

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session

Judgment No. 3134

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. S. against the Universal Postal Union (UPU) on 10 June 2010 and corrected on 21 June, the UPU's reply of 8 September, the complainant's rejoinder of 15 November and the UPU's surrejoinder of 14 December 2010;

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

Having examined the written submissions;

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

A. The complainant, a Swiss national born in 1959, joined the International Bureau of the UPU in Berne (Switzerland) in August 1999 under a short-term contract. On 1 July 2000 he obtained a permanent appointment and thus became a participant in the Provident Scheme of the UPU. On 1 November 2004 he was transferred to the Secretariat of the United Nations in New York (United States of America).

On 3 August 2004, before leaving the UPU, he had asked the Secretary of the Provident Scheme to "consider the possibility" of transferring the rights that he had accumulated in the Scheme to the United Nations Joint Staff Pension Fund (UNJSPF), under an

agreement between the two institutions which was then in draft form, but which was due to enter into force on 1 January 2005. The “Agreement on the transfer of pension rights of participants in the [UNJSPF] and of participants in the Provident Scheme of the [UPU]” was in fact signed on 24 February 2005.

In a letter dated 21 June 2007 the complainant pointed out to the new Secretary of the Provident Scheme that the transfer of his rights had not taken place, contrary to the assurances given by the latter’s predecessor in 2004, and he asked him to effect the transfer. On 2 July 2007 the Secretary replied that steps would be taken to initiate the procedure as soon as possible. Following discussions with the UNJSPF, he sent the complainant a letter dated 4 March 2008, informing him that his request for the transfer of his pension rights was not admissible. Instead, he offered him a withdrawal settlement, in accordance with the Regulations of the Provident Scheme. This letter was returned to the UPU on 16 July without having been delivered, and was transmitted to the complainant by e-mail the same day. On 12 November the Secretary of the Provident Scheme, who had still not received a reply to his letter of 4 March or to the e-mail of 16 July 2008, reminded the complainant that the UNJSPF was refusing the transfer of his entitlements, because the request had not been made before 1 January 2006, as required by Article 4 of the Agreement on the transfer of pension rights. The complainant, having requested further details concerning the amount of the withdrawal settlement, was informed on 12 December 2008 that it amounted to 61,738.45 Swiss francs, and that interest might be paid, exceptionally, at 4 per cent per annum from 1 November 2004.

On 19 May 2009 the complainant told the Secretary of the Provident Scheme that the failure to transfer his pension rights entailed a “significant loss” for him, since the sum offered to him on 12 December 2008 was substantially less than the actuarial equivalent of his retirement pension – estimated at approximately 92,000 francs – which the Provident Scheme ought to have transferred to the UNJSPF at the time he left the UPU. He believed he was entitled to payment of the difference, but was open to conciliation. The Management Board

of the Provident Scheme then appointed a negotiating team, which met with the complainant on 29 September 2009. He signed the record of the negotiation, which indicated that the parties had reached agreement on a solution whereby the Provident Scheme would pay him 90,000 francs in full and final settlement.

On 2 October the complainant asked the Secretary to review the terms of this “agreement”, which he considered disadvantageous to him, and on 11 December 2009 he repeated this request. On 17 December 2009 the Secretary replied that since he had not accepted the agreement it was now “null and void”, and that the Provident Scheme would therefore pay him a withdrawal settlement of 61,738.45 francs, together with interest at 4 per cent per annum from 1 November 2004, i.e. a total of 75,504.80 francs. On 22 December 2009 the complainant challenged this decision to pay him a withdrawal settlement, and in a letter of 5 January 2010 he informed the Secretary that he did not accept the payment which had been made to him without his consent, and asked to be informed, *inter alia*, of the actuarial equivalent of the retirement pension which ought to have been transferred to the UNJSPF on his behalf when he left the UPU. On 21 January the Secretary told him that the sum in question was 91,205.79 francs, and on 16 February 2010 the complainant claimed payment of the difference between that sum, plus interest at 4 per cent per annum since 2004, and the sum which had already been paid to him, i.e. 36,570.65 francs. By a letter dated 11 March 2010 the Secretary informed the complainant that the Management Board, at a meeting held on 9 March 2010, had taken note of the breakdown of negotiations and had confirmed the decision to pay him a withdrawal settlement in accordance with the Regulations of the Provident Scheme. That is the impugned decision.

B. The complainant states that he was notified of the impugned decision “a few days” after 11 March 2010, and he therefore considers that he filed his complaint within the time limit of ninety days prescribed by Article VII, paragraph 2, of the Statute of the Tribunal.

On the merits, he contends that the Provident Scheme of the UPU has been guilty of negligence in his case. Although he had requested the transfer of his pension rights to the UNJSPF in 2004, the Provident Scheme, contrary to “what had been agreed”, did not take any action until 21 June 2007, at which point the time limit for such a transfer had already expired. He also asserts that, in accordance with Judgment 2116 of the Tribunal, the Scheme had a duty to inform him in due time of any action that might imperil his rights or rightful interests. However, it did not supply him with any copy of the Agreement on the transfer of pension rights, nor did it inform him, when he asked its Secretary to transfer his rights, that he had to make the same request to the UNJSPF.

The complainant argues that, because of the failure to transfer his rights, he has suffered an as yet undetermined material injury, the amount of which he will only be able to assess once he receives a pension from the UNJSPF. He also considers that he has suffered moral injury, through the time and energy which he has had to expend on his case.

He asks the Tribunal to order the UPU to pay him the sum of 36,037.92 francs, together with 5 per cent per annum interest from 1 January 2010. He explains that this sum corresponds to the difference between the actuarial equivalent of his retirement pension at the time when he ceased working for the UPU and the amount of his withdrawal settlement, i.e. 61,738.45 francs, plus 4 per cent interest per annum until the end of 2009. He also claims compensation for the loss of future pension benefits, provisionally estimated at 50,000 francs, as well as 5,000 francs for moral injury and 7,000 francs for costs.

C. In its reply the UPU states that the time limit of ninety days for the complainant to file his complaint with the Tribunal expired on 9 June 2010, but that it will not object to the receivability of the complaint *ratione temporis* if the complainant proves that he was notified of the impugned decision after 12 March 2010.

On the merits, the defendant considers that the letter of 21 June 2007 represents, in both fact and law, the formal request for the

transfer of rights, and that it cannot be blamed for the fact that this request was submitted out of time. In its view, the letter of 3 August 2004 cannot be regarded as a transfer request, because at that time the Agreement on the transfer of participants' rights was not yet in force. However, when the complainant asked it to "consider the possibility" of transferring his rights, he had received a favourable reply, albeit an informal one. The defendant therefore argues that the transfer was possible as soon as the Agreement came into force, provided its requirements were observed, including its Article 4. But the complainant did not make any request for information from the UNJSPF after joining it, and did not take any other step until 21 June 2007. In its view, the complainant was therefore guilty of a lack of diligence, which the Provident Scheme attempted in good faith to remedy, particularly by reacting immediately to his letter of 21 June 2007 and then by negotiating with the UNJSPF. Given that the complainant was no longer employed by the UPU when the Agreement came into force, the defendant asserts that it was not then possible for it to provide him with a copy. It considers that it acted with due care towards the complainant by informing him, before he left its employment, of a possible "future entitlement".

D. In his rejoinder the complainant requests a hearing. He states that he was notified of the impugned decision on 13 March 2010 at the earliest, and that the burden of proof as to the date of notification lies with the defendant, given its contention that the complaint is irreceivable.

He submits that the oral information he received before he left the UPU, and the fact that the Provident Scheme did not proceed to pay him a withdrawal settlement in 2004, gave him a legitimate belief that the transfer which he had requested on 3 August 2004 would in fact take place. He also criticises the Provident Scheme for having retained his pension rights for over two years without considering how to deal with them or realising that it was necessary to regularise his situation.

On the basis of a report by a firm of actuaries which he annexes to his rejoinder, he claims the sum of 350,000 Swiss francs, together

with interest at 5 per cent from 1 November 2010, in compensation for the financial loss which he has sustained from the failure to transfer his rights to the UNJSPF.

E. In its surrejoinder the defendant maintains its position.

CONSIDERATIONS

1. The complainant, having worked at the UPU and been a participant in its Provident Scheme from 1 July 2000, was transferred to the Secretariat of the United Nations with effect from 1 November 2004, on which date he became a participant in the UNJSPF.

2. On 3 August 2004 the complainant had sent a letter to the Secretary of the Provident Scheme, stating that:

“As I am being transferred to the United Nations in New York, I would be grateful if you would consider the possibility of transferring my rights in the Provident Scheme of the UPU to the United Nations Joint Staff Pension Fund, in accordance with the Agreement on the transfer of pension rights between the two funds which is due to come into force on 1 January 2005.”

In a letter dated 21 June 2007 he drew the attention of the Secretary of the Provident Scheme to the fact that, “contrary to what had been agreed”, his accumulated rights had not been transferred to the UNJSPF. He went on to explain that:

“Before being transferred, in October 2004, to the Secretariat of the United Nations, [...] your predecessor [...] had confirmed to me that the transfer would take place in the framework of the Agreement between the UPU Provident Scheme and [the UNJSPF], which came into force in [...] 2005. Certain steps were taken for this purpose, but were not apparently completed. Please therefore ensure that the transfer is effected, bearing in mind the period of time which has elapsed since my redeployment to the United Nations.”

The Secretary of the Provident Scheme acknowledged receipt of this letter on 2 July 2007, stating that he intended to “make the necessary contacts in order to initiate the procedure as soon as possible”.

3. The UNJSPF refused to allow the transfer, because the complainant had not submitted his request within the time limit stipulated in Article 4 of the Agreement on the transfer of pension rights which it had concluded on 24 February 2005 with the UPU Provident Scheme, that is, by 1 January 2006. On 12 December 2008 the Provident Scheme therefore informed the complainant that, in accordance with Article 32 of its Regulations, he would receive a withdrawal settlement in the sum of 61,738.45 Swiss francs and that, exceptionally, interest at a rate of 4 per cent per annum might also be paid on that amount.

Indeed, the complainant was not entitled to a deferred retirement benefit under Article 31 of the Regulations of the Provident Scheme, because he had been a participant for less than five years. A withdrawal settlement had therefore to be paid instead. Under Article 32, paragraph 2, of the said Regulations, a withdrawal settlement consists of the amount of the departing participant's contributions, together with a supplement amounting to 10 per cent of his or her contributions (not including any sums paid for retroactive validation) for each full year of contributory service in excess of two years, up to a maximum of 100 per cent. The complainant's attention had also been drawn to Article 18, paragraph 1, of the Regulations, according to which "[t]he right to a withdrawal settlement [...] shall be forfeit if for two years after payment has been due the beneficiary has failed to submit payment instructions or has failed or refused to accept payment".

4. Having complained that he had sustained "significant loss" from the non-transfer of his pension rights – the actuarial equivalent of his retirement pension when he left the UPU was estimated at approximately 92,000 francs – and having learned that there was no possibility of "buying back" the lost contribution years from the UNJSPF, the complainant signed a "record of negotiations" with a negotiating team from the Management Board, according to which it was agreed that he would be paid 90,000 francs in full and final settlement. When he disputed the terms of that agreement, on the basis that he had "not negotiated in full knowledge of the facts", the

Provident Scheme decided that the agreement was “null and void”, and in December 2009 it paid him 61,738.45 francs, together with interest at 4 per cent per annum from 1 November 2004, i.e. a total of 75,504.80 francs. On 16 February 2010 the complainant claimed payment of the difference between the actuarial equivalent of his retirement pension at 31 December 2004, likewise with interest at 4 per cent per annum, and the above sum, i.e. 36,570.65 francs.

On 11 March 2010 the Secretary of the Provident Scheme confirmed the decision to pay the complainant a withdrawal settlement in accordance with the Regulations of the Scheme. That is the impugned decision.

5. According to Article VII, paragraph 2, of the Statute of the Tribunal, a complaint must be filed within ninety days after the complainant was notified of the decision impugned. The defendant argues that the time limit appears not to have been observed and that the complaint is therefore time-barred. This objection is without foundation. According to the case law of the Tribunal (see, *inter alia*, Judgment 2863, under 3), the period of time for filing a complaint begins to run not from the day when the complainant was notified of the impugned decision, but from the following day. In this case, the complainant states that he was notified of the impugned decision on 13 March 2010, the date given on the complaint form, and the defendant has not produced any evidence to the contrary. As the time limit began to run on 13 March 2010, it had not expired on 10 June 2010, the date of filing indicated by the Registry on the complaint form, in accordance with Article 4, paragraph 2, of the Rules of the Tribunal.

6. In his rejoinder the complainant has applied for a hearing, under Article 12 of the Rules, to confirm his version of the facts surrounding the decision to pay him a withdrawal settlement. However, having regard to the highly explicit character of the written submissions, and the information provided in the documents produced by the parties, the Tribunal considers that it is fully informed on this matter and that it is therefore unnecessary to allow the application.

7. The Agreement of 24 February 2005 was not yet signed at the time when the complainant wrote to the UPU asking it to consider the possibility of transferring his rights to the UNJSPF. It is therefore understandable that he did not at that point make an unconditional request for a subsequent transfer to the UNJSPF of the rights he had accumulated with the Provident Scheme.

Given that the complainant's request pertained to pension entitlements, i.e. to a field that may not be easy to understand for an official who has no actuarial training, it was all the more important that the UPU should respond to it carefully and expediently. However, it is not disputed that the Secretary of the Provident Scheme gave a positive oral response to the complainant's request and assured him that the transfer would be effected as soon as the agreement had been signed, and there is no doubt that in so doing the Secretary was acting in the exercise of his functions. The complainant could therefore assume in good faith that his rights would be transferred to the UNJSPF without his having to approach the Fund himself, in the manner provided for in Article 4 of the Agreement.

The Provident Scheme did not, however, effect the expected transfer, as the letter of 2 July 2007 from its Secretary shows, nor does that letter explain why it had omitted to do so. It follows that the UPU has been negligent in this regard. It is clear that there is a sufficient causal link between its negligence and the injury suffered by the complainant, the amount of which remains to be determined.

8. Before the Tribunal, the complainant is claiming compensation, for the first time, for the injury arising from the reduction of his pension consequent upon the non-transfer of his pension rights. This claim is clearly irreceivable, since no decision could have been made on that issue prior to the filing of the complaint (see Judgment 2306, under 8). As for the claim for payment of the difference, subject to interest of 4 per cent per annum, between the actuarial equivalent of his retirement pension at the time he left the UPU and the sum of 61,738.45 francs, plus interest, which he was actually paid, this is ruled out by Article 32 of the Regulations of the Provident Scheme,

concerning the withdrawal settlement payable to a participant who ceases his employment without being entitled to a retirement pension.

9. In the present case, the loss sustained by the complainant consists of the difference between the payments which the UNJSPF would have made to him when he reached retirement age, if the Provident Scheme had transferred his accumulated entitlements to the Fund, and the benefits which the Fund will actually pay to him at that time. This loss has to be compensated by means of an indemnity corresponding to the capitalised amount of this difference, minus the capitalised amount of the supplementary pension which the complainant may have secured with an independent provident institution, using the capital sum of 75,504.80 francs which the defendant paid him in December 2009. The Tribunal is not in a position to determine the quantitative relationship between the amount claimed under this head and the loss which the complainant has sustained, which has to be compensated.

The case will therefore be remitted to the UPU so that it can calculate the loss sustained by the complainant through its negligence, on the basis that the sum it has to pay him by way of damages will take account of the sum of 75,504.80 Swiss francs already received by the complainant, and cannot exceed the sum claimed by him on 16 February 2010, i.e. 36,570.65 francs.

10. Accordingly, the complainant's request to enter further submissions with a view to evaluating his loss in terms of future pension benefits need not be entertained.

11. In the light of the foregoing, the Tribunal will not rule upon the complainant's plea that his right to be informed has been violated, since in any event such a violation would not result in any increase in the damages awarded.

12. The complainant has suffered moral injury which is to be compensated by the payment of an indemnity of 3,000 francs. He is also entitled to 2,000 francs for costs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case is remitted to the UPU for it to take action as indicated under 9 above.
2. The UPU shall pay the complainant an indemnity of 3,000 Swiss francs by way of damages for moral injury.
3. It shall also pay him 2,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet