

The Administrative Tribunal,

Considering the complaint filed by Mr A.G. S. against the United Nations Industrial Development Organization (UNIDO) on 7 April 2005, the Organization's reply of 1 August, the complainant's rejoinder of 30 September, his further submission of 7 November and UNIDO's surrejoinder of 23 December 2005;

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, a Canadian national born in 1947, joined UNIDO in 1981. At the material time he was an Industrial Development Officer, at grade P-4, on a 50 per cent basis. He is also President of the Staff Council, an office he has held since 1997. The Staff Council is the executive organ of the UNIDO Staff Union.

The elections which culminated in the complainant's re-election as President of the Staff Council in November 2003 were tainted with controversy, owing to a last-minute decision by the polling officers to exclude one of the three candidates on the grounds that her candidacy was not supported by the requisite number of signatures. Some staff members believed that the relatively low rate of participation in the elections was attributable to confusion amongst staff, who might have interpreted the polling officers' decision as indicating that new elections were to be held, which was not the case. Shortly before these elections, in August 2003 a referendum to amend the Statutes of the Staff Union had likewise caused controversy amongst Union members, some of whom felt that the referendum had been ill-timed and its implications insufficiently explained.

In March 2004 the two unsuccessful candidates invited staff members to support a request for a ballot to recall the complainant as President of the Staff Council, in order that "a fair and democratic new election" could be held. The requisite number of signatures – at least 25 per cent of active members – was obtained, and staff were informed on 16 June that a recall ballot would take place on 22-23 June.

In an e-mail of 18 June addressed to all Headquarters staff, the complainant expressed his views on the forthcoming ballot, emphasising that the elections held in November 2003 had been neither unfair nor undemocratic. On 22 June, shortly before the ballot commenced, one of the unsuccessful candidates – Mr G. – responded by sending a "personal statement" via an e-mail entitled "Cast a 'Yes' Vote to Recall the 18th Staff Council President" to all UNIDO Field offices and to Headquarters staff. The results of the ballot were published on 23 June: there were 100 votes in favour of recalling the President and 288 against. The complainant therefore remained in office.

By a memorandum of 7 September 2004 the complainant drew the attention of the Director of the Human Resource Management Branch (HRM) to the content of Mr G.'s statement, which he considered to be defamatory. According to the complainant, Mr G. had accused him of having lied, of having not done his utmost to defend the rights of all staff and of having used his position as President of the Staff Council to enhance his personal career. Furthermore, his pending appeal concerning the issue of his promotion had been mentioned by Mr G., who ought not to have been aware of it, given that appeals were meant to be treated in strictest confidence. The complainant assumed that HRM had conducted an investigation into this "flagrant breach of confidence", and he asked the Director to inform him of the outcome. Lastly, noting that the Organization appeared to condone Mr G.'s conduct, since it had remained silent in the face of what was clearly an attempt "to cast aspersions on [his] good name and have staff draw erroneous conclusions", the complainant stated that he would appreciate a response on the matter.

By a memorandum dated 23 November 2004, the complainant informed the Director-General that he had received no reply to his memorandum of 7 September, a copy of which was attached. He stated that in his opinion Mr G.'s statements warranted "an unambiguous response on the part of the Organization as dictated by [Staff] Regulation

11.2 and on the part of Mr G[.] in the form of a public apology”, and that he “look[ed] forward with confidence to the Organization adopting an appropriate and responsible course of action”. The complainant delivered his memorandum of 23 November to the Director-General by hand on 24 November. That same day, however, a reply dated 18 November from the Director of HRM was delivered to him by hand, under cover of a routing slip dated 24 November on which the following message appeared:

“Please refer to your memorandum dated 23 November 2004 addressed to the Director-General on the above-mentioned subject.

This is to inform you that the attached response to your memorandum was forwarded to you on 18 November 2004.”

With regard to the content of Mr G.’s statement, the Director of HRM considered that it would not be appropriate for the Organization to interfere in the internal affairs of the Staff Council. As for the breach of confidentiality concerning the complainant’s internal appeal, he stated that he had confirmed with his staff that they had not discussed the appeal with anyone.

On 7 April 2005 the complainant lodged the present complaint, by which he impugns the Director-General’s implied decision not to take any action pursuant to his memorandum of 23 November 2004.

B. The complainant contends that Mr G.’s e-mail of 22 June 2004 contained at least three libellous statements. Firstly, he says, Mr G. accused him of being a liar, by stating that he had “go[ne] door-to-door” in order to “spread untruths” upon the announcement of the recall ballot. Secondly, he accused him of dereliction of duties by stating that he “ha[d] not done his utmost to defend the rights of [all staff]”. Thirdly, he accused him of having used his position as President of the Staff Council to enhance his personal career, referring to his pending appeals. The complainant emphasises that these statements were published via the Organization’s e-mail system and were thus communicated to all staff members, causing damage to his reputation and dignity.

He also argues that by failing to protect him from Mr G.’s “libelous statements”, UNIDO breached its duty of care and good faith, as well as the principle of equal treatment. UNIDO had a duty to investigate the conduct of Mr G. in order to determine whether disciplinary action should be taken against him. Mr G.’s statement was sent not just to Union members, but to all staff. Consequently, the Director of HRM was wrong to abstain from intervening on the grounds that it concerned “an internal process with the Staff Council”. According to the case law, “action that impairs the dignity of the international civil service, and likewise gross abuse of freedom of speech, are inadmissible”, regardless of whether staff union activity is involved.

The complainant asks the Tribunal to order UNIDO to publish a written apology for having allowed the publication of Mr G.’s statement and for having failed to protect his personal and professional reputation. In addition, he claims 30,000 euros in moral damages (10,000 euros for each libellous statement) for UNIDO’s failure to protect his reputation and dignity, and for violation of the principle of equal treatment; 5,000 euros in moral damages for its failure to protect his right to the confidentiality of his internal appeals; 5,000 euros in moral damages for its failure to protect him, in his capacity as a staff representative, against discriminatory and prejudicial treatment; and 5,000 euros in costs.

C. In its reply UNIDO submits that the complaint is irreceivable on two counts. Firstly, the complainant has failed to exhaust the internal means of redress. On 24 November 2004 he received an express decision in reply to his memorandum of 7 September. Consequently, he cannot rely on Article VII(3) of the Statute of the Tribunal, which applies only where the Administration has failed to take a decision on a claim. On receiving the express decision of 24 November, he had two options: he could either submit a request for review of that decision to the Director-General, in accordance with Staff Rule 112.02(a), or, given that the routing slip accompanying it clearly indicated that it also constituted a reply to his memorandum of 23 November to the Director-General, he could have lodged an appeal with the Joint Appeals Board in accordance with Staff Rule 112.02(b), challenging the Director-General’s reply. However, the complainant did neither, and his complaint is therefore irreceivable under Article VII(1) of the Tribunal’s Statute.

Secondly, Staff Regulation 12.1 provides that a staff member may bring an appeal against “an administrative decision alleging the non-observance of [his or her] terms of appointment, including all pertinent regulations and rules, or against disciplinary action”. UNIDO points out that the complainant’s memoranda of 7 September and 23

November 2004 were both sent on the letterhead of the Staff Union and signed by him as President of the UNIDO Staff Council. The Administration having thus been led to believe that he was raising an issue on behalf of the Staff Council, the decision it took in response to his memoranda was not a decision within the meaning of Staff Regulation 12.1.

On the merits UNIDO submits that, according to the case law, the general principle applicable to this case is that an international organisation does not have the authority to take action in respect of a staff member's conduct in the context of staff union activities. Referring to Judgment 2227 it recalls that, whilst there may be exceptions to that principle, the Administration's scope of action is confined to "cases where there is gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives". UNIDO considers that the statements to which the complainant objects were neither ill-intentioned nor defamatory. It emphasises that they were made in a context of deep division within the Staff Union, and in direct response to the views expressed by the complainant.

With regard to the allegation that it failed to take action to protect the complainant's reputation and dignity, the Organization reiterates that according to the case law, it had no authority to intervene in the internal affairs of the Staff Union. Had it chosen to intervene, not only would it have been charged by some Union members with taking sides in a Staff Union dispute, but its intervention would have set a bad precedent and created "a 'chilling effect' on the associational rights of union members".

UNIDO requests an award of costs, to be determined *ex aequo et bono* by the Tribunal, on the grounds that the complainant has committed an abuse of process by frivolously filing his complaint prematurely, and by misleading the Administration into thinking that he was raising matters on behalf of the Staff Council.

D. In his rejoinder the complainant presses his pleas. He maintains that the failure of the Director of HRM to respond to his memorandum for over two months amounted to an administrative decision entitling him to seek review with the Director-General under Staff Rule 112.02(a). He rejects the Organization's view that the routing slip of 24 November together with the memorandum of 18 November from the Director of HRM constituted an "answer received from the Director-General" within the meaning of Staff Rule 112.02(b)(i). There was no express delegation of authority by the Director-General, nor even any indication that the latter had been consulted.

E. In its surrejoinder the Organization draws attention to the fact that in his memorandum to the Director-General the complainant did not state or even imply that he was seeking the review of an administrative decision. It maintains its objection to receivability and reiterates that the challenged statements were neither defamatory nor a gross abuse of the right to freedom of expression.

CONSIDERATIONS

1. The complainant has been a staff member of UNIDO since 1981. He was elected President of the UNIDO Staff Council in 1997 and has held that position ever since. In June 2004 a Staff Union ballot was held to determine whether the President should be recalled. The recall proposal was defeated. Shortly before the recall ballot, the complainant sent an e-mail to all Headquarters staff with respect to the recall proposal. In response to that e-mail, a fellow member of the Staff Union who supported the recall proposal sent a statement via e-mail to all Field Offices and to Headquarters staff. The complainant contends that his colleague's e-mail contained false and defamatory statements. It also made reference to appeals initiated by the complainant with respect to "his career advancement and promotion".

2. On 7 September 2004, approximately ten weeks after the recall ballot, the complainant sent a memorandum to the Director of the Human Resource Management Branch (HRM) regarding his colleague's "personal statement". The memorandum, which was on the letterhead of the Staff Union and signed by the complainant as President, UNIDO Staff Council, raised two issues. The first concerned his colleague's reference to his promotion appeal, which, he said "point[ed] to a security leak somewhere". He asked to be informed of "the outcome of [the] fact-finding initiative" which, he assumed, had been undertaken by HRM upon receipt of the e-mail containing his colleague's statement. He also complained that the e-mail contained false statements which were defamatory of him. He contended that his colleague's conduct in sending the e-mail was "unbecoming of an international civil servant". His memorandum concluded with the following:

“the Organization has, for whatever reason, kept silent. For want of affirmative action, it can only be assumed that the Organization condones such behaviour.

I would appreciate your response on the matter.”

3. Having received no reply to his memorandum to the Director of HRM by 23 November 2004, the complainant then sent a memorandum to the Director-General. Again, he wrote on Staff Union letterhead and signed as President, UNIDO Staff Council. In that memorandum, he referred in general terms to UNIDO Staff Rules and Regulations and the standards of conduct for international civil servants. He concluded by saying:

“I strongly believe that [my colleague’s] statements warrant an unambiguous response on the part of the Organization as dictated by Regulation 11.2 and on the part of [my colleague] in the form of a public apology. I look forward with confidence to the Organization adopting an appropriate and responsible course of action.”

Staff Regulation 11.2 is concerned with disciplinary measures.

4. On 24 November the complainant received a routing slip addressed to him as President of the UNIDO Staff Council, to which was attached a memorandum dated 18 November from the Director of HRM. The routing slip referred to the complainant’s memorandum to the Director-General of 23 November. By the memorandum of 18 November the Director informed the complainant that no member of HRM had spoken to anyone with respect to his promotion appeal. He also stated that the other issue raised by the complainant was:

“inherently partisan and [one] in which parties are prone to express divergent and contentious views [and one which] cannot easily be treated as a management issue. Therefore, I do not believe I can comment on it.”

5. The complaint was filed on 7 April 2005 on the basis that the failure of the Director of HRM to answer the complainant’s initial memorandum within 60 days constituted “an implied decision [...] not to take any action” and that his subsequent memorandum to the Director-General was a request for review of that decision. On the further basis that the Director-General did not reply to that request within 60 days, the complainant contends that he is entitled to appeal directly to the Tribunal pursuant to Staff Rule 112.02(b)(ii). It is unnecessary to refer further to the complaint for, as UNIDO contends, it is clearly irreceivable.

6. By Article II of its Statute, the Tribunal is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations”. By Article VII(1), a complaint is not receivable unless the decision impugned is a “final decision” and the complainant has exhausted internal remedies. By Rule 112.02 of the UNIDO Staff Rules, a staff member who wishes to appeal an administrative decision must write to the Director-General requesting a review of that decision. That rule further provides:

“Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.”

7. There are circumstances in which failure to respond to a communication within a specified time or, if no time is specified, within a reasonable time, may constitute an implied decision or may be deemed to constitute an actual decision. That will be the case, for example, where there is a failure to respond to a request to take specific action or to accept a specific claim. However, the complainant’s memorandum of 7 September falls into neither of those categories. According to its terms, it merely asked that the complainant be informed as to the investigation which, he assumed, had been undertaken with respect to the leaking of information as to his promotion appeal and that he be provided with a response to his claim that he had been defamed by his colleague.

8. Although he wrote to the Director of HRM as President of the Staff Council, it is clear that the complainant raised matters which concerned him personally as a staff member of UNIDO. However, he sought no particular action nor any particular decision; and he made no particular claim or demand against the Organization. In these circumstances, it is impossible to regard the Director’s failure to respond within 60 days as an implied decision, much less an implied decision with respect to the terms of the complainant’s appointment or the provisions of the Staff Regulations as they applied to him.

9. Even if it were possible to treat the failure of the Director of HRM to reply to the complainant within 60 days as an implied decision, the complaint would still be irreceivable. The complainant’s subsequent memorandum

of 23 November to the Director-General simply cannot be viewed as a request for review of that decision. At best, that memorandum constituted a request that the administration institute disciplinary proceedings against the colleague who, he alleged, had defamed him. However, that request was divorced from any claim that UNIDO had breached any of its obligations towards him. If one were to assume that that request could properly be the subject of an appeal by the complainant, which was either impliedly or expressly refused, it was for him to institute an appeal by requesting the Director-General to review his decision refusing the request. That was not done. Accordingly, the complaint is also irreceivable on that basis.

10. Further, the claims made in the complaint for substantive relief by way of written apology and moral damages were made for the first time when the complaint was filed with the Tribunal. That being so, they have not been the subject of a final administrative decision. For that reason, also, the complaint is irreceivable.

11. Although the complaint must be dismissed as irreceivable, it is not appropriate to award costs against the complainant as requested by the Organization.

DECISION

For the above reasons,

The complaint is dismissed as is the Organization's application for costs.

In witness of this judgment, adopted on 11 May 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet