Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

X.

v.

ITU

137th Session **Judgment No. 4781**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. X. against the International Telecommunication Union (ITU) on 11 November 2020 and corrected on 7 January 2021, ITU's reply of 13 April 2021, the complainant's rejoinder of 19 July 2021 and ITU's surrejoinder of 18 October 2021;

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 case may be summed up as follows:

The complainant challenges the decision to reject her complaint of harassment and abuse of authority.

The complainant joined ITU on 1 March 2018 under a one-year fixed-term contract. On 31 May 2019, being the date when her extended appointment came to an end and her last day of service, she lodged an internal complaint "reporting [a] breach" of Service Order No. 19/09 on the Policy Against Fraud, Corruption and Other Proscribed Practices and Service Order No. 19/08 on the Policy on Harassment and Abuse of Authority on the part of her first- and second-level supervisors and retaliatory actions taken against her, which, according to her, had led to

the non-renewal of her contract. She requested that an investigation be held in connection with her complaint.

On a recommendation from the Ethics Office dated 24 June 2019, the Secretary-General – who considered that the complainant was making allegations of very differing kinds – decided, on 4 July 2019, to initiate two formal investigations in parallel. The first was conducted by the Internal Audit Unit and related to potential fraudulent practices and retaliatory actions allegedly carried out by the complainant's supervisors. The second, which was handled by an external investigator appointed for that purpose, aimed to identify whether the harassment and abuse of authority alleged by the complainant had taken place.

The external investigator delivered her report on 17 September 2019, with the Internal Audit Unit delivering its own report on 8 October 2019. Both of them found the allegations in question to be unsubstantiated and recommended that the complaint of 31 May 2019 be dismissed. The complainant received a copy of the external investigator's report on 17 October 2019 and was informed on 23 October of the Secretary-General's decision to reject all her allegations.

On 8 December 2019 the complainant submitted a request for reconsideration of that decision. Her request was rejected by a letter of 22 January 2020, to which was annexed a copy of the Internal Audit Unit's investigation report. On 23 March 2020 the complainant appealed to the Appeal Board, seeking the withdrawal of the decision of 22 January and redress for the whole of the injury she considered she had suffered. She claimed that she had been unable to prepare her internal appeal in detail as a result of "the measures taken to stop the spread of the coronavirus [COVID-19]" but that she intended to finalise it "as soon as possible" with the consent of the Board. On 9 April the Chairman of the Appeal Board replied to her that, in line with normal practice and procedures, she could not correct her appeal after the regulatory deadline and that a rejoinder could be accepted only if the reply from the Administration were to contain new elements. That same day, the complainant asked the Administration and the organisation's legal department to intervene in order to allow her to correct her appeal by the end of April, referring to "exceptional circumstances". She

received the reply that the Administration was unable to instruct the Appeal Board in procedural matters and that, in any event, she had not explained how the unusual situation brought about by the pandemic had prevented her from preparing her appeal by the prescribed deadline.

On 25 May 2020 the Administration sent its reply to the Appeal Board. The following day, the complainant, who asserted that she had been "unfairly denied" the opportunity to finalise her appeal, asked to be allowed to submit a rejoinder. The Chairman of the Appeal Board replied to her that she could present a rejoinder no later than 2 June if the reply from the organisation contained new elements. On 27 May she informed him that she took this response as a refusal and that she had no intention of drafting a rejoinder only for him to dismiss it "on the grounds that it contain[ed] no new elements". The complainant asked the Secretary-General to order the Appeal Board to allow her to submit a new brief "with no conditions or restrictions" and to appoint a "responsible person as [C]hairman [of the Appeal Board]". On 2 June 2020 the Chairman of the Appeal Board warned her of the inappropriate tone of her comments and gave her three days to explain how the pandemic situation had affected her ability to prepare her appeal in due time and what new elements she wished to address in her rejoinder. On 5 June the complainant replied to the Chairman, accusing the Board of breaching her right of appeal, of acting in a partisan manner and of lacking independence from the Administration. With regard to the preparation of her appeal, she explained that she had suffered an accident in January 2020 and that her lawyer had been inconvenienced by family issues. On 9 June the Head of the Human Resources Management Department told her that the tone used in her email of 27 May was "unacceptable", that the Secretary-General had to exercise restraint when it came to the conduct of Appeal Board proceedings and that, in the present case, he approved the Board's actions.

In its report of 29 June 2020, the Appeal Board, confirming that it considered the investigation reports to reflect a full and fair analysis of the case, recommended that the appeal be dismissed. It also noted that the complainant had failed to provide any reasons in support of her request to be allowed to correct her appeal after the prescribed deadline

and that she had not taken the opportunity to submit a rejoinder. By a letter of 13 August 2020, which constitutes the impugned decision, the complainant was informed of the Secretary-General's decision to follow the Appeal Board's recommendation.

The complainant asks the Tribunal to set aside the impugned decision and states that she does not wish the case to be referred back to ITU. She also seeks damages for the injury she alleges she has suffered, which she quantifies as at least one year's worth of the salary – including allowances and other monetary benefits – that she was receiving before her separation from service, without any deduction whatsoever, and the award of costs in the amount of 10,000 euros.

ITU asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 13 August 2020 by which the Secretary-General of ITU, acting in accordance with the Appeal Board's recommendation, dismissed her appeal against the rejection of the internal complaint that she had lodged on her departure from the organisation on 31 May 2019, in which she complained about various improper acts allegedly committed against her by her first- and second-level supervisors.

These acts, which she claimed were behind the non-renewal of her contract of appointment, consisted, according to her, first, of incidents of harassment and abuse of authority and, secondly, of fraudulent practices and retaliatory actions taken against her which gave rise to two separate investigations, led by an external investigator and by the Internal Audit Unit respectively. It is in the light of the reports drawn up at the end of those two investigations, both of which concluded that the complainant's allegations were unfounded, that the internal complaint in question had been rejected on 23 October 2019.

2. In support of her complaint, the complainant submits first of all that the impugned decision was taken in breach of her right to bring an internal appeal and to have it examined under a fair procedure.

In this regard, the complainant criticises the Appeal Board for not allowing her to finalise her appeal after the expiry of the time limit prescribed for the submission of an appeal – which, pursuant to Staff Rule 11.1.3(7)(b)(i), is sixty days from the date of receipt of the decision rejecting the request for reconsideration of the initial decision – even though she had requested permission to do so in the appeal, which she had submitted within the prescribed time limit, on 23 March 2020, but only in summary form. She had stated that, as a result of "the measures taken to stop the spread of the coronavirus" – which referred to the emerging COVID-19 pandemic – she "ha[d] not been able to prepare her appeal in detail" but that she "intend[ed] to complete it as soon as possible", which led her to "request[ing] [...] consent from the Appeal Board to do so". The Chairman of the Board had replied to her in this regard on 9 April 2020 that "[t]he Panel [in charge of the case] [had] analysed [her] request and [had] decided, according to normal practice and procedures, that it [could not] accept [her] initiative to submit complementary information after the regulatory deadline".

3. The Tribunal considers that the complainant is correct in contending that the Appeal Board's refusal to accede to her request, subsequently confirmed in the Board's report dated 29 June 2020, was, in the circumstances of the case, unjustified and that this constitutes an irregularity rendering the examination of her appeal unlawful.

According to the Tribunal's case law, respect for the adversarial principle and the right to be heard in the internal appeal procedure requires that the official concerned be afforded the opportunity to comment on all relevant issues relating to the contested decision (see, for example, Judgments 4697, consideration 11, 4662, consideration 11, 4408, consideration 4, and 2598, consideration 6). Accordingly, that official must have the opportunity, insofar as is compatible with the rules of receivability and procedure to which she or he is subject, to freely develop the arguments in support of her or his appeal.

The aforementioned Staff Rule 11.1.3 provides in subparagraph 7d) that: "An appeal that has not been lodged within the above time-limits shall not be receivable; the Panel may, however, waive the time-limits in exceptional circumstances [...]". This subparagraph, which therefore gives the Appeal Board the power to consent to an appeal being lodged after the expiry of the time limit referred to above, must clearly be interpreted as also allowing the Board, a fortiori, to consent to an appeal that has been duly lodged within the time limit – as in the present case – being finalised after the expiry of that time limit if exceptional circumstances meant that it could only be initially lodged in summary form.

A provision that gives an appeal body the ability to waive the time limits that normally apply confers on that body discretionary power to be used according to the circumstances of each case. However, in the event of a dispute on the matter, it is for the Tribunal to ensure that the appeal body has not exercised that power improperly (see, for example, Judgment 3267, considerations 3 and 4).

In the present case, the Tribunal considers that, given the very particular situation in which the complainant found herself at the material time, the Appeal Board was indeed presented with exceptional circumstances within the meaning of the aforementioned subparagraph (d), which warranted permission being given to the complainant to finalise her appeal outside the time limit, and that the Board was therefore acting improperly in refusing to give her that opportunity, attempting to justify this position by a reference to "normal practice and procedures", from which it should therefore have departed.

4. Admittedly, the sole and very general reference made by the complainant in her appeal of 23 March 2020 to the "measures taken to stop the spread of the coronavirus [COVID-19]" would not have sufficed, in the absence of any further evidence, to demonstrate that the situation legitimately justified a waiver of the time limit as requested.

However, when invited by the Chairman of the Appeal Board on 2 June 2020 to clarify the reasons why she had been unable to lodge her appeal in its finalised form within the prescribed time limit, the

complainant explained, in an email of 5 June, that she had suffered a skiing accident on 31 January which had led to her being signed off work until 2 March – as was attested to in a medical certificate attached to that email – and was only able to make contact with her lawyer at the end of that period to find that the lawyer then had to cut back on his work with effect from 5 March to take care of his child, since schools had been ordered to close as part of the measures imposed to control the pandemic.

Firstly, the Appeal Board's report, when confirming that the request for an extension had been refused, merely referred to "the absence of a justification for an extension [of the deadline]", thus failing to specifically address the arguments raised in this explanation – which, in fact, the Board seems to have quite simply ignored, even though it was the Board's Chairman who had asked the complainant to provide an explanation.

Secondly, the Tribunal considers that these arguments should have been accepted in the circumstances. In its submissions, the organisation disputes the merits of the complainant's arguments, submitting that she had had nine days before the accident occurred on 31 January to send her lawyer the information needed to prepare her appeal and that it has not been shown that the incapacity caused by the accident would necessarily have prevented her from carrying out that task while she was signed off work, nor that having to look after a child at home made it impossible for the lawyer in question to deal with the complainant's case during the 21 days which, as at 2 March, still remained before the expiry of the appeal deadline. However, aside from the questionable legal scope and purely speculative nature of some of these assertions, it is in any event undeniable that the period within which the complainant needed to lodge her appeal in order to meet the prescribed deadline was marked by the occurrence of abnormal events, the combined effects of which covered the greater part of that period and were such as to substantially alter the conditions for preparing the appeal. Furthermore, both the complainant's accident and the temporary unavailability of her lawyer due to pandemic control measures constituted unforeseen circumstances, so that the complainant cannot be criticised for not using

the time she had available before each of those incidents occurred to work on the preparation of her appeal.

5. It is true that the Appeal Board had informed the complainant, in the aforementioned email of 9 April 2020, that she might be permitted to lodge a rejoinder in order to respond to any observations made by the Secretary-General, but that the complainant had felt compelled to decline that suggestion. However, the email explained that she would only be permitted to lodge a rejoinder if the observations in question contained new elements not available to her before the deadline for submitting the appeal. This was therefore not an invitation to develop at this stage on the initial arguments contained in the appeal itself and, furthermore, the organisation insists in its submissions before the Tribunal that it would not have been legitimate for the complainant to use this option to "circumvent [...] the decision that the Board had previously taken" not to allow her to finalise her appeal after the deadline. Therefore, the proposal in question did nothing to remedy the procedural irregularity caused by the refusal to accede to the complainant's request for a waiver of the time limit.

6. While the Tribunal cannot condone the fact that, in emails exchanged at the material time, the complainant felt the need to question the independence of the Chairman of the Appeal Board, although such an accusation was unfounded and was worded in unacceptable terms, the considerations set out above lead the Tribunal to conclude that the internal appeal procedure was not conducted with due respect for the complainant's rights.

7. It follows that the impugned decision of 13 August 2020, taken in the light of a recommendation from the Appeal Board which was made unlawfully, is procedurally flawed and should be set aside.

At this point in its findings, the Tribunal should in principle refer the case back to ITU for the Appeal Board to re-examine the complainant's appeal, having given her the opportunity to finalise it. However, in view of the length of time that has elapsed since the internal appeal procedure was initiated and of the fact that the

complainant has, in the context of the proceedings before the Tribunal, had ample opportunity to submit any further arguments that she would have been able to present before the Appeal Board, that course of action does not seem suitable in the present case, especially since the complainant herself submits in her complaint that "such a referral [would not be] at all appropriate". The Tribunal will therefore rule directly hereafter on the lawfulness of the decision to reject the internal complaint lodged by the complainant on 31 May 2019.

8. In support of her claims against that decision, the complainant puts forward various pleas alleging procedural flaws affecting the lawfulness of the investigation carried out by the external investigator into her allegations of harassment and abuse of authority.

Although the Tribunal wishes to emphasise that this investigation was conducted impartially and very thoroughly, as can been seen from the report of 17 September 2019 where the conclusions of the investigation are set out, one of the pleas on which the complainant relies, alleging a breach of the adversarial principle, is well founded.

9. According to the Tribunal's case law, an accusation of harassment made by an official requires an international organisation to investigate the matter ensuring that due process is observed, for the protection of both the person(s) accused and the accuser (see, for example, Judgments 3617, consideration 11, 3065, consideration 10, 2973, consideration 16, and 2552, consideration 3).

As a result, in the event of an accusation of harassment, the adversarial principle requires, in particular, that the accuser be kept informed of the content of statements made by the person(s) accused and any testimony gathered as part of the investigation, in order to challenge them if necessary (see Judgments 4110, consideration 4, 3617, consideration 12, and 3065, considerations 7 and 8).

In the present case, it is not apparent from the file that the complainant was informed during the course of the investigation, as is required by this case law, of the content of the observations made by the supervisors who were the subject of her complaint or the statements

of the witnesses heard by the investigator. On the contrary, all the evidence appears to confirm the complainant's assertion, which is not expressly disputed by the organisation in its submissions, that the information in question was not provided to her. In that regard, the Tribunal notes in particular that the sections of the report of 17 September 2019 that deal with the methodology of the investigation and the detailed examination of the complainant's various allegations indicate that she was indeed heard at the start of the investigation but was not subsequently invited to comment on the reactions of her supervisors when they were questioned by the investigator, nor on the statements from the various witnesses heard by the investigator.

It follows from these findings that the investigation in question was not conducted in compliance with the adversarial principle.

10. The effect of this procedural flaw is to render unlawful the decision of 23 October 2019 to reject the complainant's internal complaint, which had therefore been taken on the basis of an unlawful investigation.

In this regard, it must be noted that, although the internal complaint in question related not only, as mentioned, to the allegations of harassment and abuse of authority dealt with in that investigation but also contained allegations of fraudulent practices and retaliatory actions which led to a separate investigation, carried out by the Internal Audit Unit, the Tribunal considers that the decision to reject the internal complaint must nonetheless be regarded as flawed in its entirety. This is because, although it was legitimate to hold a specific investigation into the allegations in the second category, in view of their singular nature and the specialist skills required to investigate them, they were nevertheless inextricably linked, in this case, to the accusations of harassment themselves, since the alleged fraud and the retaliatory actions reported by the complainant essentially concerned the financing conditions for her contract of appointment and the reasons why this was not renewed. The remit of the investigation assigned to the external investigator therefore covered all of the matters mentioned in the internal complaint, including – inasmuch as they might relate to the

alleged harassment – those that were also examined in parallel by the Internal Audit Unit, and indeed the parties' submissions concur on this point. It follows that the irregularity in that investigation affected the handling of the internal complaint in its entirety and that, although the Secretary-General, in rejecting the internal complaint, based his decision on the findings of both investigation reports together, that decision is flawed in its entirety, as well as the decision of 22 January 2020 which rejected the request for reconsideration of the Secretary-General's decision.

11. It follows from the foregoing that the impugned decision of 13 August 2020 and the decisions of 23 October 2019 and 22 January 2020 must be set aside, without there being any need to rule on the complainant's other pleas against them.

12. Given the irregular examination of the internal complaint of 31 May 2019, the case should, in principle, be referred back to ITU for a new investigation. However, in view of the time that has elapsed since the material facts took place and the fact that the complainant has left the organisation, that solution would, again, be inappropriate in the present case, as the complainant herself comments in her rejoinder, where she states that such a referral "is hardly realistic".

13. The complainant is, however, entitled, to compensation for injuries of any kind resulting from the unlawfulness of the decisions set aside above.

In that regard, it must be noted that there is no evidence on the file to corroborate the merits of the various allegations made by the complainant against her two supervisors and, in particular, the allegation that the non-renewal of her contract of appointment was the result of retaliatory action on their part. In addition, the Tribunal cannot fail to point out that the written submissions produced before it by the complainant, which deal almost exclusively with procedural matters, do not include any specific criticism of the substance of the conclusions reached by the external investigator and the Internal Audit Unit when rejecting each of the allegations in question. Although it is true that, as

stated, the complainant was denied the possibility to dispute the statements made by her supervisors and by the witnesses during the harassment investigation and also to finalise her argumentation before the Appeal Board, there was nothing to stop her, in the proceedings before the Tribunal, from setting out the reasons why she considered those conclusions to be incorrect on the substance.

The fact remains that the infringement of the complainant's rights identified above, resulting from both the breach of the adversarial principle during the harassment investigation and the flawed internal appeal procedure, of themselves caused her moral injury. In the circumstances of the case, the Tribunal considers that this injury will be fairly redressed by awarding the complainant moral damages in the amount of 20,000 euros.

14. As she succeeds for the most part, the complainant is entitled to costs, the amount of which will be set at 10,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of ITU of 13 August 2020 is set aside, as are the decisions of 23 October 2019 and 22 January 2020.
2. ITU shall pay the complainant moral damages in the amount of 20,000 euros.
3. It shall also pay her 10,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER