Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 3), D. (No. 4) and F.

v.

ITU

126th Session **Judgment No. 4028**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms C. D. (her third), Mr H.-L. D. (his fourth) and Ms A. F. against the International Telecommunication Union (ITU) on 30 June 2015 and corrected on 28 August, the ITU's reply of 9 December 2015, the complainants' rejoinder of 18 April 2016 and the ITU's surrejoinder of 14 July 2016;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 13 of its Rules;

Considering the applications to intervene filed by:

[names removed]

and the letter of 6 February 2018 by which the ITU sent its comments on those applications to the Registrar of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants challenge Service Order No. 14/10 changing the health insurance scheme at the ITU, as well as individual decisions implementing that service order.

Facts relevant to this case are to be found in Judgment 3736, delivered in public on 8 February 2017.

On 30 April 2014 the ITU published Service Order No. 14/10. It announced that, as from 1 May 2014, current and former ITU staff members who had previously been affiliated to the Staff Health Insurance Fund (hereinafter "the SHIF") – which was the joint health insurance fund of the ITU and the International Labour Office, the secretariat of the International Labour Organization – would automatically become members of the ITU's new health insurance plan. On 11 June Ms D. and Ms F. submitted a request for review of that service order to the Secretary-General. They objected to the failure to consult the staff representation bodies – Ms D. was a member of the Staff Council and Ms F. of the ITU Former Staff Members' Association – and complained about the deterioration in staff members' employment conditions and in the situation of retirees owing to, in particular, the introduction of a system of deductibles and higher contributions without improved cover in return. On 23 July 2014 the Chief of the Human Resources Management Department advised them that the Staff Council and the Former Staff Members' Association had been "closely involved" with the process since a working group including elected representatives of current and retired insured persons had been set up. Its work had culminated in the aforementioned service order, which had been approved by the Joint Advisory Committee, on which four staff representatives sat. She added that the new insurance plan offered similar coverage to the SHIF despite the higher contribution rate and the introduction of the system of deductibles. Consequently, the requests for review were rejected and Service Order No. 14/10 was "upheld in its entirety".

On 24 June Ms D. and Mr D. requested the Secretary-General to review his decision to raise contributions to the health insurance plan, as reflected in their pay slips for May 2014. On 24 July Mr D. was advised that his request was time-barred and, in addition, groundless. Ms D. was invited to refer to the reply that had been sent to her on 23 July.

On 19 August Ms D. challenged the refusal to reimburse her for various health-related expenses owing to the application of the system

of deductibles. In a memorandum dated 30 September, she was again invited to refer to the reply that had been sent to her on 23 July.

On 24 October 2014 the complainants' lawyer submitted to the Appeal Board a collective appeal directed against the various rejection decisions that they had received. That appeal sought the withdrawal of Service Order No. 14/10, the reestablishment of the complainants' affiliation to the SHIF, compensation for moral and material injury and an award of costs. Citing Judgment 995 of the Tribunal, the ITU submitted that the appeal was irreceivable in its entirety. It considered that while Chapter XI of the Staff Regulations and Staff Rules allowed assistance before the Appeal Board, it was for the staff member to set down her or his complaints in writing to the Chairman of that Board and not the person assisting her or him. In this case, therefore, the lawyer did not have standing to submit an appeal on the complainants' behalf. The ITU added that the appeal was time-barred as far as Ms D. was concerned, since she had lodged it one day after the expiry of the three-month time limit prescribed in Staff Rule 11.1.1, paragraph 2 b), and that it was irreceivable as far as Mr D. was concerned since his request for review had been time-barred.

Before giving their opinion, the members of the Appeal Board decided to interview Mr B., the former representative of ITU insured persons on the SHIF Management Committee, to gain a better understanding of the role of the aforementioned working group. Mr B. provided them with various documents. In its report dated 2 February 2015, the Appeal Board considered in respect of Ms D.'s appeal that the complexity of Service Order No. 14/10 had necessitated additional staff information sessions and this factor justified a waiver of time limits. On the merits, the Board questioned whether the Staff Council's representatives had been given enough time and elements to contribute to the process culminating in Service Order No. 14/10 with an informed opinion. The Board considered that several steps of the process required further clarification but that it was not able to carry out the necessary investigation in view of the deadlines established in paragraph 4 of Staff Rule 11.1.1. It suggested that the Secretary-General entrust this task to a special, neutral committee and recommended that he revise

aforementioned paragraph 4. To enable the Secretary-General to make a "fully informed" decision, the Chief of the Human Resources Management Department requested the Chairman of the Appeal Board to clarify various points, which he did on 18 March. In a memorandum of 1 April 2015, which constitutes the impugned decision, the complainants were informed that the Secretary-General endorsed the arguments put to the Appeal Board by the ITU and found that their appeal was irreceivable, but he would consider the possibility of revising aforementioned paragraph 4.

Before the Tribunal, the complainants request the setting aside of the impugned decision, Service Order No. 14/10 and the individual decisions implementing that service order; the reestablishment of their affiliation to the SHIF; compensation for the moral and material injury they state they have suffered; and an award of costs.

The ITU submits that the complaints are irreceivable because the underlying internal appeal was itself irreceivable and, subsidiarily, that they are unfounded.

CONSIDERATIONS

1. As the complaints seek the same redress and rest on submissions which are, for the most part, identical, it is appropriate that they be joined to form the subject of a single ruling.

2. The ITU's first objection to receivability is based on a breach of the Staff Rules. Under Staff Rule 11.1.1, paragraph 4, a staff member wishing to appeal must set down her or his complaints in writing and send them to the Chairman of the Appeal Board; she or he is entitled to request assistance by any person she or he chooses. The ITU infers from this that only assistance, and not representation, is allowed during internal appeal proceedings, which, in its view, prevents the appeal from being lodged by a lawyer.

However, this issue may remain undecided since when an internal appeal is tainted with a flaw – other than late submission – which prevents it from being considered as properly filed, it is for the appeals

body, in the exercise of its duty of care, to enable the appellant to correct the appeal by granting her or him a reasonable period of time in which to do so (see Judgments 3943, under 5, and 3127, under 10), and that did not occur in the present case.

Accordingly, the ITU's objection to receivability cannot, in any event, be accepted.

3. The complainants request the setting aside of Service Order No. 14/10. However, as the Tribunal recalled in Judgment 3736, under 3, "according to the case law, a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged (see Judgment 3628, under 4, and the case law cited therein)". In these circumstances, the claims seeking the setting aside of Service Order No. 14/10 are irreceivable and must be dismissed.

4. The complainants seek the setting aside of the Secretary-General's final decision of 1 April 2015 which, rejecting the Appeal Board's opinion, dismissed their internal appeal.

That internal appeal concerned:

– the requests for review of Service Order No. 14/10 submitted by Ms D. and Ms F., which were rejected in a decision of 23 July 2014;
– the requests for review of pay slips for May 2014 submitted by Ms D. and Mr D., which were rejected in a decision of 24 July 2014;
– Ms D.'s request for review in respect of a calculation of reimbursements for health-related expenses, which was rejected in a decision of 30 September 2014.

5. Since the claims seeking the setting aside of Service Order No. 14/10 must be dismissed, as stated in consideration 3 above, the same applies to the claims directed against the Secretary-General's final decision insofar as it concerns the decisions of 23 July 2014 on the

requests for review that were directed solely against the aforementioned service order.

Ms F. has not challenged any individual decision implementing Service Order No. 14/10. Her complaint is therefore irreceivable.

6. However, Ms D. and Mr D. submitted requests for review of their pay slips reflecting an increase in the deduction for health insurance. Ms D. submitted a further request for review of a calculation of reimbursements of health-related expenses which showed that a deductible had been applied. These decisions are individual decisions implementing Service Order No. 14/10 which, as stated above, are open to appeal.

7. The ITU objects to the receivability of Ms D.'s complaint on the grounds that she received the decision on her request for review on 23 July 2014 but did not lodge her internal appeal until 24 October 2014. In the ITU's view, the three-month time limit prescribed by the Staff Rules for submitting an appeal was exceeded. It argues that the time limit started to run on the day after the notification, that is on 24 July 2014, and therefore expired on 23 October. The complainant considers that the time limit is expressed in clear months and that the appeal was submitted on the last day possible. In this respect, she relies on Judgment 2831, under 3.

As stated above, Ms D. was notified of the decision rejecting the request for review of her May 2014 pay slip on 24 July 2014, and not 23 July. Accordingly, the appeal submitted on 24 October 2014, within the three-month time limit provided in the applicable provision, was in any event receivable.

The same finding must be applied to Mr D.'s internal appeal and the Secretary-General's decision concerning his pay slip. Mr D. was likewise notified of the rejection of his request for review on 24 July 2014 and he too lodged an internal appeal on 24 October 2014. Mr D.'s internal appeal was hence receivable.

Lastly, in her internal appeal, Ms D. challenged the decision of 30 September 2014, which rejected her request for review concerning a

calculation of reimbursements for health-related expenses. The internal appeal was submitted on 24 October 2014 and was therefore receivable.

In conclusion, the complaints of Ms D. and Mr D. are receivable.

8. On the merits, the complainants allege that the internal appeal proceedings were flawed and that their right to an effective internal appeal was breached. They submit that they were deprived of their right to an effective internal appeal owing to the Appeal Board's inability to review the disputed decisions completely. That Board's conclusions and recommendations read as follows:

> "The Board considers that several steps of the process that ended in the publication of SO14/10 still require further clarification.
>
> One important issue the Board believes should be clarified in order to determine the overall legitimacy of the process is the reason why the Management Committee of the SHIF did not call for a General Assembly of all insured persons to amend the Regulations and Administrative Rules of the SHIF, taking into account that they do not foresee the separation of one of the parties.
>
> The investigation needed to collect and analyze the relevant information that would permit to conclude on the regularity of the process behind SO14/10 exceeds the operational capacity of the Board within the deadlines established in paragraph 4 of Rule 11.1.1.
>
> The Secretary-General may consider giving this task to a special and neutral committee with the participation of all interested parties.
>
> [...]"

It is apparent from these conclusions and recommendations that the Appeal Board did not give an opinion on the merits of the appeal. As a result, the complainants were deprived of an essential safeguard inherent in their right of appeal, namely that the Secretary-General be informed by the Board's opinion when taking his final decision.

It follows that the impugned decision is unlawful as it was not taken in the light of such an opinion.

At this stage of the proceedings, the Tribunal would ordinarily set aside the impugned decision and remit the case to the ITU for the appeal to be given proper consideration. However, in the particular circumstances of the case, the Tribunal does not consider this course appropriate, since it would prolong detrimental uncertainty as to the lawfulness of the new

health insurance scheme to which the ITU's current and former staff members are affiliated. The Tribunal will hence rule on the complainants' submissions regarding the lawfulness of the scheme.

9. The complainants allege that the failure to consult the Staff Council constitutes a procedural flaw. In Judgment 3736, the Tribunal found that Service Order No. 14/10 was unlawful on that basis (consideration 7) but that the unlawfulness was due only to a procedural flaw that could be remedied, including retroactively (consideration 13). The ITU has provided the Tribunal with documents showing that the Staff Council was consulted following Judgment 3736. This plea must therefore be dismissed.

10. The complainants then allege a procedural flaw consisting in a failure to consult the Joint Advisory Committee in the proper manner. First, they assert that the Committee did not receive the requisite information which would have enabled it to give an advised opinion, such as, for example, the reason why no agreement could be reached in discussions between the ITU and the ILO, or what alternatives there might have been. Furthermore, the new scheme formed the subject of only a very brief presentation offering no information about the choices made. Secondly, they say that the draft service order forwarded to the Joint Advisory Committee omitted annexes 1 and 2 thereto. Lastly, the Committee met on 30 April 2014, which, according to the complainants, did not comply with the time limits set by its Rules of Procedure, and issued its recommendation on the same day.

Staff Regulation 8.2 reads:

> "The Secretary-General shall establish joint administrative machinery with staff participation to advise him regarding personnel policies and general questions of staff welfare or any administrative matter which he may refer to it, and to make to him such proposals as it may desire for amendment of the Staff Regulations and/or Staff Rules."

The change of health insurance scheme comes within the ambit of this provision, having regard to its purpose, and the Joint Advisory Committee should therefore have been consulted.

The evidence on file shows that the Joint Advisory Committee gave its advice twice. It was first asked to provide its advice on the implementation of a new medical insurance plan and the draft amendment of the Staff Regulations and Staff Rules, which led to a first opinion of 17 March 2014. It gave a second opinion on 30 April 2014 having been reconvened to consider a note on the context in which the ITU was separating from the SHIF and the basis of the new scheme, as well as a description of the new benefits and the Regulations of the new insurance scheme.

As they had been duly informed of the scope of the reform, there was nothing to prevent the members of the Joint Advisory Committee from questioning the Secretary-General's choice, from seeking information on the reasons for the ITU's separation or on possible alternatives, or from putting any other questions as they had been expressly invited to do in the email convening the second meeting.

Contrary to the complainants' submissions, annexes 1 and 2 were attached to the latter email.

As far as compliance with the time limit for convening the second meeting is concerned, reference must be made to paragraph 9 of the Committee's Rules of Procedure, which states the following:

> "The draft agenda and documents for a meeting shall be made available to the members at least ten calendar days before the date of the meeting. In exceptional circumstances, the Committee may decide to derogate from this rule, if at least five members of the Committee so agree."

According to the parties, the Committee met within seven days. The notice of the meeting asked the members to agree to derogate from the ten-day time limit laid down in paragraph 9. The ITU supplies a list of seven members who expressly agreed to do so. Moreover, the exceptional circumstances required for a derogation from the ten-day time limit were met in this case owing to the fact that, on the one hand, the Committee had already given a first opinion which merely had to be supplemented and, on the other hand, the service order had to be published by 30 April at the latest, as the ITU ceased to be a member of the SHIF on 1 May 2014.

The complainants also contend that paragraphs 12, 16, 17 and 18 of the Committee's Rules of Procedure were breached.

They submit that the meeting report was not approved by the members, contrary to the requirements of paragraphs 12 and 16, and that the Secretary-General did not inform the Committee of his decision to accept the recommendation before he implemented it, in breach of the terms of paragraph 17. However, the Tribunal considers that these are not substantive flaws; this is especially true of the absence of the report's approval by the Committee members, as it is not contended that this report did not reflect the true content of that body's discussions.

Paragraph 18 states that, if the Secretary-General does not approve the recommendation, he must inform the Committee and indicate the reasons for his decision and the Committee must meet again to review the case. The complainants assert that this was not done in respect of paragraph 5 of the Committee's opinion of 30 April 2014, which recommended that the service order should include strong encouragement to use the network of the insurance company chosen by the organisation, while acknowledging the freedom of choice of medical providers, in order to contain costs and ensure the sustainability of the system.

It is plain from the evidence in the file that the substance of the Committee's suggestion was incorporated in annex 2 to Service Order No. 14/10, which is devoted to a description of the benefits provided by the insurance company, and it was also reflected in the email of 30 April 2014 publishing the service order.

Paragraph 18 did not therefore apply in this case.

In conclusion, the plea that the Joint Advisory Committee was not properly consulted is therefore groundless.

11. The complainants also allege a breach of the principles of good faith and legitimate expectations, as well as a breach of the duties of transparency and to inform, due to the organisation's failure to inform the insured persons adequately of its intention to change its medical insurance scheme.

The Tribunal notes in this respect that the Staff Council was informed of the situation and of further developments as from October 2012. The situation was discussed by the ITU Council in June 2013. Moreover, Ms D., along with other representatives of active and retired insured persons, took part in the working group set up in order to prepare for the implementation of the new medical insurance plan.

Bulletin No. 31 of the ITU Former Staff Members' Association, published in August 2013, apprised retired staff members of the "deteriorating" situation of the SHIF, of the opening of discussions between the ILO and the ITU, and of the possibility that the latter might withdraw from the scheme managed by the SHIF. These issues were debated at the General Assembly of the ITU Former Staff Members' Association on 12 February 2014, where the members were updated on current activities in that connection.

All insured persons were informed of their outcome by the information note of 6 March 2014 and by the disputed Service Order No. 14/10.

The Tribunal considers that, in these circumstances, the plea that insured persons were insufficiently informed must be rejected.

12. In its letters of 23 July 2014 the organisation explained that the ITU insured persons could have continued their membership of the SHIF only by paying higher contributions than ILO insured persons. In the complainants' view, this reasoning involved a mistake of law, since the principle of equality applies only within the same organisation.

This and other criticism based on the above-mentioned letters is beside the point, since the purpose of the passages in question from those letters of 23 July 2014 was not to state the basis for the change of health insurance scheme, but only to comment on the context in which it had taken place (see, with regard to the first criticism, Judgment 3736, under 10).

13. Lastly, the complainants rely on a breach of acquired rights. In their opinion, the changes to the health insurance scheme substantially undermine the acquired level of protection of staff, mainly owing to the

system of deductibles which deprives staff members of any benefit from their health insurance until their medical expenses have reached a relatively high threshold. They hold that, coupled with the increase in contributions, this measure is unreasonable having regard to the grounds given for its adoption, and they point out that the burden of this measure is borne only by the insured persons.

As the Tribunal found in Judgment 3909, under 12, international organisations' staff members are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see also Judgment 3876, under 7).

The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (see, for example, Judgments 2089, 2682, 2986, 3135 and 3909 cited above).

In this case, the Tribunal finds that the change to another health insurance scheme does not affect the staff's actual right to membership of a social security scheme, but concerns solely the terms and conditions for giving effect to this right.

Regarding the deductibles introduced by the new scheme, their amount increases in proportion to the salary or pension scale, but they are capped at 750 Swiss francs per annum per person (1,500 Swiss francs per family). They do not apply to children under the age of 18, or to children in full-time education and disabled children under the age

of 21. Nor do they apply to medical expenses for dental care, optical care or hearing aids. The contribution rate has gone up from 3.30 to 3.91 per cent. The Tribunal considers that, having regard to these factors, the change to another health insurance scheme which is criticised by the complainants does not adversely affect the balance of contractual obligations or alter a fundamental term of employment in consideration of which they accepted an appointment, or which subsequently induced them to stay on. Hence, it cannot be considered as constituting a breach of an acquired right within the meaning of the case law cited above.

It is true that, as the complainants point out, the burden of the new measures is borne by the insured persons alone. It must however be remembered that, despite a fall in its income resulting from a zero growth budget and the drop in contributions from some member States, the ITU continues to fund 50 per cent of the scheme for staff members and two thirds of it for retirees. As the defendant organisation explains, the new measures which have been put in place seek to maintain the financial equilibrium of the new insurance plan in order to ensure its continuity and stability while respecting the principles of solidarity and mutualisation of risks.

In Judgment 1241, under 19, the Tribunal considered that "the change the complainants object[ed] to [was] part of wider reforms the [organisation] made to put the [health insurance] scheme on a sounder financial footing over the long term" and that the organisation in question was "right to pursue that aim by all suitable means at its disposal, [including by] measures to ensure that, in keeping with the notion of mutual aid, everyone bears a fair share of costs".

This consideration applies *mutatis mutandis* to the present complaints.

The plea that acquired rights were breached is therefore unfounded.

14. It follows from the foregoing that the claims seeking the setting aside of the impugned decision and of the decisions implementing Service Order No. 14/10 must be dismissed.

Consequently, the same applies to the claims that the defendant organisation should be ordered to re-establish the complainants' affiliation

to the SHIF and to compensate for the material and moral injury which they allegedly suffered owing to the unlawful nature of the decisions implementing the aforementioned service order. On the other hand, Ms D. and Mr D. are each entitled to moral damages in the amount of 10,000 euros to compensate for the injury caused by the flaw in the internal appeal proceedings identified in consideration 8, above.

15. As Ms D. and Mr D. succeed in part, they must each be awarded the sum of 2,000 euros in costs.

16. Several applications to intervene have been filed. The procedural flaw affecting the internal appeal of Ms D. and Mr D. concerns only these two complainants. As the remaining pleas have been dismissed, the applications to intervene must also be dismissed.

DECISION

For the above reasons,

1. The complaint of Ms F. is dismissed.
2. The ITU shall pay moral damages in the amount of 10,000 euros to Ms D. and likewise to Mr D.
3. The ITU shall pay each of them 2,000 euros in costs.
4. All other claims by Ms D. and Mr D. are dismissed.
5. The applications to intervene are dismissed.

In witness of this judgment, adopted on 24 April 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ