

**NINETY-SEVENTH SESSION**

**Judgment No. 2364**

The Administrative Tribunal,

Considering the fourth complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 9 September 2002, the Union's reply of 9 July 2003, the complainant's rejoinder of 14 October and the UPU's surrejoinder of 3 December 2003;

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

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

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

A. The complainant's career is outlined in Judgments 1929 and 2251, which relate respectively to the first and third complaints filed by the complainant and were delivered on 3 February 2000 and 16 July 2003. Following Judgment 1929, the complainant was assigned to a post at grade P.5 as head of project.

In an e-mail of 15 November 2001, the Director-General asked the internal auditor to conduct an audit, in accordance with the internal audit charter, of all the complainant's travel vouchers for 2001. The expense account was checked by the Director of Human Resources and the internal auditor on 11 January 2002. On 21 February the latter sent the Director-General a preliminary investigative report, in which he evaluated the UPU's losses at 17,396 Swiss francs and recommended commissioning an "external investigator" to confirm or invalidate the charges held against the complainant.

In a letter dated 10 March 2002, the Director-General explained to the complainant that the internal auditor had noted aggressive behaviour on his part towards some of his colleagues and had identified "certain acts which could be considered bad management (days off without justification, disregard of expense refund rules, false dates entered in expense accounts, breach of administrative rules governing missions, days off and rest days, and breach of rules concerning leave)". The Director-General considered that a more thorough investigation, in the course of which the complainant would be heard in the presence of the Director of Human Resources, was necessary. He told the complainant that his hearing, which would be conducted by the auditor, should make it possible to clarify the procedure followed for the missions he had undertaken since October 2000. The Director-General added that the complainant would subsequently be able to "provide further details in writing to the internal auditor, furnish any additional evidence and identify potential witnesses, within ten days of the hearing". He also made it clear that the inquiry would be confidential and that the complainant was "required" not to mention it to anyone. Hearings began on 21 March 2002.

On 9 April the complainant asked the Director-General to reconsider the "investigation concerning his official missions" and the "decision" of 10 March. As the Director-General did not reply to that request within the statutory time limit, the complainant referred the matter to the Joint Appeals Committee on 10 May.

On 14 or 15 May the internal auditor handed in his investigative report, in which he found that the complainant had committed several irregularities and concluded that, in view of the sheer number of breaches of the rules and especially their systematic occurrence, a "disciplinary sanction commensurate with the seriousness of the facts of the case" was unavoidable. Considering, furthermore, that the complainant was "unsuitable for service with the UPU" and was using his "considerable know-how" to harm the Union, he recommended his dismissal. He added that, in accordance with the Staff Regulations of the International Bureau of the UPU, the matter should be referred to the Disciplinary Committee and he proposed that the complainant should be suspended so as to facilitate the handling of his case and to allow the Disciplinary Committee to deliver its opinion "free of pressure". In a letter

dated 16 May, the Director-General informed the complainant that he was ordering the opening of a disciplinary procedure and his immediate suspension, without loss of salary, until the procedure was completed.

In its report of 17 May the Joint Appeals Committee found that the complainant's appeal was irreceivable on the grounds that it was not brought against "an administrative decision concerning the complainant", since in the Committee's view the letter of 10 March merely notified the latter that an investigation was to be conducted by the internal auditor. In a letter of 23 July 2002, which constitutes the impugned decision, the Director-General confirmed to the complainant that his appeal of 10 May was irreceivable.

On 29 November 2002, following the disciplinary procedure, the complainant was dismissed for serious misconduct with effect from 28 February 2003.

B. The complainant argues that the letter of 10 March 2002 did constitute a decision which could be challenged by internal appeal and that his complaint is therefore receivable.

On the merits, he contends that the Director-General disregarded the applicable regulations when he decided to open a second administrative investigation on 10 March 2002, following the "secret" investigation opened against him on 15 November 2001. In the light of the findings of the first investigation and the provisions of the annex to office notice 83/1996 on the rules governing internal audits, the Director-General had no other choice, according to the complainant, than to initiate a disciplinary procedure. Yet, quite unexpectedly, he decided to instruct the internal auditor to conduct a second investigation in order to build up evidence that would support his pre-conceived opinion. In so doing the Director-General misused his authority in an attempt to avoid the conducting of an impartial and truly adversarial investigation.

The complainant contends that the Director-General prevented him from knowing his rights and obligations by failing in his duty – prescribed by the provisions of the aforementioned office notice, which are the only ones applicable to this case – to set up a system which would ensure that officials subjected to an administrative investigation receive fair treatment. In order to justify the opening of the second administrative investigation, the Director-General accused him of failing to abide by the relevant regulations, and thus prejudged his case.

The complainant also accuses the Director-General of having committed other misuses of authority by laying down rules for the administrative investigation, including a confidentiality requirement, which are not based on any regulation enforceable against UPU staff but which had the effect of preventing him from producing evidence. In the complainant's opinion, the Director-General entrusted the investigation to the only two officials who were barred from conducting it owing to their involvement in the secret investigation, namely the internal auditor and the Director of Human Resources. He also wrongly laid the burden of proof on the complainant, thereby violating international civil service rules.

The complainant considers that the investigators committed abuses of authority, with the support of the Director-General, by refusing to inform him of the precise charges held against him, and by not letting him have copies of either the evidence supporting the charges against him or the regulations on which they intended to rely "in order to impose their own rules of procedure". The complainant further denounces the fact that the investigators objected to the presence of the witness he had chosen during the investigation procedure.

In conclusion, the complainant submits that the Director-General personally "initiated, planned, organised, supervised and controlled the administrative investigation as a form of reprisal" in order to get rid of him, and also ignored the "orders" of the Tribunal, given that the Director-General has already been censured in Judgment 1929 for similar acts. In his view, measures should be taken to "deter" him from "starting again".

The complainant requests the annulment of the decision of 10 March 2002 as well as of the internal audit charter. He also requests that the Tribunal recognise that his pleas are well founded and claims 330,000 Swiss francs in compensation. Lastly, he claims 15,000 francs in costs.

C. In its reply the UPU contends that the complaint is irreceivable on the grounds that the letter of 10 March 2002 does not constitute an adverse decision. Referring to Judgment 1929, it asserts that the complainant has no cause of action warranting rulings in law since he can obtain the quashing of the decision and redress. In its view, the complainant has also extended the scope of his claims before the Tribunal, since he is now requesting the repeal of the internal audit charter and increased damages.

The UPU replies on the merits only subsidiarily. It argues that the complainant could not expect to enjoy the same rights under an investigation procedure as under a disciplinary procedure, in view of the different purposes served by the two. In the case in hand, the investigation procedure was not substituted for the disciplinary procedure as a means of denying the complainant's rights but was a necessary preliminary measure aimed at establishing the relevant facts. The Director-General therefore committed no misuse of authority by asking the complainant to attend a hearing and to produce evidence. Yet, according to the defendant organisation, the complainant refused to take part in the investigation, purely with the intention of delaying the start of the disciplinary procedure. The UPU maintains that, given that it had good reason to doubt the authenticity of the evidence produced by the complainant, it was up to him to disclose the required documents, which he refused to do because they might have proved compromising.

The defendant explains that the auditor was the only person appointed to conduct the investigation; the Director of Human Resources simply had to attend the hearings. In its view, these two officials cannot be accused of bias. The mandate of the internal auditor was based on office notice 83/1996 and the internal audit charter. He acted within his terms of reference, in accordance with statutory requirements and the general interest, and did not commit any misuse of authority.

The UPU further contends that the auditor did not "invent" any rules. He followed the guidelines set out in a handbook, which is an internal document containing the "practical expression of the principles governing the investigatory procedure", and duly informed the complainant. In accordance with the principles of the internal audit charter, the investigation had to be confidential. This confidentiality requirement also reflected sound administrative practice serving the general interest. The complainant did not receive copies of the relevant documents during the investigation because the investigative report was also confidential. The UPU adds in that respect that the items constituting evidence were essentially documents either drawn up or produced by the complainant himself. According to the defendant, the list of charges contained in the letter of 10 March 2002 was sufficiently clear for him to be able to gauge the seriousness of his misconduct.

Lastly, the UPU argues that the complainant was constantly doing his best to "abuse the system and obtain undue benefits by fraud". It argues that it is in its interest to combat such abuse, a consideration which clearly takes precedence over the need to protect the so-called legitimate interests of the complainant. It contends that the latter has not proved that he suffered any injury, whereas the Union itself has suffered damage on account of the complainant's querulous behaviour. The UPU considers that the complaint is vexatious, because it is intended to harm and paralyse the running of the Union, and requests that the Tribunal order the complainant to pay costs.

D. In his rejoinder the complainant submits that the UPU's objections to receivability do not stand up to scrutiny and reflect its aim of avoiding any "fair hearing before an impartial, neutral body".

On the merits, he contends that, by opening the second administrative investigation, the Director-General effectively deprived him of his rights and prevented the Disciplinary Committee, which might have been objective and impartial, from establishing the relevant facts. He accuses the defendant of having "selected convenient so-called witnesses", among the airlines' security services, for instance, and of having interviewed them without his knowledge. According to him, the internal auditor "invented" rules in order to achieve the Director-General's objectives and intentionally made false statements. According to the internal audit charter, the auditor alone was subject to the confidentiality rule. Yet the UPU, he alleges, made "strictly tactical use" of that requirement, which confirms that the investigation was conducted as a measure of reprisal. The complainant considers that the UPU's "fraudulent acts are a constant underlying feature of the manoeuvring coordinated by the Director-General" in order to get rid of him.

E. In its surrejoinder the defendant presses its pleas. It points out that in accordance with the internal audit charter the complainant was under an obligation "not to take any action" beyond the scope of the investigation. Moreover, since an investigation does not necessarily lead to a disciplinary procedure, it is in a staff member's interest for it to remain confidential, which was implied in the letter of 10 March 2002 sent to the complainant. The UPU considers, nevertheless, that it had to produce whatever evidence was necessary, which meant finding witnesses, even outside its own staff. It points out that the right to be heard is more limited in the case of an investigation by an internal auditor, which results in a report, whereas in the case of a disciplinary procedure there may ultimately be an adverse decision. The complainant was in any case given the opportunity to be heard in the course of the disciplinary procedure.

## CONSIDERATIONS

1. The complainant seeks the quashing of the “decision”, dated 10 March 2002, to open an administrative investigation against him. He denounces several procedural irregularities, requests that the Tribunal deliver several rulings in law and submits many financial claims.

The UPU pleads that the complaint is irreceivable and subsidiarily that it should be dismissed as unfounded.

2. Even though it is only the “decision” of 10 March 2002 which he wishes to have set aside, the complainant refers to facts which arose after that date and adds in his rejoinder that, since the final decision was dated 23 July 2002, “all grievances raised until that date can validly be taken into account” as part of his complaint. In addition, before the Tribunal he also submits a claim for the repeal of the internal audit charter – a claim that was not put forward in his internal appeal.

With regard to the claims based on facts subsequent to 10 March 2002 and presented as grounds for appeal, since internal remedies were not exhausted (Article VII(1) of the Statute of the Tribunal), they must be deemed irreceivable. The same goes for the claims that were not put forward in the internal appeal proceedings.

Furthermore, the validity of a decision or measure cannot be judged on the basis of facts occurring subsequently to that decision or measure.

In the case in hand, therefore, all facts subsequent to the “decision” of 10 March 2002 must be disregarded and the situation must be considered as it stood at that date.

3. On 10 March 2002 the complainant was informed that an administrative investigation concerning him was to be conducted, which might lead to a disciplinary procedure. The purpose of such an investigation, which may be compared – in terms of criminal justice – to the investigation that precedes possible criminal proceedings, is not to gather evidence which can be used against the person concerned, but to provide the competent authority with enough information to decide whether there is sufficient evidence to initiate a disciplinary procedure. Since the latter must by definition be adversarial, the organisation cannot make use of evidence against the person concerned unless it has been gathered in compliance with proper adversarial procedure, as required by consistent case law, and the individual concerned may contest any measure not complying with that requirement.

4. Since it does not affect the complainant’s legal situation, either by changing his status or even by making any statement in that respect, the measure of 10 March 2002 does not constitute an “administrative decision” concerning the complainant.

The Director-General was quite right, therefore, following the advice of the Joint Appeals Committee, to consider the complainant’s internal appeal irreceivable.

On the other hand, the opening of a disciplinary procedure is a decision which adversely affects the staff member, exposing him to a disciplinary measure but at the same time allowing him specific procedural safeguards. The staff member is not vulnerable to an arbitrary act by the administration, since, in the event that his legitimate interests are affected, he still has the possibility of filing an appeal.

Assuming that the complainant’s grievances were well founded, the later disciplinary procedure gave him an opportunity to air those grievances and to ensure that his rights were fully respected. Furthermore, he could appeal to the Tribunal against any resulting sanction. Thus, the impugned measure did not cause the complainant injury.

5. The claim for annulment is therefore without merit and must be dismissed. The same applies to the claims for rulings in law, which are in fact merely arguments in support of the claim for annulment.

The complainant’s financial claims are derived from his main claims and must therefore also be dismissed.

6. The defendant requests that the legal costs should exceptionally be charged to the complainant. It argues in support of that claim that his numerous complaints are vexatious insofar as they are merely intended to harm and paralyse the running of the Union.

In the circumstances the Tribunal does not consider this claim to be justified.

## DECISION

For the above reasons,

Both the complaint and the UPU's counterclaim are dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet