

106th Session

Judgment No. 2779

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. A.-S. against the International Telecommunication Union (ITU) on 11 May 2007 and corrected on 10 July, the Union's reply of 15 October 2007, the complainant's rejoinder of 10 January 2008 and the ITU's surrejoinder of 21 February 2008;

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

Having examined the written submissions;

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

A. The complainant, a Spanish national born in 1946, joined the ITU in 1982. At the material time he was employed as a translator/reviser under a permanent contract at grade P.4. He was due to retire on 30 November 2006, when he would reach the Union's statutory retirement age. Following a recommendation by the Chief of the Conferences Department to Mr R., Chief of the Personnel and Social Protection Department, the Secretary-General of the ITU decided to detach the complainant to the Conferences Department, General Secretariat, as Acting Head of the Spanish Translation Section, with effect from 20 December 2004 and to grant him a non-pensionable

special post allowance at grade P.5, payable from 20 March 2005 until further notice. In a memorandum dated 25 January 2005 the complainant informed the Secretary-General that he was not able to accept that position, particularly in view of the fact that he would shortly be lodging an internal appeal concerning another matter. On 31 January the complainant had a discussion with Mr R. regarding his employment situation, and subsequently began performing the functions of the ad interim position.

In an e-mail of 3 February 2005 addressed to the Secretary-General's assistant, Ms G., the complainant explained that he had arrived at an agreement in principle with Mr R. whereby the vacancy for the post of Head of the Spanish Translation Section would be announced and he would then be appointed to that post and granted a fixed-term contract for a period of two years. As a result of this extension, his retirement would be deferred and he would be guaranteed at least 24 months of pensionable service at grade P.5. He added that he believed it was a good agreement for both parties.

The vacancy for Head of the Spanish Translation Section was advertised on 15 April 2005 and the complainant applied for the post. On 27 July he sent an e-mail to the Secretary-General explaining his agreement with Mr R. He added that the extension was his only motivation for accepting the post as the Section was in a "calamitous situation" and he requested the Secretary-General to confirm the agreement. On 1 August Mr R. and the Chief of the Conferences Department were asked, on behalf of the Secretary-General, to provide their comments regarding the matter on an urgent basis. On the following day Mr R. replied that he had never offered a two-year contract because he was not in a position to do so. He also explained that, in his opinion, the extension would solve both the complainant's and the Section's problems. In an e-mail of 3 August to Mr R., the complainant stated that Ms G. had been very surprised by the content of the agreement. She had criticised Mr R., indicating that he did not have the capacity to make promises concerning the eventual decisions of the Secretary-General. She advised that the complainant forget about

the agreement. Mr R. responded to the complainant on 5 August that he would take care of it.

By a decision dated 8 September 2005 the complainant was transferred to the vacant post and promoted to grade P.5 with retroactive effect from 1 August. On 16 December he sent an e-mail to the Secretary-General reminding him that he had accepted the post on the condition that his contract would be extended at least until August 2007, and requesting him to take a decision regarding that extension. Having received no response, the complainant wrote to Mr R. on 20 February 2006 and asked him to petition the Secretary-General for a decision regarding his extension. He insisted that Mr R. had given his word and explained that he had to make important decisions regarding his personal and professional life a few months in advance of his retirement date and that he felt frustrated with the lack of a response from the Secretary-General. Mr R. replied on 21 February denying the complainant's assertion that he had given his word. He said that the Secretary-General was aware of his requests and would make a decision to extend the complainant's contract if it was necessary. In his response to Mr R.'s e-mail the following day, the complainant set out the terms of the contested agreement and demanded a meeting with the Secretary-General and Mr R.

In a memorandum dated 22 September 2006, the Head of the Conferences and Publications Department urged Mr R. to consider the complainant's request for a contract extension. He attached the complainant's written request to that effect. The reasons to justify the extension included an anticipated heavy workload during the upcoming period, the difficulty of finding an appropriate substitute and the need for the complainant's support in preparation for the World Radiocommunication Conference that was opening in October 2007. On 5 October 2006 the complainant wrote to the Secretary-General requesting a confirmation of the extension of his contract until 1 August 2007. By a memorandum dated 10 October 2006 Mr R. informed the complainant that the Secretary-General had decided not to extend his contract. On 11 October the complainant asked the Secretary-General to review his decision, but he was notified by a memorandum of 16 October that the Secretary-General had rejected

his request. Consequently, his contract would expire on 30 November 2006.

The complainant filed an internal appeal challenging that decision on 29 November 2006. He separated from service on the following day. In its report dated 31 January 2007 the Appeal Board recommended that the new Secretary-General maintain the decision of 16 October 2006. By a letter dated 13 February 2007 the complainant was informed that the Secretary-General had decided to follow the Board's recommendation. That is the impugned decision.

B. The complainant contends that when he was approached in late 2004 to assume the duties of the Head of the Spanish Translation Section on an ad interim basis he turned down the offer because he was concerned that he was approaching statutory retirement age and that the corresponding increase in salary – in the form of a special post allowance – would be non-pensionable. He was also concerned that the then Secretary-General was biased against him as he had previously filed two internal appeals. He had been mistreated by the Secretary-General and he was afraid that if he accepted the post the bad will and malice shown towards him would adversely affect his remaining years of service.

He submits that he met with Mr R. on 31 January 2005, who proposed a compromise solution so that he would immediately assume the duties of Head of the Spanish Translation Section on an ad interim basis. The post would be advertised and he would be appointed to it in June. His permanent contract would then be converted to a two-year fixed-term contract with effect from the date of his assignment to the post. Consequently, he would have the benefit of an increased pensionable salary for two years and his appointment would extend beyond statutory retirement age. The complainant argues that the ITU, represented by Mr R., made a valid offer to extend his appointment. Upon his acceptance of that offer there was a binding contract that the Union unilaterally breached. He contends that, as he had “fulfilled his end of the bargain”, he was entitled to have the ITU deliver on its commitments. As a result of the bad faith thus displayed by the Union, he suffered moral damages. Citing the Tribunal's case law he contends

that the Union's legal liability under that contract is unaffected by the fact that his agreement with Mr R. was made orally. In addition, the Union had numerous opportunities to deny the terms of the agreement in response to his frequent written and oral communications. However, it seldom replied to his communications and did not deny his assertions until he had served in the post for more than a year and a half and his retirement was imminent. He argues that this is "incomprehensible" if there was no agreement between the parties.

He further contends that he relied on Mr R.'s offer to his detriment, accepting a post in a "troubled and dysfunctional" Section that he initially had no desire to assume and loyally serving in that post until his retirement. The Union is consequently estopped from denying the agreement. Moreover, the ITU was unjustly enriched at his expense because it did not have to pay him any salary, benefits or other emoluments between his date of retirement and 1 August 2007, the expiry date of the agreed extension of his contract.

Lastly, he alleges that the decision not to extend his contract beyond statutory retirement age was an error of law as it flowed from the bias, ill will and malice which the Secretary-General harboured towards him because he had filed two internal appeals.

The complainant seeks disclosure of a number of documents and he asks the Tribunal to order hearings and to call several witnesses. He claims 222,000 Swiss francs in damages for lost salary and pension benefits. In addition, he seeks moral damages in the amount of 250,000 francs, costs of at least 25,000 United States dollars and interest at the rate of 8 per cent per annum from 1 December 2006 until all awards due to him under the judgment are paid to him in full.

C. In its reply the Union submits that the complainant's claims for moral damages, costs and interest, which were not put forward in his internal appeal, are irreceivable for failure to exhaust internal remedies. On the merits it asserts that it made no commitment to extend the complainant's contract beyond his statutory retirement date: during the discussion on 31 January 2005, Mr R. raised the possibility of such an extension but explained that it would be subject to the

exigencies of the service at the material time and the Secretary-General's agreement. Pursuant to the Staff Regulations and Staff Rules, neither Mr R. nor the Chief of the Conferences Department had the authority to enter into a firm commitment regarding the contract extension of a staff member at grade P.5, and the complainant could not fail to be aware of this. Furthermore, at no time did the Secretary-General agree to extend the complainant's contract, nor did he raise an expectation that he would do so.

Contrary to the complainant's contentions, the ITU asserts that its lack of response to his e-mail requests for confirmation of his alleged agreement with Mr R. should have been interpreted as an implicit rejection of that request. An administrative decision modifying a staff member's conditions of service requires an administrative action in order to be effective. In the Union's view, this is a recognised principle of international civil service law that is reflected in the Staff Rules. In addition, as indicated by the complainant himself in an e-mail to Mr R., he was warned by the Secretary-General's assistant in April 2005 that Mr R. did not have the authority to make such a commitment.

The Union rejects the complainant's argument that it is estopped from denying the existence of his agreement with Mr R. Citing the case law it points out that the complainant is unable to prove that he suffered any detriment resulting from his detachment and subsequent promotion. Furthermore, as the only person with authority to enter into such an agreement was the Secretary-General, it was not reasonable for the complainant to rely on statements made by Mr R. In addition, the ITU was not unjustly enriched at his expense; upon his retirement another staff member was assigned to his post and awarded a special post allowance pursuant to the Staff Regulations.

The ITU strongly objects to the complainant's assertions that the Secretary-General harboured "bias, ill-will and malice" towards him, arguing that there is no evidence to support this. Indeed, by promoting the complainant to the post of Head of the Spanish Translation Section at grade P.5, the Secretary-General displayed confidence in him, not

hostility towards him. The decision not to extend his contract beyond statutory retirement age was made pursuant to the Staff Regulations.

With respect to the complainant's request for disclosure, it points out that it has provided all the documents relevant to the case.

D. In his rejoinder the complainant seeks to refute several points in the Union's reply. He asserts that on the basis of his agreement with Mr R. he decided not to pursue a prior appeal relating to a request for a promotion, because he believed that by virtue of that agreement he would obtain the same relief as the relief that he was seeking through the appeal process. He argues that if Mr R. made an agreement without authority, it is the Union and Mr R. that must suffer the adverse consequences thereof. The Union had a positive duty formally to advise him that it would not be bound by the agreement he was asserting. Moreover, as the ITU was not willing to resolve this dispute by agreeing to a settlement he had proposed before filing his complaint, he urges the Tribunal to award him exemplary damages.

E. In its surrejoinder the Union maintains that Mr R. did not, and could not, make a commitment to extend the complainant's contract beyond statutory retirement age. It denies his assertion that he decided not to pursue his appeal in light of his agreement with Mr R. and explains that the internal appeal in question related to a modification of the date of his annual step increment. The Union argues that the complainant's comments in this regard denote patent bad faith on his part. It otherwise presses its main arguments.

CONSIDERATIONS

1. The complainant challenges a decision not to extend his contract beyond statutory retirement age. He advances four main arguments. First, the complainant submits that the ITU's offer, made by the Chief of the Personnel and Social Protection Department, Mr R., to extend his contract beyond statutory retirement age for at least a two-year period from his acceptance of the offer, constituted a

binding contract. The Union breached that contract entitling him to the claimed relief.

2. Second, he submits that having relied on the promises of Mr R. to his detriment, the ITU is estopped from denying their existence.

3. Third, he contends that the Union has been unjustly enriched by its failure to extend the complainant's contract beyond statutory retirement age.

4. Fourth, the complainant alleges that the Secretary-General's decision not to extend his contract was motivated by bias, ill will and malice stemming from the complainant's prior two appeals against the ITU.

5. The first issue to be resolved is whether a promise was made to the complainant to extend his contract beyond statutory retirement age in exchange for accepting the post of Head of the Spanish Translation Section. The Tribunal makes the following observations regarding the circumstances and the conduct of the parties during the relevant time: the complainant's recitation of the content of the contested agreement was entirely consistent throughout his correspondence over a long period of time; Mr R.'s refutations of the agreement are self-serving and were not made directly to the complainant despite numerous enquiries; the complainant's explanation, articulated from the outset, for only being willing to accept the appointment if he received two years of pensionable income, is cogent. Having regard to the above circumstances and conduct of the parties, the Tribunal finds that a promise was made by the Chief of the Personnel and Social Protection Department.

6. The second issue is whether the promise was made by someone who is competent or is deemed to be competent to make such a promise. The evidence indicates that after the complainant and Mr R. had reached an agreement, Ms G. told the complainant that

Mr R. did not have the authority to make the promise. Further, the numerous requests by the complainant to the Secretary-General for confirmation of the agreement points to awareness on the part of the complainant that Mr R. did not have the requisite authority. Additionally, it may also be inferred from the length of time the complainant had been with the ITU and the seniority of his position that he was either aware or should have been aware that Mr R. did not have that authority. Based on the foregoing, the Tribunal concludes that Mr R. was not competent and could not be deemed to be competent by the complainant to make the promise he seeks to enforce (see Judgment 782, under 1). The finding that Mr R. did not have the requisite authority to make the promise destroys the claim for breach of contract. As well, as the complainant must be taken in these circumstances to have known that Mr R. was not competent to make the promise, his argument that the Union is estopped from denying the existence of the agreement also fails.

7. Although the principal claim is dismissed, this does not end the matter. The ITU contends that the claim for moral damages is irreceivable. That contention must be rejected. The claim for moral damages is a claim for consequential relief which the Tribunal has the power to grant (see Judgment 2609, under 10). As the Tribunal has found, even though he was not competent to make the representation, Mr R. made a promise to the complainant that his appointment would be extended beyond statutory retirement age. Mr R. also fostered the complainant's false belief that the promise would be honoured. Despite the complainant's numerous requests over a period of approximately 18 months clearly explaining his belief that a promise had been made, the Secretary-General chose to ignore the opportunities to correct the complainant's misapprehensions and permitted him to act on his mistaken belief. Lastly, the Secretary-General failed to make a decision on the complainant's request for an extension in a timely fashion. This conduct constitutes a breach of the duty to respect the complainant's dignity. At the very least, the Secretary-General should have notified the complainant that the Union did not accept the obligation when the matter was first brought to

his attention. This conduct has caused the complainant moral injury for which he must be compensated in the form of moral damages. Accordingly, the Tribunal will order the ITU to pay the complainant moral damages in the amount of 25,000 Swiss francs. The complainant is also entitled to costs, which the Tribunal fixes at 750 francs.

8. The Tribunal considers it unnecessary to order the disclosure of the documents requested by the complainant or the holding of oral hearings.

DECISION

For the above reasons,

1. The ITU shall pay the complainant moral damages in the amount of 25,000 Swiss francs.
2. It shall also pay him costs in the amount of 750 francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet