

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**ITU**

**134th Session**

**Judgment No. 4518**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. M. against the International Telecommunication Union (ITU) on 27 April 2020 and corrected on 28 May, ITU's reply of 1 September, the complainant's rejoinder of 30 November 2020, ITU's surrejoinder of 12 March 2021, the complainant's additional submissions of 21 May and ITU's final comments thereon of 28 June 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the application for a hearing submitted by the complainant;

Considering that the facts of the case may be summed up as follows:

The complainant challenges his non-appointment to a fixed-term position and the non-renewal of his short-term contract. He further challenges the organisation's refusal to conduct an investigation into the allegations of harassment made against him which, according to him, form the basis of the non-appointment and non-renewal decisions.

The complainant first worked for ITU as an external collaborator from August 2015 to January 2017. In February 2017, he joined ITU under a short-term contract as a Programme Coordinator at grade P.3. This contract was subsequently renewed several times.

On 24 September 2018 a vacancy notice was published for the post of Programme Coordinator at grade P.3 under a two-year fixed-term appointment. The complainant, who was already carrying out the duties of a Programme Coordinator, applied for that post.

By an e-mail of 23 November 2018, the Human Resources Management Department (HRMD) provided the complainant with updates on his contractual situation. He was informed that the contract under which he was then working – covering the period from 15 January 2018 to 14 December 2018 – would be shortened to 16 November 2018, and that a contract break had been scheduled from 17 November to 2 December 2018 considering his previous periods of short-term contracts. Furthermore, HRMD informed the complainant that he had been offered a new period of contract after this break from 3 December 2018 to 28 February 2019. It was also indicated to him that in accordance with the Policy on Short-term Contracts, he would have reached the maximum period of 23 months assigned to the same functions on 28 February 2019.

On 24 January 2019 the complainant was recommended for selection to the P.3 fixed-term position advertised in September 2018.

After the expiry of his contract on 28 February 2019, the complainant's appointment was extended for three additional weeks until 22 March 2019.

On 15 March 2019 the complainant was allegedly informed orally that he would not be offered the P.3 position because a harassment complaint had been filed against him in January 2019.

By an e-mail of 22 March 2019, in response to the complainant's inquiries regarding the renewal of his contract expiring on the same date, the Director of HRMD stated that he could not provide him with an answer before the Secretary-General had taken a decision. On that same day, the complainant sent a memorandum to the Secretary-General requesting an investigation into the accusations made against him and explaining that his employment at ITU was at stake.

The complainant separated from service on 22 March 2019.

Having received no reply to his memorandum, the complainant engaged a legal counsel who, on 4 April 2019, sent a letter asking for an amicable settlement through the direct appointment of the complainant to the P.3 fixed-term position for which he had applied.

By memorandum of 8 May 2019 the Director of HRMD informed the complainant that his last contract could not have been extended because he had reached the maximum period of employment under a short-term contract. Regarding the selection procedure for the P.3 fixed-term position, the Director of HRMD pointed out that it was still under way. He further informed the complainant that a preliminary investigation into the harassment allegations made against him had been carried out and that according to the report dated 4 March 2019 a number of pieces of tangible evidence led to the conclusion that the allegations brought forward were established as serious and credible. Having weighed all the legitimate interests at stake, the Secretary-General took the view that it was not appropriate to initiate a full-fledged investigation and that it was preferable that the complainant's appointment should come to an end upon the expiry of his short-term contract.

On 8 July 2019 the complainant lodged an internal appeal with the Appeal Board.

On 23 September 2019 the complainant was notified of the cancellation of the vacancy notice for the P.3 fixed-term post.

In its report dated 2 December 2019, the Appeal Board concluded that the non-renewal of the complainant's short-term contract was not unlawful, as he had been informed of the end date of this contract and a prolongation would have been contrary to the relevant staff rules and regulations. Regarding the non-appointment to the P.3 fixed-term post, the Appeal Board considered that although the complainant had every reason to assume that he would be successful, the non-appointment decision was not unlawful. The Appeal Board also found that the allegations of harassment had an adverse impact on the complainant's candidature and that he had not been given the opportunity to defend himself. It therefore recommended that Secretary-General should proceed immediately with a formal investigation and should consider appointing

the complainant to the P.3 post or an alternative post should the investigation conclude that the allegations were not borne out.

By letter of 29 January 2020 the complainant was informed of the decision of the Secretary-General to launch a formal investigation into the harassment allegations made against him and, once the investigation was completed, to consider appropriate measures in light of its conclusions. The Secretary-General however considered the complainant's internal appeal irreceivable insofar as it concerned his non-appointment to the P.3 post, as there was no final appealable decision. Although the complainant's appointment to that post had been recommended, this recommendation had not been implemented. That is the impugned decision.

On 4 March 2021 HRMD forwarded to the complainant the final investigation report, dated 31 January 2021, which concluded that the allegations of harassment made against him were not substantiated.

The complainant asks the Tribunal to quash the impugned decision with full legal and retroactive effect and to find that the decisions not to renew his contract and not to appoint him to the P.3 post were unlawful. The complainant further asks the Tribunal to find that the decision to initiate a preliminary investigation and the decision not to initiate a proper investigation into the allegations of harassment against him at the relevant time were unlawful and in breach of the duty of care. He asks to be reinstated to the position he occupied when his contract was terminated in March 2019, with full retroactive payment of all benefits and any other emoluments he would have earned since then as well as pension contributions. Alternatively, the complainant asks to be paid an amount equal to the salary corresponding to the initial duration of the P.3 position to which he should have been assigned – which is two years – including all emoluments and other benefits as well as pension contributions. The complainant seeks moral damages in the amount of 250,000 United States dollars for the illegal tacit impediment to his right to career progression and for the prejudice to his personal and professional reputation. He also claims costs, interest at the rate of 5 per cent per annum on all sums due from May 2019 until such sums are fully paid, and such other relief as the Tribunal deems necessary, fair and just.

ITU asks the Tribunal to find that it is not practicable to foresee – let alone quantify or implement – which measures would be appropriate for the Secretary-General to adopt before the ongoing investigation is completed. In its surrejoinder and final submissions, ITU asks the Tribunal to find that the complaint is only receivable to the extent that it concerns the decision not to renew the complainant's contract beyond 22 March 2019. Alternatively, should the Tribunal consider the complainant's challenge to the non-selection decision to be also receivable, ITU asks the Tribunal to find that it was properly made.

#### CONSIDERATIONS

1. In his internal appeal, dated 8 July 2019, the complainant challenged the decision not to extend his short-term contract when it expired on 22 March 2019. He also challenged the decision not to appoint him to the P.3 post for which he had applied and for which he had been recommended by the Selection Committee. He alleged that by those decisions the Administration acted unlawfully and in bad faith and that the decisions were made on an unlawful finding of misconduct based on allegations of harassment against him which were not formally investigated as required, violating his due process rights and the applicable standard of proof. He also contended that the decisions were arbitrary and in breach of ITU's duty of care towards him. He requested the Appeal Board to set aside those decisions and to recommend that he be reinstated to the position which he occupied when his last short-term contract ended. Alternatively, he requested the Appeal Board to recommend that ITU should pay him all salaries and other benefits for the two-year period during which he should have been appointed in the P.3 post for which he had applied. He also requested the Board to recommend the immediate initiation of a proper investigation into the harassment allegations, the payment of damages with 5 per cent interest from May 2019 to the date on which all amounts awarded are fully paid, and an award of costs.

2. In the decision, dated 29 January 2020, which the complainant impugns, the Chief, HRMD, informed him that the Secretary-General had accepted the Appeals Board's recommendation to proceed immediately with the formal investigation of the harassment investigation pursuant to the applicable Guidelines, particularly Service Order No. 19/10 entitled "ITU Investigation Guidelines". The Chief, HRMD, further stated that once the investigation was completed the Secretary-General "will consider any appropriate measures in light of the conclusions of the investigation".

3. Regarding the complainant's allegations concerning the non-renewal of his short-term contract, the Appeal Board concluded, correctly, that any further renewal would have been unlawful pursuant to Service Order No. 09/06, entitled "Policy on Short-Term Contracts", which limited such contracts to a maximum of twenty-three months, which the complainant had already served. Accordingly, the complainant's submissions supporting his claim that the decision not to renew his short-term contract was unlawful are unfounded.

4. The Appeal Board correctly observed that the allegations of harassment against the complainant adversely affected his candidature for the advertised P.3 post. It accordingly recommended the initiation of the formal investigation into the allegations. At the material time, paragraph 15 of the ITU Policy on Harassment and Abuse of Authority, contained in Service Order No. 05/05, required the Secretary-General to launch a formal investigation once a harassment complaint was lodged. The policy contained no provision that permitted a decision to be made on a mere preliminary assessment of a complaint. Additionally, the Appeal Board recommended that if the investigation concluded that the allegations against the complainant were not proved, ITU should consider appointing the complainant to the P.3 post for which he had applied or to an alternative P.3 post in the Telecommunication Standardization Bureau (TSB), bearing in mind the best interest of ITU. It further recommended that the complainant be paid financial compensation as appropriate.

5. However, in the impugned decision, the Secretary-General rejected the Board's recommendations concerning the complainant's non-appointment to any P.3 post. He decided that this aspect of the complainant's claim was irreceivable because the Appeal Board had stated that "the appointment procedure was almost completed" (emphasis added) and that "the Secretary-General did not implement the recommendation" to appoint the complainant to the subject post. This was plainly wrong, as is ITU's repetition that this claim is irreceivable in these proceedings.

6. Noteworthily, while, on the one hand, ITU asserts that there was no decision to make an appointment to the subject P.3 post, it is plain from the organization's submissions that the complainant was not appointed to fill it because of the allegations of harassment made against him. Thus, ITU sets out the context in which the Secretary-General "did not deem fit" to appoint the complainant "by making a final appointment decision" in part in the following terms: "It is true that the Administration took cognizance of the preliminary assessment report in early March 2019. The conclusion of this report was that the allegations brought against the [c]omplainant were serious and credible. The implications of this were that, as a matter of good management and without prejudging the [c]omplainant's conduct, [ITU] was bound to bear in mind factors such as [...] the need to consider taking precautions to preserve the well-being of staff members in TSB (given the nature of the allegations, especially of female staff members), or to keep a harmonious working atmosphere in the [...] service [...]". ITU has also stated that it was in this context that "the Secretary-General deemed [it] appropriate to put on hold the filling of the P.3 post [...]".

7. It is therefore evident that the complainant was not appointed to the advertised P.3 post because the harassment allegations appeared to be serious and credible on a preliminary assessment although the applicable ITU Policy on Harassment and Abuse of Authority provided no legal basis for such an assessment. It is recalled that according to the Tribunal's case law, stated in consideration 2 of Judgment 4153, for example, the decision of an international organization to make an appointment is within the discretion of its executive head and that such

a decision is subject to only limited review. However, such a decision may be set aside if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of law or fact, or if some material fact was overlooked, or if there was an abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. Anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever her or his hopes of success may be.

8. The Secretary-General's acceptance of the recommendation to investigate the harassment complaint against the complainant and his statement, in the impugned decision, that once the investigation was completed, he would consider any appropriate measures in light of the conclusions of that investigation, meant that he would have taken disciplinary measures against the complainant if the allegations were proved. It also meant that he would have made a decision concerning the complainant's appointment or appropriate compensation if the investigation exonerated him. Accordingly, no issue of receivability arose concerning the non-appointment of the complainant to the subject post. The impugned decision will be set aside to the extent that it was decided therein that the complainant's claim concerning his non-appointment to the advertised P.3 post was irreceivable.

9. The parties informed the Tribunal that the investigation has been completed. ITU states that it was conducted by an independent and highly qualified investigator who found that none of the allegations against the complainant was substantiated. However, the Secretary-General has made no decision on the complainant's claim that the decision not to appoint him was unlawful. Noteworthy, ITU states that in September 2019 it was decided to assign the post previously advertised to different functions which implied a decision not to select the complainant, who was informed on 23 September 2019. This statement ignores the Appeal Board's recommendation that if the allegations of harassment against the complainant were not substantiated ITU should

also consider appointing him to another P.3 post or to compensate him. ITU's further statement to the effect that the complainant needed to challenge the supposed implied decision, which he was informed of on 23 September 2019, is disingenuous. It merely diverts attention from the issue whether the decision not to appoint the complainant to the subject post was unlawful, as it clearly was. The cancellation of the recruitment process for the advertised post in September 2019 did not cure the unlawfulness.

10. ITU's statements, referred to in the foregoing consideration, suggest that ITU will not appoint the complainant to a P.3 post, as the Board had recommended. Neither has ITU considered compensating him in lieu thereof. In September 2019 the Administration cancelled the Vacancy Notice for the post for which the complainant had applied. Whilst in the circumstances of this case it would be impracticable to order the complainant's reinstatement, ITU will be ordered to compensate him because he was denied the opportunity to be appointed to the advertised post on a two-year contract in circumstances where he was the only candidate whom the Director of TSB and the Chief of Department had on 24 January 2019 recommended to fill the post after the selection procedure. But for the unsubstantiated allegations, it is very difficult to avoid the conclusion that he would have been appointed.

11. The complainant is therefore entitled, by way of material damages, to the salary and other benefits which he would have received had he been appointed to the subject post for a period of two years commencing on 23 March 2019 – the day following his separation from service – less any income he received from other employment during that same period. The complainant will also be awarded moral damages for the harm to his professional reputation and to his dignity which he demonstrates, to the Tribunal's satisfaction, he suffered as a result of the unlawfulness of the decision. The Tribunal assesses those damages at 10,000 United States dollars. He is also entitled to an order of costs for which the Tribunal will award 8,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision dated 29 January 2020 is set aside to the extent stated in consideration 8 of this judgment.
2. ITU shall pay the complainant material damages equivalent to the salary and other benefits which he would have received had he been appointed to the subject post for a period of two years from 23 March 2019 to 22 March 2021 less any income he received from other employment during that same period.
3. ITU shall pay the complainant moral damages in the amount of 10,000 United States dollars.
4. ITU shall pay the complainant costs in the amount of 8,000 United States dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ