

SEVENTY-THIRD SESSION

In re KIGARABA

(Interlocutory order)

Judgment 1188

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 1 July 1991 and corrected on 23 July, the UPU's reply of 9 September, the complainant's rejoinder of 14 November and the Union's surrejoinder of 20 December 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 3.10.1, 3.10.5.A.d, 10.1.1, 10.1.2, 10.2.1 and 10.2.4 of the Staff Regulations of the International Bureau of the UPU and Rules 110.4, 110.4.3 and 111.3.1, .3, .8, .10 and .12 of the Staff Rules;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. Regulation 3.10.1 of the Staff Regulations of the International Bureau reads:

"An education grant shall be available to a staff member who is not locally recruited and whose child is in full-time attendance at a school, university or similar educational institution of a type which will, in the opinion of the Director-General facilitate the child's reassimilation in the staff member's recognized home country. The amount of the grant per scholastic year for each child shall be 75 per cent of 11,000 US dollars of admissible educational expenses, up to a maximum grant of 8,250 US dollars. ..."

Regulation 3.10.5.A.d states that the costs of attendance shall include "the cost of enrolment, registration, prescribed textbooks, courses, examinations and diplomas, but not boarding fees, school uniforms or optional charges".

The complainant, a citizen of Tanzania, joined the staff of the Union at its headquarters in Berne in 1983. He is employed as a first secretary at grade P.3 in its Personnel Section, in Division I, and he is in charge of education grants, among other things.

He has a daughter who was born in 1975 and a son who was born in 1979, and they attended the International School in Berne in the 1989-90 school year. In a form dated 16 May 1990 he claimed education grants for both children for the period from 30 August 1989 to 22 June 1990. The totals he claimed in expenses came to 13,875 Swiss francs for his daughter and 12,645 francs for his son. Under the heading "Observations" he said: "To the above amounts must be added lump sums to cover the cost of textbooks in accordance with the material rules". On 17 May he made out a statement showing, among other things, payment of 300 dollars, or 438 francs, for his daughter and 150 dollars, or 219 francs, for his son under the heading "Lump sum to cover the costs of textbooks". In support of his claims he produced two UPU forms - one for his daughter and one for his son - headed "Certificate of school attendance and of costs for education grant" and signed on 16 May by the headmaster of the International School. Opposite the heading "Textbooks (not including stationery and reference books)" appeared the words "were not given free of charge".

The Head of Personnel having raised the matter, the headmaster wrote him a letter on 28 May saying that "textbooks are neither given nor sold; they are loaned to our students".

In a minute of 1 June the Director-General asked the complainant to explain his claims and he answered in a letter of 8 June that he had bought textbooks outside the school. He said that again in a letter of 13 June. In further letters of 15 and 27 June the headmaster affirmed that he had never had to buy textbooks for his children, who had had them on loan.

In a minute of 20 June to the Head of Division I the Director-General rejected the complainant's claims and ordered referral to the Disciplinary Committee under Regulation 10.2.4 on the grounds that his statements had been, not just mistaken, but false. The complainant was so informed by letter of 26 June. On 28 June he wrote to the Director-General making a request for review under Rule 111.3.1, but by a minute of 3 July to the Head of Division I the Director-General upheld his decision of 20 June.

The Disciplinary Committee, which reported at some unknown date, recommended giving the complainant a written warning under Regulation 10.2.1a. On 13 November the Director-General wrote him a letter saying that his advancement to his next salary step was delayed by one year, a sanction provided for in Regulation 10.2.1b. The stated reason was his "false declaration" that the school had not supplied textbooks free of charge.

By a letter of 3 December 1990 he asked the Director-General to let him have the text of the Disciplinary Committee's report, but the Director-General refused.

On 21 December the complainant lodged an appeal under Rule 111.3.3 against the decision of 13 November, and his case went to the Joint Appeals Committee. The Committee met on 5 February 1991. In its report, though it held that the complainant had committed misconduct, it recommended the lesser sanction of written warning. But by a decision of 19 April 1991, the one impugned, the Director-General upheld the sanction imposed on 13 November 1990.

B. The complainant cites Regulation 3.10.5.A.d and an administrative circular, No. 14 of 22 October 1987, which explains in paragraph 14 that, "if the textbooks are not provided free of charge" and the school so certifies, the staff member may claim the prescribed lump sums without supplying evidence of purchase. There is, says the complainant, the same "lump-sum reimbursement" in other United Nations agencies. UPU practice differs in that the Union does not require any certificate from the school that textbooks have been prescribed, or any receipt for the purchase of textbooks, before refunding the cost of them.

The complainant argues that he did buy textbooks for use by his children in the school year 1989-90, either in bookshops or directly from the school, but that he is not bound to produce receipts since he is merely claiming the lump sums due. How can his statement on the UPU forms that textbooks "were not given free of charge" be described as "false" when the headmaster wrote in his letter of 28 May 1990 that "textbooks are neither given nor sold"? The Director-General had decided on his guilt even before referring his case to the Disciplinary Committee: that was why he rejected the Committee's recommendation, and his motives are suspect.

Why should the complainant have compromised his career merely for the sake of 657 Swiss francs? Other officials who have filed irregular claims to education expenses - he gives examples - have never suffered the slightest rebuke. His claims were proper, and by imposing a sanction the Union has discriminated against him. The Director-General's repeated refusals of his applications for transfer are unfair and suffice to discredit the gratuitous charges against him, which have marred his reputation and career prospects and caused him stress and uncertainty.

He asks that the reports of the Disciplinary Committee and the Joint Appeals Committee be disclosed to him and to the Tribunal; that the decision to withhold his step increment for a year be set aside; that any reference to the matter be struck from his personal file; that he be granted his step advancement as from 1 December 1990; that he be paid 450 United States dollars in lump-sum reimbursement of the cost of the textbooks for his children; and that he be awarded the equivalent of two years' salary and allowances in moral damages and 10,000 Swiss francs in costs.

C. In its reply the Union gives its own account of the facts of the case.

It submits that the complainant's claim to repayment of the costs of his children's textbooks is irreceivable because he did not make that claim in his appeal of 21 December 1990 and he has therefore failed to exhaust the internal means of redress.

Paragraph 14 of the circular of 22 October 1987 does entitle the staff member, without production of receipts, to lump-sum reimbursement of the cost of textbooks. But there is such entitlement only if the textbooks have not been provided free of charge and the school so certifies in the prescribed form. The circular says in paragraph 3 that any wrong or false statement of claim may make the claimant subject to one of the sanctions laid down in Chapter X of the Staff Regulations.

The complainant knew full well that by merely declaring that the books had not been supplied free of charge he

could obtain lump-sum reimbursement without providing further evidence. He held to his false statement in his letters of 8 June and 13 June 1990. The gravity of his offence was compounded by his being himself in charge of the refund of educational expenses. Since he was given only the second least severe sanction, it was not disproportionate to his offence.

The Union answers the complainant's other allegations, which it submits are either immaterial or unfounded.

It declines to disclose the reports the complainant wants to see: Rule 110.4.3 says that "The deliberations and reports of the Disciplinary Committee and its recommendation to the Director-General shall be confidential"; and Rule 111.3.12 provides that the staff member shall be sent only a copy of the Joint Appeals Committee's recommendation, not the full text of its report.

D. In his rejoinder the complainant observes that the Union does not deny that the staff member may claim the costs of any textbooks not given free of charge. To lend is not to give, and in claiming costs he abided by the letter of the rules. The child who merely has a textbook on loan is, after all, not so well off as the one who has a copy of his own. The complainant submits that he was entitled in good faith to take that view. Yet not only did the Union charge him with making a false statement but it so informed the headmaster. It thereby failed in the duty of respect it owed him. Indeed it went further and actually punished him for not sharing its own view of the meaning of the rules, though claims to education expenses are notoriously difficult to administer. To misread the rules should not be a punishable offence. There was breach of the principle of proportionality, as both the committees held for reasons they stated in the reports that the Union has refused to disclose.

E. In its surrejoinder the Union submits that the complainant's argument rests on interpretation of the word "given" and is therefore irrelevant since the text of the circular, which exists only in French, uses the term "fournis", or "provided". His original statement that textbooks "were not given free of charge" was in bad faith because all along he intended a play on the word "given". In fact all the textbooks were provided to his children free of charge; the circular precludes payment where books are so provided; and he knew that a mere claim would suffice to secure him the lump-sum amounts he was not entitled to. He thereby committed an offence, and the sanction imposed on him was proper. He may not plead his own good faith since he was familiar from his own work with the meaning of the circular. He has never shown that he had to buy the set books. Had the headmaster noticed the false statement he would never have endorsed it in the first place.

CONSIDERATIONS:

1. The complainant has been with the International Bureau of the Union since 1983 and in 1986 became a first secretary at grade P.3 in the Personnel Section. Among his duties was the processing of claims for the refund of education expenses. In February 1988 and again in January 1990 he applied, in vain, for transfer to another section where he might put to use his experience of postal administration.

2. On 16 May 1990 he submitted claims, countersigned by the headmaster of the International School of Berne, to the refund of expenditure on prescribed textbooks for his daughter and his son in the 1989-90 school year. After correspondence with him and with the headmaster on the subject the Director-General wrote a minute on 20 June to the Head of Division I rejecting his claims and ordering that the matter be referred to the Disciplinary Committee on the grounds that they were based on the false statement that the school had not supplied his children with textbooks free of charge.

3. Regulation 10.1.1 of the Staff Regulations of the International Bureau of the Union reads:

"A staff member who has failed to perform his duties either intentionally or through negligence or carelessness shall be liable to disciplinary action corresponding to the seriousness of the fault."

Regulation 10.1.2 provides for the establishment of the Disciplinary Committee to advise the Director-General, and Regulation 10.2.1 says that disciplinary measures under 10.1.1 include "written warning" and "delayed advancement to the next salary step".

4. At some date which the case records do not reveal the Committee recommended imposing on the complainant a written warning under Regulation 10.2.1a, but in his letter of 13 November 1990 the Director-General imposed instead the severer sanction provided for in 10.2.1b, the withholding for one year of his advancement to his next salary step, on the grounds of his "false declaration".

The Committee's report was neither appended to that letter nor supplied to the complainant in response to his letter of 3 December to the Director-General seeking disclosure of it. On 21 December he appealed to the Joint Appeals Committee, and it too recommended a written warning. Though the text of its recommendation is in the case records, its full report is not. Again the Director-General held to the sanction already imposed and his final decision of 19 April 1991, the one now under challenge, was to confirm that sanction.

The Union continues to refuse to let the complainant have the full reports of either the Disciplinary Committee or the Joint Appeals Committee but has expressed willingness to disclose them to the Tribunal if so required.

The Disciplinary Committee's report

5. Rule 110.4 of the Staff Rules of the International Bureau sets out the procedure to be followed by the Disciplinary Committee and, in particular, Rule 110.4.3 says that "The deliberations and reports of the Disciplinary Committee and its recommendations to the Director-General shall be confidential".

In this case, however, after the sanction had been imposed, the complainant lodged an internal appeal which went to the Joint Appeals Committee. The material issue is therefore whether the full text of the Disciplinary Committee's report, and not just the text of its recommendation, was disclosed to the Joint Appeals Committee. If it was, the Union should have let the complainant too have a copy and, failing that, there was a procedural flaw in that there was breach of his right of defence.

The Joint Appeals Committee's report

6. Rule 111.3.8 reads:

"... Normally, proceedings before the [Joint Appeals Committee] shall be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing."

Rule 111.3.10 says:

"The Joint Appeals Committee shall, by majority vote, adopt and submit a report to the Director-General. The report shall contain a record of the proceedings in the appeal, and shall include a summary of the matter as well as the Committee's recommendation. ..."

And Rule 111.3.12 reads:

"The final decision in the matter, taken by the Director-General after the Joint Appeals Committee has forwarded its report, shall be notified to the staff member, who shall at the same time be sent a copy of the Committee's recommendation."

7. Those rules do not bear out the Union's contention that the Joint Appeals Committee's report is to be treated as confidential. In any event an item that formed part of the internal appeal proceedings should be at the Tribunal's disposal since it cannot otherwise appraise the background to the impugned decision and determine whether it shows any flaw. Further submissions are therefore required to complete the case records.

The Union shall, within 15 days of receiving the text of this judgment, supply:

(a) the full report of the Joint Appeals Committee; and

(b) the full report of the Disciplinary Committee, provided that it formed part of the submission to the Joint Appeals Committee together with any observations it cares to make.

The complainant shall in turn have 30 days in which to answer in a further brief.

The Union may submit a final brief in another 30 days.

8. Being to blame for the delay, the Union shall pay the complainant 1,000 Swiss francs. Costs are reserved.

DECISION:

For the above reasons,

1. The Tribunal orders further submissions as set out in 7 above.
2. The Union shall pay the complainant 1,000 Swiss francs.

In witness of this judgment Miss Mella Carroll, Judge, the Right Honourable Sir William Douglas, Deputy Judge and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Mella Carroll
William Douglas
José Maria Ruda
A.B. Gardner