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

SEVENTY-SIXTH SESSION

In re GAUTREY

Judgment 1326

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michael Leslie Howard Gautrey against the International Telecommunication Union (ITU) on 15 January 1993, the Union's reply of 24 May, the complainant's rejoinder of 6 September and the ITU's surrejoinder of 14 October 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 9.6 and Rule 11.1.1 of the ITU Staff Regulations and Staff Rules, Articles 8(a) and 8(c) of the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the United Nations Common System of Salaries and Allowances (Document ACC/1982/PER/CM/24) and Article 11.6 of the Staff Regulations of the International Labour Office;

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, who is British, joined the staff of the ITU in April 1986 on transfer from the Food and Agriculture Organization of the United Nations under the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the United Nations Common System of Salaries and Allowances (Document ACC/1982/PER/CM/24). He was put on a post as English editor at grade P.3 with the International Frequency Registration Board. He got a permanent appointment in April 1988.

On 23 February 1990 his supervisor informed him orally that his post was to be abolished in the spring of that year and that, no other suitable post being available, the ITU would be terminating his appointment. But the Chief of the Personnel and Social Protection Department would - it was understood - help him to find a job in another organisation.

On 8 March the Chief of Personnel confirmed what his supervisor had already said. In a later conversation he told him that his entitlements, taking account of his seniority in the United Nations system, came to some 90,000 Swiss francs, including repatriation grant and termination indemnity, which the Secretary-General of the Union had decided - as Regulation 9.6 d) allows - to increase by 50 per cent. At those meetings the complainant says he asked whether, if he found a fixed-term appointment in another organisation by 1 January 1991, the ITU would baulk at paying him the termination indemnity when he left or at least preserve his entitlement until he got a permanent job; he says that the Chief of Personnel agreed to look into the matter.

On 3 July 1990 he was chosen for a post at the International Labour Office (ILO) and on 4 September accepted the ILO's offer of an appointment for two years starting on 2 September.

On 4 September he wrote to the ITU's Secretary-General to say that he had not yet got any answer to his question about his termination indemnity and that signing the contract with the ILO did not mean that he was waiving his entitlements under his appointment with the ITU.

By a letter of 13 September 1990 the Chief of Personnel told him that because of the special circumstances and although there was no such requirement in the ITU's Staff Regulations or the 1982 Inter-Organization Agreement, the Secretary-General had taken "the quite exceptional decision" to maintain for two years as from 2 September 1990 his entitlement to termination indemnity under Regulation 9.6 on the following terms: if the ILO ended his appointment before 2 September 1992 and he found no other job, the ITU would make up the termination indemnity from the ILO with the amount that would have been due to him in United States dollars at 31 December 1990; if he was unemployed at the end of his two-year appointment it would pay him the indemnity in full.

By a letter of 25 October 1990 he asked the Secretary-General in accordance with Rule 11.1.1.2 a) to reconsider the decision of 13 September on the grounds that he ought to get the termination indemnity on leaving the Union and that if the ILO did not give him a permanent appointment the amount should be reckoned as at the date of expiry of his contract with the ILO.

By a letter of 29 November 1990 the Secretary-General turned down his request: he was not covered by Regulation 9.6 since he had not been "dismissed from the ITU then appointed by the ILO" but "transferred from the ITU to the ILO", and the decision to maintain his entitlement had gone "beyond any obligation in the rules or contract".

On 11 December 1990 he applied to the Secretary-General for leave to bypass the internal appeals procedure and take his complaint against the decision of 29 November straight to the Tribunal. The Secretary-General refused in a letter of 10 January 1991.

On 20 February 1991 he lodged an internal "complaint" with the Appeal Board against the decision of 29 November 1990. He claimed payment of the indemnity due from the ITU as at 1 September 1990 plus interest at the rate of 10 per cent a year as from the same date - unless the ITU preserved his entitlement until he got a permanent appointment with the ILO. If he got no such permanent appointment the amount of the indemnity should be reckoned as at the date of the expiry or termination of his fixed-term appointment with the ILO.

In its report of 2 August 1991 the Appeal Board observed that in no circumstances would he get less than the amount he would be entitled to if termination indemnity became due either within or upon expiry of his two-year contract with the ILO or if the ILO employed him further, but it regretted that the ITU had failed to inform him that in the latter contingency his acquired rights would be maintained by the ILO and it suggested giving him an assurance on that score.

By a memorandum of 7 October 1991 to the chairman of the Board the Secretary-General endorsed the report but with two reservations: he felt unable to endorse the Board's statement that the complainant would not receive less than what he would be entitled to if the ILO gave him an extension of contract; and since the ITU's commitment to maintaining his entitlement was made ex gratia he had no acquired rights at all.

In an "amendment" of 19 October 1992 to its report the Board said that the ITU had acted in accordance with the rules; that, the two-year commitment having expired, the ITU was no longer liable towards the complainant; that if the ILO gave him any further fixed-term appointments the only material rules on termination would be the ones in the ILO Staff Regulations; and that there was no evidence of breach of acquired rights.

In a letter of 21 October 1992 - the impugned decision - the Secretary-General told him that the amendment to the Board's report concluded the internal appeals proceedings which his letter of 25 October 1990 had started, and his claims in that letter were rejected.

B. The complainant has three pleas.

First, the impugned decision was unlawful because the Appeal Board was not properly constituted. The Secretary-General appointed a new Board on 1 September 1992 by Decision 7634. According to an opinion given by the Union's legal adviser on 9 November 1992 the former Board members should hear appeals received by 1 September 1992. So the former members should have written the amendment to the report; they did not, since the staff representative, for one, had been replaced.

Secondly, the Union failed to respect his entitlement to termination indemnity. According to Regulation 9.6 a) it must pay such indemnity to "staff members whose appointments are terminated because of abolition of the post or reduction of the staff". If the complainant had not been transferred from the ITU to the ILO and if he had awaited the end of his appointment before looking for a new job, the Union would have dismissed him on the grounds of abolition of post. The transfer was no reason to exclude him from entitlement under Regulation 9.6; he was entitled to compensation for breach of a fundamental term of employment, namely the security of permanent appointment. All that he agreed to was that instead of paying the indemnity at the end of his appointment the ITU should preserve it until he got a permanent contract with another organisation. Had he been given the choice he would have stayed on at the ITU.

He objects to the Secretary-General's decision of 13 September 1990 to maintain his entitlement only until 2

September 1992. He is now subject to Article 11.6 of the ILO Staff Regulations, which does not prescribe the payment of termination indemnity for non-renewal of fixed-term appointments. As for the amount of the indemnity, it should be reckoned as at the date of separation from the ILO if it did not offer him an indefinite appointment.

Thirdly, the Union was in breach of its duty of good faith. Almost two years went by between his request for review and the Secretary-General's final answer, which came after a lapse of the two years in which the Union guaranteed payment of the indemnity.

The complainant seeks (1) the quashing of the Secretary-General's decision of 21 October 1992; (2) payment of the termination indemnity in the amount due at 1 September 1990 plus interest at the rate of 10 per cent a year as from the same date, unless the Union guarantees the entitlement until the ILO offers him a permanent contract; failing such a contract, the amount of the indemnity should be reckoned as at the date on which a fixed-term contract with the ILO expires or is terminated; (3) moral damages for the undue delay in reviewing his case; and (4) 89,500 French francs in costs.

C. In its reply the Union states that the ILO's offer was the outcome of joint efforts by its Chief of Personnel and the complainant. The ITU did its utmost to let him stay on in the common system. It did not dismiss him; so he may not claim entitlement under Regulation 9.6. Although there was termination of its contract with him within the meaning of paragraph 8(a) of the Inter-Organization Agreement, only termination of contractual links with the international civil service, which he has failed to establish, confers entitlement to the indemnity. Besides, since his transfer he has been covered by the ILO's rules on fixed-term contracts, under which, in cases like his, full service with the common system counts in reckoning the indemnity.

The Union denies breach of entitlement to termination indemnity. It decided to preserve his entitlement for two years because it knew that the ILO would be unable to comply with paragraph 8(c) of the Inter-Organization Agreement, under which:

"... the receiving organization will, if it is possible to do so in accordance with its normal policies, grant him an appointment of duration not less than that of his appointment in the releasing organization."

The ITU had no duty under rules or contract to do so.

It was not in breach of good faith, though it regrets the time that the appeal took. The legal adviser's intent was respected in constituting the Appeal Board. It was because members who should have sat declined to do so that exceptional arrangements had to be made, and they caused the complainant no injury anyway.

D. In his rejoinder the complainant maintains that the appeal procedure was flawed because the composition of the Appeal Board was not in keeping with the legal adviser's opinion of 9 November 1992, which was that "any appeal received by 1 September 1992, whatever the stage the proceedings might have reached, must be heard by the Board as constituted prior to that date, that Decision 7634 of 1 September 1992 was "clear and needs no interpretation"; and that "any other approach might prompt challenge from appellants on such grounds as that the Board's membership had been so changed as to harm their case". The complainant points out that the Board's report of 2 August 1991 was in his favour, and he submits that the conclusions of the amendment thereto would have been different had the Board been properly constituted.

Though he did get a transfer, the ITU was bound to make good the loss of security in law he suffered in the termination of his permanent appointment. Payment of the indemnity is not subject to termination of contractual links with the international civil service, a concept he is unaware of. In any event the continuity of that relationship has not been established since he has no guarantee of renewal of his appointment with the ILO. The termination of his contract with the ITU - even though the ILO undertakes to count his full seniority in the common system - robs him of a basic entitlement, the termination indemnity.

E. The Union presses its pleas in its surrejoinder. In answer to the charge of breach of entitlement to termination indemnity it submits that the purpose of the indemnity is to compensate the loss not just of an essential term of employment but of employment itself and the discontinuity of service within the common system. The complainant therefore has no claim to termination indemnity. Disagreement over the purport or interpretation of a decision does not ipso facto warrant an award of moral damages; nor indeed does the regrettable delay over the appeal.

CONSIDERATIONS:

1. In April 1986 the complainant joined the ITU as an English editor at grade P.3 with its International Frequency Registration Board (IFRB). He had fixed-term contracts up to 20 April 1988, when the Union granted him a permanent one.

2. On 23 February 1990 the Chief of the IFRB told him orally that his post would be abolished at the end of the year but said that the Administrative Council still had to confirm the decision in June. On 8 March 1990 the Chief of the Personnel and Social Protection Department informed him that in the absence of any other suitable post he would do whatever he could to find one that matched the complainant's background and qualifications in another international organisation within the system.

3. On 19 March 1990 the Chief of Personnel sent his counterpart at the International Labour Office (ILO) a letter recommending the complainant and explaining why his post was to be abolished as from 1 January 1991. On 3 July 1990 the ILO told the complainant it would offer him a fixed-term appointment and on 4 September he signed a two-year contract with the ILO with effect from 2 September 1990.

4. Also on 4 September the complainant wrote to the Secretary-General of the Union about his entitlement under the rules to termination indemnity, which he said he by no means intended to waive. In a letter of 13 September 1990 the ITU's Chief of Personnel informed him that the Secretary-General had decided as an exceptional measure to conserve his entitlement but only for two years as from 2 September 1990.

5. On 25 October 1990 he asked the Secretary-General to review the decision. The Secretary-General having rejected his request on 29 November 1990 and having later denied him leave to go straight to the Tribunal, he appealed to the Appeal Board on 20 February 1991.

6. In its report of 2 August 1991 the Board took the view that he had an acquired right to the termination indemnity and that his entitlement should be safeguarded whatever might happen: whether the ILO were to terminate his appointment, extend it or fail to renew it. But before making a final recommendation the Board wanted to find out about the Secretary-General's stand.

7. In a memorandum of 7 October 1991 the Secretary- General told the chairman of the Board that he agreed with its report but had reservations in particular about the complainant's alleged acquired rights. In a memorandum of 29 May 1992 the Board said that it took the Secretary-General to mean that the ITU would not be liable towards the complainant beyond the two years his contract was to run at the ILO and it asked the Secretary-General to confirm that this was what he meant. In view of the concurring opinions that the ILO expressed on 11 June and the ITU on 28 July the Board sent the Secretary- General an "amendment" to its report on 19 October in which it absolved the ITU of any liability towards the complainant. The ILO extended his appointment by one year on 6 October.

8. The Secretary-General's final decision of 21 October endorsing the amended report is the one the complainant is impugning. He rests his claim to quashing on the improper composition of the Appeal Board, breach of his right to termination indemnity, and the Union's failure to act in good faith.

The composition of the Appeal Board

9. His main objection to the make-up of the Board is that not all of the members who signed the report of 2 August 1991 took part in the review of his case on 19 October 1992. Though Mr. Irmer was in the chair on both occasions, the two other members were in the first instance Mr. Sant, the regular member representing the IFRB - where the complainant was working - and Mr. Vérove, the regular member elected by the staff; but the second time a new regular member, Mr. Olms, represented the IFRB and Mr. Fonteyne served as the staff's newly elected regular member. The complainant observes that the members newly appointed on 1 September 1992 were to consider appeals received after that date. But the Board already had his by that time.

10. To account for the attendance of the new members the Union points out that after the appointments of 1 September 1992 Mr. Sant retired and had to be replaced by his former alternate, Mr. Olms, who then became a regular member; though Mr. Vérove was kept on he became an alternate and refused to sit; and though of course he had had an alternate before 1 September 1992, Mrs. Bourne, she too declined to sit. Being thus unable in practice to enlist either the former members who were already familiar with the case or indeed any member who

had been on the Board before 1 September 1992, the ITU had no choice but to appoint new people to represent the IFRB and the staff on 19 October 1992.

11. The Tribunal holds that, in view of the particular circumstances described in 10 above, the Board's membership was in keeping with the provisions of Rule 11.1.1.3 and so it serves no purpose to ask, as the complainant does, whether the Board's conclusions would have differed if its members had been as before.

The entitlement to termination indemnity

12. The complainant further objects that the impugned decision infringed his right to termination indemnity under Regulation 9.6 a), which says that "staff members whose appointments are terminated because of abolition of the post or reduction of the staff shall be paid an indemnity". His, he believes, is such a case: he got oral notice on 23 February 1990 of termination for abolition of post at the end of 1990 and on 8 March 1990 he had it confirmed.

13. The ITU retorts that there had been no actual termination of his appointment by 2 September 1990, when he left to take up duty at the ILO. It argues that entitlement to termination indemnity flows not from the anticipation or risk of termination but from actual severance of the contractual bonds between an official and an employer who can no longer keep him. What in the Union's submission caused the break in the complainant's appointment was his transfer to the ILO under the Inter-Organization Agreement concerning transfer of staff between organisations within the United Nations common system.

14. The plea is successful. Although the termination of the complainant's appointment on account of the abolition of his post from 1 January 1991 had been mooted as early as February 1990 there is no evidence that any such decision was taken before he left the ITU on 2 September 1990. So there is no substance in his contention that his leaving the ITU was due to the abolition of his post. The correspondence shows that, as the Union argues, he left the ITU on transfer to the ILO under the Inter-Organization Agreement. The Chief of the Personnel Development Branch at the ILO pointed that out to him in the formal offer of appointment of 27 July 1990: "your assignment ... will be treated as an inter-agency transfer". In like terms the Chief of Personnel at the ITU told him on 30 August 1990 that his "transfer to the ILO" was "accepted with effect from 2 September 1990". So his case falls under paragraph 8 a) of the Agreement, which says that "a staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization". He is therefore mistaken in contending that he was dismissed for abolition of post.

15. He may not rely a contrario on the fact that his case is not mentioned among those for which Regulation 9.6 e) excludes payment of termination indemnity since - as has been said - his was a case of transfer under the Agreement, not of termination.

16. The Tribunal finds no more cogent his plea that payment of the indemnity may be due to him for the loss of a fundamental term of his conditions of employment, namely the security of a permanent appointment, on his getting only a fixed-term one.

17. Entitlement to termination indemnity arises only in cases of separation for abolition of post. On the date of transfer his appointment had not been terminated, and there is no provision in the Regulations for the award of indemnities in cases other than those set out in 9.6. Security of tenure in cases of transfer comes under paragraph 8 c) of the Agreement, which reads:

"Subject to satisfactory completion by the staff member of any period of probation which it may require, the receiving organization will, if it is possible to do so in accordance with its normal policies, grant him an appointment of duration not less than that of his appointment in the releasing organization".

So it was up to the ILO as the receiving organisation to ensure that the complainant would not lose the security of a permanent appointment, and if he lost it he should have asked the ILO to comply with the material provision. But he failed to do so, even though he was fully aware by 3 July 1990 of the ILO's intention of offering him only a fixed-term contract, which he accepted without qualification on 4 September 1990.

18. He submits that if he had let matters drag on for four months - from September to December 1990 - he would have had no difficulty in getting the indemnity and that he went to the ILO only because his post was being done away with.

19. The argument would be sustainable only if by the time of his transfer to the ILO his post had actually been abolished. But it had not. Moreover, the condition for getting the indemnity was termination and that would have ruled out transfer since he would no longer have been on the staff of the Union. In any event there are no grounds for assuming that the ILO would have taken him on once the four months had passed.

20. His argument under this head being devoid of merit, the plea based on breach of entitlement to termination indemnity fails.

The Union's duty to act in good faith

21. Lastly, he pleads breach of good faith, the gist of it being the length of the internal proceedings. It took the Secretary-General two years to give him a final reply to his request of 25 October 1990 for review. Twenty months elapsed between the lodging of his appeal with the Appeal Board and its amended report and that was sixteen months over the fourteen weeks that Regulation 11 1.1.4 f) allows.

22. The Tribunal observes first that the alleged delay was not wholly the Secretary-General's fault. What is more, it took him little more than a month to reply on 29 November 1990 to the initial appeal of 25 October 1990 and only two days to take the final decision of 21 October 1992 after examining the Appeal Board's amended report of 19 October. The rather long time which the Board took from the lodging of the complainant's appeal to the submission of its amended report is due partly to the Staff Council's having refrained from taking part in the Board's work from December 1991 to May 1992 and partly to changes in its membership following the appointments of 1 September 1992. In any event such delay, however regrettable, was not in the circumstances of this case such as to impair the lawfulness of the impugned decision or cast doubt on the Union's good faith.

23. The complainant's main claims to termination indemnity having failed, so too do his claims to damages for alleged moral injury and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner

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