Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2932**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms P. B. against the International Telecommunication Union (ITU) on 8 June 2009, the Union's reply of 17 September, the complainant's rejoinder of 22 October and the ITU's surrejoinder of 26 November 2009;

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. Facts relevant to this dispute are set out in Judgment 2772, delivered on 4 February 2009, and Judgment 2889, delivered on 3 February 2010, dealing respectively with the complainant's first and second complaints, the latter of which was an application for execution of Judgment 2772. In the instant case, the complainant impugns the decision of 6 March 2009 whereby she was placed on sick leave from 7 November 2008.

B. With regard to the receivability of her complaint, the complainant states that she is challenging a final decision because she has previously exhausted internal remedies.

On the merits, she asserts that the ITU has "malevolent intentions" towards her and deliberately undermined her health repeatedly for several years "until she was eventually incapacitated". Furthermore, she accuses the Union of having taken a series of unlawful decisions that caused her injury. For instance, she states that in March 2008, after she filed her first complaint, she was notified of a disciplinary measure involving the withholding of a salary increment, with effect from 1 April 2008, on the grounds that she was on special leave with pay; on this point she contends that Rule 3.4.1. of the Staff Rules was breached.

According to the complainant, the letter of 10 April 2008 informing her that her special leave with pay would end on 1 May unless she agreed to undergo a medical examination reflects the Union's determination to "get rid of [her] by whatever means necessary". She claims that the ITU harassed her over a period of 18 months and hounded her to undergo the examination. Having failed to achieve its aim, it decided on 8 July 2008 to place her on special leave without pay as from 11 July, which induced in her a state of "oxidative stress" which eventually led her to apply for the award of a disability benefit. As she sees it, the decision constituted a disciplinary measure imposed in response to the filing of her first complaint with the Tribunal and amounted to "asphyxiation by cutting off her means of subsistence". Noting that the Tribunal, in its Judgment 2721, held that it is essential that salaries be paid punctually and in full, she emphasises that she was deprived of a livelihood, with a dependent husband and two dependent children, and was obliged to bear the cost of maintaining her social security coverage. Drawing attention to the fact that the personnel action form pertaining to the decision of 8 July shows that her special leave without pay is to end on 31 December 9999 (*sic*), she asserts that she was the victim of "disguised and abusive termination". She points out that, according to Judgment 2324, the decision to place an official on leave with or

without pay "pending a review" is one that inevitably affects that person's dignity and good name and, moreover, it is one that will almost certainly carry adverse consequences for his or her career and health; where, as in this case, the decision is unlawful, the person concerned is entitled to compensation.

Lastly, she contends that the decision to place her on sick leave as from 7 November 2008 "injures her dignity and health" and is unlawful, abusive and flawed. Moreover, it reflects the Union's intention to terminate her for reasons of health as swiftly as possible.

The complainant requests the Tribunal to set aside the decision of 6 March 2009 insofar as it places her on sick leave as from 7 November 2008 and to grant her special leave with pay until such time as she is reinstated. In addition, she claims 1,100,000 Swiss francs in compensation for moral and material injury and 10,000 francs in costs.

C. In its reply the ITU submits that, insofar as it places the complainant on sick leave with effect from 7 November 2008, the decision of 6 March 2009 constitutes a new administrative decision capable of adversely affecting her and that, since the complainant failed to challenge it by filing an internal appeal, the complaint is irreceivable. The claims for an award of compensation for alleged moral and material injury are therefore likewise irreceivable. The Union also rejects the complainant's argument that her complaint is receivable as "part of the ongoing dispute resolution process instituted against the decision [of] 8 July 2008" to place her on special leave without pay; indeed, that leave was converted into special leave with pay by the decision of 6 March 2009, and her complaint is therefore also irreceivable on the grounds that it is devoid of substance. Lastly, the Union challenges the receivability of the complaint on the grounds that it duplicates the application for execution of Judgment 2772.

On the merits, the ITU makes clear that placement on special leave without pay does not constitute disguised or abusive termination; it involves suspension of the application of the employment contract for a specific term. It affirms that the complainant, who succeeded in

having the decision of 8 July 2008 set aside by Judgment 2772, is now challenging the decision of 6 March 2009 whereby she was placed on sick leave as from 7 November 2008. It considers that, in so doing, the complainant is filing an identical claim to that submitted in her application for execution of the said judgment. Thus, the ITU produces the reply and surrejoinder that it entered in the context of that application and requests the Tribunal to treat them as an integral part of its reply to the third complaint. It contends that the complainant was rightly placed on sick leave, since her incapacity for service had been duly attested by her attending physician and the ITU's medical adviser.

D. In her rejoinder the complainant attributes the fact that the ITU considered it necessary to set out its position on the merits to its implicit recognition of the receivability of her complaint. She argues that the Union's decision to place her on sick leave with effect from 7 November 2008 was an attempt to avoid implementing consideration 11 of Judgment 2772 and to end her contract on the evening of 3 February 2010. The fact that the said decision cancelled that of 8 July 2008 in no way remedied, in her view, the damage inflicted by the earlier decision. She states that the aim of her second complaint was to secure "full execution" of Judgment 2772, whereas her third complaint concerns the retroactive change in her administrative situation. In this regard she points out that, according to the case law, "[n]o organisation may retroactively alter at will the position of its staff".

E. In its surrejoinder the ITU maintains that the complaint is irreceivable on a number of counts. It states that the complaint cannot concern anything other than the decision to cancel the complainant's special leave without pay and the fact that she was placed instead on special leave with pay. It notes that it is customary for an organisation to set out its position on the merits so as not to prejudge the Tribunal's findings on the issue of receivability.

CONSIDERATIONS

1. The complainant impugns the decision of 6 March 2009 whereby, inter alia, she was placed on sick leave as from 7 November 2008. Her claims are listed under B above.

2. Facts relevant to this dispute are set out in the Tribunal's Judgments 2772 and 2889.

The complainant maintains in the instant case that the above-mentioned decision is "not only unlawful and abusive but also flawed", that it "injures her dignity and health" and that the ITU, in taking such a decision, demonstrated pertinacity and bad faith in pursuit of its aim of "revoking her employment contract at all costs".

3. The ITU asserts that the complaint and some of the complainant's claims are irreceivable for failure to exhaust internal remedies. It also challenges the receivability of the complaint on the grounds that it is devoid of substance and that it duplicates the application for execution of Judgment 2772.

4. The Tribunal notes that, by its Judgment 2889, it dismissed the application for execution of Judgment 2772, holding that "[b]y taking the action set out in the letter of 6 March 2009, the Union […] committed no fault".

It follows that the decision contained in the said letter, which constitutes the decision impugned by the complainant in this case, cannot be challenged without offending against the *res judicata* rule.

5. As the decision is thus beyond criticism, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet