

## SEVENTY-NINTH SESSION

### *In re SAUNDERS (No. 10)*

#### **Judgment 1422**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 15 August 1994, the ITU's reply of 31 October, the complainant's rejoinder of 4 November and the Union's letter of 22 November 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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

Having examined the written submissions;

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

A. The complainant's career at the Union has been summed up under A in Judgments 970, 989 and 1018. Like his earlier complaints this one arises out of his wish to make good the loss of earnings and of future pension entitlements due to his promotion from G.5 to P.2.

In a report on an appeal which he had lodged on 10 March 1992 against the reclassification of his post the Appeal Board of the ITU recommended that the Secretary-General should seek a "pragmatic solution" to his case. Having learned that a new post at grade G.7 in electronic publications might fall vacant, he asked the Secretary-General in a memorandum of 30 October 1992 to consider putting him on it in line with the Board's recommendation.

After seeing him in the presence of a legal officer and the chairman of the Staff Union, the Chief of the Personnel Department told him in a memorandum dated 20 November 1992 what pay and pension entitlements he might expect if the Secretary-General appointed him to a G.7 post. In a memorandum of 27 November to the Secretary-General he objected to the terms set out in the Chief's memorandum.

On 6 April 1993 the Union issued vacancy notice 12/93 for a post, No. S70/G7/135, in the Electronic Publications and Marketing Section. On 23 April the complainant lodged an application which he said did not imply consent to the "totally unacceptable" conditions in the memorandum of 20 November 1992. On 17 November 1993 the Chief of Personnel wrote to tell him that his application had not been successful.

In a memorandum of 30 November 1993 he asked the Secretary-General to review the rejection of his application. The Secretary-General upheld his decision in a reply dated 10 January 1994.

On 31 March 1994 he put his case to the Appeal Board, which recommended on 21 June that the original appointment, based on a recommendation from the Appointment and Promotion Board, should be "annulled"; that a new board "composed of members who hold a grade at least equivalent to that of the post" should reconsider the applicants; and that the rights of the successful one should be "protected".

In a memorandum of 21 July 1994 to the complainant the Secretary-General said he had decided to reverse the appointment he had made to post S70/G7/135 and to convene a new Appointment and Promotion Board to review all the applications that had been put to the earlier one. He promised he would advise the new board to make its recommendation on the strength of merit alone and would base his new decision entirely on that recommendation; if the complainant won, his conditions of employment would be determined according to the material rules and his "administrative and personal" situation. That is the decision under challenge.

B. The complainant submits that the rejection of his application for post S70/G7/135 shows two fatal procedural flaws.

One is that the Union "deliberately" infringed Staff Regulation 4.9 e), which requires that anyone taking part in a meeting of the Appointment and Promotion Board hold a grade "at least equal to that of the post under

consideration".

Secondly, he charges the Administration with unlawfully rejecting his application because he had objected to the terms which the Chief of the Personnel Department "arbitrarily" imposed on any appointment he might get to a post at G.7. That amounted to sidestepping established procedure and putting him at a disadvantage before the Administration had compared him with others on merit.

He wants the Tribunal to set aside the impugned decision; to quash the successful candidate's appointment and order the Union to appoint him instead - with non-local status - at the highest step in the grade and with retroactive effect. Failing the quashing of the unlawful appointment, he claims (1) material damages including (a) payment of the difference in monthly earnings until retirement between his pay at grade P.2 and what he would have got at G.7 and (b) the reckoning of his pension entitlements on the basis of assignment to the G.7 post, and (2) moral damages in the amount of 50,000 Swiss francs. He seeks costs.

C. In its reply the ITU acknowledges that there was a flaw in the membership of the Appointment and Promotion Board. That is why the Secretary-General reversed his decision to appoint the other official and ordered a new competition. In any event a flaw of that sort did not warrant appointing the complainant without holding a new competition.

The Union denies that the Board took account of the complainant's failure to accept the terms the Chief of Personnel set out in the memorandum of 20 November 1992. That would have implied that the Chief of Personnel had made him a binding offer. But he had no authority to make such an offer, and his memorandum was merely informative.

The complainant's allegations of moral injury are unsubstantiated.

D. In his rejoinder the complainant presses his claims. He produces a message from the chairman of the Appointment and Promotion Board explaining that it had decided to put his name on the short list only if his application was "unconditional", i.e. without reservations about the terms set out by the Chief of Personnel. He says the Union is determined to keep him at P.2 by any means, "fair or foul".

#### CONSIDERATIONS:

1. On 23 April 1993 the complainant, a grade P.2 official of the ITU, applied for a vacant post at grade G.7, No. S70/67/135. He stated that his application should not be construed as acceptance of terms which the Chief of Personnel had set out in a memorandum of 20 November 1992. Those terms were that, if he was appointed to the post, his step in grade G.7 would be so determined that his net pay and allowances would be at least equal to the sum of his net base salary and post adjustment allowance, reckoned at the single rate, at his then step and grade, step 12 in P.2. The Chief of Personnel had estimated that he would be put at step 7 in G.7, which would mean an increase of some 905 Swiss francs in his annual take-home pay. And he would revert to the local status which he had had as a member of the General Service category of the staff.

2. The complainant's name was not on the short list considered by the Appointment and Promotion Board and the Administration told him in a memorandum of 17 November 1993 that his application had not been successful. The Secretary-General having refused to intervene, he appealed. The Appeal Board accepted his contention that the Appointment and Promotion Board had been improperly constituted because, contrary to the requirement in Staff Regulation 4.9 e), one of the Board's members had not held a post at a grade at least equal to that of the vacancy.

3. By the decision now impugned the Secretary-General reversed the decision he had taken earlier on the recommendation of the Appointment and Promotion Board and directed that the Board be reconvened, consider all applicants whose names had been transmitted by the preselection panel, make its recommendation only on the merits of the applicants, and abstain from considering any other element which might be brought to its knowledge, including the Chief of Personnel's memorandum of 20 November 1992 to the complainant.

4. The complainant is asking the Tribunal:

(a) to quash the Secretary-General's decision;

(b) to quash the appointment to the post and appoint the complainant instead without holding a new competition;

(c) to order the ITU to "calculate the complainant's new pay at G.7" upon such appointment "at the same step he reached at P.2";

(d) to order it to maintain his non-local status;

(e) to order it to make the adjustment of his salary retroactive;

(f) alternatively, to award him the material and moral damages set out in B above;

(g) to award him costs.

5. In putting his case to the Appeal Board and to the Tribunal the complainant has seen fit to file voluminous memoranda relating to previous disputes about his pay, which is expressed in United States dollars and which he says is lower, because of the declining value of the dollar against the Swiss franc, than his earnings would have been had he remained in the General Service category. Those issues are irrelevant to this case, the sole material point being whether the impugned decision infringed his rights under the Staff Regulations.

6. The complainant has utterly misconceived the issues arising from the Secretary-General's decision. The appointment of another applicant having already been reversed, the question of quashing that appointment does not arise. As to the complainant's claim that he be appointed instead, the Secretary-General's decision that the Appointment and Promotion Board proceed de novo was fully justified, that being a matter at the Secretary-General's discretion. The Tribunal has already ruled in Judgment 988, in which it dismissed Mr. Saunders' second complaint, that Regulation 4.9 allows the Secretary-General to promote someone even against the Appointment and Promotion Board's advice and is intended as a safeguard to ensure compliance with the rules on appointment and promotion. The intent is not to enable the Secretary-General to prefer a weaker candidate on compassionate or indeed any other grounds. The complainant's principal claim to the quashing of the impugned decision and his alternate claims to material and moral damages therefore fail. That being so, the other claims to relief, which are consequential, must fail as well.

7. The complainant has asked the Tribunal to hear evidence from two witnesses, whom he names, about an alleged former breach by the Appointment and Promotion Board of the requirement that members of the Board hold a grade at least equal to that of the vacancy. Since the Secretary-General has accepted the Appeal Board's finding that the Appointment and Promotion Board was improperly constituted and has reversed his earlier decision, no useful purpose would be served by hearing the witnesses.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas  
P. Pescatore  
Mark Fernando  
A.B. Gardner