

NINETY-SEVENTH SESSION

Judgment No. 2365

The Administrative Tribunal,

Considering the fifth complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 31 October 2002 and corrected on 14 November 2002, the Union's reply of 15 August 2003, the complainant's rejoinder of 20 November 2003 and the UPU's surrejoinder of 26 February 2004;

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. Facts related to this complaint are set out in Judgment 2364, also delivered this day.

On 14 or 15 May 2002, the internal auditor handed in to the Director-General his investigative report on the expenses incurred in the course of the complainant's missions between October 2000 and December 2001, in which he proposed suspending the complainant from duty owing, in particular, to the "number of appeals [he had] filed". In a letter dated 16 May 2002, the Director-General, drawing attention to the "systematic and recurrent nature of the [complainant's] fraudulent transactions", informed the latter that he was ordering the initiation of a disciplinary procedure and his immediate suspension, without loss of salary, until that procedure was completed.

On 14 June the complainant asked the Director-General to reconsider the decision of 16 May. 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 26 July, asking the Committee to "recognise" that the decision to suspend him should be cancelled, that the "validity of the injuries [he had] sustained" was established and that they warranted compensation. In its report dated 16 October, the Committee took the view that the decision to suspend the complainant showed no formal or procedural flaw and that the Committee was "not competent to recognise either the validity of or the compensation for the injuries sustained" by the complainant. It recommended that the Director-General maintain his decision to suspend the complainant, if he deemed it necessary, until the disciplinary procedure was completed. In a letter dated 21 October 2002, which constitutes the impugned decision, the Director-General confirmed the suspension decision and stated that the complainant's "claims regarding the validity of and compensation for injuries" were unfounded.

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

B. The complainant contends that the reasons given for the decision to suspend him from duty did not meet the criteria laid down in the Tribunal's case law. In his view, that decision reflected abuse of authority insofar as it was designed to prevent him from producing relevant evidence for the disciplinary procedure. He points out that he was refused access to his own professional records and to the UPU's "documentary data base", where he could have consulted the applicable regulations.

The complainant further maintains that the impugned decision taken by the Director-General was a form of reprisal against him following the various appeals he had filed and therefore breached the principles that apply to the international civil service. Lastly, the complainant considers that by taking the decision of 16 May 2002 to suspend

him from duty, the Director-General was prejudging his case, because he could not possibly have examined the 55 pages of the investigative report objectively and thoroughly in the space of only 24 or 48 hours. He produces a “technical and critical analysis” of that report as an appendix to his complaint.

The complainant asks the Tribunal, as a “measure of investigation”, to order a review of the investigative report by qualified experts who would be instructed to establish whether or not the report complies with the applicable substantive and formal rules. He also asks the Tribunal to recognise that his pleas are well-founded and to award him 230,000 Swiss francs in compensation, on the grounds that he has suffered “major” moral and professional injury. He claims 20,000 francs for each month of suspension and 20,000 francs in costs.

C. In its reply the UPU contends that the complaint is irreceivable. It considers that, since the complainant omitted to maintain his claim for the suspension decision to be set aside, the Tribunal need not rule on that point. 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 claiming damages. It adds that, to the extent that the decision to suspend the complainant has become final and enforceable, a review of the investigative report by an expert would serve no purpose.

The UPU replies on the merits only subsidiarily. It endeavours to demonstrate that the suspension of the complainant was clearly well-founded and was not tainted with any formal or procedural flaw. It considers that in the circumstances of the case the Tribunal could not possibly find any error of fact or law, nor any misuse of authority. The defendant also refers to Staff Rule 110.3, which in pertinent part reads as follows:

“If a charge of serious misconduct is made against any staff member, the Director-General may, if he considers that the charge is well-founded and that the staff member’s continuance in office pending an investigation of the charge would be prejudicial to the service, order the staff member to be suspended from duty, without loss of salary and without prejudice to his rights, until the investigation has been completed.”

It infers from this provision that the decision to suspend a staff member in the context of a disciplinary procedure lies at the discretion of the Director-General and is therefore subject only to limited review by the Tribunal.

According to the UPU, the decision of 16 May 2002 was sufficiently substantiated, given that it referred expressly to the investigative report. It points out that, at the suspension stage, the Director-General need only consider that the charge is well-founded in order to take his decision; he need not have “absolute” proof, which can be established in the course of the disciplinary procedure. The defendant considers that it provided the complainant with all the relevant documents in good time and points out that he never asked to be sent the regulations he mentions.

The UPU explains that the Director-General referred to the investigative report only with respect to the details of the fraudulent transactions and that he did not endorse the internal auditor’s opinion that the suspension of the complainant was justified by the number of appeals he had initiated. The Director-General, moreover, had sufficient time to examine the said report.

Lastly, the defendant maintains that the complainant was constantly doing his best to “abuse the system and to 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 argues that, by basing the decision to suspend him from duty solely on the investigative report, the Director-General deliberately omitted to take account of essential facts related to the administrative investigation procedure, drew conclusions from the evidence that “suited his purposes but were manifestly mistaken” and disregarded “the undeniably extravagant nature” of the recommendations contained in the report. The complainant further contends that by maintaining his suspension for more than five months, the Director-General confirmed that it was a measure of reprisal. In his view, the measure was also “an intermediate stage” in the process of getting rid of him undertaken by the Director-General on the basis of his preconceived

opinion. Lastly, he accuses the UPU of engaging in “fraudulent practices”.

E. In its surrejoinder the defendant presses its pleas. It points out that the complainant has not specified which essential facts it failed to take into account. In its view, the duration of the suspension should be seen in the light of the difficulties encountered in the course of the investigation and the complainant’s obstructive attitude. The UPU considers that since the conditions for suspension were objectively met, there can be no question of abuse of power. It further contends that it cannot be accused of breaching the complainant’s right to be heard.

CONSIDERATIONS

1. On 14 or 15 May 2002, the internal auditor handed in his investigative report on the complainant’s mission expenses to the Director-General of the UPU. The auditor found that the complainant had committed a number of irregularities and that “in view of the sheer number of breaches of the rules and especially their systematic occurrence, a disciplinary sanction was unavoidable”. On 16 May 2002 the Director-General informed the complainant that he was ordering the initiation of a disciplinary procedure against him and his suspension with immediate effect. It had not been possible for the complainant to be heard before the decision was taken.

On 14 June 2002 the complainant asked for that decision to be reconsidered. As the Director-General did not reply within the statutory time limit, the complainant referred the matter to the Joint Appeals Committee on 26 July 2002. He put forward five pleas, including the lack of “receivable reasons” and the fact that the Director-General had prejudged his case. He asked the Committee to cancel the decision to suspend him and to recognise the “validity” of his pleas and of the injuries he claimed he had sustained and which in his view warranted compensation.

In its report of 16 October 2002, the Joint Appeals Committee recommended that the Director-General maintain his decision to suspend the complainant until the end of the disciplinary procedure, if he considered that to be necessary.

In a decision of 21 October 2002, the Director-General forwarded the report to the complainant and informed him that the decision of 16 May 2002 to suspend him was confirmed. He added that “the claims regarding the validity of and compensation for injuries were unfounded [and that the] claim regarding the validity of his five main pleas was irreceivable”. That is the impugned decision.

2. It should be pointed out that, following the disciplinary procedure, the Director-General dismissed the complainant for serious misconduct by a decision of 29 November 2002.

That procedure and the disciplinary sanction are not, however, at issue in this case.

3. The complainant considers that his suspension was unlawful and claims financial compensation for moral and professional injury. He accuses the Director-General of having based his decision on an incorrect investigative report, which he failed to examine with care. In his view, his suspension from duty was neither explained nor justified by the requirements of the disciplinary investigation, but it seriously impaired his dignity and his reputation. He alleges the decision was also a form of reprisal, used by the Director-General to prevent him from having access to the evidence he needed for his defence. He accuses the Director-General of misuse of authority. The complainant also bases his assertions on facts which occurred after the decision to suspend him. As a measure of investigation, he requests the Tribunal to order a review of the investigative report by qualified experts.

The UPU pleads that the complaint is irreceivable and, subsidiarily, that it is unfounded.

4. The Tribunal sees no need to rule on most of the objections to receivability, since the complaint is in any case unfounded.

(a) The suspension of the complainant was an interim, precautionary measure, which was to last as long as the disciplinary procedure. It was ordered without hearing the complainant’s views on the matter beforehand, but the latter’s right to be heard was safeguarded since he later had an opportunity to exercise it before the impugned decision was taken. In any case, a decision to suspend need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see Judgment 1927, under 5).

Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by

the requirements of the organisation and in accordance with the principle of proportionality. A measure of suspension will not be ordered except in cases of serious misconduct.

Such a decision lies at the discretion of the Director-General. It is subject therefore to only limited review by the Tribunal, that is to say, if it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see, for instance, Judgment 2262, under 2).

(b) Staff Rule 110.3 reads in part as follows:

“If a charge of serious misconduct is made against any staff member, the Director-General may, if he considers that the charge is well-founded and that the staff member’s continuance in office pending an investigation of the charge would be prejudicial to the service, order the staff member to be suspended from duty, without loss of salary and without prejudice to his rights, until the investigation has been completed.”

The defendant asserts that the complainant’s suspension was ordered by the Director-General, in a decision of 16 May 2002, in compliance with that rule. In his decision, the latter wrote that the investigative report “demonstrate[d] the systematic and recurrent nature of the [complainant’s] fraudulent transactions” and that “the charge was serious and well-founded”. He also informed the complainant that he would have an opportunity to “present [his] defence” in the course of the disciplinary investigation and that the decision was being taken “without prejudice to [his] rights”. It should be pointed out that, in this case, the authority responsible for deciding interim measures, both before and after the complainant had the opportunity to exercise his right to be heard, was the Director-General.

The rule quoted above and the decision of 16 May 2002 appear each to contain contradictory terms as they both presume that the charge is well-founded while explicitly or implicitly safeguarding the complainant’s right to be heard. It must be assumed, however, that this is due to clumsy drafting and that the expression in Rule 110.3 “if he considers that the charge is well-founded” should be understood to mean “if he considers that the specific accusations made allow him to presume that the charge is well-founded”, and that this is what the Director-General really meant as well.

(c) With regard to whether the right to be heard was safeguarded, it is the situation at the time of the impugned decision, i.e. on 21 October 2002, that needs to be considered, since the procedure before the Joint Appeals Committee gave the complainant the opportunity to put forward the grounds which in his view invalidated the decision to suspend him.

It is also necessary to determine whether the conditions for suspending the complainant from duty were met at the time the Director-General ordered that measure, i.e. on 16 May 2002, all subsequent facts being irrelevant.

Moreover, since the only impugned measure is the complainant’s suspension, there is no need to examine either the decision to initiate the disciplinary procedure or the sanction to which it led.

5. In the light of the above considerations, the pleas put forward by the complainant both in his complaint and in his rejoinder appear unfounded.

(a) The complainant contests the investigative report and asks the Tribunal to have it reviewed by “qualified experts”.

This plea is unfounded. Since the disciplinary procedure initiated after the report was adversarial, the complainant had every opportunity to exercise his rights, and in particular his right to contest the investigative report. Any inaccuracies in the report could have been raised in the course of that procedure.

(b) On the basis of many arguments and allegations, the complainant contends that insufficient reasons were given for the decision to suspend him.

(i) Without exceeding his extensive discretionary authority, the Director-General could legitimately consider that it was in the UPU’s interest to suspend the complainant from duty during the disciplinary procedure. The complainant, who had initiated many appeals against the UPU, was contesting the facts, and in view of the seriousness of the charges against him, a thorough verification of the facts appeared indispensable.

The measure of suspension did not affect the rights of the complainant, since it was intended to apply it for a limited period only and since the Union could ensure that the measure was not widely publicised. The internal auditor's report contained specific accusations on the basis of which it was reasonable to assume that irregularities deserving a disciplinary sanction had been committed. And, contrary to the complainant's allegations, the suspension did not restrict his right to defend himself.

(ii) In addition, the reasons given in the investigative report and in the decision to suspend the complainant, supplemented by those appearing in the recommendation of the Joint Appeals Committee, which the Director-General endorsed, were sufficient.

Even though the reasons given in the impugned decision were incomplete, the decision was nevertheless substantiated. The plea concerning a lack of reasons is therefore unfounded.

(c) The complainant argues that the decision to suspend him is tainted with abuse of authority insofar as he was denied access to his professional records and hence to evidence which he needed for his defence.

However, the suspension was based on objective reasons. It was not intended to deprive him of the evidence he needed to defend his rights, nor has it been shown that, in the circumstances, the complainant was denied his right to produce relevant evidence.

(d) According to the complainant, his suspension constituted a measure of reprisal for the many appeals he initiated against the UPU. In support of that view he quotes a statement the Union made in a brief related to another of his complaints before the Tribunal, in which it asserts that "since the investigative report also called for the suspension of the complainant to prevent him causing further damage to the Organisation, particularly by initiating yet more appeals, the complainant was suspended from duty with immediate effect".

It cannot be assumed from that statement that the Director-General ever intended to penalise the complainant. In concluding that it was in the interest of the service to suspend the complainant, the Director-General merely exercised his discretionary authority, which in the Tribunal's opinion he did not abuse.

(e) The complainant accuses the Director-General of prejudging his case because his decision of 16 May 2002 was based on the investigative report which he received on 14 or 15 May 2002. He argues that the Director-General did not take time to study the 55 page report and its 207 pages of annexes before taking his decision. Furthermore, he asserts that the investigative report, which should in his view have remained confidential, was appended by the defendant to its briefs in two other complaints filed by the complainant before the Tribunal. That, he argues, meant that the Director-General "formally and completely approved" a report that he had not had time to study, which is proof that the impugned decision was tainted with bias.

The complainant's remarks show that he has misunderstood the internal nature of the investigative report. Since the latter was requested and produced as part of an internal audit, it cannot on its own serve as conclusive evidence against a staff member. On the other hand, it may yield indications of irregularities justifying the initiation of a disciplinary procedure, in the course of which the person charged must be allowed all admissible means of defence.

The Director-General did not abuse his discretionary authority by considering that the investigative report contained indications which merited further scrutiny in the context of a disciplinary procedure, even on the assumption that he had been unable to study the report in full himself. The complainant produces no evidence, either, to show that the UPU is engaged in fraudulent practices, or that it failed to take account of essential facts or drew mistaken conclusions from the evidence.

6. Since the main claims fail, so too do the subsidiary claims. Consequently, the complainant's claims for compensation must be dismissed.

7. The complaint must therefore be dismissed under all heads.

8. The defendant requests that costs be awarded against the complainant, in view of the vexatious nature of the complaint. The Tribunal considers it unnecessary to grant this request.

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