

SEVENTY-SIXTH SESSION

In re ANDERSON

Judgment 1322

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rolf Ingemar Anderson against the International Telecommunication Union (ITU) on 23 February 1993, the ITU's reply of 26 March, the complainant's rejoinder of 20 April and the Union's letter of 14 May 1993 to the President of the Tribunal;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Regulation 3.15 and Rules 3.4.2, 4.12 b) and 11.1.1.2 b) of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

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

A. The complainant is a Swedish citizen who was born in 1933. The ITU employed him at its headquarters in Geneva for many years. On 1 October 1984 he changed from the General Service category of staff, in which he had held grade G.7, to the Professional category, in which he was granted grade P.3. As an official of the ITU he paid contributions to the United Nations Joint Staff Pension Fund.

In 1989 the contributions he was paying to the Fund towards his pension on retirement were lower than those he would have been making had he still had grade G.7, the reason being the fall since 1984 in the rate of exchange for the United States dollar against the Swiss franc. In a letter of 12 June 1989 to the Secretary-General he asked that "special measures be applied" to ensure that his promotion would "not result in a future pension level below what would have been obtained if not promoted". Having got no answer within the time limit of six weeks set in Rule 11.1.1.2 b) of the Staff Rules, he appealed to the Appeal Board on 25 July 1989. In its report of 25 October the Board recommended rejecting his appeal, it was accordingly rejected, and he did not then pursue the matter.

In a letter of 26 August 1992 he asked the Secretary-General to pay him the salary he would have received in the first half of 1991 and from 1 January 1992 onwards had he kept grade G.7 and to restore the amount of his pension to at least the equivalent of what it would have been but for the change in his grade in 1984. The Secretary-General refused by a memorandum of 8 October. The complainant appealed to the Appeal Board on 20 October 1992 and, having got no reply, filed this complaint on 23 February 1993 against what he inferred as the rejection of his claim.

Meanwhile, in its report dated 19 February 1993, the Board had recommended no action by the Secretary-General for the time being though it expressed the view that the case might serve as an example of the failure of the United Nations system to ensure the fair treatment of staff promoted from the General Service to the Professional category.

B. The complainant observes that it was in 1989 that he first realised that because of a sharp fall in the value of the dollar against the Swiss franc the contributions he was paying to the Pension Fund were lower than they would have been had he not moved from grade G.7 to P.3 in 1984 and that his pension entitlements on retirement would suffer accordingly. The Appeal Board's comment on the appeal he lodged with it on 25 July 1989 was that it was irreceivable: it was too late because he had failed to challenge at the time the decision to promote him to P.3, and it was premature because he could do no more than make "conjectures" about the amount of his future pension. He explains that he is taking the matter up again because the amount of his pension is no longer a matter for conjecture.

The recent practice of the ITU is to protect the position of anyone in the General Service category who is put on a post in the Professional category by letting him opt to keep his present grade; but that does not help officials who changed categories before the decline of the dollar, and they are therefore being discriminated against. The consequences of such discrimination should be removed with retroactive effect.

Rule 3.4.2.3 b) of the ITU Staff Rules reads:

"Where promotion from the General Service category to the Professional category results in a decrease of a staff member's pensionable remuneration, he shall keep his pensionable remuneration at the level which it had reached immediately prior to the promotion until that level is exceeded as a result of advancement or further promotion."

That text was adopted when currencies were stable and the ITU is using it improperly for the purpose of systematic reduction in staff pay. The Union ought to have warned him that pay in the Professional category might prove volatile. He pleads breach of Regulation 3.15 of the ITU Staff Regulations, which reads:

"Pensionable remuneration shall, without prejudice to the conditions of engagement of the staff member, consist of the amount calculated in accordance with the provisions of the Regulations of the United Nations Joint Staff Pension Fund."

In his submission the reduction in his pension, which is due to the reduction in his pensionable remuneration at grade P.3, constitutes - to quote that Regulation - "prejudice to [his] conditions of engagement".

He seeks the "adjustment" -

(a) of "salary and all other benefits" due after 30 September 1985 to "levels in harmony with the original intent of Staff Rule 3.4.2, i.e. by maintaining the salary difference in force during the first year of promotion until the end of the service period", such adjustment to "take into account the difference in hours worked by Professional staff in Geneva and New York";

(b) of "pension in accordance with Staff Regulation 3.15, taking into account the pension [he] would have obtained without promotion"; and

(c) of "all benefits for the last three years, up to and including retirement, on the basis of what would have been due" during that period if he had not been promoted.

C. In its reply the ITU submits that the complaint is irreceivable on two grounds.

First, the complainant did not include in his internal appeal the part of claim (a) above that he founds on "the difference in hours worked by Professional staff in Geneva and New York". To that extent he has failed to exhaust the internal means of redress and his present complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

Secondly, his claims to adjustment of salary are out of time and to that extent the complaint is again irreceivable. He knew full well long before 1992, and certainly no later than 25 July 1989 when he lodged his first internal appeal, that his salary at grade P.3 was lower than what it would have been had he still been at grade G.7.

In any event, says the Union, his complaint is devoid of merit. He founds his claims solely on the ITU's too narrow interpretation of Rule 3.4.2.3. In fact its reading of the text is sound. The rule applies only where the promotion, at the time at which it takes effect, brings about a reduction in the official's pensionable remuneration. In the complainant's case the material date was 1 October 1984, that of his promotion. Since the amount of his pensionable remuneration then actually increased, the rule did not come into play at all. Besides, it does not apply *ad infinitum*: if it did, the amounts of salary and pensionable remuneration would become acquired rights, and that is plainly untenable.

The complainant may not plead ignorance of the material rules. Rule 4.12 b) stipulates: "In accepting appointment the staff member shall state that he has been acquainted with and accepts the conditions laid down in these Staff Regulations and Staff Rules". Since the Regulations and Rules give in dollars the salary scales applicable to Professional category staff the complainant must have known the basis of reckoning his salary. Promotion is not a unilateral decision by the ITU: he accepted it of his own free will.

D. In his rejoinder the complainant enlarges on his original pleas and seeks to refute those put forward by the Union on the receivability and the merits of his complaint. He sets out in detail his objections to the Appeal Board's reasoning in its report of 19 February 1993. He denies that he realised long before 1992 that his salary at P.3 was lower than what it would have been at G.7 and that his case rests solely on the interpretation of Rule 3.4.2.3. He explains that what he wants is the correct interpretation of that rule as it was conceived at the time of its adoption, and he takes exception to the purely formal objections raised by the defendant.

CONSIDERATIONS:

1. The complainant, an official of the ITU, used to belong to the General Service category of staff. On 1 October 1984 he was transferred from a post graded G.7 to one in the Professional category that was graded P.3. As a result his status and his conditions of service changed and his salary, which till then had been denominated in Swiss francs, was stated in United States dollars.

2. On 26 August 1992 he wrote to the Secretary-General of the Union asking that his basic pay for the first half of 1991 and from 1 January 1992 on should match the higher amounts he would have obtained had he not been promoted; claiming recalculation of his pension so that it would "at least" match what he "would have obtained without promotion"; and contending that he ought to have been granted the "normally expected" increases in remuneration due on account of his advancement by two grades in the Professional category. On this last point he explained that the submission of the claims in his letter "in no way precludes any further claim" at a later date. In a memorandum dated 8 October 1992 the Secretary-General replied that he could not, for reasons he set out, allow the complainant's claims. On 20 October 1992 the complainant lodged an appeal with the ITU Appeal Board. In its report dated 19 February 1993 the Board "recommended no action to be taken by the Secretary-General at the present stage". On 23 February the complainant filed this complaint and his claims are summed up at the end of B above.

3. As to his claim to the adjustment of his salary and benefits after 30 September 1985 the Tribunal observes that he was aware as early as 1989 of the difference between his pay at grade G.7 and his pay at P.3. On 25 July of that year he lodged with the Appeal Board an appeal, which proved unsuccessful, about the interpretation of Rule 3.4.2. He took the matter no further at the time. The claim is clearly time- barred and therefore irreceivable under Article VII(2) of the Tribunal's Statute, which sets a time limit of ninety days for appealing against a final decision to the Tribunal.

4. In answer to his claim to the adjustment of his pension entitlements, all that need be said is that such entitlements depend on pensionable remuneration, which determines the amount of the contributions due from the staff member to the United Nations Joint Staff Pension Fund; that pensionable remuneration must be reckoned in accordance with the Regulations of the Fund; and that the complainant's contributions were correctly based on the pensionable remuneration corresponding to his P.3 grade. The claim is therefore devoid of merit.

5. He also claims the adjustment of "all benefits for the last three years, up to and including retirement, on the basis of what would have been due" if he had not been promoted. Insofar as that claim coincides with his claim to the adjustment of salary and benefits "after 30 September 1985" it is irreceivable for the reasons stated in 3 above; and insofar as it goes beyond that claim it is irreceivable under Article VII(1) of the Tribunal's Statute because he did not make it in the context of his internal appeal and has therefore failed to exhaust the internal means of redress.

6. Lastly, he has contended - though he does not make a formal claim to that effect in the complaint form - that he ought to have been granted salary increments corresponding to advancement by two grades in the Professional category. But he has cited no provision of the Regulations or Rules which requires or even permits such adjustment of pay. Rule 3.4.2.3 does not help his case because it merely serves to determine new basic salary when a staff member moves from the General Service to the Professional category: once the new basic salary is established the rule has no further application.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda
William Douglas
Mark Fernando

