

FIFTY-FOURTH ORDINARY SESSION

In re ZAHAWI

Judgment No. 633

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Telecommunication Union (ITU) by Mr. Muqbil Zahawi on 24 November 1983 and corrected on 1 December, the ITU's reply of 10 February 1984, the complainant's rejoinder of 11 April and the ITU's surrejoinder of 1 June 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 5.2.1 and 9.5 and Rule 5.1.1(b) of the ITU Staff Regulations and Staff Rules;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a citizen of Iraq, was head of a section of the Personnel Department of the ITU in Geneva and held grade P.4 under a permanent appointment. In mid-1982 he was granted sick leave, and the ITU let him take it in Cairo. On 30 October 1982 he wrote from there applying for one year's special leave without pay, to start at the end of his sick leave. On the recommendation of the United Nations medical consultant in Cairo his sick leave was extended to 31 March 1983. On 16 February 1983 he wrote again asking for special leave, but only up to 30 September. By a letter of 29 March the Secretary-General informed him that to make savings his post had been abolished and if no other could be found his appointment would end; the three months' notice required under Regulation 9.5 would start on 1 April. On 4 April he replied, asking again that he be put on special leave up to 30 September and also that the three months' notice start on 1 October; failing that, was he to be treated as taking annual leave or must he return to Geneva at once? In a letter of 18 April addressed to Cairo the Secretary-General told him that his application for special leave was now pointless and that he was put on annual leave, from 1 April, for the three-month period of notice. He did not get the letter in Cairo. He left for Geneva and on Monday 2 May reported for duty, only to be shown a copy of the letter and told there was no work for him to do. At the end of a letter of 5 May to the Secretary-General objecting to the termination of his appointment he asked that his annual leave end -- in fact on 29 April -- because he had turned up for work. On 10 May the Secretary-General refused, confirming his decision to put the complainant on annual leave from 1 April and citing Rule 5.1.1(b), which reads: "Leave may be taken only when authorized. The exigencies of the service may require that leave be taken by a staff member during a period designated by the Secretary-General...". The complainant appealed on 30 May to the Appeal Board. Meanwhile the Secretary-General changed his mind about the application for special leave, and in a letter of 14 June suggested that, once he had used up his annual leave, as required by Regulation 5.2.1, he might have special leave up to 31 October; the three-month period of notice would start on 1 November. The complainant accepted the offer. On 3 August the Board recommended reversing the decision to keep him on annual leave from 2 May, but by a letter of 26 August, the challenged decision, the Secretary-General refused: this meant that he had been on annual leave from 1 April until it ran out on 20 July and was then on special leave from 21 July to 31 October.

B. The complainant submits that it was wrong to make him take annual leave from 2 May, when he reported for duty. He should not have had to start using up his annual leave until 15 June -- when the Secretary-General's offer took effect -- and then only as a prior condition for the special leave. His annual leave would thus have taken him up to 8 September and he would have had full pay up to that date and not just until 20 July. The reason why he returned to Geneva was that his special leave had not yet been granted and indeed he learned on 2 May it had actually been refused. The purpose of Rule 5.1.1(b) is to empower the Secretary-General to make someone take annual leave at a convenient time, not when he does not want to go on leave at all. In any event the rule cannot apply to accrued leave, the taking of which is required only by Regulation 5.2.1. Since he did not get the letter of 18 April in Cairo it was reasonable for him to report for duty on 2 May and to expect to be working from that date. He seeks the quashing of the decision of 26 August to keep him on annual leave from 2 May to 14 June 1983, payment of remuneration during that period, and costs.

C. The ITU makes two main submissions in its reply. First having unconditionally accepted the Secretary-General's offer of 14 June, the complainant is estopped from making any further claim. The offer was to his advantage: its purpose and effect were to give him another three months' salary for the period from 1 November 1983 to 31 January 1984 and to allow more time to find him another assignment. Secondly contrary to the Board's view, Rule 5.1.1(b) does authorise the Secretary-General to make someone take annual leave, and he was right to do so in this case since no "exigencies of the service" could be more imperative than budgetary cuts requiring the abolition of posts. The ITU submits that precedent supports this view. It invites the Tribunal to dismiss the complaint as devoid of merit.

D. The complainant presses his claims in his rejoinder. He challenges several allegations of fact in the reply and develops his pleas. He sees nothing in the case law to support the view that a staff member may be compelled to take annual leave: the cases cited by the ITU are not parallel.

E. In its surrejoinder the ITU observes that the rejoinder raises no new material issue and fails to refute the arguments in its reply about estoppel and the Secretary-General's authority to put an official on leave if the "exigencies of the service" so warrant.

CONSIDERATIONS:

1. The complainant was employed on a permanent contract at the P.4 grade in the Personnel Department of the ITU. He was first appointed to the organisation in February 1967. On a date prior to 20 July 1982 he sought and obtained sick leave and permission to spend his sick leave in Cairo. His sick leave was subsequently extended to terminate on 31 March 1983. On 29 March 1983 the Secretary-General advised him that his post had been abolished for budgetary reasons and that his contract would be terminated, the three months' period of notice to commence from the end of his sick leave. On 18 April 1983 the Secretary-General placed the complainant on ordinary leave from 1 April 1983 and during the three months' notice period, and this is the decision impugned in these proceedings.

2. The complainant had earlier applied for leave without pay, preferably to start as soon as his sick leave was over. In his letter of 18 April 1983 the Secretary-General observed that there would be little point in granting the leave applied for, the decision having been taken to abolish the complainant's post.

3. On 14 June 1983, however, the Secretary-General wrote to the complainant stating that he had reconsidered his decision and that he would grant "leave without pay after you have exhausted your accumulated leave (Regulation 5.2, paragraph 1) and until the end of October 1983". He added that, if the complainant accepted this offer, the notice period would start on 1 November 1983. By letter dated 17 June 1983 the complainant accepted the offer.

4. In the opinion of the Tribunal, the unconditional acceptance by the complainant of the Secretary-General's offer, which, incidentally, conferred certain financial benefits on the complainant, amounted to a withdrawal of any objection he may have had to the Secretary-General's placing him on leave in the first place. Any question of principle which he might have been able to raise in regard to his being placed on leave otherwise than on his own application, and any distinction he might have sought to draw between annual leave entitlement and accrued annual leave, have been rendered purely hypothetical by his acceptance of the arrangement offered by the Secretary-General.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

André Grisel

Jacques Ducoux

William Douglas

A. B . Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.