

G.
v.
UPU

121st Session

Judgment No. 3591

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. G. against the Universal Postal Union (UPU) on 30 November 2012 and corrected on 12 April 2013, the UPU's reply of 17 June, the complainant's rejoinder of 24 September and the UPU's surrejoinder of 30 October 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to reduce his salary by half following the exhaustion of his entitlement to sick leave on full salary and pending a determination by an ad hoc medical board as to whether his illness is service-incurred.

The complainant began taking an increasing amount of sick leave from 2010 onwards, referring to his difficult work environment. In March 2011, while he was absent on sick leave, the Director of Human Resources and Social Relations (hereinafter "the Director of HR") informed him that by 14 March he would have accumulated 158 days of sick leave on full salary over the last four consecutive years and that, upon reaching 196 days, equivalent to nine months, he would be placed on sick leave with half pay, in accordance with Staff Rule

106.2(1)(c) of the Staff Rules of the International Bureau of the UPU (hereinafter “the Staff Rules”).

In the event, the complainant was able to return to work on a half-time basis on 18 April, whereupon the administration informed him that the reduction of his salary would not take place until 31 May 2011. On 16 May 2011 the UPU medical adviser, after having examined the complainant, wrote to the Director of HR expressing the opinion that the complainant would have the capacity to work at 75 per cent rather than on a half-time basis, but that he had contacted two specialized clinics in order to obtain a second medical opinion. Meanwhile, the complainant continued to work half-time. By combining his half-salary with his remaining sick leave entitlements, he was able to continue receiving the equivalent of a full salary until the end of that year.

On 16 June 2011 the complainant’s counsel wrote to the Director General alleging that the complainant had been the victim of harassment since 2002 and requesting an investigation. Amongst other claims for relief, he requested that the complainant be allowed to work from home and that he continue to receive his full salary. By a letter of 4 July 2011 the Director General informed the complainant’s counsel that he agreed to launch an investigation and invited him to submit a formal complaint of harassment. He also authorized the complainant to work from home, on an exceptional basis and subject to a number of conditions. However, referring to Staff Rule 106.2, he rejected the request that the complainant continue to receive his full salary, as he had exhausted his entitlement to sick leave on full salary.

The complainant’s formal complaint of harassment was filed on 19 December 2011. The outcome of the investigation into his allegations of harassment is the subject of a second complaint filed with the Tribunal on 15 February 2014.

In January 2012 the complainant submitted a medical certificate in which his doctor certified that he had a 100 per cent work incapacity for the period from 25 December 2011 to 25 January 2012. By a letter of 24 January 2012 the Administration informed the complainant that the period from 1 to 25 January 2012 would be considered as sick leave on half salary, because he had exhausted his

entitlement to sick leave on full salary as of 31 May 2011, but that he could maintain his full salary by using his annual leave entitlements, if he so wished. On 1 February 2012 the complainant informed the Administration that he agreed to use his annual leave as a means to maintain his full salary.

The complainant submitted a request for review on 23 February 2012 challenging the decision of 24 January. He argued that his sickness was attributable to the performance of his official duties and, therefore, that it should be considered as sick leave on full salary. He further argued that the decision of 24 January had been taken in retaliation for his having lodged a harassment complaint and asked for a separate investigation into his allegation of retaliation. The complainant also asked to be provided with a copy of his medical record prepared by the specialized clinic at UPU's request, emphasizing that if it contradicted the view expressed by his own doctor, namely that his illness was clearly service-incurred, a medical board should be established pursuant to Staff Rule 106.2(1)(g).

The complainant's request for review was rejected by the Director General on 22 March 2012 on the ground that a causal link between the complainant's illness and the performance of official duties had not been established to date. However, the Director General proposed the immediate establishment of an ad hoc medical board composed of one doctor to be selected by the complainant, another by the Administration and the third chosen in common agreement by the two doctors selected by the parties, and he asked for the complainant's agreement thereto by 23 April. He also informed him that, in the event that the ad hoc medical board considered that his illness was service-incurred, his entitlement to full salary for the relevant period would be reinstated. By another letter of 22 March 2012 the Director General informed the complainant that he had decided not to open a separate investigation into his allegation that the decision of 24 January amounted to retaliation.

On 19 April 2012 the complainant returned to his full-time work capacity while performing his duties from home. On 23 April he agreed to the establishment of the ad hoc medical board, but he

informed the UPU that additional time was needed as his doctor had refused to participate in the medical board.

On 23 April 2012 the complainant lodged an appeal with the Joint Appeals Committee (JAC) against the Director General's decision of 22 March to maintain the decision of 24 January. The JAC recommended in its report of August 2012 that the Director General reconsider his decision concerning the complainant's sick leave entitlements for the period 1 to 25 January 2012 if the ad hoc medical board found a causal link between the complainant's illness and the performance of his official duties.

By a letter of 7 September 2012 the Director General confirmed his decision, recalling that the medical board would have to determine whether the complainant's illness was service-incurred. That is the impugned decision in the present complaint.

On 13 July 2015 the UPU confirmed to the Registry of the Tribunal that, to date, an ad hoc medical board had not yet been established, as no agreement had been reached as to the appointment of a third doctor.

The complainant asks the Tribunal to order that all sick leave, salary, home leave and other emoluments deducted from his account (assessed as 196 days at full salary and approximately 182 days at half salary) be reimbursed and re-credited and that no further deduction be made on account of any of his absences which, in his view, are service-incurred. He further asks the Tribunal to order that, pending the report of any medical board empanelled under the UPU Staff Rules, he be treated as being incapacitated on account of a service-incurred illness for the purposes of Staff Rule 106.2(4) and that he be paid immediately with full retroactive effect all salary, benefits and other emoluments he would be entitled to receive had he not allegedly exhausted his statutory sick leave benefits under Staff Rule 106.2 until the date of issuance of the medical board's report. He claims material and moral damages for the severe physical and psychological damage he has suffered as a result of the procedural violations resulting from the letter of 24 January 2012, exemplary moral damages for the retaliatory action taken against him for having lodged a harassment

complaint, as well as costs, with interest on all amounts awarded at the rate of 8 per cent.

The UPU submits that the complaint is irreceivable because it is not directed against a final decision, and that it is entirely unfounded. It asks the Tribunal to order the complainant to pay all costs and expenses that it has incurred in defending this case.

CONSIDERATIONS

1. The complainant began working with the UPU on 2 October 1995 as a temporary translator. Following a sequence of short-term contracts, the complainant was appointed under a fixed-term contract as a French Language Translator (grade P 3) from 1 December 1997. The complainant was granted a permanent contract from 1 December 1999. From 2010 onwards he began taking an increasing amount of sick leave, citing tension in the unit between himself and his supervisor, which had allegedly affected his health. In a letter dated 11 March 2011, the complainant was notified by the Director of HR that as of 14 March 2011 he would have accumulated 158 days of sick leave on full salary over the last four consecutive years and that, once he reached the maximum of 196 days of sick leave on full salary, any additional sick leave days would be paid at 50 per cent in accordance with Staff Rule 106.2(1)(c). As of 31 May 2011, he had used up his allotment of sick leave on full salary. As he worked half-time for the period from 1 June to 24 December 2011, his monthly pay remained unchanged (100 per cent). The complainant was then placed on 100 per cent sick leave for the period 25 December 2011 to 25 January 2012. He was informed by a letter from HR dated 24 January 2012 that, as his entitlement to sick leave on full salary had been exhausted, he would be granted sick leave on half salary for the period from 1 to 25 January 2012, but that if he so chose, he could have time deducted from his annual leave in order to maintain his monthly salary at 100 per cent.

2. The complainant contested the 24 January decision in two letters to the Director General dated 23 February 2012 and 6 March

2012, requesting its review on the basis that his illness was service-incurred and, therefore, that his sick leave should be granted on full salary, in accordance with Staff Rule 106.2(4) and Administrative Instruction (DRH) No. 25 on Long-term illness dated 30 July 2004. He also alleged that the decision of 24 January had been taken in retaliation for his having filed a complaint of harassment and he requested a separate investigation into this matter. In his reply dated 22 March 2012, the Director General rejected the complainant's request for review on the grounds that a causal link between the complainant's illness and the performance of his official duties had not yet been established. He confirmed the decision to grant the complainant sick leave on half salary, while offering to convene an ad hoc medical board to determine whether there was a causal link between the complainant's illness and the performance of his official duties, assuring him that if such a link were found he would be retroactively reimbursed and re-credited for the appropriate periods. In a separate letter, also dated 22 March 2012, the complainant was informed that the Director General rejected his request to open a separate investigation into his allegation of retaliation, on the ground that it was not substantiated and that the decision of 24 January and the proposals made therein, which had been accepted by the complainant, were in accordance with applicable regulations.

3. By a letter dated 12 April 2012, the complainant was informed that the Director General had mandated the Internal Audit to conduct a fact-finding investigation into his allegations of harassment and that as of 18 April 2012 he was temporarily and exceptionally allowed to work from home (telecommute) under the same conditions as those set out in his previous letter of 4 July 2011. Those conditions stated that the situation would be re-examined following a medical evaluation of the complainant's health, that his productivity should represent 75 per cent of his normal in-office work productivity, and that the agreement was based on the fulfillment of these conditions.

4. The complainant filed an internal appeal with the JAC on 23 April 2012 against the 22 March decision confirming the decision

to reduce his salary by half pending a determination by an ad hoc medical board as to whether his illness was service-incurred. In August 2012, the JAC found that the decision should not be reviewed until the final results of the ad hoc medical board had been reported. It recommended that the Director General review the 22 March decision (confirming the previous 24 January decision) if the medical board found a causal link between the complainant's illness and the performance of his official duties. By a letter dated 7 September 2012, the Director General informed the complainant of his decision to confirm the decisions of 24 January and 22 March 2012 pending the outcome of the ad hoc medical board's findings. The complainant impugns that decision in the present complaint.

5. The complainant requests oral proceedings and his claims for relief are set out above.

6. The UPU asks the Tribunal to reject the complaint as irreceivable on the grounds that the 7 September 2012 decision cannot be considered as a final decision, as it stated that the case would be reviewed in light of the outcome of the report of the ad hoc medical board and thus the complainant has not yet exhausted all means of internal redress. In case the Tribunal finds the complaint receivable, the UPU requests that the Tribunal reject it as unfounded in its entirety. It also makes a counterclaim for all costs and expenses incurred.

7. As the written submissions are sufficient to allow the Tribunal to render an informed decision, the Tribunal rejects the request for oral hearings.

8. The Tribunal finds the complaint receivable only insofar as it regards the question of whether the UPU was correct in treating the complainant's illness under the terms for regular sick leave pending a finding by the ad hoc medical board, or whether it should have treated his illness as service-incurred until proven otherwise. The complainant's implicit claim that the UPU should have accepted the complainant's

submissions proving his illness as service-incurred without the need for an opinion from an ad hoc medical board, is irreceivable. The complainant impugns the Director General's decision to form an ad hoc medical board. The Tribunal finds this claim irreceivable, because the appointment of a medical board is not a final decision which immediately adversely affects the complainant. Moreover, the complainant formally accepted the proposal to form the medical board in a letter dated 23 April 2012.

9. The complainant bases his complaint on the following eight arguments:

- 1) Reducing the complainant's salary by 50 per cent following a service-incurred illness breached Staff Rule 106.2, Administrative Instruction No. 25 and the jurisprudence of international civil service law;
- 2) The impugned decision is tainted with bias, discrimination, and personal prejudice;
- 3) The impugned decision is a continuation of an illegal pattern of harassment against the complainant;
- 4) The principle of equal treatment was breached;
- 5) The complainant's work environment violated accepted standards requiring favourable work conditions;
- 6) The impugned decision constitutes retaliation and breaches the United Nations Whistleblower policy entitled "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations" of 15 December 2005 (ST/SGB/2005/21);
- 7) The JAC report dated 15 August 2012 and the impugned decision were grossly flawed and in breach of the right to an effective internal appeal; and
- 8) The UPU is liable for the above violations and compensation is due.

10. The Staff Rules governing sick leave stipulate in relevant parts (Staff Rule 106.2(1)(a) and (g)) that "[a]ll sick leave must be

approved on behalf of the Director General”, and that “[a] staff member may be required at any time to submit a medical certificate as to his condition or to undergo examination by the UPU medical adviser. Further sick leave may be refused or the unused portion withdrawn if the Director General is satisfied that the staff member is able to return to his duties, provided that if the staff member so requests the matter shall be referred to an independent medical practitioner or to a medical board acceptable to both the Director General and the staff member.” The Introduction to Administrative Instruction No. 25 explains that “[t]his Administrative Instruction sets out the procedure to be followed, in the event of long-term illness, for requesting determination of the degree of incapacity for work and the effects of long-term illness on a staff member’s rights and privileges, termination on health grounds and the right to part-time employment in the event of partial disability”. In section II, under the title “Procedure for requesting determination of the degree of incapacity for work”, it stipulates that “[w]hen a staff member has used up all the sick leave on full salary to which he/she is entitled (see Staff Rule 106.2), the Human Resources Directorate (DRH) will contact the staff member to find out his/her views on what measures, if any, should be taken, such as making changes to the working environment, reducing working hours or requesting disability benefit (the first stage of the procedure for requesting determination of the degree of incapacity for work). The Director of Human Resources and the Secretary of the Universal Postal Union Provident Scheme will consult each other, if necessary, to harmonize the next stages of the procedure for determining the staff member’s degree of incapacity for work, which may lead to his/her separation from service on health grounds and a request for disability benefit.” Section III, entitled “Delays in reaching a decision”, provides that “[i]f a staff member has used up all the sick leave (on full or half salary) and annual leave to which he/she is entitled and his/her case is still under consideration due to a delay concerning either the medical examination or the decision of the Provident Scheme Management Board, the staff member will be granted special leave on half salary (with no reduction in dependency allowances, rental subsidy, education grant

or the Union's contribution to health insurance) until the date of the Board's decision".

11. The UPU did not violate any of the above-mentioned norms in the procedure which resulted in the impugned decision. The Tribunal finds that as sick leave must be approved by the Director General, the nature of the sick leave must also be approved. Considering that sick leave for service-incurred illnesses is an exception to the general sick leave allowances, it follows that if further verifications are requested, the UPU is bound to treat the staff member's illness under the usual terms for sick leave until the determination by a medical board that the illness is service-incurred. In the present case, that determination by an ad hoc medical board is still pending. The complainant submits that the UPU breached the provisions of Administrative Instruction No. 25 as he does not believe that HR had taken any steps to "find out his views on what measures, if any, should be taken, such as making changes to the working environment, reducing working hours or requesting disability benefit". The Tribunal finds that HR contacted the complainant on several occasions to discuss his illness and sick leave requirements; that it had understood the complainant's views on what measures should be taken as he had explicitly stated such in several letters (requesting his transfer, separate work areas from his supervisor, review of his work responsibilities, and to work from home (telecommute)) and had responded by moving his office to another area of the unit, setting up intermediaries so that the complainant could avoid direct contact with his supervisor, and finally allowing him to telecommute. The Tribunal finds that the complainant's assertion that he was eligible under section III of Administrative Instruction No. 25 for "special leave" is unfounded as he did not meet the criterion specified in that section (i.e. he had not used up all of his sick leave on full or half pay as well as all of his annual leave).

12. The complainant's arguments that the impugned decision was tainted with bias, discrimination, and personal prejudice, was a continuation of an illegal pattern of harassment against the complainant, breached the principle of equal treatment, constitutes retaliation and

breached UN Whistleblower policy, and that his work environment violated accepted standards requiring favourable work conditions, are irrelevant to the question raised in this complaint. The decision impugned (i.e. that the complainant's illness be treated as a regular illness pending a finding by the ad hoc medical board) is lawful and was solely based on a question of law. The Tribunal underlines that the only question to be answered in the present complaint was whether or not the UPU was bound to treat the complainant's illness under the terms for regular sick leave pending a finding by the ad hoc medical board and the Director General's final decision on the matter. The final decision, if favorable to the complainant, shall have retroactive effect.

13. The complainant's plea that the JAC report dated 15 August 2012 and the impugned decision were grossly flawed is unfounded. He argues, in substance, that because his allegations of harassment were not addressed by the JAC in its report or by the Director General in his final decision, he was denied the right to an effective internal appeal. The Tribunal notes that these allegations did not appear in the request for review that was submitted to the Director General on 23 February 2012 and that, although the complainant subsequently included them in his submissions to the JAC, by that time he had already agreed that they should be investigated by Internal Audit. The JAC, in its report, implicitly considered the appeal to be partially receivable and partially unfounded (for the same reasons as those stated above). The Tribunal considers the decision of 7 September (that the complainant's illness be treated as a regular illness pending verification) as a final administrative decision in accordance with Article VII, paragraph 1, of its Statute and recognizes that the complainant has exhausted all means of internal redress with regard to the receivable aspect of the present complaint. Considering this, the Tribunal finds that the JAC properly limited its opinion essentially to the lawfulness of the complainant's illness being treated under the normal rules pending the outcome of the medical board's findings (without addressing the complainant's allegations of harassment, which were the subject of parallel proceedings, nor his claim regarding the nature of his sick

leave, as that question could be treated only after the determination by the medical board).

14. In light of the above, the complaint is irreceivable in part, unfounded in the remainder and the complainant is not entitled to costs or damages. Consequently, all claims must be dismissed. All other particulars, not specifically mentioned, are either irrelevant or were absorbed by the main issues.

15. With regard to the counterclaim for costs, the Tribunal notes that the UPU has not justified the request in any way. An organisation must explicitly state the reasons for its counterclaim in order for such a request to be considered as an exceptional circumstance meriting the imposition of costs on the complainant (see Judgment 1962, under 5). Therefore, the UPU's counterclaim must be dismissed.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The UPU's counterclaim is also dismissed.

In witness of this judgment, adopted on 2 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

DRAŽEN PETROVIĆ