Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. (No. 2)

v.

ITU

123rd Session **Judgment No. 3738**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. S. against the International Telecommunication Union (ITU) on 23 June 2014, the ITU's reply of 16 December 2014, the complainant's rejoinder of 14 January 2015 and the ITU's surrejoinder of 18 March 2015;

Considering the documents produced by the ITU at the Tribunal's request;

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:

Details of the complainant's career at the ITU are to be found in Judgment 3737 also delivered in public this day. Suffice it to recall that the complainant, who entered the ITU's employ on 29 February 2012 on a one-year fixed-term contract, was placed on sick leave on 19 December 2012, initially until 31 January 2013 and then until 28 February 2013.

By a letter of 28 January 2013 – which was sent to the complainant by internal mail and also e-mailed to his work e-mail address – the Chief of the Human Resources Management Department (HRMD) informed the complainant that, as the Director of the Telecommunication Development Bureau had already told him, his contract would not be

renewed when it expired on 28 February 2013 because his post was to be abolished.

On 18 February 2014 the complainant sent a letter to the Secretary-General entitled "Retroactive payment of indemnity and compensation claim". He asserted that he had not learned of the decision not to renew his contract until 20 February 2013, and that he was entitled to the termination indemnity provided for under Staff Regulation 9.6, together with interest. He added that the fact that he had not received that indemnity had caused him moral injury, for which he sought redress. On 24 March 2014 the Chief of HRMD replied on behalf of the Secretary-General, saying that the complainant's assertion that he had not learned of the decision not to renew his appointment until 20 February 2013 was patently untrue, because the decision had been sent to his work e-mail address from which he had "sent and/or read one/several e-mail(s)" on 1 February 2013, as confirmed by the Information Services Department. She concluded that the complainant had been in a position to become aware of the said decision on that day at the latest and accordingly, any claim in connection with that decision was clearly time-barred and hence irreceivable on that ground. That is the impugned decision.

The complainant seeks the setting aside of that decision, compensation for material and moral injury and an award of 4,000 euros in costs.

The ITU, which was authorised by the President of the Tribunal to confine its submissions to the issue of receivability, contends that the complaint is irreceivable since it is a "veiled appeal" against the decision not to renew the complainant's contract and the claim made on 18 February 2014 was time-barred.

In his rejoinder, recalling the Tribunal's case law according to which it is the claims alone which determine the scope of a dispute, the complainant points out that his complaint does not include any claim against the decision not to renew his contract. He therefore concludes that the ITU's objection to his complaint's receivability because it is a "veiled appeal" against the said decision is groundless.

He further argues that the 12-month time limit stipulated in Staff Rule 3.16.1 for filing a claim for retroactive payment did not begin to run until he became aware of his entitlement to a termination indemnity.

In its surrejoinder, the ITU maintains that the complaint is irreceivable.

CONSIDERATIONS

1. The complainant impugns the decision of 24 March 2014 by which the Chief of HRMD dismissed, on behalf of the Secretary-General, his claim made in a letter of 18 February 2013 for retroactive payment of the termination indemnity provided for under Staff Regulation 9.6 and compensation for the moral injury resulting from its non-payment.

2. That decision, which does not address the substance of the complainant's claim, is based solely on the premise that the claim is time-barred because it was filed more than one year after the complainant was notified of the decision not to renew his fixed-term contract in a letter dated 28 January 2013. Although it does not explicitly say so, the impugned decision thus plainly intended to apply Staff Rule 3.16.1, which states: "A staff member who has not been receiving an allowance, grant or other payment to which he is entitled shall not receive retroactively such allowance, grant or payment unless he has made written claim within one year following the date on which he would have been entitled to the initial payment."

The complainant disputes the dismissal of his claim on the basis that it was time-barred.

3. On 18 November 2014 the defendant was informed by an e-mail from the Registrar of the Tribunal that "[t]he President of the Tribunal ha[d] acceded to the request" made by the ITU in a letter of 1 October that it "limit its reply [...] to the sole issue of receivability [of the complaint]". Although that e-mail, and likewise the e-mail of 17 December 2014 by which the Registrar notified the complainant's counsel of that decision, echoed the wording used in the ITU's letter for the sake of convenience, the "issue of receivability" must be understood here to extend to the receivability of the complainant's claim submitted to the Secretary-General on 18 February 2014, even though the issue arises in connection with

the lawfulness of the decision to reject the claim as time-barred and hence relates to the merits of the complaint rather than its receivability.

The Tribunal observes that, notwithstanding its ambiguity, the wording employed in these e-mails to the parties does not prevent the Tribunal from ruling in this judgment on the dispute as to whether the claim was time-barred, given that this issue was extensively addressed by the complainant himself in his complaint and that, although the complainant does not respond to the ITU's arguments on this point in his rejoinder, he has nevertheless given adequate expression to his opinion on the matter in view of the decision reached by the Tribunal below.

The Tribunal further notes that although the ITU was authorised to confine its submissions to the receivability of the complaint and of the claim made on 18 February 2014, it is nevertheless entitled to draw all the legal consequences from the conclusions to which the Tribunal's examination of these issues will lead, including those concerning the impugned decision.

4. The ITU contends that the complaint is irreceivable on the basis that it is a "veiled appeal" by the complainant against the decision of 28 January 2013 not to renew his contract. In the defendant's view, the complaint should therefore be dismissed, either on the grounds that the complainant has failed to exhaust internal means of redress in accordance with Article VII, paragraph 1, of the Statute of the Tribunal, if the complainant is considered to have access to those means of redress, or on the grounds that it is time-barred in view of the 90-day time limit provided for under Article VII, paragraph 2, if the complainant was entitled to challenge the decision directly before the Tribunal.

However, although the complainant does criticise the decision not to renew his contract in the context of arguments seeking to establish his entitlement to a termination indemnity, it is quite clear that he makes no claim against it. Indeed, the complainant emphasises in his rejoinder that his complaint is not to be construed in that manner.

The author of a complaint is of course free to decide what claims she or he wishes to file with the Tribunal. It is those claims – unless they are amended or counterclaims are filed – that determine the scope

of the dispute. Where, as is the case here, they are clearly identified, their terms bind not only the other party but also the Tribunal (see, for example, Judgment 630, under 2 and 3).

Thus, the ITU's alternative objections to the receivability of a claim that the complainant does not make can only be dismissed as misdirected.

5. It should also be noted that, insofar as the version of the ITU's Staff Regulations and Staff Rules that was in force at the material time did not provide former staff members with internal means of redress, the complainant, who was no longer in the ITU's employ at the time when the decision of 24 March 2014 was taken, is entitled to challenge that decision directly before the Tribunal (see Judgments 2892, under 6 to 8, 3139, under 3, or 3178, under 5).

6. Regarding the receivability of the claim submitted by the complainant to the Secretary-General on 18 February 2014, the parties' dispute concerning compliance with the 12-month time limit stipulated in Staff Rule 3.16.1 for claiming the retroactive payment of an indemnity turns on identifying the point at which that period started to run.

7. A first point to be considered here is whether the time limit was triggered, as the ITU argues, by the notification to the complainant of the decision of 28 January 2013 not to renew his contract, or whether, as the complainant submits, the time limit did not start until he was in a position to know that he was entitled to a termination indemnity, which only became clear to him in the light of information received subsequently. However, this issue, which the Tribunal cannot decide in the present judgment since it indirectly concerns the merits of the dispute, need not be determined in view of what is said below, even assuming that the ITU's argument on this first issue is tenable.

8. Indeed, the complainant, who was on sick leave at the material time, submits that in any case he did not become aware of the letter of 28 January 2013 until he visited his office, to which the letter had been delivered by internal mail, on 20 February 2013, i.e. less than 12 months before he submitted his claim of 18 February 2014.

Reiterating the reasoning stated in the impugned decision, the ITU disputes this version of events, asserting that the letter was simultaneously sent to the complainant's work e-mail address on 28 January 2013 and that he plainly became aware of it on 1 February 2013 at the latest since it is apparent from information in the ITU's possession that he dealt with other work-related e-mails on that day.

However, according to firm precedent, it is for the sender of a document to prove its date of receipt by the recipient in the event of a dispute on this matter (see, for example, Judgments 456, under 7, 723, under 4, 2473, under 4, 2494, under 4, 3034, under 13, and 3253, under 7).

In this case, although the activity log of the complainant's work e-mail address for January and February 2013, which was placed on the file by the ITU, shows that the above-mentioned e-mail was indeed sent on 28 January 2013, the log does not indicate on what date the complainant became aware of its content. The Tribunal also observes that the reference to the e-mail in that log is actually accompanied by an indication that the e-mail was not opened by its recipient.

Moreover, having been asked specifically, in the context of a request for further submissions, to produce any evidence of the date on which the e-mail was opened, the ITU explicitly acknowledged in a letter dated 11 October 2016 that there was "no document that prove this".

In these circumstances, the Tribunal finds that the burden of proving when the complainant became aware of the e-mail's content, which, as recalled above, lies with the ITU, has not been discharged.

9. The Tribunal notes in this connection that neither the ITU's argument, put with some insistence, that the complainant's version of events is "improbable" in light of the relations between the parties at the time when the e-mail was sent, nor the fact, also cited by the defendant, that the ITU's e-mail system possesses technical functionalities allowing users to conceal that they have read an e-mail, is apt to satisfy the requirement of proof.

It should also be recalled that, as the Tribunal has consistently held, bad faith cannot be presumed and hence will not be established unless evidence thereof is provided (see, for example, Judgments 2282, under 6, 2293, under 11, 2800, under 21, or 3407, under 15).

10. The ITU's argument concerning the date on which the complainant learned of the decision of 28 January 2013 will therefore be dismissed, without entering into the question of whether in this case the ITU could validly notify the complainant of such a decision by an e-mail sent to his work e-mail address while he was on sick leave.

11. It follows from the above that the impugned decision of 24 March 2014 wrongly rejected the claim for retrospective payment of a termination indemnity and compensation for moral injury submitted by the complainant on 18 February 2014 on the grounds that it was time-barred, whereas the Secretary-General should have considered its substance. Accordingly, that decision must be set aside and the case remitted to the ITU for a new decision on the merits of the claim to be taken within 30 days from the public delivery of this judgment.

12. The impugned decision has of itself caused moral injury to the complainant, distinct from the injury described in the letter of 18 February 2014, in that it violated his right to have his claim properly examined, and delayed the final settlement of this case, whatever its eventual outcome may be. In the circumstances, the Tribunal considers that this injury will be fairly redressed by an award of compensation in the amount of 3,000 euros.

13. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 24 March 2014 is set aside.
2. The case is remitted to the ITU for a new decision on the merits of the claim for a termination indemnity and compensation for moral injury submitted by the complainant on 18 February 2014 within 30 days from the public delivery of this judgment.
3. The ITU shall pay the complainant 3,000 euros in moral damages.
4. It shall also pay him 2,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 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 8 February 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ