

EIGHTY-EIGHTH SESSION

***In re* Beaucent**

Judgment 1929

The Administrative Tribunal,

Considering the complaint filed by Mr Thierry Beaucent against the Universal Postal Union (UPU) on 25 January 1999, the UPU's reply of 30 March, the complainant's rejoinder of 28 April, the Union's surrejoinder of 7 June, the observations provided by Mr Achim van der Weg on 26 August at the invitation of the Tribunal, the complainant's additional submission of 22 September and the Union's further comments dated 7 October 1999;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, who is Swiss and was born in 1952, entered the staff of the International Bureau of the UPU on 26 April 1993 as assistant counsellor responsible for strategic planning at grade P.4. After being appointed to the post of Head of the Finance Section, he was promoted to counsellor at grade P.5 on 1 June 1997.

On 23 February 1998, the Deputy Director-General, as the complainant's first-level supervisor, completed his performance appraisal and career plan report for the period 1 January 1997 to 31 December 1997. He gave him the overall rating "good".

On 30 July 1998, external consultants, contacted at the request of the Council of Administration to carry out a study "evaluating the structuring of the UPU", submitted their report. Their recommendations included the merging of the Informatics and Data Base Section and the Postal Technology Centre. On 28 August 1998, the Deputy Director-General informed the complainant that the above merger would take effect on 1 September. In the context of the merger, the former Head of the Informatics Section, Mr van der Weg, was appointed Head of the Finance Section in place of the complainant. The latter was transferred to the Postal Technology Centre. The Deputy Director-General also sent him a letter the same day enumerating a number of criticisms of his performance. On 17 September, the complainant replied to the Deputy Director-General's letter. In a minute of 22 September, the complainant requested the Director-General to reconsider the decision to transfer him. In a letter dated 16 October, the Deputy Director-General replied to the complainant's letter of 17 September and informed him that his position remained unchanged. By a letter of 19 October, the Director-General informed the complainant that he upheld the decision to transfer him to the Postal Technology Centre.

On 6 November, the complainant appealed to the Joint Appeals Committee. In its report dated 10 December, the Committee concluded that the lack of confidence in the complainant was sufficient reason to justify his transfer and recommended that the Director-General maintain his decision. In a letter dated 11 December 1998, which is the impugned decision, the Director-General confirmed the transfer of the complainant.

B. Based on the case law of the Tribunal, the complainant has several pleas.

He deduces from the letter of 28 August 1998 that an investigation was carried out without his knowledge and that it did not comply with any of the applicable criteria.

He contends there was misuse of authority. The investigation carried out involved monitoring his hours of work by means of the computerised security system, which had been installed for the sole purpose of reinforcing the protection of property and persons. He says that the use of the data obtained through this system for a purpose other than such protection is "unlawful". The investigations and the interpretation of their results reveal the existence of a disciplinary procedure against him.

The complainant also alleges personal prejudice against him by the Deputy Director-General. By way of evidence, he refers to his change in attitude between 23 February 1998 (when he gave him the evaluation "good") and 28 August 1998 (when he made "the most severe criticisms" against him). With regard to the letter of 28 August 1998, he alleges errors of fact and of law, the failure to take into account relevant facts and the clearly mistaken conclusions drawn from the evidence. Moreover, he considers that the terms used by the Deputy Director-General caused him "very grave moral injury". He says that the Deputy Director-General also made "precise threats" intended to dissuade him from appealing.

Furthermore, the complainant endeavours to prove that his transfer constituted in practice a hidden disciplinary sanction. He also submits that the impugned decision is contrary to the interests of the Union on the grounds that the jobs attributed to Mr van der Weg and to himself did not correspond to their respective qualifications.

As a subsidiary plea, he contends that he suffered an interruption of the automatic progression of his career. Pursuant to a decision of the Executive Council of 1978, which has been applied uniformly over the past twenty years and which, he says, constitutes an acquired right, the head of a section is appointed counsellor at grade P.5 and, after a period of five years, is promoted to senior counsellor at grade D.1, without any change of functions or responsibilities.

The complainant requests the Tribunal to: set aside the administrative investigation of his case; order the withdrawal of the challenged documents from his personal file; recognise that he has been the victim of prejudice and misuse of authority; quash the decision to transfer him and order his reinstatement in his previous duties; and order that he be paid 60,000 Swiss francs in moral damages, 50,000 francs in "professional damages", 208,000 francs in material damages and 20,000 francs in costs.

C. In its reply the Union contests the receivability of several of the complainant's claims on the grounds that they are new. These are his claims seeking the setting aside of the investigation which the complainant says was conducted against him (the Union denies that such an investigation took place), the withdrawal of the challenged documents from his personal file and the compensation for moral damages. It adds that requesting the Tribunal to recognise that he has been the victim of prejudice and misuse of authority is merely a "personal and gratuitous interpretation by the complainant" and does not constitute a claim.

Referring to Regulation 1.2 of the Staff Regulations of the International Bureau of the UPU, it explains that: "Staff members shall be subject to the authority of the Director-General, who may assign them, in accordance with their qualifications, to any of the activities or offices of the Bureau". The decision to transfer the complainant was taken in the context of a restructuring of the Bureau, recommended by external consultants. It cannot be of a disciplinary nature, since transfer is not one of the disciplinary measures enumerated in Regulation 10.2 of the Staff Regulations. Moreover, the Joint Appeals Committee shared the general management's opinion that the former Head of the Informatics Section, as well as the complainant, had the necessary qualifications to discharge their new functions.

The Union contends that the complainant was not the subject of a disciplinary procedure. Besides, the fact that the Deputy Director-General kept a file containing "supporting documents" is proof that there was no prejudice against the complainant. The Union recalls that his appraisal report of 23 February 1998 was not without criticisms towards him and recognises that the loss of confidence resulting from the shortcomings observed on the part of the complainant could have "influenced" the decision of the Director-General. The reasons for the transfer were communicated to the complainant and, in accordance with its case law, the Tribunal only has a limited power of review over that decision.

The Union explains that there is no automatic promotion. The Executive Council decided that certain criteria, such as the quality of the work performed, efficiency, experience and professional knowledge had to be demonstrated for promotion to senior counsellor. It doubts that the complainant meets these criteria.

Furthermore, in 1998 the UPU adopted a new system of classification of Senior and Professional category posts, which led to the repealing of the 1978 decision of the Executive Council according to which the Head of the Finance Section is established at grade P.5. It therefore maintains that he suffered no material injury.

The Union adds that there was no abuse of authority, since the computerised security system was only used to verify whether the complainant in practice worked overtime hours.

D. In his rejoinder the complainant submits that he put forward all his claims in his internal appeals but the Union did not respond to them.

The shortcomings noted while he was Head of the Finance Section were due to the shortage of staff and several decisions taken by the Director-General, which did not help him achieve the objectives established.

By its very nature, a hidden disciplinary sanction is not envisaged by the Staff Regulations. The role of the Tribunal is precisely to determine whether a measure constitutes a hidden sanction and to provide redress.

The complainant emphasises that the UPU never provided "clear reasons" for its decision to transfer him and that the Joint Appeals Committee considered that the decision was contrary to the interests of the Union.

He contends that the new system of classification of Senior and Professional category posts is not yet being "applied in practice".

He submits that the Union only transferred him with a view to reassigning Mr van der Weg after that official's section had been abolished.

E. In its surrejoinder the Union observes that the complainant has not produced any new evidence in his rejoinder which would make it modify its position. It presses its arguments and indicates that, although the introduction of the new classification of Senior and Professional category posts was delayed, it is now in force.

It submits that the complainant cannot complain of a shortage of human resources in the Finance Section, since he was responsible for this situation due to his attitude.

F. In his observations Mr van der Weg submits that the transfer of the complainant, which is the outcome of a "combination of circumstances", has to be understood as a professional necessity and not a disciplinary measure. He emphasises that the complainant works better "in a *solitary* environment". He is not very "skilled in interpersonal relations", which is an essential qualification for personnel management.

Mr van der Weg adds that in mid-August 1998 the Director-General informed him, in a confidential discussion, of the problems in the Finance Section and asked him if he would be prepared to take over the complainant's post. He accepted this proposal.

G. In his additional submission the complainant affirms that the reference made by Mr van der Weg to a confidential discussion with the Director-General destroys the Union's argument that the decision to transfer him was taken on 28 August 1998. He says that his transfer was not, therefore, the outcome of a combination of circumstances.

He adds that, in the past, he has successfully collaborated with several working groups, which refutes the allegations concerning his solitary nature.

H. In further comments, the Union explains that it did not offer the post of Head of the Finance Section, then occupied by the complainant, to Mr van der Weg. The discussion between the Director-General and the latter was of a "purely exploratory nature".

CONSIDERATIONS

1. The complainant, who is Swiss and was born in 1952, entered the staff of the International Bureau of the Universal Postal Union (UPU) on 26 April 1993 as assistant counsellor responsible for strategic planning at

grade P.4 for a probationary period of two years. He was appointed a permanent official as of 1 April 1995.

After being selected for the post of Head of the Finance Section he was promoted counsellor at grade P.5 with effect from 1 June 1997. In this post, he was confronted with difficulties with his subordinates and the period was characterised by tension between the complainant, on the one hand, and the Deputy Director-General and Director-General, on the other.

The Deputy Director-General gathered additional information on the complainant's performance and opened a file on the matter without informing him.

On 30 July 1998 the Director-General received a report which had been requested by the Council of Administration and entrusted to external consultants. They recommended an in-depth reorganisation of the structuring of the UPU, which still required preliminary studies. Some of the proposed measures could only therefore be adopted after the Universal Postal Congress, to be held from 23 August to 15 September 1999. In addition to their principal recommendation, the consultants also proposed the merger of the Informatics and Data Base Section and the Postal Technology Centre. According to the consultants,

"information, as a means of disseminating the latest developments in the postal services sector, is an essential resource for the UPU. The merger of the Informatics and Data Base Section with the Postal Technology Centre would form part of a strategy to introduce the methods of teamwork proposed above (= ad hoc groups) and would make it possible to achieve eventual synergies between the capacities of these two groups. This could also have the effect of increasing the capacity of the IB (= International Bureau) to provide information services to member countries and to its governing bodies."⁽¹⁾

In consultation with the Management Committee of the International Bureau of the UPU, the Director-General decided to apply this recommendation immediately, with effect from 1 September 1998, so that the new structure would already be operational by the time the Council of Administration met in October 1998. Being not very satisfied with the complainant's performance and conduct, the Director-General decided to assign him to the Postal Technology Centre and to transfer Mr van der Weg, former Head of the Informatics Section, to the post of Head of the Finance Section.

On 28 August 1998, in a very brief meeting, the Deputy Director-General informed the complainant of his transfer to the Postal Technology Centre with effect from 1 September 1998. On the same occasion, he transmitted to him a detailed seven-page letter, with thirty-four annexes attached (resulting from the investigation which he had undertaken) enumerating a series of criticisms of the complainant's professional performance and conduct, which were found wanting. The letter concluded as follows:

"I wish to draw your attention to the need to take very seriously the criticisms set out in this letter and request you to modify urgently your professional conduct and relations, failing which I will be obliged to envisage other appropriate measures in accordance with the Staff Regulations."

When the complainant was informed of his transfer, the new post to which he was to be assigned had not yet been determined. He subsequently reported to the Head of the Postal Technology Centre as Manager of Internal Operations and Planning, without any subordinate officials, according to the post description of 16 September 1998 and the organisational chart of 1 October 1998.

Within the time period which he had been granted, the complainant replied to the Deputy Director-General on 17 September 1998 with supporting documents. In short, he refuted the criticisms levelled against him and announced that he would appeal against the grave disciplinary sanction constituted, in his view, by his transfer.

On 22 September the complainant requested the Director-General to reconsider the matter. The latter declared such a re-examination unjustified on 19 October and explained the reasons for the restructuring measures and the changes in personnel.

On 6 November the complainant appealed to the Joint Appeals Committee which, in its report of 10 December, considered that:

"The circumstances in which this decision was notified to the complainant give grounds for believing that it consisted in effect of a hidden sanction and that the party concerned rightly believed that his dignity had been injured. The [Appeals Committee] understands the human and personal distress that the complainant may have suffered."

However, the Committee admitted that the complainant had committed serious faults and considered that the transfer was justified. It recommended that the appeal be dismissed. The Director-General so decided on 11 December 1998.

2. The complainant seeks the setting aside of the administrative investigation, the withdrawal of the challenged documents from his personal file, "recognition of prejudice and abuse of authority by the general management", the quashing of the decision of his "compulsory transfer" and his reinstatement in his previous duties, 60,000 Swiss francs in moral damages, 50,000 francs in "professional damages", 208,000 francs in material damages and 20,000 francs in costs. In short, he refutes the criticisms levelled against him and holds that his compulsory transfer was a hidden disciplinary sanction.

The Union maintains that all the complainant's claims are either irreceivable or devoid of merit. In its view, the letter of 28 August 1998 bore no relation to the decision to transfer the complainant. The letter was a mere warning intended to improve his conduct and performance or, failing that, to lead to a possible disciplinary procedure. The transfer was decided upon in the interests of the Union, taking into account the need for rationalisation and the abilities of the various officials concerned. The past performance of the complainant was only taken into consideration for the purpose of assessing his abilities.

Receivability

3. The complainant's claims for the administrative investigation to be set aside and certain documents to be withdrawn from his personal file are raised for the first time and are therefore irreceivable.

His claim that there was misuse of authority and prejudice in practice relate to the merits of the decision. But it is not in the interests of the complainant to seek a ruling in law thereon, when in practice he can obtain the quashing of the decision and redress.

His financial claims are not irreceivable insofar as they are closely related to the setting aside of the impugned decision, which is the principal claim.

The merits

4. The right of the Union to decide upon a compulsory transfer which is in its interests (see Regulation 1.2, paragraph 1, of the Staff Regulations) is rightly not contested.

5. Precedent has it that such a decision is at the Director-General's discretion. In principle, an organisation is the judge of its own interests and the Tribunal will not substitute the organisation's views with its own; it will not interfere unless the decision is *ultra vires*, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority. (See, for example, Judgments 1496 (*in re* Güsten) under 7; 1757 (*in re* Hardy No. 4) under 4; and 1862 (*in re* Ansorge No. 2) under 5.)

6. However, compulsory transfer, in the manner in which it is processed, ordered and notified, must not needlessly harm the interests of the staff member, and particularly his dignity, nor cause him unnecessary hardship. And the decision must follow a proper enquiry. (See Judgments 1496, under 8; 1726 (*in re* Mogensen) under 24; 1779 (*in re* Feistauer) under 12 and 13; and 1862, under 6.)

7. Furthermore, compulsory transfer of a disciplinary nature must afford the staff member the safeguards available in the case of disciplinary sanctions, that is the right of the staff member to be heard before the sanction is ordered, with the option for him to participate in the full processing of the evidence and to make all his pleas (see the above judgments).

It matters little in this respect whether or not transfer is envisaged among the disciplinary sanctions set out in the Staff Regulations. What is decisive is whether the transfer appears to be the consequence of the alleged professional shortcomings of the staff member which may, by their nature, give rise to disciplinary sanctions.

It may be added that the protection provided to staff members against transfers which constitute

disciplinary sanctions does not prevent organisations from carrying out the transfers which may be necessary in their interests. Where such measures are not urgent, they could be delayed until the staff member concerned is able to express an opinion and organise a defence before the measure is taken. In urgent cases, provisional measures could be adopted which do not prejudice the material decision.

8. In the present case, the Union contends rather unconvincingly that the compulsory transfer (an administrative measure necessitated by the restructuring) was totally unrelated to the professional criticisms levelled at the staff member in the letter of 28 August 1998, which might subsequently lead to a disciplinary procedure. In fact, the compulsory transfer and the letter were communicated to the staff member on the same occasion on 28 August 1998 during a brief interview. The fact that the Deputy Director-General had already carried out an investigation and established a file in support of these criticisms on that occasion also gives grounds for believing that they played an important role in the Director-General's decision to go ahead with the compulsory transfer. In its reply, the Union also indicates that:

"the shortcomings observed over several months, which are enumerated in that letter, contributed to the deterioration in the climate of confidence between the management of the International Bureau and Mr Beaucent, which may also have influenced the choice of the Director-General."

Moreover, in a letter to the complainant of 16 October 1998, the Deputy Director-General agreed that the criticisms made "may no longer have the same importance since your transfer to the Postal Technology Centre". This confirms that they were to a great extent behind the decision to transfer the complainant and that they were also intended to justify that decision. For its part, the Joint Appeals Committee considered that "the circumstances ... leave the impression that it was in practice a hidden sanction", without, however, drawing the conclusion that the complainant's lawful right to a hearing had not been respected. It also noted that it had not perceived "any element which would justify the sudden nature of the transfer".

The restructuring measure is not contested, nor is it open to criticism by the Tribunal; it gave rise to the abolition of a section and the post of head of the section. The Director-General took advantage of the measure to transfer the head of the section which had been abolished to the post occupied by the complainant and to transfer the latter, whose performance and conduct he considered did not give satisfaction to the Union.

The material decision was therefore of a mixed nature. It was motivated, on the one hand, by the restructuring and the concern for the effective use of human resources and, on the other hand, by the complainant's performance and conduct, which were deemed unsatisfactory.

In objective terms, the new assignment, as it was presented, could also appear to be less interesting and prestigious than that of the head of the section from which the complainant had been removed, even though he retained his grade and pay. In effect, he was removed from a post of confidence in which he managed several colleagues and, at the time he was informed of the transfer, the new post to which he was assigned had not yet been determined. He had grounds for fearing that the new post offered fewer opportunities for career development.

The element of sanction inherent in the transfer was borne out by the brutal manner in which it was announced and put into effect. While the concern to carry out the restructuring rapidly is easily understandable, it is neither argued nor proven that a permanent transfer was so urgent that it prevented any consultation with the persons concerned. The sudden announcement of a transfer to a post which could be considered inferior, coming into effect a few days later, without prior notice or consultation, therefore wounded the complainant's dignity. This was rightly noted by the Joint Appeals Committee. The circumstances were such that the complainant perceived the measure as a sanction linked to the grievances levelled against him.

9. Taken together, the material circumstances give grounds for considering that the impugned transfer partly constituted a hidden disciplinary sanction.

As it was not accompanied by the protective measures required before the imposition of disciplinary sanctions, the complainant's right to a hearing was not respected. The opportunity which he was subsequently granted to express his views was not sufficient to redress the consequences of this procedural flaw. In view of the formal nature of this right, there is no need to establish whether the challenged measure

was materially justified.

The impugned decision must, therefore, be set aside and the procedure resumed from the point at which it was flawed, through the application of the relevant terms of Staff Regulations 10.1 to 10.3.

This judgment does not prevent the Director-General from taking the measures necessary to safeguard the proper functioning of the service until a final decision can be made: see Judgment 1771 (*in re* De Riemaeker No. 4) under 4(a), and the precedents cited therein.

It does not prejudice in any way the decision to be taken on the merits.

10. The complainant's financial claims are premature, since the Tribunal cannot yet rule on the merits of the decision. The unlawful nature of the impugned decision and its consequences would undoubtedly justify the granting of moral damages already at this stage. However, the gravity of the case may be assessed differently, depending on whether or not the Union has a valid reason for carrying out the transfer. Therefore, it appears preferable to send the case back on this point as well.

Having succeeded, as the case currently stands, the complainant is entitled to costs, which may be set at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 11 December 1998 is set aside.
2. The case is sent back to the Director-General so that it can be resumed as indicated under 9 and 10.
3. The Union shall pay the complainant the sum of 5,000 Swiss francs in costs.
4. All his other claims are dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

Catherine Comtet

1. Registry's translation