

NINETY-FOURTH SESSION

Judgment No. 2181

The Administrative Tribunal,

Considering the fifth complaint filed by Mrs D. F. against the International Telecommunication Union (ITU) on 17 April 2002, the Union's reply of 14 June, the complainant's rejoinder of 19 July and the letter of 9 August 2002 by which the Union informed the Registrar of the Tribunal that it did not wish to submit 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, for which neither party has applied;

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

A. Until September 1978 the complainant was employed by the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) and participated in the United Nations Joint Staff Pension Fund (UNJSPF). She joined the ITU as a proof-reader under a short-term contract dated 12 September 1978, which took effect the following day. This contract, which contained a clause excluding participation in the UNJSPF, was extended three times with the same conditions, the last time until 30 June 1979. In the meantime, the complainant had applied on 22 March for a post as editorial assistant at grade G.6. She was selected for the post, and on 10 May the ITU offered her an appointment for a trial period of six months. The contract granted to her with effect from 13 May 1979 replaced her previous contract and likewise excluded participation in the UNJSPF. On 12 November 1979 the complainant was offered a probationary appointment beginning on 15 November 1979, which is the date on which she was entitled to resume participation in the UNJSPF. She obtained a permanent appointment on 1 December 1980. Further details concerning the career of the complainant, who retired on 1 April 2000, can be found, under A, in Judgment 1678, which concerns her third complaint.

The central issues of the present dispute are the break in the complainant's participation in the UNJSPF between 13 September 1978 and 14 November 1979 and its impact on the amount of her pension. On 30 November 1999 the complainant received an estimation of the amount of her future pension. Taking the view that the said break would cause her a loss of income of 2,934 United States dollars per annum, she wrote to the Secretary-General on 22 December 1999 asking him to validate her service for the period in question. Having received no reply, she lodged an appeal with the Appeal Board on 13 March 2000. Despite her reminders, the complainant was unable to obtain a decision from the Board on her appeal. By a letter of 18 December 2001 she sought the Secretary-General's authorisation to go straight to the Tribunal, asking him to reply by 18 January 2002, failing which she would interpret the absence of a reply as implied consent. This letter likewise remained unanswered.

B. On the issue of receivability, the complainant explains that the "intolerable" delay in processing her internal appeal led her to seek leave to appeal directly to the Tribunal. Since she had received no reply by 18 January 2002, that is the date from which the time limit for filing a complaint with the Tribunal began to run. She filed her complaint on 17 April 2002 and it is therefore receivable.

On the merits, the complainant explains that at the relevant time, Rule 6.A of the Staff Rules Applicable to Conference and Other Short-term Service provided that this category of employees could not participate in the UNJSPF. However, in 1978-79 most organisations had adopted a practice allowing retroactive participation where short-term contracts were renewed without a break for a cumulative period of more than one year, or in the event

of a request for validation of prior service. The provision in question should therefore be interpreted in the same way. Yet the ITU's Personnel Department, of its own initiative, introduced stricter conditions of application and thereby breached the legality principle. The complainant states that when she resumed participation in the Fund, she enquired as to the possibility of validating the period during which she had not been eligible for participation, but was informed that this was impossible. At that time, she made no further enquiries, believing that the Union's position could not be unlawful.

The complainant also considers that the ITU breached the principle of good faith by granting her a trial contract on 13 May 1979 instead of a probationary appointment as stipulated in the vacancy notice. This she describes as a "genuine subterfuge" designed to deprive her of pension entitlements. Referring to the Tribunal's case law, she emphasises that the organisation has a duty not to cause its staff undue injury. She denounces the Union's practice of tolerating the granting of short-term contracts for periods of more than one year without rectifying the situation of the staff members concerned as regards participation in the UNJSPF, which did not take account of the provisions of Article 21 of the Pension Fund Regulations.

Lastly, the complainant points out that through the impetus given by the United Nations General Assembly the practice of excluding participation in the UNJSPF for certain categories of employees has been modified. She considers that the Union breached the principle of equal treatment, since there is no objective factor justifying the difference between the treatment she received and that accorded to ITU staff members after the modification of the said practice.

The complainant asks the Tribunal to set aside the implied decision to reject her appeal; to declare that her non-participation in the UNJSPF between 13 September 1978 and 14 November 1979 contravenes the three principles mentioned above; and to set aside the appointment decisions of 12 September 1978 and 10 May 1979 insofar as they excluded participation in the UNJSPF, and likewise that of 12 November 1979, insofar as it was not given retroactive effect from 13 May 1979. To remedy the injury she claims to have suffered, she seeks the validation of the disputed period of service or, failing that, a lump-sum compensation payment of 2,934 dollars per annum, plus interest, with effect from 1 April 2000. Lastly, she seeks an award of 80,000 Swiss francs representing interest on payments due and moral damages, as well as 6,000 francs in costs.

C. In its reply, the Union submits that during the period in question the complainant was employed not under a single contract of more than one year in duration but under two different short-term contracts. Regarding the nature of these contracts or the granting of a trial contract instead of a probationary appointment, these issues were the subject of administrative decisions which could have been challenged, but the complainant never made use of the means of appeal that were open to her. Given that her probationary appointment was converted into a permanent appointment after one year, rather than the two years initially stipulated, she was not given less favourable treatment than other staff members. When she was nominated for a probationary appointment, she chose not to challenge the fact that she was excluded from participation in the UNJSPF; she cannot now seek to remedy the consequences of her failure to act. The Union points out, in particular, that in the absence of any deliberate intention to cause her injury, the principle of good faith has not been breached.

Article 23 of the Pension Fund Regulations provides that a period of prior service during which a staff member was not eligible for participation in the UNJSPF may be validated, provided that the terms of the staff member's appointment did not expressly exclude participation during that period. The complainant was therefore not entitled to validation of service for the disputed period. Furthermore, her request ought to have been made within one year of the commencement of her participation. Consequently, to accept her reasoning would be to deprive Article 23 of all substance.

D. In her rejoinder the complainant argues that the Union's refusal to combine the respective durations of her two short-term contracts is totally contrary to the spirit and purpose of Article 21 of the Pension Fund Regulations. Moreover, in Judgment 1886 the Tribunal held that continuous employment under a series of different contracts does not preclude the retention of staff members' acquired rights. She emphasises that under the Staff Regulations and Staff Rules, it is the probationary appointment preceding a permanent appointment that constitutes the trial period, and that her appointment in December 1980 was granted not as a favour but in recognition of the quality of her work.

She asserts that Rule 6.A was not applicable to her because she had previously participated in the UNJSPF. The provision which ought to have been applied to her is Article B.6 of the UNJSPF Administrative Rules, which

stipulates that a participant who leaves the service of one member organisation and enters the service of another "without an interruption in the continuity of his or her employment" shall, subject to Article 21 of the Pension Fund Regulations, remain a participant in the Fund. She maintains that the ITU's practice, between 1978 and 1979, with regard to short-term contracts was "more restrictive and more penalising" than that of the majority of the other organisations of the United Nations common system.

CONSIDERATIONS

1. The complainant, who worked until 12 September 1978 at ICITO/GATT, where she participated in the UNJSPF, joined the ITU on 13 September 1978 under a short-term contract as a proof-reader. This contract, which excluded participation in the UNJSPF, was extended three times, ultimately until 30 June 1979.

Meanwhile, on 22 March 1979, she had applied for a post as editorial assistant, grade G.6, which had been advertised by a vacancy notice of 16 March. She was selected for the post and offered an appointment for a trial period of six months. The contract granted to her with effect from 13 May 1979 replaced her previous contract and excluded participation in the UNJSPF.

On 12 November 1979 she was granted a probationary appointment, "normally lasting two years", which began on 15 November. With effect from 1 December 1980, she obtained a permanent appointment and she remained in the employ of the Union until she retired on 1 April 2000.

2. By a letter of 31 January 1980, the UNJSPF informed the complainant that her appointment at the ITU had caused a break in her participation between 13 September 1978 and 14 November 1979 and that validation of service would only be possible if she had been employed on a full-time basis by a member organisation of the UNJSPF during the period in question.

According to the complainant, when she resumed participation in the UNJSPF, she contacted the personnel officer in charge of UNJSPF matters in order to obtain details of the steps required for validation of the said period, but he replied that it was not possible under the current rules. The complainant acknowledges that at that time she took no further steps.

3. On 30 November 1999 she received an estimate of the amount of her future retirement benefit. In view of the loss of income resulting from the fact that the period of service from 13 September 1978 to 14 November 1979 was not taken into account, on 22 December 1999 she sent the Secretary-General a request for validation of her service during that period.

Having received no reply on expiry of the six-week period provided for in Staff Rule 11.1.1(2)(b), the complainant lodged an appeal with the Appeal Board on 13 March 2000. The Board received the parties' submissions and examined the internal appeal, but despite the complainant's reminders, it never produced a report or expressed an opinion. The complainant then asked the Secretary-General, on 18 December 2001, to allow her to bring her case directly before the Tribunal. She asked him to reply no later than 18 January 2002.

Since the Secretary-General did not reply within that deadline and the Appeal Board has since taken no further action to process the appeal, the complainant filed a complaint with the Tribunal on 17 April 2002. She asks the Tribunal to:

- set aside the implied rejection of her appeal by the Secretary-General of the ITU;
- declare that the failure to take into account for retirement purposes her service at the ITU from 13 September 1978 to 14 November 1979 contravenes the principles of legality, good faith and equal treatment;
- set aside the appointment decisions of 12 September 1978 and 10 May 1979 insofar as they excluded participation in the UNJSPF;
- set aside the decision of 12 November 1979 by which she was granted a probationary appointment, insofar as it was not given retroactive effect from 13 May 1979;

- award compensation in respect of the resulting injury;
- award her 80,000 Swiss francs representing interest on sums due and moral damages; and
- award her costs.

4. The complainant argues that by refusing to grant her request for validation, the Secretary-General is confirming a situation which is unlawful for want of legality, good faith and equal treatment.

5. The complainant considers that the impugned decision contravened the legality principle. She asserts that the ITU, like the other organisations of the United Nations common system, must bring its internal rules and regulations into line with Article 22 of the Universal Declaration of Human Rights, which provides, inter alia, that "[e]veryone, as a member of society, has the right to social security". It must therefore ensure that its staff are insured for retirement, death and disability through participation in the UNJSPF or an equivalent insurance system. The complainant adds that although the said organisations have generally accepted a limitation of that principle in the case of short-term contracts, that limitation remains compatible with Articles 21 and 23 of the Pension Fund Regulations.

The complainant criticises the ITU because on the basis of Rule 6.A of the Staff Rules Applicable to Conference and Other Short-term Service, it has excluded participation in the Pension Fund for staff appointed under short-term contracts without adopting special provisions for cases where an employee engaged under such a contract has previously participated in the Fund. She adds that those provisions likewise fail to cover the issue of subsequent validation of service for such employees; nor do they provide for the situation whereby successive short-term contracts can result in an unbroken period of service exceeding the one-year limit stipulated in Staff Rule 4.14.3(a).

The complainant considers that the issues left open by the ITU's internal rules and regulations should be resolved by reference to the practice within the United Nations common system. She submits that in 1978-79 most organisations of the common system had adopted a practice on short-term contracts enabling Articles 21 and 23 of the Pension Fund Regulations to apply in full. This practice consisted of stating in short-term contracts that such contracts did not *ipso facto* lead to participation in the UNJSPF, and allowing retroactive participation without reservations in the event that the period of service extended beyond one year without interruption, or in the event of a request for validation of prior service.

The complainant considers that the above-mentioned Rule 6.A should have been interpreted likewise. Consequently, the Personnel Department could not of its own initiative introduce stricter requirements without breaching the legality principle. It is therefore incomprehensible that the forms used by the ITU in 1978 and 1979 for short-term appointments contained the following pre-printed clause:

"This appointment excludes participation in the United Nations Joint Staff Pension Fund".

Indeed, according to the complainant, the wording of this clause clearly referred to the text of Articles 21 and 23 of the Pension Fund Regulations, which created an exception where the terms of the staff member's appointment had expressly excluded participation in the Fund. Thus, she argues, the ITU's practice of relying on the pre-printed clause in short-term contracts to assert that validation of prior service was impossible gave an entirely different meaning to the Pension Fund Regulations, which were never intended to exclude certain categories of employees from the insurance cover provided by the UNJSPF.

She concludes that there was no valid legal basis for the ITU to disregard the relevant provisions of the Pension Fund Regulations and Administrative Rules and to assert that she was not entitled to seek the validation of her service for the period between 13 September 1978 and 14 November 1979.

6. The ITU reiterates the arguments it raised before the Appeal Board. It points out that the complainant was not entitled to request the validation of her service for the period from 13 September 1978 to 14 November 1979, given that the contracts granted to her during that period expressly excluded participation in the UNJSPF. It draws the Tribunal's attention to the fact that Article 23 of the Pension Fund Regulations applies in the present case and that the complainant's request for validation of service on 22 December 1999 was time-barred, since under Article 23 the request ought to have been submitted within one year of 15 November 1979.

7. The Tribunal notes that the central issue of the complaint is the validation of the complainant's service for the period from 13 September 1978 to 14 November 1979 on the basis of Article 23(a) of the UNJSPF Regulations, which provides as follows:

"A participant may elect, within one year of the commencement of participation, to validate prior service during which he or she was not eligible under these Regulations for participation, provided that (i) participation succeeded the ending of such service within two years, (ii) the service was the most recent prior to participation and had not been interrupted by a break of more than one year, (iii) participation had not, during such service, been expressly excluded by the terms of appointment, and (iv) the totality of the period open to validation is elected."

What emerges from this article is that staff members whose terms of appointment expressly excluded participation in the UNJSPF during the period of service preceding their participation cannot subsequently request the validation of that period of service. That was the case with the complainant, whose short-term contract, renewed three times, contained a clause stipulating that her appointment excluded participation in the UNJSPF, as did her six-month trial contract. For short-term contracts, the basis of that clause was Rule 6.A, which provided that staff members engaged under short-term contracts could not participate in the UNJSPF.

The Tribunal finds no illegality in the application of the above-mentioned provisions to the complainant's case. She could, of course, have made use, at the time when she was granted her short-term or trial appointments, of the appeal mechanisms established by the Union, to obtain a modification of the terms of her contracts, or to challenge the legality of Rule 6.A. However, since she failed to do so in due time, she is hardly in a position to seek the annulment of her appointments of 1978 and 1979 more than 20 years later. Besides, the nature of those appointments can no longer be challenged. The argument that the complainant did not use the available means of appeal for fear of harming her career cannot be accepted. Moreover, her request for validation of service, which was submitted on 22 December 1999, must be considered to be time-barred.

Consequently, the complainant's plea of a breach of the legality principle is unfounded and must fail.

8. The complainant submits that the Union breached the principle of good faith. She states that it resorted to a "genuine subterfuge" in granting her a six-month trial contract with effect from 13 May 1979, instead of a probationary appointment as stipulated in the vacancy notice, which would have enabled her to participate in the UNJSPF as soon as she took up her duties as editorial assistant.

Given that no deliberate intention on the part of the Union to cause the complainant injury can be discerned, and since the Union did not omit to inform the complainant of "any action that may imperil [her] rights or rightful interests" (see Judgment 1756, under 10(b)), it cannot be said in the present case that the principle of good faith has been breached. As the ITU rightly observes, the complainant entered quite wittingly into the contract of employment that was offered to her (see Judgment 1450, under 25).

9. The complainant considers herself to have been the victim of a breach of the principle of equal treatment. She contends that the ITU's practice with regard to short-term contracts during the period 1978-79 was more restrictive and more penalising for staff members than the one applied by the majority of other organisations of the United Nations common system. Indeed, she argues, the change observed in most organisations, whereby any clause that was more restrictive than the requirements stemming from Article 21 of the Pension Fund Regulations was eliminated, had not taken place at that time at the ITU, which had thus breached its commitment to maintain a practice convergent with the rules of the common system.

The complainant adds that there is no objective factor justifying a difference between the treatment she received in 1978-79 and that received by other ITU staff members after the modification of the practices in force.

However, the Tribunal emphasises, in accordance with a firm line of precedent, that a breach of the principle of equal treatment implies that the administration has given different treatment to employees who are in the same situation both in fact and in law (see Judgment 1445, in particular), which was clearly not the case here. Indeed, the complainant does not mention any staff member who was in the same situation in fact and in law and who was treated differently from her.

Consequently, this plea fails.

10. In view of the foregoing considerations, the complaint must be dismissed as unfounded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet