SEVENTY-SEVENTH SESSION

In re TAR

Judgment 1356

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Zoltan John Tar against the International Telecommunication Union (ITU) on 14 May 1993, the ITU's reply of 29 October 1993, the complainant's rejoinder of 10 January 1994 and the Union's surrejoinder of 10 February 1994;

Considering the application to intervene filed by Mr. Yann Saunders;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Regulation 3.5 and Rule 11.1.1.2 a) of the ITU Staff Regulations and Staff Rules;

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. ITU Staff Regulation 3.5 reads:

"a) In order to adjust for cost-of-living variations in Geneva in relation to a base index, there shall be added to the net base salary of a staff member in the Professional category and above a post adjustment the amount of which shall be determined by multiplying 1 per cent of that net base salary by a multiplier reflecting the number of points by which the multiplier index for the duty station concerned exceeds the base index.

b) The post-adjustment index for Geneva and the corresponding multiplier shall be determined at regular intervals by the International Civil Service Commission."

In August 1980 the complainant, an Australian, joined the staff of the ITU in Geneva and was assigned to the International Advisory Committee on Telegraphy and Telephony, which is known by the initials of its title in French, CCITT. He now holds a post in the CCITT as counsellor at grade P.5.

On a proposal the Secretary-General had put to it in May 1992 the ITU's Administrative Council adopted on 8 July 1992 a resolution on conditions of employment expressing concern that salary scales in the common system of the United Nations organisations, to which the ITU belongs, failed to reflect differences in working hours at different duty stations and calling on the General Assembly of the United Nations and the International Civil Service Commission (ICSC) to look into the matter. In another resolution of even date the Council decided to set up a "consultative group" to examine employment issues and recommend action within the common system.

From Service Order No. 78 of 12 November 1992 the complainant learned that the figure of the post-adjustment multiplier for that month for Geneva was 92.2. In a memorandum of 17 December he asked the Secretary-General to review the decision announced in the service order and claimed material and moral damages; he also asked that in the event of rejection he be relieved of the obligation to go to the Appeal Board. By a letter of 17 February 1993, the impugned decision, the Secretary-General rejected his request for review but agreed to his putting his case straight to the Tribunal.

In its report of 21 May 1993 to the Administrative Council the consultative group said it hoped that the ICSC would resolve what it called the "apparent contradiction between equalization of purchasing power and hours of work".

On 28 June 1993, at its 38th session, the Commission decided not to change practice as to working hours in the common system.

B. The complainant submits that the decision to set the post-adjustment multiplier for November 1992 at 92.2 is unlawful because it overlooked differences in working hours between New York and Geneva. He has three main

pleas.

He argues first that the Secretary-General neglected an essential fact. To be valid, comparison of purchasing power at duty stations must have regard to staff whose conditions of service are the same. But working hours are 11.8 per cent longer in Geneva than in New York. So the impugned decision is at odds with the whole purpose of post adjustment, which the ICSC says is to give the pay of all Professional category staff the same purchasing power whatever their duty station may be.

His second plea is breach of equal treatment. Because of inflation the purchasing power of staff pay in Geneva fell by about a quarter from 1984 to 1992 as against staff pay in New York. Staff in the General Service category, however, have not fared so badly: whereas the highest level of their pay comes within the range of pay corresponding to grade P.2 in New York it rose in Geneva from the equivalent of P.2, step 4, in 1984 to that of P.4, step 4, in 1992.

The complainant contends, lastly, that the Union has infringed his right to "equal pay for equal work" under Article 23(2) of the Universal Declaration of Human Rights. Though the ITU has complied with the "form" of the Staff Regulations the "substance" discriminates against the Professional category of staff in Geneva and is in breach of the terms of his appointment.

He seeks an 11.8 per cent increase in salary as from November 1992; back-payment of 113,280 Swiss francs for unremunerated service since August 1984; and 50,000 francs in moral damages. He also wants the Union to restore the relative value of his salary by offsetting the disproportionate rise since 1984 in the value of salary paid to other categories of staff at the Union.

C. In its reply the ITU submits that the complaint is irreceivable. At issue are long-established practices such as differences in working hours between Geneva and New York and an alleged loss in the purchasing power of pay since 1984. The fact that the complainant was an intervener in a complaint on which the Tribunal ruled in Judgment 826 (in re Araman and Sala) on 5 June 1987 shows that he was aware then of the disparity he is now alleging. So by any reckoning the time limit for appeal ran out years ago.

The Union argues that his complaint is, besides, devoid of merit.

As he acknowledges, the Administration has complied with the material rules. What he is objecting to are decisions of the Commission. Although the Union would have welcomed a new approach from the Commission to problems common to several duty stations, it had to abide by the rules whether or not they linked the post-adjustment allowance to working hours.

The ITU denies discrimination. Work like the complainant's does not lend itself to quantification in terms of working hours. So he is wrong to take the principle of equal pay for equal work to mean equal pay for an equal number of working hours. What the principle means is equal pay for work of equal value. In any event the principle has an effective safeguard at the ITU in the job-classification system.

In line with the "Noblemaire" principle pay of staff in the Professional category is based on levels of pay of United States federal civil servants, and according to the "Fleming" principle pay of staff in the General Service category is based on the best prevailing local conditions. That has led to a big overlap in pay between the two categories at some duty stations. That the Union has sought a remedy is plain from the work of the consultative group it set up.

Insofar as the complainant is not alleging breach of the Staff Regulations or Staff Rules there is no challengeable decision. His acceptance of the ITU's offer of appointment implied that he had read and accepted the rules; so his plea of breach of his terms of employment is groundless.

D. The complainant rejoins that his complaint is receivable and well-founded. His case turns on a recurrent breach which has nothing to do with the grievance on which the Tribunal ruled on in Judgment 826.

He presses his pleas on the merits and accuses the Union of seeking refuge in the rules of the common system. In his view it has observed only the letter, not the spirit of Noblemaire. Its infringement of that and other principles is a breach of acquired rights. Instead of bowing to the common system the Union should obey higher principles of equity, good faith and equal treatment and avoid causing its staff undue injury.

The complainant asks the Tribunal to declare that the difference in working hours between the United Nations in New York and the ITU in Geneva offends against the basic guarantee of equal purchasing power throughout the common system and to order the ITU to afford a remedy by increasing the pay of Professional category staff in Geneva or lowering their working hours or granting such other redress as may restore "equality of conditions leading to equivalence of purchasing power".

E. In its surrejoinder the ITU observes that the complainant has not put forward any new material argument in the rejoinder which it has not already answered. His new claims are, it contends, contrary to the case law.

CONSIDERATIONS:

1. The background to the case is as follows. In May 1992 the Secretary-General of the Union put to its Administrative Council the question of the difference in working hours between duty stations, a point which the pay scales of Professional category staff do not take into account. The Council adopted a resolution, No. 1024, at its 47th Session in June and July 1992. Among other things, the resolution set up a "consultative group" to "study staff issues in order to recommend to the Council specific actions, in conformity with the Common System". The group submitted to the Council a report dated 21 May 1993. Under the heading "Working Hours" the group said it "welcomed the commitment" of the representative of the International Civil Service Commission "to complete the study of this question before September 1993"; noted that "hours of work were not uniform in the Common System as they varied from duty station to duty station"; and expressed the hope that the Commission would "specifically address this apparent contradiction between equalization of purchasing power and hours of work". The upshot was, however, a decision by the Commission at its 38th Session, in July and August 1993, "to maintain the current common system practices with regard to working hours and to inform the General Assembly accordingly".

Receivability

2. The complainant, an ITU official, is impugning a decision confirming the "multiplier" that was applied in reckoning the post-adjustment allowance for the purpose of determining his own entitlements for November 1992.

3. The ITU is challenging the receivability of the complaint on the grounds that it is -

"based on situations, which were either established practices long before the date of the appeal (such as differences in working hours between the comparator and the complainant's duty station; alleged losses in purchasing power between Geneva and New York; alleged discrimination against Professional Staff as compared to the General Services staff) or were of a hypothetical character at the time of lodging the appeal (net remuneration increases for levels D.1 and D.2, ungraded officials and General Services category)."

4. Rule 11.1.1.2 a) of the ITU Staff Rules reads:

"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."

The complainant lodged such appeal within the six weeks allowed under Rule 11.1.1.2 a), challenging Service Order No. 78 dated 12 November 1992. In his reply of 17 February 1993 the Secretary-General refused to review the matter of the multiplier applied to the post adjustment and to pay the complainant the retroactive increase of 11.8 per cent he had claimed and authorised him to appeal directly to the Tribunal. That is the final decision he is impugning and he filed his complaint on 14 May 1993, within the time limit in Article VII(2) of the Tribunal's Statute. The conclusion is that his complaint is receivable.

The merits

5. The decision originally challenged by the complainant arose out of Service Order No. 78, which set the multiplier to be applied in the reckoning of the post adjustment for the Professional category of Union staff in Geneva in November 1992. The figure is calculated to ensure that the pay of staff in the Professional category should have equal purchasing power whatever their duty station may be. The material rule is Regulation 3.5 a) of the ITU Staff Regulations, which is set out in A above.

6. The complainant acknowledges that the Regulation was duly observed in the determination of the multiplier for November 1992. He is not alleging any flaw in the method of reckoning the multiplier but is using the matter as a pretext for objecting to one feature of the terms of his employment, namely that he has to work a week of forty hours against the thirty-five required of Professional category staff of the common system who are stationed in New York. He is accordingly seeking, among other things, an increase of 11.8 per cent in his pay to compensate for his longer working hours. His request for review under Rule 11.1.1.2 a) arose out of the determination of working hours in the Union and the common system.

7. What the complainant is really challenging is the pay scales applicable to the category of staff to which he belongs. That is a matter radically different from challenging the multiplier, which is just the result of an arithmetical exercise that varies with the prevailing rates of exchange between the dollar - the currency of account in the common system - and other currencies and which is supposed to give pay the same purchasing power in New York and elsewhere.

8. The conclusion is that in refusing the complainant's claims the Union has acted in accordance with its own rules and with its obligations as a member of the common system and under the Statute of the International Civil Service Commission. Those claims are nothing more than an attempt to challenge the pay scales under the guise of attacking the multiplier.

9. Since the complainant's main claim fails, so too do all the others.

10. Since the complaint fails on the foregoing grounds, so too does the application to intervene.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Michel Gentot
A.B. Gardner

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