Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session **Judgment No. 3156**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms A. B. and Mr C. S. (his third) against the International Telecommunication Union (ITU) on 4 December 2010 and corrected on 10 February 2011, the Union's reply of 3 June, the complainants' rejoinder of 8 September and the ITU's surrejoinder of 14 December 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. In 2009 the complainants were elected to the ITU Staff Council – the body which, according to Staff Regulation 8.1, is responsible for representing the interests of the staff before the Secretary-General and his representatives. On 15 September 2009 the Council – of which Mr S. was then Chairman – published a communiqué, known as a "Flash", informing the personnel that a grade G.5 staff member had just been suspended from duty with immediate effect two months after

having "allegedly omitted to bring to the Director's attention an email message he was expecting". The authors of the Flash criticised the attitude of that person's grade P.5 supervisor and of the Director's assistant and concluded with the words:

> "Finally, we trust that it is pure coincidence that this completely disproportionate administrative measure is directed at a G5 staff member who happens to be a staff representative?
>
> Is this the beginning of a new era in ITU? Are the G staff now completely responsible for all shortcomings of the hierarchy?
>
> We should not abandon our principles but support our colleagues by standing by them in troubled times. Who knows, you may be next!"

On 25 September the Chief of the Administration and Finance Department sent to Mr S. a memorandum in which he pointed out that the publication of the Flash had seriously violated "certain fundamental principles underlying the right to freedom of expression", such as the principle of confidentiality, because the staff member in question was the subject of an administrative investigation. He also stated that the Flash had raised "serious suspicions against other colleagues" and that, in the interests of the staff, "appropriate measures" had to be taken, with the agreement of the Secretary-General, "in order to ensure the protection of all staff members". He therefore informed the complainant that, until further notice, all communications from the Staff Council for general distribution (on paper or by e-mail) should be submitted to him prior to their sending or distribution. On 30 September Mr S. requested the Secretary-General to review the decision of 25 September and to withdraw it on the grounds that it imposed censorship and unduly infringed the right of association. He observed that the Flash of 15 September could not have raised "serious suspicions" against certain staff members, as no names had been mentioned. On 13 October 2009 the Chief of the above-mentioned department wrote to Mr S. to tell him that, following their discussion that day, the ban on sending or distributing communications to all staff members without prior authorisation was lifted with immediate effect.

On 5 May 2010 the Staff Council circulated by e-mail another Flash informing the personnel that the contract of the staff member who had been suspended had not been renewed. In an e-mail of 7 May 2010 addressed to all staff, the Chief of the Administration and Finance Department explained that, following the adoption of the measure of 25 September 2009, negotiations had taken place, as a result of which the "privilege" granted to the Staff Council had been reinstated in exchange for an undertaking by the Council to set up an editorial committee whose function would be "to screen controversial Flash messages". However, in spite of this he had received several complaints about the Flash of 5 May 2010, including at least two from members of the Staff Council. Consequently, he was launching an investigation to determine in particular whether the "promise" to establish the editorial committee had been kept. He concluded by saying that he had "no option but to again suspend the ability [of the Council] to send Emails to all staff until the investigation [wa]s complete". Most of the members of the Council, including the complainants, resigned at that point. By an e-mail of 21 May 2010, the Chief of the above-mentioned department informed the staff that he was going to reinstate the e-mail "privilege" in order that the remaining Staff Council members might communicate with ITU staff, and that "[t]here [wa]s clearly no point in continuing an investigation as most of the persons involved [we]re no longer members of [the] Staff Council".

In a letter of 18 June 2010 to the Secretary-General, 13 staff members, including the complainants, sought to explain the reasons for publishing the two disputed Flashes, namely that it was the Council's duty to inform the personnel that one of its members had been suspended from duty and would no longer be able to represent them and, subsequently, that that member's functions as a staff representative had ceased because her contract had not been renewed. In their opinion, the decisions adopted on 25 September 2009 and 7 May 2010 had breached the Council's freedom of communication and expression. The signatories of the letter alleged

that the Administration had engaged repeatedly in "unlawful actions" for which it might be held answerable to the members of the Staff Council as well as the staff whose right of representation had been breached, and they each claimed compensation in the amount of 30,000 Swiss francs. As they received no reply, they wrote to the Secretary-General again on 6 September to ask him to review his implied decision to reject their claim of 18 June. On the same day, they received a memorandum, dated 3 September 2010, in which the Secretary-General stated that any action against the decision of 25 September 2009 was time-barred and that, as that decision had been withdrawn, any claim for compensation relating to it was groundless. In his opinion, the decision of 7 May 2010 had not injured them in any way, because the suspension applied only to electronic means of mass communication and that measure had been lifted after 15 working days. In addition, the Secretary-General considered that the claim of 18 June 2010 was completely unfounded, because the Administration had acted "strictly within the limits of its authority by virtue of the Union's duty to protect both its staff members and the dignity of the international civil service". He criticised the Council members for not having checked the accuracy of the information contained in the disputed Flashes with the Administration. The complainants retired on 30 September 2010. On 18 October they and the 11 other signatories of the letter of 18 June asked the Secretary-General to consider their request for review of 6 September henceforth to be directed against the decision of 3 September. By letters dated 25 November 2010, the Secretary-General informed them that their request for review had been rejected. These are the impugned decisions.

B. Relying on Judgment 2892 the complainants explain that once they ceased to be staff members of the ITU on 30 September 2010 they no longer had access to the internal means of redress. They consider that their complaints are therefore receivable under Article VII, paragraph 1, of the Statute of the Tribunal.

On the merits, they contend that the Tribunal's case law regarding staff associations is also applicable to representative bodies such as the Staff Council for which provision is made in the Staff Regulations.

They hold that freedom of communication is part and parcel of freedom of speech, without which the Council could not exercise a genuine representative function and, consequently, that access to means of communication must be withdrawn only in cases of "patent abuse or if imperative reasons so require in order to safeguard higher interests of the organisation". Since, on the one hand, neither of the disputed Flashes contained an accusation which amounted to an abuse of a right, or malicious, defamatory, rude or injurious statements and, on the other hand, the Administration did not plead any exceptional circumstances, the complainants consider that the decisions adopted on 25 September 2009 and on 7 May 2010 breached the two above-mentioned freedoms.

Moreover, the complainants denounce the "Administration's unacceptable behaviour which was tantamount to blackmailing the Staff Council […] in order to ensure that what it did and said remained not within the limits established by the law, but within the infinitely narrower ones set at the Administration's discretion". In their opinion, as the Administration could not bear the Council's criticism of its decisions, it tried to neutralise this body, which it regarded as too independent, by reducing it to silence for fear of retaliation or conflict. The complainants contend that the Staff Council has no obligation to check the accuracy of the information in its possession with the Administration and they deny that the information published in the above-mentioned Flashes was incorrect. Similarly, they deny that the Flashes were an affront to the dignity of the international civil service or that the principle of confidentiality was breached. They argue that the staff member who had been suspended from duty had not only the right but also a duty to inform the Council of the decision taken with regard to her, in order to explain her absence from its meetings.

Lastly, the complainants take the Administration to task for interfering in the affairs of the Staff Council because of its animosity towards some of its members, especially Mr S. (see Judgment 3155, also delivered this day), and its determination to harass some of them. They also tax it with thinking that it can defend

staff members' interests in place of the Council and with not respecting the rights of the defence. They submit that, contrary to the ITU's assertions, the members of the Council had not promised to set up an editorial committee.

The complainants seek the setting aside of the impugned decisions, the payment to each of them of compensation in the amount of 30,000 Swiss francs, plus interest at an annual rate of 8 per cent as from 18 June 2010 and the product of the capitalisation of that interest, as well as costs in the amount of 3,000 euros.

C. In its reply the Union submits that the complaints are irreceivable because internal means of redress have not been exhausted. It considers that since the complainants, who were no longer staff members after 30 September 2010, chose to initiate an internal appeal procedure by sending a request for review to the Secretary-General, they ought to have completed that procedure by appealing against the decision forwarded to each of them on 25 November. It says that it regrets that the Appeal Board did not therefore have the opportunity to issue an opinion on the claim for compensation of 18 June 2010. It adds that any action against the decision of 25 September 2009 and, consequently, any claim for compensation for alleged injuries caused by it are not only time-barred but also groundless, because that decision was withdrawn. Lastly, it points out that if the measure of 7 May 2010, which suspended access to electronic means of mass communication, did cause injury to the complainants, it had been redressed even before the submission of the claim of 18 June, because that measure was lifted on 28 May 2010.

Subsidiarily, the Union argues that the complaints are devoid of merit, because the decisions of 25 September 2009 and 7 May 2010 did not constitute retaliation or blackmail against members of the Staff Council. It appends to its reply several Flashes published by the Council in 2009, some of which contain what it regards as sharp criticism of the Administration, in order to demonstrate that it takes no action whatsoever provided that the Council does not abuse its

freedom of speech. The ITU considers that, in the instant case, the Council abused this freedom by publishing information in breach of the principle of confidentiality which applies during administrative investigations in order to safeguard the parties' reputation and dignity. In this connection, it maintains that the underlying reasons for the publication of the Flash of 15 September 2009 were wrong, because the grade G.5 staff member's suspension from duty had no impact on her activities as staff representative; since she retained her right of access to ITU premises, she could attend Staff Council meetings.

The Union also contends that it had to fulfil its duty to protect the dignity of the staff members the Staff Council had unjustly targeted. It reproaches the Council for having failed in its duty to defend the interests of all staff members, because its antagonistic, even accusing, attitude caused injury to the above-mentioned staff member's supervisors and colleagues in that the information about them which it published was biased and malicious. The ITU adds that the Council showed no concern for the accuracy of this information and emphasises that its invitation to conduct screening is not dictated by a desire for censorship but is aimed at protecting the personnel. It draws attention to the fact that the e-mail circulating the Flash of 5 May 2010 was wrongly entitled "Termination of an ITU staff member's appointment" and it produces an e-mail of the same date from a member of the Council – whose name has been removed – in which this person complained of the defamatory nature of this Flash. The Union states, on the basis of an e-mail from the current Chairman of the Council, that the promise to set up an editorial committee to ensure that excesses such as the publication of the Flash of 15 September 2009 would not reoccur, has not been kept.

In addition, the Union points out that, since none of the Council members who resigned ever lodged a complaint of harassment pursuant to Service Order No. 05/05, any allegation on that subject must be declared unfounded. It submits that the complainants have not proved the existence of any serious moral injury which might entitle them to compensation.

D. In their rejoinder the complainants draw attention to the fact that, after receiving notification of the decisions of 25 November 2010, eight of the persons who had claimed compensation on 18 June referred the matter to the Appeal Board on 30 November 2010. The Board did therefore consider this claim and it submitted its report to the Secretary-General on 7 March 2011. They add that their complaints, which are aimed solely at obtaining compensation and which are not disguised applications to have the decisions of 25 September 2009 and 7 May 2010 cancelled, were filed within the time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal.

On the merits, the complainants submit that the Administration seriously hampered the independent functioning of the Staff Council. They say that, since the Council had set up an ad hoc group on communication in September 2009, there was no question of its Chairman – Mr S. – making any promise to set up an editorial committee to play a similar role. They point out that the records of the Council's decisions for October and November 2009 made no mention of any discussion concerning the setting up of an editorial committee, but that the record concerning the meeting of 11 May 2010 shows that the Flash published a few days earlier had indeed been approved by the above-mentioned group.

The complainants ask the Tribunal "firmly to oppose the submission of anonymous statements to it without its prior authorisation" and therefore to disregard an e-mail of 5 May 2010 sent by a member of the Staff Council.

E. In its surrejoinder the ITU maintains its position and requests the joinder of the two complaints with those filed with the Tribunal on 15 July 2011 by the eight staff members who referred the matter to the Appeal Board on 30 November 2010. On the merits, it says that the publication of the two disputed Flashes showed that the mechanism of the ad hoc group on communication was either not used, or was used ineffectively. As for the anonymous testimony before the Tribunal, it

considers that what matters is its content and not the identity of its author.

CONSIDERATIONS

1. At the material time both complainants were members of the Staff Council of the ITU and one of them was the Chairman of that body.

2. On 15 September 2009 the Staff Council circulated to all staff members of the ITU a communiqué, Flash No. 9-09, in which it announced and criticised the Administration's decision of 4 September to suspend a grade G.5 staff member.

3. By a memorandum of 25 September 2009, the Chief of the Administration and Finance Department protested about this initiative to the Chairman of the Staff Council on the grounds that, in his view, this communiqué breached the requisite confidentiality of the administrative investigation which had been opened in order to decide what action was to be taken with regard to the staff member in question and that it also targeted other ITU staff members in an unacceptable manner. He ended this memorandum by saying that it was "most regrettable, but necessary in the interests of the staff as a whole, that appropriate measures […] be taken, with the agreement of the Secretary-General, in order to ensure the protection of all staff members" and that "[t]herefore, […] until further notice, it ha[d] been decided that all communications from the Staff Council for general distribution to all staff members (on paper or by e-mail) sh[ould] be submitted to the Chief of the Administration and Finance Department prior to their sending or distribution".

4. This decision, which had formed the subject of a request for review on 30 September, was withdrawn on 13 October 2009 after a meeting where, according to the ITU, the Staff Council had undertaken to set up an internal mechanism to screen the content of communications addressed to all the staff.

5. However, on 5 May 2010 the Staff Council circulated an e-mail containing Flash No. 3-10, where it again referred to the case of the staff member whose situation had been mentioned in the Flash of 15 September 2009 and announced that her service had been terminated because her contract had not been renewed.

6. As the Chief of the Administration and Finance Department considered that this initiative constituted further abuse by the Council of its freedom of expression, he informed the ITU personnel by an e-mail of 7 May 2010 that he had decided "to again suspend [its] ability to send Emails to all staff". He explained that this measure would end on completion of an investigation to determine inter alia whether the Council had kept its "promise" to set up a mechanism for screening messages intended for general distribution. This new decision was thus tantamount to the provisional restoration of the prior authorisation rule introduced by the decision of 25 September 2009, except that it applied only to electronic communications.

7. This decision led most of the members of the Staff Council, including the two complainants, to resign in protest. In a new e-mail of 21 May 2010 the Chief of the Administration and Finance Department informed the staff that, in light of those circumstances, there was no point in continuing the investigation and that he had decided to reinstate the e-mail "privilege" of the remaining Staff Council members to enable them to communicate with ITU staff, until new elections were held.

8. On 18 June 2010 the complainants, along with other staff members of the Union, submitted a claim for compensation for the injuries which they considered they had suffered on account of the violations of the right of staff representation resulting from the above-mentioned decisions of 25 September 2009 and 7 May 2010. The Secretary-General rejected this claim in memorandums of 3 September 2010. This position was upheld in decisions of 25 November after a review procedure had been conducted pursuant to Staff Rule 11.1.1.

9. The complainants, who left the organisation on 30 September 2010, impugn the latter decisions directly before the Tribunal. Indeed, as the Tribunal found in Judgment 2892, under the Staff Regulations and Staff Rules of the ITU, only serving staff members have access to the internal appeal procedures, and it was therefore no longer possible for the complainants to refer their case to the Appeal Board (see also in this connection Judgments 2840, under 21, and 3074, under 13).

10. Both complaints seek the same redress and are based on identical submissions. They shall therefore be joined to form the subject of a single ruling.

11. In its surrejoinder the ITU requested that the present complaints should also be joined with those of eight other staff members who are likewise claiming compensation for the alleged injury caused by the decisions of 25 September 2009 and 7 May 2010. The Tribunal notes, however, that these eight complaints are directed against decisions refusing to grant compensation which were adopted after the matter had been referred to the Appeal Board, and that they contain submissions specifically pertaining to the conditions in which those internal appeals were examined. Thus, not only are they not based on exactly the same facts, but they raise questions of law that are partly different. Joinder is not therefore justified (see, in particular, Judgments 1541, under 3, and 3064, under 6).

12. As the Tribunal has already had numerous occasions to state in its case law, bodies of any kind which are responsible for defending the interests of international organisations' staff must enjoy broad freedom of speech, subject to the reservations set out below, and in particular they have the right to take to task the administration of the organisation whose employees they represent. This case law, which was originally established with regard to staff unions or staff associations and their officials (see Judgments 496, under 37, 911, under 8, or 1061, under 3), also applies to bodies like the Staff Council of the ITU which are responsible for representing the interests

of the staff before the administration of the organisation (see Judgment 2227, under 7).

13. In addition, the freedom of speech that these bodies enjoy can be respected only if they also have the freedom of communication which is part and parcel thereof. For this reason, while the executive head of an organisation certainly has wide discretion to determine and, if appropriate, alter the scope of the means of communication made available to these bodies, decisions on the matter must not have the effect of curtailing, through overly restrictive measures, the rights and freedoms which they are allowed in order to perform their function (see, with regard to staff unions or associations, Judgments 496 and 911, or Judgment 1547, under 8, and, with regard to a staff committee, Judgment 2228, under 11).

14. Hence, the ITU is wrong in referring to the Staff Council's ability to circulate e-mails to all staff members as a "privilege", as it did in the above-mentioned decision of 21 May 2010 and in its submissions to the Tribunal. A body of this kind has a legitimate right to avail itself of this facility, unless there is good cause for restricting it. Nor does the ITU have any grounds to accuse the Council, as the Secretary-General did in his memorandums of 3 September 2010, of "failing in its duty to provide all members of staff with objective, reliable and established information". Indeed, the Union should under no circumstances seek to review the accuracy of information disseminated by the Council.

15. The freedom of speech and the freedom of communication of the bodies in question are not, however, unlimited. Not only is an organisation entitled to object to misuse of the means of distribution made available to its staff committee (see the aforementioned Judgment 2228, under 11), but it also follows from the case law cited above in consideration 12 that the right to freedom of speech does not encompass action that impairs the dignity of the international civil service, or gross abuse of this right and, in particular, damage to the

individual interests of certain persons through allusions that are malicious, defamatory or which concern their private lives.

16. Since organisations must prevent such abuse of the right of free speech, the Tribunal's case law does not absolutely prohibit the putting in place of a mechanism for the prior authorisation of messages circulated by bodies representing the staff. An organisation acts unlawfully only if the conditions for implementing this mechanism in practice lead to a breach of that right, for example by an unjustified refusal to circulate a particular message.

17. This was the approach adopted in the above-mentioned Judgment 2227, in a case which bears a close similarity to the present one, where an organisation had decided to make the photocopying and distribution of Staff Committee communications subject to prior authorisation after the distribution of what it regarded as a tendentious notice. The Tribunal found that it could not set aside a general decision of that kind on the grounds that it did not afford the requisite safeguards to ensure freedom of speech because those safeguards are in any case predicated on the general principles of international civil service law and those established by the Tribunal's own case law and by that of other international administrative tribunals. It therefore considered that only subsequent decisions refusing to authorise a particular communication that were based on that general decision could potentially be set aside if they did not fall within the strictly defined cases where it is lawful to restrict freedom of speech for one of the reasons mentioned above in consideration 15.

18. The Tribunal will apply the same case law here. It follows that the decisions of 25 September 2009 and 7 May 2010 cannot be deemed unlawful in themselves. It must also be noted that, in this case, no other decision may be challenged. Indeed, the Flashes of 15 September 2009 and 5 May 2010, the publication of which gave rise to the measures in question, were circulated without hindrance and the written submissions make no mention of any actual refusal to

distribute other Staff Council documents during the very short period when those measures were in force.

19. At most, these measures might have been regarded as unlawful if they had been issued in a purely arbitrary manner or constituted an abuse of authority.

20. However, while there is no formal proof supporting the ITU's contention that the Flash of 15 September 2009 constituted a breach of the requisite confidentiality of an investigation that was under way, the other reason for the decision of 25 September 2009, i.e. the need to protect the individual interests of ITU staff members, was indubitably well founded. Indeed, that Flash targeted the P.5 supervisor of the staff member whose suspension was mentioned, and also the Director's assistant, and the Staff Council appeared to place the primary responsibility for the staff member's blunder on these individuals. While those allegations were not really defamatory, the fact that they were brought to the attention of all of the staff without the persons concerned being able to refute them gave them a malicious character. The only argument put forward in the request for review of 30 September 2009 in an attempt to deny that there had been abuse of the freedom of speech, namely that the persons concerned had not been named in the Flash, is nonsensical, since they could easily be identified simply because their functions were mentioned. This unacceptable targeting sufficed in itself to justify the measure adopted on 25 September 2009.

21. In addition, the Flash of 5 May 2010 is indirectly open to the same criticism in that, by referring to the Flash of 15 September 2009, it led the reader to refer back to it and could even be interpreted as indicating that the officials in question were somehow responsible for the non-renewal of the contract of the staff member who had had to leave the ITU. This ambiguity was all the more unfortunate because this non-renewal was wrongly termed a "termination" in the subject

line of the covering e-mail. This further abuse of the freedom of speech therefore justified the decision of 7 May 2010.

22. In these circumstances, the Tribunal will not accept the complainants' contention that the impugned measures merely reflected the "Administration's bias" and were in fact motivated by "animosity" towards the Staff Council and by a wish "to thwart and harass some [of its] members".

23. As the decisions of 25 September 2009 and 7 May 2010 were therefore not unlawful, the ITU did nothing wrong in issuing them and, contrary to the complainants' submissions, the fact that these decisions were subsequently withdrawn by those of 13 October 2009 and 21 May 2010 respectively, does not in any way prove that there was any wrongdoing. The Union was therefore right to refuse the complainants' claim for compensation for the injury which they considered they had suffered on account of the measures in question.

24. It follows from the foregoing that the complaints must be dismissed, without there being any need for the Tribunal to rule on the complainants' request for the removal from the file of one document whose contents are of no relevance to the outcome of this dispute, or to rule on the various objections to receivability raised by the defendant.

DECISION

For the above reasons,

The complaints are 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