

SIXTY-EIGHTH SESSION

In re SAUNDERS (No. 2)

Judgment 988

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 18 March 1989 and corrected on 17 April, the ITU's reply of 18 July, the complainant's rejoinder of 14 August and the Union's surrejoinder of 15 November 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 4.1, 4.3, 4.8(a) and 4.9 and Rules 3.4.2 and 11.1.1 of the ITU Staff Regulations and Staff Rules;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. As Judgment 970 recounts, under A and 1, the complainant joined the ITU in 1967 and was granted a permanent appointment at grade G.5 as an office assistant in 1969. After several transfers he was appointed as from 1 January 1986 to a post in the Conferences and Common Services Department which he had held at grade G.7 since 1984 but which was then upgraded to P.2.

By a memorandum of 19 October 1988 he submitted to the Secretary-General an appeal under Rule 11.1.1.2(a) against what he described as "continuing breach" of Regulation 4.3, which requires that "staff in service shall be given reasonable promotion possibilities": he had entered in vain some two dozen competitions for posts that would have brought him promotion. The Secretary-General answered on 8 November that his lack of success meant, not that 4.3 had been broken, but that other candidates had been found better.

On 10 November 1988 he appealed to the Appeal Board under Rule 11.1.1.2(b). In its report of 8 December the Board, having found no breach of the rules in any of the competitions, recommended rejecting his appeal. By a memorandum of 20 December 1988, the impugned decision, the Deputy Secretary-General communicated the report to the complainant and said he had nothing to add.

B. The complainant alleges breach of Regulation 4.3 in that he has not had "reasonable promotion possibilities" and of equal treatment in that staff junior to him have had "impressive career advancement".

His appointment to the P.2 post on 1 January 1986 was no promotion: for almost ten years his duties had warranted that grade anyway and, contrary to the spirit of Rule 3.4.2, on "salary policy on promotion", he was worse off because his pay and future pension entitlements started at once to fall.

The Appeal Board failed to define "reasonable promotion possibilities" and to acknowledge that his work had been first-rate; mistakenly reasoned that everyone had equal prospects of promotion just because the staff were represented on the Appointment and Promotion Board, though in fact it rubber-stamps some senior officer's prior choice; and ignored the improper criteria by which others had been preferred to him.

He gives an account of his career, including his secondments from the grade pertaining to his appointment - G.5 - to posts at a higher grade. In his view such secondment is not promotion, and he explains how he has had hopes of real promotion dashed time and again. Promotion possibilities are not "reasonable" unless the competent staff member can look forward to an average run of promotions. It is unfair of the Appointment and Promotion Board and the Secretary-General to flout the principles of promotion by letting a post be filled by someone of the head of department's own choosing and not by someone who comes out top by objective criteria.

The complainant cites eleven instances in the 15 years up to 1985 in which he was denied promotion. He has been discriminated against out of resentment aroused by his consistent refusal to defer to the Administration's views and put up with their "shenanigans". He is a "capable, experienced and willing worker", and the Union's explanations of his failure to get promotion are implausible.

He seeks the quashing of the impugned decision; the correction of his "permanent" grade to G.6 from 1 January 1973 to 31 December 1976 and to G.7 from 1 January 1977 to 31 December 1985 and consequent recalculation of his and the ITU's pension contributions; the safeguarding of his pensionable remuneration at the rate it would have attained at 31 December 1985 had his grade been correctly determined; the recalculation of his pay as from 1 April 1987 to give him a proper differential; his immediate promotion to a grade befitting his qualifications, experience and seniority and the grade of the post he held until January 1989; an injunction against "retaliatory action such as was taken in January 1989" when his "permanent" post was abolished and he was transferred; and costs.

C. The ITU replies that the complaint is irreceivable because the complainant has not exhausted the internal means of redress. If there was breach of Regulation 4.3 it took the form of administrative decisions, and he ought to have challenged them under Rule 11.1.1. Each decision not to appoint him to any of the 25 posts he applied for - the last was taken on 28 June 1988 - was challengeable; yet he failed to challenge them in the prescribed form and in time.

Besides, his complaint is devoid of merit. Regulation 4.3 says that, though staff shall have reasonable promotion possibilities, it shall be "without prejudice to the recruitment of fresh talent at all levels". That is in line with Regulation 4.1, which says that the "paramount consideration" in recruitment is the need for staff who attain "the highest standards of efficiency, competence and integrity". However high the complainant's opinion of his own merits may be, it is the Secretary-General who decides whether or not to recruit "fresh talent" meeting those standards. Regulation 4.3 entitles staff, not to promotion, but to opportunities of getting it, such as the complainant plainly had since he applied for 25 posts. Besides, he did get promotion: he started at grade G.4 and is now P.2.

His allegations of discrimination are groundless. According to Regulations 4.8(a) and 4.9(a) it is the Secretary-General, not the head of department, who appoints to a post, and staff representation on the Appointment and Promotion Board safeguards the principle of equal treatment for all.

D. The complainant rejoins that the Union distorts some issues of fact and conceals others. He goes over his career in the ITU and seeks to present it in what he sees as its true light.

As to receivability, what he objects to is not so much the ITU's sometimes unfair refusal to promote him to posts he applied for as its persistent rejection of his applications over 20-odd years, in continuing breach of Regulation 4.3 and the terms of his appointment.

He enlarges on his contentions on the merits. He maintains that he has not misconstrued 4.3, the phrase the Union quotes being immaterial to his case. He has never argued that the rule entitles him to regular promotion. The ITU cannot determine on any objective grounds whether to fill a post from within or by recruiting "fresh talent". It is unfair to deny him promotion just because the grade of his "permanent" appointment is only G.5 when he has amply shown his fitness for Professional category work. Seconding him for years to such work is just administrative juggling. It is deplorable that he should earn less after promotion than before and the alleged advantages do not make up.

He has been blatantly discriminated against. The staff of some departments have forged ahead. Though staff may always apply for posts, what matters is that they stand a fair chance of success if well qualified. The mere issue of notices of vacancy does not guarantee equal prospects of promotion for everyone.

E. In its surrejoinder the ITU observes that much of the rejoinder comments on trivial matters and that whatever does have any relevance fails to weaken its own case. It enlarges on the pleas in its reply, maintaining that the complaint is irreceivable. As to the merits, it observes that the complainant has had a reasonably successful career, that in any event it is under no duty to promote him and that it cannot be at fault in preferring superior candidates, however many competitions he may have entered. The Secretary-General enjoys wide discretion over appointment and promotion and in every one of those competitions has exercised his discretion properly and indeed without challenge from the complainant.

CONSIDERATIONS:

1. By a memorandum of 19 October 1988 to the Secretary-General of the Union the complainant appealed against what he saw as a continuing breach of Regulation 4.3 of the ITU Staff Regulations and Staff Rules. During the more than 21 years he had served the Union, he applied for some two dozen vacancies offering a possibility of promotion. He said that many of the vacancies were filled by colleagues junior to him in grade or length of service

or in both. Other colleagues had enjoyed in only a few years a number of promotions far beyond what was reasonable. The complainant's promotion to P.2 on 1 January 1986 was a misnomer as he had had the functions of that grade since September 1974.

By a memorandum of 8 November 1988 the Secretary-

General explained to the complainant that the fact that his candidatures had not been successful did not mean that Regulation 4.3 had been breached but rather that better candidates had been found each time.

By a memorandum of 10 November to the Chairman of the ITU Appeal Board the complainant contended that by not taking the opportunity, provided by paragraph (e) of Regulation 4.9, of deciding promotions contrary to the advice of the Appointment and Promotions Board the Secretary-General had repeatedly denied the complainant for over 21 years a fundamental right to parity with other selected candidates.

The Appeal Board reported on 8 December saying that from the evidence there was nothing to indicate that in any of the competitions mentioned by the complainant had there been any breach of the Staff Regulations, and recommending rejection of the appeal. By a memorandum of 20 December the Deputy Secretary-General forwarded a copy of the report to the complainant, adding that he had nothing to add to previous correspondence concerning the application of Regulation 4.3; in other words, there had been no breach of that regulation.

The complainant then went to the Tribunal.

2. The Union has for the first time raised the issue of receivability. It submits that the complaint is irreceivable because the complainant applied for 25 posts, each rejection of his 25 applications was an administrative decision which he could have challenged under paragraph 2 of Rule 11.1.1, and he did not challenge a single one.

3. Whether or not the complaint is receivable it is devoid of merit.

Regulation 4.3 merely prescribes reasonable opportunities for promotion: it does not state that every staff member shall be promoted.

In each competition the complainant was given his chance, but the Union must pick the best candidate by objective criteria and would have been wrong to take the complainant simply because he had not been promoted for a long time.

4. It is true that paragraph (e) of Regulation 4.9 does allow the Secretary-General to promote even against the advice of the Appointment and Promotion Board. But that provision is intended as a safeguard to ensure that the rules on appointment and promotion have been complied with: the intention is not to enable the Secretary-General to prefer a weaker candidate to the best on humanitarian or other grounds. He must always bear in mind the need to secure the highest standards of efficiency, competence and integrity enjoined by Regulation 4.3.

5. Besides, the complainant has had several promotions. He joined the Union in 1967 at grade G.4 and by 1 January 1986 had advanced to grade P.2.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll

