

G. (No. 3)

v.

UPU

(Application for interpretation and review filed by the UPU)

(Application for execution filed by Mr G.)

127th Session

Judgment No. 4077

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation and review of Judgment 3928 filed by the Universal Postal Union (UPU) on 25 January 2018, Mr D. G.'s reply of 13 July, the UPU's rejoinder of 31 August and Mr G.'s surrejoinder of 4 October 2018;

Considering the application for execution of Judgment 3928 filed by Mr G. on 12 February 2018 and corrected on 16 February, the UPU's reply of 30 April, Mr G.'s rejoinder of 27 July and the UPU's surrejoinder of 12 October 2018;

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

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 3928, delivered in public on 6 December 2017, the Tribunal, upholding the third complaint filed by Mr G. (hereinafter "the complainant"), set aside the decisions to abolish his post and to terminate his appointment and ordered the UPU to reinstate him as from 9 May 2015, with all legal consequences, and to pay interest at the rate

of 5 per cent per annum, from due dates until the date of payment, on the resulting remuneration arrears, less any net earnings from other employment the complainant may have received after 9 May 2015 and his termination indemnities. The Tribunal also awarded the complainant moral damages in the amount of 20,000 Swiss francs and costs in the amount of 7,000 Swiss francs.

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

- (a) The Director General's decision to reject the Joint Appeals Committee's recommendation, according to which the decision to terminate the complainant's appointment should be set aside, was not adequately motivated.
- (b) The ordinary competent authority regarding the abolition of posts was the Council of Administration; the Chair of the Council of Administration took the decision to abolish five posts, including one of the four P 3 posts within the French Translation Service, in accordance with Article 12(1) of the Rules of Procedure of the Council of Administration. The complainant occupied one of those four posts and it was his post which was abolished. Article 12(1) of the Rules of Procedure of the Council of Administration provides: "[u]rgent questions raised between sessions [of the Council of Administration] shall be dealt with by the Chairman". The Tribunal concluded that the UPU had not presented sufficient evidence that the abolition of posts was "for **urgent** financial reasons" (emphasis added) as the Council of Administration had been aware of the financial situation for years and had nevertheless confirmed the posts in the budget for 2015. The decision to abolish the post was not taken in accordance with the rule of competence referred to in Article 12(1) of the Rules of Procedure of the Council of Administration cited above. The Tribunal found that the abolition decision was an administrative decision challengeable before the Tribunal in accordance with Article II of its Statute.
- (c) In awarding moral damages, the Tribunal took into consideration the UPU's breach of its duty of care and of its duty to protect the dignity of its staff members by failing to notify the complainant

directly of the abolition of his post, as well as the bias shown towards him in selecting his post for abolition among four potential P 3 posts within the French Translation Service, contrary to the clear terms of the applicable provision.

Staff Regulation 9.1 provides, in paragraphs (2) and (3):

“2 If the necessities of the service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments or appointments for an indefinite period shall be retained in preference to those on all other types of appointment, and staff members with probationary appointments shall be retained in preference to those on fixed-term appointment.

3 Appointments shall be terminated with due regard to the competence, efficiency and official conduct, to length of service and to the factor of geographical distribution; all else being equal, appointments of staff members with the least family responsibilities shall be the first to be terminated.”

3. In its application for both interpretation and review of Judgment 3928, filed on 25 January 2018, the UPU submits that:

- (a) The decision to abolish posts was taken by the Chair of the Council of Administration and not by the Director General. The decision must therefore be regarded as a decision of the Council of Administration and, as such, did not constitute an administrative decision impugnable before the Tribunal in accordance with Rule 111.3 of the Staff Rules of the International Bureau of the UPU and Staff Regulation 11.2(1). The UPU adds that the decision to abolish five posts without any reference to the termination of specific appointments was not unilateral in nature, and did not carry any direct legal consequences for the complainant.
- (b) The Tribunal disregarded a fundamental material fact contained in the letter sent by the Deputy Director General to the Chair of the Council of Administration, which cited not only the urgent financial difficulties and budgetary constraints faced by the UPU, but also the “need to align the structure of the [International Bureau] with the evolving needs of the UPU (and its member countries) with the aim of further enhancing its efficiency and cost effectiveness”.

- (c) The Director General's decision to terminate the complainant's appointment, which implemented the Council of Administration's abolition of post decision, fell within the Director General's executive functions.
- (d) The Tribunal did not consider the dire financial situation faced by the UPU, which necessitated the abolition of five posts. To illustrate this contention, the UPU points out that in 2011 there was a funding deficit of 74,685,920 Swiss francs, and by the end of 2014, the deficit increased to 77,952,874 Swiss francs. The UPU contends that the Tribunal's finding that the UPU did not present sufficient evidence to support its assertion that the abolition of posts was for urgent financial reasons is materially flawed and, furthermore, that the Tribunal did not consider the UPU's submissions and documentation regarding its financial situation.
- (e) The UPU challenges the Tribunal's interpretation and application of Staff Regulation 9.1, referring to the finding that the complainant's permanent appointment carried more weight than his official conduct in the determination of whether his appointment should be terminated. It also disagrees with the Tribunal's finding of bias against the complainant.
- (f) The UPU disagrees with the Tribunal's finding that the complainant was not directly notified of the abolition of his post and argues that he was given proper notice of the decision to terminate his appointment.
- (g) It further disagrees with the Tribunal's finding that the Director General's decision was not adequately motivated.
- (h) Finally, the UPU asserts that it is impossible to give effect to the Tribunal's order to reinstate the complainant.

4. The UPU requests that the Tribunal: "Rescind the [d]ecisions contained in its Judgment No. 3928 insofar as they relate to the mandatory reinstatement of [the complainant] and the setting aside of the abolition and termination decisions taken by the [Council of Administration] and the [Director General], or, in the alternative award to [the complainant], in lieu of reinstatement, a non-punitive compensation

amount which duly takes into consideration the serious financial constraints faced by the UPU and which does not exceed the maximum compensation amount payable to staff members upon termination of their appointments pursuant to Staff Rule 109.4.1(c)(i) and the Indemnity Table provided at Staff Rule 109.4.” The UPU further requests the Tribunal to provide “a clear interpretation” of its findings.

5. The complainant asks the Tribunal to dismiss the application for interpretation and review of Judgment 3928 as irreceivable and devoid of merit; to order the UPU to pay him 100,000 Swiss francs for the additional moral damage caused to him and for the delay in executing Judgment 3928, with interest on all amounts awarded, as well as costs; to order the UPU to provide him with a written apology acknowledging the falsity of the allegations made by the Director General and the Legal Adviser against him during the meetings of the Council of Administration of 23, 24 and 27 April 2018 and by the organization in its application for interpretation and review of Judgment 3928.

6. The UPU submits that the transcripts of the April 2018 meetings of the Council of Administration annexed to the complainant’s submissions are irreceivable as they are not official transcripts. It asserts that these transcripts were made by the complainant, and that the Summary Record provided by the Secretary General of the Council of Administration, which was not prepared in transcript format, is the only official record of the meetings of the Council of Administration. The Tribunal acknowledges that the contested annexes are unofficial documents but observes that although the UPU states that these documents were not “confirmed or verified”, it does not contest specifically any part of them.

7. On 12 February 2018 the complainant filed an application for execution of Judgment 3928, because, as of that date, none of the orders made in that judgment had been executed. On 14 June 2018, the complainant received an amount equivalent to three years’ salary and indemnities, plus 5 per cent interest, as well as the amounts awarded

for moral damages and legal costs as ordered by the Tribunal in Judgment 3928. As the UPU has not reinstated him and paid his pension fund contributions for that period, he maintains the present application for execution. He asks the Tribunal to order the UPU to immediately execute and implement the remainder of the redress already granted by the Tribunal. In the event that the UPU fails to do so within 10 days of the date of the issuance of the requested order, he asks that the UPU be fined the sum of 10,000 Swiss francs per month for the duration of the delay in executing the judgment. He also requests awards of moral and exemplary damages in the amount of 100,000 Swiss francs each to compensate for the injury to his health, honour, dignity, and reputation caused by the illegal conduct of the UPU in retaliation for the exercise of his right of appeal. He claims interest at 8 per cent per annum on all sums due from the date of delivery in public of Judgment 3928 to the date of final payment.

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

9. According to the Tribunal's case law, ordinarily an application for interpretation can only concern the decision in a judgment and not the grounds therefor (see, for example, Judgment 3984, consideration 10, and the case law cited therein). The application for interpretation is, on the face of the record, irreceivable as it does not put in issue the terms of the orders made in the decision in Judgment 3928.

10. Regarding the application for review, it is well settled that the Tribunal's judgments are final and carry the authority of *res judicata*. They may be reviewed only in exceptional circumstances and on strictly limited grounds. The only admissible grounds therefor are failure to take account of material facts, a material error (in other words, a mistaken finding of fact involving no exercise of judgement, which thus differs from misinterpretation of the facts), an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely

in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. On the other hand, pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea afford no grounds for review (see, for example, Judgments 3001, consideration 2, 3452, consideration 2, 3473, consideration 3, 3634, consideration 4, 3719, consideration 4, and 3897, consideration 3).

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

12. The UPU's submission under consideration 3(a) above is in part based on a misinterpretation of Judgment 3928, and in part immaterial to the issue of the admissibility of the application for review. Moreover, the applicant's submissions clearly cannot be regarded as pleas of material errors, but either seek to call into question the Tribunal's interpretation of the facts of the case and its application of the law, or have no bearing on the outcome of the case. The argument that the decision to abolish posts did not constitute an administrative decision because it was taken by the Chair of the Council of Administration and not by the Director General is also incorrect.

13. The reason which led the Tribunal to set aside the decision to abolish the five posts was the lack of competence of the interim deciding authority, i.e. the Chair of the Council of Administration, as there was no proven urgency which would have empowered him to take such a decision. Accordingly, the Tribunal's decision did not put in issue the Council of Administration's authority to take a decision as the abolition decision was taken by the Chair without the power to do so and therefore it cannot be considered as a decision of the Council of Administration. This is a question of law, challengeable in accordance with Article II of the Tribunal's Statute.

14. It must be noted that Article II does not specify which organ of the organization must take a challengeable administrative decision and, therefore, introducing any such limitation based on the internal

rules of an international organization is incompatible with the Tribunal's Statute. It is also worth noting that in consideration 2 of Judgment 580, delivered in public on 20 December 1983, the Tribunal stated the following:

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

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

15. In addition, the abolition decision was foundational to the termination decision, which directly affected the complainant. The complainant filed his complaint against the abolition and termination decisions. With regard to the abolition decision, the Tribunal found that the assertion of urgency promoted by the Director General and on which the interim competence of the Chair of the Council of Administration was based, was at odds with the fact that the Council of Administration approved the posts in question in the budget for 2015, i.e. a short time before the interim, extraordinary procedure for the posts abolition started, and notwithstanding the fact that the existence of the difficult financial situation had been known since 2011. Accordingly, the Tribunal based its decision to set aside the abolition decision on the finding that there was insufficient evidence to support the alleged “urgency”, and that, therefore, the Chair of the Council of Administration did not have any competence to abolish the posts in question. The Tribunal's decision to set aside the termination decision was based on the unlawfulness of the abolition of the complainant's post and the improper application of Staff Regulation 9.1, paragraphs (2) and (3), as cited above, either of which was sufficient to justify the setting aside of that decision. In any case, the UPU contests the Tribunal's evaluation of the facts and

exercise of judgement, and its submission, as set out in consideration 3(a) above, is irreceivable as it does not raise any admissible ground for review.

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

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

17. In its pleas the UPU submits that “the UPU must stress that the [Tribunal] has made a decision which clearly sits outside its purview and seeks to call into question the mandate and authority of the [Council of Administration] as the sovereign governing body of the UPU between Congresses. If upheld, the Administration will have no choice but to take the matter to that governing body, as the [Director General] is in no way authorized to rescind [Council of Administration] decisions. Such an outcome might even lead to significant political implications of a wider character, including a review by UPU member countries of remedial mechanisms available to staff members for impugning decisions of the [Director General]” (emphasis added). This is a subtle threat to the Tribunal but a threat nonetheless. As an independent judicial body, the Tribunal is constituted by judges who must act without fear

or favour. Such a threat must be ignored. Also, the threat if acted upon would subvert the operation of the rule of law at an international level. That is because dissatisfaction with a judgment lawfully rendered by a judicial body should never ground the rejection of the jurisdiction of that body. This is unacceptable behaviour by an international organization. The disdain the organization shows for the orderly resolution of justiciable disputes subverts the very institutions established to resolve them and the framework within which they operate. That is even more so as the organization's understanding of the judgment in question is misconceived.

18. The UPU also contends that the proposal of the Deputy Director General to the Chair of the Council of Administration referred additionally to the "need to align the structure of the [International Bureau] with the evolving needs of the UPU (and its member countries) with the aim of further enhancing its efficiency and cost effectiveness". Notwithstanding the fact that this motivation for the decision taken by the Chair fails on vagueness grounds, even if it were valid, this plea has no bearing on the outcome of the case, as this other consideration was not an urgent matter either and, as such, did not sustain the exercise of the Chair's interim power. Also clearly irreceivable are the UPU's submissions regarding the finding that the complainant was not directly notified of the abolition of his post and the finding that the Director General's decision was not adequately motivated, as these submissions do not contest a material error, but the Tribunal's exercise of judgement. The alleged misinterpretation of the applicable provisions (Staff Regulation 9.1, paragraphs (2) and (3)) also affords no ground for review. Likewise, the challenge to the findings that the decisions to abolish the post and to terminate the complainant's appointment were unlawful, the objections that the financial situation was not considered, and that the decision of 3 August 2015 of the new Chair of the Council of Administration, confirming the 15 December 2014 decision of the previous Chair, became moot with the setting aside of the original decision, clearly fall outside the purview of the application for review. The Tribunal's decision is clear and the UPU, as stated above, either

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

19. With respect to the UPU's request that the Tribunal rescind its decision with respect to the complainant's reinstatement and award him material damages instead, there is no reviewable error that would allow the Tribunal to grant that request.

20. In its application for review, the UPU simply disagrees with the Tribunal's appraisal of the evidence and its interpretation of the law. As stated above, the UPU's arguments, summarized in consideration 3, demonstrate that the present application does not raise any admissible ground for review, nor any question of interpretation, and that it is in fact merely an attempt to re-open issues already settled in Judgment 3928. Accordingly, it must be dismissed.

21. With regard to the application for execution filed by the complainant, the UPU contests its receivability on the grounds that it is premature and moot. The UPU claims that the application is premature, as the complainant was informed by letter dated 30 January 2018 that the UPU was taking the necessary measures with regard to his reinstatement, and that the decision to abolish the complainant's post was taken by the Council of Administration and accordingly the decision to reinstate him was also within the competence of the Council of Administration.

22. The UPU argues that the application was also moot because, "in the event that the Tribunal nonetheless confirms its ruling in Judgment 3928, the [Council of Administration] exceptionally approved the budget for the creation of a new post in order to execute Judgment 3928 and reinstate the complainant as ruled". However, a commitment to take steps required by a judgment does not constitute full compliance with the judgment. Thus the application is not moot.

23. The application for execution filed by the complainant is receivable. The 30 January 2018 letter from the Deputy Director General to the complainant essentially informed him that the UPU disagreed with the Tribunal's Judgment 3928 and had filed an application for interpretation and review. It stated inter alia that the UPU "must await the outcome of [the review] process before considering any further action" and that it must also await a "final deliberation and decision" of the Council of Administration which would be meeting in April 2018. The Tribunal recalls that an application for review does not suspend the execution of the judgment (see Judgment 1620, consideration 7). In this case, as mentioned above, the application for interpretation does not put in issue the terms of the orders made by the Tribunal in its decision in Judgment 3928. In light of this, the judgment should have been executed promptly and, accordingly, the application for execution is not premature. Moreover, the Deputy Director General's assertion, in the 30 January 2018 letter, that "it is not only impossible to reinstate [the complainant] to a post that has been abolished; it is simply not within my purview to create or abolish posts within the [International Bureau]", was neutralised by the fact that the Council of Administration later approved a budget for the creation of a new post for the complainant. It is also important to note that when a decision to abolish a post is set aside by the Tribunal, there is no need for a new decision to recreate that post. Therefore, the UPU had only to make the administrative arrangements for reinstating the complainant with all the legal consequences that this entailed.

24. In light of the above, if the complainant is not reinstated with all legal consequences, as required by the orders made in Judgment 3928, within one month of the date of the public delivery of the present judgment, the UPU shall pay him 10,000 Swiss francs for each month of delay thereafter.

25. The delay in fully executing Judgment 3928 by not reinstating the complainant has caused him moral injury. In awarding moral damages the Tribunal takes into particular account the following: the duration of the delay, the administrative difficulties faced by the UPU

in implementing the judgment, and the misleading presentation by the International Bureau of the case to the Council of Administration, alleging misconduct on the part of the complainant as well as noting his complaints to the Tribunal as reasons for not wanting to reinstate him. The proper exercise by a staff member of her or his right to bring a complaint to the Tribunal should not be held against her or him or found criticism of her or his conduct. Moreover, the International Bureau could not refer to the complainant's alleged misconduct as a reason not to reinstate him as no disciplinary proceeding has occurred in that regard, so misconduct has never been proven. It is all the more grave when considering that the alleged reason for the abolition of the posts was because of financial constraints. The abolition of a post can never be based on a staff member's conduct, as that would constitute a hidden sanction. The International Bureau's presentation before the Council of Administration constituted a breach of the duty of care and of the adversarial principle, as the complainant was not given any opportunity to defend himself and his reputation from the allegations. The UPU must respect the dignity of its staff and preserve their reputation.

26. The complainant is entitled to an award of moral damages which the Tribunal sets in the amount of 25,000 Swiss francs.

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

The complainant is entitled to costs in the total amount of 7,000 Swiss francs for these two applications.

All other claims and counterclaims must be dismissed.

DECISION

For the above reasons,

1. The UPU's application for interpretation and review is dismissed.
2. If the complainant is not reinstated with all legal consequences, as required by the orders made in Judgment 3928, within one month of the date of the public delivery of the present judgment, the UPU shall pay him 10,000 Swiss francs for each month of delay thereafter.
3. The UPU shall pay the complainant 25,000 Swiss francs in moral damages.
4. The UPU shall also pay the complainant 7,000 Swiss francs in costs.
5. All other claims and counterclaims are dismissed.

In witness of this judgment, adopted on 6 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 November 2018.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ