

G. (No. 4) and N. (No. 2)

v.

UPU

128th Session

Judgment No. 4142

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr D. G. against the Universal Postal Union (UPU) on 7 July 2017 and corrected on 15 August, the UPU's reply of 20 November 2017, the complainant's rejoinder of 16 March 2018, corrected on 22 March, and the UPU's surrejoinder of 2 July 2018;

Considering the second complaint filed by Ms J. N. against the UPU on 7 July 2017 and corrected on 21 July, the UPU's reply of 31 October 2017, the complainant's rejoinder of 13 February 2018 and the UPU's surrejoinder of 23 May 2018;

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

Having examined the written submissions;

Considering that the facts of the cases may be summed up as follows:

The complainants challenge the decisions not to directly appoint them to posts which became vacant during the two-year period following the termination of their appointments deriving from the abolition of their posts.

By a letter of 6 February 2015 Mr G. 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. 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.

On 17 February 2017 Mr G. requested to be appointed, pursuant to Staff Regulation 9.1(5), to a post which he alleged had become vacant and for which he was qualified. He was informed on 2 March 2017 that the UPU Staff Regulations had been revised by the Council of Administration and that Staff Regulation 9.1(5) had been abolished with effect from 1 April 2016. As a result, direct appointment to any post for which a vacancy notice was published after that date was no longer possible. Moreover, the post in question had not been advertised.

On 20 March 2017 Mr G. requested the Director General to confirm that the refusal to grant him a direct appointment to the vacant post represented his final decision on the matter. By a letter of 10 April 2017 the Deputy Director General confirmed the decision of 2 March.

On 2 May Mr G. requested that the Director General review his decision and appoint him to the vacant post, and he also claimed damages and costs. His letter was to be treated as a request for review under Staff Rule 111.3(1). By a letter of 15 May he was informed that as a former staff member, he did not have access to the internal appeal mechanism and could therefore proceed directly to the Tribunal.

Mr G. impugns the decision of 10 April 2017 in the present proceedings.

In Judgment 3928, delivered in public on 6 December 2017, the Tribunal set aside the decisions to abolish Mr G.'s post and to terminate his appointment and ordered the UPU to reinstate him with effect from 9 May 2015.

The UPU filed an application for interpretation and review of Judgment 3928 in January 2018. In Judgment 4077, delivered in public on 28 November 2018, the Tribunal dismissed this application and ordered the UPU to reinstate Mr G. within one month of the public delivery of its judgment, failing which it would have to pay him 10,000 Swiss francs for each month of delay. It also awarded Mr G. moral damages and costs.

In his fourth complaint before the Tribunal Mr G. initially asked the Tribunal to set aside the impugned decision and to order his reinstatement as from February 2017 and claimed two years' gross salary in moral damages, as well as costs, with interest on all sums awarded. In his rejoinder, the complainant withdrew his request for reinstatement but maintained his other claims for relief and added a claim for material damages based on the loss of opportunity resulting from the UPU's refusal to appoint him to the vacant post.

The UPU argues that Mr G.'s fourth complaint is entirely devoid of merit and that his claims for reinstatement and for damages have now become moot. It asks the Tribunal to order that the complainant bear his own costs, as well as the UPU's costs in an amount left at the Tribunal's discretion. It submits that Mr G. has failed to notify the Tribunal of the sums he received as a result of Judgment 3928 on 14 June 2018. Lastly, it objects to his request for oral proceedings.

By a letter of 6 February 2015 Ms N. was informed that, despite its best efforts, the UPU had found no available suitable position to which she could be reassigned following the abolition of her post. It had therefore decided to terminate her appointment with effect from 9 May 2015. The letter also stated that in accordance with Staff Regulation 9.1(5) she would normally be offered any suitable position that would fall vacant during the two years after the effective date of her termination.

On 1 February 2017 Ms N. requested to be appointed, pursuant to Staff Regulation 9.1(5), to one of eight positions which she alleged had become vacant and for which she was qualified. She was informed on 20 February 2017 that the UPU Staff Regulations had been revised by the Council of Administration and that Staff Regulation 9.1(5) had been abolished with effect from 1 April 2016. As a result, direct appointment to any post for which a vacancy notice was published after that date was no longer possible. Notwithstanding the foregoing, her applications for the positions which had been advertised would be taken into consideration.

On 10 March 2017 Ms N. requested the Director General to review his decision not to appoint her to any of the posts which had become vacant. By a letter of 10 April the Deputy Director General informed Ms N. of the decision to reject her request for review and maintain the decision of 20 February.

On 9 May Ms N. lodged an appeal with the Appeals Committee challenging the decision of 10 April. By a letter of 18 May she was informed by the Chair of the Appeals Committee that, as a former staff member, she did not have access to the internal appeal mechanism.

Ms N. impugns the decision of 10 April 2017 in the present proceedings.

In Judgment 3930, delivered in public on 24 January 2018, the Tribunal set aside the decision to abolish Ms N.'s post and to terminate her appointment and awarded her material damages for the loss of opportunity to continue working with the UPU until her retirement age in an amount equal to 30 months' gross salary, including the UPU's contribution to the Provident Fund during those 30 months, as well as 30,000 Swiss francs in moral damages and costs.

The UPU filed an application for interpretation and review of Judgment 3930 in February 2018. In Judgment 4079, delivered in public on 6 February 2019, the Tribunal dismissed this application and awarded Ms N. interest at the rate of 5 per cent per annum on the amounts which had been paid in May 2018 pursuant to Judgment 3930, moral damages, as well as costs.

In her second complaint before the Tribunal, Ms N. asks the Tribunal to set aside the impugned decision, to "apply" former Staff Regulation 9.1(5) and to order her reinstatement with full retroactive effect from 1 January 2017 to one of the ten positions for which she applied. Alternatively, she seeks material damages equivalent to what she would have earned from 1 January 2017 to the date on which she would have retired (31 December 2024), additional compensation for loss of the UPU's contributions to medical insurance from 1 January 2017 to 31 December 2024 and compensation to cover the UPU's contributions to the Provident Fund. She further claims material damages equivalent to the difference between a D 1 and D 2 salary for

the loss of opportunity for promotion from 1 January 2017 until the date on which she would have retired, 250,000 francs in moral damages, 200,000 francs in exemplary damages, as well as costs, with interest on all sums awarded, less any amounts already awarded to her in Judgment 3930. She requests the production of a number of documents relating to the selection of candidates for posts for which she applied between 2015 and 2017.

The UPU argues that Ms N.'s complaint is entirely devoid of merit and asks the Tribunal to order that she bear her own costs, as well as the UPU's costs in an amount left at the Tribunal's discretion. It opposes her request for oral proceedings, as well as her request for the production of documents.

CONSIDERATIONS

1. In her first complaint, which led to Judgment 3930, delivered on 24 January 2018, Ms N. challenged the decision to abolish her post and the decision to terminate her permanent appointment with effect from 9 May 2015. In Judgment 3930, the Tribunal set aside the decisions to abolish Ms N.'s post and to terminate her appointment, and awarded her material and moral damages, as well as costs.

2. In his third complaint, which led to Judgment 3928, delivered on 6 December 2017, Mr G. challenged, *inter alia*, the decisions to abolish his post and to terminate his permanent appointment. In Judgment 3928, the Tribunal set aside the decisions to abolish Mr G.'s post and to terminate his appointment, ordered his reinstatement with retroactive effect and awarded him interest on payments due, moral damages, and costs.

3. In the present complaint, her second, Ms N. impugns the 10 April 2017 decision confirming the 20 February 2017 decision not to grant her a direct appointment pursuant to former Staff Regulation 9.1(5). In the decision of 20 February, the Director of Human Resources (HR) informed Ms N. that "on 25 February 2016, the Council of Administration

decided, in conformity with its function defined in article 107.1.36 of the General Regulations of the Universal Postal Union (UPU), to lay down a thoroughly revised version of the UPU Staff Regulations which also comprised the abolition of the aforementioned staff regulation [9.1(5)] (with effect from 1 April 2016). As a result, the possibility of direct appointment [...] is no longer part of the legal framework of the organization nor can it apply to any vacancy notices published on or after 1st April 2016.” The Director of HR confirmed that “[Ms N.’s] current applications for vacancy notices advertised by the UPU [would] be taken into consideration as part of its ongoing recruitment processes, in full compliance with the existing rules”. Ms N. requested a review of that decision in a letter dated 10 March 2017, claiming that the 20 February decision, inter alia, breached her acquired rights under Staff Regulation 9.1(5). Prior to the amendment of the Staff Regulations, in early 2016, Staff Regulation 9.1(5) provided that “[a] staff member appointed on a permanent basis or for an indefinite period whose appointment is terminated because of abolition of post shall normally be offered another suitable post for which he is considered to possess the necessary qualifications, if one becomes vacant during the two years after the date on which the termination becomes effective”. In the above-mentioned 10 April 2017 letter, the Deputy Director General rejected the complainant’s request for review of 10 March, reiterating that former Staff Regulation 9.1(5) was no longer part of the legal framework of the organization.

4. In the present complaint, his fourth, Mr G. impugns the 10 April 2017 decision confirming the 2 March 2017 decision not to grant him a direct appointment pursuant to former Staff Regulation 9.1(5). In the decision of 2 March 2017, the Director of HR informed Mr G. that “on 25 February 2016, the Council of Administration decided, in conformity with its function defined in article 107.1.36 of the General Regulations of the Universal Postal Union (UPU), to lay down a thoroughly revised version of the UPU Staff Regulations which also comprised the abolition of the aforementioned staff regulation [9.1(5)] (with effect from 1 April 2016). As a result, the possibility of direct appointment [...] is no longer part of the legal framework of the

organization nor can it apply to any vacancy notices published on or after 1 April 2016.” The Director of HR also informed Mr G. that the allegedly vacant post within the French Translation Service which he had requested be directly offered to him “ha[d] not been advertised. In case the International Bureau issue[d] a vacancy notice, [Mr G. would be] invited to submit [his] application which [would] be taken into consideration as part of its ongoing recruitment processes, in full compliance with the existing rules”. Ms N.’s and Mr G.’s claims for relief are set out above in the summary of the facts.

5. As the two complaints are based on similar grounds, involve the same organization, and regard similar requests for redress, the Tribunal finds it convenient to join them in order to render one judgment. The Tribunal finds the written submissions to be sufficient to reach a reasoned decision and therefore denies the complainants’ requests for oral hearings. As regards Ms N.’s request for the production of documents, it is also denied for reasons that will be made clear in the next consideration.

6. The complaints are unfounded having regard to Judgments 3930 and 3928. As a consequence of the *res judicata* authority of Judgment 3930, the decisions to abolish Ms N.’s post and terminate her permanent appointment do not exist *ex tunc*. Accordingly, Ms N.’s second complaint, based on those two decisions (and their relevant consequences) which do not legally exist, is unfounded. As the primary claims fail, the subsidiary requests also fail and her complaint must be dismissed in its entirety.

7. Similarly, Mr G.’s fourth complaint is rendered moot by Judgment 3928 in which the Tribunal ordered “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” (see Judgment 3928, under 20). As his primary claim was rendered moot by Judgment 3928, the subsidiary requests also fail and his complaint must be dismissed in its entirety.

8. The UPU seeks an order that Mr G. and Ms N. pay some of its costs. This is inappropriate given the fact that Judgments 3928 and 3930 were not available to the complainants when they filed their complaints. While the complainants could have withdrawn their present complaints after Judgment 3928 was delivered in public on 6 December 2017 and Judgment 3930 on 24 January 2018, considering the UPU's applications for interpretation and review of those judgments, it is understandable that they did not.

DECISION

For the above reasons,

The complaints are dismissed, as are the UPU's counterclaims for costs.

In witness of this judgment, adopted on 22 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ