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

NINETY-SIXTH SESSION

Judgment No. 2279

The Administrative Tribunal,

Considering the sixth complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 18 November 2002 and corrected on 16 December 2002, the UPU's reply of 26 March 2003, the complainant's rejoinder of 28 April and the Union's surrejoinder of 6 June 2003;

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

Having examined the written submissions and decided not to 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. Facts relevant to this case are contained in Judgment 2177, delivered on 3 February 2003, concerning the complainant's second complaint. It may be recalled that the electronic attendance recording system which the UPU had been testing since 15 February 1999, referred to below as the "clocking-in system", was applied to all staff of the International Bureau of the UPU as from 15 March 1999. This meant that staff had flexible working hours and were able to choose their time of arrival and departure, provided that they were present during "core hours", during which attendance was compulsory.

By Administrative Circular No. 22/Rev. I of 26 May 2000, the Director-General confirmed what he had announced on 30 April 1999, namely that because heads of division, section and unit were not compensated for overtime, they were exempted from the system. The complainant asked for this decision to be reconsidered on 26 June 2000. The case was brought before the Tribunal, which, in Judgment 2177, dismissed the complaint on the grounds that internal means of redress had not been exhausted.

Meanwhile, on 24 April 2002, Administrative Circular No. 22/Rev. II had been published. According to this new version, which cancels and replaces Administrative Circular No. 22/Rev. I, directors alone are exempted from the need to clock in and out.

On 23 May the complainant filed a request for a review of Administrative Circular No. 22/Rev. II, particularly on the grounds of breach of the principle of equal treatment. As the Director-General did not reply to this request within the prescribed one-month period, the complainant filed an appeal with the Joint Appeals Committee on 23 July. The Committee issued its report on 15 August, unanimously recommending that all provisions of the administrative circular be maintained. In a letter of 21 August 2002, which constitutes the impugned decision, the Director-General informed the complainant that he had decided to dismiss his appeal. He considered the appeal irreceivable, because it concerned not an individual decision but an administrative circular which could give rise to an individual decision in application of the circular.

Following an audit of the missions carried out by the complainant, he had meanwhile been subjected to a disciplinary procedure and suspended as from 16 May 2002.

B. According to the complainant, the principle of equal treatment has been breached because directors are not obliged to observe "core" attendance times. In his view, the only purpose of the system introduced by the UPU is to check the time spent at work by some of the staff.

He contends that the provisions of the disputed administrative circular should be applied with "obligatory,

immediate and uniform" effect to all staff members within a given category. He argues that the introduction of the clocking-in system ended the relationship of trust which for 17 years had underlain the use of flexible working hours, and consequently impaired his dignity. Furthermore, staff members who, like himself, have to record their arrival and departure times will feel humiliated if they are in the company of visitors who witness the operation.

The complainant asks the Tribunal to set aside the "relevant provisions" of Administrative Circular No. 22/Rev. II, to recognise that it gives rise to unequal treatment and to grant him 20,000 Swiss francs in compensation. Noting that the administrative circular was issued "eight weeks" after his second complaint was filed, he asks the Tribunal to recognise that the Administration published the circular as a means of avoiding being sanctioned by the Tribunal and that such a "tactical manoeuvre" is not compatible with the principles of the international civil service. He claims 20,000 francs on that count; he also seeks 5,000 francs in costs.

C. In its reply the UPU contends that the complaint is irreceivable for several reasons. It recalls that a decision which merely confirms an earlier decision does not set off a new time limit for filing an appeal. In the case in hand, the challenged administrative circular merely confirms the earlier decision to exempt senior staff from the clocking-in system; it does not alter the principle of exemption, but merely restricts it to the director category, that is, to eight individuals. Furthermore, the UPU points out that the complaint is aimed at quashing an administrative circular. However, a staff member may not directly call for the cancellation of general decisions if these must ordinarily be given effect by individual decisions. Nor has the complainant succeeded in proving that he suffered injury; holding grade P.5, "without a director's responsibilities", he took full advantage of flexible working hours and was in fact required to use the clocking-in system, as introduced by the Administrative Circular of 24 April 2002, only until 16 May 2002, the date at which he was suspended. Lastly, the defendant points out that since the main claims are irreceivable, so too are the claims for compensation.

Subsidiarily, the Union notes that the status of senior staff in fact and in law is different from that of other staff. The exemption from clocking-in granted to senior staff is merely the corollary of the duties and responsibilities they have to assume, since very often they have to work more than 40 hours a week as a result of their greater responsibilities. Contrary to the allegations of the complainant, the flexible time constraint constitutes an added right rather than an obligation, because the system allows staff to adapt their working hours within a broader time span and to take extra leave. The defendant adds that an employer can hardly be accused of discrimination because he wants to ensure by means of an electronic recording system that his staff are present during core working hours.

The UPU considers, furthermore, that monitoring the working hours of International Bureau staff in no way detracts from their dignity. Quite to the contrary, it merely reflects sound management. In the defendant's view, the complainant was constantly seeking to "abuse the system and obtain undue benefits by fraud". It argues that it is in its interest to combat such abuses, a consideration which clearly takes precedence over the need to protect the so-called legitimate interests of the complainant.

The Union, which describes the complainant's attitude as "querulous", considers the complaint to be abusive and asks the Tribunal to award costs against the complainant.

D. In his rejoinder the complainant maintains that his complaint is receivable. He categorically rejects the UPU's argument that any objection to Administrative Circular No. 22/Rev. II would need to be raised within the time limit for any appeal contesting Administrative Circular No. 22/Rev. I.

On the merits, the complainant alleges that the Union impaired his dignity by violating one of the major principles of the international civil service, namely that of equal treatment for officials placed in the same situation in fact and in law. He argues that the defendant's offensive "personal attacks" against him, which in his view further detracted from his dignity, are clearly unfounded. Furthermore, his so-called querulous attitude is merely the inevitable consequence of the "confrontational stand" adopted by the Union, which, by resorting to numerous procedures against him, has forced him to file a number of appeals merely to defend his rights.

E. In its surrejoinder the UPU deplores the "particularly edifying tone" of the complainant's submissions. Noting that the complainant has not put forward any new arguments in his rejoinder, it confirms those expounded in its reply and maintains its claims.

CONSIDERATIONS

1. The complainant's career with the UPU is described in Judgments 1929 and 2251, to which reference should be made.

This dispute is related to the introduction by the UPU of an electronic system for recording the attendance of UPU staff members. The complaint bears on the latest version of the internal rule governing the system, namely Administrative Circular No. 22/Rev. II of 24 April 2002. According to this version of the circular, which was issued by the Director-General, all staff members of the Union are obliged to clock in except directors (of whom there are eight).

The complainant, who at the material time held a post at grade P.5, though without a director's responsibilities, considers that the new rule violated the principle of equal treatment.

2. His internal appeal having failed, the complainant now brings his case before the Tribunal, which is asked implicitly to quash the impugned decision, to set aside the "relevant provisions" of the disputed administrative circular, and to award him 20,000 Swiss francs in compensation for injury, a further 20,000 francs in "deterrent damages" on the grounds that adopting the circular was allegedly a tactical manoeuvre on the part of the UPU, and 5,000 francs in costs.

He complains of unequal treatment and "constant violations of the terms of employment".

The Union calls for the complaint to be dismissed as irreceivable and subsidiarily on the grounds that it is unfounded.

3. The claim for compensation based on alleged fraudulent manoeuvres of the UPU in adopting the disputed administrative circular has not been raised in an internal appeal. Since internal remedies were not exhausted, this claim is irreceivable.

The complainant has also submitted various claims to rulings in law. These are admissible in support of claims for annulment and for the grant of related benefits, but are otherwise irreceivable, since there is no cause of action (see Judgment 2251, under 6).

4. The Union considers the complaint irreceivable on two further counts.

(a) It argues firstly that as a "decision" Administrative Circular No. 22/Rev. II is not open to challenge insofar as it merely confirms an earlier decision. It cannot therefore properly be regarded as a decision, that is, one affecting the staff member's status in law.

In the event, however, the Director-General did not merely confirm an earlier decision; had that been the case, the impugned decision would have had no effect on the legal status of the staff members concerned (see for example Judgments 759 and 1983). On the contrary, as expressly stated in the new administrative circular, the latter cancelled and replaced the previous version and altered its content. It therefore constitutes a new rule governing the electronic attendance recording system, which completely replaces the existing rule and, since all the conditions are met, is challengeable as such. The fact that some provisions of the previous circular are maintained in the new version is irrelevant.

This plea therefore fails.

(b) Referring to case law whereby in principle any general decision which is to be applied through individual decisions cannot be impugned directly before the Tribunal but may only be challenged in a complaint brought against an individual decision, the Union also points out that the disputed administrative circular could have no direct legal effects on staff and could be challenged only when applied through an individual decision. Thus, the complainant's objection to the administrative circular itself must be deemed irreceivable. The UPU notes moreover that this case is the second one filed on the same subject by the complainant, who "in the meantime has not taken the opportunity to request an individual decision".

A distinction needs to be drawn here between instructions whose purpose is to tell the Administration how to apply the law, which have no direct bearing on the legal status of staff members, and administrative decisions which

impose obligations on staff themselves, particularly decisions affecting an indeterminate number of staff.

In the case in hand, the disputed administrative circular applies directly to all the staff members concerned, by obliging some to clock in and out when entering and leaving their work place. No individual decisions in application of the circular are required. According to the Tribunal's case law, a measure which is regulatory in character and which applies generally to a category of staff whom it may adversely affect may be challenged directly, without any need to await an individual decision (see Judgment 2244, under 8, and Judgments 1451 and 1618 referred to therein), if the measure is directly applicable (see Judgments 1786, under 5, and 1852, under 3).

This plea therefore also fails.

5. The complainant alleges that having to clock in impairs his dignity and breaches the principle of equal treatment, since directors are exempt.

The principle of equal treatment requires that cases which are the same or similar be governed by the same rules and that dissimilar cases be governed by rules that take account of their dissimilarity (see Judgments 347, under 4; 754, under 6; 1864, under 5; 1990, under 7; 2194, under 6(a); 2252, under 6(a); and 2262, under 6(b)).

(a) An official is entitled to due consideration for his dignity and an organisation must avoid needlessly impairing that dignity (see, for example, Judgments 1724, under 12, and 2116, under 5).

It has become commonplace, however, especially since the introduction of flexible working hours, for the arrival and departure times of employees in many enterprises, whether in the public or in the private sector, to be systematically and automatically checked. This obligation, which is partly intended to clarify relations between the social partners, should in no way be considered as dishonourable for the employees or officials concerned.

(b) The complainant fails to see any crucial difference between the status of a director and that of any other official.

The Union, on the other hand, explains that the status of directors differs in fact and in law from that of other officials. Whereas the latter are entitled to compensation for overtime, directors, as senior officials bearing heavy responsibilities, may be expected to work more than the normal weekly hours without compensation. This different status justifies the fact that they should be subject to different rules as regards clocking in and out of the office.

This explanation carries weight. Different treatment in relation to the clocking-in obligation is also found in other work places, no doubt for similar reasons. The Tribunal has already had occasion to note the existence of different constraints in terms of hours of work between senior and other officials (see Judgment 1460, under 11), which would also justify different rules for electronic attendance recording systems.

The complainant's criticism of the UPU's management, based on his opinion that the clocking-in system could have been avoided altogether or applied differently, is of no avail. Such matters concern the management of the Union and therefore fall within the power of the Director-General rather than the Tribunal.

The complainant is also wrong in suggesting that the Union was proposing not to apply the administrative circular strictly, but rather to make exceptions, since only the circular has been challenged and submitted to the Tribunal's consideration.

(c) According to the complainant, the fact that visitors are able to see that he has to clock in while directors do not constitutes further evidence of inadmissibly unequal treatment and an unacceptable impairment of his dignity. According to the Union, the complainant was never placed in such a situation.

The complainant attaches too much importance to this possibility. Nowadays any visitors may be expected to understand the need for such administrative checks. The obligation to clock in and out cannot therefore be considered dishonourable for the staff members concerned.

The complainant's plea therefore appears unfounded.

6. Since the main claim for annulment is dismissed, so too is the claim for compensation.

7. The UPU, which succeeds in the main, asks for its costs to be borne by the complainant.

In this case, the Tribunal considers the request need not be granted.

DECISION

For the above reasons,

The complaint is dismissed, as is the UPU's claim that the complainant be ordered to pay costs.

In witness of this judgment, adopted on 14 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.