

EIGHTY-FOURTH SESSION

In re Avia Aranda

Judgment 1677

The Administrative Tribunal,

Considering the complaint filed by Mr. Antonio Avia Aranda against the International Telecommunication Union (ITU) on 12 March 1997 and corrected on 19 March, the ITU's reply of 21 April, the complainant's rejoinder of 22 May and the Union's surrejoinder of 17 July 1997;

Considering Article II, paragraph 5, 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. Under ITU Staff Regulation 3.8 a) a special post allowance is paid to "any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". Regulation 3.8 b) says:

"Exceptionally, when additional temporary work of at least four weeks duration, e.g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months and starting from the date on which the staff member takes up duties the level of which corresponds to a higher grade."

Paragraph c) of 3.8 says that the amount of the allowance shall be "equivalent to the salary increase the staff member would have received had he been promoted to the grade of the post in which he is serving".

The complainant, who is Spanish, joined the staff of the ITU on 1 August 1993 in its Common Services Department as head of Archives at grade P.2. Late in January 1994 the head of Library and Archives Services retired leaving the post vacant. On the 26th the chief of the Department provisionally gave the complainant the duties of head of Library and Archives Services. In line with Regulation 3.8 b) the ITU paid him a special post allowance at P.3 as from 1 February 1994. After six months it broke off payment for one month. It then resumed payment with similar breaks of one month every six months.

After a probationary period of two years the complainant's appointment as head of Archives was confirmed as from 1 August 1995.

By a memorandum dated 13 November 1995 the complainant applied to the chief of the Personnel and Social Protection Department for payment of a special post allowance corresponding to P.4, the grade of the post of head of Library and Archives Services. In a memorandum of 16 February 1996 the chief of the Common Services Department asked the chief of Personnel to let the complainant have the allowance as from 1 January 1996. On 2 May the chief of Personnel asked for a new post description on the grounds that the one made in 1977 did not seem to match the complainant's actual duties.

By a decision dated 7 June 1996 the Secretary-General extended payment of his P.3 allowance as from 1 January 1996. On 13 June he asked the Secretary-General to raise the allowance to P.4. On 16 July the Secretary-General refused on the grounds that the post of head of Library and Archives Services and two others in the unit had been abolished at 1 January 1996. By a memorandum of 11 September the complainant lodged an appeal with the Appeal Board against the decision of 7 June. In its report of 22 November the Board recommended reversing that decision and paying him the allowance at P.4 under Regulation 3.8 a) as from 1 January 1996.

On 13 December 1996 the Secretary-General informed the complainant that because the post of head of

Library and Archives Services had been abolished he was rejecting the Board's recommendation. That is the decision he is impugning.

B. The complainant submits that from 26 January 1994 until the end of February 1997, when he went on unpaid leave, he performed the duties of the post. As the Appeal Board held, he was entitled to the allowance under Regulation 3.8 a) because after abolishing the post at 1 January 1996 the Union failed to "redefine" the duties formally assigned to him. Since the grade was beyond doubt P.4 he is entitled to the P.4 allowance under 3.8 c).

He wants the Tribunal to declare the decision of 13 December 1996 unlawful, set it aside insofar as it refuses him the allowance at P.4 and order the Union to pay him the allowance at that grade. He claims costs.

C. In its reply the ITU acknowledges that the additional duties the complainant took on do match some that the former head of Library and Archives Services carried out. But it contends that the conditions in 3.8 a) for the grant of the allowance at P.4 were not met: there was no "existing post" at a higher grade of which the complainant was actually performing the duties. There must be a recent post description that sets out the actual duties. Here the description dated back to 1977 and had never been revised. So there was no knowing whether the duties were still the same. Owing to the reforms in the library the post description was out of date and the further duties the complainant took on do not ascertainably warrant P.4. What is more, because of the reforms the post is to be P.3.

D. In his rejoinder the complainant points out that the post was abolished only two years after he had been given the duties. It is the supervisors' duty to see that a post description is up to date. Failing anything more recent the post description of 1977 is the main criterion. Making out that the post is only P.3 does not square with the findings of an outside consultant who helped with the reforms.

E. In its surrejoinder the Union refers the Tribunal to its submissions in the reply and produces the new description of the post which is graded P.3.

CONSIDERATIONS

1. The complainant joined the Union on 1 August 1993 as head of Archives at grade P.2.

The head of Library and Archives Services having retired, he became acting head on 1 February 1994. The post was graded P.4. He continued to carry out the duties until 28 February 1997, when he took one year's unpaid leave.

2. He was being paid a special post allowance at grade P.3 under Staff Regulation 3.8 b). On 13 November 1995 he asked the Personnel and Social Protection Department to pay him the allowance at P.4 in accordance with 3.8 a).

3. On 22 January 1996 the Union abolished the post of head of Library and Archives Services as at 1 January 1996.

4. By a decision of 7 June 1996 the complainant had his 3.8 b) allowance extended as from 1 January 1996, but with a break in May.

5. On 13 June 1996 he asked the Secretary-General to review that decision and grant him the allowance at P.4 under 3.8 a). By a memorandum of 16 July 1996 the Secretary-General refused.

6. On 11 September 1996 the complainant appealed to the Appeal Board against the decision of 7 June 1996 granting him the allowance under 3.8 b) at P.3. In its report of 22 November the Board recommended reversing the decision and granting him the allowance under 3.8 a) at P.4 as from 1 January 1996.

7. By a decision of 13 December 1996, which the complainant is impugning, the Secretary-General rejected the Board's recommendations on the grounds that the post of head of Library and Archives Services, No. S30/P4/234, had been "abolished at 1 January 1996".

8. The complainant asks the Tribunal:

"to declare the Secretary-General's decision of 13 December 1996 in breach of the Staff Regulations and general principles of law";

"to set it aside insofar as it refuses him the special post allowance at P.4 under Regulation 3.8 a)"; and

"to order the Secretary-General to pay at least 5,000 Swiss francs in costs."

9. The complainant is impugning the decision of 13 December 1996 on two counts: the Union "applied the wrong rule" to reckon his allowance, and it "got the amount wrong".

The material rule

10. It is common ground that the complainant had been receiving a special post allowance at P.3 under 3.8 b) since 1 February 1994 for taking on further duties after the retirement of the head of Library and Archives Services.

11. The reason why the Union applied 3.8 b) was, as the chief of Personnel explained, that the complainant was at the time on probation and a probationer may not benefit under 3.8 a).

12. On 9 June 1995, after two years' probation, the complainant was definitively appointed head of Archives as from 1 August 1995 at grade P.2. At the time he was still acting head of Library and Archives Services. On 13 November 1995 he asked that the allowance paid to him at P.3 under 3.8 b) be converted into one paid at P.4 under 3.8 a).

13. The Union's answer is that the conditions are not met for granting him an allowance under 3.8 a).

14. Regulation 3.8 a) says that a "non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". So it lays down two conditions. One is that there must be a post at a higher grade than the claimant's; the other that the claimant must be performing the duties of the post. The Union adds a third condition, that the post description must be recent. But it is wrong: there is neither a written rule nor any particular basic principle that lays down that requirement.

15. Regulation 3.8 b) says that "Exceptionally, when additional temporary work of at least four weeks duration, e.g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months". As the Board held, the complainant was not doing "additional temporary work", but was, to quote 3.8 a), "temporarily required to assume the responsibilities and duties of an existing post in a higher grade". Having been head of Archives at P.2, he started, on 1 February 1994, to perform and indeed continued to perform the duties of the P.4 post of head of Library and Archives Services.

16. The Union's pleas are that the post did not exist and that the description of it was invalid. They do not hold water. The duties that the ITU gave the complainant in February 1994 were those of post S30/P4/234. Two years went by before the Union abolished the post, and he went on performing the duties anyway. It is obviously the duty of supervisors and of the Personnel Department to keep post descriptions up to date. The latest one, even if not recent, is still the main yardstick.

The amount of the allowance

17. The complainant wants the Tribunal to approve the Appeal Board's recommendation for reckoning his allowance at P.4.

18. His claim succeeds. It is beyond question that the post of head of Library and Archives Services was graded P.4 and that he had been acting head since 1 February 1994.

19. There is no evidence to suggest that abolition of the post meant any change in his duties as acting head. So he is entitled to payment of the allowance at P.4 as from 1 August 1995, the date at which he definitively became head of Archives.

For the above reasons,

- 1. The Secretary-General's decision of 13 December 1996 is quashed.**
- 2. The ITU shall pay the complainant the special post allowance at grade P.4 as from 1 August 1995 in accordance with Staff Regulation 3.8 a).**
- 3. It shall pay him 4,000 Swiss francs in costs.**

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

**Michel Gentot
Jean-François Egli
Seydou Ba**

A.B. Gardner