

SEVENTY-THIRD SESSION

***In re* DER HOVSEPIAN**

(Interlocutory order)

Judgment 1177

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tony Der Hovsépian against the Universal Postal Union (UPU) on 19 December 1991, the Union's reply of 4 February 1992, the complainant's rejoinder of 27 February and the Union's surrejoinder of 25 March 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 4.1, 4.3, 4.8.2, 4.8.3 and 4.8.4b 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. The complainant, a Lebanese citizen, joined the staff of the International Bureau of the Universal Postal Union in 1965 at grade G.6. He was promoted several times, and last in 1985 to P.4. Since 1987 he has been deputy head of Section C, which is in charge of services and transport.

In February 1991 the post of head of Section C, which is graded P.5, was put up for competition. The deadline for applications was 14 May, later 5 July 1991. There were 22 candidates who applied in time, 7 internal and 15 from outside the Union. The Appointment and Promotion Committee met on 19 July and in its report of the same day made the complainant its first choice. By a service minute of 24 July the Director-General announced the appointment of an outside applicant, Mr. Michel Fohouo, a citizen of Cameroon and one of two candidates that the Committee had put third equal. The announcement followed an interview on 22 July at which the Director-General had told the complainant of his decision and the reasons for it.

By a letter of 19 August the complainant asked the Director-General to review his decision. In his reply of 13 September the Director-General upheld it. On 4 October the complainant went to the Joint Appeals Committee. In its report of 26 November the Committee held that the decision not to appoint the complainant to the post was flawed and recommended allowing his appeal and either making another appointment or, if that proved impossible, granting him compensation.

But by a letter of 28 November 1991, the decision now impugned, the Director-General confirmed his rejection of the complainant's candidature, albeit on different grounds, namely the need for geographical distribution, the complainant's professional qualifications and his conduct.

B. The complainant submits that the grounds stated by the Director-General are unfounded.

The argument about geographical distribution overlooks essential facts. Like the successful candidate, the complainant is from a country that belongs to a region just as under-represented in the senior category of Union staff. Besides, geographical distribution did not prevent the promotion of someone from an over-represented region to another post as head of section. So it is arbitrary to try to get round the Appointment and Promotion Committee's recommendation by relying on the reference in Regulation 4.8.4b to geographical distribution. In the complainant's view a visit to the Union from a member of the Government of Cameroon in May 1991 had something to do with the Director-General's choice.

The Director-General's doubts about the complainant's professional ability, which he bases on a report of May

1990, are unwarranted. The Appointment and Promotion Committee was aware of the report when it recommended him, and the Director-General himself made him acting head of the section for eight months. His work in that period earned praise from people of note.

The Director-General gives an implausible picture of him as an inefficient official who was promoted only in the hope that he would perform better at a higher grade or step. No executive head grants promotion for such reasons, and the Appointment and Promotion Committee, which studied his file, would never have made him its first choice had he been as useless as all that.

The Director-General also said that he had behaved improperly in incidents some six years earlier over a girl who had worked in his household as an au pair and another staff member of the Union. He is blameless: the couple reported him to the police but the court cleared him of all charges. It is odd that the Director-General should bring the matter up so long afterwards, when he had already paid the price of a harsh sanction at considerable financial loss.

The final reason the Director-General gave for his decision rests on a mistake of law. Referring to the mention of "fresh talent" in Regulation 4.3, the Director-General suggests that external candidates should be given priority over serving officials. But Regulations 4.8.2 and 4.8.3 limit the Director-General's freedom to seek candidatures from member States as long as there is a serving official able to fill the vacancy.

The complainant asks the Tribunal to set aside the decision of 24 July 1991 and to order the Union either to appoint him head of Section C or grant him the corresponding grade, salary and allowances as from 1 July 1991. He seeks awards of 25,000 Swiss francs in moral damages and 10,000 francs in costs.

C. In its reply the Union sets out the principles governing the recruitment, appointment and promotion of its officials. Paragraph 2 of Regulation 4.8 empowers the Director-General to fill any vacant post other than one at grade D.2 through transfer or promotion from within the Bureau. Paragraph 3 says that postal administrations shall be told of vacancies that are not filled from within.

The Appointment and Promotion Committee looks at applications for posts and submits to the Director-General a short-list in order of preference. But the Committee's choice is not binding on the Director-General, and in this case he had good reason not to appoint the complainant even though the Committee had put him first.

Some of his remarks are irrelevant, such as what he says about the visit by a member of the Government of Cameroon.

Only the outside applicants were made subject to the rules on geographical distribution, and the complainant was unsuccessful on grounds of personal qualities, professional qualifications and staff management policy.

The complainant has received promotions and salary increments: there is clearly no prejudice against him. In fact he has been treated leniently in the hope that he would reform. For example, he has been allowed to take home leave in Greece instead of the Lebanon. The head of section is a senior officer, and the post cannot go to someone who is plainly unqualified.

As the complainant himself acknowledges, he meddled in the private life of his former au pair girl. Even though his conduct did not amount to a criminal offence it was not what an international organisation is entitled to expect of a candidate for a senior post. That he let himself be drawn into a "brawl" on Union premises barely six months after promotion to P.4 confirms that his conduct left much to be desired. Besides, he never challenged the sanction imposed on him at the time.

D. In his rejoinder the complainant enlarges on his own pleas and answers the Union's.

He submits that the Director-General is putting forward a new legal concept in saying that he picked an outside candidate for reasons of "management policy". The concept is at odds with the criteria in Regulation 4.1 for promotion or appointment to vacant posts.

To his mind the Union's reply suffers from many omissions, ignoring several facts - which he lists - on the pretext that they are immaterial.

He contends that ministers do not commonly visit the Union and the coincidence between the Cameroonian minister's visit and the choice of the Cameroonian candidate is striking.

He maintains, lastly, that the Appointment and Promotion Committee ranked him higher than any of the outside candidates and he asks for disclosure of the table showing its ratings.

E. In its surrejoinder the Union develops its arguments and addresses several issues of fact and of law raised in the complainant's rejoinder. It observes in particular that the Director-General did not disregard the recommendations by the Appointment and Promotion Committee since he chose one of the candidates on its short-list. It refuses to disclose the item the complainant wants it to disclose, pointing out that the Committee's discussions are privileged.

CONSIDERATIONS:

1. By a decision of 24 July 1991 the Director-General of the International Bureau of the Universal Postal Union appointed Mr. Michel Fohouo, a citizen of Cameroon, to a post, graded P.5, as head of Section C, which is in charge of services and transport. The complainant, who is a Lebanese citizen and a P.4 official at the Bureau and who applied for the post, is asking the Tribunal to quash that decision and a decision of 28 November 1991 dismissing his internal appeal.

2. The holder of the post having left, a notice of vacancy was issued to the staff of the Union and to postal departments in member States putting the post up for competition, stating the qualifications required and setting the deadline for applications at 14 May 1991. By that date there were 20 candidates, 13 of them on the staff of postal departments in member States and 7 on the Union's own staff. Believing that there were not enough candidates, the Director-General issued another notice on 29 May 1991 setting a new deadline at 5 July. By that date there were another two candidates from national postal departments.

3. The Appointment and Promotion Committee was then made up of the Deputy Director-General of the Union, the three Assistant Directors-General, the Head of Personnel and two grade D.1 officials, one named by the Director-General and the other by the Staff Association. The Committee went over the applications on 19 July 1991. There was no examination but merely comparison of qualifications on paper.

In its report to the Director-General the Committee picked four candidates. The first in order of preference was the complainant, who as deputy head of Section C was performing the functions of the post to be filled. Third equal came Mr. Fohouo, who was at the time Deputy Director of Accounting and Finance in the Ministry of Postal Services and Telecommunications in Cameroon.

At an interview on 22 July 1991 the Director-General explained to the complainant that he had picked Mr. Fohouo mainly on the grounds that there were not enough Cameroonians on the staff, though he also said that the complainant was still young enough to reach P.5.

Feeling that, for one thing, the Lebanon was no better represented on the staff than Cameroon, the complainant made a written request on 19 August for review of the decision. The Director-General's reply of 13 September 1991 shifted ground: it did not refer to the lack of Cameroon citizens on the staff or to the complainant's career prospects but said that his behaviour had for years been unsatisfactory. The letter was quite different in tone from the interview. The complainant thereupon filed an internal appeal.

The Joint Appeals Committee reported on 26 November 1991. The only passage of its report that has been submitted to the Tribunal reads as follows:

"30. In view of the foregoing the Joint Appeals Committee -

(a) holds that the decision not to appoint Mr. Der Hovsépian to the post of head of Section C is tainted with errors of form, procedure and appraisal;

(b) accordingly recommends:

(1) allowing Mr. Der Hovsépian's appeal;

(2) making a new appointment;

(3) if the choice already made may no longer be reversed, granting the appellant compensation in the form of personal promotion or of a suitable award of damages;"

The rest of the Committee's recommendation is not material.

On 28 November the Director-General wrote the complainant a long letter rejecting the Committee's recommendations. He stated several grievances against him, some of which harked back to 1967. He concluded that the complainant did not meet the conditions in Regulation 4.1 of the Staff Regulations. He pointed out that Regulation 4.3 provided that there should be no restriction on resort to new talent from outside the Union. He said, though he did not explain, that the Committee had misunderstood some features of the case.

4. When the Director-General's decision is not based on the results of an examination marked by an independent body, he has a wide degree of discretion in making an appointment and granting promotion. Though he is not bound by any recommendation from an advisory body, his authority does not make referral to such a body pointless. A selection body relieves him of the burden of carrying out an assessment himself. It ensures that all applications for appointment or promotion, whatever their source, shall be examined impartially and on the merits. And its report enables the Tribunal to appraise the background to the impugned decision and determine whether it shows any flaw.

5. It is the Union's fault that the Tribunal cannot exercise its power of review in this case. Pleading privilege for the Appointment and Promotion Committee's deliberations, the Union has refused to disclose a table showing the Committee's ratings of the complainant.

An item that forms part of the decision may not be withheld from the Tribunal's scrutiny. That holds good for the Joint Appeals Committee's report as well, of which only the recommendations quoted in 3 above have been disclosed. There shall therefore be further submissions to complete the case records, the Union being required to supply the reports of the Appointment and Promotion Committee and of the Joint Appeals Committee.

The Union shall, within 15 days of receiving the text of this judgment, disclose those items of evidence together with any observations it cares to make.

The complainant shall in turn have 30 days in which to comment.

The Union may submit a last brief in 15 days.

6. 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 5 above.

2. The Union shall pay the complainant 1,000 Swiss francs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

