Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3124**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms P. B. against the International Telecommunication Union (ITU) on 21 September 2010 and corrected on 29 November 2010, the Union's reply of 9 March 2011, the complainant's rejoinder of 11 June and the ITU's surrejoinder of 19 September 2011;

Considering Article II, paragraph 5, 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 dispute are set out in Judgments 2772, 2889 and 2932, dealing respectively with the complainant's three previous complaints. Suffice it to recall that the complainant, a French national born in 1960, was notified in a letter from the ITU dated 6 March 2009 that steps were being taken to adjust her administrative status: in particular, she had been placed on sick leave from 7 November 2008, and the effective date on which she would begin to receive

disability benefit would be 4 February 2010. In Judgment 2889 the Tribunal found that "[b]y taking the action set out in [that] letter […] the Union […] committed no fault", and in Judgment 2932 it confirmed that finding.

By an e-mail of 22 February 2010 the complainant informed the ITU of the final balance of her "leave entitlement as of 6.11.2008" and requested it to make the necessary adjustments. She also transmitted the documents required to effect payment of her disability benefit. On 8 March 2010 the Union told her that she would in fact begin receiving the benefit from 26 April. In a letter dated 18 May the United Nations Joint Staff Pension Fund (UNJSPF) informed her of the amount of the benefit and notified her that, in accordance with the Administrative Rules of the Fund, she would have to undergo medical examinations from time to time in order to ascertain that her state of health continued to justify payment of the benefit. By a letter of 23 June 2010, which constitutes the impugned decision, the Chief of the ITU's Administration and Finance Department told the complainant that the Secretary-General had agreed, "after consulting the Joint Advisory Committee, to terminate [her] appointment with effect from 26 April 2010, by reason of [her] state of health", in accordance with Staff Regulation 9.2, and that she would receive an indemnity in lieu of notice, as well as a termination indemnity equivalent to the difference between 11.42 months of base salary – corresponding to slightly less than 14 years' service – and the amount of the benefit she would receive from the UNJSPF during that period, in accordance with Regulation 9.6(b).

B. The complainant argues, in the first place, that her defence rights have been infringed, insofar as she was not invited to state her views before the decision was taken to terminate her appointment. Moreover, the application in her case of Regulation 9.2 – which, like Regulation 9.1, provides merely that a staff member's services "may" be terminated for health reasons – constitutes in her opinion an error of law because the Secretary-General, in taking the view that the

appointment of a staff member receiving a disability benefit must be terminated, was mistaken as to the meaning of the provision in question.

The complainant then contends that there has been a breach of Regulation 9.1(d), according to which the Secretary-General "shall obtain the advice of the Joint Advisory Committee" before terminating any appointment, because the ITU has failed to show that the Committee was in fact consulted. She adds that, because the identity of the members of the Committee was not disclosed, the requirement of transparency has not been met, and that there is a major procedural flaw in the fact that the documents supposedly supplied to the Committee were concealed from her.

She points out that, according to Article 1.2 (*recte* 1.3) of the Regulations of the Staff Health Insurance Fund, an official on leave without salary is entitled to be voluntarily insured by the Fund, and she states that she had an obvious interest in being granted leave on those terms. She recalls that, as the recipient of a disability benefit, she is in fact insured by the Fund, by virtue of Article 1.3(e); however, if this benefit ceases to be paid following a periodic medical examination, her participation in the Fund will also cease. She alleges that the Union has failed in its duty of care towards her by terminating her employment before the age of 55, at which age incapacity is deemed to be permanent, according to Article 33 of the Regulations of the UNJSPF. She adds that her illness, which in her opinion has been "prolonged and indeed aggravated" by the termination of her employment and the fear of losing her Staff Health Insurance Fund coverage, is probably due in part to the harassment and reprisals to which she has been exposed.

The complainant also contends that the principle of non-retroactivity has been disregarded, since the decision to terminate her employment, which adversely affected her and hence could not permit of an exception to that principle, took effect on 26 April 2010 but was only communicated to her in the letter of 23 June 2010.

Subsidiarily, she argues that Staff Regulation 9.6 has been breached. She points out that in the calculation of her termination indemnity, the impugned decision refers to "base salary", whereas the language used in that Regulation is "gross salary", and this makes it impossible for her to know whether the provision in question has been applied correctly. The complainant also contends that when the length of her service was calculated for the purpose of paying the indemnity, the breaks in service between the various short-term contracts she had been given at the beginning of her career at the ITU should only have been deducted if they lasted for one month or longer. On that basis, she believes that by June 2010 she had accumulated more than 14 years of service, and that the amount of her indemnity should therefore have been higher. She adds that the duration of the notice of termination should also be taken into account in the calculation, but she is unable to verify whether that has been done.

The complainant asks the Tribunal to set aside the impugned decision and, unless the ITU is required to reinstate her, to order it to place her on special leave without pay on health grounds until she reaches the age of 55, or until the payment of her disability benefit ceases. She claims payment with interest of the balance of termination indemnity which she considers to be owing to her, together with the sum of 50,000 euros for injury and 10,000 euros for costs. Lastly, she requests the Tribunal to rule that if these sums are subject to national taxation, she will be entitled to claim reimbursement from the ITU of any tax paid.

C. In its reply the defendant submits that the decision to terminate the complainant's appointment was taken in conformity with the Staff Regulations and Rules. It states that the Joint Advisory Committee was in fact consulted, having been invited by a letter of 18 February 2010 to give its view on the appropriateness of the termination. According to the Union, the allegation that documents transmitted to the Committee were concealed from the complainant is "incorrect and specious". In its view, the date of termination was determined "in a logical and appropriate manner, and in accordance with consistent

practice", and the complainant has failed to show that the retroactive effect of that measure caused her any injury.

The defendant takes the view that the complainant is seeking to create an artificial link between her state of health and the harassment and reprisals to which she claims to have been exposed. It notes that similar arguments have already been rejected in Judgment 2772, and states that the complainant is barred by the principle of *res judicata* from raising them again in these proceedings.

The ITU explains that, in accordance with Staff Regulation 9.6(a), a termination indemnity is calculated on the basis of gross salary less staff assessment, that is, on the basis of net or basic salary, as indicated in Regulation 3.1(a). It disputes that the complainant's length of service exceeds 14 years, because according to Regulation 9.6(g), length of service is deemed to comprise "the total period of a staff member's full-time continuous service with the Union, regardless of types of appointment". It emphasises that its good faith in the matter is evident from its continuing endeavours to calculate or recalculate the complainant's entitlements in her own best interests, consequent upon the judgments handed down on the complaints she has previously brought to the Tribunal.

D. In her rejoinder the complainant reiterates the bulk of her pleas. She states that by failing to respond to her pleas concerning a breach of her defence rights and the existence of an error of law arising from the application of Staff Regulation 9.2, the ITU has implicitly admitted that they were well founded.

The complainant also argues that the letter of 18 February 2010 does not show that the Joint Advisory Committee gave an opinion. It shows rather that the Committee was misled, since it was told that the Secretary-General was obliged to terminate her employment, and that both Staff Rule 8.2.1 and the Rules of Procedure of the Committee were breached, since inter alia it was addressed to all the members of the Committee, not merely to five of them. Lastly, she points out that the Secretary-General did not take the impugned decision within

60 days of the date on which the Committee communicated its recommendations.

E. In its surrejoinder the ITU maintains its position but gives certain clarifications. It submits that, although there is no evidence showing that the complainant was notified in writing of the decision to initiate a termination procedure in her case, there are "various concordant indications" that she was in fact informed that termination was being contemplated. It states that, since the complainant was no longer able to discharge her functions, it decided, in the exercise of its discretion, that it was in its interest to terminate her appointment.

The defendant annexes to its surrejoinder a copy of the opinion in favour of the complainant's termination given by the Joint Advisory Committee, and states that the members of the Committee were not misled in any way. It was decided that in this case the Committee would have two additional members, so that the Secretary-General could be given "an even more studied opinion on a sensitive case". However, the enlarged composition of the Committee did not affect the outcome, because the opinion of the members was unanimous. The ITU admits that the period of time that elapsed between the Committee's deliberation and the adoption of the impugned decision exceeded the maximum period allowed, but it contends that, however regrettable this may be, it did not cause any injury to the complainant since the opinion rendered by the members of the Committee was still valid on 23 June 2010.

Lastly, the Union explains that, in accordance with Staff Regulation 9.6(g), the length of service to be taken into account in determining the amount of the complainant's termination indemnity was calculated without deducting the breaks between her various short-term contracts. As evidence of this, it points to the statement, in a note annexed to the letter of 23 June 2010, that the indemnity was calculated on the basis of a period of service of 14 years and eight months. However, it adds that, when a staff member receives an indemnity in lieu of notice, the notice period is not reckoned as a period of service, in accordance with the applicable rules and the Tribunal's case law.

CONSIDERATIONS

1. The complainant impugns the decision of the Secretary-General of the ITU, conveyed to her by a letter of 23 June 2010, to terminate her appointment for health reasons with retroactive effect from 26 April, in accordance with Staff Regulation 9.2.

The main facts of the case are set out in Judgments 2772, 2889 and 2932, dealing with the complainant's three previous complaints to the Tribunal.

2. The first of the complainant's pleas is that the decision of 23 June 2010 was taken in breach of her defence rights, since she was not given an opportunity to express her views before it was adopted.

She emphasises that, when she requested payment of a disability benefit, she had no idea that a decision would be made to terminate her appointment on health grounds, and that she certainly did not waive her right to be heard in the event of such a decision.

3. According to the Tribunal's case law, an organisation cannot unilaterally alter the status of a staff member before giving him or her an opportunity to express a view on the action that it intends to take (see in particular Judgments 1484, under 8, and 1817, under 7).

4. In this case, the defendant admits that nowhere in the file is there any trace of a notification in writing to the complainant of the decision to begin the termination procedure. It asserts that the complainant was told orally that the procedure had begun, but this argument cannot be upheld by the Tribunal because there is no evidence on file to support it. The defendant also comments that there are "various concordant indications that the complainant was in fact informed that the Administration was contemplating termination in her case". It refers, in particular, to an e-mail of 3 February 2010 in which the complainant confirmed that, in accordance with Article 1.3(e) of the Regulations of the Staff Health Insurance Fund, she wished to maintain her participation in the Fund "as from the payment of a disability pension from the UNJSPF". The ITU

considers that in referring to that provision, which deals with former officials, the complainant was fully aware that, as soon as she began to receive the pension, she would have the status of a former official, and that the Administration was intending to terminate her appointment on health grounds. Lastly, it points out that in a letter of 18 May 2010 the UNJSPF had referred expressly to the complainant's employment coming to an end on 26 April 2010, but she had not reacted "in any way".

5. The Tribunal considers that, although the defendant's assertions may be correct, the fact remains that there is nothing in the file to show that the requirement in the above-mentioned case law has been met. Indeed, there is no evidence that the complainant was expressly informed by the ITU that her appointment was to be terminated for health reasons and that she was thus given the opportunity to state her views on that termination in advance.

6. It follows from the foregoing that the Union deprived the complainant of her right to be heard before taking a decision adversely affecting her.

The impugned decision, which resulted from a flawed procedure, must therefore be set aside, without there being any need to examine the complainant's other pleas, which by their nature would not, if upheld, result in any increase in the damages awarded to her.

7. The complainant must be restored to the administrative status which she held at the time her appointment was terminated, with all the legal consequences that this entails.

8. She shall be paid an indemnity of 5,000 euros for the moral damage suffered owing to the unlawfulness of the decision taken concerning her.

9. The complainant is entitled to costs, which the Tribunal sets at 3,000 euros.

10. The complainant's claim that the ITU should be ordered to reimburse her any national tax which might be levied on the sums awarded to her must be dismissed for want of a present cause of action in this regard.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant shall be restored to the administrative status which she held prior to the termination of her appointment, as stated under 7 above.
3. The ITU shall pay her an indemnity of 5,000 euros for moral injury.
4. It shall also pay her 3,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, 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 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet