EIGHTIETH SESSION

In re SAUNDERS (No. 13)

Judgment 1466

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 30 November 1994, the ITU's reply of 17 February 1995, the complainant's rejoinder of 3 March and the Union's surrejoinder of 7 April 1995;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Information on the complainant's career at the Union has appeared under A in Judgments 970, 989 and 1018.

Like his tenth complaint, on which the Tribunal ruled in Judgment 1422, this dispute arises out of the complainant's discovery of what he sees as a procedural defect in competitions the Union held to fill two vacancies at grade G.7 in 1990 and 1991. In letters dated 18 December 1990 and 27 March 1991 the Chief of the Personnel Department told the complainant, who had applied for both posts, that his applications had not been successful.

By a memorandum of 15 June 1994 the complainant asked the chairman of the Appointment and Promotion Board to tell him who had sat on the Board that had examined his applications for the posts. After receiving the chairman's reply of 20 June he asked the Secretary-General in a letter of even date to review the appointments he had made to those posts on the grounds that the grade of one of the Board's members had not been equal to or higher than that of the vacant posts. By a memorandum of 28 July the Secretary-General rejected his request as time-barred.

The complainant put his case to the Appeal Board on 5 August 1994. The Board recommended rejecting his appeal in a report dated 1 November. In a memorandum of 15 November 1994, the impugned decision, the Secretary-General upheld his earlier decision.

B. The complainant submits that the exceptional circumstances of his case warrant waiver of the time limit for appeal. He could not have gained knowledge of the Union's breach of procedure in time. What is more, the breach was "deliberate" and recurred several times.

On the merits he observes that, although decisions on appointments are discretionary, the Tribunal will quash them for breach of a procedural rule.

He accordingly seeks the quashing of the appointments; moral and material damages in an amount equal to the difference between his pay and what he would have got at the highest step in grade G.7 as from the date of the appointments; the reckoning of his salary and entitlements at the highest step in grade G.7 at non-local rates or, failing that, a "transitional allowance" equal to the difference between his pay at step 12 of P.2 and what he would have got at step 12 in G.7; compensation for any loss of pension entitlements as a P.2; and an award of costs.

C. In its reply the ITU contends that the complaint is irreceivable because the complainant failed to appeal within the six-week time limit set in Staff Rule 11.1.1.2 a). It is plain from the case law that time limits apply even if the decision under challenge is tainted with a procedural flaw. In any event the burden was on the complainant to gather the information necessary for his appeal within the available time.

On the merits the Union acknowledges that there was "a slight procedural irregularity" but denies that it had any causal bearing on the complainant's failure to win the competitions.

D. In his rejoinder the complainant contests the Union's pleas on receivability and maintains that, however "slight"

the flaw, a decision that offends against the rules must be set aside. He presses his claims and asks the Tribunal to order the ITU to inform all the unsuccessful applicants for the two posts of the "procedural irregularity in the selection process which entitles them to appeal against the decision to reject their application and ... claim damages".

E. In its surrejoinder the Union presses its arguments in the reply, objecting to what it calls a display of "bad taste" in the rejoinder.

CONSIDERATIONS:

1. The complainant applied for two vacant posts at grade G.7 which the ITU had advertised in October 1990 and January 1991. The Union informed him by letters of 18 December 1990 and 27 March 1991 that his applications had not been successful. He did not ask for review of either of those decisions within the time limit of six weeks set by Staff Rule 11.1.1.2 a).

2. As is recounted in Judgment 1422, under 1 and 2, he applied for another G.7 post on 23 April 1993. That application too having proved unsuccessful, he made an appeal on 30 November 1993 which went to the Appeal Board. In its report the Board upheld his contention that one of the members of the Appointment and Promotion Board had not, as Staff Regulation 4.9 e) required, held a post at a grade "at least equal" to that of the vacant post and that that Board had therefore been improperly constituted. On 21 July 1994 the Secretary-General accordingly reversed the appointment he had challenged and directed the Appointment and Promotion Board to proceed de novo. The complainant impugned that decision in his tenth complaint, which he filed on 10 August 1994. The Tribunal dismissed the complaint in Judgment 1422.

3. On 15 June 1994, while the proceedings in the tenth complaint were still pending, the complainant addressed an inquiry to the chairman of the Appointment and Promotion Board about the composition of the Board that had considered his two applications of October 1990 and January 1991 for G.7 posts. He discovered from the chairman's reply of 20 June 1994 that the Board had been improperly constituted, for the same reason, on those occasions as well. He thereupon sent the Secretary-General the very same day a request for review of the decisions of 18 December 1990 and 27 March 1991 rejecting those applications. In his reply of 28 July 1994 the Secretary-General rejected his request on the grounds that he had failed to observe the time limit of six weeks in Rule 11.1.1.2 a) and it was therefore time-barred. On 5 August 1994 he appealed to the Appeal Board. In its report of 1 November 1994 that Board too held that his appeal was time-barred and recommended rejection. By a memorandum of 15 November 1994, the decision impugned, the Secretary-General accordingly rejected his appeal.

4. The material issue is whether, as the complainant contends, the time limit of six weeks in Rule 11.1.1.2 a) is to be reckoned, not from the dates of notification of the decisions of 18 December 1990 and 27 March 1991, but from 20 June 1994, the date at which he discovered the defects in the membership of the Board.

5. Precedent has it that a time limit is a matter of objective fact and begins to run when a decision is notified. If that were not so, whatever considerations of equity there might be, there could be no certainty in legal relations between the parties, and such certainty is the whole purpose of time limits: see Judgments 752 (in re Goldschmidt) and 955 (in re Pineau), both under 4, and 603 (in re Grant), under 3. The only exceptions that the Tribunal has allowed are where the complainant has been prevented by vis major from learning of the decision (see Judgment 21: in re Bernstein) and where the defendant has misled him or withheld some document from him in breach of good faith (see Judgment 752).

6. It is therefore immaterial that the complainant discovered too late new facts that, in his submission, showed the decisions of 1990 and 1991 to have been unlawful.

7. The complainant seeks to get round the difficulty by accusing the Union of bad faith. His argument is that it has repeatedly violated the same Staff Regulation, 4.9 e), and must therefore be presumed to have committed the same error deliberately. The defendant admits in its reply that an error was made in the procedure of selection for the posts in question, but says that it was due to a mere oversight: one Board member did hold a post at a grade lower than that of the vacant posts, but had been put on a G.7 post and so had been granted the special post allowance at that grade; and everyone concerned had lost sight of the fact that she did not herself have the required grade.

8. The Tribunal sees no reason to question the Union's explanation and is satisfied on the evidence that the Union

has not misled the complainant or shown him bad faith such as to warrant the derogation he seeks.

9. The complaint must therefore fail because it is irreceivable under Article VII(1) of the Tribunal's Statute, the internal procedure of appeal not having been duly followed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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