Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G. (No. 3) and J.

v.

ITU

123rd Session **Judgment No. 3736**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr H. G. (his third) and Mr P. J. against the International Telecommunication Union (ITU) on 13 October 2014 and corrected on 1 December 2014, the ITU's reply of 11 March 2015, the complainants' rejoinder of 16 June and the ITU's surrejoinder of 24 September 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of parties has applied;

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

The complainants challenge the ITU's decision to change its medical insurance scheme and to increase their premiums under this insurance scheme.

At the material time, the complainants, who are former ITU staff members, were affiliated to the Staff Health Insurance Fund (hereinafter "the SHIF"), which was the joint health insurance fund of the ITU and the International Labour Office, the secretariat of the International Labour Organization (ILO).

An information note of 6 March 2014 informed all active and retired ITU staff members who were affiliated to the SHIF that, as the

ITU and the ILO had failed to reach an agreement on redressing the SHIF's financial situation, the ITU would be changing its "medical insurance provider" as from 1 May 2014. It was explained that, under the new medical insurance scheme, benefits would match those provided under the SHIF, but that the contribution base rate would be increased in order to ensure the new scheme's "solvency and sustainability". By letters of 15 and 16 April 2014 concerning the aforementioned note, the complainants asked the Secretary-General to inform them of the appeal channels open to them in the event that the change of health insurance scheme proved to be disadvantageous for them. Pending receipt of a reply, they asked him to consider their letter to be "the first step in proceedings to appeal" against a decision which would oblige them to join a scheme other than the SHIF.

On 30 April 2014 the ITU published Service Order No. 14/10, which announced that, as from 1 May 2014, current and former ITU staff members who had previously been affiliated to the SHIF would automatically become members of the new health insurance scheme.

On 10 June 2014 each of the complainants asked the Secretary-General to review "the decision(s) leading to the change" of health insurance scheme. Having seen from their pension slips dated 23 April 2014 that the amount of their premiums had risen, their main submission was that the change breached their acquired rights. The head of the Human Resources Management Department explained to each of the complainants in separate letters dated 23 July 2014 that the decision to change the health insurance scheme did not constitute a breach of their acquired rights. She therefore advised them that their requests for review, which had been treated as being directed against Service Order No. 14/10, were rejected and that the Order was "upheld in its entirety". This is the decision which each complainant identifies in the complaint form as the impugned decision.

In the meantime, on 26 June, Mr Johner, who had not received a reply to his letter of 16 April 2014, had filed an appeal with the Appeal Board, which issued its report on 1 September. On 7 October 2014 Mr Johner was informed that, in accordance with the Appeal Board's conclusion, the Secretary-General considered that his appeal, which must be deemed to be directed against the information note of 6 March 2014, was irreceivable

as the note did not constitute an administrative decision adversely affecting him.

The complainants ask the Tribunal to set aside the impugned decisions, Service Order No. 14/10, the information note of 6 March 2014 and their pension slips of 23 April 2014. Mr J. also requests the quashing of the decision of 7 October 2014. In addition, the complainants ask to be reaffiliated with retroactive effect to the SHIF, and they claim compensation, with interest, for material injury, as well as compensation for moral injury. Lastly, each complainant also claims 6,000 euros in costs.

The ITU submits that the only challengeable decision in the instant case is Service Order No. 14/10. It adds that, since the complainants did not file an appeal with the Appeal Board to challenge the decisions of 23 July 2014, their complaints are irreceivable, since they have not exhausted internal means of redress, as are their claims seeking reaffiliation to the SHIF and compensation for alleged injury. Moreover, the ITU submits that the complaints are unfounded on the merits.

CONSIDERATIONS

1. Since both complaints essentially contain common claims and rest largely on the same arguments, they will be joined in order that they may form the subject of a single judgment.

2. The complainants first request the setting aside of the information note of 6 March 2014, and Mr J. also requests the setting aside of the decision of 7 October 2014 dismissing his appeal against the note. However, the Tribunal finds that, since the purpose of this note was essentially to inform active and retired ITU staff members who were affiliated to the SHIF that the Union would be changing its "medical insurance provider", it is not an administrative decision adversely affecting the complainants. As this note is not therefore open to appeal, the complaints must be dismissed insofar as they concern it.

3. The complainants also request the setting aside of Service Order No. 14/10. However, the Tribunal draws attention to the fact that,

according to the case law, a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged (see Judgment 3628, under 4, and the case law cited therein). In these circumstances, the claims seeking the setting aside of this service order must be dismissed. The same applies to the claims for the quashing of the decisions of 23 July 2014 dismissing the requests for review of 10 June 2014 which, in the Tribunal's opinion, were rightly construed as being directed against the service order.

4. On the other hand, the ITU's argument that the complainants' claims are irreceivable in respect of the decisions – evidenced by their pensions slips – to deduct higher insurance premiums from their pensions, must be rejected since these decisions do indeed constitute individual decisions implementing Service Order No. 14/10. As stated above, they are therefore open to appeal.

5. Lastly, the ITU submits that none the claims in the complaints is receivable, because the complainants did not complete the internal appeal proceedings which they had initiated. Indeed, it considers that the complaints do not satisfy the requirement set forth in Article VII, paragraph 1, of the Statute of the Tribunal that all internal means of redress must have be exhausted.

However, the Tribunal has already ruled that, under the provisions in force at that time, those means of redress were not open to former ITU staff members (see Judgments 2892, under 6 to 8, 3139, under 3, or 3178, under 5). The complainants could therefore file a complaint directly with the Tribunal and, contrary to the ITU's assertions, the fact that they had nonetheless initiated internal appeal proceedings did not by any means signify that they had to complete them (see the above-mentioned Judgments 2892 and 3139).

6. It may be concluded from the foregoing that the complaints are receivable only insofar as they seek the setting aside of the decisions to deduct higher insurance premiums from the complainants' pensions. Of course, in support of their claims against these decisions, the complainants

may challenge the lawfulness of Service Order No. 14/10 on which they were based.

7. On the merits, the complainants submit that the Staff Council was not consulted on Service Order No. 14/10 before it was published. They point out that subparagraphs (b) and (c) of Staff Rule 8.1.1, in the version in force at the material time, stipulated respectively that "[t]he Staff Council shall be consulted on questions relating to staff welfare and administration" and that, "[e]xcept in cases of emergency, general service orders concerning [such] questions [...] shall be transmitted in advance to the Staff Council for consideration and comment before taking effect".

In view of its subject matter, Service Order No. 14/10 plainly fell within the scope of these provisions and the Staff Council should therefore have been consulted on it.

The ITU submits that the complainants' plea should nevertheless be dismissed because the draft service order was discussed by a working group in which Staff Council representatives participated, which, in its opinion, enabled the Council to make any comments it considered pertinent.

The Tribunal recalls, however, that in keeping with the principle *tu patere legem quam ipse fecisti*, when a text provides for the consultation of a body representing the staff before the adoption of a decision, the competent authority must follow that procedure, otherwise its decision will be unlawful (see, for example, Judgments 1488, under 10, and 3671, under 4). In this case, it has been established that the ITU did not consult the Staff Council on the disputed service order. The Council representatives' participation in the above-mentioned working group, on which the defendant organisation relies, was not a valid substitute for the consultation of the Council as such. In addition, neither the fact, as stated by the ITU, that the Staff Council had been informed in October 2012 of the difficulties encountered by the SHIF, nor the fact, as noted below, that the Joint Advisory Committee set up under Staff Regulation 8.2 was properly consulted, can be regarded as obviating the need to consult the Staff Council, as required by the aforementioned Staff Rule 8.1.1(b) and (c).

The complainants are therefore correct in submitting that Service Order No. 14/10 was unlawful for this reason.

8. The complainants also contend that the ITU breached the principles of good faith and of the protection of legitimate expectations, as well as of the duty of transparency and the duty to inform, by not properly informing the insured persons of its intention to change its medical insurance scheme.

The Tribunal notes in this respect that Bulletin No. 31 of the ITU Former Staff Members' Association, published in August 2013, apprised retired staff members of the "deteriorating" situation of the SHIF, of the opening of discussions between the ILO and the ITU and of the possibility that the latter might withdraw from the scheme managed by the SHIF. Those issues were debated at the General Assembly of the ITU Former Staff Members' Association on 12 February 2014, where the members were updated on current activities in that connection. All insured persons were informed of their outcome by the information note of 6 March 2014 and by the disputed Service Order No. 14/10.

The Tribunal considers that, in these circumstances, the plea that insured persons were insufficiently informed must be rejected.

9. The complainants also contend that the principle of non-retroactivity was breached because "the pension slips [of 23 April 2014] suggest that the new contribution rate was applied as from April [2014] although it came into force on 1 May 2014".

However, the complainants are wrong in thinking that this reveals an anomaly, since health insurance contributions are necessarily payable prior to the start of the period covered by this insurance. Thus, the fact that the premiums for the first month in which the new scheme applied were deducted in the previous month does not breach the principle of non-retroactivity.

10. In the letter of 23 July 2014, which was sent to each of the complainants, the organisation explained that ITU insured persons could have remained members of the SHIF only by paying higher contributions

than those of ILO insured persons. In the complainants' opinion, this reasoning rested on a mistake of law, since the principle of equality applies only within the same organisation.

This criticism is beside the point, since the purpose of the passage from the letter of 23 July 2014 quoted above was not to state the basis for the change of health insurance scheme, but only to comment on the context in which it had taken place.

11. Furthermore, it is to no avail that, in their rejoinder, the complainants allege a procedural flaw consisting in the failure to consult the Joint Advisory Committee, since it is clear from the documentation produced by the defendant organisation that this committee was in fact properly consulted by the Secretary-General.

12. Lastly, the complainants submit that the SHIF Management Committee was bypassed, insofar as the separation process was worked out between the ILO and the ITU without the Committee being associated in it. This argument is devoid of merit, because the Regulations of the SHIF, which do not deal with the eventuality of the withdrawal of one of the organisations affiliated to the Fund, do not specify that this Committee must be involved in such a process.

13. It follows from what was said under 7, above, that Service Order No. 14/10 is unlawful because the Staff Council was not consulted. The decisions to deduct additional insurance premiums from the complainants' pensions as from 1 May 2014 must therefore be set aside and the organisation must be ordered to reimburse the complainants the amount thereof.

The complainants are also entitled to compensation for the moral injury caused by the unlawful nature of these undue deductions. However, given that the unlawfulness of Service Order No. 14/10 is due only to a procedural flaw which, moreover, may be remedied, including retroactively, an award of 2,000 euros to each complainant will constitute sufficient compensation for this injury.

14. As the complainants succeed in part, they are entitled to costs, which the Tribunal will set at 2,000 euros for each of them.

DECISION

For the above reasons,

1. The decisions to deduct additional insurance premiums from the complainants' pensions as from 1 May 2014 are set aside.
2. The ITU is ordered to reimburse each of the complainants the amount of the additional premiums unduly deducted from their pension.
3. It shall pay each complainant compensation in the amount of 2,000 euros for moral injury.
4. It shall also pay each of them 2,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ