

SEVENTY-EIGHTH SESSION

***In re* MORIER**

Judgment 1418

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roland Morier against the Universal Postal Union (UPU) on 6 January 1994 and corrected on 12 January, the UPU's reply of 29 March, the complainant's rejoinder of 5 May and the Organisation's surrejoinder of 8 July 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, who was born in 1952 and has both Swiss and French nationality, joined the International Bureau of the UPU at Bern in September 1991. He was assigned to Section M (Informatics and Data Base) on probation for two years as a computer expert at grade G.6.

On 1 September 1992 he got a step increment. In an interim performance report of 29 September 1992 the head of his section said that on the whole his work was satisfactory and that he would probably qualify in due course for a permanent appointment.

In September 1992 Section M moved to new premises. In January 1993, when there was a shuffle of staff, a new head of section was appointed and the complainant's duties were changed.

By a minute of 14 April 1993 a fellow employee of his told the Director-General that the complainant had telephoned him on 8 April and in the course of conversation had made threats against the Director-General and members of Section M. He added that on 6 April he had noted "breakdowns" in the computer system. By a letter of 17 May to the Director-General the complainant asked to be "informed of the exact content" of that minute.

In a second probation report of 21 May the head of Section M made a far from flattering assessment of the complainant's performance and conduct. In an appendix dated 24 May he explained why he found the complainant's performance wanting and said that, having noticed no improvement despite repeated warnings, he was not in favour of an extension of appointment. On 4 June 1993 the complainant was sent the report under cover of a letter from the Assistant Director-General but he neither signed it nor commented on it.

Meanwhile, on 2 June, he had seen the Assistant Director-General and the heads of Sections K (Personnel) and M and learned that on 27 May the Management Committee had decided to terminate his appointment but that he might opt instead for voluntary separation as from the end of August 1993. The offer was renewed in a letter of 7 June, which he did not answer.

On 9 June the Deputy Director-General sent him notice of termination and informed him that his appointment would end on 7 July 1993 in accordance with Regulation 9.1.1c of the Staff Regulations, but that he was relieved of duty immediately.

By a letter of 21 June the complainant asked the Director-General to reconsider the decision to terminate his appointment. The Director-General upheld it in a letter of 15 July, to which he appended a minute of 9 July from the head of Section M saying that the threats the complainant had made while speaking on the telephone to the author of the minute of 14 April gave reason to fear he might try to "sabotage" the Bureau's computer system.

By a letter of 26 July 1993 the complainant lodged an appeal with the Joint Appeals Committee under Staff Rule

111.3.2. On 30 August the Committee sent him the other employee's minute of 14 April and on 13 September he sent that employee a refutation in writing.

In its report of 17 September 1993 the Committee held that the Organisation had infringed the complainant's right of defence and recommended that the Director-General review the decision and consider reinstating him.

The Director-General refused in a letter of 11 October 1993. That is the decision under challenge.

B. The complainant submits that during his probation the Union infringed his right to training, assistance and protection and, when it dismissed him, his right to due process.

It gave him no warning and deprived him of his right to a hearing: it did not allow him to comment on the second probation report and failed to send him in time his colleague's minute of 14 April 1993. So he was unable to improve his performance or refute the charges against him. He denies that he was to blame for the computer breakdowns and alleges a "campaign" against him.

The second probation report was inaccurate since his performance had not at all deteriorated. The decision to terminate his appointment is flawed since it was based on mistakes of facts and overlooked essential facts.

He asks the Tribunal to set aside the Director-General's decision of 11 October 1993; to order the Union to reinstate him for at least six months and to remove from his file any documents "damaging to his dignity and career"; to award him damages in an amount equivalent to the pay he would have received from the date of termination until reinstatement, "plus 5 per cent a year"; and to award him 15,000 Swiss francs in costs.

C. In its reply the Union points out that Staff Regulation 9.1.1c empowers the Director-General at any time to end the appointment of a staff member on probation for a permanent one "if, in his opinion, such action would be in the interest of the Union". Under Staff Regulation 9.1.4 the Director-General does not have to consult the Joint Advisory Committee "where the services of a staff member appointed for a probationary period are terminated". Lastly, under Staff Regulation 9.5.2b the Union must give notice of not less than thirty days, and it did.

It denies depriving the complainant of his right to a hearing: several times his supervisors "called upon him to improve his behaviour and performance". He was allowed to have his say at the meeting of 2 June 1993. The Assistant Director-General wrote to him on 4 June inviting him to a meeting with the Deputy Director-General, but he did not turn up.

He could have challenged the probation report of 21 May 1993, which was drawn up according to the rules, but he failed to do so. The impugned decision was taken on the strength of many adverse assessments of his work by supervisors and colleagues, and so is neither arbitrary nor flawed.

D. In his rejoinder the complainant submits that relations at work became strained after the official who wrote the minute of 14 April joined Section M. He was never told that his supervisors were unhappy with him. His colleagues' criticisms were written "to please the supervisors" and were unfounded.

He again challenges the content of his second probation report and argues that the decision to terminate his appointment was based on unsubstantiated charges of "sabotage" and was therefore unlawful.

E. In its surrejoinder the UPU states that if the Tribunal deems it necessary the complainant's former colleagues are willing to confirm under oath their adverse assessments of him.

It presses its pleas and denies that the decision to terminate him was based on the charge of sabotage.

Lastly, it reasserts that the complainant was fully aware of the unfavourable appraisals of his performance and conduct.

CONSIDERATIONS:

1. The complainant joined the UPU on 10 September 1991 as a computer expert in Section M (Informatics and Data Base). He was to be on probation for two years.

2. An interim report of 29 September 1992 described aspects of his performance in his first year as "very good" or "good", save his "reliability of judgment" and "knowledge of German", which were rated only "satisfactory". The head of his section accordingly declared him likely to qualify in due course for a permanent appointment.

3. In the report of 21 May 1993 on his second year of probation a new head of section gave him appreciably lower ratings, from "good" to "unsatisfactory". On 2 June 1993 he was summoned to see the Assistant Director-General, the head of the Personnel Section and the head of Section M. They told him that the report on his performance was not good enough and made him an offer of terminal settlement, but he did not accept the offer. On 4 June the Coordination and Programme Committee recommended immediate termination.

4. By a letter of 4 June the Assistant Director-General formally passed the report on to him and asked him to return it duly signed by 7 June. He was also told that the Deputy Director-General would want to see him on 7 June. He sent the Deputy Director-General a letter dated 4 June protesting about the meeting of 2 June. In an express letter of 7 June, confirmed in a letter of 9 June, the Deputy Director-General terminated the complainant's appointment at 7 July 1993 and relieved him of duty with immediate effect. On 21 June the complainant asked the Director-General to review that decision, but in a letter of 15 July the Director-General upheld it for reasons set out in an appendix.

5. The complainant appealed to the Joint Appeals Committee. In a report dated 17 September 1993 the Committee recommended that the Director-General reverse the decision on procedural grounds and consider reinstating him. But in a letter of 11 October 1993, the challenged decision, the Director-General rejected the Committee's findings and confirmed the termination.

6. The material issue in this case is thus whether the decision to terminate the complainant's probationary appointment was lawful. Regulation 9.1.1c of the Staff Regulations says:

"In the case of all other staff members, including staff members serving a probationary period for a permanent appointment, the Director-General may at any time terminate the appointment if, in his opinion, such action would be in the interest of the Union."

According to the case law a decision not to renew a staff member's appointment is discretionary and will be set aside only if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. Those criteria hold good for any discretionary decision, but in reviewing a decision not to confirm the appointment of a probationer the Tribunal will be particularly cautious; otherwise probation would fail to serve as a period of trial. The purpose of probation is to ensure that new staff members are the best qualified. So an organisation must be allowed the widest measure of discretion in the matter and its decision will stand unless the defect is especially serious or glaring. Moreover, where the reason for refusal of confirmation is unsatisfactory performance the Tribunal will not replace the organisation's assessment with its own. Such are the principles the Tribunal will apply to determine whether the decision to end the complainant's appointment was lawful.

7. The complainant puts forward two series of arguments, one alleging material errors, the other breach of his right to a "fair trial".

The alleged material errors

8. Under material errors he alleges mistakes of fact and failure to take account of essential facts. He objects, first, to the Union's saying he was "very shy and fearful of contact with others" and of taking part in "any kind of meeting" and that what "strained his relations with his supervisors" was his seeking to "avoid any supervision". He protests that those criticisms do not square with the fact that his work brought him into contact with everyone inside the Union and with various outside suppliers as well. He observes that as a token of confidence the head of Section M confirmed him in a post in communications that required even more dealings with others. He says that his attending various meetings shows he got on well with colleagues and his behaviour at meetings called forth neither warning nor reprimand.

9. The UPU does not refute any of those factual statements but explains that his shortcomings first became apparent in September 1992 with a move into new quarters: his behaviour then became unsatisfactory, he got on

less well with superiors and he sought to escape supervision. The upshot was that he was not confirmed in the post in communications he refers to.

10. The complainant demurs and cites documents about the installation of an "Ethernet type local area network" in which he says he played a big part. But the Tribunal will not rule on the issue. All that need be said is that in May 1992 Section M updated its plan of work and amended it again later, notably in January 1993. Because of the complex and highly technical nature of the computer tasks those changes entailed it is not easy to tell just whether and if so how far they affected what the complainant had to do in the section. To judge from the minute the head of section wrote on 9 July 1993 and which the Director-General appended to his decision of 15 July, the complainant's behaviour towards colleagues and supervisors was found to be awkward, even though his performance was rated "very good" or "good" in the interim report of 29 September 1992. But that was not the explanation the Director-General gave for the termination: the actual text of the minute does not mention such shortcomings among the reasons for dismissal. So his first plea fails because it is not borne out by the facts.

11. Likewise the Tribunal will not entertain his objections to the UPU's charges of sabotage and declining performance, including his knowledge of French. Neither do such allegations appear in the minute of 9 July 1993, at least not as reasons for dismissal. The allusions by the head of section to threats from him of sabotage served merely as a reminder of the security risks underlying the recommendation already made in the minute of 21 May 1993 that he be ordered to "leave the office once and for all as soon as he is told of the decision".

12. The complainant's only material objection is to his performance appraisals. He cites a comment from the head of Section M that "his work was invariably ill thought out, undocumented and slovenly", whereas "at a certain standard computer work demands accuracy". The head of section cites by way of example the "installation of the International Bureau's electronic mail system", which he said the complainant was quite unable to cope with "methodically or for any length of time", and "the untidiness of his desk and cupboards".

13. The Tribunal will not replace with its own assessment that of the complainant's supervisors, whose experience and technical knowledge better equip them to identify his shortcomings. The fact that new duties were given to the complainant in his second year on probation does not suffice to cast doubt on the assessment to which he objects.

14. The conclusion is that the complainant offers no evidence to suggest that his dismissal rests on mistaken or untrue facts or overlooks essential facts. There is no need to take into account the three appendices to the Union's reply which the complainant challenges in law on the grounds that they are affidavits made to please the Union. The other evidence the parties have filed suffices to show that the plea is without merit.

The probationer's right to due process

15. The complainant's second plea is breach by the Union of its duty to keep a probationer properly informed of the assessment of his work and professional conduct. Citing the case law, he observes that a probationer must be told of any mistake he may have made and so given the opportunity to do better. The Union denied his right to a hearing and to answer the allegations on which it based the decision to dismiss him, and that was in breach of "due process".

16. The plea fails. It is plain from the evidence that the Union told him more than once what it thought of the quality and quantity of his output. In keeping with the procedure for appraising probationers his supervisors made on 29 September 1992 an interim report on his work and behaviour, and thereby revealed to him their assessment. In his minute of 9 July 1993 the head of his section spoke of having pointed out to him some weaknesses in his performance and talked to him several times about how to remedy them. The UPU observes, and the complainant does not really deny, that it does not ordinarily give written warnings when staff fall short of what is expected but prefers to get them to improve by means of a frank and outspoken talk perhaps with a third party present. The UPU says there were many such talks between the complainant and the head of his section in the presence of the deputy head. The complainant himself confirms that he saw several heads of section, though he says the talks failed to tell him what was wrong. But his explanation is unconvincing: it is implausible that supervisors should, when speaking to a probationer, be at pains to avoid discussing how he is coming along, especially when, as was said in 10 above, his personal behaviour was causing problems. In any event at a meeting on 5 April 1993 with all the staff of Section M the Director-General commented on the work he was doing outside normal office hours. He can scarcely deny that, being addressed to a probationer and however they may have been expressed, such comments conveyed his supervisors' dissatisfaction since they ordered him for security reasons to keep normal hours.

17. Another material point is that the complainant was told orally of the adverse appraisal in the report of 21 May at the meeting he had on 2 June 1993 on his return from leave, with the Assistant Director-General, the head of the Personnel Section and the head of Section M. What matters is that the Administration then informed him of the adverse comment in the report. It is further established that he got immediate notice of the report of 4 June from the Coordination and Programme Committee, that it was accompanied by the text of the report of 21 May and that it came with an invitation to report to the Deputy Director-General on 7 June. So he had every opportunity to draft any comments he wished and submit them on 7 June. Not only did he fail to turn up but he never sent back the report duly signed, as he had been asked, and he made no comment. So the Deputy Director-General felt he had no choice but to dismiss the complainant on 7 June in the Union's interests.

18. The conclusion is that the Union discharged its obligation to give the complainant notice of the report on his performance and conduct, and thereby the opportunity to state his views, before the Director-General took the final decision.

19. Although the especially serious charges allegedly made on 9 April 1993 about his sabotaging the Union's computer system called for a proper reply, he himself acknowledges that at none of the meetings with his supervisors were those charges pressed. Besides, as was said in 11 above, sabotage is not one of the stated reasons for his dismissal. So it is hard to see why he objects to the Union's sending him no minute or warning on the subject.

20. The Tribunal is satisfied on the evidence that the Union did not break the rules of due process. Indeed he has had unfettered access to the channels for internal appeal under the Staff Regulations, since he put his case to the Joint Appeals Committee before coming to the Tribunal. The written submissions for which the Tribunal's Statute provides have afforded him a further opportunity to gain particulars of the charges and to answer them in full in his rejoinder. The plea of breach of due process cannot be sustained.

21. His main claim having failed, so too do his claims to the removal from his file of any document that may damage his career and to awards of damages and costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner