EIGHTY-FOURTH SESSION

***In re* Yousif** **Judgment 1725**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ahmed Yousif against the International Telecommunication Union (ITU) on 24 January 1997, the ITU's reply of 19 March, the complainant's rejoinder of 20 May and the Union's surrejoinder of 24 July 1997;

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

Having examined the written submissions;

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

A. The complainant, a Sudanese who was born in 1939, joined the staff of the ITU on 1 January 1980 under a fixed-term appointment. He was assigned as an engineer at grade P.4 to the Technical Cooperation Department of the General Secretariat at the Union's headquarters in Geneva. After a transfer within the Union he was seconded to the United Nations from 1 February 1986 to 1 February

1988. From 1 February 1993 he served as radio communications engineer in the Telecommunication Development Bureau (BDT) and was paid a special post allowance corresponding to grade P.5. On 1 December 1994 he was promoted to P.5. His contract was extended to 31 December 1999, the date at which he was to retire.

On 12 December 1995 Mrs. N. M., a secretary in the Bureau, sent the Secretary-General and the Director of the Bureau a memorandum complaining about a quarrel in Nairobi on 28 November 1995 between her and the complainant at an ITU seminar which the complainant was organising there.

On 9 February 1996 the Secretary-General forwarded to the complain-ant a copy of the memorandum from Mrs. M. and told him that, since the charges it made might warrant disciplinary action, he was invited, in accordance with Staff Rule 6.1.3, to comment by 16 February. The complainant replied in a memorandum of 12 February. On the 15th the Secretary-General referred the matter to the Joint Advisory Committee. In its report of 7 March the Committee held that the complainant:

> "had addressed insulting and threatening remarks to Mrs. M. and shown her physical violence and had, among other things, threatened her with dismissal, shouting at her in public and in front of many witnesses on the evening of 28 November 1995 in the lobby ... of the hotel in which were resident the participants in various seminars, including the BDT one that he was organising."

The Committee's majority recommendation was dismissal. It said, however, that if the Secretary-General decided against that the only other possible sanction would be downgrading from P.5 to P.4, and it recommended ensuring that the complainant never again went on mission for the ITU or represented it at meetings or took part in headquarters meetings attended by outsiders. By a letter of 12 March 1996 the Secretary-General told the complainant that he had decided to downgrade him from P.5, step 10, to P.4, step 10, as from 1 April. The same day he asked the Director of the Bureau to take the other action against the complainant which the Committee had recommended.

By a letter of 14 May the complainant submitted to the Secretary-General a request for review of that decision in accordance with Staff Rule 11.1.1.2 a). By a memorandum of 17 June the Secretary-General told him that he was confirming the downgrading and the other action. On 6 August the complainant filed an internal appeal against that decision with the Appeal Board. In its report of 29 October the Board recommended confirming the disciplinary and other action taken. By a memorandum of 7 November 1996 the Secretary-General informed the complainant that he was upholding his original decision. That is the decision now under challenge.

B. The complainant puts forward four pleas.

His first is that the Joint Advisory Committee and the Appeal Board endorsed Mrs. M.' story without heeding his own explanations or the statements of impartial witnesses. He says that he never threatened Mrs. M. The quarrel went no further than "an exchange of strong words accompanied by a waving of arms and gestures on both sides". He cites a declaration which several participants in the Nairobi seminar signed on 30 November 1995 and which praised his talents for organisation and management. One reason why Mrs. M. made an issue of the incident was a fear of disciplinary action for her poor performance and insubordination. Citing Judgment 1384 (*in re* Wadie), the complainant contends that the ITU's allegations do not amount to a "set of precise and concurring presumptions" of his guilt.

His second plea is that there was no due process before the Joint Advisory Committee and the Appeal Board. The Committee made a mistake of law and betrayed prejudice against him by referring in its recommendation to misdemeanours he had allegedly committed over the years. The secretary of the Committee had, as chief of the Personnel and Social Protection Department, recommended his downgrading to the Secretary-General and should therefore have stepped down or been removed so as to ensure proper impartiality. The Committee did not heed the views of the Director of the Bureau, who was not in favour of any sanction. The Committee should have given him a hearing and taken oral evidence from witnesses. There were two flaws in the proceedings before the Appeal Board. One was that the Union refused to let him be represented at the Board's

hearings on 24 October 1996 and thereby acted in breach of Staff Rule 11.1.1.4 b). The other was that the Board held hearings in his absence, and that was in breach of Rule 11.1.1.4 d).

The complainant's third plea is that his downgrading, aggravated as it was by the decision not to let him go on mission or attend ITU meetings, was not proportionate to what had happened on 28 November 1995. Nor did it correspond to any of the disciplinary sanctions provided for in Rule 10.1.1 a). He cites a letter of 6 April 1996 from the Sudanese Government saying that the punishment was out of proportion.

Fourthly, he observes that downgrading is not a disciplinary sanction provided for in the rules of the International Labour Office, though the International Labour Organization is the United Nations agency in charge of labour matters. Downgrading "is considered as a management tool for use only if the parties agree".

He seeks the quashing of the decision of 12 March 1996, full reinstatement at grade P.5 as from 1 April 1996, the payment of 100,000 United States dollars for material and moral damages, an award of costs and the payment of interest at the rate of 6 per cent a year on the sums due. He also wants the Tribunal to have an ILO expert explain to it the ILO's policy on downgrading.

C. In its reply the Union says that it paid heed throughout to the various versions of the material facts. It does find a "set of precise and concurring presumptions" of the complainant's guilt: the detailed objections put forward by Mrs. M., the reports by two members of the ITU staff who witnessed the incident and the complainant's involvement in earlier incidents that showed up what sort of man he was. The Union contends that the evidence he wants to adduce relates to the quality of his performance, which is not at issue. It was free to conclude from the statements by Mrs. M. and by her witnesses that the incident did not stop at "an exchange of strong words accompanied by a waving of arms and gestures".

The Union submits that it was only reasonable for the Advisory Committee to take account also of the unfavourable items in the complain-ant's personal file. There was no reason for the chief of the

Personnel Department to withdraw from the Committee. According to Rule 8.2.1 he or his deputy is an *ex officio* member of the Committee as its secretary. Furthermore, there is no evidence to bear out the complainant's contention that it was the chief of Personnel who had proposed downgrading to the Secretary-General. Nor were the views of the Director of the Bureau determinant, since the final decision on disciplinary action lies with the Secretary-General.

The Union observes that the complainant had two opportunities of stating his views: first, on 12 February 1996, in answer to the Secretary-General's memorandum telling him that a charge had been brought against him; secondly, on 28 February, after the first meeting of the Advisory Committee. He did not apply for hearings on either occasion.

The Union rejects his contention that the sanction was out of proportion to the offence. The Administration's reply of 18 September 1996 to his internal appeal said that his strong language and violent gestures had infringed in several respects the standards of behaviour required of international civil servants and set out in Regulation 1.5. It also pointed out that the incident had marred the ITU's reputation because it had occurred abroad. The restrictions put on the complainant's duties were not disciplinary sanctions but intended to prevent any recurrence. The letter of 6 April 1996 from the Sudanese Government constituted inadmissible interference in the ITU's internal affairs.

The Union observes that since downgrading is a sanction provided for in the Staff Regulations it need not find authority for it in the ILO's rules. Besides, other international organisations apply such sanctions. It objects to the complainant's application for the hearing of an expert witness.

D. In his rejoinder the complainant argues that the material facts should be "substantiated beyond a reasonable doubt". In his view the ITU is merely making allegations when it says that the incident went beyond what he himself admitted. The restrictions on his functions do amount to sanctions and are attributable to prejudice against him. They

were imposed in breach of due process. He is not challenging the Union's right to impose the sanction of downgrading.

E. In its surrejoinder the Union presses its earlier pleas.

CONSIDERATIONS

1. The complainant has been on the staff of the International Telecommunication Union since 1 January 1980. At the material time he was serving in its Telecommunication Development Bureau (BDT) at grade P.5. In November 1995 it sent him to a seminar in Nairobi. There he had a row with an assistant secretary, and she objected to his behaviour. The Administration started disciplinary proceedings against him and the Secretary-General referred his case under Staff Rule 10.4.1.1 c) to the Joint Advisory Committee, which met three times. The majority recommended dismissing him. But the Committee was unanimous that "if the Secretary-General in the exercise of his discretionary authority should take account of facts not available to the Committee which might not allow him to endorse its recommendation ... the only other form of disciplinary action possible should be ... downgrading (from P.5 to P.4)". And to save its good name and protect its staff while on missions the Union should – the Committee believed – see to it that the complainant did not himself go on any more missions or to any more meetings attended by outsiders. On 12 March 1996 the Secretary-General accordingly downgraded him from P.5 to P.4 and asked the Director of the Bureau to give effect to the Committee's recommendation against letting him go on missions or attend meetings.

2. He made a request for review but on 17 June 1996 the Secretary-General upheld the decision. He filed an appeal. In a report dated 29 October 1996 the Appeals Board recommended confirming the disciplinary and other action and "revising [his] post description as soon as possible or reassigning him". The Secretary-General accordingly rejected the appeal by a decision of 7 November 1996, which he impugns. His complaint is receivable.

3. He is seeking reinstatement at grade P.5 in his former duties and an award of 100,000 United States dollars in damages. He

submits that the disciplinary action was unwarranted; that the proceedings before the Joint Advisory Committee and Appeals Board were flawed; that none of the charges against him was proven; and that the punishment was in any event neither fitting nor proportionate, being imposed not, as the International Labour Office's own rules require, in the organisation's interest but by way of disciplinary action.

4. On the last point he applies for the hearing of an expert from the ILO to explain to the Tribunal why that Organization treats downgrading, not as a form of disciplinary action, but as a "management tool" to be used only with the staff member's consent. The application is disallowed because such inquiry would serve no purpose and ITU Staff Rule 10.1.1 includes "demotion to a lower grade" among possible sanctions anyway.

5. The complainant objects to the Joint Advisory Committee's report-ing without having let him or his counsel plead before it or the Director of the Bureau comment in writing. He further objects to its taking account of items in his personal file that were prior to the material facts and its showing bias, which he partly blames on the fact that the secretary of the Committee, who was prominent in handling his case, was also Chief of Personnel.

The Tribunal is satisfied on the evidence that there were no flaws in the Committee's proceedings. The Union told the complainant on 9 February 1996 about the allegations against him and invited him under Staff Rule 6.1.3 to answer by the 16th. On the 12th he did so in a memorandum with five appendices. The Committee met and then called on him on the 27th to account for other incidents in his career. He replied forthwith in writing. The proceedings were fully adversarial. There was nothing in the rules to require the Committee to grant the complainant a hearing, and he did not apply for one anyway. The Committee submitted its report on 7 March 1996 after seeing the written evidence he had put to it. It was in accordance with Rule 8.2.1 that the chief of Personnel served as its secretary, and his doing so raised no presumption of bias in its report, the less so since he had no right to vote. The Committee was right too, provided its proceedings were adversarial, to consider whether the incident in Nairobi was a singular instance or not. As the rules required, it did take evidence

from the Director of the Bureau; there was nothing wrong with its doing so orally; and, as it said in its report, it took account of his views, even thought it did not endorse them.

6. The Appeal Board proceedings show no flaw either. The complain-ant objects to the denial of representation by his own counsel and to the holding of hearings in his absence in breach – he says – of Rule 11.1.1.4 d). The answer to the former objection is that the Board heard him on 24 October 1996. It is true that his counsel were unable to attend, having been warned of the date only a few days beforehand, but changing it as they asked proved impossible. On the other point the Board did hear the complainant and witnesses. So there was no breach of Rule 11.1.1.4 d). In any event the Board is not a court of law and does not have to act as one in all respects: see Judgment 1124 (*in re* el Ghabbach No. 2) under 9.

Lastly, the complainant seems to be arguing that the Board was wrong to shift the burden of proof from the Union to him. But he rests his argument on the statement in its report that "in his oral submissions the evidence he gave failed to bear out his version of the facts". That is just a comment that, being irrelevant to the burden of proof, shows no mistake of law.

7. All that need be said on the merits is that the facts are proven and they did warrant disciplinary action. On 28 November 1995 the complainant publicly insulted and threatened someone at work. The incident was a serious one, and not to be mitigated by praise of his skill at running seminars or by support from the Sudanese Government. His behaviour was inexcusable and amounted to misconduct. There is no evidence to bear out his contention that downgrading was a punishment out of proportion to the offence.

The Union's handling of the case was beyond reproach and shows no misuse of authority. It is a pity that a chart it put out on 1 February 1996 presumed his downgrading to P.4. But the unit that was to blame for the "mistake" made him an apology, and it did not affect the lawfulness of the downgrading anyway.

8. Since his claim to the quashing of the impugned decision fails, so does his claim to damages.

DECISION

For the above reasons,
The complaint is dismissed.

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

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT
JULIO BARBERIS
JEAN-FRANÇOIS EGLI

A.B. GARDNER