

The Administrative Tribunal,

Considering the second complaint filed by Mrs A. E. L. against the International Telecommunication Union (ITU) on 24 March 2003, the ITU's reply of 23 May, the complainant's rejoinder of 21 July, and the Union's letter of 22 August 2003 to the Registrar of the Tribunal indicating that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, 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 the complainant's career are to be found in Judgment 2170, delivered on 3 February 2003, on her first complaint. The dispute arose because the ITU had, on the grounds of her performance, withheld her step VIII salary increment which fell due on 1 July 2000. The Tribunal set aside the impugned decision and ordered the organisation to grant her step VIII retroactively from 1 July 2000. It indicated that it could not deal with her claims to step IX (due on 1 May 2001) and step X (due on 1 March 2002), and dismissed her pleas relating thereto.

As mentioned in Judgment 2170, Service Order No. 01/02 issued on 20 February 2001 informed staff of changes in the performance appraisal system.

Acting on behalf of the Director of the Telecommunication Development Bureau (BDT), on 6 February 2002 the Deputy Director of BDT wrote to the Chief of the Personnel and Social Protection Department recommending that, because of unsatisfactory performance, the complainant not be granted the salary increment due on 1 March 2002. On 14 February the Chief of Personnel informed the complainant that her step was being withheld. The complainant wrote to the Secretary-General on 10 March 2002, seeking a review of that decision. As a result, the memoranda of 6 and 14 February were withdrawn from her personnel file, on the grounds that paragraph 7 of Service Order No. 01/02 requires that reasons must be given as to why the staff member's performance is not considered satisfactory, and this had not been done. The question of the increment was referred back to her supervisor for him to issue a new and reasoned recommendation. From 12 April 2002 the complainant was on sick leave. From the beginning of May 2002 the complainant's supervisor took up different functions elsewhere within ITU. On 12 May 2002 he submitted three performance appraisals on the complainant; the most recent covered the whole of 2001 and was signed by him on 3 May 2002.

On 17 June 2002 the complainant filed an appeal with the Appeal Board, against the withholding of step X. The Board reported on 28 August 2002, making three formal conclusions. It did not support granting her the step X increment. It concluded that the memoranda of 6 and 14 February should be removed from her personnel file and all other files, and that the complainant's former supervisor should produce a report on her services for the relevant period, within a specific deadline. In addition to the above formal conclusions the Board recommended that the Secretary-General should take steps to resolve apparent inconsistencies in the Staff Regulations and Rules and Service Order No. 01/02, stating that: "While these inconsistencies persist, the Staff Regulations and Rules take precedence over the Service Order." The Secretary-General endorsed the formal conclusions of the Board, and so informed the complainant in a memorandum of 28 October 2002. He indicated that an appropriate decision on her salary increment due on 1 March 2002 would be made at a later stage on the basis of the appraisal to be drawn up by her former supervisor.

In a memorandum of 15 November 2002 the complainant's former supervisor gave an assessment of her performance for the period from 1 May 2001 to 28 February 2002. Referring to the appraisal he had submitted for 2001, he gave reasons why he still deemed her performance to have been unsatisfactory for the period up to

28 February 2002. On the basis of that appraisal, the Director of BDT recommended withholding the salary increment due on 1 March. On 20 December 2002 the Secretary-General upheld the decision not to grant her that increment. That is the impugned decision.

On 10 March 2003 the complainant sent a "reminder request" to the Chief of Personnel asking for the retroactive granting of step IX, due since 1 May 2001.

B. The complainant takes the view that although she included claims for steps IX and X in her first complaint to the Tribunal, her present claim for step X is not barred by the *res judicata* principle and her complaint is thus receivable. As the Tribunal itself said in Judgment 2170, it could not deal therein with her claims relating to steps IX and X, because it considered them to be "outside the scope of [the] judgment". For that reason it did not in any way enter into the substance of those particular claims. They were therefore dismissed by the Tribunal only for a formal legal reason.

The complainant's central argument is that after the withdrawal of the memoranda of 6 and 14 February 2002, there remained no valid legal basis for refusing her the step X salary increment, due since 1 March 2002. In her opinion, the Tribunal's reasoning in her first case applies equally well in the present case, namely that the impugned decision cannot be justified on the basis of unsatisfactory performance since no performance evaluation had been carried out prior to the date when the salary increment was due, as required by Staff Rule 12.1.5. She considers that the ITU Administration and the Appeal Board were wrong to base their position on paragraph 7 of Service Order No. 01/02, since it is in contradiction with Rule 12.1.5 which has not been abrogated and therefore prevails over the Service Order. With that in mind, she submits that the appraisal in the memorandum of 15 November 2002 could serve no purpose.

The Union's original refusal to grant her step X also caused her moral injury. She submits that in assessing the amount of compensation due to her, account should be taken of procedural flaws that occurred. First, because there was undue delay between the date of receipt by the Secretary-General of the Appeal Board's report and the issuance of his final decision on 20 December 2002. Secondly, she objects to the format of the appraisal of 15 November 2002, given that it was not marked confidential and was inappropriately drafted by her former supervisor on paper with a letterhead relating to his new functions. It is evident from the organisation's attitude that it has taken no account of the Tribunal's criticisms in Judgment 2170. It has failed to respond to her correspondence and has taken no steps to reach an "amicable settlement" with her with regard to her step X, or even her step IX salary increment. Its actions against her are "unjustified and unjustifiable" and being legally invalid, should be considered null and void.

The complainant seeks the quashing of the decision of 20 December 2002. She wants to be granted her next salary increment (step X) retroactively from 1 March 2002 with payment of the corresponding amount due from that date, including interest. She claims compensation for both moral injury and for the damage caused to her health. She also claims costs.

C. In its reply the Union asserts that the principle of *res judicata* is indeed applicable in this instance, and for that reason her complaint is inadmissible. In Judgment 2170, referring to the complainant's pleas in support of her claims for steps IX and X, the Tribunal stated that "those pleas are dismissed". So too, in its decision, it affirmed that "[a]ll other claims are dismissed". Her claim for the granting of step X was among those claims, and the Tribunal's judgment is, moreover, final and binding.

On the merits, it submits that it is fully aware that the appraisal report for 1 May 2001 to 28 February 2002 was not drawn up prior to the date of 1 March 2002 when the salary increment was due. It argues, however, that the particular circumstances of the complainant's case need to be kept in mind. First, the present complaint is not admissible; secondly, as stated in its submissions on her previous complaint, the non-satisfactory nature of her services had been well documented before her former supervisor produced the report he signed on 3 May 2002; and thirdly, as it has already made known to the Tribunal, the complainant did not cooperate in the establishment of her periodical appraisals.

D. In her rejoinder the complainant presses her plea regarding the receivability of her complaint.

She rebuts the arguments put forward by the defendant organisation. In her opinion, her former supervisor's memorandum of 15 November 2002 cannot serve as a legally valid basis for establishing any unsatisfactory nature

of her services. Moreover, the defendant organisation seems to acknowledge as much, since it has preferred instead to refer to the report signed by him on 3 May 2002. She insists that there was no real appraisal report, such as is required under the prevailing norms established by the ITU, for withholding the step X salary increment due on 1 March 2002.

## CONSIDERATIONS

1. The complainant first joined the ITU in 1992. She was subsequently employed under a fixed-term contract which was extended twice and replaced by a "managed renewable term" appointment with effect from 31 March 1998 until 31 March 2003. Her appointment was not renewed thereafter.

2. Following a reorganisation of functions in April 2000, the complainant was appointed Head of Telecom Surplus and Resource Mobilization. On 2 August 2000 she was informed of the decision to withhold her step VIII salary increment for which she had become eligible on 1 July of that year. The decision was taken on the ground that "more time was needed to assess her performance" in her new functions. That decision was set aside by the Tribunal in Judgment 2170 and it ordered the ITU to pay the complainant her salary increment from 1 July 2000 together with other relief arising from the quashing of the impugned decision.

3. It will later be necessary to refer to Judgment 2170 in more detail. For the moment, however, it is sufficient to note that, by the time the complaint which led to that judgment had been filed, increments for steps IX and X, respectively, had also been withheld. In that first complaint, the complainant sought orders requiring retroactive payment of all three increments. However, the Tribunal held that that complaint was "only properly concerned with the administrative decision of 2 August 2000" and that "[t]he impugned decision [was] solely a decision not to grant [the complainant] a salary increment as of 1 July 2000 on the basis of her performance". Consequently, the Tribunal held that it could not deal with claims relating to the increments for steps IX and X and those pleas were dismissed.

4. It is not clear whether the complainant has yet received the step IX increment for which she became eligible on 1 May 2001 but which, seemingly, was withheld pending the delivery of Judgment 2170. In any event, it is not disputed by the ITU that she became eligible for a step X salary increment on 1 March 2002. On 6 February 2002 it was recommended by the Deputy Director of BDT, acting on behalf of the Director of BDT, that the salary increment not be granted - on the ground that her performance had not been satisfactory. By a memorandum of 14 February the complainant was informed that the step increment would be withheld pending a decision by the Secretary-General. On 10 March the complainant requested reconsideration of the decision pointing out, amongst other things, that Service Order No. 01/02 of 20 February 2001 had not been complied with in that her supervisor had not "inform[ed] the Personnel Department in writing of the reasons why [her] performance [had] not been satisfactory" and she sought retroactive payment of the step X increment. The upshot was that the decision to withhold the increment was cancelled by the Secretary-General on 15 March. The Secretary-General also decided that the question of the increment due on 1 March 2002 should be referred back to the complainant's supervisor for "issuance of a new and motivated recommendation". Additionally, the notification of 6 February was to be withdrawn from her personnel file.

5. On 17 June 2002 the complainant submitted an appeal to the Appeal Board against the Secretary-General's refusal to order retroactive payment of the step X increment. She asked that the memoranda of 6 and 14 February 2002 be taken out of her personnel file and destroyed, and sought compensation for "the moral injury and damage" suffered as a consequence of the organisation's refusal to pay the increment in question. It was argued in the appeal, as it had been in her first complaint that led to Judgment 2170, that, in the absence of a valid unsatisfactory performance report prior to the date on which an increment becomes payable, a staff member is entitled to payment of that increment as and from that date.

6. In its report of 28 August 2002, the Appeal Board noted that there were "unsatisfactory aspects and delays in handling the whole issue", and that "personal reports for the [complainant had] not been completed by her [s]upervisor properly and when due over an extended period". However, the Board was of the view that, as satisfactory service is a precondition for a salary increment and there was no basis upon which that could be established, there were "sufficient grounds for the increment to be withheld until all necessary procedures [could] be completed to enable the Secretary-General to make a decision". It stated that that was "consistent with

paragraph 7 of Service Order 01/02". Consequently, the Board concluded that the memoranda of 6 and 14 February 2002 should be removed from the complainant's file and all other files but that her claim to retroactive payment of her step X increment could not be supported. Further, while making recommendations as to procedures relating to the granting and withholding of increments generally and as to the course to be followed in the complainant's case, the Appeal Board expressly stated that it reached no conclusion as to whether she had suffered "moral injury or damage".

7. Performance appraisal reports for the periods 1 September 1999 to 31 March 2000, 1 April to 31 December 2000 and 1 January to 31 December 2001 were eventually submitted in respect of the complainant on 12 May 2002. A report for the period 1 May 2001 to 28 February 2002 was submitted on 15 November 2002 in the form of a memorandum. It was stated therein that the "unsatisfactory assessment" carried out earlier that year was "equally applicable to the period [in question]".

8. On 24 December 2002 the complainant was informed by letter dated 20 December from the Secretary-General that he had decided not to grant her the step X increment as her supervisor had concluded that her services had been unsatisfactory during the period 1 May 2001 to 28 February 2002. That is the impugned decision.

9. In essence, the complainant contends that, consistent with Judgment 2170, she was entitled - pursuant to the relevant Staff Regulations and Rules and, if it be relevant, paragraph 7 of Service Order No. 01/02 - to be paid her step X increment as and from 1 March 2002 because there was then no valid unsatisfactory appraisal report by reference to which payment could be refused. To the extent, if any, that paragraph 7 of Service Order No. 01/02 provides to the contrary, the complainant contends it is inconsistent with the relevant Staff Regulations and Rules and that they must prevail.

10. The ITU contends that the complaint is inadmissible by reason of the principle of *res judicata*. It argues that Judgment 2170 constitutes a final and binding determination with respect to the granting of the complainant's step X increment. In the alternative, it submits that, although Judgment 2170 may be equally applied to the present case, the particular circumstances of the case warrant dismissal of the complaint.

11. *Res judicata* operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard. It extends to bar proceedings on an issue that must necessarily have been determined in the earlier proceeding even if that precise issue was not then in dispute. In such a case, the question whether *res judicata* applies will ordinarily be answered by ascertaining whether one or other of the parties seeks to challenge or controvert some aspect of the actual decision reached in the earlier case.

12. Judgment 2170 was concerned with the complainant's entitlement to her step VIII salary increment, her pleas regarding entitlement to salary increments for steps IX and X being dismissed on the basis that they were not and could not be the subject of her first complaint. That being so, there was no final and binding decision on her present claim either expressly or as a necessary step to the decision that she was then entitled to a step VIII increment. Accordingly, the complaint is not barred by *res judicata*.

13. Before turning to the ITU's submissions with respect to the particular circumstances affecting the case, it is convenient to consider the relevant Staff Regulations and Rules and the Service Order.

14. Staff Regulation 3.4 a) relevantly provides:

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

Staff Rule 3.4.1 a) provides:

"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."

Rule 12.1.5 is as follows:

"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. [...]"

15. The above Regulation and Rules and their interrelationship were considered in Judgment 2170 in which the Tribunal said, under 14:

"[...] 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. [...] 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."

16. The clear import of Judgment 2170 is that where an organisation fails to take the steps by which it might ultimately deny a staff member an increment, that organisation cannot be heard to say thereafter that the staff member is disentitled to the increment.

17. In February 2001, Service Order No. 01/02 was issued with respect to performance appraisals. Paragraph 7 provides:

"As from 1 March 2001, the periodic salary increments provided for under Regulation 3.4 of the Staff Regulations will no longer be subject to submission of the appraisal report, but will be dealt with on the basis of a simplified administrative procedure. Two months ahead, supervisors will receive from the Personnel Department a list of staff members indicating the date on which their next salary increment is due. That increment will, in accordance with Rule 3.4.1 of the Staff Rules, be granted where the staff member's performance and conduct have been satisfactory during the period in question. If a staff member's performance and conduct are not satisfactory, the supervisor must inform the Personnel Department in writing of the reasons why the performance and conduct have not been satisfactory, at least one week before the beginning of the month in which the next increment is due. The supervisor's memorandum will be copied by the Personnel Department to the staff member for information. The recommendation will be submitted to the Secretary-General for decision. Pending this decision, the increment will be withheld."

18. There is no inconsistency between paragraph 7 of Service Order No. 01/02 and the relevant Staff Regulations and Rules considered in Judgment 2170. Moreover, that paragraph makes it abundantly clear that an increment can be withheld only where the procedures therein specified have been followed.

19. The particular circumstances upon which the ITU relies to argue that the complainant should not be granted her step X increment are that the unsatisfactory nature of her services had already been documented prior to the report signed on 3 May 2002 and that she did not cooperate with the establishment of her periodic appraisals. It may at once be noted that the appraisal for the relevant period was not made in May 2002, but in November of that year. Further, and given the complainant's absence on sick leave at various times during the relevant appraisal periods, it is difficult to infer lack of cooperation on her part. However, and more to the point, the matters upon which the Union relies fall far short of establishing that it made a genuine effort to comply with its own procedures, and do not show that the complainant frustrated or sabotaged any such effort. That being so and consistent with what was said in Judgment 2170, those considerations cannot defeat the complainant's entitlement to her step X increment as and from 1 March 2002.

20. The treatment of the complainant by the ITU is not only unacceptable but, given the terms of Judgment 2170, almost incomprehensible. The complainant is entitled to moral damages in the sum of 3,000 Swiss francs and to costs in the sum of 1,500 francs.

## DECISION

For the above reasons,

1. The Secretary-General's decision of 20 December 2002 is set aside.
2. The ITU shall pay the complainant her step X salary increment from 1 March 2002, together with interest on the arrears at 8 per cent per annum to the date of payment.
3. It shall pay her moral damages in the sum of 3,000 Swiss francs and costs in the amount of 1,500 francs.

In witness of this judgment, adopted on 14 November 2003, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Ms Mary G Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

Flerida Ruth P. Romero

Mary G Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.