

**110th Session**

**Judgment No. 2958**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. V. against the International Telecommunication Union (ITU) on 21 February 2009 and corrected on 5 June, the ITU's reply of 2 September, the complainant's rejoinder of 6 November 2009 and the Union's surrejoinder of 9 February 2010;

Considering Article II, paragraph 5, 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 case are to be found in Judgment 2609, delivered on 7 February 2007. It may be recalled that in September 2002 the ITU issued Service Order No. 02/08, which provides in paragraph 2.4.1 that “[u]pon completion of four years of continuous service on fixed-term contracts, a staff member will normally be offered a permanent contract”, but that the granting of such a contract is subject to “continued satisfactory service” and “confirmation that continuing work and funding is available”. Paragraph 2.4.2 provides

that the decision “shall be taken by the Secretary-General and, as regards the staff of each Bureau, upon recommendation of the Director concerned”.

The complainant, a national of Guinea born in 1953, joined the ITU in 1997 under a two-year fixed-term contract, at grade P.5, in the Telecommunication Development Bureau (BDT). His contract was subsequently renewed several times. In late 2002 his supervisor, the former Director of BDT, wrote to the Personnel and Social Protection Department, requesting that the complainant’s contract be converted into a permanent one. The complainant eventually lodged an appeal against the rejection of that request, and on 29 November 2005 he filed a complaint with the Tribunal. Similar complaints were filed by 28 other staff members whose requests for conversion had also been rejected. In Judgment 2609 the Tribunal noted that it was not possible to determine whether the 2002 recommendation was still current in 2005, when the complainant had been informed of the decision not to convert his contract. It found that the decision in question had been taken in the absence of a relevant recommendation and, therefore, in breach of Service Order No. 02/08, and it decided to remit the matter to the Secretary-General for reconsideration in accordance with the procedure laid down in the Service Order.

In the meantime, the complainant’s post had been abolished and, as from September 2006, he had been reassigned temporarily to the post of Head of the Sector Strategies and Conferences. In March 2007 two posts of Counsellor – to Study Groups 1 and 2 respectively – were created in BDT as part of a reorganisation of the Bureau. The complainant was informed by memorandum of 20 March that he was reassigned to the post of Counsellor to Study Group 2 with effect from the following day. The memorandum also indicated that his contract would be extended for one year until 20 March 2008 and that an interim appraisal report would be drawn up six months after taking up his duties in order to evaluate his performance in the new post.

By a memorandum dated 16 April 2007 the Deputy Secretary-General, referring to Judgment 2609, invited the newly appointed

Director of BDT to make a recommendation with respect to the conversion of the complainant's fixed-term contract. On 23 April the Director of BDT recommended against such conversion, noting that the complainant did not fulfil the condition of continued satisfactory service and that his performance in his new post was to be evaluated in an interim appraisal report. In the interim report drawn up in October 2007 the complainant's performance was rated "acceptable", and in February 2008 he received an appraisal report covering the period January to December 2007 showing an overall rating of 3, corresponding to "fully met requirements".

In the course of 2007 the complainant enquired several times about the conversion of his fixed-term contract. In a letter of 12 March 2008 to the Deputy Secretary-General his counsel reiterated the request for conversion, recalling the terms of Judgment 2609 and referring to what he considered to be a promise by the Administration that a decision in his case would be taken by the end of 2007. The Deputy Secretary-General responded on 14 March 2008 that a decision would be taken after receiving the recommendation from the Director of BDT. The latter wrote to the Deputy Secretary-General on 20 March, explaining that the complainant's performance had not always been at the level expected and that there was no budget for his post. With a view to "ensuring the efficient functioning of the BDT" he had decided to merge the responsibilities for Study Groups 1 and 2 and to assign them to a single Counsellor; the complainant's post would therefore be abolished. He also noted that there were no suitable positions to which the complainant could be assigned and he requested that relevant steps be taken to terminate his contract.

By a letter of 25 March 2008 the Secretary-General informed the complainant that his contract would be extended until 30 April 2008 but that his post was to be abolished. Consequently, the redeployment process had been initiated, but if this proved unsuccessful his contract would not be renewed upon its expiry. On 23 April 2008 the complainant wrote to the Secretary-General requesting that that decision be reviewed and that his contract be converted into a

permanent one. However, the decision of 25 March was confirmed on 29 April. In the event, the complainant separated from service on 30 June 2008, his contract having been extended by two months on account of his state of health.

On 30 June the complainant lodged an appeal with the Appeal Board. In its report of 29 September 2008 the Board concluded that there was no basis for a negative assessment of his performance in 2007 and that the procedure laid down in Service Order No. 02/08 had not been followed. It accordingly recommended that the complainant's case be re-examined as from 16 April 2007, the date when the Deputy Secretary-General had asked the Director of BDT to make a recommendation with respect to the conversion of his contract. By letter of 28 November 2008 the complainant was informed that the Secretary-General disagreed with the Board's conclusion and confirmed the decision not to renew his fixed-term contract. That is the impugned decision.

B. The complainant takes issue with the ITU's refusal to convert his fixed-term contract to a permanent one notwithstanding the Tribunal's order in Judgment 2609. He contends that the Union had a duty to convert his fixed-term contract in view of the fact that, as from the spring of 2007, the three conditions laid down in Service Order No. 02/08, namely satisfactory service, continuing work and availability of funding, were fulfilled, and he submits that the Administration failed to provide appropriate justification for not doing so. He points out in this respect that, when the Director of BDT recommended against the conversion in April 2007, he was not in a position to assess his performance as he had been his supervisor for only a month. The complainant also submits that the Administration failed to convert his fixed-term contract in the autumn of 2007, although in October his performance had been rated "acceptable" in his interim appraisal report and the ITU Council had approved the budget for the two Counsellor posts in September of that year. It further failed to convert his contract in the spring of 2008 although he had been given an overall rating of 3 in the appraisal report issued in February

and an extension of his contract until 20 March 2009 had then been envisaged.

He also challenges the decisions to abolish the post of Counsellor to Study Group 2 and not to renew his contract on the grounds that they are tainted with abuse of authority and procedural as well as substantial flaws. He submits that the abolition of his post was neither justified, since there was sufficient funding, nor necessary, as it did not reduce the number of staff in BDT. Furthermore, it contravened the Tribunal's case law which provides for the duty to inform the staff member concerned about the reasons for abolishing his or her post.

According to the complainant, the decision to terminate his contract was taken in breach of the relevant rules. He considers that, in view of the fact that he ought to have been granted a permanent contract in 2007, he had the right to be treated as a permanent staff member and therefore to be provided with three months' notice of termination, to be given priority over other staff members when filling vacant posts and to have his case referred to the Joint Advisory Committee. He also considers that the Union failed in its duty of care, as it did not find him alternative employment despite the availability of several posts for which he was a suitable candidate, and that it displayed bad faith. Moreover, in leading him to believe that his contract would be converted if his performance was satisfactory, it failed to treat him with due respect.

The complainant asks the Tribunal to quash the decision of 28 November 2008 and to order that his fixed-term contract be converted into a permanent one. He also seeks reinstatement in his former post or assignment to an equivalent post matching his grade and experience with retroactive effect from 1 July 2008. Alternatively, he seeks compensation in the form of three years' gross salary. He claims moral damages in an amount to be determined by the Tribunal and not less than 15,000 Swiss francs in costs.

C. In its reply the ITU submits that the decision to abolish the complainant's post was based on objective grounds, namely budgetary

savings and efficiency of service, and that it was therefore perfectly lawful as to substance. It explains that, following the abolition in January 2006 of the post to which the complainant was initially appointed (post 851), efforts were made to redeploy him. He was assigned to another post (post 232), which was temporarily vacant as a result of the detachment of its incumbent to other duties, and the budget allocated to that post was used to fund his contract. This funding arrangement continued when the complainant was assigned the duties of Counsellor to Study Group 2, but he himself did not have a budgeted post. Indeed, it ultimately proved impossible to proceed with the establishment of the post of Counsellor to Study Group 2 owing to budgetary constraints. Furthermore, it became apparent that the workload was insufficient to warrant maintaining two Counsellor posts and the duties attached to these posts did not correspond to grade P.5.

The Union disputes the contention that the complainant's contract should have been converted in the spring of 2007. It points out that the negative recommendation issued by the Director of BDT in April 2007 was based on the complainant's poor performance as evidenced by his appraisal report for 2006. Furthermore, the complainant had just been transferred to a new and unbudgeted post. Thus, the criteria for conversion were clearly not satisfied in the spring of 2007, even though the 2006 appraisal was later invalidated. Nor were they satisfied in the autumn of 2007 or in the spring of 2008, since the requirement of continuing funding was still not met.

The ITU asserts that it complied with all the requirements established by the case law with regard to the non-renewal of a fixed-term contract owing to the abolition of a post, and that the impugned decision is therefore also lawful with regard to form and procedure. In particular, the reasons for the decision were conveyed to the complainant sufficiently in advance, since he was notified on 25 March 2008 that his contract would not be renewed if the redeployment process proved unsuccessful, and the Staff Regulations and Staff Rules provide for a notice period of 30 days in such cases. Furthermore, efforts were made to identify a suitable alternative

position for him, albeit without success, and the complainant was awarded fair and reasonable compensation. His allegation that he has not been treated with due respect should therefore be dismissed.

D. In his rejoinder the complainant reiterates his pleas. He maintains that the budget relating to his post was approved by the ITU Council in September 2007 and that his performance appraisal for 2007 contained detailed work objectives for 2008, thus indicating that “continuing work” was available. He points out that on 1 June 2009 the incumbent of post 232 was still detached to other duties, so the funds attached to that post were still available. He asserts that the hasty decision to terminate his contract was plainly taken for other than financial reasons, and that the decision to abolish his post is therefore tainted with abuse of authority or an error of fact. He also contends that he has been denied equal treatment in relation to the numerous staff members whose contracts have been converted.

E. In its surrejoinder the ITU maintains its position. It acknowledges that post 232 continued to be budgeted after March 2008, but explains that this was necessary in order that its incumbent could be reassigned to it if need be; in the meantime the corresponding funds have been used only to fund the short-term contracts of other staff members.

## CONSIDERATIONS

1. The complainant joined the ITU on 17 August 1997 under a two-year fixed-term contract which was subsequently renewed several times. In late 2002 the Director of BDT wrote to the Chief of the Personnel and Social Protection Department recommending that the complainant’s contract be converted to a permanent one in accordance with Service Order No. 02/08 of 9 September 2002.

Paragraph 1.2 of Service Order No. 02/08 provides:

“The new contracts policy aims at providing greater uniformity in the treatment of the staff, providing more stable employment to the staff, making employment in the Union more attractive, and enhancing career development and staff mobility in the Union. It shall be implemented under

the authority of the Secretary-General, according to the needs of the Union and in its best interests.”

Paragraph 4.3 states that:

“A staff member holding a fixed-term contract and having already completed four years of service shall be offered a permanent contract, subject to the conditions and according to the procedure outlined in paragraph 2.4 [...]”

Paragraph 2.4 reads as follows:

“2.4.1 Upon completion of four years of continuous service on fixed-term contracts, a staff member will normally be offered a permanent contract. The granting of this permanent contract shall be subject to continued satisfactory service, as defined in Staff Rule 4.14.1, and to the confirmation that continuing work and funding is available. Periods of service completed on short-term contracts, and at least a full month of special leave without pay and a full month of sick leave, shall not be taken into account in the calculation of the four-year period.

2.4.2 The decision to grant a permanent contract shall be taken by the Secretary-General and, as regards the staff of each Bureau, upon recommendation of the Director concerned. A negative decision of the Secretary-General shall be notified to the staff member with appropriate justification.”

2. As no action was taken on the recommendation to convert his contract, the complainant, after exhausting internal remedies, filed a complaint with the Tribunal along with other colleagues whose requests for conversion had also been turned down. In Judgment 2609, delivered on 7 February 2007, the Tribunal stated that:

“[...] Service Order No. 02/08 requires the Secretary-General to decide upon the conversion of fixed-term contracts on an individual basis. It does not permit a blanket suspension of the process which it directs. It is conceded by the ITU that, for the most part, the decisions affecting the individual complainants in the present cases were taken in consequence of the policy decision to suspend the conversion of fixed-term contracts and not on the basis of a consideration of the budgetary position as it might affect them as individual staff members. That approach involved an error of law and, subject to a consideration of the position of the complainants in respect of whom additional arguments are put, the decisions to reject the recommendations of the Appeal Board and the earlier decisions not to convert the complainants’ fixed-term contracts must be set aside.”



In conclusion, the Tribunal ordered the ITU to convert the fixed-term contracts of most of the complainants to permanent contracts. However, the Tribunal distinguished the present complainant's case from those of his colleagues in that it was not able to determine whether the recommendation by his Director (written in 2002) was still valid in March 2005. It therefore held that, in the complainant's case, the appropriate course was to have the matter remitted to the Secretary-General for reconsideration upon receipt of a current recommendation from the complainant's Director.

3. (a) In 2006 the complainant's post (post 851) was abolished and he was redeployed to the post of Head of the Sector Strategies and Conferences (post 232), which was temporarily vacant owing to the detachment of its incumbent to other functions financed from extra-budgetary funds. The complainant's assignment to that post was dependent on the incumbent's period of detachment and his contract was thus extended until 20 March 2007. Following the restructuring of BDT in March 2007, the complainant was assigned to the newly created post of Counsellor to Study Group 2 and his contract was extended until 20 March 2008. Pending the actual creation of the budget for the post of Counsellor to Study Group 2, his salary continued to be paid from the budget for post 232.

(b) The complainant received a negative performance appraisal report for 2006. He contested that report and in November 2007 it was invalidated. In response to a request of 16 April 2007 from the Deputy Secretary-General, the new Director of BDT, in a memorandum dated 23 April 2007, recommended against the conversion of the complainant's contract into a permanent one, arguing that he had not met the criterion of continuous satisfactory service. After several requests for information regarding his contract, the complainant was informed on 1 June 2007 that the Director of BDT had requested a six-month observation period to assess his performance as Counsellor to Study Group 2 prior to making a proposal with regard to the conversion of his contract. On 15 October 2007 an interim appraisal report was issued in which the complainant's performance was considered "acceptable".

(c) On 15 February 2008 the complainant received a positive performance appraisal report for the year 2007. The Secretary-General signed that report on 19 February 2008, thereby approving the evaluation as well as the work objectives given to the complainant for the following year. On 6 March 2008 the complainant's first-level supervisor and the Director of BDT requested a one-year extension of his appointment (Staff Request V265). That request was approved by the Chief of the Finance Department on 10 March 2008 and by the Chief of the Personnel Department on 11 March 2008, but it was not signed by the Secretary-General. The complainant's counsel wrote to the Deputy Secretary-General on 12 March requesting the conversion of the complainant's contract. He threatened to initiate legal proceedings in the event that the Administration failed to confirm by 14 March the conversion of the complainant's contract into a permanent one. In his reply, dated 14 March 2008, the Deputy Secretary-General stated that his appraisal report for the period from 21 March 2007 to 20 March 2008 had been submitted to the Secretary-General and that the Administration would be in a position to make a decision regarding the conversion of the complainant's contract as soon as it received the recommendation of the Director of BDT.

(d) On 20 March 2008 the Director of BDT sent a memorandum to the Deputy Secretary-General stating that:

“[n]otwithstanding [the complainant's] performance evaluation reports in recent years, which have not been of the standard to be expected of a member of staff at the level of P5, it is important to note that there was no budget attached to [the complainant's] post in the last biennium, nor is there budget in 2008-2009.”

He went on to say that:

“[i]t is my responsibility, as Director of the BDT, to ensure an optimum use of our limited resources. For this reason, along with the goal of ensuring the efficient functioning of the BDT, I have decided to assign all responsibilities for Study Groups 1 and 2 to one Counsellor. The post to which [the complainant] is currently assigned is to be abolished.

Alternative openings within the BDT for [the complainant] have been investigated, to no avail. There are currently no suitable positions to which [he] could be assigned.

[...] I request that you undertake the necessary procedures to ensure termination of [the complainant's] contract as soon as possible."

On 24 March 2008 the complainant's first-level supervisor and the Director of BDT filed a new Staff Request (V312), asking for a 40-day extension of the complainant's contract. This Request, which replaced the previous Request V265, set the expiration of the complainant's contract at 30 April 2008. In a letter dated 25 March 2008 the Secretary-General informed the complainant that the post of Counsellor to Study Group 2 would be abolished, that he was being given advance notice of his termination, and that no financing for his post was foreseen in the 2008-2009 budget.

4. The complainant requested a review of that decision, but it was confirmed. On 30 June 2008 he filed an appeal with the Appeal Board, which concluded in its report dated 30 September 2008 that:

"the procedure outlined in Service Order 02/08 and the internal procedure for making a recommendation to the Secretary-General were not followed. [The complainant's] case should be re-examined from the time of the request dated 16 April 2007 from the Deputy Secretary-General."

5. By a letter of 28 November 2008 the Secretary-General notified the complainant of his decision not to endorse the Appeal Board's recommendation. Regarding the Board's conclusion quoted above, the Secretary-General stated that:

"considering your 2006 appraisal report [...] and the previous evaluations which the BDT Director considered to be less than satisfactory, it was decided to evaluate your performance after a probationary one year period, interrupted by a six months interim activity report [...]. I wish to emphasize that you accepted the one year contract extension on 21 March 2007 [...], thereby implicitly renouncing the immediate conversion of your fixed-term contract and thus, accepting the reasons therefor, i.e., the non-fulfillment of the conversions' criteria."

The Secretary-General also referred to the BDT Director's view of the "unsatisfactory nature" of the complainant's performance and, disagreeing with the Board's finding that "[i]n 2007 [...] there was no basis for a negative assessment of [the complainant's] performance", he stated:

“the BDT Director did have, in March 2007, a basis for a negative assessment of your performance constituted, in particular, by your 2006 performance appraisal report which he had [...] signed in March 2007. The said report was invalidated (owing to errors of form and procedure and given the impossibility, due to the absence of your direct supervisor, of a reappraisal exercise) only in November 2007 after you requested its review in September 2007.”

With regard to the other criteria for converting the complainant’s contract, i.e. continuing work and funding, the Secretary-General stated:

“[i]ndeed, apart from the well founded unfulfilled first criterion [...], the fact that you had been redeployed on new and unbudgeted functions – although in view of a post creation – should have led the Appeal Board, as I had been led, to conclude that these two other conditions clearly were not met either.”

He concluded that “since not all of the criteria for conversion were met, [the complainant’s] contract could not justifiably be made permanent either in 2007 or 2008”, and as the Board, in his opinion, had failed to address the real subject of the appeal, he informed the complainant that he had decided to reject his appeal and to confirm his decision of 25 March 2008.

6. The complainant contends that the ITU refused to convert his contract into a permanent one even though all the conversion criteria were met; that the decision to abolish his post was made on the pretext of an allegedly insufficient budget yet did not lead to a reduction in the number of staff in BDT and is thus tainted with abuse of authority; that the illegal termination of his contract and the Union’s subsequent failure to make efforts to secure his continued employment are likewise tainted with abuse of authority; and that the ITU violated its duty to treat him with due respect. His claims are set out under B, above.

7. The Tribunal is of the opinion that the Secretary-General’s decision to accept the BDT Director’s negative recommendation was flawed because it was based on an invalidated performance appraisal report – which invalidation had the effect of rendering flawed any decisions based on that report – and because all of the complainant’s

valid appraisal reports rated his performance “satisfactory”. The second and third justifications of lack of funding and lack of continuing work are also unfounded. The absence of a signature from the Secretary-General on Staff Request V265 (requesting a one-year contract extension for the complainant) does not alter the fact that both the Chief of the Finance Department and the Chief of the Personnel Department approved the one-year extension of the complainant’s appointment, thereby indicating that there was both continuing work and funding available for at least the following year. The ITU also cites the particular circumstances regarding the budgeting of post 232 as further evidence of lack of financial support for the complainant’s appointment. The Tribunal notes, however, that post 232 was still vacant and budgeted at the time the complaint was filed, which shows that the complainant could have continued working in that post. Furthermore, the Tribunal considers it important to point out that although on 6 March 2008 the Director of BDT was willing to request a one-year extension of the complainant’s contract, just two weeks later – after the ITU had received the letter of 12 March from the complainant’s counsel – he decided not only to abolish the complainant’s post, but also that the complainant’s contract should be terminated “as soon as possible”. He then requested that the complainant’s contract be extended by only 40 days. This sudden and unexplained decision change gives rise to a presumption of abuse of authority. Furthermore, the decision to abolish the complainant’s post did not, in fact, result in a reduction of staff members in the BDT Department, which is “[o]ne of the tests which the Tribunal has developed over the years to determine whether or not a post has truly been abolished” (see Judgment 2092, under 7). Therefore, there has been abuse of authority, as the abolition of the complainant’s post was motivated “not by relevant and objective considerations, but by a desire to remove a staff member for whose dismissal there are no lawful grounds” (see Judgment 269, under 2). In addition, the Tribunal notes that the ITU failed to provide the complainant with the reasons why he was not selected for the consolidated post of Counsellor to Study Groups 1 and 2 or for certain other posts for which he had applied.

8. For the above considerations, the Secretary-General's decision of 28 November 2008, maintaining the decision of 25 March 2008 not to renew the complainant's contract, must be set aside, as must the ITU's decision not to convert the complainant's contract into a permanent one. However, considering the time that has passed and the potential administrative difficulty in reinstating the complainant in a post that no longer exists, the Tribunal, having regard to the time the complainant should have worked with the Union, orders that the ITU pay him compensation in the form of three years' gross salary, minus the amounts received as termination indemnity. The complainant is also entitled to 40,000 Swiss francs in moral damages and 7,000 francs in costs.

## DECISION

For the above reasons,

1. The Secretary-General's decision of 28 November 2008 is set aside, as is the decision not to convert the complainant's fixed-term contract into a permanent contract.
2. The ITU shall pay the complainant the equivalent of three years' gross salary, minus the amounts received as termination indemnity.
3. It shall pay him 40,000 Swiss francs in moral damages.
4. It shall also pay him 7,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet