*Registry's translation, the French text alone being authoritative.*

**SEVENTIETH SESSION**

**Judgment 1070**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. S. C. against the International Telecommunication Union (ITU) on 10 October 1989 and corrected on 17 October, the ITU's reply of 16 January 1990, the complainant's rejoinder of 1 March and the Union's surrejoinder of 4 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 9.1(a)(1), Chapter X and Rule 11.1.1.2 of the ITU Staff Regulations and Staff Rules, and Article 2.7.1 of the Regulations of the ILO/ITU Staff Health Insurance Fund;

Having examined the written evidence;

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

A. The complainant, a Frenchman, joined the staff of the Union in Geneva in 1975 under a short-term appointment and obtained a permanent one in 1978. He held a grade G.5 post. Being recognised as his dependants, his wife and two sons were covered by the staff health insurance scheme.

He and his wife were divorced on 17 April 1986. In March 1987 she went to the Union and what she said there aroused suspicion that the ILO/ITU Staff Health Insurance Fund had repaid him four-fifths of the expenses which she had incurred for hospital treatment at Evian-les-Bains, in France, from 1982 to 1985 and which had been repaid in full under French health insurance schemes.

The Union made an inquiry and obtained his comments. On 29 June 1987 the Secretary-General wrote him a letter observing that he had claimed, and the Fund had paid him, part of the expenses already met in full under the French insurance schemes and that there was a strong presumption that all his claims to the Fund for repayment of medical expenses incurred by dependants had already been met from other sources. The matter was put to the Joint Advisory Committee, which according to Chapter X of the Staff Regulations and Staff Rules the Administration must consult before imposing any disciplinary sanction. He was asked to state his case, as Rule 10.1.3 required.

By a minute of 3 July the Head of the Personnel Department told him to pay back 11,718.55 Swiss francs to the Fund, and the Union began in December 1987 docking that sum from his salary at the rate of 500 francs a month.

After correspondence in which at his request he was sent several items of evidence the Secretary-General wrote to him on 29 February 1988 putting questions on the Committee's behalf. In a letter of 21 March to the Secretary-General the complainant answered the questions, asked the Union to get in touch with the disputes section of the state health insurance fund of Upper Savoy, in Annecy, and pleaded his innocence. He wrote to the secretary of the Fund on 25 April urging him too to write to Annecy. The Deputy Secretary-General passed on further questions from the Committee in a letter of 29 April, and he answered on 9 May. On 19 August the secretary of the Fund wrote to tell him that someone from the Fund would be going to Annecy to look into the matter. In its report of 30 August the Committee found that he had acted fraudulently and in breach of the Fund Regulations*(*In particular of Article 2.7, which reads: "1.Where the insured person or one of his dependants protected by the Fund is covered by another health insurance scheme, whether public or private, or by a public medical care service, the insured person is required - (a) to indicate to the Secretary of the Fund the name of the scheme or service concerned; (b)in connection with every claim for benefit he submits to the Fund, to supply the Secretary with a statement, together with supporting documents, listing the benefits received or to be received in respect of the expenditure in question from the scheme or service above-mentioned.") by claiming and receiving the benefits; it recommended ordering him to pay back the sums wrongly paid and dismissing him under Rule 10.1.1a) for misconduct.

On 31 August the Secretary-General wrote to tell him that he was summarily dismissed.

On 3 October he made a request under Rule 11.1.1.2a) for review of the decision, the Deputy Secretary-General refused it in a letter of 15 November and he filed an appeal under 11.1.1.2b) on 15 December. Having got the ITU's reply of 24 January 1989 to that appeal, he filed penal charges on 27 February 1989 against his former wife with the public prosecutor at Thonon-les-Bains.

In its report of 18 May 1989 the Appeal Board recommended rejecting his appeal and by a letter of 14 July 1989, the decision he impugns, the Secretary-General informed him that he had accepted that recommendation.

B. Recounting the events that led to his dismissal, the complainant contends that he has fallen foul of the vengefulness and treachery of his former wife. The hospital bills she gave him to back up the claims he put to the Fund did not show that the French insurance schemes had paid them in full already. How could he have known that she was having two bills made out for the same treatment, one for the French schemes and the other for transmittal through him to the Fund? He behaved throughout in good faith and cannot be properly taken to task for having trusted his own wife. Would he have had the effrontery to bring in Annecy or the public prosecutor had he been privy to her wiles? The Fund knew that she had other coverage since he told its secretary so in writing as early as 1978, and it is at fault for failing to check the bills he gave it.

There were procedural flaws. There was not due process. The Joint Advisory Committee did not look into the case properly. It was dilatory. Its membership was in breach of the rules. The complainant was not duly shown the full records. Instead of letting him plead as he wished the Committee just put questions to him.

The Union ought to have done more to investigate the charges. It too had a duty to check that the bills had not yet been paid. It never got in touch with Annecy. Its ruthless desire to get rid of him shows abuse of its authority. Why, when the alleged offence is so serious, did it not bring charges against him in the criminal courts? It treated him slightingly. Its decision was arbitrary. The penalty was out of proportion to the offence. The consequences for him are severe.

He claims reinstatement or else an award of damages that takes account of the sums he would have earned had he stayed with the Union up to retirement, of the reduction in his pension entitlements and of his poor prospects of employment. He claims moral damages and costs.

C. In its reply the Union points out that since its own rules provide for punishing misdemeanours by staff it need not bring charges in any criminal jurisdiction. The inference the complainant seeks to draw from its not charging him is mistaken.

It gives its own version of the facts and submits that there is no need for oral proceedings.

It contends that there was no procedural flaw. The charges were in the Secretary-General's letter of 29 June 1987, which set out the facts, cited the evidence, mentioned Rule 10.1.3 and invited a reply. The complainant was given further evidence on 5 August and 8 September so that he could defend himself properly. He was asked not just to answer the Committee's questions but also to make any other observations he wished. There was much correspondence with him, and he stated his case in many conversations with people in the Personnel Department.

There was no defect in the Committee's membership, and he does not even explain what it may have been. The Committee did investigate the case properly. It met five times, substantiated its findings, which were unanimous, put two sets of questions to the complainant and had its secretary write to the hospital at Evian to have evidence checked.

The Union went to much trouble to establish the truth of the charges. It established that the Fund had paid him the amounts for the period from 1982 to 1985. His former wife gave it copies of the original bills that were quite different from those he had put to the Fund. It got the hospital to confirm in writing, in particular in a letter of 27 May 1988, that the French schemes had met the costs in full and that his wife had had nothing to pay. His guilt being beyond doubt, there was no need whatever, and the Union had no duty anyway, to get in touch with Annecy.

Even if the complainant's declarations of good faith were true he would have to bear the consequences of his own negligence and credulity. In fact the Union has many reasons to doubt his good faith, in particular because of some inconsistencies which it sees in his pleadings. It got no statement from him about the nature of his wife's coverage in France or the rates of refund she might claim. But even if it had had such information he would still have been liable. Under Article 2.7.1 of the Fund Regulations he had an absolute personal duty to ensure that expenses he

claimed were refundable. So he may not plead good faith or a dependant's deceit, whatever reasons he may have had to be trusting. Where his trust is mistaken it is not the Union that should bear the consequences. Moreover, not to punish breach of the duty would encourage fraud.

The decision was not arbitrary: it was the outcome of full and thorough disciplinary proceedings, the complainant's rights were respected, and the evidence of his misconduct was clear and never properly challenged. He does not deny that the expenses were met twice over but merely seeks to blame his former wife. His offence was so serious that there was no wrongful exercise of the Secretary-General's discretion in resolving to dismiss him.

Lastly, there is no evidence of abuse of authority. Before his misconduct came to light the Union showed not the slightest wish to cause him ill and indeed he was faring well in his career.

D. In his rejoinder the complainant presses his application for oral proceedings.

He contends that the tone and content of the ITU's reply are provocative. He seeks to correct its version of the facts on many points. He enlarges on issues he believes it misrepresents and on his earlier pleas. He maintains that his right to a hearing was not respected: the questions put to him by the Committee were so ambiguous and vague that he scarcely knew how to answer, and he had only two conversations with the Personnel Department, not the "many" the ITU alleges. The Committee's composition was flawed for reasons which he argues are clear from two items of evidence he submits. Its inquiry was inadequate. It did not get in touch with the hospital at Evian directly. The hospital's reply was incomplete. The head of the hospital should be asked to explain why and by whom two bills were made out for the same treatment. The Union refuses to approach the French social insurance authorities in Annecy, though it ought to do all it can to establish the facts. Even under its own disciplinary procedure misconduct presupposes mens rea, which it has never proved. The complainant submits the text of the penal charges he has lodged against his former wife in France. She resorted to trickery without his knowledge. He rejects the notion of any absolute duty to make sure that the bills he put in were in order. It is not he who should suffer for the dishonesty of his former wife, which the Fund and the Union could have found out for themselves by showing proper caution. He was not so well treated in his career as the Union makes out.

E. In its surrejoinder the Union objects to the aggressive tone of the complainant's largely irrelevant rejoinder and to the many improper remarks it contains. It submits that oral proceedings would serve no purpose. It discusses many issues of fact which the complainant dwells on. It maintains that it fully respected his right to a hearing. In any legal system criminal liability may arise from failure to act or from negligence. There was nothing wrong with the membership of the Joint Advisory Committee. The complainant fails to refute the Union's pleas on issues of law, seeking merely to cast full blame for the fraud on his former wife and protesting his own good faith. The fact is that he was guilty of serious misconduct by claiming repayment of invoices for large sums without first checking that they had not already been repaid by his wife's own insurance, which he was fully aware of. Even supposing that the Union was guilty of an oversight in assuming his own good faith, that would not discharge him of liability. Such is the case law of the United Nations Administrative Tribunal, which the ITU cites.

CONSIDERATIONS:

1. The complainant joined the staff of the Union on 14 April 1975 under a short-term appointment. He had it converted into a permanent one on 1 January 1978. The Secretary-General of the Union dismissed him for misconduct on 31 August 1988 and confirmed that decision on 15 November 1988. He appealed to the Appeal Board on 15 December 1988. By a letter of 14 July 1989, the decision he is impugning, the Secretary-General rejected his appeal and confirmed the original decision.

2. The complainant was dismissed under Regulation 9.1(a)(1) and Rules 10.1.1a)(7) and c) for misconduct.

The Union charged him with having got the ILO/ITU Staff Health Insurance Fund to pay him 11,718.55 Swiss francs towards the costs of hospital treatment his former wife had received at a hospital at Evian-les-Bains - the Camille Blanc - between 1982 and 1985, although two social insurance schemes in France, the "Mutuelle générale" of the Department of Education and the "Mutuelle sociale agricole", had already met the costs. The complainant's answer was that when he had submitted the hospital bills to the Fund for repayment he had not known that there were other copies of the invoices for the same treatment and that other schemes had already met the same costs.

The Union rejected his explanation and referred the case to the Joint Advisory Committee. In its report of 30

August 1988 the Committee took the view that the complainant had committed fraud by cheating the Fund and it unanimously recommended dismissing him for misconduct. The Secretary-General accepted the recommendation and terminated his appointment for that reason on 31 August 1988. In its report of 18 May 1989 the Appeal Board recommended rejecting his internal appeal.

3. The complainant's objections to the Secretary-General's decision of 14 July 1989 confirming his dismissal are both procedural and substantive.

4. First come his procedural objections.

He pleads that the recommendation by the Joint Advisory Committee on which the decision was based was tainted with a flaw in the Committee's membership.

The complainant does not explain what rules he thinks were broken: he merely enters records of meetings the Staff Council held on 5 and 6 September 1988, and their relevance is unclear. Being stated in vague and general terms, his plea cannot be entertained.

Besides, it is devoid of merit. The Union submits, and the complainant does not deny, that the membership of the Joint Advisory Committee that examined his case was that which had preceded the publication of a new list of members on 13 September 1988. The issuance of the new list could not in any way affect the validity of the Committee's earlier membership and besides the Committee had reported as early as 30 August 1988.

The conclusion is that the plea is unsound.

So is his other procedural objection, that the Committee did not carry out a proper investigation. The evidence shows that it met five times to discuss the case, that it went into all the issues of fact and of law, and that it examined the material papers, of which it appended the main ones to its report.

5. Secondly, the complainant alleges that the Union denied his right to a hearing and his right to see the case records.

That plea fails too since the evidence entered both by him and by the Union plainly belies it. The final decision of 14 July 1989 to dismiss him was the culmination of full correspondence between the two sides, two interviews with him and, as prescribed by the rules, internal appeal proceedings. The Tribunal is satisfied that he had ample opportunity to find out exactly what the serious charges against him were and to state his case at each point in the proceedings.

Besides, both in his complaint and in his rejoinder he has enlarged on his pleas on the issues of fact and of law and he could not have done so unless he had had the full records at his disposal.

6. Thirdly, he maintains that the Union took no trouble to establish charges against him.

The ITU retorts that proof lay, first, in the items of evidence which the Fund supplied and which showed that it had paid him 11,718.55 Swiss francs towards costs refundable under its regulations and incurred in 1982-85; secondly, in photocopies of original invoices other than those which he had put to the Fund, and which appear to have been made solely for the purpose; thirdly, in a declaration from the hospital that the French insurance schemes of which the complainant's former wife was a member had met the costs in full; and fourthly, in a statement of account dated 2 April 1987 which the Union has got the hospital to testify to, that his former wife did not pay anything towards the costs of her treatment.

The Tribunal is satisfied on such evidence that the complainant got from the Fund sums to meet hospital expenses the two French insurance schemes had already defrayed in full.

As the Joint Advisory Committee and the Appeal Board held, there could be no clearer evidence than that of the truth of the charges.

His plea under this head fails.

7. On the merits the complainant submits that the Union was wrong to hold him liable because he acted in good

faith and in ignorance of what his former wife, who was alone to blame for the trickery, was up to.

All that need be said on that score is that the evidence does not bear out his protest of good faith. Since he knew full well that his former wife belonged to the French insurance schemes, it is scarcely plausible that for over four years he should have been submitting invoices to the Fund without even bothering to inquire whether the schemes had not already paid the hospital expenses in full. His conduct argues, to say the least, a degree of laxity quite inadmissible in an international civil servant in that he wilfully ran a substantial and unreasonable risk, the foreseeable outcome being the defrauding of the Fund. He has only himself to blame for the consequences of his own oversight.

Another point the Union makes is that he had a duty under Article 2.7.1 of the Fund regulations:

"Where the insured person or one of his dependants protected by the Fund is covered by another health insurance scheme, whether public or private, or by a public medical care service, the insured person is required -

(a) to indicate to the Secretary of the Fund the name of the scheme or service concerned;

(b) in connection with every claim for benefit he submits to the Fund, to supply the Secretary with a statement, together with supporting documents, listing the benefits received or to be received in respect of the expenditure in question from the scheme or service above-mentioned."

In filing such a statement the complainant had a duty to make sure that the "supporting documents" were genuine and he could not shirk it by shifting responsibility to his former wife and professing his own ignorance and good faith. It is irrelevant to his plea of good faith that he has instigated criminal proceedings against her in the French courts on the grounds of fraud, though he might cite her conviction, if she were found guilty of the charges, as a new fact warranting review.

His behaviour amounted to misconduct warranting dismissal.

8. Since his allegations of procedural flaws, breach of his rights to self-defence and the levelling of false charges are rejected, so are his submissions that the Union acted arbitrarily and failed in its duty to respect his dignity and good name. In any event what he says on that score is gratuitous: apparently he sees in the mere levelling of false charges an attack on his dignity and reputation. His plea is unsound both in fact and in law.

9. He alleges breach of the doctrine of proportionality. Though he does not enlarge on that plea either, what he seems to be arguing is that the degree of misconduct was not so great as to warrant summary dismissal.

There are several judgments on the subject and what they say is that a sanction out of proportion to the subjective and objective nature of the offence must be quashed because it is flawed with a mistake of law. Applying that rule calls for special caution when the sanction is dismissal.

The Tribunal is satisfied on the evidence that the complainant's conduct, spread as it was over several years, cannot be set down to mere oversight that would be to some extent pardonable or at least would not warrant dismissal. What he committed was misrepresentation and fraud, and in imposing a drastic sanction the Secretary-General neither drew clearly mistaken conclusions from the evidence nor went beyond the bounds of his discretion.

10. Lastly, the complainant accuses the Union of breach of good faith. That terse assertion seems to be prompted by a feeling, to which he gives vent in his brief, that the Union was casting about for any pretext to get rid of him and so committed an abuse of authority.

What has been said above shows that his dismissal was not at all based on "any pretext".

He cites no evidence to suggest that the Union was hostile. On the contrary, it appears to have treated him considerately to the very end. On 15 June 1988, a few weeks before termination, the head of the Conference and General Services Department gave instructions for extending his secondment by twelve months from 1 July 1988 and at the same time appointed him to replace the head of the Assembly Group. It is hard to read into such a decision any hostility on the Union's part.

Since that plea too fails, so does the complaint as a whole.

There is no need to allow the complainant's application for oral proceedings and the hearing of witnesses: the written submissions fully allow of a ruling.

The complaint is dismissed in its entirety, including the claims to compensation and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 3 January 2006.