Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session **Judgment No. 3155**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C. S. against the International Telecommunication Union (ITU) on 9 August 2010 and corrected on 17 September 2010, the Union's reply of 7 January 2011, the complainant's rejoinder of 11 April and the ITU's surrejoinder of 19 July 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. The career of the complainant, a Spanish national born in 1950, is outlined in Judgment 2881, delivered on 3 February 2010, concerning his first complaint. Suffice it to recall that the grade D.2 post of Chief of the Finance Department, to which he had been seconded on 30 June 2003 and for which he received a special post allowance, was abolished as part of the reorganisation of the General Secretariat of the ITU. By a decision of 20 June 2007, which he challenged in his first complaint, the complainant was assigned to the P.5 grade post

of Special Advisor on financial matters to the Chief of the Administration and Finance Department.

On 21 October 2009 the complainant sent the Secretary-General a memorandum in which, referring to an issue raised in that complaint, namely the violation of his right to have his services "effectively utilised", he reported that his situation – which he described as "deliberate, continual professional sidelining" – had deteriorated, because for the past 15 months he "[had] had nothing, absolutely nothing, to do". He added that he reserved the right, in due course, to claim adequate compensation and he asked for authorisation to take his case directly to the Tribunal. He was denied this authorisation on 1 December, as the Chief of the Administration and Finance Department asked him to follow the internal appeal procedure set out in Chapter XI of the Staff Regulations and Staff Rules by first submitting a request for review to the Secretary-General. On 22 December 2009 the complainant lodged an appeal with the Appeal Board, in which he complained of the "professional inactivity" which had been forced upon him since 30 June 2008. He alleged that he was the victim of constant harassment and that the Secretary-General had seriously and deliberately undermined his dignity and reputation. He therefore considered that he was entitled to claim adequate compensation. He stated that, once he had received a reply to his appeal, he would appreciate it if he were given the opportunity to file a rejoinder. In its reply of 2 February 2010 the ITU stated that it considered the appeal to be irreceivable because, before lodging it, the complainant should not only have initiated the procedure laid down in Service Order No. 05/05, entitled "ITU policy on harassment and abuse of authority", but should also have submitted a request for review to the Secretary-General. On the merits, it took the complainant to task for refusing to work with his direct supervisor. It also denied the complainant's request to file a rejoinder, on the grounds that the rules set forth in the above-mentioned Chapter XI did not provide for such a possibility.

In its report of 9 March 2010, the Appeal Board, noting that the pleas raised by the complainant in his appeal were identical to those

contained in his first complaint, drew attention to the fact that in Judgment 2881, after having examined the evidence produced by the ITU, the Tribunal had stated that "the complainant's duties were substantive" and that, since the allegation of being "professionally sidelined" therefore had to be dismissed, "there [wa]s no need to rule on its receivability". That being so, the Board dismissed the appeal "on the basis of the principle of *res judicata*, without there being any need to rule on its receivability". Nevertheless it recommended that the Secretary-General should ensure, inter alia, that the Chief of the Administration and Finance Department would "continue to entrust the appellant with duly documented duties having regard to his qualifications and professional experience". By a memorandum of 10 May 2010, which constitutes the impugned decision, the Secretary-General informed the complainant that he had decided to dismiss his appeal on the basis of the principle of *res judicata*. He added that he had nonetheless asked the Chief of the said department to ensure that the complainant's skills and experience were put to the best possible use until he retired. The Secretary-General regretted the complainant's rather uncooperative attitude and invited him to enter into a constructive dialogue with his direct supervisor. The complainant retired on 30 September 2010.

B. The complainant endeavours to show that his complaint is receivable. He considers that the reasons for dismissing his appeal which were given in the ITU's reply of 2 February 2010 are wrong. In his opinion, the Union's duty of assistance required it to treat his memorandum of 21 October 2009 as a complaint of harassment and to commence an investigation. Citing the Tribunal's case law, especially Judgment 2882, he adds that where a staff member submits an appeal to an internal appeal body without first requesting a review, as occurred in this case, the Administration must correct this mistake, failing which it may not be held against the staff member concerned.

On the merits, the complainant submits that the internal appeal procedure was flawed because the adversarial principle was breached. He alleges that, by not allowing him to file a rejoinder with the Appeal

Board, the Union prevented him from expressing his views on the objection to receivability predicated on the principle of *res judicata*. He argues that for an objection based on *res judicata* to be sustainable, the parties, the purpose of the suit and the cause of action must be the same as in the earlier case. In his view, the condition that the suit must have the same purpose was not met in this case because, in his first complaint, the claim for compensation for the injury caused by the ongoing violation of his right to have his services "effectively utilised" concerned the period from 22 June 2007 to 16 October 2008 – the date on which he had filed his rejoinder with the Tribunal – whereas in his internal appeal it related to the period from 16 October 2008 to 22 December 2009.

In addition, the complainant accuses the Union of causing him "very serious moral injury" by unlawfully depriving him of his duties, in breach of his "right to a proper administrative position and to respect for his dignity". He explains that, after the creation of his Special Advisor post, he was given some "trifling" tasks, but the appointment of the new Chief of the Administration and Finance Department in March 2008 led to his "isolation in complete idleness".

The complainant seeks the setting aside of the impugned decision and the payment of compensation equivalent to 12 months of his last salary, plus interest at a rate of 8 per cent per annum as from 22 December 2009 and the product of the capitalisation of that interest. Subsidiarily, he asks that the case be remitted to the ITU and that it be ordered to redress the injury which he suffered owing to the breach of the procedure laid down in Service Order No. 05/05 and to the unreasonable delay in settling the dispute. He also claims costs in the amount of 10,000 euros.

C. In its reply the ITU argues that the complaint is irreceivable on several grounds. First, it contends that the complainant has not exhausted the internal means of redress as he did not submit a request for review to the Secretary-General and thus infringed Staff Rule 11.1.1(2)a). In the Union's opinion, the complainant's reliance

on Judgment 2882 is misplaced, because he was told precisely what procedure to follow. Secondly, the ITU points out that the complainant did not lodge a formal complaint of harassment or abuse of authority pursuant to Service Order No. 05/05. In its view, the memorandum of 21 October 2009 could not be interpreted as a complaint of that nature, since it did not describe any act, behaviour, language or situation which might constitute harassment or abuse of authority, as required by the Service Order. Thirdly, the ITU submits that the complaint is irreceivable by virtue of the *res judicata* principle, because the Tribunal has already ruled on the allegation that the complainant was deprived of his duties in Judgment 2881.

On the merits, the defendant denies that the adversarial principle was breached, since Chapter XI of the Staff Regulations and Staff Rules makes no provision for the filing of further submissions.

The Union also states that during the meetings that were held between the complainant and his direct supervisor – the Chief of the Administration and Finance Department – the latter noted the complainant's "great reluctance, if not unwillingness" to take on the duties which he intended to give him. As the complainant was invited to perform a number of essential tasks but refused to cooperate, the only option was to refrain from entrusting him with substantive tasks.

D. In his rejoinder the complainant maintains that his complaint is receivable. On the merits, he emphasises that between 16 October 2008 and 22 December 2009 he was totally deprived of his duties. This situation gives rise to a strong presumption of retaliation and therefore abuse of authority, because it coincided with the filing of his first complaint on 5 June 2008.

E. In its surrejoinder the Union reiterates its position. In its view, the complainant's allegation that he was deprived of his duties because he had filed his first complaint is belied by the fact that, in that complaint, he asserted that he had been "professionally sidelined" since June 2007.

CONSIDERATIONS

1. Facts relevant to this dispute are to be found in Judgment 2881, delivered on 3 February 2010, concerning the complainant's first complaint.

2. The complainant impugns the decision of 10 May 2010 by which the Secretary-General of the ITU, acting on the basis of the Appeal Board's report of 9 March 2010, dismissed the appeal which the complainant had lodged by a memorandum of 22 December 2009 where he complained of being placed in a situation of "professional inactivity". The Secretary-General informed him, however, that he had expressly asked the Chief of the Administration and Finance Department to ensure that his skills and experience were put to the best possible use until he retired.

3. The Union raises several objections to the receivability of this second complaint. In particular, it submits that the complainant has not exhausted the internal means of redress afforded by Chapter XI of the Staff Regulations and Staff Rules, because he lodged an appeal with the Appeal Board without first requesting the Secretary-General to review a clearly identified administrative decision.

The Tribunal observes, however, that in his memorandum of 22 December 2009, the complainant considered that his "professional inactivity" constituted harassment. This memorandum, which could not, by definition, seek the setting aside of a precisely identified decision, ought to have been treated as a complaint of harassment lodged on the basis of Service Order No. 05/05 of 16 March 2005. Since this issue could not therefore be brought directly before the Appeal Board, it was up to the Union to initiate the procedure laid down in that Service Order.

4. The Tribunal will not, however, order the resumption of that procedure, because the complaint is in any case devoid of merit. In consideration 11 of Judgment 2881 the Tribunal already noted that the

Union had produced sufficient evidence to enable it to conclude that the complainant's duties were substantive and that the alleged wrongdoing on the part of the Secretary-General was not proven.

Although the complainant submits that his allegations in this case concern a period which partly postdates the period at issue in Judgment 2881, it must be found that he has not provided the Tribunal with evidence enabling it to reach a different conclusion.

5. The complainant also contends that the internal appeal procedure before the Appeal Board was flawed because the adversarial principle was ignored. However, as indicated above, the complainant's memorandum of 22 December 2009 should not have been addressed to the Appeal Board. Consequently, the plea that the procedure before that body was flawed is, in any event, of no avail.

6. It follows from the foregoing that the complaint must be dismissed, without there being any need to rule on the objections to receivability raised by the Union, other than that examined above.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Patrick Frydman
Catherine Comtet