Registry's translation, the French text alone being authoritative.

SIXTY-EIGHTH SESSION

In re FABIANI

Judgment 1011

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Denise Fabiani against the International Telecommunication Union (ITU) on 22 December 1988 and corrected on 10 January 1989, the ITU's reply of 10 April, the complainant's rejoinder of 10 July and the Union's surrejoinder of 10 August 1989;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal and Rules 3.4.2, 3.17.1 and 11.1.1.2 of the ITU Staff Regulations and Staff Rules;

Having examined the written evidence 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. The ITU granted the complainant, a French citizen, a permanent appointment in 1980. She was promoted to grade G.7 at 1 January 1981. Her post was regraded P.2 and she was promoted to that grade at 1 January 1985.

ITU Rule 3.4.2(b) says that on promotion from the General Service to the Professional category "... the total of the new base pay plus the appropriate post adjustment at the single rate shall, during the first year following promotion, exceed by the amount of one step in the professional grade his salary in the General Service category including the non-resident's allowance and the language allowance, if applicable". The complainant was accordingly promoted from grade G.7, step 7, to P.2, step 3, the date of her advancement to step 4 being set at 1 May 1985. She has been paid a special post allowance corresponding to grade P.3 most of the time since 1 June 1986.

Pay for staff in the General Service category is stated in Swiss francs, pay for staff in the Professional category in United States dollars. At the material time shifting rates of exchange and increases in the scales of pay for General Service category staff were to the benefit of that category.

On 28 January 1986 the complainant wrote to the Chief of the Personnel Department pointing out that but for her promotion she would have reached step 8 in G.7 in July 1985 and earned 5,835 Swiss francs a month, whereas her salary at grade P.2, step 4, in December 1985 for example, had come to only 5,817 francs; her pension contributions had fallen; the loss of pay was in breach of the rules; and her salary should not have fallen lower than what it would have been at G.7.

At the time there were talks about the general problem between staff representatives, including the complainant, and the Union.

Four officials promoted from G.7 to P.2 on 1 January 1986 asked the Secretary-General under Rule 11.1.1.2(a) to review the determination of step in their new grade, the Secretary-General refused, and they appealed to the Appeal Board under Rule 11.1.1.2(b) on 31 March 1987. In its report of 4 June 1987 the Board held that the rules had been properly applied but recommended remedial action.

On 22 February 1988 the complainant wrote to the Chief of Personnel citing her memorandum of 28 January 1986 and the Board's recommendations, reaffirming that in 1985 she would have got more pay at G.7, and asking for review.

By letters of 18 March 1988 the Chief of Personnel told the four appellants that, the United Nations having decided to take shifts in currency rates into account in reckoning the pay of anyone who changed categories on promotion, the Union would do likewise as from 1 January 1986 and review their pay at the end of the year. The Union calls such review an "anniversary calculation".

On the same day the Chief of Personnel wrote to tell the complainant that the Union would not apply that decision as from 1 January 1985, the date of her promotion. On 8 April 1988 she asked for review of her step in P.2 and of her pensionable remuneration as from 1 January 1986. The Chief of Personnel answered in a memorandum of 15 April that the Union had always applied 3.4.2 correctly and, though steps would be taken as from 1 January 1988 to mitigate the effects of a weaker dollar on pay in the first year after promotion to the Professional category, they would not affect the complainant, who had been promoted three years earlier.

On 26 May she appealed to the Appeal Board under 11.1.1.2(b). In its report of 24 October 1988 the Board held that her case was the same as the four earlier ones save that it related to 1985, and 3.4.2(b) had again been correctly applied; but it recommended extending the benefit of "anniversary calculations" to those, like her, promoted in January 1985. By a memorandum of 9 November 1988, the impugned decision, the Deputy Secretary-General told her that the "anniversary calculation" would be made only as from 1 January 1986; her appeal was rejected.

B. The complainant observes that she cannot argue her case properly because the Union has not explained its position.

It has acted in breach of 3.4.2(b), which means that a staff member should earn more in the year following promotion and entails reviewing the total of earnings at the end of that year. The Union has acted at odds with the decision, notified on 18 March 1988, to follow United Nations practice as from 1 January 1986. Since the Union could not tell until 1 January 1986 whether the complainant's pay in 1985 had been what 3.4.2(b) required, that decision applied to her as well, there being no breach of the rule against retroactivity. The Union is in breach of the principle of equal treatment because the complainant has fared less well than the other four. She cites Judgment No. 152 (in re Garnett) of the United Nations Administrative Tribunal.

She lost 4,000 Swiss francs in 1985 alone because the Union refused to take account of the weakening of the dollar, the rise in salaries for the General Service category and the increment she would have got in G.7.

She seeks the quashing of the impugned decision, the recalculation of her pay as from the date of promotion, and costs.

C. The ITU replies that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has not followed the internal appeal procedure properly. The purpose of her appeal of 26 May 1988 to the Board was to challenge the Union's refusal of 15 April to review her pay against 3.4.2(b): in a memorandum of 29 August 1988 to the chairman of the Board she said she was "not appealing against the decision taken by the Secretary-General concerning the introduction of new measures for staff promoted on or after 1 January 1986". What she argued was that back in 1985 the Union had already misapplied 3.4.2 and caused her to lose some 4,000 francs.

The appeal procedure begins with a request for review of an "administrative decision" under 11.1.1.2(a) and the request must be sent to the Secretary-General, with a copy to the head of the official's department, within six weeks. Presumably the decision the complainant wanted to challenge was one of her monthly pay slips in 1985. But since she did not act until she wrote her memorandum of 22 February 1988 she was over two years late in challenging even the last of those pay slips. Moreover, her memorandum of 28 January 1986 to the Chief of Personnel was not a request under 11.1.1.2(a) because it was not addressed to the Secretary-General; she did not send a copy to the head of her department; she did not plead breach of the rules or of her contract; and she did not say what decision she objected to. She also failed to challenge within the time limit in 11.1.1.2(b) the rejection implied in the absence of an answer. Even if the memorandum was a claim under Rule 3.17.1 ("Retroactivity of Payments"), as its wording suggests, she still failed to appeal later under Rule 11.1.1. The talks going on with the Union at the time afforded no pretext for not respecting the time limits for appeal. To retort that she may challenge a continuing breach of 3.4.2(b) is to put too wide a construction on Judgment 323 (in re Connolly-Battisti No. 5).

As to the merits the Union contends that it correctly applied 3.4.2(b) and all other rules that were material at the time of her promotion. Under 3.4.2(b) the comparison is not with what she would have earned in her old grade but with her actual earnings at the date of promotion, and the comparison is made only in the twelve months thereafter. Judgment 152 of the United Nations Tribunal is irrelevant. The "anniversary calculation" does not apply to the complainant, and she misreads the decisions of 18 March: they apply to promotion only as from 1 January 1986 because neither she nor anyone else promoted earlier had filed a timely appeal. Allowing her claim would be unfair to others promoted before that date.

D. In her rejoinder the complainant discusses several issues of fact.

She contends that she did follow the internal appeal procedure correctly. She addressed a proper request for review under 11.1.1.2(a) on 28 January 1986 to the Chief of Personnel. If it was wrongly addressed, he should have told her. Besides, what is addressed to a subordinate is necessarily addressed to the Secretary-General. Having got no answer, she duly lodged her appeal with the Appeal Board under 11.1.1.2(b) on 26 May 1988. The Union did not plead irreceivability at the time, and the Board did not declare her appeal irreceivable. The Union shows bad faith in contending that she was out of time when it was itself guilty of time-wasting and deterrent tactics in its talks with the staff representatives. She had no reason to appeal against the decision to apply new measures to the four officials promoted at 1 January 1986. As she made plain in her memorandum of 29 August 1988 to the chairman of the Board, her purpose was to object to the method of reckoning her own pay as from 1 January 1985.

She enlarges on her pleas on the merits. In particular she explains why in her view the Union's interpretation of 3.4.2(b) is wrong and she cites the English text.

She reaffirms that there was breach of 3.4.2(b) in her case. She sees no reason why the system of anniversary calculations should not be applied as from 1 January 1985, her case being in all material respects identical to that of the four other officials who benefit from that system and especially since the decline in the dollar was more detrimental to Professional category pay in 1985 than in earlier years.

E. In its surrejoinder the Union observes that it has already answered the complainant's pleas on receivability and on the merits and that it need, for the most part, only enlarge on its earlier arguments. It points to what it sees as misrepresentation of fact in the complainant's rejoinder. As to receivability, it maintains that her memorandum of 28 January 1986 did not qualify as a valid request for review under Rule 11.1.1.2(a) but was merely a claim under Rule 3.17.1. Even if it were a valid request she failed to challenge in time the implied rejection of it under the further provisions of the Rules on appeals. Besides, Rule 11.1.1.2(a) expressly requires the sending of a letter to the Secretary-General and a copy to the head of department, and the complainant may not plead ignorance of those requirements.

CONSIDERATIONS:

Receivability

1. The complainant filed her complaint on 22 December 1988, within the time limit in Article VII(2) of the Tribunal's Statute.

What she is impugning is a decision the Deputy Secretary-General of the Union took in a memorandum of 9 November 1988 maintaining his earlier decision "concerning the date of January 1986 as the date from which the measures known as 'anniversary calculations' may be introduced".

She first put forward her claim in a memorandum of 22 February 1988; the Chief of the Personnel Department rejected it in a memorandum of 18 March; she pressed her claim in another dated 8 April; and the Chief of the Personnel Department again rejected it on 15 April. On 26 May 1988 she lodged an internal appeal under Rule 11.1.1 of the ITU Staff Regulations and Staff Rules against the decision of 15 April, and that was the appeal which the impugned decision of 9 November 1988 rejected.

2. It is not the decision of 15 April that the complainant ought to have challenged in her internal appeal since it was mere confirmation of an earlier decision that had already been put into effect and of which the complainant was aware.

The "administrative decision", within the meaning of Rule 11.1.1.2(a), which caused her injury was the one which determined her remuneration at grade P.2 in the twelve months following the date of her promotion - first at step 3 and from May 1985 at step 4 - the last of those months being December 1985. She should therefore have lodged an appeal under Rule 11.1.1.2(a) by addressing a letter to the Secretary-General within six weeks of the date of written notification of the decision, i.e. from some time in December 1985. She knew by then not only that there had occurred what she saw as a misinterpretation of Rule 3.4.2 but also the amount of the injury that she had suffered thereby and that gave her a cause of action. In fact, as was said above, she did not appeal until 26 May 1988, and she was therefore out of time.

3. The memorandum she wrote on 28 January 1986 cannot be construed either in form or in substance as a request for review under 11.1.1.2(a) but was merely a claim under Rule 3.17.1, which is about the "Retroactivity of Payments".

4. Article VII of the Tribunal's Statute says that a complaint shall not be receivable unless the decision impugned is a final one and such remedies as are available under the applicable Staff Regulations have been exhausted. To satisfy that requirement, which is mandatory, the staff member must duly lodge an internal appeal with the competent body within the time limit in the Staff Regulations.

Since the complainant failed to file an internal appeal in the proper form and within the time limit in the Staff Regulations and Staff Rules and indeed failed to act under 11.1.1.2(a) until over two years had elapsed since the date at which she ought to have appealed, her complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

The merits

5. The complaint being irreceivable, there is no need to go into the merits.

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 Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mella Carroll
H. Gros Espiell
A.B. Gardner

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