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

SEVENTY-SEVENTH SESSION

In re SIGRIST

Judgment 1370

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Aloïs Joseph Sigrist against the International Telecommunication Union (ITU) on 30 June 1993 and corrected on 16 September, the ITU's reply of 3 December 1993, the complainant's rejoinder of 4 March 1994 and the Union's surrejoinder of 8 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 3.8 and Rules 3.4.2 and 11.1.1.2 and .4 of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, 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 Swiss citizen who was born in 1939, joined the General Service category of the ITU's staff in Geneva in 1970 at grade G.6. In 1971 he was promoted to grade G.7.

By a letter of 9 September 1977 the Secretary-General told him that his post had been classified in a grade in the Professional category, P.2, and that the Appointment and Promotion Board took the view that he "met the requirements for promotion to the grade" of the post as from 1 January 1977; if he wanted to keep his pensionable remuneration at the level corresponding to grade G.7 he might apply for payment of special post allowance as from 1 January 1977; and he would have to return the sums he had been paid in compensation for overtime hours worked in the General Service category unless he consented to the postponement to 1 April 1977 of his promotion or to payment of a special post allowance. By a letter of 21 September 1977 he agreed to be paid the special post allowance as from 1 April 1977.

By a memorandum of 22 August 1991 he applied to the Secretary-General under Rule 11.1.1.2 a) to have the amount of his post allowance adjusted retroactively to make up for the loss in pay which he said he had sustained from adoption of the new salary scale, published on 13 May 1991, for General Service staff at Geneva.

Having had no reply within the time limit in Rule 11.1.1.2 b), he lodged an appeal with the Appeal Board on 14 November 1991 against the implied rejection of his claim. The Board reported to the Secretary-General on 18 March 1993. Having failed to agree, its three members each wrote separate opinions. Two of them were of the view that, though anomaly there was, the Union had not treated the complainant unlawfully; the third member, who was the staff representative, dissented.

On the strength of the Board's report the Secretary- General told the complainant in a letter of 1 April 1993 that he was "free to apply for the cancellation of [his] special post allowance at grade P.2". The implied decision in that letter to reject his claim is the one he is impugning.

The Deputy Secretary-General had informed the complainant in a letter of 10 March 1993 that his P.2 post had been regraded P.3 and he was deemed to qualify for promotion to that grade. After correspondence he wrote to the Secretary-General on 27 May 1993 asking for the cancellation of his special post allowance and accepting the promotion to P.3. By a decision of 3 June the Secretary-General promoted him to P.3 as from 1 June 1993.

B. The complainant submits that the change in his category and grade in 1977 must be seen as promotion. Obviously at the time he did not qualify under Regulation 3.8 for special post allowance. The sole purpose of granting him the allowance was to let him have a P.2 salary - which at the time was higher than his salary at his step in grade 7 - yet keep his pensionable remuneration at grade 7, which was higher than the pensionable remuneration corresponding to his step in grade P.2. So for several reasons the decision he challenges is unlawful.

First, the Union was in breach of the principle - reflected in Rule 3.4.2 - that promotion means a rise in salary or at the very least protection from a drop in salary. To be sure, document CA 43/6729-E, which the Secretary-General put to the Administrative Council of the Union at its 43rd Session in 1988, shows that on promotion from the General Service to the Professional category the Union makes any resulting difference in salary equivalent to at least one step in the new grade for the year following the promotion. But the Union affords no guarantee of the level of pay thereafter.

Any practice whereby promotion may entail a fall in pay after the first year is inadmissible. Indeed the Tribunal has condemned it in several rulings.

Secondly, even if the Union refuses to treat the complainant's change in grade in 1977 as promotion, any allowance - and of course especially the special post allowance, intended as it is to compensate for assumption of the duties and responsibilities of a higher grade - is just an incidental item of full pay on top of base salary. It may not become a sum to be subtracted from salary. So it is only logical and fair to allow the complainant at the very least G.7 pay if higher than what he was actually being paid. So the impugned decision disregards the rule that special post allowance may not be negative.

Thirdly, the Union's treatment of the complainant was not beyond reproach: over a year and a half went by - from 22 August 1991 to 1 April 1993 - between the complainant's application to the Secretary-General for review and the final decision. To lay the whole blame on the Appeal Board will not do: it is up to the Union to see that the time limits in the Staff Regulations and Staff Rules are observed. It was therefore in breach of good faith.

Lastly, the complainant pleads serious moral injury from the Union's blatant dilatoriness.

He asks the Tribunal to set aside the Secretary-General's decision of 1 April 1993 and accordingly order the Union to pay him for the period from 1 August 1990 to 31 May 1993 the difference between the pay he would have got had he kept grade G.7 and the pay he actually received, including the special post allowance, at step 14 in grade P.2, and to award him moral damages and costs.

C. The Union replies that contrary to what the complainant makes out he did not get promotion in 1977. Even though the Secretary-General spoke of "promotion" in his letter of 9 September 1977, he offered instead payment of the post allowance at grade P.2, and that is what the complainant accepted.

So though the Union could have adhered strictly to Rule 3.4.2.3 b) it went far beyond what that rule required of it and granted him instead something to his advantage.

It did not disregard the rule that promotion means a rise in salary or at least protection from a fall. Its position is set out in CA 43/6729-E and fully squares with Rule 3.4.2, which guarantees payment of a higher salary after promotion than before it, albeit for not more than one year. That is quite in line with the case law, which, though it accepts that because there may be career benefits promotion need not bring higher pay, does not require any indefinite guarantee of it.

True, special post allowance must not be negative; but adjustment in the post allowance, which the complainant is claiming, is not the only remedy for the decline in the terms of employment of Professional category staff. There were other options the Union would have agreed to had the complainant asked at the right time: he could have applied for the cancellation of the post allowance and kept only grade G.7 - which he had in fact never lost - or also sought actual promotion to P.2.

At some points in the internal proceedings the Administration was not as expeditious as it ought to have been. But its attitude towards the complainant was not dilatory and it was not in breach of good faith. So it caused him no moral injury.

D. In his rejoinder the complainant maintains that the change in grade in 1977 did amount to promotion.

In his submission the Union preferred the grant of special post allowance, which he sees as a means of giving effect to the decision to promote him, to applying Rule 3.4.2.3 b). The reason was that though the rule affords guidance applying it would have meant blocking his pensionable remuneration for a long time, whereas letting him have the special post allowance had the effect of indexing his pensionable remuneration to the General Service

salary scale. In any event grant of the special post allowance was no favour but just a way of fulfilling the obligation that every organisation has to protect the employee from the adverse consequences of promotion. Besides, the ITU made sure it complied with that obligation to the advantage of two other staff members in like case.

He rejects its reading of Rule 3.4.2 and of the case law and maintains that it is quite wrong to let promotion mean any loss of earnings after one year.

He denies that it was up to him to take action when the total of his P.2 salary and post allowance fell below the amount he would have been earning had he not been promoted. And he doubts that the Administration would have complied with a request for either of the options it suggests in its reply.

Lastly, he again alleges that the ITU's tardiness in dealing with his case caused him moral injury and citing Judgment 1326 (in re Gautrey), observes that it is not the first time that the Union has behaved in this way.

E. In its surrejoinder the Union maintains that what the complainant got in 1977 was not promotion but special post allowance, which it says was the best solution for him.

The two other cases he cites are immaterial: one official's position was not the same as his in law; in the other case the action taken was exceptional and ex gratia.

The Union maintains its interpretation of Rule 3.4.2 which, it observes, the Tribunal has confirmed again recently in Judgment 1322 (in re Anderson).

Lastly, it again asserts its good faith towards the complainant and in support of its case cites the Tribunal's ruling in Judgment 1326.

CONSIDERATIONS:

1. The ITU appointed the complainant in 1970 at grade G.6 and promoted him to G.7 in 1971. His unit, the secretariat of the International Frequency Registration Board, having been reformed, the Secretary-General of the Union told him in a letter of 9 September 1977 that his post had been upgraded to P.2 and that in the Appointment and Promotion Board's view he qualified for promotion to that grade as from 1 January 1977; but so as to keep his pensionable remuneration at the G.7 level he might opt for payment of special post allowance as from the same date. He concurred with the suggestion and so got the special post allowance as from 1 April 1977.

2. On 22 August 1991 he asked the Secretary-General to recalculate his post allowance to make up for the loss of pay he had suffered since January 1991, when the Union had brought in new scales of pay for staff in the General Service category. Having got no answer he inferred rejection of his claim and appealed to the Appeal Board on 14 November 1991. In its reply of 6 July 1992 to his appeal the Union confirmed the implied rejection. In the light of the Board's report of 18 March 1993 the Secretary-General decided on 1 April that (1) he was free to apply for the cancellation of the P.2 special post allowance and (2) if he agreed to promotion to P.3 and made a prior application for cancellation of the post allowance his pay would be reckoned on the strength of his personal grade, which was G.7. After getting further information about the promotion from the Secretary-General he applied on 27 May 1993 for cancellation of the P.2 allowance and accepted promotion to P.3. By a decision of 3 June 1993 the Secretary-General accordingly promoted him to P.3.

3. The decision he impugns is the Secretary-General's decision of 1 April 1993 rejecting by implication his claim to review of the post allowance.

The decision taken in 1977

4. The complainant submits that the impugned decision offends against the provisions on promotion in the Staff Regulations and Staff Rules and the general rule that a promotion should bring more, or at least no less, pay than before. In his submission the decision of 9 September 1977 was to promote him, not just to grant him special post allowance, because the conditions in Regulation 3.8 for grant of the allowance were not met and the Union granted it only as a means of giving effect to his promotion.

5. The Union demurs. By its way of thinking the letter of 9 September 1977 is not to be treated as promotion, and it

quotes the following excerpt:

"... your post is graded P.2. The Appointment and Promotion Board ... took the view that you qualified for promotion to that grade as from 1 January 1977. But to keep your pensionable remuneration at the level of grade G.7 you may apply for special post allowance, which you would also get as from 1 January 1977."

6. It is hard to discern in that passage anything but the offer of a choice between promotion and a special post allowance. And the complainant opted for the allowance. That is borne out by his failing to cite any other formal decision to promote him to P.2, although there was such a decision when he got promotion to P.3. By a letter of 10 March 1993 the Deputy Secretary-General told him that his post had been upgraded from P.2 to P.3 as from 1 November 1992 and that he qualified for promotion to the higher grade. But - the letter went on - because of the possible disadvantages of promotion to P.3 in the circumstances then obtaining in the common system of the United Nations he was free to turn down the offer. His pay would be based on his personal grade, which was still G.7, provided he expressly surrendered the post allowance. The complainant accepted the offer and the Secretary-General promoted him to P.3 by the decision of 3 June 1993 mentioned in 2 above. So his administrative status just before promotion to P.3 was what it had been in 1977: his post was upgraded, he qualified for promotion to the new grade and his personal grade, G.7, served as the basis for reckoning his new pay. The only difference was that in 1993 he had to give up the post allowance whereas in 1977 he had to opt for it. The letter of 10 March 1993 makes it plain, and he does not deny, that his promotion depended on his relinquishing the post allowance, promotion and grant of the allowance being mutually exclusive.

7. The Tribunal has already so ruled in Judgment 1171 (in re Saunders No. 6) in which it held under 2:

"The fact that the complainant continued to receive the P.2 allowance shows that he was merely to discharge the duties of the P.2 post and was not promoted to P.2."

8. That answers the complainant's contention that he had been promoted to P.2 even though he was drawing the post allowance. It is immaterial whether or not the conditions in which he was granted the allowance met the requirements of Regulation 3.8: suffice it to observe that he acquiesced and amply reaped the benefit for most of the period during which he received the allowance. So the Tribunal cannot allow his plea that he was promoted.

9. For the foregoing reasons the complainant is mistaken both in fact and in law in pleading that the Union is in breach of the whole concept of "promotion". He was never promoted to grade P.2 but merely opted for a P.2 post allowance while keeping his own grade, G.7.

The allegedly "negative" post allowance

10. From January 1991 the complainant's pay at P.2 fell below what he would have earned, all told, if he had stayed at grade G.7 without the post allowance. He says that the post allowance has become "negative" and he has suffered a big drop in pay.

11. The Union observes that the allowance served him well for fourteen years, up to February 1991, and that only for a short while, in 1991 and 1992, did he actually lose. Though the parties disagree on how much he lost, they agree that loss there was. The ITU argues that the complainant fares as he does because of trends in pay for staff in the General Service category and that other ITU staff and officials of other organisations in the common system of the United Nations have fared likewise on account of the whittling down of pay of staff in the Professional category.

12. Those submissions satisfy the Tribunal that the fall in the complainant's earnings is due to factors which are beyond the Union's control inasmuch as they derive from the common system. The ITU was under no duty to reverse a decision which the complainant had consented to and which, until 1991 at any rate, was to his financial advantage. What is more, cancelling his post allowance would have meant promoting him tothe higher grade and, as the Deputy Secretary-General pointed out in his letter of 10 March 1993, that might be to his detriment because of prevailing conditions in the common system. The plea is devoid of merit.

The plea of bad faith

13. Lastly, the complainant contends that the Union's dawdling over his case shows bad faith. Over a year-and-a-half went by from his applying for review until his getting the Secretary-General's final decision, including just

over sixteen months from 14 November 1991, when he went to the Appeal Board, until 18 March 1993, when it reported. Yet according to Rule 11.1.1.4 f) it should not have taken longer than fourteen weeks. The Union did not even bother to answer the request he made on 22 August 1991 for review and did not react until 6 July 1992, when it entered its reply to his appeal, nearly eight months after he had filed it.

14. Judgment 1317 (in re Amira) of 31 January 1994 brought out the need for a properly functioning internal appeal procedure, of which the Appeal Board is an essential part. In this case the Board took far too long to report and failed to perform its function properly. Although in the circumstances the shortcomings of the appeal procedure may not be deemed to constitute bad faith, the ITU was negligent and caused the complainant injury. On that account it must afford him redress.

DECISION:

For the above reasons,

1. The complaint is dismissed insofar as it seeks the quashing of the Secretary-General's decision of 1 April 1993.

2. The Union shall pay the complainant 5,000 Swiss francs in damages for the injury set out in 14 above.

3. It shall pay him 8,000 French francs towards costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.