

SIXTY-FIRST ORDINARY SESSION

***In re* DUBRET**

Judgment 804

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Fernand Dubret against the International Telecommunication Union (ITU) on 25 April 1986 and corrected on 9 June, the ITU's reply of 10 September, the complainant's rejoinder of 9 October and the ITU's letter of 7 November 1986 informing the President of the Tribunal that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 2.1 a) of the ITU Staff Regulations, Rule 11.1.1.2a) of the Staff Rules and Service Order No. 111 (Rev. 2) of 1 July 1981 on the classification of posts, in particular paragraphs 2, 3.3 and 3.3.3;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a Frenchman, joined the ITU in 1952. In 1975 he was assigned to the group of engineers of the Technical Co-operation Department at grade P.3. As from 1 January 1980 he was paid a special duty allowance at P.4, and that was the grade he held until retirement, on 31 December 1985. On 12 March 1984 the Personnel Department asked for a new description of his post and for the purpose he filled up a "desk audit" form. In accordance with Service Order No. 111 (Rev. 2) of 1 July 1981, which lays down the procedures for the classification of posts, the Personnel Department reported on 30 July 1984 on the classification of his post. The report recommended that the Secretary-General confirm the grade at P.4. It came to the complainant's notice some time in October 1984. Quite how it did is in dispute, but at any rate from 10 October on there was an exchange of minutes on the subject between the Personnel Department and the complainant, who alleged flaws in the procedure and mistakes of substance in the report. In a minute of 16 October the Chief of the Department informed him that the Secretary-General had approved the recommendation. In a minute of 22 January 1985 the Deputy Secretary-General of the ITU drew his attention to Order 111. On 30 January he submitted a request for review of the classification of his post to the Classification Review Board. Reporting on 26 November 1985, the Review Board recommended declaring his request irreceivable because he had failed to file it within the time limit in the Order. The Secretary-General having endorsed that recommendation on 23 January 1986, the complainant appealed to the Appeal Board on 3 February. In its report of 10 April 1986 the Appeal Board said that the procedures in the Order were unclear, and particularly the time limit in which the complainant had been required to refer his case to the Review Board, but it recommended declaring the appeal time-barred. Its report was forwarded to the complainant on 11 April and he filed this complaint on 23 April. A letter of 5 June 1986 from the Secretary-General informed him that his appeal was rejected as irreceivable.

B. The complainant alleges that the procedure that was followed in drawing up the new description of his post was in breach of the sixth clause of paragraph 2 of the Order: not only did a supervisor tamper with his entries in the desk audit form, to his detriment and without his consent, but the Personnel Department disregarded its duty under the Order to consult him on the matter and he was denied his say.

As to the receivability of his request for review of the classification of his post, he maintains that the classification report of 30 July 1984 was never notified to him directly and in writing as Rule 11.1.1.2a) in fine of the Staff Rules requires. The ITU also misled him by referring him to a procedure of which the various stages are ill-defined. He goes at some length into the matter of the time limit in which he had to submit his request to the Review Board and he objects to the views the two internal bodies expressed on that score. One point he makes is that paragraph 3.3.3 of the Order, on "the responsibility of the staff member" in the review procedure, is obscure and sets no deadline anyway.

On the merits he submits that the ITU committed mistakes of fact and of law. The gist of his case is that there was breach of Regulation 2.1a) of the Staff Regulations, which stipulates "equal pay for substantially equal work", and that the decision is unfair because the work he did from 1975 to 1985 was of the kind ordinarily entrusted to consultant engineers at grade P.5.

In his claims for redress he seeks the quashing of the "decisions by the Review Board and the Appeal Board to declare his claims time-barred and irreceivable", the "revision" of the classification report and the award of a special duty allowance at grade P.5 as from April 1982.

C. In its reply the ITU invites the Tribunal to hold the complaint irreceivable.

First it submits that the claims are misdirected. Though the Secretary-General's final decision was taken on 5 June 1986, after the complaint had been filed, the complainant did amend the complaint form when he was correcting his complaint at the Registrar's bidding and he does state that final decision as the one he is impugning. But he made no corresponding change in the text of his claims, which still challenge the recommendations by the internal bodies, and such recommendations are not challengeable before the Tribunal.

The ITU's second plea is that the complainant did not properly follow the internal appeal procedure since he missed the six-week time limit in paragraph 3.3 of the Order for putting to the Review Board his request for review of the Personnel Department's recommendation. In fact he was given formal notice of the Personnel Department's recommendation and of the Secretary-General's approval thereof in the minute of 16 October 1984 from the chief of the Department. Yet he did not go to the Review Board until 30 January 1985, which was too late. Although paragraph 3.3.3 of the Service Order authorises the staff member whose request has been rejected, or his supervisor, to file a request directly with the Review Board, that paragraph is just a "superfluous" addition to 3.3, which expressly sets the time limit at six weeks from the date of notification of the challenged recommendation.

The ITU's pleas on the merits are subsidiary. It observes that the dispute arose out of a difference between the complainant and his supervisors in appraising his qualifications and the work he was doing and that in assessing a subordinate's duties his supervisors enjoy discretionary authority.

D. In his rejoinder the complainant enlarges on his pleas, stressing again the ITU's failure to give him formal notification of the challenged recommendation and to discharge its duty of consulting him in the course of the desk audit. He seeks to rebut the ITU's allegations about the internal appeal proceedings and the starting date of the time limit in paragraph 3.3 of the Order. He presses his claims.

CONSIDERATIONS:

1. The complainant joined the ITU in 1952 and after several promotions reached grade P.3 in 1975. In 1980 he was granted a special duty allowance for grade P.4. His responsibilities having in his view grown, he made a request for reclassification of his post to P.5. A classification review was carried out but his post was confirmed at P.4. He submitted an internal appeal. On 5 June 1986 the Secretary-

General rejected it on the grounds that his request had been irreceivable, thereby endorsing recommendations from the Classification Review Board and the Appeal Board.

Receivability

2. The thrust of the ITU's reply is that on several grounds the complaint is irreceivable.

3. The first plea is that it is misdirected. The complaint was filed on 25 April 1986. At that date the ITU had not yet taken any challengeable decision, there was no more than a recommendation by the Appeal Board, and the complaint was therefore premature and irreceivable.

But the complainant put the mistake right not only within the time limit for filing the complaint but also within the one for correcting it which the Registrar set under Article 7(4) of the Rules of Court. He actually states that the decision under challenge is the one of 5 June 1986. In the interests of fair process the correction will be allowed.

While not objecting to that, the ITU points out that though the complainant duly altered the date of the decision he

was challenging he omitted to alter the text of his claims for redress, which seek the quashing of the two boards' recommendations that his case be declared irreceivable.

Although those recommendations are not challengeable before the Tribunal, the complainant's mistake is a material one. There is no doubt that what he wants is, as has been said, the quashing of a decision taken by a competent ITU authority after exhaustion of the internal means of redress. It would be taking requirements of form too far to declare the complaint irreceivable on the grounds the ITU relies on.

4. Its second plea is a stronger one.

The procedure for the classification of posts is spelled out in detail in Service Order No. 111 (Rev. 2) and it is in several stages.

When the "head of the organ" makes a request for review of the classification of a post, either on his own initiative or on the incumbent's, the Personnel Department carries out a "desk audit" and makes a recommendation, which it notifies in writing to the incumbent.

5. Thus the end of the first stage is marked not by a decision but by a mere recommendation of the Personnel Department's, and it has two consequences that are stated in paragraph 3.3 of the Order, headed "Classification review procedures".

One consequence is that the incumbent of the post and several others may within six weeks of the date of notification of the recommendation make a "request" for review of the recommendation. The request is then "filed with" the Classification Review Board. Paragraph 3.3 does not say quite how, and, there being no clear rule on the matter, it must be for the most diligent of those who may file it to do so.

The second consequence is that, according to 3.3, the competent authority may not act before the six weeks expire. The recommendation is therefore blocked during that period, the only exception being where the incumbent notifies his acceptance of it in writing.

6. All this leaves the competent authority discretion to act, whatever the recommendation may be, either after expiry of the six weeks or else, where the case goes to the Review Board, after the Board has reported. The competent authority may grant or reject the request, or else opt for some solution in between.

7. What happens when the reclassification is refused is set out in paragraph 3.3.3 under the heading "Responsibility of the staff member (or supervisor)". The staff member may submit directly to the Review Board a request for the review of the classification. He sends a copy to the "head of the organ".

In the ITU's submission paragraph 3.3.3 is mere duplication and repetition of the rule that applies before the Secretary-General takes his decision. A staff member who has failed to challenge the Personnel Department's recommendation within the six weeks may not later challenge the decision before the Review Board.

It is true that this case fits the ITU's interpretation since the Secretary-General simply endorsed the recommendation made to him. But the interpretation does not square with the provisions of the Order as set out above. A case may be referred to the Review Board at two points, after the desk audit and after the Secretary-General has taken his decision. The two referrals are quite separate and are provided for under distinct paragraphs. The former is a possibility open to several; the latter, only to the incumbent. The former is made at the consultation stage; the latter requires the Board to determine whether a decision is correct.

The Tribunal concludes that the staff member who has failed to act under 3.3 is not time-barred but may still go to the Review Board after the Secretary-General has made his decision. That being so, it is immaterial whether the complainant was given due notification of the recommendation and, if so, whether his request of 30 November 1984 was within the six weeks.

8. The ITU has a third plea against receivability. What it says is that although 3.3.3 sets no time limit for referral to the Review Board it is in fact a "superfluous" addition to 3.3: the six-week deadline applies in both cases. The complainant knew by 18 October 1984 at the latest that the Secretary-General had taken a decision, and the six weeks had long expired by 30 January 1985, when he appealed to the Board.

As has been said, the two procedures, the one in 3.3 and the one in 3.3.3, are separate. The time limit under the 3.3 procedure, which starts on written notification of the recommendation, cannot obtain also when the challenge is to a decision. Nor can referral under 3.3 be a prerequisite of referral under 3.3.3.

As a general rule time bars should be strict: the staff member has only himself to blame if he acts too late. But for that very reason the Tribunal will not itself create a time limit. Nor does the ITU cite any provision of the Staff Regulations or other rule that sets a general time limit for submitting an internal claim.

9. Even supposing there were a time limit it would not apply in this case. The complainant was not given notification of the Secretary-General's decision. The only item of evidence before the Tribunal is the minute of 16 October 1984 from the chief of the Personnel Department which takes up some of the complainant's arguments and concludes by saying that the Secretary-General has approved the classification report. The date of approval is not even stated. It is not unduly demanding to expect that there be fuller and more explicit notification of a decision by an organisation than that.

The Tribunal concludes that the complainant's claim was not time-barred and that the impugned decision was mistaken in rejecting the internal appeal for that reason.

The correctness of the impugned decision

10. The complainant contends that the Secretary-General's refusal to review the classification of his post was unlawful. He alleges procedural flaws and, on the merits, unequal treatment.

The ITU replies, very briefly, that the dispute arises only out of a difference between the complainant and his supervisors in evaluating the quality and value of his contribution to the group of engineers he belonged to. It declines in its submissions to go in detail into his pleas of procedural flaws and merely alludes to "some misinterpretations" on his part.

11. Paragraph 2 of the Order lays down the procedure to be followed when the organisation receives a request for reclassification:

"... the Personnel Department carries out a desk audit of the post with the incumbent and his immediate supervisor, discusses any questions concerning the duties, responsibilities and qualification requirements of the post, and prepares the draft definitive post description ...".

The Department then "evaluates the post (giving full consideration to the material submitted ...)".

At this preliminary stage, though the Personnel Department in the end makes the recommendation, there must be consultation first, with the incumbent among others.

The complainant has two pleas. The first is that one of his supervisors changed without his consent his entries in the application form he filled up at the outset and that he was not consulted in the course of the desk audit.

It is difficult to rule on this because the ITU has not produced the desk audit papers. All it says is that the staff member's supervisor has authority to review what he says and that the complainant has misread the passage quoted above. That is not an adequate answer to a plea that imputes a purely procedural obligation. Though the Personnel Department is not bound to endorse what the staff member says, there is a procedural requirement that in taking the actual decision the Secretary-General should have everyone's views at his disposal.

Whatever its inclination to accept the complainant's first plea, the Tribunal need not do so since the second one succeeds and in itself warrants setting the impugned decision aside.

His second plea is that there was no consultation with him during the desk audit. Again, there is no answer from the ITU, beyond a remark that his contention is "puzzling". The Personnel Department minutes filed by him give a clearer picture: although the desk auditors did make use of the form he had filled up they say nothing of any consultation with him, and for want of other evidence the Tribunal cannot but conclude that the consultation required by the Order never took place. The requirement of an on-the-spot evaluation is not met by just taking note of the staff member's application: there must be a meeting and discussion with him on any points it may raise.

There being no need to go into the merits, the Tribunal holds that the impugned decision shows a procedural flaw in the breach of the complainant's right to have his full say in consultation. For that reason the decision cannot stand.

12. That does not entail the success of the complainant's claim to payment of the P.5 special duty allowance as from April 1982 up to the date of his retirement. The ITU has not addressed his main plea of unequal treatment and, though the post description is not the only criterion, may not simply plead the Secretary-General's discretionary authority.

In the circumstances the Tribunal will refer the case back to the ITU for review.

13. The complainant is awarded 2,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the ITU for review.
3. The ITU shall pay him 2,000 Swiss francs in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel
Jacques Ducoux
Pierre Pescatore
A.B. Gardner