

G. (No. 5)

v.

UPU

130th Session

Judgment No. 4291

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr D. G. against the Universal Postal Union (UPU) on 25 January 2018 and corrected on 28 February, the UPU's reply of 7 June, corrected on 14 June, the complainant's rejoinder of 2 November and the UPU's surrejoinder of 7 December 2018;

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 dismissal of his complaint of harassment and abuse of authority.

The complainant joined the UPU in 1995 and was granted a permanent appointment in December 1999. In December 2011 he submitted a complaint alleging harassment and abuse of authority by his supervisor within the French Translation Service, as well as other UPU officials, and requested that the investigation be conducted by the United Nations Office of Internal Oversight Services (OIOS).

On 22 March 2012 the complainant was informed that the OIOS had refused to conduct a full investigation of the complaint on procedural grounds which rendered the complaint irreceivable, namely that it had not been submitted by either the aggrieved individual or a third party with direct knowledge of the situation, as required by UPU

Administrative Instruction No. 34 of 4 November 2011 (AI/34). The OIOS sent a preliminary report to the UPU on 30 March 2012 concluding that the complaint was irreceivable and that the core of the complaint seemed to be work performance related and the facts relied upon did not constitute harassment. The UPU Director General, with the complainant's agreement, requested an external service provider (referred to as "Internal Auditor" under the UPU terminology) to conduct an investigation into the complainant's allegations.

In its investigation report of September 2012 the Internal Auditor found that none of the allegations presented in the complaint of December 2011 were well founded. As a result, the Director General decided to close the matter in October 2012. The complainant challenged that decision, which led to Judgment 3732, delivered in public on 8 February 2017, in which the Tribunal sent the case back to UPU to take a new decision after recommendation by a new properly composed Joint Appeals Committee. It also awarded 6,000 euros in moral damages, as the complainant had only been provided with an executive summary of the investigation report.

In March 2017 the Chair of the newly composed Appeals Committee informed the complainant that his complaint of harassment would be reconsidered. On 24 April the complainant submitted a revised statement of appeal.

In its opinion of 14 July 2017 the Appeals Committee found that many issues raised in the revised appeal were not receivable as they were not part of the original appeal. On the merits, it found that the allegations of harassment were related to work performance, that they were based on the complainant's perceptions and that they were not founded. It also concluded that his allegations of institutional harassment and abuse of authority were unfounded and recommended that the Director General confirm his initial decision to dismiss the complaint of harassment and close the case. By a letter of 27 October 2017 the complainant was informed of the Director General's decision to follow the Appeals Committee's recommendation. That is the impugned decision.

The complainant asks the Tribunal to find that he was harassed and to order the UPU to initiate disciplinary proceedings against all UPU officials found responsible for his harassment. He claims 250,000 Swiss francs in moral damages for the harassment suffered and the inexplicable delay between the issuance of the Appeals

Committee's opinion and the communication of the impugned decision. He asks the Tribunal to order that any sick leave, home leave and other emoluments deducted due to his service-incurred illness caused by harassment be "re-credited", to order a re-classification review of his former post to which he has been reinstated in execution of Judgment 3732 and to order the UPU to revise his job description and reclassify his post. Finally, he asks the Tribunal to order that he be allowed to work permanently from home at a percentage mutually agreed upon by him and his treating physician. He claims costs and interest on all sums awarded.

The UPU submits that the complaint is partly irreceivable, as the complainant's claims relating to matters that occurred after the decision of 10 December 2012, which confirmed the decision to close the case on his harassment complaint, are beyond the scope of the present complaint. Some of his claims for relief seek injunctions which are beyond the Tribunal's remit. It asks the Tribunal to dismiss the complaint as entirely unfounded and to order the complainant to bear part of its costs.

CONSIDERATIONS

1. The background to this complaint can be found in Judgment 3732. It may be recalled that the complainant submitted a complaint of harassment, abuse of authority, and retaliation by his supervisor (Mr Z.) on 21 December 2011 (dated 19 December 2011). In its Preliminary Assessment on Prohibited Conduct by a Staff Member at the UPU, dated 30 March 2012, the OIOS found the complaint to be both irreceivable and unfounded. It was found to be irreceivable as it had been submitted by the complainant's lawyer instead of by himself (or a third party with first-hand knowledge) as required by the relevant rules. However, the OIOS noted "that the remarks and allegations contained in [the Director General's] letter [to the complainant's lawyer] as well as the complaint of 19 December 2011 will be thoroughly analyzed". The eight alleged incidents of "harassment, abuse of power and retaliation" raised in the complaint and analyzed by the OIOS were:

- (a) degrading, violent and unprofessional treatment (by Mr Z.) and institutional tolerance of such behaviour by all UPU management;

- (b) destruction of professional trust and respect resulting in a tension-filled work environment;
- (c) abusive and unwarranted revocation of job-specific duties;
- (d) improper freezing of the complainant's professional evolution in 2006;
- (e) professional humiliation and ongoing harassment in 2009;
- (f) continued harassment while on work-related medical leave;
- (g) ongoing direct and institutional harassment; and
- (h) abuse of power regarding negligent investigation into ongoing harassment complaints.

In its final observations the OIOS found:

- The complaint was not receivable as it was not submitted by the aggrieved individual or by a third party with direct knowledge of the situation (it was submitted by the complainant's lawyer).
- "It is apparent that there are disagreements between [the complainant] and [Mr Z.], who, at one point shared a close personal relationship. OIOS notes that the core of the complaints seems to be work performance related, an issue, which is not normally considered harassment, and not dealt with under AI 34."
- Some of the examples presented to demonstrate alleged prohibited conduct related to administrative decisions which fell beyond the scope of Mr Z.'s authority (such as post reclassifications and job descriptions).
- Managers have the prerogative to designate an Officer-in-Charge (OIC) in their absence and there are no rules stipulating that staff members senior in grade or time of service must be selected. The non-selection of the complainant as OIC in Mr Z.'s absence does not constitute harassment.
- "The report of alleged harassment and abuse of authority is largely stated in general terms, more demonstrative of a staff member seeking alternative work conditions, for example, 'to be allowed to work permanently from home'. The relief sought suggests that managerial action would be more appropriate to address the complaint."

2. Despite the OIOS assessment, the Director General decided, in respect of the complainant's request, to have an external service provider, the "Internal Auditor", conduct an investigation into the allegations. Following a full fact-finding investigation, in which the complainant and ten witnesses were interviewed, in its report of 11 September 2012, the Internal Auditor concluded that none of the complainant's allegations were founded and no prohibited conduct had taken place. In its Executive Summary, evaluating the same allegations (as listed above), it found that the facts arising out of the interviews and documents did not support the complainant's "interpretation" or, when placed in context, "the resultant picture contradicts the substance of the complaint". With regard to allegations (f) and (g) it found that, insofar as they related to medical assessments, the matter was outside the scope of the investigation. The Director General thus decided to close the matter and notified the complainant of this decision in a letter dated 23 October 2012.

3. Following the Director General's 10 December 2012 rejection of his 23 November 2012 request for review, the complainant filed an internal appeal with the Joint Appeals Committee (JAC) on 10 January 2013. In its report dated 4 November 2013, the JAC concluded that the allegations of harassment were unfounded. By letter dated 22 November 2013, the new Director General endorsed the conclusions of the JAC and confirmed the 10 December 2012 decision (taken by his predecessor) to find the allegations of harassment to be unfounded and to close the case.

4. On 15 February 2014 the complainant filed a complaint with the Tribunal against that decision, which led to Judgment 3732 (delivered in public on 8 February 2017). In that judgment, at considerations 3 and 6, the Tribunal identified two flaws in the JAC's approach to the appeal: the JAC's composition was improper and the redacted report of the Internal Auditor provided to the complainant was not sufficiently detailed. Thus, the Tribunal sent the case back to the UPU to take a new decision, after a recommendation from a new, properly composed JAC. The complainant was awarded 6,000 euros in moral damages for the fact that he was provided with only an executive summary of the investigation report, and 4,000 euros in costs. The UPU's counterclaim for costs was dismissed.

5. Following a review by a newly composed Appeals Committee, the 14 July 2017 report of the Appeals Committee noted that:

“(a) the United Nations OIOS, in its preliminary assessment did not find the complaint of prohibited conduct receivable. Moreover, the core of the complaints were found to be work-performance related, an issue which is not normally considered harassment.

(b) In normal circumstances, the complaint case should have been closed after the OIOS report. However, on the request of the complainant, [the Director General of the] UPU asked the [Internal Auditor] to conduct an independent enquiry into the alleged complaints, which was agreed to by the Complainant’s Counsel.

(c) The [Internal Auditor], in its detailed fact-finding report, did not find any substance in the Complainant’s allegations.”

It went on to state that “[t]he [Appeals Committee] has gone into each of the alleged harassment complaints and did not find them to be based on the facts of the case. These cases of alleged harassment are clearly those relating to work performance of the Complainant and are at best his own perceptions.” The Appeals Committee also found that the allegations against his supervisor, Mr Z., were not founded and that “[t]hey are based on the perceptions of the Complainant and have not been found to be valid or persuasive”. It also found that the complaints relating to freezing of the complainant’s professional evolution and to professional humiliation were “also not backed by the facts” and the claims of institutional harassment and abuse of power were “also found not to be true. In fact, the UPU Management seems to have gone out of its way to investigate the complaints.” It therefore recommended that the Director General confirm the initial decision to dismiss the complaint and “close the case once and for all”, also dismissing requests for costs. The Director of Human Resources informed the complainant, by letter dated 27 October 2017, of the Director General’s decision to endorse the Appeals Committee’s recommendation and dismiss the appeal.

6. The complainant essentially bases his complaint on the following grounds:

(a) He was a victim of a broad and extensive pattern of harassment and abuse of authority;

- (b) the new internal appeals procedure and the 2012 investigation report and witness statements (disclosed in 2017) “revealed serious irregularities with the investigation process”, including: false testimony by ten witnesses; ignoring essential evidence; lack of objectivity; failure to allow the complainant to test and counter witness testimonies; bias against the complainant; the JAC’s findings (that the allegations of harassment were not based on facts) are without merit; and failure to take into account the overall picture;
- (c) the Appeals Committee and the Director General’s final decision failed to provide the basis on which the opinion and decision was made;
- (d) further events, which occurred after he lodged his initial complaint of harassment, demonstrate an overall pattern of harassment and as such are relevant to the present complaint;
- (e) the decision to dismiss his appeal and close the case was irregular and unlawful; and
- (f) the complainant was provided only with a notification of the decision taken by the Director General in the letter from the Director of Human Resources and therefore “it can be assumed that such decision was never taken, at least not by the competent authority”.

7. The UPU asks the Tribunal to find the complaint partly irreceivable and entirely unfounded, and to reject the complainant’s claims for further costs, damages and interest. It also requests that the Tribunal order the complainant to bear all his costs as well as part of the organization’s costs in an amount left to the Tribunal’s discretion.

8. In his complaint form, the complainant requested an oral hearing, identifying himself and the Director General as witnesses to be called. In his rejoinder he added the former Director General, the Director of Human Resources, and the complainant’s supervisor, Mr Z., to his list of requested witnesses. The basis for his request is an alleged “lack of clarity about the denials” by the organization regarding his allegations of harassment. As the parties have presented ample submissions and documents to permit the Tribunal to reach an informed and just decision on the case, there is no need for an oral hearing. The request for an oral hearing is, therefore, rejected.

9. In his complaint, the complainant raises several claims regarding events that occurred after the decision of 10 December 2012. In particular: the unjustified and irregular disciplinary procedure in 2013-2014; the abolition of his post and the termination of his contract in 2015; the UPU's refusal to grant him temporary contract appointments; the UPU's refusal to appoint him to a vacant position in the French Translation Service in 2017; and the UPU's refusal to timely implement Judgment 3928. Such claims are irreceivable. As observed above, according to the decision taken in Judgment 3732, the case was sent back to the UPU for a new decision following a recommendation by a new, properly composed JAC. Accordingly, the proceeding continues from the filing of the complainant's 10 January 2013 internal appeal, which circumscribes the subject matter of this case. The Tribunal shall therefore not address the issues (listed above) raised by the complainant which occurred after that date.

10. In his claims for relief, the complainant asks the Tribunal to order a number of measures which are either unrelated to the present complaint or beyond the Tribunal's competence, namely, that the Tribunal should order the UPU to: initiate disciplinary action against UPU officials; re-credit the complainant with previously deducted sick leave, salary, home leave and other emoluments; commence a reclassification review of the complainant's post; revise the complainant's job description and grade; and allow the complainant "to work permanently from home at a percentage mutually agreed upon by him and his treating physician". Those claims will not be considered.

11. As the Tribunal recalled in Judgment 4233, consideration 3:

"[H]arassment can be the cumulative effect of a series of actions which, in isolation, might not be viewed as harassment (see, for example, Judgments 3485, consideration 6, 3599, consideration 4, and 4034, consideration 16) even if they were not challenged at the time of the events (see Judgment 3841, consideration 6). However, firstly, the person alleging harassment bears the burden of proving the allegation (see Judgments 2067, consideration 5, 2100, consideration 13, 2370, consideration 9, and 2406, consideration 13) and, secondly, the only actions which can be said to constitute harassment are those for which there is no reasonable explanation (see Judgments 2370, consideration 17, 2524, consideration 25, 3447, consideration 9, 3996, consideration 7B, 4038, consideration 18, and 4108, consideration 7)."

12. The complainant has failed to prove his allegations.

The complainant's submissions, and in particular, pleas (a) and (b) listed above in consideration 6, essentially ask the Tribunal to appraise the evidence presented in the OIOS Preliminary Assessment and in the Internal Audit Investigation Report, and to rule that the Appeals Committee and the Director General have erred in their assessments of the evidence. In Judgment 3593, consideration 12, the Tribunal stated as follows:

“[...] it is not the Tribunal's role to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. For that reason such a body is entitled to considerable deference. So that where in the present case the Investigation Panel has heard evidence and made findings of fact based on its appreciation of that evidence and the correct application of the relevant rules and case law, the Tribunal will only interfere in the case of manifest error.”

(See also Judgments 4091, consideration 17, 3882, consideration 13, and 3682, consideration 8.)

13. In the present case, the complainant's allegations of harassment were reviewed by two independent investigative bodies, which concluded not only that no harassment had been proven, but that the evidence (including the testimonies of ten witnesses) contradicted the complainant's allegations and perceptions. Their findings were then reviewed by the Appeals Committee and the Director General. Again, in a similar case, the Tribunal stated as follows, in Judgment 3995, consideration 7:

“[...] It is well settled that it is not the Tribunal's role to review an internal appeal body's findings of fact or assessment of evidence unless they are tainted with manifest error (see, for example, Judgments 3593, under 12, 3682, under 8, or 3831, under 28). In the instant case, it is plain from the reports that have been produced that the [Office of Audit and Oversight] investigation was conducted rigorously and competently and that the complainant's comments in response to their disclosure do not in any way prove that the findings of this investigation involved any manifest error.”

14. The Tribunal does not find any flaws in the investigative proceedings, nor in the assessments of those findings by the Appeals Committee or the Director General. With regard to the “serious irregularities” identified by the complainant in the new internal procedure, and in the 2012 investigation report and witness statements,

the complainant asserts that all ten of the witness statements are false, unsubstantiated, and show bias against him. In his submissions, he stated: “The complainant believes that [the witnesses] were convinced to make their sensationally false statements based on the assurance from UPU that it would remain confidential. There is no other explanation for the extreme false nature of the allegations they made during their interviews”. Essentially, the “flaws” he has identified are that they did not agree with his perceptions. He has not submitted any evidence that the investigators “failed to obtain, refused to accept or ignored relevant evidence, took account of irrelevant evidence or misconstrued the evidence” (see Judgment 3447, under 6). The ten witness statements are consistent, which supports the conclusion that the issue at hand is a misperception of events on the part of the complainant. It is notable that the Internal Auditor, at the end of the Executive Summary of its report, added:

“In accordance with UPU Administrative Instructions (DRH) No. 34 paragraph 6.18, all persons interviewed were reminded of and acknowledged the Administrative Instruction No. 35/2011 on protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations. Nevertheless, certain of the individuals interviewed expressed specific concerns about their personal physical security as a result of this process. We recommend that UPU considers what action is appropriate to adequately address these concerns.”

15. The crux of this case appears to be a misalignment of perceptions and a misunderstanding regarding the burden of proof. The complainant mainly relies on his own recitation of the facts and his perception of those facts as “proof” of his alleged harassment. However, the organization’s submissions, the investigation reports, and the witness statements reflect a contrary perception. The complainant asks for oral hearings because he finds the organization’s denials of his allegations to be insufficient. However, the burden of proof rests on him and he has not discharged it. For example, in his rejoinder he states that “the [UPU] chose not to address the numerous allegations of harassment that he made in his Complaint [...], limiting its arguments to two incidents/aspects, merely alleging that the rest are without merit. [...] Had the [UPU] believed or had the evidence that the Complainant’s allegations were without merit, it should have provided that evidence to the Tribunal [...], instead of merely alleging that the Complainant has not substantiated his allegations. It is grossly

inappropriate for the Respondent to simply assert that the Complainant has not demonstrated his allegations without disclosing its rebuttal evidence, if any, to the contrary.” It is for the complainant to adduce evidence of his allegations, and in the absence of such evidence, all such allegations should be rejected (see Judgment 28 at paragraph 4 of Section A).

16. The complainant’s plea that he was only provided with a notification of the decision taken by the Director General in the letter from the Director of Human Resources and therefore “it can be assumed that such decision was never taken, at least not by the competent authority”, is unfounded.

17. As stated in Judgment 4139, consideration 6, “[t]he Tribunal’s case law recognizes that the decision of the executive head of an organization may be communicated to the official concerned, as is common practice, by means of a letter signed by the head of human resources management (see, for example, Judgments 2836, consideration 7, 2837, consideration 4, 2871, consideration 7, 2924, consideration 5, or 3352, consideration 7). However, it must be clear from the terms of that letter, or, at least, from consideration of the documents in the file, that the decision in question was indeed taken by the executive head himself”.

18. In the 27 October 2017 letter from the Director of Human Resources to the complainant, it is expressly written: “I hereby notify you of [the] Director General’s final decision to dismiss your appeals and close this case.” There can be no doubt, in view of that wording, that the decision was not taken by the Director of Human Resources but that she was acting as the designated intermediary in informing the complainant of the Director General’s decision, in accordance with the normal administrative practice (see Judgments 2924, consideration 5, and 3352, consideration 7).

19. The complainant’s plea that the decision to dismiss his appeal and close the case was irregular and unlawful is unfounded. As observed above, the Tribunal finds no flaws in the new appeal proceedings, nor in the prior investigative proceedings upon which they were based, nor in the communication of the final decision.

The pleas regarding lack of justification in the Appeals Committee's opinion and in the Director General's final decision are likewise unfounded. In Judgment 4164, addressing a similar argument, the Tribunal stated the following, at consideration 13: "The Tribunal has consistently stated that when the executive head of an organisation adopts the recommendations of an internal appeal body, she or he is under no obligation to give any further reasons in her or his decision than those given by the appeal body itself." The following was also stated in Judgment 3184, consideration 10:

"The case law has consistently provided that '[t]here is a duty to explain a decision or a conclusion because everyone concerned has to know the reasons for it [...] [b]ut the duty will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower one or a recommendation by some advisory body' (see in particular Judgment 1673, under 6). Consequently, the Director-General, in his final decision, was not required to provide a detailed reply to each of the objections raised by the complainant. He merely had to state reasons for adopting or rejecting the recommendation of the advisory body and the reason on which the original decision was based."

In the present case, the Director General endorsed the Appeals Committee's opinion, which recommended that he dismiss the appeal in its entirety, and was based on its findings (section IV of the opinion) which are concise and specific, as well as the findings of the Internal Auditor and the OIOS investigations. The Tribunal concludes that the duty to motivate the Appeals Committee's opinion and the final decision has been fulfilled.

20. Considering this is a continuation of a previous judicial proceeding in which the case was remitted to the defendant for a new decision, the Tribunal does not find it appropriate to grant the UPU's counterclaim for costs.

21. In light of the above, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed, as is the UPU's counterclaim for costs.

In witness of this judgment, adopted on 8 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ