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

101st Session **Judgment No. 2551**

The Administrative Tribunal,

Considering the eleventh complaint filed by Mrs M.P. against the International Telecommunication Union (ITU) on 26 July 2005 and corrected on 22 August, the Union's reply of 29 September, the complainant's rejoinder of 25 October and the ITU's surrejoinder of 6 December 2005;

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. Facts relevant to this case are to be found under A in Judgment 2200 concerning the complainant's seventh, eighth, ninth and tenth complaints. It may be recalled that on 12 February 2001 the complainant had requested compensation under Appendix D to the United Nations Staff Rules for what she deemed to be a "total [...] service-incurred impairment". The Secretary-General of the ITU informed the complainant on 28 May that he had decided to appoint an ad hoc compensation board that would determine if her condition – as evaluated in a psychiatrist's report of 13 January 2001 – was work-related and advise if any compensation was due to her. The complainant's contract was terminated for health reasons as from 29 May 2001 and she was awarded a disability benefit with effect from the following day.

In a letter of 19 September 2003, the Chief of the Personnel and Social Protection Department informed the complainant that, since the Ad Hoc Compensation Committee that was appointed had not reached a unanimous conclusion on whether her medical condition was service-incurred or not, it had been unable to formulate a recommendation on the issue of possible compensation, and that the Secretary-General was therefore not in a position to decide on her request. He added that she had the possibility of requesting that her case be submitted to a medical board. The complainant availed herself of that possibility and the Medical Board met on 24 November 2004. In its report, the Board concluded that the complainant was not suffering from a service-related illness and that her work capacity was unimpaired. In a letter of 18 February 2005 the acting Chief of the Personnel and Social Protection Department informed the complainant that, on the basis of the conclusions of that report, it had been decided to reject her request for compensation. He attached a bill for the fees relating to the Medical Board and asked the complainant to settle half the amount indicated.

On 16 March the complainant wrote to the Secretary-General contesting the Medical Board's report on the grounds that it was "inaccurate and irregular", and asking him to reconsider his decision to reject her request for compensation. She received a reply dated 22 March to the effect that the Secretary-General did not intend to change his decision. The matter went before the Appeal Board, which delivered its report on 8 July, recommending that the Secretary-General maintain his decision to reject the request for compensation. In a letter of 12 July 2005, which constitutes the impugned decision, the acting Chief of the Personnel and Social Protection Department informed the complainant that the Secretary-General was maintaining the decision of 18 February.

B. The complainant contends that the provisions of Appendix D were breached insofar as the Medical Board did not provide an answer to the only question it was asked, namely whether at the time of the termination of her contract her illness as diagnosed in January 2001 was service-incurred or not, and that her request for compensation was rejected on the basis of a medical report which was "incomplete, inaccurate and inconsistent with the findings in the report [...] of 13 January 2001". Pointing out that there is a contradiction between her separation for health reasons and the conclusions of the medical report of November 2004, the complainant sets out to demonstrate that her illness was indeed service-related and considers that it is for the Tribunal to decide whether she could at the same time suffer from a "100 per cent irreversible psychic illness (medical report [of January 2001]) and preserve an unimpaired work capacity". She complains that the Administration took four years to set up the Medical Board and deplores the fact that the latter was not able to give an opinion on the depression she was suffering from at the

time of her departure from the ITU, which in her view was the consequence of the “professional harassment” to which she had been subjected. She contends that, in an attempt to “evade its obligations”, the Administration instructed the Ad Hoc Compensation Committee to consider the report of January 2001, but asked the Medical Board to examine her current state of health. She maintains that the Union’s response to her request for compensation was based “purely on financial reasons”.

The complainant asserts furthermore that, according to the provisions of Appendix D, the ITU should have submitted the Medical Board’s report to the Ad Hoc Compensation Committee, in order to enable the latter to make recommendations to the Secretary-General on the basis of which he could take a decision. She adds that the Administration had no right to ask her to pay for the examination by the Medical Board which, considering that the Board failed to give an answer to the only question at issue, was in her view unnecessary.

Noting that colleagues of hers aged over 55 had been allowed to opt for voluntary early retirement, the complainant points out that she has faced financial difficulties since April 2000 and has been dependent on United Nations Joint Staff Pension Fund benefits and the Swiss disability benefit. She also contends that her dismissal by the ITU was probably unlawful. In her view, if her work capacity was indeed unimpaired, then the terms on which her appointment was terminated reflect the Union’s wish to save on the amount of her termination indemnity, since disability benefits are deducted from that indemnity if a contract is terminated for health reasons.

The complainant’s claims are as follows.

– Should the Tribunal deem that her contract was terminated unlawfully for health reasons although her work capacity was unimpaired, she requests that the ITU either pay her “all [the] salaries withheld since April 2000 up to [her] retirement age” or reinstate her; pay “the Pension Fund contribution for the period 2001 to 2007”; reimburse the Pension Fund in respect of the “benefits it has paid [her] and [those she] has received from the Cantonal Disability Fund” since 2001; and grant her compensation for moral injury caused by harassment at work.

– Should the Tribunal deem that the ITU was entitled to terminate her contract but not for health reasons, she asks it to order the Union: to “reimburse the Pension Fund in respect of the benefits [...] it has paid [her] and [...] the benefits [she] has received from the Cantonal Disability Fund since 2001”; to pay her “the difference in termination indemnity” (approximately 90,000 Swiss francs); to grant her compensation for moral injury; to “pay [her] the difference between the benefits she has received and all [the] salaries withheld [...] since April 2000”; and to pay her “the contribution to the Pension Fund for that period”.

– Should the Tribunal deem that the ITU was entitled to terminate her contract for reasons of health, she claims compensation for the delay in setting up the Medical Board, and asks the Tribunal to decide whether, when her contract was terminated, her illness was service-related or not, since the medical report “failed to perform the only task it was intended for”. She also asks the Tribunal to order the ITU to grant her “exemplary damages” due to the fact that the Union allegedly “urged the Appeal Board even before [it] met to reject [her] request for compensation”.

– Should the Tribunal deem that her illness was service-related, the ITU should apply Articles 11.1 to 11.3 of Appendix D.

– Should the Tribunal decide otherwise, the ITU should grant her “compensation as in the case of unlawful dismissal”.

In any event the complainant claims compensation for moral injury arising from the professional harassment she alleges she experienced and from the fact that she has been “confused and destabilised” by the ITU, considering that after so many years she is still not sure whether she is or was “100 per cent sick or 100 per cent healthy”. She also claims “exemplary damages for flawed procedure” on the grounds that the ITU apparently “ordered the Appeal Board even before it met to reject her request for compensation”, and seeks any other redress the Tribunal deems appropriate. In addition, she asks the Tribunal to “reserve [her] rights against the ITU with regard to the disclosure of the medical report”, which could prove damaging to her interests. Lastly, she claims costs.

C. In its reply the ITU contends that some of the complainant’s pleas have already been considered by the Tribunal and that since the latter has already ruled on such questions as the method used to calculate her separation entitlements, these are now *res judicata*. It alleges further that her other arguments relate to “elements of the file

[...] which are now time-barred".

The Union maintains that the procedure before the Medical Board was correctly conducted and that the Secretary-General's decision based on that report was well founded and legitimate. In its view the experts acted independently in accordance with professional and ethical standards, and the complainant's allegation that the Medical Board did not fulfil its terms of reference is unsubstantiated. It argues that, particularly in view of the "extremely clear" conclusions reached by the Board, on which it does not consider itself qualified to comment, the issue of whether the termination of her contract was unlawful does not arise. It adds that the Board's finding related to the complainant's work capacity has no bearing on the question of whether her illness was service-incurred or not.

In additional observations, the ITU explains that it does not apply the provisions of Appendix D as such. Even though in the absence of specific rules concerning compensation procedures, it instructed the Ad Hoc Compensation Committee to be guided by the practices described in Appendix D, it did not intend to be bound subsequently by its provisions. It also rejects the complainant's objection to the appeal procedure as based on errors of interpretation and law. In view of the complexity of the case, the time taken to deal with the compensation request appears in its view "readily explicable". The Union also asserts that the complainant must bear sole responsibility for the disclosure of the Medical Board's report and that her claim in that respect must be rejected as unfounded. Lastly, it recalls that the complainant agreed to the Medical Board's procedure, according to which if the Secretary-General rejected her claim for compensation she would have to pay half the costs incurred.

D. In her rejoinder the complainant argues that the Medical Board's report constitutes new evidence which justifies reconsidering the issue of whether or not her contract was unlawfully terminated.

Referring to a 1999 document of the ITU Council concerning occupational illness, she maintains that in her case the Union ought to have turned to its insurers to cover her loss of earnings and/or any compensation due to her. She considers that the proceedings of the Medical Board were improperly conducted and that the various medical opinions produced are contradictory. In her view the Administration did nothing to preserve the confidentiality of the Medical Board's report and must, therefore, assume responsibility.

E. In its surrejoinder the ITU submits that the Council document referred to by the complainant is obviously irrelevant in view of the fact that the insurance coverage for occupational illness dealt with therein could not apply to the complainant's case until it had been decided whether or not her illness was of occupational origin. It maintains, moreover, that the complainant has not succeeded in demonstrating that the conclusions reached by the different experts are contradictory.

CONSIDERATIONS

1. The complainant, whose career is outlined under A in Judgment 1976 concerning her first complaint, joined the ITU on 1 June 1988. Some disputes she had with the Administration led initially to Judgments 1976 and 2026 (her second complaint), which were mainly related to her job description, and subsequently to Judgments 2070, 2160 and 2161 (on her third, fourth and fifth, and sixth complaints respectively), which were mainly concerned with the consequences of a service-incurred injury that she sustained in 1992. Her appointment was terminated for health reasons with effect from 29 May 2001. She was granted a disability benefit with effect from 30 May 2001, and she received an invalidity benefit in accordance with the Swiss federal law of 19 June 1959 on invalidity insurance.

2. On 6 April 2000 the complainant had submitted a form headed "professional illness-accident report", declaring that she was suffering from a "major depressive syndrome" resulting from "mobbing activities" at her place of work. On 12 February 2001 she submitted a request for compensation on the grounds of an alleged causal link between her worsening state of health and her professional activities. On 28 May 2001 the Secretary-General informed her that he had decided to appoint an ad hoc compensation board which would determine whether her medical condition was related to her professional activity at the ITU. If the reply was affirmative, the ad hoc board was to advise him on any need for compensation.

3. In previous complaints, the complainant has already asked the Tribunal to rule on the occupational origin of both her incapacity for work prior to the termination of her contract and her disability. In Judgment 2160 (under

9) delivered on 15 July 2002, the Tribunal considered that it was not in a position to decide the matter, since it depended on “a finding by a competent body (a medical board) that the complainant in fact suffer[ed] from the psychological condition mentioned and a finding by another competent body (a compensation board) that such condition [was] service-related”. It found that the complainant was within her rights to request that such bodies be constituted without delay.

4. The appointment of the Ad Hoc Compensation Committee was delayed owing to disagreements between the ITU and the complainant regarding the nomination of its members. In Judgment 2200 (under 17) delivered on 3 February 2003, the Tribunal found that the delays resulted solely from the complainant’s own actions.

The Ad Hoc Compensation Committee was eventually set up only in the second half of 2002. According to its terms of reference of 9 September 2002 and the summary thereof contained in the preamble to its report of 29 July 2003, the Committee’s task was to decide whether the complainant’s medical condition “at separation from the ITU” could be attributed to her professional activities at the ITU. The terms of reference also indicated that the Committee was to be guided by the rules contained in Appendix D to the Staff Rules of the United Nations, governing inter alia compensation in the event of illness attributable to the performance of official duties.

The Ad Hoc Compensation Committee was unable to provide an answer to the question it had been asked. Two of its members arrived at the conclusion that there were no elements in the complainant’s file to confirm that her work situation at the ITU was the only cause of her illness, although it was evident that she felt harassed by the organisation; those two members also concluded that only a medical board would be competent to answer the question. The third member, appointed by the complainant, did find a sufficient causal link between the complainant’s professional activities and the illness leading to her separation; he explained his position at length in a note annexed to the Committee’s report.

The Committee nevertheless unanimously concluded that necessary measures should be taken by the organisation to ensure that such cases did not reoccur and that vulnerable staff were protected from unfair treatment.

5. On 19 September 2003 the Chief of the Personnel and Social Protection Department informed the complainant that the report of the Ad Hoc Compensation Committee did not enable the Secretary-General to take a decision regarding her request for compensation. He added that if she so wished her case would be submitted to a medical board, the expenses of which would be partly borne by her if after reviewing its conclusions the Secretary-General took a decision that was not in her favour. In a letter of 30 January 2004 he stated that the questions put to the experts “[would], as far as the Union [was] concerned, be confined to the issue submitted to the Compensation Committee [...] regarding whether [the complainant’s] condition was attributable to the performance of her official duties, in other words, whether her condition might be service-related”.

The complainant asked for such a medical board to be appointed. In its report of 31 January 2005 the Board reached the following conclusions:

“At present [the complainant] shows neither depression symptoms, nor any severe anxiety disorder, nor a condition of post-traumatic stress […]. Her personality now appears to be restored owing to the fact that she is no longer working for the ITU.

In view of the above we would describe her personality as [...] suffer[ing] a breakdown due to relational conflicts. Nevertheless we cannot recognise an occupational illness.

Her work capacity is currently unimpaired.”

6. By letter of 18 February 2005 the complainant was informed that the Secretary-General had rejected her request for compensation for sickness/invalidity attributable to the performance of official duties. On 16 March she asked the Secretary-General to reconsider his decision, but the acting Chief of the Personnel and Social Protection Department informed her, by letter of 22 March, that it had been confirmed. The complainant appealed against that decision to the ITU’s Appeal Board.

In its report of 8 July 2005, the Appeal Board considered that only a medical board could ascertain whether the illness affecting the complainant at the time her contract was terminated was service-related or not. It noted that the Medical Board’s view had been unequivocally negative. The subsidiary reply the Medical Board had given regarding the complainant’s then current state of health had no bearing on any illness she might have suffered at

the time her contract was terminated, or on the Medical Board's main conclusion that it did not "recognise an occupational illness".

The Appeal Board recommended that the Secretary-General maintain his decision and reject the complainant's request for compensation for illness attributable to the performance of her official duties. In view of the time taken for the procedure, however, it recommended that the Secretary-General "ensure that in future all cases of that kind be dealt with as a matter of priority and more diligently in order to find rapid solutions so as to avoid protracted and problematic conflicts".

By a decision of 12 July 2005, which constitutes the impugned decision, the complainant was informed that the decision of 18 February, confirmed on 22 March 2005, was maintained.

7. As the parties have entered extensive written submissions, hearings will not be necessary; the complainant's request to that effect is therefore disallowed.

8. Despite their apparent complexity, the complainant's claims essentially amount to asking the Tribunal to consider whether the Medical Board, and the Appeal Board thereafter, correctly answered the question of whether there was a plausible causal link between the illness affecting the complainant at the time her contract was terminated and the performance of her duties in the service of the ITU.

The Tribunal has not dealt with this problem on the merits in any of the judgments rendered on the complainant's previous complaints. From this point of view the complaint is therefore receivable and there is no need to reply to the defendant's objections that some of the complainant's pleas are now *res judicata*.

9. In dealing with a dispute concerning the occupational origin of a disabling illness, the Tribunal may not replace the findings of a medical board with its own. However, according to consistent precedent it is competent to review the procedure followed by the board and, in particular, to say whether the board's report, used as a basis for an administrative decision denying the occupational origin of a recognised disability, shows any material mistake or inconsistency, or overlooks essential facts, or draws plainly wrong conclusions from the evidence (Judgments 1284 under 4, 1752 under 9 and 2361 under 9).

10. The present dispute stems from the letter of 12 February 2001, in which, even before her contract was terminated, the complainant asked the Union to pay her compensation on the grounds that the deterioration in her state of health was service-related. In response to the complainant's request, it was decided to set up firstly the Ad Hoc Compensation Committee, which did not achieve a consensus among its members, and secondly the Medical Board, whose procedure and conclusions are contested by the complainant.

11. On comparing the reports drawn up by the above Committee and Board, it becomes apparent that they did not address the issue from the same angle.

The Ad Hoc Compensation Committee did not look at the complainant's state of health as it was at the time it gave its opinion. The debate that took place in the Committee shows that the only issue at stake – and the only one it had to deal with according to its terms of reference – was that of whether or not the illness that had led to the termination of the complainant's contract was service-related. It considered by a majority that the issue could not be resolved on the basis of the available evidence.

The Medical Board on the other hand, regardless of the lengthy explanations the defendant offers in this respect in its reply to the complaint, took a different approach. It is clear from its conclusions that its opinion on the complainant's state of health referred to the time when its examination took place. It did not mention the illness that the complainant was suffering from in May 2001, or the possibility that such illness might be attributable to her working conditions during the last years of her employment with the ITU. Nor was it able to "recognise" that her illness was occupational.

12. The procedure followed by the Medical Board, which was set up as a result of the failure of the Ad Hoc Compensation Committee to reach satisfactory conclusions, is unacceptable in view of the requirements laid down in Appendix D of the United Nations Staff Rules, specifically mentioned in the Committee's terms of reference, by which the two bodies were to be guided. This may be explained, though not justified, by the excessive length of time taken for the procedure, for which there is no point in seeking to apportion the blame between complainant and defendant.

What matters in this case is that it was the defendant which was conducting the procedure and which should have ensured that the case could be settled during the period immediately following the separation of the complainant. Had the bodies responsible for examining the case been set up without delay – in the logical order prescribed in the Tribunal's Judgment 2160, under 9 – an unequivocal answer to the question of whether or not the complainant's illness was service-related could probably have been given. It is understandable that in the event the Medical Board, after a lapse of almost four years, had difficulty completing its task, especially as the complainant's condition appears to have improved substantially during that period.

That circumstance in itself, however, should not have prevented the Medical Board from carefully investigating on the one hand the complainant's medical condition at the time her contract was terminated, and on the other hand the facts regarding the behaviour to which she maintains she was exposed during the last years of her employment with the ITU, and the effects that behaviour had on her. It may of course be argued that this would be the role of a compensation committee rather than a medical board. Nevertheless, the Medical Board accepted the terms of reference it was given and should have made sure that it had all the necessary information at hand; if it was no longer able in the circumstances to complete its task, it should have informed the Administration of that fact so that the latter could take whatever steps were required according to the rules by which it was supposed to be guided. The Medical Board could not in any case elude its responsibility, although this is what happened as it concentrated on the complainant's state of health at the time when it met, instead of determining her condition at the time her contract was terminated or considering whether there was a link between her medical condition and her service with the ITU.

13. The procedure followed to ascertain whether there was a plausible causal link between the complainant's professional activities in the ITU and the illness that led to her separation was therefore improperly conducted and is tainted with denial of justice.

14. The decision of 12 July 2005 confirming the decisions of 18 February and 22 March 2005 must therefore be set aside. The case must be referred back to the Union, which should appoint a medical board to consider whether the illness leading to the termination of the complainant's contract was service-related or not and, if appropriate, it must be determined what additional compensation may be due to her.

In view of this outcome the complainant's other pleas need not be examined.

15. The complainant in the circumstances has suffered moral injury, for which she is entitled to compensation, which the Tribunal sets at 7,000 Swiss francs.

16. The complainant is also entitled to costs, which are set at 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case is referred back to the ITU for the latter to appoint a medical board to consider whether the illness leading to the termination of the complainant's contract was service-related or not and, if appropriate, it must be determined what additional compensation might be due to her.

2. The ITU shall pay the complainant 7,000 Swiss francs in compensation for moral injury.

3. It shall also pay the complainant 2,000 francs in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.