

The Administrative Tribunal,

Considering the first and second complaints filed by Mr D.J. G. against the International Telecommunication Union (ITU) on 19 November 2004 and 22 February 2005 respectively, the first having been corrected on 21 February 2005, the ITU's replies of 27 May, the complainant's combined rejoinder of 1 July and the Union's surrejoinders of 9 and 13 September 2005;

Considering the third and fourth complaints filed by the complainant against the ITU on 20 July 2005 and corrected on 13 September, and his fifth complaint filed on 13 September, the ITU's replies of 14 December 2005, the complainant's rejoinders of 18 January 2006, and the Union's surrejoinders of 6 March 2006;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Dutch citizen born in 1946, entered the service of the ITU on 1 November 1999 on a two-year fixed-term appointment, at grade D.2, as Chief of the Personnel and Social Protection Department. Initially, he was on secondment from the International Civil Aviation Organization (ICAO). In September 2001 he was also appointed as the ITU's Senior Security Officer. His contract with the ITU was extended from 1 November 2001 to 31 October 2003, as was his secondment.

Towards the end of 2001 the complainant informed the Secretary-General of the ITU that he had applied for the vacant post of Director of Administration and Services at the ICAO. By a letter of 29 January 2002 the Secretary-General replied that he wished to keep him in the ITU's service and offered to extend his appointment from 1 November 2003 until 28 February 2006 – the month in which he would reach the mandatory retirement age – provided that he withdrew his application for the ICAO post, adding that this extension would be issued “at least four months before 1 November 2003”. The complainant withdrew his application a few days later.

As reflected in Resolution 1210, in May 2003 the ITU Council decided that pending approval of the budget for 2004-2005 no fixed-term contracts were to be extended beyond 31 December 2004. As a temporary measure, on 2 October 2003 the complainant's contract was extended from 1 November 2003 to 31 December 2004. The restriction on contract extensions was lifted on 29 October 2003. His secondment ended on 31 October 2003 and he was “transferred” to the ITU.

A revised contract extension for the complainant, covering the period from 1 November 2003 to 28 February 2006, was drawn up on 25 November 2003 and submitted to the Secretary-General for his approval. The Secretary-General did not give his approval, however, and returned it unsigned. A similar proposal was submitted on 16 January 2004. On this occasion, the Secretary-General indicated that he saw no need to change the extension decision of 2 October 2003, and that a new extension would be granted at the end of 2004. The complainant wrote to the Secretary-General on 13 February 2004, asking him to review the decision not to approve the extension, and thus honour the “written commitment made on 29 January 2002”. However, the Secretary-General maintained his position.

On 7 May 2004 the complainant filed a first internal appeal, challenging the Secretary-General's refusal to extend his appointment to 28 February 2006. In a report dated 15 July 2004, the Appeal Board recommended that the contract extending the complainant's service to February 2006 be signed within 60 days of receipt of the Board's report. Under cover of a letter of 24 August 2004 the Secretary-General sent the complainant a contract extension covering the period from 1 January 2005 to 28 February 2006, indicating that it was “in accordance with the terms of [the] letter of 29 January 2002”; he made no reference to the complainant's appeal. In his first complaint, the complainant cites the letter of 24 August 2004 as the impugned decision.

In the meantime, by a decision of the Secretary-General, dated 28 June 2004, the complainant had been temporarily detached from his post as Chief of the Personnel and Social Protection Department to a post of Special Advisor. In that decision, the Secretary-General stated that the complainant had filed an internal appeal, and that the nature of this action had led to a “deterioration” of the “privileged relationship, based on total confidence”, that must exist between himself and the Chief of Personnel. He also referred to “certain failings in the outputs of some areas of the Personnel and Social Protection Department”. On 2 July the complainant submitted a request for review of that detachment decision. His request for review was rejected on 12 August 2004.

The decision of 28 June 2004 was then abrogated and replaced by a decision of 3 September 2004, whereby the Secretary-General announced the actual transfer of the complainant to the post of Special Advisor to the Secretary-General. Nevertheless, on 23 September 2004, the complainant lodged a second internal appeal, challenging the decision of 28 June. He also asked the Secretary-General, on 30 September, to review the actual transfer decision, but this request went unanswered.

On 12 October the ITU issued vacancy notice 38-2004, for the post of Chief of the Personnel and Social Protection Department. The complainant wrote to the Secretary-General on 15 October seeking a review of the decision to advertise the post, but received no reply.

On 17 November the Secretary-General sent a memorandum to the complainant, in which he criticised the latter’s performance as Senior Security Officer, alleging that he had not followed up on certain recommendations relating to staff security which had been made by the United Nations body UNSECOORD (Office of the United Nations Security Coordinator). He attached a copy of a report dated 20 October 2004 by the Internal Auditor, whom he had asked, by a memorandum of 3 September 2004, to carry out an enquiry into the implementation of those recommendations. On 7 December the complainant asked the Secretary-General to withdraw the memorandum of 17 November, but again received no reply.

On 2 December 2004 the Appeal Board issued its report on the complainant’s second appeal relating to the decision to detach him temporarily to the post of Special Advisor. The Board recommended, inter alia, setting aside the decision of 28 June 2004, removing from the text of the decision any reference to the complainant’s performance and clarifying with him the status and level of the post to which he had been detached. In a memorandum of 14 December 2004, the Secretary-General, referring to the Board’s report, advised the complainant that the Acting Chief of Personnel and two other senior officials would hold meetings with the complainant to “clarify the status and level” of the post to which he had been detached. In his second complaint, the complainant challenges the implied rejection of his request for review of the temporary detachment decision of 28 June.

On 16 December 2004 the complainant lodged a third internal appeal, challenging the transfer decision of 3 September 2004, and a fourth appeal, challenging the decision to advertise the post of Chief of the Personnel and Social Protection Department. On 24 January 2005 he submitted a request for review of the implied rejection of his request for the withdrawal of the Secretary-General’s memorandum of 17 November 2004.

The Appeal Board issued its reports on the complainant’s third and fourth appeals on 22 February 2005. Regarding his transfer, it expressed certain reservations, but considered that the decision had been taken within the Secretary-General’s discretionary powers, and within the scope of the applicable Staff Regulations and Rules. As for the vacancy notice, the Board considered that the post in question was vacant at the time it was advertised, and that the decision to advertise it was in conformity with the applicable rules. In the third complaint, the complainant challenges the implied rejection of his request for review of the transfer decision dated 3 September 2004. In the fourth complaint, he challenges the implied rejection of his request for review of the decision to issue vacancy notice 38-2004.

Having received no reply to his request for review of 24 January 2005, the complainant lodged a fifth appeal, on 4 April 2005, challenging the implied rejection of his request for withdrawal of the memorandum of 17 November 2004. The Appeal Board issued its report on 18 May 2005. It concluded that the memorandum in question did not constitute an administrative decision that had any adverse effect on the complainant and was therefore not a challengeable decision. It recommended resolving the matter through dialogue. By a letter of 11 July 2005, the Secretary-General informed the complainant that he agreed with the Board’s conclusions and was maintaining all the remarks contained in the memorandum of 17 November 2004. That is the decision impugned by the complainant in his fifth complaint.

B. The complainant has presented identical pleadings in his first and second complaints. In both complaints he argues that the Secretary-General failed to issue express decisions on the recommendations made by the Appeal Board on his first two internal appeals.

His first complaint is directed against the ITU's failure to renew his fixed-term appointment at the time when the renewal was due. He argues that by persistently refusing to grant the contract extension from 1 November 2003 to 28 February 2006 the Secretary-General was not respecting the "written agreement" of 29 January 2002. The complainant states that he accepted the offer made to him in the letter of 29 January and there was thus a binding contract which the ITU subsequently breached. Relying on that offer, he withdrew his application for the ICAO post and relinquished both his return rights to the ICAO as well as his permanent contract status. He points out that by the terms of the letter of 29 January 2002 his contract renewal should have been effected no later than four months prior to 1 November 2003, and while he acknowledges that Resolution 1210 imposed a bar on contract extensions for a time, he says that as the bar was lifted on 29 October 2003 his contract should have been renewed as soon as practicable thereafter. Since other staff members had their contracts renewed at that time, he argues that the Secretary-General's action offended against the principle of equal treatment and was an affront to his dignity. He alleges that the delay in granting his extension arose from "bias, ill-will and malice". Furthermore, he contends that by the terms of the agreement of 29 January 2002 his fixed-term appointment had to be renewed for his position as Chief of Personnel rather than for the position of Special Advisor.

His second complaint is directed against his temporary detachment to the post of Special Advisor. He contends that he was moved to this "lesser post" without any valid reason being given and without him being consulted. The decision, he argues, constituted misuse of procedure as it was taken outside the parameters of the Staff Regulations and Staff Rules. It was taken *ultra vires* given that he was moved to a post that was non-existent, and that was not listed in the 2004-2005 budget. He further contends that the move resulted in his demotion as his new duties corresponded to a P.4-level post whereas he held grade D.2. In his opinion, the decision to "demote" him was a disguised disciplinary measure, taken in direct retaliation for his having filed an internal appeal. He asserts that further retaliation followed, and refers to "explicit acts of harassment, mobbing, bullying and intimidation".

The third complaint concerns the decision of 3 September 2004 by which he was actually transferred to the post of Special Advisor. He indicates that he is challenging the implied rejection of his internal appeal and puts forward pleas that are similar to those in his second complaint. He also alleges various procedural flaws, mentioning, *inter alia*, that the post could not have been properly classified and that he only received an unofficial post description.

The fourth complaint is directed against the decision to advertise the post of Chief of the Personnel and Social Protection Department. On the grounds that the decisions announcing his temporary detachment and then his transfer to the post of Special Advisor were clearly unlawful and should be set aside, he argues that it must follow that the decision to advertise his former post was unlawful too and consequently should also be set aside. He contends that allowing the selection process to go ahead caused "irreparable harm" to his reputation and that he is entitled to redress.

The fifth complaint is directed against the Secretary-General's refusal to withdraw the memorandum of 17 November 2004 criticising the complainant's performance as Senior Security Officer. The complainant alleges that the memorandum was issued in retaliation for his having filed internal appeals, and that it constituted an "additional act of harassment". He claims that his rights of defence were breached and that he was denied due process. He notes from a paragraph on "Security Management" in Council document C05/EP/6-E, dated 20 April 2005, that the Internal Auditor's enquiry was reported to the ITU Council, but adds that the report of 20 October 2004 produced by that official was biased, contained errors and did not take essential United Nations documents into account. The complainant also takes issue with the memorandum of 3 September 2004 containing the mandate given to the Internal Auditor. Two copies of that memorandum were supplied to the Appeal Board, and the complainant believes that they contain discrepancies which have not been adequately explained.

In all five complaints he seeks the disclosure of various documents, including the report of the meeting held by the Coordination Committee on 22 June 2004, a post classification report for the post of Special Advisor that he was transferred to, and, for comparison purposes, a further copy of the memorandum sent by the Secretary-General to the Internal Auditor on 3 September 2004.

In his first complaint, the complainant asks that the extension of his appointment from 1 November 2003 to 28 February 2006, which was "finally granted" by the Secretary-General on 24 August 2004, be "confirmed by the

Tribunal as a matter of right". He also seeks 10,000 Swiss francs in moral damages, and interest on any amount paid to him, calculated from 28 June 2004.

In his second complaint he seeks the quashing of the decision of 28 June 2004, and claims reinstatement in the post of Chief of Personnel. He wants the decision to "temporarily detach" him to be declared null and void *ab initio*, so that his service record can reflect "continuous service" as Chief of the Personnel and Social Protection Department. He seeks a total of 300,000 francs in moral damages under several heads, including 50,000 francs in "exemplary" damages on account of the "abuse of power, intimidation and harassment" he was subjected to for having exercised his right to appeal. He claims two years' salary, as well as the corresponding pension entitlements, in the amount he would have received had he returned to the ICAO as a director and been able to work to the age of 62. He also claims interest on all amounts he is awarded, calculated from 28 June 2004.

In his third complaint he wants the decision by which he transferred to the post of Special Advisor to be set aside. As he was due to retire at the end of February 2006 he no longer presses his claim to reinstatement, but instead seeks "significant moral damages". He claims "additional moral damages" under several heads, and "exemplary" moral damages as compensation for the "mobbing, bullying and harassment" he was subjected to.

In his fourth complaint he seeks the quashing of the decision to advertise the post of Chief of the Personnel and Social Protection Department and the cancellation of vacancy notice 38-2004. He claims compensation for the "public humiliation and moral injury" that the publishing of the vacancy notice caused him. In addition, he seeks an apology from the Secretary-General.

In his fifth complaint he seeks the withdrawal of the memorandum of 17 November 2004 and the removal from any ITU files of any other documents relating to it. He wants the Secretary-General to "correct the paragraph on 'Security Management' in Council document C05/EP/6-E" and to issue a corrigendum for that document. He also claims moral damages.

In each complaint he claims costs, and such other relief as is deemed equitable by the Tribunal.

C. In its reply to the complainant's first complaint, the ITU holds that the complaint is irreceivable for want of a cause of action. Contrary to the complainant's assertions, he is in fact challenging the decision of 24 August 2004. But that decision was in line with the Appeal Board's recommendation and had no adverse effect on him. It afforded him entire satisfaction, since by that decision the Secretary-General extended the complainant's contract through to 28 February 2006, in accordance with the commitment made in the letter of 29 January 2002.

On the merits, the ITU argues that it lawfully executed the commitment made to the complainant in January 2002. Citing the case law, it submits that although the letter of 29 January specified that the extension would be settled "at least four months before 1 November 2003", this was not an immutable part of the commitment. The position in law had changed because the Council had adopted Resolution 1210, by which contract extensions could not go beyond 31 December 2004, which meant that the Secretary-General was free to exercise his discretionary powers. First, he limited the complainant's contract extension to 31 December 2004. Then, on 24 August 2004, four months prior to the expiry date of the complainant's then current contract, he granted him an extension to 28 February 2006. The ITU holds that it would not have been advisable to renew the complainant's contract at a time when other staff members were in an unstable contractual situation. Moreover, the Secretary-General explained to the complainant on several occasions, both orally and in writing, why the particular circumstances prevailing at the time prevented him from immediately extending his contract. It adds that there was nothing in the letter of 29 January 2002 to indicate that the contract extension he was to receive could only apply to his post of Chief of the Personnel and Social Protection Department.

The ITU also contests the receivability of the second complaint, on the grounds that the complainant is not challenging a final decision. The Board reported on 2 December 2004 and the Secretary-General notified the complainant of his final decision on 14 December 2004. It argues that he should have challenged that latter decision, which brought the internal appeal procedure to a close. It contends that the claims put forward by the complainant in his second complaint are groundless and thus irreceivable. In particular, his claim for an amount equivalent to the salary he would have received at the ICAO until the age of 62 is irrelevant, since it has no connection with the temporary detachment decision which is the subject of the second complaint.

On the merits, the ITU submits that the temporary detachment decision did not constitute a "retaliatory" measure. It

contends that the complainant had exercised his right of appeal “without good judgement” and without taking into account “the higher interests of the organization”. He had in part abused his right of appeal, and his attitude had caused a breakdown in the relationship of trust that had to exist between him and the Secretary-General. As a result, the Secretary-General was left with no other choice than to remove him from his functions as Chief of the Personnel and Social Protection Department. The decision of 28 June 2004 was thus taken in the interests of both the service and the organisation; it was taken within the Secretary-General’s discretionary powers, and after consultation with the Coordination Committee. With regard to the budgetary status of the post of Special Advisor, it explains that the post had existed before, but had not been budgeted for in the 2004-2005 biennium. The ITU considers that the allegation of misuse of procedure is unfounded and it rejects his allegations of harassment. It adds that the complainant had not lost any of his rights, including his D.2 salary, even though his post of Special Advisor was subsequently graded D.1.

In its reply to the third complaint the ITU again raises objections to receivability, arguing in particular that the decision of 3 September 2004 announcing his transfer was not a “new decision” that could be challenged before the Tribunal. That decision merely confirmed the one of 28 June 2004 by which he had been temporarily detached to the post of Special Advisor. It points out that the grounds for these two decisions were the same in fact and in law, and the complainant’s third complaint inevitably repeats arguments that he had already put forward in his second complaint. It holds that the new arguments he puts forward are without relevance and in some instances relate to facts that postdate the impugned decision.

Replying to his fourth complaint the organisation contends that the complaint is irreceivable on two counts. Firstly, the publication of a vacancy notice cannot be considered to be an individual decision adversely affecting a staff member, and is therefore not a decision that is challengeable before the Tribunal. Secondly, in the absence of an “actual decision”, there was no adverse effect for the complainant to invoke, and he therefore has no cause of action.

On the merits, it submits that the complainant’s arguments are unfounded. The decision to advertise the post of Chief of the Personnel and Social Protection Department was no more than a “management measure”, taken in the interest of the service and within the Secretary-General’s discretionary powers. By virtue of the decision to transfer the complainant to the post of Special Advisor, the complainant’s former post was vacant at the time it was advertised. The decision to advertise the post was therefore legally sound.

In its reply to the fifth complaint, the ITU, regarding the receivability of the complaint, maintains the position it took during the internal appeal procedure, namely that the challenged memorandum of 17 November 2004 was no more than “a critical remark” made by the Secretary-General in a supervisory context. The memorandum had not given rise to any disciplinary sanction, nor had it served to support a negative appraisal report, and it was not placed in the complainant’s administrative file. That line of argument was corroborated by the Appeal Board, which concluded that the complainant’s appeal was irreceivable *ratione materiae*, and in taking his final decision the Secretary-General relied on the Board’s opinion. The ITU argues that by requesting that any document relating to the memorandum be removed from “any file” the complainant has broadened the scope of the claims put forward in the internal proceedings.

On the merits, it asserts that the complainant’s queries regarding the memorandum of 3 September 2004, which constituted the mandate given to the Internal Auditor, have nothing to do with the subject of the fifth complaint, which concerns the lawfulness of the Secretary-General’s memorandum of 17 November 2004. The complainant had been asked to approach the ITU Legal Adviser with regard to the alleged discrepancies in the copies of the memorandum of 3 September, but had not done so. Moreover, the Secretary-General’s decision to initiate the enquiry arose from a report that the complainant himself had written on 9 August 2004, raising certain security issues. There was no breach of his right of defence, given that in the memorandum of 17 November he was asked to submit any comments by 3 December 2004, and he would also have been able to formulate comments in any subsequent appraisal report. The complainant has not shown that there was any flaw that could justify withdrawing the memorandum of 17 November.

D. In his rejoinders the complainant develops his pleas and maintains his claims. He points out that his first complaint does have a cause of action since in the decision of 24 August 2004 the Secretary-General did not respond to the claims for moral damages and legal fees that he put forward in his first internal appeal.

E. In each surrejoinder the ITU maintains its objections to receivability, and likewise its arguments on the

merits. It points out that the complainant cannot claim any right to reimbursement of expenses incurred in connection with the internal appeal process, and contends that his request for moral damages is devoid of any foundation.

## CONSIDERATIONS

1. The second, third and fourth complaints arise out of closely related events and circumstances and had their genesis in the complainant's pursuit of an internal appeal, the decision relating to which is the subject of his first complaint. Additionally, the second, third, fourth and fifth complaints give rise essentially to the same question, namely, whether the decisions and actions involved were taken in good faith or for an improper purpose related to the subject matter of the first complaint. In these circumstances, it is appropriate that all five complaints be joined to form the subject of a single ruling.

2. The complainant was appointed Chief of the Personnel and Social Protection Department at the ITU on a two-year fixed-term contract as from 1 November 1999. He was appointed at grade D.2 and was, at that stage, on secondment from the International Civil Aviation Organization (ICAO). With effect from 1 November 2001, his secondment and appointment were extended for another two years.

3. Towards the end of 2001, the complainant was invited to and did apply for the post of Director of Administration and Services, with the ICAO. He informed the Secretary-General of the ITU of his candidature for the post, whereupon the Secretary-General offered to extend his contract from 1 November 2003 until 28 February 2006, the date on which the complainant would reach the mandatory retirement age at the ITU, on the condition that he withdrew his application for the ICAO post. The complainant accepted the offer and duly withdrew his application. The Secretary-General confirmed the agreement by a letter of 29 January 2002. The final paragraph of that letter provided:

“The contract extension from 1 November 2003 until 28 February 2006 will be issued at least four months before 1 November 2003.”

4. In May 2003, the ITU Council resolved that, pending approval of the 2004-2005 budget, short-term and fixed-term appointments should not be extended beyond 31 December 2004. In July 2003 the Secretary-General informed the Personnel Department that, if the Council passed the budget at its October 2003 session, “the extensions [granted to 31 December 2004 would] be extended to the normal dates”. The budget was passed in October although, it seems, it may have necessitated some staff reductions or redeployments.

5. Steps were taken in the second half of 2003 to extend the complainant's secondment from the ICAO but without success. Eventually, on 25 November 2003, the complainant was transferred from the ICAO to the ITU, with effect from 1 November 2003. He then had no return right to the ICAO where his normal retirement age would have been 62 as distinct from 60 years of age with the ITU. In the meantime, the complainant's contract had been extended from 1 November 2003 until 31 December 2004. After his transfer from the ICAO, the complainant submitted a form for the signature of the Secretary-General to extend his contract until February 2006 in keeping with the earlier agreement. The form was returned to the complainant unsigned and with the signature part crossed out. According to the ITU, the complainant was informed by an official from the Secretary-General's Office that it would send a “negative signal” to the staff who feared non-renewal of their contracts if his contract were to be extended at that stage and that he should resubmit his application “at a later, more appropriate moment”.

6. Although a number of ITU staff had not had their contracts extended to the normal expiry date in May 2004, it seems that that process was well under way when, in January 2004, a further form for the extension of the complainant's contract was submitted to the Secretary-General. The form was returned to the complainant with the following notation:

“I do not see the necessity to change the previous extension decision based upon the policy at that moment.”

On 13 February 2004 the complainant sought a review of that decision stating as follows: “legally [...] the ITU is bound to keep me in service until 28 February 2006 and an extension now or later would not change this legal obligation”. That, apparently, was not the precise understanding of the Secretary-General for he returned the memorandum to the complainant with a handwritten note stating that that was his understanding “if nothing wrong

happens”. The note continued:

“Then, there is no necessity to take cumbersome measures especially when everyone, the [Personnel Department] in particular, is busy in the redeployment procedures.”

7. The complainant wrote to the Secretary-General on 23 March 2004 contesting his handwritten reasons and asking to meet with him to “solve” the issue. A meeting took place on 5 April 2004, the details of which were set out in a memorandum that the complainant sent to the Secretary-General on 7 April. In that memorandum, he recalled that the Secretary-General had said:

- “that in Japan staff at levels D.1/D.2 would never appeal”;
- “that [he] thought that the letter [of] 29 January 2002 did not bind [him]”;
- “that in Japan a Chief of Personnel would not protect himself while other staff were in a precarious position”;
- and
- “that staff members at D.1/D.2 level are more or less political appointees who should resign when executive heads change”.

The memorandum also contained the following:

“You urged me not to appeal and advised me that if I lodged an appeal I would lose the respect of the ITU staff and Member States’ delegates and that you would have no more confidence in me.”

8. The Secretary-General returned the complainant’s memorandum to him with a handwritten note stating:

“I did not urge you at all. I said ‘you can make an appeal but it will be a silly action.’”

He did not dispute any of the other statements in the complainant’s memorandum.

9. The complainant wrote to the Secretary-General again on 21 April 2004. In that memorandum, he stated that it was “noticeable that [the Secretary-General’s] attitude towards [him had] significantly changed since [he was] no longer on secondment from ICAO”. He also stated that he felt obliged to pursue his rights but suggested that a mediator be requested to assist in resolving the matter. He also indicated that, unless the matter was resolved within the next six days, he would lodge an appeal with the ITU Appeal Board. On 30 April 2004, the Secretary-General replied stating that the “written commitment [...] in [his] letter dated 29 January 2002 ha[d] never been questioned”. He added that he had explained his concerns at the “inappropriate timing” of administrative action extending the complainant’s contract “on a priority basis” while the “precarious situation” of other staff had not been solved. He also stated that:

“This inexplicable insistence on immediate administrative action to extend your contract [...] despite repeated explanations [...] on the advisability of not doing this at this time, has led to a deterioration of the privileged relationship, based on total confidence, that the Secretary-General must have with the Chief of Personnel Department.

I fear that this matter has tarnished your standing as Chief of Personnel. However, I am still hopeful that in the coming period you will find a way to restore the climate of trust that is essential for the satisfactory implementation of your duties as Chief of Personnel and thus avoid putting the Secretary-General in a difficult situation.”

10. The complainant lodged an appeal with the Appeal Board on 7 May 2004 asking that his contract be extended until 28 February 2006, and claiming moral damages and costs. While the appeal was pending, the Secretary-General informed the complainant, on 28 June 2004, that the “Coordination Committee had unanimously recommended that [he] withdraw [his] appeal”. According to the Secretary-General, he endorsed that recommendation and requested the complainant to “take all necessary actions to restore the working relationship” and he mentioned “an apology as an example of one such action”. He also told the complainant that, if he did not withdraw his appeal, “the relationship of trust [...] could not be restored and without it [he] could not continue functioning as the Chief of Personnel”.

11. The Appeal Board delivered its report on 15 July 2004. It rejected the claims for moral damages and costs on the ground that it had not found any provision in the Staff Regulations and Rules for that course. However, it recommended that the Secretary-General sign an extension of the complainant's contract within 60 days. The extension was signed on 24 August 2004, although without reference to the recommendation of the Appeal Board. That decision, which impliedly rejected the complainant's claim for damages and for costs, is the subject of the first complaint in which moral damages in the sum of 10,000 Swiss francs and costs in the same amount are claimed.

12. The second complaint arises out of a meeting between the Secretary-General and the complainant on 28 June 2004 when it was recommended that the complainant withdraw his internal appeal. The Secretary-General apparently had a signed decision with him at the meeting although he did not inform the complainant of the nature of the decision. The decision, which was provided to the complainant later that day, temporarily detached him from his post as Chief of the Personnel and Social Protection Department to "a post of Special Advisor". The written decision contains the following statement:

"On 7 May 2004, the Chief of Personnel and Social Protection Department submitted an appeal to the Appeal Board against a non-action by the Secretary-General. The nature of this action has led to a deterioration of the privileged relationship, based on total confidence, which the Secretary-General and the Chief of Personnel [...] must have. Furthermore, during the past few months, I have noticed certain failings in the outputs of some areas of the Personnel and Social Protection Department that are a cause of concern."

The so-called "failings" were not specified.

13. The complainant requested a review of the temporary detachment decision on 2 July 2004 and was informed by the Secretary-General by letter dated 12 August 2004 that his request was rejected. He then lodged a second appeal with the Appeal Board. The Board found that the post of Special Advisor was a non-budgeted grade D.1 post, but that the complainant had retained his personal D.2 grade. It made no findings on the complainant's claims of harassment and bad faith for which he had claimed moral damages. Nor did it make any findings on his claim that his detachment was a disguised disciplinary measure and constituted a demotion. Instead, the Board said that it was "not in a position either to comment on the [Secretary-General's] affirmation of loss of confidence or to establish where the limits of [his] discretionary power[s] [lay]". Accordingly, it said that it "must assume that [the complainant's] detachment [was] not a disciplinary measure, but a measure warranted by the needs of the service and taken [...] within the discretionary powers conferred on [the Secretary-General]". However, the Board expressed doubt as to whether the post of Special Advisor existed and said that it could not confirm whether the duties corresponded to a D.2 level. It thus held that the decision of 28 June 2004 did not conform to this Tribunal's case law relating to the need to respect a staff member's dignity when effecting a transfer. Further, it held that the complainant should have been afforded "a formal consultation [...] in order to [...] explore a course of action that could have been acceptable to both parties". It also held that the reference in the temporary detachment decision to "failings", in the absence of "previous formal reported evidence", was inappropriate. In the result, it recommended that the temporary detachment decision be set aside and that proper steps be taken to "establish" that decision, including by appropriate consultation to "explain and clarify the status and level of the post [of Special Advisor]" and to ensure that the complainant's dignity was preserved.

14. Following the recommendation of the Appeal Board, the Secretary-General informed the complainant, on 14 December 2004, that:

"The Acting Chief of Personnel, the Acting Chief of Finance and the Legal Adviser [would] hold meetings with [him] to explain and clarify the status and level of the post [...] in order to ensure that [his] dignity is duly preserved."

The Secretary-General added that he would favourably consider any application by the complainant for a vacant budgeted post – other than that of Chief of Personnel – for which the Coordination Committee considered him qualified. That is the decision the complainant says he impugns by the second complaint, in which he seeks reinstatement as Chief of Personnel, moral damages, compensation equivalent to two years' salary for his inability to return to the ICAO, where he could have worked until the age of 62, and costs.

15. The third complaint arises out of a decision of 3 September 2004 which was said to abrogate and replace the detachment decision of 28 June 2004. The decision of 3 September transferred the complainant to the post of

Special Advisor with effect from 1 September. The complainant requested a review of that decision on 30 September and, having received no response, he lodged his third appeal with the Appeal Board on 16 December 2004.

16. In a report issued on 22 February 2005, the Appeal Board held that there should have been a formal consultation before the transfer decision was promulgated and noted that the transfer to “an unestablished post” made the complainant’s position “more precarious” as the continuation of the post was “contingent on available funding”. However, it held that it was not in a position to reach a conclusion as to the complainant’s claims of breach of “relevant standards of conduct, mobbing/harassment and bad faith”. It also held that the transfer decision was not a disciplinary measure and was taken within the discretionary powers of the Secretary-General and within the scope of the applicable Staff Regulations and Rules. The Board considered that in order to “remain valid” the transfer decision had to be accompanied with assurances that the post of Special Advisor would “continue to be funded” for the complainant’s normal term of appointment.

17. The Secretary-General did not respond to the report of the Appeal Board with respect to the complainant’s third appeal. In due course, the complainant lodged his third complaint, seeking moral damages and costs.

18. The fourth complaint arises from the Secretary-General’s decision to issue a vacancy notice for the post of Chief of the Personnel and Social Protection Department on 12 October 2004. The complainant requested on 15 October a review of that decision and, again having received no response, lodged a fourth appeal with the Appeal Board, concurrently with his third on 16 December 2004. The Board concluded that, as the previous appeals had not had the effect of suspending the decisions then in issue, the post advertised on 12 October was vacant and the decision to advertise it was taken in accordance with the applicable Staff Regulations and Rules. Having received no final decision from the Secretary-General, the complainant lodged his fourth complaint with the Tribunal seeking the quashing of the decision to advertise the post, an apology from the Secretary-General, damages for the humiliation occasioned by the advertisement, and costs.

19. The fifth complaint relates to a memorandum dated 17 November 2004 from the Secretary-General to the complainant claiming a “lack of professionalism” and “poor performance” in the discharge of his duties as Senior Security Officer. Attached to the memorandum was a report dated 20 October 2004 by the Internal Auditor, which was later reflected in a paragraph headed “Security Management in the report on Internal Audit activities for 2004, which was presented to the ITU Council at its 2005 Session. The complainant requested the Secretary-General to withdraw the memorandum and, again, received no response. He duly lodged a fifth appeal with the ITU Appeal Board. The Board held that the memorandum of 17 November was not an administrative decision that had adverse consequences for the complainant and, thus, that the appeal was irreceivable *ratione materiae*. The Secretary-General informed the complainant on 11 July 2005 that he agreed with the Board’s conclusions and “therefore maintain[ed] all the remarks contained in the memorandum”. That decision is the subject of the fifth complaint by which the complainant seeks the withdrawal of the memorandum of 17 November 2004, correction of the paragraph on “Security Management” contained in Council document C05/EP/6-E, as well as moral damages and costs.

20. Before turning to the substance of the complaints, it is convenient to note a number of preliminary matters. The first is that the ITU contends that the first complaint reveals no cause of action as the impugned decision, namely the decision of 24 August 2004 extending the complainant’s contract until February 2006, had no adverse consequences for him and, as his contract was in fact extended by that decision, he had no cause of action when the complaint was filed. On that basis, the ITU contends, amongst other things, that the first and second complaints should not be joined. That argument overlooks the fact that in his first internal appeal the complainant claimed moral damages for the failure of the Secretary-General to extend his contract when requested, as well as the costs of the appeal. The decision of 24 August impliedly rejected these claims and, thus, to that extent, there was a subsisting cause of action when the complaint was lodged (see Judgment 2065).

21. The second preliminary matter which should be noted is that the complainant has asked for oral hearings and for the production of documents. However, the written materials provided by the complainant and the ITU are sufficient to enable a determination of all five complaints. Accordingly, the requests for oral hearings and for orders for the production of documents are refused.

22. It is also convenient to note at this stage that the ITU contends that the fourth complaint is patently irreceivable. That complaint concerns the vacancy notice for the post previously occupied by the complainant. As

stated in Judgment 1786, a complainant must ordinarily challenge an individual decision that directly affects him or her. Usually, a vacancy notice is neither a final administrative decision nor a decision affecting an individual staff member. However, there may be circumstances where a vacancy notice for a post held or previously held by a complainant constitutes an implied decision directly affecting that person. In the circumstances affecting the present complainant, the vacancy notice was, in substance, a decision to dismiss him from the post to which he had originally been appointed. That being so, the fourth complaint is receivable. See Judgment 2515 where, in analogous circumstances, an ITU staff member was assigned to the post of Advisor to the Secretary-General and the vacancy notice which was later issued for his previous post was held to constitute his dismissal from that post.

23. As already indicated, the second, third and fourth complaints arise out of the complainant's pursuit of an internal appeal relating to the contract concluded between him and the Secretary-General on 29 January 2002. It is not disputed that there was a binding contract. The only point of dispute is whether the complainant was entitled to call for a formal extension of his contract prior to August 2004, i.e. four months prior to the expiry of his contract, which had been extended to December of that year. In this regard, it is suggested by the ITU in its pleadings that that was all that was required having regard to the Council's decision in 2003, which made it impossible to extend his contract, as agreed, but resulted in its extension until 31 December 2004. However, the fact that the extension could not be granted at the agreed time did not alter the terms of that agreement. As the complainant had fulfilled his side of the bargain by withdrawing his application for the ICAO post, he was entitled to have the agreement made with the Secretary-General performed according to its terms. When that became temporarily impossible, it was for the complainant to decide whether to repudiate the agreement and claim damages for its breach or to affirm it. He impliedly chose the latter course, thereby extending the time for performance until that became possible. That occurred in November 2003. That being so, the ITU's argument that there was no breach of the agreement because the complainant was granted an extension of his contract four months prior to its expiry date of 31 December 2004 must be rejected.

24. The ITU also resists the first complaint on the ground that it was reasonable and proper to postpone performance of the agreement to extend the complainant's contract because other staff had not had their contracts extended in the normal way. It may well be that the Secretary-General was concerned that the extension of the complainant's contract would send "a negative signal" to other staff members. If so, the proper course was to ask the complainant if he would agree to a later date for performance and, then, to fix a definite date on which the extension would be granted. It was not for the Secretary-General unilaterally to decide when the extension would be granted. Moreover, the Secretary-General's actions not only constituted a failure to acknowledge the complainant's legal right, but also a failure to acknowledge that the complainant's position was materially different from that of other staff members in that he had fulfilled his part of the bargain, thereby foregoing the opportunity to have his application for the ICAO post considered and, after his transfer to the ITU, had surrendered his right to return to the ICAO. At the very least, those considerations required the Secretary-General either to fulfil his part of the bargain when asked to do so or to provide the complainant with a definite date as to when that would be done. Instead, the Secretary-General suggested that the extension would be granted only if "nothing wrong happen[ed]" and attempted to justify his actions on the patently spurious pretext that it required "cumbersome measures".

25. The Secretary-General's unilateral disregard of the complainant's rights also constituted a failure to respect his dignity. Those failures were compounded by the efforts to have the complainant withdraw his first appeal and, perhaps, apologise for asserting his rights. Those failures warranted an award of moral damages and the Appeal Board should have so held notwithstanding that there was no express Staff Rule authorising that course. The failure of the Appeal Board to so hold constitutes an error of law. And the subsequent failure of the Secretary-General to grant the complainant moral damages involves the same error of law. Accordingly and to the extent necessary, the decision of 24 August 2004 will be set aside and, instead, the ITU will be ordered to pay moral damages in the sum of 10,000 Swiss francs in respect of the Secretary-General's failure to extend the complainant's contract when so requested.

26. The second, third and fourth complaints may be dealt with together as they relate to a series of interdependent events commencing with the temporary detachment of the complainant and culminating, in substance, with his dismissal from the post to which he had been appointed. Clearly, the immediate cause of those actions was the complainant's failure to withdraw his appeal relating to the extension of his contract. Moreover, the detachment decision was, in terms, based on the fact that the complainant had lodged an appeal with the Appeal Board, albeit that it is said that that caused the Secretary-General to lose confidence in him as Chief of Personnel. In its replies to the second and third complaints, the ITU claims that the loss of confidence was not the result of the fact that the complainant lodged an appeal, but because he abused his right to appeal. That argument must be

rejected. Even if the Secretary-General believed that he was entitled to defer the granting of an extension of the complainant's contract until August 2004, he must have known that that did not accord with the terms of the agreement which he had signed and, accordingly, at the very least, that there was an arguable case to the contrary. That being so, the asserted loss of confidence can only be ascribed to the complainant's failure to accede to the Secretary-General's unilateral and, as it transpires, wrongful refusal to grant the requested contract extension. In these circumstances, no matter how they are rationalised, the detachment decision, the transfer decision and, ultimately, the decision in substance to dismiss the complainant from the post to which he had been appointed, can only be viewed as retaliation for his having pursued his appeal. That being so, all three decisions were motivated by an improper purpose and, accordingly, cannot be justified as the proper exercise of discretion. In relation to all three decisions, the failure of the Appeal Board to so hold constitutes an error of law. And as the express and implied decisions of the Secretary-General which are the subject of the second, third and fourth complaints replicate the failure of the Appeal Board, they involve the same error of law and must be set aside.

27. The Tribunal is obliged to note that it is a most serious breach of the rights of international civil servants to take retaliatory action simply because they have pursued an internal appeal. International civil servants – no matter how high their rank is – cannot protect their rights in national tribunals. Their only recourse is through the mechanisms established by the relevant Staff Rules. To punish a person because he or she has had resort to those mechanisms is a gross abuse of power warranting an award of substantial exemplary damages as requested in the second and third complaints.

28. Before leaving the substance of the second, third and fourth complaints, it is necessary to note that the complainant raises various other issues, including breach of applicable Staff Rules, procedural irregularities and lack of proper consultation. He also alleges that the acts and decisions to which those complaints relate constitute harassment and he details other actions to support that claim. It is unnecessary to pursue those issues as the decisions impugned by those complaints must be set aside on the ground already identified.

29. The fifth complaint raises a less serious issue than that raised by the second, third and fourth complaints. However, the complainant claims that the refusal of the Secretary-General to withdraw the comments relating to his performance as Senior Security Officer was a further act of retaliation and constituted an "additional act of harassment". On the other hand, the ITU contends, as it did before the Appeal Board, that the memorandum of 17 November 2004 was simply "an operational measure taken within the supervisory authority that every supervisor exercises over a subordinate". Further, it points out that the memorandum did not give rise to disciplinary action and was not placed in the complainant's personal file. However, the ITU mistakes the nature of the decision under challenge, as did the Appeal Board. The challenged decision was not the decision to issue the memorandum, but the decision not to withdraw the critical remarks after the complainant informed the Secretary-General that the Internal Audit report contained various factual errors and had been prepared without proper consultation with him. There is nothing in the materials provided to the Tribunal to suggest that the Secretary-General considered the matters raised by the complainant.

30. It was said in Judgment 442 that:

"As a rule an official's comments on his subordinates do not give them any right to compensation; otherwise supervisors would express only guarded opinions about their subordinates, and that would be harmful to the organisation's efficiency. The most that can be said is that when a supervisor expresses an opinion which he knows to be untrue for a purely malicious purpose he, or the organisation, will be liable."

To that should be added the rider that the duty to act in good faith and, also, the duty to respect the dignity of a subordinate require that the subordinate be given an opportunity to answer any criticism made and that his or her answers or explanations be fairly considered. In the present case, there is nothing to suggest that the matters raised by the complainant were fairly considered. Moreover, the Appeal Board's conclusion that the appeal was not receivable, which was based on its misunderstanding of the decision then under appeal, provided no justification for the Secretary-General's decision to maintain the remarks in his memorandum.

31. The Appeal Board's misunderstanding of the decision that was the subject of the complainant's fifth internal appeal constitutes an error of law. Because the Secretary-General's final decision was based on the Board's findings and recommendation, it involves the same error of law and must be set aside. The moral injury resulting from the breach of the duty to act in good faith and, also, the duty to respect the dignity of a subordinate is adequately compensated by a global award of moral damages relating to the acts and decisions impugned by the

second, third, fourth and fifth complaints. As the memorandum of 17 November 2004 was not placed in the complainant's personal file, there is no need to make an order for its removal. Similarly, it is not for the Tribunal to order the correction of the report provided to the ITU Council in 2005, particularly as that course appears to have been mandated by the Council itself.

32. The acts and decisions which gave rise to the second, third, fourth and fifth complaints demonstrate a sustained disregard for the complainant's rights and, inevitably, resulted in his "public humiliation". Accordingly, in addition to moral damages in respect of the failure to extend the complainant's contract in a timely manner and the exemplary damages already discussed, there should be an award of moral damages in the sum of 25,000 Swiss francs for those later acts and decisions.

33. The complainant's claim for compensation for the two years' salary and additional pension entitlements he would have obtained had he returned to the ICAO must be rejected. He, himself, must have acquiesced in his transfer to the ITU and the consequential change in the date of his compulsory retirement age is solely the result of his own decision. Further, it is inappropriate to order his reinstatement as Chief of the Personnel and Social Protection Department or to make the declarations sought in the complaints. Moreover, it is not for the Tribunal to order apologies. The complainant has been vindicated by the Tribunal's findings and that is all that is necessary.

## DECISION

For the above reasons,

1. The decision of 24 August 2004 is set aside to the extent that it impliedly rejected the complainant's claim for moral damages.
2. The ITU shall pay the complainant 10,000 Swiss francs for the failure to extend his contract in a timely manner.
3. The express and implied decisions rejecting the complainant's appeals with respect to his detachment, transfer and dismissal from the post of Chief of the Personnel and Social Protection Department and the decision of 11 July 2005 rejecting his appeal with respect to the memorandum of 17 November 2004 are set aside.
4. The ITU shall pay the complainant additional moral damages in the sum of 25,000 Swiss francs in respect of the actions and decisions which are the subject of the second, third, fourth and fifth complaints.
5. It shall pay him exemplary damages in the sum of 25,000 Swiss francs by reason of the retaliatory nature of the decisions to detach, transfer and dismiss him from the post of Chief of the Personnel and Social Protection Department.
6. The ITU shall pay the complainant's costs for all proceedings in the sum of 10,000 Swiss francs.
7. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

