Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

106th Session **Judgment No. 2772**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms P. B. against the International Telecommunication Union (ITU) on 8 February 2008 and corrected on 22 February, the Union's reply of 5 May, the complainant's rejoinder dated 12 June and the ITU's surrejoinder of 23 September 2008;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a French national born in 1960, joined the ITU in 1995 as a clerk. She received a permanent appointment on 1 July 2004 at grade G.5.

On 7 December 2006 the complainant became so overwrought, making angry accusations and threatening suicide, that the Administration called the medical emergency services and she was rushed to hospital. She was absent on sick leave until 31 January 2007. Her attending physician stated in a medical certificate dated

24 January 2007 that she "[would be] completely fit for work from 1 February 2007".

When the complainant reported to the ITU on 1 February 2007 she was informed that she could not return to work. The Personnel and Social Protection Department asked the ITU Medical Adviser to issue a recommendation, based on a full report from the complainant's attending physician, as to whether she could "reasonably return to active employment" and, if so, on what conditions. In response to this request, on 29 March the Medical Adviser forwarded a full report from the complainant's attending physician and stated that, according to this report, the complainant could return to work, but that it was "essential that she is no longer subjected to any mobbing". As the Deputy Secretary-General in charge of the above-mentioned department considered that this reply did not amount to the recommendation which had been requested, on 23 April he made the same request to the Medical Services Section for United Nations and Specialized Agencies at Geneva, which has been responsible for dealing with all the Union's medical matters since 1 April 2007. By a letter of 30 April the doctor of this section informed the complainant that she was to undergo a medical examination by a specialist and asked her to make an appointment with him; after this appointment, on 26 June he reminded her that she had to be examined by a specialist in order that a recommendation could be made to the Administration and he asked her to contact a specialist who had been designated for this purpose. The complainant was again invited, by letter of 17 July 2007, to contact the specialist at her earliest convenience. She replied that the ITU Medical Adviser had already issued a recommendation concerning her fitness to resume her duties.

In the meantime, on 8 February 2007 the complainant had sent the Secretary-General a memorandum summarising the events which, in her opinion, had triggered her hospitalisation on 7 December 2006, to wit her hierarchical superior's comment, when she had returned to work in September 2006 after time off due to a road accident, that "he did not need sick people", the Administration's silence in this

connection and the fact that, in the course of her duties, she had discovered the existence of double invoicing and had been gradually sidelined. She also summarised events on 7 December 2006 and 1 February 2007. She drew attention to the fact that her dignity had been undermined and that she had been intimidated. She also alleged that she had been discriminated against because her post was classified two grades below that of colleagues carrying out the same duties. She requested special leave with pay as from 1 February 2007 and reinstatement in a post fitting her profile, with a supervisor "who respects [her] dignity and behaves like a real professional". By a letter of 23 March 2007 the Deputy Secretary-General in charge of the Personnel and Social Protection Department notified her that by a decision of 26 February 2007 she had been granted special leave with pay as from 1 February 2007. She was further informed that this department was making every effort to find a solution enabling her to return to active employment within the organisation as soon as possible and on optimal conditions.

On 4 May the complainant asked the Secretary-General to review her situation, for she considered that she had been treated in a manner incompatible with her terms of employment. On 28 May the Deputy Secretary-General replied that the decision to place her on special leave with pay still stood. He explained that this decision had been taken in order that the complainant's fitness for work could be assessed by the competent medical authorities and that, subject to a satisfactory report, the Administration would be quite able to assign her duties suiting her grade, skills and qualifications.

On 17 August the complainant submitted an appeal to the Appeal Board against the decision of 28 May, contending that the Administration had acted in breach of the Staff Regulations and Staff Rules. She argued that there was no need for a medical examination by a specialist, as the Administration was obliged to take into consideration her attending physician's certificate and the ITU Medical Adviser's findings. The Board issued its report on 25 October 2007. It recommended inter alia that the complainant should comply

with the request of the United Nations Medical Services Section, that she should be shielded from material and moral injury pending the outcome of the specialist's examination, that the period of special leave with pay should be extended and that, the specialist's report permitting, the complainant should return to her former post or be assigned to an equivalent post, while at the same time care should be taken to eliminate all forms of mobbing. By a letter of 7 November 2007 the Secretary-General informed the complainant that he had decided to follow these recommendations. Nevertheless, he noted that no form of mobbing had been found to have occurred and that the complainant had never lodged a complaint in that connection. That is the impugned decision.

B. The complainant asserts that she first complained of moral harassment within her service. In December 2004 she complained to a hierarchical superior in writing with a copy to the then Secretary-General. She complained orally to another hierarchical superior on 7 December 2006 and lastly to the Secretary-General in writing on 8 February 2007. She says that, although she did not qualify this second letter as a "complaint", it contains a precise description of acts, behaviour and language constituting harassment, as required by Service Order No. 05/05 on ITU policy on harassment and abuse of authority. According to this service order, the Secretary-General ought to have opened an inquiry within three weeks of receiving her letter. In her opinion, her hierarchical superiors are trying to cover up their behaviour by "trying to make out that [she] is mentally ill". She submits that the ITU is not only in breach of its duty to implement measures to protect her, but that it has increased her distress by ordering her to undergo a further medical examination by a specialist which, she maintains, "offended her dignity". Moreover, she contends that the purpose of Staff Rule 6.2.2(a), paragraph 7, which stipulates that "a staff member may at any time be required to submit a medical certificate as to his condition or to undergo examination by a medical practitioner named by the Secretary-General", is to prevent unwarranted requests for sick leave.

The complainant draws attention to the fact that both her own attending physician and the ITU Medical Adviser pronounced her fit for work, and she submits that the fact that the Union is groundlessly challenging the Medical Adviser's opinion is contrary to the Staff Regulations and the Tribunal's case law. In her view, the fact that the Union is preventing her from working despite concordant medical opinions constitutes mobbing.

Furthermore, she emphasises that the ITU had the opportunity to express its opinion on the allegations of moral harassment before the Appeal Board. In her view, the Board deemed the mobbing to be a proven fact because the Union did not dispute it.

The complainant asks the Tribunal to quash the Secretary-General's decision of 7 November 2007 and to order that she be reinstated in her post or assigned to an equivalent post "with a G.7 salary" within one month of the delivery of the judgment and that, in the meantime, she should be allowed to remain on special leave with pay. She subsidiarily claims compensation in the amount of one million Swiss francs for moral injury. She also claims costs.

C. In its reply the ITU notes that since some of the complainant's claims are new, they must be declared irreceivable as internal means of redress have not been exhausted. It points out that the complainant bases her complaint almost entirely on the fact that the Secretary-General did not open an inquiry in accordance with the terms of Service Order No. 05/05. In the Union's opinion, since this plea was not raised during the internal appeal, it ought to be dismissed as being manifestly irreceivable. It draws attention to the fact that the complainant did not follow the procedure laid down in the aforementioned service order. No attempt was made to resolve the dispute informally, and the sole purpose of the letter of 8 February 2007 was to request special leave with pay pending her reinstatement. The Union states that it did not reply to the allegations of moral harassment before the Appeal Board for legitimate reasons, in particular because they were neither the subject matter nor the cause of the appeal. It considers that the Board committed an error of law by accepting baseless assertions.

The ITU draws attention to various incidents prior to that of 7 December 2006 which, in its opinion, prove that the complainant showed signs of behavioural difficulties. In view of the seriousness of the incident on 7 December and the complainant's previous history, the Union is convinced that the decision to place the complainant on special leave with pay was reasonable and proportionate and it holds that it was taken in the interests of both the complainant and the ITU.

The Union states that the decision to ask the complainant to undergo a specialist examination is based on Staff Regulation 4.10 and on Staff Rules 4.10.1 and 6.2.2, which authorise the Secretary-General to call for a medical examination at any time. It acknowledges that Staff Rule 6.2.2(a), paragraph 7, is usually invoked when an extension of sick leave is requested, but it submits that it can be applied for other purposes. For example, the organisation may refuse to allow a staff member to return to work if it has legitimate and reasonable grounds for thinking that he or she is not fit to do so, or that such a return to work would expose the staff member concerned and his or her colleagues to risks. The ITU underlines that it had made a precise request to its Medical Adviser who, unfortunately, conveyed only a summary of the opinion of the complainant's attending physician. On the basis of the documents in his possession, the doctor of the United Nations Medical Services Section considered that the complainant should be examined by an independent specialist. Contrary to the complainant's allegations, the medical opinions are not concordant.

D. In her rejoinder the complainant presses her pleas. She emphasises that she is ill and that she is not receiving a salary, since by a letter of 10 April 2008 she was informed of the decision to end her special leave with pay with effect from 1 May 2008 because of her refusal to undergo a medical examination by a specialist. She explains that she is suffering chronic pain on account of the road accident she

had in 2006 and that she herself is paying for her medical treatment. She further states that it is not impossible that this pain, combined with depression due to mobbing, make her unfit for work. She considers that this possible incapacity should be covered by the ITU's disability insurance.

The complainant comments that the ITU's choice of a specialist who used to work in a hospital caring for patients suffering from serious psychiatric disorders "was right in line with [the Union's] strategy of keeping her quiet […] by making out that she was 'crazy'".

E. In its surrejoinder the Union maintains its position. It holds that it was up to the complainant to query the choice of specialist when she was invited to consult him, if that upset her so much; it records that the complainant raised this argument only in her rejoinder.

The Union asserts that the arguments related to facts occurring after the filing of the complaint are manifestly irreceivable and adds that the complainant has lodged two other internal appeals in connection with these facts.

CONSIDERATIONS

1. On 7 December 2006 an incident occurred which led to the complainant being rushed to hospital. She was placed on sick leave from that date until 31 January 2007. She was then informed by a letter of 23 March that the Secretary-General had decided on 26 February to grant her special leave with pay as from 1 February 2007.

In the meantime, the Personnel and Social Protection Department had asked the organisation's Medical Adviser for a recommendation, based on a full report of the complainant's attending physician, as to her fitness to return to active employment. The Medical Adviser replied to this request on 29 March. The Deputy Secretary-General in charge of the above-mentioned department, who was dissatisfied with this reply, made the same request to the United Nations

Medical Services Section. The doctor of this section decided that the complainant should be examined by a specialist in order to determine her fitness for duty and he asked her to make an appointment with him.

On 4 May 2007 the complainant wrote to the Secretary-General and, with reference to the decision of which she had been notified by the letter of 23 March 2007, asked him to review her situation in accordance with Staff Rule 11.1.1, paragraph 2(a).

On 28 May 2007 the Deputy Secretary-General informed the complainant that the decision of 26 February 2007 granting her special leave with pay was being maintained in order to permit an assessment of her fitness for work by the competent medical authorities.

On 26 June the doctor of the United Nations Medical Services Section reminded the complainant that she had to undergo a medical examination and asked her to contact the designated specialist. This request was subsequently repeated.

2. On 17 August the complainant submitted an appeal to the Appeal Board against the decision of 28 May confirming that of 26 February. In its report of 25 October 2007 the Board found that "no provision of the organisation's Staff Regulations or Staff Rules establishes the possibility of verifying the technical opinions of the organisation's Medical Adviser", but recommended that "the appellant comply with the request of the United Nations medical service, with the assistance of her attending physician if necessary", and that the "appellant should be shielded from material and moral injury pending the outcome of the specialist's examination requested by the United Nations medical service"; in this connection it recommended "the extension of the agreed arrangements in the form of special leave with pay until the findings of the specialist's examination possibly necessitate new arrangements". The Board also recommended that, "the specialist's report permitting, the complainant return to her former post, or be assigned to an equivalent post, while at the same time care must be taken to eliminate all forms of mobbing", that "the question of medical opinions and second opinions be strictly regulated and that the

Administration prepare an amendment to the Staff Regulations and Staff Rules on this subject in time for the next Council session".

By a letter of 7 November 2007, which constitutes the impugned decision, the Secretary-General notified the complainant that he had decided to follow the Appeal Board's recommendations specifically concerning her.

3. In her most recent written submissions to the Tribunal, the complainant indicates that by a letter of 10 April 2008 she was informed that the General Secretariat had decided to end her special leave with pay with effect from 1 May 2008, but that this situation could be "reconsidered" if she were to undergo the specialist examination requested by the ITU. She also reports some new facts which have occurred since the filing of her complaint on 8 February 2008. The Union comments quite aptly that any fact occurring after the impugned decision should not be taken into account when examining the lawfulness of that decision.

4. The complainant asks the Tribunal:

"Principally:

1. To quash the decision of the ITU's Secretary-General of 7 November 2007.

Having done this:

2. To order that [she] be reinstated […] in her former post or assigned to an equivalent post within the ITU with a G.7 salary within one month of delivery of the judgment.

3. In the meantime to continue to grant [her] […] special leave with full pay.

Subsidiarily:

4. To award [her] […] compensation for moral injury in the amount of [one million Swiss francs].

At all events:

5. To order the ITU to defray all the costs of these proceedings including a fair fee for [her] lawyer

[…]."

In support of her complaint she first relies on the moral harassment to which she was allegedly subjected.

She further contends that although she was declared fit for work by both her attending physician and the organisation's Medical Adviser, the ITU has prevented her from working "on the pretext of [her] non-existent psychiatric disability and despite concordant medical opinions regarding the diagnosis in December 2006 and her fitness to return to work on 1 February 2007".

Receivability

5. The Union asks the Tribunal to dismiss all the new claims as irreceivable on the grounds that internal means of redress have not been exhausted. It notes that claims Nos. 2 to 5 are new, since they were not presented in the course of the internal appeal proceedings.

6. It is clear from the submissions that the complainant submitted an appeal to the Appeal Board against the decision of 28 May 2007 and that, as she considered that she had been treated in a manner which was incompatible with her terms of employment, she asked to be allowed to return to work as soon as possible. However, she made no particular request relating to the moral harassment to which she had allegedly been subjected. Similarly, although she expounds at length on this subject in the complaint which she filed with the Tribunal, her main claims concern the quashing of the impugned decision and the consequences which this quashing must have. Her claim for compensation for the offence to her dignity resulting from the moral harassment to which she says she was subjected is advanced only subsidiarily in the event that her claim for reinstatement is not granted. The Tribunal therefore considers that claim No. 2 (save with regard to the award of a "G.7 salary") and claims Nos. 3 and 5 are receivable, since they are related to claim No. 1 – the main purpose of the complaint – concerning the quashing of the impugned decision, the receivability of which is not disputed.

Subsidiary claim No. 4 will be examined only if the Tribunal decides to reject the main claim.

However, the request for the award of "a G.7 salary" must be declared irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, because it was not presented to the Appeal Board and has thus been submitted to the Tribunal before all internal remedies have been exhausted.

The merits

7. The complainant argues in substance that the decision to keep her on special leave with pay in order to permit an assessment of her fitness for work by the competent medical authorities is not in conformity with the Staff Regulations and Staff Rules. She asserts that the Administration was obliged to take account of the medical certificate issued by her attending physician as well as the findings of the organisation's Medical Adviser when assessing her fitness to resume her duties. In her opinion, it was unnecessary to call for a medical examination by a specialist in the circumstances.

8. The texts on which the Union bases its decision to ask the complainant to undergo a medical examination by a specialist read as follows:

Staff Rule 6.2.2

"[…]

7) a staff member may at any time be required to submit a medical certificate as to his condition or to undergo examination by a medical practitioner named by the Secretary-General. Further sick leave may be refused or the unused portion withdrawn if the Secretary-General is satisfied that the staff member is able to return to his duties, provided that if the staff member so requests the matter shall be referred to an independent practitioner or a medical board acceptable to both the Secretary-General and the staff member;

[…]"

Staff Regulation 4.10

"The Secretary-General shall take steps to ensure that staff members meet appropriate medical standards before appointing them and during their service with the Union."

Staff Rule 4.10.1(b)

"Staff members may be required from time to time to satisfy the Medical Adviser, by medical examination, that they are free from any ailment likely to impair the health of others or interfere with the proper discharge of their duties."

9. The Tribunal concurs with the Appeal Board that there was no specific provision concerning cases in which a medical opinion was necessary and that none of the provisions of the Staff Regulations and Staff Rules provided for the possibility of the Administration verifying the technical opinions of the Medical Adviser.

In the absence of any provision on the subject, it is acceptable that, as is generally the case in other international organisations, a medical adviser is authorised to assess a staff member's fitness to return to work after sick leave, and the conditions on which this return to work should take place, on the basis of his or her own knowledge, of the staff member's medical file and of the opinion expressed by the staff member's attending physician. It is only when the opinions of the Medical Adviser and the attending physician diverge that recourse to an independent medical specialist may be contemplated.

10. In the instant case, it should be recalled that after the incident on 7 December 2006 the complainant was rushed to hospital, placed on sick leave until 31 January 2007 and reported for work on 1 February 2007 in accordance with the medical certificate issued by her attending physician, which stated that she "[would be] completely fit for work from 1 February 2007".

In view of the foregoing, the Tribunal considers that, even if the Union could base its decision to ask her to remain at home on the fact that it had not yet received a full report on the complainant's fitness to

resume active employment, it could no longer shirk its obligation to reinstate the complainant, on conditions which were left to its discretion, once it had received the Medical Adviser's memorandum informing it that a detailed report dated 18 March 2007 had been received from the attending physician. Contrary to the Union's assertions and as the Appeal Board so aptly noted, the Medical Adviser did not merely convey a summary of the opinion of the complainant's attending physician, but in her memorandum of 29 March 2007 had "explicitly mention[ed] the receipt of a detailed medical report and […] also expressed an opinion as to whether the complainant could reasonably return to active employment, by saying that the complainant [wa]s 100% fit for work". The Union therefore no longer had any valid reason to keep the complainant on special leave with pay in the absence of factors linked to events after 1 February 2007 and warranting an assessment of her fitness to resume active employment. Consequently, the complainant had to be allowed to return to duties matching her grade and skills, without prejudice to the subsequent implementation of a procedure to determine whether, and on what conditions, she is fit for active employment, provided that the current Staff Regulations and Staff Rules so permit.

11. It follows from the foregoing that the impugned decision must be quashed and that the complainant must be reinstated in her post or assigned to an equivalent post. If it is impossible to reinstate her in her former post in the immediate future, the complainant shall be granted special leave with pay for no longer than three months as from the delivery of this judgment, this being the period of time which the Tribunal deems long enough for the Union to be able to assign her to a post.

12. The complainant is entitled to costs, which the Tribunal sets at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The complainant shall be reinstated in her post or assigned to an equivalent post as stated under 11 above.
3. The ITU shall pay the complainant costs in the amount of 5,000 Swiss francs.
4. All remaining claims are dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet