113th Session **Judgment No. 3107**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2892 filed by Mr P.G. T. against the International Telecommunication Union (ITU) on 17 June 2010, the ITU's reply of 27 October 2010, the complainant's rejoinder of 31 January 2011 and the Union's surrejoinder of 28 April 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 set out in Judgment 2892, delivered on 3 February 2010, concerning the complainant's first and second complaints. In that judgment, the Tribunal ruled inter alia that the decision of 13 December 2007 by which the ITU's Secretary-General confirmed the decision to dismiss the complainant with effect from 7 September 2007 was set aside, as was the earlier decision of the Deputy Secretary-General of 16 March 2007 suspending the complainant from duty.

Following his dismissal, the complainant established a Swiss company, and in June 2008 the Swiss Government notified the company that its application for membership of the ITU's Telecommunication Development Sector had been forwarded to the Union. The ITU wrote to the complainant in his capacity as Managing Director of the company on 1 April 2009, acknowledging receipt of the application for membership of his company and stating that, pending approval of the application by the Administrative Council, the company could participate in the Union's work on a provisional basis. It also informed the complainant that he was not allowed to enter the Union's premises because of the incident that had occurred on 15 March 2007, following which he had been escorted out of the Secretary-General's office and requested to give back his access badge before being dismissed. The Union added that any other representative of the company would nevertheless be authorised to enter the meeting rooms, provided that he or she avoided the premises occupied by the Secretary-General. On 24 April 2009 the complainant was informed by the ITU that his company was successfully registered with the Telecommunication Development Sector.

Following the delivery of Judgment 2892 in early February 2010, the complainant, who believed that he was no longer banned from entering the ITU's premises, contacted the Union to arrange for his participation at a conference it was organising in India from 24 May to 4 June. He received confirmation that he was registered to attend the conference. However, on 14 May, when he met with the Director of the Telecommunication Development Bureau, he was informed by the Head of the Security and Safety Service that he was still banned from entering ITU installations. This was confirmed by the Chief of the Administration and Finance Department who, in a letter of 19 May, informed the complainant on behalf of the Secretary-General that the decision not to allow him access to the Union's premises or to any premises under its responsibility was maintained and that he was therefore not welcome to attend the conference in India. Having been informed of this decision by the complainant, the Swiss authorities wrote to the Secretary-General on 20 May, asking him to take the

necessary measures to allow the complainant to attend the conference since, in their view, following the delivery of Judgment 2892, there was no longer any valid reason to deny the complainant access to the Union's premises. The complainant, who had already made travel and accommodation arrangements in that respect, arrived at the conference hall on 25 May but was refused access. Following discussions with the security service, he left the hall and returned to Switzerland.

B. The complainant contends that, in maintaining its decision not to grant him access to its premises, the ITU has failed to execute Judgment 2892. Indeed, the ongoing ban is based on facts which gave rise to his suspension from duty, the prohibition to enter the Union's premises and ultimately his dismissal; these decisions were considered to be illegal by the Tribunal in the aforementioned judgment. He submits that the decision not to allow him access to the ITU's installations caused serious damage to his honour and reputation and that he suffered financial loss when he was not allowed to attend the conference in India, since he had paid for plane tickets, accommodation and salaries, inter alia.

The complainant asks the Tribunal to order that the ITU and its officials immediately cease prohibiting him from entering its premises or attending meetings that he would otherwise be allowed to attend and cease taking against him "special measures" that are not applied to other participants in meetings in or with the ITU. He also asks that the Union be ordered to remove from his personal file and from any other files all documents relating to the allegations that gave rise to Judgment 2892, and that the Secretary-General be ordered to circulate "this Order of Execution" together with Judgment 2892. In addition, he claims moral damages in an amount not less than 50,000 Swiss francs, exemplary damages in an amount not less than 50,000 francs, material damages in the amount of 13,000 francs, as well as costs in the amount of 10,000 francs. Lastly, he seeks the payment of interest at 8 per cent per annum, from "the date of Judgment 2892 (November 2009)" to the date of its full execution, on all sums granted to him. He also asks for oral hearings.

C. The ITU asserts that it fully executed Judgment 2892 and that the sums due to the complainant were transferred to his bank account in early March 2010. It contests the receivability of the application for execution as it does not in fact relate to the execution of Judgment 2892 but to circumstances that occurred after his separation from service which are not linked to that judgment. It adds that, at the material time, the complainant was not a staff member and that, consequently, the circumstances under which he was not granted access to the Union's premises are not covered by his terms of appointment or the Staff Regulations and Staff Rules.

On the merits, the defendant explains that, based on the privilege relating to the inviolability of the Union's premises, the Secretary-General is responsible for ensuring security on these premises and may therefore prohibit access if necessary. It states that the complainant proved to be aggressive when he was a staff member and that, more recently, he used "inappropriate tone and arguments" when he replied to the letter of 19 May 2010 from the Chief of the Administration and Finance Department. Consequently, the Secretary-General considered that it was in the Union's best interest not to grant him access to its premises. It adds that the measure was not taken against a member of the Telecommunication Development Sector, i.e. the complainant's company, but against the complainant as an individual.

The ITU asks the Tribunal to dismiss the complainant's application for oral hearings on the grounds that the case is sufficiently documented.

D. In his rejoinder the complainant reiterates his arguments. He contends that his application for execution is receivable, alleging "continuing breach" of the Tribunal's ruling in Judgment 2892. He stresses that the decision to refuse him access to the Union's premises is based on facts and considerations already dealt with by the Tribunal in Judgment 2892.

E. In its surrejoinder the Union maintains its position. It adds that in Judgment 2892 the Tribunal set aside the decision to dismiss the complainant because the evidence was inconclusive and not because of a finding that he was not aggressive during the meeting of 15 March 2007.

CONSIDERATIONS

1. The complainant, a former staff member of the ITU, claims that the Union has not fully executed Judgment 2892 in that it has maintained a ban on his presence at all ITU installations contrary to the orders made by the Tribunal in that case. It is necessary to say something of the background facts that led to Judgment 2892. On 15 March 2007 the complainant was called to the office of the Secretary-General. It is not disputed that they then had a disagreement on the subject of the complainant's performance in 2006. According to a note for the record made by the Deputy Secretary-General on 16 March 2007, the complainant "raised the tone of his voice several times" and "was threatening in his gestures and tone". The Secretary-General who, according to his version of events, thought the situation "could reach [his] physical integrity", asked the security officers to escort the complainant from his office and, some five minutes later, asked them to escort him from the building. The complainant was obliged to hand over his badge when leaving the building. On 16 March 2007 he was suspended from duty and on 4 September 2007 he was dismissed with effect from 7 September. In due course, complaints were lodged with the Tribunal. In Judgment 2892, delivered on 3 February 2010, the complainant was awarded moral damages for, amongst other things, the Secretary-General's instructions that he be escorted from his office and, later, from the building. In this regard, the Tribunal noted, in consideration 26, that there was "no suggestion that the complainant engaged in or, in so many words, actually threatened violence". The Tribunal also set

aside the decisions of 16 March 2007 and 4 September 2007 and, although it did not order reinstatement, ordered, amongst other relief, that he be paid his full salary and the other entitlements he would have received if his contract had expired on 21 March 2008.

2. The ITU admits that there is a ban on the presence of the complainant at all its installations and that the ban has been enforced, including on an occasion in May 2010 when he sought to attend an ITU conference in Hyderabad, in India, as a representative of a company that he had founded and that had registered as a conference participant. It also admits in its surrejoinder that the complainant was initially banned "as a consequence of the decision of 16 March 2007 to suspend him from duty". However, it contends that the ban now in force is not that ban but a "new" ban imposed after the complainant separated from service. It is not in dispute that the reasons for the "new" ban relate directly to the events of 15 March 2007 upon which the Tribunal ruled in Judgment 2892. This notwithstanding, the ITU contends that the "new" ban was placed on the complainant "as a private individual" in application of its privilege of inviolability and, thus, the complaint is irreceivable. As a subsidiary argument, it seeks to justify the "new" ban by reference to the events of 15 March 2007, pointing out that the Tribunal set aside the decision to dismiss the complainant because the evidence was inconclusive and not because of a finding that he was not aggressive on the evening in question. As will later appear, these arguments must be rejected.

3. Although the Tribunal made no specific order with respect to the ban that came into effect "as a consequence of the decision of 16 March 2007 to suspend [the complainant] from duty", the effect of its order setting aside the decision of 16 March 2007 was that the decision to ban the complainant from the ITU premises was no longer of any effect. As stated in Judgment 1306, consideration 6, "[w]hen a decision is quashed it is deemed never to have been taken". Accordingly, any subsequent or consequential decision based

entirely on a decision that has been set aside necessarily lacks legal foundation and is a nullity. Moreover and as stated in Judgment 1338, consideration 11, "an international organisation which has recognised the Tribunal's jurisdiction is bound, not merely to refrain from acting in disregard of a judgment, but to take whatever action the judgment may require". It follows that, once Judgment 2892 was delivered and the decision of 16 March 2007 set aside, the ITU was obliged to lift the ban that had been placed on the complainant in consequence of that decision. And if that required a specific instruction to the Security and Safety Service, that instruction should have been given.

4. There is no evidence that anything was done to lift the ban on the complainant either before or after delivery of Judgment 2892. On the contrary, the ITU acknowledges that on 1 April 2009, before judgment was given, it advised the complainant by letter that the ban on his presence in ITU buildings was maintained until further advice. The exact wording, in French, was:

> *"l'interdiction de votre présence personnelle dans les bâtiments de l'UIT est maintenue jusqu'à nouvel avis."*

Later, on 19 May 2010, after delivery of Judgment 2892, the Chief of the Administration and Finance Department wrote to the complainant, confirming, in the name of the Secretary-General, the maintenance of the decision not to permit him access to ITU buildings. The precise words, in French, were:

> *"je vous confirme [...] le maintien de la décision de ne pas vous permettre d'avoir accès aux bâtiments de l'UIT."*

It is correct, as the Union contends, that this correspondence was written after the complainant ceased to be an ITU staff member, that having occurred not later than 21 March 2008. However, the terms of the correspondence directly contradict the assertion that a "new" ban was placed on the complainant. The correspondence clearly indicates that the previous ban – and that could only be the ban placed on the complainant in consequence of the decision of 16 March 2007 – was being maintained. Indeed, there was no reason why the ITU should

even have thought it necessary to impose a new ban in April 2009, as Judgment 2892 had not then been delivered. The failure of the ITU to lift the ban imposed in consequence of the decision of 16 March 2007 when Judgment 2892 was delivered was a failure to execute that judgment. And the maintenance of the ban thereafter was a deliberate act that was contrary to its obligation to execute the judgment fully.

5. It is necessary to observe that the maintenance of the ban or, indeed, the imposition of a "new" ban cannot be justified by reference to the events of 15 March 2007. Those events were the subject of findings in Judgment 2892, including the finding in consideration 26 that the Secretary-General's action in having the complainant escorted from his office and, later, from the building was "disproportionate" and that the complainant had neither "engaged in [n]or, in so many words, actually threatened violence". By force of *res judicata*, these findings are, as stated in Judgment 2720, consideration 10, "no longer open to challenge and are therefore binding on both parties as true statements of fact". (See also Judgment 1540, consideration 7.) Moreover, the finding that the charge of serious misconduct relating to the events of 15 March 2007 had not been proven means that the complainant was innocent of the charge based on those events. The principle of *res judicata* has the consequence that that cannot now be controverted by the ITU.

6. The complainant seeks various orders, including that the ITU "cease and desist" from banning him from its premises and from attending conferences or meetings that he would otherwise have the right to attend, the removal of all documents relating to the events of 15 March 2007 from its files, the circulation of this and Judgment 2892 throughout the ITU and to its "Governing Council", and moral, material and exemplary damages, as well as costs. The complainant also seeks an oral hearing. The application for an oral hearing is refused. The facts are not in dispute and the legal issues are comprehensively exposed in the pleadings.

7. The application for exemplary damages is also refused. The complainant contends that the ban on him constitutes "retaliation for his exercise of his fundamental rights of appeal". The fact that an organisation persists in maintaining allegations against a complainant contrary to the Tribunal's findings may well lead to an inference that subsequent acts against that complainant were taken in retaliation for his or her having approached the Tribunal. However, that inference will not be drawn if there is other sufficient explanation for the acts in question. In the present case, the maintenance of the ban on the complainant is explicable on the basis of the personal difficulties between the Secretary-General and the complainant which were revealed in Judgment 2892 and which have existed for some time. As will later be explained, the complainant is entitled to moral damages and the Secretary-General's personal antipathy towards him is a matter properly to be taken into account in their assessment.

8. It was pointed out in Judgment 2720, consideration 12, that an international organisation has a duty, flowing from the general principles governing the international civil service, to refrain from conduct that may harm the dignity or reputation of staff members, including former staff members. And where it has engaged in such action, it has a continuing obligation to take steps to remedy, as far as possible, any injury caused by its actions. The maintenance of the ban on the complainant after delivery of Judgment 2892 constituted an affront to his dignity and a slur on his reputation. In the circumstances, the complainant is entitled to moral damages in the sum of 10,000 Swiss francs.

9. The claim for material damages is made on the ground that the complainant incurred expenses, which he assesses at 13,000 Swiss francs, in relation to his abortive trip to Hyderabad. The complainant was informed by letter from the Chief of the Administration and Finance Department on 19 May 2010, five days before the Hyderabad conference, of the continuing ban on his presence at ITU installations

and advised not to attend the conference and, also, not to incur expenses that would be futile. The complainant claims that he had, by then, purchased his airline tickets and booked hotel accommodation that could not be cancelled. However, he does not say that he could not obtain a refund on his airline tickets. Having been warned of the ban preventing him from attending the conference, albeit that the ban should have been lifted on delivery of Judgment 2892, the complainant was obliged to mitigate his damages, including by cancelling his airline tickets and seeking a refund. Accordingly, the Tribunal will not award material damages for the out-of-pocket expenses claimed by the complainant, but will allow compensation on an equitable basis in the sum of 5,000 francs.

10. The ITU must immediately lift the ban on the complainant's presence at its installations. To this end, the Tribunal will make a formal declaration that the ban imposed in consequence of the decision of 16 March 2007 and maintained on 1 April 2009 and, again, on 19 May 2010, is of no force or effect and order the ITU to inform its Security and Safety Service of the terms of that declaration within seven days of the delivery of this judgment. Additionally and to ensure that there is no doubt concerning the maintenance of a ban on the complainant as a consequence of the events of 15 March 2007, the ITU will be ordered to provide a copy of this judgment to the heads of all its departments and divisions within seven days of its delivery. The Tribunal sees no need to order more extensive circulation of the judgment or to make further orders as sought by the complainant. The complainant is, however, entitled to costs in the sum of 5,000 francs.

DECISION

For the above reasons,

1. It is declared that the ban imposed on the complainant's presence at ITU premises in consequence of the decision of 16 March 2007 and maintained on 1 April 2009 and 19 May 2010 is of no force or effect.

2. The ITU shall inform its Security and Safety Service of the terms of the declaration made in Order 1 within seven days of the delivery of this judgment.

3. The ITU shall provide a copy of this judgment to the heads of all its departments and divisions within seven days of its delivery.

4. The ITU shall pay the complainant material and moral damages in the sum of 15,000 Swiss francs.

5. It shall also pay him costs in the amount of 5,000 francs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2012, Ms Mary G. Gaudron, Vice-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 4 July 2012.

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