

115th Session

Judgment No. 3204

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A.J.H. B. (né H.) against the International Telecommunication Union (ITU) on 21 September 2010, the ITU's reply of 23 December 2010, the complainant's rejoinder of 30 January 2011 and the Union's surrejoinder of 10 May 2011;

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

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

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

A. Facts relevant to this case are given in Judgments 2643 and 2826, delivered on 11 July 2007 and 8 July 2009 respectively, on the complainant's first and second complaints, and in Judgment 3203, also delivered this day. Suffice it to recall that by a memorandum dated 27 August 2007 the Secretary-General of the Union informed the complainant that he had decided to refer the matter of the recognition of same-sex marriage for the purpose of the determination of dependency benefits to the ITU Council, for consideration, at its session in 2008. However, the aforementioned matter was not

submitted to the Council in 2008, nor indeed in 2009. In a memorandum of 26 October 2009 the complainant alleged that the Secretary-General's failure to fulfil the promise he had given on 27 August 2007 had caused him distress and he requested that the matter be submitted to the Council at its session in 2010. He also claimed 12,000 Swiss francs in moral damages.

The complainant separated from service on 31 October 2009. Having received no reply to his memorandum of 26 October, he filed an appeal with the Appeal Board on 14 January 2010 in which he reiterated his earlier request and his claim for damages. On 19 January the Chief of the Administration and Finance Department sent a letter to the complainant, appended to which was a decision dated 18 December 2009 – which the former had signed on behalf of the Secretary-General – in response to the complainant's memorandum. The decision, *inter alia*, invited the complainant to explain the basis upon which he had quantified his claim for moral damages.

The Appeal Board delivered its report on 5 March 2010 in which it recommended, among other things, rejecting the complainant's claim for moral damages. The following month the matter of same-sex marriages and domestic partnerships was submitted to the ITU Council. By a letter of 7 May 2010 from the Chief of the Administration and Finance Department the complainant was notified, *inter alia*, that the Secretary-General had decided to award him 12,000 Swiss francs in moral damages as compensation for any injury he might have suffered as a result of the Secretary-General's failure to submit the matter to the Council in 2008.

By a memorandum dated 17 June 2010, a copy of which was sent to the complainant and the Secretary-General, the Chief of the Administration and Finance Department requested the Chief of the Accounts Division to pay the complainant the amount of 12,000 francs in execution of the decision of 7 May. However, by a letter of 23 June 2010 from the Secretary-General, the complainant was informed "clearly and unequivocally" that the promise given to him on 7 May was null and void. The Secretary-General stated that he had not approved the payment of moral damages, either expressly or

tacitly, and that he had decided to follow the recommendation of the Appeal Board in this respect. Consequently, the decision of 7 May was replaced by his present decision, taken in accordance with Rule 11.1.1.5 of the Staff Regulations and Staff Rules. That is the impugned decision.

B. The complainant argues that, although the impugned decision was taken after he had left the service of the Union, it is related to a decision taken while he was still a staff member, that is, the decision not to submit the matter of the recognition of same-sex partnerships to the ITU Council at its session in 2008. In addition, the Union violated his rights by failing to honour a promise which, in his view, was a term of his employment contract. Consequently, he considers that his complaint is receivable. Referring to the Tribunal's case law, the complainant adds that the question of whether or not he has a cause of action with respect to particular claims is a matter to be determined by the Tribunal.

On the merits, he again refers to the case law and asserts that international organisations have a duty to abide by their promises. He contends that he suffered stress as a consequence of the Union's failure to submit the matter of the recognition of same-sex marriages and domestic partnerships to its Council at its session in 2008 or 2009. In fact, he lost confidence in the Union's willingness to address this issue and he therefore decided to pursue employment in the private sector. The continued uncertainty about his situation caused him moral injury. He disputes the Appeal Board's findings in this respect.

With respect to the decision of 7 May 2010, the complainant contends that he had every reason to believe that the Chief of the Administration and Finance Department was competent to convey to him the Secretary-General's final decision. He suffered additional uncertainty and moral injury as a result of the decision to declare the offer of moral damages null and void and, in his view, the Union must be held accountable for the consequences of the inadequacies of its decision-making process. He therefore submits that it is proper for the Tribunal to award him exemplary damages.

The complainant seeks 12,000 Swiss francs in moral damages for the ITU's failure to fulfil the promise made to him on 27 August 2007, 12,000 francs in moral damages for its failure to pay him the sum he was offered by way of compensation on 7 May 2010, and a further 12,000 francs in exemplary damages. He also seeks interest on all the sums awarded.

C. In its reply the Union contends that, as the complainant failed to challenge the decision not to submit the issue of same-sex marriages to the Council in 2008 within the time limits set out in the relevant Staff Regulations and Staff Rules, any related claims are time-barred and therefore irreceivable. In addition, he has no cause of action with respect to the decision not to submit the matter to the Council in 2009, because he separated from service on 31 October of that year and any decision the Council might have taken would have had effect only as from 1 November 2009, when he was no longer a staff member. The Union considers that, by submitting the matter to the Council at its session in 2010, it fulfilled the promise of 27 August 2007 and also granted the requests contained in the complainant's memorandum of 26 October 2009 and his internal appeal of 14 January 2010.

On the merits, referring to the case law, the Union states that the Chief of the Finance and Administration Department did not have the authority to make the financial commitment contained in the letter of 7 May 2010. First, pursuant to the Union's Convention, only elected officials are empowered to manage its resources, and the Chief of the Finance and Administration Department is an appointed staff member who is only permitted to commit the Union's resources by express delegation which, in this case, he did not have.

Secondly, Article 12, paragraph 2, of the Union's Financial Regulations and Financial Rules stipulates that no expenses may be committed without written authorisation from the Secretary-General or an official duly authorised for that purpose. Under Article 10, paragraph 4, of the Financial Regulations and Financial Rules the Secretary-General may make such *ex gratia* payments as he deems to be necessary in the interest of the Union. However, the Chief did not

request either verbal or written authorisation before making the promise to pay the complainant moral damages and the Secretary-General only became aware of the fact of the offer when he received a copy of the memorandum of 17 June 2010. In light of the foregoing, the ITU considers that the legal conditions for a commitment to be effective are not met in this case.

Lastly, the Union submits that the complainant's allegations that it failed to honour the promise made in the decision of 27 August 2007 are incorrect and without foundation. It denies that he suffered personal distress or injury to his dignity or reputation.

D. In his rejoinder the complainant develops his pleas. He states that he was not informed that the Secretary-General had decided not to abide by his promise of 27 August 2007 and, consequently, the applicable time limit to challenge that decision began to run on 26 October 2009, when he requested that the issue of same-sex marriages be submitted to the Council in 2010. In addition, he reiterates several arguments that he put forward in his third complaint.

E. In its surrejoinder the ITU maintains its position in full.

CONSIDERATIONS

1. This is the complainant's fourth complaint before the Tribunal. Much of the relevant background is discussed in three related judgments, namely Judgments 2643 and 2826, and Judgment 3203, also delivered this day.

2. The complainant asserts an entitlement to be paid 12,000 Swiss francs in moral damages as a consequence of the failure of the Secretary-General to abide by a decision communicated to him in a memorandum of 27 August 2007. In the memorandum the Secretary-General explained the steps that would be taken by the Union to execute Judgment 2643. It included the statement that the question of the recognition of marriages between people of the same

sex would be submitted to the Council for consideration at its session in 2008 and, as the case may be, the Staff Regulations and Staff Rules would be modified accordingly.

Not only was the matter not submitted to the Council in 2008, it was also not submitted in 2009. The complainant took no steps in either 2008 or 2009 to seek enforcement (on the assumption it was enforceable) of the commitment given to him in the memorandum of 27 August 2007.

3. From statements made in his brief to the Tribunal, it is clear that the complainant elected not to challenge the failure of the Secretary-General to submit the matter to the Council in either 2008 or 2009, save for making a demand in his memorandum of 26 October 2009 that the matter be submitted to the Council at its session in 2010. At least as to the complainant's inaction in relation to 2008, he submits that he was "allow[ing] the Secretary-General more time".

4. In its reply the ITU appears to challenge the receivability of the complaint, at least insofar as it seeks to litigate non-compliance with the statement made on 27 August 2007. It contends that the complainant did not challenge the failure to submit the matter to the Council in 2008 within the time limits provided for by Chapter XI of the Staff Regulations and Staff Rules. This argument was amplified in its surrejoinder in which it pointed out the complainant's failure to contest the implicit decision of the Secretary-General not to submit the matter to the Council in 2008. Again the argument was advanced by reference to the complainant's failure to contest the matter pursuant to the relevant Staff Regulations and Staff Rules. While it does not do so explicitly, the ITU appears to be raising the issue of whether or not the complaint is receivable either on the basis that internal remedies have not been exhausted (Article VII, paragraph 1, of the Tribunal's Statute) or, perhaps, the complaint was not filed within the required ninety days (Article VII, paragraph 2, of the Statute).

5. The first proposition is correct. The statement of 27 August 2007 was a decision to submit the matter to the Council in 2008 and

the fact that the matter was not submitted involved, at the least, an implicit decision not to do so. No steps were taken by the complainant to challenge that implicit decision if, as he now contends, it caused him injury even if it was only the loss of the opportunity to gain the benefit of a favourable decision which might have operated to his benefit during the remainder of his employment by the ITU. For this reason, the complaint, insofar as it is based on non-compliance with the statement of 27 August 2007, should be dismissed as irreceivable.

6. The complainant also argues that he is entitled to be paid 12,000 francs because of a promise or commitment contained in a letter of 7 May 2010 to him from the Chief of the Administration and Finance Department. In that letter the Chief stated:

“I hereby inform you that the Secretary-General has decided to award you the amount of CHF 12,000 that you requested in your memorandum of 26 October 2009 and in your above-mentioned appeal to compensate the moral damages that the non-submission of the matter to Council 2008 as mentioned in the decision of 27 August 2007, may have caused you.”

This letter has several elements. The first is that it was expressed to be sent on behalf of the Secretary-General. The second is that it asserted that a decision had been made by the Secretary-General. The third is that the decision was an “award” of moral damages in the amount of 12,000 francs.

7. The ITU submits in its reply that the Secretary-General was the only person with authority to make a decision to pay an amount on the basis set out in the letter, but he made no such decision. Furthermore, the Chief of the Administration and Finance Department had not been delegated with the authority to make the decision.

8. The complainant seeks to rely on the decision in the letter of 7 May 2010 to claim 12,000 francs and challenges, in these proceedings, the decision of the Secretary-General of 23 June 2010 to nullify and declare void the decision contained in the letter of 7 May.

9. The substance of this case appears to the Tribunal to be whether the nullifying and voiding of the ostensible decision to award 12,000 francs in moral damages involves a breach of the ITU's duty to act in good faith. What this duty to act in good faith involves in a similar context has already been addressed in earlier cases. It is settled by the Tribunal's case law that, according to the rules of good faith, anyone who was a staff member of an organisation and to whom a promise was made, may expect that promise to be kept by the organisation. However, the right to fulfilment of the promise is conditional. One condition is that the promise should be substantive. Another is that the promise is from someone who is competent or deemed competent to make it. Yet another is that the breach should cause injury to the person who relies on the promise (see Judgment 782).

10. However, the principles just discussed concern executory promises. That is, a promise to do or refrain from doing some act in the future and upon which the promisee may rely in the period between the making of the promise and the time for the promisor to act or not act. However, these principles are inapt to apply without qualification to a commitment capable of immediate implementation whether it is to be characterised as a promise or characterised in some other way.

In the present case, the unequivocal commitment to pay the complainant was capable of immediate implementation. The commitment was made by someone – the Chief of the Administration and Finance Department – with clear ostensible authority to communicate a decision of the Secretary-General. It is commonplace in international organisations for others in senior positions to speak on behalf of the organisation's executive head. The failure to honour the commitment and the decision to nullify it made by the Secretary-General on 23 June 2010 were a breach of the ITU's duty to act in good faith. Moreover, the communication from the above-mentioned Chief must be taken to have recorded a decision of the Union itself. In the absence of fraud or some other fundamental illegality (but not want of authority), the defendant must abide by the decision and

cannot resile from it as the Secretary-General did in purporting to annul it. The Tribunal is fortified in this conclusion by the fact that no attempt has been made by the ITU to explain why the commitment was made in the first place. It is highly improbable that the making of the commitment was accidental. Cases may arise where a bare promise or commitment is made by an organisation and withdrawn for reasons which are consistent with the organisation acting in good faith. But it is not apparent that this is such a case.

The complainant is therefore entitled to moral damages for this breach, with interest. However, the Tribunal is not satisfied that this is a case for an award of exemplary damages.

DECISION

For the above reasons,

1. The ITU shall pay the complainant 12,000 Swiss francs in moral damages.
2. It shall pay him interest on this amount at the rate of 5 per cent per annum from 7 May 2010 to the date of payment.
3. The Union shall also pay the complainant 1,300 francs in costs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet