

**G. (No. 3)**

*v.*

**UPU**

**125th Session**

**Judgment No. 3928**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. G. against the Universal Postal Union (UPU) on 14 December 2015 and corrected on 24 March 2016, the UPU's reply of 10 August, the complainant's rejoinder of 24 November, corrected on 12 December 2016, and the UPU's surrejoinder of 20 March 2017;

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 his post and to terminate his appointment while he was on sick leave.

The complainant joined the UPU in 1995. He was awarded a permanent appointment in 1999. At the material time, he was Reviser/Expert Translator within the French Translation Service (STFR) at grade P 3.

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. Among the posts to be abolished was a P 3 post within the Logistics Directorate (DL). 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By a letter of 22 December 2014 the Government of Qatar informed the Director General that Mr A.-A. had been replaced by Mr A.-N. with effect from 19 November 2014.

On 8 January 2015, by internal memorandum No. 2/2015, the Administration notified all staff that several posts would be abolished due to financial constraints, including an “Expert/Translator” position within the DL. In a subsequent corrigendum to internal memorandum No. 2/2015 the Administration indicated that “a P3 post” within the STFR would be abolished.

The Director of Human Resources (HR) was asked by the Deputy Director General to identify which position within the STFR should be abolished. She replied on 14 January recommending that the complainant’s post be abolished, due to his performance and conduct. By a Note of 2 February 2015 she recommended that the Director General abolish the complainant’s post and that his appointment be terminated, as there was no possibility of reassignment. The Director General approved that recommendation on 3 February.

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 he could be reassigned following the abolition of his post by the Council of Administration, as communicated in internal memorandum No. 2/2015 and its corrigendum. It had therefore decided to terminate his appointment with effect from 9 May 2015. The letter also stated that in accordance with Staff Regulation 9.1(5) he would normally be offered any suitable position that would fall vacant during the two years after the effective date of his termination.

The complainant went on sick leave on 9 February.

On 23 February the complainant requested that the decisions to abolish his post and to terminate his appointment be reviewed and asked that his sick leave be recognized as service-incurred. His request was

dismissed as unfounded by a letter of 23 March, noting, inter alia, that his sick leave, which had started on 9 February according to the complainant's physician, could not be attributed to the performance of official duties.

On 27 March the complainant requested authorization from the Director General to appeal directly before the Tribunal. His request was rejected on 1 April.

On 23 April 2015 the complainant lodged an internal appeal against the decision of 23 March.

In its report of 27 May 2015 the Joint Appeals Committee concluded that the decision to abolish the complainant's post had been unlawful as there was no valid Council of Administration decision to that effect. It also found that the process leading to the termination of his appointment had breached his 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 breach of the Tribunal's case law. As the complainant had the right to request that his 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 his appointment be set aside.

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.

By a letter of 16 September 2015 the Director General provided a summary of the Joint Appeals Committee's findings and recommendation to the complainant and informed him that he had decided to reject them as they were based on "fundamentally flawed and unsubstantiated considerations". That is the impugned decision.

By a letter of 9 October 2015 the complainant requested to be provided with the Joint Appeals Committee's full report and objected to the unjustified delay between the date of the report and the Director General's decision. The Director of HR replied on 30 October that the Joint Appeals Committee's report was confidential.

As preliminary matters, the complainant seeks the disclosure of various documents and he requests oral proceedings. He asks the Tribunal to quash the impugned decision and to order his reinstatement. Alternatively, he claims material damages in an amount equal to all salary, benefits, pension contributions, and all other emoluments he would have received from the date of his separation to his statutory retirement date (28 February 2026). He claims two years' gross salary in moral damages, as well as costs, with interest on all sums awarded. Lastly, he asks the Tribunal to order an investigation into the institutional harassment against him and to award exemplary damages on that basis.

The UPU requests the Tribunal to dismiss the complaint as partially irreceivable with respect to his claims relating to the abolition of his post and wholly devoid of merit, and to order the complainant to pay the costs incurred.

#### CONSIDERATIONS

1. In the present complaint, the complainant challenges the decisions to abolish his post, to terminate his permanent appointment, to dismiss his request for review of those decisions, and the Director General's final decision, dated 16 September 2015, dismissing the complainant's internal appeal and "uphold[ing] all administrative decisions referred to in [the internal] appeal, 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 his appointment, "which stemmed from fundamentally flawed and unsubstantiated considerations". He also contested that the termination of the complainant's appointment occurred while he was on sick leave.

2. The complainant filed an internal appeal on 23 April 2015 against the abolition of his P 3 post as Reviser/Expert Translator in the STFR and the termination of his permanent appointment while on sick leave, alleging breaches of the UPU's internal rules.

3. In its report dated 27 May 2015, 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 proposals or documents relating to the proposed abolition of posts were submitted six weeks before the opening of the Council of Administration's session, as required by Staff Regulation 2.2.

4. 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. While it did not take a position on the UPU's alleged breach of its duty of care or the retaliatory nature of the decisions, it 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. 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.

5. The complainant bases his complaint on the following grounds:

- the Director General provided no justification for his decision to reject the Joint Appeals Committee's recommendation which were in favor of the complainant and the decision itself was incomplete as it did not include a copy of the Joint Appeals Committee's report;
- the decision to abolish his post was taken *ultra vires*, without consulting the complainant, was an abuse of authority, breached the UPU's internal rules, was not based on objective grounds or on organizational needs, and was retaliatory;
- the termination of his permanent appointment violated the UPU's duty of care as well as Staff Regulation 9.1(2) and (3) as there was no proper communication with the complainant during the redundancy period and the complainant was not retained despite his 19 years of service, his permanent contract status, the availability of indefinite or fixed-term appointments which could have been abolished instead of his, and his family obligations; and
- the termination of his 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).

6. 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.

7. The complaint is founded. Consistent case law holds that “[t]he executive head of an international organization 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” (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 decision but the Tribunal considers that some of the merits of the complaint must also be addressed.

The Tribunal notes that the Director General stated that his rejection of the Joint Appeals Committee's recommendation was because it “stemmed from fundamentally flawed and unsubstantiated considerations”. As noted above, that is an insufficient justification, but coupled with the fact that the Director General did not attach to his decision taken in accordance with Staff Rule 111.3.11 the Joint Appeal Committee's complete report, rendered the decision entirely meaningless.

8. 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.”

9. 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).

10. 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.

11. 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.”

12. 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 Council of Administration Chair between sessions.

13. The Council of Administration held its session for 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 Council of Administration Chair 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.

14. 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 his post) that he did not take the abolition

decision and that the decision by the Chair of 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 with 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). Moreover it must be noted that in the letter of 15 December 2014 from the Deputy Director General to the Chair of the Council of Administration requesting the latter's approval of the abolition of the five posts, the complainant's post is not directly mentioned. It simply states "P3 DL" among the list of posts to be abolished so the decision to abolish the complainant's post, specifically, was taken afterwards by the Director General on 3 February 2015 when he approved the recommendation of the Director of HR, dated 2 February 2015.

15. It should also be noted that, in breach of the UPU's duty of care and duty to protect the dignity of its staff members, the complainant was not even notified directly of the abolition of his post. He was instead informed, as all staff, via the publication of a corrigendum of January 2015 to internal memorandum No. 02/2015, stating, *inter alia*, that a "P3 Post (French Translation Service)" would be abolished (along with the other four posts). The Tribunal recalls that "[t]he decision to abolish a post must be communicated to the staff person occupying the post in a manner that safeguards that individual's rights. These rights are safeguarded by giving proper notice of the decision, reasons for the decision and an opportunity to contest the decision. As well, subsequent to the decision there must be proper institutional support mechanisms in place to assist the staff member concerned in finding a new assignment" (see Judgment 3041, under 8).

16. Staff Regulation 9.1(2) and (3) provides:

“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.”

17. 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 a 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 limited himself to state 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.

18. It must be noted that in the present case, as stated above, the initially proposed abolition list merely referenced a P 3 DL post and not the complainant's post in particular. It was the Director General who, by approving the recommendation of the Director of HR, chose, from among the four P 3 posts of the STFR, the complainant's post specifically for abolition. The Tribunal would normally not consider this subsidiary decision further as it naturally becomes void with the setting aside of the previous decision, but it must be noted insofar as it affects the complainant's dignity. The 14 January 2015 note from the Director of HR to the Deputy Director General shows a bias against the complainant. In her assessment of which P 3 post should be eliminated from the STFR she analyzed the incumbents of the four P 3 posts according to their seniority and types of contract, stating "[i]n line with Staff Regulation 9.1 [paragraph] 2 and taking into consideration the above elements, [the complainant], [Mr P.] and [Mr D.] should normally be retained in preference to [Ms R.] who only holds a fixed-term appointment". She then chose not to apply that Regulation in favour of basing her recommendation on her evaluation of the performance and conduct of the four incumbents. The Tribunal highlights that the wording of the provision ("staff members with permanent appointments or appointments for an indefinite period **shall be retained** in preference to those on all other types of appointment" (emphasis added)) does not allow for such a deviation.

19. To contest the complainant's assertion of being a "competent and loyal" staff member, the UPU improperly cites the fact that the complainant had filed two previous complaints with the Tribunal. The Tribunal notes that staff members have the right to bring complaints alleging non-observance, in substance or in form, of the terms of their appointment and of the provisions of the Service Regulations, in accordance with the provisions of Article II of the Statute of the Tribunal. International organisations shall not hold the proper exercising of that right against the staff member.

20. 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 his post

must also be set aside. Having regard to the nature and length of the complainant's appointment, the Tribunal will therefore order the UPU to reinstate him in the post he occupied prior to its unlawful abolition, as from the date on which the termination of his contract took effect, that is 9 May 2015, with all the legal consequences that this entails. On the due sums, the UPU shall pay interest at a rate of 5 per cent per annum for the past monthly amounts due until the date of full payment, less any net earnings from other employment the complainant may have received after 9 May 2015 and his termination indemnities.

The complainant is also entitled to an award of moral damages for the unlawful decisions, the breaches of the UPU's duty of care, and the offence to his dignity. The Tribunal shall set the amount at 20,000 Swiss francs. He is therefore entitled to costs, which will be set at 7,000 francs.

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

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

#### DECISION

For the above reasons,

1. The abolition decision and the termination decision are set aside.
2. The UPU shall reinstate the complainant as indicated in consideration 20, above.
3. It shall pay the complainant interest calculated as indicated in consideration 20, above.
4. It shall pay him moral damages in the amount of 20,000 Swiss francs.
5. It shall also pay him costs in the amount of 7,000 Swiss francs.
6. 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 6 December 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ