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

**SEVENTY-SEVENTH SESSION**

# *In re* KIGARABA (No. 3)

**Judgment 1366**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 19 August 1993, the UPU's reply of 24 September, the complainant's rejoinder of 4 November and the Union's surrejoinder of 9 December 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 3.10 of the Staff Regulations and Rule 111.3.2 of the Staff 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 Tanzania, is employed by the UPU and his career is summed up in Judgment 1188 under A.

When he joined the Personnel Section in 1983 Regulation 3.10.5.C.a and c of the Staff Regulations of the International Bureau of the UPU, which sets the amount of the education grant, read as follows:

"a In the case of attendance at an educational institution outside the area of the duty station, the amount of the grant shall be:

...

ii where the institution does not provide board, 1100 US dollars plus 75 percent of the first 3000 US dollars of the cost of attendance, plus 50 percent of the next 1000 US dollars of such costs and 25 percent of the next 1000 US dollars up to a maximum grant of 3000 US dollars per scholastic year."

"c When, for the purpose of applying the scale of reimbursements approved for the education grant, the expenses incurred by a staff member in a currency other than the US dollar are converted into US dollars, the official United Nations rate of exchange used shall be whichever of the following two rates is the higher: that which was in force at the date when the existing scale of reimbursements came into effect or that in force at the date when the reimbursement is made, the same rate being used in converting the US dollar amount of the reimbursement into the currency in which it is to be paid."

The complainant was entitled to the education grant since two of his four children were at school in Tanzania. He usually applied for an advance and the Union paid any balance or recovered any sum in debit when he sent in the final yearly expense sheet. Several currencies being involved - the Swiss franc, the Tanzanian shilling and the United States dollar - the question arose as to which exchange rate should be applied. The matter was settled by office notice 22/1979 of 30 March 1979, which states in paragraph 8(c):

"When converting into US dollars expenses incurred in a currency other than the US dollar, the rate of exchange used shall be either that which was in force at the date when the existing scale of reimbursements came into effect (1 January 1977) or that in force when the reimbursement is made, whichever of the two is higher. The same rate shall be used in converting the US dollar amount of the grant into the currency in which it is to be paid. ..." (Registry's translation).

In 1984 the regressive system of refund was dropped and the exchange rate referred to in Regulation 3.10.5.C.c - known as the "minimum rate" - was made the rate of 1 March 1983. In 1989 3.10.5.C.c was deleted.

In a minute of 3 October 1990 to the Head of the Division of Legal and Administrative Affairs the Head of the Personnel Section (Division I) stated that because of the "minimum rate" in effect on 1 March 1983 the amounts the complainant had received were too high. The Assistant Director-General then decided that when drawing up expense sheets for the 1989 school year officials should use only one exchange rate, namely the United Nations operational rate in force when the advances were paid. The complainant agreed.

By a minute of 27 February 1992 the Director-General set up a committee of enquiry to see whether the complainant had received more than his due to cover school fees and if so to determine by how much and suggest ways of recovery.

In its report of 17 July 1992 the committee of enquiry concluded that from 1983 to 1990 the complainant had been overpaid 32,222.40 Swiss francs but repayment might be limited to sums overpaid from 1986 to 1990, or 27,779.55 Swiss francs.

The complainant commented in a letter of 31 August 1992 and on 28 September 1992 the Director-General ordered him to pay back the smaller amount.

In a letter of 22 October 1992 the complainant asked the Director-General to reconsider. By a letter of 11 November the Director-General upheld the decision and told him that from 1 December 1992 900 francs would be deducted from his monthly salary.

In a letter of 17 November the complainant asked the Director-General to reduce the amount to 200 a month on the grounds of other financial commitments. The Director-General refused in a letter of 11 December.

On 4 December 1992 the complainant appealed to the Joint Appeals Committee under Staff Rule 111.3.2 against the decision of 11 November.

In its report of 21 April 1993 the Appeals Committee recommended that the Director-General reconsider his decision to recover overpayments from 1986 to 1988, there being doubt as to whether there was prescription for recovery, and held that it would not be reasonable to demand recovery of the sums overpaid for 1989 and 1990, except for 450 dollars.

In a letter of 28 May 1993, the impugned decision, the Director-General rejected the Committee's first recommendation, accepted the second - so that the complainant still owed 27,872.42 francs - and upheld his decision to deduct 900 francs a month from salary.

B. The complainant submits that he has no debt to the UPU.

That the rules are unclear is plain from the committee of enquiry's taking five months to report and the Appeals Committee's meeting three times. According to general principles of law someone whom a decision concerns must get the benefit of any doubt.

He says that he merely applied in good faith arrangements that were already in use to reckon the benefits due to other staff.

None of the many amendments to Regulation 3.10 being retroactive, his statements for the years 1986 to 1989 were in line with the material rules. So was the one for the 1989-90 school year since the 1989 revision of 3.10 did not ordain any particular method of currency conversion. The balance he owed was approved twice, in July 1989 and December 1990, and should not have been worked out again in January 1992 on the strength of a new exchange rate. The method advocated by the committee of enquiry is arbitrary in that it bears more heavily on staff from countries with a weak currency. It should not apply to 1990-91, let alone earlier years.

The complainant submits that the time limit the Union applied for reimbursement appears neither in its own rules, which say nothing on the subject, nor in those of other organisations of the United Nations common system.

He asks the Tribunal to quash the Director-General's decision of 28 May 1993 insofar as it orders repayment of amounts he received in education grant from 1986 to 1988 and refuses to reimburse him 4,119.30 or 4,068.75 Swiss francs; to order the Union to repay him, with interest at 10 per cent a year, the amounts deducted from salary since 1 December 1992 and 4,119.30 or 4,068.75 Swiss francs; and to award him moral damages and costs.

C. In its reply the UPU states that the complainant gained for years from the depreciation of the Tanzanian shilling by wrongly treating the "minimum rate" as if it were a fixed or ceiling rate and using it systematically instead of the United Nations operational rate in force at the dates of his final expense sheets. Though the grant is supposed to cover only three-quarters of school fees, the complainant was repaid his actual expenses up to thirteen times, and on one occasion, as the Joint Appeals Committee said, seventeen times what he had actually spent.

According to the text of Regulation 3.10.5.C.c as in force from January 1983 only the amounts making up the "scale of reimbursements approved" referred to in c are subject to the method of currency conversion prescribed therein. The United Nations operational exchange rate should have been used for expenses actually incurred.

There is no evidence that the complainant acted in good faith; nor do the facts square with the allegation that his predecessors misinterpreted the applicable rules.

No new provision or interpretation of the rules has been made retroactive, and the sole purpose of recovery of the overpayments is to offset the financial consequences of the mistakes he made from 1986 onwards.

D. In his rejoinder the complainant develops his pleas. He argues in particular that by approving the statements he submitted other staff members accepted his interpretation of Regulation 3.10, which was the same as that of former UPU officials. Other organisations either have a time limit of one or two years or do not recover overpayment in the event of a mistake.

E. In its surrejoinder the Organisation presses its pleas and maintains that the rules on reimbursement left no room for interpretation. The complainant deliberately blurred the distinction between the minimum rate and the United Nations operational rate, and the Director-General was alerted only by the external auditor. The Union's right to recover overpayment is not subject to prescription. In the United Nations common system only the World Intellectual Property Organization has such a time limit, and it is irrelevant to this case.

CONSIDERATIONS:

1. The complainant joined the staff of the Union in 1983 at grade P.2. In 1986 he was promoted to first secretary at grade P.3 in the Personnel Section and there he was put in charge of claims to the refund of education expenses.

2. This case is about the UPU's claim to recovery of sums it says he has been paid over and above his due under Regulation 3.10 in respect of education expenses for two of his children who were at school in Tanzania. To meet such expenses the complainant used to apply for an advance and any balance was made over when he sent in his final yearly expense sheet. In 1990 the Personnel Section came to the view that by applying the rate of exchange in force at 1 March 1983 he had got more in reimbursement and later in advances than he had actually spent on the education of his children. Applying the single United Nations operational rate that was in force when advances were paid for the 1989 school year, the UPU reckoned at 9,046.75 Swiss francs the amount to be paid back by the complainant for that year. At the time he agreed to the method of reckoning.

3. On 27 February 1992 the Director-General decided to set up a committee of enquiry to check the education expenses refunded to the complainant. In its report of 17 July 1992 the committee concluded that he had been paid 32,222.40 francs more than his due but that recovery might be confined to the school years 1986 to 1990 and he would then have to pay back only 27,779.55 francs. Having been asked to comment on the committee's conclusions, he rejected them in a letter of 31 August 1992. The Director-General nonetheless decided on 28 September 1992 that he must repay the 27,779.55 francs.

4. On 22 October 1992 he made a request for review but the Director-General upheld the decision on 11 November 1992 and set at 900 francs the amount to be docked from his monthly salary, starting in December 1992. On 17 November he asked the Director-General to reduce the monthly deduction to 200 francs but that was refused by a decision of 11 December 1992. On 4 December he lodged an appeal with the Appeals Committee against the decision of 11 November 1992 insofar as it confirmed that he was to pay back sums in excess of his entitlements. On 21 April 1993 the Committee submitted recommendations that were largely in his favour. But the Director-General rejected the complainant's claims by a decision of 28 May 1993, the one he is impugning.

5. The nub of the dispute is the choice of the rate of exchange to be applied in reckoning the amounts due to the complainant as education expenses for the school years 1986 to 1990. The material rule is Regulation 3.10.5.C.c of

the Staff Regulations, which at 1 January 1983 read as set out in A above. As from 1 January 1984 the text was amended: the words "that which was in force at the date when the existing scale of reimbursements came into effect" were replaced with the words "that which was in force at 1 March 1983". The Administration stopped referring to this rate, which was known as the "minimum rate", when 3.10.5.C.c was deleted in 1989.

6. The complainant accepts the method of reckoning used for 1989, the "minimum rate" having by then been dropped. His main objection is that after getting the committee of enquiry's report the Union applied, for the purpose of reckoning his entitlements prior to 1989, the United Nations operational exchange rate which had prevailed at the time and which was higher than the one prevailing at 1 March 1983.

7. That objection fails. It is plain from the material text that the rate prevailing at 1 March 1983 is to apply only if higher than the one that prevailed at the date of repayment. The rate of exchange of the United States dollar stood at 1 March 1983 at only 9.56 Tanzanian shillings whereas the successive rates prevailing at the dates of repayment from 1985 to 1990 ranged from 25 to 193.3 shillings. Short of mistaking the "minimum" for the "maximum" rate the complainant may not properly contend that the rate prevailing at 1 March 1983 should invariably have been used to reckon repayments to be made after 1984.

8. He alleges that it was UPU practice to apply the 1983 "minimum rate" and in support he relies on the fact that senior officers of the Personnel Section checked and approved his expense sheets and other staff members got the same benefits as he.

9. The UPU denies such practice. Besides, as the Joint Appeals Committee pointed out, there is a rule that the whole common system of the United Nations abides by and that the International Civil Service Commission has cited more than once, for example in a report of 1978 (No. 30 A/33/30, paragraph 222). That rule is to repay education expenses only in part. Yet according to the Committee, because of his misreading of Regulation 3.10.5.C.c, the complainant got far more than his actual expenses. At least once he got seventeen times as much as what he had had to spend. None of those statements does he challenge. Since as officer in charge of claims to education expenses he drew up his own expense sheets, he was not free to seek refuge in the senior officers' approval or to remain silent about a discrepancy to his own advantage.

10. He seeks to justify his behaviour by pleading that other staff members had done the same. The plea fails because equality in law does not embrace equality in the breach of it. In any case, as the committee of enquiry observes, the Director-General ordered the same treatment for the others as for the complainant.

11. The complainant then alleges that the amendments to Regulation 3.10 could not be retroactive. He is wrong. The rule against retroactivity is not at issue here since no new provision or interpretation of the rules on the method of calculation were made retroactive.

12. What is at issue is the recovery of overpayments; and the complainant, as was pointed out above, must have been aware of the patent disproportion between the advances he was receiving and the education expenses he had actually incurred. So he may not properly plead any mistake in interpretation.

13. He has a subsidiary plea that there is a time limit for the recovery of overpayments. Though he acknowledges that there is none in the UPU's rules, he argues that the Union should follow the practice of the United Nations and the common system, which he says limits the period for which overpayments may be recovered to the two years or even to the one preceding the discovering of the mistake. He believes that in his case limiting the period to one year would be quite warranted.

14. The Union observes that any payment made in error may be recovered but does not challenge the rule that an obligation may lapse with time: it claims recovery only of overpayments since 1986, it has thereby waived some of the sum due and it has not demanded interest.

15. In the circumstances the time limit the Union has set is much to the complainant's advantage and his plea under this head therefore fails.

16. Since his main claim to the quashing of the impugned decision does not succeed, neither does any of his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.