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

EIGHTY-FOURTH SESSION

In re Fabiani (No. 3)

Judgment 1678

The Administrative Tribunal,

Considering the third complaint filed by Mrs. Denise Fabiani against the International Telecommunication Union (ITU) on 6 May 1997, the ITU's reply of 18 June, the complainant's rejoinder of 20 August and the Union's surrejoinder of 23 September 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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, a Frenchwoman who was born in 1940, joined the staff of the ITU on 13 September 1978 under a short-term appointment at grade G.6. She was later granted a probationary appointment and then a permanent appointment as from 3 December 1980. On 1 January 1981 she was promoted to G.7 as an administrative assistant. Her post having been upgraded to P.2, she got promotion to that grade on 1 January 1985. On 1 May 1989 she was promoted to P.3.

At its 1995 session the Council of the Union expressed concern about the unfavourable treatment as to pensions, and for that matter as to pay as well, of staff who had been promoted from the General Service to the Professional category. It instructed the Secretary-General to tackle the problem.

In letters of 7 and 29 November 1995 the Secretary-General told the coordinator of a body known as the "G to P" Working Party, which had been set up in 1991, that he intended to take exceptional action and make an offer to each of the officials concerned. They were to be allowed either to keep their then administrative status or else, as from 1 January 1995, to return to the General Service category at the grade which they had held before promotion to the Professional one. The Secretary-General explained that he would not grant payment of the special post allowance to anyone who opted for reinstatement in the General Service category but who was continuing to perform the duties of a post in the Professional category. Anyone in that position would be treated as falling solely within the General Service category and so would lose non-local status and the benefits and allowances that went with it. On 4 December the chief of the Personnel and Social Protection Department forwarded those letters to the complainant.

By a letter of 12 December 1995 the Secretary-General invited the complainant to choose between staying on in the Professional category and going back to the General Service one as from 1 January 1995 on the terms set out in the letters of 7 and 29 November. By a letter of 22 December 1995 the complainant asked him to make her a better offer. On 4 January 1996 the deputy chief of the Personnel and Social Protection Department refused on the Secretary-General's behalf to do so. In a letter of 5 January she agreed to reinstatement in the General Service category at grade G.7 as from 1 January 1995 on the Secretary-General's terms. The change was made at that date by a decision that the Secretary-General took on 14 February 1996. The complainant continued to carry out the same duties as she had been performing at grade P.3.

By a letter of 27 March she submitted an "informal" appeal to the Secretary-General against the decision of 14 February insofar as it denied her the special post allowance. In a memorandum of 24 April he offered a stay of the appeal proceedings until the end of the Council's next session, and she agreed. On 3 July he told her that the Council's decision did not warrant payment of the allowance and that the three-month time limit in Staff Rule 11.1.1.2 b) for appeal to the Appeal Board started that day. On 3 October she lodged her

appeal with the Board against the decision of 3 July. In its report of 6 December the Board said it could not recommend paying her the allowance but was in favour of putting her on a G.7 post. She got notice of the report on 9 December 1996. The complainant and other staff who had gone back to the General Service category wrote memoranda on 16 October 1996 and 15 January 1997 to the Secretary-General. By a memorandum dated 7 February 1997 the Secretary-General informed them of the outcome of the Council's debate on the subject. That is the decision she is impugning.

B. The complainant submits that her complaint is receivable. Under Rule 11.1.1.5 the Secretary-General had sixty days in which to act on the Board's report, which she got on 9 December 1996. So the deadline was, she says, 7 February 1997. Even if the memorandum of that date may not properly be treated as a final decision within the meaning of the Tribunal's Statute, the ninety-day time limit in Article VII(3) ran from 7 February. The complaint is therefore in time.

On the merits the complainant observes that she is still performing the duties of a P.3 post and she contends that the Secretary-General's decision not to grant her the allowance is unlawful under Regulation 3.8. She submits that she did not surrender her right to the allowance by opting for reinstatement in the General Service category. The decision also runs counter, in her view, to the principle of equal treatment inasmuch as several staff members who have always belonged to that category and who, like her, are performing the duties of Professional category posts do get the allowance. The decision not to pay her the allowance is unfair since her "downgrading" does not correspond to any change in her duties and is not warranted by any reason related to work.

She asks the Tribunal to declare unlawful the Secretary-General's stand in his memorandum of 7 February 1997, to order the Union to pay her the special post allowance as from 1 January 1995 and to award her 10,000 Swiss francs in costs.

C. In its reply the ITU submits that the complaint is time-barred. The complainant had ninety days in which to lodge it from the expiry of the time limit of sixty days which Rule 11.1.1.5 laid on the Secretary-General for taking his final decision after receiving the Appeal Board's report. The Secretary-General got the report on 6 December 1996. In any event the memorandum of 7 February 1997 may not be treated as the Secretary-General's final decision under Rule 11.1.1.5.

On the merits the Union points out that there was no precedent for the offer it made to staff like the complainant who had been promoted from one category to the other. Those staff were fully aware of their position when they made their choice between no change in their administrative status and reinstatement in their pension rights. The Union questions the complainant's good faith on the grounds that after agreeing to an act which she believes may have been unlawful she is now challenging it before the Tribunal. To her plea of breach of equal treatment as to the grant of the special post allowance the Union retorts that those who are being paid the allowance are not in the same position either in fact or in law as she inasmuch as they benefit under Staff Regulation 3.8 a), which governs staff who hold a permanent appointment and who have been appointed after competition to a "fixed-term post". Nor, in its submission, is there any breach of equity. She knew full well what she was doing in going back to the General Service category, and the change brought her a net rise in salary. Any special post allowance would have to be reckoned on the strength of her current salary at G.7 and so would bring her a further, and unwarranted, increase. The term "downgrading" is inappropriate to describe a measure to which she agreed and which has brought her better pay and pension rights.

D. In her rejoinder the complainant presses her pleas and claims. She maintains that her complaint is receivable: she could not know when the Board's report reached the Secretary-General. Since he did not see fit to take a decision on that report it would be wrong for the Union to benefit from his getting notice of it one working day before she did.

On the merits she contends that there is no objective yardstick for distinguishing her case from that of staff who have always belonged to the General Service category and who are being paid the special post allowance. Though going back to that category did not lower her pay, her earlier promotion to the Professional category did.

E. In its surrejoinder the ITU maintains that her complaint is irreceivable for the reasons set out in its reply

and points out that her reinstatement in the General Service category, which she herself applied for, caused her no injury. So she has no cause of action.

CONSIDERATIONS

1. The Union has employed the complainant since 13 September 1978. It gave her short-term appointments and then, on 3 December 1980 a permanent one. On 1 January 1981 it promoted her to grade G.7 as an administrative assistant.

2. On 1 January 1985 it upgraded her post and promoted her to P.2. It promoted her to P.3 as at 1 May 1989 in accordance with Judgment 1092, which the Tribunal delivered on 29 January 1991, on her second complaint.

3. She agreed to return to G.7 and did so at 1 January 1995 according to a decision of 14 February 1996. Her purpose in going back to the General Service category was to avoid the unfavourable consequences of promotion from that category to the Professional one. But her duties were the same as those she had been performing in the Professional category.

4. On 27 March 1996 she applied for a special post allowance. In a reply dated 24 April 1996 the Secretary-General refused. He also proposed a stay of the time limit for appeal to the Appeal Board pending any decision that the Council of the Union might take on the subject of the adverse consequences of promotion in category. She agreed in a memorandum of 3 June 1996.

5. On 3 July 1996 the Secretary-General sent her a memorandum saying that in the light of the Council's decision he was upholding the earlier decisions and the time limit for appeal to the Appeal Board ran from that date.

6. She lodged her appeal on 3 October 1996. In its report of 6 December 1996 to the Secretary-General the Appeal Board said, among other things, that it could not recommend paying her the allowance. She received a copy of the report on 9 December.

7. By a single memorandum of 7 February 1997 the Secretary-General informed several officials that he could not tackle the "G to P problem" until the Tribunal had ruled on the complaints that raised the issue. That is the decision that the complainant is impugning.

8. The ITU submits that her complaint is time-barred under Article VII of the Tribunal's Statute. It cites Staff Rule 11.1.1.5, which gives the Secretary-General sixty days from the date of receipt of the Appeal Board's recommendation to give the staff member notice of his final decision. In its submission the ninety-day time limit for filing a complaint runs either from the date at which the official receives the final decision or from the expiry of the sixty-day time limit for notifying one.

The Union points out that, the Board having sent its report to the Secretary-General on 6 December 1996 and a copy to the complainant on the 9th, the sixty days began on 6 December 1996 and expired on 3 February 1997. Though the complainant then had ninety days in which to go to the Tribunal, i.e. until 4 May, she did not file until the 6th.

9. In her rejoinder she says that, though she did not know when the Board's report reached the Secretary-General, her own copy arrived on 9 December 1996, a Monday and the first working-day after the Board adopted it. The ITU does not challenge that. Since the sixty days therefore ran from 9 December her complaint was receivable under Articles VII(2) and VII(3) of the Statute. In the complaint form she took the Secretary-General's memorandum of 7 February 1997 to her and other staff for the purpose of reckoning the time limit. The reason was that 7 February was the very date of expiry of sixty days from the date at which she had got the copy of the Board's report.

10. The memorandum of 7 February is not the final decision by the Secretary-General within the meaning of Rule 11.1.1.5. It is his reply to two general memoranda dated 16 October 1996 and 15 January 1997 from the complainant and others asking what effect the Secretary-General intended to give to the Council's decisions. Neither of the two memoranda referred to the complainant's appeal, which was at the time pending. Nor did the Secretary-General's memorandum of 7 February 1997. In particular, that memorandum neither

mentions the report by the Board nor cites any rule that might have led the complainant to believe that it constituted a final decision on that report. Indeed the complainant herself acknowledges that "it is not at all clear that the memorandum of 7 February 1997 may be treated as a decision" under Rule 11.1.1.5.

11. For the foregoing reasons the memorandum of 7 February 1997 may not be construed as giving her final notice of the rejection of her appeal. The conclusion is that according to Rule 11.1.1.5 the ninety days in which she had to come to the Tribunal began at 4 February 1997, not, as the Union makes out, at 3 February.

12. The time limit for filing her complaint accordingly expired on 5 May 1997. As she confirms in her rejoinder, she did not file it until 6 May. So her complaint is irreceivable for failure to meet the time limit in Article VII of the Tribunal's Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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