

## SIXTY-FIFTH SESSION

### ***In re Zayed (No. 3)***

#### **Judgment 922**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Ezzat Fayez Zayed against the Universal Postal Union (UPU) on 6 July 1988, the Union's reply of 15 August, the complainant's rejoinder of 14 September and the Union's letter of 7 October 1988 stating that it did not wish to file a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Regulations 9.1.4, 9.6.1 and .2 of the Staff Regulations of the International Bureau of the Union;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 868, under A. By that judgment, delivered on 10 December 1987, the Tribunal set aside the Director-General's decision of 15 October 1986 to dismiss the complainant on the grounds of unsatisfactory performance and referred the case back to the Union for a new decision. By a letter of 24 February 1988 the Director-General informed the complainant that by a decision of 17 February the spokesman of the Arab Language Group had ruled out the complainant's reinstatement in the Arabic translation service because of the appraisal of his performance, which had been the reason for his dismissal, held good. By a letter of 7 March 1988 the Director-General informed him that he would be paid 34,400 Swiss francs in indemnity, that being the full amount due under Regulations 9.6.1a and 2a of the Staff Regulations. On 14 March the complainant stated his objections to that decision and asked that it be reviewed; at the same time he applied for permission to go straight to the Tribunal. On 11 April he lodged his second complaint, an application for interpretation of Judgment 868. By a letter of 31 May the Director-General informed him that the spokesman of the Arab Language Group had agreed to let him go straight to the Tribunal and stood by the decision notified in the letters of 24 February and 7 March 1988: that was the final reply to his letter of 14 March.

B. The complainant submits that the decision to confirm his dismissal was in breach of the *res judicata* rule. Moreover, being taken for the same reasons as the original decision, it too is tainted with abuse of authority and the other fatal flaws. For example he alleges breach of Regulation 9.1.4, which he says required the Administration to consult the Joint Advisory Committee before ending his appointment. The spokesman of the Arab Language Group has awarded him the termination indemnity provided for in Regulation 9.6 even though 9.6 does not apply to and indeed expressly excludes the case of dismissal on the grounds of unsatisfactory service. The sum paid to him is equivalent to only about three months' actual pay and is to be treated as a mere advance on emoluments he is entitled to anyway. He believes that the decision to dismiss him was prompted by the spokesman's hostility towards him and in support of that contention he puts forward the same pleas as those he advanced in his first complaint: see Judgment 868, under B and D.

He invites the Tribunal to declare null and void the decision notified to him by the letters of 24 February and 7 March 1988, to order the Union to pay him in full the sums he is entitled to up to the age of 60 should his reinstatement not prove possible, and to award him 50,000 Swiss francs in moral and material damages, and costs.

C. In its reply the Union observes that this complaint and the second one have the same purpose and should therefore be joined. In the light of Judgment 868 the spokesman of the Arab Language Group gave serious thought to reinstating the complainant in the Arab translation service but in the end ruled that out because of his lack of qualifications. He has therefore been granted the termination indemnity in accordance with the material provisions of the Staff Regulations, which, as Judgment 868 required, have been applied to him by analogy. The amount of the indemnity is adequate in view of his other income. It invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant expresses the view that the spokesman has utterly disregarded Judgment 868. Although the Joint Appeals Committee and the Tribunal refused to accept that his dismissal was warranted by professional shortcomings, the spokesman is still treating that as a valid reason. He draws attention to facts which in his submission refute the defendant's accusations against him and he enlarges on his pleas. He presses his claims.

## CONSIDERATIONS:

### Joinder

1. In its reply the Union applies for joinder of this and Mr. Zayed's second complaint for the purpose of delivering a single judgment.

The Tribunal disallows the application. Though there are facts common to both cases, which are the sequel to Judgment 868, the second one is an application for interpretation of that judgment whereas this one impugns a decision the complainant believes to be contrary to the judgment. Though connected by common facts, the cases do not have the same purpose in law and are governed by different procedures.

### Receivability

2. The complainant is challenging a letter which the head of Personnel of the International Bureau of the Union wrote him on 31 May 1988 informing him that the spokesman of the Arab Language Group of the Union had confirmed the decision, notified by letters of 24 February and 7 March 1988 from the Director-General, against which the complainant had lodged an internal appeal by letter dated 14 March. In that letter he had also applied for permission to go straight to the Tribunal before the Joint Appeals Committee reported and the spokesman of the Arab Language Group consented. What he is impugning is therefore a final decision and he has exhausted the internal means of redress as required by Article VII(1) of the Statute of the Tribunal. Moreover, he has respected the time limit in Article VII(2).

The complaint is receivable.

### The merits

3. In Judgment 868 the Tribunal set aside the decision notified in the Director-General's letter of 15 October 1986 and referred the case back to the Union for a new decision.

It fell to the spokesman of the Arab Language Group, who employs the complainant, to give effect to that decision since, as the Tribunal observed in the judgment under 1, the Director-General of the Bureau does no more than pass on to the staff member a decision taken by the spokesman.

4. According to the terms of the judgment there were two requirements that the new decision must satisfy: it was to be properly substantiated, and it was to apply by analogy the material provisions of the UPU Staff Regulations.

The spokesman of the Arab Language Group took the new decision on 17 February 1988 and the Director-General of the Union passed it on to the complainant on 24 February.

The decision is not substantiated. The spokesman merely says that he has reviewed the matter of the complainant's fitness for work in the translation branch. In what is apparently his summing-up of the case he observes that Judgment 868 declared that the Tribunal may not replace the Administration's opinion of an employee's qualifications and work with its own and that the appraisal is exclusively a matter for the discretion of the competent authority, in this case the spokesman himself. That being so, he abides by the appraisal on which the original dismissal was founded, and which holds good.

To dispose of the case in that way will not do. The Tribunal set aside the original dismissal and ordered review. Compliance with its ruling calls for more than a bald affirmation that there has been further inquiry. The complainant ought to have been received and given his say, and the decision he is now challenging ought to have set out the findings of the further inquiry. Such response to the Tribunal's ruling is cavalier and unacceptable.

The Union was also required to apply by analogy the material provisions of the Staff Regulations of the

International Bureau. The impugned decision is again silent and leaves the Tribunal in ignorance of its position on that score.

In any event, as to Regulation 9.1.4, which provides for consultation of the Joint Advisory Committee before terminating any appointment, the Tribunal sees no reason why it should not apply by analogy to the complainant's case.

For the foregoing reasons the decision cannot stand.

5. The complainant is seeking an award of damages and the Tribunal will award him at least part of what he claims. Whatever decision the Union may now take, it will not be retroactive. The Union is therefore required to pay the complainant damages equivalent to the sums he would have been paid had he remained on the staff from the date of his dismissal up to the date of this judgment.

6. He shall also be paid 2,000 Swiss francs in costs.

#### DECISION:

For the above reasons,

1. The decision of 17 February 1988 by the spokesman of the Arab Language Group, notified by the Director-General's letter of 24 February, and the decision notified by the letter of 31 May 1988 are set aside.

2. The Union shall pay the complainant damages equivalent to the sums he would have been paid had he remained on the staff from the date of his dismissal up to the date of this judgment.

3. The Union shall pay him 2,000 Swiss francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
H. Gros Espiell  
A.B. Gardner