

## EIGHTY-EIGHTH SESSION

### *In re* Saunders (No. 19)

#### Judgment 1934

##### The Administrative Tribunal,

Considering the nineteenth complaint filed by Mr Yann Harris Saunders against the International Telecommunication Union (ITU) on 28 December 1998, the ITU's reply of 19 March 1999, the complainant's rejoinder of 13 April and the Union's surrejoinder of 18 June 1999;

Considering Article II, paragraph 5, 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. Regulation 3.8 a) of the ITU Staff Regulations provides that:

"A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition ..."

Information on the complainant's career is set out under A in Judgments 970, 989, 1018 and 1422.

The complainant was reinstated in the General Services category at grade G.6 with effect from 1 January 1995, even though he continued to discharge the functions of the P.2 post to which he had been promoted, without receiving the corresponding special post allowance.

By a letter of 27 August 1996, the Secretary-General informed the complainant of his decision to abolish his post with effect from 30 November and, therefore, to terminate his appointment on the same date. In a letter of 11 September, the complainant accepted his termination. In a letter of 12 September, the Secretary-General informed him *inter alia* that this acceptance was conditional on his agreement not to appeal his separation and/or any of its terms and conditions. The termination conditions awarded to the complainant were more favourable than normal. The same day the complainant accepted, in writing, the contents of this letter. In a letter to the Chairman of the Appeal Board, dated 20 September 1996, he indicated that he withdrew unconditionally all of his outstanding appeals against the ITU.

On 29 January 1998, the Tribunal delivered Judgment 1679 (*in re* Serlooten), in which it set aside the Secretary-General's refusal to pay Mr Serlooten (another staff member of the ITU reinstated in the General Services category) the special post allowance provided for under Staff Regulation 3.8 a) and ordered the payment of the allowance as from 1 January 1995.

In a letter of 16 April 1998, the complainant requested the Secretary-General to grant him, in accordance with Judgment 1679, a special post allowance from 1 January 1995 to the date of his separation, that is 30 November 1996. Having received no reply, he lodged an internal appeal with the Appeal Board in a letter of 13 June 1998. He reiterated his request and also asked for recalculation of his termination indemnity. The Board delivered its report to the Secretary-General on 21 September. Considering that on the occasion of his separation, and particularly in his letter of 20 September 1996, the complainant had withdrawn "any future claims" against the ITU, it recommended the Secretary-General not to accede to the complainant's request. In a letter of 8 October 1998, which is the impugned decision, the Secretary-General informed the complainant that he had decided to follow the Board's recommendation.

**B. Citing consideration 10 of Judgment 1679, the complainant asserts that Staff Regulation 3.8 a) "applies to anyone who temporarily has to take on the duties of an existing post at a grade higher than his own". He explains that, from 1 January 1995 up to his separation, he discharged the functions of a P.2 post while his personal grade was G.6. He says that he therefore qualifies for the payment of a special post allowance for that period, as provided for in the above Staff Regulation.**

**Following Judgment 1679, the Secretary-General decided to pay the above allowance to all staff members in the same situation as Mr Serlooten. The complainant contends that the ITU cannot, therefore, refuse him this right.**

**He submits that the granting of the allowance represents "a minuscule price to pay" by the ITU for its negligence, dilatoriness and unfair treatment of him since 1974. Considering the quality of his services to the ITU, it would be failing in its duty of care towards him if it did not grant him the above allowance as of 1 January 1995.**

**He emphasises that the losses he suffered in terms of his retirement pension forced him to sell his house in Switzerland and move with his wife to the United States of America.**

**The complainant requests the Tribunal to quash the Secretary-General's decision of 8 October 1998 and order the payment of a special post allowance from 1 January 1995 to the date of his separation, as well as compensation for the moral and material damages resulting from his forced departure to the United States of America. He also claims costs.**

**C. In its reply the ITU asserts that, through his long presentation of the facts, the complainant is seeking to induce the Tribunal to re-examine arguments that he had already raised in his previous complaints, which is contrary to the principle of *res judicata*. In practice, the sole issue which arises in the present case is the applicability of Judgment 1679 to the complainant.**

**The ITU contends that the present complaint is irreceivable in view of the fact that, by appealing, the complainant is in breach of the commitment that he made in his letter of 12 September 1996.**

**Having left the staff of the ITU in November 1996, and not being a party to the case brought by Mr Serlooten, the complainant is not entitled to benefit from the application of Judgment 1679.**

**D. In his rejoinder the complainant asserts that he was still in the ITU's service when it should have paid him the special post allowance, but that the ITU "deliberately" postponed paying it. Although he waived any right to contest his separation, he did not waive his rights to the payment of the special post allowance as of 1 January 1995.**

**E. In its surrejoinder the ITU presses its arguments.**

## **CONSIDERATIONS**

**1. The nineteenth complaint filed by the complainant, a former staff member of the ITU, challenges a decision of 8 October 1998 by which the Secretary-General decided, in accordance with a unanimous recommendation by the Appeal Board, to dismiss the complainant's request for the payment of a special post allowance at grade P.2 for the period between January 1995 and November 1996, and for the recalculation of the termination indemnity paid to him on the occasion of his separation.**

**2. In the same way as a number of his colleagues who had been promoted to grade P.2 when they had previously been in the General Services category, the complainant realised that his transfer to the Professional category would have a negative impact on the level of his retirement pension. He therefore opted, as permitted by the ITU, to return to the General Services category as of 1 January 1995, where he was reinstated at grade G.6. His post was subsequently abolished and he was informed, by a letter of 27 August 1996, that his appointment would be terminated on 30 November 1996. He was notified in an annex to this letter of the details of the indemnities to which he was entitled. Following an exchange of letters on 11 and 12 September 1996, as an exceptional measure, more favourable conditions were granted to the complainant, who formally accepted the terms of this settlement and, by a letter of 20 September 1996,**

withdrew his outstanding appeals before the ITU's Appeal Board.

3. On 29 January 1998, the Tribunal, ruling on the complaint filed by a colleague of the complainant (Judgment 1679, *in re* Serlooten), held that a staff member who had been reinstated in the General Services category, while continuing to perform the same duties as he had at grade P.4, qualified for the special post allowance which, under Staff Regulation 3.8 a) of the ITU, is payable to "any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". The complainant, who had been refused the payment of this allowance, applied on 16 April 1998 to benefit from the case law resulting from Judgment 1679. His request was rejected in a decision which was confirmed by the Secretary-General of the ITU, in line with the recommendation of the Appeal Board. The Board had unanimously considered that:

"the negotiations which resulted in 1996 in the arrangement between the ITU and the complainant for the termination of his appointment are of the nature of a final settlement, with the renunciation by the complainant of any future claims on the employer. This means that he can no longer be considered as a member of the group of staff members concerned by the issue of the transition from G to P. The new fact constituted by Judgment 1679 of the Administrative Tribunal delivered ... in respect of one member of this group (Mr Serlooten) does not therefore modify the terms and conditions of the complainant's settlement with the ITU."

4. The complainant is requesting the Tribunal to quash the Secretary-General's decision of 8 October 1998 and order the ITU to pay him the special post allowance to which he considers he is entitled, as well as compensation for the moral and material damages which he claims to have suffered. He reviews the background of his administrative differences with the ITU and the many disputes to which they have given rise, which have nothing to do with the present case. On his entitlement to the special post allowance, he contends that the validity of his claims was recognised in Judgment 1679, which found in favour of a staff member who was in the same situation as he was and which was applied by the ITU to other staff members. He says that the ITU did not discharge its legal obligations towards him and failed in its duty of care to his dignity and reputation. He adds that the ITU imposed a veritable moral sanction on him by taking the decision, which was imputable to the personal animosity of the Chief of Personnel and the Legal Adviser, to terminate his appointment. If he ended up accepting the conditions imposed upon him by the Administration, it was because he was practically constrained to do so by the circumstances.

5. The ITU rebuts these claims by pointing to the undertaking given by the complainant pursuant to the termination settlement, which it says was exceptionally favourable, not to appeal and to withdraw any outstanding appeals. It adds that Judgment 1679 carries the authority of *res judicata* only on the parties to the dispute, that the complainant had not intervened in the case and that, in any case, he was not in the same situation as the staff members who benefited from the case law, as he had left the ITU's service in November 1996.

6. The complainant's pleas regarding the conditions under which he came to leave his post must fail. He explicitly accepted the settlement proposed to him and did not lodge a precise appeal with the Appeal Board on this point, confining his claims to his alleged entitlement to a special post allowance, for the period between 1 January 1995 and the date of his separation, and a recalculation of his termination indemnity.

7. His claims to the Tribunal on this point must be dismissed. In his letter of 12 September 1996, the complainant unconditionally accepted the Secretary-General's letter of the same day setting out the terms of his separation and making them conditional on his agreement not to appeal the decision to terminate his appointment, nor any of its terms and conditions. Moreover, the complainant, who had lodged three appeals with the Appeal Board, one of which related precisely to his entitlement to the special post allowance, formally withdrew them by his letter of 20 September 1996. There is no evidence that these commitments - which the complainant now appears to regret - were tainted by a fraudulent attitude or pressure from the ITU. The complainant accepted the terms and conditions of the settlement that he made with the organisation, some of which were very favourable, and he cannot challenge them now. His pleas, particularly relating to the unequal treatment which he claims to have suffered, must also fail in view of the existence of this settlement.

8. The complainant cannot invoke in his favour *res judicata* in a case to which he was neither party nor intervener. Nor did the ITU commit any unlawful act in refusing to accede to his demands and review the reciprocal commitments entered into in September 1996. The complainant's principal claims must therefore fail and, with them, the claims to compensation for moral and material damages, since there is no flaw in the

**ITU's management of the case.**

**DECISION**

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment, adopted on 12 November 1999, 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 3 February 2000.**

*(Signed)*

**Michel Gentot  
Jean-François Egli  
Seydou Ba**

**Catherine Comtet**