Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3140**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms A.-M. B. against the International Telecommunication Union (ITU) on 14 September 2010 and corrected on 23 December 2010, the Union's reply of 8 April 2011, the complainant's rejoinder of 14 July and the ITU's surrejoinder of 21 October 2011;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this dispute are to be found in Judgments 3138 and 3139, also delivered this day, concerning the complainant's first three complaints. It may be recalled that she was informed by a letter of 17 November 2009 that her fixed-term appointment had been extended as an "interim precautionary measure" from 1 December 2009 to 30 April 2010. The Chief of the Administration and Finance Department then advised her by a letter of 31 March 2010 that, although

the Secretary-General had decided not to pursue the disciplinary proceedings concerning her, he had decided not to renew her contract when it expired.

In a memorandum dated 28 April 2010 the complainant explained to the Secretary-General that, in her opinion, the abandonment of disciplinary proceedings constituted a "change in circumstances" warranting a review of the decision of 17 November 2009, and she asked him to "bring the length of [her fixed-term] appointment into line with Staff Rule 4.14.2", which stipulates that an appointment of this kind is for one year or more. In a letter of 16 June 2010, which constitutes the impugned decision, the Chief of the Administration and Finance Department told the complainant that her interpretation of the aforementioned provision was manifestly wrong, since it was plain that only the initial fixed-term appointment must be for one year or more, whereas extensions could be for a shorter period if, as in her case, in his view, "unsatisfactory performance justified appraisal in less than one year".

B. The complainant considers that, as she was not invited to express her views prior to the adoption of the decision to extend her fixed-term appointment for five months only on the grounds that her performance was allegedly unsatisfactory, this decision is tainted with a major procedural flaw. With regard to the breach of Staff Rule 4.14.2, she submits that, if the Secretary-General had wished to draw a distinction between the duration of an initial fixed-term appointment and that of any extensions thereof, provision would have had to be made for such differentiation in the Staff Rules.

The complainant asks the Tribunal to set aside the impugned decision, to order the ITU to extend her appointment for at least one year as from 1 December 2009 and to "restore all her rights during that period". She also claims compensation for the material injury suffered and interest on the sums due, compensation for moral injury and costs in the amount of 6,000 euros.

C. In its reply the ITU, relying on Judgment 1244, recalls that a complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, if the internal appeal preceding it was itself irreceivable because it breached rules of procedure. It submits that this is the case here: the complaint is time-barred because the complainant did not submit her request for a review of the decision of 17 November 2009 within six weeks of the notification of that decision, in breach of Staff Rule 11.1.1(2)(a). In its view, that decision and the abandonment of disciplinary proceedings are "two quite separate measures". This abandonment does not therefore constitute a new fact warranting a departure from the time limit for lodging an appeal.

On the merits, the Union maintains that Staff Rule 4.14.2 can only be construed as requiring that the duration of an initial fixed-term appointment be not less than one year, for if the authors of the rules had wished to establish a minimum length for possible extensions, they would have done so, whereas the rules stipulate that such an appointment may be extended "under the conditions set by the Secretary-General", who thus has a discretion in this regard.

D. In her rejoinder the complainant, relying on Judgment 2868, argues that, since the ITU did not object to her request for review of 28 April 2010 when it was submitted, it cannot now claim that it was submitted out of time. Subsidiarily, she contends that the decision of 16 June 2010 constitutes a new decision based on new grounds, which she was entitled to challenge directly before the Tribunal.

E. In its surrejoinder the Union maintains its position in full. It argues that the decision of 16 June 2010 dismissed the request for review of 28 April 2010 and cannot be regarded as a new decision. It adds that, even if that decision did not expressly state that the request was time-barred, this was clearly one of the reasons for its rejection.

CONSIDERATIONS

1. The complainant, who was suspended from duty as from 4 September 2009, was informed by a letter of 17 November 2009 that her fixed-term appointment was being extended for only five months as from 1 December. On 31 March 2010 the Chief of the Administration and Finance Department informed her that the Secretary-General had decided not to pursue the disciplinary proceedings concerning her and not to extend her appointment beyond 30 April 2010.

2. In a memorandum of 28 April 2010 the complainant asked the Secretary-General to review the decision of 17 November 2009. The Secretary-General rejected her request on 16 June 2010. That is the decision impugned before the Tribunal.

3. The Union draws attention to the fact that, according to the Tribunal's case law, if an internal appeal is irreceivable because rules of procedure have been breached, the complaint filed with the Tribunal is also irreceivable under Article VII, paragraph 1, of its Statute. It submits that this is the case here, as the complainant, who was still in the ITU's service when she was notified of the decision of 17 November 2009, did not submit a request for a review of that decision within the six-week time limit laid down in Staff Rule 11.1.1(2)(a).

It is clear from the evidence that the complainant was acquainted with the contents of the decision of 17 November 2009 on 23 November 2009 at the latest, this being the date on which she signed the extension of her contract until 30 April 2010. As she did not challenge that decision within the six-week time limit laid down in the aforementioned provision, it has become final.

4. It is well established in the case law that a staff member concerned by an administrative decision which has become final may ask the Administration to review it where some new and

unforeseeable fact of decisive importance has occurred since the decision was taken, or where he or she is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken (see Judgments 676, under 1, 2203, under 7, and 2722, under 4).

In her memorandum of 28 April 2010 the complainant submitted that the decision to abandon disciplinary proceedings, of which she had been informed by the letter of 31 March 2010, constituted a "change in circumstances" warranting a review of the decision of 17 November 2009.

5. This raises the question of whether the decision of 31 March 2010 constitutes a "new and unforeseeable fact of decisive importance" that occurred after the decision of 17 November 2009 was taken.

In order to reply to this question, these decisions must be placed in their respective contexts. When the decision of 17 November 2009 was taken, disciplinary proceedings were under way. In those circumstances, the extension of the complainant's appointment could be no more than an interim precautionary step pending the possible adoption of a disciplinary measure. In view of the precarious situation entailed by the extension of her appointment for five months, the complainant could not be unaware that the Union would take a final decision on her case during that period and would come to a conclusion as to whether a disciplinary measure should be imposed on account of the misconduct with which she was charged, or even whether it should retain her services. She therefore had sufficient information to submit a request for review within the six-week time limit.

The decision of 31 March 2010 did not shed a different light on that of 17 November 2009. It was plain that either of the above-mentioned solutions might be chosen. The decision of 31 March 2010 did not therefore constitute a new and unforeseeable fact of decisive importance warranting a departure from the prescribed time limit within which the complainant had to submit her request for review of the decision of 17 November 2009.

6. The fact on which the complainant relies, namely that when she submitted her request for review the ITU did not raise the objection that she had presented it out of time, does not in any event render her complaint receivable. Similarly, her argument that she could challenge the decision of 16 June 2010 directly before the Tribunal because it was a new decision must be dismissed, since the decision in question was the Administration's reply to her request for review.

7. The uncertainty in which the complainant was left as to the possible adoption of a disciplinary measure, which was censured in Judgment 3138, has no bearing on the outcome of this case.

8. Since internal means of redress have not been exhausted as required by Article VII, paragraph 1, of the Statute of the Tribunal, the complaint must be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet