

SEVENTY-THIRD SESSION

In re ZAYED (Najia)

Judgment 1195

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Najia Zayed against the Universal Postal Union (UPU) on 12 September 1991, the UPU's reply of 17 October, the complainant's rejoinder of 23 December 1991 and the Union's surrejoinder of 7 February 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 3.1.2 and 3.1.3 of the Staff Regulations of the International Bureau of the Union;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. Regulations 3.1.2 and 3.1.3 of the Staff Regulations of the International Bureau of the UPU read:

"2. The dependency rate in the scale of basic salaries of Senior and Professional category staff members shall apply to staff members with a dependent spouse or dependent children. If the spouse is also a staff member of the Union, or if he is a staff member of the United Nations or a specialized agency, the basic salary shall be paid at the dependency rate in respect of a child only to the official having the higher grade.

3. A spouse shall be deemed to be dependent when his annual occupational earnings, after deduction of income tax, are less than step 1 of the salary attached to grade G.1 of the General Service category. Where husband and wife have been legally separated, the Director-General shall decide in each case whether the basic salary shall be paid at the dependency rate."

The complainant joined the International Bureau in Berne in 1975. She is employed by the Arab Language Group of the Union as a member of the Arabic translation service in the Professional category.

Her husband, Mr. Ezzat Fayez Zayed, also used to be employed in that service. As Judgment 868 of 10 December 1987 recounts under A, he was dismissed on 30 September 1986. From that date she declared him each year to be her dependant and was accordingly paid her own salary at the higher rate known as the "dependency rate".

By Judgment 868 the Tribunal set aside her husband's dismissal and sent his case back to the Union for a new decision. By Judgment 922 of 8 December 1988 it quashed a new decision by the spokesman of the Arab Language Group to confirm his earlier dismissal and awarded him in damages "the sums he would have been paid had he remained on the staff" since the date of dismissal.

The spokesman of the Group and Mr. Zayed concluded a settlement on 18 May 1990 reinstating him in the Arabic translation service up to 30 November 1990, paying him for the period from 9 December 1988 to 31 August 1990 and putting him on unpaid leave from 1 September to 30 November 1990. He then took retirement.

In a letter of 11 February 1991 to the complainant the Union pointed out that from October 1986 to May 1990 her husband had had occupational earnings above the limit in Regulation 3.1.3 ("step 1 of the salary attached to grade G.1 of the General Service category"); that she had therefore not been entitled to payment of her own salary at the dependency rate for that period; and that she owed the Union a total of 5,940.80 Swiss francs. The letter asked how she would pay it.

In a reply of 21 February to the Director-General of the International Bureau the complainant objected to the letter of 11 February on the grounds that her employer was the Arab Language Group and that the Bureau had acted *ultra vires*. In a letter of 28 February the Union retorted that it was merely applying the rules and had therefore had no reason to consult the Group beforehand. On 22 March the complainant went to the Joint Appeals Committee. The

Committee held that there was no flaw in the decision. By a letter of 19 June 1991, the decision impugned, the Assistant Director-General informed the complainant that the decision was upheld and that the amount due would be subtracted from her pay in 18 monthly instalments starting on 1 July 1991.

B. The complainant points out that the International Bureau failed to claim repayment after the retroactive correction of her husband's position in accordance with Judgment 922 for the period from 1 October 1986 to 8 December 1988 and even after the settlement of 18 May 1990. The reason why it did not act until February 1991 was that it was in two minds about the matter. It misled the spokesman of the Group by failing to keep him informed.

A staff circular on claims to dependency benefits - No. 106 of 5 December 1990 - says that no retroactive payment may be made to a staff member in 1990 for any period prior to 1 January of that year. So there is prescription, and it must apply also to claims from the Administration to repayment. The Union's claim would be time-barred even if Mr. Zayed's had been an ordinary case of reinstatement; but it was not: he was reinstated by virtue of the above-mentioned settlement. In its report the Joint Appeals Committee observed that, though the rules set no period of limitation for the claim, equity required one. It thereby acknowledged the unfairness of the decision.

The complainant claims the quashing of the impugned decision or, failing that, an order that, in accordance with circular 106 of 5 December 1990, she pay back only the sums claimed by the Union for the period from January to May 1990, or 848.75 Swiss francs. She also claims costs.

C. In its reply the UPU submits that the complainant was not entitled to salary at the dependency rate for any period in which her husband was paid more than an official at step 1 of grade G.1. Everyone is bound to put in a yearly declaration of family status, and that is why no-one may claim payment for any period prior to 1 January of the current calendar year. But that does not prevent the Union from claiming recovery of sums wrongly paid to the staff member for some prior period. The Union is free not to set a period of limitation for such recovery, and it has set none. Besides, in this instance the period would not have begun until 18 May 1990, the date of the settlement with Mr. Zayed, and the Union claimed recovery under ten months later. The Appeals Committee held the decision to be lawful. The Union invites the Tribunal to dismiss the complaint as devoid of merit.

D. The complainant rejoins that when negotiating the settlement with her husband the Union never spoke of the sums it is now withholding from her salary and its calculations at the time did not cover them. Had her husband then known of its demands he would not have consented to the settlement. He waived his right to payment of 20,000 Swiss francs in salary for the last three months before retirement and to the Tribunal's award of 10,000 Swiss francs in moral damages. Since the settlement saved the Arab Language Group 30,000 francs on that account, the Union is in especially bad faith in clawing back nearly 6,000 more.

The decision impugned is further flawed in that the competent authority, the spokesman of the Group, was unaware of all the relevant items of evidence and even of the International Bureau's intention. Knowing that the spokesman would "never agree to its asking for the sums back", the Union waited for ten months after the settlement until he had left.

The complainant develops her arguments on the issue of limitation. She maintains that even if her husband's reinstatement had been real - which it was not - the Union should not be free to claim payment for any period preceding the date of the settlement by more than one year.

E. In its surrejoinder the Union develops the pleas in its reply. In particular it distinguishes this case from that of Mr. Zayed, which it says was finally settled, in line with the agreement of 18 May 1990, in November 1990. It thereupon determined the amount wrongly paid to the complainant and sought repayment on 11 February 1991. The Staff Regulations say nothing of any period of limitation. Besides, only a few months went by between the date at which the Union was entitled to claim repayment and the date at which it actually did so.

CONSIDERATIONS:

1. The complainant is challenging a decision by her employer, the Universal Postal Union, to subtract from her pay in eighteen monthly instalments sums which it had granted her on the grounds that her husband was her dependant.
2. The first point at issue is whether the Union made undue payment to the complainant.

According to Regulation 3.1.2 of the Staff Regulations a staff member in the Professional category who has a "dependent spouse" is entitled to payment of basic salary at a higher rate known as the "dependency rate". Regulation 3.1.3 defines the term "dependent spouse".

The complainant's husband too used to be on the staff of the Union until it dismissed him on 30 September 1986. As from 1 October 1986 the Union recognised him as her dependant and therefore paid her salary at the dependency rate in accordance with 3.1.2.

Mr. Zayed appealed to the Tribunal against his dismissal. In Judgment 922 the Tribunal awarded him damages "equivalent to the sums he would have been paid had he remained on the staff from the day of his dismissal up to the date" of the judgment, i.e. from 1 October 1986 to 8 December 1988. Under an agreement he concluded with the Union on 18 May 1990 he received his pay for the period from 9 December 1988 to 31 August 1990 and was then put on unpaid leave up to 30 November 1990, when he retired.

Having received the award of damages and the retroactive payment of salary, the complainant's husband may not be deemed to have been her "dependent spouse" within the meaning of 3.1.3 from 1 October 1986 to 30 November 1990. So she did not qualify under 3.1.2 for payment of salary at the dependency rate in that period. The conclusion is that such payment was not due, even though of course at the time when she claimed it she was in good faith since she had reason to believe that her husband was indeed her dependant. It was, after all, the Union's fault that he himself did not receive until long afterwards payment of the salary and allowances due to him.

3. Since the complainant received undue payment, the second point at issue is whether the Union may recover the amounts she was paid.

It is a general principle of law that any sum paid on a mistaken assumption of fact is recoverable. And since the complainant received payment on the assumption that her husband was her dependant and since that assumption later proved to be mistaken, the sums she received are, according to that principle, recoverable.

4. The complainant has, however, refused to pay back the sums the Union is claiming, and she puts forward two pleas.

First, she submits that since, before the conclusion of the agreement of 18 May 1990, the Union failed to point out to her husband that it would require her to pay the sums back it acted in bad faith.

That argument fails. The agreement between the Union and the complainant's husband is extrinsic to the relationship between the Union and the complainant and for her is *res inter alios acta*.

Her second objection is that because of prescription the debt has become unenforceable. There is indeed a widely recognised principle that lapse of time may extinguish an obligation, but the difficulty here is that the Union's rules set no time limit for such extinctive prescription. The complainant maintains that it should be after one year, and she cites a staff circular, No. 106 of 5 December 1990, which says in paragraph 10 that no retroactive payment of dependency benefit may be made to a staff member in 1990 for any period prior to 1 January of that year.

The analogy is not a sound one. As the Union states, what the circular means is that the staff member, who has to file each year his claim to dependency benefit, is required to support it with a statement of any fact that is relevant to the particular year and that he already has knowledge of. In this case, however, there was no question of the Union's being able to demand repayment from the complainant until the publication of Judgment 922 and the conclusion of the agreement with the complainant's husband.

5. The Tribunal is nevertheless free to determine whether in the circumstances of the case the Union was in bad faith in demanding repayment in its letter of 11 February 1991. There are two periods. The first is from 1 October 1986 to 8 December 1988, and it formed the subject of Judgment 922. The second is from 9 December 1988 to 30 November 1990, and it is covered by the agreement concluded on 18 May 1990 between the Union and the complainant's husband.

As to the latter period, the time between 18 May 1990 and 11 February 1991, the date of the Union's demand, was less than a year. As to the former, the sums due to the complainant's husband under Judgment 922 were paid to him in January 1989, so that just over two years had elapsed before the demand was made. Yet even that was not long enough to warrant declaring the undue payments irrecoverable. Not only is the period of extinctive prescription

much longer in most national systems of law, but the complainant pleads no personal difficulty or hardship in making repayment: the Union is not claiming lump-sum reimbursement but is spreading it over eighteen months.

6. The conclusion is that, with due regard to all the circumstances of the case, the complainant is bound to repay to the Union the amounts demanded in its letter of 11 February 1991 and that her complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, 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.

Jacques Ducoux
Mella Carroll
José Maria Ruda
A.B. Gardner