

EIGHTIETH SESSION

In re SAUNDERS (No. 15)

(Interlocutory order)

Judgment 1468

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 9 March 1995 and corrected on 16 March, the ITU's reply of 5 May, the complainant's rejoinder of 18 May and the Union's surrejoinder of 20 June 1995;

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. Information on the complainant's career at the ITU has appeared under A in Judgments 970, 989 and 1018. From March 1973 to September 1974 he worked in the Union's Fellowships Service. In January 1986 he was promoted to grade P.2.

By office memorandum No. 59 of 5 September 1994 the Administration informed its staff of the promotion of Mrs. Patricia Faccin to grade P.3 as head of the Fellowships Service as from 1 February 1994. While still an administrative assistant at grade G.7, she had taken on duties formerly assigned to the head of the Service after he had retired and the Union had decided to "freeze" his post pending restructuring. The Union later abolished his post and reclassified Mrs. Faccin's - from G.7 to P.3 - as from 1 February 1994. It was on a recommendation from the Coordination Committee that the Secretary-General decided to promote her to P.3.

Having learned of her promotion from the office memorandum, the complainant asked the Personnel Department in a memorandum dated 6 October 1994 for a copy of the corresponding vacancy notice.

By a memorandum of 19 October the Chief of the Personnel Department explained that the Union had reclassified her post and given it a new job description but had been unable to advertise the post of the former head because it had been "frozen at the time of his retirement".

On 20 October 1994 the complainant asked the Secretary-General to review under Staff Rule 11.1.1.2 a) the decision to make Mrs. Faccin head of the Service. In a memorandum of 2 December 1994 the Deputy Secretary-General upheld the decision.

On 4 December the complainant put the matter to the Appeal Board under Rule 11.1.1.2 b). In its report of 26 January 1995 the Board concluded that the problem he had raised did not affect him "directly", that the Secretary-General had acted "in keeping with his mandate", that the procedure "appeared to be in conformity with that followed in similar cases", and that the underlying issue was the same in this instance as in earlier appeals from the complainant. The Board again expressed the wish that the Union should seek a "fair solution" to his case.

By a memorandum dated 3 March 1995, the impugned decision, the Secretary-General told the complainant he was upholding the decision of 2 December 1994.

B. The complainant submits that the Union resorted to subterfuge to make Mrs. Faccin head of the Fellowships Service. Since Staff Regulation 4.8 c) provides that "selection for posts in grades P.1 and above ... shall be made on a competitive basis", the ITU should have advertised the post when it fell vacant upon the retirement of the previous head of the Service. But it decided to freeze the post, assigned the duties to Mrs. Faccin and then reclassified her own post. That deprived the complainant of the opportunity of competing for a vacancy he was qualified to fill.

He seeks material damages equivalent to the higher salary and pension entitlements he would have had as head of the Fellowships Service, an award of 20,000 Swiss francs in moral damages, and costs.

C. In its reply the ITU submits that it would have acted wrongly had it advertised and filled a P.3 post of which the duties were likely soon to change because of restructuring of the Service. It applied the proper procedure for reclassifying Mrs. Faccin's post, and the complainant's suggestion that he stood a chance of winning the post in a competition is "far-fetched".

D. In his rejoinder the complainant alleges a pattern of prejudice against him that culminated in a promotion which enabled Mrs. Faccin to pass to P.3 over the head of the complainant despite his higher grade, seniority in the Professional category and first-hand knowledge of the Fellowships Service. In any event the Union's methods are at odds with the spirit of the rules on promotion.

E. In its surrejoinder the ITU presses the pleas in its reply.

CONSIDERATIONS:

1. The complainant joined the ITU in 1967. He got a permanent appointment in 1969 at grade G.5 and as from 1 March 1973 was seconded to a G.6 post as administrative assistant to Mr. A. Maggio, the head of the Fellowships Service. After a competition the Union appointed him in 1974 as administrative officer at grade P.1 in the Service, which he left in September 1974. In 1986 it promoted him to P.2.

2. Mr. Maggio retired in 1992. On 26 September 1994 the complainant found on his return from leave an office memorandum, No. 59 dated 5 September, announcing that Mrs. Patricia Faccin had been promoted to P.3 as head of the Service. Mrs. Faccin had been holding a G.7 post as administrative assistant in the Service. In a memorandum of 6 October to the Personnel Department the complainant asked for a copy of the notice of vacancy of the P.3 post. By a memorandum of 19 October the Chief of the Personnel Department replied:

"Following Mr. Maggio's retirement on 1.1.1992, Mrs. Faccin was progressively called upon to carry out the duties of Head of the Fellowships Service ... along with her other duties. After a number of years, Mrs. Faccin's post was reclassified based on a new job description. The reclassification of her post and Mrs. Faccin's promotion were effective on 1.2.1994.

As regards Mr. Maggio's post, it was frozen at the time of his retirement and consequently could by no means be advertised."

3. In a letter of 20 October 1994 the complainant put to the Secretary-General in accordance with Staff Rule 11.1.1.2 a) a request for review of the decision to promote Mrs. Faccin as head of the Service. He alleged, among other things, that to freeze Mr. Maggio's post, assign the duties to Mrs. Faccin, upgrade her post to P.3 and promote her to that grade was just a "stratagem" calculated to put her in charge of the Service without observing "the fundamental principles governing recruitment, appointment and promotion" embodied in the Staff Regulations.

4. By a memorandum of 2 December 1994 the Deputy Secretary-General informed the complainant that the decision stood. He said:

"... Mrs. Faccin's promotion is in fact the result of the process of reclassification of a post, and of promotion of its incumbent, consecutive to the retirement of Mr. Maggio and to the progressive redistribution of some of his former functions to another post."

5. On 4 December 1994 the complainant submitted an appeal to the Appeal Board of the Union. In a memorandum dated 12 January 1995 to the Chairman of the Board the Secretary-General explained that the redistribution of Mr. Maggio's duties had taken place in the context of a restructuring of the Fellowships Service; the conclusion had been that "the G.7 post occupied by Mrs. Faccin, comprising her former duties and the responsibilities coming from Mr. Maggio's post which she had assumed de facto since the latter's retirement, should indeed be reclassified to the P.3 grade"; and the competent body, the Coordination Committee, had confirmed the reclassification as from 1 February 1994 and recommended promoting Mrs. Faccin to P.3. The Secretary-General had accordingly decided on 11 May 1994 to promote her as from 1 February 1994.

6. In its report of 26 January 1995 the Appeal Board held that the Secretary-General's decision did not directly

affect the complainant and that the Secretary-General had acted within his powers and apparently in accordance with the practice in similar cases. The Secretary-General thereupon confirmed the decision of 2 December 1994 and so informed the complainant in a memorandum of 3 March 1995, the impugned decision.

7. In its reply to the complaint the Union further alleges that the post formerly held by the head of the Fellowships Service "has been frozen and finally abolished".

8. That post had been in existence for many years when Mr. Maggio retired. Though it was then apparently "frozen", the Union has adduced no evidence to show that it was abolished thereafter. Indeed, some time later, Mrs. Faccin was promoted to what appears to be the very same post. Yet the ITU says that it was a different one, namely Mrs. Faccin's own G.7 post, which, with some of Mr. Maggio's former duties added, had been reclassified to P.3.

9. The Tribunal will look to the substance regardless of the form. The material question is whether the post that now exists is the same post as before. Since the answer to that question may affect Mrs. Faccin adversely, she is invited to make such submissions to the Tribunal as she thinks fit, and to do so within thirty days of her receiving the text of the present judgment, which is an interlocutory order. The Union and the complainant may each file observations within a time limit of thirty days from the date of receipt of a copy of her submissions.

DECISION:

For the above reasons,

The Tribunal orders the further submissions set out in 9 above.

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