Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. (No. 2)

v.

ITU

124th Session **Judgment No. 3846**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms E. C. against the International Telecommunication Union (ITU) on 18 June 2014 and corrected on 27 August, the ITU's reply of 11 December 2014, the complainant's rejoinder of 21 February 2015 and the ITU's surrejoinder of 26 May 2015;

Considering Article II, paragraph 5, 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 objects to the working conditions to which she was subjected during a secondment and contends that the ITU breached the rules on performance appraisals.

The complainant was temporarily assigned to the Telecommunication Development Bureau (BDT) from 21 March 2011 to 31 August 2012 to perform the duties of Administrative Assistant to the Director of the Bureau. During this secondment she was called upon to put in many hours of overtime. Between 25 June and 3 August 2012 she was on sick leave. Thereafter she took annual leave until the end of her secondment.

On 21 December 2012 the complainant wrote to the Secretary-General, first in order to protest against the "very tough" and "abnormally exhausting" working conditions to which she claimed to

have been subjected during her secondment and, secondly, to request the finalisation of her performance appraisal for 2011 and redress for alleged moral injury deriving from the ITU's conduct. The Administration then asked the Director of the BDT to provide some explanations, which he did on 11 April 2013. In the meantime, a performance appraisal covering the whole of the secondment period had been finalised. On 1 May the complainant was informed of the Secretary-General's decision to dismiss her claim for moral damages which, in his opinion, was not supported by any evidence. On 12 June she requested a review of that decision. That request was rejected on 23 July.

On 21 October 2013 the complainant submitted an appeal to the Appeal Board. She sought the setting aside of the decision of 23 July, redress for alleged injury and an award of costs. She also asked the Appeal Board to hear witnesses if it considered that there was insufficient evidence to establish the facts. Having read the Secretary-General's reply, in which it was argued that the appeal should be dismissed as unfounded, she asked for authorisation to file a rejoinder. On 19 December 2013 the Appeal Board rejected this request, but at the same time it informed her that the deadline for submitting its report had been extended owing to "*force majeure*", to wit the absence on mission or annual leave of some of its members and the closure of the ITU during the end-of-year holiday period.

The Appeal Board issued its report on 21 January 2014 after written proceedings. It considered that the Administration and the complainant were jointly responsible for the delay in drawing up the performance appraisal for 2011 and that the complainant had not suffered injury on account of that delay. It also held that her working conditions had not been abnormally demanding, but had entailed overtime which should be compensated.

In a memorandum of 21 March 2014, which constitutes the impugned decision, the Secretary-General stated that, insofar as the letter of 21 December 2012 could be regarded as an "implicit request for compensation" for overtime, the complainant was invited to submit the enclosed form in order to request "compensation for overtime worked with prior authorisation" between 22 December 2011 and 31 August 2012.

She declined to do so. The Secretary-General dismissed the other claims on the grounds that the Appeal Board had rightly rejected the complainant's request for authorisation to file a rejoinder, since she had not stated her reasons for doing so.

On 18 June 2014 the complainant filed a complaint with the Tribunal in which she asked it to set aside the impugned decision, to order redress for the injury which she considers she has suffered and to award her costs.

The ITU asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant has filed a complaint with the Tribunal in order to obtain the setting aside of the impugned decision. She also asks the Tribunal to order the ITU first to redress the injury which she considers she has suffered and which she estimates to be at least 30,000 euros and, secondly, to award her costs in the amount of 8,000 euros.

2. The ITU asks the Tribunal to dismiss the complaint in its entirety as unfounded.

3. In support of her claims, the complainant puts forward both procedural and substantive arguments.

4. As far as procedural grounds are concerned, the complainant considers that the internal appeal proceedings conducted by the ITU are tainted with three flaws, namely the unlawful refusal of her requests to file a rejoinder and for the hearing of witnesses, the failure to abide by procedural time limits and, lastly, the composition of the Appeal Board.

5. The complainant submits that the Appeal Board's denial of her request to file a rejoinder disregarded the scope of the adversarial principle, in that it unduly deprived her of her right to be heard in satisfactory conditions and of a thorough review of her case. Since it refused to hear the witnesses she had named, the Appeal Board could not provide the Secretary-General with an informed opinion. She adds

that the explanation given in the impugned decision, that the request for authorisation to file a rejoinder had to be rejected because no reasons had been stated for it, has no effect in law and that, in any event, she did not have to state the reasons for her request.

In the ITU's opinion, a request for authorisation to file a rejoinder does not have to be automatically granted by virtue of the adversarial principle. It submits that the Appeal Board fully exercised its competence and that it found, in the exercise of its discretionary power, that it had all the relevant information that it needed to issue its report. The ITU also submits that it is up to the official requesting authorisation to file a rejoinder to state the reasons for that request, which must be rejected if no reasons are given.

6. In Judgment 3590, which concerned the same parties, the Tribunal held that:

> "[R]egardless of whether the right to file a rejoinder is provided for in the rules governing appeal proceedings or not, this right must be granted to the official concerned whenever the Administration submits decisive arguments to the advisory body of which the appellant could not be aware (see Judgments 3223, under 6, and 3438, under 9). Such was the case here. The implied refusal to permit the complainant to comment on the reply of [the Secretary-General] is all the more unacceptable as it could not be justified for reasons of speed, given that the Appeal Board had just announced that the delivery of its report was postponed.
>
> By not allowing the complainant to make a fully informed rejoinder as she requested, the Appeal Board therefore infringed the right to be heard that is inherent in the adversarial principle."

The complaint was allowed for this reason.

In the instant case, the refusal of the Appeal Board to authorise the filing of a rejoinder by the complainant does not constitute a breach of the adversarial principle, because the ITU's reply did not disclose any genuinely new facts. The Appeal Board was under no obligation to call the witnesses whom the complainant wished it to hear, since it was for that body to decide whether such a step was appropriate.

7. In her plea that procedural time limits were ignored, the complainant submits that the appeal procedure followed in this case infringed Staff Rule 11.1.1, paragraph 4, in that the Appeal Board decided to extend the time limit for submitting its report beyond ten weeks on the grounds that missions, annual leave and the office closure amounted to a case of *force majeure*, whereas those circumstances did not constitute one.

The ITU asserts that the whole internal procedure took place within the 14 weeks stipulated in Staff Rule 11.1.1, paragraph 4 f). It adds that the notion of *force majeure* must be broadly interpreted and that the events to which the Appeal Board referred constitute objective exceptional circumstances. Moreover, it maintains that the extension of the time limit for submission of the Appeal Board's report did not cause the complainant any moral injury.

8. Staff Rule 11.1.1, paragraph 4 f), is worded:

> "[I]n a case of *force majeure*, the Board (or, if the latter cannot be convened immediately, its Chairman) may extend the time limits stipulated in subparagraphs a), c) and e) of the present paragraph; however, the total duration of the procedure in any particular case shall not exceed 14 weeks from the date on which the appeal was submitted. In the event of any such extension granted by virtue of the present subparagraph, both parties shall be informed accordingly."

The Tribunal is of the opinion that, as the ITU itself recognises, the events to which the Appeal Board referred do not constitute "extraneous, unforeseeable and compelling factors". The defendant organisation may not therefore rely on *force majeure* to justify a failure to comply with the time limit for the submission of the Board's report. In this case, however, this flaw had no practical implications and hence does not warrant an award of damages.

9. As far as the allegedly unlawful composition of the Appeal Board is concerned, the complainant, who at the time of filing her complaint was assigned to the General Secretariat, contends that the designation as Chairman of the Board of an alternate who was also

a staff member of the General Secretariat was contrary to Staff Rule 11.1.1, paragraph 3, and deprived her of a guarantee of impartiality.

The ITU argues that the composition of the Appeal Board was valid and lawful having regard to the letter and spirit of the applicable rules. In this case, it was rightly considered that the alternate Chairman should chair the Appeal Board for the examination of the complainant's appeal, since the appeal "was prompted by, or related to events which took place during her secondment to the BDT".

10. Staff Rule 11.1.1, paragraph 3, reads as follows:

> "The Appeal Board, which shall be assisted by a Secretary appointed for a period of two years by the Secretary-General, shall, when meeting, be composed of:
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> a) a Chairman or alternate; the Appeal Board shall be chaired by the alternate Chairman in the event of the Chairman's absence or the examination of cases which concern a staff member from the General Secretariat, when the Chairman is a member thereof, from the same Bureau as the Chairman.
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> b) a member or alternate from the General Secretariat or, as appropriate, the Bureau to which the appellant belongs;
>
> c) a member representing the staff."

The Tribunal finds that the composition of the Appeal Board was lawful because, as the complainant had been assigned to the BDT, the Chairman of the Appeal Board was rightly replaced by the alternate Chairman in accordance with the above-cited rule. The fact that the complainant's assignment to the BDT had come about as a result of a secondment has no bearing on the application of this rule, the purpose of which is to guarantee the Appeal Board's impartiality and to prevent a staff member's internal appeal being examined by an appeal body chaired by a person who has too close a professional relationship with her or him.

11. In support of her argument that the impugned decision is tainted with substantive flaws and that she is therefore entitled to redress, the complainant submits that the ITU engaged in wrongful conduct which caused her moral injury and led to a deterioration in her

health. In this connection, she refers to the delay in drawing up her performance appraisal and to the "abnormal" working conditions to which she was subjected.

With regard to the performance appraisal, the complainant states that the ITU breached its duty to conduct appraisals in December 2011 and September 2012 relating to her period of secondment; that the explanations of the Director of the BDT are tainted with bad faith; and that she was not at fault and there is no valid excuse.

As far as her working conditions are concerned, she states that the Director of the BDT was both too indifferent and too demanding, even though she was faced with abnormal working conditions. The particular conditions associated with the duties of an administrative assistant, namely the heavy workload, readiness to work long hours and great flexibility, in this case masked abnormal and abusive working conditions which worsened in 2012. The situation was such that she was unable to use up her days of leave accumulated in 2011 and took no annual leave before the new administrative assistant arrived.

12. The ITU maintains that, regardless of the reasons for the delay in finalising the only performance appraisal that was drawn up during the period of secondment, the complainant has not established the existence of any injury.

Moreover, it considers that, while it is true that the working conditions of an administrative assistant are particularly demanding, which justifies classification of the post at grade G.7, they are neither abnormal nor abusive on that account. Since the complainant decided not to use the system for compensating overtime, she cannot now claim compensation in this regard.

13. The question raised by the complainant's plea regarding her working conditions is whether the events complained of are indeed proven and whether they caused her injury. The Tribunal finds that the complainant provides no substantive evidence in support of her submissions that the tasks assigned to her were so difficult that her working conditions were abnormal or abusive. Although she has

produced the testimony of persons who held her post or who worked in the human resources team attached to the BDT, who report an excessive amount of work, this is not enough to establish that the complainant was subjected to abnormal or abusive working conditions. It cannot therefore be accepted that she did work in such conditions.

14. On the matter of overtime, it is not disputed that the complainant worked overtime and was normally entitled to be paid for the extra hours worked. However, the complainant refused the compensatory system offered by the ITU, which had acknowledged that situation, thereby forgoing her claim to any redress. The ITU therefore did nothing wrong in requiring the complainant to work in those conditions. This plea must be dismissed.

As for the lateness of the performance appraisal, the Tribunal draws attention to the fact that every international civil servant has the right to be informed of her or his supervisors' appraisal of her or his service (see Judgments 1394, under 5, 2067, under 10, or 3171, under 30). The organisation therefore has a duty to evaluate an official's work in a timely manner and any failure to do so is a breach of its obligations to its staff. In this case, the complainant did not have her appraisal interview with the Director of the BDT until 8 February 2013. On 11 February 2013 she returned her signed appraisal to him, but she disputed some of the ratings given to her. The arguments of the ITU that the complainant had received a step advancement and that since 2011 she had known that the Director of the BDT was fully satisfied with her service do not exempt it from providing her with a proper performance appraisal within the time limit specified in the applicable provisions. The Tribunal considers that the delay in drawing up the performance appraisal constitutes a breach by the ITU of its own obligations. It finds, however, that contrary to the complainant's submissions, this breach did not have any practical consequences for her.

15. It follows from the foregoing that, as the decision of 21 March 2014 was tainted with only minor flaws, there is no reason to set it aside. The complaint will therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 April 2017, 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 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ