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

104th Session **Judgment No. 2713**

The Administrative Tribunal,

Considering the complaint filed by Mr F. C. against the Universal Postal Union (UPU) on 16 October 2006, the Union's reply of 24 November, the complainant's rejoinder of 29 December 2006 and the UPU's surrejoinder of 9 March 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not order hearings, for which neither party has applied;

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

A. Rule 111.3 of the Staff Rules of the International Bureau of the UPU, entitled "Joint Appeals Committee procedure" reads in pertinent part as follows:

"1. Before appealing against an administrative decision a staff member shall, as a first step, address a letter to the Director General requesting that the administrative decision be reviewed. Such letter must be sent within one month from the time the staff member received notification of the decision in writing.

2. If the staff member wishes to make an appeal against the decision notified by the Director General in his reply to the request referred to in §1, he shall submit an application in writing to the Chairman of the Joint Appeals Committee within one month of the date of receipt of the Director General's decision. If no reply has been received from the Director General within one month of the date the letter was sent to him, the staff member shall, within the following month, submit his application in writing to the Chairman of the Joint Appeals Committee.

3. An appeal shall not be receivable by the Joint Appeals Committee unless the time limits specified in § 2 have been met, provided that the Committee may waive the time limits in exceptional circumstances."

The complainant, a Tanzanian national born in 1946, was engaged by the International Bureau on 1 July 1995 for a two-year period as a Regional Adviser responsible for the English-speaking African countries and Mozambique. His duty station was Harare (Zimbabwe). This appointment was extended until 31 December 1999. The contract signed by the complainant for the period 1 January to 29 February 2000 was extended several times and ended on 31 December 2005. The complainant did not have the status of an official of the International Bureau at any time during his employment relationship with the UPU.

The complainant's monthly salary was calculated and paid in United States dollars until 31 December 1999. As from 1 January 2000 it continued to be set in dollars but was paid in Swiss francs after conversion at an exchange rate specified in a footnote on the first page of each of the complainant's contracts. Initially this rate could not be higher than 1.20 Swiss francs to the dollar, but for the period 1 March 2002 to 31 December 2005 it had to be at least equal to that ratio. Between 1 January 2000 and 31 December 2005 the rate applied by the UPU was usually lower than that used by the United Nations (UN).

On 7 November 2005, in a letter written in English and addressed to the Director General, the complainant objected to the fact that the exchange rate "arbitrarily" applied by the UPU was lower than that used by the UN. He claimed reimbursement of the amounts which he considered had been unduly withheld from the pay he had received since 1 January 2000 and he asked the Director General to take a formal decision on the matter. By fax and registered letter of 12 December, both written in French, the Director General informed the complainant that he had rejected his request; he drew the complainant's attention to the fact that the provisions of the Staff Rules and Regulations did not apply to him. At the complainant's request, an English translation of this decision was sent to him on 19 December by fax and by registered letter of the same date. On 20 December the complainant wrote to the Director General to explain why he could not accept the decision of 12 December 2005 and to announce that, after consulting a lawyer, he would challenge it before the Tribunal. On 13 January 2006 the complainant's lawyer

sent a letter to the Director General in which he invited him to confirm that he regarded the letter of 20 December 2005 as a request for review within the meaning of Staff Rule 111.3 or, failing that, to treat his own letter as such a request. In his reply of 7 February 2006 the Director General stated that, in his opinion, the letter of 7 November 2005 constituted a request for a review, but that it had been submitted out of time with respect to the payslips which the complainant had received before 7 October 2005. Noting that the latter had not challenged his decision of 12 December 2005 before the Joint Appeals Committee within the time limit of one month laid down by the Staff Rules, he stated that he could only confirm that decision.

On 17 February 2006 the complainant lodged an appeal with the Joint Appeals Committee in which he challenged primarily the decision of 12 December 2005 and subsidiarily the "new decision" of 7 February 2006. He drew attention to the fact that the registered letter of 19 December 2005 containing the English version of the decision of 12 December 2005 had not reached him at his new place of residence in Tanzania until 17 January 2006. In its report of 9 June the Committee held that the appeal was time barred. By a decision of 17 July 2006 – which constitutes the impugned decision – the Director General informed the complainant that, on the basis of that report, he considered his appeal to be irreceivable.

B. The complainant explains, with reference to the Joint Appeals Committee's argument that his appeal was time-barred, that he returned to his home country when his appointment ended and that it was not until 17 January 2006 that he received the registered letter containing the English translation of the decision of 12 December 2005. In his opinion the Committee and the Director General were mistaken in holding that the period for filing an appeal with the Joint Appeals Committee started to run on the date when the said translation was faxed to him. He states that he fails to understand why the Union would have sent him a registered letter requiring acknowledgment of receipt if the period for filing an appeal did not begin to run on the date of receipt of that letter. Furthermore, since the Director General had told him in his letter of 12 December 2005 that the Staff Rules and Regulations did not apply to him, he had concluded that he had no internal means of redress and that he should immediately file a complaint with the Tribunal, as indeed he indicated in his letter of 20 December. He therefore found himself in the midst of a "procedural muddle", and he considers that the "duty of care" and the "requirements of good faith" should have prompted the Director General either to inform him that he had to file an appeal with the Joint Appeals Committee within one month, or to pass on the letter to the Committee.

On the merits, the complainant makes it clear that the dispute concerns his remuneration for the period January 2000 to December 2005. Relying on the Tribunal's case law he asks the Tribunal to "rule" that all his letters of appointment and letters of extension during the above-mentioned period were "null and void in part", "insofar as they all contain an illegal exchange rate clause".

The complainant submits that the UPU cannot rely on the fact that he accepted the "illegal" conditions of his letter of appointment. He considers that the "arbitrary" practice followed by the UPU since 2000, which consists in converting its regional advisers' salary into Swiss francs at an exchange rate which it sets unilaterally and which differs from that applied by the UN, is contrary to the law and, in particular, to the fundamental principles of international civil service law. In his opinion, all UN specialised agencies, including the UPU, which has accepted the Statute of the International Civil Service Commission, must apply the basic rules of the common system, especially the exchange rates set by the UN, regardless of the status of their employees.

The complainant points out that the exchange rate applied to him was different to that which other officials of the International Bureau enjoyed and he concludes from this that the principle of equal treatment has been violated.

Lastly, he submits that while an organisation may determine its employees' terms of appointment, once their status and salary have been established it cannot deprive them of their right to a full salary by unilaterally setting an exchange rate. He underlines that in his case this rate was especially inappropriate because his duty station was not in Switzerland.

His principal claim is that the Tribunal should set aside the Director General's decision of 17 July 2006. In addition, he asks the Tribunal:

"1. To set aside the decisions of the Director General of the UPU of 12 December 2005 and 7 February 2006;

2. To find that the decision regarding payment of the salary for October 2005 was null and void in part since it applied an […] exchange rate which was unlawful because it was set unilaterally by the UPU and differed from that

applied by the UN;

3. To find that the contract extending [his] appointment […] of 1 November 2004 and all the preceding contracts of appointment and/or extensions of his appointment as from 9 August 1999 were null and void in part since they contained a clause regarding the conversion of his salary at an […] exchange rate which was unlawful because it was set unilaterally by the UPU and differed from that applied by the UN;

4. To order the Universal Postal Union to fully reimburse the amounts it unduly withheld by means of this unlawful exchange rate between 1 January 2000 and 31 December 2005, i.e. the sum of […] 148,027.45 [francs] – plus 5% interest as from 31 December 2002;

5. To grant [him] fair compensation for costs;

6. To dismiss all other or contrary claims put forward by the Universal Postal Union."

C. In its reply the Union observes that before filing an appeal against an administrative decision, an official must first send a letter to the Director General, within one month, to request a review of the decision. If the official does not receive a reply from the Director General within one month of dispatching his request for review, he must file an appeal with the Joint Appeals Committee within the following month. In this case, the complainant was notified of the decision of 12 December 2005 that same day, since it was faxed to him; accordingly, the time limit for appealing to the Committee expired on 11 January 2006. The Union adds that the Director General's letter of 12 December 2005 clearly indicated that the request of 7 November 2005 had been turned down and it set out the reasons for that decision. The letter of 7 February 2006 merely confirmed that decision in different terms and could not therefore constitute a new decision giving rise to new time limits for appeal.

Regarding the allegation of a breach of the principle of good faith, the UPU considers that, as in his letter of 7 November 2005 the complainant requested a formal decision on his claims, he should have awaited notification of such a decision. Given that he has been assisted by a lawyer, and since the latter in his letter of 13 January 2006 referred expressly to the provisions of the Staff Rules concerning the Joint Appeals Committee procedure, the complainant cannot claim to have been unaware of the time limit for filing an appeal. Moreover, the UPU contends that the Director General should not be criticised for not having forwarded the letter of 20 December 2005 to the Committee, for the letter could not be regarded as an appeal.

Relying on the case law, the Union asserts that regular payments, whether in the form of salary or some other benefit, amount to decisions that may be challenged at the time. Failing such a challenge they become final and may be challenged thereafter only if there are grounds for review of administrative action. In this case the complainant does not rely on such grounds. His request of 7 November 2005 was receivable only insofar as it related to his salary for October, because he had not challenged his earlier salary payments.

The Union considers that in his complaint to the Tribunal the complainant has widened the scope of the claims he submitted in the internal appeal procedure: to the extent that they now include figures which were not presented in the course of the internal appeal, these claims are irreceivable because internal means of redress have not been exhausted.

On the merits, the UPU emphasises that the rules applicable to the calculation of the complainant's remuneration were clearly set out in the vacancy notice for his post. He expressly accepted the terms of his successive appointments. His contracts were therefore valid and did not infringe either the applicable provisions of the Staff Rules and Regulations or the principles of international civil service law.

Lastly, the Union observes that the principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. The authority which is required to give equal treatment to dissimilar situations has a broad discretion in adopting rules that take into account that dissimilarity. The UPU explains that regional advisers are the only employees who do not work at headquarters and that during the period at issue they were always recruited on the same terms, which were suited to the special circumstances of their appointments.

D. In his rejoinder the complainant submits that the Director General did not "clearly indicate" in his letter of 12 December 2005 that he regarded the letter of 7 November 2005 as a request for review. In addition, the receipt by fax of the decision of 12 December 2005, which, what is more, was in French – a language he does not speak –

cannot in any circumstances constitute the *dies a quo* of the one month period he had in which to file an appeal with the Joint Appeals Committee. He denies that he has widened the scope of his claims before the Tribunal: according to him, they still "still rest on the same basis".

He states that regional advisers were put under heavy pressure to accept the disputed rate of exchange.

Lastly, he claims that the "little footnote" to his contracts which set the disputed exchange rate could not in any circumstances constitute an "essential term" of the contracts.

E. In its surrejoinder the Union observes that, according to the information supplied by the complainant in his application forms, he improved his French between 1995 and 2005: he can now read this language without difficulty and understand it fairly well. It asserts that if, on accepting his terms of appointment in January 2000, the complainant did not pay attention to the clause regarding the rate of conversion of his salary which was to be found in normal size font at the bottom of his letter of appointment, he was subsequently at liberty to challenge those terms whenever he received a payslip. It underlines that a contract exists only "if both parties have shown contractual intent and all the essential terms are worked out", and it states that remuneration for a service constitutes "an essential term of any contract". Since the clause regarding the rate of conversion makes it possible to calculate remuneration, it is an essential term of the contract.

CONSIDERATIONS

1. During his employment at the UPU from 1 July 1995 to 31 December 2005, the complainant, who was assigned to Harare as a Regional Adviser, never had the status of an official of the International Bureau. His monthly salary was initially calculated and paid in dollars, but as from 1 January 2000 it was paid in Swiss francs after conversion at a rate that the complainant challenged in vain with the Director General. By a letter of 12 December 2005 the Director General rejected the complainant's request that the exchange rate applied should be that used by the UN and that the amounts which he considered had been unduly withheld from his salary should be reimbursed.

2. The complainant lodged an appeal on 17 February 2006 with the Joint Appeals Committee. In its report of 9 June 2006 the Committee considered that the decision of 12 December 2005 had been notified at the latest by the fax of 19 December 2005; consequently, this was the date on which the period for filing an appeal had started to run. It therefore found unanimously that the complainant's appeal was time-barred and hence irreceivable. By a decision of 17 July 2006 the Director General declared the appeal to be irreceivable on the basis of this report's conclusions.

That decision is challenged before the Tribunal.

3. The complaint raises the crucial issue of whether an internal appeal against the decision of 12 December 2005 was lodged within the one-month period prescribed in the Staff Rules. The reply to this question – and indeed to that of whether the appeal of 17 February 2006 was filed out of time, as the Union maintains in its submissions to the Tribunal – depends on the description to be given, in light of the pertinent Staff Rules, to the complainant's letters to the Director General in which he tried to obtain the payment of the arrears he is claiming.

(a) The internal appeals procedure is defined by Staff Rule 111.3, paragraphs 1 to 3 of which are reproduced under A, above.

(b) In his decision of 12 December 2005 the Director General treated the letter of 7 November 2005 as a request for review within the meaning of paragraph 1 of this Rule. He rejected the request and in so doing drew attention to the fact that the complainant had freely accepted the terms of his remuneration during his successive appointments. In his letter of 7 February 2006 the Director General confirmed his decision of 12 December 2005, while making it clear that the request of 7 November 2005 could not refer to payslips received before 7 October 2005 and that it was therefore time-barred insofar as it concerned earlier payslips.

(c) According to Staff Rule 111.3, paragraph 2, if the complainant wished to appeal against the decision of 12 December 2005, he should have sent an application in writing to the Chairman of the Joint Appeals Committee within one month of notification of that decision. The complainant wrote to the Director General on 20 December 2005, challenging the decision in precise terms and announcing that he intended to impugn it before the Tribunal.

The Director General should have realised that the complainant was following the wrong procedure and should have informed him accordingly. Alternatively he should have passed on his letter to the Chairman of the Committee directly and invited the latter to treat it as an application within the meaning of Staff Rule 111.3, paragraph 2. These steps could have been taken in time, because it is not disputed that the letter of 20 December 2005 reached the Director General without any particular delay, in other words well before the expiry of the time limit for filing an appeal, even if that period started to run as from the receipt of the French version of the decision of 12 December 2005.

(d) The Director General, however, remained silent upon receipt of the letter of 20 December 2005. Furthermore, he waited more than three weeks before replying to the reminder sent by the complainant's lawyer on 13 January 2006 that the request for review was irreceivable. In doing so, he committed a serious breach of his duty of care, which requires the Administration of an international organisation to help as soon as possible to correct any procedural mistake which might be made by a staff member who is challenging a decision, at least when rectification would enable this person to take useful action (see Judgment 2345, under 1(c)). This rectification will usually consist in clearly and precisely outlining the means of redress open to the official. The provision of such information was all the more justified in this case because the complainant could have legitimate doubts about the application of Staff Rule 111.3, given that he did not have the status of an official of the International Bureau.

(e) The decision of 17 July 2006 that the internal appeal was irreceivable because it was time-barred is therefore ill-founded. There is, however, no need to send the case back to the Director General, because he has given detailed reasons for his unequivocal dismissal of the complainant's claims, and the Tribunal may now rule on them, as requested by the complainant.

4. The complainant submits that, since it was decided that his salary was to be paid to him in Swiss francs, the conversion from United States dollars into Swiss francs should have been effected by applying the variable rates used by the UN and not a rate determined arbitrarily by the UPU. He contends that the Union's unlawful practice resulted in a loss to him of some 150,000 francs; between 1 January 2000 and 31 October 2005 the conversion rate which should have been applied, according to the tables which he has presented, in fact fluctuated from month to month between 1.13 and 1.80 Swiss francs to the United States dollar.

(a) For the period 1 January 2000 to 31 December 2005, in the contract and letters of extension accepted by the complainant – which were drawn up in French but provided to the complainant in English – the heading "Basic salary" showed a figure in dollars but referred to a footnote. In the letter of 16 December 1999, extending his appointment for the period 1 March 2000 to 28 February 2002, the footnote read as follows:

"The total amount of the basic salary and post adjustment will be converted into [Swiss francs] at a rate of conversion from [United States dollars] not to exceed 1.20 [Swiss francs]. Payment will be in [Swiss francs]."

In the letters of 9 January 2002 and 1 November 2004 extending his contracts for the periods 1 March 2002 to 31 December 2004 and 1 January to 31 December 2005 respectively, the footnote in question read:

"The total amount of the basic salary and post adjustment will be converted into [Swiss francs] at a rate of conversion from [United States dollars] of not less than 1.20 [Swiss francs]. Payment will be in [Swiss francs]."

(b) A comparison of these clauses shows that the wording of the footnote to the letter of 16 December 1999 differs significantly from that of the footnotes to the letters of 9 January 2002 and 1 November 2004. In the first case the exchange rate should be *no more than* 1.20 Swiss francs to the United States dollar, whereas in the second case this rate should be *at least* 1.20 francs to the dollar.

The parties appear to have paid no heed to this change in wording. Both refer only to the initial version of the conversion clause. They proceed from the misconception that this clause remained unchanged and consequently that the conversion rate for the complainant's remuneration remained fixed at *no more than* 1.20 francs to the dollar during the period at issue.

(c) Contrary to the conditions stipulated in the first version of the conversion clause, the amount in United States dollars of the complainant's monthly remuneration between July 2000 and February 2002 was converted into Swiss francs at a rate higher than 1.20 francs to the dollar.

In August and September 2002 and as from November 2002 the conversion rate applied to the complainant's

remuneration was a constant 1.20 francs to the dollar and the same was true for the period from December 2004 to March 2005 and in May 2005, whereas the rate which should have applied according to the tables submitted by the complainant was lower.

5. The complainant therefore does not rely on the second version of the conversion clause contained in the letters of extension of 9 January 2002 and 1 November 2004. He is disputing the lawfulness of the conversion system applied by the UPU, which, in his view, set the conversion rate unilaterally throughout the period from 1 January 2000 to 31 December 2005. He submits that the UPU ought to have applied the rates used by the UN during this period.

The Tribunal will therefore confine itself to the examination of this plea.

6. The complainant did not express any reservation concerning the conversion rate applicable to his remuneration either when he signed his contracts or when he received his payslips. It was not until the Union informed him of its decision not to renew his appointment beyond 31 December 2005 that he contested the lawfulness of this system; today he tries to justify his silence by saying that he was afraid of losing his job.

This argument cannot be accepted, for to do so would be tantamount to recognising that the weaker party is entitled, in all circumstances and at any time, to challenge clauses that it could not bring itself to contest on signing a contract.

Furthermore, the complainant does not show that his consent was invalidated for any reason. It must therefore be considered that, for the period between 1 January 2000 and 31 December 2005, the parties were fully bound by the clauses of the contracts they had signed. Given the real consensus *ad idem* and the principle of trust and confidence, the validity of all these clauses cannot be disputed.

From this point of view, the complainant's acceptance of the currency conversion rules which he now challenges cannot be called into question.

7. The complainant contends that fundamental principles of international civil service law have been violated and he asks the Tribunal to find that all his employment contracts with the UPU between 1 January 2000 and 31 December 2005 were null and void in part.

He does not, however, specify which general principle or rule of law has in this case been violated to such an extent that the Tribunal could rule that the disputed clause concerning the rate of conversion is null and void. Neither has he shown which principles or standards of international civil service law would have required the application of the conversion rate used by the UN to his remuneration. In these circumstances the Tribunal cannot accept his argument.

8. Moreover, it is hard to see what might prohibit an international organisation and an expert entering into a fixed-term contract of employment from agreeing that the expert's salary should be paid – irrespective of his or her duty station – in the currency of the State where the organisation has its headquarters, converted into another currency at a rate predetermined in an objective and reliable manner. This solution can *prima facie* be justified by the need to safeguard interests which are worthy of protection, for example by preventing sudden fluctuations in the exchange rate giving either party an undue advantage or injuring either of them.

9. The complainant also alleges unequal treatment. He has not, however, shown that international civil servants doing similar work to that assigned to him at the UPU received or would systematically receive better remuneration than he did and that this difference in treatment would stem from the change in the remuneration method agreed between the Union and himself.

10. His criticism regarding the lack of competence of the bodies which altered the rules on the remuneration of UPU regional advisers is likewise unsubstantiated.

11. The complaint can therefore be allowed only in part and there is no need to rule on the issue of whether some of the claims made in it are irreceivable, as the Union submits.

12. In consideration 3(d) it was stated that the UPU did not entirely fulfil its duty of care towards the complainant during the internal appeal proceedings. Although in the circumstances of the case this flaw is not fatal,

it caused moral injury to the complainant, which must be redressed. Compensation may be fairly assessed at 6,000 Swiss francs.

13. Since the complainant partially succeeds he is entitled to costs in the amount of 3,000 francs.

DECISION

For the above reasons,

1. The UPU shall pay the complainant 6,000 Swiss francs in moral damages.

2. It shall also pay him costs in the amount of 3,000 francs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.