

NINETY-EIGHTH SESSION

Judgment No. 2396

The Administrative Tribunal,

Considering the seventh complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 15 February 2003, the Union's reply of 23 May, the complainant's rejoinder of 29 August and the UPU's surrejoinder of 28 November 2003;

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 may be found in Judgment 2364, delivered on 14 July 2004, concerning the complainant's fourth complaint.

It may be recalled that in May 2002 the internal auditor had submitted an investigative report in which he found that the complainant had committed several irregularities and concluded that a disciplinary sanction was unavoidable. In a note dated 27 May 2002 the Director General then asked the Disciplinary Committee for its opinion regarding an appropriate disciplinary sanction. In its confidential report dated 6 September 2002 the Committee unanimously concluded that the only charge which could be brought against the complainant was that he had been absent for 14 days, immediately preceding and following some of his missions, without any valid justification. It recommended a reduction in salary step within the same grade and delayed advancement to the next salary step.

Between 10 September and 4 October 2002 the UPU contacted several airlines by letter or by fax, as well as the management of some of the national postal authorities involved in the complainant's missions, in order to check the exact dates of the missions. In five of the faxes sent to airlines between 13 September and 3 October 2002, it was stated that since the UPU was "a specialised agency of the United Nations and benefit[ed] from immunity [...] it [was] particularly difficult [...] to file criminal charges" against one of its employees. The complainant was named in four of the five faxes.

After receiving copies of them, the complainant filed an "appeal" with the Director General by a letter of 31 October 2002 claiming compensation for the injury caused by the "clearly defamatory statements" about him contained in the above-mentioned five faxes and asking for a corrective note to be sent to the same addressees, subject to a penalty for default, stating that the reference to "criminal charges" was entirely unfounded. Having received no reply, he sent a reminder to the Director General on 10 December 2002. Again receiving no reply from the latter, the complainant challenges before the Tribunal the implicit decision to reject his "appeal".

Meanwhile, the Disciplinary Committee had again been consulted and had submitted a further report recommending the dismissal of the complainant. On 29 November 2002 the latter was dismissed for serious misconduct with effect from 28 February 2003.

B. The complainant contends that the fact that the five disputed faxes contain defamatory statements concerning him shows that the Union was pursuing a "deliberate tactic" aimed, in his view, at giving certain airline employees "the wrong impression" in order to encourage them to breach national legislation for the protection of confidential data, by which they are bound, by making them believe that in the circumstances they were justified in divulging the requested information. In evidence thereof, he points out that the four faxes in which he was named were sent directly to certain employees and not to the general management of the companies, despite the fact that only the latter has the authority to decide how to respond to such enquiries.

As for the UPU's argument whereby its status as "a specialised agency of the United Nations" made it difficult to

file criminal charges, the complainant replies that it does not stand up to scrutiny, considering that the Union has the power to lift the immunity of its employees. He submits further that, if the UPU decided not to lift his immunity from legal process, it was clearly because no offence had been committed under national law. According to him, had the Union brought criminal charges, its representatives might have faced prosecution before the national courts, depending on the outcome of the proceedings.

The complainant maintains that he suffered moral and professional injury and that his dignity and reputation have been seriously impaired. He points out that he did not have the opportunity to argue his case with the third parties concerned.

He asks the Tribunal to recognise, firstly, that the Union sent faxes to third parties on several occasions mentioning criminal charges against him and, secondly, that the defamatory statements concerning him “are part of a deliberate tactic” by the UPU and have seriously and lastingly impaired not only his dignity but also his personal and professional reputation. He also asks the Tribunal to order the defendant to pay him 150,000 Swiss francs in damages and 5,000 francs in costs.

C. In its reply the Union contends that the complaint is irreceivable. In its view, the faxes in dispute do not constitute decisions causing injury and it points out that, if those faxes were considered as individual decisions, then the complainant should have brought separate proceedings, asking the Tribunal subsequently to join them. It submits that the complainant “unilaterally decided to appeal directly to the Tribunal” and therefore did not exhaust internal remedies. Moreover, in his complaint to the Tribunal he extended the claims he had submitted previously and in that respect the complaint is likewise irreceivable. Referring to Judgment 1929, the UPU recalls that the complainant shows no cause of action justifying a ruling in law, given that in practice he can obtain the quashing of the decision and redress. In its view, the complainant’s behaviour is purely “querulous”.

On the merits, the defendant contends that it is because the complainant repeatedly refused to produce documents concerning his missions that the Director General considered that, before he could decide on the matter, the investigation which the Disciplinary Committee had left unfinished should be completed. It agrees that, depending on the extent to which personal details are protected under national legislation, they cannot normally be disclosed to third parties, “except in certain circumstances, such as the presence of an overriding private or public interest”. It argues that in mentioning in confidential faxes its reluctance to file criminal charges it was “trying to obtain personal details which might be protected in order to speed up the investigation, while safeguarding its own reputation and that of the complainant”. According to the Union, the information obtained enabled the occurrence of certain frauds to be established with certainty and was transmitted on 30 October 2002 to the Disciplinary Committee, which then recommended the dismissal of the complainant for very serious misconduct. That recommendation was subsequently endorsed by the Director General.

The Union denies that it ever impaired the complainant’s dignity; it maintains that he was kept informed regarding the requested further investigation, that it showed all due respect and made every effort to avoid causing him any unnecessary harm. It argues that it had a legitimate statutory interest in obtaining documents, which the complainant had failed to produce, insofar as evidence of “contradictions, irregularities and/or suspected fraud” had been found. Considering that the complainant was one of the Union’s senior officials and a former Head of the Finance Section, his conduct should have been particularly irreproachable. The UPU considers that its duty to safeguard the complainant’s professional dignity and reputation is subject to its right to require of its staff members the standard of behaviour that is expected of international civil servants, particularly as regards their integrity. Since it has been clearly established that the complainant did not act in good faith and systematically refused to produce any document which might prove prejudicial to his case in order to gain time, his dignity does not deserve to be safeguarded any more than it was. The Union maintains that the fraud repeatedly committed by the complainant needs punishing.

In its view, the complainant has not shown that he suffered any injury. It believes on the contrary that it was the Union that was harmed, particularly in terms of its image, on account of the complainant’s fraudulent behaviour, his systematic obstruction and the many appeals he has initiated. In the defendant’s opinion, the present complaint is vexatious insofar as it is merely intended to harm and paralyse the running of the Union. It asks the Tribunal to order the complainant to pay costs.

D. In his rejoinder the complainant submits that his direct appeal to the Tribunal was justified on the grounds that no decision was taken within sixty days of his “appeal”.

On the merits, he notes that the Union has admitted behaving “fraudulently”, “with the specific intention of breaching certain provisions of several national laws”. According to him, the UPU has also acknowledged that it seriously impaired his dignity and reputation and deliberately caused him injury. He argues that the statutory right on which the Union relies to justify its behaviour is only “subsidiarily” and “succinctly” referred to in the current regulations and that it only concerns hotel expenses. He maintains that he supplied all the documents he was asked for in addition to other vouchers, as stated in the reports of the Disciplinary Committee, and that no further evidence was requested in the course of the first two checks on his travel expenses. He cites Judgment 2152 to the effect that staff members are under no obligation to assist the Administration in any actions the latter may wish to take against them.

In his view the defendant must believe that the end justifies the means, since it considers that, because it eventually succeeded in collecting “irrefutable evidence of fraud”, whatever abuses or excesses it committed in obtaining that “evidence” were justified by the result. He contends that the “principles” the defendant upheld in the circumstances are totally opposed to those of the international civil service as defined in the Tribunal’s case law.

E. In its surrejoinder the UPU maintains that in the faxes in dispute it merely asked certain questions to which the airlines were not obliged to reply and that it therefore committed no unlawful act. It points out that by virtue of the principle of presumption of innocence, the fact that it referred to the possibility of filing criminal charges did not mean that the complainant would necessarily be found guilty. The latter’s dignity was therefore not impaired, especially in view of the fact that fraud was actually committed. It notes that the complainant does not deny that the information gathered was accurate but merely disputes the way in which it was finally elicited. It reiterates its arguments based on the complainant’s attempts to obstruct the investigation.

CONSIDERATIONS

1. Having noted irregularities in the expense accounts drawn up by the complainant for his missions abroad between October 2000 and December 2001, the UPU initiated disciplinary proceedings against him on 16 May 2002. The Director General ordered a further enquiry after receiving a confidential report from the Disciplinary Committee on 6 September 2002. As part of the investigation, requests for information were sent confidentially to airlines and to the general management of national postal administrations, by mail or by fax bearing the signature of either the Director General, the Deputy Director General or the Director for Economic and Regulatory Affairs.

The five faxes sent to airlines all followed the same model, starting with an explanation of the reasons for the request and, with one exception, mentioning the complainant by name. One of the faxes, drafted in French and dated 19 September 2002, reads as follows:

“The Universal Postal Union (hereinafter UPU) has been conducting an investigation of suspected systematic fraud involving one of the colleagues of the undersigned.

For your information, the UPU is a specialised agency of the United Nations and benefits from immunity. As a result, it is particularly difficult for it to file criminal charges against one of its staff, which would, however, no doubt have enabled it to obtain more than strong circumstantial evidence in a case of this kind.

The information in this letter is therefore confidential and we would greatly appreciate your efforts to maintain its confidentiality.”

The other four faxes, drafted in English, contain similar wording.

In a fax sent subsequently to the Director General of a national postal administration, the Director General of the UPU emphasised that the information requested was confidential and should be sent to him by fax marked “confidential” to his personal number.

2. On 31 October 2002 the complainant, who had received a copy of the five above-mentioned faxes and other documents relating to the investigation, filed an “appeal” with the Director General complaining at the “defamatory statements” the faxes contained. He added that the statements constituted unacceptable behaviour for which he intended to seek compensation. He asked for a corrective note to be sent immediately to the five recipients of the faxes, subject to a penalty of 1,000 Swiss francs per month and per fax for default, and for the

payment of 20,000 francs in damages as “compensation and fair redress” for each of the five faxes.

On 10 December 2002 the complainant complained to the Director General that he had received no reply to his “appeal”. He added that “according to the relevant provisions of the Statute of the ILO Administrative Tribunal, [he could] appeal directly to the Tribunal if the administration of the organisation fail[ed] to take a decision on any claim within sixty days”. Having received no reply, he filed his seventh complaint on 15 February 2003.

3. The Union’s main plea is that the complaint is irreceivable on several grounds.

In its view, the complainant has not complied with the statutory internal appeal procedure and has not exhausted the available means of redress, as required by Article VII of the Statute of the Tribunal. Furthermore, the “communications in dispute do not constitute decisions causing injury which, in themselves, are open to challenge” since “they are not binding on the complainant”. In any case, in his complaint to the Tribunal the complainant has unduly extended the scope of the claims submitted in his internal appeal.

The first two objections, which – in view of the material circumstances – are the only ones that need to be addressed here, are unfounded for the following reasons.

(a) The internal appeal procedure is governed by Articles 11.1 and 11.2 of the Staff Regulations of the International Bureau of the UPU and Staff Rules 111.1 to 111.3. According to these provisions, before appealing against an administrative decision a staff member must address a letter to the Director General – within one month from the time the decision was notified – requesting that the administrative decision be reviewed (Rule 111.3, paragraph 1). If the staff member wishes to make an appeal against the decision notified by the Director General in his reply to the request for review, he must submit an application in writing to the Chairman of the Joint Appeals Committee within one month of the date of receipt of that decision. If no reply has been received from the Director General within one month of the letter being sent, the staff member must, within the following month, submit his application in writing to the Chairman of the above Committee (Rule 111.3, paragraph 2). The Joint Appeals Committee, on which the staff are represented, is responsible for considering the staff member’s appeal and advising the Director General (Article 11.1 of the Staff Regulations and Rule 111.1, paragraph 1). According to Regulation 11.2 a staff member is entitled to file a complaint with the Administrative Tribunal against a final decision of the Director General in conformity with the Statute of the Tribunal. By agreement with the Director General, the staff member may dispense with an opinion of the Joint Appeals Committee and apply directly to the Tribunal.

There is, however, no provision for an internal appeal in the absence of an administrative decision.

Regulations or rules that are ambiguous or incomplete should be construed *contra proferentem* and in favour of the staff (see Judgment 1755, under 12 *in fine*); naturally, this rule applies not only to the provisions that are directly applicable to the case, but also to the rules which designate those provisions. In the light of the content of the above provisions of the Staff Regulations and Rules, the complainant cannot be blamed for believing that his internal appeal had been implicitly rejected and that he was entitled to have direct recourse to the Tribunal. This he did in conformity with Article VII, paragraph 3, of the Statute of the Tribunal, since the Administration had failed to take a decision on his “appeal” within sixty days from the notification of the appeal to it.

(b) The Tribunal need not look into the question of whether or not the disputed faxes are decisions causing injury, since the complainant’s “appeal” was not in the main directed against the fact that the faxes had been sent.

In his complaint he does cast doubt on the appropriateness of sending them, but he fails to establish why that was not a suitable course of action in view of the need to establish the facts and of his own attitude during the investigation. The chief objective of the “appeal” was rather to make good the injury which the content of the disputed faxes had allegedly caused him. The complainant obviously had a present and personal interest in filing an “appeal” in that respect as soon as possible. The receivability of the complaint cannot be denied insofar as it relates to that grievance.

4. The Tribunal will therefore consider whether the content of the five incriminated faxes was such as to cause injury to the complainant’s dignity and reputation.

Any administrative or disciplinary body of an organisation which consults a third party to obtain information concerning the professional behaviour of one of its staff members must naturally avoid impairing the latter’s

dignity and reputation. In the first place, it absolutely must ensure that the presumption of his innocence is maintained, and if its action is such as to breach the presumption of innocence or the fundamental rights of the staff member, making that action confidential is of no avail.

It is surprising how casually the disputed faxes were drafted. The arguments put forward by the defendant in its submissions in no way justify the action taken by its officials, whose manner of communicating with third parties was at best debatable.

This does not mean, however, that the complaint must be allowed. The disputed wording has to be seen in the context of the faxes as a whole, which the sender could presume would be read with all the professional, objective care he might expect from the addressees, even though these were not the most senior managers of the companies and administrations to which they were sent. The wording is in fact within the limit which could not be exceeded by the defendant without breaching the complainant's fundamental rights.

The complainant's pleas are therefore unfounded and his complaint must be dismissed.

5. The UPU, on the grounds that the complaint is vexatious, asks for the costs of the proceedings to be awarded against the complainant. The Tribunal will not grant that request.

DECISION

For the above reasons,

The complaint and the UPU's counterclaim are dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet