

NINETY-SECOND SESSION

In re Tebourbi

Judgment No. 2104

The Administrative Tribunal,

Considering the complaint filed by Mr Habib Tebourbi against the International Telecommunication Union (ITU) on 23 January 2001 and corrected on 6 February, the ITU's reply of 11 May, the complainant's rejoinder of 6 June and the Union's letter of 13 July 2001 to the Registrar stating that it did not wish to enter a surrejoinder;

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

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

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

A. The complainant, a Tunisian who was born in 1941, joined the staff of the Union on 16 October 1995 having been seconded by the government of his country at the request of the ITU's former Secretary-General. He was recruited as an adviser on a short-term appointment at grade P.5 which was renewed several times. One of his duties was to assist the Telecommunication Development Bureau (BDT) in implementing resolutions and decisions which the ITU's governing bodies adopted in 1994 to promote the use of telecommunications and information and space technologies in protecting the environment.

By a memorandum of 18 February 1999 the new Director of the BDT asked the acting Chief of the Personnel and Social Protection Department to extend the complainant's appointment until 31 July 1999, and informed him that he had warned the complainant that implementation of the "Telecommunications-Environment" project would not continue in the same form beyond that date. The complainant nonetheless got a new appointment for the period from 30 August 1999 to 3 March 2000. But by a memorandum of 29 February 2000 his first-level supervisor told him that although he had set formalities in motion on 31 January to renew it, the renewal would finally not go ahead.

The complainant protested to the Secretary-General in a memorandum of 6 March. He pointed out that he had been assured that he would keep his post for at least five years; that he needed only one more year to complete the five years of contributions to the United Nations Joint Staff Pension Fund which would entitle him to a pension; and that he was only eighteen months away from retirement. He sought a "fair settlement of [the] issue". Having got no reply, in a letter of 12 April he again asked the Secretary-General to reconsider his decision. Citing financial constraints the Secretary-General replied on 22 May that he upheld the decisions notified to the complainant orally several times by the Director of the BDT and in writing on 29 February. The complainant appealed to the Appeal Board on 12 July 2000. Having heard no more, he has filed this complaint challenging the implied rejection of his appeal.

B. Citing the case law the complainant submits that his case is receivable. The ITU disregarded the time limits applying to internal appeals: although he sent in his request three times there was no response.

No reasons for the non-renewal were given in the decision of 29 February 2000 notifying it to him nor in the Secretary General's reply of 22 May. His appointment was due to end on 3 March, and in the circumstances four days cannot be regarded as sufficient notice. Not until the day on which his contract expired did he get the memorandum of 29 February 2000. He alleges that the Director of the BDT never informed him orally of the imminent non-renewal, and that the memorandum of 18 February 1999 cannot be treated as notice. What is more,

the Director of the BDT and his first-level supervisor (who was best placed to judge whether or not his services should be extended) gave him oral assurances that his post would be maintained.

In his submission the ITU's financial arguments cannot stand as there were funds available for the renewal of his appointment. Furthermore, the impugned decision is contrary to the Union's interests: his supervisor's endeavours to keep him on the staff are evidence that his services were "badly needed" in the BDT until the end of 2000. The Union has transferred most of his duties to a colleague, who, in his view, did not possess the right skills; and in so doing it broke the rules since the official in question was to have retired at the end of February 2000. He alleges that he has fallen victim to a "witch hunt": the present Director of the BDT discriminated against him because he has the same nationality as the latter's predecessor, with whom he worked closely.

On the issue of his pension entitlements, he cites Judgment 245 (*in re Meyer*) submitting that it ought to be the basis for the Tribunal's ruling. In that dispute the organisation refused to extend the complainant's appointment by thirteen days so that he could complete the five years of contributions he needed to entitle him to a pension. The Tribunal found that obviously wrong conclusions had been drawn from the evidence and ruled that the organisation should "extend the complainant's final appointment so as to bring his total period of service to five years".

The complainant asks the Tribunal to quash the decisions of 29 February and 22 May 2000 and to order his reinstatement as from 4 March 2000 so that he is assured of completing the five years of contributions entitling him to benefit from the Pension Fund. Should the Tribunal order reinstatement after that date, he seeks compensation for material injury, namely the emoluments and allowances he would have received had his appointment been duly renewed. He also claims moral damages and costs.

C. In its reply the Union first explains the circumstances in which the complainant's appointment came to an end. In February 1999 the new Director of the BDT told him that for financial reasons the BDT was to be restructured so his contract would not be renewed beyond 31 July 1999. The Union was able to renew it for six months by means of a temporary financial arrangement, but it gave him no assurance that he could subsequently expect a further renewal, particularly not for a period long enough to enable him to complete five years of contributions to the Pension Fund. At the beginning of 2000 the Director of the BDT decided to proceed with the restructuring. It was for that reason that his contract was not renewed, and not because the Director wanted to "get rid" of officials who had worked closely with his predecessor.

The ITU enlarges on its reasons, referring to a memorandum of 18 October 2000 from the Director of the BDT to the Secretary-General which is attached to its reply. According to the memorandum, the Director did consider the requests put to him by the complainant's supervisor, but as manager of the BDT's resources he was unable to agree to them. Based on financial considerations, the decision not to renew his appointment was taken in the Union's interests. His supervisor's representations did not amount to a promise or guarantee of renewal, since the authority for such decisions is not his. It was for the Director of the BDT to judge whether the complainant should be kept on, and in the event renewal was found not to be necessary: the work he had been doing could still be continued.

D. In his rejoinder the complainant observes that the ITU has provided no evidence of the financial difficulties it alleges. In his submission the Union's pleas concerning the period from February to July 1999 should be disregarded since that period is immaterial to the present dispute, his contract having been renewed until 3 March 2000. However, it is plain from the events that occurred in the four months prior to the impugned decision that he was bound to have legitimate expectations that his contract would be renewed. He maintains that the Director of the BDT gave him oral assurances to that effect.

CONSIDERATIONS

1. The complainant was recruited by the ITU in 1995 to serve in the Telecommunication Development Bureau (BDT). His first-level supervisor informed him in a memorandum of 29 February 2000 that his appointment would not be renewed when it expired on 3 March 2000.

On 6 March and 12 April 2000 the complainant asked the Secretary-General to reconsider that decision. The Secretary-General replied on 22 May that he upheld the decision of 29 February.

2. The complainant appealed to the Appeal Board on 12 July 2000. Thereafter, he wrote several times to its

Chairman seeking consideration of his appeal within the prescribed time limit. Having received no reply he has come to the Tribunal challenging the implied rejection of his appeal.

Receivability

3. Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of a complainant's rights. An official may come straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable period of time, the latter being determined in the light of circumstances (see Judgment 2039, *in re* Bousquet Nos. 5, 6 and 7; as well as Judgments 1829, *in re* Müller-Engelmann and 1968, *in re* Concannon and the numerous judgments cited therein).

Those conditions are obviously fulfilled in the present case. His endeavours to get a response having failed, the complainant could hardly be expected to wait any longer as there was no indication that a prompt conclusion from the Board was likely. The Tribunal therefore takes the view that he exhausted the internal means of redress.

The merits

4. According to the case law, although a decision not to renew a fixed-term or short-term appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. Such a decision will be set aside if it shows some flaw such as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the evidence.

Are the contested decisions tainted by any of those flaws?

5. According to the complainant, he had been given assurance that his contract would be renewed. The Union demurs: he received no such assurance from anyone with the authority to give it, namely the Secretary-General or the Director of the BDT. The Tribunal finds nothing in the evidence to bear out the complainant's assertions. As to witnesses, the complainant does not apply for hearings but cites the names of several people, leaving the Tribunal to decide whether or not they should be heard. In the absence of sufficient information as to the facts they would be able to prove, the Tribunal sees no reason to hear them.

6. A steady line of precedent has it that in the event of non-renewal of a fixed-term appointment, there must be a definite decision and it must be notified to the official. In addition, it must be founded on grounds that are valid and of which the official must be duly informed with "reasonable notice" so that he may exercise his right to appeal if he wishes (see Judgments 1544, *in re* Gery-Pochon, and 1583, *in re* Ricart Nouel, and the others cited therein).

The complainant objects that he was told about the non-renewal on the very day that his contract expired, the memorandum of 29 February not having reached him until 3 March 2000.

The ITU retorts that it so advised him several months in advance. It offers no evidence whatsoever of that assertion, however. On the contrary, the complainant's appointment which was originally due to end on 31 July 1999 was finally renewed; thereafter, his first-level supervisor even set in motion the formalities for a further renewal.

The conclusion is that the ITU has failed to prove that it discharged its duty to warn the complainant about the non-renewal long enough in advance to enable him to exercise his rights and take whatever steps he saw fit.

7. The complainant objects that the ITU failed to account for the decision in the memorandum of 29 February 2000 not to renew his contract.

The case law requires an organisation to give its reasons for non-renewal so that the Tribunal may review its decision. They may be clarified in some document subsequent to the decision. In this case the Secretary-General's letter of 22 May 2000 to the complainant accounted amply for the non-renewal of his appointment.

8. The complainant pleads abuse of authority.

Precedent says that there will be abuse of authority where the Administration, though not overstepping its authority, uses it for some purpose other than those prescribed by law or, to put it more broadly, those that the general interest

requires. A staff member who pleads misuse of authority, and the tribunal that allows the plea, must be able to identify the improper purposes for which the authority (in this case the authority not to renew a short-term appointment) has been exercised.

Since the Director of the BDT has a duty to act in the interests of the Union, it must be ascertained whether those interests were the basis for the impugned decisions.

The ITU contends that the complaint is unfounded. It asserts that the decision not to renew the complainant's appointment was taken in its own interests. It took account of the Union's budgetary difficulties and its need to pursue not just priorities but other activities as well, including those previously carried out by the complainant. But, it says, renewal of its contractual relationship with the complainant was not essential to the continuation of the work he had been doing. In the Union's view, the complainant has failed to prove that his previous duties were affected by the new operational arrangements decided on by the Director of the BDT.

The complainant retorts that the facts show that the Director of the BDT did not abide by the guidelines in the resolutions and decisions of the ITU's governing bodies concerning the Union's new role in the area of environmental protection. That, he says, is confirmation that the decisions taken by the Director of the BDT and approved by the Secretary-General - concerning the non-renewal of his contract and the fate of his work after he left - were not in the ITU's interests.

The complainant has failed to show that the contested decisions were in some other interest than that of the service. Nor is there any proof that the Director of the BDT declined to renew the complainant's contract simply because the former Director and the complainant share the same nationality. The Director's decision was dictated by the need to address budgetary problems and the fact that the complainant did not have to be kept on in order for his previous duties to continue. In the absence of any other evidence to support it, the plea of abuse of authority fails.

9. In Judgment 245 cited by the complainant, the Tribunal found that the complainant's fixed-term appointment ought to be "extended" because he needed only thirteen days' service more to complete the five years of contributions which would entitle him to benefit from the Pension Fund. In the present case, the complainant is not in a comparable position as he was on short-term appointments and was approximately one year short of entitlement to a retirement pension. That being so, a waiver of the rules would appear unwarranted.

10. For all the foregoing reasons, the Tribunal concludes that the impugned decisions were flawed by the Union's delay in informing the complainant of the non-renewal. As a result, he has suffered material and moral injury warranting redress in the form of payment by the ITU of an amount equal to two months of his last net salary without deduction of contributions to the Pension Fund.

DECISION

For the above reasons,

1. The contested decisions are set aside.
2. The Union shall pay the complainant an amount equal to two months' salary in material and moral damages, in accordance with what is said under 10 above.
3. It shall pay him 6,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.