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

NINETY-FIFTH SESSION

Judgment No. 2263

The Administrative Tribunal,

Considering the second complaint filed by Mr P. H. against the International Telecommunication Union (ITU) on 2 December 2002, the Union's reply of 31 January 2003, the complainant's rejoinder of 28 February and the ITU's surrejoinder of 2 April 2003;

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's career and certain facts relevant to the present dispute are set out in Judgment 2086, delivered on 30 January 2002, concerning the complainant's first complaint.

The possibility of granting personal promotions to ITU staff members was established by Service Order No. 99 of 17 September 1998. Eligibility for a personal promotion is subject to the fulfilment of six conditions. In order to satisfy the first condition, staff members in the professional category must have completed at least 18 years "of continuous service in ITU, under a fixed-term, MRT [managed renewable term] or permanent contract".

It may be recalled that the complainant was initially employed by the Union from 16 November 1981 until 2 September 1983 under a short-term contract which was extended four times. He was then employed on the same basis from 3 October until 31 December 1983. He obtained a fixed-term appointment with effect from 1 January 1984. In November 1999 he asked to be promoted to grade P.4 with effect from 1 January 2000, but this was refused on the grounds that he did not satisfy the first condition of Service Order No. 99, since his periods of employment under short-term contracts could not be taken into account in calculating length of service. In Judgment 2086, the Tribunal dismissed the complainant's first complaint. However, under 5(b), it reasoned as follows:

"That begs the question of whether, by analogy with the treatment accorded staff in other organisations and even in the absence of such rules, there are grounds for counting the months in excess of the twelve-month limit for short-term contracts towards the eighteen years of uninterrupted service specified in Service Order No. 99.

While there may be arguments for doing so, they do not suffice for the complaint to succeed: there would in any event be a shortfall in the requisite eighteen years, since the first twelve months are not counted. Besides, the Tribunal sees no reason to rule on a matter which is not current."

By a memorandum of 21 February 2002 the complainant, referring to 5(b), asked the Chief of the Personnel and Social Protection Department to take into account the period from 17 November 1982 to 31 December 1983 in calculating his years of service, and consequently to promote him to grade P.4 with retroactive effect from 1 January 2001 and compensate him for the loss suffered with regard to the level of his future retirement pension. The Chief of that department replied on 14 March 2002 that his request could not be granted. Indeed, it appeared to be impossible to take into account periods of service prior to 1 January 1984, since there had been a break in service between 3 September and 2 October 1983. The complainant submitted a request for review of that decision in a memorandum to the Secretary-General, dated 27 March 2002. The Chief of the Personnel and Social

Protection Department informed him in writing on 17 May that the Secretary-General had confirmed the position adopted previously. The complainant filed an appeal with the Appeal Board on 31 May, reiterating the requests he had made on 21 February. In a memorandum of 19 August 2002 to the Chairman of the Appeal Board, he enquired as to the progress of the examination of his case but received no written reply.

B. The complainant states that the Appeal Board appears to have ceased functioning. In accordance with the Tribunal's case law, he tried to obtain an opinion from the Board, but having been unable to obtain one he was entitled to bring his case directly before the Tribunal, which he did within the prescribed time limits.

On the merits, he submits that in Judgment 2086 the Tribunal held that Staff Rule 4.14.3, which stipulates that short-term appointments shall be granted for periods of less than one year, had not been observed in his case. According to him, the Tribunal concluded from this that the period in excess of the 12-month maximum period applicable to short-term contracts should be taken into account in calculating his length of service. Although the ITU contends that he incurred a break in service in the autumn of 1983, in the complainant's submission, that "interlude", all or part of which constituted paid leave, was "purely artificial". Since it is established that beyond 16 November 1982 the renewal of his short-term contracts was illegal, he ought to have been considered as being employed under a fixed-term contract. On this issue he refers to Judgment 1385. In his view, the condition of 18 years of continuous service must be deemed to be satisfied in his case.

Since the Union acted illegally in granting him short-term contracts beyond 16 November 1982, the complainant also claims to have suffered losses with regard to the level of his future retirement pension. Indeed, at the relevant time, participation in the United Nations Joint Staff Pension Fund (UNJSPF) was expressly excluded for staff engaged under contracts of that type. He emphasises that the ITU's practice of inserting an exclusion clause in short-term contracts differed from that of most organisations established in Geneva. The Union ought to have granted him UNJSPF membership with effect from 17 November 1982. By failing to do so, it violated the principle of good faith.

The complainant asks the Tribunal to set aside the implied decision to reject his internal appeal, to declare that he satisfies the condition concerning length of service for the purpose of entitlement to a personal promotion on 1 January 2001, and to find that he is entitled to that promotion. He also asks the Tribunal to order the ITU to validate his service for the period from 16 November 1981 to 31 December 1983, or to pay him the actuarial equivalent of the loss suffered, that is to say 102,457 United States dollars, together with interest at the rate of 5 per cent calculated from 30 June 2003. Subsidiarily, he asks the Tribunal, for pension purposes, to order the Union to validate his service for the period from 17 November 1982 until 31 December 1983, or to pay him the actuarial equivalent of the loss suffered, that is to say 76,568 dollars, with interest at the same rate. Lastly, he claims 10,000 dollars in compensation for the injury he suffered, particularly as a result of the malfunctioning of the internal appeal procedure, as well as 5,000 dollars in costs, and he asks the Tribunal to send the case back to the ITU.

C. In its reply the ITU states that it does not wish to comment on the receivability of the complaint.

On the merits, it argues that in Judgment 2086 the Tribunal did not rule on the issue of whether the complainant's short-term contracts should be treated as fixed-term contracts. Consequently, any argument put forward by the complainant on this issue must be rejected. It denies that the break in service which occurred between 3 September and 2 October 1983 was purely artificial; on the contrary, that period "restored a legal situation" with regard to the Staff Rules Applicable to Staff Members Engaged for Conferences and other Short-term Service. It infers from the above-mentioned judgment that because of the break in service, it is not possible to take into account periods of service prior to 1 January 1984.

Regarding the problem of the complainant's pension level, the ITU submits that he is trying to derive from Judgment 2086 consequences which, from a legal point of view, it cannot have. The contracts that he signed for the periods prior to 1 January 1984 contained a clause expressly excluding participation in the UNJSPF. The Union contests the assertion that those clauses were illegal. The argument referring to the situation prevailing at that time in other organisations of the common system is irrelevant. Lastly, the ITU submits that the claim for validation of the period beginning on 16 November 1981 goes beyond the scope of the claims put forward in the internal appeal and is therefore irreceivable.

D. In his rejoinder the complainant contends that in Judgment 2086 the Tribunal left open the issue of whether the

period in excess of the maximum duration of 12 months for short-term contracts should be taken into account. That issue must now be decided, and the Tribunal has acknowledged the existence of arguments in favour of that solution. The complainant considers that the break in service that was imposed on him loses its legal validity, given that he ought to have been considered as being employed under a fixed-term contract as from the beginning of his thirteenth month of service. He notes that in Judgment 2181 delivered on 3 February 2003, the Tribunal upheld the legality of the exclusion clause appearing in short-term contracts, but argues that he is not in the same factual situation as the complainant whose complaint was dismissed in that judgment. He rejects the view that one of his claims is irreceivable.

E. In its surrejoinder the ITU explains that in view of the circumstances existing at the time, it was not abusive for it to resort initially to short-term contracts. It acknowledges that an administrative error occurred in that the statutory duration of 12 months was exceeded, but submits that this should not lead to "abusive and unreasonable" conclusions as to the parties' true intention. The intention to restore the legality of the complainant's administrative situation vis-à-vis the applicable statutory provisions is evident from the break in service which occurred in September 1983. The defendant considers that the Tribunal's reasoning in Judgment 2181 regarding the exclusion of UNJSPF participation is fully applicable to the present case, since the two complainants are in the same situation in law.

CONSIDERATIONS

1. The complaint follows another in which the complainant claimed a personal promotion to grade P.4 with effect from 1 January 2000, in accordance with ITU Service Order No. 99 of 17 September 1998, which defines the conditions and formalities governing the granting of a personal promotion.

The annex to that Service Order indicates, in paragraph 1, that eligibility for a personal promotion is subject to the fulfilment of six conditions, the first of which reads as follows:

"a) the staff member has completed at least

- 18 years (Professional category)

- 20 years (General Service category)

of continuous service in ITU, under a fixed-term, MRT or permanent contract".

2. By its Judgment 2086 on the complainant's first complaint, to which reference may be made, the Tribunal dismissed the complainant's claims on the grounds that the condition of 18 years' continuous service was not yet satisfied and that, in any case, it was not necessary for it to rule on a matter which was not current.

3. On 21 February 2002, referring to Judgment 2086, the complainant submitted a further request for a personal promotion to grade P.4 with retroactive effect from 1 January 2001. He also requested that the period from 17 November 1982 to 31 December 1983 be taken into account in calculating his years of service, and that compensation be paid to him in respect of the loss he had suffered with regard to the level of his future retirement pension. That request was not granted and on 27 March 2002 the complainant wrote to the Secretary-General seeking a review of that decision. On 17 May the Chief of the Personnel and Social Protection Department informed him that the Secretary-General had confirmed the position adopted previously.

4. On 31 May the complainant filed an appeal with the Appeal Board, reiterating the requests he had made on 21 February. On 19 August, having received no reply, he submitted a memorandum to the Chairman of the Appeal Board, which remained unanswered. On 2 December 2002 he filed a complaint with the Tribunal against the implied rejection of his internal appeal. His claims are set out under B, above.

5. Regarding his personal promotion to grade P.4, the complainant accuses the ITU of having violated the legality principle and also the principle of good faith. He rejects the Union's contention that on 1 January 2001, because of the break in service which occurred between 3 September and 2 October 1983, he had not completed a continuous period of service of 18 years beginning on 17 November 1982. He asserts that in Judgment 2086 the Tribunal held that the relevant provisions of the ITU Staff Rules, which prohibit short-term appointments of more than one year,

had not been complied with, and that it concluded that "the months in excess of the twelve-month limit for short-term contracts [should be counted] towards the eighteen years of uninterrupted service [...]".

He submits that the break which occurred between 3 September and 2 October 1983 should have been considered as a period of leave. Indeed, in his view, once it had been recognised that from 17 November 1982 the renewal of his short-term contracts contravened the applicable statutory provisions, he ought to have been considered as being engaged under a fixed-term contract. However, it was not the ITU's practice to have breaks in fixed-term contracts. Consequently, he considers that the break which occurred between 3 September and 2 October 1983 was purely artificial and loses all legal validity in the light of the fact that he ought to have been employed under a fixed-term contract. Therefore, the condition provided for in Service Order No. 99 requiring 18 years of continuous service must be deemed to be satisfied. He adds that since the defendant organisation has raised no objection regarding the other conditions of eligibility for a personal promotion, he must be promoted with effect from 1 January 2001.

6. On the basis of its interpretation of Judgment 2086, the ITU takes the view that in calculating the 18 years of continuous service, "it is not possible to take into account periods of service prior to 1 January 1984 (when the first fixed-term contract was granted to the complainant), because he incurred a break in service between 3 September and 2 October 1983".

It adds that even if it were held that the period in excess of the first 12 months of the unbroken chain of contracts beginning on 16 November 1981 should be taken into account (i.e. approximately ten months' service between 17 November 1982 and 2 September 1983, excluding the period between 3 October and 31 December 1983), the total period of 18 years' service would not be attained until 28 February 2001, which, under Service Order No. 99, would render the complainant eligible for a personal promotion only on 1 January 2002. Indeed, the ITU points out that paragraph 4 of the annex to Service Order No. 99 provides that in order to be eligible for personal promotion, staff members must satisfy the criteria concerning length of service on 1 January of each year. It contends that in order to be eligible for personal promotion on 1 January 2001, the complainant would have had to have completed his 18 years of continuous service by 31 December 2000.

This, it asserts, clearly could not be the case, because whatever approach is taken, including the approach most favourable to the complainant, the total period of 18 years' service was, at best, acquired on 28 February 2001, which means that he would not have been be eligible for personal promotion until 1 January 2002.

The ITU also points out that it did not need to comment on the other conditions of eligibility for that promotion, contrary to the impression conveyed by the complainant's assertions, and that the decision to grant a promotion of that kind involves a procedure in which the candidate's file must be submitted to the Appointment and Promotion Board, which is responsible for evaluating candidates.

7. The Tribunal does not accept the defendant organisation's argument regarding the calculation of the period of continuous service completed by the complainant, which is based on an erroneous interpretation of Judgment 2086. In that judgment, the Tribunal did not rule on the issue of the break of service between 3 September and 2 October 1983, but merely observed that "there would in any event be a shortfall in the requisite eighteen years, since the first twelve months are not counted".

The question to be resolved is that of whether, for the purposes of Service Order No. 99, the period in excess of the 12-month maximum duration stipulated for short-term contracts should be taken into account in calculating the 18 years of continuous service.

The answer is necessarily affirmative. Indeed, as noted by the Tribunal in the above-mentioned judgment, the first 12-month period cannot be taken into account in calculating the 18 years of continuous service. However, once that period had elapsed, the complainant must be considered to have been in service from 17 November 1982 onwards, even in the absence of a provision to that effect and taking into account the contracts he was granted thereafter.

Regarding the break in service which occurred between 3 September and 2 October 1983, it is necessary to establish whether this prevented the complainant from completing the 18 years of continuous service beginning on 17 November 1982.

The Tribunal considers that it did not. The evidence on file, and particularly an affidavit produced by the complainant as an annex to his written submissions, shows that the break imposed on the complainant was justified

only by the fact that he was employed under short-term contracts. Since the Tribunal has determined that the complainant must be deemed to have been in service from 17 November 1982 onwards, the break in question must be viewed as a period of leave.

In view of the foregoing considerations, the complainant must be deemed to have completed the 18 years of continuous service rendering him eligible for a personal promotion, provided that the other conditions are satisfied. Consequently, the Secretary-General's decision must be set aside insofar as the latter considered that the complainant did not satisfy the condition of 18 years of continuous service stipulated in Service Order No. 99.

However, that condition is merely the first of six conditions of eligibility for a personal promotion defined in Service Order No. 99, and since the remaining conditions have not been examined in the context of this dispute, notwithstanding the complainant's assertions, the case shall be sent back to the ITU for consideration of the complainant's request in the light of the other conditions, the condition as to 18 years' service having been satisfied since 1 January 2001.

8. The complainant seeks the validation, for pension purposes, of his service for the period from 16 November 1981 to 31 December 1983, or payment of the actuarial equivalent of the loss suffered, with interest at the rate of 5 per cent calculated from 30 June 2003. Subsidiarily, he seeks the validation of his service for the period from 17 November 1982 to 31 December 1983, or payment of the actuarial equivalent of the loss suffered, with interest at the rate of 5 per cent calculated from 30 June 2003.

However, as held by the Tribunal in the case which gave rise to Judgment 2181, short-term contracts expressly excluded United Nations Joint Staff Pension Fund participation, and the complainant's claim to alter those stipulations is both irreceivable and unfounded.

9. The complainant's claim for relief based on the injury he suffered, "particularly as a result of the malfunctioning of the internal appeal procedure", is considered by the Tribunal to be well founded.

Indeed, the serious malfunctioning of the internal appeal procedure, which the Union does not deny, and the fact that the ITU wrongly refused to acknowledge that the complainant had completed 18 years of continuous service, caused him an injury in respect of which the Tribunal shall award him 3,000 Swiss francs.

10. Having partially succeeded, the complainant is entitled to 3,000 francs in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it rejects the complainant's request for a personal promotion.

2. The case is sent back to the ITU for examination of the complainant's request in accordance with consideration 7, above.

3. The Union shall pay the complainant 3,000 Swiss francs in damages.

4. It shall also pay him 3,000 francs in costs.

5. His other claims are dismissed.

In witness of this judgment, adopted on 21 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.