

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

FIFTY-FIRST ORDINARY SESSION

In re BYRNE-SUTTON

Judgment No. 592

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Telecommunication Union (ITU) by Mr. Geoffrey Byrne-Sutton on 5 July 1983 and brought into conformity with the Rules of Court on 14 July, the ITU's reply of 16 September, the complainant's rejoinder of 14 October and the ITU's communication of 31 October 1983 stating that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 1.11 and 4.14 and Rules 4.14.1, 4.14.2, and 11.1.1 of the ITU Staff Regulations and Staff Rules;

Having examined the written evidence and considering oral proceedings to be unnecessary;

Considering that the material facts of the case are as follows:

A. The complainant, an Irish citizen born in 1930, joined the ITU on 21 January 1979 at grade D.1 on a two-year appointment as head of the Language Division. His performance report for 1979-80 was partly unfavourable, and he stated his objections, believing it to be unfair and biased. His appointment was nevertheless extended to 31 January 1982 and to 31 December 1982. On 27 October 1982 the Secretary-General told him that because the ITU "could not be completely satisfied with [his] performance" his appointment would not be renewed beyond 30 June 1983. On 16 November he asked the Secretary-General to review that decision and to withdraw or substantiate the criticism. On 30 November the Secretary-General upheld the decision, alluding to his indifferent report for 1979-80 and observing that he had difficulty in getting on with others and would not do translation or editing himself in busy periods. On 28 February 1983 he appealed to the Appeal Board under Rule 11.1.1.2 b), asking for a permanent or at least a five-year appointment. In its report of 28 March the Board found that his performance was satisfactory, held that he had had reason to expect extensions up to five years -- though not necessarily a permanent contract -- if his performance was satisfactory, and recommended an extension at least to 21 January 1984. On 13 April the Secretary-General, though disagreeing with the Board's conclusions, accepted its recommendation, and an offer of extension to 21 January 1984 was accepted by the complainant on 21 June. The decision he impugns is the one of 13 April 1983.

B. The complainant submits that he is entitled to a permanent appointment because his post is permanent Rule 4.14.2 b) says that fixed-term appointments may be granted to those -- and presumably only those -- "recruited for services of prescribed duration or under credits provided for temporary staff". Besides, the practice is to give permanent appointments also to those who have joined under fixed-term ones, not just to those who have completed probation. The ITU changed tack: first it accused him of poor performance; then it simply said he had no expectation of renewal. Its original stance shows that it did feel bound to justify non-renewal. He was entitled to expect renewal, and is now in a serious plight. The ITU has hampered his attempts to find other employment. The Appeal Board rejected the criticisms of his performance and they are groundless. The decision therefore rests on a mistake of fact. It is arbitrary. He has served the organisation well, and the decision is therefore also detrimental to its interests. He seeks a permanent or, failing that, a five-year appointment up to 21 January 1989; subsidiarily, damages amounting to 812,300 Swiss francs for loss of earnings; payment of 74,363.34 United States dollars into the pension fund so that he will get a full pension at the age of 60; and 100,000 Swiss francs as damages for moral injury.

C. In its reply the ITU submits that the complaint is irreceivable. It was clear from the terms of the impugned decision that the offered extension was the final one. Having accepted it on 21 June -- in his own good time and without qualification -- he waived his claim to another and he is therefore estopped from bringing his complaint. It is in any event devoid of merit. The ITU submits that in many respects his version of the facts is wrong or

tendentious. The contract says that it may be extended only "by mutual agreement" and gives no "expectancy of renewal". The terms of his appointment led him to think he might have renewal up to five years in all, and indeed this is what he has had. While there is no bar to the grant of a permanent appointment to a fixed-term official, the practice he cites is irrelevant since, as the Board recognised, the ITU is not bound to grant one. The decision was therefore not in breach of the terms of his appointment. Nor did it infringe the Staff Regulations. He got the first two extensions because it was not the time to change the incumbent. But the ITU had made up its mind by the end of 1982 that he was not the right man for the job and he got an extension only so that he could look for other employment. The Secretary-General was free to decide at his discretion whether the complainant came up to standard and in doing so had regard solely to the organisation's interests. In declaring the complainant's performance satisfactory the Board merely put a different construction on the facts, and it was not competent to evaluate his performance anyway. Lastly, there is no evidence to suggest the ITU has hampered him in seeking other work.

D. In his rejoinder the complainant enlarges on his submissions so as to refute the arguments in the reply. The Secretary-General is mistaken if he believes he enjoys untrammelled authority in deciding not to renew a contract. He may and indeed should grant a permanent appointment if it is in the ITU's interests. The ITU's interest lies in having competent and conscientious staff, and the complainant should therefore have a permanent appointment or at least a five-year one. He produces evidence to bear out his contention that he has shown a high degree of efficiency and administrative skill, the Appeal Board having rightly rejected the vague and unsubstantiated strictures on his performance.

CONSIDERATIONS:

Receivability

1. On 21 January 1979 the complainant was appointed to the staff of the ITU for a period of two years, up to 20 January 1981, as head of the Language Division. His appointment was extended from 20 January 1981 to 31 January 1982 and from 1 February to 31 December 1982.

On 27 October 1982 he was informed by the Secretary-General that because his performance was not completely satisfactory his appointment would not be renewed beyond 30 June 1983. He appealed, applying for review of the decision, but the Secretary-General upheld it on 30 November, on such grounds as the comments the complainant had written in his performance report for the period from 21 January 1979 to 31 December 1980, his behaviour towards other staff, particularly his subordinates, and people outside the organisation, and his refusal to do translation or editing himself in busy periods.

On 28 February 1983 the complainant appealed to the Appeal Board asking for the cancellation of the Secretary-General's observations, their removal from his files and the conversion of his appointment into a permanent or at least a five-year one.

In its report of 28 March the Board held that the complainant had reason to expect that his appointment would be extended to a maximum of five years, that his performance was satisfactory and that he had not been in breach of his oath of office in seeking support from the Government of his country. The Board therefore recommended that the Secretary-General extend his appointment for a period which would bring it to a total of at least five years, to wit, to 21 January 1984.

On 13 April the Secretary-General, though not concurring in the Board's reasoning, accepted its recommendation and extended the appointment to 21 January 1984.

On 21 June the complainant signed a form accepting the extension "on the conditions stated in your original letter of appointment".

On 5 July he filed the complaint.

2. The ITU argues that by accepting the decision of 13 April 1983 the complainant waived his right to appeal against it to the Tribunal and that the present complaint is therefore irreceivable because it is in breach of the principles of good faith and estoppel.

The plea fails. Waiver of a right to bring an action may not be presumed. Waiver is binding only if it is express or

clearly implied on the facts. In this instance it was neither. The complainant never formally surrendered his claims against the ITU, and his mere acceptance of a decision giving him partial satisfaction did not necessarily denote waiver of the claims that had not yet been met. No other interpretation of his position would hold water unless the ITU had made it plain that the final extension depended on his refraining from filing suit.

The right to a permanent appointment

3. The complainant was appointed for a fixed term. There is no need to consider the ITU's plea that the decision was correctly founded on resolution No. 795 of the Administrative Council. It was not challenged in time, and it cannot be challenged now.

Accordingly, contrary to what he contends, the complainant has no right to conversion of his fixed-term appointment into a permanent one. It is immaterial that he received assurances about the possibility of confirmation, that he holds a permanent post, that his predecessor had a permanent appointment and that other staff members have been granted permanent appointments after fixed-term ones. None of these facts warrants the grant of the permanent appointment. In particular there is no provision in the Staff Regulations and Staff Rules which says that the incumbent of a permanent post should perforce have a permanent appointment.

Abuse of discretion

4. The case law is that whether or not to extend an appointment is a matter of discretion. The Tribunal may exercise only a limited power of review over such a decision and indeed will quash it only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

5. In this case the notice of vacancy said that if an outside applicant was successful he would be granted an appointment for two years, which might be extended to not more than five. The complainant's contract actually states that it carries no right or expectancy of renewal or of conversion to any other type of appointment. This is in line with Rule 4.14.2 b) of the Staff Regulations and Staff Rules.

But there is nothing in that rule or in the contract which precludes application of the case law. Otherwise, when an official was appointed for a fixed term an organisation need only, under the rules or contract, refuse the right to renewal to preclude review by the Tribunal and deprive him of a form of protection he was reasonably entitled to. That does not mean any fixed-term official may claim the right to stay on indefinitely. But an organisation may not get rid of a staff member as it pleases, and without stating reasons, when the period of his appointment expires. It must take care that its decision suffers from none of the defects which entitle the Tribunal to set it aside.

6. In its reply to the complainant's internal appeal the ITU said that the Secretary-General was not required to give reasons for not extending the contract beyond 21 January 1984. As was said in 5 above, this approach is at variance with the case law.

But the ITU's reply to the complaint contains several criticisms of the complainant. It says, for example, that his performance report for the period from 21 January 1979 to 31 December 1980 was not completely satisfactory and that he broke the oath of office by seeking support from the Irish Government. Moreover, the Secretary-General had previously observed that on several occasions the complainant had been in disagreement with his superiors, his colleagues and people outside the ITU.

There is no need to consider whether or not the complainant was in breach of his oath. The material point is that the only report on his performance expresses reservations about it and it appears from several items filed in support of the complaint that indeed there was much disagreement between the complainant and those he was in touch with. The Tribunal accordingly holds that the impugned decision should be deemed to be in the ITU's interests and therefore suffers from none of the defects which would entitle the Tribunal to set it aside. In particular it does not draw any clearly mistaken conclusions from the facts. The complaint must therefore be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable Lord Devlin, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Devlin

E. Razafindralambo

A.B. Gardner