

## **NINETY-THIRD SESSION**

**Judgment No. 2126**

The Administrative Tribunal,

Considering the complaint filed by Mr A. O. against the International Telecommunication Union (ITU) on 12 July 2001 and corrected on 16 October, the ITU's reply of 14 December 2001, the complainant's rejoinder of 18 February 2002, and the Union's surrejoinder of 12 April 2002;

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

Having examined the written submissions and decided not to allow the complainant's application for hearings;

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

A. The complainant, who is a British citizen, joined the ITU on 22 August 1996 as an engineer. In August 1999 he obtained a five-year manageable renewable term appointment; he holds grade P.5. He has a daughter who attends school in Ipswich, England, and he is entitled to an education grant. This dispute concerns his claims for reimbursement of the cost of his daughter's compulsory school lunches and group transport to and from school using a privately run bus service.

ITU Staff Regulation 3.11.C.1.b) states that in the case of attendance at an educational establishment outside the duty station the amount of education grant will be:

"where the institution does not provide board, a flat rate for boarding as provided in Annex 6 to these Regulations plus 75 per cent of the allowable costs of attendance, up to a maximum annual grant as provided in Annex 6..."

Regulation 3.11.A.1.d) defines the "cost of attendance" stating as follows:

"'Cost of attendance' shall include the cost of enrolment, prescribed textbooks, courses, examinations and diplomas, and boarding fees, when applicable, but not school uniforms or optional charges. Where local conditions justify such provision, the cost of attendance may include the cost of midday meals, if these are provided by the school, and the cost of daily group transportation."

The complainant requested reimbursement for the cost of midday meals and transport to and from school for 1997/98. By a memorandum of 20 August 1998 the acting Chief of the Personnel and Social Protection Department told the complainant that such costs had been reimbursed to him by mistake for the school year 1996/1997 and could not be paid for 1997/1998. He explained that when a school does not provide board the ITU grants a flat rate of £2,750 sterling, which "is meant to cover all living expenses, including meals and public transportation". Similarly, in a letter of 11 December 1998 he said that when the flat-rate grant is paid, lunches and group transportation are not considered allowable expenses.

The complainant submitted a further claim for the 1998/1999 school year. By a letter of 13 December 1999 to the Chief of the same department, the complainant contested the ITU's interpretation of the relevant rules and sought reimbursement for the claims that were pending and an undertaking that the ITU would settle any similar claims made for future years; he asked for a final administrative decision.

In a letter of 21 February 2000 the Chief of the Personnel and Social Protection Department confirmed the stance taken by the acting Chief of the Department. The complainant wrote to the Secretary-General on 29 March seeking

a review of the decision of 21 February. His letter went unanswered and on 7 June 2000 the complainant appealed to the Appeal Board.

B. The complainant submits that as the Appeal Board has not reported and the Secretary-General has taken no formal decision his claims have been constructively denied; he has thus exhausted the internal means of redress, and his complaint is receivable. He holds the view that he is entitled to be reimbursed for the school meals and transportation costs and has two main pleas.

First, he contends that the ITU has failed to observe or properly apply the Staff Regulations and Rules. From the wording of Regulation 3.11.C.1.b) it is clear that he should be paid 75 per cent of the allowable costs of attendance - which include midday meals and transportation costs - over and above the flat rate given in Annex 6 of the Staff Regulations. Citing Regulation 3.11.A.1.d) he submits that "local conditions" clearly justified the reimbursement of the costs of his daughter's school lunches in that the meals were provided by the school and were mandatory. Daily group transportation was also justifiable and the service used was recommended by the school. Therefore, the costs he is claiming have been legitimately incurred. The construction put on those Regulations by the ITU does not follow their plain meaning. Its decision to refuse him reimbursement was arbitrary and was not based on any binding rule. Besides which, any ambiguity in the rules must be held against the drafter - not against the staff member.

Secondly, the ITU's failure to render formal decisions has caused him further harm, for which he should be compensated.

The complainant requests the production of any documents that can show on what grounds he was denied reimbursement. He asks the Tribunal to order the ITU to reimburse 75 per cent of the costs of midday meals and transport incurred since 1997/1998 through to the present date and agree to such reimbursement for future years. He also seeks compensation for moral injury; costs; interest on all sums awarded to him; and any other relief which the Tribunal considers equitable.

C. In its reply the ITU holds that the complaint was lodged several months after the expiry of the statutory time limit and is therefore irreceivable. It is also devoid of merit.

It states that administrative arrangements for the reimbursement of educational expenses are governed by decisions taken at the United Nations common system level. Such arrangements have been agreed by the Consultative Committee on Administrative Questions (CCAQ) for application throughout the system, and are usually reflected in each individual organisation's Staff Regulations, which is the case for the ITU. The practice to be followed with regard to midday meals is set out in the CCAQ Handbook. Section 2-10.10 e) specifies that the flat-rate grant paid for boarding outside the school is intended to "cover full board" and organisations should not also pay 75 per cent of the cost of lunches. By the terms of the Handbook the transport costs claimed by the complainant are not reimbursable either.

The Union contends that it correctly interpreted and applied the relevant Staff Regulations. The school attended by the complainant's daughter does not provide boarding, and so the maximum education grant payable to the complainant is made up of the flat-rate component and 75 per cent of the allowable costs not associated with the flat rate. In this case, the cost of midday meals is included in the flat rate and thus excluded from the "costs of attendance". It is only when the flat rate is not applicable that meals and transportation are included in the "costs of attendance". In fact, the flat rate has to be regarded "as a lump sum replacing the cost of boarding, including meals, charged by the school".

D. In his rejoinder the complainant maintains that his complaint is receivable. Precedent has it that a complainant does not have to wait indefinitely for a final decision. He waited a reasonable time before bringing his case to the Tribunal. He notes that the Union did not produce the documents he requested.

On the merits, he argues that the CCAQ Handbook cannot be regarded as binding. The terms of his employment are governed by his contract and the Staff Regulations, neither of which refers to the Handbook in question. A plain reading of the relevant provisions shows that the costs he is claiming are payable in addition to the flat rate for boarding.

E. In its surrejoinder the Union notes that the complainant bases his arguments on his own interpretation of

Regulation 3.11.A.1.d) and assumes that the provision regarding "local conditions" applies in the case of his child living and attending school in the home country, regardless of other procedures that might apply. It explains that when a child is studying away from the duty station a flat rate for the cost of board and transportation is included in the education grant and any additional expenses for school lunches or transport arranged by the school are not reimbursed. Conversely, when children study at the duty station the staff member does not get the flat rate portion of the education grant, and the costs in question would be considered for reimbursement.

Moreover, if Regulation 3.11.A.1.d) was applied in the way the complainant is suggesting it would lead to a situation of unequal treatment, since he would be reimbursed more than staff in a similar situation. There is a common approach among organisations when implementing this regulation even though no internal service order regarding the application of the education grant has yet been published for ITU headquarters staff. The CCAQ (now the CEB<sup>(1)</sup>) Handbook serves as a "reference source" for the application of basic entitlements and benefits throughout the UN common system.

## CONSIDERATIONS

1. The complainant, having been internationally recruited by the ITU and assigned to Geneva, is entitled to certain benefits, including an education grant. For the school year 1996/97, the ITU paid him education grant for one of his daughters who was attending school in England, which included the reimbursement of the cost of midday meals and school transport. However, on 20 August 1998 he was informed that those costs had been reimbursed to him by mistake for 1996/97 and that they would not be reimbursed for the school year 1997/98, because under Staff Regulation 3.11.C.1.b) the flat rate granted for living expenses of non-boarding children covered all expenses of that nature.

2. On 13 December 1999 the complainant contested this decision. On 21 February 2000 the Chief of the Personnel and Social Protection Department replied to him that his claims for education grant would continue to be treated on the same basis. The complainant wrote to the Secretary-General of the ITU on 29 March 2000, but since his letter went unanswered he appealed to the Appeal Board on 7 June. The Appeal Board approached the Administration to obtain information on the matter and on 1 November 2000 received a memorandum from the Chief of the Personnel Department indicating that the complainant had not been asked to reimburse the sums paid by mistake as this was due to an administrative error, but confirming the position set out in the letter of 21 February 2000 with regard to his claims for the following school years.

3. The months passed and the Appeal Board did not issue a report. The complainant therefore decided to go directly to the Tribunal. On 12 July 2001 he filed a complaint, seeking the reimbursement of 75 per cent of the costs of his daughter's midday meals and transport as from the 1997/98 school year, moral damages, costs, and interest on all sums awarded to him, payable as "from 17 June 2000". He also requests that the ITU be ordered to reimburse the same expenses in future for as long as his daughter is entitled to "education emoluments".

4. The ITU argues that the complaint is irreceivable, but its plea must fail. Its argument is the following: by the terms of Staff Rule 11.1.1.4 e) and f), the report of the Appeal Board should have been sent to the Secretary-General by 15 September 2000 at the latest. As from that date, the Secretary-General had sixty days in which to take a final decision and, from the date on which the decision should have been taken, namely 14 November 2000, the complainant had ninety days to file his complaint with the Tribunal. It contends that the complaint, which was filed on 12 July 2001, is therefore time-barred.

5. This argument can obviously not succeed. The complainant was clearly right to expect the Appeal Board to make a recommendation and the competent authority to take a final decision, which could then be brought before the Tribunal. If the Appeal Board failed to issue a recommendation by 15 September 2000 and appeared to be continuing its examination of the case in October and November, the responsibility for this delay does not lie with the complainant who, in accordance with constant precedent, could come directly to the Tribunal after waiting a reasonable time for a final decision. This right cannot be denied to him because of the shortcomings of the Union. The complaint is therefore receivable.

6. On the merits, the complaint turns on whether the flat-rate sum granted to the complainant, namely £2,750 sterling, is intended to cover all school expenses, including the cost of midday meals and school transport.

The applicable provisions are those of Regulation 3.11.C.1, which sets the amount of the education grant, read in conjunction with Regulation 3.11.A.1.d). The first paragraph of Regulation 3.11.C reads as follows:

### **"C. Amount of the grant**

1. In the case of attendance at an educational institution outside the duty station, the amount of the grant shall be:

a) where the institution provides board for the child, 75 per cent of the allowable costs of attendance and the cost of board up to a maximum annual grant as provided in Annex 6 to these Regulations;

b) where the institution does not provide board, a flat rate for boarding as provided in Annex 6 to these Regulations plus 75 per cent of the allowable costs of attendance, up to a maximum annual grant as provided in Annex 6 to these Regulations ..."

7. Regulation 3.11.A.1 defines the terms used in the provisions concerning the education grant. According to paragraph 1d) of that Regulation:

"'Cost of attendance' shall include the cost of enrolment, prescribed textbooks, courses, examinations and diplomas, and boarding fees, when applicable, but not school uniforms or optional charges. Where local conditions justify such provision, the cost of attendance may include the cost of midday meals, if these are provided by the school, and the cost of daily group transportation ..."

8. The complainant asserts that these provisions are clear. He stresses that his daughter does not board at the institution she attends, that it is compulsory for her to take midday meals at school - the cost of which is billed to him - and that she uses the transport company recommended by the school. He must therefore be reimbursed 75 per cent of the corresponding costs over and above the flat-rate sum he receives.

9. The ITU demurs. It contends that the cost of midday meals is clearly included in the flat-rate grant and is therefore excluded from the "costs of attendance". Such was the recommendation of the Consultative Committee on Administrative Questions (CCAQ), which aims to improve and harmonise management practices in international organisations within the United Nations common system. Section 2-10.10e) of the CCAQ Handbook, adopted at the 30th Session in 1969, provides as follows:

"Where the flat rate grant was paid for boarding outside the school it was intended to cover full board. Organizations should not therefore also pay 75 per cent of the cost of lunches ... provided by the school and charged for in the school bill."

A similar recommendation covers transport costs.

10. Although there is nothing unreasonable about these recommendations, they still need to be incorporated in the regulations to which staff members can refer. On this score the ITU's argument is not convincing. The combined provisions of the first paragraphs of sections A and C of Regulation 3.11 necessarily imply that, where a child attends an institution as a day-pupil, a sum equivalent to 75 per cent of the allowable costs of attendance - which may include, where local conditions justify such provision, the cost of midday meals and of school transport - is to be added to the flat-rate component. The ITU offers no evidence of specific circumstances which might prevent the application of these provisions in the present case. The complainant's principal claims therefore succeed.

11. The complainant asks the Tribunal to order the ITU to reimburse any sums that he may, in future, have to pay to the school attended by his daughter in respect of midday meals and transport. While it is incumbent upon organisations to observe the rule of law, it is not for the Tribunal to issue injunctions against them. This claim therefore fails.

11. In view of the above, the complainant is entitled to moral damages, which are set at 5,000 Swiss francs.

12. He is entitled to costs, set at 3,000 francs.

13. The sums to be paid to the complainant pursuant to this judgment, with the exception of the costs, shall bear interest from 7 June 2000 at an annual rate of 8 per cent.

## DECISION

For the above reasons,

1. The Tribunal sets aside the implied decision to reject the internal appeal filed by the complainant on 7 June 2000 against the refusal to reimburse the expenses he claimed for midday meals and transport as from the 1997/98 school year in connection with his daughter's schooling in England.
2. The ITU shall pay the complainant a sum equivalent to the expenses claimed by him as from the 1997/98 school year.
3. It shall pay him 5,000 Swiss francs in moral damages.
4. It shall pay him 3,000 francs in costs.
5. The amounts due under 2 and 3 above shall bear interest at an annual rate of 8 per cent as from 7 June 2000.
6. His other claims are dismissed.

In witness of this judgment, adopted on 10 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

*(Signed)*

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

1. United Nations System Chief Executives Board for Coordination