Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P. (No. 20)

v.

ITU

137th Session **Judgment No. 4780**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twentieth complaint filed by Ms M. J. P. against the International Telecommunication Union (ITU) on 31 March 2020;

Considering the emails of 12 June 2020 from the Registrar of the Tribunal informing the parties that, at ITU's request, the President of the Tribunal had granted a stay of proceedings by virtue of Article 10, paragraph 3, of the Tribunal's Rules, and the Registrar's emails of 15 October and 23 November 2020 respectively informing the parties of the resumption of the proceedings;

Considering ITU's reply of 18 January 2021, the complainant's rejoinder of 23 February 2021 and ITU's surrejoinder of 31 May 2021;

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 contests the monthly amount deducted from her pension as contribution to her after-service health insurance in the period from May 2001 to December 2019.

On 6 February 2020, the complainant wrote to the Secretary-General stating that the amount of her monthly contribution for after-service health insurance had been wrongly calculated from May 2001 to December 2019 and that, rather than paying 247.21 Swiss francs in monthly contributions during that period, she should have paid 176.79 francs. She asked to be reimbursed the difference, with interest, as from 2001.

By a letter of 12 February 2020, the Chief, Human Resources Management Department (HRMD), replied that the difference between the amounts deducted from her pension benefit for her affiliation to the ITU Health Insurance up to December 2019 and as from January 2020 was not due to a calculation error during the former period, but due to the transition, as from 1 January 2020, from the Collective Medical Insurance Plan (CMIP) to the United Nations Staff Mutual Insurance Society against Sickness and Accident (UNSMIS) and the difference in the applicable contribution rate. Under the UNSMIS Internal Rules, the applicable contribution rate was 3.4 per cent, whereas under the CMIP Regulations it was 3.91 per cent. It was the different contribution rate applied by CMIP and UNSMIS, respectively, which explained why the reduction in the amount deducted from the complainant's pension benefit applied only as from January 2020.

On 3 March 2020, the complainant filed an appeal with the Appeal Board against the Administration's 12 February 2020 decision. On 9 March 2020, the Chair of the Appeal Board advised her that she needed to address to the Secretary-General a request for reconsideration of the contested decision prior to filing her appeal, as per Staff Rule 11.1.2, and he provided her with a copy of the ITU Staff Regulations and Staff Rules.

On 31 March 2020, the complainant filed the present complaint with the Tribunal impugning the Administration's decision of 12 February 2020. Having been informed of the filing of this complaint, ITU requested a stay of proceedings before the Tribunal so that the matter could be referred to the Appeal Board for further consideration. The President of the Tribunal granted ITU's request for a stay of

proceedings pending the completion of the internal appeal procedure and the parties were relevantly informed on 12 June 2020.

By a memorandum of 19 June 2020, ITU's Legal Adviser asked the Chair of the Appeal Board to consider resuming the internal appeal procedure, in order to provide the complainant with the opportunity to effectively exercise her right to an internal appeal. The Chair of the Appeal Board replied, on 23 June 2020, that he had provided the complainant with all the necessary information in order for her to exercise her right to an internal appeal, but that she seemed not to have taken it into account. Notwithstanding, the Chair of the Appeal Board accepted to resume the internal appeal procedure and to grant the complainant a further delay to complete her appeal, namely to provide the Board with a copy of her request for reconsideration.

In its report of 22 September 2020, the Appeal Board noted that the complainant had not complied with the requirement to submit a request for reconsideration to the Secretary-General before submitting her appeal, as per Staff Rule 11.1.2. However, the Board decided to apply a "flexible approach" to receivability to avoid causing additional unnecessary delays in resolving the underlying issues and therefore considered the appeal partly receivable, i.e. receivable to the extent that it concerned the complainant's request to reconsider the calculation of her monthly contribution for after-service health insurance. The Board found that the calculations of the complainant's contributions to the different ITU health insurance schemes over the years were correct and there was no need for a recalculation. It therefore recommended to reject the appeal in its entirety, which the Secretary-General accepted in his decision of 30 September 2020.

The complainant asks the Tribunal to order ITU to refund her an amount of at least 15,000 Swiss francs for the overpayment made towards her after-service health insurance, through the deduction of undue amounts from her pension benefit, in the period from June 2001 to December 2019; to bear part of the cost of her medical contributions as from June 2001; and to refund her the yearly "deductibles" from May 2014 to December 2019, amounting to 550 Swiss francs per year, as well as the loss she incurred in "dental and optical ceilings". She further

asks ITU to recalculate her disability pension benefit as from February 1988 and to compensate her for the loss she incurred because of the payment of undue pension contributions, estimated at 45,900 Swiss francs (2,400 Swiss francs per year). She claims a redundancy payment of 120,527 Swiss francs and 30,000 francs in material damages, moral damages, and costs, plus interest on all sums awarded. In the rejoinder, she claims a further 10,000 Swiss francs in moral damages and costs, and 11,000 Swiss francs for the delay in dealing with her claims.

ITU submits that the complaint is irreceivable for failure to exhaust internal remedies and is, in any event, time-barred. Alternatively, it argues that the complaint is entirely without merit and that it amounts to an abuse of process warranting an award of costs against the complainant in the amount of 500 Swiss francs.

CONSIDERATIONS

1. In her brief, the complainant identifies the 12 February 2020 letter from the Chief, Human Resources Management Department (HRMD), as the impugned decision. That letter informed her that there was no error in the calculation of her after-service health insurance contributions and that the difference between the amounts deducted from her pension benefit up to December 2019 and as from January 2020 was not due to a calculation error during the former period, but due to ITU's transition from the Collective Medical Insurance Plan (CMIP) to the United Nations Staff Mutual Insurance Society against Sickness and Accident (UNSMIS) as from 1 January 2020, and the difference in the applicable contribution rate.

The Tribunal notes that, in the meantime, the Appeal Board considered the matter and, on 30 September 2020, the Administration took a final decision on the complainant's appeal, in which it endorsed the Board's conclusions on the merits, including that the calculations of the complainant's contributions to the different insurance schemes were correct, and rejected the complainant's appeal in its entirety. In that final decision, the Administration expressly referred to the fact that, despite its finding that "the requirement to submit a formal request for

reconsideration to the Secretary-General before submitting an appeal was not met", the Appeal Board had applied a "flexible approach" to receivability and had considered the appeal partly receivable. In view of this final decision taken in the course of the proceedings, which has thus replaced the decision initially impugned before the Tribunal, the present complaint must be deemed to be directed against the 30 September 2020 decision.

2. ITU contests the receivability of the complaint on two grounds. First, it contends that the complainant never addressed to the Secretary-General a request for reconsideration of the initial decision of 12 February 2020, as required by paragraph 1 of Staff Rule 11.1.2. Second, it submits that the complainant's challenge to the calculation of her health insurance contributions since 2001 is time-barred since, according to paragraph 1 of Staff Rule 11.1.2, a request for reconsideration of an administrative decision has to be made within 45 days of its receipt. ITU further submits that the complainant had raised the same issue regarding the calculation of contributions, upon ITU's transition from the Staff Health Insurance Fund (SHIF) to CMIP, in her seventeenth complaint in 2014, which was summarily dismissed by the Tribunal in Judgment 3627.

3. The complainant contends that the new provision of Staff Regulation 11.1, as amended in 2016, granting former staff members access to the internal means of redress, does not apply to a former staff member, such as herself. She argues that the rules applicable to her are those in force in 1988. She denies that her claims are time-barred and submits that it was only in January 2020, when she made a telephone inquiry to UNSMIS and the United Nations Joint Staff Pension Fund (UNJSPF), that she discovered that ITU had consistently provided incorrect information both to UNSMIS and the UNJSPF.

4. According to Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted

such other means of redress as are open to her or him under the applicable Staff Regulations".

It is firmly established in the Tribunal's case law that a staff member is not allowed, on her or his own initiative, to evade the requirement that internal means of redress must be exhausted before a complaint is filed with the Tribunal (see Judgments 4443, consideration 11, and 3458, consideration 7).

5. The Tribunal notes that through the publication of Service Order 16/09 on 20 July 2016, ITU amended Chapter XI "Appeals" of its Staff Regulations and Staff Rules.

Further to the 2016 amendment, paragraph 2 of Staff Regulation 11.1 "Appeals", provided that:

> "Unless otherwise specified in these Staff Regulations or Staff Rules, for the purposes of this chapter, **the term 'staff member' shall be understood as referring to both active and former staff members**." (Emphasis added.)

Also, paragraph 1 of Staff Rule 11.1.2 "Request for reconsideration" provided that:

> "1. A staff member who, under the terms of Regulation 11.1, wishes to appeal against an administrative decision shall, as a first step, address a written request for reconsideration to the Secretary-General, with a copy to the Director of the Bureau in which he/she serves, where appropriate, requesting that the decision in question be reviewed. The request for reconsideration, clearly identified as such, must specify the contested administrative decision and grounds for the request, and must be sent within forty-five (45) days from the date on which the staff member was notified of the decision."

Moreover, regarding the "[e]ntry into force and implementation of amendments to Chapter XI", Service Order 16/09 relevantly provided, in paragraph 3, that:

> "3.1 These amendments [...] enter into force on the date of publication of the present Service Order.
>
> 3.2 Any challenge to an administrative decision notified as from the date of publication of this Service Order will be subject to the provisions of Chapter XI as hereby amended. Any challenge to an administrative decision notified before the publication of the present Service Order will be subject to the version of Chapter XI in force at that time."

6. The foregoing provisions relating to the appeals procedure are mandatory in nature and cannot be circumvented. These provisions make it clear that they apply to both current and former staff members, including retirees. Contrary to the complainant's allegation, the amended provisions apply to her, as she challenges a decision communicated to her after the entry into force of the amendments promulgated in Service Order 16/09. Therefore, she should have exhausted internal remedies by addressing to the Secretary-General a request for reconsideration of the initial 12 February 2020 decision.

7. According to the evidence presented in this case, by an email of 9 March 2020, the Chair of the Appeal Board not only informed the complainant that he "failed to identify the 'request for reconsideration', referred to in Rule 11.1.2", but he also provided her with a copy of the Staff Regulations and Staff Rules, specifically drawing her attention to the need to provide the Appeal Board with her request for reconsideration referred to in Staff Rule 11.1.2. Although the Appeal Board took care to inform the complainant and to provide her with clear guidance on the internal appeal procedure, the complainant regrettably decided not to follow the instructions and to appeal directly to the Appeal Board. The fact that the Appeal Board considered that the appeal was partly receivable and went on to examine it on the merits, on the basis of a deliberate "flexible approach" to receivability, is immaterial.

As the Tribunal said in Judgment 2536, consideration 5:

> "The complaint must therefore be found irreceivable insofar as it follows an internal appeal which was itself irreceivable. Contrary to the view put forward by the complainant, the fact that the Appeals Board examined not only the issue of lack of jurisdiction or irreceivability but also the merits of the case does not render the defendant's objection to receivability inadmissible."

(See also, for example, Judgments 3330, consideration 2, and 3311, consideration 6.)

The Tribunal further notes that ITU consistently stated, including before the Appeal Board, that the complainant's appeal was irreceivable for failure to address to the Secretary-General a request for reconsideration of the contested decision, as per the requirement in Staff

Rule 11.1.2, and there is nothing on the file to indicate that the Secretary-General waived that requirement. Accordingly, the Tribunal considers that ITU did not exempt the complainant from the requirement to submit a request for reconsideration in order to exhaust internal remedies. ITU's first objection to receivability is well founded. In these circumstances, it is not necessary to consider its second argument.

8. As the complainant did not address a request for reconsideration of the initial decision of 12 February 2020, in accordance with Staff Rule 11.1.2, she has not exhausted internal remedies. Her complaint is therefore irreceivable, according to Article VII, paragraph 1, of the Tribunal's Statute, and must be dismissed.

9. With regard to ITU's counterclaim for costs, the Tribunal considers that, although the complaint was obviously misconceived and the language used by the complainant in her submissions to the Tribunal is highly inappropriate, ITU has not sufficiently established that the complaint is vexatious or frivolous (see, for example, Judgments 4726, consideration 14, and 3672, consideration 6). ITU's counterclaim for costs will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is ITU's counterclaim for costs.

In witness of this judgment, adopted on 25 October 2023, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER