

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. (No. 2)

v.

ITU

137th Session

Judgment No. 4777

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr L. C. against the International Telecommunication Union (ITU) on 22 March 2021 and corrected on 22 April, and ITU's reply of 4 August 2021, the complainant having chosen not to file a rejoinder;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the calculation of his remuneration and the determination of his step following his promotion from grade G.6 to grade P.3.

The complainant joined ITU in 1999. In 2019, although he held grade G.6, he applied for a grade P.3 post. The vacancy notice stated the following in relation to the remuneration associated with the P.3 post in question: "Annual salary from \$ 60,233 + post adjustment of \$ 58,848". By a decision of 28 October 2019, the Secretary-General decided to appoint him to that post with effect from 1 November 2019.

On 11 November 2019 the Human Resources Management Department (HRMD) forwarded to the complainant a simulation of his payslip for November 2019 reflecting his promotion from grade G.6,

step 11, to grade P.3, step 6. That same day, the complainant sent an email to the head of HRMD, in which he stated that he was “not on the same salary level as before” and asked for an explanation. On 29 November 2019 the head of HRMD replied that he was reviewing the complainant’s situation. The complainant received his payslip for December 2019 and then that for January 2020. The latter payslip showed payment of a sum of 452.65 Swiss francs for “adjustment of guaranteed amount G to P” and the replacement of the “single parent allowance”, previously received by the complainant, by a “dependency allowance – child”, which was of a lower amount. These changes were also reflected in the complainant’s payslip for February 2020.

On 9 March 2020 the complainant submitted to the Secretary-General a request for reconsideration entitled “Effect of promotion”, in which he stated that he was “very surprised by the effect of [his] promotion on the level of [his] remuneration” and claimed that his pay should be “at least equal to what it [would have been] [if he had] been promoted to the grade immediately above”, that is grade G.7, and that the amount of his family allowance should remain as it was before his appointment to grade P.3. On 14 April 2020 the head of HRMD informed the complainant that the Secretary-General had decided to reject his request for reconsideration.

On 4 June 2020 the complainant lodged an appeal with the Appeal Board, in which he again asked for his remuneration to be reviewed. In its reply of 3 August 2020 to the complainant’s appeal, ITU indicated that the complainant’s remuneration and step had been determined as follows:

“From 2012, the Union decided to take voluntary action to compensate for the reduction in the number of staff members promoted from category G to posts classified in category P. [...] To this end, the staff members affected have since seen an adjustment in the guaranteed amount (or personal transitional allowance (‘PTA’)) equivalent to two steps in their original grade, calculated at the date of promotion from G to P. [...]

[The complainant] has benefited from this practice which does not derive from the rules but from a voluntary action by the Union [...]

Child allowances were added, both in relation to his past (originating) G.6 remuneration and to his (post-promotion) P.3 remuneration, in order [...] to compare the two amounts and thus identify the step on the P.3 annual salary

scale which would be at least equal to the amount of the G.6 remuneration increased by two steps.

[...]

As a result, [the complainant] was assigned a step that was far higher than if the family allowances had not been taken into account. This is how he was assigned to step 6 [...]"

On 20 August 2020 the complainant submitted a rejoinder in which he asked ITU "to rescind [his] promotion". On 4 September 2020 ITU submitted a surrejoinder.

On 21 October 2020 the Appeal Board delivered a report in which it recommended, inter alia, that the complainant's claim to have his remuneration reviewed should be rejected but that his claim for his promotion to be rescinded should be assessed in consultation with the complainant's head of unit.

On 22 December 2020 the complainant was informed that the Secretary-General had decided to reject all his claims, including the claim for his appointment to the P.3 post to be rescinded, without there being any need to consult with his supervisor, as it was "clearly contrary to the Union's interests" given that it would affect the functioning of the unit and require a new selection procedure to be put in place. That is the impugned decision in the complainant's second complaint.

The complainant seeks the setting aside of the impugned decision of 22 December 2020, including "to the extent that it ignores the decision to take into account family allowances when determining [his] step within grade P3", and of the promotion decision of 28 October 2019, and asks the Tribunal to order "the promotion procedure to be reopened". He seeks compensation for the whole of the injury he alleges he has suffered, in other words payment by ITU of "all salary it owes [him]", together with interest, and damages for the moral injury allegedly suffered. Lastly, he seeks the award of 8,000 euros in costs.

ITU asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant, being dissatisfied with his remuneration following his promotion to a grade P.3 post for which he had successfully applied as the result of a competition initiated through a vacancy notice, impugns the decision of the Secretary-General of ITU of 22 December 2020 which rejected his various claims for that remuneration to be reviewed. In his complaint form, he seeks the setting aside of the impugned decision and also of the initial decision relating to the promotion awarded to him on 28 October 2019.

2. In his first plea, the complainant complains that the impugned decision was not notified to him until a little over two weeks after the expiry of the 45-day time limit prescribed in ITU's Staff Rule 11.1.4.

But the Tribunal has recalled that time limits of this kind are not intended to have the effect of nullifying a decision taken after their expiry. Their non-observance does therefore not render such decisions unlawful and, in applicable cases, only entitles the staff member concerned to compensation if it causes injury to her or him (see Judgment 4584, consideration 4). Since the submissions do not indicate how this delay caused any injury to the complainant, the Tribunal considers that the plea is unfounded.

3. In his second plea, the complainant complains that ITU chose not to rescind its decision to promote him despite the recommendation in the Appeal Board's report of 21 October 2020 inviting the Organisation to examine and assess the request he had made to that effect, in consultation with his head of unit. The impugned decision states that, having examined that possibility, the Secretary-General of ITU found that it would be contrary to the interests of the organisation to rescind the complainant's appointment to the grade P.3 post, without there being any need to consult with his supervisor to that effect. The Secretary-General's explanation for this was that rescinding the appointment in question would affect the functioning of the service, lead to unnecessary movement of staff and require a new selection procedure to be put in place.

However, although the complainant expresses his disagreement with these reasons and explanations, he does not actually explain how this response could render the impugned decision unlawful. First of all, the Tribunal notes that the Secretary-General did follow the Appeal Board's recommendation to examine the complainant's request for his promotion to be rescinded. Next, while it is true that the Secretary-General did not consult the complainant's head of unit on the matter, as the Appeal Board had also recommended, the Tribunal's case law establishes that the executive head of an organisation may reject the recommendations of an internal appeal body as long as reasons are given for her or his decision (see, for example, Judgment 4616, consideration 9, and the judgments cited therein). Since the Secretary-General provided reasons in support of his decision explaining why he deemed it unnecessary to consult the head of unit, the Tribunal considers that the argument on which the complainant seeks to rely, solely concerning that lack of consultation, must be rejected.

Furthermore, the Tribunal's case law also establishes that the executive head of an organisation has wide discretion in appointing or promoting staff and, therefore, the decisions that she or he takes in this area are subject to only limited review by the Tribunal. Thus, the Tribunal will only interfere in such a decision if it was taken without authority or in breach of a rule of form or procedure, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly wrong conclusion was drawn from the evidence or if there was abuse of authority (see, for example, Judgments 4552, consideration 2, 4451, consideration 6, and 3742, consideration 3). This case law also applies in the particular situation where, as in the present case, the object of the contested decision is to determine whether it is appropriate to rescind the award of a promotion to a staff member who now feels dissatisfied with it. In this regard, the complainant is, in reality, simply asking the Tribunal to replace the Secretary-General's assessment by its own assessment of whether or not the promotion he received should be rescinded, which misconstrues the limited power of review of the Tribunal in such a case.

This second plea is therefore unfounded.

4. In his submissions, the complainant sets out several other pleas which seek to show that the impugned decision is unlawful either because ITU failed to take essential facts into consideration when fixing his remuneration or because the organisation breached its duty of care and its obligation to act in good faith toward him when effecting his promotion.

5. The relevant rules of the organisation in relation to the classification of posts and the salary policy on promotion in a situation similar to that of the complainant, in other words where a staff member is promoted from the General Service category to the Professional category, can be found in Staff Regulation 2.1 and Staff Rule 3.4.2, which provide as follows:

“Regulation 2.1 Classification of posts

a) The numbers and grading of staff are subject to the approval of the Council. In deciding on grading, the Secretary-General, in agreement with the Director of the Bureau concerned, where appropriate, shall establish the place of each post in the classification plan on the basis of its duties, responsibilities and the qualifications required to perform the work. The classification plan as agreed to by the Council shall be based upon the principle of equal pay for substantially equal work.

b) *Categories of post*

i) Posts are classified into the Senior Counsellor, Professional and General Service categories

[...]

The *Professional category* includes the following grades in descending order of difficulty and responsibility:

P.5

P.4

P.3

P.2

P.1

[...]

The *General Service* category consists of the following grades in descending order of difficulty and responsibility:

G.7

G.6

G.5
G.4
G.3
G.2
G.1”

“Rule 3.4.2 Salary policy on promotion

Staff members receiving promotions shall be paid in accordance with the following provisions:

1. *Promotion within the General Service category*

During the first year following promotion, a staff member in continuous service shall receive in salary the amount of one full step in the grade to which he has been promoted more than he would have received without promotion, except where promotion to the lowest step of the grade yields a greater amount. The step rate and date of salary increment in the higher salary grade shall be adjusted accordingly.

2. *Promotions within the Professional and higher categories*

On promotion to a higher grade, the step of a staff member in the Professional and higher categories shall be the lowest step in the new grade which will provide an increase in net base salary at least equal to that which would have resulted from the granting of two steps within the grade prior to promotion. If promotion takes effect on the staff member's incremental date, the new salary is calculated after the award of any increment due in the grade prior to promotion. The date of the award of further within-grade increments in the higher grade shall be the anniversary date of the promotion, with due regard to the provisions of paragraph a) of Regulation 3.4.

3. *Promotions from the General Service to the Professional category*

a) Where a staff member is promoted from the General Service to the Professional category, the provision in paragraph 2 above shall apply, with the following elements considered to be part of the salaries to be used for the determination of the step in the new grade:

- i) the net amount of any allowance which is pensionable and which the staff member received while serving in the General Service or related categories;
- ii) any post adjustment at the single rate applicable to the grade/step in the Professional category to which the staff member is promoted.

b) Where promotion from the General Service category to the Professional category results in a decrease of a staff member's pensionable remuneration, he shall keep his pensionable remuneration at the level which it had reached

immediately prior to the promotion, until that level is exceeded as a result of advancement or further promotion.”

6. The complainant first criticises the organisation for failing to check whether a promotion to grade P.3 could have a negative effect on his remuneration and for omitting to take account of the fact that, within grade G.6 which he held at the time, he was about to be assigned an additional pensionable step on attaining twenty years’ service, barely six weeks after the decision to appoint him to the promoted post.

However, the Tribunal notes, in the first place, that it is apparent from the submissions and from the evidence on file that, although the aforementioned Staff Rule 3.4.2 sets out a very clear and precise rule for calculating the salary of a staff member who is promoted from the General Service category to the Professional category, as was the case for the complainant, the organisation then made further corrective adjustments in his favour which were not insignificant and which resulted in him benefiting from an increase in pay. The complainant has not contradicted in any meaningful way the organisation’s assertion that the effect of the adjustment thus made by ITU is that the remuneration he receives at grade P.3 remains higher overall than his previous remuneration at grade G.6. As explained by ITU and noted by the Appeal Board, that adjustment is the result of a practice introduced in 2012 for the benefit of the organisation’s staff members. The complainant’s plea that his promotion had a negative effect on his remuneration is therefore not established. This is so particularly in view of the fact that the complainant’s arguments do not take account of other kinds of allowances associated with promotion in the Professional category.

In the second place, the Tribunal considers that the complainant is wrong in criticising ITU for omitting to take account of the fact that he was about to be assigned an additional pensionable step in his grade G.6 post. As the Tribunal has repeatedly stated, officials are expected to know the rules and regulations to which they are subject (see, for example, Judgment 4673, consideration 16, and the case law cited therein). This principle clearly includes any matters particular to their personal situation. It was the complainant’s choice to apply for the post

in respect of which he was awarded the promotion in question and it was up to him to assess the advantages and disadvantages thereof beforehand.

It is true that, according to well-established case law of the Tribunal, the general principle of good faith and the duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury and that an employer must consequently inform officials in advance of any action that might imperil their rights or harm their rightful interests (see Judgment 4072, consideration 8, and the case law cited therein). However, the Tribunal considers that this obligation to act in good faith and this duty of care do not – despite what the complainant submits to the contrary, without identifying anything in the Tribunal’s case law to substantiate his argument – extend to a requirement for the organisation to take the initiative to calculate the loss or gain in salary which might result from a promotion from a grade G post to a grade P post for any staff member interested in applying for such a promotion.

This plea is unfounded.

7. Still in support of his argument that ITU breached the principle of good faith and the concomitant duty of care, the complainant next submits that the aforementioned Staff Regulation 2.1 propounds two basic principles, the first being that a hierarchy exists through the classification of posts into categories, together with a hierarchy within each category on the basis of a grade determined by the responsibilities and qualifications required, and the second being that there should be equal pay for equal work. The complainant concludes that the higher the grade, the higher the remuneration ought to be, so that a promotion should necessarily lead to a significant increase in pay.

8. However, firstly, the Tribunal notes that, as the organisation rightly points out in its submissions, the methodology that has been embodied and applied in the United Nations system for decades for determining salaries does not show a linear continuity between the responsibilities and levels of pay at the higher grades in category G and

those at the lower grades in category P. Secondly, it is apparent from the submissions and the evidence that to accede to the complainant's claim for a higher level of remuneration in his grade P.3 post than that resulting from the adjustment already awarded to him on the basis of the remuneration he received at grade G.6 would, on the contrary, amount to a deviation from the principle of equal pay for equal work when compared with other ITU staff members at grade P.3 who did not come from the General Service category.

9. In that regard, the Tribunal already recalled, in its Judgment 1196, consideration 19, that it is well known that different salary scales exist for the General Service category and the Professional category, which in itself neither is discriminatory nor constitute a breach of the principle of equal treatment, emphasising the following:

“[A]ccording to consistent precedent the distinction between international and local staff is a fundamental one inherent in the very nature of an international organisation. It is due to the peculiar circumstances in which such organisations work and it is concurred in, with both its advantages and its drawbacks, by anyone who seeks employment with them, be it in one category of staff or in the other. Each category of staff offers career prospects and conditions of recruitment and pay that differ according to its own requirements, and a staff member may not plead breach of equal treatment if treated differently because he belongs to one category rather than to the other.”

Similarly, in Judgment 498, consideration 1, the Tribunal had made the following remarks in relation to those distinctions:

“G staff are recruited largely in [the headquarters country] or neighbouring countries. It is therefore only right that [...] their pay [...] should be in line with pay scales in [the headquarters country]. Officials in other categories, however, may come from and be required to serve anywhere in the world. [...] [The organisation] takes as its standard of comparison the best-paid national civil service. Consequently the allegation of unlawful discrimination fails.”

In Judgment 498, the Tribunal had also noted that, contrary to what the complainant maintains in the present case, it was not unlawful for staff members in the Professional category and those in the General Service category to receive different amounts of family allowance,

since the principle of equal treatment can only be applied to staff members who are in the same situation.

These other pleas are unfounded.

10. Lastly, the complainant argues that ITU breached its obligation to act in good faith and its duty of care towards him, since, in its reply of 3 August 2020 to the appeal that he had lodged with the Appeal Board, the organisation allegedly informed him that it had been decided that family allowances would be taken into account when determining his step within his new grade P.3, but that this decision was never implemented. The complainant adds that, if family allowances had been taken into account, he would have been assigned step 10 rather than step 6 that was applied on his promotion.

According to the complainant, failure to comply with this commitment, which created rights in his favour, breaches the principle of good faith by which the organisation is bound and entitles him to claim compensation for the whole of the injury allegedly suffered as a result.

ITU explains that, contrary to what the complainant asserts, at the time of his promotion he was in possession of all the elements relating to the calculation of his salary, that the details relevant to his remuneration at step 6 of grade P.3 had been provided to him on a regular and continuous basis on his payslips, and that this documentation showed that, even following ITU's reply of 3 August 2020 to the appeal that he had brought before the Appeal Board, the step assigned to him remained step 6.

11. The Tribunal notes that it can be established from the submissions and the evidence on file, in particular the emails of 11 and 13 May 2021 that the organisation sent to the complainant immediately following his assertion to the head of HRMD that ITU had made a decision to take the amount of his family allowances into account when determining his step within his new P.3 grade, that what the complainant regards as a "decision" by ITU was in fact an incorrect explanation based on factual inaccuracies, for which the organisation

apologised to the complainant as soon as it became aware of the mistake.

In the first place, it is clear from the file that, as the organisation rightly states in its email to the complainant of 13 May 2021, despite ITU's reply of 3 August 2020 to the appeal brought by the complainant, there is no evidence that any decision was taken to award the complainant a benefit that could suggest any intention on the part of the organisation to take the family allowance which he received in grade G.6 into account when calculating his step in grade P.3.

In the second place, it is apparent from the submissions and the evidence on file that at no point did the family allowance previously received by the complainant enter into the calculations made by the ITU when determining the remuneration for the step 6 assigned to him.

In the third place, the reply submitted by ITU to the Appeal Board in the internal appeal procedure could not, in itself, be regarded as a decision. Furthermore, even if it did constitute a decision, in view of the preceding considerations, that decision would have stemmed from a purely factual error and so would not, in any event, have created any rights (see Judgments 3483, consideration 6, 2906, consideration 11, and 1111, consideration 5).

This plea must, therefore, be dismissed.

12. Ultimately, although the complainant may regret the fact that his promotion from grade G.6 to grade P.3 did not lead to his pay being significantly higher than previously, it is clear that, with regard to the arguments he puts forward for the impugned decision to be set aside and for the promotion awarded to him to be rescinded, there is no evidence of any irregularity that would justify the setting aside of that decision.

13. As a result of the foregoing, the complaint must be dismissed in its entirety, without there being any need to rule on the objection to receivability raised by the organisation.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER