

## EIGHTY-FIRST SESSION

### *In re SAUNDERS (No. 16)*

#### **Judgment 1528**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 21 September 1995 and corrected on 29 September, the ITU's reply of 29 November 1995, the complainant's rejoinder of 30 January 1996 and the Union's surrejoinder of 5 March 1996;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. Facts relevant to this case are set out, under A, in Judgments 970, 989, 1018 and 1422.

On 23 April 1993 the complainant applied for a vacant post, No. S70/G7/135, but he proved unsuccessful. On 21 July 1994 the Secretary-General cancelled the appointment he had made to the post and convened a new Appointment and Promotion Board to re-examine the candidatures that the original Board had received. That was the decision the complainant impugned in his tenth complaint, which the Tribunal dismissed in Judgment 1422.

The new Board met on 12 December 1994. Having learned in a letter of 19 December from the Chief of the Personnel and Social Protection Department that the Secretary-General had picked someone else, the complainant sought review in a letter of 21 December 1994 headed "Appeal against an administrative decision". By a memorandum dated 2 February 1995 the Secretary-General confirmed his decision of 19 December 1994.

By a memorandum of 7 February 1995 the complainant asked the Secretary-General to explain to him, among other things, why his candidature had failed. In the absence of a reply he sent further requests for the information on 23 February and 10 March. By a memorandum of 14 March the Secretary-General invited him to take the matter up with a member of the Board. He did so on 23 May. The chairman of the Board accordingly told him in a memorandum of 24 May that the deciding factor had been his lack of a "good knowledge of the ITU's activities, including familiarity with its internal publication authoring and publication production processes".

By a letter of 29 May 1995 on his "Continued appeal against an administrative decision re your choice of a candidate to fill post S70/G7/135", he again sought review by the Secretary-General. On 19 August he appealed to the Appeal Board against the Secretary-General's implied rejection of his request dated 29 May. Failing a reply from the Administration within the four-week time limit under Staff Rule 11.1.1.4 a) he lodged the present complaint on 21 September. On 23 October the Secretary-General asked the Chairman of the Board for an exceptional extension of the time limit. By a memorandum of 26 October, of which a copy was addressed to the complainant, the Chairman of the Board gave the Secretary-General until 30 November to reply.

In a report dated 9 February 1996 the Board held that the complainant had failed to show that the Appointment and Promotion Board had gone beyond its terms of reference; but it recommended, in a spirit of "conciliation", that the Secretary-General consider changing the grade of his post from P.2 to G.7.

B. The complainant submits that the Personnel Department did not allow him to update the curriculum vitae that the Appointment and Promotion Board relied on. As a result the Board lacked proper information about his experience in the Documents and Publications Production Division and therefore overlooked essential facts.

He wants the Tribunal to set aside the decision of 2 February 1995 and award him damages in the amount of 50,000 Swiss francs for moral injury. He also claims costs.

C. In its reply the ITU contends that the complaint is irreceivable because the complainant failed, twice, to exhaust

the internal remedies open to him.

First, he made no challenge to the Secretary-General's decision of 2 February 1995 within the three-month time limit on appeal to the Board set in Rule 11.1.1.2 b). Even if he made out that he had appealed to the Board against the decision of 24 May 1995 such appeal would have been time-barred under 11.1.1.2 a), which requires an official to seek review from the Secretary-General of an administrative decision before going to the Appeal Board and within six weeks of getting notice of it. In this case the decision was the one of 19 December 1994 telling him his candidature had been unsuccessful.

Secondly, he came to the Tribunal without awaiting either the Appeal Board's report - which the Secretary-General receives under Rule 11.1.1.4 e) "within 10 weeks from the date on which the appeal was submitted" - or the Secretary-General's decision, be it express or implied, within the meaning of Article VII(3) of the Statute of the Tribunal.

D. In his rejoinder the complainant challenges the second Appointment and Promotion Board's reason for rejecting his application because it was not the same as the original Board's reason.

He also rebuts the Union's plea on receivability. In his submission the memorandum from the Chairman of the Appointment and Promotion Board dated 24 May 1995 contained a new fact on which he relied when he put his claim of 29 May 1995 to the Secretary-General for a fresh decision. That request, against the new decision of 24 May 1995, was properly filed within the time limit in 11.1.1.2 a). As for the time limit under 11.1.1.2 b) he was no less diligent since the subject of his appeal of 19 August 1995 was the Secretary-General's implied rejection of the request he had sent on 29 May 1995. He submits, lastly, that the Appeal Board failed to report within the 14-week limit in Rule 11.1.1.4 f).

E. In its surrejoinder the ITU presses its pleas on receivability.

#### CONSIDERATIONS:

1. As was recounted in Judgment 1422 on his tenth complaint, the complainant, who is a grade P.2 official of the ITU, applied on 23 April 1993 for a vacant G.7 post, No. S70/G7/135. He was unsuccessful, but on 21 July 1994 the Secretary-General set aside the appointment he had made and directed the Appointment and Promotion Board to base its recommendation on the candidates' merits alone, without considering any other element which might be brought to its knowledge.

2. A letter of 19 December 1994 from the Chief of the Personnel and Social Protection Department told the complainant that he had again been unsuccessful. He wrote a letter on 21 December asking the Secretary-General to review that decision. He asserted:

"I contend and shall demonstrate if need be that the Board did not follow your recommendation and that its own recommendation to you was heavily influenced by factors extraneous to the qualifications and professional experience of the candidates."

3. The Secretary-General replied in a memorandum of 2 February 1995 that he had "received no indication that the [Board] has not followed the recommendation"; he therefore maintained his decision of 19 December 1994.

4. By a memorandum of 7 February the complainant asked the Secretary-General to answer several questions he put about the Board's composition and proceedings and in particular to say whether the new Board had "found that [his] qualifications, professional experience, etc. were inferior to those of the successful candidate". In his reply of 14 March 1995 the Secretary-General gave some explanation, but not the reasons for rejecting him, about which he suggested that the complainant approach a member of the Board in accordance with its rules of procedure. The complainant accordingly wrote to the chairman of the Board on 12 April. The chairman answered in a memorandum of 24 May that the reason why he had been unsuccessful was that he lacked a "Good knowledge of the ITU's activities, including familiarity with its internal publication authoring and publication production processes", which the notice of vacancy had required.

5. The complainant wrote the Secretary-General a letter on 29 May 1995 asserting that "no unbiased selection panel could ever have reached the conclusion that all the candidates [on] the short list ... had a better knowledge" than he of such activities. He asked the Secretary-General "once again to reconsider" his decision to appoint the successful

candidate. He received no reply.

6. On 19 August 1995 he appealed to the Appeal Board "against the failure of the Secretary-General to act on my further request of 29 May 1995 that he review his decision to reject for the second time my application to fill post S70/G7/135". Without awaiting the outcome he filed this complaint with the Tribunal on 21 September 1995. In its report of 9 February 1996 the Board concluded that the Appointment and Promotion Board had not acted contrary to the rules or to the terms of its mandate.

7. The complainant's case is that the reason why the Appointment and Promotion Board declared him unqualified to fill the vacancy or even to be on the short list was that it overlooked essential facts about his experience in the preceding three years and that those facts were missing from his personal records because the Personnel Department had refused to let him update them before the competition.

8. Rule 11.1.1.2 of the ITU Staff Regulations and Staff Rules provides:

"(a) A staff member who ... wishes to appeal against an administrative decision, shall as a first step address a letter to the Secretary-General ... requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks from the time the staff member received notification of the decision in writing.

(b) If the staff member wishes to make an appeal against the decision contained in the answer received from the Secretary-General, he shall submit his appeal in writing to the ... Appeal Board within three months from the date of receipt of that decision. If no reply has been received from the Secretary-General within six weeks of the date on which the letter referred to in paragraph (a) was sent, the staff member shall, within the six following weeks, submit his appeal in writing to the ... Appeal Board ..."

9. The ITU contends that the administrative decision which the complainant is challenging is the one in its letter of 19 December 1994; that the rejection of his request for review was communicated to him in the Secretary-General's memorandum of 2 February 1995; that he failed to appeal within the time limit of three months in Rule 11.1.1.2 b); and that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

10. The complainant relies on the letter he wrote on 29 May 1995 to the Secretary-General. That, he says, was not a late request for review of the decision of 19 December 1994, but a request that the Secretary-General "review again his decision not to appoint him to the vacant post"; he made it as soon as he became aware of new facts in a memorandum of 24 May 1995 he got from the chairman of the Appointment and Promotion Board; he was not to blame for the delay in learning those facts; he got no reply from the Secretary-General within six weeks of sending his letter of 29 May; he appealed "within the six following weeks"; and so his appeal was in time.

11. The complainant argues as if he discovered some new fact from the chairman's memorandum of 24 May 1995. Yet he knew all along that the Board had not had his updated personal records; and he was making out already in his letter of 21 December 1994 - quoted in 2 above - that he could demonstrate that the Board had not followed the Secretary-General's recommendation of 21 July 1994 and had instead been heavily influenced by extraneous factors. From the Secretary-General's reply of 2 February 1995, if not earlier, he knew the Secretary-General's position to be that the Board had followed that recommendation. So what he learned from the memorandum of 24 May 1995 was nothing new.

12. The relief he seeks is the quashing of the Secretary-General's decision of 2 February 1995. If he was dissatisfied with that decision the remedy that Rule 11.1.1.2 gave him was an appeal to the Appeal Board, not another request to the Secretary-General for review, whether of the decision of 19 December 1994 or the one of 2 February 1995. Not having lodged a timely appeal against the decision of 2 February, he failed to exhaust his internal remedies. And the precedents are clear: a reply to a further request for reconsideration is not a new decision setting off a new time limit for appeal. The complaint fails because it is irreceivable under Article VII(1) of the Tribunal's Statute.

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 11 July 1996.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner

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