

THIRTIETH ORDINARY SESSION

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

Judgment No. 209

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Telecommunication Union (ITU) drawn up by Mr. Robert Vincent Lindsey on 14 April 1972, the ITU's reply of 28 July 1972, the complainant's rejoinder of 30 December 1972 and the ITU's surrejoinder of 19 February 1973;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article VIII of the ITU/United Nations Agreement, Article 9, paragraph 13, of the Montreux Convention of 1965, Resolution No. 7 of 1959 of the Plenipotentiary Conference of the ITU and ITU Staff Regulation 3.5;

Having heard in oral proceedings on 9 May 1973 Mr. Nicolas Peyrot, counsel for the complainant, and Mr. Antoine Zarb, agent of the ITU;

Considering that the material facts of the case are as follows:

A. By Resolution No. 7 of 1959 of the Plenipotentiary Conference of the ITU the conditions of service, salaries, allowances and pensions of ITU staff members were assimilated to those of the United Nations common system. The ITU Staff Regulations were accordingly amended in May 1960, and on 1 March, like other staff members in the same category, Mr. Lindsey had received a letter from the Secretary-General stating that in future his salary would be expressed in United States dollars and that the Swiss franc equivalent might therefore vary according to the exchange rate (paragraph 7(b) of the letter). The relevant financial rules nevertheless remained unchanged, and the ITU continued to use the Swiss franc for purposes of accounting, as it had since 1868.

B. On 3 February 1961 Mr. Lindsey appealed to the Tribunal protesting at the prejudice which ITU staff members might suffer in regard to termination allowances, family allowances and pension rights because of the assimilation of their conditions of service to those of the United Nations common system. In the course of the written proceedings, which led to Judgment No. 61 of 4 September 1962, Mr. Lindsey observed in his rejoinder of 31 December 1961 that the Swiss franc had become slightly stronger than the dollar, a change in the exchange rate had caused a slight loss, and in any case staff members faced a chronic risk. In its surrejoinder of 27 February 1962 the ITU stated:

"The defendant organisation will not question the complainant's contention that the Swiss franc has become slightly stronger than the dollar. It would point out, however, first, that the ITU's commitments are underwritten in Swiss francs and, secondly, that the dollar exchange rate is taken into account in establishing the index on which changes in the post adjustment allowance are based. Fluctuations in that rate can therefore have only a negligible effect on ITU staff members and it is not they, but the organisation alone which suffers any inconvenience caused by such fluctuations."

C. By Service Order No. 125 of 17 May 1971 the Secretary-General of the ITU decided to apply the exchange rate of 4.08 Swiss francs to the dollar. The complainant took the view that the increase granted in the post adjustment allowance did not fully offset the reduction in the value of the dollar. First, he observed, his pensionable remuneration had suffered a proportionate reduction and future contributions to the United Nations Joint Staff Pension Fund would be correspondingly reduced and, secondly, he feared that through the introduction of a new salary scale on 1 July 1971 and certain changes in the post adjustment allowance his actual income would suffer from the application of the new dollar exchange rate. He therefore wrote to the Secretary-General on 22 June 1971 pointing out the disadvantages of the new exchange rate and ascribing them to a breach of his conditions of service. In his view the ITU had given the Tribunal an undertaking in 1962 to ensure that fluctuations in the parity of the dollar would have only negligible effect on ITU staff members, and he asked the Secretary-General to review the decision in Service Order No. 125 in the light of that undertaking.

Reversing the decision would, after all, entail no cost for the ITU since its income was in Swiss francs and it would simply have to sacrifice its accidental profits from the revaluation of the Swiss franc in relation to the dollar. In his reply of 8 July 1971 the Secretary-General observed that the sole disadvantage mentioned by the complainant was the reduction in his pensionable remuneration and that examining his claim would be pointless in view of his special position with regard to pension rights following Judgment No. 61. On 17 September 1971 the complainant appealed to the Appeal Board of the ITU claiming fair compensation for the loss of salary allegedly suffered by him as a result of the revaluation on 15 May 1971 of the Swiss franc in relation to the dollar. The Board noted that neither during the proceedings leading to Judgment No. 61 of 1962 nor at any other time had Mr. Lindsey impugned the decision mentioned in paragraph 7(b) of the letter of 1 March 1960 informing him that in future his salary would be expressed in dollars. The Board accordingly held that he had agreed at least tacitly during the past eleven years that his salary should be expressed in dollars without any exchange rate guarantees. It held that the complainant's claims were therefore time-barred, and on 18 November 1971 the Secretary-General informed him by letter that he had no comments to make on the Board's recommendation.

D. In his complaint impugning the decision of 18 November 1971 Mr. Lindsey maintains that his appeal to the Board was not time-barred since the new methods of calculating his salary had not caused him prejudice until the time of his original claim which he submitted to the Secretary-General on 22 June 1971. He refers to the undertaking allegedly given by the ITU before the Tribunal in 1962 and states that he is appealing against the methods of calculating his salary applied since the fall in the value of the dollar, which he claims have caused him prejudice only since 1 June 1971. In his final statement of claims he asks the Tribunal:

1. to declare that in his financial dealings with the complainant the Secretary-General has wrongfully applied exchange rates lower than 4.32 Swiss francs to the dollar;

2. to quash the Secretary-General's decision of 18 November 1971;

3. to declare that his salary, pension rights, allowances and other income should continue to be calculated at the rate of 4.32 Swiss francs to the dollar and paid to him by the ITU at that rate;

4. to order the ITU accordingly to pay him the following:

(a) the sum of 4,488.70 Swiss francs plus interest at 5 per cent a year from 1 January 1972 (median date) for the months from June 1971 to December 1972 inclusive; and

(b) a sum corresponding to the difference between his actual remuneration and that to which he would be entitled if the above-mentioned exchange rate were applied, with effect from January 1973 until the date of final award of judgment, plus 5 per cent interest on the compensatory sum paid for each month calculated from the last day of the month;

5. to declare further that the compensation claimed under point 4 should bear 5 per cent annual compound interest;

6. to order that the costs of his complaint as stated by him should be awarded against the ITU; and,

7. as an exceptional measure and in view of the circumstances which led to the award of Judgment No. 82, to declare that the judgment shall take immediate effect.

E. The ITU maintains that the complainant cannot properly claim that it should conduct its financial dealings with him in Swiss francs and endow that currency with a stable parity, since such a claim was time-barred long ago. It points out that the parties agreed in 1960 to conduct their financial dealings in United States dollars and that for over ten years the complainant made no formal protest. It observes that, although the complainant's arguments do reveal a complicated situation, the Union is in no way to blame. It argues that fluctuations in exchange rates are an inevitable risk for everyone; that no special commitment was ever made in the complainant's favour; that international organisations have concluded mutually binding co-operation agreements, jointly determine rules and standards and apply them to all their staff members for the sake of uniformity in the international civil service; that every decision mentioned in the present case was applied not only to the complainant and other ITU staff members but to all officials of United Nations agencies resident in Switzerland in so far as those decisions "appertain to the structure and functioning of the international civil service and [to] benefits of an impersonal nature and subject to variation" (Judgment No. 61: Lindsey v. ITU). In the organisation's view the complaint and the appended

documents reveal no genuine and proven grievance constituting even the slightest breach of the complainant's conditions of service as prescribed by ITU Staff Regulations or recommended under the "common system". The ITU accordingly maintains that the complaint is time-barred and irreceivable and, subsidiarily, that it should be dismissed on its merits.

CONSIDERATIONS:

Without its being necessary to determine whether the complaint is time-barred;

The complainant contends that the decision of 18 November 1971, by which the Secretary-General of the International Telecommunication Union, on the recommendation of the Appeal Board, dismissed his appeal on the claim that his salary should be paid in Swiss francs and not in United States dollars, was in violation both of the Administrative Tribunal's Judgment No. 61 of 4 September 1962 and of the undertaking given by the organisation during the proceedings which led to that judgment; that the decision disregarded the complainant's terms of appointment; and, finally, that the decision caused him serious prejudice for which he is entitled to compensation.

As to the first claim:

The present complaint is entirely different in origin and purpose from the complaints settled by the judgment of 4 September 1962. It follows that Mr. Lindsey cannot properly rely on the decision given in that judgment.

Moreover, it appears from the observations submitted by the ITU during the proceedings which led to the aforesaid judgment that the Union confined itself to setting forth the reasons which it regarded as justifying dismissal of the complaint and did not, and in fact could not legally, undertake any commitment for the future in the course of observations made on a specific case.

As to the second claim:

Mr. Lindsey's contract of appointment, dated 23 December 1949, while specifying that his annual salary would be 17,000 Swiss francs as from 1 January 1950, also stated that his "duties and rights as an official of the International Telecommunication Union are laid down in the Staff Regulations and in the Rules of the Staff Provident Fund".

It thus appears that from the time of his appointment the complainant's position under the regulations and rules was liable in principle to be changed by the competent bodies of the ITU; only if the Union had upset the whole structure of the complainant's contract or derogated from the basic conditions which might have affected his decision to accept appointment could its action have given rise to the award of compensation. Even if it were granted that the whole structure of the contract had been upset in the present case, he could not properly rely on this argument in support of his claim since he has agreed to the payment of his salary in dollars since 1960 without protest.

Moreover, by Resolution No. 7 adopted at its meeting in Geneva in 1959, the Plenipotentiary Conference of the ITU approved "the principle of alignment of the conditions of service of Union staff with those of the United Nations Common System" and resolved *nl.* that except where the Union's administrative regulations provide otherwise for elected officials or members of the Provident Fund, the conditions of service of staff in the Common System shall apply to the staff of the Union".

The Administrative Tribunal is not competent to rule on the legality of a resolution adopted by the Plenipotentiary Conference, which is the legislative organ of the Union.

Finally, the decisions taken by the executive authorities of the organisation in pursuance of Resolution No. 7 cited above, and specifically those providing that staff salaries should be expressed and paid in United States dollars and not in Swiss francs as before, were explicitly approved by Resolution No. 5 adopted by the Plenipotentiary Conference at Montreux in 1965, and consequently are not now open to discussion in contentious proceedings.

It follows that the complainant cannot substantiate his plea to the Tribunal to the effect that the Secretary-General of the Union, after the devaluation of the dollar, ought to have taken decisions contrary to those approved by Resolution No. 5, cited above, nor can he ask the Tribunal to substitute itself for the administrative authorities for the purpose of taking decisions which he claims to be necessary.

As to the third claim:

It follows from the foregoing that Mr. Lindsey cannot properly maintain either that the impugned decision constituted a breach of the terms of his contract or that it was taken in application of unlawful decisions. Hence his claims alleging liability on the part of the Union, however derived, are ill-founded.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1973.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet