Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B.

v.

ITU

138th Session **Judgment No. 4830**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. B. against the International Telecommunication Union (ITU) on 19 January 2022 and corrected on 21 February, ITU's reply of 8 September 2022, the complainant's rejoinder of 22 November 2022 and ITU's surrejoinder of 15 May 2023;

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 may be summed up as follows:

The complainant challenges the implied decision dismissing his request for his administrative situation to be regularised, the decision ordering his transfer, the decision to award him a special post allowance in that it excluded a certain period and the amount in question was insufficient, and the decision announcing his promotion in that it was not retroactive and did not place him on step 7 of grade G.4.

The complainant joined ITU in 1995 under short-term contracts. In 1997 he was appointed to the post of mail clerk at grade G.2. In January 2004 he was transferred to a post of messenger in the Messenger Service, also at grade G.2.

Between 2003 and 2011, the complainant undertook several detachments within ITU, for which he received, at various times, a special post allowance (SPA) at grade G.3, G.4 or G.5, depending on the duties carried out. In October 2011 he was detached to the Information Services Department (IS) as an assistant operator, for which he was awarded a SPA at grade G.3. In 2013, while he was still detached to IS, the Messenger Service, to which he belonged, was closed down and all its posts, including the complainant's, were abolished. The complainant was therefore transferred, within IS, to a grade G.2 post in the User Services Division with effect from 1 January 2014, and, from that date, ceased to receive a SPA linked to the exercise of duties corresponding to grade G.3.

Between 2013 and 2015, the complainant's supervisors noted that there was a discrepancy between the grade of his post and the level of the duties he performed. In his performance appraisal report for 2013, his supervisor stated that he carried out the same tasks as his colleagues, who were at grade G.5. In the complainant's performance appraisal report for 2014, his new supervisor recommended that his post grading should be reviewed, although she did not specify to which grade she thought the tasks actually carried out corresponded. In an email of 7 December 2015, the head of the User Services Division stated that a request should be made to reclassify the complainant's post. However, he informed the complainant that the reclassification could lead to the post being advertised by way of a competition.

On 22 November 2017 the head of the User Services Division informed the complainant that there were no plans for a reclassification of his post, but that there was "an understanding that [the complainant was] presently performing work responsibilities above his current grade" and that "a [SPA] request [would] be submitted".

On 12 December 2018 the complainant sent a letter to the Secretary-General, headed "Regularisation", in which he maintained that "[f]or years, [his] job description [had] not corresponded to the duties [he] perform[ed] and which [were] of a far higher level". He asked the Secretary-General to "intervene" in order to remedy a "great injustice". He explained that he "wish[ed] the definition of [his] post to

be reviewed, [together with] the classification of the post [...] and [...] [his] administrative position [...]", and that "[i]f that could not be done retroactively, [he] also wish[ed] to receive compensation for all the time [he had] performed duties of a higher level and the painful wait for this situation to be put right".

On 23 April 2019 the complainant submitted to the Secretary-General a request for reconsideration "of the implied decision dismissing [his] request of 12 December 2018".

By the decision of the Secretary-General No. 17258 of 2 May 2019, of which he only became aware on 13 May 2019, the complainant was transferred, along with his post and his G.2 grading, to the Logistics Service of the Facilities Management Division, with effect from 1 April 2019 (previous post reference number: IS07/G2/277 – new post reference number: SG02/G2/277).

On 20 June 2019 the complainant submitted a second request for reconsideration to the Secretary-General in relation to that transfer decision. He was invited to contact the head of the Human Resources Management Department to discuss his situation.

By an email of 13 August 2019 to the head of the Human Resources Management Department, the complainant followed up on a meeting that had taken place at the beginning of February 2019, by confirming his "agreement to the two [reconsideration] procedures being adjourned until the end of February 2020", and asked for a meeting to be held between 15 and 30 September 2019. The complainant and the head of the said department met again on 25 September 2019.

On 16 December 2019 the complainant was awarded a SPA at grade G.4, with retroactive effect from 1 April 2019 but excluding the month of October 2019. This SPA was mentioned on his payslip for January 2020.

By an email of 13 March 2020 headed "Special Post Allowance/Reconsideration" and addressed to the head of the Human Resources Management Department, the complainant asked for the amount of his SPA, which he regarded as incorrect, to be corrected. He

received a response the same day, stating that the payroll service would be asked to check the amount of his SPA.

By the decision of the Secretary-General No. 17488 of 6 March 2020, the complainant was promoted, following an internal competition and with effect from 1 March 2020, to the post of Technical Logistics Support Assistant within the Facilities Management Division, at grade G.4, step 6 (reference of post previously held: SG02/G2/277 – reference of new post held: SG22/G4/250). As a result, he ceased to receive a SPA with effect from 1 March 2020.

In an email of 19 March 2020 addressed to the head of the Human Resources Management Department, the complainant stated that he considered that "the situation reported in [his] letter of 12 December 2018" remained unresolved and that he wished to receive a response to the requests for reconsideration he had submitted on 23 April and 20 June 2019 within 45 days from 1 March 2020. The complainant also stated in his email that he contested his promotion in that it was not retroactive and did not place him on step 7 of grade G.4. He also stated that he had no objection to postponing "the deadline for replying by a few weeks if necessary or to assist in finding an amicable solution".

By email of 30 April 2020, the head of the Human Resources Management Department told the complainant that he had noted his request but that he wished he could respond to it once the work situation became easier, in view of the restrictions caused by the COVID-19 pandemic. He added the following in his email: "This means that we undertake not to contend that your request is time-barred unless and until we have [...] responded to it".

On 22 October 2020 the head of the Human Resources Management Department informed the complainant that he had examined his request for reconsideration in relation to the "determination of the conditions of [his] promotion" and that he was "unable to recommend that the situation be reviewed". He explained to the complainant that his step 6 in grade G.4 had been determined in accordance with Staff Rule 3.4.2 and that appointments and promotions following a competitive process take place on a date subsequent to the end of the selection process. He also recalled him that he had received

a SPA for the period from 1 April 2019 to 29 February 2020, with one month's interruption in October 2019 because the award of a SPA could not exceed a continuous period of six months.

On 21 December 2020 the complainant submitted an appeal to the Appeal Board against the implied decision dismissing the request he had made on 12 December 2018 to have his administrative situation regularised, his transfer on 2 May 2019 to the Logistics Service, the decision to award him a SPA from 1 April 2019 in that it excluded the month of October 2019 and the amount of the SPA was insufficient, and the decision of 6 March 2020 to promote him in that the promotion was not retroactive and did not place him on step 7 of grade G.4. In his appeal, the complainant requested, in particular, the reclassification of the post he had held in the User Services Division and his promotion to grade G.5, the review of the amount of the SPA awarded to him with effect from 1 April 2019, as well as the review of the effective date and of the step of his promotion.

On 28 May 2021 the Appeal Board issued its report, in which, having found the appeal to be admissible in its entirety, it recommended that the Secretary-General dismiss the complainant's various claims but award him financial compensation in an amount equivalent to the difference between grade G.2 and grade G.4 for the period when he was assigned to the User Services Division between 1 January 2014 and 1 April 2019.

On 21 October 2021 the Secretary-General informed the complainant that the Appeal Board had dismissed most of his claims and that he had also decided not to follow the Board's recommendation to award him financial compensation for the period from 1 January 2014 to 1 April 2019 because he considered that the appeal was, on this point, "manifestly irreceivable in several respects". That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 21 October 2021 dismissing his internal appeal, the decision of 22 October 2020, the decision of 6 March 2020 relating to his promotion, the decision of 16 December 2019 awarding him a SPA, the decision of 2 May 2019 ordering his transfer, and the implied decision

dismissing the request he made on 12 December 2018 for his administrative situation to be regularised. He seeks the reconstruction of his career based on a G.5 grading with effect from 1 January 2013, including the production of an "accurate job description with an accurate grading", payment of the extra remuneration, in particular that payable under routine advancements, and the additional contributions to the Pension Fund to which he considers he is entitled, together with late payment interest at the rate of 5 per cent per annum from each due date. He claims 60,000 euros in compensation for the moral injury he considers he has suffered. Lastly, he seeks costs of 12,000 euros.

ITU asks the Tribunal to dismiss the complaint as irreceivable, except in relation to the arguments concerning the complainant's promotion to grade G.4, which it asks the Tribunal to reject as unfounded.

CONSIDERATIONS

1. In his complaint form, the complainant asks the Tribunal to set aside the decision of the Secretary-General of ITU of 21 October 2021, together with the earlier decisions that it expressly or implicitly confirms, to order the organisation to compensate him in full for the injury suffered and also to order the organisation to pay him 12,000 euros in costs.

In his brief, the complainant specifies that the earlier decisions which he wishes to have set aside are the decision of 22 October 2020 dismissing his request for reconsideration in relation to the conditions of his promotion, the decision of 6 March 2020 regarding his promotion to grade G.4, step 6, the decision of 16 December 2019 awarding him a SPA of an amount which he contests and which excludes a certain period, the decision of 2 May 2019 concerning his transfer to the Logistics Service, as well as the implied dismissal of the request he made on 12 December 2018 for his administrative situation to be regularised.

The complainant states that he has no wish to return to the irregular situation he was in, or to be appointed to a grade G.2 post, or to have to return any part of the remuneration he received as a consequence of some of the decisions which he is challenging, but that what he wants is for the reality and the level of the duties he performed to be formally recognised through the notification of an accurate job description with an accurate grading.

He also submits that setting aside the contested measures would be insufficient to adequately redress the injury he has suffered and considers that an adequate remedy should, in particular, take the form of a reconstruction of his career based on a G.5 grading with effect from 1 January 2013, the payment of the consequential extra remuneration, in particular that payable under routine advancements, and of the additional contributions to the Pension Fund, as well as the late payment interest at the rate of 5 per cent per annum from the due date of each of the sums in question.

The complainant submits that he has also suffered serious moral injury, the amount of which he assesses as at least 60,000 euros.

2. In its reply, ITU recalls that, during the internal appeal procedure, it submitted – although the Appeal Board did not agree with it on this point – that the complainant's appeal was brought out of time as far as the majority of his claims were concerned. ITU therefore considers itself justified in concluding that, since the complainant failed to properly exhaust the internal means of redress available to him, the present complaint is, accordingly, irreceivable, except "as regards his promotion to grade G.4 with effect from 1 March 2020".

As regards the request made by the complainant on 12 December 2018 to have his "administrative position" regularised, the organisation submits first of all that such a request could, in any event, relate only to amounts received during the preceding 45 days and that the complainant is time-barred from claiming the regularisation of amounts received any earlier. According to the organisation, since the complainant's claims can therefore only pertain to a period going back no further than 28 October 2018, the Appeal Board's recommendation is redundant

given that it concerned a period prior to that date. Anyway, the request for reconsideration submitted on 23 April 2019 in respect of what the complainant regarded as an implied decision dismissing his request of 12 December 2018 was, in any case, time-barred since, while there was no set deadline for replying to the request of 12 December 2018, the period of 132 days taken to submit the request for reconsideration on 23 April 2019 rendered it out of time and, therefore, irreceivable.

In any event, the organisation considers that the appeal lodged by the complainant on 21 December 2020 was out of time insofar as it concerned the implied dismissal of the request he made on 12 December 2018 to have his administrative situation regularised, his transfer to the Logistics Service on 2 May 2019 and the decision to award him a SPA with effect from 1 April 2019, since it was not lodged with the Appeal Board within the time limit of 60 days prescribed therefor.

3. Having recalled that the Appeal Board expressly considered that the appeal was admissible in its entirety, the complainant notes first of all that, prior to the impugned decision, the organisation never alleged that his request of 12 December 2018 had been submitted out of time. A defendant organisation may not object to the receivability of a complaint before the Tribunal on the basis that the appeal itself was irreceivable for reasons that it did not raise at the appropriate juncture in the internal procedure. In any event, the request of 12 December 2018 was not time-barred as there was no time limit on the complainant's calls for his situation to be regularised and for the injury caused by the discrepancy between the level of his post and the level of the duties actually performed to be redressed. As long as an official's position remains irregular, she or he is entitled to ask for it to be regularised and to receive compensation for the injury caused by the situation and its duration, the question of receivability of her or his request being of no further relevance at the time when the injury is assessed and the most suitable manner of compensation to ensure full and fair redress for that injury is determined.

Given that, prior to the impugned decision, the organisation also failed to allege any non-compliance with the 45-day time limit within which a request for reconsideration of an earlier decision, whether express or implied, must be submitted, it may not rely on that as a ground of irreceivability before the Tribunal in seeking to have the present complaint dismissed. In any event, that ground of irreceivability does not apply to the request for reconsideration of 23 April 2019, firstly, because there was no statutory time limit within which the Administration had to respond to the request of 12 December 2018 and, secondly, because the period in which the request for reconsideration was submitted is not manifestly unreasonable.

As regards non-compliance with the statutory time limit of 60 days within which an appeal must be lodged with the Appeal Board, the complainant considers this ground of irreceivability to be unfounded. According to him, it is established that, at a meeting held at the beginning of July 2019, the organisation suggested to him that the examination of his first two requests for reconsideration be adjourned until the end of February 2020, and that he accepted this suggestion at a second meeting held on 8 July 2019, confirming his agreement in writing in an email of 13 August 2019. Furthermore, in its email of 30 April 2020, the organisation reiterated its willingness to adjourn the review procedure in respect of the various requests for reconsideration the complainant had submitted up until that point, while nothing in the content of its response of 22 October 2020 indicated that it intended to adjourn the review procedure only in respect of the complainant's fourth request for reconsideration, which concerned the conditions of his promotion. If that was indeed its intention, the organisation should have advised him without delay, in accordance with its duty to act in good faith, so that he might properly exercise his right of appeal. The complainant also notes that, in any event, his email of 19 March 2020 could have been regarded as an internal appeal, which should have been forwarded by the Administration to the Appeal Board.

Lastly, the complainant submits that ITU's attempt to limit the scope of its response of 22 October 2020 to just the request for reconsideration of the decision of 6 March 2020 promoting the

complainant to grade G.4, step 6, was unreasonable. The request for reconsideration of that promotion decision was, in the complainant's view, linked to the central question of the level of the duties which he had previously performed, and it was therefore improper to presume or conclude that the complainant wished to dissociate the procedural aspects of matters the substance of which he considers indissociable.

4. The relevant provisions of Chapter XI of ITU's Staff Regulations and Staff Rules (2019 edition, applicable to this case) are the following:

– Rule 11.1.2 ("Request for reconsideration"):

> "1. A staff member who [...] wishes to appeal against an administrative decision shall, as a first step, address a written request for reconsideration to the Secretary-General, with a copy to the Director of the Bureau in which he/she serves, where appropriate, requesting that the decision in question be reviewed. The request for reconsideration, clearly identified as such, must specify the contested administrative decision and grounds for the request, and must be sent within forty-five (45) days from the date on which the staff member was notified of the decision.
>
> 2. As from the date on which he/she receives the request for reconsideration, the Secretary-General shall have a period of forty-five (45) days within which to reply to it in writing."

– Rule 11.1.3 ("Appeal Board"):

> "[...]
>
> 7. The appeal procedure shall be as follows:
>
> a) If a staff member having submitted a request for reconsideration to the Secretary-General wishes to contest the decision notified to him/her in the Secretary-General's reply thereto, he/she shall submit to the Chairman of the Appeal Board a written appeal containing his/her complaints, with a copy for information to the Secretary-General and to the Director of the Bureau in which he/she serves, where appropriate;
>
> b) The time-limit for the submission of an appeal is sixty (60) days, to be counted:
>
> i. from the date of receipt of the Secretary-General's reply to the request for reconsideration, or

ii. if no reply to the request for reconsideration has been communicated to the staff member within the time-limit specified in Rule 11.1.2.2 above, from the date of expiry of that time-limit;

[...]

d) An appeal that has not been lodged within the above time-limits shall not be receivable; the Panel may, however, waive the time-limits in exceptional circumstances, in which case it shall promptly inform the parties accordingly, with an explanation of the specific reasons for its decision to allow the waiver;"

– Rule 11.1.4 ("Final decision"):

"1. The final decision of the Secretary-General shall be notified to the appellant within forty-five (45) days of receipt by the Secretary-General of the Panel's report. [...]

2. The final decision concludes the internal appeal procedure."

5. The Tribunal notes, in the first place, that, during the internal appeal procedure before the Appeal Board, ITU expressly asserted that the appeal was irreceivable with regard to the majority of the requests for reconsideration submitted by the complainant, because proper recourse had not been had to the internal means of redress. Similarly, in the impugned decision of 21 October 2021, the organisation expressly stated that the Appeal Board had failed to properly appreciate the fact that the complainant's appeal was manifestly irreceivable in several respects.

While it is true that, in the context of the present complaint, ITU relies in part on grounds other than those which it raised during the internal appeal procedure before the Appeal Board, the Tribunal considers that an organisation may, notwithstanding the case law to which the complainant refers in this regard, put forward grounds other than those relied on in the internal appeal procedure, because the organisation did raise, during that procedure, an objection as to receivability based on a failure to have proper recourse to the internal means of redress, regardless of the precise ground. To find the opposite would amount to compelling an organisation, in the context of the internal appeal procedure, to put forward from the outset all of the grounds that could possibly justify its objection as to receivability, even

where it could believe – rightly or wrongly – that the principal grounds raised before the internal appeal body were of themselves sufficient.

6. In the second place, the Tribunal notes that, in his letter of 12 December 2018 addressed to the Secretary-General, the complainant based his claims on administrative decisions that he did not challenge within the period prescribed by the aforementioned Staff Rule 11.1.2. It is clear from the evidence that the complainant did not submit a request for reconsideration in respect of his job description or his transfer when he was transferred on 1 January 2014 to a grade G.2 post within the User Services Division of the Information Services Department (IS). Neither did he submit a request for reconsideration in respect of the payslips which he subsequently received every month.

The Tribunal cannot accept the complainant's argument that his request of 12 December 2018 was not time-barred because its purpose was to obtain compensation for the whole of the injury he allegedly suffered for the period from 1 January 2013 to 1 March 2020, and that actions of this type are not, as such, subject to any particular time limit. The Tribunal considers this manner of presenting the case contrived, because, in a dispute involving a challenge to individual decisions, as here, compensation for injury arising from the alleged unlawfulness of such decisions could only be granted as a consequence of their setting aside, which presupposes by definition that they have been challenged within the applicable time limit. Endorsing the complainant's argument would have the effect of authorising an organisation's staff members in practice to evade the effects of the rules on time limits for filing appeals by allowing them to seek compensation at any time for the injury caused to them by an individual decision, even though they did not challenge that decision in time. Such a situation would scarcely be permissible having regard to the requirement of stability of legal relations which, as the Tribunal regularly points out in its case law, is the very justification for time bars (see, for example, Judgments 4742, consideration 9, and 4655, consideration 15).

It follows that the complaint is irreceivable to the extent that it concerns the implied decision dismissing his request of 12 December 2018 for his administrative situation to be regularised, because he failed to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Statute of the Tribunal.

7. As regards the complainant's second request for reconsideration, submitted on 20 June 2019 and relating to the decision of 2 May 2019 ordering his transfer, the Tribunal notes that, in the email he sent to the head of the Human Resources Management Department on 13 August 2019, the complainant confirmed "[his] agreement to the two procedures [relating to his first two requests for reconsideration, in other words the request of 23 April 2019 for reconsideration of the implied rejection of his request of 12 December 2018 for his administrative situation to be regularised, and the request of 20 June 2019 for reconsideration of the transfer decision of 2 May 2019] being adjourned until the end of February 2020". Similarly, in a second email sent to the same addressee on 20 August 2019, the complainant included the minutes he had written of the meeting held on 4 July 2019 in the presence of a trade union official. According to the minutes, the head of department had asked to adjourn the review procedure in respect of the complainant's first two requests for reconsideration and to be given six months, until the end of February 2020, to resolve the issue and reclassify the complainant's post at grade G.4, it being suggested at the end of the meeting that the complainant reflect on this proposal and respond to it on Monday 8 July 2019. In a third email sent to the same head of department on 19 March 2020, the complainant clearly specified that it was indeed "[t]he deadline[s] for processing" his first two requests for reconsideration which had been adjourned until the end of February 2020. In a statement issued on 4 March 2021, the trade union representative who had attended the meetings of 4 and 8 July 2019 between the complainant and the head of the Human Resources Management Department also confirmed that the latter had "proposed that the appeal proceedings be adjourned", to which the complainant had formally agreed on 8 July.

In addition, in his email of 19 March 2020, in which he asked for a reply within 45 days of 1 March 2020 to his requests for reconsideration submitted on 23 April and 20 June 2019 and also stated that he was challenging his promotion, the complainant specified the following: "I have no objection to postponing the deadline for replying by a few weeks if necessary or to assist in finding an amicable solution". On 30 April 2020 the organisation responded to him as follows: "[W]e undertake not to contend that your request is time-barred unless and until we have [...] responded to it". However, in its reply of 22 October 2020, the organisation responded only to the complainant's request for reconsideration relating to the determination of the conditions of his promotion.

According to firm precedent based on the provisions of Article VII, paragraph 1, of the Statute of the Tribunal, the fact that an internal appeal is lodged by a complainant out of time renders her or his complaint irreceivable for failure to exhaust the internal means of redress available to staff members of the organisation, which cannot be deemed to be exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see Judgments 4655, consideration 20, 4160, consideration 13, and 4159, consideration 11, as well as, for example, Judgments 2888, consideration 9, 2326, consideration 6, and 2010, consideration 8).

However, there are exceptions to this general principle laid down in the Tribunal's case law. One of them is the case where the defendant organisation misled the complainant, depriving him of the possibility of exercising his right of appeal in violation of the principle of good faith (see, for example, Judgments 4184, consideration 4, 3704, considerations 2 and 3, 2722, consideration 3, and Judgment 3311, considerations 5 and 6).

The Tribunal notes that the sentence "we undertake not to contend that your request is time-barred unless and until we have [...] responded to it", contained in the organisation's email of 30 April 2020, was sent in response to an email from the complainant in which he referred to his first two requests for reconsideration, in addition to submitting a new

request for reconsideration in relation to his promotion. The Tribunal also notes that, in its email of 30 April 2020, the organisation did not specify that the sentence was to be understood as referring only to the complainant's request for reconsideration relating to his promotion. It follows that the organisation's email of 30 April 2020 was such as to mislead the complainant as to the extent of the adjournment of the procedure for reviewing his requests for reconsideration. Indeed, the complainant was entitled to infer from the ambiguous content of that email that the organisation had decided to extend the adjournment of the review procedure in respect, in particular, of his request for reconsideration of 20 June 2019 concerning the transfer decision of 2 May 2019, which, as stated above, had been adjourned by agreement of the parties until such time as the organisation provided a reply to the complainant. In view of the fact that the latter received a reply from the organisation on 22 October 2020, it is only from that date that it can be said with certainty that he was aware that the procedure for reviewing his request for reconsideration of 20 June 2019 was no longer adjourned.

Consequently, contrary to what ITU submits, pursuant to the case law recalled above and to the aforementioned Staff Rule 11.1.3(7)(b), the internal appeal lodged by the complainant on 21 December 2020 could not be regarded as time-barred insofar as it challenged his transfer dated 2 May 2019.

8. On the other hand, even if the complainant's email of 13 March 2020, addressed to the head of the Human Resources Management Department and concerning the amount of the special post allowance (SPA) awarded to him by decision of 16 December 2019, with retroactive effect from 1 April 2019 but subject to one month's interruption of payment in October 2019, could be regarded as a request for reconsideration, it must be concluded that a failure to expressly respond to that request within the 45-day time limit, as provided for in the aforementioned ITU Staff Rule 11.1.2(2), materialised on Monday 27 April 2020 and that, since the procedure for examining that request for reconsideration had not been adjourned, the complainant had, accordingly, to lodge his internal appeal within 60 days of that date, pursuant to Staff Rule 11.1.3(7)(b), in other words no later than Friday

26 June 2020. The internal appeal lodged by the complainant on 21 December 2020 was therefore time-barred insofar as it challenged the SPA awarded to him retroactively with effect from 1 April 2019.

9. As regards the fourth request for reconsideration submitted by the complainant on 19 March 2020, by which he sought to challenge the decision of 6 March 2020 concerning his promotion to the post of Technical Logistics Support Assistant at grade G.4, step 6, following a competition process for which he had applied, the Tribunal notes that the request was properly submitted within the 45-day time limit under the aforementioned Staff Rule 11.1.2 and that the complainant's supervisor expressly replied to it on 22 October 2020. The Tribunal goes on to note that the complainant challenged that promotion decision by way of an internal appeal addressed to the Appeal Board on 21 December 2020 and that the organisation, in its defence before the Appeal Board and its written submissions before the Tribunal, expressly considered that the internal appeal was receivable in that regard. The Tribunal also considers that the complaint is receivable on this point.

10. In the circumstances, the Tribunal concludes that the present complaint is receivable only insofar as it seeks the setting aside of the decision of 2 May 2019 concerning the complainant's transfer, of the decision of 6 March 2020 concerning his promotion and of the decisions of 22 October 2020 and 21 October 2021.

The remainder of this judgment will therefore be limited to examining the complaint insofar as it relates to those decisions, keeping in mind that, although the complainant wishes the decisions to be set aside, he makes it clear "that he has no wish to return to his earlier work situation". In the brief annexed to his complaint form, the complainant adds in this regard that, aside from compensation for the moral injury he has suffered, he considers that redress for the injury done to him should "take the form of a reconstruction of his career based on a G.5 grading with effect from 1 January 2013, payment of the consequential extra remuneration, including that payable under routine advancements, additional contributions to the pension fund and late payment interest

at the rate of 5 per cent per annum from the due date of each of the sums in question", and should also include an "accurate job description with an accurate grading".

11. In that regard, the complainant submits first of all that the Appeal Board breached the adversarial principle and the right to an effective internal appeal in that it asked ITU to provide a report from the service that dealt with post classification, which was central to the opinion issued by the Board, but that he himself was not given much time to present his case in the light of that report, that his comments dated 27 April 2021 about the report do not appear in the annex to the Appeal Board's opinion and that, given that there were contradictions between his own statements and those of his supervisors, the Board should have asked his former colleagues, including his supervisors, about his duties and should have found out from the report's author why the same functions and responsibilities were classified at two different grades according to the points of view expressed. The complainant adds that, had the procedure been carried out correctly and had the Appeal Board investigated the case better, it might well have concluded that he had in fact performed duties at a G.5 level, rather than G.4.

However, the Tribunal notes that the line of argument thus developed by the complainant goes beyond the scope of the complaint, which, as explained in the preceding considerations, is receivable only to the extent that it concerns the lawfulness of the decisions by which the complainant was transferred and promoted, taken respectively on 2 May 2019 and 6 March 2020.

12. The Tribunal considers that the same must be said of the pleas based on a breach of the right to a proper administrative position and the right to equal treatment, a breach of ITU Staff Regulation 2.1 and bad faith on the part of the organisation in opposing the requests made by complainant over the course of several years for a review of his post classification. Again, these pleas are extraneous to the review of the lawfulness of the aforementioned decisions of 2 May 2019 and 6 March 2020.

13. The complainant goes on to submit that the decision, taken on 16 December 2019, to award him a SPA at grade G.4 with retroactive effect from 1 April 2019 and the aforementioned decision of 6 March 2020 are also unlawful because, when considered in the context in which the earlier decisions were taken, they are insufficient to redress the injury he considers he has suffered, regardless of "whether or not [those two decisions] are flawed in themselves". The complainant submits in this respect that the SPA was only for grade G.4 and did not extend beyond April 2019, while the promotion was not retroactive and, in terms of step classification, did not take account of the fact that he was on the top step of grade G.2 throughout all the years he performed duties at G.5 level – perfectly satisfactorily – and he therefore missed out on the increments that he would have received had he been promoted sooner in his former duties and had those duties been properly recognised and classified.

However, the Tribunal recalls that, for the reasons set out above, the present complaint is irreceivable insofar as it is directed against the decision to award him a SPA with retroactive effect from 1 April 2019.

Furthermore, and as observed by the organisation and previously noted by the Tribunal, the promotion decision of 6 March 2020 was taken in the discrete context of a new job opening for which an internal competition was held, to which the complainant voluntarily applied. It follows that an assessment of the alleged unlawfulness of such a promotion – and the determination of the step involved – cannot be based on the unlawfulness of other earlier decisions – which, moreover, were not challenged in due time – but only on any unlawfulness in the promotion decision itself or in the procedure followed. It must be noted that the complainant does not allege any unlawfulness of that kind.

14. It follows from the foregoing that the complainant's pleas referred to in considerations 11 to 13 must be dismissed, as must his claims for a reconstruction of his career as referred to in consideration 10.

15. As regards the decision of 2 May 2019 transferring the complainant, the Tribunal recalls that it is well established in its case law that a decision to transfer an employee of an international organisation, which, as with any appointment decision, lies within the discretion of the executive head of the organisation concerned, is, for that reason, subject to only limited review. Therefore, such a decision may be set aside only if it was taken ultra vires, if it shows formal or procedural flaws or a mistake of fact or law, if some material fact was overlooked, if there was abuse of authority or if a clearly wrong conclusion was drawn from the evidence (see, for example, Judgments 4609, consideration 4, 4451, consideration 6, 3488, consideration 3, 2635, consideration 5, 1556, consideration 5, or 883, consideration 5). The complainant's arguments concerning the transfer decision of 2 May 2019 will be examined in the light of this case law.

Among the complainant's various pleas against that decision, there is one which falls within the Tribunal's limited power of review as defined above, since it is based on a procedural flaw, and which is decisive for the outcome of the present dispute. This plea concerns the lack of prior consultation with the complainant about the duties that he would be assigned in his new post.

The complainant states in his written submissions that he was not informed, prior to his transfer, of the nature of his new duties, other than that his role "would be connected with the new building". He also contends that the job description for his new employment was not drawn up until November 2019, that is seven months after his transfer took effect.

Although the organisation insists on the fact that the complainant was informed in advance of the reasons for his transfer, as is required by the case law (see, for example, Judgment 4690, consideration 6), it does not respond in its written submissions to the complainant's argument that the advance information provided did not cover his new duties. Indeed, in its reply, the organisation asserts that "[t]here is no requirement for a consultation to cover all aspects of [the] transfer in detail in order for it to be valid". But the Tribunal's case law requires that a staff member who is to be transferred be informed in advance of

the nature of the post proposed for her or him and, in particular, of the duties involved, so that she or he is able to comment on those new duties as well (see, for example, Judgments 4609, consideration 8, 4451, consideration 11, 3662, consideration 5, 1556, considerations 10 and 12, or 810, consideration 7). The lack of prior consultation with the complainant on this point is a procedural flaw sufficient to render the contested transfer decision unlawful.

It follows from the foregoing that the transfer decision of 2 May 2019 must be set aside, as must the Secretary-General's decision of 21 October 2021 in that it found the complainant's internal appeal to be irreceivable insofar as it concerned that transfer decision, without there being any need to examine the complainant's other pleas.

The Tribunal notes that the setting aside of the transfer decision of 2 May 2019 will not have any practical effect on the complainant's work situation given that, since his promotion decided on 6 March 2020, he has held another grade G.4 post.

16. The Tribunal notes that the complainant does not seek compensation for the material injury he allegedly suffered as a result of the unlawfulness of the transfer decision of 2 May 2019, by which he was assigned to a grade G.2 post within IS. Even if the complainant had made such a request, it would not, in any event, be appropriate to grant it, since the file shows that he received for that post a grade G.4 SPA, retroactive to the date on which his transfer took effect.

17. However, the complainant is justified in maintaining that the unlawfulness of the contested transfer decision caused him a certain moral injury. The lack of advance information provided to the complainant about the responsibilities involved in the new duties he was to assume were such as to cause him anxiety and stress and adversely affected his rights, which is characteristic of that form of injury. The Tribunal considers that this injury will be fairly redressed by awarding him damages in the amount of 7,000 euros.

18. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The Secretary-General's decision of 21 October 2021, in that it found the complainant's internal appeal to be irreceivable insofar as it concerned the transfer decision of 2 May 2019, is set aside, as is the transfer decision of 2 May 2019.
2. ITU shall pay the complainant 7,000 euros in moral damages.
3. It shall also pay him 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 23 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER