

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

119th Session

Judgment No. 3438

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. S. against the International Telecommunication Union (ITU) on 25 October 2012 and corrected on 5 December 2012, the ITU's reply of 11 April 2013, the complainant's rejoinder of 16 July and the ITU's surrejoinder of 16 October 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. The complainant, who entered the ITU's service in 2000, received a permanent appointment in May 2007. In order to undertake some academic research in the field of telecommunications, at her request she was placed on special leave without pay from 3 January 2008 until 3 January 2009. In November 2008 her leave was extended until 15 February 2009, at which point she was informed that this would entail a loss of the link with her previous, grade P.3 post of policy analyst.

The complainant returned to active service on 16 February 2009 and was provisionally assigned within her former department to a post which did not match her profile. From 14 to 28 September she was granted special leave with pay to enable her to prepare and defend

her doctoral thesis. On 2 October she asked without success to be transferred directly to either of the two grade P.3 posts for which she had applied in the Telecommunication Standardization Bureau. As it proved impossible to identify a post to which the complainant could be redeployed after her temporary assignment ended on 31 October 2009, that assignment was extended until 31 January 2010. In December 2009 the complainant again requested a direct transfer or, failing that, special leave without pay from 1 February 2010 until 1 May 2011 on personal grounds and because she wished to pursue her research and teaching activities in the field of telecommunications. She was granted this leave at the beginning of January 2010.

The complainant was selected to fill one of the two above-mentioned grade P.3 posts and she was asked to take up her duties on 17 May at the latest. Since she could not be available before 23 August 2010, the offer was withdrawn. In February 2011 the complainant's special leave was extended until 30 November 2011, at her request. During that period the complainant regularly enquired about progress towards finding possible positions with a view to her returning to active service, continued to apply for vacant posts, announced that she was flexible and said that she could return to work on 12 December. On 26 September 2011 the Chief of the Human Resources Management Department sent chiefs of departments and bureau directors a memorandum asking them to consider the complainant for any suitable vacant post in line with her competencies.

As from 19 October the complainant sent the Secretary-General a series of requests that he review a number of decisions, implied or otherwise, rejecting her candidature, including for posts subject to a selection procedure.

In a memorandum of 5 December 2011 chiefs of departments and bureau directors were invited to give the complainant's candidature priority when she met the criteria in the vacancy notice for a position for which she had applied and when her qualifications and competencies were at least equal to those of other shortlisted candidates. On the same date the Chief of the Human Resources Management Department, noting that the reintegration process had not been successful, wrote to the

complainant to inform her that it was impossible to grant her the special leave with pay which she had requested, since it was not in the organisation's interests. She proposed that the complainant should choose between either a one-year extension of her special leave without pay, in order to enable the ITU to pursue its efforts to reintegrate her, or a termination procedure. As the complainant opted for the first possibility, on 9 December 2011 her leave was extended until 11 December 2012. On 11 January and 9 May 2012 the attention of the chiefs of departments and bureau directors was again drawn to the complainant's situation.

In the meantime, on 23 February 2012, as her various requests for review had been rejected, the complainant submitted an appeal to the Appeal Board. In his reply of 30 March the Secretary-General held that the appeal was irreceivable on several grounds, in particular because it was directed against the decision of 9 December 2011 and various selection procedures and those decisions did not adversely affect the complainant. On 13 April the complainant asked for permission to file a rejoinder in order to respond to these objections to receivability, but her request was denied on the grounds that the Staff Regulations and Staff Rules made no provision for this possibility. On 30 March she had again asked the Secretary-General to review the decisions rejecting her applications for a number of positions. On 4 May she filed a "supplementary appeal" with the Appeal Board against the denial of that request, to which the Secretary-General replied on 31 May.

In its report of 11 June 2012, the Appeal Board concluded that the complainant should be directly reintegrated as soon as possible in a post matching her competencies and that, in the meantime, she should be given a temporary assignment. It considered, however, that in view of her conduct, there were no grounds for allowing her claim for compensation for moral injury. In addition, it recommended that the ITU should supplement the provisions governing special leave. In a letter of 26 July 2012, which constitutes the impugned decision, the complainant was informed that the Secretary-General had decided to uphold all the disputed decisions.

B. The complainant submits that her complaint is receivable, particularly because making a post subject to a selection procedure amounts to a refusal to reintegrate her, and because the decision to keep her on special leave without pay was indeed a decision adversely affecting her. She taxes the members of the Appeal Board with “incompetence” and bias and in consequence infers that her right to an effective internal appeal was breached. She also contends that her right to be heard was breached because her request to file a rejoinder in proceedings before the Board was refused.

On the merits the complainant accuses the ITU of bad faith and maintains that her right to return to active service was breached. She argues that the ITU infringed the principles of legal certainty and mutual trust by making her reintegration subject to conditions not contained in any text.

She requests the setting aside of the impugned decision, her effective reintegration as soon as possible, special leave with full pay backdated to 12 December 2011, restoration of all her rights as from 1 February 2010 or 1 May 2011 at the latest, and interest on the sums due. She requests compensation for moral injury on account of the breach of trust of which she was the victim and the insulting language used by the ITU with reference to her in the proceedings before the Appeal Board. She claims costs in the amount of 12,000 euros and asks the Tribunal to find that, should the sums awarded be subject to national taxation, she would be entitled to a refund of the tax paid from the ITU.

C. In its reply the ITU informs the Tribunal that on 8 January 2013, just as a termination procedure was about to be initiated, the Secretary-General approved the complainant’s appointment to a position for which she had applied, and that she took up her duties on 20 February 2013. In view of these developments, ITU is of the view that the complaint should now be regarded as being directed only at the request for compensation for alleged injury due to a breach of the duty to reintegrate the complainant and the decision taken in the organisation’s

interests not to grant the complainant special leave with pay as from 12 December 2011.

The ITU reiterates some of its submissions in the proceedings before the Appeal Board in an endeavour to show that the complaint is irreceivable on several grounds. It adds that the complainant's claim that her rights should be restored for the period 1 February 2010 and 1 May 2011 is irreceivable, because it is entered for the first time in the proceedings before the Tribunal.

The ITU asks the Tribunal to rule on the complainant's insulting and defamatory allegations regarding the Appeal Board. It says that the applicable texts make no provision for the filing of a rejoinder in proceedings before the Board, but that it is plain from the Tribunal's case law that the complainant's right to be heard has not been breached, because she has been able to reply to the ITU's arguments in the complaint which she has filed with the Tribunal.

On the merits the ITU explains that since there are no rules on the reintegration of a staff member who, after a year, has lost any link with his or her post when special leave expires, a practice reconciling the interests of the staff member and those of the organisation had been devised. In the instant case, it maintains that it has only an obligation of endeavour. A staff member must be reintegrated in a post matching his or her grade and qualifications, and this may be done directly or through a selection process, depending on the organisation's interests. Current policy tends more towards holding a competition in order to recruit persons possessing the highest standards of competence and integrity, in accordance with Article 27, No. 154, of the ITU Constitution. A staff member has the right to be chosen in preference to other candidates only if he or she has equivalent qualifications and competencies.

The ITU endeavours to show that, in its actions, it displayed all the requisite care for the complainant, that the language which it used with reference to her in the proceedings before the Appeal Board did not exceed the bounds of what is acceptable in the context of legal proceedings and that there is no reason to grant her any compensation.

D. In her rejoinder the complainant maintains all her claims, except those concerning her return to active service. She explains that the ITU is wrong to refer to Article 27, No. 154, of its Constitution, because that article concerns the recruitment of staff and the determination of conditions of service.

E. In its surrejoinder the ITU notes that in Judgment 3223, in another case concerning it, the Tribunal found that staff members did not have an automatic right to file a rejoinder with the Appeal Board.

CONSIDERATIONS

1. The relevant provisions of ITU Staff Regulation 5.2, which deals with special leave, read as follows:

“Regulation 5.2 Special leave

1. Special leave with full or partial pay or without pay may be granted in exceptional cases, for such periods as the Secretary-General may prescribe, taking into account the interests of the Union, to staff members who so request. Special leave is normally without pay. In very exceptional circumstances, special leave with full or partial pay may be granted only for a very limited duration.

2. a) Special leave may be granted for advanced study or research in the interest of the Union, in cases of extended illness, or for any other important reason.

[...]”

2. The complainant entered the service of the ITU in 2000 and was given a permanent appointment on 4 May 2007. She was granted special leave without pay for one year, starting on 3 January 2008, in order to take part in academic trainings and activities. This special leave was extended until 15 February 2009 at her request. At that juncture she was informed that this extension beyond one year would entail the loss of the link with her previous post.

On returning from leave the complainant was directly assigned to a position at the same grade as that of her previous post. This assignment was to last until 31 October 2009 pending her assignment

to more appropriate duties. Before that date was reached, the complainant was granted special leave with pay from 14 to 28 September 2009 to defend her doctoral thesis. Her temporary assignment was then extended until 31 January 2010, as the organisation had not agreed to transfer her directly to either of the two posts for which she had applied. The complainant was again granted special leave without pay from 1 February 2010 to 1 May 2011 in order to be able to teach at a university.

She had, however, applied for two advertised posts which were of interest to her. Although she was informed on 30 March 2010 that she had been selected for one of those two posts, she could not be appointed because, for family and personal reasons, she was unable to take up her duties until August, a situation which the organisation was not in a position to accept.

Her special leave without pay was therefore extended until 30 November 2011.

3. As suggested by the organisation, the complainant applied for a number of other vacant posts. On 23 September 2011, as agreed, she informed the organisation that she would be available as from 12 December, at the end of a term at the university where she was lecturing.

The ITU advised her that it was doing its best to find her a suitable position. It invited her again to apply for vacant posts and told her that a termination procedure would be opened if she could not be assigned to a new position before 12 December 2011 when her special leave would end.

4. On 19 October and 30 November 2011 the complainant requested a review of various implied decisions not to redeploy her in vacant posts which had been advertised, and a review of explicit decisions rejecting her candidature following selection procedures.

As the reintegration process proved unsuccessful owing to the lack of an available post matching the complainant's qualifications and competencies, on 5 December 2011 the ITU informed her that her request for special leave with pay had been rejected, since such leave

was contrary to the organisation's interests. It offered her another one-year extension of her special leave without pay to enable the ITU to pursue its efforts to reintegrate her. If she did not accept this solution, a termination procedure would have to be opened. This procedure would be broken off if, in the meantime, the reintegration process proved successful. The complainant criticised the proposed solution and was sceptical that every possible effort had been made to find her a post, but she nevertheless accepted the extension of her special leave without pay until 11 December 2012, since the organisation had confirmed that she was free to pursue her outside research and teaching activities.

5. On 23 February 2012 and 4 May 2012 the complainant appealed against the decisions of the ITU Secretary-General rejecting her requests for review of 19 October and 30 November 2011 and those which she had filed against the rejection of her various applications for posts.

On 11 June 2012 the Appeal Board recommended inter alia that the Secretary-General should transfer the complainant directly to a vacant post matching her qualifications and competencies. More generally, it recommended supplementing the provisions on special leave and clarifying the terminology in the Staff Regulations and Staff Rules pertaining to the notions of job, post, reinstatement and transfer in relation to redeployment. On the other hand, it suggested that the complainant's claim for compensation for moral injury should be dismissed on the following grounds:

“D. The alleged moral injury

The Board finds that the appellant does not offer proof of a cause and effect relationship between the situation which she initially accepted and then challenged and the alleged injury.

The Board notes that, through her conduct, in particular by breaking off a selection procedure which might have been successful and by refusing to accept the proposed date for taking up her duties, the appellant failed to take advantage of the opportunities for reintegration which she was offered, although she had a reasonable chance of being selected for the posts for which she had applied.

The Board also notes that the appellant asked for extended leave in order to pursue her professional lecturing activities and that these requests have further complicated her administrative situation.

The Board therefore concludes that there is no reason to allow this claim.”*

By a decision of 26 July 2012 the Secretary-General dismissed the appeals and upheld all the disputed decisions. He pointed out that the complainant had maintained her request for an extension of her special leave, even though her attention had been drawn to the loss of the link with her post that such an extension would entail.

6. On 8 January 2013, after the filing of the complaint with the Tribunal, the Secretary-General approved an internal recommendation that the complainant should be appointed to a post for which she had applied. On 20 February 2013 she returned to the organisation’s service in order to take up that post.

7. The complaint seeks the setting aside of the aforementioned decision of 26 July 2012. Since the request for reintegration is moot, the only claims still requiring consideration are those that the complainant’s “full rights to her salary and pension” should be restored “as from 1 February 2010 or 1 May 2011 at the latest”, with “interest on the sums due”, and that she should be awarded compensation for moral injury and costs.

8. The complainant submits that she was deprived of an effective internal appeal. In her opinion, the membership of the Appeal Board and the manner in which it functions made it impossible for that body to provide a thorough statement of the reasons for its opinion, or to arrive at them independently.

The Tribunal will not respond to the complainant’s general criticism of the Appeal Board. It is sufficient to note that there is nothing in the file to show that the Board failed to give thorough consideration to the dispute submitted to it, or that it did not objectively examine all the submissions and documents presented by both parties.

* Registry’s translation.

Given that the Board recommended that the Secretary-General should appoint the complainant directly – which the ITU had always opposed – and that rules and regulations should be adopted to prevent the recurrence of such a complicated situation, the complainant’s allegation that the Board lacks independence vis-à-vis the Secretary-General is hardly justified.

This plea, which the Tribunal finds to be intemperate and improper, is therefore devoid of merit.

9. The complainant also contends that her right to be heard was breached, as she was deprived of her right to file a rejoinder to the ITU’s reply to her internal appeal.

The procedure of the Appeal Board is governed by Staff Rule 11.1.1. Under paragraph 4 thereof a staff member must set down his complaints in writing and send them to the Chairman of the Appeal Board and the Secretary-General is invited to reply to them. No provision is made for any other exchange of written submissions before the Appeal Board’s deliberations. As the Tribunal has already had occasion to find, while this rule makes no provision for a second exchange of written submissions, it does not 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 (see Judgment 3223, under 6).

The complainant expressly asked for authorisation to file a rejoinder, which she was refused. In addition, she was informed that the Appeal Board could decide to order oral proceedings in the presence of the parties, if necessary. This procedure might appear open to criticism in view of the nature of the questions put to the internal appeal body which, it acknowledged, were complex. However, the complainant lodged a second appeal (the “supplementary complaint”) which, although it concerned other decisions rejecting her candidature, raised similar issues. The procedures for examining these appeals were joined and the Appeal Board gave a single opinion on all the matters raised by the complainant, who commented so extensively on the Secretary-General’s objections that most of her submissions to the Tribunal have

been thoroughly debated by the parties in the internal appeal proceedings. In these circumstances, it would be excessively formalistic to find that there has been a breach of the right to be heard in this case.

This plea therefore also fails.

10. The circumstances of the case are unusual in that special leave without pay initially lasting for one year was extended on several occasions for a total of five years, interrupted by a provisional return to work for a period of slightly less than a year. Some of these extensions were granted at the request of the complainant, who wished to gain further academic training, to lecture at university and to shoulder family responsibilities. But, to a great extent, they were also necessitated by obstacles to her return to active service, the greatest of which was the ITU's refusal to effect this reintegration on the grounds that the complainant had lost any link with her previous post when her special leave was first extended beyond one year.

As the complainant returned to active service on 20 February 2013, the main question is whether the refusal to reintegrate her earlier, by direct assignment, involved a breach of the applicable provisions of the ITU's Staff Regulations and Staff Rules.

11. Under Staff Regulation 5.2, paragraph 1, special leave with or without pay may be granted in exceptional cases to staff members who so request, for a limited duration, taking into account the interests of the ITU. The complainant's first special leave was granted to her for one year in order that she might undertake advanced study or research in the Union's interests, within the meaning of Staff Regulation 5.2. The organisation agreed to extend this leave for one and a half months on the same grounds. The decision granting this extension clearly indicated that it would entail the loss of the link with the complainant's previous post.

The ITU acknowledges that none of the Staff Regulations or Staff Rules establishes conditions for the reintegration of a staff member on special leave who has lost the link with his or her previous post. It explains that the practice it has devised in this respect stems from the

need to reconcile the staff member's interests in returning to active service and the organisation's interests in ensuring the smooth operation of services. It does not dispute the right of a staff member on special leave to be reintegrated within the organisation, but submits that this right is different in nature when that person's link with his or her previous post has disappeared. In other words, if this link still exists, on returning from his or her special leave the staff member must be directly assigned to his or her post, or an equivalent post, without having to go through a selection procedure. If this link has disappeared, the organisation still has a duty to reintegrate that person, but this is now an obligation of endeavour and no longer an obligation of result. It therefore no longer has a duty to appoint that staff member directly to an available post, but a duty conscientiously to make all the efforts which may be required of it to ensure that the person concerned finds a position in line with his or her competencies.

12. The Tribunal considers that this solution takes reasonable account of the interests of the staff member who has obtained special leave for a fairly long period of time during which it can happen, for example, this his or her post is abolished or that restructuring takes place with the result that an equivalent post cannot be identified immediately. The attention of the person concerned must be duly drawn to this possibility when he or she requests such leave. This solution also meets the legitimate interests of the organisation, which are protected by the principles governing appointments, transfers and promotions set forth in Staff Regulation 4.1 on the basis of Article 27, No. 154, of the ITU Constitution. These provisions state the necessity of securing for the ITU the service of persons possessing the highest standards of efficiency, competence and integrity.

13. In the instant case, the complainant's appointment was not terminated under duress and she was not obliged to take temporary leave. She herself asked to leave the organisation temporarily for personal reasons while reserving the possibility of requesting reintegration at a later date. As her leave was extended at her request beyond a year, she was warned that she could no longer obtain direct reassignment to her

post, with which she would lose any link. She accepted this consequence in maintaining her request for leave. For this reason she cannot tax the organisation with having committed an error of law, or with having breached the principles of legal certainty and mutual trust by making her return to active service subject to selection procedures.

14. Having regard to its limited power to review the assignment of posts by international organisations, the Tribunal will only note that there is nothing in the file to suggest that, in the course of this procedure, the ITU breached the obligation of endeavour which it acknowledges it had in respect of the complainant and which ultimately led to her being reintegrated in its staff, once an available post had finally been identified.

15. It follows that the complaint must be dismissed in its entirety, without there being any need to rule upon the ITU's objections to receivability.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ