

## NINETY-FOURTH SESSION

Judgment No. 2170

The Administrative Tribunal,

Considering the complaint filed by Mrs A. E. L. against the International Telecommunication Union (ITU) on 3 April 2002, the ITU's reply of 27 June, the complainant's rejoinder of 5 August, and the Union's surrejoinder of 17 September 2002;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, an American citizen born in 1953, first joined the ITU in October 1992 under a Special Service Agreement. On 29 January 1996 she was appointed Head of the Resource Mobilization Unit in the Policies, Strategies and Programming Department in the Telecommunication Development Bureau (BDT). After a restructuring of the Bureau, she became the Head of Telecom Surplus & Resource Mobilization in the Policies, Strategies and Financing Department (PSF). At the material time she held grade P.5, step VII, on a "managed renewable term" appointment. The complainant is currently on extended sick leave.

On the basis of a memorandum of 2 August 2000 concerning the complainant's periodical personal report for the period 1 September 1999 to 30 June 2000, addressed to the Chief of the Personnel and Social Protection Department from the complainant's supervisor - the Chief of PSF - and copied to the complainant, she was not awarded her salary increment to step VIII effective from 1 July 2000. In the memorandum, her supervisor addressed the need to have more time to evaluate the complainant's progress in the wake of the Department's reorganisation, and that, pending a positive review at a later date, the step increment would be made retroactive to 1 July. The complainant refuted the content of the memorandum the same day in an e-mail to her supervisor. On 11 September the complainant addressed a request to the Secretary-General for an administrative review of the decision taken in the memorandum of 2 August. She did not receive a reply.

On 20 October the Chief of the Personnel and Social Protection Department informed the complainant that her supervisor had been sent her periodical personal report to be completed by 29 November 2000. Her supervisor thereafter asked her to complete her section of the report, so that he could discuss it with her during the week of 13 November; the complainant refused. On 4 December 2000 she appealed to the Appeal Board against the decision of 2 August not to award her a salary increment to step VIII. Given the fact that the Board has not yet heard her case and the dispute has not been resolved internally, the complainant challenges the implied rejection of her request for administrative review submitted on 11 September 2000. As a consequence of the ongoing dispute, her salary increments to steps IX and X have also been withheld.

On 20 February 2001 Service Order No. 01/02 announced a new performance appraisal system. Among the changes, as from 1 March 2001 it would no longer be necessary to have an appraisal report submitted in order to be awarded periodic salary increments; nevertheless, it still required the staff member's performance and conduct to be satisfactory.

B. The complainant explains that the dispute arises out of her periodical personal report covering the period from 1 November 1998 to 31 August 1999. That report, signed by herself and her former supervisor on 19 October 1999 did not include the "Objectives for the next appraisal period" which are required in box 4 of the appraisal form. These objectives, she submits, were unilaterally determined and added after the fact by her subsequent supervisor and she was not aware of them until late January 2000. She objected to them and even went so far as requesting the

Secretary-General to transfer her out of BDT. This did not happen and instead, as a result of the reorganisation, she was given a new title and responsibilities without the appropriate secretarial assistance that had been promised to her. She contends that she was not given the guidance she should have received when she took over her new duties; even though she had asked to meet with her supervisor several times, he told her that he did not have the time.

She argues that the memorandum of 2 August 2000, in which her supervisor refused to grant her the step increment, was flawed. It was not on the correct form, did not follow the correct procedures, lacked mutually agreed upon objectives, and was not sufficiently motivated. The Staff Regulations and Staff Rules, as well as other internal norms of the ITU, set out what constitutes a valid staff member performance appraisal; a salary increment may only be withheld for unsatisfactory service, which can only be established by a proper periodic performance report. As the memorandum does not satisfy any of the requirements of a proper performance report, the refusal to grant her a salary increment to step VIII is "legally invalid" and the ITU's failure to follow the established guidelines amounts to an error of law. In addition, the memorandum came only from her direct supervisor, but according to her, Staff Rule 3.4.1 requires that a performance appraisal should be carried out by all the staff member's supervisors. Thus the memorandum does not satisfy the requirement of being signed by each level in the hierarchy of command. The Staff Rules also require that a periodical performance report be completed before a salary increment can be awarded, but the memorandum, which was not even a true performance report, was written one month after the increment became due. Lastly, there were not any true objectives set for her, as she and her supervisor never came to an agreement on them. This constitutes a substantive irregularity and another error of law. She contests the refusal to grant her salary increments to steps IX and X for largely the same reasons.

Furthermore, the ITU Administration has disregarded and grossly violated its own Staff Rules by never answering her request for review of an administrative decision and by not addressing her internal appeal. She also makes several allegations of personal bias against her amounting to harassment by her supervisor.

She asks the Tribunal: to quash the impugned decision contained in the memorandum of 2 August 2000 as well as the consequent actions withholding both her salary increment steps VIII and IX; to order the Secretary-General to grant her the salary increment step VIII retroactive to 1 July 2000 and the step IX retroactive to 1 May 2001, plus interest on all sums, and that he also be ordered to grant her the salary increment step X, retroactively and including interest; to order that any and all documents related to the impugned decision be removed from her personal file; to award her payment of moral damages plus interest; and to award her costs. She also requests the Tribunal to order that all payments shall be made within two months of the delivery of judgment.

C. The ITU replies that the memorandum contested by the complainant had been sent to the Personnel and Social Protection Department by her supervisor in order to explain why he was not in a position to assess the complainant's performance for the period concerned, most notably because the restructuring that had taken place just a few months earlier did not allow for an adequate period of assessment. It was for that reason that her supervisor was sent a new periodical personal report on the complainant in October 2000.

It notes that the complainant has constantly refused to participate in any evaluation exercise of her performance or in the establishment of objectives. Consequently, three salary step increments have been withheld. In addition, concerning her assertion that she never agreed to any of the objectives in her performance report, it points out that it was the complainant herself that had sent an advance copy of the report to the Personnel and Social Protection Department, with the notation that she had also given it to her supervisors. It submits that she is largely to blame for "an exceptional administrative situation" because she systematically refused to accept the objectives each time they were discussed. For this reason none of the statutory deadlines could be adhered to in her case, and the Secretary-General decided in February 2002 that the matter had to be settled and that the missing performance appraisal reports be submitted to him so that he could take a decision on whether to grant the salary increment that has been withheld since July 2000. These reports have finally been established and on 27 May 2002 the Chief of the Personnel and Social Protection Department sent them to the complainant's home address for signature.

D. In her rejoinder the complainant objects to the fact that the ITU has tried to convince the Tribunal that the current impasse is due to her lack of cooperation. She denies that the objectives were ever discussed with her, or that she was the one to submit them to the Personnel and Social Protection Department. She alleges that it was her supervisor who always refused to agree with her suggested objectives. She questions the authenticity of certain documents submitted by the Union and asks the Tribunal to call certain witnesses, either to testify orally or in writing, to establish the facts surrounding the objectives in her report.

The complainant contests the performance reports that have now been established, as they were signed on 3 May 2002 but her supervisor had ceased his functions as Chief of PSF the day before. They are furthermore flawed because they do not adhere to either the guidelines previously in force or the new ones set out in Service Order No. 01/02. She has not signed them because she considers them to have been illegally established and is waiting for the Tribunal's ruling on them. She notes that the ITU has failed to address her arguments concerning breach of the Staff Rules and other procedural flaws.

E. In its surrejoinder the Union presses its pleas. It refutes the complainant's allegations concerning the accuracy of certain documents and accuses her of trying to misrepresent the facts.

## CONSIDERATIONS

1. The complainant first joined the ITU on a Special Service Agreement in October 1992. On 29 January 1996 she was appointed Head of the Resource Mobilization Unit in BDT at grade P.5 on a two-year fixed-term basis. Her contract was extended to 31 July 1997 and 31 December 1999 successively. Her fixed-term contract was replaced by a "managed renewable term" appointment from 31 March 1998 up to 31 March 2003.
2. There was a dispute regarding the complainant's performance appraisal for the period of 1 November 1998 to 31 August 1999. When the complainant first initialled the report, her supervisor had left blank the section where he, in consultation with the complainant, was supposed to describe the objectives to be met for the following appraisal period. The complainant says that when she saw the report at the end of January 2000, she noticed that the objectives section had been filled in and she took exception to that in her "Note on my 'Periodic Personal Report'", which she attached to the report. The ITU claims that the complainant discussed the objectives with her supervisor in November 1999. The complainant insists, however, that she never accepted the objectives put forth by the supervisor.
3. On 5 April 2000 the Director of BDT sent a memorandum to his staff to inform them of a "reorganization of functions and reassignment of staff" in effect that day. The complainant was given responsibility for the Telecom Surplus Programme. Thereafter, her position was renamed Head of Telecom Surplus & Resource Mobilization. She was promised secretarial assistance.
4. The complainant states that she did not receive the appropriate secretarial assistance, nor did she receive substantive briefing or instructions for her new functions until 19 July 2000. Her supervisor told her on two occasions that she could have access to the files but that he did not have time to brief her.
5. The complainant's supervisor briefed her on 19 July 2000, more than two weeks after the end of the appraisal period and without any periodical personal report having been prepared. By copy of a memorandum of 2 August 2000 the complainant was informed of the decision to withhold her salary increment on the grounds that more time was needed to assess her performance; it was also stated in the memorandum that the step increment could be granted retroactively after a further assessment for the period from April to November 2000. The same day the complainant contested that decision. When she complained to her supervisor, he told her to take the legal steps available.
6. On 11 September 2000 the complainant wrote to the Secretary-General, requesting a review of the decision of 2 August in conformity with sub-paragraph 2(a) of Staff Rule 11.1.1. The Secretary-General never replied to the request, although, according to the Staff Rules, the reply was due within six weeks of sending the request for review. The complainant appealed to the Appeal Board on 4 December 2000.
7. According to the complainant's version of the events - which the ITU does not seriously contest - throughout the entire year of 2001, she made constant inquiries in person and by telephone to the Alternate Chairman of the Appeal Board, who told her each time that the Board could not proceed until the Secretary-General submitted his reply.
8. On 13 November 2001 the Alternate Chairman wrote to the complainant. He acknowledged that she was frustrated with the appeal process and explained that "at this stage, the Appeal Board is blocked". The present complaint was filed on 3 April 2002.

9. There can be no doubt that the complaint is receivable. The ITU offers no explanation for its quite extraordinary failure to respond in any way either to the complainant's initial request for review sent to the Secretary-General or to her subsequent appeal to the Appeal Board. Whatever the reason, however, the Tribunal has clearly articulated the applicable principles. In Judgment 2104, under 3, it decided as follows:

"Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of a complainant's rights. An official may come straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable period of time, the latter being determined in the light of circumstances [...].

[...] His endeavours to get a response having failed, the complainant could hardly be expected to wait any longer as there was no indication that a prompt conclusion from the Board was likely. The Tribunal therefore takes the view that he exhausted the internal means of redress."

10. As to the merits, the present complaint is only properly concerned with the administrative decision of 2 August 2000. In their materials, both parties make a large number of submissions relating to events subsequent to that decision and seek rulings from the Tribunal with regard to other actions and decisions which are manifestly outside the scope of this judgment. The impugned decision itself is solely a decision not to grant her a salary increment as of 1 July 2000 on the basis of her performance.

11. The relevant provisions of the Staff Regulations and Staff Rules are cited below.

Staff Regulation 3.4 a) states that:

"Salary increments [...] shall be awarded annually to staff members on the basis of satisfactory service [...]"

Staff Rule 3.4.1 a) says that:

"Satisfactory service for the purpose of awarding a salary increment shall be defined [...] as satisfactory performance and conduct of staff members in their assignments as evaluated by their supervisors."

and Staff Rule 12.1.5 dealing with annual performance reports stipulates that:

"A report shall be made on the work and conduct of each staff member prior to the date of every salary increment and whenever a fact or assessment which might call for a change in previous reports deserves recording. [...]"

12. Clearly, these provisions were not complied with. The requirement that an annual performance report be established prior to the scheduled date of the annual salary increment is a formal one. The salary increment, which was due on 1 July 2000, was not preceded by an evaluation. As a result, the impugned decision cannot be justified on the basis that the complainant's performance was not satisfactory. The means of assessing whether performance is satisfactory is the annual performance report and it is the organisation's responsibility to see to it that such a report is prepared on time. A staff member's right to an increment cannot be defeated by the organisation's failure to comply with its own rules.

13. The ITU argues that revisions of the complainant's work objectives for the purposes of evaluating her performance were a necessary prerequisite to the process because of the restructuring of BDT, where she worked. The Union claims that the complainant contributed to confusion regarding the objectives because she refused to cooperate with evaluations. The missing report was eventually established in 2002. Finally, the ITU takes issue with the fact that the complainant invokes "legalistic arguments" regarding what it describes as an exceptional administrative situation and argues that, under the circumstances, it was impossible to comply with the applicable rules.

14. This line of argument is unacceptable. An international organisation has a duty to comply with its own internal rules and to conduct its affairs in a way that allows its employees to rely on the fact that these will be followed. The complainant may indeed have been uncooperative and may have contributed to the confusion in establishing her objectives (the Tribunal makes no finding to that effect), but if that were the case, it was the job of the Administration to deal with the situation and not to act as if the complainant did not exist. An appraisal report was due prior to the 1 July 2000 salary increment. There is no evidence that the ITU even attempted to prepare such a report. While there is no doubt that an employee cannot obtain the right to an annual salary increment by

deliberately sabotaging the reporting process, it is equally the case that an employer cannot deprive its staff of the increments to which they are entitled by failing to complete the necessary preliminary steps.

15. As previously indicated, the Tribunal cannot in the present complaint deal with claims relating to her salary increments to steps IX and X and those pleas are dismissed.

16. Since she succeeds in part, the complainant is entitled to moral damages which are aggravated by the ITU's wholly unacceptable treatment of her internal appeal. This is apparently not an isolated incident; the Tribunal had to deal with a very similar situation in Judgment 2160. The Tribunal fixes the damages at 3,000 Swiss francs. She is entitled to her costs in the amount of 1,500 francs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ITU shall pay the complainant her salary increment from 1 July 2000, together with interest on the arrears at 8 per cent per annum to the date of payment.
3. It shall also pay her moral damages in the sum of 3,000 Swiss francs and costs in the amount of 1,500 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet