Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3139**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A.-M. B. against the International Telecommunication Union (ITU) on 8 September 2010 and corrected on 23 December 2010, the Union's reply of 8 April 2011, the complainant's rejoinder of 14 July and the ITU's surrejoinder of 21 October 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 dispute are to be found in Judgment 3138, also delivered this day, concerning the complainant's second and third complaints. It may be recalled that the complainant, who had been suspended from her duties as an administrative assistant in the Telecommunication Development Bureau (BDT) as from 4 September 2009, was advised by letter of 17 November that her fixed-term appointment had been extended as an "interim precautionary measure" from 1 December 2009 to 30 April 2010 and that this decision in no way prejudged her performance, conduct or "the outcome of the

current proceedings concerning [her]". The Chief of the Administration and Finance Department told her in a letter of 31 March 2010 that it had become apparent, following a "careful examination of [her] file", that her performance had "all too often been unsatisfactory", despite the fact that the Union had given her the means to improve. He stated that the conduct giving rise to her suspension, which constituted misconduct within the meaning of Staff Rule 10.1.1, could lead to disciplinary action but that, "in view of the circumstances", the Secretary-General had decided not to pursue the disciplinary proceedings. On the other hand, as her conduct constituted further proof that the ITU could "justifiably not rely on [her] services to carry out its important mission", the Secretary-General had also decided to follow the recommendation made to him by the Director of the BDT in his memorandum of 12 March, not to renew her contract when it expired on 30 April.

On 28 April the complainant sent a memorandum to the Secretary-General to ask him to review the decision not to renew her contract. By a letter of 10 June 2010, which she impugns before the Tribunal, the Chief of the Administration and Finance Department informed her that she had not put forward any reason which might lead the Secretary-General to go back on his decision.

B. The complainant draws attention to the fact that on 14 September 2010 she filed a fourth complaint seeking the setting aside of the decision to extend her appointment for a period of less than one year as from 1 December 2009, and she states that, if the Tribunal were to allow that complaint, her separation from service on 30 April 2010 would have to be regarded as a dismissal. However, irrespective of whether she was dismissed on that date or whether her appointment was simply not renewed, she considers that the Union ought first to have invited her to express her point of view and to have forwarded to her the memorandum of 12 March 2010 from the Director of the BDT.

The complainant points out that, in her case, several periodical performance appraisal reports were not drawn up, in particular that for 2009. Since she was given the rating of 2 for the overall assessment in

her periodical performance appraisal report for 2008, a new appraisal ought to have been carried out without fail within six months, in accordance with paragraph 3.5 of Service Order 08/09, but this was not done.

She also contends that by suddenly abandoning the disciplinary proceedings and deciding not to renew her appointment the Administration breached the principle of the protection of legitimate expectations and misused its authority because, in her opinion, that radical shift in position was triggered by the lodging in February 2010 of her internal appeals concerning her suspension.

The complainant asks the Tribunal to set aside the impugned decision and that of 31 March 2010, to order her reinstatement and consequently the restoration of her full rights, with interest on all sums due. If she is not reinstated, she requests the payment of 24 months' salary in compensation for the injury suffered. She also claims costs in the amount of 8,000 euros.

C. In its reply the Union comments that, since the complainant separated from the ITU on 30 April 2010, she filed a complaint directly with the Tribunal, as she had the right to do, but it regrets that this prevented the internal appeal process initiated on 28 April 2010 from being completed.

On the merits, the Union emphasises that a non-renewal of contract cannot be regarded as a dismissal decision. Relying on Judgment 1544, it states that it fulfilled its obligations in this case, because the grounds for the non-renewal decision were stated and a reasonable period of notice was given. It recalls that, in accordance with the Tribunal's case law and the relevant provisions of the Staff Regulations and Staff Rules, a fixed-term appointment ends automatically on the date of its expiry. While the organisation is not obliged to consult the official prior to the adoption of a decision not to renew his or her appointment, which decision is discretionary in nature, it is however bound to draw that person's attention beforehand to his or her unsatisfactory performance. In the complainant's case this was done "repeatedly". The ITU points out that, when her performance

deteriorated, it acted kindly and tried to help her to overcome her difficulties. Since her performance remained unsatisfactory in 2008 and 2009, the defendant considers that the decision not to renew her contract was justified. It explains that, if no periodical performance appraisal report was drawn up for 2009, this was mainly due to the fact that there was no work to be evaluated during the second half of the year. In the circumstances, paragraph 3.5 of Service Order 08/09 was not infringed. In the opinion of the ITU, the non-renewal decision was taken with due respect for the complainant's right of defence, because she had every opportunity to present her arguments when she requested a review of that decision.

D. In her rejoinder the complainant suggests that the Tribunal should join her first complaint with her fourth. On the merits, she contends that it would have been possible to draw up a periodical performance appraisal report for 2009, and she emphasises the contradictory nature of the Union's reasoning when it states that it could not evaluate her performance in 2009, but partly justifies the decision not to renew her contact by asserting that her performance that year was unsatisfactory.

E. In its surrejoinder the ITU maintains its position in full. It considers that, since there were objective reasons for not writing a periodical performance appraisal report for 2009, it could "justifiably depart" from the rules governing performance appraisals.

CONSIDERATIONS

1. The complainant was working at grade G.5 in the BDT when she was suspended from duty as from 4 September 2009. She was advised by letter of 17 November 2009 of the decision to extend her fixed-term appointment, as "an interim precautionary measure", for five months as from 1 December 2009. The letter indicated that this decision did not in any way prejudge her performance. On 31 March 2010 the Chief of the Administration and Finance Department sent her a letter in which he informed her that, although the conduct giving rise

to her suspension constituted misconduct, the Secretary-General had decided not to pursue the disciplinary proceedings concerning her. On the other hand, on the basis of a memorandum of 12 March from the Director of the BDT, he had decided not to renew her contract when it expired on 30 April 2010. The request for a review of the decision of 31 March, which the complainant submitted on 28 April, was denied by a letter of 10 June 2010. That is the decision which she impugns in her complaint, by which she seeks not only the setting aside of that decision, but also her reinstatement in the ITU or, failing that, an award of damages.

2. On 14 September 2010 the complainant filed a fourth complaint in which she challenges the decision to extend her appointment for a period of less than one year as from 1 December 2009. She requests that this fourth complaint be joined with the complaint presently before the Tribunal. In accordance with its case law, the Tribunal will not accede to this request, because the requisite conditions for ordering such a joinder are not met.

3. The Union regrets that the internal appeal procedure initiated on 28 April 2010 by the submission of a request for review was not completed, but it raises no objection to receivability on that account.

The Tribunal automatically examines the receivability of complaints filed with it. In the instant case it is plain that, although the complainant had the status of a staff member when she submitted her request for a review under Staff Rule 11.1.1(2)(a), that was no longer the position when she was notified of the decision of 10 June 2010. In Judgment 2892, the Tribunal held that the provisions of the ITU Staff Regulations and Staff Rules governing internal appeals did not provide for appeals by former staff members. In such circumstances, where a decision has not been communicated until after a staff member has separated from service, the former staff member does not have recourse to the internal appeal process (see for example Judgment 2840, under 21). Hence the Tribunal will not find that the complaint is irreceivable pursuant to Article VII, paragraph 1, of its Statute.

4. The complainant has no grounds to regard the refusal to renew her contract as a disguised disciplinary measure imposed in retaliation for the internal appeals against her suspension, which she had lodged in February 2010. While the decision of 31 March 2010 does refer to the conduct giving rise to her suspension on 4 September 2009, that conduct is mentioned only as additional proof that the Union could not "rely on [the complainant's] services in order to carry out its important mission".

Moreover, the decision of 31 March 2010 cannot be regarded as a dismissal decision; it was simply a decision not to renew a contract which was due to expire because, at that date, no request for review having been submitted within the prescribed time limit, the decision of 17 November 2009 extending the complainant's appointment for five months had become final (see Judgment 3140, also delivered this day).

5. Although the decision of 31 March 2010 was therefore neither a disciplinary measure nor a dismissal, the complainant's right to be heard had to be respected nonetheless. However, the memorandum of 12 March 2010, to which that decision referred and in which the Director of the BDT announced that he could not recommend the extension of the complainant's appointment, was a purely internal document which did not have to be discussed with her beforehand. In addition, the complainant had every opportunity to challenge the decision not to renew her contract.

6. As the Tribunal recalled in Judgment 1544, under 11, although a fixed-term appointment ends automatically at the scheduled date of expiry, the staff member must be told the true grounds for non-renewal and given reasonable notice of it, irrespective of the contents of the clauses of his or her contract.

In the instant case these requirements were met. The decision of 31 March 2010, which was taken one month before the appointment expired, was notified ten days later and sufficiently clear grounds were given for it.

7. On the whole, it is not disputed that from 2003 to 2009 the complainant's attention was regularly drawn in different ways to her rather unsatisfactory, or even "unacceptable", performance and the possible consequences if it did not improve. Nor is it disputed that the Union often displayed a sympathetic attitude towards her, owing to her psychological frailness, and that it provided her with not inconsiderable assistance to help her overcome her professional and personal difficulties. The complainant's explanations and the evidence on file do not convince the Tribunal that, in refusing to extend her appointment on account of her consistently poor performance, the Union abused the discretion it must be allowed in this sphere.

8. However, it must be found that the decision not to renew the complainant's appointment was not preceded by an appraisal, conducted with due process, of the work done by her in the period immediately prior to her suspension. The submissions show that the parties had agreed that such an appraisal should be carried out at the beginning of September 2009 and that the "interim precautionary" decision of 17 November 2009 expressly stated that the contract extension in no way prejudged the complainant's performance. In addition, since the complainant had obtained the rating of 2 for the overall assessment in her periodical performance appraisal report of 27 May 2009, a fresh appraisal ought to have been conducted within six months, in accordance with the provisions of paragraph 3.5 of Service Order 08/09. It is inadmissible that the Union did not find the time to do so.

9. The complaint must therefore be allowed for this reason and the decision of 10 June 2010 must be set aside. Nevertheless, in view of all the circumstances of the case, there is no justification for ordering the complainant's reinstatement.

The Union must pay her compensation in the amount of 10,000 Swiss francs for the moral injury which she has suffered on the sole ground that her performance did not form the subject of an appraisal for 2009 carried out with due process.

It must likewise pay her costs in the sum of 2,500 francs.

10. The complainant's remaining claims will not, however, be allowed.

DECISION

For the above reasons,

1. The decision of 10 June 2010 is set aside.
2. The ITU shall pay the complainant compensation of 10,000 Swiss francs for the moral injury she has suffered.
3. It shall also pay her costs in the amount of 2,500 francs.
4. 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