

**In re RHYNER-CUEREL**

**Judgment No. 317**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Universal Postal Union (UPU) by Miss Françoise Cuérel (who has since married and is now known as Mrs. Rhyner-Cuérel) on 29 April 1976 and brought into conformity with the Rules of Court on 21 May, the UPU's reply of 24 August, the complainant's rejoinder of 21 September and the UPU's surrejoinder of 15 November 1976;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, Staff Regulations 9.2, 9.5, 9.6 and 9.14 of the International Bureau of the UPU, Articles 6, 19, 21, 34, 46, 49 to 54, 56 and 61 to 63 of the Regulations of the Provident Scheme of the UPU and the relevant provisions of the internal rules of the Scheme;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. From 1 May 1954 to 31 July 1958 the complainant served on the staff of the International United Bureaux for the Protection of Industrial, Literary and Artistic Property (BIRPI), now known as the World Intellectual Property Organization (WIPO). On 1 August 1958 she joined the staff of the International Bureau of the Universal Postal Union on a provisional appointment as a typist, a post corresponding to grade G.2. On 1 October 1958 she was given a permanent appointment as a junior chancery assistant. On 1 January 1962 she was promoted to senior chancery assistant and from 1 January 1964 her grade was known as Second Clerk (grade G.5). For some four years she served as supervisor of Chancery II. From 1 March to 13 November 1966 she was given leave without pay for reasons of health. She was then transferred to the information and documentation branch and promoted to First Clerk (grade G.6) on 1 January 1968. From 19 February 1968 until 30 April 1976, when she left the Bureau, she served as secretary and shorthand-typist at grade G.6 in the legal and constitutional questions section.

B. On her appointment to the staff of the Bureau account was taken, as she was informed on 26 November 1958, of her period of service with BIRPI in determining her recognised seniority for the purpose of applying certain provisions - relating to the grant and calculation of retirement pensions - of the old "Regulations on the organisation, operation and control of the work of the International Bureau" (dated 30 June 1953). The Regulations did not at the time provide for a deferred retirement benefit, a form of settlement of termination entitlements made in the event of termination or resignation. Under a new social security scheme introduced on 1 January 1964 the complainant kept her acquired right to recognition of her period of service for the purpose of payment of a normal retirement pension at the age of sixty or of an early pension at the age of fifty-five.

C. The Provident Scheme of the UPU did not exist at the time of the complainant's appointment. In keeping with the rules then in force, however, the complainant joined a "survivors' insurance scheme", which the UPU financed by regular payment of insurance contributions amounting to 15 per cent of salary. A sum equivalent to 5 per cent of the complainant's basic salary was also withheld provisionally as her personal contribution, on the analogy of a new rule which had come into effect on 1 January 1959 for staff members given permanent appointments after that date. That rule was repealed and the complainant made no personal contributions after 1 January 1961. A new social security scheme was introduced similar to that in force for the United Nations common system. On 1 January 1964 a UPU "Provident Scheme" was established and the complainant joined the new pension fund of the Scheme. The Scheme consists of a "Provident Fund" for staff members appointed after 1 January 1964 and a "Pension Fund" for staff members appointed before that date. As a participant of the Pension Fund the complainant paid into it from 1 January 1964 the prescribed contributions, which amounted to 7 per cent of her pensionable remuneration, and the UPU made the prescribed monthly payments on her behalf.

D. By letters of 20 June and 28 November 1973 the complainant applied for early retirement for reasons of health and produced a medical certificate made out by a Dr. Wälchli on 20 June 1973. The UPU and the Provident Scheme construed her application as a "request for termination for reasons of health" within the meaning of Staff Regulation 9.2 "combined with an application for grant of a disability benefit" within the meaning of Articles 34 and 56 of the Regulations of the Provident Scheme. The UPU therefore consulted its medical adviser, Dr. Strasser, who, in a medical report of 29 January 1974 based on his own examination of the complainant and on a medical report by Dr. Wälchli dated 15 December 1973, found that the complainant was not suffering from general incapacity for work within the meaning of Article 34 of the Scheme Regulations, but recommended granting her six months' sickness leave.

E. Having seen the medical reports, the Management Board of the Provident Scheme concluded, on 9 February 1974, that the complainant did not meet the conditions for grant of a disability benefit - incapacity for service likely to be permanent or of long duration. It did not, however, rule out review of the case. On 28 February the UPU informed the complainant of the Board's view and granted her extended sickness leave on full pay from 1 March. By letter of 30 March, Maître Stampfli, the complainant's lawyer, objected to the grant of sickness leave and to the way in which the medical adviser of the UPU had reached his conclusions.

F. In June 1974 the UPU received another certificate from Dr. Wälchli, dated 14 June, which suggested that the complainant's health had improved. It therefore wrote to her on 21 August asking her whether she felt able to resume work shortly and informing her that, under the rules in force, after 1 September 1974 she would be allowed sickness leave only on half-pay. By letter of 30 August Maître Stämpfli said that his client wished to start proceedings to claim her early retirement pension and in support of her application he sent a medical certificate made out by Dr. Wälchli on 26 August 1974 and referred to the earlier ones made out by Dr. Wälchli on 15 December 1973 and 14 June 1974. In a medical report dated 8 November 1974 Dr. Strasser, the medical adviser both of the Bureau and of the Provident Scheme, held to his view that the complainant was fit for work, but proposed consulting Professor Walther, Director of the Psychiatric Clinic of the University of Berne, as a psychiatric expert. On 22 November 1974 the complainant's lawyer agreed, on certain conditions, to consulting the expert proposed by the medical adviser, and Professor Walther was so informed. In his report of 22 May 1975 he found that the complainant was prone to recurrent fits of nervous depression and was no longer fit for service at the Bureau. He added, however: "She is not suffering from such general incapacity as would prevent her from accepting in some other organisation, administration or enterprise work which is reasonably compatible with her abilities and with the duties she performs at the International Bureau of the UPU as secretary and shorthand-typist".

G. On 2 September 1975 this medical report was put before the Management Board of the Provident Scheme. The Board refrained from taking any immediate and final decision on the complainant's application because of two new facts which might affect its decision. The first was a request made by the Provident Scheme to the United Nations Joint Staff Pension Fund for an interpretation of Article 34 of the Scheme Regulations. The second new fact was a letter which the complainant had sent on 25 August 1975 to the chairman of the Board. A reply was received from the United Nations Joint Staff Pension Fund at the end of June 1975. It took the view that a disability benefit should be paid to a participant suffering from incapacity, due to injury or illness, to earn a living, but that a participant who was medically fit for employment outside the organisation should not be entitled to a benefit. The Board observed that in her letter of 25 August 1975 to its chairman the complainant had mentioned for the first time the possibility of payment of a deferred retirement benefit at the age of sixty, and this, says the UPU, "led the Board to think that she was perhaps no longer seeking a disability benefit". The Management Board therefore appointed a special delegation "to approach the complainant's lawyer, discuss the case fully with him and ascertain his own opinion and his client's real intention".

H. Talks took place and on 23 January 1976 the complainant represented by her lawyer, concluded a "contract for the settlement of termination entitlements" with the UPU and its Provident Scheme. Under the contract the Scheme was to pay her a "deferred retirement benefit" within the meaning of Article 53 of the Scheme Regulations from 23 April 1989 "on the conditions which apply to all Scheme participants". By a further letter also dated 23 January 1976, the complainant's lawyer confirmed on her behalf that with the conclusion of the contract her application for a disability benefit lapsed.

I. In performance of the contract, and as she had been informed by letter of 28 January 1976, the complainant's appointment was terminated for reasons of health on 30 April. By a letter of 25 March the secretary of the Scheme explained to her in detail how the Scheme would pay her entitlements and calculate her deferred retirement benefit

and how many years of service it would take into account in making that calculation; the period during which the contributions prescribed in Article 49 of the Scheme Regulations were payable was defined in Article 46, paragraph 1, namely the period from 1 January 1964 to 30 April 1976, when she ceased to be a participant, i.e. 11 years and 8 months.

J. The UPU says that the complainant did not respond to the letter of 25 March nor to a letter of 29 April 1976 in which the secretary of the Scheme told her "of the payment made by the insurance fund and asked her to sign an appended statement of release". The statement ran: "I acknowledge receipt of the lump sum and bond certificates mentioned above and forgo any claim in this regard on the International Bureau ...". The UPU says that she signed the statement and sent it back without comment and on termination was paid a total of 98,798.60 Swiss francs - 38,965.50 Swiss francs as termination indemnity 3,881.50 francs as compensation for unused annual leave insurance fund deposits amounting to 28,951.60 francs and Swiss bonds bearing a normal value of 27,000 francs. She was also guaranteed payment of a deferred retirement benefit of 11,957.40 francs a year at the age of sixty, or 8,822 francs a year at the age of fifty-five. Finally, she will in time receive an annuity from the Swiss old-age and survivors' insurance scheme (AVS).

K. The complainant finds it unfair that in calculating her pension account was taken only of her length of service since the introduction of the new social security scheme in 1964, viz. 11 years and 8 months; counting her periods of service with BIRPI/WIPO (1954-58) and with the UPU before the new scheme came into force (1958-63) her length of service would total 21 years and 4 months.

L. In her claims for relief the complainant asks the Tribunal "(1) to review the number of years of service to be taken into account in calculating my deferred benefit; (2) to take account for that purpose (a) of the fact that my termination for reasons of health is wholly due" to working conditions "which are contrary to the Universal Declaration of Human Rights; (b) of the breaches of procedural rules committed by the International Bureau of the UPU in respect of the medical examination, which she originally asked for on 22 May 1973 but which did not take place until April 1975".

M. In its memorandum of 24 August 1976 the UPU notes that the complainant is challenging the fourth section of the "contract for the settlement of termination entitlements", which relates to the calculation of her deferred retirement benefit (see paragraph H above). It points out that that section of the contract falls within the exclusive competence of the UPU Provident Scheme, which is administered and represented in relation to third parties by a joint collective body known as the Management Board, a foundation under Swiss law which is subject to control by the Swiss Federal Council and possesses legal personality distinct from that of the UPU. The challenged contract is not a "decision" and even if it were, the section which is contested concerns, not the UPU, but a distinct legal entity, the Provident Scheme. Even if the complaint were taken to "impugn" the letter of 25 March 1976 (see paragraph I above), in which the secretary of the Scheme told the complainant how her entitlements would be settled, that letter is not a "decision" either. Even if it were, the complainant would not have exhausted the internal means of redress since she failed to appeal to the Management Board in accordance with Article 19 of the Scheme Regulations.

N. The UPU therefore contends that the complaint is plainly irreceivable. First, it does not challenge a "decision" but a freely concluded "contract" or possibly a "letter of information" sent to the complainant in accordance with the contract. Secondly, it is not brought against the Provident Scheme of the UPU, which concluded the challenged section of the contract and sent the letter in question, but against the International Bureau which, took no decision on the matter and is not competent to do so. Thirdly, the complainant has failed to exhaust the internal means of redress available to her under Article 19 of the Scheme Regulations.

O. The UPU reserves its case on the merits, should the Tribunal dismiss its plea of irreceivability. It argues that the complainant consented to payment of a deferred retirement benefit - and was in fact paid the sums mentioned in paragraph J above - "within the meaning of Article 53 of the Scheme Regulations" (which governs the method of calculating such benefit) and "on conditions which apply to all Scheme participants". Under that clause of the contract the complainant, on the advice of her lawyer and "in full knowledge of her position, agreed not only to payment of a deferred retirement benefit but also to the method of calculating that benefit laid down in the Regulations". *Volenti non fit injuria*, and the complainant is estopped from objecting to that method, which is in accordance with Article 53 of the Regulations and of which the secretary of the Scheme had informed her in accordance with the contract.

P. The UPU therefore asks the Tribunal to find the complaint irreceivable and, subsidiarily, as to the merits, to dismiss all the claims for relief as utterly unfounded. As to the form, it also asks for the deletion, on the grounds that it is "libellous and irrelevant", a passage in the complainant's original memorandum in which she accuses her immediate superior of having shown her unwanted attentions.

Q. In her rejoinder the complainant makes two further claims. She asks the Tribunal, first, to order the Management Board of the Provident Scheme to review the rules on calculation of length of service and, secondly, to order the International Bureau of the UPU to adapt its allowances to the salary increases granted by the United Nations to General Service category staff members with retroactive effect from 1 August 1975.

R. In its surrejoinder the UPU observes that in her rejoinder the complainant has revised her original claims and now further seeks review of the rules on calculation of length of service, i.e. a review of the Regulations of the Provident Scheme. It contends that such a claim falls outside the Tribunal's competence. Moreover, it has never formed the subject of a prior appeal within the meaning of Article VII of the Statute of the Tribunal and so the complaint remains Irreceivable in its revised form. The second claim made in the rejoinder is also a new one which goes beyond the original purview of the complaint and has never before been raised with the UPU. Hence "in the absence of a decision by the defendant organisation that new claim is also irreceivable". It is in any case quite unfounded.

S. Accordingly the UPU fully abides by the conclusions in its reply of 24 August 1976.

#### CONSIDERATIONS:

As to the form of the complaint:

1. The Universal Postal Union asks the Tribunal to strike from the complainant's original memorandum a passage which it regards as libellous and irrelevant and in which the complainant alleges that one of her supervisors showed her unwanted attentions. It is true that the passage does not mention any fact of direct relevance to the complaint, the subject of which is the number of years of service to be taken into account in calculating a deferred retirement benefit. In general, however, a complainant may not be taken to task for giving his own account of the conditions in which he has worked even if they have no direct bearing on the settlement of the legal points he may raise. What may be expected of him is that he should not twist the facts as he knows them. Hence there are no grounds for striking out the complainant's allegations. Since they have a bearing on her work they are in principle admissible. The fact that they are not proved does not mean that they may be treated as wittingly false.

As to the receivability of the complaint:

2. Under the heading "Date of the decision impugned" the complainant puts "End of January 1976, taking effect on 1 May 1976". There was only one act, however, in which the Union took part at that time and which concerned the complainant. On 23 January 1976 the Union and the Provident Scheme jointly concluded a contract with her. According to Article VII of its Statute the Tribunal hears complaints which challenge decisions and decisions alone, and that excludes contracts, for example. Unless the complainant is impugning a decision her complaint is irreceivable.

If the complainant wished to avoid or vary the contract of 25 January 1976 she ought first to have asked the other parties and called for decisions from them on the matter. Those are the only kind of decisions she might have impugned before the Tribunal.

3. There is no point in considering the complainant's contention in her rejoinder that she might have lodged a complaint under Article VII, paragraph 3, of the Statute has the Union and the Provident Scheme remained silent for over sixty days. That contention is immaterial. In any event the complainant has neither established nor even contended that in filing her complaint on 29 April 1976 she acted within the period of ninety days which, according to Article VII, paragraph 3, starts to run on the expiry of the period of sixty days and which must be respected if any complaint is to be receivable.

4. In the fourth clause of the contract of 23 January 1976 the Provident Scheme of the UPU undertook to pay the complainant "a deferred retirement benefit under Article 53 of the Regulations of the Provident Scheme of the UPU, payable from 23 April 1989 on the terms which apply to all participants in the Scheme". On 25 March 1976 the secretary of the Scheme wrote to tell the complainant about such matters as the amount she would be paid

under that provision. That letter interpreted the rules and gave figures which were open to discussion. The UPU is therefore wrong in contending that the letter merely flowed as a normal consequence of performance of the contract of 23 January 1976. That letter was the first document to set out in detail the amounts of entitlements which the complainant would have been unable to work out with any certainty on her own or with the advice of her lawyer. In other words, it furthered the performance of the contract of 23 January 1976, was a fairly important supplement to that contract and constituted a true decision. There is no need, however, to consider whether the complainant is implicitly impugning that decision, which she does not mention in her claims for relief. Even if she were, her complaint would be irreceivable for two reasons.

The first reason is this. The decision of 25 March 1976 was taken by the secretary of the Provident Scheme and relates to the Scheme's obligations. According to Article 1(3) of its Regulations the Scheme is a fund within the meaning of sections 80 and following of the Swiss Civil Code and it is therefore an independent legal entity distinct from the UPU itself. Had the complainant wished to impugn the decision of 25 March 1976 she ought to have brought her complaint against the Scheme, not the UPU. But the complaint is brought against the UPU, not the Scheme, and so would be irreceivable.

Secondly - and again on the hypothesis the Tribunal is considering - the complainant would have been bound under Article 19(1) of the Regulations of the Provident Scheme to appeal to its Management Board and then, if need be, within sixty days submit to it a request for review of its decision. She did not follow that procedure. She would therefore have failed to exhaust the internal means of redress in accordance with Article VII, paragraph 1, of the Statute of the Tribunal. That is the second reason why her complaint would be declared irreceivable.

5. Since the complaint is irreceivable, so too is the rejoinder. Besides, in so far as the claims for relief set out in the rejoinder go beyond those in the original memorandum they are in themselves irreceivable. The Tribunal will never comment on the validity of the rules applied or the adjustment of allowances paid. Those matters are not raised in the original memorandum. Moreover, the validity of rules is not subject to review by the Tribunal, which is competent only to review decisions - in other words, individual and specific acts.

#### DECISION:

For the above reasons,

1. The Union's request for the striking out of a passage from the complaint is disallowed.
2. The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 November 1977.

(Signed)

M. Letourneur,  
André Grisel  
Devlin

Roland Morellet