

## NINETY-FIRST SESSION

***In re Kigaraba (No. 7)***

**Judgment No. 2062**

The Administrative Tribunal,

Considering the seventh complaint filed by Mr Richard Kigaraba against the Universal Postal Union (UPU) on 30 June 2000 and corrected on 21 July, the UPU's reply of 17 October, the complainant's rejoinder of 21 December 2000 and the Union's surrejoinder of 20 March 2001;

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

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 complainant's career at the UPU is recounted in several judgments, including Judgments 1188 and 1366 in which the Tribunal ruled on two of his earlier complaints. Since 1 September 1992 he has held a post as first secretary at grade P.3. On 9 March 1999 he was elected President of the Staff Association.

In response to the Staff Association's wish, the UPU decided in 1996 to reclassify posts at its International Bureau. Posts in the Professional and Senior categories were to be regraded in accordance with the Master Standard of the International Civil Service Commission (ICSC). The exercise was entrusted to an external classifier (Mrs C.). Office notice 31/1999 of 29 April 1999 said that, if a post was assigned a grade higher than that of its incumbent, it would be put up for competition, which meant that the incumbent was not automatically entitled to promotion. The notice also stated the grades attributed to posts: the complainant's was classified as P.3. On 18 June 1999 the complainant applied for review of the grading of his post.

As part of the machinery put in place to deal with such applications, a standing committee for the reclassification of posts in the Professional and Senior categories was formed and a new external classifier, Mrs T., was appointed by mutual agreement between the Director-General and the Staff Association.

Of the twenty-six applications submitted to her for review, Mrs T. confirmed the grades of eighteen posts, and upgraded three posts definitively and five others "prospectively". The complainant's post and three others at grade P.3 were given a "prospective" <sup>(1)</sup> P.4 grade.

By a letter of 18 August 1999 the complainant was informed that the classifier had recommended a "prospective" classification of P.4 for his post and that the Director-General had decided that the upgrading would take effect "once the conditions [were] met". On the same day the complainant asked the Director-General to reconsider the decision not to upgrade his post to P.4. On 5 October he asked the Director-General to let him have certain documents pertaining to the classification. He was sent those that concerned him personally under cover of a letter of 12 October. On 29 October he appealed to the Joint Appeals Committee. The latter sought disclosure of the documents that the UPU had declined to send to the complainant. In a letter of 13 December 1999 the Director-General accounted for his refusal to disclose them. In its report of 5 February 2000, the Committee recommended upgrading the complainant's post to P.4 and promoting him accordingly. The report was submitted for consideration by an ad hoc working group and on 24 February the Director-General organised a telephone conference call with Mrs T. in order to clarify the meaning of "prospective classification". The complainant and the Staff Association Committee declined to take part.

The complainant having refused an individual desk audit with the classifier, the Director-General told him in a letter of 14 March 2000 that he had decided to commission a new evaluation of his post. A third classifier, Mrs F., was appointed without the Staff Association having been consulted. On 13 April she graded the complainant's post as P.3. The Director-General wrote to the complainant on 27 April 2000 upholding his decision to maintain the post at grade P.3. That is the impugned decision.

B. Citing comments appended to Mrs T.'s classification, the complainant asserts that he meets the minimum requirements to have his post upgraded to P.4.

He contends that the Director-General's decision to maintain it at P.3 is unlawful and betrays abuse of authority: it is based on a misapplication of the principles and practices of the International Bureau and those of the United Nations common system, and on the unwarranted rejection of the recommendations made by the Joint Appeals Committee and the working group formed by the Director-General himself.

The Director-General misconstrued the notion of "prospective classification". His post was evaluated prospectively for lack of time and the assessment is more an analysis of tasks *performed* than of future attributions required by the restructuring of his post or the International Bureau.

The complainant points out that in the United Nations common system the practice is for the incumbent of the upgraded post to be appointed automatically to the post if he is shown to have given satisfaction. The International Bureau too has done that in practice: the incumbents of all upgraded posts without exception have been promoted.

It is obvious that the Director-General decided to have his post audited a third time merely in order to challenge - unjustly - the reclassification from P.3 to P.4 and cancel the appeals process. Matters were made worse by the "dilatory measures" the Director-General took as soon as he learned that the post had been upgraded to P.4. For example, he twice refused to let the complainant and the Joint Appeals Committee see certain documents, in breach of his right of defence; contrary to consistent practice, the Staff Association was denied the opportunity to examine Mrs T.'s report; and the Director-General formed a working group to consider the Committee's report etc.

Lastly, Mrs F.'s classification of his post was in gross breach of the rules on appeals and those on the reclassification of posts in the Professional and Senior categories and shows several procedural errors and flaws. Furthermore, she drew wrong conclusions from the facts solely in order to invalidate Mrs T.'s classification.

The complainant asks the Tribunal to quash the decision of 27 April 2000, to order the Director-General to upgrade his post to P.4 and to promote him to that grade as from 1 May 1999, the "date on which the decision challenged in this complaint was implemented" and to award him moral damages in an amount of 20,000 Swiss francs. He also claims 10,000 francs in costs.

C. In its reply the Union submits that the impugned decision concerns only the grading of the complainant's post. The complaint is therefore irreceivable insofar as it addresses the complainant's promotion to grade P.4.

Citing the Tribunal's case law it points out that some of the items filed by the complainant as evidence are privileged, a number of them are only drafts and others he obtained by overstepping his authority as President of the Staff Association.

As to his allegation of breach of his right to a hearing, the Union points out that Mrs T. did not prepare a general report - she filled out "point-rating worksheets". Consequently, the complainant may claim production of his own worksheet but not those of other staff members. He is confusing his personal interests with those of the Staff Association in objecting to the fact that the latter was not allowed to see Mrs T.'s report: he has no standing to plead breach of someone else's right to a hearing and besides, only by way of exception was the Association consulted about Mrs C.'s report.

The UPU denies procedural flaws. Authority for decisions about post classification lies with the Director-General and there can be no objection to his seeking an opinion on the options available to him. It points out that the UPU's method of upgrading posts is different from that of the other organisations of the United Nations common system because that method was adopted at the Staff Association's request. Since, unlike the other organisations, the Union had never before based the grading of posts on the Master Standard, it was starting out from a different position from theirs. It observes that the complainant systematically refused, both as a staff member and as President of the Staff Association, to take part in any efforts to clarify the notion of "prospective classification".

It submits that the Director-General's decisions to obtain further information show no abuse of authority because such decisions form part of his attributions.

Lastly, the allegations of a mistake of fact and obviously wrong conclusions drawn from the evidence are without merit.

D. The complainant rejoins that his internal appeal addressed both the post classification and his promotion and that the Joint Appeals Committee found in his favour: the complaint is therefore receivable.

Contrary to the Union's assertion, he says, the case law it cites does hold that any items forming part of the proceedings that led to the impugned decision must be produced.

As to the breach of his right to a hearing, he maintains that Mrs T. wrote a report and that there was nothing confidential about it. The Union's plea that it consulted the Staff Association by way of exception is unsound: Rule 108.1 of the Staff Rules says that the Committee of the Staff Association must be consulted on all matters to do with staff welfare and administration.

As to the other procedural flaws, the complainant submits that, though the Director-General has wide discretion over post classification, that discretion is not limitless because it is subject to review. The fact that it was applying the Master Standard for the first time cannot release the UPU from its obligation to follow the procedure prescribed properly. He maintains that the third classification was unlawful; otherwise, the executive head of an organisation would be free to bring in as many classifiers as he needs until one of them grades the post as he wants.

The complainant points out that as part of the current reorganisation of the International Bureau, the attributions of his post - on which the classification was based - are to be split to make two posts. Consequently, as from 2 April 2001 the post at issue in this complaint will not exist in its present form.

E. In its surrejoinder the UPU submits that, since the complainant's post will no longer exist as from April 2001, his claim to its reclassification at grade P.4 no longer has any substance and is therefore irreceivable.

## CONSIDERATIONS

1. The complainant, a Tanzanian citizen born in 1945, joined the Universal Postal Union (UPU) at its headquarters in Bern in 1983 as a second secretary at grade P.2 in the Personnel Section. After being promoted to first secretary at grade P.3, he was transferred at his own request to another P.3 post in a different section as from 1 September 1992. On 9 March 1999 he was elected President of the Staff Association.

Meanwhile, the Union having embarked on a post classification exercise, the Director-General had hired the services of an external classifier to grade posts in the Professional and Senior categories. The Union had never before used the Master Standard of the International Civil Service Commission (ICSC) in regrading those posts.

In accordance with the procedure, a post description and detailed questionnaire signed by their immediate supervisors were supplied by all staff members.

The classifier, Mrs C., drew up a classification of posts in the Professional and Senior categories. Staff were so informed by office notice 31/1999 of 29 April 1999, which said that incumbents of upgraded posts would not be promoted automatically and that the posts would be put up for competition. The complainant's post was graded as P.3. The Director-General approved the classification and the rules to apply it which provided for the possibility of review. A standing committee was set up to consider applications for the review of grades assigned to posts in the Professional and Senior categories. Where they were found receivable, the applications were to be submitted to a new external classifier selected jointly by the Staff Association and the Director-General, authority for decisions on post classification lying with the latter.

Mrs T. was appointed as the new classifier. Of the twenty-six applications for review submitted to her she confirmed the grade attributed in eighteen cases and upgraded the posts in three others. The remaining five were upgraded on a "prospective" basis. These included the complainant's post, which was given a "prospective"

classification of P.4. She specified what she meant by the term: an upgrading to P.4 would be contingent on the "extension" of the staff member's duties.

By a letter of 18 August 1999 the complainant was informed of the Director-General's decision to maintain his post at P.3 until the conditions set out in the attachments to the classifier's recommendation were met. On the same day he asked the Director-General to reconsider his decision.

The Director-General asked Mrs T. to state exactly what she meant by "prospective classification". Mrs T. did so, adding that only individual desk audits of the staff members concerned would have enabled her to determine the level of the duties they actually performed.

The matter was referred to the Joint Appeals Committee. In its confidential report the latter recommended allowing the appeal, in other words upgrading the complainant's post and promoting him to grade P.4.

After reading the report, the Director-General made yet another attempt to determine the meaning of "prospective classification". For the purpose he arranged a telephone conference call with Mrs T. on 24 February 2000. The complainant, who had been invited to take part both on a personal basis and as President of the Staff Association, chose not to attend. He was nonetheless informed of the conclusions reached. According to Mrs T., for a prospective classification to become definitive:

- (a) the post must involve greater responsibilities and qualifications which justify upgrading it;
- (b) the incumbent must assume the increased responsibilities and perform the duties to the supervisors' entire satisfaction in order to be eligible for promotion.

Even so, the post would be put up for competition.

When asked, Mrs T. said that she was unable to complete her evaluation for lack of time and that an individual desk audit with the incumbent was the best way of determining the level of duties.

The Director-General then decided to have Mrs T.'s assessment completed by another classifier. The Staff Association was invited to participate in choosing one, but declined on the grounds that to appoint a third classifier would be contrary to the procedure for the grading of posts in the Professional and Senior categories.

The complainant refused a desk audit with the appointed classifier, Mrs F., who therefore based her assessment on the same documents as her colleagues. She graded the complainant's post as P.3.

The Director-General upheld that grading on 27 April 2000. That is the decision now under challenge.

2. The complainant seeks the quashing of that decision, the upgrading of his post to P.4, promotion to that grade as from 1 May 1999 (when the impugned decision took effect), and awards of 20,000 Swiss francs in moral damages and 10,000 francs in costs.

In support of his claims the complainant has several pleas - procedural flaws, errors of fact and of law, abuse of authority - which are addressed below. In his submission the second evaluation grading his post as P.4 was the right one because it was based on the post description and questionnaire and matched the duties he actually performed. So the Director-General had no reason to order a third assessment and his decision to do so was in breach of the procedure agreed on with the Staff Association. Besides, the third assessment itself was flawed, first and foremost because the classifier undertook a complete review of the post rather than completing the second classifier's assessment.

The Union seeks the dismissal of the complaint, on the grounds that it is partly irreceivable and that the complainant's pleas and charges are devoid of merit.

3. The UPU asks the Tribunal to declare that the complainant's claim to promotion to P.4, on the grounds that his post was upgraded to that level, is irreceivable. It observes that, even supposing it had been upgraded, the post would in any case have been put up for competition. Besides, the impugned decision does not address promotion, so the internal means of redress have not been exhausted.

The complainant retorts that the matter has already been dealt with internally, the Joint Appeals Committee having found in his favour on that score.

The Tribunal need entertain that issue only if the decision to grade the post as P.3 stands.

4. The complainant stated that his post would no longer exist as from 2 April 2001. In its surrejoinder the Union accordingly asked the Tribunal to declare the complaint irreceivable for want of a cause of action.

That claim could succeed if the only issue was the future grading of the post. But that is not the case: the classification for the period ending 1 April 2001 is also at issue since the complainant claims promotion to P.4 with retroactive effect. He is entitled to have that claim considered, at least in terms of its monetary implications.

5. The defendant proposes the removal from the file of certain items of evidence deemed confidential to which the complainant had access as President of the Staff Association and which, the Union alleges, he produced without authorisation in breach of his duties as a staff member.

It submits to the Tribunal certain items it regards as confidential which are not for communication to the complainant.

The Tribunal's practice is to consider any items that are material to the case (see amongst others Judgment 1637, *in re Fahmy* No. 3, under 6).

As to the documents submitted by the Union as confidential, the Tribunal will not use them to the complainant's detriment unless he has had the opportunity to see them beforehand (see Judgment 1815, *in re Gutiérrez*, under 2, and the others cited therein).

6. In any grading exercise the assessment of the type of work performed and the level of responsibility is a value judgment, and only those whose training and experience equip them for the task may make such an assessment. The decision is, in other words, a discretionary one. So it is subject to review only on limited grounds and will not ordinarily be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. The Tribunal will not substitute its own assessment or direct that a new one be made unless it is satisfied on the evidence that there is a fatal flaw of that kind (see Judgments 1647, *in re Bombo N'Djimbi*, under 7, 1808, *in re Mesfin*, under 5, and the others cited therein).

7. The parties disagree as to the exact purpose of the grading exercise and the procedure to be followed.

(a) Neither party denies that posts should be graded according to the incumbent's current duties and responsibilities, and they are right on that score.

This accordingly rules out "prospective" classification, which is based on the likely evolution of the post.

(b) However, many of the complainant's objections are based on the assumption that under the grading procedure adopted the classifier is virtually bound to base the evaluations solely on the post description and questionnaire, without completing the information by means of another evaluation or an individual interview.

The UPU assumes the opposite.

The evidence shows that the Union is right. The UPU is part of the United Nations common system. It was using the ICSC's recommendations and Master Standard for the first time. It began by applying that procedure to posts in the General Service category at the end of 1996 and in early 1997. The process is described in office notice 62/1997, paragraph 3 of which states that "information was collected by means of a questionnaire. Where it proved necessary to complete or clarify the information given by the incumbents of the posts, desk audits ... were carried out by the consultant. The expanded Management Committee (together with two representatives of the Staff Association) requested 16 additional desk audits".<sup>(2)</sup> In office notice 31/1999 of 29 April 1999, which is about the grading of posts in the Professional and Senior categories, the Director-General explains how the first stage of the evaluation procedure was conducted. A description of every post, written by the incumbent and endorsed by the supervisor, was given to the classifier. The latter "conducted desk audits with the chosen incumbents and their

supervisors when she deemed necessary ... In all, 27 desk audits were carried out". The notice goes on to explain the review procedure. If a request for review is receivable, a new external classifier chosen by agreement between the Director-General and Staff Association carries out a new evaluation "and possibly a 'desk audit'". It is quite plain from these documents - which have not been challenged on this point - that the post description could be supplemented by a desk audit if necessary.

(c) It follows that the second ("prospective") classification of the complainant's post was not consistent with these rules since the classifier did not determine the grade solely on the strength of his current duties and responsibilities. Furthermore, she did not carry out a desk audit - though she thought one was necessary - to determine his duties and responsibilities exactly. It was clearly in the Union's interests that the results of the classification should be applied within a reasonable period of time.

That being so the Director-General did not exceed his discretionary authority by ordering a further evaluation - as allowed by the rules on review - and appointing a new classifier. A desk audit may not have been feasible at the time, and so he did not overstep his authority in ordering a new classification.

The complainant argues that a desk audit was unnecessary as the post description and questionnaire were evidence enough that what the second classifier described as a "prospective" classification in fact corresponded to his post as it stood. But the plea fails. Experience had already shown that desk audits were often necessary for a precise evaluation, and the Director-General did not abuse his discretionary authority by following the second classifier's opinion on that matter.

8. The complainant pleads breach of his right of defence inasmuch as the Union refused to let him see Mrs T.'s general report. The Union retorts that what she prepared was not a report but individual point rating sheets for each staff member and that they cannot all be disclosed to the complainant. In his rejoinder, however, the complainant acknowledges that the Union did produce the "report" - which is more akin to a letter - in support of its reply.

There is no longer any substance to that objection since the complainant was free to rely on the document as he wished.

9. The complainant objects that there was breach of his right to be heard in that the Staff Association was not given the opportunity to examine Mrs T.'s report.

He has come to the Tribunal in a personal capacity and so lacks *locus standi* to assert the rights of a staff association. He could no doubt plead a procedural flaw if cooperation with the Staff Association was compulsory in this instance and was likely to have a bearing on the outcome of the case.

But there is no evidence that that is so. Paragraph 1 of Staff Rule 108.1, cited by the complainant, provides that the Committee of the Staff Association shall be consulted "on questions relating to staff welfare and administration, including policy on appointments, promotions and terminations" and paragraph 2 provides for "general administrative instructions or directives on questions within the scope of paragraph 1". The rule allows the authorities some leeway in choosing the issues to be submitted to the Committee. Although the Staff Association was consulted about grading policy, clearly Rule 108.1 did not require it to be consulted again in connection with individual requests for review of initial gradings.

10. The complainant pleads other procedural flaws.

(a) In his submission, after the Joint Appeals Committee recommended allowing the appeal, the Director-General ought not to have sought the opinion of members of a working group formed to write a report. The complainant learned of the document. He contends that the Director-General had no right to seek other opinions.

The Union retorts that the document is privileged. Moreover, it contends that the Director-General is entitled to seek all necessary opinions.

It is right. There was nothing reprehensible in the Director-General's action. The plea fails.

(b) Similarly, the complainant objects to the Director-General's having sought information from the classifier, Mrs T., in order to clarify what she meant by "prospective" classification.

The same observations apply to that plea. The Director-General may gather any information which will enable him to take his decision advisedly. The classifications qualified as "prospective" called for some explanation.

There was no breach of the complainant's right to be heard because he received copies of the correspondence, was invited to take part in the conference call - even if he declined at his own risk - and was informed of the conclusions drawn from it.

The plea fails.

(c) The complainant further contends that the Director-General broke the rules on appeals. He does no more than observe that, according to the rules, the Director-General should have responded to his request before referring it to the Joint Appeals Committee (Rule 111.3), and contests the fact that the review procedure provided for direct appeal to the Committee. However, he claims no injury on that count.

If the point is intended as a plea, it is clearly without merit.

(d) The same applies to his objection that the Director-General tried to relieve the President of the Joint Appeals Committee of her duties. The Committee's proceedings were proper and the complainant claims no injury on that count.

(e) The complainant holds that the grading procedure for posts in the Professional and Senior categories provided for only two evaluations. By ordering a third, the Director-General was in breach of a procedure he had himself set.

As already noted, there was no abuse of authority in the Director-General's finding that Mrs T.'s evaluation was inconsistent with the procedure and virtually unusable as a basis for any reliable assessment of the post as it stood. It follows that the new evaluation he commissioned replaced Mrs T.'s and served as a third opinion. The situation was a new one and the procedure he followed to deal with it was consistent with the intent of the rules he had set.

(f) The complainant further alleges breach of equal treatment and the *res judicata* rule. He sees unequal treatment in the fact that the Administration conferred on itself the right to conduct three evaluations, the last of which disregarded the one by Mrs T. However, he fails to establish that in a comparable or like situation it would have acted otherwise.

He may not invoke *res judicata* for want of a decision by a judicial authority. Nor may he plead breach of the authority of an administrative decision that has not been challenged. Mrs T. was not an administrative authority. Besides, her evaluation was not final and if it showed any shortcomings, they could be addressed in an appeal against the effects of the classification, following a final decision by the Director-General.

(g) The complainant submits that no additional information was necessary because it could be inferred from Mrs T.'s classification that even as it stood his post could be upgraded to P.4.

However, even supposing Mrs T. was right that a desk audit was still needed, the additional information should have been limited to the audit and its result should then have been used to supplement Mrs T.'s evaluation.

It has already been shown above that such an option was all but unfeasible and that the Director-General did not misuse his discretionary authority by ordering a new evaluation. Mrs T. was not in a position to provide further information within a reasonable period given the date at which the new classification was to take effect. Besides, there was no knowing what the new evaluation would bring and the changes it might require vis-à-vis Mrs T.'s.

It is to be noted that the complainant declined all involvement in the procedure to obtain additional information. If as a result the classifier did not receive information which might have been favourable to his case, he alone would be to blame.

11. The complainant sees abuse of authority in the fact that the Director-General did not classify his post as P.4. In his submission by refusing to upgrade it he favoured the organisation unduly to the complainant's detriment.

Abuse of authority may not be presumed (see Judgment 2035, *in re* Boivin No. 5, under 8). It is plain from the foregoing that the Director-General's purpose was to order a classification which was fair and consistent with the rules of the ICSC. There is not one iota of evidence of any abuse of authority.

12. The complainant pleads an error of fact.

The classification itself establishes how prospective classification is to be understood. Points are assigned only to current activities and responsibilities as set out in the post description and questionnaire. It is only logical that the classifier could not assign points to activities or responsibilities not yet defined. Accordingly, the "prospective" classification was meaningless and it was an error of fact not to recognise as much in the impugned decision.

He alleges that the Union was wrong to discount Mrs T.'s conclusions, since in the comments attached to the classification she said that "The final grade determination is based on the Officer's performance of substantive activities such as the revision of consultant reports (more than for format) and the conceptualization of regional projects including their description in project papers for approval by the [Council of Administration]." He maintains that he fulfils these conditions, so the UPU was bound to upgrade his post to P.4.

In support of his allegation of a mistake by the Director-General, he points out that the Joint Appeals Committee and the working group recommended allowing his appeal.

He fails to prove such a mistake. The recommendations were submitted after he filed his internal appeal and at a time when Mrs T. had not yet supplied the necessary clarifications - something she was qualified to do, unlike the Joint Appeals Committee or the members of the working group that the Director-General consulted. Mrs T.'s comments, the correspondence with her and the replies given by telephone show that the prospective grading would be valid only if the incumbent assumed new or extended responsibilities and activities. That was not yet established and an individual desk audit was required for the purpose. The Director-General's decision shows no mistake of fact.

The complainant puts forward virtually the same arguments in support of his allegation that essential facts were overlooked and obviously wrong conclusions drawn from the evidence. Those pleas too must fail.

13. All the pleas being devoid of merit, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Office notice 56/1999 of 19 August 1999 stated that prospective classification meant that "upgrading [of the posts in question was] contingent upon the expansion of the duties of the posts involving additional qualifications and responsibilities which will be studied by the group of experts responsible for reviewing the structure and operations of the [International Bureau] early in 2000". (Registry's translation)



## 2. Registry's translation.

Updated by PFR. Approved by CC. Last update: 27 July 2001.