

## SEVENTY-FIFTH SESSION

### *In re* BURNELL

#### Judgment 1292

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Colin Burnell against the Universal Postal Union (UPU) on 26 November 1992 and corrected on 3 December 1992, the UPU's reply of 1 February 1993, the complainant's rejoinder of 18 March and the Union's surrejoinder of 23 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Staff Regulation 4.8 and Staff Rules 102(1) and 111.3(2) of the International Bureau of the UPU and Articles 2(2), 5(1), 7 and 8 of the Regulations of the English Translation Service;

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 English Language Group of the UPU is an autonomous body that employs the staff of the English Translation Service of the International Bureau of the Union. Under Article 2(2) of the Regulations of the English Translation Service the Management Committee of the Service or its chairman acts as the Group's "spokesman". Article 5(1) provides that the Union's "International Bureau shall, in its capacity as authorized agent of the [Group], ensure the operation and administration of the [Service] on the basis of the provisions of the Union's Acts and of the decisions taken by the Executive Council and by the [Service's] Management Committee or its Chairman". Under Article 7 the staff of the Service "have the same status as international civil servants and the same conditions of service as staff members of the UPU International Bureau ...".

The complainant, a British subject, joined the English Translation Service in July 1967 as a translator at grade P.2 at the International Bureau of the Union in Berne. He got promotion to P.3 in 1969 and to P.4 in 1977. In a letter of 3 May 1988 to the Director-General of the Bureau the spokesman of the Group announced the Management Committee's decision to upgrade the complainant's post to P.4/P.5, to make him "Head of the English Translation Service" and to promote him to P.5 as from 1 July 1988. In a letter of 10 May 1988 the Director-General informed the complainant of his new title and promotion to P.5.

By a letter of 25 April 1989 the spokesman of the group as chairman of the Management Committee asked the Director-General to consider granting the complainant diplomatic status on the grounds that "other International Bureau staff" whose promotions had come later already had it. In his reply of 12 June the Director-General said that being no more than the Group's agent all he could do was convey its decisions to the staff. By a letter of 21 July the spokesman asked the Director-General to notify to the Swiss Government the Group's decision to promote the complainant and ask it to grant him the privileges and immunities that went with his new grade. In a letter of 8 September the Director-General refused on the grounds that the complainant's grade was higher than the Bureau's classification standards allowed.

In a letter of 12 March 1992 to the Director-General the complainant cited a booklet in which the Bureau set out the privileges and immunities of its officials in Switzerland. He said that he had only just seen it for the first time, asserted his right to the diplomatic status granted to officials at his grade and claimed the retroactive recognition of his rights and compensation for material and moral injury. In a letter of 14 April the Director-General told him that his having come across the booklet only recently did not warrant review.

By a letter of 1 May the complainant asked the Director-General, since there was no time bar, to review his decision. In a letter dated 21 May the Director-General informed the complainant of correspondence he had had with the spokesman and explained that since the spokesman had not reacted to his letter of 8 September 1989 - of which he supplied a copy - he saw no reason to reopen the matter.

On 4 June 1992 the complainant appealed to the Joint Appeals Committee under Staff Rule 111.3(2). In its report of 3 August the Committee recommended rejecting his appeal. It held that he lacked the status of an International

Bureau official, that posts of head of service were graded P.4 and not P.4/P.5, as the English Language Group had decided, that Switzerland granted diplomatic privileges only in the Union's own interests, not the official's, and that who should enjoy them was at the organisation's discretion. By a letter dated 10 August 1992, which the complainant received on 3 September and now impugns, the Director-General endorsed the Committee's recommendation.

B. The complainant submits that it was arbitrary of the Director-General to refuse to apply to the Swiss Government for the grant of diplomatic status to him and his wife. Article 7 of the Regulations of the English Translation Service confers the same status and conditions of employment on members of the Service as on staff members of the International Bureau. There is a limit on the number of officials at P.5 and above who may be granted diplomatic status but, provided that the "quota" is not filled, all such officials are entitled to diplomatic privileges and immunities under agreements between the Swiss Government and the Union. So the Director-General's treatment of the complainant shows bias.

The Director-General acted in breach of good faith by implying in his letter of 8 September 1989 to the spokesman that his promotion was invalid because it overlooked the Union's classification standards. It was in line with the more sharply defined standards laid down by the International Civil Service Commission (ICSC). In any event the Bureau gave prior approval to his promotion, which the English Language Group decided by virtue of authority the Bureau had delegated to it.

He disputes other reasons the Director-General took from the Appeals Committee's report. If the grant of diplomatic status is just a "means ... to allow officials to accomplish their duties in the best possible conditions", why should the complainant be the only such official in Switzerland to be denied it? Inasmuch as the Union's long-standing practice is to seek diplomatic immunity for all senior staff the Director-General's departure from it was an improper exercise of discretion.

The complainant asks the Tribunal to quash the decision of 10 August 1992 and order the Director-General to inform the Swiss Government of his promotion to P.5 and invite it to issue to him and his wife "series C" identity cards, which betoken diplomatic status. He also claims awards of 10,000 Swiss francs a year in damages from 1 July 1988 to the date of issue of such papers and of 10,000 francs in costs.

C. In its reply the Union contends that the Group's decision to promote the complainant to P.5 was in breach of the Bureau's grading standards, which stipulate that the head of a service that forms an "administrative unit" shall have grade P.4 and the head of a section P.5 or D.1. The Director-General is under no duty to apply for diplomatic status for the complainant, who is just the head of a service.

Such status is not a right but is intended to enable staff to perform official duties in the most favourable conditions. The complainant's claim to 10,000 francs a year from 1988 in damages shows that he is putting his own interests before the Union's.

The UPU seeks to correct several points of fact the complainant is relying on. Insofar as his supervisory duties fall below the ICSC's requirements for P.5 his promotion does not meet that body's standards either. Since the duties of the head of a translation service are not on a par with those of a head of section he must be deemed to have had promotion ad personam. The Director-General is not wont to seek diplomatic status for officials on whom he bestows such promotion.

The UPU has not treated the complainant arbitrarily. Under ICSC standards his post should still be at P.4 like the posts of other heads of translation services. Besides, the Union's quota would not allow them all to enjoy diplomatic status.

D. In his rejoinder the complainant enlarges on his pleas and answers allegations in the reply. He points out that the Director-General himself promoted him to P.5 and did so only after the Head of the Personnel Section told the spokesman that P.5 was an "appropriate" grade for him. The spokesman having informed the Director-General in the letter of 25 April 1989 that his promotion was a "normal" one and not ad personam, the UPU may not shift ground now. The distinction between "head of section" and "head of service" is pedantic: when the Bureau's former "services" became "sections" they did not undergo any substantive change.

His duties are like those of other P.5 officials in the Bureau, and the number of Professional and General Service

staff he supervises at sessions of the Congress of the UPU is greater than what ICSC standards require for P.5. Besides, his ICSC "point-factor rating" is well within the P.5 range even without further points for supervisory work. The UPU is wrong to liken his position to that of heads of other translation services: only he is at P.5. The UPU's quota not being exhausted at the time of his promotion, he could have had diplomatic status at once.

E. In its surrejoinder the UPU develops its earlier pleas and answers issues of fact and law raised in the rejoinder. Unlike other United Nations organisations it has only one official language, French, and does not itself employ staff to translate into other languages. A decision of the English Language Group - even when it follows an advisory opinion from the Head of Personnel of the Bureau - does not require the Director-General to go beyond his remit and treat the Group's staff as officials of the International Bureau itself. The conditions of service of Bureau officials apply only "by analogy" to translation staff and as employer the Group may adapt them as it sees fit. The ICSC's general standards do not apply to highly specialised posts like translators'. Though the quota may not impede the grant of diplomatic status, the Director-General is not for all that bound to solicit it.

#### CONSIDERATIONS:

1. In 1967 the complainant joined the English Translation Service of the International Bureau of the Universal Postal Union. On 3 May 1988 the Management Committee of the English Language Group as his employer redesignated his post Head of the Service and regraded it P.4/P.5. He was accordingly promoted to grade P.5 as from 1 July 1988.
2. By a letter of 12 March 1992 he asked the Director-General of the International Bureau to grant him and his wife the privileges and immunities that were enjoyed by staff in the grade to which he had belonged since 1988. He claimed retroactive recognition of his rights and compensation for denial of diplomatic status. The Director-General refused his claims. His request for review and his internal appeal were in turn also rejected. On 10 August 1992 the Director-General notified to him the final decision rejecting his claim and that is the one he is now impugning.
3. On 19 April 1946 the Secretary-General of the United Nations concluded an agreement with the Federal Council of Switzerland on the privileges and immunities of international civil servants in that country. It applies "by analogy" to the UPU. In a circular dated 1 April 1987 the Permanent Mission of Switzerland to the International Organizations in Geneva explained that the "series C" identity card was allocated to senior international officials assimilated to diplomatic staff and that the organisations were free to name the senior officials who might claim diplomatic status, provided that their class or function warranted such status and the proportion of such officials did not exceed 12 per cent of the total number of staff.
4. In Judgment 122 (in re Chadsey) the Tribunal considered the status of staff of the English Translation Service of the Union. It held that though the language groups had some autonomy they were not separate legal entities. According to the Regulations of the English Translation Service it is directed by a Management Committee but administered by the International Bureau as agent for the English Language Group.

Article 7 of the Regulations provides:

"The employer of the ETS [English Translation Service] shall be the English Language Group. Nevertheless ETS staff members shall have the same status as international civil servants and the same conditions of service as staff members of the UPU International Bureau ..."

Article 8 reads:

"... The number, qualifications and grades of the staff, as well as decisions concerning their appointment, promotion and termination, shall be the responsibility of the ETS Management Committee, which shall obtain the prior opinion of the International Bureau and the ETS Senior Reviser."

5. In a letter of 25 April 1989 to the Director-General the chairman of the Management Committee of the Service asked him to consider granting diplomatic status to the complainant, though acknowledging that it was not conferred ipso facto on anyone who reached the rank of P.5 but was at the Director-General's discretion. The chairman wrote to the Director-General again about the matter on 29 May as spokesman of the English Language Group. In a letter of 12 June the Director-General replied that he "could not ask the federal Swiss authorities to grant diplomatic status" to the complainant. On 21 July the spokesman again asked for action to have diplomatic

privileges conferred on the complainant. In his reply of 8 September the Director-General pointed out that the grade the Management Committee of the English Translation Service had given the complainant was higher than the one prescribed according to the Union's grading standards and so there was no basis for seeking diplomatic status for the complainant. The spokesman did not respond to the Director-General's letter.

6. When the Director-General asks the Swiss Government to confer diplomatic status he is exercising his discretion. He has to determine whether a staff member is a senior officer who is assimilated to a diplomatic agent within the meaning of the Swiss Permanent Mission's instructions, whether the staff member's class or function warrants such status and whether the staff member can be fitted within the 12 per cent quota of those who qualify for it. So the Tribunal will not interfere with his decision unless he has committed some procedural or formal error or a mistake of law or of fact, or applied some wrong principle, or drawn illogical conclusions from the evidence before him.

7. In his letter of 8 September 1989 to the spokesman of the English Language Group the Director-General cited UPU Staff Regulation 4.8, which establishes that the promotion of a staff member may be considered only in accordance with the Union's grading standards, and Staff Rule 102.1, which, when read together with the Annex, requires that the head of a service be graded P.4.

8. On the strength of Article 7 of the Regulations of the Service, which stipulates that its staff shall have the same conditions of employment as staff of the International Bureau, the complainant argues that it would be arbitrary to rule that P.5 staff members of UPU translation services could not qualify for diplomatic status. But that is not the point. The question is whether by reason of a proper classification of his functions the complainant's name should have been put forward for the grant of diplomatic status.

9. It is common ground that the upgrading of his post and his own promotion to P.5 were decided autonomously by the English Language Group without reference to the "Standards for the classification of posts" in the Annex to the UPU Staff Rules. Moreover, the chairman of the Management Committee of the English Translation Service acknowledged by letter of 25 April 1989 to the Director-General that he "might have some difficulty in meeting this request because no other UPU language group includes a member of staff qualified to enjoy this status". In the circumstances the Tribunal finds no reason to believe that the Director-General acted arbitrarily or was mistaken as to the complainant's functions and supervisory responsibility. The conclusion is that the claim that the Director-General be ordered to invite the competent Swiss authorities to issue "series C" identity cards to him and his wife cannot succeed. Nor in consequence can his further claims to damages and to costs.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
William Douglas  
P. Pescatore  
A.B. Gardner