

THIRTIETH ORDINARY SESSION

In re JOSHI

Judgment No. 208

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the Universal Postal Union (UPU) drawn up by Mr. Sharad Anant Joshi on 8 February 1972, the UPU's reply of 10 May 1972, the complainant's rejoinder of 19 June 1972 and the UPU's surrejoinder of 8 September 1972, the complainant's subsequent memorandum of 3 November 1972 having been disregarded as immaterial;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 38ter 2 of the Regulations of the International Bureau of the UPU, and Rule 13 of the Internal Rules on post grading in the International Bureau;

Having examined the documents in the dossier, oral proceedings having been neither requested by the complainant nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Shortly before his appointment to the staff of the International Bureau of the UPU Mr. Joshi received from the Bureau a letter dated 29 February 1968 informing him that being only 33 he was too young to be appointed as Second Secretary. The letter stated that "under the recently adopted rules on the recruitment, appointment and promotion of Bureau staff members candidates for a post as Second Secretary should be at least 35 years old and candidates for a post as First Secretary 40." The letter also stated that the average age of Second Secretaries then employed by the UPU was 44. In his reply of 7 March 1968 the complainant stated that in view of those explanations he accepted an appointment as Third Secretary. On 27 June 1969 he wrote accepting confirmation of his appointment to a permanent post and stating that he did so also in view of the terms of the letter of 29 February 1968. He was promoted to Second Secretary on 1 June 1970.

B. In June 1971, having learned that an official aged 36 had just been appointed as Assistant Counsellor, the grade immediately above that of First Secretary, Mr. Joshi wrote to the Director-General saying that he accordingly assumed that the International Bureau had ceased to apply the criterion of age to recruitment and claiming regrading as Assistant Counsellor because of his qualifications and the experience he had gained since his appointment. In his reply of 9 August 1971 the Chief of Personnel explained that the minimum age of recruitment had been reduced because the retirement age would in future be 60 instead of 65, but that that change in the conditions of appointment conferred no rights on serving staff members. On 1 October 1971 the complainant stated that he could not accept that explanation and therefore repeated his request for regrading. On 30 November 1971 he was told that the decision of 9 August 1971 was confirmed. The International Bureau also informed him that, as he had requested in accordance with Regulation 38ter 2, he need not appeal to a joint committee under the internal procedure.

C. In his complaint before the Tribunal Mr. Joshi maintains that by refusing to grant serving staff members the same benefits through regrading as it has granted to new recruits - even though the benefits were granted because of the lowering of the retirement age - the UPU has established two parallel grading systems. Such a situation defeats any attempt to end discrimination in the international civil service and introduce a single grading system for all organisations. In deciding thus, the Director-General exceeded his powers under Regulation 5 of the International Bureau of the UPU, which does not allow for such parallel systems. The decision is also tainted with procedural irregularity in that it was not officially notified to the staff. Grading is one of the main conditions determining the acceptance of an appointment and if the grading system is subsequently altered serving staff members should be allowed to choose between the old and the new system. Denial of such a choice in the present case is a procedural irregularity. The impugned decision detracts from rights acquired under the contract of appointment inasmuch as the criteria for grading stated in the letter of 29 February 1968 formed an integral part of the conditions of his appointment: (1) those criteria were the only ones notified to him before his appointment; (2)

that letter did not refer to any other provision on post grading; (3) having had misgivings about the age criterion, he accepted the appointment only because the Director-General assured him in the above-mentioned letter that the criterion would be uniformly applied in future; (4) he explicitly stated that his acceptance was based on the terms of the letter, and (5) the International Bureau agreed to that condition since it raised no objection. The complainant accordingly prays that the Tribunal order either that the impugned decision be quashed and that the conditions of new staff members be assimilated to those of serving staff or that his own conditions of appointment should be assimilated to those of new staff through his regrading or promotion to Assistant Counsellor, or payment to him of 400,000 Swiss francs as damages for the prejudice caused to him by the refusal to regrade or promote him.

D. In its reply the UPU states that the information given by the Director-General on the age criterion in his letter of 29 February 1968 did not bind him for the future, especially since that criterion was not later embodied in the Regulations of the International Bureau. That information was merely an interpretation which the Director-General was entitled to make in offering an appointment to the complainant by virtue of the powers conferred on him by Rule 13 of the Internal Rules on post grading. Nor was the offer of appointment unreasonable, especially in view of the complainant's language qualifications at the time and the conditions of appointment offered to similarly qualified officials. The complainant's letter of acceptance dated 7 March 1968 cannot be interpreted as containing any valid reservation. Acceptance of the Staff Regulations and Rules cannot be made subject to reservations. The UPU points out that it is vital for the Director-General to have discretionary authority to recruit staff since considerations of general policy - which vary from time to time, although the purpose is always to promote the UPU's best interests - have to be taken into account. The Director-General was accordingly competent to prescribe different age criteria in 1968 and 1971. The grading standards in the grading rules will be applied objectively and independently of subjective qualifications. Even supposing that the complainant's qualifications surpassed those required for a Third Secretary, that did not mean that he was in any way entitled to personal promotion or to the regrading of his post. According to the case law of the Tribunal, if the incumbent of a post has qualifications superior to those required for that post and even if he has accepted it only in the expectation of its being upgraded, he is not entitled to demand promotion or regrading. A complaint based mainly on an individual assessment of the personal superiority of one staff member over others has no legal merit, and the Tribunal cannot accept it. The post of Assistant Counsellor to which a staff member aged only 36 was appointed in 1971 was that of head of the Director-General's secretariat. The grading of that post in the International Bureau is much lower than that of comparable posts in other organisations. since the complainant has failed to prove that the Director-General acted *ultra vires* or misused his authority, the UPU prays that the complaint be dismissed.

CONSIDERATIONS:

1. As to the competence of the Tribunal:

Regulation 5, paragraph 7(a), of the Regulations of the International Bureau of the Universal Postal Union states that the Director-General shall be empowered to classify posts according to the functions mentioned in Regulation 15, and to determine grading standards. Under Regulation 13 of the Internal Rules concerning post grading the Director-General is empowered to grade staff members in accordance with their age, education, experience and ability. In applying these provisions the Director-General is required to exercise his discretion. It follows that his decisions can be set aside only if they were taken without authority, are irregular in form or tainted by procedural irregularities, or are based on incorrect facts, or on illegality, or if essential facts have not been taken into consideration, or if there has been a misuse of authority, or if conclusions which are clearly false have been drawn from the documents in the dossier.

In rejecting, on 9 August 1971, the complainant's request for regrading and in confirming that decision on 30 November 1971, the Director-General acted in accordance with the provisions cited above, that is to say that he took a decision which lay within his discretion. The question at issue, therefore, is whether that decision is tainted by any of the irregularities which the Tribunal may correct.

2. As to the alleged lack of authority:

The complainant considers that in applying two parallel grading systems, the first adopted in 1968 and the second in 1971, the Director-General acted *ultra vires*. In so far as the Regulations confer certain powers on the Director-General in respect of grading, they do not determine the substance of the measures to be taken. In particular, they do not forbid the successive adoption of different systems. Consequently in applying different standards in 1971 from those which had been applicable in 1968 the Director-General did not exceed his authority. In fact, the

complainant is confusing two different questions: authority and the use made of authority. In order to invalidate the plea of lack of authority, it is enough to confirm that the Director-General did not overstep the limits of his powers, and it is not necessary to consider how he exercised those powers.

3. As to the alleged procedural irregularity:

The complainant charges the Director-General with having introduced in 1971 post grading standards which he had not previously published in a document communicated to the whole staff. The complainant may not, however, properly rely upon the failure to publish those standards, which apply to staff members recruited after his own appointment and which therefore do not directly concern him.

4. As to the alleged improprieties of procedure:

The improprieties alleged by the complainant relate to posts put up for competition subsequently to his appointment, i.e. to procedures to which he was not a party. An official is not, however, entitled to complain of procedures in which he is not involved. It follows that in the present case the Tribunal is not called upon to consider the allegation of improprieties of procedure.

5. As to the alleged breach of the terms of appointment:

The complainant claims to have accepted appointment to the staff of the UPU in the light of the Director-General's assurances concerning uniform application of the age criteria. Consequently he alleges that the Director-General's refusal to regrade him in the light of the new recruitment standards amounts to a breach of contract. This argument is contradicted by the correspondence exchanged between the parties. In his letter of 29 February 1968 the Director-General did indeed refer to the grading standards then in force and express the intention of applying them strictly, but he did not exclude the possibility of amending them or promise to adjust the complainant's position if that were done. As regards the complainant himself, he accepted appointment, at first provisionally and then finally, on the terms stated by the Director-General, without making any reservations to cover the possibility of the adoption of new grading standards. There can therefore be no question of any breach of contract.

6. As to the principle of equality:

The complainant's main contention is that as a result of the adoption of new classification standards he has been put at a disadvantage in relation to officials appointed later. Not only can the latter officials be appointed at the outset to a higher grade than that to which the complainant was originally appointed; they are entitled to a full retirement pension at the age of 60, or five years earlier than the complainant himself. The complainant is therefore basing his plea on the principle of equality, although he has not expressly said so.

According to this principle, which is applicable in international organisations as a general rule of law even if not embodied in any specific text, persons who find themselves in a similar factual and legal position should be put on the same legal footing. At the time of his appointment the complainant was subject to the old grading standards. His position was therefore different from that of staff members recruited in accordance with the new standards. Thus, since he was not in the same position as those staff members, the complainant did not suffer any discrimination in relation to them.

Moreover, the principle of equality must be applied within the limits imposed by efficient administration. If any amendment of grading standards were to entail a review of the position of staff members already appointed, complications would inevitably arise which might discourage the organisations from making necessary adjustments and thus compromise their efficient operation. In particular, it would be generally difficult and sometimes impossible to put serving officials on the same footing as newly-appointed officials. Further, it would not always be possible for the organisations to meet the additional financial responsibilities consequent on the regrading of all their staff members. It would therefore be unreasonable to require an organisation to review the terms of appointment of all its staff in the light of the principle of equality as a result of changes in standards of recruitment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1973.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet