

SIXTY-SIXTH SESSION

In re SAUNDERS

Judgment 970

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 27 July 1988 and corrected on 19 September, the ITU's reply of 21 December 1988, the complainant's rejoinder of 9 February 1989 and the Union's surrejoinder of 28 March 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Regulations 3.8 and 4.12(b) and Rules 3.4.2 and 11.1.1 of the ITU Staff Regulations and Staff Rules;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, who is British, joined the Union in 1967 and got a permanent appointment in 1969 as an office assistant at grade G.5, step 4. As from 1 March 1973 he was seconded "until further notice" to a grade G.6 post in the Technical Co-operation Department and as from 1 June 1973 he was granted under Regulation 3.8* the special post allowance pertaining to G.6. (* Regulation 3.8 reads:

"(a) A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade.

...

(c) The amount of the special post allowance shall be equivalent to the salary increase the staff member would have received had he been promoted to the grade of the post in which he is serving.")

He was transferred to a grade P.1 post for one year as from 1 January 1974 and granted the P.1 post allowance under Regulation 3.8(a). On 17 September 1974 he was moved yet again to a P.2 post and as from that date was granted the P.2 post allowance. In July 1976 he wrote to the Secretary-General of the Union pointing out that because of increases in the salaries of General Service category staff he was making some 170 Swiss francs a month less on his P.2 post than he would have earned had he kept a post at his permanent grade, G.5. To make up the difference the Secretary-General granted him salary step increments in P.2 as from 1 August 1975 and again as from 1 January 1977.

In letters of 13 October and 29 November 1978 to the Secretary-General he contended that because his old G.5 post had since been upgraded to G.6 and then to G.7 his pay at P.2 should go up to the figure he would have earned at G.7. The Secretary-General rejected his claim on 11 December 1978.

On 29 May 1979 he made a "standing application" for all vacant posts at G.6 and G.7. He observed that because of increases in General Service salaries and the decline in the value of the United States dollar - the currency of payment of Professional category salaries - in terms of the Swiss franc - the currency paid to staff in the General Service category - his P.2 salary was far below what he would have got had he stayed in the General Service category, in which he might by then have reached G.6 or G.7. By a memorandum of 25 July 1979 the Chief of the Personnel Department informed him that because of "the anomaly which has resulted from circumstances beyond our control" he was granted two more steps in P.2 as from 1977 and 1978.

On 15 May 1984 the Secretary-General transferred him as from 1 May to a G.7 post in the Conferences and Common Services Department, still with payment of the P.2 allowance. On 8 October 1985 the Secretary-General upgraded that post to P.2 as from 1 January 1986 and on 31 October he appointed the complainant to it as from the same date.

On 10 April and again on 19 May 1987 he wrote to the Secretary-General pointing out that he had not had a single salary increment since 1978 and asking for more steps. The Chief of the Personnel Department refused on 9 December 1987, and on 11 December he appealed under Rule 11.1.1 in a memorandum headed "Anomalous income situation". On 15 December the Secretary-General asked him to identify the decision he was challenging and said that the rules had been complied with. On 10 March 1988 he appealed to the Appeal Board under Rule 11.1.1.2(b). In a memorandum of 20 May 1988 to the Secretary-General the Chairman of the Appeal Board said that the Board had held his appeal to be irreceivable because he had not respected the time limits in the Staff Regulations and there were no exceptional circumstances warranting waiver of them. By a memorandum of 25 May 1988, the decision impugned, the Secretary-General rejected his appeal.

B. The complainant submits that if an organisation is in continuing breach of an obligation appeal will lie at any time. From April 1987 the pay he would have got at G.7 rose above his actual pay at P.2. That was a continuance of the breach begun in 1976, and his internal appeals of 10 April 1987 and 10 March 1988 therefore respected the time limits in the Regulations.

As to the merits he contends that the Secretary-General's decisions to upgrade his post from G.7 to P.2 and promote him to P.2 in that post cannot strip him of his rights as a staff member in the General Service category under his permanent contract. It was the Secretary-General's duty to explain how those decisions might affect his rights, especially if he was to suffer further decline in pay and pension entitlements such as he had already seen in 1976-78. It is against the letter and spirit of the Regulations that his secondment, transfer and promotion should impair his pay and pension rights.

He asks the Tribunal to quash the decision of 25 May 1988 and have the case sent back to the Appeal Board for an opinion on the merits. He seeks costs.

C. The Union replies that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal: not having lodged his internal appeal in time, the complainant has failed to exhaust the internal means of redress. Asked by the Chairman of the Appeal Board in a memorandum of 17 March 1988 to say what decision he was challenging, he answered on 29 March that he was appealing against the Secretary-General's decisions of 8 and 31 October 1985 and he asked the Board, in accordance with Rule 11.1.1.2(c), to waive the six weeks' time limit in 11.1.1.2(a) for a request for review. Not only did he wait until 10 April 1987 before objecting to those decisions but, as the Board held, there was no reason to waive the time limit. Moreover, assuming - as he does - that his memorandum of 10 April 1987 introduced a request for review under 11.1.1.2(a), he ought to have filed within six weeks an appeal under 11.1.1.2(b) against the rejection to be inferred from the Secretary-General's failure to answer within six weeks. He did not do so.

As to the merits the Union submits that:

(1) It has committed no breach of its rules, having always paid the complainant the pay pertaining to his grade. There is no guarantee in the rules that his pay must be kept above any particular figure on the General Service scale.

(2) On 1 January 1986 he changed staff categories: till then he was on secondment and getting a post allowance, whereas afterwards he was in the Professional category. To be sure, while on secondment he was granted salary increments; but that was only *ex gratia* and through the application by analogy of Rule 3.4.2(b), which protects an official promoted from the General Service to the Professional category against any fall in pay "during the first year following promotion". On promotion he agreed to put up with the disadvantages as well as drawing the benefits of grade P.2. Besides, the risks of promotion to the Professional category are offset by advantages that are not financial.

(3) The Secretary-General had no duty to inform him of his entitlements on promotion: according to Regulation 4.12(b) "In accepting appointment the staff member shall state that he has been acquainted with and accepts the conditions laid down in these Staff Regulations and Staff Rules".

(4) There is not a sufficient causal link between action by the Union and the alleged injury. The decline in his pay is due not to his promotion, which was lawful anyway, but to the fall in the value of the dollar, for which the Union cannot be held liable.

(5) To allow the complaint would discriminate against P.2 staff who have not been promoted from the General Service category.

D. In his rejoinder the complainant comments on what he sees as misrepresentation in the Union's account of the facts. He states that his "current job" was abolished on 25 January 1989.

As to receivability, he submits that the decision he actually appealed against was the underpayment of his salary in April 1987. Besides, each monthly payment of salary constituted a new and challengeable decision. Only if he had had to appeal against the decisions of October 1985 would waiver of the internal time limit have been necessary; anyway there were many exceptional circumstances warranting waiver, which he sets out.

He enlarges on his pleas on the merits. He comments on his position before and after promotion to P.2, observing that acceptance of promotion is not consent to any sort of injustice. Had he risen in the ordinary way from G.5 to G.7 and then to P.2 he would at each promotion have got salary increments equal to one step in the higher grade; as it was, he got no increase after August 1978, when he reached the top step in P.2. By applying the rules too rigidly the Union is discriminating unfairly against him and the few others who have changed categories. The Tribunal may provide a remedy in equity.

He makes comments on specific points he objects to in the reply.

He alters the statement of claims. He asks the Tribunal to quash the decision of 25 May 1988; to order the Secretary-General to "promote" him to G.7 as from 1 May 1984 and recalculate his pay and pensionable remuneration at P.2 as from 1 January 1986; or, failing that, to order his transfer as a non-local official at grade G.7 according to arrangements he sets out. He claims costs. His subsidiary claims are that the Union guarantee that his pay and pension entitlements shall never be lower than the "corresponding amounts, calculated concurrently, at step 12 of grade G.7"; that "the paradoxical situation on which this complaint is founded will never be allowed to recur"; that "the abolition of [his] former permanent job on 25 January 1989 will not, within the next five years, lead to the termination of [his] permanent appointment"; and that all issues be resolved by the end of 1989.

E. In its surrejoinder the ITU observes that in his rejoinder, much of which is irrelevant, the complainant continues to challenge staff policies and salary scales which apply to the whole United Nations system and which the Union may not depart from. The comparison he draws between what he is earning and what he might have earned had he stayed in the General Service category is hypothetical and unsound.

The Union enlarges on its contention that the complaint is time-barred. Though it acknowledges that because of sick leave there was an "exceptional circumstance" warranting waiver of the time-limit for internal appeal under Rule 11.1.1.2(c), it cannot regard as receivable his appeal of 10 March 1988 to the Appeal Board, which he filed six months after his return to work.

Moreover, his claims as stated in his rejoinder are irreceivable under Article VII of the Tribunal's Statute insofar as they did not form part of his internal appeal or were not set out in the original complaint.

As to the merits, the ITU develops its pleas, pointing out that salary increments are not guaranteed every year and that an increase in salary on promotion is guaranteed only in the first year, not indefinitely. The complainant enjoyed protection in keeping a permanent appointment at G.5 to fall back on if his fixed-term appointment at a higher grade ran out. Variations in the pay of staff in the Professional and General Service categories are beyond the Union's control, and though the Secretary-General did take steps to give him some financial relief the decisions were exceptional. He was under no duty or pressure to apply for higher posts, and in appointing him the Union gave him preference over other applicants. It explains why it believes it has treated him correctly and fairly and observes that he omits to mention the advantages other than financial that his belonging to the Professional category has brought him.

CONSIDERATIONS:

1. The complainant joined the ITU in 1967 as a member of the General Service category of staff and after a series of secondments was promoted as from 1 January 1986 to a post in the Professional category at grade P.2. On 10 April 1987 he wrote to the Secretary-General to complain that the rise in General Service salaries, which are denominated in Swiss francs, and the fall in the value of the United States dollar, the currency of Professional category salaries, had continued to produce the result that his earnings were lower than if he had remained in the

General Service category. He asked the Secretary-General to authorise exceptional measures such as the grant of special additional steps in the P.2 grade to give him the normal financial rewards of promotion. On 19 May he sent the Secretary-General a reminder asking again for correction of what he saw as an anomaly.

2. On 9 December 1987 the Chief of the Personnel Department replied that the Union could not grant his request, and he appealed to the Appeal Board on 10 March 1988.

Receivability

3. Article VII, paragraph 1, of the Statute of the Tribunal reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

4. The procedure for challenging administrative decisions in the ITU is set out in paragraph 2 of Rule 11.1.1 in the following terms:

"(a) A staff member who, under the terms of Regulation 11.1, wishes to appeal against an administrative decision, shall as a first step address a letter to the Secretary-General with a copy to the head of the organ in which he serves, requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks from the time the staff member received notification of the decision in writing.

(b) If the staff member wishes to make an appeal against the answer received from the Secretary-General, he shall submit his appeal in writing to the Chairman of the Appeal Board within three months from the date of receipt of the answer. If no reply has been received from the Secretary-General within six weeks of the date the letter referred to in paragraph (a) above was sent to him, the staff member shall, within the six following weeks, submit his appeal in writing to the Chairman of the Appeal Board ..."

5. According to paragraph 2(c) of Rule 11.1.1 an appeal is not receivable by the Appeal Board unless the time limits are met, although the Board may waive them in exceptional circumstances. In this case the Board did not consider the circumstances to be exceptional and dismissed the complainant's appeal as irreceivable.

6. The complainant states that, if an appeal will lie only against a specific administrative decision, then he is appealing against decision 5381 of 8 October 1985 and decision 5418 of 31 October 1985.

7. Inasmuch as he has not complied with the requirements of Rule 11.1.1 for challenging either of those decisions any appeal against them is clearly irreceivable.

In his letter of 29 March 1988 to the Chairman of the Appeal Board he stated that he was asking the Secretary-General, not to review those decisions, but to correct the anomalous salary situation resulting from them, and appealing against the Secretary-General's reply of 15 December 1987. His letter of 10 April 1987 to the Secretary-General does not purport to request the review of any administrative decision, but seeks a fresh decision from the Secretary-General in the circumstances he states.

The ITU's refusal of 15 December 1987 to adjust his salary did constitute an administrative decision which was open to challenge. But he failed to comply with the requirements of Rule 11.1.1 in that he failed to take the first step of requesting review by the Secretary-General. Under Rule 11.1.1 such request is a condition precedent to the lodging of an internal appeal. That condition not having been met, the challenge to the decision of 15 December 1987 is irreceivable because the complainant has failed, as Article VII(1) of the Tribunal's Statute requires, to exhaust the internal means of redress.

8. The complainant further contends that each alleged short-payment of salary constitutes in itself a separate breach by the Union of its obligations towards him. But since he has not sought review by the Secretary-General of any of the alleged short-payments, his complaint is again irreceivable for the reasons stated in 7 above.

DECISION:

For the above reasons,

The complaint is 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, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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