

G. (No. 2)

v.

UPU

123rd Session

Judgment No. 3732

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. G. against the Universal Postal Union (UPU) on 15 February 2014 and corrected on 20 June, the UPU's reply of 29 September 2014, the complainant's rejoinder of 5 January 2015 and the UPU's surrejoinder of 11 February 2015;

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 dismiss his allegations of harassment and abuse of authority as unfounded.

The complainant joined the UPU as a translator in 1995. He has been working under a permanent contract since 1999.

By a letter of 16 June 2011 the complainant made allegations of moral and institutional harassment. Following exchanges with the Administration, he submitted a formal complaint of harassment and abuse of authority on 19 December 2011. At his request the Administration asked the UN Office of Internal Oversight Services (OIOS) to assist the UPU in conducting a fact-finding investigation. The OIOS conducted a preliminary assessment only. In its report dated 30 March 2012 it found that the complaint had not been submitted by the aggrieved individual or a third party with direct knowledge of the situation, as required by Administrative

Instruction No. 34 of 4 November 2011 on conflict resolution mechanisms related to discrimination, abuse of authority and harassment, and that it was, therefore, irreceivable. The OIOS also noted that the core of the complaint seemed to be work performance related, which was not normally considered harassment. The complainant agreed on 5 April 2012 that the investigation be conducted by the UPU Internal Auditor instead and an externally sourced company was appointed. On 11 September 2012 the Internal Auditor submitted the fact-finding investigation report, in which he concluded that none of the complainant's allegations were founded. By a letter of 23 October 2012 the Director General informed the complainant of the Internal Auditor's main conclusions and that he had decided to close the case.

On 1 November 2012 the complainant requested a full, unredacted copy of the report. By a letter of 16 November 2012 the Director General denied that request on the ground that Administrative Instruction No. 34 did not provide for the communication of the report at that stage of the proceedings in order to protect all parties involved in the case. In the event of an internal appeal against the decision to close the case, the report would be transmitted to the Joint Appeals Committee (JAC) which would then transmit it to the party or parties having lodged the appeal, in accordance with the principle of due process.

By a letter of 23 November 2012 the complainant requested the review of the decisions of 23 October and 16 November and asked the Director General to allow a direct appeal before the Tribunal. On 10 December 2012 the Director General confirmed his decisions and invited the complainant to follow the established procedure by filing an internal appeal.

On 9 January 2013 the complainant filed his appeal before the JAC. In its report of 4 November 2013 the JAC unanimously considered that the fact-finding investigation report did not allow it to conclude that harassment had occurred. It also considered that making the complete report available to the complainant was not in the best interest of any eventual resolution of the conflict. It recommended that the parties seek mediation to resolve the conflict and that both parties make constructive efforts to reintegrate the complainant into the translation team. By a letter

of 22 November 2013 the complainant was informed of the Director General's decision to dismiss his appeal as unfounded, in accordance with the JAC's report. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the UPU to allow him to work permanently from home, to reimburse any sick leave, salary and home leave which were deducted on account of absences which are "service-incurred". He further asks the Tribunal to order a classification review of his post, that his 2010 performance review be conducted by an independent official, that his job description be revised and that he be granted any grade adjustments that are required given his experience and seniority. He asks that those responsible for failing to abide by the principles set out in Administrative Instruction No. 34 be subjected to disciplinary action. He also claims moral damages on several accounts, as well as costs, with interest on all amounts awarded.

The UPU submits that the complaint is unfounded. It asks that the Tribunal order the complainant to bear all costs incurred by the UPU.

CONSIDERATIONS

1. The complainant raises the following threshold issues: the Director General's denial of the complainant's request to file a complaint directly with the Tribunal was unlawful; the composition of the JAC was improper; and the non-disclosure of the Internal Auditor's report was in breach of the fundamental guarantees of due process.

The complainant has applied for oral proceedings. As the written submissions are sufficient to allow the Tribunal to render an informed decision, the Tribunal rejects the request for an oral hearing.

2. According to the Tribunal's case law, "the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see, for example, [...] Judgments 2781, under 15, and 3067, under 20). This is especially true since internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a

ruling on points of law. [...] [T]he review of a disputed decision in an internal appeal procedure may well suffice to resolve a dispute, one of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately lodged, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see, for example, Judgments 1141, under 17, or 2811, under 11). [...] [T]he Appeal Board plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of the organisation and the broad investigative powers granted to it. By conducting hearings and investigative measures, it gathers the evidence and testimonies that are necessary in order to establish the facts, as well as the data needed for an informed assessment thereof.” (See Judgment 3424, considerations 11(a) and (b).) Therefore, considering the administrative, quasi-judicial nature of the internal appeal, both parties (staff and Administration) must be in agreement in order to bypass the internal appeal procedure, which is a fundamental element of the conflict resolution system of an international organization, and come directly before the Tribunal. Considering that the internal appeal procedure is provided for in the Staff Rules and the Staff Regulations of the International Bureau of the UPU, that the exhaustion of all available internal means of redress is required by the Statute of the Tribunal, and that the complainant has not proven that the President abused his authority or violated the principle of equal treatment in deciding not to allow the complainant to come directly before the Tribunal, the complainant’s argument that the refusal to bypass the internal appeal was an act of retaliation is unfounded.

3. According to the complainant, one member of the JAC should have been disqualified from the consideration of his appeal, because of his close work contact with the complainant and because he had also been interviewed by the Internal Auditor during the investigation of his harassment complaint. The complainant asserts that he was unaware of this latter fact when he was asked to approve the composition of the

JAC. The UPU demurs, stating that the contested member only acted as a communicator between the complainant and his supervisor due to the complainant's refusal to communicate directly with his supervisor but it does not reply to the specific claim that the contested member had been interviewed by the Internal Auditor during the investigation. The Tribunal is of the opinion that the contested JAC member could not be a member of the JAC assessing the complainant's appeal if he had been interviewed by the Internal Auditor, since the JAC had to assess the testimonies on which the Internal Auditor's report was based. His impartiality may be open to question (see Judgment 2671, under 10) as there are reasonable grounds for concluding that there was an actual conflict of interest, not merely a perceived conflict (see Judgment 2225, under 19). The complainant's argument that the JAC's composition was improper is founded.

4. The complainant asserts that the Internal Auditor's fact-finding investigation report was not disclosed to him in breach of the fundamental guarantees of due process. The JAC dealt with the issue of whether to disclose the Internal Auditor's report and it decided not to make it available to the complainant for the following reasons:

“According to clause a of paragraph 6.21 of Administrative Instruction No. 34 of 4 November 2011:

- a If the report indicates that no prohibited conduct took place, the Director General will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation.

According to the investigation, the alleged prohibited conduct did not take place. The alleged offender and the aggrieved individual were informed of this fact. A summary of the findings and conclusions was communicated to the aggrieved individual – the [complainant] in this case. The Administrative Instruction does not require that the complete report be communicated.

- b The question then arose – was the ‘right of reply’ of the [complainant] being violated? The JAC concluded that this was not the case, as it was the [complainant] that had made the allegations in the first place.
- c The International Bureau had already considered the possibility of making redacted summaries available to the [complainant].

However, the interviewees did not agree to the release of even redacted interview summaries to the [complainant].

- d The JAC also believes that this entire case is a sad manifestation of human relations gone badly wrong. The JAC believes, too, that the situation is not irrecoverable. Given this optimism, the JAC further believes that making the complete report available to the [complainant] is not in the best interest of any eventual resolution of the current situation.”

5. Regarding point “a” above, the Tribunal observes that Administrative Instruction No. 34 refers to the investigative stage prior to that of the internal appeal and, therefore, that it cannot be used as a basis for denying access to the documents which were used by the JAC in the formation of its opinion and recommendations. It can be added that the Director General, in his letter of 16 November 2012, essentially stated that though he denied the complainant’s request to have an unredacted copy of the Internal Auditor’s report at that stage of the proceedings, in the event of an internal appeal against the decision to close the case, the report would be transmitted to the JAC which would then transmit it to the complainant.

6. With regard to the remaining three arguments cited above (b, c and d), reference should be made to Judgment 3640, which was recently adopted in plenary session of the Tribunal. Although that Judgment refers to “allegations made against [the complainant]” and to “the accused official” as well as to the right “to defend herself or himself fully in [disciplinary] proceedings”, it is equally applicable in the present case, to the complainant who is seeking to establish a case of harassment in the internal appeal.

In consideration 19 the Tribunal noted the established case law “according to which ‘a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’ and, ‘under normal circumstances, such evidence cannot be withheld [by this authority] on the grounds of confidentiality’ (see Judgment 2229, under 3(b), to which Judgment 3295, under 13, refers)”.

However, the Tribunal went on to observe in consideration 20 that:

“[A]s is expressly indicated by the use of the terms ‘as a general rule’ and ‘under normal circumstances’ in the above excerpts of judgments, the case law in question does allow some exceptions to the principle which it establishes.”

It must be stressed, in the present case, that the complainant insisted on the production of a full unredacted copy of the Internal Auditor’s report. But, as the Tribunal said in Judgment 3640, under 20:

“[I]n order to respect the rights of defence, it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof (see Judgment 2771, under 18).”

Although the JAC offered four reasons for not providing the report in full to the complainant, the Tribunal finds them unpersuasive. It may well have been appropriate for the JAC to have refused to produce the unredacted copy of the report in full. The mere refusal of the interviewees to consent to the disclosure of the report (reason c stated above) is not, of itself, a valid reason. However the protection of the identity, objectively assessed, of the interviewees may have justified refusal to provide an unredacted version.

The Tribunal cannot express a concluded view on this question because a copy of the full, unredacted report is not before the Tribunal. But to respect the complainant’s right to be provided with sufficient material to make the case against him and to prosecute his appeal the JAC should have offered a summary of the evidence to the complainant. The document actually provided by the Director General (in effect the executive summary of the report) is not sufficiently detailed. Accordingly, the JAC erred in the approach it adopted.

7. The two flaws identified in considerations 3 and 6 above warrant remitting the matter back to the UPU so that the competent authority may take a new decision upon recommendation of a new, properly composed JAC. The complainant is entitled to an award of moral damages, which the Tribunal sets at 6,000 euros. As the complaint succeeds in part, the complainant is also entitled to an award of costs, which the Tribunal sets at 4,000 euros. The UPU’s counterclaim for costs will be dismissed.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back to the UPU for a new decision of the Director General, taken after recommendation by a new, properly composed JAC, in accordance with considerations 3 and 6, above.
3. The UPU shall pay the complainant moral damages in the amount of 6,000 euros.
4. It shall also pay him costs in the amount of 4,000 euros.
5. All other claims are dismissed, as is the UPU's counterclaim for costs.

In witness of this judgment, adopted on 27 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ