

## EIGHTY-EIGHTH SESSION

### *In re Fabiani* (No. 4)

Judgment 1935

The Administrative Tribunal,

Considering the fourth complaint filed by Mrs Denise Fabiani against the International Telecommunication Union (ITU) on 5 January 1999, the ITU's reply of 16 March, the complainant's rejoinder of 22 April and the Union's surrejoinder of 17 June 1999.

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. Regulation 3.8 a) of the ITU Staff Regulations says:**

"A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition ..."

The complainant's career and facts relevant to this case are set out under A in Judgment 1678 delivered on 29 January 1998 in which the Tribunal ruled on her third complaint. Judgment 1679 (*in re Serlooten*), delivered on the same day, is also relevant to the present complaint. Both the above cases concerned the terms of the two staff members' reinstatement, on 1 January 1995, in the General Services category and in particular the Secretary-General's refusal to pay them the special post allowance provided for in Regulation 3.8 a).

The Tribunal dismissed Mrs Fabiani's third complaint as time-barred. However it allowed Mr Serlooten's complaint and ordered the ITU to pay him the allowance as from 1 January 1995.

Citing Judgment 1679 the complainant asked the Secretary-General in a letter of 26 February 1998 to grant her the special post allowance as from 1 January 1995. By a letter of 13 March 1998 the Secretary-General informed her that he would grant it as from 1 February 1998, the first day of the month following the delivery of Judgment 1679. In a letter of 3 April the complainant asked him to reconsider that decision and grant the allowance as from 1 January 1995. The Secretary-General refused in a letter of 25 May 1998.

The complainant lodged an appeal by a letter of 4 June. The Appeal Board reported on 24 August. Citing the principle of equal treatment it recommended applying the decision as from 1 January 1995. In a letter of 8 October 1998, the impugned decision, the Secretary-General told the complainant that he had decided not to endorse the recommendation.

**B. The complainant contends that the Secretary-General's decision is a breach of Regulation 3.8. Since it establishes no limitations, Regulation 3.8 must be construed as conferring entitlement to the special post allowance as from the date on which the staff member starts to perform the duties of the higher post.**

Citing the Appeal Board's report she pleads breach of equal treatment: the ITU has applied Regulation 3.8 differently to two officials who are in the same position in fact.

She asks the Tribunal to quash the Secretary-General's decision of 8 October 1998 refusing to pay her the

special post allowance for the period from 1 January 1995 to 31 January 1998 and to order the ITU to pay her the allowance as from 1 January 1995. She claims 4,000 Swiss francs in interest on payments due and moral damages, and an award of 5,000 francs in costs.

C. In its reply the ITU explains that it awarded the complainant a special post allowance only as from 1 February 1998 in order to comply with the limits imposed by the principle that a judgment carries the authority of *res judicata* only for the parties to the dispute.

Had the Tribunal wanted her to benefit from the application of Judgment 1679 it could have joined her third complaint to that of Mr Serlooten and thus averted objection to the receivability of her complaint. To allow her present complaint would amount to devoiding Judgement 1678 of its substance and "impairing" the principles of the certainty and stability of the parties' position in law".

D. In her rejoinder the complainant observes that the ITU confines itself to giving explanations that have no bearing on the complaint.

The ITU's practice having been found unlawful by the Tribunal, it cannot be deemed lawful for the period from 1 January 1995 to 31 January 1998.

The ITU having acknowledged that the case law established in Judgment 1679 applies to other staff members in like situations, its arguments that this judgment carries the authority of *res judicata* only on the parties to the dispute are immaterial.

E. In its surrejoinder the ITU maintains that the arguments put forward in its reply are relevant since they enable the scope of Judgment 1679 to be defined. The ITU is under no obligation to apply that judgment to the complainant in a strictly identical manner.

## CONSIDERATIONS

1. The material facts are set out in Judgment 1678, to which the Tribunal refers.

2. In the present complaint, the complainant requests the setting aside of the decision taken by the Secretary-General of the ITU on 8 October 1998, by which he refused her the payment of a special post allowance from 1 January 1995 to 31 January 1998.

She seeks the payment of this allowance from 1 January 1995 under Regulation 3.8 of the Staff Regulations, the granting of 4,000 Swiss francs in interest on payments due and moral damages and 5,000 francs in costs.

3. The ITU contends that allowing the present complaint would amount to: devoiding Judgment 1678 of its content and meaning; "challenging the principles of the certainty and stability of the parties' position in law"; and *de facto* surreptitiously reviewing the above judgment.

The ITU therefore asserts that the complaint is irreceivable on the grounds that it takes up once again a case which has already been resolved and challenges the authority of *res judicata*.

4. In Judgment 1216 (*in re* Saunoi No. 6), the Tribunal indicated that, in order to sustain an objection to *res judicata*, the parties, the purpose of the suit and the cause of action must be the same as in the earlier case.

5. In the present case, the complainant had already lodged a previous complaint with the Tribunal seeking the quashing of the decision by the Secretary-General of the ITU, by which he refused her the payment, from 1 January 1995, of the special post allowance provided for under Regulation 3.8 of the Staff Regulations. This complaint was dismissed in Judgment 1678 and the complainant can no longer challenge the administrative decision to refuse her the above allowance, which has become final.

6. With regard to Judgment 1679, on which she bases her claims, the Tribunal holds that she cannot invoke in support of her pleas the authority of *res judicata* in a judgment to which she was neither party nor intervener.

7. It follows that the complaint must fail.

## DECISION

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment, adopted on 12 November 1999, 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 2000.**

*(Signed)*

**Michel Gentot  
Jean-François Egli  
Seydou Ba**

**Catherine Comtet**