NINETY-EIGHTH SESSION

Judgment No. 2414

The Administrative Tribunal,

Considering the third complaint filed by Mrs A. E. L. against the International Telecommunication Union (ITU) on 3 February 2004, the ITU's reply of 7 April, the complainant's rejoinder of 16 August, and the Union's surrejoinder of 15 October 2004;

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. Facts relevant to this case are set out under A in Judgments 2170 and 2316, delivered on 3 February 2003 and 4 February 2004 respectively, on the complainant's first and second complaints. She was employed by the ITU from 1992. From 1998 she held a "managed renewable term" (MRT) contract.

Service Order No. 02/09, issued by the ITU on 9 September 2002, announced that MRT appointments were abolished as from 2 May 2002.Subject to certain criteria, MRT contracts could be converted into permanent contracts. The criteria, specified in paragraph 2.1 of the Service Order, were:

"a) the staff member concerned has completed four years of service within the Union; and

b) his/her services have been satisfactory during that four-year period."

The complainant's contract was due to expire on 31 March 2003. By a letter of 23 December 2002 the Secretary-General informed her that a review of her file had led to the conclusion that she did not meet the criteria laid down in paragraph 2.1 b) of the Service Order as her services had not been satisfactory, and for that reason he had decided not to convert her MRT contract into a permanent one. He also said that for the same reason relating to her service, and upon the recommendation of the Director of the Telecommunication Development Bureau (BDT), he had decided not to extend her contract when it expired in March.

On 10 February 2003 the complainant requested a review of both those decisions. By a letter of 24 March 2003 the Chief of the Personnel and Social Protection Department informed the complainant that the Secretary-General was maintaining his decision of 23 December 2002. On 23 June the complainant filed an internal appeal, claiming, inter alia, one year's net base salary in moral damages. The Secretary-General's observations were submitted to the Appeal Board on 31 July.In its report, issued on 8 September 2003, for "reasons of equity" the Board recommended paying the complainant compensation in line with the principles contained in Staff Regulation 9.6 on termination indemnity, which up to 2 May 2002 applied in the event of "termination" of an MRT contract. By a letter of 6 November 2003 to the complainant, which constitutes the impugned decision, the Secretary-General stated that he was maintaining his "decision of 23 December 2002, confirmed on 24 March 2003".

An Ad Hoc Commission of Inquiry was set up on 19 February 2003 to investigate allegations of harassment made by the complainant. By a memorandum of 27 February to the Chief of the Personnel and Social Protection Department, the complainant, who was on sick leave, sought compensation on the grounds that the illness she was suffering from was service-incurred and requested a contract extension.The Commission of Inquiry submitted its report to the Secretary-General on 28 March 2003. Because of the need to study the report, the Secretary-General extended the complainant's contract until 30 April 2003. On 25 April the complainant was sent a copy of the final page of the report containing the Commission's "overall conclusion".

B. The complainant submits that the decisions taken on 23 December not to convert or renew her MRT contract were based on the erroneous assumption that she did not meet the criteria in paragraph 2.1 b) of the Service Order. She understands the Service Order to mean that the staff member's services had to have been satisfactory during the four-year period referred to in paragraph 2.1 a). That, she argues, was so in her case. By February 2003 she had

completed nine years of uninterrupted service. Up to October 1999 her services were always evaluated in a proper fashion, and were deemed to be very satisfactory. From that point onward it was not established by any "validly produced" performance appraisal report that her services were not satisfactory. Besides which, as indicated by the Appeal Board, the Service Order does not specify which four years should be taken into consideration. In her opinion, the decisions of 23 December 2002 are "legally untenable". They were based on erroneous facts and were taken in violation of the applicable rules on conversion of MRT contracts.

She submits that she was treated in a discriminatory manner as others in BDT had their MRT contracts either extended or converted into permanent appointments. Furthermore, she claims that she has been the subject of moral harassment and that the underlying intention was to get rid of her. She requests the Tribunal to order the production of the complete report issued by the Ad Hoc Commission of Inquiry that looked into her allegations of harassment and mobbing. The report, she adds, constitutes documentary evidence that the continued moral harassment led to her illness. She regards the report to be of the utmost importance, given that according to a medical specialist's certificate her illness was considered to be service-incurred.

She refers to procedural issues, maintaining that the defendant organisation acted in disregard of its internal appeal procedures, for one thing because its reply to her appeal was not submitted within the statutory four-week time limit. On the basis of all the procedural shortcomings to which she refers, she asks for a higher amount of compensation for moral injury than that claimed in her internal appeal, claiming an additional six months' salary.

The complainant seeks the quashing of the impugned decision and the dual decision of 23 December 2002, as well as reinstatement on a permanent contract – in a service other than the BDT – with retroactive effect to 1 May 2003. Failing reinstatement, she claims damages for material injury in an amount of not less than three years' net base salary, to compensate for the loss of 12 years' active service. As compensation for moral injury suffered over "the last four years", she claims an amount "equivalent to 18 months of her net base salary". She also claims costs.

C. In its reply the Union states that the decisions not to convert or renew the complainant's contract were validly taken. It acknowledges that the complainant had completed more than four years of service within the organisation, and thus clearly fulfilled the requirement of paragraph 2.1 a) of Service Order No. 02/09. She did not, however, fulfil the requirement in paragraph 2.1 b), as her services had not been entirely satisfactory during the relevant four-year period. This had become clear from her performance appraisals since October 1999. Moreover, the administrative decision not to renew a fixed-term contract or not to convert such a contract into a permanent one is a discretionary decision, and precedent has it that the Tribunal will not substitute its own judgement for that of the administrative authorities concerned. In the case at bar, the decisions taken by the Secretary-General represent a "reasonable and sensible" application of the discretionary power vested in him.

It rejects the complainant's assumption that the relevant four-year period for evaluating her performance is that prior to October 1999. The period of most relevance is clearly that immediately preceding the date when conversion of a contract is being considered. MRT contracts were abolished on 2 May 2002, which means that the four years preceding that date are those that should be taken into consideration, and it is not up to the staff member to choose which four years should apply. To follow the complainant's argument would be contrary to good management principles.

It does not accept the complainant's argument that the performance reports indicating that her services were unsatisfactory are to be considered "invalid". Although the timing of particular performance reports was in issue in Judgments 2170 and 2316, in no way did the Tribunal invalidate the evaluations that were made. In any event, in this instance it becomes clear that the reports were established before the date on which the decision denying conversion and renewal was taken, and therefore legitimately serve to support the Secretary-General's decision. It points out that the complainant did not contest the appraisal reports drawn up for the period from 1.9.99 to 31.12.01. Nor can it be held that the complainant was treated in a discriminatory manner: the situation of her other colleagues in BDT was not remotely similar to her own.

The Union states that the complainant's arguments justifying the disclosure of the report of the Ad Hoc Commission of Inquiry are without merit; the report did not form the basis of the decision under challenge and is of no relevance to the present case. The decision of 23 December 2002 was taken prior to her request that a commission of inquiry should be established and was taken on the basis of overall unsatisfactory performance.

At the Tribunal's request, subsequent to the filing of its reply the defendant organisation produced a complete copy

of the report and its annexes.

D. In her rejoinder the complainant refers to the complete copy of the Ad Hoc Commission of Inquiry's report forwarded to her on 15 June 2004. While she is aware that the report is not the subject of the present complaint, she says that her request for its disclosure was reasonable as the report will serve to show the working environment she was confronted with at the time when her performance was evaluated as unsatisfactory. She also points out that she had asked for a commission of inquiry to be constituted as early as April 2001.

E. In its surrejoinder the defendant organisation maintains its earlier arguments. The Commission, it points out, rejected almost all of the allegations put forward by the complainant; it considered that those it retained related to isolated incidents which were not constitutive of moral harassment.

CONSIDERATIONS

1. The complainant was employed by the ITU from 1992. Her service came to an end following decisions by the Secretary-General, on 23 December 2002, neither to convert her managed renewable term (MRT) contract to a permanent contract nor to extend her existing contract beyond 31 March 2003. Her appointment was subsequently extended to 30 April so that the Secretary-General could study the report of an Ad Hoc Commission of Inquiry established to investigate whether the complainant had been the victim of harassment.

2. The Secretary-General's decision not to convert the complainant's MRT contract to a permanent contract was based on her failure to meet the criteria in paragraph 2.1 b) of Service Order No. 02/09 issued on 9 September 2002. The Service Order relevantly provides:

"[…] existing MRT contracts shall be converted into permanent contracts, subject to the following criteria:

a) the staff member concerned has completed four years of service within the Union; and

b) his/her services have been satisfactory during that four-year period."

The letter communicating the Secretary-General's decisions stated that the complainant's "services [had] not been satisfactory, as established in [her] successive performance appraisal reports".

3. The decision not to extend the complainant's contract was also based on her "unsatisfactory services", as well as a recommendation of the Director of the Telecommunication Development Bureau (BDT), where she was employed.

4. On 10 February 2003 the complainant sought a review of the Secretary-General's decisions of 23 December 2002. In her request for review she contended that, on the question of converting her contract, the relevant performance appraisal reports were those that had been completed prior to October 1999. In all of those reports her services were rated satisfactory or better. She also contended in her request for review that subsequent reports, upon which the Secretary-General's decisions were based, were invalid and should not have been taken into account for any purpose.

5. Writing on behalf of the Secretary-General on 24 March 2003 the Chief of the Personnel and Social Protection Department confirmed the earlier decisions neither to convert nor renew the complainant's contract. Thereafter, on 23 June 2003, the complainant appealed to the Appeal Board. The Board reported to the Secretary-General on 8 September of that year. It made no express finding on the question whether, for the purposes of Service Order No. 02/09 concerning the conversion of MRT contracts, regard should have been had to the complainant's appraisal reports prior to 1999. Instead, it noted that neither that Service Order nor the Council Resolution on which it was based specified which four years of service were to be taken into account.

6. Nor did the Appeal Board concern itself with the validity or relevance of the complainant's performance appraisal reports after October 1999. It noted, however, that immediately after the complainant's contract came to an end, a new structure was put in place in the BDT and her post was abolished. In the result, the Board recommended that, for reasons of equity, the compensation principle contained in Regulation 9.6, that was applicable to the "termination" of MRT contracts before 2 May 2002, be applied in the complainant's case. The Board concluded that it was not competent to give an opinion on the complainant's claim relating to "moral injury

or damage" and expressly made no recommendation on her other claims.

7. On 6 November 2003 the Secretary-General informed the complainant that he had "decided to maintain [his] decision of 23 December 2002, confirmed on 24 March 2003". The complainant's third complaint is directed against the decision of 6 November, or, more precisely, against the two decisions embodied in that communication. The ITU does not dispute that the complaint is receivable.

8. The complainant contends that the Secretary-General acted illegally or on a factually erroneous basis in deciding neither to convert nor renew her contract because of her unsatisfactory service "as established in [her] successive appraisal reports". She asks that the decision of 6 November 2003 and the earlier decisions to which it related be set aside and that she be reinstated in employment with the ITU with effect from 1 May 2003. As an alternative to her claim for reinstatement, she seeks compensation in an amount equivalent to not less than three years' net base salary. Additionally, she seeks moral damages "equivalent to 18 months of her net base salary [...] for the moral damages suffered [...] over the last four years", together with the costs of these proceedings.

9. Although the complainant has raised a number of other matters, only two issues are relevant to the impugned decisions. The first is whether, as she has contended throughout, the Secretary-General should have had regard to her appraisal reports prior to October 1999 and, on the basis of those reports, converted her MRT contract to a permanent contract in accordance with Service Order No. 02/09. The second is whether the Secretary-General's decisions neither to convert nor renew her contract involve reviewable error because of his reliance on performance appraisal reports after October 1999.

10. As for the first issue, it has already been noted that Service Order No. 02/09, which was issued in September 2002, provides that MRT contracts shall be converted to permanent contracts if the staff member has completed four years of satisfactory service. Although that Service Order does not specify which four-year period is to be taken into account, it would produce absurd consequences if it were to be read as referring to any four years during which a staff member has performed satisfactorily. The only rational interpretation is that it refers to the four consecutive years immediately preceding a decision as to whether the contract in question should or should not be converted.

11. It follows that the complainant's argument that regard should have been had to her performance appraisal reports from 1994 until October 1999, in which her services were consistently rated satisfactory or better, must be rejected.

12. As for the second issue referred to above, it is not disputed that, subject to one qualification, the complainant's performance appraisal reports for the various appraisal periods from 1994 until 31 August 1999 were carried out in accordance with normal practice and the relevant Staff Rules. The qualification referred to above concerns the report for the period ending 31 August 1999. That report was signed by her then immediate supervisor on 19 October of that year but, because he was about to take up other duties, he did not complete the part of the form in which objectives for the appraisal period commencing 1 September were to be specified.

13. There were discussions in November 1999 between the complainant and her new immediate supervisor with respect to new objectives for the period which had commenced on 1 September, but they were unable to reach agreement on them. Her new supervisor subsequently completed that section of the report, apparently without conferring further with the complainant. In January 2000 her second-level supervisor, the Director of the BDT, added a comment to the report, referring to the complainant's "poor performance in the first part of [the] year" and stating that objectives were changing and that there was a need to review her assignments. The complainant signed that report on 21 February 2000, adding a note contesting the conditions under which the report was made.

14. As a result of a reorganisation of the BDT which took place in April 2000, the complainant became Head of Telecom Surplus and Resource Mobilization. However, she was not briefed on her new responsibilities until 19 July 2000.

15. On 1 July 2000 she became eligible, subject to satisfactory service, for a salary increment in accordance with Staff Regulation 3.4 a). "Satisfactory service" is defined in Staff Rule 3.4.1 a) as "satisfactory performance and conduct of staff members in their assignments as evaluated by their supervisors". At the material time, Staff Rule 12.1.5 provided:

"A report shall be made on the work and conduct of each staff member prior to the date of every salary increment and whenever a fact or assessment which might call for a change in previous reports deserves recording. [...]"

No performance appraisal report was prepared before the complainant became eligible for her salary increment.

16. In August 2000 the complainant was informed that her July 2000 salary increment was to be withheld. That decision was the subject of Judgment 2170 in which this Tribunal held that, as a performance appraisal report had not been established, the decision to withhold the increment could not "be justified on the basis that [her] performance was not satisfactory". In the result, the decision to withhold the salary increment was set aside and the ITU was ordered, amongst other things, to pay the increment from 1 July 2000. The complainant became eligible for further increments on 1 May 2001 and on 1 March 2002. Both were withheld.

17. New procedures with respect to salary increments were introduced in February 2001. Those procedures allowed that it was no longer necessary for an appraisal report to be submitted prior to the granting of a salary increment. Instead, if a staff member's service was not satisfactory, his or her supervisor was to inform the Personnel Department in writing, stating reasons why it was not satisfactory, one week before the beginning of the month in which the increment was due – and a copy was to be provided to the staff member concerned.

18. The decision to withhold the complainant's March 2002 salary increment was the subject of Judgment 2316. It appears from that judgment that, quite apart from the failure to establish performance appraisal reports, the procedures established in February 2001 had not been followed prior to the decision in question. Because those procedures had not been complied with, it was held by the Tribunal that the complainant was entitled to be paid her March 2002 increment.

19. It also appears from Judgment 2316 that, after October 1999, no appraisal reports were submitted with respect to the complainant until May 2002. Then, reports were submitted for the periods 1 September 1999 to 31 March 2000, 1 April to 31 December 2000 and 1 January to 31 December 2001. The complainant and her immediate supervisor met on four occasions in February and March 2002 to discuss those reports but, because of her absence on sick leave from April of that year, they were not immediately signed by her. Those reports assessed her performance as unsatisfactory.

20. It also appears from Judgment 2316 that a further report, in the form of a memorandum dated 15 November 2002, purported to assess the complainant's performance for the period 1 May 2001 to 28 February 2002, a period overlapping the last of the reports submitted in May 2002 and signed by the complainant in November of that year. The memorandum stated that the unsatisfactory assessment carried out earlier that year was "equally applicable" to the period from 1 May 2001 to 28 February 2002. It does not appear that a report for the period February to December 2002 was submitted prior to the Secretary-General's decisions of 23 December 2002 neither to convert nor renew the complainant's contract.

21. It is clear that the various appraisal reports for the appraisal periods up until February 2002 were irregular in that they were established well after the dates on which the complainant became eligible for salary increments and, on the assumption that her satisfactory assessment for the period ending 31 August 1999 had to be changed, well after her supervisor apparently thought that was the case. The new procedures established in February 2001 cannot excuse compliance with Staff Rule 12.1.5, particularly in a case where a prior satisfactory assessment is to be changed to unsatisfactory.

22. The delay in preparing performance appraisal reports after 1999 is unexplained although the ITU relates it to the complainant's failure to agree to the objectives to be included in those reports. It is sufficient to note that, although in November 1999 she contested the new objectives set, that cannot explain the failure to prepare further performance appraisal reports until May 2002.

23. In Judgment 2170 the Tribunal described the requirement of Staff Rule 12.1.5 that an annual performance report be established prior to the scheduled date of a salary increment as "a formal one" which had to be complied with. It is important to explain why that was so. A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty

of an international organisation to act in good faith towards its staff members and to respect their dignity. That is why it was said in Judgment 2170 that an organisation must "conduct its affairs in a way that allows its employees to rely on the fact that [its rules] will be followed".

24. The fundamental considerations which lead to the conclusion that an organisation must comply with the rules which it has established also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance. Just as the decisions to withhold the complainant's salary increments could not be justified on the basis of her unsatisfactory performance because the relevant rules had not been complied with, so also, for the same reason, the decisions neither to convert nor renew her contract cannot be justified on that basis.

25. It follows that the Secretary-General's decision of 6 November 2003 and the earlier decisions of 23 December 2002 and 24 March 2003 which were thereby confirmed must be set aside. Given that the complainant's post has now been abolished, it does not appear that her reinstatement is feasible. She is, however, entitled to compensation which should be assessed by reference to the decision not to convert her contract to a permanent one. Accordingly, compensation should be assessed in a sum equal to 18 months of her net base salary.

26. The complainant's claim for moral damages cannot be sustained on the basis of the injuries sustained "over the last four years". She is entitled to moral damages only in respect of the decisions neither to convert nor renew her contract, they being the decisions which are the subject of the complaint. Those damages are appropriately assessed in the sum of 10,000 Swiss francs. She is also entitled to costs in the sum of 5,000 francs.

DECISION

For the above reasons,

1. The decision of the Secretary-General of 6 November 2003 neither to convert nor renew the complainant's contract is set aside, as are the earlier decisions thereby confirmed.

2. The ITU shall pay the complainant compensation in an amount equal to 18 months of her net base salary.

3. It shall pay her moral damages in the sum of 10,000 Swiss francs, and costs in the sum of 5,000 francs.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.