

NINETIETH SESSION

In re Kirsch

Judgment No. 2022

The Administrative Tribunal,

Considering the complaint filed by Mr William Joseph Kirsch against the International Telecommunication Union (ITU) on 11 October 1999 and corrected on 28 October and the ITU's reply of 2 December 1999;

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 citizen of the United States born in 1956, joined the staff of the ITU in June 1998 on a two-year fixed-term appointment as Head of External Affairs at grade P.5.

On 8 March 1999 the General Secretariat Management Committee produced a summary record of a meeting it held on 1 March. Paragraph 3.2 of that document related to the ITU's policy regarding invitations to speak at external events. It mentioned a proposal that the External Affairs invitations database should be made available on the internal web.

On 30 March 1999 the ITU published Office Memorandum No. 12 entitled "Policy on invitations to speak at external events". It specified that the External Affairs section would become "the central focal point for invitations" and that all invitations to speak on behalf of the ITU should be forwarded to that section for processing and entering on the database. The complainant wrote to the Secretary-General on 16 April saying that, by virtue of that memorandum, new responsibilities had been assigned to him. He said he equated it with an administrative decision to assign him "D.1-level review responsibilities" which, prior to the issuing of the memorandum, were assumed by the Senior Level Management Committee (SLMC), a consultative body composed of elected and other high-level officials. He, therefore, requested a review of the decision contained in the memorandum, and a special post allowance at D.1 level.

By a letter of 2 June 1999 the Secretary-General acknowledged receipt of that letter and numerous other requests for review received from the complainant in April and May. The following day, the complainant submitted an appeal to the Appeal Board. He is challenging the implied rejection of his appeal.

B. The complainant contends that his complaint is receivable because of the ITU's failure to take a decision on his appeal of 3 June 1999.

He submits that the ITU did not set objectives for him at the time he took up employment and had failed to keep the classification of the post "accurate and up-to-date". At its meeting of 1 March 1999 the ITU General Secretariat Management Committee assigned him "additional" responsibilities and duties for implementing ITU policy on invitations to speak at external events. Office Memorandum No. 12 of 30 March 1999 constituted the administrative decision to assign those additional tasks to him. Prior to that date the policy governing the invitations was implemented by the SLMC which included senior officials at grades D.1 or D.2.

Citing the Tribunal's case law, he contends that the ITU failed to comply with Staff Regulation 3.8 regarding the grant of the special post allowance. From the wording of the Management Committee's summary record of 8 March 1999 and the subsequent office memorandum it is clear that duties of at least D.1 in level were to be transferred to a "central focal point" - meaning to him as Head of External Affairs. Since the transfer of duties was for a period of at least four weeks he contends that the ITU should pay him the allowance. Its failure to do so constitutes an affront to his dignity.

He therefore claims a "D.1 special post allowance", 25,000 Swiss francs in moral damages and 12,000 United States dollars in costs.

C. In its reply the Union objects to the receivability of the complaint. In a letter he sent to the Secretary-General on 5 July 1999, the complainant wrote in his closing sentence: "In view of its inclusive nature this letter replaces and supersedes all my previous communications of every kind". Given the precise wording of that sentence, it concluded that the complainant was withdrawing his requests for review, including the one submitted to the Appeal Board on 3 June. The complainant was absent from the office from 12 July to 19 September, with the exception of 10 August, and his whereabouts were unknown. It could not, therefore, obtain clarification from him regarding his appeal.

On the merits the Union contests that additional responsibilities were assigned to the complainant through Office Memorandum No. 12. The complainant has misinterpreted the procedure set out therein and his argument is based on a "simplistic analysis" of how those responsibilities affect the grading of his post. The arrangements detailed in the memorandum can have no effect on the post which he occupied as Head of External Affairs for two reasons. First, although the memorandum indicated that his section would become a central focal point, it also specified that there would be a sharing of responsibilities between the Secretary-General's Office and the Directors of the three Bureaux. Secondly, the aim of the memorandum at issue was primarily to organise more efficiently the decision-making process regarding invitations to speak at external events. The processing of the invitations was already part of the remit of the Head of External Affairs, and this was specified in the job description pertaining to his post. The memorandum therefore had no impact either on the assignments listed in the job description or on the level of classification of his post. Accordingly, there were no grounds for granting him the special post allowance, nor for awarding him moral damages and costs.

CONSIDERATIONS

1. The complaint arises from a request the complainant made to the Secretary-General that a special post allowance be granted to him on account of additional responsibilities deriving from, in his opinion, the procedures set out in Office Memorandum No. 12 dealing with invitations to speak at external events. The complainant asserts that the memorandum assigned responsibilities to him which were previously undertaken by the Senior Level Management Committee. Therefore, he should have been granted a special post allowance by virtue of Staff Regulation 3.8 b).

2. The Union is of the view that the complaint is based on a misinterpretation of the procedures established by the office memorandum. It asserts that the arrangements described in the memorandum have no impact on the grade of the complainant's post. First, the memorandum attributes the overall supervision of the procedure for processing invitations to the External Affairs section; however, it also institutes a sharing of responsibilities between the Secretary-General's Office and the Directors of the three Bureaux. Secondly, its objective is to implement a more efficient decision-making process on invitations to speak at external events. The processing of invitations, particularly the preparation of the replies thereto, was already within the mandate of the Secretary-General's Office and the External Affairs section as stipulated in the job description for the complainant's post.

3. The ITU considers that the complaint is not receivable for the following reasons. The complainant submitted to the Secretary-General a great number of requests for reconsideration of various administrative decisions and he filed three appeals with the Appeal Board. But on 5 July 1999 he sent a letter which he said superseded all his previous correspondence. From the text of that letter, the ITU concluded that the complainant was withdrawing all his requests for reconsideration and his appeal. For that particular reason, the Union is of the opinion that the present complaint is not receivable as the complainant withdrew the appeal he had filed with the Appeal Board.

4. The Union also submits that it was not possible to verify the complainant's exact intentions with regard to his appeal: from 12 July to 19 September 1999, with the exception of one day, the complainant was absent from the office. During that time he remained out of contact with the ITU and the Union was unsuccessful at contacting him by registered mail.

5. As to the receivability of the complaint, the Tribunal notes the complainant's letter of 5 July 1999 to the Secretary-General, in which he said: "In view of its inclusive nature this letter replaces and supersedes all my previous communications of any kind". It is necessary to understand the meaning of this declaration from the

context of the entire letter.

6. In the letter referred to above, in which he offers to resign as of the end of March 2000, the complainant was attempting to reach a mutual agreement between himself and the Union. It appears that he was trying to negotiate an arrangement favourable to his personal situation.

7. The behaviour of the complainant might appear to have led to the interpretation that he was withdrawing his appeal because he did not diligently pursue it through the internal procedures open to him. The Tribunal recalls what it said in Judgment 1970, *in re* White, under 9: "A complainant cannot sit back and do nothing when an appeal is lodged. He must pursue the appeal diligently".

8. A complainant is limited to filing his complaint only after exhausting all internal means of redress. If he did withdraw his appeal he did not exhaust all internal means of redress.

9. Since an exact interpretation of the letter of 5 July 1999 is uncertain, the Tribunal considers it necessary to examine the complaint on the merits which can only result in its dismissal.

10. The whole of the complaint rests upon the following two paragraphs of Regulation 3.8 of the Staff Regulations:

"a) 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 ...

b) Exceptionally, when additional temporary work of at least four weeks' duration, e. g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months and starting from the date on which the staff member takes up duties the level of which corresponds to a higher grade."

11. In order to succeed under Regulation 3.8 a) the complainant must point to "an existing post" of which he was assigned the duties. He fails to do so. At best, he suggests that his "new" duties were previously performed by a committee, some or all of whose members may have held posts ranked superior to his. This is clearly not enough to meet the very specific requirements of that provision.

12. Under Regulation 3.8 b) the complainant fares no better. First, the Tribunal notes that the text is purely permissive and does not purport to create any rights. Secondly, the text is clearly designed to address only temporary situations, as is well illustrated by the example given of a conference; there was nothing temporary about what the complainant was asked to do. And finally, those so-called "new" duties appear to the Tribunal to be wholly compatible with the duties already attached to the post he held as Head of External Affairs.

13. The claim must accordingly be dismissed as must his claim for damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.