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

NINETY-NINTH SESSION

Judgment No. 2439

The Administrative Tribunal,

Considering the twelfth complaint filed by Mr T.B. against the Universal Postal Union (UPU) on 8 October 2003 and corrected on 19 November 2003, the Union's reply of 6 January 2004, the complainant's rejoinder of 14 April and the UPU's surrejoinder of 14 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. Facts relevant to this dispute are set out in Judgment 2438, also delivered this day.

Article 12 of the Regulations of the Provident Scheme of the UPU concerns, inter alia, the determination of contributory service. Paragraph 1 reads as follows:

"The contributory service of a participant shall be calculated in completed years and months; the total number of days in incomplete months shall be divided into months, each group of 30 days and any balance of 15 days or over counting as a completed month while any balance of less than 15 days shall be disregarded."

Article 32 of the same Regulations, entitled "Withdrawal settlement", at the material time was worded as follows:

"1 A withdrawal settlement shall be payable to a participant whose age on separation is less than 62, or if he is 62 or more on separation but is not entitled to a retirement benefit.

2 The settlement to which the departing participant is entitled shall consist of:

a his own contributions;

b a supplement equal to 10 percent of his own contributions [...] for each year of contributory service in excess of 2 up to a maximum of 100 percent."

In a letter dated 24 February 2003 the Secretary of the Scheme informed the complainant of the situation regarding his pension rights following his dismissal. He wrote to him again on 13 March giving details of the methods of calculation used.

On 23 April 2003 the complainant filed an appeal with the Management Board of the Scheme objecting that different periods of contributory service had been used to calculate his deferred retirement benefit and the amount of his withdrawal settlement, respectively. He asked the Board to comment. In a letter of 10 July 2003, which constitutes the impugned decision, the Secretary of the Scheme informed the complainant that the three members of the Management Board had approved the method of calculation in question and that the "decision" of 24 February 2003 was therefore final.

B. The complainant explains that for the purpose of calculating the amount of a deferred retirement benefit all years of contributory service are taken into account. In his case, the Scheme based its calculation on a period of contributory service of nine years and ten months. On the other hand, in calculating the amount of his withdrawal settlement, it took into account a period of contributory service of only seven years. He estimates the consequent loss at 64,057.19 Swiss francs.

According to the complainant, Article 32 of the Scheme's Regulations is clearly unfair. It also appears to him to be in breach of the principle of equal treatment, since the same staff member is subject to different rules as regards his

contributory service according to whether he opts for a deferred retirement benefit or for a withdrawal settlement.

The complainant contends that Article 12 of the Regulations stipulates that the period of contributory service begins on the date of commencement of participation and ends on the date of cessation of service, with no exception. The version of paragraph 2 of Article 32 which "curtails" this period by two years in the case of a withdrawal settlement was adopted well after Article 12. In his view, the provisions of Article 12 should therefore, on account of their "prior status", take precedence.

Lastly, the complainant argues that the provisions which should apply in his case are those that were in force when he joined the Scheme in April 1993, and which did not stipulate the current two-year "curtailment".

The complainant asks the Tribunal to set aside the impugned decision and to order the Provident Scheme to pay him the sum of 64,057.19 francs, plus 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 UPU again 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 the complainant definitively opted for a withdrawal settlement in August 2003 without – it maintains – expressing any reservation, the complaint is irreceivable for want of a present interest. It is also irreceivable insofar as the complainant has extended the scope of his claims before the Tribunal. The defendant also points out that the claims contained in the complainant's brief are not the same as those appearing in the complaint form, where he does not specify what amounts he is claiming. In its view, only the claims set out in the complaint form are receivable.

The UPU asserts that the calculation he is disputing was made in accordance with Article 32(2) of the Regulations of the Scheme. It points out that since the new version of the Article is more favourable to participants than the old version, the issue of non-retroactivity does not even arise.

Referring to Judgment 14, the defendant maintains that the Tribunal does not in this case need to have recourse to equity since Article 32 is "perfectly clear". It considers that, by referring to the principle of equal treatment, the complainant is seeking to have his case dealt with in the same way as cases where circumstances of fact and of law are different, given that the calculation of a deferred retirement benefit is based on Article 31 of the Regulations whereas Article 32 applies in the case of a withdrawal settlement.

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 suggests that it is for the Tribunal to decide whether, in the case of a dispute with the Provident Scheme, a brief in reply submitted by the UPU is admissible or not.

He submits that, even though he "acknowledged receipt" of the sum he was paid as a withdrawal settlement, he did not thereby renounce all claims against the Scheme. He rejects the Union's argument that he has extended the scope of his claims before the Tribunal.

According to the complainant, both the internal appeal procedure and the proceedings before the Tribunal are tainted with various formal flaws; this is shown in his view by the fact that two out of the three persons who took the impugned decision were not entitled to represent the Scheme, since they are not registered on the Register of Commerce as members of the Management of the Scheme.

The complainant notes that the UPU has produced new evidence which he believes shows that, since 1993, the Regulations of the Provident Scheme have ceased to be enforceable against beneficiaries of the Scheme. He asserts that, according to its case law, the Tribunal may refer to current national law. He concludes that he can therefore ask the Tribunal to order the defendant to pay him the same "separation benefit" as would be provided for under Swiss law, for which he claims 320,117.99 francs.

E. In its surrejoinder the defendant points out that the title page of its brief in reply is wrong since the brief in fact presents the position of the Provident Scheme. It contends that, insofar as they are unrelated to the claims of the complaint, the complainant's pleas in his rejoinder – such as those relating to the application of Swiss law and to publication in the Register of Commerce – are irreceivable.

CONSIDERATIONS

1. The complainant was affiliated to the UPU's Provident Scheme from 26 April 1993 to 28 February 2003.

In a letter of 24 February 2003, the Secretary of the Provident Scheme informed the complainant that, following his dismissal, he was entitled to choose between the payment of a deferred retirement benefit at the age of 62 and a withdrawal settlement. If he opted for the latter, he would receive an amount calculated in accordance with the provisions of Article 32 of the Regulations of the Provident Scheme, that is, by adding to the sum of his "own contributions plus compound interest" a supplement equal to 10 per cent of that sum "for each year of contributory service in excess of 2". The complainant was also asked to send back a discharge form, duly dated and signed, as soon as he received the payment in question. The form included the following wording:

"I the undersigned declare herewith that I have received the above-mentioned capital sum as a withdrawal settlement and that I therefore renounce all subsequent claims against the Provident Scheme of the UPU."

2. In the appeal he filed with the Management Board of the Provident Scheme, the complainant objected to the fact that the deferred pension benefit and the withdrawal settlement had not been calculated on the basis of the same period of contributory service. He was informed on 10 July 2003 that his appeal had been rejected. That is the impugned decision.

3. On 18 August 2003 the complainant wrote to the Secretary of the Scheme as follows:

"I have decided to opt for a withdrawal settlement and to receive payment of the sum mentioned in your letter of 24 February 2003.

I shall [...] send you the discharge form as soon as I receive the funds."

The Secretary acknowledged this choice on 27 August 2003 and added:

"As promised in your letter of 18 August 2003, please send me back the enclosed discharge form, duly dated and signed, as soon as you receive the [aforementioned] sum."

The complainant never returned the discharge form.

4. The UPU contends that the complaint is irreceivable on the grounds that within the time provided for under Article VII(2) of the Statute of the Tribunal, the complainant merely filed his complaint form, on 8 October 2003, without appending the brief referred to in Article 6(1)(b) of the Rules of the Tribunal.

The complainant filed his brief within the time allowed by the Registrar in accordance with Article 6(2). In so doing he has followed the same approach as previously (see Judgment 2398, under 8, concerning the complainant's ninth complaint). The fact that this approach has been followed in several of the cases the complainant has submitted to the Tribunal might lead one to believe that it reflects vexatious intent. It may be recalled, however, that the possibility of correcting a complaint which does not comply with the formal requirements of Article 6(1) of the Rules is given to international civil servants as a means of protecting them against the strict implications of a procedure with which they are not necessarily familiar.

5. It would be excessively formalistic to declare – as the defendant would like – that the quantified claims set out in the complainant's brief are irreceivable merely because they do not appear on the complaint form. The claims set forth in his brief simply reflect the objections he raised in the course of the internal procedure to the application of Article 32 of the Provident Scheme's Regulations.

6. The defendant further contends that the complaint shows no cause of action and must be dismissed because the complainant accepted payment of the sum indicated in the letter of 24 February 2003 without reservation. It denounces the complainant's bad faith in that respect.

It was only when the sum had been paid that the complainant filed an appeal before the Tribunal, instead of returning the discharge form to the Scheme bearing his signature as promised.

The justifications the complainant tries to give in his rejoinder for these apparently contradictory actions are hardly convincing. The financial difficulties he encountered following his dismissal may explain why he opted for an immediate withdrawal of capital rather than a deferred retirement benefit. But had he acted in good faith, should he not rather have declared from the start that he was prepared to accept the amount offered while reserving the right to claim the additional amount corresponding to the two years of contributory service curtailed under the terms of Article 32 of the Regulations?

The Tribunal need not, however, consider further the issue of whether, by proceeding as he did, the complainant waived any further claim based on the terms of that Article, since his complaint is in fact devoid of merit.

7. Rather than argue that the Scheme's bodies applied the relevant provisions of the Regulations incorrectly, the complainant challenges the procedure defined in those provisions. He is at liberty to do so. While general provisions may not be contested at the time of their adoption, their lawfulness may be challenged by a staff member through an appeal against a decision applying those provisions which actually causes present damage to his personal interests (see Judgment 2379, under 5).

8. The complainant finds that unequal treatment arises from the fact that the calculation of the amount of a withdrawal settlement does not take account of a participant's total years and months of contributory service. He points out that, by contrast, the deferred retirement benefit provided for in Article 31 of the Regulations is calculated, *mutatis mutandis*, in the same way as the retirement benefit referred to in Article 29, that is to say, without the actuarial reduction of two years of contributory service which applies in the case of a withdrawal settlement. The deferred retirement benefit is therefore calculated on the basis of the whole period of contributory service, subject only to a rounding off procedure set out in Article 12 of the Regulations.

9. Before ruling on that plea, it is worth recalling the following circumstances.

The UPU's Provident Scheme is a Swiss law foundation in the meaning of Articles 80 *et seq* of the Swiss Civil Code. An Article 89 *bis* was added to those provisions on 21 March 1958 and subsequently amended several times, in particular at the time of the entry into force of the Federal Act of 25 June 1982 on occupational old-age, survivors' and invalidity insurance (*Loi sur la prévoyance professionnelle vieillesse, survivants et invalidité*, or "LPP"). According to paragraph 6 of Article 89 *bis*, provident schemes providing old-age, survivors' and invalidity insurance for staff are governed by certain provisions of the LPP, especially with respect to the definition and principles of occupational insurance and the insured salary or income, adjustment of statutory benefits to reflect changes in prices, the guarantee fund, supervision and financial security (sub-paragraphs 1, 4, 11, 12 and 14).

The Constitution of the Provident Scheme establishes the headquarters of the foundation in Bern (Article 2) and places it under the supervision of the Federal Social Insurance Office (hereinafter referred to by its French acronym, OFAS), which is a sub-division of the federal Internal Affairs Department (Article 7). According to Article 8(2) of the Constitution, the Management Board is authorised to adopt the Scheme's Regulations, which govern inter alia the management and administration of the foundation (8(2)(a)) as well as the benefits and guarantees to which staff members of the International Bureau of the UPU are entitled (8(2)(b)). The Board's decision is, however, subject to approval by the OFAS.

The Constitution was duly approved by the OFAS, in its initial version and subsequent revised versions, the last of which being dated 24 November 1994. The same goes for the Regulations of the Provident Scheme. That being the case, the complainant – who it may be said worked as head of the Finance Section of the UPU – ought to have demonstrated in what way the statutory procedure he criticises is incompatible with the relevant provisions of Swiss law. He should equally have demonstrated how that procedure breached the actuarial rules governing the determination of the capital sum payable to a participant in a closed fund, whose assets constitute the only guarantee of its commitments towards insured participants and which must therefore ensure that it possesses sufficient reserves to cover those commitments. He should more specifically have attempted to establish that the principles underlying Article 32 of the Regulations are incompatible or at any rate unjustified with respect to the primacy of benefits system applied by the Scheme, whereby the entitlements of the insured person correspond to the present value of acquired benefits, which is not the case in a primacy of contributions system, where the entitlements of the insured person correspond to the mathematical reserve (for the definitions of these provident schemes, see Articles 15 and 16 of the Swiss Federal Act of 17 December 1993 on unrestricted transfer in occupational old-age, survivors' and invalidity insurance).

10. As for the question of whether the Management Board which delivered the impugned decision was properly constituted, the complainant does not show in what respect it contravened the terms of the Constitution. His argument regarding the fact that two members of the Management Board are not registered on the Register of Commerce is clearly unfounded.

11. The right to equal treatment requires that situations which are the same or similar be governed by the same rules and that dissimilar situations be governed by rules that take account of the dissimilarity. Any authority which has to apply the right to equal treatment to dissimilar situations enjoys considerable discretion when adopting rules that take into account such dissimilarity (see Judgment 2194, under 6(a)). It must simply ensure that the exercise of its discretion is not tainted with arbitrariness (see Judgment 2412, under 7).

Clearly the situation of a person who – before reaching the normal retirement age – leaves the Provident Scheme and is immediately paid a lump sum as a withdrawal settlement is not the same as the situation of a person who, under such circumstances, opts for a deferred retirement benefit. In the latter case, the entitlement is obviously tied to the future of the Scheme and the person's life expectancy constitutes a natural risk.

The plea that the right to equal treatment has been breached is therefore unfounded.

12. The complainant contends that the provisions which should apply in his case are those in force at 26 April 1993, which did not provide for the deduction of two years of contributory service when calculating the amount of a withdrawal settlement.

In accordance with the principle of non-retroactivity, an organisation cannot apply retroactively to staff a rule which is unfavourable to them (see Judgment 1979, under 5(h)). The question of whether a rule is favourable or unfavourable to a staff member needs to be approached in general terms.

In this case, the reply is obvious. The version of Article 32 criticised by the complainant was adopted in November 2001. Far from adversely affecting the legal situation of participants opting for an immediate withdrawal of capital, it substantially improved it. In the version in force at the time the complainant joined the Scheme, Article 32 actually stipulated deducting five years from the period of contributory service of a participant opting for a withdrawal settlement. The 2001 amendment reduced the deduction to two years. In other words, the change in the terms of employment of the complainant was not unfavourable. This fact also deprives of any substance the complainant's somewhat obscurely-worded argument whereby Article 12 of the Regulations, on account of its prior status, should "take precedence for the purpose of determining the period of contributory service".

13. The conclusion is that the complaint must be dismissed.

14. Contending that the complaint is vexatious, the defendant claims that the costs of the proceedings should be charged to the complainant. The Tribunal holds that, in the circumstances of the case, there are no grounds for acceding to this 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.