

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M. B.

v.

UPU

(Application for interpretation and review filed by the UPU)

(Application for execution filed by Ms M. B.)

127th Session

Judgment No. 4078

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation and review of Judgment 3929 filed by the Universal Postal Union (UPU) on 22 February 2018, Ms O. M. B.'s reply of 12 July, the UPU's rejoinder of 31 August and Ms M. B.'s surrejoinder of 4 October 2018;

Considering the application for execution of Judgment 3929 filed by Ms M. B. on 1 March 2018 and corrected on 8 March, the UPU's reply of 12 June, corrected on 19 June, Ms M. B.'s rejoinder of 24 September and the UPU's surrejoinder of 26 October 2018;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 3929, delivered in public on 24 January 2018, the Tribunal, upholding the complaint filed by Ms M. B. (hereinafter "the complainant"), set aside the decisions to abolish her post and to terminate her appointment and awarded her material damages for the loss of opportunity to continue working with the UPU until her retirement

age in an amount equal to 30 months' gross salary with reference to her last month's gross salary, plus the equivalent of the employer's contribution that would have been due to the Provident Scheme during those 30 months. The Tribunal also awarded moral damages in the amount of 30,000 Swiss francs and costs in the amount of 7,000 Swiss francs.

2. The main reasons for the Tribunal's decision were that:

- (a) The Director General's decision to reject the Joint Appeals Committee's recommendation, according to which the decision to terminate the complainant's appointment should be set aside, was not adequately motivated.
- (b) The ordinary competent authority regarding the abolition of posts was the Council of Administration; the Chair of the Council of Administration took the decision to abolish five posts, including that of the complainant, in accordance with Article 12(1) of the Rules of Procedure of the Council of Administration. This article provides: "[u]rgent questions raised between sessions [of the Council of Administration] shall be dealt with by the Chairman". The Tribunal concluded that the UPU had not presented sufficient evidence that the abolition of posts was "for **urgent** financial reasons" (emphasis added) as the Council of Administration had been aware of the financial situation for years and had nevertheless confirmed the posts in the budget for 2015. The decision to abolish the post was not taken in accordance with the rule of competence referred to in Article 12(1) of the Rules of Procedure of the Council of Administration cited above. The Tribunal found that the abolition decision was an administrative decision challengeable before the Tribunal in accordance with Article II of its Statute.
- (c) In awarding moral damages, the Tribunal took into consideration the UPU's failure to properly assess the complainant's illness.

3. In its application for both interpretation and review of Judgment 3929, filed on 22 February 2018, the UPU submits that:

- (a) The decision to abolish posts was taken by the Chair of the Council of Administration and not by the Director General. The decision must therefore be regarded as a decision of the Council of Administration and, as such, did not constitute an administrative decision impugnable before the Tribunal in accordance with Rule 111.3 of the Staff Rules of the International Bureau of the UPU and Staff Regulation 11.2(1). The UPU adds that the decision to abolish five posts without any reference to the termination of specific appointments was not unilateral in nature, and did not carry any direct legal consequences for the complainant.
- (b) The Tribunal disregarded a fundamental material fact contained in the letter sent by the Deputy Director General to the Chair of the Council of Administration, which cited not only the urgent financial difficulties and budgetary constraints faced by the UPU, but also the “need to align the structure of the [International Bureau] with the evolving needs of the UPU (and its member countries) with the aim of further enhancing its efficiency and cost effectiveness”.
- (c) The Director General’s decision to terminate the complainant’s appointment, which implemented the Council of Administration’s abolition of post decision, fell within the Director General’s executive functions.
- (d) The Tribunal did not consider the dire financial situation faced by the UPU, which necessitated the abolition of five posts. To illustrate this contention, the UPU points out that in 2011 there was a funding deficit of 74,685,920 Swiss francs, and by the end of 2014, the deficit increased to 77,952,874 Swiss francs. The UPU contends that the Tribunal’s finding that the UPU did not present sufficient evidence to support its assertion that the abolition of posts was for urgent financial reasons is materially flawed and, furthermore, that the Tribunal did not consider the UPU’s submissions and documentation regarding its financial situation.

- (e) The UPU challenges the Tribunal's finding regarding the complainant's loss of opportunity to continue working with the UPU until her retirement age.

4. The UPU requests that the Tribunal: "Rescind the [d]ecision contained in its Judgment No. 3929 insofar as it relates to the setting aside of the abolition and termination decisions taken by the [Council of Administration] and the [Director General] (respectively), the award of material damages in an amount equal to 30 months' gross salary with reference to her last month's gross salary (along with the equivalent of the employer's contribution that would have been due to the Provident Scheme during those 30 months), and the award of moral damages and costs; or, in the alternative, award [to the complainant] a non-punitive compensation amount which duly takes into consideration the serious financial constraints faced by the UPU and which does not exceed the maximum amount payable to staff members upon termination of their appointments pursuant to Staff Rule 109.4.1(c)(i) and the Indemnity Table provided at Staff Rule 109.4." The UPU further requests the Tribunal to provide "a clear interpretation" of its findings.

5. The complainant asks the Tribunal to declare the application for interpretation and review of Judgment 3929 irreceivable and devoid of merit; to order the UPU to pay her 50,000 Swiss francs for the additional moral damage caused to her by bias and prejudice against her; to award her legal costs; to order the UPU to provide her with an apology acknowledging the falsity of the allegations made by the Director General and the Deputy Director General against her during the meetings of the Council of Administration of 23, 24 and 27 April 2018.

6. The UPU submits that the transcripts of the April 2018 meetings of the Council of Administration annexed to the complainant's submissions are irreceivable as they are not official transcripts. It asserts that these transcripts were made by the complainant, and that the Summary Record provided by the Secretary General of the Council of Administration, which was not prepared in transcript format, is the only official record of the meetings of the Council of Administration.

The Tribunal acknowledges that the contested annexes are unofficial documents but observes that although the UPU states that these documents were not “confirmed or verified”, it does not contest specifically any part of them.

7. On 1 March 2018, the complainant filed an application for execution of Judgment 3929, because as of that date, none of the orders made in that judgment had been executed. On 28 May 2018, the complainant received an amount equivalent to 30 months of salary, post adjustment, allowances and UPU contributions to the Provident Scheme, as well as the amounts awarded for moral damages and legal costs as ordered by the Tribunal in Judgment 3929. She maintains the present application for execution because of the late payment of the amounts due, for which she says she is entitled to interest, and claims further moral damages and legal costs. Specifically, she claims moral damages in the amount of 100,000 Swiss francs for having to bring an application for execution, and exemplary damages in the same amount to compensate for the injury to her health, honour, dignity, and reputation caused by the illegal conduct of the UPU in retaliation for the exercise of her right of appeal. She also claims costs in the amount of 10,000 Swiss francs, and interest at the rate of 5 per cent per annum on the sums that were paid to her belatedly pursuant to Judgment 3929, for the period commencing 30 days after the public delivery of that judgment and ending on the date of payment (28 May 2018).

8. As the two applications concern the same judgment, the Tribunal finds it convenient to join them in order to render one judgment. The Tribunal finds the written submissions to be sufficient to reach a reasoned decision and therefore denies the complainant’s request for oral hearings.

9. According to the Tribunal’s case law, ordinarily an application for interpretation can only concern the decision in a judgment and not the grounds therefor (see, for example, Judgment 3984, consideration 10, and the case law cited therein). The application for interpretation is, on

the face of the record, irreceivable as it does not put in issue the terms of the orders made in the decision in Judgment 3929.

10. Regarding the application for review, it is well settled that the Tribunal's judgments are final and carry the authority of *res judicata*. They may be reviewed only in exceptional circumstances and on strictly limited grounds. The only admissible grounds therefor are failure to take account of material facts, a material error (in other words, a mistaken finding of fact involving no exercise of judgement, which thus differs from misinterpretation of the facts), an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. On the other hand, pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea afford no grounds for review (see, for example, Judgments 3001, consideration 2, 3452, consideration 2, 3473, consideration 3, 3634, consideration 4, 3719, consideration 4, and 3897, consideration 3).

11. The application for review is also irreceivable, as the UPU does not raise any of the admissible grounds for review set out above.

12. The UPU's submission under consideration 3(a) above is in part based on a misinterpretation of Judgment 3929, and in part immaterial to the issue of the admissibility of the application for review. Moreover, the applicant's submissions clearly cannot be regarded as pleas of material errors, but either seek to call into question the Tribunal's interpretation of the facts of the case and its application of the law, or have no bearing on the outcome of the case. The argument that the decision to abolish posts did not constitute an administrative decision because it was taken by the Chair of the Council of Administration and not by the Director General is also incorrect.

13. The reason which led the Tribunal to set aside the decision to abolish the five posts was the lack of competence of the interim deciding authority, i.e. the Chair of the Council of Administration,

as there was no proven urgency which would have empowered him to take such a decision. Accordingly, the Tribunal's decision did not put in issue the Council of Administration's authority to take a decision as the abolition decision was taken by the Chair without the power to do so and therefore it cannot be considered as a decision of the Council of Administration. This is a question of law, challengeable in accordance with Article II of the Tribunal's Statute.

14. It must be noted that Article II does not specify which organ of the organization must take a challengeable administrative decision and, therefore, introducing any such limitation based on the internal rules of an international organization is incompatible with the Tribunal's Statute. It is also worth noting that in consideration 2 of Judgment 580, delivered in public on 20 December 1983, the Tribunal stated the following:

“Who took the decision is not a question on which the Tribunal's competence, as defined in Article II(1) of its Statute, depends. The article merely says that the Tribunal may hear complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. An appeal may therefore lie to the Tribunal against a decision by any authority which a complainant accuses of having infringed the terms of his appointment or the provisions of the Staff Regulations. The decision challenged in this case is just such a decision since the complainant is alleging that the Governing Body acted in breach of a rule he infers from Article 11.3 of the Staff Regulations.

There is therefore no need to consider whether the Tribunal is competent to review measures which the Governing Body takes in the exercise of its rule-making authority.”

15. In addition, the abolition decision was foundational to the termination decision, which directly affected the complainant. The complainant filed her complaint against the abolition and termination decisions. With regard to the abolition decision, the Tribunal found that the assertion of urgency promoted by the Director General and on which the interim competence of the Chair of the Council of Administration was based, was at odds with the fact that the Council of Administration approved the posts in question in the budget for 2015, i.e. a short time before the interim, extraordinary procedure for the posts abolition started, and notwithstanding the fact that the existence of the difficult

financial situation had been known since 2011. Accordingly, the Tribunal based its decision to set aside the abolition decision on the finding that there was insufficient evidence to support the alleged “urgency”, and that, therefore, the Chair of the Council of Administration did not have any competence to abolish the posts in question. The Tribunal’s decision to set aside the termination decision was based on the unlawfulness of the abolition of the complainant’s post. In any case, the UPU contests the Tribunal’s evaluation of the facts and exercise of judgement, and its submission, as set out in consideration 3(a) above, is irreceivable as it does not raise any admissible ground for review.

16. It can be added that the United Nations Joint Inspection Unit reached the same conclusion, that there was no evidence of urgency to abolish the posts, in paragraph 178 of its 2017 report entitled “Review of Management and Administration in the Universal Postal Union”, where it stated the following:

“According to the report on human resources covering the period from November 2014 to September 2015, five staff posts were abolished, including three encumbered positions at the Director and Professional levels and the continuing/permanent contracts of those staff members were terminated in May 2015. [...] Following a recommendation by the executive management, the decision to abolish the posts was taken by the Chair of the Council of Administration, based on article 12 of its rules of procedure. The Council of Administration, the body responsible for the creation and abolition of posts, was not consulted. [...] The Inspector was informed that the abolition of the posts was a matter of urgency, given the financial implications, and therefore could not be deferred to the next session of the Council of Administration. **The Inspector fails to see the urgency of the matter. Proposals on the abolition of posts (in particular posts at director level) should be brought to the Council of Administration, as foreseen in the General Regulations, thus allowing member countries to exercise proper oversight.**” (Emphasis in the original.)

17. In its pleas the UPU submits that “the UPU must stress that the [Tribunal]’s decision clearly falls outside its purview and seeks to call into question the mandate and authority of the [Council of Administration] as the sovereign governing body of the UPU between Congresses. If upheld, the Administration will have no choice but to take the matter to that governing body, which may lead to significant implications of

a wider character, including a review by UPU member countries of remedial mechanisms available to staff members for impugning decisions of the [Director General]” (emphasis added). This is a subtle threat to the Tribunal but a threat nonetheless. As an independent judicial body, the Tribunal is constituted by judges who must act without fear or favour. Such a threat must be ignored. Also, the threat if acted upon would subvert the operation of the rule of law at an international level. That is because dissatisfaction with a judgment lawfully rendered by a judicial body should never ground the rejection of the jurisdiction of that body. This is unacceptable behaviour by an international organization. The disdain the organization shows for the orderly resolution of justiciable disputes subverts the very institutions established to resolve them and the framework within which they operate. That is even more so as the organization’s understanding of the judgment in question is misconceived.

18. The UPU also contends that the proposal of the Deputy Director General to the Chair of the Council of Administration referred additionally to the “need to align the structure of the [International Bureau] with the evolving needs of the UPU (and its member countries) with the aim of further enhancing its efficiency and cost effectiveness”. Notwithstanding the fact that this motivation for the decision taken by the Chair fails on vagueness grounds, even if it were valid, this plea has no bearing on the outcome of the case, as this other consideration was not an urgent matter either and, as such, did not sustain the exercise of the Chair’s interim power. Also clearly irreceivable is the submission regarding the finding on the complainant’s loss of opportunity to continue working with the UPU until her retirement age, as this submission does not contest a material error, but the Tribunal’s exercise of judgement. Likewise, the challenge to the findings that the decisions to abolish the post and to terminate the complainant’s appointment were unlawful, the objections that the financial situation was not considered, and that the decision of 3 August 2015 of the new Chair of the Council of Administration, confirming the 15 December 2014 decision of the previous Chair, became moot with the setting aside of the original decision, clearly fall outside the purview of the application for review. The Tribunal’s decision is clear and the UPU, as stated above, either merely contests

the exercise of judgement or refers to issues which do not have any bearing on the outcome of the case.

19. With respect to the UPU's request that the Tribunal rescind its decision "insofar as it relates to the setting aside of the abolition and termination decisions taken by the [Council of Administration] and the [Director General] (respectively), the award of material damages in an amount equal to 30 months' gross salary with reference to her last month's gross salary (along with the equivalent of the employer's contribution that would have been due to the Provident Scheme during those 30 months), and the award of moral damages and costs" and to instead award her "a non-punitive compensation amount which duly takes into consideration the serious financial constraints faced by the UPU and which does not exceed the maximum amount payable to staff members upon termination of their appointments pursuant to Staff Rule 109.4.1(c)(i) and the Indemnity Table provided at Staff Rule 109.4", there is no reviewable error that would allow the Tribunal to grant that request.

20. In its application for review, the UPU simply disagrees with the Tribunal's appraisal of the evidence and its interpretation of the law. As stated above, the UPU's arguments, summarized in consideration 3, demonstrate that the present application does not raise any admissible ground for review, nor any question of interpretation, and that it is in fact merely an attempt to re-open issues already settled in Judgment 3929. Accordingly, it must be dismissed.

21. With regard to the application for execution filed by the complainant, the UPU contests its receivability on the grounds that it is premature and moot. The UPU claims that the application is premature, as the complainant was informed by letter dated 22 February 2018 that the UPU had filed an application for interpretation and review of Judgment 3929 and that the matter would be discussed by the Council of Administration at its April 2018 meetings. Therefore, she filed her application for execution without waiting for the decision of the Council of Administration. The UPU states that the application is also

moot, because the complainant received payments in execution of Judgment 3929 on 28 May 2018 (as detailed above in consideration 7).

22. The application for execution filed by the complainant is receivable. The 22 February 2018 letter from the Deputy Director General to the complainant essentially informed her that the UPU disagreed with the Tribunal's Judgment 3929 and had filed an application for interpretation and review. It stated *inter alia* that the UPU must "await the outcome of the review process before the [Tribunal]" before considering any further action and that it must also await a "final deliberation and decision" of the Council of Administration which would be meeting in April 2018. The Tribunal recalls that an application for review does not suspend the execution of the judgment (see Judgment 1620, consideration 7). In this case, as mentioned above, the application for interpretation does not put in issue the terms of the orders made by the Tribunal in its decision in Judgment 3929. The judgment should therefore have been executed promptly and, accordingly, the application for execution is not premature.

23. In light of the above, the Tribunal orders the UPU to pay the complainant, within one month of the date of the public delivery of the present judgment, interest on the amounts paid at the rate of 5 per cent per annum from one month from the date of the public delivery of Judgment 3929 (24 January 2018) until the date of final payment (28 May 2018).

24. The delay in fully executing Judgment 3929 has caused the complainant moral injury. In awarding moral damages, the Tribunal takes into particular account the following: the duration of the delay and the fact that there was no need to seek a decision from the Council of Administration to authorize the execution of a judgment of the Tribunal, particularly when the budget was already approved for payments of awards.

25. The complainant is entitled to an award of moral damages which the Tribunal sets in the amount of 15,000 Swiss francs. The complainant is also entitled to costs in the total amount of 7,000 Swiss francs for these two applications.

The complainant seeks an apology from the organization by order of the Tribunal. This claim is rejected as such an order is outside the Tribunal's competence (see, for example, Judgment 2742, consideration 44, or Judgment 3597, consideration 10).

All other claims and counterclaims must be dismissed.

DECISION

For the above reasons,

1. The UPU's application for interpretation and review is dismissed.
2. The UPU shall pay the complainant 5 per cent interest in accordance with consideration 23, above.
3. The UPU shall pay the complainant 15,000 Swiss francs in moral damages.
4. The UPU shall also pay her 7,000 Swiss francs in costs.
5. All other claims and counterclaims are dismissed.

In witness of this judgment, adopted on 8 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ