113th Session **Judgment No. 3106**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A.G. S. against the United Nations Industrial Development Organization (UNIDO) on 13 April 2010 and corrected on 8 July, the Organization's reply of 13 October 2010, the complainant's rejoinder of 20 January 2011 and UNIDO's surrejoinder of 27 April 2011;

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 are to be found in Judgment 2538, delivered on 12 July 2006 on the complainant's first complaint. Suffice it to recall that following the controversial Staff Council elections of November 2003, in which the complainant was re-elected as President of the Staff Council, the two unsuccessful candidates invited staff members to support a request for a ballot to recall the complainant as President. The requisite number of signatures was obtained and the ballot was held in June 2004, but the result was favourable to the complainant, who thus remained in office.

A few days before the ballot, the complainant sent to all Headquarters staff an e-mail in which he expressed his opinion on the recall initiative, emphasising that the elections of November 2003 had been neither unfair nor undemocratic. He told the staff, among other things, that, if they believed he had not done his utmost to defend their rights or had used his position as President to enhance his personal career, then they ought to vote to have him removed from office. One of the unsuccessful candidates, Mr G., responded by sending to all UNIDO staff at Headquarters and in field offices an e-mail calling upon them to support the recall vote. He alleged that the complainant had "go[ne] door-to-door and […] spread untruths", that he had not done his utmost to defend the rights of staff and that he had launched appeals against the Organization claiming his career advancement and promotion. The complainant considered this e-mail to be defamatory and in a memorandum to the Administration he stated that, in his opinion, it warranted an unambiguous response from the Organization and a public apology from Mr G. The Administration declined to interfere in what it considered to be internal affairs of the Staff Council and the complainant then filed a complaint with the Tribunal, which was dismissed as irreceivable in Judgment 2538.

In early October 2006 the complainant discovered that a copy of Mr G.'s e-mail had been posted on a bulletin board on the Organization's intranet. He wrote to the Secretary of the Joint Disciplinary Committee on 13 October, arguing that the statements made by Mr G. in his e-mail amounted to defamation, libel and a violation of the Standards of Conduct for the International Civil Service. He asked that appropriate disciplinary measures be taken against Mr G. and that the latter be instructed to issue a public apology. The Secretary of the Joint Disciplinary Committee advised him to submit his request to the Human Resource Management Branch (PSM/HRM), which the complainant did on 1 November 2006. By a memorandum of 15 January 2007 the Director of PSM/HRM replied that the matter had already been addressed by the Administration in 2004 and that there was no basis to pursue it any further. The complainant wrote to the Director-General on 6 March 2007 requesting a review of that decision. He characterised the

presence of Mr G.'s e-mail on UNIDO's intranet as continued defamation and he requested that it be removed from the system immediately and that Mr G. be instructed to issue a public apology. He also claimed 25,000 euros in compensation. In the event that his requests were not granted, he sought permission to proceed directly to the Tribunal. By a memorandum of 27 April the Director of PSM/HRM notified him on behalf of the Director-General that Mr G.'s e-mail was no longer available on the intranet and that, as the matter had already been decided upon in Judgment 2538, the requested relief could not be granted. She added that his request to proceed directly to the Tribunal had not been allowed.

On 19 June 2007 the complainant filed an appeal with the Joint Appeals Board seeking, in addition to his earlier request for relief, 3,000 euros in costs. UNIDO submitted a statement on behalf of the Director-General on 17 August 2007. The complainant replied to that statement on 18 January 2008 arguing inter alia that the continued presence of Mr G.'s e-mail on the Organization's intranet constituted harassment. The Board issued its report on 17 December 2009. Although a majority of its members considered that Mr G.'s e-mail constituted libel *per se*, the Board unanimously concluded that the continued presence of that e-mail on UNIDO's intranet did not amount to harassment and that there was no evidence of specific injury to the complainant which could support an award of compensation. It exonerated the Administration from any responsibility for the e-mail and held that the Staff Rules did not support the complainant's request for costs. By a memorandum of 8 January 2010 the Director-General informed the complainant that he had decided to dismiss his appeal as irreceivable and unfounded. That is the impugned decision.

B. The complainant asserts that the impugned decision is vitiated by errors of fact and of law. He argues that the false statements made by Mr G. in his e-mail to staff constituted libel and caused harm to his reputation and good name. Indeed, in his e-mail Mr G. accused him of being a liar, thereby implying that he lacked the integrity necessary for the office of Staff Council President. Moreover, he accused him,

without providing any evidence, of not having done his utmost to defend the rights of staff and of using his office for personal gain. These libellous statements caused the complainant injury not only at the time when Mr G.'s e-mail was circulated but also during the two years when it remained posted on a bulletin board on UNIDO's intranet.

The complainant further contends that Mr G.'s statements were contrary to the Organization's rules and the Standards of Conduct for the International Civil Service and that they were malicious. While acknowledging that elected staff representatives may be criticised in strong language, he points out that there are limits to such criticism. Indeed, injurious and defamatory statements are not without repercussions for their author, regardless of whether he or she is an elected staff representative or whether they are made in the context of staff union activity. Referring to the Tribunal's case law, he submits that international organisations have a duty to provide a safe and secure work environment, to protect a staff member's good name and reputation and to ensure that their facilities are not abused and that their rules and regulations are respected. In his opinion, the Joint Appeals Board erred in finding that UNIDO was not responsible for the contents of Mr G.'s e-mail or any consequences emanating from it. The Board also erred in placing upon him the burden of proving actual injury. This, he argues, and the inordinate delay with which it carried out its task, resulted in a breach of due process for which he is entitled to moral damages.

The complainant asks the Tribunal to set aside the impugned decision. He claims material damages equivalent to one year's salary at his last grade and moral damages in the amount of 50,000 euros. He also claims costs for the internal appeal proceedings as well as the proceedings before the Tribunal.

C. In its reply UNIDO submits that the complaint should be dismissed on the grounds that the complainant has no cause of action and that the issues raised by him are *res judicata*. In particular, if, as the complainant assumes, Mr G.'s e-mail was posted on the bulletin

board shortly after it was sent, it follows that it was already there when the complainant filed his first complaint with the Tribunal, and the discovery of its continued presence in October 2006 does not constitute a new fact or circumstance giving rise to a new cause of action. Moreover, the e-mail had been removed from the intranet by the time he appealed to the Joint Appeals Board, and he had been duly informed of this. Similarly, his allegations of defamation based on the e-mail in question were dismissed by the Tribunal in Judgment 2538, which has *res judicata* authority. Thus, the present complaint is, in substance, an application for review of Judgment 2538. The defendant also submits that the complaint is irreceivable because the complainant's communications following his alleged discovery of the e-mail on the intranet did not result in a new administrative decision setting off new time limits for an appeal. Moreover, his request for disciplinary action against Mr G. was separate from any claim that UNIDO had breached its obligations towards him, and in any case he does not have a right to seek disciplinary action against another staff member.

On the merits, the Organization argues that, as Mr G.'s e-mail had been removed from the intranet long before the complainant filed his internal appeal, there is no substance to his claim that the Organization failed to protect him or to ensure that its facilities are not abused and that its rules and regulations are respected. It considers that it was entirely legitimate for Mr G. to seek a change in the leadership of the Staff Union's executive organ and that the recall initiative was not intended as a personal attack on the complainant. Relying on the Tribunal's case law, UNIDO points out that an international organisation does not have the authority to take action against a staff member for exercising his or her right to freedom of expression in the context of staff union activity, unless the language used is ill-intentioned or defamatory. With regard to Mr G.'s statements, in particular, it contends that they were neither of the above. It explains that they were made in response to the complainant's earlier message to staff and that they should therefore be interpreted in the light of the comments contained therein. Moreover, they should be considered in their proper context, namely that of a deeply divided Staff Union in

which a large number of staff members supported the initiative for a recall ballot. The defendant considers that the complainant is mostly to blame for the delay in the internal appeal process: he submitted his internal appeal almost three years after the relevant events took place and this delay was due to the fact that he chose to file his first complaint with the Tribunal, which was found to be clearly irreceivable.

D. In his rejoinder the complainant asserts that the present complaint is receivable. He points out that it is based on a new set of facts, which give him a new cause of action, and that the issues raised therein are not *res judicata*, not only because they are substantively different to those raised in the complaint leading to Judgment 2538, but also because the Tribunal did not rule on the merits of his claims in that judgment. He also points out that he has exhausted the internal means of redress in accordance with UNIDO's rules and regulations. The complainant presses his pleas on the merits and argues that Mr G.'s actions amounted to harassment, which he brought to the Administration's attention by lodging an internal complaint as soon as he discovered that Mr G.'s e-mail had been posted on the bulletin board. He reproaches the Organization for its failure to conduct an investigation into his allegations of harassment and, in addition to the claims put forward in his complaint, he asks the Tribunal to award him moral damages for that failure.

E. In its surrejoinder UNIDO observes that the complainant's allegations that it was Mr G. who posted the e-mail on the bulletin board after the recall procedure was over, that this amounted to harassment and that he (the complainant) lodged in that respect an internal complaint which the Organization failed to investigate, have been raised for the first time in his rejoinder. It rebuts these allegations, arguing that in fact the complainant sought an examination by the Joint Disciplinary Committee as to whether Mr G.'s e-mail constituted defamation and a breach of conduct. It adds that, as he failed to raise these allegations in his internal appeal, he is now barred from raising them before the Tribunal. It otherwise

fully maintains its position regarding both the receivability and the merits of the complaint.

CONSIDERATIONS

1. The complainant is a former UNIDO staff member. From 1997 until 31 January 2007 he was President of the Staff Council, which is the executive organ of the UNIDO Staff Union. As recorded in Judgment 2538, a Staff Union ballot was held in 2004 to determine whether the President should be recalled. Shortly before the ballot, the complainant sent an e-mail to all Headquarters staff with respect to the recall proposal. In response, one of the persons who had proposed the recall sent an e-mail to all Headquarters and field office staff urging a "Yes" vote in the ballot. In that e-mail, he referred to the complainant's earlier e-mail and stated that he had "go[ne] door-to-door and [...] spread untruths". In 11 numbered paragraphs, he also set out various statements in the complainant's e-mail and his answers to them. In one such paragraph, he said that the complainant had said that he should be voted out of office if he had used his position as President to enhance his personal career and responded by saying:

> "Indeed, he has done so. I understand that he has launched appeals against the organization claiming his career advancement and promotion."

2. Referring to the e-mail in question, the complainant sent a memorandum to the Director of the Human Resource Management Branch (PSM/HRM) in September 2004 and another to the Director-General in November 2004 in which he asked, respectively, for a response and stated that he believed that he was entitled to an unambiguous response from the Organization and a public apology from the author of the e-mail. He did not obtain satisfaction and eventually lodged a complaint with the Tribunal. The Tribunal held that the complaint was irreceivable (see Judgment 2538).

3. Some few months after the delivery of Judgment 2538 on 12 July 2006, the complainant learned that a copy of the e-mail in question was on a bulletin board on the Organization's intranet

system. The evidence does not disclose when it was put on the bulletin board or by whom. On 13 October 2006 the complainant purported to submit a disciplinary case against the e-mail's author to the Joint Disciplinary Committee. Following advice from its Secretary, he asked the Director of PSM/HRM to submit his complaint to the Committee. The Director replied on 15 January 2007 declining to take any action. On 6 March 2007 the complainant sought review of that decision and asked that the e-mail be removed immediately from the bulletin board, that its author "be instructed to write [...] an open letter of apology" and that the Organization pay him compensation in the sum of 25,000 euros for "the continued injury to [his] reputation and dignity". On 27 April 2007 he was informed that the e-mail was no longer publicly available but his request was otherwise refused. The complainant then lodged an appeal with the Joint Appeals Board. The Board concluded, amongst other things, that the fact that the e-mail was on the bulletin board did not constitute harassment by the Organization. It also concluded by majority that the e-mail was defamatory *per se* but unanimously concluded that there was no evidence of damage to the complainant's reputation or dignity. By a memorandum of 8 January 2010 the Director-General dismissed the complainant's internal appeal on the grounds that it was irreceivable and lacked merit. UNIDO maintains those arguments in the present proceedings in which the complainant seeks material and moral damages and costs.

4. The argument that the internal appeal was irreceivable is made by reference to the principle of *res judicata*. In this regard, it is argued that the issues raised in the internal appeal were determined by Judgment 2538. As explained in Judgment 2316, under 11:

> "*Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard."

A decision as to the "rights and liabilities of the parties" necessarily involves a judgment on the merits of the case. Where, as here, a complaint is dismissed as irreceivable, there is no judgment on the

merits and, thus, no "final and binding decision as to the rights and liabilities of the parties". Accordingly, the present complaint is not barred by *res judicata*.

5. UNIDO makes a further argument to the effect that the present complaint is, in substance, an application for review of Judgment 2538 and that the complainant has not established any ground for its review. It claims it is in substance an application for review because "there is no new cause of action" and "there [was] no new decision". This argument must be dismissed. The complainant does not challenge the Tribunal's ruling in Judgment 2538. Moreover, one of the grounds on which his complaint was held to be irreceivable in Judgment 2538 was that there had been no final administrative decision to challenge. There has now been a decision and, accordingly, there is now a cause of action (see Judgment 2058, under 5).

6. There are two aspects to the complainant's present claim. The first concerns the Organization's failure to take action against the author of the e-mail, it being argued that, in not doing so, it breached its duty of care to provide a safe and secure workplace and, also, its duty to protect the complainant's dignity and reputation. In his pleadings before the Tribunal, the complainant also frames his case as a failure to investigate his complaint of harassment against the author of the e-mail. The second aspect concerns the presence of the e-mail on the bulletin board. In this regard, the complainant seeks to hold the Organization liable for the allegedly defamatory content of the e-mail.

7. The question whether the Organization was under a duty to protect the complainant from the actions of the author of the e-mail has to be considered in the light of the principle of freedom of association. So far as is presently relevant, that principle has two important aspects. The first is that it precludes interference by an organisation in the affairs of its staff union or the organs of its staff union (see Judgment 2100, under 15). A staff union must be free to conduct its own affairs, to regulate its own activities and, also, to

regulate the conduct of its members in relation to those affairs and activities. Thus, it was said in Judgment 274, under 22, that "[t]here could be no true freedom of association if the disapproval of the Director-General, whether justified or not, of what was said [in an open letter issued in connection with a staff union referendum] could lead to disciplinary measures". Further, an organisation must remain neutral when differences of opinion emerge within a staff union: it must not favour one group or one point of view over another. To do so would be to diminish the right of a staff union to conduct its own affairs and to regulate its own activities. Nor does an organisation have any legitimate interest in the actions of staff members in their dealings with their staff union and/or other staff union members with respect to the affairs and activities of the union. Thus, it was said in Judgment 274, under 22, that "[a] staff member's conduct of [his] private life is not the concern of the Director-General [unless it] brings the Organization into disrepute", and that trade union activities "likewise constitute an area that is 'prima facie' outside the Director-General's jurisdiction", although "there may be exceptional cases".

8. The second aspect of freedom of association that is relevant to the present case is that it necessarily involves freedom of discussion and debate. It was pointed out in Judgment 274, under 22, that "this freedom, when feelings run strong [...] can spill over into extravagant and even regrettable language". This notwithstanding, the Tribunal has acknowledged that the freedom of discussion and debate is not absolute and that there may be cases in which an organisation can intervene if, for example, 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" (see Judgment 2227, under 7). Within this context, it is convenient to consider the allegedly defamatory nature of the e-mail in question.

9. The law of defamation is not concerned solely with the question whether a statement is defamatory in the sense that it injures a person's reputation or tarnishes his or her good name. It is also

concerned with the question whether the statement was made in circumstances that afford a defence. Broadly speaking, the defences to a claim in defamation mark out the boundaries of permissible debate and discussion. As a general rule, a statement, even if defamatory in the sense indicated, will not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the extent of the publication was reasonable in the circumstances.

10. As already indicated, the e-mail in question was issued in response to an earlier e-mail distributed by the complainant. In his e-mail, the complainant raised a question as to whether the author of the e-mail of which he complains "truly believed" that the complainant's election as Staff Council President in somewhat controversial circumstances in 2003 was "either unfair or undemocratic" and asked why, if he did, "he chose to run anyway". These statements were capable of being understood as impugning the latter's integrity, and he was entitled to respond in kind to that criticism. Moreover, there was considerable discussion with respect to the events surrounding the 2003 election in the period leading up to the recall ballot in 2004. Many members of the Staff Union participated in that discussion, some by way of e-mail and some in oral debate in Staff Union meetings in which the complainant was able to and did express his views. The subject matter of that discussion was a matter of legitimate interest to all members and all persons eligible to be members of the Staff Union and, in these circumstances, the extent of the circulation of the e-mail in question in the course of that discussion cannot be said to have been unreasonable. Accordingly, it cannot be said that the circulation of that e-mail by its author in the period leading up to the recall ballot involved any abuse of the freedom of speech which necessarily attends freedom of association. Thus, UNIDO could not investigate the actions of the author of the e-mail in question nor take any other action against him without interfering in staff union affairs. And that

is so even if the complainant did lodge a complaint of harassment. The claim that UNIDO breached its duty to the complainant by failing to take action against the author of the e-mail in question must be dismissed.

11. Somewhat different considerations apply to the second aspect of the complainant's claim. As already indicated, the evidence does not disclose when the e-mail was copied to the bulletin board or by whom. UNIDO claims and it is not disputed that it was removed by the end of November 2006. At best, the evidence only permits of a finding that it was on the bulletin board for a period of approximately three months from September 2006. By then, presumably, the controversy surrounding the 2003 election and the recall ballot had abated. Certainly there is no evidence of any continuing discussion in 2006 and any criticism by the complainant of the author of the e-mail was by then a matter of history. Any republication of the e-mail at that time amounted to excessive publication and, thus, it is not entitled to the same protection that attached to the original e-mail. This notwithstanding, there is no evidence to suggest that the e-mail on the bulletin board was widely read. Nor is there any evidence to suggest that its presence on the bulletin board was the result of ill will or any intentional act that can be attributed to the Organization. Moreover, it was removed before the complainant sought that course in his request for review of the decision of the Director of PSM/HRM of 15 January 2007. Even so, an organisation has a duty of care to ensure that material that injures the reputation or dignity of its staff members does not find its way into any of its authorised channels of communication. The complainant is entitled to claim against the Organization for its breach of that duty, even though the offending material was removed from the bulletin board before he lodged his internal appeal. In these circumstances, the complainant is entitled to material and moral damages. Given that the evidence does not permit of a finding that the e-mail was widely read on the bulletin board and, in the absence of evidence of any actual damage to the complainant's

reputation by reason of its presence on the board, the Tribunal assesses those damages at 1,000 euros. Having had a measure of success, the complainant is entitled to costs of 500 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of 8 January 2010 is set aside.
2. UNIDO shall pay the complainant material and moral damages in the sum of 1,000 euros.
3. It shall also pay him costs in the amount of 500 euros.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 4 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet