Registry's translation, the French text alone being authoritative.

102nd Session **Judgment No. 2601**

The Administrative Tribunal,

Considering the complaint filed by Mr V. Z. against the International Telecommunication Union (ITU) on 3 March 2006 and corrected on 10 March, the Union's reply of 17 May, the complainant's rejoinder of 6 July and the ITU's surrejoinder of 28 September 2006;

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, who has dual Colombian and Swiss nationality, was born in 1947. He joined the ITU in August 1987. At the material time he was employed at grade P.5 as Head of the Spanish Translation Section in the Conferences Department and was the supervisor of Mr M., a grade P.4 translator.

Towards the end of 2003 relations between the complainant and Mr M. began to deteriorate. On 14 September 2004 the two men started a quarrel in the course of which they came to blows. They were pulled apart by colleagues. Mr M., who had a face injury, allegedly said to the complainant "I'll kill you", before adding "administratively". The statements of the three colleagues who witnessed the altercation were taken down within hours of the event.

The next day, on 15 September, the acting Chief of the Personnel and Social Protection Department wrote to the complainant informing him that, as a result of that incident and in accordance with Staff Rule 10.1.3, he was suspended from his supervisory duties over the Spanish Translation Section pending completion of an investigation, but that he would continue to perform his duties as translator-reviser. He added that the decision was "a purely precautionary measure designed to allow the Spanish Translation Section to operate in an untroubled atmosphere" and that it "in no way prejudge[d]" the outcome of the investigation or of any possible disciplinary proceedings. Mr M. for his part was asked to change offices.

In a memorandum of 17 September addressed to the Secretary-General, the complainant requested that the decision to suspend him from his duties be cancelled and that sanctions be applied to Mr M. for "assault and death threats against [him]". The acting Chief of the Personnel and Social Protection Department replied on 21 September that the decision of 15 September was being maintained. On the same day the complainant sent him a medical certificate, in which the physician he had consulted stated that he had found three kinds of injuries of traumatic origin which "[could] have been caused by the rough treatment" to which the complainant said he had been subjected.

In a memorandum of 27 September the complainant explained to the Secretary-General that he had "done no more that defend [himself]" against a physical attack and that he therefore failed to understand why a precautionary measure had been taken against him. He said he was quite ready to take part in a reconstruction of the events. It was replied on 30 September that holding a reconstruction appeared premature at that stage of the investigation. In the course of the investigation, those concerned submitted comments, the Chief of the Conferences Department made observations and many witness statements were gathered, including that of Ms G. The complainant asked for the latter's testimony, which he considered libellous, to be withdrawn, but his request was denied.

By a letter of 6 December 2004 the Secretary-General informed the complainant that, further to the investigation, he was charged with committing acts of violence against Mr M. Considering that the use of violence in the workplace was unacceptable, especially on the part of a supervisor, and constituted a breach of the standards of conduct required of international civil servants, he had decided to initiate disciplinary proceedings and hence to refer the matter to the Joint Advisory Committee. The latter met on 11 and 17 February 2005. In its report it took

the view that the persons concerned had been guilty of serious misconduct justifying the application of a “severe sanction” among those listed in Staff Rule 10.1.2. In the case of the complainant it recommended demotion to a lower grade. In a letter of 1 March 2005 the Secretary-General informed the complainant of his decision to demote him from P.5 to P.4. On 2 March he sent him another letter in which he relieved him of his duties as Head of the Spanish Translation Section and assigned him to translator-reviser duties.

On 23 and 24 March the complainant wrote to the Secretary-General asking him to reconsider those two decisions. In letters dated 20 and 21 April 2005 the Secretary-General replied that he had decided to maintain them. The complainant submitted an appeal to the Appeal Board on 18 July, alleging several procedural flaws and a breach of defence rights. The Appeal Board handed in its report on 10 October. Considering that the complainant ought to have been present when witnesses were heard and that, “[i]n seeking to determine whether the complainant was at fault, the investigation should consider all the facts and not accept hearsay as evidence without establishing its probative value”, it recommended that the Secretary-General “reinitiate the disciplinary procedure in accordance with the rules”. In a letter of 5 December 2005, which constitutes the impugned decision, the Secretary-General explained to the complainant in detail why he was not in a position to follow that recommendation and stated that he was maintaining the decisions of 20 and 21 April 2005.

B. The complainant puts forward four pleas. Firstly, he contends that the decisions of 1 and 2 March 2005 were taken in breach of a formal and procedural rule, insofar as he was not present when the statements of his three colleagues were taken down in the hours following the altercation. He refers in that respect to Judgment 1133. He adds that the Administration rejected his requests for one of those statements to be altered “in order to bring it closer to the facts”, for a face-to-face meeting to be arranged and for a reconstruction of the events to be organised.

Secondly, the complainant considers that the aforementioned decisions are based on an error of law. He maintains that it was Mr M. who attacked him and that he himself was not guilty of misconduct since the right of self-defence is recognised as a “fundamental right of every person”. Referring to several judgments of the Tribunal, he contends that the sanction he incurred is out of proportion with the charges against him. He also considers that he was penalised twice on the basis of the same facts.

Thirdly, he contends that the impugned decisions are tainted with an error of fact and overlook essential facts. On this point the complainant explains that prior to the altercation of 14 September 2004 he had been subjected on many occasions to “direct or indirect verbal abuse” by Mr M. and had asked for measures to be taken against the latter. Nothing was done, however, because, according to him, the Administration did not appreciate the full measure and seriousness of the situation. He thus felt “let down by his employer”. He adds that his performance of his duties was always beyond reproach and that his colleagues never complained about his behaviour. In his view the Secretary-General failed to take account of the “mitigating circumstances that accompanied [his] reaction”, or of the responsibility borne by his “attacker”. He points out that although the latter was in his view recognised as being “to blame” for the altercation, the sanction he incurred was less severe than his own.

Fourthly, the complainant argues that the “ITU’s fundamental principles and rights” – including the obligation to act in good faith, to inform staff members of actions that are likely to affect their legitimate interests and to safeguard those legitimate interests as well as the reputation and dignity of staff members – were breached. Although Mr M.’s verbal attacks continue, the Administration has still done nothing to defend him, which in the complainant’s view is inadmissible. He adds that his defence rights were breached insofar as on several occasions he was given deadlines which were obviously much too short and he was not provided with a number of documents. In addition, he had to “endure the libellous and insulting testimony” given by Ms G., since the Administration refused to withdraw it. He notes, lastly, that the decision to suspend him from his duties was notified in breach of the Staff Rules, since the Spanish Translation Section was informed before he was.

The complainant asks the Tribunal to quash the decisions of 1 and 2 March 2005, as well as that of 5 December 2005. He also asks to be reinstated at grade P.5 and in his duties as head of the aforementioned section and for his career to be reconstituted. He would also like the Tribunal to order the ITU to withdraw Ms G.’s testimony and to take whatever measures are necessary against her “for acting in that way”. Lastly, he claims compensation for moral injury and an award of costs.

C. In its reply the ITU contends that the complainant’s claims concerning the reconstitution of his career, the withdrawal of Ms G.’s testimony, costs and compensation for moral injury were not made prior to the proceedings

before the Tribunal and are therefore irreceivable.

In reply to the complainant's first plea, the ITU contends that the reference to Judgment 1133 is irrelevant since in the present case the right to be heard was scrupulously observed, insofar as the witnesses' statements were neither taken down nor examined without the complainant's knowledge. It adds that it is not up to the Administration to ask a witness to alter his or her statement and that, since the testimonies gathered in the course of the investigation were sufficient to establish the facts, it considered it unnecessary to undertake a reconstitution of the events.

With regard to the second plea, the defendant considers that the sanction applied to the complainant, though severe, is proportionate to the seriousness of his misconduct, since for a head of section at grade P.5 to strike a subordinate at the workplace represents a serious breach of several of the rules of conduct required of international civil servants. It explains that in this case it was the demotion to a lower grade that constituted the disciplinary sanction. The decision to suspend the complainant from his supervisory duties, on the other hand, was taken in the exercise of the Secretary-General's discretionary authority regarding assignments; it therefore amounts to an administrative measure taken purely in the interest of the service and not for the purpose of penalising the complainant a second time.

The ITU rejects the third plea as being without merit. It points out that, insofar as he shared the responsibility for the altercation of 14 September 2004, Mr M. received the disciplinary sanction which the Joint Advisory Committee recommended applying to him. It maintains that it never disregarded the complainant's "warnings" concerning Mr M. On the contrary, it acted with all due diligence, albeit without success. It recognises that the comments made by Mr M. concerning the complainant are unacceptable, but points out that it would appear from the observations made by the Chief of the Conferences Department that on 16 August 2004 the complainant had sent a memorandum to Mr M. the tone of which was somewhat "provocative".

With regard to the fourth plea, the ITU contends that the complainant has not succeeded in demonstrating that there was any breach of the fundamental rights and principles of the international civil service. It recalls that all civil servants have an obligation to abstain from using violence, but that that obligation is greater in the case of those exercising supervisory responsibilities. It was therefore logical to apply different sanctions to the complainant and to Mr M. It maintains, moreover, that a witness statement cannot be withdrawn at the request of one of the parties. The complainant was, however, entitled to challenge Ms G.'s testimony, and in the event his challenge was taken into account.

D. In his rejoinder the complainant sets out to demonstrate that the ITU's objection to receivability concerning four of his claims is unfounded.

On the merits he reiterates his pleas. He accuses the ITU of failing to elucidate all the relevant facts and of having ignored the previous behaviour of his "attacker". He accuses the Union of having done nothing to protect him from the latter's "mockeries and harassment", which are ongoing and which drove him to file two complaints for harassment on 29 March and 6 June 2006.

The complainant also contends that in its reply the defendant "did everything it could to discredit him" and disregarded his right of self-defence. On the basis of the *in dubio pro reo* principle, he argues that insofar as there is no proof of his guilt he should not have been penalised. He adds that the observations of the Chief of the Conferences Department are tainted with many inaccuracies and appear to be an "attempt to justify after the event his failure to act, which encouraged the attack of 14 September 2004".

E. In its surrejoinder the defendant fully maintains its position. In its view the complainant's guilt is beyond doubt and his reference to the principle of *in dubio pro reo* is therefore without merit. With regard to his harassment complaints, it states that the procedure is under way but that, since the facts on which they are based post-date the impugned decision, they cannot be taken into account in the present proceedings.

CONSIDERATIONS

1. When the complainant was Head of the Spanish Translation Section of the ITU, at grade P.5, he entered into a violent altercation with a grade P.4 staff member, Mr M., who was under his supervision. In the course of that altercation, which occurred on 14 September 2004, the two staff members exchanged blows and had to be

pulled apart by colleagues. After gathering witnesses' accounts of the incident, the Administration decided on 15 September to suspend the complainant from his supervisory duties, in accordance with Staff Rule 10.1.3. It was stated that the suspension was "a purely precautionary measure designed to allow the Spanish Translation Section to operate in an untroubled atmosphere", which "in no way prejudge[d] the outcome of the investigation or of any possible disciplinary proceedings".

2. After obtaining the comments of the two staff members concerned and their respective versions of the facts, the Secretary-General of the ITU decided on 6 December 2004 to initiate disciplinary proceedings against the complainant, emphasising that "[w]orkplace violence, especially on the part of an official exercising supervisory responsibilities, is inadmissible and constitutes a breach of the standards of conduct required of international civil servants as defined in Staff Regulation 1.4 and in Service Order 02/05 of 4 July 2002". Thus, in accordance with Staff Rule 10.2.2, the case was referred to the Joint Advisory Committee, which was to consider not only the complainant's role but also that of the other staff member involved, in order to determine the latter's "share of responsibility". After meeting twice, on 11 and 17 February 2005, the Committee concluded unanimously that the two staff members were guilty of serious misconduct warranting the application of a severe sanction, which, in the complainant's case, should be demotion to grade P.4. In two letters, dated 1 and 2 March 2005 respectively, the Secretary-General notified the complainant that he had been demoted to grade P.4 and that he had been suspended from his duties as Head of the Spanish Translation Section and assigned to translator-reviser duties in that section.

3. After the Secretary-General, on 20 and 21 April 2005, had rejected the complainant's requests for reconsideration, the latter referred his case on 18 July to the Appeal Board, which on 10 October 2005 recommended reinitiating the disciplinary proceedings, on the grounds that the complainant ought to have been present when statements were taken and that "[i]n seeking to determine whether the complainant was at fault, the investigation should consider all the facts and not accept hearsay as evidence without establishing its probative value".

4. On 5 December 2005 the Secretary-General informed the complainant that in his opinion the requirements of due process had been observed in his case and that, consequently, he felt unable to follow the recommendation given by the Appeal Board. He therefore confirmed his decisions of 20 and 21 April 2005, as a result of which the penalised staff member filed a complaint with the Tribunal.

5. The complainant contends that the impugned decisions were taken in breach of the procedural rules, that they rest on errors of law and of fact and that they overlooked essential facts. He holds moreover that the organisation violated its fundamental obligations to act in good faith, to keep its staff members informed and to safeguard their legitimate interests, reputation and dignity.

6. Where the alleged breach of procedural rules is concerned, the complainant refers to the Tribunal's case law, and specifically to Judgment 1133, to support his argument that the statements gathered following the altercation should have been taken in his presence, and that the Administration wrongly refused to request the amendment of the testimony given by one of his colleagues and rejected his request for a reconstitution of the events on the spot.

7. The Tribunal does not consider that in this case the requirements of due process were disregarded. The complainant was informed of the statements taken immediately after the incident and those gathered subsequently, and indeed of the observations made by the Chief of the Conferences Department, and he had several opportunities to express his own views and to comment on the documents submitted to the Joint Advisory Committee. There was no written rule or principle which obliged the Administration to take down those statements in the presence of the complainant, given that they were not used without his knowledge, or to hold a face-to-face meeting or a reconstitution on the spot of this regrettable incident.

The reference to Judgment 1133 is not relevant, as pointed out by the Secretary-General in the impugned decision, because the procedural flaw at issue in the case leading to that judgment stemmed from the fact that, in a case involving criminal aspects, the Administration had taken as evidence accusations calling into question a staff member's probity, without giving the latter an opportunity to know what they were or to challenge them in the course of the administrative inquiry. On that occasion the Tribunal recalled, as it had done in a similar case leading to Judgment 999, that "whoever makes inquiries of the kind that were made in this case must be scrupulous in not taking evidence from one party without the other's knowledge". In the present case, the submissions show that none of the statements was withheld from the complainant, who was given the opportunity to comment on them

and even to criticise them at all stages of the administrative proceedings, and that he obtained the further testimonies he had requested. While he did challenge some of the statements, as he had every right to, the Administration was under no obligation to accede to his request to have a statement altered or "clarified" in order to "bring it closer to the facts", nor to agree to the withdrawal of another statement which he considered biased and libellous.

8. According to the complainant the impugned decisions are tainted with an error of law, since they apply a sanction to him even though he was not guilty of any misconduct, and since they are in any case disproportionate and in breach of the principle whereby one cannot be penalised twice on the basis of the same facts.

9. It is hard to deny the complainant's misconduct: acts of rudeness and violence are naturally unacceptable in the workplace, whether in an international organisation or any other institution. It is particularly unacceptable for a supervisor to come to blows with a staff member under his supervision, and to strike him in the face as he did in the present case. Admittedly, it appears from the submissions that, against a background of long-standing animosity between the complainant and his subordinate, the latter's attitude and the threats and insults he gave vent to on several occasions are by no means blameless and should have caused the defendant to intervene before the situation degenerated. Similarly, it is impossible to tell with certainty from the file which of the two staff members started the fight. But, regardless of any doubts that may linger after a careful scrutiny of the evidence, the fact remains, according to the detailed finding of the Joint Advisory Committee, that "[a]ll the witnesses agreed that, when they arrived on the scene, Mr M. [...] was leaning backwards on the secretary's desk and [the complainant] was standing over him" and that, "[i]mmediately after the fight [...], Mr M. [...] had cuts on his face and a bump on his forehead. [The complainant], on the other hand, bore no visible marks of any blow." Even though it was subsequently stated in a medical certificate dated 18 September 2004 that the complainant had various injuries which "[could] have been caused by the rough treatment he said he was subjected to", it has not been established that he merely defended himself from attack. As once again the Joint Advisory Committee found, "even if [the complainant] was truly in a situation of self-defence, his reaction should have been proportionate to the assault. He should have tried to leave the premises without engaging in a fight and, if obliged to defend himself, he should merely have tried to bring his opponent under control without striking him to the point of causing him injury."

10. While the complainant's misconduct is undeniable and, contrary to what has been alleged, leaves no room for doubt, a question remains as to whether the sanction of demotion to a lower grade, which is one of the most severe provided for in the Staff Rules, is proportionate to the charges held against him. In this respect the complainant could undoubtedly find mitigating circumstances in Mr M.'s attitude of insubordination, or even provocation, but that behaviour was in any case not such as to justify resorting to physical assault, which the defendant organisation could not tolerate on the part of a staff member entrusted with major responsibilities. The Tribunal in the circumstances is therefore unable to find that the sanction incurred by the complainant was clearly out of proportion (see Judgment 1725 for a similar situation). Nor is the sanction in breach of the principle of equal treatment, since the precedents referred to by the complainant concern facts which are different from those he is charged with.

11. The plea based on a breach of the *non bis in idem* principle fails. The only disciplinary sanction incurred by the complainant was the demotion to grade P.4 of 1 March 2005, and whilst the Secretary-General deemed it necessary, by his decision of 2 March 2005, to suspend him from his supervisory duties over the Spanish Translation Section and to assign him to translator-reviser duties, that decision did not constitute a second sanction, but an administrative measure which became necessary as a result of the demotion. The defendant is right to assert that the decision to reassign him was dictated by the interest of the service and that the Secretary-General was entitled, in the exercise of his discretionary authority, to decide that it was out of the question that the complainant should retain supervisory responsibility over the section and in particular over the translator with whom he had come to blows.

12. The complainant accuses the defendant of committing an error of fact and of overlooking essential facts, namely "the responsibility of the attacker", "the responsibility of the Administration" and the fact that he felt let down by the latter, which failed to support him despite the fact that the staff members who had worked with him had never voiced any complaints about his behaviour. It emerges clearly from the submissions, however, that the decision-making authority was fully informed, if only by the many documents produced by the complainant himself, of all the circumstances which might have been considered as attenuating his responsibility. The complainant is not really accusing the Administration of having acted on the basis of materially incorrect facts, but of having incorrectly assessed the facts of the case. Some of these facts probably did allow for a degree of

interpretation, such as the question of whether the death threats voiced by Mr M. after the altercation referred only to the “administrative” death of the complainant, but there is no indication that the way the Administration interpreted the facts was ill intentioned or biased against the complainant. The Tribunal will therefore not dwell on the debate between the parties regarding the complainant’s performance prior to the incident and will confine itself to ruling that the Secretary-General was able lawfully to apply a sanction to him for perpetrating acts of violence on one of his subordinates.

13. The Tribunal further finds that the disputed decisions were properly substantiated; the complainant was kept duly informed about the progress of the investigation, and the deadlines he was given to reply to requests for information and to the messages he was sent were sufficient and gave him the chance to defend himself without any infringement of his right to be treated fairly and to have his dignity safeguarded. While he appears, in the conclusion of his complaint, to criticise the manner in which he was notified of the suspension measure decided against him, he does not specifically challenge its lawfulness and does not show that the fact that this measure was brought to the attention of the section staff before he was officially notified himself actually caused him injury.

14. Since the file shows no breach of the fundamental rights enjoyed by international civil servants, the claims both for the quashing of the impugned decisions and for compensation for moral injury must be dismissed, bearing in mind that none of the circumstances subsequent to the disputed sanction can be considered by the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.