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

NINETY-NINTH SESSION

Judgment No. 2438

The Administrative Tribunal,

Considering the eleventh complaint filed by Mr T.B. against the Universal Postal Union (UPU) on 8 September 2003 and corrected on 16 October, the Union's reply of 19 December 2003, the complainant's rejoinder of 7 April 2004 and the UPU's surrejoinder of 7 June 2004;

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's career is outlined in Judgments 1929, 2251, 2365 and 2398 concerning the complainant's first, third, fifth and ninth complaints, respectively.

On 29 November 2002 the complainant was dismissed subject to a period of three months' notice ending on 28 February 2003. In a letter dated 24 February 2003 the Secretary of the UPU's Provident Scheme informed him of the situation regarding his pension rights. He explained that according to the Scheme's Regulations he was entitled to choose between a deferred retirement benefit and a withdrawal settlement and gave details of how much he could expect to receive in each case. On 24 March the complainant submitted an "internal appeal" to the Director General of the UPU, which was also a "[r]equest for review" of the "decision" of 24 February. In a letter of 31 March the Director General asked him to refer the matter to the Provident Scheme in view of the fact that relations with participants, particularly in the case of disputes, were governed by the Scheme's Regulations.

Referring to Staff Rule 111.3, the complainant lodged an appeal with the Joint Appeals Committee by a letter of 28 April. He challenged the "decision" of 24 February and requested the cancellation of the "decision regarding [his] entitlement to deferred remuneration", corresponding to the amount of contributions paid in to the Provident Scheme by the Union on his behalf. He contended that in the event of termination of his appointment this remuneration had to be paid over in full. In its report of 6 June the Committee concluded unanimously that it had no jurisdiction to deal with the complainant's appeal. The Director General informed the complainant in a letter of 10 June 2003 that his appeal was irreceivable. That is the impugned decision.

B. The complainant argues that his complaint is receivable on the grounds that his appeal challenged the effects of a decision notified to him by the Provident Scheme, and that those effects amount to a breach of his terms of employment. According to him, the decision of 10 June 2003 marked the exhaustion of internal remedies.

On the merits, the complainant explains that deferred remuneration was provided for under the terms of his contract, which alone in his view have binding effect. He maintains that the Scheme "discounted" the remuneration which the Union was "contractually bound" to pay him. He assesses the amount of the shortfall at 191,571.65 Swiss francs. He considers that the UPU must "act in lieu" of the Scheme where the latter refuses to abide by the terms of his contract.

The complainant asks the Tribunal to set aside the impugned decision and to order the UPU to pay him the aforementioned sum, with accrued interest of 8 per cent per annum from 1 March 2003, as well as compensation for injury. He also claims 1,000 francs in costs.

C. In its reply the defendant criticises the Tribunal's case law regarding the correction of complaints, noting that, as in the present case, it can lead to abuse. In its view, since it lacked jurisdiction to decide the matter of the complainant's pension rights, and since the complainant had definitively opted for a withdrawal settlement in August 2003 without – it maintains – expressing any reservation, the complaint is irreceivable for want of a cause of action and a present interest. The Union adds that any claim that was not put forward in his internal appeal is

irreceivable.

On the merits, the UPU denies any breach of the complainant's terms of employment. It explains that he was entitled, for his withdrawal settlement, to the capitalised total of his own contributions plus a supplement amounting to 70 per cent of those contributions. He was not entitled to be paid the contributions accrued by the Scheme.

Considering the complaint vexatious, the UPU asks the Tribunal to order the complainant to pay the costs of the proceedings.

D. In his rejoinder the complainant argues that the fact that the UPU declined jurisdiction to deal with his claim in no way impinges on the receivability of his complaint. He further maintains that the defendant failed to seize the opportunity it was offered during the internal appeal procedure to settle the dispute amicably and that it must accept the consequences, including the financial ones, of the choices it made.

On the merits, he points out that the Regulations of the Provident Scheme "are not part" of the contract he signed in 1993. He also puts forward new arguments, notably casting doubt on the Scheme's independence with regard to the Union. He acknowledges that he opted for a withdrawal settlement on 18 August 2003 but denies that he did so without reservation, since he had filed an appeal before that date.

E. In its surrejoinder the UPU, referring to Judgment 1519, contends that the pleas put forward by the complainant in his rejoinder are irreceivable because they are unrelated to his claims.

CONSIDERATIONS

1. On 29 November 2002 the Director General of the UPU notified the complainant of his dismissal with effect from 28 February 2003.

On 24 February 2003 the Secretary of the UPU's Provident Scheme wrote to the complainant informing him that he was entitled to choose between a deferred retirement benefit and a withdrawal settlement, in accordance with Article 28(1) of the Scheme's Regulations, which defines benefits available to participants who are not eligible for either a retirement benefit or a disability benefit. After obtaining further details regarding the extent of his entitlements, the complainant wrote to the Director General challenging the "decision" of 24 February 2003. The Director General asked him on 31 March to refer the matter directly to the Scheme.

2. On 28 April 2003 the complainant filed an appeal with the Joint Appeals Committee. Referring to Staff Rule 111.3, he asked the Committee to recommend cancelling the "decision regarding [his] entitlement".

On 2 May the Chairman of the Joint Appeals Committee replied that the letter of 24 February 2003 was neither an administrative decision nor disciplinary action in the meaning of Article 11.1 of the Staff Regulations, which then stipulated in paragraph 1 that "[t]he Director-General shall set up administrative machinery (a Joint Appeals Committee) with staff participation to advise him in case of any appeal by staff members against an administrative decision [...] or against disciplinary action". He added that the Scheme was managed and administered by its own Management Board and concluded that the appeal could not be dealt with by the Joint Appeals Committee. The complainant nevertheless maintained his appeal.

In its report of 6 June 2003 the Committee unanimously decided that it had no jurisdiction to consider the appeal. On the basis of that report the Director General informed the complainant on 10 June 2003 that his appeal was irreceivable. That is the impugned decision.

3. According to Staff Rule 111.3, the decision taken by the Director General after receiving the report of the Joint Appeals Committee is final. The Rule draws no distinction between final decisions on the merits and decisions of irreceivability. The Staff Rules make no provision for any internal appeal against that decision, which is therefore definitive. Hence the present complaint is in principle receivable under Article VII(1) of the Statute of the Tribunal, insofar as it seeks the quashing of the decision of 10 June 2003.

4. The complainant does not, however, contest any of the grounds given in the Joint Appeals Committee's report which led the Director General to find the appeal irreceivable. His pleas are concerned solely with the

content of the letter of 24 February 2003, in which the Secretary of the Scheme informed him of the different amounts to which he would be entitled according to whether he opted for a deferred retirement benefit or a withdrawal settlement.

Since it is clearly the complainant's wish not to challenge the Director General's decision to decline jurisdiction, the complaint must be rejected insofar as it seeks the quashing of the decision of irreceivability taken on 10 June 2003.

5. The complainant further claims payment by the defendant of the difference between his own estimate of the value of his withdrawal settlement and the amount the Scheme was prepared to pay him in that respect.

These claims are clearly irreceivable on the grounds that internal remedies have not been exhausted according to Article VII(1) of the Statute of the Tribunal. It is true that the Scheme is usually represented before the Tribunal by the UPU itself. That does not, however, mean that the complainant does not first have to comply with the provisions that regulate the internal settlement of disputes between the Scheme and its participants.

According to Article 19 of the Scheme's Regulations, a participant, or any other person able to show that he is entitled to rights under the Regulations by virtue of the participation in the Provident Scheme of a staff member, who considers that a decision of the Management Board is prejudicial to him may, within 60 days of its notification to him, submit a written request to the Board asking it to review the decision. It is only in the event that the Management Board maintains its decision or takes no action on the request within 60 days that the member concerned may file a complaint with the Administrative Tribunal of the ILO, or bring an administrative law appeal before the competent Swiss tribunal – the Insurance Tribunal of the Canton of Bern – which has concurrent jurisdiction (see Judgment 2203, under 2(b) *in fine* and (e)). In the present case, while he initially requested a review by the Management Board, he also referred the matter to the Director General (who declined jurisdiction) and then to the Joint Appeals Committee, contesting the details he had been given in writing by the Secretary of the Scheme regarding the amounts to which he would be entitled following his dismissal. Although his approach is unusual, the complainant appears to defend it by arguing, especially in his rejoinder, that since the Scheme is managed by officials placed under the authority of the Director General the UPU itself should be answerable for the Scheme's shortcomings. That would not suffice, however, to render the appeal which is the subject of the present proceedings receivable.

6. The complaint must therefore be dismissed.

Arguing that the complaint is vexatious, the defendant requests that the costs of the proceedings should be charged to the complainant. The Tribunal considers it inappropriate to grant that request.

DECISION

For the above reasons,

The complaint and the UPU's counterclaim are dismissed.

In witness of this judgment, adopted on 28 April 2005, 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 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.