

FIFTY-FOURTH ORDINARY SESSION

In re ZAHAWI (No. 2)

Judgment No. 634

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Telecommunication Union (ITU) by Mr. Muqbil Zahawi on 6 April 1984, the ITU's reply of 2 July, the complainant's rejoinder of 5 September and the ITU's surrejoinder of 15 October 1984;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Regulations 9.1 and 9.5 and Rule 11.1.1.2(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. Relevant information appears in Judgment No. 633, under A. The complainant, an Iraqi, joined the ITU in Geneva in 1967. He held a permanent appointment on a grade P.4 post as head of a section of the Personnel Department. From mid-1982 he was on sick leave in Cairo. On 29 March 1983 the Secretary-General wrote to him there to say that his post had had to be abolished to make savings; every effort would be made to find him other employment, but if none was found he was given notice of termination under Regulation 9.5, the three-month period of notice to start after his sick leave ended on 31 March. On turning up for duty in Geneva on 2 May he was told there was no work for him to do. In a letter of 5 May he asked the Secretary-General to review the decision to abolish his post. On 30 May he explained that, failing his reinstatement in his own post, there was another P.4 post in the Department he wanted to be transferred to. In a report of 6 June 1983 the Joint Advisory Committee of the ITU, to which the matter of termination had been referred under Staff Regulation 9.1(d), recommended cancelling the notice of termination and considering ways of employing him. On 14 June the Secretary-General offered him leave without pay, after using up his annual leave, until the end of October; the notice of termination would start on 1 November 1983 unless he was found another assignment. He accepted the offer. On 26 August the Secretary-General, in a letter mainly about other matters, said: "Should no other assignment have been found before 31 October, I reconfirm that ... notice will start on 1 November 1983." On 14 October the Secretary-General told him he need not report for duty on 1 November, when the notice would begin. On 13 November he appealed to the Appeal Board. The Board reported on 4 January 1984. The majority held the appeal time-barred, and in a letter of 11 January to the complainant the Secretary-General said that the majority report did not "call for any comments". The next day he wrote again to say there was no suitable vacancy and the complainant's contract would end on 31 January. The complainant impugns the decisions of "11/12 January 1984".

B. The complainant submits that the Appeal Board was wrong to hold that the final decision was the offer of 14 June 1983 and that his internal appeal of 23 November missed the three-month deadline in Staff Rule 11.1.1.2(b). That decision did not answer his request for review of the decision of 29 March 1983, it related to special leave and postponed the matter of abolition and termination. Whether his request was rejected by the decision of 26 August or, more likely, that of 14 October, the first unconditional one, his appeal was in time. The internal means of redress being exhausted, his complaint is receivable. As to the merits, he observes that abolition must, says Regulation 9.1, be required by the "necessities of the service". Yet his duties were recently confirmed by the ITU Plenipotentiary Conference and have since been allotted to other staff. Although the Administrative Council had to and did approve the abolition the Secretary-General misled it by saying he had been "on extended absence since mid-1982"; he had been mainly on sick leave. The termination of his appointment was also in breach of 9.1. Clause (b) guarantees employment to permanent staff subject only to the "availability of suitable posts". According to (d) the Joint Advisory Committee ought to have been consulted before he was given notice. Clause (f) requires the Secretary-General to report terminations to the Administrative Council: he reported the abolition of the complainant's post, not the termination of his appointment. Clause (c) required that his competence, efficiency, official conduct, length of service and family circumstances and the geographical distribution of staff be taken into account: on any and all of these grounds he deserved to be kept on. Any one of three vacancies would have suited him. The Secretary-General made no real effort to find him other work. He seeks the quashing of the decisions of

11/12 January; reinstatement in his former post or, failing that, assignment to a suitable post as from 31 January 1984; subsidiarily, material and moral damages; and in any event costs.

C. In its reply the ITU observes, as to receivability that the complainant himself admits to having been given notice of termination on 29 March 1983, and that it is quibbling to say that the decisions before that of 14 October were conditional. The Secretary-General repeatedly informed him that his post was abolished and his appointment would be terminated, and the reassurances that, as Regulation 9.1(e) required, every attempt would be made to find him other work did not make those decisions conditional. The decisions he ought to have challenged were that of 29 March 1983, on abolition of his post, and that of 14 June 1983, on termination of his appointment. His internal appeal was therefore time-barred and his complaint is irreceivable. Subsidiarily, the ITU submits that the complaint is devoid of merit. The complainant cannot be reinstated since his post has been abolished. The Secretary-General is not responsible for the decision by the Plenipotentiary Conference to cut the ITU's budget, which has required severe retrenchment of staff. Nor is it the Secretary-General's fault that no post has yet been found to suit his qualifications. The ITU recounts the steps it has taken to place him within the ITU or elsewhere, and the steps it will continue to take for that purpose, in accordance with 9.1(e), for two years from the date of termination. His allegations of defects in the decisions are unfounded. In particular 9.1(d) requires consulting the Joint Advisory Committee, not before giving notice, but before "terminating any appointment". The decisions were taken with due regard to the Union's needs. The ITU invites the Tribunal to dismiss the subsidiary claim for damages because it not only fulfilled its obligations but deferred *ex gratia* the period of notice, thereby granting the complainant another three months' pay and increasing his pension entitlements.

D. In his rejoinder the complainant points to several allegations of fact in the reply which he regards as mistaken or misleading. He answers in some detail arguments in the reply, enlarges on those set out in his original brief, and presses his claims for relief.

E. The ITU in its surrejoinder expresses the view that the rejoinder raises no relevant issue which it has not already answered in its reply. It identifies what it believes to be inaccurate statements of fact and again invites the Tribunal to dismiss the complaint as irreceivable or, subsidiarily, devoid of merit.

CONSIDERATIONS:

1. The complainant Joined the permanent staff of the International Telecommunication Union in 1967 in the Personnel Department and was promoted to grade P.4 in 1978. His present complaint relates to the abolition of his post and the termination of his appointment.

Receivability of the complaint

2. On 29 March 1983 the Secretary-General of the ITU wrote to the complainant stating that in order to carry out the budgetary reductions decided on by the Plenipotentiary Conference it was necessary to abolish certain posts including the complainant's. The letter went on to say that if the complainant could not be continued in ITU employment his contract would be terminated and the letter was to be considered notice of termination, the three-month period of notice to commence at the end of his sick leave, which was to run until 31 March 1983.

On 14 June 1983 the Secretary-General again wrote to the complainant stating that he had reconsidered his decision in regard to the grant of leave and informing the complainant that the notice of termination would take effect from 1 November 1983.

The decisions regarding the abolition of the complainant's post and the termination of his appointment are separate and distinct. As to the former, notice of that decision is set out in clear and unambiguous terms in the Secretary-General's letter of 29 March 1983. It was not until 23 November 1983 that the complainant lodged his appeal to the ITU Appeal Board seeking a cancellation of the decision. Rule 11.1.1, which governs internal appeals in the ITU, specifies that any appeal must be brought within 12 weeks of the decision impugned. His internal appeal being time-barred, the complainant has failed to comply with the provisions of Article VII of the Statute of the Administrative Tribunal which require that he shall have exhausted such other means of resisting the impugned decision as were open to him under the applicable Staff Regulations.

As to the decision to terminate his appointment, the complainant contends that the letters of 29 March 1983 and 14 June 1983 were conditional only and did not give notice of a final decision to terminate. In his appeal to the

Appeal Board he speaks of "what appears to be a decision by the Secretary-General, notified on 14 October 1983, to refuse to reconsider the conditional notice of termination sent to me on 29th March 1983". In the same document he seeks a recommendation that the notice of termination contained in the letter of 29 March 1983 be cancelled.

In the proceedings now before the Tribunal the complainant submits that the only final decision on termination is to be found in the Secretary-General's letter of 12 January 1984 informing him that no suitable assignment had been found for him up to then and that his contract would be terminated and at the same time enclosing forms in connection with the termination of his appointment. But the complainant concedes in paragraph 22(d) of his complaint that he has not exhausted the internal means of resisting the decision of 12 January 1984, which he considers to be final.

The Tribunal is of the view that notice to terminate the complainant's appointment is contained in the Secretary-General's letter of 29 March 1983. The fact that it was sent before the Joint Advisory Committee was consulted, as required by Rule 9.1(d), does not detract, as the majority of the Joint Advisory Committee thought it did, from its being a valid decision until such time as it is withdrawn or quashed. As to its being conditional only, the Secretary-General's letter stated that every effort was being made to reassign the complainant to other duties. All the terms of the letter must be read together to determine its meaning. Taken together the meaning is clear that notice of termination was being given but if in the meantime the complainant could be reassigned the ITU would not pursue its powers under the notice.

The complainant not having lodged his internal appeal against the decision until 23 November 1983 his internal appeal was time-barred and thus he has failed to comply with the provisions of Article VII of the Statute of the Administrative Tribunal, which require that he shall have exhausted such other means of resisting the impugned decision as were open to him under the applicable Staff Regulations.

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