Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 2)

v.

ITU

122nd Session **Judgment No. 3671**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms C. D. against the International Telecommunication Union (ITU) on 12 March 2014 and corrected on 22 April, the ITU's reply of 11 September, the complainant's rejoinder of 22 December 2014 and the ITU's surrejoinder of 8 April 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges two service orders.

On 30 January 2013 the ITU published Service Orders Nos. 13/01 and 13/03. The first of these service orders informed the staff of a number of amendments to the Staff Rules. In particular, the new Staff Rule 8.3.1(a), concerning associations and clubs of staff members, provided that "any official contacts and discussions concerning questions [relating to staff welfare and administration and policy on salaries and related allowances] shall be effected solely by the Staff Council, which shall be the sole representative body recognized for that purpose". The second service

order was entitled "Criteria and conditions for the recognition of staff associations and clubs, granting of resources and facilities to such associations and clubs".

On 13 March 2013 the complainant, acting in her capacity as a "staff member, elected member of a staff association and member of the Staff Council", submitted a request for review to the Secretary-General concerning these two service orders which were, in her view, "unlawful and unsatisfactory". Since the Secretary-General rejected this request on 17 April on the grounds that insufficient reasons had been given for it, the complainant referred the matter to the Appeal Board on 15 July 2013. She submitted that Service Orders Nos. 13/01 and 13/03 violated freedom of association: the former because it stipulated that henceforth the Staff Union – of which she was the President – could make representations to the ITU authorities only through the Staff Council, and the latter because it made the recognition of staff associations and the granting of resources and facilities to them subject to compliance with certain conditions. She requested their withdrawal and she sought redress for moral injury, inter alia.

In its report of 15 October 2013 the Appeal Board considered that neither service order violated freedom of association and therefore recommended the dismissal of the appeal. The complainant was informed by a memorandum of 12 December 2013 that the Secretary-General considered her appeal to be irreceivable for the reasons given by the ITU during the internal appeal proceedings. The Secretary-General was of the opinion that, insofar as it was directed against Service Order No. 13/01, the appeal was out of time, since the complainant was challenging a "long-established principle" which the service order merely confirmed, according to which the Staff Council was the Administration's sole official negotiating partner when discussing questions related to staff welfare and administration or policy on salaries and related allowances; insofar as it was directed against Service Order No. 13/03, he considered that the appeal was irreceivable because the complainant had not shown that she had a cause of action to challenge this general decision. However, without prejudice to his position on receivability, the Secretary-General

had decided to endorse the Appeal Board's recommendation and hence to dismiss the appeal on the merits. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as Service Orders Nos. 13/01 and 13/03, to order the ITU to remedy the moral injury that she has suffered and to award her 7,000 euros in costs.

The ITU reiterates the arguments it entered in the internal appeal proceedings and submits that the complaint is irreceivable. Subsidiarily, it argues that the complaint should be dismissed as devoid of merit.

CONSIDERATIONS

1. The ITU submits that the complaint is irreceivable. First, it contends that the complainant's challenge to Service Order No. 13/01 is time-barred since that text merely reaffirms a "long-standing principle embodied in the Staff Regulations and Staff Rules" of the ITU. Secondly, it contends that the complainant does not have a present cause of action enabling her to challenge Service Order No. 13/03. The complainant, on the other hand, submits that, as a member of the Staff Council, both of these service orders adversely affect her owing to the amendments which they introduce. She therefore considers that her complaint is receivable.

2. The ITU amended the Staff Rules through Service Order No. 13/01. As indicated by its title, "Amendments to the Staff Rules", this service order informed the staff of the adoption of new provisions which had been incorporated into the Staff Rules. The ITU can therefore hardly contend that they merely reaffirmed rules which were already in force. Indeed it is hard to see why the ITU should have felt the need to introduce such amendments if they contained no new provisions. Moreover, the Tribunal notes that the service order expressly stated that these new provisions would enter into force on the date of their publication, thus confirming that they amended the existing law. Consequently, the ITU's plea based on an alleged time bar is unfounded. The complaint is therefore receivable as far as Service Order No. 13/01 is concerned.

3. With regard to Service Order No. 13/03, the Tribunal's case law establishes that insofar as an official alleges a failure to respect the prerogatives of a body of which she or he was a member, she or he has a cause of action which gives her or him standing to bring a complaint (see, for example, Judgment 3546, under 6). In the instant case, the complainant is a member of the Staff Council and she submits that the latter was not consulted before Service Order No. 13/03 was published. In accordance with the case law, the complainant therefore has a cause of action before the Tribunal, even though this service order constitutes a regulatory measure which may ordinarily be challenged only indirectly in the context of an appeal lodged against an individual decision based on it. The complaint is therefore also receivable as far as Service Order No. 13/03 is concerned.

4. In support of the complaint the complainant submits that the Staff Council was not consulted on the service orders before they were published. She contends that Staff Rule 8.1.1(c), in the version applicable at that time, provided that "[e]xcept in cases of emergency, general service orders concerning questions [relating to staff welfare and administration and policy on salaries and related allowances] shall be transmitted in advance to the Staff Council for consideration and comment before taking effect".

The ITU argues that this submission should be dismissed, because two members of the Staff Council participated in the working group set up to draft these services orders and thus the Council was able to make any comments it thought fit.

The Tribunal recalls, however, that in keeping with the principle *tu patere legem quam ipse fecisti*, when a text provides for the consultation of a body representing the staff before the adoption of a decision, the competent authority must follow that procedure, otherwise its decision will be unlawful (see, for example, Judgment 1488, under 10). It is ascertained that the ITU did not consult the Staff Council on the matter of the disputed service orders. The fact relied upon by the ITU, that two members of the Council took part in the above-mentioned working group, is not a valid substitute for the consultation of the Council. The complainant

is therefore right in contending that Service Orders Nos. 13/01 and 13/03 were adopted by an unlawful procedure, and they must be set aside for this reason, without there being any need to examine the complainant's remaining pleas. It follows from the foregoing that the Secretary-General's decision of 12 December 2013 must also be set aside.

5. Although the complainant's claims for the setting aside of these texts have been allowed, as she is acting in her capacity as a staff representative, she is not entitled to moral damages (see Judgments 3258, under 5, and 3522, under 6). She is, however, entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The impugned decision and Service Orders Nos. 13/01 and 13/03 are set aside.
2. The ITU shall pay the complainant costs in the amount of 3,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ