

The Administrative Tribunal,

Considering the complaint filed by Mr W.G. against the International Telecommunication Union (ITU) on 21 July 2004 and corrected on 12 October, the ITU's reply of 3 December 2004, the complainant's rejoinder of 7 February 2005, and the Union's surrejoinder of 10 March 2005;

Considering Articles II, paragraph 5, and VII 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. The complainant, an American national who was born in 1953, entered the service of the ITU in 1989 as a System Analyst/Programmer and from late 1991 had a permanent appointment. From 1 November 2001 he held the P.5 post of Head of the User Services Division in the Information Services (IS) Department.

By Service Order No. 3/14 of 31 July 2003, the Secretary-General announced a new structure for the IS Department that was to take effect from 1 September 2003. In the context of that restructuring three vacancy notices were issued on 2 September. One of these, No. 6-2003, advertised the P.5 post of Chief of the User Services Division. The classification exercise relating to that post had been carried out in July 2003 by the Head of the Human Resources Development Division. The two other vacancy notices, Nos. 5-2003 and 7-2003, advertised the P.5 posts of Senior Project Manager and Chief of the Infrastructure Services Division, respectively.

Wanting to know to what extent the advertised post of Chief of the User Services Division was different from his existing post, the complainant wrote to the Chief of the Personnel and Social Protection Department on 10 September. By memorandum of 15 September the complainant was informed that, following his request, another Classification Officer had conducted a further analysis of the new post, and had confirmed that the duties pertaining to it were approximately 50 per cent different from those of the post he occupied. The memorandum went on to say that, based on "established classification practice" when there is a difference of more than 40-50 per cent, the post is considered a new one. The complainant was advised to apply for the post. He later applied for all three of the new positions and was pre-selected for each of them.

The complainant wrote to the Secretary-General on 7 October 2003 requesting a "final review" of the decision to restructure the IS Department as well as the decision to "reclassify" his current post. He asked to be assigned to one of the two new division head posts created under the restructuring. The Secretary-General replied by letter of 25 November 2003, rejecting assertions made by the complainant. He also indicated that it was his intention "to complete the appointment procedures" for the post of Chief of the User Services Division.

The complainant subsequently filed an internal appeal. The Appeal Board issued its report on 25 February 2004. As the restructuring in the IS Department had not been completed, the Board did not take up matters relating to the complainant's redeployment or transfer. It did, however, look into the way the restructuring was undertaken and its consequences for the complainant. It made four recommendations, the last being – as was mentioned in point 18 of the Secretary-General's reply to the complainant's internal appeal – that the Secretary-General should, in the interest of applying best practice, consider transferring the complainant to one of the P.5 posts of chief of division projected for the IS Department. By letter of 23 April 2004 from the Chief of the Personnel and Social Protection Department, the complainant was informed that the Secretary-General had rejected his internal appeal. That is the impugned decision.

On 13 August 2004 the complainant was assigned to the post of Senior Project Manager in the IS Department, with effect from 1 August.

B. The complainant takes issue with the restructuring process that took place in the IS Department. His

contention is that the manner in which the reorganisation took place caused him injury. In the event of restructuring there are procedural requirements that apply, and in his opinion the Administration did not comply with them.

He submits that the classification process carried out was arbitrary and that the ITU failed to adhere to the Staff Regulations and relevant procedures. He alleges abuse of power, arguing that the Administration misused its discretionary authority, inasmuch as his own post could have been reclassified to that of “Chief of the User Services Division”; instead, his post was abolished and a new one was created that was essentially the same as the one he occupied. He also alleges abuse of procedure, contending that by failing to apply relevant internal rules regarding the classification of posts the organisation deprived him of the procedural safeguards which are intended to protect employees. His acquired rights were thus disregarded.

He believes that the abolition of his post was motivated by a desire to sideline him and he alleges harassment. He was transferred to a new post without proper reasons being provided. He says it was an ill-defined role where he had no clear directions from senior management; he suffered gradual demotion and supervised fewer people. He submits that the classification decision was based on prejudice, ill will, bad faith and malice, thus necessitating the quashing of the impugned decision.

The complainant asks the organisation to disclose any documents that may be deemed relevant to his appeal. By way of redress, in accordance with the recommendation made by the Appeal Board, he asks to be appointed to a post “commensurate with [his] prior post”, namely, to one of the posts of Chief of Division in the restructured IS Department. He seeks an undertaking that the ITU will “not further remove staff from [his] supervision without his prior consultation”. He claims moral damages on account of the organisation’s failure to respect his dignity and because of the stress caused by “ongoing professional uncertainty” during the restructuring period. He also claims costs.

C. The ITU holds that the complaint is irreceivable. It points out that it contested the receivability of the complainant’s internal appeal on the grounds that it was premature. It maintains the view it held in the internal appeal proceedings, contending that the complainant could not show that he had suffered any “actual or probable prejudice” given that neither the restructuring of the IS Department nor the selection process for the three vacancy notices issued on 2 September 2003 had been completed at the time when he filed his internal appeal. It holds that the prejudice alleged by the complainant is “fictitious”.

In addition, it points out that the redress claimed in his complaint is different in some respects from that claimed in his internal appeal. It submits that the complainant’s claim to be appointed to a post commensurate with his former one is without foundation as he was appointed to such a post with effect from 1 August 2004. It considers his claim for damages to be irreceivable as it was not put forward during the internal appeal proceedings. Furthermore, it holds that matters relating to the complainant’s current post are beyond the scope of the present complaint as they arose after the filing of his internal appeal.

The ITU also considers the complaint to be devoid of merit, arguing that the complainant has not shown that he suffered prejudice. It states that the restructuring of the IS Department arose from a recommendation made by the External Auditor, and it was carried out in the best interests of the Union. It was not motivated by any attempt to “sideline or discredit” the complainant.

It explains that the job classification work took place in the specific context of the restructuring, and contends that the complainant’s arguments regarding the applicability of the procedure followed are, therefore, unfounded. As part of the reorganisation, all Chief of Division and Project Manager functions were reviewed. With regard to the position of Chief of the User Services Division, the conclusion drawn by the Administration following the classification work was that it was a new position and should be advertised. The ITU maintains that the complainant has not shown that the classification exercise was conducted in an arbitrary manner. His contractual status and essential conditions of employment were in no way modified, and he did not have acquired rights to a particular post. It rebuts his allegations of harassment.

D. In his rejoinder the complainant says that by arguing that his complaint was premature and that he had suffered no prejudice, the ITU is ignoring the substance of his complaint. By the time he filed his internal appeal his situation had deteriorated; he had fewer support staff and duties had been taken from him.

He reiterates his plea that the classification exercise involved abuse of authority, claiming that the restructuring was

presented as a *fait accompli*. He attaches a sworn affidavit in which he relates a conversation he had in the summer of 2003 with the first of the two officials who were involved in the classification exercise. The complainant says that he learnt from that conversation that the classifiers had been “instructed” to find a difference greater than 50 per cent between the duties of the job he then held and the post of Chief of the User Services Division that was being created.

E. In its surrejoinder the ITU maintains its view that the complaint is irreceivable. It states that the complainant exercised virtually all of his duties as Head of the User Services Division until the time of his appointment as Senior Project Manager.

The ITU produces a statement written by the first official involved in the classification of the new post. That official confirmed therein that, despite the initial impression, it became clear after a thorough examination that the new post was substantially different from the complainant’s then post, and that therefore it was necessary to advertise it. The organisation reasserts that the classification exercise was carried out in strict compliance with the rules in force.

CONSIDERATIONS

1. The complainant joined the ITU in 1989 as a System Analyst/Programmer, at grade P.3. He was subsequently promoted to grade P.4 and, later, to Head of the User Services Division, at P.5, in the Information Services (IS) Department with effect from 1 November 2001.
2. A report dated 26 June 2002 from the External Auditor recommended that the “IS Department be reorganized along rational ITU priority needs”. Thereafter, on 7 July 2003, the Chief of the IS Department circulated a proposed new structure for the Department with individual staff members designated against particular positions. A person other than the complainant was designated as Chief of the User Services Division and the complainant was designated as a Project Manager. An updated version was issued on 10 July without the designation of persons to particular posts. On 31 July 2003 the Secretary-General announced a new structure for the IS Department along the lines earlier proposed.
3. As part of the restructuring exercise, three posts, including that of Chief of the User Services Division, were treated as new posts and vacancy notices were issued for them on 2 September 2003. On 10 September the complainant wrote to the Chief of the Personnel and Social Protection Department requesting information as to the basis for treating the post of Chief of the User Services Division as a new post. On 15 September the complainant was informed that, at the time of the preparation of the relevant vacancy notice, the post had been assessed as approximately 50 per cent different from the post held by him – an assessment which had subsequently been confirmed in a review by another classification officer – and that “[b]ased on established classification practice”, it was to be considered a new post. He was subsequently informed that there was no “written rule” with respect to the percentage difference required before a post is regarded as a different post. He was also informed that the earlier designation by the Chief of the IS Department of particular names against particular posts had neither “official, nor legal status” and that the recruitment procedures required by the Staff Regulations would be strictly applied in the case of all three advertised posts.
4. On 7 October 2003 the complainant wrote to the Secretary-General seeking a “final review” of the “administrative decision to restructure the [IS] Department [...], including the decision to arbitrarily and irregularly reclassify [his] current post”. He asked that he be assigned “without regard to competition to one of the two new division head posts created under the so-called restructuring”. The Secretary-General replied to the complainant on 25 November stating, amongst other things, that it was his intention to complete the appointment procedures for the post of Chief of the User Services Division.
5. Following the Secretary-General’s decision of 25 November 2003, the complainant appealed to the ITU Appeal Board seeking reinstatement in his previous post or, in the alternative, an order that he be employed by the ITU until the age of 60. In the further alternative, he sought “appointment to a post commensurate with [his] prior post, with clearly defined duties corresponding to [his] grade, skills, training and experience”. Additionally, he claimed moral and material damages, and costs.
6. The complainant applied for all three of the posts advertised on 2 September 2003 and was pre-selected for

each. However, no final decision had been made when his appeal was considered by the Appeal Board. Because the process had not then been completed, the Board held that the only part of the appeal which it should consider was “that which reflect[ed] upon the manner in which the administration ha[d] prepared the reorganisation and the eventual consequences for the [complainant]”. In the result, the Board recommended that the complainant’s requests for reinstatement, employment until the age of 60 and assignment to an appropriate post not be considered at that stage. The Board made two general recommendations with respect to the restructuring process and, so far as concerns the complainant, it recommended that the “Secretary-General should take into consideration [the] transfer of the [complainant] to one of the posts of Chief of Division” in the restructured Department.

7. The complainant was informed on 23 April 2004 that the Secretary-General had decided to maintain his decision of 25 November 2003 and was given reasons for that decision. That decision is the subject of the complaint by which the complainant seeks appointment to one of the posts of Chief of Division in the restructured IS Department. He also seeks an undertaking that the ITU will not further remove staff from his supervision. He claims moral damages, damages for stress, and costs. Additionally, he asks for an oral hearing to call evidence on “the issue of his harassment” and an order for the production of all documents relied upon by the ITU to reach the conclusion that the post of Chief of the User Services Division differed by 53 per cent from the post he previously occupied. It is convenient to state, at once, that the application for production of those documents is refused. The Tribunal has consistently held that it will not order the production of documents on the speculative basis that something might be found to further the complainant’s case.

8. The ITU asks the Tribunal to find the complaint irreceivable on the basis that, because the complainant submitted his appeal to the Appeal Board before the restructuring was complete, his appeal was premature and therefore irreceivable. Furthermore, because the restructuring was not then complete, it argues that the complainant had not suffered any actual or probable prejudice when he submitted his appeal to the Board and thus had no cause of action. These arguments must be rejected. In the context of the announced restructuring, the vacancy notice for the post of Chief of the User Services Division clearly carried with it a final administrative decision to abolish the complainant’s post. That decision affected the terms and conditions of his employment in that, if he wished to remain employed in the IS Department at his then current grade, he was required to submit his candidature for the posts advertised as vacant.

9. Although the complainant originally sought review of the decision to restructure the IS Department as well as the decision to treat the post of Chief of the User Services Division as a new post, his arguments are directed not to the restructuring decision, as such, but to the manner in which the restructuring was carried out. In particular, his arguments are directed to the decision that the post of Chief of the User Services Division was a new post for which a vacancy notice should be issued, which decision necessarily implied the abolition of his existing post. In this regard, the complainant contends that the ITU failed to apply internal rules regarding the classification of posts, denied him due process and failed to provide him with “any independent reason” for the course taken. Additionally, he claims that the decision constituted a breach of his acquired rights. Further, he argues that the decision was motivated by a desire to sideline him and was based on prejudice, ill will, bad faith and malice. Moreover, he claims that the decision constitutes harassment.

10. Before turning to the complainant’s arguments, it is necessary to emphasise two matters. The first is that an international organisation necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, the creation of new posts and the redeployment of staff (see Judgments 269 and 1614). As was pointed out in Judgment 1131, the Tribunal may not supplant an organisation’s view with respect to these matters, and decisions on them are discretionary and subject to limited review.

11. The second matter that should be emphasised is that the complaint concerns only the decision to abolish the complainant’s post, that being the only administrative decision that affected him when he sought “final review” by the Secretary-General and, thus, the only matter that could properly be before the Appeal Board. Subsequent events and decisions may be relevant to determining whether the decision to abolish his post was motivated by an improper purpose or otherwise involved an abuse of power. However, they do not otherwise fall for present consideration. Thus, for example, in these proceedings the complainant cannot claim moral or material damages for what he claims was ultimately his “reclassification into [the] illusory position [of Project Manager]” which, he says, equates with “internal demotion”. If the complainant has rights in this regard (as to which, see Judgment 1368), they cannot be determined in these proceedings.

12. The complainant’s argument with respect to non-observance of the rules relating to reclassification must be

rejected. The complainant relies for this argument on Service Order No. 111 (Rev.2) which applies to the classification of posts to determine their appropriate grade. The exercise involved in the present case was not a classification exercise, much less an exercise of the kind contemplated by Service Order No. 111 (Rev.2). Although the techniques employed in a classification exercise were used, the exercise in question was a comparative exercise to determine whether the post of Chief of the User Services Division in the restructured IS Department was or was not the same as that occupied by the complainant before the restructuring. In this regard, a difference of approximately 50 per cent was considered decisive.

13. As with a classification exercise, a decision as to whether the posts were or were not the same involved the making of value judgments, including as to the extent of the difference to be treated as decisive. There is nothing to suggest that the selection of approximately 50 per cent was not in accordance with usual practice or was unreasonable in the circumstances. Accordingly, the complainant's contention that it was "arbitrary" must be rejected.

14. In his rejoinder the complainant introduces evidence of a conversation he had with the official who had first compared the two posts in question. The complainant states that in that conversation he was told that neither the official in question nor the Classification Officer could find a difference greater than 50 per cent but that they had been instructed to do so. It is not disputed that there was a conversation as to the difference between the two posts. However, the person with whom the conversation took place says that, after a glance at the two job descriptions, he and the Classification Officer had thought that it would not be necessary to advertise the post. He says, however, that a thorough examination revealed that the posts were different. Given this, and given also that there were differences in the duties of the posts and that the two persons concerned in comparing them each provided written assessments as to the nature and extent of those differences, the complainant's evidence does not establish that there was not a decisive difference.

15. The complainant's argument that he was denied due process must be considered in the context that he was a member of the Ad Hoc Committee on the Information System Audit Report and thus knew that the IS Department was the subject of proposed restructuring. Indeed, the Committee itself recommended that "[n]ew job descriptions for all IS staff should be defined and reviewed [...]". Moreover, the restructuring which eventually occurred was proposed as early as March 2003, and the proposal that was circulated contained a statement that there would be "[n]ew job descriptions for all IS staff". In these circumstances, the complainant must have known, as early as March 2003, that there was a real possibility that the job description for the post of Chief of the User Services Division would be significantly different from the one for the post which he occupied.

16. There is nothing to suggest that the complainant was officially informed prior to the publication of the internal vacancy notice that his post was to be abolished. Indeed, the evidence is that he was given information to the contrary. However, once the vacancy notice was issued, he sought and received information as to the reason for that course. The fact that the reason emanated from officials of the ITU and not from an independent source is of no relevance. Once the complainant was provided with the reason, he was armed with all necessary information to put his case to the Secretary-General that there was no significant difference between his post and the advertised post and thus no occasion for the internal vacancy notice.

17. To the extent that the complainant relies on acquired rights to challenge the decision to abolish his post, that reliance is misplaced. Upon abolition of his post, the complainant had an acquired right to a grade P.5 position with responsibilities and duties appropriate to his qualifications and experience. If, as he claims, he was denied such a position – a matter upon which the Tribunal makes no finding – that occurred as a result of subsequent events and decisions which are beyond the scope of the complaint. Moreover, it appears from the report of the Appeal Board that, for some time after his post was abolished, he maintained his functions of head of division, albeit with reduced responsibilities.

18. The complainant's arguments with respect to improper purpose, abuse of power and harassment may be considered together. For present purposes and without making any findings on the issue, the matters on which the complainant relies to establish harassment may be assumed. There is, thus, no need for the calling of evidence on that issue. Accordingly, the request for an oral hearing is refused.

19. The account of harassment began in fact with the circulation by the Chief of the IS Department of the proposed plan for restructuring with particular persons assigned to particular posts, the complainant being assigned to the post of Project Manager and not that of Chief of the User Services Division. After his post was abolished

and application was made for review, according to statements produced by the complainant, directions were issued denying him access to the software storeroom; reports were commissioned with unreasonable deadlines, without those reports being acted upon; resources and staff were removed; threatening and conflicting e-mails were issued; and other staff members failed to greet him.

20. The matters which arose after the abolition of the complainant's post are incapable of establishing that there was any animosity or other improper purpose on the part of anyone at the time the decision was taken to abolish the post.

21. Although the Chief of the IS Department was consulted in the comparison exercise which led to the abolition of the complainant's post, the evidence is incapable of supporting a finding that the persons responsible for that exercise, much less the Secretary-General who made the final decision, were party to a scheme to sideline the complainant or were motivated in any way by prejudice, malice, bad faith, ill will or any other improper purpose.

22. Lastly, the designation of the complainant against a different post to be created in the restructuring and the abolition of his post cannot, of themselves, be regarded as harassment. Particularly is that so in a context in which the restructuring resulted from an external recommendation and the complainant was invited to, and did, submit his candidature for the three newly created posts in a selection process which, it must be assumed in the absence of any evidence to the contrary, was carried out strictly in accordance with applicable procedures.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet