

**SEVENTY-NINTH SESSION**

***In re* KIGARABA (No. 6)**

**Judgment 1445**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 15 August 1994, the UPU's reply of 18 October, the complainant's rejoinder of 22 December 1994 and the Union's surrejoinder of 6 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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's career at the UPU and facts material to this case are summed up under A in Judgments 1188 of 15 July 1992 and 1310 of 31 January 1994.

As was said in those judgments, the Union accused the complainant of making a false statement on 16 May 1990 to obtain repayment of the cost of school textbooks for his children, who were at the International School in Berne. On two UPU forms, one for his daughter and one for his son, headed "Certificate of school attendance and of costs for education grant" he wrote that the textbooks "were not given free of charge". Correspondence between the Head of Personnel and the headmaster revealed that the school had lent the books to the children. At the Director-General's bidding the complainant sent a letter of explanation on 8 June 1990.

In a minute of 20 June to the head of the complainant's unit, Division I, the Director-General rejected the complainant's claims to repayment and referred the matter to the Disciplinary Committee under Regulation 10.2.4 of the Staff Regulations of the International Bureau of the UPU. By a letter of 28 June the complainant asked the Director-General to reconsider his decision but in a minute of 3 July to the Head of Division I the Director-General upheld it. In its report of 26 July the Disciplinary Committee unanimously recommended giving the complainant a written warning under Regulation 10.2.1a. On 13 November, however, the Director-General told the complainant that his next salary step was postponed for one year, a penalty provided for in Regulation 10.2.1b.

On 21 December the complainant lodged an appeal. In its report of 28 March 1991 to the Director-General the Joint Appeals Committee endorsed the Disciplinary Committee's recommendation of 26 July 1990. He impugned in his first complaint the decision that the Director-General accordingly took on 19 April 1991 to hold up his step advancement.

In Judgment 1188 of 15 July 1992 the Tribunal issued an interlocutory order to the UPU to produce the reports of the Joint Appeals Committee and the Disciplinary Committee. In Judgment 1228 of 10 February 1993 the Tribunal sent the case back, without ruling on the merits, for a new decision by the Union on the grounds that the appeal procedure had been flawed.

The complainant refused to lodge a new appeal as the Director-General suggested. On 3 August he filed his second complaint, an application for the execution of Judgment 1228, on the grounds that the Union was to take a new decision. He also claimed the cost of his children's school textbooks. In Judgment 1310 of 31 January 1994 the Tribunal dismissed the application as premature on the grounds that the case was pending before the Joint Appeals Committee. It dismissed his claim to the cost of the textbooks on the grounds that he had failed to exhaust the internal means of redress.

In its second report, dated 24 May 1994, the Joint Appeals Committee recommended by a majority that the Director-General still take disciplinary action against the complainant but consider making it less severe. By a

letter of 6 June 1994, the decision impugned in this complaint, the Director-General told the complainant that he upheld his decision of 13 November 1990 to hold up his step increment by one year.

B. Citing Judgment 1310, and in particular what the Tribunal said under 9, the complainant submits that it did not at the time have before it all the required evidence to entertain his claim to the cost of the textbooks. It is plain from his internal appeal of 21 December 1990 that he did make the claim. The reason why he awaited the outcome of the disciplinary proceedings before going to the Joint Appeals Committee was that his claim to lump-sum repayment and the matter of the disciplinary sanction had to be taken together.

He presses some of the pleas he put forward in support of his first complaint. He points out again that the books were not given but lent by the International School at Berne and he spent money to replace several that were damaged or lost and to buy others. The decision of 6 June 1994 shows prejudice: there is no accounting otherwise for the Director-General's determination to punish him for claiming a sum so much smaller than the amount of the education grant he was entitled to.

He pleads breach of equal treatment. Whereas the Union settled amicably claims by all other staff that were inconsistent with the rules, his was the only case to prompt correspondence with the school and then disciplinary proceedings. Though the Union was right to be less easy-going in handling the matter it was not right to discriminate against anyone in changing its approach.

The Director-General overlooked relevant facts. In his minute of 20 June 1990 he discounted the arguments in the complainant's letter of 8 June 1990 explaining his claim. The Director-General made a mistake of fact in failing to distinguish between "giving" and "lending" school books. That is why he wrongly described as false the complainant's statement that the books "were not given free of charge". And the Director-General's letter of 6 June 1994 says nothing of the "mitigating circumstances" found by the Disciplinary Committee and the Joint Appeals Committee.

The complainant wants the Tribunal to review what it said in Judgment 1310 under 9. He asks it (1) to quash the Director-General's decision of 6 June 1994, (2) to order the Union to pay him the salary and allowances that would have been due to him had he got his step increment on 1 December 1990, plus interest at the rate of 10 per cent a year, (3) to order the Union to pay him 450 United States dollars, plus interest at the rate of 10 per cent a year, as repayment of the cost of the textbooks and (4) to award him moral damages and costs.

C. In its reply the Union contends that the complainant's application for review of what the Tribunal said in Judgment 1310 under 9 is irreceivable. He offers no valid reason for such review. He admits that he was late in going to the Joint Appeals Committee and his explanation is unconvincing. In any event he is not entitled to the cost of the books. It is covered by school fees and his children got the books free of charge anyway. He has consistently refused to produce evidence to show that he bought books save to replace lost ones.

Under Staff Regulation 10.2 there is only one form of disciplinary action that is lighter than postponing a step increase. That penalty is proportionate to the complainant's offence. What he did was the more serious because it was he who was processing officials' claims to school expenses. He knew that if he said on the two certificates of school attendance that textbooks were not supplied free of charge he could get the lump-sum repayment without offering any evidence in support.

He was not discriminated against. He may not plead an "easy-going" policy on education expenses. Even if there had been such a policy it would have been of his own making. Besides, the Union is not aware that any other officials have committed improprieties like those he is guilty of.

D. In his rejoinder the complainant submits that the internal means of redress need not have been exhausted for an application for review to be receivable.

He was not to blame for the policy on education expenses: his job was to apply it, not to think it out. The Disciplinary Committee and the Joint Appeals Committee acknowledged that it was "easy-going" and thought that a "mitigating circumstance".

He has not kept the receipts for the books he bought. He saw no point in that since he was claiming refund of the lump sum.

E. In its surrejoinder the Union repeats that the International School supplies all school books free of charge and that the complainant had no reason to buy any. Even if he had bought school books - and he offers no evidence of having done so - he would not have been entitled to lump-sum repayment since they are covered by school fees.

It is not true that the policy was "easy-going": the cost of books is met only if the school certifies that they are not supplied free of charge. What the Disciplinary Committee and the Joint Appeals Committee were referring to was the Union's approach to another head of education expenses.

#### CONSIDERATIONS:

1. This complaint is about disciplinary action taken against the complainant for making a false statement. He made the statement in support of his claim to payment of a lump sum to cover the cost of textbooks in accordance with administrative circular No. 14 of 22 October 1987. Facts relevant to the dispute appeared in Judgments 1188 and 1310.

2. Judgment 1228 quashed the Director-General's decision of 19 April 1991 for breach of the complainant's right of defence. Instead of awaiting the outcome of the internal appeal proceedings, which had resumed with a newly formed Joint Appeals Committee, the complainant filed another complaint directly with the Tribunal. But Judgment 1310 dismissed it as premature, ruling under 9 that his claim to the repayment of the cost of the school books was irreceivable because he had failed to exhaust the internal means of redress.

3. The complainant is seeking review of that ruling. According to consistent case law the Tribunal's judgments carry the authority of *res judicata* and may be reviewed only in exceptional cases. As was held in Judgment 1353 (in re Louis No. 4) -

"Several pleas afford inadmissible grounds for review, such as allegations of errors of law or misappraisal of evidence; other pleas may be admissible provided they may have an effect on the Tribunal's decision, examples being failure to take account of some specific fact and a material error, i.e. a mistaken finding of fact that involves no value judgment and is therefore distinguishable from misappraisal of evidence."

The complainant argues that the parties adduced "little evidence" on the issue and that the Tribunal, which "merely touched" on the merits, failed to take account of a specific fact. But it is plain on the evidence - and the complainant has himself conceded - that his claim to the lump-sum benefit, which he lodged with the Joint Appeals Committee on 21 December 1990, over five months after the Director-General's final decision of 3 July 1990, was time-barred, and the explanations he gives for the delay are not convincing. Since he has offered no valid grounds for taking a different view of the matter, his application for review of the earlier ruling must fail.

4. The Appeals Committee submitted on 24 May 1994 a second report recommending that the Director-General should uphold his decision to take disciplinary action but consider imposing a lighter penalty. The Committee held that the complainant's other claims, including repayment of the costs of the textbooks, showed no cause of action. By a decision of 6 June 1994 the Director-General confirmed the postponement of his step increment by one year. That is the decision under challenge.

5. The complainant's pleas come under four heads: breach of equal treatment, neglect of material facts, breach of the rule of proportionality, and prejudice.

6. First, he pleads breach of equal treatment. He relies on a statement by the Disciplinary Committee, which the Joint Appeals Committee cited in its report of 28 March 1991, that the Bureau's practice of refunding school expenses was fairly "easy-going". He says that he was denied the benefit of such practice.

7. Consistent precedent has it that there cannot be breach of equal treatment unless there is different treatment of officials who are in like position in fact and in law. There is no evidence to show just what the practice that the complainant relies on may have been: it does not seem to be a general one. Nor is there any evidence to suggest that those who he says benefited from it were all in the same position in fact and law as he. Indeed the Disciplinary Committee's report shows that his position in fact was peculiar to him since it was he who processed claims to the refund of education expenses. So he may not claim the same treatment as other officials and his plea must fail.

8. Secondly, he contends that the Union overlooked material facts: the Director-General failed to consider the arguments he appended to his claim of 8 June 1990; committed mistakes of fact by overlooking the difference

between "lending" school books and "giving" them out and by wrongly charging him with wilful misconduct; showed bias by overlooking mitigating circumstances; and broke the rule that the punishment must be proportionate to the offence.

9. None of the objections can be sustained. The absence of a reply to the letter of 8 June 1990 is relevant only to the decision of 20 June 1990, not to the one of 6 June 1994 that has prompted this complaint. So the plea fails on the facts.

10. It is mistaken to say that the Director-General failed to distinguish between "lending" and "giving" school books. The Disciplinary Committee made that distinction in its comment that the complainant himself had written on the school certificates of 16 May 1990 that books "were not given free of charge" and that "his statement proved false, since the school said it lent all the prescribed books free of charge to pupils, including Mr. Kigaraba's children". The Joint Appeals Committee rejected the complainant's allegations on that score in 1991 and again in 1994. The Director-General accepted the conclusion of the Disciplinary Committee and that of the Appeals Committee in its second report that the complainant's false statement amounted to misconduct. He thereby correctly construed and approved the grounds in fact and law for the recommendations by the two bodies. So there was no mistake of fact.

11. The complainant's third plea is that the punishment was too harsh. In his submission the Director-General ignored the mitigating circumstances and the slightness of his offence. The Disciplinary Committee had pointed out in his favour that the Union had been rather easy-going about meeting school costs and that this was his first attempt to claim a lump sum. Although in 1991 the Appeals Committee shared that view, in 1994 it was more cautious on the grounds that not it but the Disciplinary Committee was competent to say what sort of disciplinary action was fitting. At all events the choice was obviously at the Director-General's discretion and the Tribunal will not interfere unless his decision shows some fatal flaw such as the one the complainant is alleging, breach of the rule of proportionality. In this case there was only one lighter form of punishment that the Staff Regulations allowed. Moreover, the Director-General thought his offence the more serious for his being the official in charge of processing claims to education expenses. The conclusion is that the penalty was not in the circumstances obviously disproportionate. His plea fails.

12. Lastly, his plea of prejudice fails for want of proof. He admits to having no direct evidence but sees bias as the only way of accounting for his other grievances and for the Director-General's rare determination to punish him for claiming 450 United States dollars. So proving prejudice depends on the success of his other pleas. Since for the reasons given above none of those other pleas is sustainable, this plea too must fail.

13. Since his complaint is devoid of merit he fails in his claim - which is, besides, irreceivable - to payment of the cost of the school books. Since his main claim fails so must the others.

#### DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas  
Michel Gentot  
E. Razafindralambo  
A.B. Gardner

