

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3223

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr C. S. against the International Telecommunication Union (ITU) on 28 February 2011 and corrected on 18 April, the Union's reply of 3 August, the complainant's rejoinder of 7 November 2011 and the ITU's surrejoinder of 13 February 2012;

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 relating to the complainant's career are set out in Judgments 2881 and 3155, delivered on 3 February 2010 and 6 February 2013 respectively, concerning his first and second complaints. It is sufficient to recall that on 22 December 2009 the complainant, who then held grade P.5, had lodged an appeal with the Appeal Board, complaining of the "professional inactivity" imposed on him since 30 June 2008, and stating that he was entitled to adequate compensation.

On 16 April 2010, while awaiting a final decision on his appeal, he sent the Secretary-General a “request for compensation for the injury [resulting] from [the] improper and wrongful deprivation of functions” which he was facing. On 31 May, considering that this request had been implicitly rejected, he submitted a request for review. Subsequently, on 6 August, he lodged an appeal with the Appeal Board. The ITU’s principal contention, in its reply to the Board, was that in the light of Judgment 2881 the appeal was irreceivable according to the principle of *res judicata*. Subsidiarily, it argued that the appeal was wholly without foundation. On 17 September, having received a copy of this reply, the complainant wrote to the Chairman of the Appeal Board enquiring whether it would be possible for him to file a rejoinder and to add to his claims. In particular, he wished to update his claim for compensation to 30 September 2010, the date on which he was due to retire, and to enter a claim for punitive damages. The Board delivered its report on 22 September. It considered that, in the absence of new or unforeseeable circumstances, the appeal had to be dismissed according to the principle of *res judicata*. By a letter of 25 November 2010, which constitutes the impugned decision, the Secretary-General informed the complainant that he had decided to endorse the Board’s opinion.

B. The complainant submits that the internal appeal procedure was flawed because the adversarial principle was ignored. He contends that, by not allowing him to submit a rejoinder to the Appeal Board, the Union prevented him from responding to the objection to receivability based on the *res judicata* principle. He argues that for such an objection to be sustainable, the parties, the purpose of the suit and the cause of action must be the same as in the earlier case. In this instance, however, the purpose of the suit was not the same, so that condition was not met. He accepts, on the basis of Judgment 2881, that from 22 June 2007 to 16 October 2008 his duties were substantive, but he claims that they were not commensurate with the P.5 grade, and that he is therefore entitled to compensation for the resulting injury. Moreover, the *res judicata* authority of that judgment by no means

debars him from seeking compensation for the fact that the ITU had deprived him of any function from 16 October 2008, in breach of its “obligation to give its staff a proper administrative position and to their right to respect for their dignity”. He explains however that, on this point, the purpose of the complaint now submitted to the Tribunal “partly overlaps” with that of his second complaint. He states that because of his “idleness” he suffered “very considerable moral injury”.

The complainant seeks the setting aside of the impugned decision and payment of compensation equivalent to 24 months of his final salary, plus interest at 8 per cent per annum as from 16 April 2010, together with the capital yield on the interest. He also claims 10,000 euros in costs. Lastly, he asks the Tribunal to find that, should these various sums be subject to national taxation, he would be entitled to a refund of the tax paid from the ITU.

C. In its reply the ITU contends that, since the Tribunal has already, in its Judgment 2881, ruled on the plea that he was deprived of any function, the complaint is irreceivable by virtue of the principle of *res judicata*. In its view, the same is true of the complainant’s claim for compensation on the basis that the tasks he was given were not commensurate with his grade for the period from 22 June 2007 to 16 October 2008. The Union argues that the Tribunal, in finding that the complainant’s duties were substantive, necessarily acknowledged that they corresponded to the P.5 grade for the period to which the aforementioned judgment refers. It adds that the claim is also time-barred because it was not submitted until 16 April 2010, if not later. The defendant also states that the new claims submitted in the letter of 17 September 2010 are irreceivable, since they were not included in the appeal of 6 August.

On the merits, the ITU denies that the adversarial principle was breached, since the provisions of Chapter XI of the Staff Regulations and Staff Rules, which deals with appeals, do not provide for the possibility of submitting a rejoinder. It states that the complainant has not suffered any moral injury, since in his complaint he was able to

express his views with regard to its pleadings in the reply which it had filed with the Appeal Board.

The Union also states that from June 2007 the complainant's attitude was rather unconstructive and that he showed a "flagrant lack of goodwill" in his relations with his supervisor. It cites various examples to show that the complainant is alone responsible for the situation in which he found himself.

D. In his rejoinder the complainant enlarges on his pleas. Regarding the question of respect for the adversarial principle, he states that there is no provision of internal law to prevent a staff member from supplementing his claims after having lodged an internal appeal and, as an incidental plea, he challenges the lawfulness of paragraph 4 of Staff Rule 11.1.1, which governs the procedure before the Appeal Board. He also argues that Judgment 2881 does not "inescapably" lead to the conclusion that his duties matched his grade. Lastly, he challenges the "fallacious allegations" that he refused to work, pointing out that over a period of 13 months his duties remained well below his qualifications, his professional level and his experience.

E. In its surrejoinder the defendant reiterates its position. It argues that the provisions of Chapter XI of the Staff Regulations and Staff Rules clearly require a staff member, when lodging an appeal, to state all his or her grievances, pleas and claims from the outset. On the merits, it submits that the complainant has failed to prove that the tasks entrusted to him did not correspond to his grade, and criticises him for having refused to carry out certain tasks of "strategic importance" for the ITU.

CONSIDERATIONS

1. On 16 April 2010 the complainant submitted a request for compensation for what he regarded as "improper and wrongful" deprivation of his functions. After unsuccessfully seeking a review of the implied dismissal of this request, he filed an internal appeal on

6 August. In the reply that it submitted to the Appeal Board, the ITU expressed the view that, in light of Judgment 2881 concerning the complainant's first complaint, the appeal should be declared irreceivable by virtue of the *res judicata* principle. The complainant impugns the Secretary-General's decision of 25 November 2010 to dismiss his appeal on the basis of the aforementioned principle, in accordance with the Board's report.

2. The complainant contends that, since the ITU had challenged the receivability of his internal appeal by invoking the *res judicata* principle, he was entitled to submit a rejoinder expressing his views on that issue. He argues that by denying his request to enter a rejoinder, the Union breached the adversarial principle.

The complainant further explains that, according to the Tribunal's case law, for an objection based on the *res judicata* principle to be sustainable, there must be identity of the parties, the purpose of the suit and the cause of action. In his opinion, the purpose of his first complaint, of his second complaint – which formed the subject of Judgment 3155 – and of the complaint presently before the Tribunal is not identical. In his first complaint he challenged the violation of his right to have his services effectively utilised during the period from 22 June 2007 to 16 October 2008, whereas his second complaint concerned the period from 16 October 2008 to 22 December 2009. While he says that he accepts the conclusion reached by the Tribunal in Judgment 2881 that, during the former period, his duties were substantive, he alleges that at that time they were not commensurate with his grade – which, in his opinion, entitles him to compensation for the resulting injury – and that thereafter he was totally deprived of his functions. He thus admits that the purpose of his fourth complaint “partly overlaps” that of his second.

3. The ITU submits that, since in Judgment 2881 the Tribunal found that the complainant's right to have his services effectively utilised had not been breached, and since, in its view, this right “necessarily encompasses” a staff member's right to be given functions consistent with his or her grade, the complaint must be

dismissed as irreceivable by virtue of the *res judicata* principle. If the Tribunal were to consider nonetheless that this principle does not apply to the request for compensation for the injury allegedly suffered by the complainant during the period from 22 June 2007 to 16 October 2008 because his duties did not match his grade, the Union states that this request is time-barred.

Referring to the pertinent provisions of the Staff Regulations and Staff Rules, the Union denies that it breached the adversarial principle. It states that, although the complainant could not file a rejoinder with the Appeal Board, he did have an opportunity to reply to the Administration's arguments in his complaint.

4. The Tribunal considers that the complainant's substantive arguments are barred by *res judicata* in respect of the period from 20 June 2007 to 22 December 2009. In Judgment 3155 it pointed out that in consideration 11 of Judgment 2881 it had "already noted that the Union had produced sufficient evidence to enable it to conclude that the complainant's duties were substantive and that the alleged wrongdoing on the part of the Secretary-General was not proven". It went on to say that, although the complainant submitted that his allegations concerned a period which partly post-dated the period at issue in Judgment 2881, "it must be found that he has not provided the Tribunal with evidence enabling it to reach a different conclusion" as far as that period was concerned.

5. Similarly, with regard to the period after 22 December 2009, the Tribunal has found no evidence in the file which would lead it to alter its assessment of the complainant's situation.

6. Although the complainant's substantive arguments may not be accepted, his criticism regarding the lawfulness of proceedings before the Appeal Board is well founded. Indeed, the Tribunal considers that, by virtue of the adversarial principle, an employer organisation may not raise an objection to an internal appeal filed by a staff member unless that person is able to express his or her views on

the merits of the objection. As the ITU points out, Staff Rule 11.1.1, paragraph 4, makes no provision for a staff member to file a rejoinder with the Appeal Board; however, nor does it rule out this possibility, and it does not therefore preclude the submission of a rejoinder by the person concerned in accordance with the requirements of the adversarial principle. The Tribunal will not therefore accept the complainant's plea that this paragraph is unlawful.

The internal appeal proceedings were nonetheless tainted with a flaw which, contrary to the Union's submissions, cannot be redressed in proceedings before the Tribunal. In the particular circumstances of the case, the Tribunal will not, however, set aside the impugned decision, but it will grant the complainant compensation in the amount of 1,000 euros for the moral injury caused by this flaw.

7. The complainant asks the Tribunal to rule that, should the sums awarded be subject to national taxation, he would be entitled to a refund of the tax paid from the Union. In the absence of any present cause of action, this claim must be dismissed.

8. As he succeeds only to a very limited extent, the complainant is entitled to costs which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The ITU shall pay the complainant compensation in the amount of 1,000 euros for moral injury.
2. It shall also pay him 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2013, 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 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet