

## **EIGHTY-FOURTH SESSION**

### ***In re* Serlooten**

#### **Judgment 1679**

**The Administrative Tribunal,**

**Considering the complaint filed by Mr. Gérard Serlooten against the International Telecommunication Union (ITU) on 12 December 1996, the ITU's reply of 7 February 1997, the complainant's rejoinder of 6 March and the Union's surrejoinder of 8 April 1997;**

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

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

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

**A. The complainant, a Frenchman who was born in 1937, joined the staff of the ITU on 1 May 1961 as a clerk at grade G.4 under a fixed-term appointment. The Union granted him a permanent appointment as from 1 June 1966 and, after several promotions, grade G.7 as from 1 January 1977. From 1982 he performed the duties of a post that was graded P.2. He was later transferred to that post and promoted to P.2 as from 1 July 1986. In 1991 he was promoted to P.3, and then, as from 1 November 1994, to P.4, as a radiocommunication engineer.**

**At its 1995 session the Council of the Union expressed concern at the unfavourable treatment as to pensions, and for that matter as to pay as well, of staff who had been promoted from the General Service to the Professional category. It instructed the Secretary-General to tackle the problem.**

**In letters of 7 and 29 November 1995 the Secretary-General told the coordinator of a body known as the "G to P" Working Party, which had been set up in 1991, that he intended to take exceptional action and make an offer to each of the officials concerned. They were to be allowed either to keep their then administrative status or else, as from 1 January 1995, to return to the General Service category at the grade which they had held before promotion to the Professional one. The Secretary-General explained that he would not grant payment of the special post allowance to anyone who opted for reinstatement in the General Service category but who was continuing to perform the duties of a post in the Professional category. Anyone in that position would be treated as falling solely within the General Service category and so would lose non-local status and the benefits and allowances that went with it. On 4 December the chief of the Personnel and Social Protection Department forwarded those letters to the complainant.**

**By a letter of 12 December 1995 the Secretary-General invited the complainant to choose between staying in the Professional category and going back to the General Service one as from 1 January 1995 on the terms set out in the letters of 7 and 29 November. By a memorandum of 13 December the complainant opted for reinstatement in the General Service category, although he objected to the refusal of the special post allowance and to having to pay back any sums that he had received in 1995 as a staff member in the Professional category. Correspondence ensued, and he asked the Secretary-General in a letter of 18 January 1996 to review the decision that he return the difference in pay between P.4 and G.7 for 1995. By a memorandum of 22 February 1996 the Secretary-General rejected his claim and pointed out that he had himself agreed to pay the amounts back by asking for reinstatement in the General Service category.**

**Meanwhile, by a decision of 14 February, the Secretary-General had put the complainant back in the General Service category, at grade G.7. He continued to perform the same P.4 duties as before. On 28 February he lodged with the Appeal Board an appeal against the Secretary-General's decision not to pay him the special post allowance and against the requirement that he return the difference in pay. In its report**

of 26 July the Board said it could not recommend paying the complainant any special post allowance but was in favour of assigning him to a G.7 post and relieving him of the requirement to pay the sum back. By a memorandum of 27 September 1996, the decision now under challenge, the Secretary-General told the complainant that he was upholding his earlier decision.

B. The complainant points out that he is still performing the duties of a P.4 post and he contends that the Secretary-General's decision not to grant him the special post allowance is unlawful under Staff Regulation 3.8. He submits that he did not surrender his right to that allowance by opting for reinstatement in the General Service category. The decision also runs counter, in his view, to the principle of equal treatment inasmuch as several staff members who have always belonged to that category and who, like him, are performing the duties of Professional category posts do get the allowance. The decision not to pay him the allowance is unfair since his "downgrading" does not correspond to any change in his duties and has nevertheless meant a cut in pay. As for the requirement that he refund the difference in pay between P.4 and G.7 for 1995, he believes that it is quite unwarranted since he did perform P.4 duties in that year and only later did he opt for reinstatement in the General Service category.

He asks the Tribunal to set aside the decision of 27 September 1996 insofar as it refuses to pay him back the amount of 8,409.80 Swiss francs, reclaimed at the Secretary-General's instructions. He claims the special post allowance as from 1 January 1995 and awards of 10,000 francs in damages and 10,000 in costs.

C. In its reply the Union points out that there was no precedent for the offer it made to staff like the complainant who had been promoted from one category to the other. Those staff were fully aware of their position when they made their choice between keeping their then administrative status and reinstatement in their pension rights. The Union questions the complainant's good faith on the grounds that after agreeing to an act which he believes may have been unlawful he is now challenging it before the Tribunal. To his plea of breach of equal treatment as to the grant of the special post allowance the Union retorts that those who are being paid the allowance are not in the same position either in fact or in law as he inasmuch as they benefit under Staff Regulation 3.8 a), which governs staff who hold a permanent appointment and who have been appointed after competition to a "fixed-term post". Nor, in its submission, is there any breach of equity: *volenti non fit injuria*. The term "downgrading" is inapposite to describe a measure to which the complainant consented and which has brought him an increase in his pension entitlements. He knew full well that according to the terms of his reinstatement in the General Service category as from 1 January 1995 any sum paid after that date to him as a member of the Professional category was refundable.

D. In his rejoinder the complainant presses his pleas and claims. He contends that there is no objective yardstick for distinguishing his case from that of staff who have always belonged to the General Service category and who are being paid the special post allowance. He points out that the purpose of the solution which was proposed to the staff concerned was to safeguard their pension entitlements, and certainly not to penalise them by reducing the amount of their pay.

E. In its surrejoinder the Union points out that the complainant's present status stems from his own acceptance of an offer that was made outside the context of the rules and that any comparison with staff who have not been reinstated in the General Service category is therefore quite irrelevant.

## CONSIDERATIONS

1. On 1 May 1961 the complainant joined the General Service category of staff of the ITU. His grade was G.4. From time to time he was promoted, and on 1 January 1977 he reached G.7. At the beginning of 1982 he moved to the Professional category of staff and was put on a P.2 post. He was paid a special post allowance. The Union promoted him to P.2 on 1 July 1986. On 1 November 1994 it promoted him to P.4 on a post for a radio-communication engineer in the Terrestrial Services Department (TSD). On 1 January 1995 he went back to the General Service category, at grade G.7, so that his pension would not suffer on account of the earlier change in category from General Service to Professional.

2. At its 1995 session the Council of the Union expressed concern about the fate of those promoted from the General Service to the Professional category and asked the Secretary-General to continue efforts to tackle the problem.

**3. The Secretary-General accordingly made an exceptional offer to anyone on the staff at 1 January 1996 who had been either promoted from the General Service to the Professional category or granted a special post allowance for some Professional grade under Staff Regulation 3.8 a). Such staff might either:**

**(a) keep their promotion or 3.8 a) allowance and so their then administrative status; or else**

**(b) return as from 1 January 1995 to the grade and step they had held in the General Service category before the promotion or the grant of the allowance, the choice to be made by 5 January 1996.**

**Anyone who chose between 6 January and 29 February 1996 to go back to the General Service category would do so only as from 1 January 1996. And anyone who was to retire from service in 1996, 1997 or 1998 might go back to the General Service category as at a date which would allow the completion of three-years' service in that category.**

**4. In a memorandum of 13 December 1995 to the Secretary-General the complainant said he agreed to return as from 1 January 1995 to step 12 in grade G.7. The grade was the one from which he had been promoted to the Professional category, and the step took account of his seniority. But he raised two questions: why was he not to be paid a special post allowance at P.4, and why should he have to pay back various sums he had earned in 1995 as a member of the Professional category?**

**5. In a reply of 20 December the Secretary-General told him that he might spread over the period left until he retired the repayment of the sums he owed on account of his return to the General Service category.**

**6. In a memorandum of 18 January 1996 the complainant said that he was still willing to go back to that category, but took issue with the Secretary-General's reply and applied under Staff Rule 11.1.1.2 a) for review of the demand for repayment.**

**7. The Secretary-General replied in a memorandum of 22 February, he put his case to the Appeal Board on 28 February, and the Board submitted its report on 26 July. On 27 September the Secretary-General gave him a final decision rejecting his claims. That is the decision impugned in his complaint, which he filed on 12 December 1996.**

**8. He is asking the Tribunal to declare the Secretary-General's decision to be in breach of the Staff Regulations and general principles of law; to set it aside insofar as it refused him payment of the sum of 8,409.80 Swiss francs, which he has refunded to the Union at the Secretary-General's bidding; to order the Secretary-General to grant him the special post allowance payable under Staff Regulation 3.8 as from 1 January 1995; and to award him in damages whatever sum it thinks fit, not to be less than 10,000 francs, and 10,000 in costs.**

### ***Breach of the Staff Regulations***

**9. Regulation 3.8 a) reads:**

**"A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition; in this latter case the allowance shall be pensionable if it is granted for a period of more than one year."**

**10. The Union's plea is mistaken. That provision is not confined to the case of an official on a permanent appointment who is put on a "fixed-term post" as the result of a competition. It applies to anyone who temporarily has to take on the duties of an existing post at a grade higher than his own. Only the second half of the provision ("However, in the case ...") deals with the case of a recruitment to a fixed-term post by competition, and it determines the date at which the allowance is payable and whether it is pensionable.**

**11. It is common ground that after reinstatement in the General Service category at G.7 the complainant was performing the same duties as he had at grade P.4.**

**12. Since the Union may at any time give him duties corresponding to his actual grade, only temporarily has**

he taken on the duties of "an existing post in a higher grade" -- P. 4 -- than the G.7 one he holds. He therefore qualifies under 3.8 a) for payment of the allowance. Neither the Union's mistaken charge against him of bad faith nor any other consideration relieves it of its duty to apply the rule.

Nor does the Secretary-General need instructions from the Council to apply the Staff Regulations and Staff Rules.

13. The decision of 27 September 1996 is a breach of 3.8 a). It must therefore be set aside insofar as it refused the complainant payment of the allowance as from 1 January 1995, the date at which he returned to the General Service category.

#### *The refund*

14. The complainant has begun refunding to the Union various allowances paid him from 1 January 1995 as a member of the Professional category and the difference in pay between P.4 and G.7. He is claiming back 8,409.80 Swiss francs, a sum that corresponds to the difference in pay earned between 1 January 1995 and the date of the decision reinstating him in the General Service category.

15. He may not for one and the same period get both the pay of a P.4 staff member and a special post allowance corresponding to that grade. His claim therefore fails, and so does his claim to an award of damages, which is unwarranted.

16. He is entitled to costs, and the amount is set at 4,000 Swiss francs.

### DECISION

For the above reasons,

1. The Secretary-General's decision of 27 September 1996 is set aside insofar as it refused the complainant payment of the special post allowance under Staff Regulation 3.8.
2. The Union shall pay him the allowance as from 1 January 1995.
3. It shall pay him 4,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

*(Signed)*

Michel Gentot  
Jean-François Egli  
Seydou Ba

A.B. Gardner