

SEVENTY-EIGHTH SESSION

***In re* DER HOVSEPIAN (No. 3)**

(Application for execution)

Judgment 1400

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Tony Der Hovsépian on 31 March 1994 for the execution of Judgments 1235 and 1306, the reply of 26 May from the Universal Postal Union (UPU), the complainant's rejoinder of 28 June and the Union's surrejoinder of 27 July 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant, a Lebanese citizen, joined the staff of the Universal Postal Union in 1965 at the age of 26. Since 1987 he has held the post of deputy head of Section C, which is in charge of services and transport. From February to December 1991 he served as acting head of the section, a grade P.5 post. In a competition to fill the post of head of Section C the Director-General preferred to the complainant an outside candidate - Mr. Michel Fohouo, a Cameroonian - though the Appointment and Promotion Committee had put the complainant first on its short-list and Mr. Fohouo third *ex aequo*. The complainant appealed to the Tribunal against a decision of 28 November 1991 confirming one of 13 September which refused him promotion to the post. In Judgment 1235 of 10 February 1993 the Tribunal set that decision aside and ordered the Union to pay him 25,000 Swiss francs in moral damages and 10,000 in costs.

2. The UPU paid him the sums due but rejected his claim to retroactive appointment as head of Section C. He then applied for interpretation of Judgment 1235 and in Judgment 1306 of 31 January 1994 the Tribunal held:

"5. ... The complainant is wrong because the quashing puts the Union under no duty to grant him the appointment or promotion he wants, ...

6. When a decision is quashed it is deemed never to have been taken. The Administration must do whatever the correction of the position in law may require and by due process take a new decision that is free from the fatal flaws in the quashed one and that gives effect to the Tribunal's ruling in the light of the reasoning that underlies it."

The Tribunal then explained that it had quashed the impugned decision:

"7. ... because the Director-General had misconstrued Regulation 4.3 of the Staff Regulations by believing that he was bound to appoint an outside candidate to the post; because he had drawn clearly mistaken conclusions from the evidence; and because he had taken irrelevant issues into account. The quashing means that the complainant is entitled to have the Union review his right to appointment or to promotion in compliance with the material rules. ..."

3. On 1 March 1994 the complainant again asked the Director-General to execute that judgment insofar as it had confirmed the quashing of the decision of 28 November 1991; had upheld his appeal concerning appointment to grade P.5; had ordered the Union to take a decision free from the flaws that had tainted the quashed one and giving effect to Judgment 1235 "in the light of the reasoning that underlies it"; and had ordered payment to him of 2,000 Swiss francs in costs. By a decision of 9 March 1994 the Director-General told the complainant that he had appointed Mr. Fohouo, the candidate he thought best suited, as head of Section C. That is the decision at issue in the present application for execution of Judgment 1235 as interpreted in Judgment 1306.

4. The complainant's first plea is that the decision of 9 March 1994 failed to execute Judgments 1235 and 1306. His position is that the Tribunal, having rejected on legal grounds the reasons for the choice of Mr. Fohouo, wanted the UPU, not to put forward new, ostensibly valid, reasons, but to review the complainant's right to appointment or promotion. The Director-General - he contends - "merely restated his decision of 28 November 1991 after revising his reasons for it before the internal appeals body". He sees in that reaction proof of the Director-General's scant regard for the Tribunal's ruling, and further proof of that in the grant of a permanent appointment to Mr. Fohouo *pendente lite*.

5. The Union demurs. It submits that, as was held in Judgment 1306, the quashing of the decision of 28 November 1991 lays no duty on it to appoint or promote the complainant, his only entitlement being that his right to appointment be reviewed in compliance with the material rules. Such review - says the Union - is exactly what the Director-General made: he re-examined the complainant's right to promotion on the strength of the information available at the time when the Joint Appeals Committee reported, i.e. on 26 November 1991.

6. The text of the impugned letter of 9 March 1994 bears out the Union's position. What it shows is that the Director-General indeed reviewed the rights and merits of the two candidates, that he put them on an equal footing on the grounds that no provision of the Staff Regulations or decision of the Executive Council's expressly conferred priority on serving staff of the Bureau, and that he showed due regard for the qualifications required in the notice of 15 February 1991 that put the vacancy up for competition. The complainant can scarcely object to the Director-General giving different reasons for rejecting him when that is what Judgment 1306 actually ordered. And the grant of a permanent appointment to Mr. Fohouo is immaterial to the present dispute.

7. Secondly, the complainant submits that the Director-General's further refusal to promote him to P.5 as head of Section C is unlawful because the decision shows procedural flaws and mistakes of fact and law and overlooks essential facts. He questions that it is proper practice to apply Regulation 4.8.3 on appointments to P.5 posts when a vacancy may be filled by promoting a serving official to it: to put a literal construction on the provision and read it together with Regulation 4.8.2, the Director-General may look for the "fresh talent" mentioned in Regulation 4.3, i.e. outside candidates, only when he cannot fill a vacancy by transfer or promotion of a serving official.

8. That construction is at odds with a practice which the Executive Council approved in 1976 and which consists in holding an external competition to fill any post at P.5 or a higher grade but letting serving staff too apply. The staff were informed of the Executive Council's decision in office notice 37/1976 of 29 July 1976. That decision was taken by the authority on which Regulation 12.1 confers competence to amend or supplement the Regulations, and it is therefore no less binding than any provision they contain.

9. The complainant further objects that the impugned decision by the Director-General cites as qualifications for the post only those required of outside candidates. In his submission the Director-General thereby overlooked the qualifications of the inside candidate - the complainant himself - and acted in breach of Regulation 4.3, on promotion, and of Rule 5A.3.1 of the Annex to the Staff Rules, on basic aptitudes required for management posts. According to Rule 5A.3.1 "10 to 15 years' wide professional experience" may count towards training. Yet the Director-General refers only to a degree from a university or comparable institution. In the complainant's view the breach is the more glaring in that Rule 5A.3.1 is so consistently applied that nearly all heads of section and other senior officers lack a university degree.

10. The plea is unsound. One point is that the requirements for the post were those announced in the notice of 15 February 1991. Professional experience is to count, according to 5A.3.1, only exceptionally, "if circumstances warrant". And whether the condition is met is plainly for the Director-General to determine at his discretion. As for the qualifications of its senior officers, the Union denies that they have only "wide professional experience": they all have the equivalent of a university degree. Be that as it may, there are no grounds for supposing that the Director-General refused the complainant promotion because he had only "wide professional experience". It is plain from the decision that in making his choice the Director-General took account of all the qualifications of the two candidates, including university studies.

11. The complainant again objects to the Director-General taking into account under the head of experience only what the outside candidates had done. Although he was given credit for seven years' experience in Kuwait, the important work he had done for the UPU itself went unnoticed. He expresses doubts about Mr. Fohouo's academic qualifications and practical experience and says that those doubts are borne out by the assessment several senior officers have made of his performance in his first thirty months as head of Section C.

12. The plea fails. It is plain from the text of the impugned decision that far from belittling the complainant's experience within the Union the Director-General cited the "fairly varied experience" he had gained "in several jobs (personnel, technical co-operation, legal affairs, liaison with translation services) before assignment to Section C (air mail, postal finance services) in 1987". So the plea cannot be sustained on the facts.

13. The allegedly unfavourable assessment of Mr. Fohouo's performance in the UPU is immaterial. The quashing of the decision of 28 November 1991 meant that the Director-General had to review the situation prior to that date on the strength of the information available at the time. The relevant information included the report of 19 July 1991 by the Appointment and Promotion Committee. The Committee's members included two of the senior officers who have since assessed Mr. Fohouo's performance as head of Section C. The Committee ranked Mr. Fohouo third ex aequo out of the twenty-one candidates, including the seven internal ones, and recommended appointing one of the ranked candidates. Any unfavourable comments that may have been made after the decision of 28 November 1991 are immaterial to consideration of Mr. Fohouo's qualifications at that date.

14. The complainant challenges the Director-General's saying that Mr. Fohouo has a sure command of French and English but ignoring his own command of French, English, Arabic and other languages. But the objection is unwarranted. The notice of competition required a "very good" knowledge of French but only "knowledge" of English. The Director-General credited the complainant with "very good knowledge of languages", and that general reference must denote French and English, the only two languages required for the post; had his knowledge of either of them been below standard the Director-General would surely have said so in the impugned decision.

15. The complainant's last plea is that the Union has used expressions that show a mistake of law. In his submission one of them is its contention that Judgment 1306 left it free to decide whether to put forward "proper reasons" for a new decision. But taken in context, as it must be, the term denotes recognition by the Union of its duty to correct the position in law. The complainant also comments on the technical level of postal services in developing countries like Cameroon which he describes as one of the "least developed", and compares his own experience with that of the other candidate. His first point, on which he offers no evidence, is no more than political bias. The other is a matter that comes within the Director-General's discretion. Besides, official documents which the UPU produces with the surrejoinder rebut the allegation that Mr. Fohouo's experience was narrow. So the plea fails.

16. The Tribunal is satisfied on the evidence that the impugned decision shows none of the fatal flaws the complainant alleges. Since his main claims fail so too do his claims to damages and costs.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner