

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

108th Session

Judgment No. 2881

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. S. against the International Telecommunication Union (ITU) on 5 June 2008, the ITU's reply of 16 September, the complainant's rejoinder of 16 October, together with the additional document which he submitted on 18 November, and the Union's surrejoinder dated 18 December 2008;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Spanish national born in 1950, entered the service of the ITU in 1970 at grade G.2 in the Sales Service of the Finance Department. In 1972 he obtained a permanent contract. He was subsequently promoted and changed category. With effect from 1 July 2000 he was promoted to the post of Chief of the Administrative Services of the Telecommunication Development Bureau (BDT) at grade P.5. On 30 June 2003 the complainant was seconded temporarily to perform the duties of Chief of the Finance

Department. As this was a grade D.2 post, he received a non-pensionable special post allowance as from 30 September 2003. On 9 May 2005 this post was advertised and the complainant applied for it. On 15 December 2005 the Secretary-General decided to assign the complainant to the post in question from 1 January 2006 to 31 December 2007 and to grant him a pensionable special post allowance at D.2 level for that period. It was expressly stipulated that the complainant would retain his permanent status at grade P.5 without a link to a specific post at that grade.

Following the reorganisation of the General Secretariat of the ITU by the new Secretary-General who took office in January 2007, the Personnel and Social Protection Department, the Finance Department and part of the Department of Common Services were merged to form a single department, the Administration and Finance Department. The post of Chief of the Finance Department was abolished with effect from 20 June 2007.

By Decision No. 13185 of 20 June 2007 the Secretary-General assigned the complainant, until further notice, to the P.5 grade post of Special Advisor on financial matters to the Chief of the newly created Administration and Finance Department and discontinued the special post allowance at the D.2 level which had been granted to him by the decision of 15 December 2005.

On 26 July 2007 the complainant sent the Secretary-General a memorandum asking him to review Decision No. 13185.

The Secretary-General rejected this request in a memorandum of 6 September on the grounds that his decision was perfectly lawful.

On 30 November 2007 the complainant lodged an appeal with the Appeal Board, which concluded in its report of 7 February 2008 that Decision No. 13185 was lawful. By a memorandum of 2 April 2008, which constitutes the impugned decision, the Secretary-General informed the complainant that he was dismissing his appeal.

B. The complainant states that his purpose in filing a complaint with the Tribunal is to seek recognition of his right to retain grade D.2 on a

personal basis, which grade he considers he obtained by being promoted. He relies on Service Order No. 01/12, entitled “Change of practice in respect of the link between staff members and posts”, in particular paragraph 7 thereof which reads as follows:

“Beyond the two-year period [...], if the post to which the staff member has been seconded and subsequently appointed has to be abolished [...], the organization must endeavour to redeploy the staff member to an existing similar post of an equivalent grade [...]. [I]f the transfer has resulted in a promotion, the staff member retains on a personal basis, the grade to which he or she has been promoted.”

In the complainant’s opinion, when he was transferred to the post of Chief of the Finance Department following the competition, he received a “promotion”. He therefore considers that this provision applies in the instant case.

The complainant also states that he is not disputing “the Secretary-General’s authority to take appropriate measures in the best interests of the organisation” or to implement the decisions which he has taken with regard to him; however, relying on various “indications”, he claims that in his case the Secretary-General “misused his authority *ad personam*”. In this connection, he explains that he refers to these “indications” in order to justify a claim for adequate compensation for the injury which he has suffered. He contends that he has been “professionally sidelined” because he has been given no real duties in his new post as Special Advisor on financial matters, that other staff members of the Union in a similar situation have been able to keep their grade and have thus received more favourable treatment and that he is in a precarious position because no funds have been specifically allocated to his new post since its creation. He points out that when the three departments were merged to form the Administration and Finance Department, the post of Chief of the Personnel and Social Protection Department was transferred to the new department; yet of the three chief of department posts, his was the only one to be occupied and in the end it turned out to be the only one which was abolished. He infers from this that the abolition of his post and his demotion could “be evidence of *ad personam* motives rather than the interests of the service”.

The complainant asks the Tribunal to order his retroactive reinstatement in grade D.2 on a personal basis and “with full rights”. He claims 250,000 Swiss francs in compensation for moral and professional injury and for “unquestionable misuse of authority” and costs in the amount of 30,000 francs.

C. In its reply the ITU contends that the complainant’s statement that he does not wish to dispute the decisions taken with regard to his case indicates that he considers the impugned decision to be well founded and therefore lawful in substance. It observes that the complainant mentions several “indications” in support of his allegation that the Secretary-General committed “misuse of authority” which supposedly caused him injury. In its opinion, this raises an issue which is not only new, but also unconnected with the impugned decision. It asks the Tribunal, “if this is also its understanding of the plea in question”, to dismiss it, along with the claim to compensation for alleged moral injury, because internal means of redress have not been exhausted.

The defendant denies that the complainant has been sidelined or placed in a precarious situation. His allegations in this respect are not only groundless, but also irreceivable, for they are related to facts occurring after the impugned decision. It also denies that the complainant has been subjected to unequal treatment or prejudice. Since the complainant was not promoted to grade D.2, he cannot ask to retain that grade on a personal basis. The Union explains that assignment to a post at grade D.1 or D.2 is of a temporary nature and that a staff member may benefit from the terms of employment pertaining to these grades only during the period in which he or she is assigned to such a post. No staff member in this situation may therefore assert a right to retain such a grade indefinitely or legitimately claim that he or she has been promoted.

D. In his rejoinder the complainant reiterates his pleas.

He holds that his plea regarding the lack of real duties in his new post is receivable because it is couched in the same terms as one of his pleas before the Appeal Board.

He withdraws his argument regarding unequal treatment.

E. In its surrejoinder the ITU fully maintains its position. It considers that the complainant has neither proved that he was promoted to grade D.2, because no such promotion ever took place, nor shown in what way he has suffered moral injury.

CONSIDERATIONS

1. The complainant entered the service of the ITU in April 1970 and has since received successive promotions and been moved to a different category. He reached grade P.5 in July 2000. In 2003 he was called upon temporarily to take on the responsibilities and duties of the post of Chief of the Finance Department at grade D.2 and in this capacity he received a non-pensionable special post allowance.

This post was advertised on 9 May 2005. After a competition the complainant was assigned to it for the period 1 January 2006 to 31 December 2007, by a decision of 15 December 2005. This decision stated *inter alia* that a pensionable special post allowance at the D.2 level would be granted to him for this period and that he would retain his permanent status at grade P.5, but without a link to a specific post at that grade.

2. The post of Chief of the Finance Department was abolished with effect from 20 June 2007 as part of the reorganisation of the Union's General Secretariat. The Secretary-General assigned the complainant, until further notice, to the grade P.5 post of Special Advisor on financial matters to the Chief of the Administration and Finance Department. The assignment decision of 20 June 2007 stated that the special post allowance at D.2 level which he had been receiving was discontinued.

On 26 July 2007 the complainant requested a review of this decision, but the Secretary-General decided to maintain it. The Appeal Board, to which the matter was referred, concluded in its report of 7 February 2008 that the decision of 20 June 2007 was lawful.

Nevertheless, the Board recommended in particular that the Secretary-General should “ensure that the complainant is given real duties out of respect for his dignity and in the interests of the service”.

By a memorandum of 2 April 2008, which constitutes the impugned decision, the Secretary-General dismissed the complainant’s appeal and maintained his decision of 20 June 2007.

3. The complainant’s claims are set forth under B, above.

4. The complainant submits that, as far as he is concerned, the Secretary-General “misused his authority *ad personam*”. He cites as evidence the fact that no real duties have been given to him since he took up his new post as Special Advisor on financial matters, that staff members in a comparable situation have received more favourable treatment because they have retained their grade, that no specific budgetary appropriation is made for his new post and that, after the merging of the Personnel and Social Protection Department, the Finance Department and part of the Department of Common Services, the Secretary-General abolished his post which, of the three chief of department posts concerned, was the only one which was occupied.

5. It must first be noted that the complainant states that he is not disputing the “the Secretary-General’s authority to take appropriate measures in the best interests of the organisation”, or his authority “to implement the decisions which he has taken with regard to him and in particular to transfer [him] to a post – even at grade P.5 – where his abilities can be put to good use”.

The only question which arises is therefore whether, as he claims, the complainant was entitled to retain grade D.2 on a personal basis by reason of Service Order No. 01/12, notwithstanding his transfer to a grade P.5 post.

6. The above-mentioned service order, which was issued by the Secretary-General, reads in pertinent part:

“1. Upon the recommendation of the Joint Advisory Committee, I have decided to introduce the following measures with immediate effect.

2. The measures apply to staff members holding a permanent or [managed renewable term] contract who are seconded to a post for a fixed period. [...]

3. Secondments shall be subject to a time limit of two years, during which, if the post to which the staff member is seconded is of a higher grade than the original post, the staff member will continue to be awarded a special post allowance in accordance with the applicable provisions of Regulation 3.8 of the Staff Regulations.

[...]

7. Beyond the two-year period referred to in § 3 above, if the post to which the staff member has been seconded and subsequently appointed has to be abolished or can no longer be financed, the organization must endeavour to redeploy the staff member to an existing similar post of an equivalent grade in accordance with the general conditions set out in Regulation 9.1 b) of the Staff Regulations. Where redeployment under those conditions proves impossible, the staff member may be redeployed to his or her original post, if it is still available, or to a post of equivalent grade to the original post. In either case, if the transfer has resulted in a promotion, the staff member retains on a personal basis, the grade to which he or she has been promoted.”

The complainant considers that he is entitled to retain grade D.2 on a personal basis pursuant to the provisions quoted above, because he was called upon to hold a grade D.2 post after procedures which the Union usually applies to promotions, in accordance with the Staff Regulations.

7. The Tribunal finds on perusing the parties’ submissions that the grade D.2 post of Chief of the Finance Department was advertised in a vacancy notice issued on 9 May 2005; that after being selected the complainant was not promoted, but assigned to this post, as the Appeal Board rightly noted; that the assignment decision of 15 December 2005 expressly stated that the complainant would be granted a pensionable special post allowance at D.2 level from 1 January 2006 to 31 December 2007 and that he would retain his permanent status at grade P.5, but without a link to a specific post at that grade. According to the Tribunal’s case law, that meant that he was merely required to discharge the duties of the grade D.2 post without being promoted to that grade (see in particular Judgment 1171, under 2).

8. The Tribunal is of the opinion that, since the complainant unreservedly accepted his assignment to the post of Chief of the Finance Department on the conditions set out in the decision of 15 December 2005, which was not challenged within the applicable time limit and in compliance with formal requirements, on taking up a new post, he could no longer call into question the conditions of his previous assignment by arguing that it constituted a promotion. It follows that there is no basis on which he can claim “reinstatement” in grade D.2 as he never held that grade *de jure*.

9. Nevertheless, the Union could not, without flying in the face of its own decision, end the complainant’s assignment to a grade D.2 post and hence the payment of the corresponding special post allowance before 31 December 2007, the date specified in the decision of 15 December 2005.

Even though, contrary to the complainant’s submissions, there is no evidence in the file to suggest that the impugned decision infringes the principle of the equal treatment of staff members and is tainted with misuse of authority, it may be concluded from the above that the impugned decision must be quashed. The complainant is entitled to the payment of the special post allowance until 31 December 2007. He is likewise entitled to compensation in the amount of 20,000 Swiss francs for the moral injury suffered on account of the unlawfulness of the decision taken against him.

10. The complainant requests compensation for the moral and professional injury he allegedly suffered because the Secretary-General did not make use of his abilities. He considers that he has been “professionally sidelined”, and to bear out his allegations he produces a list of tasks entrusted to him in his post of Special Advisor on financial matters. He draws attention to the fact that the Appeal Board recommended that the Secretary-General should “ensure that the complainant is given real duties out of respect for his dignity and in the interests of the service”.

11. However, in its reply the Union offers sufficient evidence to enable the Tribunal to conclude that the complainant's duties were substantive and that, for this reason, the alleged wrongdoing on the part of the Secretary-General is not proven. As this allegation must therefore be dismissed, there is no need to rule on its receivability.

12. Since the complainant partially succeeds, he is entitled to costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The ITU shall pay the complainant, if this has not already been done, the special post allowance until 31 December 2007, as indicated under 9, above.
3. It shall pay him compensation for the moral injury suffered in the amount of 20,000 Swiss francs.
4. It shall also pay him 5,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2009, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet