

109th Session

Judgment No. 2916

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs R.R. J. against the International Telecommunication Union (ITU) on 23 December 2008 and corrected on 27 February 2009, the ITU's reply of 9 June, the complainant's rejoinder of 21 September and the Union's surrejoinder of 22 December 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Indian national born in 1956, is a former staff member of the ITU. She joined the Union in July 2006 under a two-year fixed-term appointment as Head of the Market, Economics and Finance Unit (MEF), at grade P.5, in the Policies, Strategies and Financing Department (PSF) within the Telecommunication Development Bureau (BDT). In November 2006 the Director of BDT who was the complainant's second-level supervisor, was elected Secretary-General of the ITU. A new Director of BDT was appointed at the same time and both of these appointments took effect on 1 January 2007.

On 19 February 2007 the complainant wrote to the new Director of BDT to report an altercation with one of her subordinates. Two officers from the Personnel and Social Protection Department interviewed the complainant, as well as her subordinate and other staff members, and subsequently recommended to the Director of BDT that both the complainant and her subordinate be given a verbal reprimand.

The Director of BDT sent an e-mail on 15 March 2007 to several staff members, including the complainant, announcing a new structure for BDT which, he explained, would entail various reassignments of staff on a provisional basis. Among the changes summarised in the e-mail was the complainant's reassignment to the post of Analyst in Economics and Finance, at grade P.4, with effect from 19 March.

On 1 May 2007 the Secretary-General completed the complainant's performance appraisal for the period from July to December 2006. He gave her the overall rating 2, thus indicating that she had "[partly] met [the] requirements" of her position. He also stated that new objectives were to be provided by the new Director of BDT. The complainant objected to the Secretary-General's evaluation in a note to be attached to the report. On 6 June she met with the Chief ad interim of PSF and an officer from the Personnel and Social Protection Department as a follow-up to her 2006 performance appraisal. During this meeting, the Chief ad interim of PSF indicated that the complainant's objectives would be set for 2007 and they agreed to have a new follow-up meeting towards the end of June.

By a memorandum of 7 September 2007 the Deputy Secretary-General informed the complainant that, in line with a recommendation of the Director of BDT, the Secretary-General intended to terminate her contract "for reasons of unsatisfactory services, and in the best interest of the Union". She was invited to submit her comments, if any, having regard to her 2006 performance appraisal. It was also stated in the memorandum that the complainant would not continue to serve as Head of MEF and that she would be assigned new duties by the Director of BDT. She was notified by a memorandum of 13 September of her temporary reassignment to the post of Advisor to the Chief of the Policy and Strategies Unit. Responding to the Deputy

Secretary-General's invitation, the complainant submitted her comments on 5 October. She protested, inter alia, that it would be unfair to terminate her contract based on "a legally invalid" and "erroneous" appraisal which had failed to take her objections into consideration, and she requested that a new performance appraisal be prepared, that she be reinstated in her position as Analyst in Economics and Finance and given clear objectives. An exchange of correspondence ensued in which the Director of BDT, in a memorandum of 13 November, reiterated to the Deputy Secretary-General his dissatisfaction with the complainant's performance and his recommendation not to extend her appointment. On 20 December 2007 she was informed that her appointment would not be extended beyond its expiry date on 5 July 2008.

On 1 February 2008 the complainant wrote to the Secretary-General, requesting a review of the decision not to extend her appointment. Having received no reply, she lodged an appeal with the Appeal Board on 25 April. She claimed that "the Administration's decision not to renew [her] appointment for unsatisfactory services" was tainted with procedural and substantial errors. In its report dated 7 July the Appeal Board recommended that the complainant's appeal be rejected on the grounds that the expiry of her fixed-term appointment was not a termination within the meaning of the Staff Regulations and Staff Rules. By a letter dated 29 August 2008 the complainant was informed that, in accordance with the Board's conclusion, the Secretary-General had decided to maintain his decision of 20 December 2007 not to renew her fixed-term contract. That is the impugned decision.

In the meantime, towards the end of 2007 and at the beginning of 2008, the complainant enquired about her new objectives and job description. On 28 February 2008 she received a list of proposed objectives for 2008 and on 12 March she asked for some clarifications. Shortly thereafter, on 14 March, she lodged an appeal with the Appeal Board challenging her performance appraisal for the period from July to December 2006. The Board issued its report on her second appeal on 23 May 2008. It found that it was not admissible because the appraisal process had not been completed. By a letter dated

23 July 2008 the Secretary-General informed the complainant that he had decided to reject her appeal as inadmissible.

B. The complainant alleges that the decision not to extend her appointment is procedurally and substantially flawed, and that it is tainted with abuse of authority as it is based on an invalid and incomplete appraisal of her performance. Firstly, her 2006 performance appraisal was not finalised and there was no appraisal in 2007 and 2008, in breach of Staff Regulation 1.5 and the ITU Performance Appraisal Guide, which provide that the performance of staff members must be evaluated at regular intervals. Furthermore, in failing to complete the rebuttal procedure foreseen in the Performance Appraisal Guide, the Administration denied her the possibility of challenging her 2006 performance appraisal. Secondly, essential facts were omitted as the decision not to extend her appointment ignored her “outstanding performance” and achievements in the period 2006-2008, and, in reassigning her twice in a short period of time without setting out the objectives she was expected to fulfil or giving her a new job description, the Union prevented her from improving her performance.

Relying on the Tribunal’s case law, the complainant points out that, even if an organisation’s rules provide for the automatic expiry of fixed-term contracts, the decision not to extend an appointment for alleged unsatisfactory services is subject to judicial review. She submits that in her case the Appeal Board and, subsequently, the Secretary-General merely stated that her contract had expired automatically but failed to convey the considerations on which the decision was based.

The complainant considers that the Administration failed to respect her dignity and reputation by systematically making it impossible for her to fulfil her duties, and she believes that she received such “irregular treatment” as a result of the “political power struggle” between her direct supervisor and the new Secretary-General who was her second-level supervisor. She asks the Tribunal to annul the decision of 29 August 2008 and to order her reinstatement in her former post with all salaries and benefits with retroactive effect from 6 July 2008, or in the alternative, to award her 24 months of salary in

compensation for the non-extension of her appointment. She claims interest at “an appropriate rate” on all sums awarded from that date until such sums are paid in full. She also claims moral damages in an amount to be determined by the Tribunal, and at least 15,000 Swiss francs in costs.

C. In its reply the ITU acknowledges that the complainant’s performance appraisal for the period from July to December 2006 was not finalised, but it asserts that it was not placed in her personal file and that the decision not to extend her appointment was not based on that appraisal but on the recommendations of the Director of BDT. According to the Union, even if the 2006 performance appraisal had been finalised, it would not have resulted in an extension of the complainant’s appointment, given her “serious shortcomings”. The altercation of February 2007 and ensuing inquiry had highlighted her deficiencies in team work and management and, since then, she had been warned on several occasions that her performance was unsatisfactory. Furthermore, although during the meeting of 6 June 2007 she acknowledged her shortcomings and endeavoured to show her competence, her performance was still considered unsatisfactory thereafter. The ITU rejects the complainant’s allegation that her achievements were ignored, emphasising that, in his memorandum of 13 November 2007, the Director of BDT reiterated his dissatisfaction with her performance. It denies that there was any failure to respect the complainant’s dignity and reputation as the decision not to extend her appointment was, in its view, lawful.

The Union argues that the complainant was not prevented from improving her performance. Her first reassignment was decided within the framework of the reorganisation of BDT, she was given a job description and she never challenged such measure. As to her second reassignment, the memorandum of 13 September summarised her new duties, and her objectives were discussed with her and subsequently provided to her in writing on 28 February 2008.

D. In her rejoinder the complainant enlarges on her pleas. She considers that the fact that the 2006 performance appraisal was not

placed in her personal file is irrelevant and she points out that she was not given the opportunity to refute the statements made by other staff members in the context of the inquiry into the altercation of February 2007. She stresses that she objected to the assessment made during the meeting of 6 June 2007 and she takes issue with the Union's contention that she discussed her objectives prior to 28 February 2008.

E. In its surrejoinder the ITU reiterates its arguments.

CONSIDERATIONS

1. The complainant joined the ITU on 6 July 2006 as Head of the Market, Economics and Finance Unit in the Telecommunication Development Bureau (BDT) on a two-year fixed-term appointment. On 20 December 2007 she was informed that her appointment would not be extended beyond its expiry date. The reason given for the decision was that the Director of BDT was not satisfied with her performance. The complainant lodged an internal appeal, claiming, amongst other things, that the decision not to renew her contract involved "substantial irregularities". The Appeal Board expressed the view that, had her contract been terminated, she could have argued that the decision should be set aside for those irregularities but that that was irrelevant to the decision not to renew her fixed-term contract. The Secretary-General accepted the Appeal Board's recommendation that the appeal be rejected and informed the complainant to that effect by a letter dated 29 August 2008. That is the impugned decision.

2. Before turning to the arguments advanced by the complainant, it is convenient to note that even though "[n]otification of non-renewal [...] is simply notification that the contract will expire according to its terms [...] the Tribunal's case law has it that that notification is to be treated as a decision having legal effect for the purposes of Article VII(1) of its Statute" (see Judgment 2573, under 10, and also Judgment 1317, under 23). Accordingly, it may be challenged in the same way as any other administrative decision. To

the extent that the Appeal Board's recommendation was premised on the contrary view, it involved an error of law.

3. It is well settled that a decision not to renew a contract is a discretionary decision that may only be reviewed on limited grounds, namely, that "it was taken without authority, or in breach of a rule of form or of procedure, [...] or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority" (see Judgment 1262, under 4). The complainant contends that the decision not to renew her contract involved procedural irregularities, that essential facts were overlooked, that the decision constituted an abuse of authority and involved a failure to respect her dignity.

4. It is correct, as the ITU contends, that, where the ground for non-renewal is unsatisfactory performance, the Tribunal will not substitute its own assessment for that of the organisation concerned (see Judgment 1262, under 4). However, "[a]n organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better" (see Judgment 1583, under 6). Moreover, it "cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance" (see Judgment 2414, under 24).

5. ITU Staff Regulation 1.5(a) and (c) provides: "Staff members shall be evaluated for their efficiency, competence and integrity through a performance appraisal mechanism" and that "[p]erformance reports shall be prepared regularly for all staff members". The ITU Performance Appraisal Guide specifies that "[i]n principle, appraisal reports will be drawn up each year, unless supervisors consider that a report is not necessary for a particular year". The Guide also requires that objectives be set for the coming period. The staff member and the supervisor are to sign and initial the report, as must the Director of the Bureau. The Guide provides for a rebuttal procedure through "hierarchical channels", with final

authority lying with the Secretary-General. Provision is also made for an appeal to the Appeal Board following a request for review.

6. When the complainant commenced duties in July 2006, her direct supervisor was Mr P. T., Chief of the Policies, Strategies and Financing Department (PSF). Mr P. T. ceased to perform those functions on 15 March 2007 in circumstances set out in Judgment 2892 and is no longer an ITU staff member. From 6 July until 31 December 2006 Mr H. T. was the Director of BDT and, thus, the complainant's second-level supervisor during that period. Mr H. T. later became Secretary-General. On 15 March 2007 the new Director of BDT, Mr A. B., reassigned the complainant to a P.4 post as Analyst in Economics and Finance as part of a reorganisation of BDT. She was not then given a revised job description or provided with objectives for her new post. The complainant kept her P.5 grade for administrative purposes.

7. On 1 May 2007 the Secretary-General summoned the complainant to a meeting for the purpose of conducting a performance appraisal interview for the period from July to December 2006. He gave her an overall rating of 2 or "partly met requirements". Shortly afterwards, the complainant submitted a written note for attachment to the report, asserting, amongst other things, that "the evaluation and its grading ha[d] not taken into account the written evidence available [...] and thus ha[d] not taken into account due consideration of objective fact and circumstance". The note was not then acknowledged and, on 14 March 2008, the complainant purported to lodge an appeal against the report on various grounds, including that her direct supervisor had not participated in the assessment, that he, Mr P. T., had not informed her of any unsatisfactory aspects of her work and that she had had little contact with the Secretary-General when he was her second-level supervisor and, thus, he was not in a position to make an objective assessment. The Administration resisted the appeal on the grounds that her performance appraisal report had not been finalised. The Board accepted that argument and, in its report of 23 May 2008,

recommended that the appeal be rejected but that the appraisal be completed as soon as possible. That report was forwarded to the complainant on 23 July under cover of a letter from the Secretary-General acknowledging receipt of her comments on 14 May 2007 and stating that he would provide his detailed comments within two months. Those comments have not yet been provided.

8. The complainant met with Mr M. M., the Chief ad interim of PSF, on 6 June 2007 as “a follow-up to the periodic performance appraisal” conducted by the Secretary-General on 1 May 2007. It is not disputed that Mr M. M. expressed dissatisfaction with her work. Equally, it is not disputed that he recognised that performance appraisal “objectives should be set for 2007 and that [the complainant’s] job description [should] be revised [...] to reflect the changes in her duties” following her reassignment in March of that year. It was agreed that there would be another meeting towards the end of June. There was subsequent correspondence in which Mr M. M. indicated dissatisfaction with some of the complainant’s work but there was no follow-up meeting, no revision of her job description and no objectives were set for 2007.

9. On 30 August 2007 Mr A. B., the then Director of BDT, recommended that the complainant’s contract be terminated for unsatisfactory performance. In his recommendation he stated that her performance had been reviewed by the Secretary-General “in the early part of the year” and, again, by Mr M. M. on 6 June. He referred to various matters that were said to amount to unsatisfactory performance, including “relationship problems” when she occupied the post to which she was initially appointed. He stated that these problems had been brought to the attention of Mr P. T. but that he had failed to take any action. He also referred to an incident that occurred on 16 February 2007. It will later be necessary to refer to these matters in greater detail. On 7 September the complainant was invited to respond to this recommendation and informed that, because of the recommendation, she would be reassigned to another post. On 13 September she was advised that her new post would be Advisor to

the Chief of the Policy and Strategies Unit. Four “tasks” were identified for the post. On 18 September the complainant replied to these communications, again claiming irregularities in the performance appraisal procedure, the failure to specify objectives or conduct any performance appraisal in relation to her second post, and the failure to give her a hearing before deciding to reassign her to another post. On 20 December she was informed that the Director of BDT maintained his dissatisfaction with respect to her performance and that a decision had been taken by the Secretary-General in consultation with the Director that her appointment would not be extended beyond its expiry on 5 July 2008. It is to be inferred that the absence of a proper performance appraisal report led to a decision not to renew her contract rather than to dismiss her.

10. The complainant wrote to the Secretary-General on 1 February 2008 pointing out that she still had not been provided with clear objectives for her tasks, asking that she be given a chance to prove her competence by re-evaluation in the coming months in light of those objectives and that the decision not to renew her contract be reviewed. In the result, she was provided with objectives for her new post in February 2008 but she received no reply to her other requests.

11. The ITU argues that the complaint should be dismissed on the grounds that the complainant’s deficiencies are well documented and were appropriately brought to her attention. However, it is clear that the performance appraisal undertaken by the Secretary-General was not finalised, no proper performance evaluation was conducted thereafter, no revised job description was provided in respect of the second post occupied by the complainant and no objectives were set for any of her posts prior to the decision not to extend her appointment. These irregularities are not merely technical. The duty of good faith requires that an organisation observe its rules with respect to performance appraisal if it wishes to rely on unsatisfactory performance for any decision that is adverse to a staff member (see Judgment 2414, under 23 and 24). Moreover, it is impossible to conclude, in the absence of objectives or a revised job description, that

the complainant was given a real opportunity to prove her competence or, if necessary, improve her performance during the short period during which she occupied her second post.

12. There is another reason why prescribed procedures for performance appraisal should be observed. As was pointed out in Judgment 2836, performance appraisal procedures must be “both transparent and adversarial”. That is unlikely to be the case where the prescribed procedures are not observed. In the present case, the failure to set performance objectives before informing the complainant that her appointment was not to be extended has the consequence that the steps taken by the Administration with respect to her performance lack transparency. Moreover, there is nothing to suggest that anything that the complainant advanced in relation to the Secretary-General’s assessment of her performance was taken into account at any time prior to the expiry of her contract and his failure to complete the report had the consequence that she was deprived of the opportunity to answer what was put against her in internal appeal proceedings.

13. As no performance appraisal report was ever completed in relation to the complainant’s work and no objectives were set prior to the decision not to extend her appointment, the impugned decision must be set aside. However, as it is relevant to her claim for moral damages it is also necessary to consider the complainant’s claim of abuse of authority. In this regard, it is contended that she was caught in a “power struggle” between Mr P. T., her direct supervisor until 15 March 2007, and her second-level supervisor until the latter became Secretary-General. It may not be correct to describe the situation between her supervisors as a “power struggle”, but Judgment 2892 clearly reveals that there had been differences between them as early as October 2006 with respect to “staff relations”.

14. As already indicated, in his recommendation that the complainant’s contract be terminated, the then Director of BDT referred to difficulties the complainant had with staff under her supervision that had been brought to the attention of Mr P. T. who had

taken no action. He also referred to the event that occurred on 16 February 2007. Officers from the Personnel and Social Protection Department interviewed various staff members in relation to that incident. Their statements were not referred to the complainant. Nor was she given an opportunity to answer their claims. Nevertheless, and notwithstanding that it is clear that it was the other person involved in the incident who first became angry and raised her voice, the Personnel and Social Protection Department concluded that the incident was “to be considered as a result of a situation created as from the entry on duties [of the complainant]”. As the complainant no longer had any managerial functions following her reassignment in March 2007, it is not clear that this had any relevance to her performance in the post that she then occupied. However, the “confidential report” of the Department was referred to in the recommendation that the complainant’s contract be terminated and it is to be presumed that that recommendation was taken into account in the subsequent decision not to renew her contract.

15. The procedure adopted in relation to the incident of 16 February 2007 involved a denial of due process. There was a similar denial of due process in the decision to reassign the complainant to a third post on 7 September 2007 without first giving her an opportunity to respond to the recommendation that her contract be terminated. When regard is had to these matters, as well as the failure to provide the complainant with objectives in relation to any of the posts that she occupied until February 2008 despite her various requests in that respect, it is difficult to resist the conclusion that there was a conscious disregard of her rights and dignity. The reference by the Director of BDT in his recommendation for her termination to the former Director’s failure to take action with respect to the

“relationship” difficulties that were said to exist suggests that there was some animosity directed against the complainant because of his failure in that regard. Even if that not be the reason, the evidence leads to the conclusion that the decision not to extend the complainant’s appointment and the events leading to it were motivated by animosity towards her. This entitles the complainant to moral damages in addition to compensation with respect to the decision not to extend her appointment.

16. Although the decision not to extend the complainant’s appointment involved procedural and other errors, it does not follow that her fixed-term contract would have been renewed if those errors had not occurred. Accordingly, reinstatement is not an appropriate remedy. Similarly, the complainant is not entitled to compensation on the basis that her contract would have been renewed. Rather, she is entitled to compensation on the basis that she lost a valuable chance of having her contract renewed had proper procedures been observed. The Tribunal awards the sum of 50,000 Swiss francs in respect of material and moral damages. The complainant is also entitled to costs in the sum of 7,500 francs.

DECISION

For the above reasons,

1. The decision of the Secretary-General of 29 August 2008 is set aside.
2. The ITU shall pay the complainant 50,000 Swiss francs for material and moral damages.
3. It shall also pay her costs in the sum of 7,500 francs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 27 April 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Catherine Comtet