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

105th Session **Judgment No. 2720**

The Administrative Tribunal,

Considering the seventh complaint filed by Mr D.J. G. against the International Telecommunication Union (ITU) on 30 May 2007, the ITU's reply of 27 July, the complainant's rejoinder of 31 August, the Union's surrejoinder of 11 October 2007, the complainant's additional submissions of 8 January 2008 and the ITU's final comments thereon of 27 February 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant is a Dutch national born in 1946. Facts relevant to this case are to be found in Judgment 2540, delivered on 12 July 2006, concerning the complainant's first five complaints. It should be noted that the complainant had challenged before the Tribunal, inter alia, the decisions whereby he had been temporarily detached and subsequently transferred from the post of Chief of the Personnel and Social Protection Department (hereinafter "Chief of Personnel"), and the Administration's decision to advertise that post. In Judgment 2540 the Tribunal set aside the express and implied decisions rejecting the complainant's appeals with respect to his detachment, transfer and dismissal from the post of Chief of Personnel. It also awarded him moral and exemplary damages in the sum of 60,000 Swiss francs and 10,000 francs in costs.

On 26 July 2006 a journalist for a Swiss daily newspaper informed the complainant that he was going to publish an article on the ITU and Judgment 2540 the following day; the complainant states that he was neither informed about the content of the article nor asked for an interview. The journalist also contacted the Head of Corporate Communication to obtain the ITU's version of the facts. On the same day, 26 July, the latter official sent an e-mail to all staff members of the Union containing the letter presenting the ITU's position with regard to the judgment in question and the summary of the facts of the case that she had sent to the journalist. The complainant, considering these documents to be defamatory, requested the Secretary-General on 1 September 2006 on the one hand to review the decision to circulate them to all staff members, and on the other hand to withdraw them officially through an e- mail to all staff, to present him with a formal apology, to give him the right of reply and to award him damages. On 16 October the Secretary-General informed the complainant of his decision not to withdraw the e-mail, which he did not consider to be defamatory, and advised him that he could use existing "ways and means" at the ITU to exercise his right of reply. On 3 November 2006 the complainant filed an appeal with the Appeal Board. In its report of 9 January 2007 the Board dismissed the complainant's claims, noting, in particular, that he had the opportunity of exercising his right of reply. The complainant had not received any final decision from the Secretary- General when he filed his complaint.

B. The complainant alleges that the circulation of the e-mail of 26 July 2006 to some 900 ITU staff members was unlawful. According to the complainant, the Union presented its version of the facts and its arguments without mentioning that they had not found favour with the Tribunal and without referring to Judgment 2540; the information circulated to the staff was therefore misleading. He endeavours to show that the "Summary of Facts" and the letter sent by the ITU contain hurtful, false and defamatory information. As he sees it, these documents were aimed solely at damaging his reputation and they furthermore undermined his relations with the entire ITU staff and with his former colleagues. He points out that the ITU's actions perfectly fit the definition of defamation in the Swiss and Dutch criminal codes.

The complainant further considers that the ITU breached the rules of loyalty and the Standards of conduct for the

international civil service, especially by not even having the courtesy to inform him of its actions, send him a copy of the documents circulated and give him the opportunity to reply.

According to him, there has been "contempt of court" inasmuch as the e-mail was sent while the Appeal Board was still considering his sixth appeal. The complainant submits that the circulation of the e-mail could have affected the fairness of the proceedings by influencing the members of the Board or the outcome of the appeal. He alleges that the ITU, in its letter to the journalist, made "scandalous" attacks on the Tribunal and identifies the passages containing such attacks.

The complainant notes that the Secretary-General, in his reply to the request for review, stated that the content of the contested documents merely reflected the position that the ITU had consistently defended. According to the complainant, however, such a statement violates the principle of *res judicata*, since the Union's position was clearly rejected by Judgment 2540. Furthermore, the complainant submits that the Secretary-General failed to provide a valid reason for his decision and that the Appeal Board failed to substantiate its findings. He affirms, in particular, that the latter ignored his arguments.

The complainant asks the Tribunal to order the ITU to give him the right to reply to the ITU staff through official channels, to withdraw the documents circulated on 26 July 2006 by means of an official e-mail to all staff and, immediately after the judgment is delivered, to apologise to him formally and publicly in an e- mail, copied to the staff, for the moral injury caused to him. He claims moral damages for the severe injury to his dignity and reputation, as well as costs, and requests that the Tribunal order the payment of substantial exemplary damages in order to ensure that the actions that he denounces will not be committed again by the executive head of an international organisation.

C. In its reply the ITU asserts that the Secretary-General was entitled to express an opinion on a Tribunal judgment, even a negative opinion, and that he was not prohibited from doing so by any fundamental principle of law or by international civil service law. The Union points out that a staff member's duty of discretion persists after his or her separation from service and submits that the complainant's attitude was unworthy of a high-ranking international civil servant; it describes his remarks, reproduced by the journalist at the Swiss newspaper, as specious and unfounded. In this connection it notes that the complainant, contrary to his claims, seems to have been interviewed by the journalist. Moreover, the Union maintains that the e-mail at issue does not constitute a breach of the principle of *res judicata* since it does not challenge Judgment 2540 before the Tribunal.

The ITU submits that since the e-mail of 26 July 2006 merely reiterated its arguments and position, it could not have had any influence on the members of the Appeal Board; in any case, the Board found in favour of the complainant. The Union argues that by his allegations the complainant is casting doubt on the reputation and integrity of Board members.

With regard to the complainant's contention that his right of reply was violated, the defendant is surprised that he did not circulate his comments by an official e-mail to all staff through the Staff Council.

The Union stresses that the Secretary- General wished to alert the staff members that an article was going to be published in the Swiss newspaper and to send them the information provided to the journalist, because he felt that the Union's reputation had been tarnished by certain incorrect material contained in an article published earlier in the same newspaper. In its view, therefore, the e-mail could in no way be assimilated to an act calculated to bring the Tribunal into contempt and the terms used in the attached documents were not discourteous. While admitting that the content of the documents might have tarnished the complainant's reputation in the eyes of staff members, the Union insists that they were not defamatory and that it had not intended to cause any injury to the complainant. The purpose of the e-mail was to preserve the Union's reputation and to explain the reasons for certain decisions taken in good faith by the Secretary-General, although they were subsequently quashed by the Tribunal. The defendant endeavours to show that the statements contained in the said documents correspond to the truth or that it had serious reasons to hold them, in good faith, to be truthful. It submits that, contrary to the complainant's claims, the Tribunal never rejected its version of the facts as incorrect or untruthful.

The ITU notes that the Appeal Board, which shared its analysis, was under no legal obligation to reproduce it *in extenso* in its report, which is therefore in no way flawed by insufficient substantiation. It further stresses that the complainant declined the offer of the new Secretary-General to resolve the dispute amicably.

D. In his rejoinder the complainant maintains his version of the facts and his arguments. He accuses the ITU of trying to divert the Tribunal's attention from the issue of whether or not the documents attached to the e-mail were defamatory. As evidence of this, he cites in particular the Union's claim that he declined an offer to resolve the dispute amicably, whereas it was the ITU that failed to follow up the offer. The complainant sets out to rebut the defendant's comments on the events that gave rise to Judgment 2540 and emphasises that the ITU's reply demonstrates its refusal to accept the judgment.

He maintains that the Appeal Board failed to substantiate its findings, thereby committing an error of law. With regard to his right of reply, he contends that it was for the Administration and not the Staff Council, which was not a party to the dispute, to accord him that right.

E. In its surrejoinder the ITU maintains its position. It presents evidence to support its contention that the complainant had a lengthy exchange with the journalist at the Swiss newspaper. With regard to its offer to resolve the dispute amicably, it explains that two telephone calls were made to the complainant on 16 March 2007; it was understood that he was to contact the Administration again in that connection but he never did. The defendant responds in detail to the complainant's allegations regarding the veracity of the facts set out in the documents attached to its e-mail.

F. In his additional submissions the complainant contends that the ITU raised two new allegations in its surrejoinder, one to the effect that he had been contacted twice by a Union official on 16 March 2007 and the other concerning a factual circumstance in the sequence of events considered by the Tribunal in Judgment 2540. He submits that these allegations are unfounded.

G. In its final comments the ITU produces records showing that the complainant did indeed have two conversations with one of its staff members on 16 March 2007 regarding an amicable settlement of the dispute. It accuses him of using every possible means to prove that it has acted in bad faith. The Union denies having raised a new factual circumstance in its surrejoinder.

CONSIDERATIONS

1. The background to this case is to be found in considerations 2 to 19 of Judgment 2540, delivered on 12 July 2006, in which the Tribunal ruled on the first five complaints submitted by the complainant, who has now retired. The complainant, who was formerly an official of the International Civil Aviation Organization (ICAO), came into conflict with the ITU, to which he had been seconded as Chief of Personnel, over the terms of extension of his contract. At the instigation of the Secretary-General, he had withdrawn his candidacy for the post of Director of Administration and Services at the ICAO and had been promised in return that his contract would be extended until the date on which he reached retirement age, i.e. 28 February 2006. While the extension ought to have come into effect, in keeping with the Secretary-General's undertaking in a letter dated 29 January 2002, by 1 July 2003, the complainant's contract was in fact provisionally extended only until 31 December 2004, since the ITU Council had decided in the meantime, pending approval of the Union's 2004-2005 budget, that short-term and fixed-term appointments should not be extended beyond that date. Subsequently, even though the restrictive measure imposed by the Council had been lifted on 29 October 2003 and the complainant had been definitively transferred from the ICAO to the ITU, the Secretary-General refused on three occasions to sign the contract extension based on the arrangement initially envisaged. He considered that any such decision in favour of the Chief of Personnel would have been inappropriate at a time when, owing to the budget difficulties that the Union was experiencing, many other staff members feared that their contracts would be terminated.

Although the Secretary-General eventually signed the extension on 24 August 2004, he considered that the complainant, by insisting on securing full compliance with the previous undertaking, had damaged the relationship of trust that was essential for their collaboration. He found it particularly reprehensible that the complainant had lodged an appeal with the Appeal Board, which he vainly requested him to withdraw. He then took a series of decisions concerning the complainant, the ultimate aim of which was to dismiss him from his post as Chief of Personnel. Thus, after being detached against his will to a post of Special Adviser, the complainant learned that his former post had been declared vacant and filled, after being advertised, by a new incumbent.

2. In Judgment 2540 the Tribunal held, firstly, that the complainant was entitled to request performance of the undertaking given on 29 January 2002 by the Secretary-General, from which the latter had unlawfully released

himself by deciding to set the date of extension of the contract unilaterally. The Tribunal further ruled, inter alia, that the Secretary-General, through his sustained disregard for the complainant's rights, had violated his dignity and exposed him to "public humiliation". Lastly, it found that several of the impugned decisions amounted in effect to retaliatory measures against the complainant prompted solely by the fact that he had lodged an appeal before the Appeal Board, which constituted a most serious breach of the rights of international civil servants. Indeed, the Tribunal ordered the ITU, on the latter ground, to pay the complainant exemplary damages in addition to the moral damages that it awarded him.

3. Following the delivery of Judgment 2540, a journalist at a Swiss newspaper who wished to write an article on the case contacted the complainant and the ITU.

Concerned to protect itself from the risk that its image might be harmed by the publication of the article, which was scheduled for 27 July 2006, the Union sent a letter to the journalist on 26 July, together with a "Summary of Facts", presenting its own version of the case. In that letter, the ITU, which stated that it was "both surprised and disappointed at the Tribunal's findings", criticised the aforementioned judgment and proceeded to attack the complainant, censuring his conduct and questioning his moral integrity in the performance of his duties. It should be noted that the article in the Swiss newspaper, which was in fact published on 27 July under the headline "United Nations judicial body punishes the ITU", reported this reaction alongside other information.

But the direct ground for the complaint before the Tribunal was another ITU initiative related to this case. In a move aimed at publicising its own arguments among its staff, the Union also sent a copy of the documents provided to the journalist by e-mail to every staff member on 26 July 2006.

The complainant, asserting that the circulation of these documents to ITU staff had caused him serious injury, requested the Secretary-General to withdraw the e- mail and to remedy the consequences by giving him, in particular, a "right of reply" in the form of a similar message and by paying him damages. This request was, however, turned down by a decision of the Secretary-General of 16 October 2006. Following the delivery of the Appeal Board's opinion, this position was confirmed – notwithstanding the fact that a new Secretary-General had taken up office in the meantime – by the implicit decision impugned in this complaint.

4. The complainant has requested the convening of a hearing. However, given the numerous and extremely detailed submissions by the parties, the Tribunal considers that it is fully informed about the case and that there is therefore no need for such a hearing.

5. In support of his case, the complainant submits that the content of the documents sent by e-mail on 26 July 2006 is defamatory, seriously infringes the obligations owed by international organisations to their staff members and violates the principle of *res judicata* and the respect due to the Tribunal.

6. The Tribunal will not respond to the arguments presented in the complaint regarding prejudice that it allegedly suffered itself as a result of the circulation of the disputed message. The issue raised in this regard, which has no direct bearing on the dispute between the complainant and the ITU regarding compliance with obligations arising from their contractual relationship, falls outside the Tribunal's jurisdiction, as restrictively defined in Article II of its Statute. Furthermore, the Tribunal could not rule on such arguments without breaching its duty of impartiality.

7. On the other hand, the Tribunal must, of course, rule on the complainant's arguments regarding the alleged harm done to his own interests. It cannot but be concluded in this regard that the circulation of the disputed message to the entire ITU staff was an extremely improper action that caused serious harm to the complainant.

8. The letter attached to the message alleged, for instance, that the complainant had displayed, as Chief of Personnel, a "persistent tendency [to] give his personal interest precedence over that of all others" and a "total lack of the sense of responsibility that one might reasonably expect from an official of that grade". After referring to the complainant's "duty to manage human resources in the best interest of the Union", the same letter alleged, in even more virulent terms, that he had thereby adopted an "attitude that flout[ed] every ethical rule". Such statements, which went so far as to imply that the complainant had failed to meet the requirements of moral rectitude in the performance of his former duties, constituted an overt attack on his honour and reputation and were thus clearly defamatory.

9. The defamatory nature of the statements is compounded by the fact that they were based on a highly tendentious presentation of the facts.

In particular, the ITU improperly attributed the complainant's attitude in its letter and "Summary of Facts" to an unwarranted insistence on having his contract extended until 28 February 2006 although the Union was going through a difficult period. That version of the events takes no account either of the fact that the complainant had already had to accept a deferral of the extension following the above- mentioned decision of the Council or of the fact that the Secretary-General had unlawfully arrogated to himself the right to set the date of extension of the contract unilaterally. Furthermore, it disregards the special circumstances of the complainant, who had been compelled, in view of the promise to extend his contact, to withdraw his candidacy for a high-ranking post at the ICAO and subsequently to relinquish any possibility of reintegration into that Organization. By seeking to justify the Secretary-General's refusal to honour his commitment in accordance with the agreed terms by reference to "the social context and the explosive circumstances that existed at the end of 2003" and, in particular, the threat of a strike by staff during the World Summit on the Information Society organised by the ITU in December 2003, this version of the events also disregards the fact that two of the complainant's requests that gave rise to the dispute dated from 2004 and that they were turned down until 24 August 2004. Lastly, it fails to mention that the Secretary-General had given the complainant to understand that he felt bound by the undertaking contained in his letter of 29 January 2002 only "if nothing wrong happens", which naturally increased the complainant's concern as to whether his contract would effectively be extended in accordance with the terms initially agreed.

Moreover, the Tribunal cannot help being surprised, for instance, by the ITU's somewhat specious account of the complainant's fifth internal appeal, which challenged the Secretary-General's refusal to withdraw a memorandum containing unfavourable comments on his professional conduct. The aforementioned "Summary of Facts" states in this regard that "it sufficed to note that [the appeal] was considered irreceivable by the Appeal Board", whereas the Tribunal had held in the meantime that it was indeed receivable and, moreover, well founded.

10. This fallacious presentation of the facts of the case is all the less acceptable when one considers that the facts in question were the subject of findings by the Tribunal in Judgment 2540. According to the Tribunal's case law, such findings, by virtue of the *res judicata* rule, are no longer open to challenge and are therefore binding on both parties as true statements of fact (see Judgment 1540, under 7).

11. Contrary to the Appeal Board's opinion, the Secretary-General could not lawfully circulate a message to the staff expressing his view in the terms employed. Even if it were established that the complainant could have responded to the disputed statements by circulating another message in the same form, these statements would in any case be no less defamatory on that account.

12. As the Tribunal has consistently held, for instance in Judgments 396, 1875, 2371 and 2475, international organisations are bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members. This duty, which flows from the general principles governing the international civil service, is also applicable as a matter of course to former staff members of an organisation.

By its very nature, the act of circulating to all ITU staff, on the Union's own initiative, a message containing defamatory statements regarding the complainant constitutes a particularly serious breach of that duty. Moreover, the breach is all the more reprehensible in the present case because it follows the same pattern of vindictive action against the complainant that the Tribunal had already condemned in Judgment 2540, where it found that he had been subjected to measures that could be characterised as retaliation.

13. Furthermore, as rightly noted by the complainant, the circulation of the disputed message to all staff was also reprehensible on the ground that the addressees included the members of the Appeal Board, even though another appeal by the complainant was pending before the Board at that time.

14. Of course the ITU, which had fulfilled its obligation to execute Judgment 2540, had every right to circulate comments that were critical of that judicial ruling, and the Tribunal notes that its decision to pursue that route was taken in reaction to plans to publish a newspaper article and was not a spontaneous initiative. In so doing, however, the Union was not entitled, as noted above, to challenge the findings of fact made in that judgment, which had *res judicata* authority; nor was it entitled, above all, to harm the complainant's honour and reputation by defamatory statements. On the last point, the Tribunal further notes that even if the complainant, as the defendant contends, also made inappropriate comments to the author of the article in question, which has not been proved, this fact

would in any case not justify the circulation of the disputed e- mail.

15. It follows that the decision whereby the Secretary-General refused to remedy the consequences of the circulation of the e-mail of 26 July 2006 must be set aside.

The circulation of the e-mail to all staff members – i.e. to former colleagues who knew him well as Chief of Personnel and were therefore bound to take an interest in the information thus circulated – clearly damaged the complainant's dignity and reputation. Moreover, the injury was aggravated under the circumstances by the fact that, given the nature of the defamatory statements in question, which involved charges of lack of professionalism on the part of the complainant in performing his duties as Chief of Personnel, the circulated documents were likely to stir up animosity towards him among the staff members to whom it was addressed. To repair the injury thus inflicted on the complainant, the Union should be ordered to pay him damages in the amount of 20,000 Swiss francs.

16. Furthermore, the Tribunal must emphasise that, where a judgment has been rendered against an international organisation in a dispute with one of its staff members, the circulation after delivery of the said judgment of a message defaming the complainant constitutes a very serious breach of the obligations incumbent on the organisation in its relations with its staff members. Such conduct disregards not only the above- mentioned duty to respect the staff member's dignity and reputation but also – and this is an even more serious matter – the duty to safeguard the free exercise of his right to file a complaint with the Tribunal, which implies, inter alia, that the success of such a complaint shall not entail punitive or retaliatory measures against him. The ITU shall therefore be ordered to pay the complainant exemplary damages in the sum of 10,000 francs for having acted in the way that it did.

17. The complainant also requests the Tribunal to order the ITU to send a new e-mail to all staff, after delivery of the present judgment, retracting the content of the e-mail circulated on 26 July 2006. As the circulation of such an e-mail does indeed appear to be the only way of ensuring that the present judgment fully serves the purpose of safeguarding the complainant's honour and reputation vis- à-vis the ITU staff, the Tribunal considers that, under the circumstances, this request should be granted. The Union was under a continuous obligation, from the date of circulation to its staff of the defamatory e-mail of 26 July 2006, to take steps to remedy, as far as possible, the injury caused to the complainant. It is therefore appropriate that the Tribunal, acting under Article VIII of its Statute, should order the performance of that obligation.

With a view to ensuring, in particular, that the measure thus ordered cannot give rise to a new dispute between the Union and the complainant, it is hereby stipulated that this measure shall consist in the circulation to all staff, by electronic means, within a week of the delivery of the present judgment, the text of the said judgment, together with a brief note drafted on the ITU's initiative. The note shall simply state, without any comment and in absolutely neutral terms, that the judgment is being circulated further to the e-mail of 26 July 2006 circulated to all staff concerning Judgment 2540.

18. The Tribunal does not consider, on the other hand, that the complainant's request to be given the right to circulate an e-mail to all ITU staff in response to that of 26 July 2006 should be granted. The injury to the complainant's honour and reputation will be adequately redressed by the circulation of the present judgment, in accordance with the terms set forth in the foregoing consideration, and by the award of damages to be paid by the Union. Besides, the Tribunal notes that the circulation of such an e-mail by the complainant would undoubtedly perpetuate the dispute that has developed between him and the organisation, which would not really be in the interest of either of the two parties.

19. The complainant's request that the ITU should be ordered to present him with a public apology must likewise be rejected. The Tribunal has consistently held, for instance in Judgments 968, 1591 and 2605, that it is not competent to issue orders to that effect.

20. Since the bulk of his claims are well founded, the complainant is entitled to costs, which the Tribunal sets at 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision of the Secretary-General of the ITU is set aside.

2. The ITU shall pay the complainant damages in the amount of 20,000 Swiss francs in compensation for the injury suffered.

3. It shall pay the complainant exemplary damages in the amount of 10,000 francs for having circulated a defamatory message concerning him following the delivery of a previous Tribunal judgment, and for having thereby violated, inter alia, the free exercise of the right to a judicial means of redress.

4. The ITU is ordered to circulate the text of the present judgment to the whole of its staff in accordance with the terms set out under 17 above.

5. The Union shall pay the complainant 2,000 francs in costs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.