

**SEVENTY-SEVENTH SESSION**

***In re* SUPRAPTO**

**Judgment 1355**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Martosuharjo Suprpto against the Universal Postal Union (UPU) on 5 August 1993 and corrected on 8 September, the UPU's reply of 15 October, the complainant's rejoinder of 24 November and the Union's surrejoinder of 22 December 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 1.2, 4.1, 4.3, 4.7, 4.8 and 4.9 and Rules 111.3.1 and 113.3.2 of the Staff Regulations and Rules of the International Bureau of the UPU;

Having examined the written submissions and decided not to order hearings, 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 citizen of Indonesia who was born in 1940, joined the International Bureau of the UPU on 1 January 1983 as a first secretary at grade P.3. He was assigned to Section L (Finance).

On 9 May 1989 he applied for a vacancy as assistant head of Section H (Technical Cooperation Administration) at grade P.4 which the Union had announced in office notice 47/189 of 1 May 1989. The holder of a post as assistant head of Section E (Logistics), graded P.3/P.4, was transferred to the post in Section H and the applications were therefore considered for the post vacated in Section E.

According to the minutes of a meeting held on 9 October 1989 the Appointment and Promotion Committee (APC) put the complainant third on the short-list it recommended to the Director-General, who chose the second candidate, Mrs. Júdice Glória.

Mrs. Glória having resigned, the post was again put up for internal competition and the complainant again applied on 4 April 1991. This time the APC put him at the top of its short-list, but the Director-General preferred Mr. Arne Johnsen, who was second, and transferred him to the post on 1 September 1991.

Mr. Johnsen was transferred to another department as from 1 November 1992 and the post was advertised as vacant yet again. Although the APC again ranked the complainant first the Director-General appointed the candidate in second place, Mrs. Meretta de Saez.

By a letter of 30 October 1992 the Director-General informed the complainant that his application for the post of assistant head of Section E had been unsuccessful.

Having written on 2 November to the Director-General seeking an explanation of the reasons for the decision, the complainant asked him in a letter of 26 November to reconsider it in accordance with Rule 111.3.1.

By a letter of 15 December the Deputy Director-General confirmed the Director-General's decision.

By a letter of 21 December the complainant lodged an appeal with the Joint Appeals Committee under Rule 113.3.2.

In its report of 3 May 1993 the Committee recommended rejecting his claims but suggested that before rejecting the first candidate on a list the Director-General should consult the chairman of the Appointment and Promotion Committee.

By a letter of 11 May 1993 - the impugned decision - the Director-General informed the complainant of the final rejection of his claims.

B. The complainant has three pleas.

Citing Judgment 1235 (in re Der Hovsépian) he submits first that the Director-General should have stated the reasons for his decision not to appoint him "so that the Tribunal may properly exercise its power of review". By failing to do so the Director-General was in breach of a general principle of law.

Secondly, the impugned decision was the result of an error of law. As was held in Judgment 670 (in re Babinelli No. 2), when the Director-General disregards the recommendation of an appointment committee his decision must be quashed if it shows an error of law or prejudice. Although the Director-General may at discretion base his decision on criteria, such as geographical distribution or the advancement of women, which the APC does not apply he may not just ignore its recommendations; else it would serve no purpose at all.

The complainant's third plea is that the decision of 11 May 1993 shows prejudice against him. The Director-General has thrice preferred someone less experienced or lower in the short-list.

Lastly, he "regrets" the Union's submitting to the Joint Appeals Committee three reports which he had not seen on APC proceedings.

He asks the Tribunal to quash the decision of 11 May 1993 or, failing that, grant him personal promotion; to order the Union to pay him an amount equal to the difference between his salary and the salary of the P.4 post as assistant head of Section E as from 1 November 1992 and until it promotes him to grade P.4; and to award him moral damages and costs.

C. In its reply the Union rejects the complainant's pleas as groundless.

It explains that on the strength of secret ratings the APC draws up a short-list from which in line with Regulation 4.1 the Director-General chooses the candidate who shows "the highest standards of efficiency, competence and integrity". In 1991 he exercised his discretion in choosing Mr. Johnsen as assistant head of Section E. Though less experienced than the complainant he was fully qualified for the job. Besides, Regulation 4.3 says that seniority is a determining factor only when other qualifications are equal. Mrs. de Saez, who won in 1992, is at least as well qualified as the complainant and has been in the same grade for longer. The Director-General chose her from the APC's short-list and took account of other criteria such as the advancement of women. So he did not misuse his discretion.

The Union submits that the case ruled on in Judgment 670 is not wholly relevant: in the organisation that was defending that case the Appointment and Promotion Committee recommended only one candidate to the Director-General; so it was really the committee that made the final choice.

Lastly, the UPU points out that the reports on the APC's proceedings were appended to the Director-General's submissions to the Joint Appeals Committee, of which the complainant got a copy. If they were missing he should have asked for them at once, and he may not now allege a procedural flaw on the grounds that he did not get them.

D. In his rejoinder the complainant contends that Mr. Johnsen's "short stint" as assistant head of Section E was against the UPU's interests and merely blocked his own advancement.

In his submission Regulation 4.9 empowers the APC to act independently and it has all the information it needs to identify the suitable applicants. If the Director-General was quite free to choose between the three on the short-list why should it bother to rank them?

Any criterion the Director-General may apply over and above the Committee's must be admissible in law. But the one he relies on - the advancement of women - is not, since Regulation 4.7 says that "selection of staff members shall be made without distinction as to ... sex ...".

The complainant maintains that he was not given the APC's reports but admits that the procedural flaw is not fatal.

E. In its surrejoinder the Union points out that according to Regulation 1.2 "staff members shall be subject to the authority of the Director-General, who may assign them, in accordance with their qualifications, to any of the activities or offices of the Bureau".

The Joint Appeals Committee's suggestion for consulting the APC has no basis in law and there is no such consultation in any other international organisation. Ever since it was established in 1973, the APC's function has been to advise the Director-General, not to take decisions in his stead. The main purpose of its voting system is to determine the three best candidates. The order of preference is the outcome of the voting but is not binding on the Director-General.

#### CONSIDERATIONS:

1. The complainant joined the Union in 1983 as a first secretary at grade P.3 in Section L. He has thrice applied for a post as assistant head of Section E. In October 1989 the Appointment and Promotion Committee put him third on its short-list but the candidate ranked second was appointed. That official having left, he came top of the Committee's list in May 1991, but again the second candidate won. The new appointee being transferred to another unit, the complainant applied a third time and again came first in the Committee's list; but the Director-General yet again preferred the next candidate on the short-list, who was a woman. Having failed to get the Director-General to change his mind, the complainant filed an internal appeal against the decision of 30 October 1992 not to appoint him assistant head of Section E. By a decision of 11 May 1993 the Director-General followed the Joint Appeals Committee's recommendation and upheld the earlier decision. That is the decision now impugned.

2. The receivability of the complaint is not at issue.

3. The complainant's pleas are in substance as follows. In his submission there was not due process before the Joint Appeals Committee. The Director-General failed to substantiate the impugned decision, and although he may have stated some of the reasons for it in the internal appeal proceedings they are sketchy and contrary to general principles of law. In any event the Director-General erred in law in taking the view that he might disregard the Appointment and Promotion Committee's "decisions". And the Director-General's repeated refusal to appoint the complainant shows personal prejudice that is fatal to the impugned decision.

4. What then are the material principles to be derived from the Staff Regulations of the UPU and the case law? Under Regulation 4.8 the Director-General may fill any vacancy by promotion except a vacancy at grade D.2. Regulation 4.3 reads:

"Without prejudice to the recruitment of fresh talent at all grades, full account shall be taken in making appointments to vacant posts of the qualifications and experience which persons already in the service of the Union may possess. Seniority shall be a determining factor only when other qualifications are equal".

And Regulation 4.9 provides for an Appointment and Promotion Committee to advise the Director-General on all appointments and promotions to vacancies. According to the case law - especially Judgment 1235 (in re Der Hovsépian) on a complaint from another UPU official - the Director-General is not bound by the Appointment and Promotion Committee's recommendations and in particular need not appoint the candidate the Committee has put first. In the exercise of discretion he must ensure that his choice is not tainted with any mistake of law or fact and, to allow the Tribunal to exercise its power of review, he must state the reasons for his decision.

5. The complainant's first plea is breach of due process before the Joint Appeals Committee, and hence his argument is that the records of the Appointment and Promotion Committee's proceedings on 9 October 1989, 21 May 1991 and 2 October 1992 were made available to the Appeals Committee but not to him.

6. The plea fails. The alleged formal flaw is one that he himself describes in his rejoinder as "unimportant". The records were appended to the Director-General's submissions to the Appeals Committee and those submissions actually mentioned them. The complainant was sent a copy of the Director-General's submissions and if the reports were not in fact appended he had only to ask for them. Besides, the UPU has produced them in the present proceedings. So there has been no breach of due process.

7. His second plea, that the decision was unexplained, has two aspects to it: the UPU failed to tell him the reasons for not promoting him, and the reasons the Director-General did later offer are vague and at variance with the Regulations.

8. On the first point the Director-General's letter of 30 October 1992 telling him he had not been successful made no mention of any reasons, and neither did the letters of 10 and 15 December rejecting his request for review. But

there is no rule or principle of law that requires the Director-General to state in so many words just why he has turned someone down for promotion or appointment. What matters is that, if the official asks, the reasons must be revealed. Otherwise the Tribunal may not exercise its power of review and determine whether the reasons are lawful and the decision sound.

9. Both before the Joint Appeals Committee and the Tribunal the UPU has explained the reasons why the Director-General decided against appointing the first candidate on the Appointment and Promotion Committee's list. They are not very clearly stated: the Union says that the successful candidate "was as well qualified as the complainant but had greater seniority within their grade" and that the Director-General took account of "such general considerations as his duty to enhance the contribution women make at the top levels of international service". As the complainant points out, Regulation 4.7 bars discrimination on grounds of sex in staff matters. So any promotion wholly or even mainly based on considerations of sex would unquestionably be unlawful. But the evidence is that the decisive factor in choosing between the first two candidates on the Appointment and Promotion Committee's list was seniority, their professional qualifications being much the same. The successful candidate had served nearly six years more than the complainant in the Union and over one year more at grade P.3. He does not seriously challenge her merit and, their qualifications being comparable, it was lawful for the Union to apply the test of seniority. His second plea fails.

10. So does his third one, that the Director-General erred in law by assuming that he was empowered to disregard the Appointment and Promotion Committee's "decisions". What the Committee does is advise, not decide, and the Director-General simply exercised his discretion in choosing between the candidates on its short-list. Although, as has been said, he must exercise such discretion lawfully he is not bound by the Committee's ranking of candidates.

11. The complainant's last argument is that rejecting him three times for the post he wants suggests that he is the victim of personal prejudice. Again the plea cannot succeed. He made no challenge at the time to the appointments made in 1989 and 1991, and they are beyond challenge now. Understandably disappointed though he may be at twice losing the post to a candidate ranked second to himself, there is no evidence in the file of any personal prejudice to warrant a finding of misuse of authority.

12. The conclusion is that the complainant's claims must be disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas  
P. Pescatore  
Michel Gentot  
A.B. Gardner