

**B.**  
**v.**  
**UPU**

**125th Session**

**Judgment No. 3927**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. B. against the Universal Postal Union (UPU) on 14 October 2015 and corrected on 2 November 2015, the UPU's reply of 17 February 2016, the complainant's rejoinder of 6 June and the UPU's surrejoinder of 13 September 2016;

Considering Article II, paragraph 5, 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 suspend her without pay for three months for misconduct.

On 27 January 2015 Ms B., a Kenyan national, sent a note to the Director General in which she reported that the complainant had interrupted a discussion she was having with her colleague Ms E., turned towards her and made a discriminatory statement on African colleagues.

On 11 February 2015 the Director General appointed internal auditors to carry out a fact-finding investigation pursuant to Administrative Instruction (DRH) No. 34 of 4 November 2011 on Conflict resolution mechanisms related to discrimination, abuse of authority and harassment (hereinafter "AI No. 34"). By an email of 12 February the internal auditors invited the complainant to a meeting to discuss the matter. At the complainant's request, the Director of

Human Resources (hereinafter “the Director of HR”) suspended the auditors’ mandate on 17 February since the complainant had not been consulted before the auditors’ appointment, in breach of paragraph 6.16 of AI No. 34. The Director of HR asked the complainant to send her comments by 20 February at the latest, which she did.

On 25 February the complainant, Ms B. and Ms E. were interviewed by the auditors. A summary of their interviews was communicated to the complainant, who submitted her comments on 3 March. On 6 March the auditors submitted their investigation report in which they concluded that, from an overall perspective, the complainant’s alleged statement had been confirmed in the interviews but that it had not been directed at Ms B. specifically. The report was transmitted to the Director of HR, who recommended that the Director General initiate disciplinary proceedings against the complainant.

After being informed by letter of 30 March of the composition of the Disciplinary Committee set up to advise the Director General on the allegations of misconduct made against her and invited to submit any objections she might have against the said composition, the complainant requested to be provided with the decision to initiate disciplinary proceedings and the exact charges made against her, as well as the conclusions of the investigation report. On 24 April the Chair of the Disciplinary Committee replied that the conclusion reached in the investigation report was that the complainant’s alleged statement had been confirmed in the interviews. She was invited to provide her comments within five days, which she did on 30 April, contesting that the allegations against her had been proven and asking that the decision of 24 April be set aside, that a new investigation be conducted and that the transcript of her interview be deemed null and void in light of the procedural errors and the fact that she had never been provided with a “charge sheet” indicating the specific nature of the allegations made against her.

The Disciplinary Committee met on 5 June. It found that there was sufficient evidence to conclude that the complainant had made inappropriate comments in an unrestrained manner, which could be considered as misconduct. It recommended that the disciplinary

measures of a written warning and delayed advancement to the next salary step be imposed. In his decision of 20 July 2015 the Director General considered that the discriminatory and offensive remarks made by the complainant constituted prohibited conduct which required a sanction in line with UPU's zero tolerance policy for any kind of prohibited conduct. Accordingly, he decided to apply the sanction of suspension without pay for a period of three months. The letter also indicated that, according to Staff Regulation 10.3(4), the decision was final and an appeal could be brought directly to the Tribunal. That is the impugned decision.

By a letter of 30 July 2015 the complainant requested the Director General to review the decision of 20 July 2015. She was informed by a letter of 3 August 2015 that, in accordance with Staff Regulations 10.3(4) and as already stated in the letter of 20 July 2015, any appeal against a disciplinary decision by the Director General lies before the Tribunal.

The complainant retired on 31 December 2015.

The complainant asks the Tribunal to quash the impugned decision as well as the decision of 3 August 2015, and to award her all salary, entitlements, benefits, step-increases, pension contributions, and all other emoluments she would have received during the period of three months when she was unlawfully suspended. She claims moral damages in the amount of 100,000 Swiss francs and the same amount in exemplary damages, as well as costs, with interest on all sums awarded.

The UPU requests the Tribunal to dismiss the complaint in its entirety and makes a counterclaim for costs.

### CONSIDERATIONS

1. The complainant filed the present complaint against the final decision of the UPU's Director General, dated 20 July 2015. In that decision the Director General decided to impose on her the disciplinary measure of suspension without pay for a duration of three months, with effect from 21 July 2015, in accordance with Staff

Regulation 10.2(1)(d) and Administrative Instruction (AI) No. 26, paragraph 4, on the ground that she had made discriminatory and offensive remarks.

2. On 27 January 2015, the Director General had received a complaint of misconduct from the complainant's colleague, Ms B., stating that the complainant had interrupted a discussion between Ms B. and Ms E. to complain about another colleague. Ms B. alleged that the complainant had shouted: "I've had enough. I'm fed up with all of you Africans. I'm fed up. I cannot work with you Africans, because I have had enough. You can sack me."\* Ms B. had asked the Director General to take any action he deemed necessary.

3. As the alleged misconduct thus reported fell within the scope of AI No. 34, a fact-finding investigation by the internal auditors was ordered on 11 February 2015. The complainant was informed by email dated 12 February 2015 of such, and invited to a meeting to discuss the matter with the internal auditors. The complainant, Ms B. and Ms E. were interviewed separately on 25 February 2015 and a summary of their interviews was provided to the complainant for comment. Her comments were received on 3 March 2015. The auditors submitted their investigation report on 6 March, concluding that, from an overall perspective, the alleged statements were confirmed to have been made by the complainant, though they were not directed at Ms B. specifically (who is also African). The report was transmitted to the Director of HR who recommended that the Director General initiate disciplinary proceedings to "request the Disciplinary Committee to advise [him] on what disciplinary measures, if any, should be recommended in relation to [the complainant's misconduct]".

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\* Registry's translation. According to Ms B., the complainant had said the following, in French: «J'en ai marre. J'en ai marre de tous les Africains. J'en ai marre de vous. Je ne peux pas travailler avec vous, les Africains, car j'en ai marre. Vous pouvez me virer.»

4. A Disciplinary Committee was duly set up and the complainant was informed of its composition on 30 March 2015. In response to a request from the complainant, the Chair of the Disciplinary Committee informed her on 24 April that the conclusion reached by the auditors was that the complainant's alleged statements had been confirmed in the interviews. The Chair offered her the opportunity to comment within five days, which she did, contesting that the allegations against her had been proven and asking that the 24 April decision be set aside, that a new inquiry be ordered, and that the transcript of her interview be declared null and void in light of procedural errors. In its 5 June 2015 report, the Disciplinary Committee concluded as follows:

- there were sufficient facts to conclude that the complainant had made inappropriate comments in the presence of two staff members;
- those inappropriate comments were taken as offensive by Ms B.; however, they were not directed at the staff members present at that time (Ms B. and Ms E.);
- it appeared clearly from the auditors' report that the comments were made in an unrestrained manner by the interruption of Ms B. and Ms E. in the midst of a meeting; and
- the utterance of such comments and accompanying behaviour, no matter what the situation, should not be tolerated and could be considered as misconduct.

Considering the above conclusions, the Disciplinary Committee recommended that the Director General apply the disciplinary measures of a written warning, with a copy placed in the complainant's personal file citing conduct unbecoming of an international civil servant, and delayed advancement to the next salary step. It was also suggested that the Director General might consider requesting the complainant to apologize in writing to Ms B., with a copy to Human Resources.

5. In his decision dated 20 July 2015, the Director General informed the complainant, inter alia, that "[i]n the course of [the] investigation, it became evident that the allegations contained in the [...] written complaint of 27 January 2015 were well founded and that the conduct in question amounted to possible misconduct". He went on to

note that “the Disciplinary Committee unambiguously concluded that [the complainant’s] remark constituted a prohibited conduct on [her] behalf”. Citing the relevant Staff Regulations and Rules as well as Article 101(3) of the Charter of the United Nations and AI No. 34, he stressed that “any form of discrimination, including discrimination in respect of other staff members’ race or ethnic origin, is strictly prohibited. Moreover, as emphasized in the aforementioned Administrative Instruction, the UPU applies a zero tolerance policy for any kind of prohibited conduct.” He went on to note that “[n]otwithstanding the fact that, in compliance with the relevant provisions contained in the UPU Staff Regulations, Rules and associated Administrative Instructions, [the complainant’s] prohibited conduct (‘offenses and discrimination impacting upon working relations’) could have led to summary dismissal”, he instead decided to limit the disciplinary measure to a three-month suspension without pay.

6. In a letter of 3 August 2015 the Director General also denied the complainant’s request to receive copies of the auditors’ investigation report as well as the Disciplinary Committee’s report, citing Rule 110.4(3) of the UPU International Bureau’s Staff Rules, whereby “[t]he deliberations and reports of the Disciplinary Committee and its recommendations to the Director General shall be confidential”. The Director General denied her claim that the disciplinary decision was in any way connected to her work as a staff representative and informed her of her right to contest the final decision in a complaint before the Tribunal.

7. In the present complaint, the complainant impugns that 3 August 2015 decision, as well as the original decision of 20 July 2015, on the following grounds:

- Breach of due process: the Administration failed to notify the complainant prior to referring the complaint to the internal auditors, contrary to the provisions of AI No. 34; it failed to provide her with a written document indicating the specific allegations against her prior to initiating the investigation; and it failed to

provide her with copies of the investigation report and the Disciplinary Committee's report.

- The impugned decision was based on a flawed investigation and was disproportionate to the alleged conduct.
- The Director General was biased against her because of her position as a staff representative.

8. With regard to the fact-finding investigation, the complainant submits that the UPU erred in not consulting her prior to starting the investigation, as required by paragraph 6.16 of AI No. 34; she was not informed of the allegations made against her; the auditors failed to interview Mr G. as requested by her so that he could provide context to her comments; the summary of interviews failed to properly contextualize her statements and did not mention the pro-active steps she had taken following the incident; and she was not provided with a copy of the investigation report.

9. The complainant requests oral hearings, but as the written submissions are sufficient to reach a reasoned decision on the complaint, the request for oral hearings is denied.

10. The Tribunal notes that the complainant raised the objection of not being consulted in accordance with AI No. 34 and was informed by the Administration that there was an error in the French translation of AI No. 34 paragraph 6.16 (the English version specifying that the "aggrieved individual" must be consulted prior to initiating the investigation whereas the French version refers to consulting the person accused of misconduct) but that nonetheless, the UPU would suspend the investigation to allow her to submit any comments. She did so and the investigation was then initiated. Therefore, the Tribunal considers that the procedural error alleged by the complainant based on the French version has been rectified and will not address it further. According to the rules governing fact-finding investigations, the complainant must be informed of the nature of the allegations at the outset, but there is no requirement for full details to be provided at the early stages of the investigation. AI No. 34 provides as follows:

“6.17 At the beginning of the fact-finding investigation, the official to whom the investigation was assigned shall inform the alleged offender of the nature of the allegation(s) against him or her. [...]”

The complainant was told by Ms B., on the day of the incident (27 January 2015), that she had filed a complaint regarding the complainant’s statements, which she had found offensive. The complainant was later notified by email from the auditors, dated 12 February 2015, that an investigation was being initiated, in accordance with AI No. 34, with regard to a complaint filed by Ms B. on 27 January 2015, and asking for her presence at a meeting on 18 February to discuss the matter. As the complainant had already been informed (on the day of the incident) by Ms B. herself that a complaint had been filed and the email from the auditors specified who had filed the complaint on 27 January, and considering the fact that the investigation was being initiated under AI No. 34 on “Conflict resolution mechanisms related to discrimination, abuse of authority and harassment”, the Tribunal is satisfied that the complainant was well informed as to the nature of the allegations against her. With regard to the claim that the auditors failed to interview Mr G., as requested by the complainant, the Tribunal recognizes the fact that as Mr G. was not present during the incident, it was not unreasonable for the auditors not to interview him. It should be noted that nothing prevented the complainant from asking Mr G. to submit a witness testimony if she believed it to be necessary to her defence. Her claims that the summary of interviews failed to properly contextualize her statements and did not mention the pro-active steps she had taken following the incident are unfounded. Her testimony specified the context of her comments and the testimonies attested to the fact that she had apologized to Ms B. that same day, and had explained the context to Ms E.

11. The complainant was provided with summaries of the interviews of Ms E. and Ms B., as well as her own, and was given ample opportunity to comment on them, of which she availed herself. The auditors found that, in substance, the alleged statements had in fact been made by the complainant, based solely on the three witness testimonies (of Ms B., Ms E. and the complainant). The auditors were tasked only

with a fact-finding investigation, so they made no qualitative judgement on the complainant's statements in question and merely limited themselves to verifying whether or not the incident had occurred. Considering this, and the fact that the complainant had a summarized version of each of the interviews, she had all the evidence on which the authority based its decision (see Judgment 3863, under 18).

Thus, her right of defence and due process was protected. However, the Tribunal stresses that the UPU is mistaken in relying on "confidentiality", as stated in Staff Rule 110.4, quoted above, as a reason to deny the complainant a copy of either the investigation report or the findings and recommendations of the Disciplinary Committee. Clearly, Staff Rule 110.4(3) can only be interpreted as meaning that the deliberations are confidential and that the consequent reports are not to be published or shared unless or until the documents are relied on in adversarial proceedings, including in steps leading to the imposition of a disciplinary measure. While in the present case, the complainant had much of the information needed to defend herself (as the investigation was confined to the three witness interviews, of which she had summary copies), the only way to properly ensure that a staff member has been fully informed of all the evidence and other elements of the case against her or him, on which the authority has based or intends to base its decision, is to supply her or him with the pertinent documents. The UPU failed to do so and, in the result, the complainant is entitled to moral damages which the Tribunal assesses at 10,000 Swiss francs.

12. The complainant asserts that the Director General was biased against her and that his decision to suspend her was vitiated by malice against her for her role as a staff representative. These allegations are unfounded. She has not provided any persuasive evidence to substantiate them, whereas the consistent case law of the Tribunal requires that such allegations be proved, since bias and bad faith cannot be presumed (see Judgments 3886, consideration 8, and 3738, consideration 9).

13. Considering the discriminatory nature of the statements the complainant was found by the Director General to have made on 27 January 2015, it was not unreasonable for the Director General, following the UPU's zero-tolerance policy, to choose a stricter sanction than that recommended by the Disciplinary Committee. "The disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area" (see Judgment 3640, under 29). As stated by the Director General, the comments could have led to a summary dismissal. The complainant claims that the circumstances surrounding the incident (that is, that she felt insulted by two African colleagues which led to her outburst before Ms E. and Ms B.) and her "pro-active efforts" immediately following the incident should have been considered as mitigating factors and, therefore, that her statements should not have been considered as misconduct. This claim is unfounded. Regardless of the situation, the complainant's statements (not directed at Ms B. specifically but still referring to work colleagues) were beyond what is appropriate for an international civil servant and the Tribunal notes that her behaviour immediately following the incident was not "pro-active". The complainant had gone to speak with Ms B. for other work-related matters, and only after realizing that Ms B. was upset and after being told by her that she had filed a complaint did the complainant apologize. Therefore the Tribunal finds that, in this case, it was not disproportionate for the Director General to impose the disciplinary measure of a three-month suspension without pay. In all the circumstances, and notwithstanding the conclusion that there was a procedural flaw, it is inappropriate to set aside the impugned decision and remit the matter to the UPU.

14. As the complainant succeeds in part, she is entitled to costs in the amount of 4,000 Swiss francs.

15. In those circumstances, the UPU's counterclaim for costs is dismissed.

DECISION

For the above reasons,

1. The UPU shall pay the complainant 10,000 Swiss francs in moral damages.
2. It shall also pay the complainant 4,000 Swiss francs in costs.
3. All other claims are dismissed, as is the counterclaim for costs.

In witness of this judgment, adopted on 1 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ