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

NINETY-FOURTH SESSION

Judgment No. 2177

The Administrative Tribunal,

Considering the second complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 15 January 2002 and corrected on 4 February, the UPU's reply of 15 May, corrected on 21 May, the complainant's rejoinder of 23 July and the Union's surrejoinder of 5 September 2002;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who is Swiss and was born in 1952, joined the staff of the International Bureau of the UPU in 1993. At the material time he was a Counsellor at grade P.5.

By Office Notice No. 20/1999 of 12 March 1999, the Deputy Director-General informed staff that the electronic attendance recording system which the UPU had been testing since 15 February 1999 would apply to all staff as from 15 March. Under new flexible work schedules, staff were able to choose their time of arrival and departure provided they were at work during "core hours" (from 9 am to 11.45 am and from 2.15 pm to 4.30 pm), during which attendance was compulsory. They were to clock in and out by showing a card at one of the terminals located at the entrances to the building and the cafeteria. Because heads of division, section and unit are not compensated for overtime, the Director-General exempted them from the system by Office Notice No. 32/1999 of 30 April 1999. By a minute of 12 April 2000 the Staff Association protested against what it deemed to be unequal treatment. By Administrative Circular No. 22/Rev.I of 26 May 2000 the Director-General confirmed, inter alia, that heads of division, section and unit were exempted from recording their attendance.

On 26 June 2000 the complainant, who was not exempted from the system, asked the Director-General "to kindly reconsider the administrative decision conveyed in Administrative Circular No. 22". On 13 July the Assistant Director-General replied that the Director-General's decision would be notified to him and to the President of the Staff Association. Having received no such notification the complainant appealed to the Joint Appeals Committee on 22 August. By an e-mail message of 2 October 2000 the Chairman of the Committee told the complainant that he had mislaid the appeal and asked for a copy of it. The complainant sent one later in the month. On 29 March 2001 the new Chairman of the Committee informed the complainant that the previous Committee had been unable to process his appeal and asked him "how he wished to proceed". The complainant replied on 18 April that he would press his appeal but that, in view of the time that had elapsed, the Director-General might take a final decision without awaiting the Committee's recommendation. In a minute of 16 November to the Director-General about another appeal, the complainant complained of the Committee's inefficiency and sought leave to go straight to the Tribunal. On 19 November the Chairman of the Committee replied by e-mail that his appeal had not yet been dealt with but that an effort would be made to do so "very shortly". In a letter of even date notifying the membership of the Committee, he informed him that the latter would rule first on the issue of receivability. In answer to a reminder letter of 7 December, the complainant informed the Chairman on 10 December that having been away on mission and then on leave he had not received the letter of 19 November and asked to have it sent to his private e-mail address. The Chairman complied on the same day. By a letter of 12 December 2001 the complainant replied that in view of the delay in processing his appeal of August 2000, the Chairman's proposal for constituting the Committee was "irreceivable". On 18 December 2001 the Chairman of the Committee

acknowledged receipt of that objection, attempted to explain the delay and submitted a new proposal for the membership of the Committee.

The complainant filed his complaint on 15 January 2002 challenging the implied rejection of his appeal of 22 August 2000. On 24 April 2002 the Director-General issued Administrative Circular No. 22/Rev.II introducing changes to the electronic attendance recording system. Henceforth only directors were to be exempt.

B. Citing the case law the complainant asserts that he had every right to come directly to the Tribunal in view of the serious shortcomings of the UPU's appeal procedure: by November 2001 his request of 26 June 2000 for reconsideration of the Director-General's decision and his appeal of 22 August 2000 had not yet been addressed. He, for his part, had done everything that could be expected of him, but the Committee was unable to reach a decision within a reasonable time. He accuses the UPU of using dilatory tactics in an attempt to avert any objection to the attendance recording arrangements, thus creating a *de facto* situation.

The complainant has four pleas. The first is breach of equal treatment. Pointing out that Administrative Circular No. 22/Rev.I "nullifies and replaces all rules on normal working hours at the International Bureau", he submits that, contrary to the UPU's assertion, there is no provision excluding heads of division and section from the rules on compensation for overtime. That being so, their exemption from the electronic attendance recording system can arise only from a personal undertaking on their part to forego the benefit of those rules. In his submission, to allow only one category of staff the "right to waive entitlement under the rules on compensation" amounts to unequal treatment. He sees the attendance recording system as "inquisitorial" in intent.

Secondly, he argues that an organisation setting up such a system should provide for some means of proof (for example, a ticket issued by the terminals on each entry or exit) so that, if necessary, staff could challenge the information produced by the system. Without such a safeguard, he says, the imbalance in terms of burden of proof can be qualified as an abuse of authority.

Thirdly, he objects that the security system is linked to the electronic attendance recording system. Before introducing the latter the UPU installed a security system consisting of cameras (with film archives) in the common sectors of the building and electro-magnetic blocking mechanisms on the entrance doors to the building and to each floor. Entry via these doors is by means of the card used to clock in and out which, for this purpose, contains particulars of the card holder. The administrative circular under challenge allows the Administration to use the information recorded by the security system to check hours of attendance (for example when a staff member forgets to clock in/out). According to the complainant, that too is an abuse of authority.

Fourthly, the complainant expresses his concern about lack of confidentiality: the data entered in the electronic attendance recording system is personal and confidential. However, the UPU has not established a clear and precise written procedure allowing maximum protection of the information recorded.

The complainant asks the Tribunal to declare his complaint receivable, to recognise that his pleas are well-founded and to quash Administrative Circular No. 22/Rev.I. He further asks for 20,000 Swiss francs in compensation for the injury caused by the inefficiency of the appeal procedure; 50,000 francs in compensation for the injury he suffered from being subjected to the provisions of the above-mentioned administrative circular from 26 May 2000 to 31 December 2001; as from 1 January 2002 a penalty of 2,000 francs a month for as long as he continues to be subjected to those provisions. He claims 10,000 francs in costs.

C. In its reply the UPU submits that the complaint is irreceivable. First, the complainant failed to exhaust the internal means of redress. There was, it concedes, "some delay" in processing his appeal. However, it was due not to a lack of diligence on the Union's part but to circumstances beyond its control: the membership of the Joint Appeals Committee changed, some of its members were absent, and there were other appeals to be dealt with. It was the complainant who lacked diligence. Furthermore, he hinted to his immediate supervisor that the case was of no great importance and could be closed. And he took his case to the Tribunal out of pure malice against the UPU. The Union submits that the complaint is also irreceivable in that it challenges an administrative circular, which is by nature a general measure. The complainant refrained from seeking an individual decision because it would have been against his interests: flexible working hours and the rules on compensation being very much to his advantage. Furthermore, Administrative Circular No. 22/Rev.I which he is contesting, merely confirmed the arrangements introduced for a trial period by Administrative Circular No. 22 of 10 February 1999 and then by Office Notice 20/1999; and a confirmatory decision does not set off a new time-limit. His plea about confidentiality is

irreceivable "for want of a present cause of action", the matter having been settled by Administrative Circular No. 22/Rev.II of 24 April 2002. Lastly, the complaint is irreceivable in that it seeks to defend collective interests, reiterating arguments previously put forth by the Staff Association.

Taxing the complainant with "querulousness", the Union questions the Tribunal's practice of systematically ordering defendant organisations to meet the legal costs.

Subsidiarily, the Union rebuts the complainant's four pleas. First, there was no breach of equal treatment, since heads of division, section and unit are in a different position in fact and in law from other staff. Being the only managers in the UPU they have a separate status. Secondly, the fact that the terminals do not issue tickets on no account constitutes an abuse of authority, and besides, the system does allow staff members a measure of control. Thirdly, use of information collected by the security system is governed by clear and adequate rules: Administrative Circular No. 22 and its two revised versions. Fourthly, although there are no general rules on the protection of personal data, the information recorded by the system is treated as confidentially as possible. In any event, "any impairment of a staff member's dignity would be largely justified by the organisation's general interests".

D. In his rejoinder the complainant notes that a new version of Administrative Circular No. 22 on the electronic attendance recording system was published on 24 April 2002. Coming eight weeks after the filing of his complaint, he sees that as a tactical manoeuvre by the UPU.

On receivability he submits, citing the case law, that the UPU is to blame for the deficiencies of the internal appeal procedure, since he himself did everything that could reasonably be expected from him to move the process forward. He denies any slackening in his resolve to see his appeal through. He accuses the Joint Appeals Committee of giving precedence to an appeal filed after his own and of "blatant lying" about his statements. In his submission no individual measures were needed to apply the provisions contained in the administrative circular, and his complaint meets all the requirements of the case law. In rebuttal of the UPU's objection to receivability on the grounds that Administrative Circular No. 22/Rev.I was merely confirmatory, he points out that both the Joint Appeals Committee and the Director-General considered the merits. He also rebuts the UPU's assertion that the aforesaid provisions were published on 10 February 1999: at that time they were introduced only on a trial basis. He accuses the Union of producing a forged document in support of its plea that the impugned decision was merely confirmatory. He observes that the publication of Administrative Circular No. 22/Rev.II on 24 April 2002 does not nullify the injury he suffered until that date, so he still has a cause of action. As to the plea that he was defending collective interests, he points out that he filed the complaint in his own name. He accuses the Union of breach of good faith.

On the merits he argues first that all staff members of the UPU, whatever their grades or duties, are in like case in fact and in law as regards the number of working hours. Since the electronic system was introduced to monitor the attendance of one category of staff, there is breach of equal treatment. Secondly, he fails to see how staff can check the accuracy of the information recorded by the system when individual statements are sent out anywhere between one and four months after the data are entered. The repeated failures of the system belie the Union's assertion of unquestionable reliability. Furthermore, the fact that no receipt is issued during clocking operations reverses the burden of proof, because the data provided by the system are deemed to be correct until the employee concerned produces evidence to the contrary, but the employee is clearly unable to produce such evidence. Thirdly, concerning the link between the electronic attendance recording system and the security system, he points out that the change introduced by the second revision of the administrative circular proves that his plea is founded. Until that revision was published there was continuous breach of staff employment conditions. Fourthly, he submits that the addition of a chapter on personal data protection in Administrative Circular No. 22/Rev.II does not invalidate his plea. On the contrary, it demonstrates that his complaint is well founded. Far from being prompted by "querulousness" his complaint enabled the Union to see that the rules were flawed. To plead that there were no rules on personal data protection is of no avail: the Union had a duty to ensure the protection of such data. As proof of the UPU's failure in this regard, he produces 11 monthly statements of hours worked, belonging to different staff members. In his view the general interest of an organisation ought not to take precedence over the protection of personal and confidential information about staff.

The complainant modifies his claims. He asks the Tribunal to set guidelines for any future versions of the offending administrative circular. He claims 20,000 Swiss francs in additional damages on the grounds that the Union produced libellous documents. He increases his claim to costs to 15,000 francs on the grounds that the Union breached the principle of good faith by producing testimony to suit its own ends and forged documents.

E. In its surrejoinder the Union points out that the complainant may not introduce claims not already made in the internal appeal. Since there were none, those he introduced later, whether in the complaint or the rejoinder, are irreceivable.

The complainant's accusations are unfounded and show that he acted out of malice. It did distribute Administrative Circular No. 22 to all staff in early 1999. As to the monthly statements he produces, documents tend to disappear from the printers located on each floor of the International Bureau's building, and the complainant probably removed the statements at the printing stage. Citing later appeals filed by the complainant, the Union makes a counterclaim, asking the Tribunal to award costs against him.

CONSIDERATIONS

1. The Union's main plea is that, the complainant having come to the Tribunal while his case was pending before the Joint Appeals Committee, he failed to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute, so the complaint is irreceivable.

The complainant demurs: since no decision on his appeal was taken within a reasonable time, he was entitled to come straight to the Tribunal.

2. According to the case law, the rule requiring exhaustion of the internal remedies must not be an obstacle to the exercise of a staff member's rights. A complainant may come straight to the Tribunal where the competent body is unlikely to reach a decision within a reasonable time, which will be determined according to the circumstances of the case. However, a complainant can make use of this possibility only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time (see Judgment 2039 and the others cited therein).

Here the complainant may not rely on that precedent since he made no serious effort to accelerate the procedure. His only contact with the Joint Appeals Committee was at the latter's initiative, in the form of a request for information. The complainant fails to show that he responded: on the contrary, he wrote to the Chairman of the Committee on 12 December 2001 to say that, in view of the delay in processing his appeal he considered that the proposal to constitute the Committee was "irreceivable".

The conclusion is that he failed to exhaust the internal means of redress and that the complaint is therefore irreceivable.

3. This being the case, there is no need to consider the other pleas, either on receivability or the merits.

The complaint must accordingly be dismissed.

The Union asks the Tribunal to award costs against the complainant. The Tribunal will allow such a claim only in exceptional circumstances, which are not met in this case.

DECISION

For the above reasons,

The complaint and the UPU's counterclaim are dismissed.

In witness of this judgment, adopted on 8 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.