

SEVENTIETH SESSION

In re **FABIANI (No. 2)**

Judgment 1092

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Denise Fabiani against the International Telecommunication Union (ITU) on 9 March 1990 and corrected on 18 June, the ITU's reply of 10 September 1990, the complainant's rejoinder of 10 October and the Union's surrejoinder of 16 November 1990:

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulation 3.8 and Rules 11.1.1.2 a) and b) of the ITU Staff Regulations and Staff Rules;

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

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

A. The complainant, a French citizen, joined the staff of the International Telecommunication Union on 13 September 1978 at grade G.6. On 1 January 1981 she was promoted to a G.7 post, No. 571, as an administrative assistant (editorial) in the Specialized Secretariat of the International Radio Consultative Committee, known as the CCIR.

In a memorandum of 1 July 1982 to the Secretary-General of the Union the Director of the CCIR proposed giving the complainant from that date a temporary appointment at P.3 as "chief of copy preparation and proof-reading" until "a more definite long-term arrangement" was approved. She was paid a special post allowance corresponding to grade P.3 under Regulation 3.8 of the ITU Staff Regulations from 1 July to 31 August 1982 and again from 1 February to 30 June 1983.

In a memorandum to the Secretary-General of 18 January 1984 the Director of the CCIR asked for the upgrading of her post from G.7 to P.3 in recognition of the level of her de facto duties as editorial assistants' supervisor. On 1 January 1985 post 571 was upgraded, not to P.3, but to P.2, and the complainant was promoted to P.2. She also got a special P.2 post allowance with retroactive effect from 1 July 1984 until 31 December 1984. In an annual report written in May 1985 on the complainant the Director of the CCIR stated that her "responsibilities and performance" were "at the P.3 level or higher" and that the grading of post 571 ought therefore to be reviewed; he described her work as "outstanding".

By a memorandum of 5 August 1985 to the chief of her technical department in the CCIR the complainant applied for the regrading of her post to P.3 and for the grant of the title "editor".

Special post allowances at P.3 were paid to her from 1 June to 30 November 1986, from 1 January to 30 June 1987, from 1 August to 30 September 1987 and from 1 January to 30 June 1988.

In December 1987 the Director of the CCIR forwarded to the Personnel Department a formal request for review of the grading of the complainant's post, and a desk audit was carried out in June 1988. A post classification report of 4 January 1989 acknowledged that reductions in staff had made it necessary to redistribute tasks and responsibilities. The report discussed how far the level of responsibilities of the complainant's post was affected and concluded that they "now reach the P.3 level". Since it was a "borderline" case and since the future organisation of the technical department to which the post belonged was still uncertain the report did not recommend reclassification yet, but it did recommend continuing to pay the incumbent of the post the special P.3 allowance until the organisational structure was clearly determined.

In a letter of 2 March 1989 the complainant cited the classification report of 4 January 1989 and asked the Secretary-General under Rule 11.1.1.2 a) of the ITU Staff Rules to review the grading of her post. On 19 April 1989, having got no reply, she submitted an internal appeal to the Chairman of the Appeal Board under Rule 11.1.1.2 b) against the implied rejection of her request.

A Plenipotentiary Conference of the ITU was held in Nice in May and June 1989.

On 12 September 1989 the Chief of the Personnel Department forwarded to her a new post classification report dated 7 September 1989. That report observed that further savings would require a further reduction in staff and that the complainant would plainly have to carry out permanently the duties and responsibilities of her post since they would not revert to others. The report accordingly recommended upgrading her post to P.3.

In its report of 19 October 1989 on her appeal of 19 April the Appeal Board recommended that the Secretary-General upgrade her post to P.3 with a reasonable period of retroactivity. By a decision of 30 October 1989 the Secretary-General promoted the complainant to grade P.3, step 2, as from 1 September 1989 as an editorial assistants' supervisor. He pointed out in a letter to her of 1 November 1989 that she had been paid special post allowances at P.3, "albeit on a temporary basis", for 32 months in all between 1 June 1986 and 31 August 1989 on the strength of her additional responsibilities.

By a letter of 27 November 1989 the complainant asked the Secretary-General under Rule 11.1.1.2 a) to review the date at which her promotion took effect to make it properly retroactive. On 11 December the Secretary-General replied that the payment of a special post allowance up to the date of her promotion showed that till then the state of affairs had been only temporary, and he accordingly confirmed his decision that her promotion to P.3 would take effect only as from 1 September 1989. That is the decision impugned. By a letter of 5 March 1990 the complainant told the Secretary-General of her intention to appeal to the Tribunal and in a memorandum of 8 March 1990 he authorised her to do so directly.

B. The complainant's case rests on a single plea: the Union failed to abide by the general rule that requires an international organisation to treat its staff fairly and in good faith.

She submits that her belated promotion, with only two months' retroactivity, to a grade which her duties had warranted for over eight years was seriously detrimental to her, even though she did get the post allowance for much of the time. Her career prospects and financial position suffered inasmuch as her salary, which determines her pension rights, was 6 steps below what it would have been if her post had been graded P.3 in 1982. The detriment to her interests could have been avoided by promoting her with a reasonable period of retroactivity as indeed the Appeal Board recommended. The period granted was too short to make much difference and she has suffered both material and moral injury.

She invites the Tribunal to quash the Secretary-General's decision of 11 December 1989 and accordingly award her retroactive upgrading to P.3 for a reasonable period, and in any event not less than four years; failing that, at least four additional steps in her grade; moral damages in an amount to be set by the Tribunal; and 25,000 French francs in costs.

C. In its reply the Union contends that it has abided by the cardinal principle which requires international organisations to treat its officials fairly and in good faith.

It observes that the duties that increased the complainant's responsibilities were always temporary. There are two cycles of publication in the CCIR in that plenary meetings are held every four years and interim meetings of study committees every two years. Other publication work was not enough to warrant creating a permanent P.3 post in the complainant's technical department until 1989. Whenever her responsibilities did temporarily increase she was duly compensated, in the only way ITU rules allowed, by the grant of the special post allowance. Moreover, as soon as the increase in her responsibilities became permanent, because staff cuts had made it necessary to restructure work in the CCIR, the Union acted immediately to regrade her post and promoted her to P.3 as from 1 September 1989.

D. In her rejoinder the complainant seeks to refute each of the Union's pleas in its reply, particularly its allegation that the increase in her responsibilities was only temporary. She contends that the Union misunderstands how the CCIR works: it does not just hold the plenary and interim meetings, and the manuals it issues, though few, require a tremendous amount of effort. There has been no change in the department's structure since 1986. The Union has failed to answer her point that the Appeal Board itself recommended regrading with a reasonable period of retroactivity. She presses her claims, raising to 32,000 French francs the amount she claims in costs.

E. In its surrejoinder the Union enlarges on its earlier pleas on the merits of the case, which it submits the rejoinder

in no way weakens. It contends in particular that it acted throughout in good faith and, as soon as it was clear that the complainant's increased responsibilities were permanent, with promptness and diligence. There was no breach of any of its rules, and its handling of the case was based on concepts of sound and efficient management. It maintains that the complainant was duly compensated, for as long as and whenever her additional duties were temporary, by the grant of the special post allowance. It explains that the position of editors in her technical department was utterly unstable from 1983 until 1989, as is clear from the Union's hesitation over taking on new recruits, and that the situation had to be allowed to evolve over that period.

CONSIDERATIONS:

The background

1. The complainant joined the Union on 13 September 1978 and was assigned to a technical department of the International Radio Consultative Committee (CCIR) that prepared and published records of proceedings and technical texts. By all accounts she was an outstandingly capable worker and she received the highest praise from her superiors.

As early as 1 July 1982, when she held a post, No. 571, at grade G.7, the Director of the CCIR recommended her temporary appointment as chief of copy preparation and proof-

reading at grade P.3 and the Secretary-General thereupon approved the temporary payment to her in that capacity of a special P.3 post allowance, as provided for under Regulation 3.8 of the ITU Staff Regulations.

As from 1 January 1985 post 571 was upgraded to P.2 and the complainant was promoted to that grade as from the same date.

By a memorandum dated 5 August 1985 the complainant applied for the upgrading of her post to P.3. She received no reply and she did not press her claim.

But she continued to draw intermittently the special post allowance at grade P.3 on the grounds of her "additional duties", and nothing seems to have been done until the end of 1987, when her supervisor made a request for review of the grading of her post.

In pursuance of the review a desk audit was carried out in June 1988. A report dated 4 January 1989 by a grading officer observed that there had been reduction of staff in the department and that the level of responsibility of post 571 might increase; that because of lack of resources the complainant was performing duties more appropriate to the editor-in-chief; and that one of the complainant's additional duties affected the rating factors "supervision", "contacts" and "impact of work". The conclusion was that the responsibilities of the post, if reviewed against earlier ratings, "would now reach the P.3 level".

Notwithstanding that definite finding the grading officer recommended keeping the post at P.2 on the grounds that it was something of a "borderline case" and that the organisation of the department was "still uncertain", but continuing to pay the complainant the special post allowance at P.3. The Secretary-General accepted and by a text dated 26 January 1989 decided to continue to pay the complainant the special post allowance at P.3. That decision, which the complainant did not challenge, is final.

Not until 2 March 1989 did she apply to the Secretary-

General for review of the grading of her post, and on 19 April 1989, not having received any reply from the Secretary-General, she lodged an internal appeal under Rule 11.1.1.2 a).

A Conference of Plenipotentiaries of the Union was held in Nice in May and June 1989, and as a result the increase in the responsibilities of the complainant's post became permanent. After the Conference was over the grading officer submitted another classification report, dated 7 September 1989, on post 571. The new report referred to budgetary restrictions, stated that the duties and responsibilities of the post would not revert to others and accordingly recommended upgrading the post to P.3.

The Appeal Board reported on 19 October 1989. Without citing the second classification report it held that the complainant's post should be regraded at P.3 and recommended a reasonable period of retroactivity.

By a letter of 30 October 1989 the Secretary-General informed the complainant that he promoted her to P.3 as an editorial assistants' supervisor with effect from 1 September 1989. The Union states in its reply to the complaint that that is "the date following" ("le lendemain") the Plenipotentiary Conference, though it admits in its surrejoinder that the Conference ended in June 1989. She was put at step 2 in her new grade and the date for her advancement to the next step in P.3 was set at 1 May 1990. The Secretary-General pointed out to her in a letter of 1 November 1989 that she had drawn a special P.3 post allowance for a total of 32 months between 1 June 1986 and 31 August 1989.

The complainant submitted to the Secretary-General a request under Rule 11.1.1.2 a) for the grant of a longer period of retroactivity and his refusal dated 11 December 1989 is the decision she is impugning in her complaint.

Receivability

2. The complainant sought and received permission from the Secretary-General to bypass the Appeal Board and proceed direct to the Tribunal. There is a precedent for that in, for example, Judgment 339 (in re Kennedy) and the question of receivability is not at issue.

The merits

3. The Secretary-General having decided on 30 October 1989 to promote the complainant to grade P.3, the only material issue is the period of retroactivity. That is a matter which is peculiarly within the Secretary-General's discretion and the Tribunal will not review the exercise of his discretion to grant retroactive effect to promotion unless it is satisfied that his decision was taken without authority, or violated a rule of form or procedure, or was based on a mistake of fact or law, or unless some essential fact was overlooked, or there was abuse of authority, or some clearly mistaken conclusion was drawn from the facts.

The Tribunal is satisfied on the evidence before it that in this instance the Secretary-General lost sight of several essential facts. For one thing, in taking 1 September 1989 as the effective date of the complainant's promotion he seems to have made a mistake: since the Conference took place in May and June, 1 September is not "the date following" the Conference. Nor is any reason given or apparent why 1 May is taken as the date for the next within-grade advancement. Another relevant point is the delay in the Union's resolving, as it had it in its power to do, the uncertainties over the organisation of the complainant's department. The Secretary-

General further overlooked the adverse effect that delay in the complainant's promotion would have on her career prospects and pension entitlements.

Relief

4. The complainant suggests that a solution alternative to the grant of four years' retroactivity would be the award of another four steps in her grade, and she says that, though that would not compensate her for loss of career prospects, salary and increased pension entitlements, it would be acceptable in that it would improve her situation for the future.

In the circumstances the Tribunal will not interfere with the Secretary-General's decision to put the complainant at step 2 in P.3. But as regards the period of retroactivity it will, for the reasons set out above, order that her promotion to P.3, step 2, take effect as from 1 May 1989, the start of the month in which the Conference of Plenipotentiaries began and the yearly date set for the grant to the complainant of future steps in her grade.

Moral damages and costs

5. The Tribunal makes no award of damages for moral injury because the complainant has failed to show injury of such seriousness as to warrant such an award. But since she has won her case in part, she is entitled to an award of damages.

DECISION:

For the above reasons,

1. The Secretary-General's decision of 30 October 1989 is quashed.
2. The complainant is promoted to grade P.3, step 2, as from 1 May 1989.
3. The Union shall pay her 10,000 French francs in costs.
4. Her other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner