

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

## **107th Session**

## **Judgment No. 2845**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. J. against the Universal Postal Union (UPU) on 9 April 2008, the UPU's reply of 20 May, the complainant's rejoinder of 2 July, the Union's surrejoinder of 22 September, the complainant's further submissions of 12 October and the Union's final comments thereon dated 12 December 2008;

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 case are set out in Judgment 2747, delivered on 9 July 2008, concerning the complainant's first complaint. Suffice it to note that the complainant joined the International Bureau of the UPU in 1987 and that he held the position of Manager of the "Postal Economics" Programme, at grade P 5, in the Economic and Regulatory Affairs Directorate from 1 September 2001 until he was transferred, with effect from 1 August 2006, to the newly created

post of Coordinator of the “Acts of the Union” Programme. A large proportion of his duties were directly related to the activities of the Universal Postal Congress.

According to Article 9.8, paragraph 2, of the UPU Staff Regulations, “[s]taff members appointed between 1 January 1973 and 31 December 1989 shall not be retained in active service beyond the age of 60 years. The Director General may, in the interest of the Union, extend this age limit in exceptional cases.”

On 19 March 2007 the complainant filed his first three complaints with the Tribunal and the UPU received notification thereof on 14 June. On 27 June 2007 he attended a meeting at the Human Resources Directorate to discuss arrangements for his retirement, as he would reach the statutory retirement age on 30 June 2008. He pointed out in the course of the meeting that the Director General had offered, during a conversation in late May 2006, to retain him in service after the Congress, which was scheduled for August-September 2008, an offer that he had accepted provisionally, while stating that he would give his final decision in due course. By a letter of 28 June 2007 the complainant was informed that the Director General intended to confirm his statutory date of retirement. By a letter of 29 June 2007 to the Director General, which crossed that of 28 June, the complainant confirmed his acceptance of the May 2006 offer, referring to a tradition whereby staff members whose statutory date of retirement falls during a Congress year can remain in service until the end of the year. He added that Congress was, in his view, a “special event”.

In a letter of 13 July 2007 the Director General indicated to the complainant that no formal decision had been taken to defer his statutory date of retirement. He further stated that Congress did not constitute an exceptional case calling for deferral of the date in question. By a letter of 10 August 2007 the complainant asked the Director General to review his decision, arguing that an oral offer is no less valid than a written one and asserting that the Director General’s refusal to honour his offer constituted retaliation for his filing of three complaints with the Tribunal, given that a number of staff members

had been granted a deferral of their retirement date. An attempt was made subsequently to reach a settlement of all disputes. On 8 October 2007 the Director General wrote a letter to the complainant expressing regret that this initiative “was not successful” and confirming his decision not to extend his service.

The complainant filed an appeal with the Joint Appeals Committee on 15 October 2007. In its report of 8 January 2008 the Committee found that the complainant’s arguments in support of a deferral of his date of retirement were without merit and that the Director General’s decision could be upheld, since it was his prerogative to decide whether to defer the retirement date of a staff member in exceptional cases and in the interest of the Union. By a letter of 11 January 2008 the Director General informed the complainant that he was maintaining his decision. That is the impugned decision.

B. The complainant submits that the decision not to defer his retirement date constitutes an abuse of authority. He claims to have been sidelined since the arrival of the new Director General in 2005 and maintains that his working relationship with the latter deteriorated after he refused to be transferred to his current post. He contends that the Director General gave no rational and legitimate explanation for his refusal to act on his offer to defer the date of his retirement. In his opinion, the Director General’s decision was not taken in the interest of the Union but rather “to get rid of a troublesome staff member as quickly as possible”. The Director General’s explanations for his decisions of 13 July and 8 October 2007 were laconic, since he merely asserted that Congress did not constitute an exceptional case requiring deferral of his statutory date of retirement. According to the complainant, this statement is inconsistent with the Director General’s argument in support of his decision to transfer him, which emphasised the “strategic importance” of the duties entrusted to him, duties that called for the application of his “unique and invaluable” competences. He finds the decision not to postpone his retirement until after Congress to be arbitrary inasmuch as his competences seemed to be essential both during the session and in the following months. It is

during this period that plans to amend, develop, revise and ratify the Acts of the Union are discussed and these are areas in which, according to the Director General himself, his competences are “exceptional”. Moreover, the complainant infers from the terms of the decision of 8 October 2007 that it was “dependent” on the outcome of the attempt to reach a settlement of all pending disputes. As he sees it, the Director General did not act in the interest of the Union but retaliated against him for having refused to withdraw his first three complaints.

The complainant further alleges that there has been unequal treatment and points out that two staff members who reached the statutory retirement age before the 2008 Congress were granted a deferral of the date of their retirement. He refers in this connection to the “long-standing tradition” of extending the service of staff members reaching retirement age during a Congress year.

The complainant requests the setting aside of the decision of 11 January 2008 and the extension of his service until 31 December 2008. Should such an extension no longer be possible, he asks the Tribunal to order the UPU to pay him all the salary and benefits to which he would have been entitled if his service had been extended until 31 December 2008, together with interest as from the dates on which the sums in question would have fallen due, and to restore his pension entitlements for the period from 1 July to 31 December 2008. In either case he claims moral damages in the amount of 10,000 Swiss francs, as well as an equitable award of costs.

C. The UPU argues that the complaint is irreceivable to the extent that the complainant has filed new claims before the Tribunal for the award of financial compensation in the event that it is no longer possible to extend his service, as well as moral damages.

The Union points out that in May 2007 the Director of Human Resources, further to a request from the Director General for the development of forward-looking staff management, particularly with respect to retirement, submitted a strategy document on retirement planning which provided, inter alia, for the transfer of knowledge. To

achieve that aim, the planning procedure had to be initiated at least six months before the date of retirement. The UPU explains that since the complainant had not filed an official request for deferral of his retirement date, the Director of Human Resources treated his case “in accordance with [that] strategy [...] and bearing in mind the fact that it was a Congress year”; it was therefore approximately one year before the complainant’s retirement date that the Director considered his case and invited him to attend the meeting held on 27 June 2007.

The UPU contends that the decision whether or not to grant an extension of service to a staff member reaching the statutory retirement age falls within the Director General’s discretionary authority, and that the fact that a number of other staff members were granted such extensions is immaterial. It denies the existence of a practice of deferring the date of departure of staff members reaching the statutory retirement age during a Congress year and stresses that each case of deferral has been dealt with on an individual basis.

The Union disputes the charge of abuse of authority. While it understands the complainant’s wish to participate in Congress one last time, it argues that what is at stake is his personal interest and not that of the organisation. It points out that all documents and proposals submitted to Congress, which was to open on 23 July 2008, had to be either finalised or in the process of finalisation by 30 June 2008, the complainant’s date of retirement. Moreover, as Congress may be regarded as the beginning of a new cycle, the Director General felt that the Union’s interest would be best served if the new cycle were to be prepared with other staff members.

The UPU asserts that, contrary to the complainant’s contention, the attempt to reach a settlement should be viewed as an act of sound administration and not as evidence that the impugned decision is arbitrary.

D. In his rejoinder the complainant maintains that his claims are receivable. He affirms that his claim for moral damages was “implicitly contained” in his internal appeal and that his claim for

financial compensation is neither new nor unrelated to his principal claims.

The complainant also presses his pleas. He describes the Union's change of attitude to the extension of his service as "quite incomprehensible" but recalls that it coincided with the UPU's receipt of his three previous complaints.

He states that on 29 June 2007, i.e. one year before his statutory retirement date, he formally accepted the offer to postpone it; in his view, the Union therefore shows bad faith when it claims that he filed no official request for deferral of his retirement. He points out that the Director General has never denied proposing such a deferral or explained why it was precluded by forward-looking staff management.

The complainant challenges the Union's statement that documents for submission to Congress had to be either finalised or in the process of finalisation by 30 June 2008, because preparatory work was still under way on the date on which he filed his rejoinder. He adds that shortly before the opening of Congress the International Bureau usually receives amendments to the proposals and proposed reservations to the final protocols which have to be dealt with. He further points out that Congress represents the close of one cycle before constituting the opening of a new cycle, hence the UPU's practice of extending the service of staff members who so request during Congress years.

The complainant asserts that the Union never made him any settlement proposal and that, contrary to its statements, negotiations in fact never even commenced.

E. In its surrejoinder the UPU reiterates its position and rebuts the complainant's arguments, especially those concerning the lack of negotiations. It draws the Tribunal's attention to facts that have occurred since the filing of its reply, for instance the sending of an e-mail by the complainant to all staff members of the International Bureau although he had not obtained the authorisation required by administrative circular (PER) No. 023/Rev.3. The e-mail, just like

others sent by the complainant to representatives of UPU member countries, sought to tarnish the Director General's reputation.

Citing the letter of 13 July 2007, which excludes the possibility of any provisional or final agreement on the question of deferral of the complainant's retirement date, the Union challenges the latter's allegation that the Director General had offered a deferral in May 2006.

The UPU denies the existence of a link between the complainant's filing of his three previous complaints and the meeting of 27 June 2007; it points out in this regard that the complainant had already announced his intention to bring the matter before the Tribunal in early 2007.

The Union emphasises that the complainant's retirement on 30 June 2008 had no impact on the proceedings of Congress. Arguing that the complaint is an abuse of process because its sole purpose is to cause it harm, the UPU asks that the complainant be ordered to pay the costs of the proceedings.

F. In his further submissions the complainant questions the relevance of the information regarding the e-mails that he sent and contests the Union's version of the facts in this regard.

G. In its final comments the UPU maintains its arguments. It clarifies its version of the facts regarding the disputed e-mails.

## CONSIDERATIONS

1. The complainant's career path at the UPU and facts relevant to this case are set out in Judgment 2747, to which reference should be made.

2. The complainant claims that during a conversation in late May 2006 the Director General had proposed deferring the date of his retirement, which was scheduled for 30 June 2008, until 31 December 2008, i.e. until after Congress. He adds, however, that no formal

decision was taken at the time and that he had reserved the right to give a firm answer in due course. He states that his relations with the Director General deteriorated after he refused to be transferred with effect from 1 August 2006 to the newly created post of coordinator of the “Acts of the Union” Programme. The dispute arising from this refusal prompted him to file his three previous complaints with the Tribunal.

On 27 June 2007 a meeting was held on the subject of the complainant’s retirement. He was informed by letter of 28 June 2007 that the Director General intended to confirm his statutory retirement date, i.e. 30 June 2008. In a letter dated 29 June 2007 the complainant announced that he confirmed his acceptance of the offer to extend his service because, as he put it, Congress was a “special event”.

On 13 July 2007 the Director General, referring to the conversation in May 2006, informed him that no formal decision regarding the extension of his service had been taken and that he did not consider in this instance, and in the light of the forward-looking staff management mechanism, that Congress constituted an exceptional case requiring deferral of his statutory retirement date. On 10 August the complainant requested that the Director General review this decision. The latter confirmed it on 8 October. The Joint Appeals Committee, to which the matter was referred on 15 October 2007, submitted its report on 8 January 2008, concluding that the Director General could maintain his decision.

The complainant asks the Tribunal to set aside the decision of 11 January 2008 whereby the Director General maintained his decision not to defer his retirement date and to draw all the appropriate consequences. He puts forward two pleas in support of his complaint, namely abuse of authority and breach of the principle of equality of treatment.

3. The complainant asserts that the decision not to extend his service until 31 December 2008 constituted an abuse of authority since it “was not based on objective criteria related to the UPU’s interest but on personal considerations arising from the legal proceedings [he had]

initiated [...] and the deterioration in his working relationship with [the Director General]”.

He contends that since Congress was to be held in Geneva from 23 July to 12 August 2008, it was manifestly in the organisation’s interest to defer the date of his retirement. He states in this connection that he was the official who had “the most extensive knowledge of the Acts of the Union [and] the most experience with respect to the work of the Congress secretariat and revision of the Acts”, and that he spent most of his time at work preparing for Congress.

He also refers in his submissions to what he describes as a “long-standing tradition” in the organisation of “deferring the date of retirement until 31 December, on request, for staff members whose statutory retirement date fell during Congress years”.

He infers from the foregoing matters that the Director General’s decision not to defer the date of his retirement until 31 December 2008 was arbitrary.

4. The UPU replies that, according to Article 9.8, paragraph 2, of the Staff Regulations, the decision whether or not to extend the service of a staff member beyond the statutory retirement age falls within the Director General’s discretionary authority and that in the instant case the Director General held that Congress did not constitute an exceptional case requiring deferral of the complainant’s statutory date of retirement.

5. Article 9.8, paragraph 2, of the Staff Regulations is reproduced under A, above.

According to the Tribunal’s case law, a provision of this kind confers on the Director General a broad discretionary authority that is subject to limited review by the Tribunal, which will interfere only if it can be shown that a decision was taken without authority, that a rule of form or procedure was breached, that the decision was based on a mistake of fact or law, that an essential fact was overlooked, that a clearly mistaken conclusion was drawn from the facts or that there was

an abuse of authority (see, in particular, Judgments 1143, 2377 and 2669).

6. In the instant case the complainant, recruited in 1987, belonged to the category of staff members whose normal retirement age was 60 years. Born on 15 June 1948, he reached that age in June 2008. The Director General alone was entitled, in the exercise of his discretionary authority, to extend this age limit in the interest of the Union; but even though he is the sole judge of the organisation's interest, it must be clear from the evidence that his decision was taken solely with that interest in mind. The decision must on no account be arbitrary.

It appears, however, from the circumstances of the case and from several items of evidence that the Director General's decision in this instance was not taken solely in the UPU's interest.

7. The complainant lays considerable emphasis on the offer allegedly made by the Director General to extend his service until 31 December 2008. The Tribunal finds that, although there is no conclusive proof of such an assertion, the fact that the Director General and the complainant discussed the issue of extension of the latter's service in May 2006 is corroborated by the evidence on file. Moreover, the Director General never explicitly denied having proposed such an extension but merely indicated in his letters that no formal decision had been taken on the matter.

The Tribunal cannot but observe that the Director General's decision not to defer the complainant's retirement date appears to be totally at odds with his own words of high praise for the complainant. Indeed, he had stated, for instance in a letter to the complainant dated 8 June 2006, that the latter possessed "the requisite competences", which were "acknowledged and highly appreciated" by the member countries, and that these competences were "unique and invaluable for the International Bureau".

Moreover, it is clear from the file that other staff members received an extension of service, but the Tribunal sees no justification for this difference in treatment.

Lastly and above all, the Tribunal notes that the Director General stated clearly in his decision of 8 October 2007 that he had postponed his response to the complainant's request for review until the outcome of the attempt to reach a settlement of all pending disputes was known.

8. The Tribunal infers from all the foregoing considerations that the Director General's refusal to extend the complainant's service beyond the statutory age limit constitutes an act of retaliation for the first three complaints and the complainant's refusal to agree to a settlement of all pending disputes. The Director General used his discretionary authority for purposes other than those for which it was intended, thereby committing an abuse of authority. It follows that the impugned decision must be set aside.

9. The complainant requests, in the event that an extension of his service is no longer possible, which is the case on the date of the present judgment, that the UPU be ordered to pay him all the salary and benefits to which he would have been entitled if his service had been extended until 31 December 2008, together with interest as from the dates on which the sums in question would have fallen due, and to restore his pension entitlements for the period from 1 July to 31 December 2008. He further claims moral damages in the amount of 10,000 Swiss francs, as well as an equitable award of costs.

10. In the light of the circumstances of the case, the Tribunal considers it fair to award the complainant financial compensation equivalent to the amount of salary and benefits that he would have received had he remained in service until 31 December 2008, subject to the deduction of any pension payments received by him in respect of the period from 1 July to 31 December 2008, and to restore his pension rights for the same period. Interest at the rate of 8 per cent per annum shall accrue on the sums due.

The Tribunal also considers it fair to award the complainant moral damages in the amount of 5,000 francs.

11. As his complaint succeeds, the complainant is entitled to an award of costs set at 5,000 francs.

### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The UPU shall pay the complainant financial compensation as indicated under 10, above.
3. The complainant's pension rights shall be restored for the period from 1 July to 31 December 2008.
4. The UPU shall pay him 5,000 Swiss francs in moral damages.
5. It shall also pay him 5,000 francs in costs.

In witness of this judgment, adopted on 30 April 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet