - an issue taken up below - every staff member has an actual and present interest in having light shed on the matter. The Tribunal affords guarantees of a system of international law within the bounds of its competence: see Judgments 1265 (in re Berlioz and others), under 24, and 1328 (in re Bluske No. 3), under 13. It would therefore be wrong to deny the staff the right of appeal on the grounds that the impugned decision is general in purport.

21. Next comes the Union's plea that to quash a general decision on an application from a few might damage the interests of others who wanted it to remain in force. The plea is certainly material since on the evidence the staff of the UPU seem to disagree about the amendment to Article 19. But the Tribunal is satisfied that when a decision has been challenged, albeit by only a few, it has a duty to rule in full objectivity and as soon as possible. The Union itself has well defended the interests of those who want to keep the decision, and they themselves may do so by filing applications to intervene. The conclusion from the foregoing is that in the circumstances this objection too must fail.

The merits

22. It is clear from the parties' submissions that the main issue is the Scheme's legal status: on that will hinge the Tribunal's rulings, first on the Union's successive decisions about jurisdiction over disputes, and then on two sets of issues: the procedure for putting into effect the amendments to the Regulations, and the change in jurisdiction that the new text of Article 19 has brought about.

23. The Tribunal concurs fully with what the Union says about the legal process it chose to follow in setting up its Provident Scheme. It is true that other such schemes have been set up under international law and that the Tribunal has generally preferred that any dispute it may hear be resolved by the rules of the international civil service. But it has also been at pains to except any case in which there is express renvoi to municipal law in an organisation's rules or in the terms of appointment: for recent examples see Judgments 1311 (in re Guerra Ardiles) and 1369 (in re Decarnière No. 2 and Verlinden Nos. 1 and 2), both under 15.

24. So there is no reason why the UPU should not have chosen to set up its Scheme as a foundation under Swiss private law and to make the Swiss Federal Council both a signatory of the founding deeds and the supervisory authority. By making that option in law the Union perforce agreed to vest jurisdiction in the Swiss courts insofar as they have it under the substantive rules of Swiss law on foundations. So the Act that made new rules on foundations did not bring in any new jurisdiction. It merely vested jurisdiction in the Swiss insurance tribunals that

hear disputes involving foundations of a certain kind, namely pension funds. There can therefore be no objection to the new Swiss legislation as such or to the Union's accepting the consequences thereof.

25. Yet the Scheme does also have close enough links with international law to warrant vesting jurisdiction at the same time in an international tribunal. Its basis in law and the funding of it are international, and coverage by it is one of the terms of contracts of service that are subject to international law. Moreover, if a judgment goes against the Scheme there will arise the question of execution by the Union as the guarantor of its obligations: waiver of the UPU's immunity does not necessarily mean surrender of its financial autonomy. That being so, the Union was right originally to extend recognition of this Tribunal's jurisdiction to the Scheme, without detriment to the concurrent jurisdiction of municipal courts that was due to the Scheme's status under Swiss private law.

26. The legal option of making the Scheme a Swiss foundation and the later recognition of this Tribunal's jurisdiction inevitably created a latent conflict between the Tribunal and the competent Swiss courts. And the conflict became apparent when Switzerland conferred jurisdiction over social insurance foundations on special tribunals and the supervisory authority demanded the removal of the Tribunal's jurisdiction.

27. The upshot is that in this case there are close enough connections with both municipal and international law to warrant recognition of both jurisdictions, each for different issues. A staff member may therefore go to whatever tribunal he deems competent, and any tribunal with which suit is filed will determine whether the material issues of the particular case make it the most suitable jurisdiction. Such is the universally acknowledged doctrine of the forum conveniens: see the United States Supreme Court, Gulf Oil Corporation v. Gilbert, 330 US 501, 1947; the House of Lords, Spiliada Maritime Corporation v. Cansulex Ltd., 1987, AC 460; Bundesgerichtshof, 2 July 1991, BGHZ 115, 90; Paul Lagarde, Le principe de proximité dans le droit international privé contemporain, Recueil des Cours, Academy of International Law, 196, 1986, pages 9-238 and in particular 127-168; James Fawcett, Declining Jurisdiction in Private International Law, Reports to the XIVth Congress of the International Academy of Comparative Law, Athens and Delphi, 1994, Oxford University Press, 1995.

28. The following conclusions may be drawn from the above considerations of comparative law. Jurisdiction is conferred where there are significant connections with a particular forum; recourse to a specific system of law is one such connection; there may be more than one forum which has jurisdiction; the connections are to be assessed against the interests of both parties to the litigation and against the public interest as well; and any conflict of jurisdiction must invariably be so resolved as to allow no judicial void where conflicting jurisdictions decline competence.

29. In the light of the foregoing the amendments to the Regulations cannot stand. They rest on a fundamentally wrong assessment by the Management Board and the Executive Council of the situation that arose as a result of the Scheme's status as a foundation under Swiss civil law and of the later recognition of this Tribunal's jurisdiction.

30. Another point must be made clear. The reinstatement of the status quo by the quashing of the impugned decision restores a situation which is quite consistent with the requirement of rational division of jurisdiction in the international context. Each of the jurisdictions that may be competent - the cantonal insurance tribunal and this Tribunal - will be able to determine its own competence according to the material rules on conflict. That was what the Tribunal held in Judgment 1258 (in re Griebl-Zink) on a case in which there was similar conflict of jurisdiction: it said under 4 that it was for each court to rule on its own competence. But if the Union wanted to resolve the conflict of jurisdiction in some other way in agreement with the Swiss authorities it would have to do so by concluding a proper international agreement binding on both jurisdictions.

31. The last issue is the time limit for internal appeal. On that score the Tribunal holds that the authors of the challenged amendment were wrong to think that reducing still further a time limit that was already fairly short could somehow serve to hasten the proceedings. This amendment too, like the main one, must be set aside because there are no credible grounds for it.

32. The conclusion is that the decision amending Article 19 of the Regulations of the Provident Scheme must be set aside in its entirety.

33. Since the complainants have succeeded in their main claim they are entitled, as they ask, to an award of costs, and the amount is set at 7,000 Swiss francs.

34. Mr. Der Hovsépian's application to intervene is allowed. He shall have the same entitlements as the complainants, save as to costs.

DECISION:

For the above reasons,

1. The decision of 20 October 1992 amending Article 19 of the Regulations of the UPU's Provident Scheme is set aside and the parties' rights and obligations shall be determined accordingly.

2. The Union shall pay the complainants a total of 7,000 Swiss francs in costs.

3. The application to intervene is allowed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner

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