

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**S. (Nos. 1 and 3)**

**v.**

**ITU**

**123rd Session**

**Judgment No. 3737**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr J. S. against the International Telecommunication Union (ITU) on 11 June 2014 and corrected on 28 July, the ITU's reply of 3 December 2014, the complainant's rejoinder of 11 March 2015 and the ITU's surrejoinder of 16 June 2015;

Considering the third complaint filed by the complainant against the ITU on 14 January 2015 and corrected on 27 February, the ITU's reply of 16 June, the complainant's rejoinder of 15 October 2015 and the ITU's surrejoinder of 20 January 2016;

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 cases may be summed up as follows:

The complainant alleges that he was subjected to harassment.

The complainant was recruited by the ITU on 29 February 2012 as a Communication Officer at grade P.3 in the Telecommunication Development Bureau (BDT) on a one-year fixed-term contract. He was placed on sick leave with effect from 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 BDT had already told him, his contract would not be renewed when it expired on 28 February because his post was to be abolished.

On 28 February 2013, referring to paragraph 4.5 of Service Order No. 10/11 on Sick Leave Management, the complainant requested that his contract be extended to take account of his period of illness, which he claimed was service-incurred. On 13 March 2013 the Chief of HRMD pointed out to the complainant that his illness had not been recognised as service-incurred and informed him that, in the absence of a valid reason to extend his contract, the Secretary-General could not grant his request.

On 18 April 2013 the complainant underwent a medical examination to identify the cause of his illness. The report of the examination, dated 29 May, stated that his illness was not service-incurred. Following an exchange of e-mails in which the complainant questioned the rigour of the examination, the Chief of HRMD informed him on 18 November 2013 that there was insufficient evidence to dispute the report's findings.

On 20 February 2014 the complainant lodged an internal complaint of psychological harassment and abuse of authority directed against the Director of BDT and the Secretary-General. On 13 March 2014 the Deputy Secretary-General explained to the complainant that pursuant to paragraph 13 of Service Order No. 05/05 on ITU Policy on Harassment and Abuse of Authority, an internal complaint must be lodged within one year of the most recent occurrence of the alleged conduct. However, he considered that the “most recent occurrence” alleged by the complainant in respect of the Director of BDT was the decision not to renew his contract, of which the complainant had become aware, contrary to his submissions and as confirmed by the Information Services Department, on 1 February 2013 at the latest. The Deputy Secretary-General concluded that the internal complaint was time-barred and hence irreceivable as far as the Director of BDT was concerned. Accordingly, he invited the complainant to revise his complaint by 11 April 2014 so as to confine

his allegations to the Secretary-General. That is the decision primarily impugned by the complainant in his first complaint before the Tribunal.

On 6 April 2014 the complainant submitted to the Deputy Secretary-General a request for review of the decision to dismiss part of the internal complaint. This request was rejected on 20 May 2014.

In the meantime, also on 6 April 2014, the complainant had filed a “separate internal complaint” against the Secretary-General as the official “responsible for the administration of the ITU”. He said that he did not understand the “systematically negative actions” taken by the ITU in his regard, in particular the decision taken on 28 January 2013 not to renew his contract and the refusal to extend it. In its report of 3 October 2014, the commission which was set up to conduct an inquiry reported that it had not found any evidence of systematically negative actions, gross negligence or contempt in the complainant’s regard and recommended that the internal complaint against the Secretary-General be dismissed. It further recommended that in future any decision to terminate a contract should be sent to the official concerned by recorded delivery and by e-mail, and that, if necessary, HRMD should deliver it by hand. On 15 October 2014 the Deputy Secretary-General informed the complainant that, in accordance with the conclusion reached by the Commission of Inquiry, his internal complaint against the Secretary-General had been dismissed as unfounded. That is the decision impugned by the complainant in his third complaint before the Tribunal.

In his first complaint, the complainant seeks the setting aside of the decisions of 13 March 2014 and 20 May 2014, compensation for injury and an award of 10,000 euros in costs.

The ITU contends that the first complaint is irreceivable given that the internal complaint of 20 February 2014 was time-barred insofar as it was directed against the Director of BDT and that the complainant did not pursue the internal appeal proceedings that he had initiated by his request for review of the decision of 13 March 2014. Insofar as it concerns the allegations made against the Secretary-General, the ITU submits that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, since the decision of 13 March 2014 was

not final in that respect. The ITU further argues that the complaint is unfounded.

In his third complaint before the Tribunal, the complainant seeks the setting aside of the decision of 15 October 2014, compensation for injury and an award of 10,000 euros in costs.

The ITU submits that the third complaint should be dismissed as unfounded.

### CONSIDERATIONS

1. On 20 February 2014 the complainant, a former ITU official, lodged an internal complaint of psychological harassment and abuse of authority directed against the Director of BDT – his former supervisor – and the Secretary-General of the ITU.

In a decision of 13 March 2014, the Deputy Secretary-General considered that complaint irreceivable insofar as it was directed against the Director of BDT on the grounds that it was time-barred under paragraph 13 of Service Order No. 05/05 of 16 March 2005 on ITU Policy on Harassment and Abuse of Authority, pursuant to which such a complaint must be lodged “no later than one year after the most recent alleged occurrence of harassment or abuse of authority”. In the Deputy Secretary-General’s view, the most recent occurrence alleged by the complainant in support of his accusations against the Director of BDT was the decision not to renew his fixed-term contract contained in a letter dated 28 January 2013, of which he been notified more than a year before lodging his complaint.

In that same decision of 13 March 2014, the complainant was “invite[d], by 11 April 2014 at latest, to confine [his] complaint to [his] allegations of harassment and abuse of authority against the Secretary-General, describing [...] all the alleged occurrences supporting these accusations”.

Further to that request, on 6 April 2014 the complainant lodged a complaint against the Secretary-General alone, in which he reframed

and redirected the arguments contained in his initial complaint as instructed.

2. In his first complaint before the Tribunal, the complainant challenges the above-mentioned decision of 13 March 2014 as well as the decision of 20 May 2014 by which his request for review was dismissed. He disputes the rejection of his initial internal complaint as time-barred to the extent that it was directed against the Director of BDT and the fact that he was obliged to confine his allegations, which were in his view inextricably linked, to those concerning the Secretary-General.

In his third complaint before the Tribunal, the complainant impugns the decision of 15 October 2014 by which the Deputy Secretary-General, in accordance with the conclusions set out in the report of the Commission of Inquiry, dismissed as groundless the internal complaint against the Secretary-General that had been lodged in the circumstances described above.

3. The two complaints before the Tribunal, which essentially seek the same redress and are partly based on the same arguments, are broadly interdependent. They may therefore be joined to form the subject of a single judgment.

4. The defendant raises several objections to the receivability of the first complaint.

a) In the first place, the ITU argues that this complaint is irreceivable insofar as the complainant alleges harassment or abuse of authority by the Director of BDT, because the internal complaint of 20 February 2014 was, in its view, time-barred as far as the allegations against the Director were concerned. However, this objection, which in fact concerns the lawfulness of the Deputy Secretary-General's decision to declare the internal complaint time-barred in this respect pursuant to paragraph 13 of Service Order No. 05/05 cited above, is hence related to the merits of the first complaint rather than to its receivability. This objection may not therefore, in the Tribunal's view, be entered as an objection to receivability in the form in which it has been presented by

the ITU in its submissions. Moreover, for reasons that will emerge shortly, the arguments underpinning this objection cannot be accepted.

b) In the alternative, the ITU contends that the first complaint is irreceivable to the same extent on the grounds that the complainant, contrary to Article VII, paragraph 1, of the Statute of the Tribunal, did not exhaust all the internal remedies provided for in Chapter XI of the Staff Regulations and Staff Rules. However, as the Tribunal has previously ruled, these remedies were not open to former ITU officials under the provisions that were in force at the material time (see Judgments 2892, under 6 to 8, 3139, under 3, or 3178, under 5). The complainant was therefore entitled to come directly before the Tribunal and, contrary to the ITU's submissions, the fact that he nevertheless filed a request for review of the decision of 13 March 2014 did not oblige him to pursue the resulting internal appeal proceedings until their completion, since he had already left the ITU's employ on the date when he was notified of that decision (see Judgment 2892 cited above and, *a contrario*, Judgments 3202, under 10, and 3423, under 7b)).

c) The ITU lastly submits that the first complaint is irreceivable to the extent that the complainant alleges harassment and abuse of authority by the Secretary-General, because the proceedings initiated by the internal complaint of 20 February 2014 concerning those allegations were in fact completed. It considers that only the decision taken at the end of those proceedings (the decision of 15 October 2014) could be impugned before the Tribunal in the circumstances. However, it is plain from the wording of the decision of 13 March 2014 cited above that, as the ITU states in its submissions, its purpose was to "ask the complainant to lodge a complaint confined to the Secretary-General's alleged conduct" within a given time limit. Inasmuch as it obliged the complainant to modify his initial internal complaint, the decision of 13 March 2014 adversely affected him and, as stated above, since he did not have recourse to internal means of redress, he was in any case entitled to challenge that decision directly before the Tribunal. Moreover, the Tribunal notes that, following the ITU's reasoning, this objection was rendered moot by the filing of the third complaint with the Tribunal.

These various objections to receivability hence fail.

5. On the merits, the parties' dispute concerning adherence to the one-year time limit stipulated in paragraph 13 of Service Order No. 05/05 in respect of the allegations against the Director of BDT contained in the internal complaint filed by the complainant on 20 February 2014 turns on identifying the starting point of that time limit.

6. In this regard, the first point to be considered is whether the time limit was triggered, as the ITU argues, by the complainant's notification of the aforementioned decision of 28 January 2013 not to renew his contract, which, according to the defendant, was the most recent occurrence alleged in respect of the Director of BDT in that internal complaint, or whether, as the complainant submits, this was not the case given that later occurrences were also mentioned in the internal complaint or in the request for review of the decision of 13 March 2014. However, this is a matter that the Tribunal need not resolve in the light of what will be said below, even assuming that the ITU's argument on the first point is tenable.

7. 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, precisely one year before he submitted his request for review of 20 February 2014.

Reiterating the reasoning stated in the decision of 13 March 2014, 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 establish 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, or 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 defendant, 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 specifically asked by the Tribunal, in the context of a request for further submissions on the complainant's second complaint, which is the subject of Judgment 3738 also delivered in public this day, to produce any evidence of the date on which the e-mail was opened, the ITU explicitly conceded in a letter dated 11 October 2016 that there was "no document that could 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.

8. The Tribunal notes in this connection that neither the ITU's argument, put with some insistence, that the complainant's claim 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 likewise not be established unless evidence thereof is produced (see, for example, Judgments 2282, under 6, 2293, under 11, 2800, under 21, or 3407, under 15).

9. 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.

10. It follows from the above that in the decision of 13 March 2014 the Deputy Secretary-General wrongly determined that the complainant's internal complaint was irreceivable insofar as it concerned the Director



of BDT and thus invited the complainant without any justification to “confine [his] complaint to [his] allegations” against the Secretary General. In consequence, that decision must be set aside in its entirety.

The same applies to the decision of 20 May 2014 – which was also based on the same supposed time bar – dismissing the complainant’s request for review of the decision of 13 March 2014.

11. Furthermore, the unlawful position taken by the ITU on this matter had an adverse influence on the circumstances in which the allegations of psychological harassment and abuse of authority against the Secretary-General were examined.

Indeed, the file shows that the complainant made these allegations against the Secretary-General in the belief that, as the official responsible for the ITU’s administration, he had tolerated or supported harassment and abuse of authority by the Director of BDT and was hence complicit in the latter’s conduct. The allegations against each of these officials were therefore, for the most part, closely entwined.

Hence, in the first place, by unlawfully requiring the complainant to submit a revised version of his internal complaint that was directed solely against the Secretary-General, the ITU, as the complainant correctly asserts, unduly compelled him to sever artificially the arguments put forward in his initial complaint.

In the second place, the assessment by the competent authorities of the allegations specifically targeting the Secretary-General was inevitably distorted, precisely because it was conducted in isolation from the assessment of the behaviour of the Director of BDT, which should have taken place at the same time.

Lastly, the existence of these flaws is evident from the report submitted by the Commission of Inquiry and the grounds for the Deputy Secretary General’s decision of 15 October 2014 that was taken on the basis of it. Indeed, the complainant’s various allegations were dismissed on the grounds that they were not, in themselves, indicative of any harassment or abuse of authority since the actions in question, such as the non-renewal of the complainant’s contract or certain decisions relating to his health, had been taken by the Secretary-General in proper

exercise of his authority. However, the assessment of these actions, which of themselves do not reveal anything untoward, might well have led to a very different outcome had it been apparent that they occurred against a background of harassment by the Director of BDT.

The Tribunal therefore considers that the examination of the internal complaint against the Secretary-General was flawed, which in turn vitiated the decision of 15 October 2014 and justifies its setting aside.

12. It can be concluded from the above, without there being any need to consider the other pleas put forward in the complaints, that the impugned decisions of 13 March, 20 May and 15 October 2014 must all be set aside.

13. The case will be remitted to the ITU for a full and proper examination of the initial internal complaint lodged by the complainant on 20 February 2014 under the terms envisaged by Service Order No. 05/05, as should originally have been the case. Indeed, contrary to what the complainant suggests in his submissions, the Tribunal cannot rule at this stage on the merits of the allegations made in that complaint since most of them have not been subject to the prior investigations necessary to make an informed assessment, which the ITU's internal bodies alone are able to conduct effectively. The ITU must therefore, within 30 days of the public delivery of this judgment, set up a new commission of inquiry to investigate the said internal complaint.

14. The impugned decisions have of themselves caused moral injury to the complainant, which is distinct from the injury allegedly caused by the ITU through harassment and abuse of authority, in that they violated his right to have his complaint of 20 February 2014 fully and properly examined and have 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 awarding to the complainant compensation in the amount of 7,000 euros.

15. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The impugned decisions of 13 March, 20 May and 15 October 2014 are set aside.
2. The case is remitted to the ITU for a full and proper examination of the internal complaint lodged by the complainant on 20 February 2014 under the terms envisaged by Service Order No. 05/05 of 16 March 2005. The ITU shall therefore set up, within 30 days of the public delivery of this judgment, a new commission of inquiry to investigate the complaint.
3. The ITU shall pay the complainant 7,000 euros in moral damages.
4. It shall also pay him 5,000 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