

M. B.

v.

UPU

125th Session

Judgment No. 3929

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms O. M. B. against the Universal Postal Union (UPU) on 7 September 2015 and corrected on 2 November 2015, the UPU's reply of 16 February 2016, the complainant's rejoinder of 17 May, corrected on 31 May, the UPU's surrejoinder of 5 September 2016, the complainant's additional submissions of 25 September 2017 and the UPU's final comments thereon of 11 October 2017;

Considering the documents produced by the parties at the Tribunal's request;

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 decisions to abolish her post and to terminate her appointment while she was on sick leave.

The complainant joined the UPU in 2000. She was awarded a permanent appointment in 2002.

On 15 December 2014 the Chair of the Council of Administration, Mr A.-A., a representative of Qatar, approved a proposal of the Administration to abolish five posts within the UPU due to budgetary

constraints, including the grade D 1 post occupied by the complainant. The letter of the Administration containing the proposal stated that the Chair's approval was required for the abolition of the five posts, in view of the urgency of the matter and in line with Article 12 of the Rules of Procedure of the Council of Administration, which provides that urgent questions raised between Council of Administration sessions shall be dealt with by its Chair.

By a letter of 22 December 2014 the Government of Qatar informed the Director General that Mr A.-A. had been replaced by Mr A.-N. with effect from 19 November 2014.

At a meeting held on 7 January 2015 the complainant was informed that the Provident Scheme and Social Services (DCP) Directorate and her position as its Director (at grade D 1) would be abolished due to financial constraints and a restructuring of the UPU's International Bureau. As a result, she would be placed on special leave with full pay with effect from 8 January while her reassignment would be examined by the General Management. On 8 January the restructuring was communicated to all staff by Internal Memorandum No. 2/2015.

On 5 February the complainant requested a review of the decision to abolish her post and to place her on special leave with full pay.

By a letter of 6 February 2015 the complainant was informed that, despite its efforts, the UPU had found no available suitable position to which she could be reassigned and that it had been decided to terminate her appointment with effect from 9 May 2015. Pursuant to Staff Regulation 9.1(5) the complainant, as a staff member appointed on a permanent basis whose appointment was terminated because of the abolition of her position, would normally be offered another suitable post for which she possessed the necessary qualifications, if one became vacant during the two years after the effective date of her termination.

On 9 February the complainant lodged a second request for review, challenging the creation of new positions through Internal Memorandum No. 2/2015.

In January 2015 the vacancy announcement concerning the D 2 position of Director of the Operations and Technology Directorate (DOT), for which the complainant had applied, was cancelled. On 10 February she lodged a third request for review against the decision to re-advertise the position, purportedly with a view to restricting the eligibility to external candidates.

The three requests for review were dismissed by a letter of 20 February 2015 in which it was pointed out that the decision to abolish posts fell within the power of the Council of Administration and did not constitute an administrative decision under Staff Rule 111.3.

The complainant lodged a fourth request for review on 23 February, asking for the decision to terminate her appointment to be set aside and for her absence since 8 January to be recognized as due to a service-incurred illness. Her request was rejected as unfounded on 23 March 2015. The Director General noted that her illness, which had started the day after she had been informed of the abolition of her post, could not be attributed to the performance of official duties, and he reiterated that in accordance with Staff Regulation 9.1(5) she would normally be offered any suitable position that would fall vacant during the two years after the effective date of her termination.

On 20 March the complainant lodged an internal appeal against the decision of 20 February 2015 rejecting her first three requests for review and, on 20 April, she lodged a second internal appeal against the decision of 23 March 2015 rejecting her fourth request for review.

In its single report of 8 May 2015 the Joint Appeals Committee concluded that the decision to abolish the complainant's post could be regarded as an administrative decision by the Director General as there was no valid Council of Administration decision to that effect. It also found that the process leading to the termination of her appointment had breached her due process rights, because there was no evidence that the Administration had fulfilled its obligations under Staff Regulation 9.1(2) on the preference to be given to the reassignment of permanent staff whose posts have been abolished. Finally, it found that the complainant's separation while on sick leave was in clear violation of the Tribunal's case law. As the complainant had the right to request that her case be

referred to an independent medical practitioner or a medical board under Staff Rule 106.2(1)(g), it considered that the UPU was obliged to accept the findings of the complainant's physician until such time as that process had been followed. The Committee recommended that the decision to terminate her appointment be set aside. By a letter of 26 June 2015 the Director General decided to reject the Joint Appeals Committee's recommendation, as it was based on "fundamentally flawed and unsubstantiated considerations". That is the impugned decision.

By a letter of 3 August 2015 the new Chair of the Council of Administration, Mr A.-N., who had been contacted by former staff members of the UPU whose posts had been abolished, informed the Director General that the decision to abolish the five posts had been duly made by the former Chair, Mr A.-A., in full compliance with the rules of the UPU and the Council of Administration.

As preliminary matters, the complainant seeks the disclosure of various documents and she requests oral proceedings. She asks the Tribunal to quash the impugned decision and to order her reinstatement. Alternatively, she claims material damages in an amount equal to all salary, benefits, pension contributions and other emoluments she would have received from the date of her separation to her statutory retirement date (31 August 2021). She further asks the Tribunal to order that the new posts "created through enormous changes to the job descriptions of existing posts [and] resulting from the unlawful abolition of [...] certain posts (including [hers]), be restored to their original nature with full retroactive effect", to quash the decision to restrict the eligibility to external candidates in the competition for the D 2 position of Director DOT, and to order that the appointment to this position be cancelled and that the competition be reopened for internal candidates only. The complainant also asks the Tribunal to order that a medical board be constituted as per Staff Rule 106.2(1)(g). She seeks moral and exemplary damages and claims costs and interest on all sums awarded.

The UPU contends that the complaint is receivable only in so far as it deals with the decision to terminate the complainant's appointment, since the Director General was unable to take a final decision concerning the Council of Administration's decision to abolish the complainant's

post. It asks the Tribunal to dismiss the complaint as wholly devoid of merit and to order the complainant to pay the costs incurred.

In her further submissions, the complainant provides a 2017 report of the United Nations' Joint Inspection Unit entitled "Review of Management and Administration in the UPU" which, in her view, corroborates the allegations made in her pleadings. She claims additional material damages.

In its final comments the UPU asks the Tribunal to deem the complainant's further submissions irreceivable. It objects in particular to the presentation of new claims and/or references to events which have taken place considerably after the decision impugned was taken, and refers the Tribunal to the complainant's second complaint, which constitutes the relevant legal venue to assess those events. On the merits, it states that the complainant's additional submissions contain no element liable to modify its position and maintains its counterclaim for costs.

At the Tribunal's request, the UPU wrote to the successful candidate, Mr B., informing him of the complaint challenging his appointment and inviting him to state his views. Mr B. provided his comments to the UPU administration, which forwarded them to the Tribunal by a letter of 13 October 2017.

CONSIDERATIONS

1. In the present complaint, the complainant challenges the following five decisions and their relevant consequences:

- the 7 January 2015 decision to abolish her post of Director, DCP, with effect from 8 January 2015;
- the 7 January 2015 decision to place her on Special Leave with full pay, with effect from 8 January 2015 and to maintain her on that leave until the termination of her permanent appointment on 9 May 2015;

- the decision of 16 January 2015 to re-advertise the D 2 position of Director DOT, which had been advertised in July 2014 and for which the complainant had applied, but which was cancelled in January 2015, allegedly with a view to restricting the eligibility to external candidates;
- the 6 February 2015 decision to terminate her permanent appointment with effect from 9 May 2015, notified to her while she was on sick leave (beginning 8 January 2015); and
- the final decision of the Director General, dated 26 June 2015, rejecting her internal appeals and “uphold[ing] all administrative decisions referred to in [her internal] appeals, evidently without prejudice to any decisions on abolition of posts taken by the Council of Administration”. The Director General did not endorse the Joint Appeals Committee’s recommendation to set aside the decision to terminate her appointment, “which stemmed from fundamentally flawed and unsubstantiated considerations”.

2. The complainant filed two internal appeals: the first on 20 March 2015, against the Director General’s 20 February 2015 rejection of her three requests for review (dated 5, 9 and 10 February 2015) of the decisions to abolish her post, to create new positions, and the decision of 16 January 2015 concerning the vacancy announcement for the D 2 position of Director DOT, respectively; and the second on 20 April 2015, against the Director General’s 23 March 2015 decision to reject her 23 February 2015 request for review of the decision to terminate her appointment. In its report, dated 8 May 2015, the Joint Appeals Committee joined the two appeals and found as follows.

With regard to the decision to abolish the complainant’s post, the Joint Appeals Committee noted that:

- the creation and abolition of posts is the prerogative of the UPU’s Council of Administration and the Joint Appeals Committee cannot review its decisions, but it can verify if the decisions were in fact taken by the Council of Administration;

- no documentation or proposals on the abolition of the complainant's post could be found in the records regarding the Council of Administration's October/November 2014 session;
- the complainant's post was among the list of approved posts in the budget for 2015;
- the abolition of the five posts (including the complainant's) was approved by the Chair of the Council of Administration (Mr A.-A.) on 15 December 2014;
- a new Chair of the Council of Administration (Mr A.-N.) was appointed on 22 December 2014, with effect from 19 November 2014, therefore the 15 December 2014 handwritten approval by Mr A.-A. was invalid;
- there was no evidence that the proposals or documents relating to the proposed abolition of posts were submitted six weeks before the opening of the Council of Administration session, as required by Staff Regulation 2.2; and
- the contested abolition decision "may be regarded as an administrative decision by the Director General" and as such can be reviewed.

3. The Joint Appeals Committee recommended that the decision to terminate the complainant's appointment be revoked since there was no valid Council of Administration decision to abolish the complainant's post, and Staff Regulation 2.2 had not been respected. It did not take a position on the allegations concerning the lack of objectivity, abuse of authority or the UPU's retaliatory measures against the complainant's activities as a staff representative, and it found that the redistribution of responsibilities from the abolished posts did not amount to the creation of new posts. It also found that the complainant's due process rights, as detailed in Staff Regulation 9.1 (Termination) at paragraphs 1a, 2, 3 and 4, had not been respected and that there was no evidence to show that all potential reassignment opportunities were investigated, noting that "the Director of Human Resources considered only posts for which there was an active recruitment process, and did not look at other positions that were frozen". Finally, it found that the termination of the complainant's employment while on sick leave was in violation of the

established case law of the Tribunal and that it was incumbent on the UPU to convene a medical board in accordance with the provisions of Staff Rule 106.2(1)(g) in order to settle the question of the complainant's sick leave. Until such a time, the complainant's contract could not be terminated and the UPU was obliged to accept the findings of the complainant's physician.

4. The complainant bases her complaint on the following grounds:

- the Director General provided no justification for his decision to reject the Joint Appeals Committee's recommendation which was in favour of the complainant;
- the decision to abolish her post was taken *ultra vires*, without consulting her, was an abuse of authority, was tainted by prejudice and bad faith, breached the UPU Staff Regulations and Rules, was not based on objective grounds or on organisational needs, violated her due process rights, resulted in new positions being created and was a retaliatory measure against her for her activities as a staff representative;
- the UPU violated its duty of care towards her when it failed to find a suitable alternative post for her, ignoring posts which were frozen and for which she was competent, without considering her 15 years of service and the gender and geographical representation of staff at the UPU, and without communicating properly with her during the redundancy period; and
- the termination of her employment while on service-incurred sick leave violated the case law of the Tribunal, and the Director General's refusal to accept medical certificates issued by the complainant's treating physician without referring the case to a Medical Board violated Staff Rule 106.2(1)(g).

5. The complainant seeks an oral hearing and the production of certain documents. However, the written submissions are sufficient for the Tribunal to reach a reasoned opinion and, as it has resolved the case in favour of the complainant, the additional material is unlikely to

enhance the complainant's case. The requests for oral hearings and the disclosure of documents are denied.

6. The complaint is well founded. According to consistent case law, “[t]he executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached” (see Judgment 3862, under 20; see also Judgments 3208, under 10 and 11, 3727, under 9, and the case law cited therein). In the present case, the Director General did not adequately motivate his decision. This flaw is enough to set aside the impugned final decision, but the Tribunal considers that certain other issues raised by the complaint must also be addressed.

7. The UPU contests the receivability of the complaint insofar as it addresses the abolition of the complainant's post. It asserts that the Director General did not take the decision to abolish the posts (five posts in total including that of the complainant). It states that the decision was taken by the Chair of the Council of Administration in between sessions of the Council of Administration due to the urgency of the financial needs of the UPU, in accordance with Article 12(1) of the Rules of Procedure of the Council of Administration. Article 12 provides:

“Article 12 - Urgent questions raised between sessions

1. Urgent questions raised between sessions shall be dealt with by the Chairman.
2. If questions of principle are involved, the Chairman shall consult the members of the Council and, if he thinks fit, all the member countries of the Union; he shall inform the members consulted of the solutions adopted.”

8. The Tribunal recalls that “[a]ccording to firm precedent, a decision concerning the restructuring of an international organisation's services, which leads to the abolition of a post, may be taken at the discretion of its executive head and is subject to only limited review by

the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence. The Tribunal may not, however, supplant an organisation's view with its own (see, for example, Judgments 1131, under 5, 2510, under 10, and 2933, under 10). Nevertheless, any decision to abolish a post must be based on objective grounds and its purpose may never be to remove a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17)" (Judgment 3582, under 6).

9. According to the 22 December 2014 letter from the Minister of Information and Communications Technology, the Chair of the Council of Administration, Mr A.-A., was replaced by Mr A.-N. "starting from November 19, 2014. Hereafter [Mr A.-N.] will assume on behalf of Qatar, all the functions exercised by [Mr A.-A.] within the Universal Postal Union." However, the original and "final" decision adopted by Mr A.-A. on 15 December 2014 was later confirmed in a letter dated 3 August 2015 of the new Chair of the Council of Administration addressed to the Director General. This will be further discussed below.

10. UPU Staff Regulation 2.2 on the "Creation and abolition of posts" provides as follows:

"The creation and abolition of posts shall be decided by the Council of Administration on the basis of such proposals by the Director General. Proposals and documents relating thereto must be submitted six weeks before the opening of the Council of Administration session."

11. The ordinary competent authority regarding the abolition of posts is the Council of Administration. As noted in Article 12 quoted above, urgent questions, not involving questions of principles, shall be dealt with by the Chair of the Council of Administration between sessions.

12. The Council of Administration held its session in October/November 2014 without any apparent discussion of the urgency of the financial reasons upon which the Director General based his decision to propose the abolition of posts just a month later. In the submissions presented to the Tribunal, the UPU mentions that this difficult financial situation was known at the UPU since 2011, with the latest Actuarial Valuation published in December 2013. In fact, the Council of Administration, which was obviously aware of the financial situation, approved the posts in question in the budget for 2015. This does not support the assertion of “urgency” promoted by the Director General, upon which the interim competence of the Chair of the Council of Administration hinges, therefore the initial request for urgent consideration of the abolition of the posts was unlawful. According to the Tribunal’s case law: “[w]hether the post was abolished for financial reasons is a question of fact. Those facts were within the knowledge of [the organization] and it must show that when it advanced financial reasons as a ground for the abolition of the complainant’s post this was genuine. It has not done so. In the absence of that evidence, it is determined that the complainant’s post was unlawfully abolished and the claim on this ground is well founded” (see Judgment 3688, under 18). In the Tribunal’s view, the UPU has not presented sufficient evidence to support its assertion that the abolition of posts was for urgent financial reasons.

13. Furthermore, the Tribunal finds it useful to note that the Director General asserted (in his rejection of the complainant’s request for review of the abolition of her post) that he did not take the abolition decision and that the decision by the Council of Administration did not constitute an administrative decision within the meaning of Staff Rule 111.3. The Tribunal finds that the abolition decision is an administrative decision challengeable before the Tribunal in accordance with Article II of its Statute. According to the Tribunal’s case law, an international organisation has a duty of care which, in relation to the exercise of the right of appeal, obliges the organisation to assist a staff member who is mistaken in the exercise of that right. If the staff member has mistakenly requested a review of a decision to the wrong

authority, that authority must forward the request to the appropriate one (see Judgments 3754, under 11, and 2345, under 1).

14. The UPU does not provide a clear system for contesting decisions of the Council of Administration or interim decisions of its Chair. With that lacuna in mind, the Tribunal considers the handwritten approval of the Chair of the Council of Administration (Mr A.-A.) dated 15 December 2014, who approved the Deputy Director General's proposal of the same date to abolish several posts within the UPU, to be the original and "final" administrative decision abolishing the complainant's post. The Tribunal considers the letter of 3 August 2015 from the new Chair of the Council of Administration (Mr A.-N.) to the Director General (with the subject: "Contact attempt from former staff members of the [UPU] and their counsel concerning the posts abolished by the Council of Administration") to be a mere confirmation of the 15 December 2014 decision, on whose existence it completely depends. The new Chair of the Council of Administration merely stated in relevant part: "[a]s you know, I have been receiving many correspondences from former International Bureau staff members, their counsel and the Chairperson of the Staff Association concerning the abolition of posts mentioned above. However, the decision to abolish the posts at the International Bureau [of the UPU] was duly made by the Chairman of the [Council of Administration] in full compliance with the Rules of the UPU and the Council of Administration". Accordingly, the Tribunal finds that this decision becomes void with the setting aside of the original flawed decision of the previous Chair of the Council of Administration.

15. In light of the above considerations, the decision to abolish the complainant's post was unlawful and must be set aside. The consequent termination of appointment, based on the unlawful abolition of her post, must also be set aside. Considering the difficulties raised by the time elapsed and the subsequent restructuring of the UPU, the Tribunal shall not order reinstatement. Having regard especially to the complainant's age, qualifications, experience, and the length of time spent in the UPU's service, it is reasonable to award 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. The UPU must also pay the complainant the equivalent of the employer's contribution that would have been due to the Provident Fund during those 30 months.

The complainant is also entitled to an award of moral damages, including for the failure to properly assess her illness, which the Tribunal will set at 30,000 Swiss francs.

She is also entitled to an award of costs, which will be set at 7,000 francs.

All particulars not mentioned expressly in this decision were either irrelevant or absorbed under the topics addressed in the above considerations.

16. In light of the above, the UPU's counterclaim for costs is rejected.

DECISION

For the above reasons,

1. The decision to abolish the complainant's post and the decision to terminate her appointment are set aside.
2. The UPU shall pay the complainant material damages calculated as indicated in consideration 15, above.
3. It shall pay her moral damages in the amount of 30,000 Swiss francs.
4. It shall pay her costs in the amount of 7,000 Swiss francs.
5. All other claims are dismissed, as is the counterclaim for costs.

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

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ