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

EIGHTY-SEVENTH SESSION

In re Chevallier

Judgment 1851

The Administrative Tribunal,

Considering the complaint filed by Mr Jacques Chevallier against the International Telecommunication Union (ITU) on 11 May 1998 and corrected on 26 June, the ITU's reply of 10 August, the complainant's rejoinder of 11 September 1998 and the defendant's waiver of its right to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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 Frenchman born in 1937, joined the staff of ITU in the Radiocommunication Bureau as a designer at grade G.4 under a first short-term contract covering the period 23 June 1994 to 31 July 1994. His contract was regularly renewed until 31 July 1997.

With a view to rationalising its personnel policy, the Union decided that short-term appointment exceeding six months would be put up for competition. The complainant's job was accordingly announced in a vacancy notice for temporary employment No. 350, dated 12 June 1997. By a letter of even date, the complainant applied for the post. In July the deputy chief of the Personnel Department informed the official responsible for the selection, that it was impossible to appoint the complainant because as he was sixty he had reached the age limit.

ITU Staff Regulation 9.9 reads as follows:

"Staff members shall not be retained in active service beyond the age of 60 years or, if appointed on or after 1 January 1990, beyond the age of 62 years. The Secretary-General may, in the interest of the Union, extend this age limit in exceptional cases, on the proposal of the Director of the Bureau concerned."

By a memorandum dated 25 July 1997, the complainant's first-level supervisor informed the official responsible for recruitment that the reasons given to justify the refusal did not appear to him to be valid and, in addition, that the decision would be harmful to the unit. By a memorandum of 29 July, the complainant appealed to the Secretary-General requesting him to reconsider his decision not to appoint him. He nevertheless received a special appointment contract from 23 September to 24 October 1997, which was renewed from 25 October to 24 December 1997.

On 20 October 1997, in the absence of a reply from the Secretary-General, the complainant lodged an appeal with the Appeal Board. The Board issued its report on 6 February 1998 and transmitted it to the complainant on 10 February. In the report, the Board indicated that it had not reached a unanimous conclusion and that it was submitting two recommendations. The chairman and a member of the Board considered that the Administration had followed the usual practice in the Union, but nevertheless stated that it would be desirable for the rules applicable in this respect to be aligned as rapidly as possible with the practice followed. However, the member representing the staff considered that "the ITU should apply the spirit of Staff Regulation 9.9 to staff recruited under short-term contracts". She recommended that the Secretary-General withdraw his decision.

B. The complainant puts forward several pleas. First, he contends that the impugned decision is illegal since the age limit of sixty years is not stipulated in any text applicable in the present case. Moreover, the practice to which the Union refers is contrary to the Note on the Staff Rules Applicable to Conference and other Short-term Service, which provides that those short-term Staff Rules "are to be read in conjunction with the Staff Regulations" of the Union. It is also contrary to Rule 12.1.2(b) of the ITU Staff Rules, which states that "Exceptions to the Staff Rules may be made by the Secretary-General, provided that no exception is inconsistent with any Staff Regulation ...". By virtue of these provisions, he contends that Regulation 9.9 providing for a retirement age of sixty-two must be

applicable to him.

The complainant then submits that there was abuse of the discretionary power of the Secretary-General. In deciding not to award him the desired post, the Secretary-General did not correctly apply Regulation 9.9, as the Union did in fact call upon his services through a special appointment contract. He says that the practice of the Union is "contrary to that of the United Nations, by which the Secretary-General shall be guided", under the terms of Regulation 12.3.

Finally, the complainant contends that the competition procedure was not respected. He submits that his application was "the only one which fully complied with the qualifications required for the post of designer put up for competition". Since the vacancy notice did not specify any age limit, he held out legitimate hopes of being appointed to the post.

The complainant asks the Tribunal to quash the unwritten decision of the Secretary-General of the Union to refuse his appointment to the post put up for competition; to order the Union to appoint him to the post with effect from 1 August 1997; to order the Union to pay him a sum of 5,000 Swiss francs for moral injury and a sum of 5,000 francs in costs. Subsidiarily, if "reinstatement" is impossible, the complainant asks the Tribunal "to order the Union to pay him compensation corresponding to two years' salary and the purchase of his rights in the Pension Fund for the period 1 August 1997 to 31 July 1999, less any professional income during that period".

C. In its reply, the Union justifies its decision by citing its "constant practice". It also submits that it was entitled to entertain "doubts" as to the "personal qualities" of the complainant, as a "complaint" had been made against him by another official.

The Union recognises that the Short-term Staff Rules applicable in this case do not set an age limit, but it affirms that its practice is aimed at recruiting younger persons with a view to the "prospective management of human resources". It observes that there are currently no officials on short-term contracts who are over sixty years of age. The defendant also emphasises that this practice has developed by reason of the absence of any recent revision of the Staff Regulations and Staff Rules and that it had, together with the publication of various administrative circulars, given rise to "a body of supplementary rules". It adds in this respect that the work of reviewing and updating to fill this "gap" in the regulations is underway. This work has the objective of officially establishing the practice in question. Finally, the Union considers that it is independent with regard to its personnel management and there is no hierarchical relationship between its Staff Regulations and those of the United Nations Organization.

The Union rejects the plea of abuse of the discretionary power of the Secretary-General and submits that the recruitment of a younger person was in conformity with its personnel management objectives.

It contends that the competition procedure was respected. It explains that vacancy notices cannot contain all the information on the conditions of appointment, the nature of the contract which could be awarded, etc., all of which remain to be determined depending on the quality of the person ultimately selected as a result of the selection procedure.

D. In his rejoinder, the complainant cites the opinion of the Appeal Board in support of his contention that the complaint against him did not result in any disciplinary measures and cannot be held against him.

Concerning the practice referred to by the defendant, he responds that the question is not whether the practice is based on valid reasons, but whether it is "compatible with the applicable regulations". Furthermore, he says that only a formal decision by the competent bodies could justify the non-application of Regulation 9.9 to short-term contracts. Since such a decision has not been taken, the age limit must be sixty-two years. In this respect, he cites a report by the Tripartite Advisory Group on Human Resources Management, dated 24 April 1998, which recommends the extension of the "provisions of the Staff Regulations and Staff Rules by authorising supernumerary staff to remain in service until the age of 62". The complainant adds that the policy followed by the Union amounts to endorsing "discrimination and inequality of treatment between appointed officials and temporary staff".

On the question of not respecting the competition procedure, he rejects the defendant's explanations on the ground that they would render the procedure void of meaning.

CONSIDERATIONS

1. The complainant joined the staff of the International Telecommunication Union (ITU) on 23 June 1994, on which date he was offered a part-time short-term appointment until 31 July 1994. That contract was extended until 25 September 1994, and then converted into a full-time one from that date. His short-term contracts were renewed regularly until 31 July 1997.

For administrative reasons, the Union decided in 1997 to hold a competition for a temporary job covering the duties performed until then by the complainant. To this effect, it issued vacancy notice 350 on 12 June 1997.

2. The complainant applied for the post on the same day. His application was selected by his first-level supervisor, and subsequently by the chief of the Department concerned.

In the month of July 1997, the Personnel Department informed the official responsible for the selection that it was impossible to appoint the complainant to the job which had been put up for competition. The Department invoked the age limit of sixty years of age for temporary contracts, which obliged it to set aside the complainant, who had reached sixty years of age on 6 July.

3. On 29 July 1997, the complainant requested the Secretary-General to reconsider the implicit decision to reject his application. In the absence of a reply, he lodged an appeal with the Appeal Board on 20 October 1997. By a majority of two votes to one, the Board decided to reject the appeal. On 10 February 1998, the chief of Personnel transmitted the report of the Appeal Board to the complainant and informed him that he would be communicating to him the decision of the Secretary-General in the next few days.

In the absence of a decision by the Secretary-General, the complainant filed his complaint with the Tribunal against this implicit rejection.

4. The complainant principally seeks:

(i) the quashing of the implicit decision of the Secretary-General to refuse his appointment to the post put up for competition in vacancy notice 350 of 12 June 1997;

(ii) that the ITU be ordered to appoint him to the post with effect from 1 August 1997;

(iii) that the Union be ordered to pay him a sum of 5,000 Swiss francs for moral injury; and

(iv) that the Union be ordered to pay him a sum of 5,000 francs in costs.

If the Tribunal were to consider it impossible to order his "reinstatement", the complainant seeks subsidiarily that the Union be ordered to pay him compensation corresponding to two years' salary and the purchase of his rights in the United Nations Joint Staff Pension Fund for the period 1 August 1997 to 31 July 1999, less any professional income during that period.

5. The complainant puts forward three pleas against the implicit decision of the Secretary-General to accept the opinion of the Appeal Board of 6 February 1998, namely:

(a) the illegality of the decision;

(b) abuse of the discretionary power of the Secretary-General;

(c) failure to respect the competition procedure.

6. The complainant challenges the argument of the age limit invoked by the Union to reject his application to the post which was put up for competition. He recognises that the Staff Rules Applicable to Staff Members Engaged for Conferences and Other Short-term Service, which came into force on 1 January 1970, do not establish any age limit; however, he also submits that these Rules refer in their preamble to the Staff Regulations and that they must, therefore, be read in conjunction with the latter. The complainant accordingly cites Regulation 9.9, which establishes the age of retirement at sixty-two years in the case of officials appointed after 1 January 1990. He

contends that in the absence of a specific provision of the Staff Rules applicable to short-term service this Regulation should have been applied in his case.

7. The Union contends that its attitude was principally based on practice. It states in its reply:

"... the principal reason for this decision was that the constant practice of the Union in the recruitment of short-term staff, and in the extension of short-term contracts, is to respect the age limit of 60 years."

It refers to the "Union's constant practice", to a "clear and constant practice" and to a "practice which has become constant". Similarly, the Appeal Board based its opinion on the "practice applied at the ITU" and on "current practice".

The defendant does not specify the legal nature of this practice; it does not say whether it is an administrative practice or a customary rule.

It is a well-established principle that the existence of written law does not need to be proved: the presumption *juris et de jure* assumes cognisance of written law. However, non-written rules have to be proved by those who invoke them. In the material case, the Tribunal has not found the slightest proof of the alleged practice. It cannot decide on a rule whose existence has not been proven. The absence of proof as to the existence of the rule invoked by the Union means that its decision has no legal basis.

8. In view of the Tribunal's finding in relation to the complainant's first plea, it is not necessary to examine the other arguments put forward in the complaint.

Taking into account the current age of the complainant, the Tribunal does not allow his claims that the implicit decision be set aside and he be appointed to the post. However, it allows in part his subsidiary pleas for compensation and, taking into account the harm of all types caused to him by the illegal rejection of his application, it sets the amount of the compensation that the Union shall pay him at 40,000 Swiss francs.

DECISION

For the above reasons,

1. The ITU shall pay the complainant, within four months of the date of this judgment, the sum of 40,000 Swiss francs.

2. The ITU shall pay the complainant a sum of 4,000 francs in costs.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Julio Barberis
Seydou Ba

Catherine Comtet

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