

The Administrative Tribunal,

Considering the sixth complaint filed by Mr D.J. G. against the International Telecommunication Union (ITU) on 3 November 2006, the Union's reply of 12 February 2007, the complainant's rejoinder of 15 March and the ITU's surrejoinder of 18 May 2007;

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

Having examined the written submissions;

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

A. The complainant is a Dutch national born in 1946. The background to this case is to be found in Judgment 2540. Suffice it to recall that in his first five complaints brought before the Tribunal the complainant challenged, inter alia, the decisions by which he was temporarily detached and subsequently transferred from the post of Chief of the Personnel and Social Protection Department (hereinafter "Chief of Personnel"), as well as the Administration's decision to advertise that post. In Judgment 2540, delivered on 12 July 2006, the Tribunal set aside the express and implied decisions rejecting the complainant's appeals with respect to his detachment, transfer and dismissal from the post of Chief of Personnel. It also awarded him moral and exemplary damages in the sum of 60,000 Swiss francs and 10,000 francs in costs.

On 12 October 2004, a few months after the complainant was removed from the post of Chief of Personnel, vacancy notice No. 38-2004 was issued for that post. On 15 October the complainant wrote to the Secretary-General requesting a review of the decision to advertise the post, but received no reply. He subsequently submitted a formal application for that post on 10 December 2004. A few days later, the Secretary-General informed the complainant that he would consider favourably his application to any vacant post except that particular post.

By a memorandum of 6 December 2005 the Secretary-General informed all staff members of the appointment of Mr R. as Chief of Personnel with effect from 1 December 2005. In a memorandum to the Secretary-General dated 12 January 2006, the complainant requested that the decision to appoint Mr R. be reviewed because, in his view, it was tainted with errors of fact and law and motivated by prejudice. Soon thereafter, on 26 January, he wrote to the Chief of Personnel asking for an extension of his appointment beyond retirement age, in accordance with Staff Regulation 9.9. The Chief of Personnel replied that same day that an extension was not possible because the complainant's post would not be funded beyond 28 February 2006, the date on which he would reach retirement age.

By a memorandum of 17 February 2006 the Secretary-General rejected the complainant's request for review of the decision to appoint Mr R., emphasising that appointment decisions fell within his discretionary authority. The complainant appealed that decision with the Appeal Board on 15 May 2006, seeking the annulment of Mr R.'s appointment, moral damages, compensation for loss of earnings due to the Union's refusal to extend his contract beyond the statutory retirement age and costs. The Board issued its report on 31 July 2006. Noting the Tribunal's ruling in Judgment 2540, it recommended that the claims for annulment of Mr R.'s appointment and for compensation for loss of earnings should be rejected, but that the complainant should be awarded compensation for the damage caused to his reputation. It also recommended the award of costs. By a letter of 25 September 2006 the Secretary-General informed the complainant that he endorsed the Board's recommendations concerning the appointment of Mr R. and the claim for loss of earnings, but not those concerning the award of moral damages and costs. That is the impugned decision.

B. The complainant submits that the appointment of Mr R. to the post of Chief of Personnel is unlawful. Relying on Judgment 2540, he argues that the said vacancy notice was unlawfully issued and that for these reasons alone the decision to appoint another candidate while he himself was still in active service should be set aside.

He contends that the proceedings before the Appointment and Promotion Board were tainted with irregularities,

bias and prejudice. The decision not to include him on the shortlist is, in his view, another act of retaliation by the Secretary-General, who acted as Chairman of the Appointment and Promotion Board. He considers as further proof of prejudice the Secretary-General's statements, made in the memorandum of 14 December 2004 and in his letter of 25 September 2006, that the latter would consider favourably his application for any post except the post of Chief of Personnel, and that, even if his name had been shortlisted, he would not have nominated him to a post from which he had transferred him only a few months earlier.

In the complainant's opinion, the argument raised before the Tribunal in the proceedings leading to Judgment 2540 that he was not included on the shortlist because he did not possess the qualifications required for the post not only is unacceptable but also demonstrates a lack of good faith on the part of the Administration, especially in light of the fact that when he was selected for the post in 1999, he had all the required qualifications. He asserts that the Secretary-General's decision not to place his name on the shortlist constitutes an error of law: it was based on an earlier unlawful decision, namely the decision to transfer him, and it rested on the false premise that the intention of the Secretary-General not to appoint him was a valid reason to exclude him from the shortlist.

The complainant does not consider that the damages already awarded to him by the Tribunal cover the claims brought under the present complaint, as suggested by the Secretary-General in his decision of 25 September 2006. He emphasises that his complaint is directed against new facts and decisions, which stand on their own, and that he puts forward new claims, for which no compensation has been awarded so far.

Moreover, he draws attention to the fact that Mr R.'s appointment was extended beyond retirement age whereas his request for a similar extension was denied, in spite of the assurances given by the Secretary-General in 2002 that such an extension would be granted if there were a change in the ITU's policy on that issue. In the complainant's view, the extension of Mr R.'s appointment constituted a significant change in the ITU's strict policy not to extend the appointment of any staff member beyond the statutory retirement age. Consequently, the denial of his request for an extension amounts to a breach of the principle of equal treatment.

The complainant asks the Tribunal to set aside the decision to appoint Mr R. to the post of Chief of Personnel and to order the ITU to pay him appropriate compensation for the public humiliation and the moral injury he suffered as a result of the decision to appoint Mr R. to the said post while he himself was still in active service. He seeks compensation for loss of earnings "from the age of 60 until the age of 62, or at least until the end of 2006, corresponding to the extension of Mr R.'s appointment beyond retirement age". In addition, he claims legal costs as well as "interest at the rate of 8 per cent per annum on all amounts paid to him [...], through the date all sums due [...] are actually paid to him in full".

C. In its reply the Union submits that the complaint is irreceivable on two counts. First, the complainant is challenging an administrative act which does not constitute an impugnable decision, namely the recommendation by the Appointment and Promotion Board not to place his name on the shortlist. Second, the complaint is identical in terms of the parties involved, the purpose and the cause of action, to the complainant's previous complaints which led to Judgment 2540, and in particular his fourth complaint. Regarding the purpose, the ITU argues that, as was the case in his fourth complaint, the complainant is seeking in the present complaint compensation for moral injury caused by his removal from the post of Chief of Personnel. Similarly, as in the earlier complaints, the cause of action of the present complaint is, according to the Union, the proposition that the decision to appoint Mr R. to the said post must be set aside on the ground that it is "tainted by [...] bias and prejudice".

On the merits, the ITU denies that there was bad faith on the part of the Administration and that the proceedings before the Appointment and Promotion Board were tainted with errors of law. It argues that the shortlist of candidates for the post of Chief of Personnel was established in a lawful manner. In its opinion, the Secretary-General's statement contained in his memorandum of 14 December 2004 cannot constitute proof of bias liable to call into question the lawfulness of the appointment procedure when taken in the context of the situation prevailing at the time, which was characterised by a mutual loss of confidence between the complainant and the Secretary-General.

It points out that the Appointment and Promotion Board unanimously recommended that the complainant's name not be included on the shortlist. In the course of its deliberations, the Board took into consideration all relevant factors and carefully weighed the applicants' qualities and qualifications against the requirements of one of the ITU's most highly graded and sensitive posts. It took the view that the complainant clearly failed to meet one essential requirement for selection, namely the "[a]bility to establish and maintain effective working relationships

with officials at all levels in an international environment”. The absence of that condition and the lack of mutual confidence and of a good working climate between the complainant and the Secretary-General were key factors in the decision not to include the former on the shortlist. This, however, does not constitute proof that the Board’s recommendation was tainted with bias and errors or that it was unlawful.

The ITU also asserts that, even assuming that the Board’s recommendation was tainted with bias, there is no evidence that it caused the complainant any injury; on the one hand, the recommendation had no bearing on the final appointment decision given that, for the reasons stated above, the Secretary-General would not have appointed the complainant even if he had been shortlisted; and on the other hand, the absence of the complainant’s name from the shortlist could not have “aggravated the public humiliation and damage to [his] reputation”, since the Board’s deliberations were conducted behind closed doors and the shortlist is a confidential document.

The defendant dismisses the allegation that it acted in breach of the principle of equal treatment. It states that the extension of Mr R.’s appointment did not constitute a change in the Union’s policy; on the contrary, it was granted in accordance with Staff Regulation 9.9 and Office Memorandum No. 13 of 14 May 1993, which provide for contract extensions beyond mandatory retirement age in exceptional circumstances. In the case of Mr R., the extension of his appointment as Chief of Personnel was dictated by exceptional circumstances, namely the Plenipotentiary Conference due to be held in November 2006 only two months after he was due to retire. The complainant was not in a situation comparable to that of Mr R. in fact or in law since at the time of his retirement he was performing duties which could be taken up by another staff member. Even assuming he had remained Chief of Personnel, an extension would most probably not have been granted, given that he was due to retire nine months before the Conference, leaving sufficient time for the Secretary-General to ensure continuity through a new appointment. For these reasons the ITU considers that the complainant’s claim for the payment of compensation equivalent to two years of additional salary – a claim which the Tribunal expressly rejected in Judgment 2540 – must be dismissed.

D. In his rejoinder the complainant submits that his complaint is receivable. He emphasises that the issuance of the vacancy notice, against which his fourth complaint was directed, and the appointment of another candidate were two separate decisions, which, according to the Staff Regulations and Staff Rules, had to be appealed separately. He states that in the present complaint he is contesting the irregularities in the selection procedure and subsequent appointment of Mr R., and not the issuance of the vacancy notice, which according to Judgment 2540 was, in substance, a decision to remove him from the post to which he had originally been appointed.

E. In its surrejoinder the Union maintains that the complaint is irreceivable by virtue of the *res judicata* rule. It submits that the decision presently impugned and the one which formed the subject of the complainant’s fourth complaint are separate decisions only as to form. In the ITU’s opinion, the complainant’s purpose in the present complaint is to challenge his non-appointment to the post in question. It considers that the complainant has already received compensation for being removed from the post of Chief of Personnel by reason of the legal status attached by the Tribunal to the decision to issue a vacancy notice for the said post. It presses its pleas on the merits.

CONSIDERATIONS

1. The complainant joined the ITU on 1 November 1999 as Chief of Personnel, at grade D.2, under a two-year fixed-term appointment which was extended until 28 February 2006, the date on which he would reach retirement age. He impugns the decision of the Secretary-General to appoint Mr R. to the post of Chief of Personnel – while he himself was still in active service – for which he had also applied after his unlawful detachment from it and subsequent unlawful transfer on 24 August 2004. The complainant also challenges the ITU’s decision not to place his name on the shortlist of selected candidates for the post of Chief of Personnel, alleging that the proceedings before the Appointment and Promotion Board were tainted by irregularities, prejudice and bias. His claims are set out under B above.

2. The grounds for complaint are as follows: (i) the decision to appoint another candidate to the post of Chief of Personnel, while the complainant himself was still in active service, is unlawful since, as concluded in Judgment 2540, under 26, “the detachment decision, the transfer decision and, ultimately, the decision in substance to dismiss [him] from the post to which he had been appointed [...] were motivated by an improper purpose and, accordingly, [...] they involve [an] error of law and must be set aside”; (ii) the Secretary-General’s actions were acts of retaliation against the complainant for pursuing an internal appeal, as indicated in the same judgment, and not

placing his name on the shortlist of selected candidates for the post of Chief of Personnel should be seen as another illegal act of retaliation; and (iii) the selection process was biased against the complainant as evidenced by the Secretary-General's statement in the memorandum of 14 December 2004 that he would consider favourably any applications the complainant made to any vacant budgeted post, except the post of Chief of Personnel.

3. In its report of 31 July 2006 the Appeal Board recommended that the complainant be awarded compensation for the damage caused to his reputation as well as costs, but that his claim for annulment of the decision to appoint Mr R. to the post of Chief of Personnel and for compensation for loss of earnings until the age of 62 be dismissed. By a letter of 25 September 2006 the Secretary-General rejected the complainant's appeal in its entirety.

4. The ITU argues that the complaint is irreceivable by virtue of the rule of *res judicata*. The Tribunal notes that the complaint raises two preliminary questions regarding *res judicata*. The first question is whether in Judgment 2540 the Tribunal, expressly or implicitly, considered the failure to place the complainant on the shortlist of selected candidates for the post of Chief of Personnel. The second question is whether or not the damages awarded by the Tribunal in the above-mentioned judgment included damages stemming from the fact that the complainant had lost all chances of returning to his post. The Tribunal is of the opinion that the answer to both questions is affirmative and that consequently the complaint is irreceivable under *res judicata*.

5. It is not disputed that in its reply to the fourth complaint the Union argued that the complainant was not placed on the shortlist because he did not meet the requirements for the post. The complainant stated in his rejoinder that the argument was unacceptable given that he had the necessary qualifications when he was originally selected for the post. The ITU then slightly modified its earlier comment in its surrejoinder arguing that the complainant's inability "to establish and maintain effective working relationships with officials at all levels in an international environment" was the reason that the Appointment and Promotion Board had decided not to include his name on the shortlist. In light of the above, the Tribunal must conclude that the complainant's non-inclusion on the shortlist was indeed given due consideration by the Tribunal in Judgment 2540.

6. It follows that the issue of the complainant's non-inclusion on the shortlist of selected candidates for the post of Chief of Personnel was taken into account in the award of damages in Judgment 2540. The Tribunal had the choice of either ordering the complainant's reinstatement and an award of damages, or not ordering his reinstatement but awarding him a substantially higher amount of damages in compensation for the additional loss. It chose the latter option. In so doing, the Tribunal ensured that the complainant was duly compensated for the fact that he had lost all chances of returning to his former post, and this included the decision of the Secretary-General to appoint Mr R. to that post. As to the claim for compensation for loss of earnings from the age of 60 to the age of 62, the Tribunal recalls that this has already been dealt with by Judgment 2540.

7. Considering that the written submissions and the facts of the case are clear, the Tribunal sees no reason for an oral hearing as requested by the complainant and consequently rejects his request.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.