

EIGHTY-THIRD SESSION

***In re* Desbiolles**

Judgment 1636

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joël Desbiolles against the International Telecommunication Union (ITU) on 26 June 1996 and corrected on 29 July, the ITU's reply of 11 October, the complainant's rejoinder of 6 November and the Organisation's surrejoinder of 10 December 1996;

Considering the applications to intervene filed by Mrs. Hélène Eckert, Mr. Jacques Fonteyne, Mr. Rufino Hernandez and Mr. Jorge Schifferli on 27 September 1996;

Considering Articles II, paragraphs 3, 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither of the parties has applied for:

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

A. The complainant, a Frenchman, is an operator in the Reprography Service of the ITU's Department of Conferences and Common Services.

Late in 1994 the Union held elections to appoint participants' representatives to the ITU Staff Pension Committee of the United Nations Joint Staff Pension Fund. On 1 December 1994 the Staff Council asked the secretary of the Staff Pension Committee to quash the elections on the grounds that the balloting had been unreliable. The request was not granted.

On 16 December the scrutineers published the results of the elections. The complainant had been elected.

On 19 December 1994 the Staff Council sent a petition to the chairman of the Pension Committee and the Secretary-General of the ITU asking that the elections be declared null and void and the results cancelled.

On 17 February 1995 the Legal Adviser reported to the Secretary-General at his request on the issues raised by the petition. His recommendation was not to quash the elections but to "set up a working party as rapidly as possible to be responsible for drafting suitable election rules and procedures for the ITU ... to be applied at the next election scheduled for 1997". The Secretary-General endorsed the conclusions of the report.

On 6 June 1995 two candidates who had not been elected went to the Appeal Board asking that the elections be quashed. The Board reported to the Secretary-General on 1 December 1995. It concluded that "the elections should have been declared null and void once there was unanimity about flaws and irregularities in the voting procedure". Since it could not agree on any one recommendation, however, it put three to the Secretary-General: not to quash the election results; to quash them; or to hold "early" elections at the beginning of 1996, but without quashing the results of December 1994. In a memorandum of 20 December 1995 the Secretary-General decided to uphold the results of the 1994 elections, set up a working party to draft procedures for the election of participants' representatives to the Pension Committee and hold new elections as soon as the arrangements had been worked out.

On 24 January 1996 the complainant asked the Secretary-General, on behalf of the participants' representatives elected to the Pension Committee, to say by what authority he might order new elections and shorten the prescribed three-year term of the representatives in office. In a memorandum of 31 January 1996 the Secretary-General replied that he had authority so to act under Article 6(b) of the Pension Fund Regulations:

"The elected members and alternate members of the Committee shall hold office for three years or until the election of their successors and shall be eligible for re-election ..."

On 1 February 1996 the complainant applied for review but the Secretary-General refused in a memorandum of 15 March 1996. On 20 March the complainant asked him to waive the internal appeal procedure and allow him to go straight to the Tribunal. The Secretary-General agreed in a memorandum of 27 March 1996. That is the decision the complainant says in the complaint form that he is impugning.

The procedure for the election of representatives on the Staff Pension Committee was published in Service Order 29/Rev.1 of 31 May 1996.

B. The complainant submits that the Secretary-General acknowledged more than once that the elections of December 1994 had been proper and decided not to quash them. In any event the Secretary-General misconstrued the rules which he says empower him to hold early elections. The complainant contends that the view expressed by the ITU's Legal Adviser in his report of 17 February 1995 was the same as his own: Article 6(b) of the Pension Fund Regulations lays down "a fundamental rule made up of three components, namely the three-year term of office, the eligibility for re-election of a member or alternate member and the prolongation of the three-year term of office until successors have been effectively and properly elected". The complainant concludes that the Secretary-General acted *ultra vires* and in breach of the independence of the participants' representatives. The Legal Adviser's opinion was that Article 6(c) of the Pension Fund Regulations required every member organisation of the joint pension scheme to make rules not only for electing members representing participants but also for appointing members to represent the executive head and for electing members to act on behalf of the organisation's decision-making body. The Secretary-General did not fully discharge that obligation since the ITU's rules, made without consulting the Pension Committee, govern only the election of participants' representatives.

The complainant asks the Tribunal to quash the Secretary-General's decision to hold special elections of participants' representatives on the Pension Committee; to quash the service order setting out the procedure for the election of participants' representatives to the Pension Committee and to order the Organisation to lay down rules and procedures, in conjunction with the Committee, for electing or appointing all its members.

C. The Union's main plea in its reply is that the Tribunal is not competent to hear the case. The complaint and the applications to intervene are about how to construe and apply Article 6 of the Regulations of the Pension Fund. According to Regulation 11.2 of the ITU's Staff Regulations and Rule 11.2.1 of its Staff Rules, it is the United Nations Administrative Tribunal that is competent to hear disputes concerning the Fund.

By way of subsidiary plea the Union submits that the complaint is premature. The decision of 20 December 1995, which was taken in the context of another dispute, causes the complainant no injury in that his term of office has not yet ended. Only a decision issuing the results of the early elections will afford him any cause of action. The purpose of the decision of 20 December was to sort things out fairly. As for the service order issuing rules of procedure for electing the participants' representatives, it does not amount to an individual decision causing him injury since it has no bearing on the length of his term of office. In answer to his plea of breach of Article 6(c) of the Pension Fund Regulations the Union contends that that rule does not require it to lay down a single procedure for electing all members of the Pension Committee.

D. In his rejoinder the complainant submits that the complaint is not about the Pension Fund but about elections to the Pension Committee; so the Tribunal does have jurisdiction.

The plea that his complaint is premature and therefore irreceivable is mistaken and, besides, is a procedural quibble that shows bad faith.

On the merits he submits that the trouble that the elections caused was not serious enough to warrant quashing them. By holding early elections the Secretary-General made a mistake of law and overlooked material facts or, at the least, drew wrong conclusions. So a ruling on the case requires no interpretation of the Pension Fund Regulations, and the issue of receivability does not arise.

In no circumstances can the service order give rise to individual decisions. It causes him injury in itself because it is in breach of freedom of association and an abuse of authority.

Lastly, he explains that it was never his intention to demand a single procedure for constituting the Committee; his point is that the Secretary-General has not fully discharged his obligation.

E. In its surrejoinder the Union refutes the complainant's arguments and presses its pleas.

CONSIDERATIONS

1. Elections were held in December 1994 to appoint representatives of the staff of the Union to its Staff Pension Committee. Despite strong objections to the ballot the Secretary-General confirmed the results after consulting the Legal Adviser. An appeal went to the Appeal Board for the quashing of the elections, and the Board held that "the elections should have been declared null and void once there was unanimity about flaws and irregularities in the voting procedure". It did not, however, agree on the recommendations to be put to the Secretary-General. On 20 December 1995 the Secretary-General decided, instead of quashing the elections, to set up a working party to see what reforms of the procedures were needed and to hold new elections when the reforms had been made. The representatives elected in 1994 would stay in office until the results of the new elections were issued. The complainant, who is one of them, is challenging the Secretary-General's authority to shorten the prescribed term of elected members of the Pension Committee. He seeks the quashing of the decision of 20 December 1995 on the grounds that it ordered premature elections. Four other staff representatives have applied to intervene.

2. The main issue - and the defendant pleads it - is the Tribunal's jurisdiction. The ITU acknowledges that as an official of an organisation that has recognised the Tribunal's competence the complainant may file a complaint. Its plea is that the Tribunal is not competent *ratione materiae*, the case being one that affects the United Nations Joint Staff Pension Fund.

3. According to Regulation 11.2 of the Staff Regulations -

"A staff member shall be entitled to appeal to the Administrative Tribunal of the International Labour Organization, as provided in the Statute of the Tribunal, and to the United Nations Administrative Tribunal with regard to appeals concerning the United Nations Joint Staff Pension Fund."

Staff Rule 11.2.1 says that the body competent to hear "cases affecting the United Nations Joint Staff Pension Fund" is the United Nations Tribunal. It reads:

"Appeals with which the United Nations Administrative Tribunal may have to deal are those alleging non-observance in form or substance of the provisions of the Regulations of the United Nations Joint Staff Pension Fund."

4. It is not easy to comply with the rules about jurisdiction in a case like this one, in which the executive head took the impugned decision not on behalf of the Pension Fund but in the exercise of the authority he has, or believes he has, to act for the organisation. The dispute is about the composition and functioning of a pension committee set up under Article 6 of the Fund's Regulations. And, according to Article 4 of the Regulations, pension committees of member organisations participate in the administration of the Fund. Every international organisation that belongs to the United Nations Joint Staff Pension Scheme must set up such a committee and -- so says 6(c) -- "make rules for the election or appointment of the members and alternate members of its committee". Indeed it was the Union's failure to make rules for electing members that prompted the objections to the elections in 1994 and to this dispute.

5. It is hardly arguable that the representative character of the elected members of a pension committee and the length of their term of office are not issues "affecting the United Nations Joint Staff Pension Fund", to quote Rule 11.2.1 of the ITU Staff Rules. Besides, the complainant himself is arguing that the case is about the Secretary-General's failure to observe Article 6 of the Fund's Regulations. That alone affords reason enough to declare, in line with Rule 11.2.1(b), that the Tribunal lacks jurisdiction.

6. Although the impugned decision was not taken by any authority of the Fund, the Tribunal does not believe that it may entertain this case.

7. The Union cites Article II, paragraph 3, of the Tribunal's Statute, which says it is competent to hear "any complaint of non-observance of the Staff Pensions Regulations or of rules made in virtue thereof". That

provision alludes to the staff pension scheme of the League of Nations and so is in any event immaterial.

8. Since the complaint fails, so too do the applications to intervene.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas

Michel Gentot

Julio Barberis

A.B. Gardner