

NINETY-EIGHTH SESSION

Judgment No. 2390

The Administrative Tribunal,

Considering the complaint filed by Mr A. K. against the Universal Postal Union (UPU) on 17 September 2003 and corrected on 21 November, the Union's reply of 18 December 2003, the complainant's rejoinder of 26 February 2004 and the UPU's surrejoinder of 2 April 2004;

Considering Article II, paragraph 5, 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, a German national born in 1961, joined the UPU in Bern, Switzerland, in 1991. Having started in the General Service category, he was appointed database administrator, at grade P.3, as from 25 January 1993 following a competition in which he had participated. He was granted a permanent appointment in 1995. In a memorandum of 14 February 2002 he asked for his contract to be amended to reflect the fact that he was internationally recruited and eligible for home leave. In office notice 15/2002 of 11 March 2002 his name and that of another staff member, Mr H. (see Judgment 2389, also delivered this day), were added to the list of staff members eligible for home leave. Following an objection by the Director of Finance, however, the two staff members' eligibility for home leave was reviewed and, in a letter of 21 June 2002, the Director General informed the complainant that the addition of his name to the list "had been made by mistake and [was] not in compliance with Article 4.4 of the Staff Regulations of the International Bureau of the UPU". He explained that, since the complainant was resident in Switzerland at the time of his recruitment, he was "locally recruited"; besides, he had "never taken home leave". The Director General therefore rescinded the decision concerning the complainant contained in office notice 15/2002.

On 4 July the complainant asked the Director General to reconsider his decision. On 19 July the latter informed him that since two staff members were objecting to the UPU's practice, he was willing to undertake a detailed review of the rules and regulations concerned. He added that an enquiry would be conducted among other organisations to ascertain their practice on this issue. In a letter of 3 April 2003 the Director General confirmed his decision of 21 June 2002. Referring to a report on the matter by the Head of Legal Affairs, which he attached to his letter, he explained that the complainant was "considered as internationally recruited", but that since he had not needed to become an expatriate in order to take up his duties at the UPU in view of the fact that he was resident in Switzerland prior to his appointment, he did not meet the conditions laid down in Rule 105.3, paragraph 2*. On 2 May the complainant filed an appeal against that decision with the Joint Appeals Committee. In its report dated 17 June the Committee reached the same conclusion as the Director General and recommended rejecting the appeal. In a letter of 23 June 2003, which constitutes the impugned decision, the Director General dismissed the appeal.

B. The complainant cites Staff Regulation 4.5, which states that "[t]he allowances and benefits normally available to internationally recruited staff members shall include: [...] home leave", as well as the above-mentioned Staff Rule 105.3, paragraph 2. Since the term "national" is used in that paragraph, the complainant considers that Staff Regulation 4.6 establishes an incontrovertible link between the country of which a staff member is a national and the country of nationality. The UPU must therefore apply these provisions, and it cannot deny him home leave without breaching its own rules. He submits that the defendant has already granted home leave to a colleague in a similar situation to his own, that is, who was residing in Switzerland at the time of her recruitment.

The complainant asks the Tribunal to set aside the impugned decision, to order the UPU to readmit him to the list of staff eligible for home leave and to award him costs.

C. In its reply the Union points out that the fact that the term "normally" is used in Regulation 4.5 shows that there is no automatic entitlement to home leave and that the latter is not granted if the Director General considers

that to do so would be contrary to the purpose for which it was established, as in this case. At the time he was recruited, the complainant had been residing for almost 25 years in Switzerland, where he held a permanent residence permit. The fact that he kept up contacts with his family in Germany does not make Germany his “home”. It maintains that it has always considered that a staff member who, at the time of his recruitment, had been residing continuously in Switzerland for many years had established his home in his country of residence, regardless of his nationality. According to the defendant, this practice is consistent with both the letter and the spirit of the current regulations and is no different from the practice followed by several specialised agencies and by the United Nations Office in Geneva. It considers that the complainant’s claim to home leave is abusive since it is “obvious” that his home is in Switzerland. It adds that the case of the colleague mentioned by the complainant is quite different since she had resided in Switzerland for only a few months prior to her initial recruitment and had no permanent residence there, nor a work or residence permit for that country.

D. In his rejoinder the complainant maintains that the wording of Staff Regulation 4.5 is clear and that, if the defendant had considered that he was not eligible for home leave, it should have mentioned that fact in the letter of appointment. It did not do so. He maintains that before he was appointed all non-Swiss staff members in the professional category were allowed home leave. According to him, “the Director General’s right to grant or withhold certain benefits for a staff member depends not on the latter’s residence prior to his appointment but on a change in his residence status after the appointment”, which does not apply in this case. He points out that, in their replies to the survey on the subject, the organisations that use nationality as a criterion for granting benefits to expatriates all indicate that the place of residence at the time of the appointment does not affect entitlement to home leave. He denies that the inclusion of his name on the list of those eligible for home leave was the result of a “mistake”. That decision, which was taken after a study of the applicable rules conducted by several specialists, was approved by the Deputy Director General and the Director General. The complainant submits, lastly, that there have been at least three cases of staff members who were granted home leave despite the fact that they resided in Switzerland at the time of their appointment. The notion of “duration of the period of residence” appears nowhere in the Staff Regulations and Rules. On the contrary, Regulation 105.3, paragraph 4a, stipulates that “[t]he place of home leave of the staff member within his home country shall be [...] the place with which the staff member has the closest residential ties during the period of his most recent residence in his home country preceding appointment”. Provision is therefore made for a staff member to take home leave even though he was not residing in his home country at the time of his appointment, and there is no stipulation as to how long that situation may have lasted.

E. In its surrejoinder the UPU contends that if a staff member is eligible for home leave, that fact is mentioned in his letter of appointment. As there was no such mention in the case of the complainant, the provisions of the Staff Regulations and Rules must prevail. It argues that, although the place of residence at the time of recruitment does not appear to be a determining criterion for the international organisations consulted, “it did not emerge with any certainty” from the surveys conducted whether a staff member in the complainant’s position would have been entitled to home leave. It maintains that the initial survey conducted in February 2002 was very summary. With regard to Staff Rule 105.3, paragraph 4a, cited by the complainant, it points out that the latter never resided in Germany prior to his appointment. Since the inclusion of his name on the list of staff members eligible for home leave was a mistake, the complainant cannot make an argument out of it. Contrary to his allegations, it is the duration of the period of residence in Switzerland prior to appointment which matters and the Union has never granted home leave to any staff who at the time of their recruitment had been residing continuously in Switzerland for many years.

CONSIDERATIONS

1. The complainant, a German national born in Switzerland in 1961, joined the UPU on 9 September 1991 as a staff member in the General Services category, under a short-term contract which was extended several times until 24 January 1993.

On 19 November 1992 he was appointed First Secretary at grade P.3 as database administrator with effect from 25 January 1993. He obtained a permanent appointment in 1995.

The complainant has resided since 1969 in Switzerland, where he still resides today and where his mother also lives, and at the time he received his permanent appointment he held a settlement permit of indefinite duration issued by the cantonal aliens police authorities. Following his recruitment, the complainant received a category D

identity card (*carte de légitimation D*), which is issued to international civil servants by the Federal Department of Foreign Affairs and which mentions their immunity from legal process in the performance of their duties.

2. Following a discussion between the Director of Human Resources and the Deputy Director General, the complainant's name was added, at his request, to the list of internationally recruited civil servants eligible for home leave during the current year; that decision was published in an office notice of 11 March 2002. On 21 June 2002 the Director General went back on that decision, however, on the grounds that it had been taken in error, since the complainant was resident in Switzerland at the time of his recruitment. Having been asked by the complainant to review his decision, the Director General confirmed it on 3 April 2003.

The complainant filed an appeal with the Joint Appeals Committee asking for confirmation of his entitlement to home leave. The Committee recommended that the Director General dismiss the appeal on the grounds that the complainant had not become an expatriate as a result of his appointment in 1993 and that he "[did] not fulfil the condition of continuing to reside in a country other than that of his nationality, in order to perform his official duties in the organisation".

On the basis of that recommendation, the Director General rejected the appeal in a letter of 23 June 2003, which constitutes the impugned decision.

3. Entitlement to home leave is governed by Article 4.5 of the Staff Regulations of the International Bureau of the UPU and by Staff Rule 105.3. Its scope has been set out in detail in Administrative Circular (PER) No. 12/Add 1 of 14 June 1993.

Staff members eligible for home leave may return to their home countries every two years, at the Union's expense, for the purpose of spending a substantial period of annual leave there. The Director General may request a staff member on his return from home leave to furnish satisfactory evidence that this requirement has been fully met (Staff Rule 105.3, paragraphs 1 and 12). Home leave is normally granted to internationally recruited staff members (Regulation 4.5), though only to those who meet the conditions set out in Rule 105.3.

Internationally recruited staff members are eligible for home leave provided, in particular, that while performing their official duties they continue to reside in a country other than that of which they are nationals (Rule 105.3, paragraph 2a). According to paragraph 3 of Administrative Circular (PER) No. 12/Add 1, home leave does not apply to staff members performing their official duties in their home country, which is normally the country of which they are considered nationals, in other words, the country of the staff members' nationality or, in the case of several nationalities, the country with which, in the opinion of the Director General, they are most closely associated (Regulation 4.6).

4. The defendant acknowledges that the complainant is considered as having been internationally recruited. However, it refuses to grant him home leave on the grounds that, at the time of his recruitment, he had been settled in Switzerland for many years and that he has maintained only occasional ties with his country of origin, Germany. The complainant contends that this position is not in keeping with the provisions of the Staff Regulations and Rules, under which, according to him, all internationally recruited staff members who are not Swiss nationals but are resident in Switzerland at the time of their recruitment are eligible for home leave, at least if they maintain links with the country of their nationality.

5. The complainant's argument finds no solid support either in Regulation 4.5 or in Rule 105.3. Under that Rule, it is not sufficient for entitlement to home leave that internationally recruited staff members be serving in a country other than that of which they are nationals; they must also meet the required conditions. Thus, paragraph 2a of the Rule stipulates that a staff member shall be eligible for home leave provided that while performing his official duties he continues to reside in a country other than that of which he is a national. This condition is clearly not met in the case of a staff member who, at the time of his appointment, had been residing for several decades, practically without a break, in the country where he performs his official duties. The complainant does not deny that this is his situation.

6. The defendant's position is consistent not only with the clear wording of the relevant Staff Regulations and Rules, but also with their purpose.

The object of home leave is not primarily to make a monetary concession to staff members or, in broad terms, to

allow them a purely material benefit. It is justified, generally speaking, by the fact that it is to the advantage of the international organisations that their staff members should maintain their links with their home country (see Judgments 271, under 4 and 6, and 937, under 12). This country is not necessarily that of the staff member's nationality. It could be the country with which he has the closest connection outside the country in which he is employed (see Judgment 1985, under 9), for instance the home country of his wife or of children whom he may have adopted or taken in but who he believes should keep up their connections with their native environment. Thus according to Staff Rule 105.3, paragraph 4c, the Director General, in exceptional circumstances, may authorise a staff member to take home leave in a country other than the country of his nationality, provided that the latter can show that he maintained his normal residence in that other country for a prolonged period preceding his appointment, that he continues to have close family or personal ties in that country and that his taking home leave there would not be inconsistent with the purpose and intent of Staff Regulation 5.3.

Thus, the purpose of home leave is to enable staff members who, owing to their work, spend a number of years away from the country with which they have the closest personal or material ties to return there in order to maintain those connections. Regulation 5.3, which denies home leave to staff members whose home country is the country of their official duty station or who continue to reside in their home country, is therefore self-explanatory. Regulation 4.5, paragraph 2, reflects the same reasoning, insofar as it provides that a staff member may lose entitlement to home leave if, following a change in his residential status, he is, in the opinion of the Director General, deemed to be a permanent resident of any country other than that of his nationality, provided that the Director General considers that the continuation of such entitlement would be contrary to the purposes for which the benefit was created.

The complainant is not unaware of the purpose of the provisions to which he refers. He implicitly recognises the consequences, namely that the staff member – who, at the time of his recruitment, is resident in the country where his duty station is located and maintains no particular personal ties with the country of his nationality – cannot claim to be eligible for home leave since he did not leave the latter country to take up his appointment. This is probably why the complainant places such emphasis on the family and personal ties he said he has maintained with his country of origin, even though he has not lived there for several decades. Although his children, spouse, mother and one sister live in Switzerland, he submits that he has a grandmother, several uncles and aunts, cousins and godchildren in Germany, relatives whom he visits at least once a year. Those facts are not sufficient, however, to show that his ties have been so uninterrupted and so close as to make him eligible for home leave.

7. The complaint must therefore be dismissed without any need for the Tribunal to look more closely at the arguments put forward by the complainant regarding the limits within which the defendant may interpret the Staff Regulations and Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

_____* Staff Rule 105.3, paragraph 2, reads as follows:

“A staff member shall be eligible for home leave provided the following conditions are fulfilled:

a While performing his official duties he continues to reside in a country other than that of which he is a national.

[...]”