

111th Session

Judgment No. 3040

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. T. against the International Telecommunication Union (ITU) on 8 October 2009 and corrected on 23 October, 27 November and 11 December 2009, the ITU's reply of 17 March 2010, the complainant's rejoinder of 28 May, the Union's surrejoinder of 30 July, the complainant's additional submissions dated 28 December 2010 and the ITU's final comments thereon of 1 February 2011;

Considering Article II, paragraph 5, 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. Facts relevant to this case are to be found in Judgment 2917, delivered on 8 July 2010, concerning the complainant's first complaint. Suffice it to recall that he joined the ITU in June 1994 and was granted a permanent contract in October 2000. From November 2001 to October 2004 he was seconded to the International Trade Centre at grade P.4, and on his return to the ITU he was appointed, at grade P.5, as Head of the Administrative and Finance Services (ADM) in the Telecommunication Development Bureau (BDT) with effect from 1 November 2004.

In April 2006 the complainant's performance appraisal report for the period from November 2004 to December 2005 was issued. His supervisor, the Director of BDT, indicated under the heading "Overall Assessment" that the complainant partly met requirements. The complainant and his supervisor agreed that his performance would be appraised again in a few months. Thus, an interim appraisal report was issued in August 2006 in which the complainant's supervisor indicated that his performance did not meet fundamental requirements. That supervisor was elected Secretary-General of the ITU in November 2006 and a new Director of BDT was appointed; both appointments took effect on 1 January 2007.

In May 2007 the complainant was asked to approve and process the retroactive payment of a fellowship. By an e-mail of 29 June he informed the Director of BDT that he could not do this without some form of written explanation, given that the payment in question would be in violation of the Financial Regulations and Financial Rules.

The Director of BDT subsequently announced that, effective 2 July 2007, the complainant would be assigned to the Projects Division in the Projects and Initiatives Department within BDT. On 10 July the Secretary-General, in his capacity as the complainant's former supervisor, gave the complainant his performance appraisal report for the period 1 January to 31 December 2006 in which he stated that the complainant did not meet fundamental requirements. The complainant signed it that same day. On 30 July he was informed orally by the new Director of BDT that a recommendation had been made to terminate his appointment for unsatisfactory services. By a memorandum of 23 August 2007 the Deputy Secretary-General in charge of the Administration and Finance Department confirmed that such a recommendation had been made and indicated that, in accordance with Staff Regulation 9.1d), the matter would be referred to the Joint Advisory Committee for advice.

In its report of 22 July 2008 the Committee unanimously agreed that the complainant's performance in 2005 had been unsatisfactory and that he had not shown competence as an official at P.5. However, the members of the Committee were unable to reach consensus on the

recommendation to terminate his appointment. Some considered that there was sufficient evidence to support the recommendation, whilst others held that, on the contrary, the evidence led them to question the grounds on which the recommendation was made. The members also disagreed on the validity of the appraisal reports for 2006 and on the quality of the complainant's performance in 2006.

On 8 August 2008 the complainant was notified of the Secretary-General's decision to terminate his appointment for unsatisfactory services. The termination was with immediate effect and an indemnity equivalent to three months' salary and allowances was to be paid to him in lieu of notice. By a letter of 18 September the complainant requested the Secretary-General to review his decision. On 29 October 2008 the latter replied that since the complainant's performance had not improved, despite clear warnings, it was in the interest of the service to terminate his contract. He considered *inter alia* that the complainant had not shown the existence of any flaw warranting a modification of the decision.

On 31 January 2009 the complainant filed an appeal with the Appeal Board alleging abuse of authority, retaliation, bad faith and malice on the part of the Secretary-General. He also contended that the decision to terminate his contract had impaired his dignity. In addition, he alleged that the Joint Advisory Committee's proceedings were flawed given that his right to due process, and in particular, his right to be heard, was infringed and that the Chairman of the Committee was biased against him. He therefore asked that the Committee's proceedings be declared null and void and that he be reinstated.

In its report of 11 May 2009 the Appeal Board concluded that the Joint Advisory Committee's proceedings could not be challenged on the grounds presented in the appeal and that the Secretary-General had acted "within the competences provided to him". However, it held that the performance appraisals for 2006 did not comply with the rules laid down in the Performance Appraisal Guide of 2001. It recommended *inter alia* that the Secretary-General and the complainant be encouraged to engage in discussions to find an amicable solution.

Having received no reply from the Secretary-General within sixty days following receipt of the Appeal Board's report, the complainant filed a complaint with the Tribunal challenging the implied decision to reject his appeal.

B. The complainant alleges breach of due process insofar as the Joint Advisory Committee heard the Director of BDT but not him. He was thus deprived of the possibility of refuting the allegations made concerning his performance, in particular the new allegations made by the Director during his interview by the Committee. He also contends that the Chairman of the Committee, who was appointed by the Secretary-General, was biased against him. Indeed, in his capacity as Acting Chief of the Administration and Finance Department in 2007 and early 2008, the Chairman had been "exposed to numerous incidents and correspondence and actions" related to difficulties the complainant was facing in his private life. He points out that his request for recusal of the President was rejected.

The complainant argues that the decision to terminate his appointment is flawed insofar as the Secretary-General relied on the Joint Advisory Committee's report and the flawed appraisal reports for 2006. He questions the Committee's conclusions, pointing out that it did not recommend quashing the termination decision although it found clear inconsistencies with regard to that decision. He adds that since the members of the Committee expressed opposite views as to the validity of the contested decision, its recommendation should not have been considered as constituting advice within the meaning of Staff Regulation 9.1d). He also submits that the termination decision was premature given that he had been assigned to a new post in early July 2007 and had not been given the chance to prove his abilities in that new job. In his view, the termination decision was an act of retaliation for having refused to approve the retroactive payment of an illegal fellowship.

Referring to the Tribunal's case law concerning disciplinary measures, the complainant contends that the termination decision was disproportionate. He had good performance appraisals for many years before experiencing personal difficulties in 2005 and having to

work in an “impossible political environment”. Moreover, he spent more than 15 years working for the ITU and was promoted to P.5 on the basis of his solid reputation and competencies. He adds that the termination decision “contradicts promises made to the contrary” pointing out that, in May 2008, the Chief of the Administration and Finance Department told him that a transfer, possibly at a lower grade, could be envisaged as an amicable settlement.

Lastly, the complainant objects to the decision not to pay him the termination indemnity provided for in Staff Regulation 9.6. He acknowledges that the Secretary-General has discretion in the matter but contends that he should have considered the hardship the termination had caused him and should have provided reasons for his refusal.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement with retroactive effect from the date of termination. Failing this, he seeks the payment of a termination indemnity equivalent to 18 months’ salary. He also seeks moral damages and costs.

C. In its reply the ITU indicates that a final decision on the complainant’s appeal was issued on 30 October 2009. It acknowledges that this decision was not taken within the time limit laid down in Staff Rule 11.1.1.5, but stresses that it was taken before the ITU was informed that the complainant had filed a complaint with the Tribunal.

The Union denies any breach of due process, emphasising that the complainant was duly informed of the intention to proceed with his termination for unsatisfactory services and that the matter was referred to the Joint Advisory Committee as required by applicable rules. It explains that Staff Regulation 9.1d) provides that the Committee shall consult the Director of the Bureau concerned but that no rules provide that the staff member concerned by the termination decision must be heard. The complainant’s request for recusal of the Committee’s Chairman was considered by the Chairman himself and by the other members of the Committee but they concluded that the information to which he had access in his former capacity as Acting Chief of the

Administration and Finance Department was not such as to undermine his impartiality as Chairman.

According to the Union, the decision to terminate the complainant's appointment was lawful. The procedural irregularities noted concerning the appraisal reports for 2006 were only minor and there were no reasonable grounds to believe that the decision would have been different without the flaws in question. Indeed, the Appeal Board noted only minor procedural inconsistencies with the rules laid down in the Performance Appraisal Guide and did not question the unsatisfactory quality of the complainant's performance following his appointment as Head of ADM. It points out that the members of the Joint Advisory Committee did agree on certain conclusions and argues that the different views expressed by its members were, as stated by the Appeals Board, an indication of unbiased and free discussions.

The ITU asserts that the decision to transfer the complainant in July 2007 was taken in good faith and in the interest of the service. The Director of BDT realised only subsequently that the complainant's shortcomings would prevent him from exercising the responsibilities of any P.5 position and not only those of Head of ADM. It points out that the complainant had been warned for more than two and a half years that his performance was not satisfactory and was given ample opportunities to improve. It rejects the complainant's allegation that he was a victim of retaliation and reiterates that the sole reason for terminating his appointment was his unsatisfactory performance.

The defendant submits that the decision to terminate an appointment is discretionary and that, in the case of unsatisfactory performance, termination is the normal and reasonable decision to take. It stresses that termination for unsatisfactory service is not a disciplinary measure. In addition, it asserts that the complainant has produced no evidence showing that he was promised an amicable settlement.

The ITU argues that the Secretary-General was not obliged to provide reasons for his decision not to grant the complainant a termination indemnity. In any event, the complainant did not inform

the Administration that he was facing major difficulties which might have warranted paying him the said indemnity.

D. In his rejoinder the complainant indicates that he informed the ITU on 27 October 2009 that he had filed a complaint with the Tribunal, and that he received the final decision on his appeal on 11 November 2009.

He submits that the requirement in Staff Regulation 9.1d) that the Director of the bureau concerned should be consulted by the Joint Advisory Committee does not mean that that person has to be interviewed but he argues that since the Committee decided to do so, he should have been invited to attend the interview and thus given the opportunity to comment on the Director's allegations.

The complainant maintains his plea concerning retaliation. He points out that his performance appraisal report for 2006 was completed in July 2007 – following the e-mail of 29 June 2007 by which he refused to approve the payment of an illegal fellowship – and not by 11 May 2007 as provided for in the relevant directives. If his performance in 2006 had truly been catastrophic, the Administration should have prepared his appraisal report as early as possible. He asserts that his performance indeed improved between 2005 and 2007.

Regarding the fact that the Secretary-General did not provide reasons for refusing to pay him the termination indemnity, he observes that, according to the Tribunal's case law, even a discretionary decision must be motivated in order to allow a staff member to challenge it if he so wishes. He submits that the Secretary-General could not have been unaware that he was in a difficult situation, since he knew that he had a dependent child, that he was divorced and that he was not entitled to any national unemployment benefit or to any other kind of benefit.

E. In its surrejoinder the ITU maintains its position. It reiterates that the complainant's right to be heard during the proceedings of the Joint Advisory Committee was not violated, since he had the

opportunity to formulate his comments in writing following the hearing of the Director of BDT. It adds that a termination indemnity is granted in recognition of the quality of service or because of a particularly unfavourable social and economic situation, and not to maintain the standard of living of a staff member whose appointment has been terminated for unsatisfactory services.

F. In his additional submissions the complainant draws attention to the newly issued Judgment 2917, in which the Tribunal ruled that his performance appraisal report for 2006 was tainted with serious irregularities and ordered that it be removed from his personal file. He contends that inasmuch as the decision to terminate his appointment is based on the aforementioned appraisal report, it should be set aside. Indeed, there is no evidence that his admitted poor performance in 2005 persisted in 2006 and that his appointment therefore had to be terminated.

G. In its final comments the ITU asserts that the decision to terminate the complainant's appointment was not based exclusively on the 2006 appraisal report. It adds that the Joint Advisory Committee concluded that his performance was unsatisfactory for a staff member holding grade P.5. Moreover, the Tribunal concluded in Judgment 2917 that the appraisal was procedurally flawed but it did not dispute the negative assessment of the complainant's performance on the substance. The Union points out that the Tribunal considered that there was no evidence in the file to support the plea that the disputed appraisal report for 2006 was an act of retaliation.

CONSIDERATIONS

1. As the evidence adduced by the parties and the briefs they have submitted are sufficient to enable the Tribunal to reach an informed decision, the complainant's application for an oral hearing is rejected.

2. The complainant impugns the decision to terminate his employment with the ITU. On 11 May 2009 the Appeal Board submitted its report to the Secretary-General. As the complainant had not received a final decision from the Secretary-General within the requisite sixty-day period, on 8 October 2009 he filed his second complaint with the Tribunal challenging the implied decision to reject his appeal. By a letter of 30 October 2009 the complainant was informed that the Secretary-General had issued a final decision. In these circumstances, the complaint will be treated as directed to the express final decision of 30 October 2009.

3. In his final decision the Secretary-General accepted the Appeal Board's conclusion that the proceedings of the Joint Advisory Committee could not be challenged on the grounds presented by the complainant. He took note of the Board's opinion that the complainant's performance appraisal report for the period November 2004 to December 2005 was completed in accordance with the Performance Appraisal Guide and its opinion that the mid-term performance appraisal report and the performance appraisal report for 2006 did not meet the requirements of the aforementioned Guide. In regard to this latter opinion, the Secretary-General noted that the Appeal Board had "raised some small procedural inconsistencies" but it had not questioned the unsatisfactory quality of the complainant's work. It was also pointed out that, according to the Tribunal's case law, a procedural flaw will only invalidate a decision on the termination of appointment if there is a reasonable likelihood that the decision would have been different without the flaw. The Secretary-General maintained his view that the complainant's services from the time of his return to the ITU in November 2004 were clearly unsatisfactory.

4. Subsequently, on 8 July 2010, the Tribunal delivered Judgment 2917 regarding a complaint brought by the complainant against his 2006 performance appraisal report. In that judgment, the Tribunal concluded that "the disputed appraisal report [was] tainted

with serious irregularities”. It also observed that the “Secretary-General’s refusal to censure them constituted a breach of the assessment rules laid down in the Union’s Performance Appraisal Guide”. The Tribunal set aside the impugned decision, directed that the appraisal report be removed from the complainant’s personal file and awarded the complainant moral damages and costs.

5. In this case, the Tribunal notes that the complainant received his 2006 appraisal report on 10 July 2007 and was told on 30 July that a recommendation had been made to terminate his appointment. It appears that the 2006 appraisal report was in fact the impetus for the start of the termination proceedings. Accordingly, the Tribunal must hold that the 2006 appraisal report was material to the decision to terminate the complainant’s appointment. Moreover, that report, “a report tainted with serious irregularities”, was taken into account by the Secretary-General in reaching his decision to dismiss the complainant’s appeal. As the 2006 appraisal report has since been set aside, the Secretary-General took into account an irrelevant consideration. That being so, the impugned decision must be set aside.

6. The complainant raises a number of other issues. He alleges that the Joint Advisory Committee violated his right to be heard, that the Chairman of the Committee was biased and that the facts established by the Committee contradicted its conclusions. He also alleges that the termination decision was premature, that it constituted an act of retaliation, that it was disproportionate and that it contradicted promises made to him by the Administration.

7. The Tribunal notes that essentially the same allegation of retaliation was dismissed in Judgment 2917 on the basis that there was no evidence to support it. Nor is the allegation supported by the evidence in the present case. Moreover, the allegation is inconsistent with the evidence of the sequence of events as adduced by the ITU.

8. In relation to the complainant’s allegations regarding the Joint Advisory Committee’s proceedings, the Tribunal observes that

having regard to the nature of the proceedings, procedural fairness required that the complainant had an opportunity to hear the evidence of the Director of BDT and an opportunity to respond to the evidence. This breach of procedural fairness further undermines the termination decision. With regard to the remaining allegations in relation to the Joint Advisory Committee including the allegation of bias, in the Tribunal's opinion these allegations are not supported by the evidence and are unfounded.

9. As to the allegation that the termination of employment was premature, the Tribunal notes that the complainant was transferred to a new post with effect from 2 July 2007 and that the termination procedure was commenced after his transfer. It also notes that the complainant was on sick leave from 30 August 2007 until 22 April 2008. Although the termination process was suspended until February 2008 there was no real opportunity for the complainant to demonstrate satisfactory performance in his new post. This is a matter to be taken into account by way of moral damages.

10. With regard to the request for reinstatement, in view of the passage of time and in the circumstances of this case, the Tribunal will not order reinstatement.

11. In addition to moral damages and costs, in the alternative to his claim for reinstatement, the complainant contends that he is entitled to a termination indemnity in accordance with Staff Regulation 9.6.

12. The complainant is entitled to material damages for the wrongful termination of his appointment. The ITU will be ordered to pay the complainant an amount equivalent to 12 months' salary, allowances and other benefits to which he would have been entitled, subject to the deduction of his net earnings for the 12-month period following his separation from service. The Union will also pay the complainant moral damages in the amount of 7,500 Swiss francs for breach of procedural fairness, loss of the opportunity to demonstrate satisfactory performance in the new post and wrongful termination, as

well as 1,500 francs in costs. All the remaining claims will be dismissed.

DECISION

For the above reasons,

1. The decision of 30 October 2009 is set aside.
2. The ITU shall pay the complainant material damages in an amount equivalent to 12 months' salary, allowances and other benefits to which he would have been entitled subject to the deduction of his net earnings for the 12-month period following his separation from service.
3. It shall pay him moral damages in the amount of 7,500 Swiss francs.
4. It shall also pay him costs in the amount of 1,500 francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet