Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2391

The Administrative Tribunal,

Considering the complaint filed by Mr F. Z. against the International Telecommunication Union (ITU) on 4 February 2004, the Union's reply of 30 March, the complainant's rejoinder of 29 April and the ITU's surrejoinder of 1 June 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Swiss national born in 1948, joined the ITU in September 1995, at grade P.4, as Manager for the Montbrillant Building construction project in Geneva. The building was inaugurated on 9 October 1999 and the final accounts for the works were accepted by the ITU on 23 June 2000.

On 18 June 2002 the Union's external auditor handed in his audit report on the construction accounts for the years 1992 to 2001. As the report contained allegations and presumptions of poor management of the project, the Secretary-General decided to set up an ad hoc Commission of Inquiry. The latter handed in its conclusions on 5 July 2002 in the form of a report and private comments, in which a number of shortcomings on the part of those involved in the execution of the project were noted.

In a letter of 12 September the Secretary-General informed the complainant inter alia that the Commission of Inquiry had identified "serious dysfunctions" and that there had been "a breakdown at various levels in the chain of communication". He told the complainant that the latter had been criticised in particular for a lack of rigour and discernment in the execution and management of the project, and that he was considering initiating disciplinary proceedings against him possibly leading to a written censure. He enclosed a copy of the Commission of Inquiry's report and private comments and invited the complainant to express his views.

In a memorandum of 26 September 2002 the complainant reminded the Secretary-General that the external auditor had noted that "the resources available in the ITU's project administration […] were far from adequate given the magnitude of the tasks required" and "insufficient to cover all the services inherent in a construction project". He added that for six years he had borne the entire responsibility for managing the project and he considered that the facts relied on to justify a disciplinary sanction were minor compared to the amount of work he had accomplished. He therefore appealed to the Secretary-General's understanding and leniency. In an annex to his memorandum, he gave his views on the Commission of Inquiry's report and private comments.

On 20 February 2003 the Secretary-General issued a written censure to the complainant, a copy of which was to be placed in his personal file. In a memorandum dated 18 March the complainant asked him to reconsider his decision and withdraw the sanction. In a letter of 3 June 2003 the Secretary-General informed him that he was maintaining his decision.

On 10 June the complainant filed an appeal with the Appeal Board against the decision of 20 February 2003. In its report dated 9 September 2003, the Board expressed reservations regarding the proportionality of the sanction and recommended that the parties arrive at a compromise.

In a letter of 6 November 2003, which constitutes the impugned decision, the Secretary-General informed the complainant that, after considering the Appeal Board's recommendation, he had decided to maintain his decisions of 20 February and 3 June 2003.

B. The complainant objects to the fact that the disciplinary procedure was based on the fact findings of the

Commission of Inquiry since one of the members of the Commission also sat on the Buildings Committee and was therefore both judge and party. The complainant also alleges a breach of the principle of equal treatment. He notes that the Commission of Inquiry had expressed the opinion that the Buildings Committee, which was responsible for monitoring the overall planning, organisation and execution of the project, had not adequately performed its role. Yet although all but one of the members of the Buildings Committee held a higher grade than his, none of them was blamed, whereas he was sanctioned for what he considers to be "alleged and in any case minor shortcomings". He points out that no explanation has ever been given regarding this difference of treatment.

He complains that no reasons were given for the Secretary-General's decisions of 20 February, 3 June and 6 November 2003. According to the complainant, the reasons for the sanction are not indicated in the report of the external auditor or in that of the Commission of Inquiry; the Appeal Board in fact noted that there was no clear and direct link between the facts as they emerged from these reports and the general criticism that he had not shown sufficient rigour and discernment. Citing Judgment 1817, he observes that the omission could have been repaired in the course of the appeal proceedings but that such was not the case.

Lastly, he considers that the written censure he received, which is the second most serious of the seven disciplinary sanctions applicable under Staff Rule 10.1.1, breached the principle of proportionality. He submits that no misconduct has been demonstrated and that his services were deemed satisfactory despite the magnitude of the task entrusted to him, in recognition of which he had been granted a special post allowance corresponding to grade P.5. In his view, sanctions should be chosen in the light of all the circumstances but these were hardly taken into account in this case. The ITU has acknowledged that his behaviour can be explained "to a certain extent […] by the […] work load and the pressure […] he ha[d] faced, like other members of the staff", having been assisted in his work only by an accounting assistant with no experience or training in the field of construction, and that the external auditor noted that the resources deployed for the administration of the project were insufficient and inadequate.

The complainant asks the Tribunal to quash the decisions of 20 February, 3 June and 6 November 2003 and to find that he performed his duties satisfactorily with regard to the execution of the Montbrillant Building project. He claims 10,000 Swiss francs for moral injury as well as costs.

C. In its reply the Union contends that the complainant's presentation of the facts contains glaring omissions and distortions designed to conceal his responsibility. It points out that although the project management team was probably too small, it is wrong to insinuate that it consisted only of the complainant and an allegedly inexperienced assistant. The latter in fact was well qualified in accounting and the quality of her work was emphasised by the Commission of Inquiry. Besides her, the complainant could rely on the experience of the team assigned to him in the Logistics Services Division and on that of his direct supervisor, the Chief of the Department of Common Services. He also enjoyed the support of architectural and engineering consultants. As far as the special post allowance is concerned, the Union maintains that it was granted to the complainant not in recognition of the magnitude of the task entrusted to him, but on account of the considerable delegated responsibilities he had to assume for the management of the project.

The defendant denies that there was any inequality of treatment, insofar as disciplinary measures were also taken against the complainant's supervisor and a member of the Finance Department for lack of rigour in the management of the project.

It maintains that the dysfunctions observed by the external auditor, which the Commission of Inquiry was charged with investigating, were not essentially linked with the duties of the Buildings Committee, so that there was no reason why a member of that Committee should not also sit on the Commission of Inquiry.

The ITU further considers that sufficient reasons were given for the sanction applied to the complainant. In view of the fact that he commented on those reasons and initially admitted his responsibility on two of the counts held against him, he cannot now pretend that he was only vaguely aware of the reasons for the decision.

With regard to the alleged breach of the principle of proportionality, the defendant submits that the Secretary-General, by applying the least severe of the written sanctions, made a fair and moderate assessment of the facts of the case and the circumstances. It rejects the complainant's allegations that his performance of his duties and responsibilities was deemed satisfactory, noting that the sanction was based on clearly identified shortcomings which were directly attributable to him.

D. In his rejoinder the complainant stresses the fact that he had to manage the project on his own with his assistant, and that the Logistics Services Division, the Chief of the Department of Common Services – a telecommunications engineer – and the architectural and engineering consultants were of no help in that respect.

He submits that he commented on every point of the Commission of Inquiry's conclusions precisely because he was not aware of exactly what charges were held against him. Contrary to the defendant's allegations, he maintains that he denied his responsibility and points out that when a sanction is to be applied the burden of proof rests with the organisation. Yet, according to him, the ITU refuses to spell out exactly what he is being blamed for and is trying to use him as a scapegoat.

E. In its surrejoinder the Union reiterates its arguments and expresses surprise at the complainant's allegation that his direct supervisor was of no assistance, considering that the latter has extensive experience of project management.

CONSIDERATIONS

1. Following the publication of a vacancy notice dated 23 March 1995, the complainant was taken on by the ITU at grade P.4 as Project Manager for the Montbrillant Building in Geneva.

According to the vacancy notice, the incumbent of the post would be responsible, inter alia, for:

– ensuring liaison and coordination between the ITU and its contractual counterparts,

– controlling the quality, schedule and the costs related to the project, including the technical specifications and the works executed,

– in liaison with the Finance Department, preparing financial estimates and consolidated budget of the building project and monitoring the related expenditures to propose any corrective action in the forward plans to minimise costs,

– evaluating the bills related to the project, certifying them, as appropriate, with minimum delay for their subsequent payment by the Finance Department.

A Buildings Committee was set up with the responsibility of monitoring the overall planning, organisation and execution of the project.

2. Construction work on the building began in May 1997 and the building was inaugurated on 9 October 1999.

On 18 June 2002 the ITU's external auditor drew up a report on the audit of the construction accounts, which was submitted to the defendant for comment.

3. By a decision of 26 June 2002 the Secretary-General of the ITU set up an ad hoc Commission of Inquiry on the auditing of the accounts. Paragraph 6 of the decision reads as follows:

"The terms of reference of the Commission shall be to submit to me a […] report […] on the allegations and presumptions referred to in paragraph 3 of this Decision. The report shall, in particular, endeavour to establish whether the allegations and presumptions are founded or not and, if so, who authorized payment of the amounts in question and on the basis of what documents. Furthermore, the report shall also establish the reasons for which [I] was not informed until 20 June 2002 of the serious dysfunctions highlighted by the external auditor."

According to paragraph 3 of the decision, the external auditor had made the following four observations in his report:

"a) Observation No. 10: 'The project manager requested the Finance Department to post to account the modification of the computer centre in October 2001, whereas the accounts had already been closed and acceptance of the works in question had taken place in March of the same year. Neither the relevant amount nor any breakdown of the payments concerned appear in the project management accounts at July 2001. I consider that the

expenditure commitment requests and work contracts, which related to different accounts, should have been separated and that the amounts should have been included in the accounts prior to execution of the work.'

b) Observation No. 11: Work on extension of the sanitary facilities available to delegates adjacent to the cafeteria '… was carried out without any prior expenditure commitment request and, therefore, without knowing the costs. Since this work had already been awarded to [a general contractor] and knowing that the latter was not willing to denounce its contract, it would have been more judicious to have the work performed by [that contractor], thus avoiding paying for it twice, resulting in a loss of CHF 51 600.'

c) 'Of a total of CHF 578 711 of unliquidated obligations … an amount of CHF 25 000 was not substantiated or duly authorized under Article 13 of the Financial Regulations. The transfer vouchers were not sufficiently documented and complete.'

d) 'ITU was unable to present the order form for an invoice of CHF 795 000 for computer equipment.'"

On 5 July 2002 the Commission of Inquiry submitted a report to the Secretary-General enclosing private comments identifying five main shortcomings. On 12 September the Secretary-General sent the complainant the report and the private comments and informed him that he was considering initiating disciplinary proceedings against him, possibly leading to a written censure, on the grounds that the Commission of Inquiry was accusing him of having shown a lack of rigour and discernment in the execution and management of the project.

In a memorandum of 26 September 2002 the complainant replied, in essence, that in the light of the considerable work he had accomplished and the responsibilities he had assumed, the facts relied on to justify a sanction appeared minor; he made some detailed observations on the Commission of Inquiry's report and private comments.

On 20 February 2003 the Secretary-General wrote to the complainant in the following terms:

"The observations you submitted on 26 September 2002 in reply to my letter of 12 September 2002 have received careful attention.

I have been led to the conclusion that the charge levelled against you that, in discharging your responsibilities as manager of the Montbrillant project, you did not act with all the rigour and discernment I was entitled to expect of you, is well founded. I note, moreover, that you have admitted responsibility for at least two of the points for which you were criticised.

This letter therefore constitutes a written censure, a copy of which will be placed on your file, in accordance with Staff Rule 10.1.1 a) 2).

In the light of the aforegoing, please in future be particularly careful to follow the Union's procedures with regard to the management of projects."

On 18 March the complainant asked the Secretary-General to reconsider his decision to issue him a written censure and place a copy on his personal file.

On 3 June 2003 the Secretary-General wrote to the complainant informing him that he had decided to maintain the sanction issued on 20 February.

On 10 June the complainant filed an appeal with the Appeal Board against the decision of 20 February, confirmed on 3 June, arguing that the decision was not sufficiently substantiated and that it breached both the principle of equal treatment and that of the proportionality of sanctions.

In its report dated 9 September 2003 the Appeal Board queried the proportionality of the sanction and expressed the fear that the sanction might be "exaggeratedly harmful to the lifelong career and reputation" of the complainant; in conclusion it "urged the parties to the dispute to endeavour to reach a compromise which would avoid prolonging the case unduly".

In a letter of 6 November 2003, which constitutes the impugned decision, the Secretary-General informed the complainant that he had decided to maintain his decisions of 20 February and 3 June 2003.

4. The complainant asks the Tribunal to set aside the Secretary-General's decisions of 20 February, 3 June and 6 November 2003, to declare that he satisfactorily performed his duties and functions with regard to the Montbrillant Building construction project, and to order the defendant to pay him 10,000 Swiss francs in compensation for moral injury, and costs.

5. The complainant argues, firstly, that the impugned decision is tainted with a "suspicion of bias" insofar as the Commission of Inquiry responsible for establishing the facts underpinning the sanction against him included among its members a person who, in his capacity as a lawyer, had also sat on the Buildings Committee, which was equally involved in the management of the project and the construction of the Montbrillant Building. He recalls in this respect that the right to a fair trial is guaranteed under Article 6, paragraph 1, of the European Convention on Human Rights and under Article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

The Tribunal notes that the Buildings Committee, as the complainant points out, was responsible for monitoring the overall planning, organisation and execution of the project, while the Commission of Inquiry was instructed to express an opinion on the allegations and presumptions of bad management of the project contained in the external auditor's report, and to establish the reasons why the Secretary-General was not informed until 20 June 2002 of the serious dysfunctions highlighted by the external auditor. Considering that the Commission and the Committee did not have the same terms of reference and that the investigation into specific aspects of the above-mentioned report was conducted by three officials, the Tribunal considers that the suspicion of bias must be discarded, especially since it emerges from the evidence on file that the fact that one of the members of the Commission of Inquiry was also a member of the Buildings Committee did not prevent the former from drawing attention to shortcomings attributable to the latter.

6. According to the complainant, the plea of unequal treatment follows from that first plea. He submits that, although all but one of the members of the Buildings Committee held a higher grade than his, which implies that the officials concerned all carried weightier responsibilities, the Secretary-General singled him out to bear the responsibility for the dysfunctions reported by the Commission of Inquiry by imposing a disciplinary sanction for alleged and in any case minor shortcomings, while the members of the Buildings Committee were left free of blame. He argues that "[t]he fact that there was no reason why the various persons involved should be treated differently shows that the sanction [he] received constitutes a breach of the principle of equal treatment".

Consistent precedent has it (see Judgment 1445, under 7) that there cannot be breach of equal treatment unless there is different treatment of officials who are in like position in fact and in law.

In this case, the complainant was recruited to serve on the Montbrillant Building construction project as Project Manager with responsibilities which were clearly specified in the vacancy notice. He incurred a disciplinary sanction because he was found to have lacked rigour and discernment in particular circumstances. He has not proved that there were other officials in the same position as he in fact and in law, at whom the same charges were levelled in the same circumstances, who were treated differently. Consequently, the plea of unequal treatment fails.

7. The third plea put forward by the complainant concerns the lack of reasons given for the decisions taken against him. He maintains that since the lack of explicit or implicit reasons for the impugned decision was not repaired during the internal procedure, that decision is flawed and should be quashed.

According to precedent, as the complainant recalls, "[a] staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore." (See Judgment 1817, under 6.)

Here the impugned decision expressly mentions the earlier decisions of 20 February and 3 June 2003, which it confirms. The letter of 20 February 2003, moreover, refers to the letter of 12 September 2002, in which the Secretary-General informed the complainant that, having seen the report and private comments of the Commission of Inquiry, he was considering initiating disciplinary proceedings against him on the grounds that he had been criticised, as project manager, for lacking rigour and discernment in the execution and management of the project. The Commission's report and private comments were forwarded to the complainant, who a few days later submitted his comments on those documents, which gave him a clear idea of the charges held against him. The complainant was therefore perfectly aware of the reasons why the Secretary-General had decided to subject him to

a disciplinary sanction.

8. It remains to be determined, however, whether a reason was given for the decision to issue the complainant a written censure and to place a copy on his personal file.

Before the Appeal Board, the complainant argued that the decision of 20 February 2003 was taken in breach of the principle of proportionality. In its report, the Board recommended that the parties seek a compromise solution in the light of that principle.

By deciding on 6 November 2003 to maintain his earlier decisions in full, the Secretary-General did not follow the recommendation of the Appeal Board, which had precisely indicated that the disputed decision "appear[ed] to breach the principle of proportionality in the application of disciplinary sanctions". He was therefore under an obligation to state the reasons why he was disregarding that recommendation and instead maintaining the initial sanction, which is the second most serious, particularly so as to enable the Tribunal to check whether the principle of proportionality had been observed (see Judgment 2339, under 5). As the Secretary-General has not satisfied that obligation, his decision of 6 November 2003 must be set aside on the grounds that no reason has been given for the chosen sanction and the case must be referred back to him for a new decision.

9. The complainant claims 10,000 Swiss francs in compensation for the moral injury he suffered. The Tribunal does not consider that claim to be justified insofar as only the proportionality of the sanction is in doubt and not the sanction itself.

10. As the complainant succeeds in part, he is entitled to receive the sum of 2,000 francs in costs.

DECISION

For the above reasons,

1. The decision of 6 November 2003 of the Secretary-General of the ITU is set aside.

2. The case is referred back to the Secretary-General for a new decision.

3. The defendant shall pay the complainant 2,000 Swiss francs in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.