

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

## **108th Session**

## **Judgment No. 2889**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2772 filed by Ms P. B. on 8 June 2009, the reply of the International Telecommunication Union (ITU) of 8 July, the complainant's rejoinder of 14 August and the ITU's surrejoinder of 11 September 2009;

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. Judgment 2772 concerning the complainant's first complaint was adopted on 13 November 2008 and delivered on 4 February 2009. It should be recalled that, after an emergency hospitalisation, the complainant was absent on sick leave until 31 January 2007 and was placed on special leave with pay as from 1 February 2007. In her first complaint she requested the quashing of the decision of 7 November 2007 by which the Secretary-General had, *inter alia*, extended this leave.

By a letter of 10 April 2008 the Chief of the Administration and Finance Department reminded the complainant that she had been placed on special leave with pay pending the outcome of the medical examination which she had been asked to undergo. Noting that she had not complied with that request, he advised her that, unless she did so, her leave would end on 1 May 2008. As the Secretary-General decided on 29 April to terminate the leave in question with effect from 1 May, the days on which the complainant was absent from that point onwards were deducted from her annual leave entitlement. By a letter of 8 July she was informed that her “annual leave entitlement w[ould] be exhausted on 10 July” and that she would be placed on special leave without pay as from 11 July. Since the complainant decided to remain affiliated to both the Staff Health Insurance Fund (SHIF) and the United Nations Joint Staff Pension Fund (UNJSPF), she continued to pay her share of the corresponding contributions and the ITU exceptionally continued to pay its share of those contributions.

On 12 August the complainant wrote to the Secretary-General to request a review of the decision of 8 July. This request was rejected by letter of 18 September. On 4 November 2008 the complainant submitted an appeal to the Appeal Board in which she asked to be granted special leave with pay.

In the meantime, on 19 September 2008 the complainant had written to the secretary of the ITU Staff Pension Committee to draw her attention to Rule H.3 of the UNJSPF Administrative Rules which stipulates that, whenever a participant is placed on leave without pay for reasons of health, “a request for a determination by the staff pension committee [...] [whether a disability benefit must be paid to the person concerned] shall be made by the organization”. She was informed by letter of 15 October that the necessary steps had been taken to submit her case to the ITU Staff Pension Committee at its meeting on 19 November 2008. She was also asked to contact her attending physician at her earliest convenience, for the latter had to submit a report to the ITU Medical Adviser. This report attested the complainant’s complete, long-term incapacity for service. On 19 November the Committee decided to award the complainant a

disability benefit for two years as from 11 July 2008. Relying on Article 33(b) of the UNJSPF Regulations and on ITU Staff Rule 6.2.2, on 16 December 2008 the complainant sent a letter to the secretary of the Committee to point out that, in her opinion, the award of the disability benefit in question could take effect only “after all [her] sick leave entitlement as from 2004, which ha[d] yet to be calculated, had been deducted”.

By Judgment 2772 the Tribunal quashed the decision of 7 November 2007 and ordered the complainant’s reinstatement in her post or assignment to an equivalent post. It specified, however, that if immediate reinstatement was impossible, the complainant should be granted special leave with pay for no longer than three months, that being the period of time which the Tribunal deemed long enough for the Union to be able to assign her to a post. It also awarded the complainant costs in the amount of 5,000 Swiss francs.

After the ITU was notified of this judgment, the Chief of the Administration and Finance Department informed the complainant by letter of 6 March 2009 that in view of the decision to pay her disability benefit – of which the Tribunal had been unaware when it adopted the above-mentioned judgment – reinstatement appeared to be impossible. In those circumstances, he told the complainant that her absence from 1 May to 10 July 2008 would be treated as special leave with pay; that the 51 days of annual leave deducted for this period would be credited back to her; that her special leave without pay, which had begun on 11 July 2008, would be converted into special leave with pay until 6 November 2008, i.e. the day before that on which the ITU Medical Adviser had submitted her report certifying that she was unfit to work until further notice; that she would be placed on sick leave as from 7 November 2008; and that the effective date as from which her disability benefit would be paid, which depended on “the exhaustion of [her] entitlement to sick leave and ordinary leave”, would be 4 February 2010. The complainant was also provided with a copy of the report which the Appeal Board had issued on 9 February 2009 concerning her appeal of 4 November 2008, in which the Board recommended the setting aside of the decision of 8 July 2008.

The Administration and Finance Department informed the Accounts Division of the changes affecting the complainant's status by a note of 13 March 2009, which indicated that the complainant should be paid her salary and reimbursed in respect of the social contributions she had paid for the period 11 July 2008 to 31 March 2009.

On 3 April the complainant wrote to the Chief of the above-mentioned department to request the execution of Judgment 2772. She stated that on 10 March she had received payment of the costs awarded by the Tribunal and that on 20 March she had received the salary arrears for the above-mentioned period, but that she had not yet been reimbursed for the social contributions. She added that she was waiting to be reinstated at the ITU. On 24 April she sent a letter to the Secretary-General to remind him *inter alia* of the content of the above-mentioned judgment. The Chief of the Administration and Finance Department confirmed by a letter of 11 June that her reinstatement could not be contemplated. In the meantime, on 8 June 2009, the complainant had submitted to the Tribunal an application for execution of Judgment 2772.

B. The complainant submits that the Union is relying on a fact that occurred after her first complaint to evade its obligation to execute Judgment 2772 and to terminate her contract as soon as possible. As the Tribunal ordered – in the authoritative French version of its judgment – that she should be kept (*maintenue*), rather than placed, on special leave with pay until she was reinstated, she challenges the decision to place her on sick leave on full salary as from 7 November 2008. She considers that the ITU was obliged to pay her salary arrears and reimburse the social contributions which she had paid for the period 11 July 2008 to 31 March 2009 as soon as it was notified of the above-mentioned judgment, but she has still not received the reimbursement in question. With regard to her reinstatement, she submits that the wording of the judgment is plain and not open to any interpretation. Lastly, she asserts that the award of her disability benefit has not yet been confirmed by the UNJSPF.

The complainant requests the “full execution” of Judgment 2772 or, failing that, compensation in the amount of 1 million Swiss francs

for the moral and material injury suffered. In addition, she claims 5,000 francs in costs. Moreover, she would like the Tribunal to make it clear that the ITU has 30 days to carry out “the Tribunal’s orders”, and to impose a fine of 500 francs per day for default until she is actually reinstated in her post or assigned to an equivalent post. She also claims 8 per cent annual interest, from 11 July 2008 to the date of payment, on the salary arrears and the “advance payments” of social contributions, as well as 100,000 francs damages in compensation for the injury she has suffered on account of the fact that the ITU has frustrated her legitimate expectation that Judgment 2772 would be swiftly and properly executed.

C. In its reply the Union states that, in view of the “radical change in circumstances” which has occurred since the filing of the complaint leading to Judgment 2772, the measures it has taken do constitute full execution of that judgment. It submits that it had no intention of evading its obligation to execute the judgment, but that the complainant’s incapacity for service, which was diagnosed and certified at her request in the last quarter of 2008 – in other words a few weeks before the delivery of the above-mentioned judgment – has made her reinstatement impossible. In this connection, it emphasises that all the competent bodies found that the complainant was unfit for work. Furthermore, it points out that the award of the disability benefit was confirmed by the UNJSPF in February 2009.

Given the complexity of the situation, the ITU considers that the salary arrears were paid within a reasonable period of time and that the claim for the payment of interest on these sums must therefore be dismissed. It adds that the letter of 11 June 2009 shows that reimbursement of the social contributions was effected when the complainant’s salary for March 2009 was paid. The ITU submits that the claim to compensation in the amount of 1 million francs is irreceivable, as it can only be interpreted as the resubmission of a claim entered in the context of the first complaint, which the Tribunal

has already rejected. The Union contends that by filing an application for execution the complainant has breached the principle of good faith: since she was aware that it was impossible to execute the judgment to the letter, she cannot claim to have suffered any injury in this respect.

D. In her rejoinder the complainant reiterates her submissions. Returning to the content of the letter of 6 March 2009, she asserts that, according to the Tribunal's case law, no organisation "may retroactively alter at will the position of its staff". She adds that she could have been reinstated, as she was not granted a disability benefit as from 11 July 2008. Moreover, she points out that the compensation of 1 million francs which she is claiming would "make up for the damage to her health, life expectancy and career". In her opinion, the ITU's repeated breaches of the principle of good faith and use of "improper tactics" against her justify an award of 100,000 francs in damages.

E. In its surrejoinder the Union maintains its position.

## CONSIDERATIONS

1. In her first complaint, which resulted in Judgment 2772, the complainant challenged the decision of 7 November 2007 of the Secretary-General of the ITU to follow the recommendations of the Appeal Board that the "agreed arrangements in the form of special leave with pay [should be extended] until the findings of the specialist's examination possibly necessitate new arrangements" and that, "the specialist's report permitting, [...] the complainant [should] return to her former post, or be assigned to an equivalent post, while at the same time care [should] be taken to eliminate all forms of mobbing".

2. In the above-mentioned judgment the Tribunal, having found that the Union "no longer had any valid reason to keep the complainant on special leave with pay in the absence of factors linked to events after 1 February 2007 and warranting an assessment of her fitness to

resume active employment”, held that the complainant should be “allowed to return to duties matching her grade and skills, without prejudice to the subsequent implementation of a procedure to determine whether, and on what conditions, she [wa]s fit for active employment, provided that the current Staff Regulations and Staff Rules so permit”. It decided as follows:

- “1. The impugned decision is quashed.
2. The complainant shall be reinstated in her post or assigned to an equivalent post as stated under 11 [of the judgment].
3. The ITU shall pay the complainant costs in the amount of 5,000 Swiss francs.
4. All remaining claims are dismissed.”

Consideration 11 of Judgment 2772 stated that the complainant must be “reinstated in her post or assigned to an equivalent post” and that, “[i]f it [wa]s impossible to reinstate her in her former post in the immediate future, the complainant [was to] be granted special leave with pay for no longer than three months as from the delivery of [the] judgment”.

3. After the delivery of that judgment, the complainant reported to the ITU on 10 February 2009 and then sent a letter to the Union on 11 February requesting execution of the judgment.

On 10 March 2009 she received a letter dated 6 March 2009, signed by the Chief of the Administration and Finance Department, which read:

“Dear Madam,

I acknowledge receipt on 16 February 2009 of your letter of 11 February 2009 [...]. On 19 February 2009 we likewise received official notification of Judgment 2772 delivered by the [...] Administrative Tribunal [...] on 4 February 2009.

We have taken note of the fact that the Tribunal orders your reinstatement in your post or your assignment to an equivalent post within three months of the delivery of the judgment and that it orders us, in the meantime, to place you on special leave with pay.

We have also taken note of the fact that the Tribunal orders the ITU to pay you costs in the amount of 5,000 Swiss francs. In this regard, we confirm

that instructions have been given to the Accounts Division to pay this sum [...].

Furthermore, on 9 February 2009 the Appeal Board forwarded to the Secretary-General its report on your second appeal of 4 November 2008. [...] We see that the Appeal Board takes note, first of the content of the above-mentioned judgment [...] and, secondly, of the fact that, at your request, that is on the basis of the submission by your attending physician of a medical report attesting to your complete, long-term incapacity for service, which report was endorsed by the ITU Medical Adviser (on 7 November 2008), the [ITU] Pension Committee (on 19 November 2008) and subsequently the United Nations [Joint] Staff Pension Fund agreed to award you a disability benefit for an initial period of two years.

From the administrative point of view, we remind you that your situation was as follows:

- your leave with pay ended on 30 April 2008;
- your absence after that date was covered by the exhaustion of your annual leave entitlement up to 10 July 2008;
- as from 11 July 2008 your absence was covered by special leave without pay.

In the light of all these factors, it seems that the conclusions which must be drawn and the corresponding measures which must be taken by the Union are as follows.

In view of the decision [...] to award you a disability benefit (as from a date which remained to be determined), it appears impossible to reinstate you in the post which you used to hold, or to assign you to an equivalent post, as required by the [Tribunal]. Nevertheless, the terms of Judgment 2772 and the radical change in circumstances stemming from the decision to award you a disability benefit (a decision of which the [Tribunal] could not have been aware at the time of adopting Judgment 2772), lead me to consider the application of the following measures:

1. Your absence from 1 May 2008 to 10 July 2008, which was initially deducted from your annual leave entitlement, is regarded as special leave with pay. For this reason, you will be credited back with 51 days of annual leave.
2. As from 11 July 2008, after you had exhausted your annual leave, you were given special leave without pay. This is also being converted into special leave with pay from 11 July 2008 to 6 November 2008, the date of the day before that on which the ITU Medical Adviser filed her report attesting to your 100 per cent incapacity for service until further notice. You must therefore be paid your full salary throughout this period and the various contributions which you paid during the special leave without pay must be adjusted. Similarly, the days of annual leave

and sick leave accruing during this period will be credited to you. I emphasise that this decision is in accordance with the Appeal Board's recommendation of 9 February 2009.

3. The medical certificate submitted by your attending physician, attesting to your 100 per cent incapacity for service until further notice [...], was endorsed by the United Nations Medical Services Section on 7 November 2008. On this basis, you will be placed on sick leave as from that date and the whole of your entitlement to sick leave at 100 per cent and at 50 per cent as well as your annual leave will therefore be used to enable you to receive your full salary for as long as possible [...] As the enclosed calculation shows, you will have exhausted your leave entitlements on the evening of 3 February 2010.
4. [...] The effective date on which you will begin to receive your disability benefit depends [...] on the exhaustion of your entitlement to sick leave and ordinary leave, as stated in paragraph 3 above. As indicated this date is 4 February 2010.

The requisite calculations are being made and will be sent to you as soon as possible.

[...]"

4. The complainant considers that, in view of the decision in Judgment 2772, she had to be kept on special leave with pay until her reinstatement at the ITU, which was to take place within three months of the delivery of the said judgment.

5. The Union contends that the measures which it has taken and which are set out in the letter quoted above constitute full execution of Judgment 2772. It submits in substance that it was unable to adopt a "measure fulfilling the letter" of point 2 of the decision in the above-mentioned judgment because of the radical change in circumstances that occurred after the filing of the complaint which led to the said judgment and, in particular, because of the finding, established at the complainant's request on the basis of a report submitted by her attending physician, that she was unfit for work.

6. In accordance with the Tribunal's case law, at the stage of execution of a judgment by the parties, and likewise in the context of an application for execution, the judgment has *res judicata* authority

and must be executed as ruled (see, for instance, Judgment 1887, under 8).

7. An exception must, however, be made to this principle when execution proves to be impossible owing to facts of which the Tribunal was unaware when it adopted its judgment. In the instant case, the complainant's complete, long-term incapacity for service was established at her request and on the basis of a report submitted by her attending physician on 31 October 2008, and the ITU Staff Pension Committee decided on 19 November 2008 to award her a disability benefit.

In these circumstances, the Union could refrain from reinstating the complainant without breaching its obligations under Judgment 2772 which, moreover, had expressly envisaged the possibility that a procedure might be implemented to determine whether, and on what conditions, the complainant was fit for active employment. By taking the action set out in the letter of 6 March 2009, the Union therefore committed no fault.

8. It may be concluded from the above that the application cannot be granted.

## DECISION

For the above reasons,  
The application is dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-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 3 February 2010.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet