Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2397

The Administrative Tribunal,

Considering the eighth complaint filed by Mr T. B. against the Universal Postal Union (UPU) on 19 March 2003 and corrected on 16 April, the Union's reply of 1 September, the complainant's rejoinder of 8 December 2003 and the UPU's surrejoinder of 16 January 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. Facts relevant to this case appear in Judgment 2396, also delivered this day, concerning the complainant's seventh complaint.

After receiving an investigative report from the internal auditor, on 16 May 2002 the Director General opened a disciplinary procedure against the complainant and suspended him with immediate effect without loss of salary. On 6 September 2002 the Disciplinary Committee, to which the matter was referred, handed in a confidential report recommending a reduction in salary step within the same grade combined with delayed advancement to the next salary step and adding that it "[was] not considering taking any other action in the […] case".

Following an exchange of correspondence, a meeting was held on 2 October which the complainant attended. On 11 October the Director General wrote to inform him that since irregularities committed during his missions had been revealed by a recent further disciplinary investigation, he had ten days from receipt of the letter to submit his comments and to produce certain documents. The entire file would then be transmitted to the Disciplinary Committee. The Director General also stated that in view of the seriousness of the charges against him, the time elapsed since the beginning of his suspension, the fact that his attitude had considerably hampered the investigation conducted by the internal auditor as well as the disciplinary procedure, the new evidence that had come to light and the damage caused to the Union by his behaviour, he felt that it was a case of exceptional circumstances justifying a reduction in pay of an official following suspension. As from 15 October 2002 his salary would therefore be reduced by 50 per cent until the end of the disciplinary procedure. Noting, moreover, that by the end of 2002 the complainant would have accumulated more than 60 days' annual leave, the Director General ordered him to take at least 25.5 days' leave before the end of the year and said that, if he did not take them, the leave would not be carried forward.

On 16 October 2002 the complainant wrote to the Director General asking him to reconsider the latter three "decisions" of 11 October. In a letter of 18 October 2002 to the Director General he submitted his comments and challenged what he described as the "second referral to the Disciplinary Committee". He added that he was still waiting for a decision to be taken on the basis of the report of 6 September 2002, of which he requested a copy, and that the documents he was asked to produce concerned his private life and were not relevant to his case.

By a letter of 22 October 2002 the Director General informed the complainant that the Disciplinary Committee's report was confidential. He observed that the complainant was "once again" refusing to produce the required documents and said that the ten-day deadline indicated in his letter of 11 October still stood. In reply to that letter, the complainant submitted further comments on 24 October. While noting that the Director General refused to let him have the said Committee's report, he reiterated his request for a copy and pointed out that the "charges held [against him] differ[ed] very substantially" from those appearing in the internal auditor's investigative report on the basis of which he had been suspended. In a note dated 30 October, the Director General asked the Disciplinary Committee to "review, supplement or even modify" its report in the light of the new material he was sending it.

On 18 November 2002 the complainant filed an appeal against the three disputed "decisions" of 11 October with

the Joint Appeals Committee. In its report dated 11 December 2002 the Committee found that the complaints concerning the "second referral" to the Disciplinary Committee were unfounded. It considered that the decision to reduce the complainant's salary by 50 per cent, and likewise the order given to the complainant to take leave, which could only be seen as a useful reminder given for his benefit, complied with the current regulations. It therefore unanimously recommended maintaining the disputed decisions. In a letter also dated 11 December 2002, which constitutes the impugned decision, the Director General informed the complainant that he confirmed his decisions.

Meanwhile, the Disciplinary Committee having recommended in a further confidential report the dismissal of the complainant, the latter was dismissed for serious misconduct on 29 November 2002 with effect from 28 February 2003.

B. The complainant contends that a decision should have been taken after the first disciplinary procedure, since the conclusions of the Disciplinary Committee were "extremely clear" and it never mentioned the need for further investigations. Yet, despite his repeated requests, he received no notification of a decision.

He submits that what he considers to be the "third administrative inquiry secretly initiated" at the beginning of September 2003, which in his view was tainted with many breaches of the rules of the international civil service, and the "second disciplinary procedure" are "null and void" owing to a great many formal and substantive defects. He considers that a second disciplinary procedure could not be opened on the basis of the same charges. The Director General "deliberately magnified and aggravated […] the mistakes of the second administrative inquiry" and employed "tactical manoeuvres" intended not only to prevent him from "exercising his legitimate rights" during the third administrative inquiry but also to justify his dismissal. He also refused to let him see the report of 6 September 2002, failed to inform him at the meeting of 2 October 2002 of the new "evidence" gathered since the beginning of September, produced only "evidence" which "suit[ed] his needs" and left him a mere ten days to submit his comments on the 600-page file of the further investigation.

The complainant includes as formal and substantive defects the fact that the Director General took a "personal and active" part in the third administrative inquiry and "influenc[ed]" witnesses during the inquiry. He was guilty of "bias" and maintained the suspension measure even after the report of 6 September 2002 had recommended a "token" sanction.

According to the complainant, the two officials in charge of the third administrative inquiry, namely his direct supervisor and the Deputy Director General, were guilty of abuse of authority and bias. They had personally approved several of his requests for travel authorisations and refunds of travel expenses that were later contested by the UPU, and his supervisor moreover had been one of the main witnesses testifying against him during the first disciplinary procedure.

With regard to the decision to reduce his salary by half, the complainant points out that he was notified of it only on the day it became effective. In reply to the reasons put forward by the Director General in his letter of 11 October 2002, he argues that the seriousness of the charges levelled at him is "extremely questionable" and that the duration of his suspension was entirely due to the Director General. He expresses doubt as to the coherence and reliability of several of the new items of "evidence" produced and maintains that he handed in all the documents requested by the Disciplinary Committee within the required deadlines. In his view, any damage the Union might have suffered is entirely attributable to the Director General and more especially to the latter's "stubborn" attitude.

He contends that none of the reasons put forward by the Director General to justify the order for him to take at least 25.5 days' leave by the end of 2002 stands up to scrutiny. While Rule 105.1, paragraph 2, allows the Director General to decide, in exceptional circumstances, the period in which an official has to take his annual leave, the reasons for such a decision must be based on "the exigencies of the service". The complainant points out that he was suspended from duty at the time, and no such "exigencies" could be said to exist in this case. According to him, the only reason for the decision was to avoid the UPU having to pay him those days of leave when his appointment ended, since the Director General wanted to ensure that the days of absence which he considered "unjustified" would in no event be counted with his accumulated leave.

The complainant requests that the third administrative inquiry, the second disciplinary procedure and the Director General's decision ordering him to take 25.5 days' leave by the end of 2002 be set aside. He also asks the Tribunal firstly to recognise that his pleas are well founded and secondly to order the UPU to pay him all the amounts

“unduly deducted” from his pay since 15 October 2002. He claims 280,000 Swiss francs in compensation and 10,000 francs in costs.

C. In its reply the Union considers the complaint irreceivable in several respects. The so-called “second referral” to the Disciplinary Committee and the order to take leave, which was in fact merely a reminder of the applicable rules, are not decisions causing injury; referring to the Tribunal’s case law it argues that, even where a disciplinary procedure has been opened, there can be no act causing injury until a final decision has been taken. The claims to set aside what the complainant describes as the “third administrative inquiry” and the “second disciplinary procedure” and the claims for damages are irreceivable for failure to exhaust internal remedies. Referring to Judgment 1929, the UPU submits that the complainant shows no cause of action justifying a ruling in law, given that in practice he can obtain the quashing of the decision and redress.

The UPU takes note of the fact that the complainant is no longer asking the Tribunal to set aside the “second referral” to the Disciplinary Committee and the decision to withhold 50 per cent of his salary, which has become final and enforceable. The related claims for damages are likewise irreceivable to the extent that they concern a decision which is no longer being challenged as such.

On the merits the defendant contends that the Director General was under no statutory obligation to reach a decision on the basis of the first report of the Disciplinary Committee if he considered that further investigation was necessary. Given that the complainant objected to procedural defects in the “first referral” to that Committee, the “second referral” was an act of sound management. The same was true of the further investigation undertaken as part of an ongoing disciplinary procedure.

The UPU considers that the complainant has not provided sufficient evidence to support his allegations of bias and recalls that the conclusions of the Disciplinary Committee’s second report were based on proven facts. Insofar as the complainant was duly kept informed of how the procedure was progressing, and since his right to be heard was safeguarded, no formal or substantive defect can be held against the Union in that respect.

With regard to the deduction from the complainant’s salary, the defendant contends that the decision lies at the Director General’s discretion, in accordance with Staff Rule 110.3, which states that after four months’ suspension a deduction may, in exceptional cases, be made from the staff member’s salary, provided that the amount of such deduction shall not be more than 50 per cent. This is reimbursed to the staff member if the charge is found to be unjustified. In this instance, the Director General considered, for the reasons given in his letter of 11 October 2002, that the case was exceptional and justified the deduction. Furthermore, since the Disciplinary Committee, in its report of 29 November 2002, recommended the dismissal of the complainant for very serious misconduct, and since the latter was dismissed by decision of the Director General on that same day, the charges were indeed both serious and founded.

The defendant points out that the Director General did not fix the dates when the complainant was supposed to take leave but maintains that, as he had 85.5 days’ leave outstanding at 31 December 2002, the Director General merely reminded him that no more than 60 days’ leave could be carried forward. It adds that there was no service exigency preventing the complainant, who was then suspended, from taking his leave.

It contends that the complainant has not shown that he suffered injury. It considers that since the further investigation, the “second referral” to the Disciplinary Committee and the deduction from pay were perfectly lawful measures, the complainant cannot claim compensation in respect of an alleged injury. He cannot talk of good faith and dignity considering that he “voluntarily, knowingly and systematically” committed fraud, “did his best to drag out the procedure and artificially concocted procedural flaws”.

The Union considers that it suffered damage as a result of the complainant’s fraud and the harm done to its reputation on account of his behaviour. In its view, this complaint is abusive insofar as it is aimed at damaging the Union and paralysing its activities. In view of the “querulous” attitude adopted by the complainant, it asks the Tribunal to order him to pay costs.

D. In his rejoinder the complainant rebuts the defendant’s contention that the complaint is irreceivable. The case law to which it refers in support of its argument that there can be no act causing injury until a final decision has been taken is, in his view, entirely based on the rules applied by another organisation. It is for the Tribunal to decide whether the many irregularities affecting the third administrative inquiry, the refusal to let him have the

Disciplinary Committee's first report and the refusal to allow him to object to certain members of that Committee constitute decisions causing injury, and he maintains that injury certainly arose from the fact that he had to support his family on pay reduced by half without warning. Regarding the order to take leave, he queries the UPU's interpretation whereby the expression "I order you" amounts to a mere reminder.

In reply to the Union's allegation that he has not maintained his claims for certain decisions to be set aside, he recalls that in his complaint form he did indicate that he was challenging the decision of 11 December 2002 and ask for the impugned decision to be set aside. In his view, the notion of a "final and enforceable decision" is irrelevant in this case.

On the merits, he considers that the third administrative inquiry is flawed owing to the fact that he was not notified of it at the time it was opened. When the matter was referred a second time to the Disciplinary Committee, the Union denied him the right to object to one of the Committee members. Since according to the defendant the further investigation was part of an ongoing disciplinary procedure, it was the Disciplinary Committee which should have decided to conduct and take part in the further investigation.

As for the new items of "evidence" to which the Director General referred, the complainant submits that they consist mostly of testimonies and complains that he was not given the opportunity to request that they be supported by documentary proof or to question the witnesses. According to him, the UPU is wrong in contending that an award of damages must depend on the quashing of the impugned decision.

E. In its surrejoinder the defendant maintains its arguments. With regard to the two officials challenged by the complainant in his complaint, it argues that the Director General is free to invite any qualified person to take part in a further investigation and that it is quite "normal" for a supervisor to participate in a disciplinary investigation. Moreover, the complainant has not shown in what way the Union's objectivity and impartiality might have been impaired by the involvement of those two officials. As regards the ten-day deadline within which the complainant was allowed to give an opinion on the further investigation file, the UPU points out that the file could be examined very rapidly. It adds that there was no reason to allow the complainant a further opportunity to object to members of the Committee since he had already done so during the "one and the same disciplinary procedure". As for the testimonies, they were all submitted in writing and the complainant made no comment on them when invited to do so.

CONSIDERATIONS

1. The object of the complaint is a decision dated 11 October 2002 which, on the basis of a unanimous recommendation by the Joint Appeals Committee, was subsequently confirmed by a decision of 11 December 2002. The decision of 11 October was taken at a time when the complainant had been suspended from duty since 16 May 2002 (see Judgment 2365, under 1 and 2). In that decision, the Director General of the UPU gave the complainant ten days in which to comment on and specify his grievances regarding the procedure followed by the Disciplinary Committee, after which the complete file was to be transmitted to that Committee. He also ordered that the complainant's pay be reduced by "50 per cent from 15 October 2002 until the closure of the disciplinary procedure" and that the complainant take "at least 25.5 days' leave before the end of the year".

2. The complainant contends that what he describes as the "third administrative inquiry", which concerned the gathering of supplementary evidence, and the "second disciplinary procedure" are "null and void" owing to formal and substantive defects. According to him, the first disciplinary procedure was completed on 6 September 2002, when the Disciplinary Committee handed in its first confidential report. Instead of taking a decision on the basis of that document, the Director General implicitly disregarded its conclusions and "secretly" opened a new administrative inquiry, which he entrusted to officials who, being personally involved in the case, should never have taken part in it. On the basis of the evidence thus gathered, the Director General opened a second disciplinary procedure, which was intended to culminate in his dismissal.

These assertions are unfounded.

The Disciplinary Committee did state in its report of 6 September 2002 that it did not intend to undertake further investigations. But the Committee is only an advisory body at the service of the Director General, who is alone empowered to decide disciplinary measures against a staff member (Staff Regulations 10.1 to 10.3 and Staff Rules

110.1 to 110.4). The Disciplinary Committee's opinion does not obviate the need for the Director General to consider whether it is necessary to extend the procedure before taking his decision.

Given the difficulty encountered – largely because of the lack of full cooperation on the part of the complainant – in establishing whether the accusations regarding his mission accounts were well founded, and the doubts that still lingered in the light of all the facts uncovered by the administrative inquiry and the disciplinary procedure, the Director General was in any case justified in investigating the matter more fully. The complainant's assertions regarding the Director General's duplicity and "tactical manoeuvres", the bias of the officials in charge of the further investigations he considered necessary and, more generally, the allegations that the Administration was constantly biased against him are pure speculation and are not supported by objective evidence which might convince the Tribunal that the defendant's administrative bodies responsible for disciplinary matters abused the discretionary authority that they necessarily enjoy.

Contrary to the complainant's allegations, by opting to pursue the investigations further, the Director General did not open a new administrative inquiry prior to initiating a second disciplinary procedure. In the light of the voluminous file submitted to the Tribunal by the parties, there appears on the contrary to be continuity in the disciplinary procedure which was opened on 16 May 2002 and closed on 29 November 2002. The formal irregularities for which the complainant at length and repetitively blames the Director General, and which he contends took the form of the unlawful opening of a new administrative inquiry followed by a new disciplinary procedure, are therefore not proved.

Except as regards the irregularity dealt with in Judgment 2398, also delivered this day, the complainant wrongly argues that his right to be heard was disregarded. He had ample opportunity to express his views regarding the problems which led to the adoption of the disputed measures; he could do so either orally, especially on 2 October 2002, or in writing, not only during the investigation (including in response to the letter of 11 October 2002) but also in the course of the internal appeal procedure.

3. The complainant further objects to the reasons put forward in the decision of 11 October 2002 to justify a reduction of 50 per cent in his pay as from 15 October 2002.

This measure is provided for in Staff Rule 110.3, which governs suspension pending investigation. It can be applied only after four months' suspension and in exceptional cases. The amount of the deduction cannot be more than 50 per cent of the salary; if the charge is found to be unjustified, the amount deducted must be reimbursed to the staff member.

This provision does not give the Director General discretionary authority, but it does leave him a degree of freedom to determine in practice whether a case is so exceptional as to justify the salary deduction.

The first point to be made is that the time elapsed since the complainant's suspension is not, in itself, sufficient to justify a salary deduction. However, the other circumstances mentioned in the letter of 11 October 2002 to justify the deduction could be sufficient, taken either together or individually, to judge whether a given situation is exceptional or not. These circumstances are the seriousness of the charges against the complainant, the harm his conduct allegedly caused the UPU and his dilatory behaviour during the administrative inquiry and the disciplinary procedure.

The Tribunal need not determine whether the first two of these reasons are well founded; nor will it consider the reference to new evidence because it is probably made in connection with them. It suffices to note that the Director General was entitled to order the deduction of half the salary on the grounds of the large, if not entire, responsibility borne by the complainant for the undue prolongation of the investigations. The purpose of the latter was essentially to check the accuracy of the mission accounts. This verification need not have given rise to the burdensome administrative formalities eventually undertaken. Had the complainant, as he was duty bound, fully cooperated, the investigations would probably have been less cumbersome and more expedient.

The complainant's plea regarding the 50 per cent deduction from his salary is therefore clearly unfounded.

4. Lastly, the complainant objects to the order he received to take 25.5 days' leave by the end of 2002. This measure was taken in application of Staff Regulations 5.1 and 9.14 and Rule 105.1. According to these provisions, staff members cannot carry over more than 12 weeks (60 working days) of annual leave beyond 1 January of any

year (paragraph 3 of Rule 105.1). In basing the disputed measure on the fact that the complainant would have accumulated 85.5 days' leave by 31 December 2002, the Director General was merely indicating the consequences of a clear rule, even though those consequences were expressed somewhat incorrectly.

This plea is therefore equally irrelevant.

5. All the complainant's pleas are clearly unfounded. His complaint must be dismissed with regard to both his main claims and his subsidiary claims. The Tribunal need not therefore consider the objections raised by the defendant with respect to the formal receivability of the complaint.

6. On the grounds that the complaint is abusive, the defendant wants an award of costs against the complainant. This claim shall not be allowed.

DECISION

For the above reasons,

The complaint and the UPU's counterclaim are dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.