

NINETY-SEVENTH SESSION

Judgment No. 2351

The Administrative Tribunal,

Considering the complaint filed by Mr M. H. D. against the International Telecommunication Union (ITU) on 27 August 2003, the Union's reply of 3 November 2003, the complainant's rejoinder of 5 January 2004 and the defendant's fax dated 12 March 2004 informing the Registrar of the Tribunal that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a citizen of the Philippines, joined the ITU in December 1996 as a Programming Assistant in the Telecommunication Standardization Bureau (TSB), on a short term contract. He subsequently obtained successive contracts until 31 October 2001.

When he was recruited, the complainant had submitted a Personal History Form to the Personnel and Social Protection Department, listing the educational establishments he had attended, and he had provided a copy of a document evidencing a diploma of Bachelor of Science in Electrical Engineering issued by the Central Colleges of the Philippines (hereinafter "the CCP").

In July 2001, after it received an anonymous message casting doubt on the authenticity of that diploma, the Union queried the matter with the CCP. In a fax of 2 August, the latter informed the defendant that they had not issued the document presented by the complainant as his diploma and that the signatures borne by that document were not authentic. The complainant then explained that the original copy of his diploma had remained with his grandmother in the Philippines, but then had been lost, and that he had asked a cousin of his to obtain a new diploma from the CCP, which she had done. A copy of this new diploma had been submitted to the Personnel and Social Protection Department. In a fax of 6 August 2001, the CCP confirmed what they had said previously but their President, in a letter of 28 August, sent the ITU a certification dated 22 August 2001 stating that the complainant had completed all the academic requirements leading to the degree of Bachelor of Science in Electrical Engineering. The certification was issued in lieu of a diploma in view of the role played by the complainant in student activist movements which had compromised the reputation of the College.

By a letter of 26 October, having consulted the Joint Advisory Committee, the Director of the TSB issued the complainant a written censure. When the latter, on 7 December 2001, asked for the sanction to be reconsidered, the Secretary General notified him on 25 January 2002 of his decision to cancel the sanction and informed him that his case would be resubmitted to the Joint Advisory Committee. On 3 June the Committee recommended applying a verbal reprimand to the complainant. On 19 September the Director of the TSB issued the complainant a written censure. The complainant submitted a request for his case to be reviewed, but was informed, in a letter of 12 December, that the decision of 19 September 2002 stood. On 6 March 2003 he referred the matter to the Appeal Board, which, in its report of 8 May 2003, stated that it had reached "conclusions similar to those of the Joint Advisory Committee" and that it was therefore of the opinion "that the same sanction should have been applied". On 26 May 2003 the Chief of the Personnel and Social Protection Department informed the complainant that the Secretary General had decided to maintain the decision of 19 September 2002, confirmed on 12 December. That is the impugned decision.

B. According to the complainant, there is no evidence in the file to support the conclusion that the diploma of

which he supplied a photocopy at the time of his recruitment is not authentic. He points out that the Joint Advisory Committee stated that it had not been in a position to establish in an indisputable manner the diploma's authenticity and legal value, while the Appeal Board had admitted that it could not state with certainty that no diploma had been issued to him by the CCP prior to 1998. Both bodies recommended applying the sanction of a verbal reprimand. The reasons given in the Joint Advisory Committee's recommendation of 3 June and in the decision of 19 September 2002, imposing a written censure, were vague and did not enable him to ascertain exactly what he was accused of, and hence to defend his interests in full knowledge of the facts.

The complainant points out that it was after the written censure of 26 October 2001 that the ITU decided, without giving him notice, not to renew his contract. In fact, the Union thus applied not only a written censure but also the most severe sanction contemplated in the Staff Rules, namely dismissal, without following the proper procedure. He contends that the two sanctions are manifestly incompatible since they cannot logically be applied simultaneously. Otherwise, why would the Rules have provided a scale of sanctions from the most benign to the most severe, and what place would be left for the principle of proportionality? He states that his complaint is also directed against an implicit sanction, namely the Union's failure to offer him a fixed appointment.

The complainant contends that, even if it had been proved that his diploma were not authentic, it would still have been necessary to show that the allegedly spurious diploma had been fabricated by him, or at least to demonstrate that he could not have been unaware of its lack of authenticity, questions which were never raised. He asserts that he obtained his diploma at the end of his studies at the CCP and that he had no reason to doubt its validity.

He requests that the Tribunal:

- “1. Set aside the ITU's decisions of 19 September 2002, 12 September 2002 (*sic*) and 26 May 2003 [...] as well as the implicit decision not to renew his contract of employment with the ITU;
2. Order that [he] be reinstated in his former post or an equivalent post at ITU;
3. Order ITU to pay [him] fair compensation in the event that it refuses to reinstate him;
4. Order that [his] short term contract [...] be converted into a fixed appointment as soon as he is taken on again and at the latest within six months and order the ITU to pay [him] fair compensation in the event that it refuses to do so;
5. Award [him] compensation for the financial loss he incurred, from November 2001, as a result of the non-renewal of his contract of employment with the ITU, which should be calculated on the basis of the difference between what he might have earned at the ITU if he had continued to work there after November 2001 until the day of the Tribunal's ruling, and what he has actually earned since losing his employment with the ITU until the day of the Tribunal's ruling;
6. Order the ITU as necessary to pay him such compensation;
7. Award [him] a fair sum as compensation for moral injury, particularly in the light of the shortcomings of the procedure followed in the ITU in his case and the serious accusations levelled at him;
8. Award [him] fair compensation for his costs;
9. Order the ITU as necessary to pay him compensation under those heads.”

C. In its reply, while recognising that the complainant attended the whole of the degree course with a view to obtaining the diploma concerned, the ITU contends that it is nevertheless true that none of the documents supplied by the CCP or by the complainant proves that a diploma was issued to the latter on completion of his studies or that the copy submitted at the time of his recruitment was taken from an authentic document, validly and officially issued by the CCP.

The Union argues, moreover, that, contrary to what the complainant maintains, the onus of proof rests with him. It says that it does not grasp his objections regarding the exercise of his right to due process and contends that the decision of 19 September 2002, based on the recommendation issued by the Joint Advisory Committee, was sufficiently substantiated.

The defendant denies that the non appointment of the complainant to a fixed term contract may be construed as a sanction: appointment decisions lie at the discretion of the Secretary General and must be aimed at “securing for the Union the highest standards of efficiency, competence and integrity”, as stipulated in Staff Regulation 4.1. One of those qualities, however, namely integrity, was lacking in the complainant.

D. In his rejoinder, the complainant contends that the defendant, which was obliged to give reasons for its decisions from the start, constantly “adjusted” its position in response to the arguments he put forward, modifying, adding or withdrawing allegations and maintaining a state of “confusion”, which only made it more difficult for him to defend his case.

He adds that the Union’s position is all the more untenable for the fact that it admitted in its reply that the documents supplied by the CCP did not establish “formally and incontrovertibly” that the copy of the diploma submitted by the complainant at the time of his recruitment was taken from an authentic document, which clearly implies that it still entertained doubts in that respect.

CONSIDERATIONS

1. Prior to being recruited by the ITU, the complainant had filled in and signed a Personal History Form, on 28 November 1996, referring to a degree of Bachelor of Science in Electrical Engineering obtained at the CCP, and he had submitted a copy of the related diploma.

Having received, in July 2001, an anonymous message casting doubt on the authenticity of that diploma, the Union queried the matter with the CCP, which, on 2 August, replied that the document submitted by the complainant had not been issued by them.

The complainant explained that the original diploma, which he had left with his grandmother in the Philippines, had been lost and that he had asked a cousin of his to obtain a new diploma, a copy of which, with a transcript of his academic record, had been submitted to the Administration with his file in 1998.

In a letter of 28 August 2001, the President of the CCP, partly contradicting the information supplied on 2 August, sent the ITU a certification, dated 22 August 2001, in which he certified that the complainant had completed the entire course leading to the degree of Bachelor of Science in Electrical Engineering. The certification was issued in lieu of a diploma in view of the role played by the complainant in various activist movements which had compromised the reputation of the College.

2. On 26 October 2001 the complainant was issued a written censure. The President of the CCP drafted a certification on 31 October 2001, in which he recognised that the diploma produced by the complainant in 1998 had been obtained by the latter’s cousin from a member of the college’s staff, despite an earlier decision not to issue him any diploma for the reason mentioned above. In addition, the complainant’s contract, which expired that day, was not renewed.

On 7 December 2001 the complainant asked the Secretary General of the ITU to reconsider the sanction issued on 26 October 2001 in the light of the certification of 31 October.

The Secretary General took the decision, which was notified to the complainant on 25 January 2002, to cancel the sanction and to refer the matter to the Joint Advisory Committee.

On 3 June 2002 the Committee, by a majority, recommended applying a verbal reprimand to the complainant, but the Secretary-General decided to issue a written censure. The complainant was notified of that decision by the Director of the TSB in a letter of 19 September 2002.

The complainant asked for the decision of 19 September to be reviewed, but it was confirmed by letter of 12 December 2002.

3. On 6 March 2003 the complainant referred the matter to the Appeal Board, challenging the decision of 12 December 2002 and two implicit sanctions, namely the non renewal of his contract and his “non recruitment for a fixed appointment”.

In its report of 8 May 2003, the Appeal Board recommended in substance, like the Joint Advisory Committee, that a verbal reprimand should be applied to the complainant, on the grounds that the latter “should have informed the Personnel Department in 1996 that, although he had obtained his degree, it was not recognised by the CCP authorities owing to his activist activities”.

In a letter of 26 May 2003, the Chief of the Personnel and Social Protection Department informed the complainant that, in the light of the conclusions reached by the Appeal Board, the Secretary General had decided to maintain the sanction of 19 September 2002, confirmed on 12 December. On 27 August 2003 the complainant filed a complaint with the Tribunal, requesting in particular that the decisions of 19 September 2002, 12 December 2002 and 26 May 2003, as well as the implicit decision not to renew his contract, be set aside.

4. The complainant submits that the reasons given for the decision of 19 September 2002 are vague, to say the least, and do not give him a clear notion of the accusations against him.

In his view, the decision refers to the Joint Advisory Committee’s recommendation of 3 June 2002, where it was explained that the Committee had not been in a position to establish in an indisputable manner the authenticity and legal value of the diploma and transcript of record which he had submitted.

He argues that there is no way of knowing either what the Committee deduced from that finding, i.e. whether it settled the issue of the authenticity of the documents, or how it had been concluded from that uncertainty that his dealings with the defendant had not been sincere at the time of his recruitment or exactly what the lack of sincerity consisted in.

He contends that the recommendation of 3 June 2002 gives no information enabling him to defend his interests in full knowledge of the facts, insofar as the reasons given shed no light on the charges ultimately held against him.

5. In its recommendation of 3 June 2002, the Joint Advisory Committee concluded that:

- with regard to the diploma and the transcript of record submitted by the complainant, it had not been in a position to establish in an indisputable manner their authenticity and legal value, and
- the complainant had not shown a sincere attitude vis à vis the Union at the time of his recruitment, even if the manner in which he acted may have been influenced by the ambiguous attitude the CCP had adopted against him.

It is on the basis of that recommendation, to which the Director of the TSB referred explicitly, that the decision of 19 September 2002 was taken. The Director’s letter also contained the following paragraph:

“Without entering into the detail of the political situation in the Philippines during your studies and having given due consideration to the confusing information provided by the [CCP], [it appears that] you did not act with the sincerity and integrity expected from an international civil servant.”

6. The Tribunal concludes from the foregoing considerations that the reason for the decision of 19 September 2002 was indeed the lack of sincerity and integrity shown by the complainant, when, at the time of his recruitment, he produced a document considered to be of doubtful authenticity, and that that reason was neither vague nor imprecise, as wrongly alleged by the complainant, who had put forward that plea before the Appeal Board. The argument that the reason was vague and did not allow the complainant to know what he was being accused of is, therefore, unfounded.

7. A question remains as to whether the sanction applied to the complainant was justified in the light of the findings of the inquiry which was carried out.

As mentioned above, the sanction was applied to the complainant because, at the time of his recruitment, he did not act with the sincerity and integrity expected of an international civil servant. It emerges from the evidence that the complainant, at the time of his recruitment, had submitted a copy of a diploma and that doubts as to the authenticity of that diploma arose in July 2001, when the Administration received an anonymous communication in that respect.

(a) The impugned decision is based on the view that in all honesty, when he filled in his Personal History

Form in 1996, the complainant should have let the Union know that the CCP had refused to issue him a diploma on account of his participation in student activist movements, even though the academic course he had followed entitled him to a degree.

The complainant maintains that he received a diploma in regular fashion and that he had been unaware of the CCP's policy aimed at denying him the diploma.

The ITU follows a reverse line of reasoning. Its arguments are set out in particular in the Secretary General's brief to the Appeal Board:

“[T]he Secretary General considers it utterly unlikely that [the complainant] should have been unaware of the circumstances prevailing at the time he completed his degree course, the CCP's policy of not extending recognition to students who had taken part in activist activities and the resulting decision not to issue them with diplomas.

[...]

Moreover, contrary to what [the complainant] maintains in his submissions, the burden of proof rested on him and not on the organisation.”

In its reply the ITU states that the Secretary General entertains “a reasonable doubt regarding the sincerity of the complainant with respect to the quality of the information he supplied at the time of his recruitment”.

It is therefore necessary to find out whether a diploma was awarded and issued to the complainant in 1992 and whether the latter was aware, prior to being recruited by the ITU in 1996, that the CCP did not want to issue him a diploma because he had taken part in activist movements.

(b) Disciplinary sanctions presuppose that a staff member has committed a fault for which he must be punished. Contrary to what the ITU maintains, however, the burden of proof rests with the Administration, since the complainant must enjoy a presumption of innocence and the protection afforded by the principle *in dubio pro reo*.

It is therefore also necessary to determine whether the Secretary General could, without abusing his discretionary authority, consider that it had been established that the complainant was aware in 1996 that he was not entitled – according to the CCP – to receive a diploma and that the validity of the alleged diploma issued in 1992 was denied by the CCP.

The Secretary General did not have all the information he needed to answer that question. None of the CCP's communications – which are indeed contradictory – showed that the complainant had been informed of their intention not to issue him with a diploma, on account of activities which were considered subversive, even though he had passed all the necessary examinations. There are some indications that he really did receive a diploma in 1992, since he submitted a copy of a diploma issued on 27 March 1992. As he was unable – according to him – to locate the original, he asked his cousin to obtain from the CCP in 1998 a new copy (a duplicate or a new photocopy) of that diploma; according to the evidence, the two copies produced are similar from the point of view of the official paper used, the date (27 March 1992) and the signatures. Moreover, it was established by the cousin's affidavit and by the last certification sent by the President of the CCP that the cousin did indeed obtain the new copy from a member of the CCP's staff. This suggests firstly that the initial diploma may have been issued to the complainant in a similar manner (i.e. without any special information) and secondly that it was issued on completion of his studies; it may therefore be assumed that there was evidence in the CCP's files proving that the diploma really existed. Moreover, the series of partly contradictory indications given by the CCP did cast doubt on the reliability of some of the information they have provided (for example, in the last certification, the CCP were forced to admit that a diploma had in fact been issued, even though it should not have been).

(c) That being so, there was not sufficient proof either that the diploma was not issued to the complainant in 1992 or that the latter had been informed that, according to the CCP, he was not entitled to receive it. The Secretary General might have enquired further into the aspects which remained uncertain, but did not do so. The “likelihood” referred to by the Secretary General, if it is not incontrovertibly ascertained, cannot make up for the lack of conclusive evidence.

Based as it is on an arbitrary appraisal of the facts, the impugned decision as far as it concerns the disciplinary sanction must therefore be set aside.

8. (a) Although it did not give rise to a written decision, the non renewal of the short term contract was based on charges levelled against the complainant in the course of the disciplinary procedure.

The mere cancellation of the disciplinary sanction must entail that of the decision of non renewal.

(b) On the other hand, in his submissions to the Tribunal, the complainant has not reiterated his claim for the quashing of a decision not to allow him a fixed term contract, even though he alludes to the problem in his claim No. 4 (see under B, above).

Consequently, no such quashing is required.

9. The outcome is that the complainant is entitled to receive compensation equivalent to the salary and allowances he would have received if his contract had been renewed on 1 November 2001, until such time as the ITU takes a new decision concerning the renewal of his contract.

10. As the complainant succeeds, the ITU shall pay him 3,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The disciplinary sanction and the decision not to renew the complainant's contract are set aside.
2. The Union shall pay the complainant compensation calculated as explained under 9 above.
3. It shall also pay him 3,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2004, 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 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet