

**110th Session**

**Judgment No. 2967**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. L. against the International Telecommunication Union (ITU) on 27 February 2009 and corrected on 9 June, the Union's reply of 16 September, the complainant's rejoinder of 21 December 2009 and the ITU's surrejoinder of 6 April 2010;

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 is a Canadian national born in 1954. She joined the ITU in 1979 and was granted a permanent appointment in 1987. As a result of the restructuring of the ITU General Secretariat in June 2007, the Corporate Communication and the External Affairs Units were merged into a single division, the External Affairs and Corporate Communication Division (EACC), within the Strategic Planning and Membership Department. Prior to the restructuring, the complainant was Head of the Corporate Communication Unit and Mr C. was Head of the External Affairs Unit. They both held grade P.5.

In September 2007 a vacancy notice was published for the post of Head of EACC at grade P.5 (post 202). The complainant, who was at the time on sick leave, enquired on 25 October 2007 about the advertised post, noting that the duties relating to corporate communication were essentially the same as those of her post. She was told on the same day that the newly created post was “to head the external coop[eration] as well as coop[eration] with Members” and was thus different from hers, which was “mainly for communication”.

By an e-mail of 1 November the complainant requested that she be transferred to post 202, should its creation mean that her own post had been abolished. She also requested that her e-mail be considered as an application for the said post. That same day the Deputy Secretary-General replied that, although as a result of restructuring the duties of her post and that of Mr C. had been combined in the job description of the post of Head of EACC, the Management did not propose to abolish her post. She was also informed that neither she nor Mr C. would be transferred to the new post, as it was open for recruitment, but that her application would be registered. In a memorandum of 13 November to the Deputy Secretary-General the complainant indicated that, in light of Mr C.’s nomination as Head ad interim of the new division, she considered that her post had “effectively and for all practical purposes been abolished”. She requested that she be transferred to post 202 and that she be provided with a complete list of the duties of her own post. The Deputy Secretary-General replied that it would not be possible to transfer her to post 202, because the responsibilities of her post were different and a recruitment process for post 202 was under way.

By a further memorandum to the Deputy Secretary-General, dated 21 November, the complainant requested, in the event that she was neither transferred to nor selected for post 202, that her post be redeployed to another service where her skills and experience could be used. On 5 December 2007, having received no reply to that memorandum, she wrote to the Secretary-General requesting a review of the decisions to abolish her post, to advertise the newly created post of Head of EACC and to deny her a transfer to that post or to any other post of the same grade and level of responsibility. She reiterated her

request for a transfer to post 202 or redeployment to another post commensurate with her grade, skills and experience. By a memorandum dated 18 January 2008 the Deputy Secretary-General informed her that the Secretary-General had decided not to grant her requests, so as to maintain the equality of treatment between her and Mr C. and not to prejudge the outcome of the selection process that was under way. Noting that she had been shortlisted for post 202, he added that, if she were not selected, she would remain assigned to her post within the Strategic Planning and Membership Department with new responsibilities corresponding to her qualifications and competencies. Following her return to work from sick leave, the complainant requested, by a memorandum of 6 February, that she be officially designated acting Head of EACC, pending completion of the selection process. On 25 February she was informed that an external candidate had been selected for the new post.

On 28 February she requested in writing that she be transferred to the post of Head of the Partnership and Promotion Division in the Telecommunication Development Bureau (BDT) as soon as that post became vacant. She was advised by memorandum of 11 March that this request would be considered in the course of the recruitment process for that post but that, in the meantime, the Secretary-General had decided to transfer her, together with her post and the associated budget, to BDT. The transfer would take effect on 12 March 2008 and it would be the responsibility of her new department to establish a job description corresponding to her qualifications and competencies. With effect from 1 May 2008 the complainant was appointed Head of the Meetings Organization and Support Service in BDT.

Prior to that, on 7 March 2008, she had filed an appeal against the Secretary-General's failure to grant the requests made in her letter of 5 December 2007. She requested that she be immediately appointed to the post of Head of the Partnership and Promotion Division or, alternatively, that she be transferred, together with her post, to another service where she would be assigned duties commensurate with her grade, skills and experience. She also claimed moral and exemplary damages and costs. The Chief of the Administration and Finance Department invited the complainant to consider withdrawing her

appeal but she decided to maintain it. The Appeal Board submitted its report on 6 October 2008. It found that, as the complainant had obtained satisfaction through the Secretary-General's decision to transfer her to BDT, the appeal was not justified. It recommended that the appeal be dismissed as irreceivable. By a memorandum dated 1 December 2008 the complainant was informed that the Secretary-General had decided to endorse the recommendation of the Appeal Board. That is the impugned decision.

B. The complainant submits that the decision to “constructively abolish her post” was tainted with abuse of authority and prejudice against her. She asserts that it was not based on objective grounds or financial constraints and neither was it in the interest of the Union. In support of her assertion, she points to the fact that the Strategic Planning and Membership Department retained the number of posts it had prior to restructuring and it actually increased its budget.

She argues that by refusing to assign her directly to the post of Head of EACC, the ITU not only contravened the Tribunal's case law but also its own rules. In particular, it breached Staff Regulations 9.1b) and 9.1e), which provide that, if the necessities of the service require abolition of a post, staff members with permanent appointments should be retained in preference to those on all other types of appointments and should be offered another suitable post for which they are considered to possess the necessary qualifications. It also breached Staff Regulation 4.2a), which obliges those responsible for recruitment to take into account the desirable balance between female and male staff, as well as Resolution 48 of the 2006 Plenipotentiary Conference, according to which internal mobility should be favoured in the filling of vacancies.

Relying on the case law, the complainant contends that the treatment she received from the ITU was an affront to her dignity and reputation and showed a complete lack of respect for her person. Indeed, her staff were removed from her supervision and her duties were assigned to post 202 without prior notification or consultation, she was denied a transfer to that post despite her seniority, the changes affecting her professional standing were announced publicly and her

requests for transfer to an appropriate post were ignored. Moreover, by asking her to apply for posts rather than granting her a transfer, the Union breached a service order under which, when a post has been identified for redeployment, the incumbent is required to undergo completion of the vacancy notice procedure only if the qualifications of the vacant post correspond to a higher grade.

The complainant also contends that the ITU failed to afford her equal treatment. Whereas Mr C. was directly appointed or transferred to a different post, she was made to compete for several vacancies and was subsequently transferred to a post not commensurate with her grade, skills and experience. In addition, she refers extensively to what she considers to be evidence of the Union's malice, ill will, bias and prejudice against her which, in her view, stemmed from her identification with the former Secretary-General.

The complainant claims moral damages for the professional uncertainty and public humiliation she endured, as a result of the ITU's decision to abolish her post and its failure to assign her appropriate duties and to afford her equal treatment. She also claims exemplary damages for the moral injury and the affront to her dignity caused by the Union's malice, ill will and bias. She seeks costs and interest on all amounts at the rate of 10 per cent per annum. Lastly, she makes a request for an order for the discovery of documents.

C. In its reply the ITU submits that, as the decision of 18 January 2008 was replaced by that of 11 March 2008 and the complainant obtained satisfaction by being redeployed, the complaint is irreceivable *ratione materiae*. It also submits that the complainant's pleas regarding her new appointment, namely that it does not correspond to her grade, skills and experience, are raised for the first time in the complaint and are thus irreceivable for failure to exhaust the internal means of redress.

On the merits, the Union recalls that, according to a consistent line of precedent, restructuring decisions are subject to only limited review by the Tribunal. It explains that, contrary to the complainant's assertions, it was not her post but her functions that were abolished as a

result of the restructuring. It rejects the allegations of abuse of authority and prejudice, and argues that the restructuring and resulting adjustments in the Strategic Planning and Membership Department were based on objective reasons of efficiency and sound management and were carried out in a perfectly lawful manner.

According to the ITU, the decision to advertise the post of Head of EACC was fully in line with its rules, its constant practice and the case law. The complainant had no entitlement to a direct assignment to that post by virtue of the nature of her appointment or any other statutory benefit. Similarly, she had no absolute right of priority with respect to any given post, since such right applies only in cases where candidates possess equal qualifications. In fact, she was subsequently deemed not sufficiently qualified for post 202. Hence, her assignment, even on an interim basis, would have been contrary to the ITU's interest.

The Union strongly denies that the complainant's dignity or reputation suffered as a result of the restructuring. It points out that, notwithstanding her absence on sick leave, the complainant was fully aware of the prospective restructuring process and its implications for her department and that, from the moment she returned, every effort was made to redeploy her to duties compatible with her grade and competencies with all due respect for her reputation and dignity. It asserts that she was treated no differently than other staff members affected by the restructuring and that, unlike some of them, she was redeployed together with her post and the associated budget and was given responsibilities matching her grade, skills and experience. It therefore considers that it has fulfilled its obligations towards her and that the complainant has failed to substantiate her allegations of malice, ill will, bias, prejudice and unequal treatment.

D. In her rejoinder the complainant asserts that the complaint is fully receivable because her appeal was directed against the decision not to appoint her to the post of Head of EACC or, failing this, to a post

corresponding to her grade, skills and experience. In light of the ITU's continuing failure to appoint her to such a post, she submits that the complaint is receivable also in respect of her claims regarding her current post.

She rejects the Union's arguments on the merits, stating that the Administration made no effort to find her an appropriate post despite its obligation to do so, and that the duties assigned to her were neither commensurate with her grade and competencies nor meaningful. In her opinion, the preference afforded under Staff Regulation 9.1b) to staff members with permanent appointments is not dependent on equal qualification considerations. She concedes that her post was not formally abolished and therefore withdraws her request for the production of documents relevant to that matter.

E. In its surrejoinder the ITU maintains its position, emphasising that through her appointment as Head of the Meetings Organization and Support Service the complainant was given supervisory responsibilities fully in keeping with her grade, skills and experience.

## CONSIDERATIONS

1. The present complaint is directed against a decision of the Secretary-General, communicated on 1 December 2008, to reject as irreceivable the complainant's appeal of 7 March 2008. The complaint arises out of what is said to have been "the constructive abolition of her post". The complainant seeks substantive relief by way of moral and exemplary damages. She also applies for an oral hearing and an order for the discovery of documents. These applications are refused. So far as concerns the application for an oral hearing, the primary facts are not in dispute and the issues are well elaborated in the pleadings. As to the application for discovery, the Tribunal emphasises that "it will not order the production of documents on the speculative basis that something m[ay] be found to further the complainant's case" (see Judgment 2510, under 7).

2. In 2007, while the complainant was absent on sick leave, there was a restructuring of the ITU General Secretariat. In the course of that restructuring, two units, one headed by the complainant and the other by Mr C., were merged to form a single division, known as the External Affairs and Corporate Communication Division (EACC). The duties of the posts occupied by the complainant and Mr C. were merged into a new post, post 202. In October 2007 the complainant became aware of a vacancy notice for that new post and, upon enquiry, was informed that neither she nor Mr C. was to be appointed to it as it was open for competition. On 1 November she sent an e-mail to the Deputy Secretary-General stating that should the assigning of her duties to the new post mean that her post was abolished, she was requesting a transfer to post 202 and asking that the e-mail also be treated as an application for the new post. On the same day the Deputy Secretary-General informed her that “the management [did] not suggest to abolish [her] post”. The complainant replied on 13 November, asserting that her post “ha[d] effectively and for all practical purposes been abolished”, as Mr C. had been appointed ad interim to the new post, and asking that she be transferred to it in accordance with Staff Regulation 9.1b). There were further communications between the complainant and the Deputy Secretary-General in which she reiterated her request to be appointed to the new post and asked for detailed reasons in the event her request was refused.

3. On 21 November 2007 the complainant sent a memorandum to the Deputy Secretary-General in which she stated:

“in the event I am neither transferred nor selected to post 202, I would also request that my post [...] with new duties corresponding to my grade and competencies, along with the corresponding budget for 2008-2009, be redeployed to another service of the Union where my skills and experience can be used.”

There was no reply to that memorandum and, on 5 December 2007, the complainant formally requested the Secretary-General to review

what she described as:

“the administrative decision for

1. the abolition of my current post [...], which abolition was illusory and tainted by bias and prejudice;
2. the advertisement of post [202] instead of my transfer to it as provided for in Staff Rule 9.1.b);
3. the refusal to transfer me to post [202] after it was advertised internally and externally; and
4. not transferring me to any other post of the same grade, level of responsibility, title and other attributes and for which I possess the qualifications and skills.”

The complainant concluded:

“this request for review is sent to you within six weeks of [...] the impugned decision to irregularly abolish my post while refusing to transfer me to [post 202] or alternatively, to not redeploy my post with new duties elsewhere in the Union [...]. [I] respectfully request that I be immediately transferred to said post [202], or alternatively, that my post with new duties be redeployed elsewhere in the Union commensurate with my grade, skills, training and experience.”

4. The Deputy Secretary-General replied to the complainant’s formal request for review on 18 January 2008 informing her that she would not be transferred to post 202, which the Management had decided to advertise, and to which she would be appointed if she were the successful candidate. He also informed her that, although the responsibilities of her post and that of Mr C. had been merged in post 202, neither post had been abolished. He added that it had been decided not to transfer her to another post within the Union so as not to prejudice the selection process. There was no specific response to the complainant’s request to redeploy her post elsewhere.

5. The complainant returned from sick leave in early February 2008. On 6 February she requested that she be appointed ad interim to post 202 in accordance with Staff Regulation 9.1b) pending finalisation of the selection process. There was no reply to that

request. As it happened, neither the complainant nor Mr C. was appointed to post 202 and, on 7 March 2008, the complainant lodged her appeal. She stated in her appeal that it was “in response to the [Secretary-General’s] failure to grant her the requests made in her demand dated 5 December 2007”. She sought, by way of relief, direct appointment to a different post in respect of which she had earlier requested appointment or, alternatively, that her post be redeployed with duties appropriate to her grade, skills and experience, as well as moral and exemplary damages and costs.

6. On 12 March 2008 the Secretary-General announced, by Decision No. 13511, that the complainant and her post would be transferred to the Telecommunication Development Bureau (BDT), where it would be renumbered with a new job description.

7. In its report of 6 October 2008 the Appeal Board recommended that the complainant’s appeal be rejected on the basis that:

“The object of the appeal, the decision of 18 January 2008 [has] been cancelled and replaced by Decision No. 13511 of 12 March 2008. Whatever the reason for [this], the [complainant] obtained satisfaction [...] and her appeal is therefore not anymore justified and, as such, irreceivable.”

In conformity with that recommendation, the Secretary-General dismissed the appeal.

8. The ITU maintains that, for the reasons identified by the Appeal Board, the complaint is irreceivable. That argument involves a misreading of the complainant’s request for review of 5 December 2007 and her subsequent appeal. Although the complainant sought redeployment of her post, it was only by way of alternative relief. Both her request for review and her appeal made it clear that what was being challenged was a series of decisions as set out in the request for review, in consequence of which she was seeking moral and exemplary damages, direct appointment to the post identified in her appeal, and, only secondarily, redeployment of her post. Moreover, once her appeal was formulated to include claims for moral and

exemplary damages, it was impossible to regard her claim as having been satisfied by the subsequent decision to redeploy her post. Accordingly, her appeal was receivable, as is this complaint. At least that is so with respect to the decisions identified in the request for review of 5 December 2007. Different considerations apply insofar as the complainant now contends that the redeployment of her post did not result in the assignment of duties commensurate with her grade, skills and experience. That issue will be dealt with later.

9. As earlier indicated, the complaint is directed to “the constructive abolition” of the complainant’s post, although reference is also made in the pleadings to its abolition, as such. The expression “constructive abolition” is, presumably, used by analogy with “constructive dismissal”, which ordinarily denotes a situation in which an organisation engages in conduct such as to indicate that it no longer considers itself bound by the fundamental terms of the employment contract with the consequence that, if the employee then terminates the contract, he or she is entitled to relief on the basis that the organisation wrongfully terminated the contract. Presumably, the term “constructive abolition” is used to suggest that the complainant has the same rights and entitlements as if her post had actually been abolished. However, the analogy with constructive dismissal is not complete, there being nothing to equate with conduct indicating a failure to be bound by the employment contract. That being so, it is necessary that the present matter be analysed in terms of the transfer of functions associated with a post, and not in terms of the abolition of a post. That is not to say that some considerations relevant to the abolition of a post are not also relevant to the transfer of functions.

10. It is well settled 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 2510, under 10, and 2856, under 9). The complainant contends that the decision to abolish the functions associated with her post and to assign them to a new post was not justified on objective grounds and was based on malice,

prejudice, bias and ill will. Although the complainant contends otherwise, the reorganisation, so far as it concerned the functions previously performed by her and by Mr C., had a sound basis in terms of management and efficiency. There is no basis for implying any improper purpose by reason only of that reorganisation. And that is so even if, as the complainant contends, the reorganisation did not result in a reduction of staff in the department in which she worked prior to the reorganisation, or a decrease in its budget. Although these circumstances will ordinarily give rise to a presumption that there has been only a redistribution of functions and not a real abolition of posts, they cannot give rise to a presumption of improper purpose where, as here, the reorganisation was effected throughout the General Secretariat, and not merely in the department in which the complainant worked.

11. As in her early correspondence with the Deputy Secretary-General, the complainant argues that she was entitled to direct appointment to the new post, or other available P.5 posts, in accordance with Staff Regulations 9.1b) and 9.1e). Those provisions are concerned only with the abolition of a post. The complainant's post was not abolished and, thus, they are of no relevance. The complainant also relies on Staff Regulation 4.2a), which is concerned with the recruitment of staff and requires that "preference [...] be given, other qualifications being equal, to candidates from regions of the world which are not represented or are insufficiently represented, taking into account the desirable balance between female and male staff". That provision does not require direct appointment to a post, whether ad interim or otherwise. And insofar as the complainant relies on it to raise issues concerning her non-selection for advertised posts for which she applied, she has not established that her qualifications were equal to those of selected candidates. Besides, she has not challenged the decisions appointing those candidates to the posts in question. The complainant also relies on the terms of particular parts of Resolution 48 of the 2006 Plenipotentiary Conference which encourage internal mobility in the filling of vacancies. Those provisions do not require direct appointment to a post, or the selection

of internal candidates for a particular post. Accordingly, the complainant's argument that she should have been directly appointed to the new post or other available P.5 posts, whether ad interim or otherwise, must be rejected.

12. The complainant also argues that her treatment in connection with the reorganisation that occurred was an affront to her reputation and dignity. There is no doubt that decisions with respect to staff members, particularly those involving transfer or the assignment of new or different functions, must show "due regard, in both form and substance, for the dignity of the official concerned, particularly by providing him with work of the same level as that [previously] performed [...] and matching his qualifications" (see Judgment 2229, under 3(a)). In support of her argument, the complainant points to the failure to consult her with respect to the transfer of her duties and of the staff under her supervision or to give her any prior notice of these matters, the ad interim appointment of Mr C. to the new post, the failure to transfer her to that post or other available P.5 posts thus obliging her to apply for advertised posts and the selection of an external candidate, who was previously her deputy, to fill the new post 202. She also claims that she was not assigned duties and responsibilities commensurate with her grade, skills and experience following the redeployment of her post.

13. It is true that the complainant was neither consulted nor given previous information as to the transfer of her functions to the new post or the transfer of her staff to the new division. Although details of the restructuring were placed on her desk, they did not come to the complainant's notice as she was absent on extended sick leave. In these circumstances, the failure to consult with or inform the complainant cannot be regarded as an affront either to her good name or her dignity. And as already explained, the complainant's post was not abolished – a fact made clear to her within days of her learning of the transfer of her duties to the new post – and she thus had no entitlement to direct appointment to that post or any other post. Accordingly, the fact that she was not so appointed cannot be regarded

as an affront to her dignity or good name. Her argument in that regard is not advanced by reference to the appointment of Mr C. ad interim to the new post. That, too, occurred while the complainant was absent on extended sick leave and she could not reasonably expect in those circumstances to have been appointed ad interim. Nor is the argument advanced by the fact that her former deputy was the successful candidate for the new post. In that regard, the complainant has not established that their qualifications were equal and that thus she was entitled to preference in appointment.

14. The complainant makes two further arguments in support of her claim that her dignity was affronted and her good name tarnished. The first is made by reference to a service order which is concerned with redeployment following abolition of a post. As the complainant's post was not abolished, that service order is of no relevance and cannot possibly lead to the inference for which the complainant contends, namely, that the Administration considered her unqualified for the posts in respect of which she sought a direct transfer. The other matter relied upon by the complainant is a claim that she was not assigned duties in keeping with her grade, skills and experience. That claim clearly relates to the duties assigned to her post after its redeployment. However, the decision to redeploy her and her post was a separate decision taken after the complainant lodged her appeal. As that decision was not the subject of that appeal, the complainant has not exhausted internal remedies with respect to that decision and claims based on it are irreceivable.

15. The complainant also claims that the various decisions that were the subject of her internal appeal "were based on malice, prejudice, bias and ill-will" and involved unequal treatment. To the extent that her argument to that effect is based on the propositions that she was entitled to direct appointment to vacant P.5 posts and/or preference in appointment to advertised posts, it must be rejected for the reasons already given. Similarly, and for the reasons already given, the argument is not supported by the claim that the restructuring did not result in a reduction of posts or a decrease in the budget of the department, in which the complainant previously

worked, and neither is it supported by the claim that the Administration failed to consult with or inform her of the changes involved in the restructuring of the Secretariat while she was absent on extended sick leave.

16. The complainant makes a number of other claims which, according to the argument, support an inference of bias, malice or ill will. She claims that she was the victim of hostility because of her identification with the former Secretary-General. However, she adduces no evidence in support of that assertion. She also points to the removal of her functions as Deputy Chief of Department in August 2007. This was apparently part of the reorganisation and, thus, does not lead to the inference claimed. She also claims to have been the victim of unequal treatment in that Mr C. was directly appointed or transferred without being required to compete for an alternative position. Although Mr C. was in the same factual situation as the complainant insofar as the duties of his post were also transferred to the new post 202, the complainant has not established that she was equally well qualified for any of the posts to which he was appointed. Moreover, the complainant was directly redeployed without need to apply for the post to which she was redeployed. Nor has the complainant established that she was in the same position in fact and in law as any other person who was directly appointed to a post.

17. It is also argued that bias, malice and ill will are to be inferred because she was not assigned duties and responsibilities appropriate to her grade, skills and experience following the redeployment of her post. Although the redeployment decision is not within the scope of this complaint, subsequent events may well be relevant to the question of bias or other improper purpose. However, the responsibilities of her post were subsequently evaluated as “consistent with P5 level” and, in these circumstances, it is not possible to infer bias or other improper motive.

18. The complainant also contends that bias, malice and ill will are to be inferred from her removal, without prior notification, as an

alternate member of the Appeal Board and of the Classification Review Board. These decisions, one of which was taken by the former Secretary-General and the other by his successor, were taken prior to the restructuring in question and, standing alone, do not support the inference for which the complainant contends.

19. Although the complaint is receivable, the complainant has failed to establish any of her claims. Accordingly, the complaint must be dismissed.

### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet