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

**EIGHTY-FIFTH SESSION**

## *In re* Vitry

**Judgment 1753**

**The Administrative Tribunal,**

**Considering the complaint filed by Mrs. Elsa Chantal Vitry against the International Telecommunication Union (ITU) on 7 October 1997 and corrected on 14 November, the ITU's reply of 26 January 1998, the complainant's rejoinder of 18 March and the Union's surrejoinder of 21 April 1998;**

**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 is a French citizen who was born in 1958. On 26 June 1991 she joined the staff of the ITU's headquarters in Geneva on a short-term contract as a secretary and typist. As from 1 August 1991 the Union granted her another short-term contract as a clerk at grade G.4 in the Personnel and Social Protection Department. It renewed that contract from time to time and on 21 July 1994 promoted her to G.5.**

**On 22 July 1994 it issued a notice of vacancy, No. 13/94, for a G.5 clerk in the Personnel Department, the post to be filled by the grant of an appointment on probation. The complainant applied and on 28 October 1994 the Union offered her the appointment on probation for two years as from 1 November. For some of her duties, relating to short-term staff, she came under Mrs. Miriam Aubry, whereas for the rest, which related to the recruitment of short-term interpreters, she was answerable to Mrs. Jacqueline Jouffroy.**

**On 1 August 1995 her second-level supervisor, the head of the Staff Administration and Post Classification Service, wrote a minute saying that the quality of her performance warranted a step increment, the "periodic staff report" on her performance from 1 November 1994 to 31 July 1995 would be made as soon as her first-level supervisors had entered their assessments.**

**On 31 January 1996 the Secretary-General of the Union imposed a written warning on the complainant for giving leave to members of the Geneva police, without first consulting her supervisors, to enter ITU premises to seek information about an official who had been involved in a road accident.**

**Only on 9 August 1996 did the complainant see her appraisal report for the period from 1 November 1994 to 31 July 1995. Mrs. Jouffroy described as "unsatisfactory" her performance at a conference from October to November 1995, but gave her the general rating "satisfactory". The head of the Staff Administration and Job Classification Service initialled the report on 27 August 1996.**

**On 12 September 1996 the complainant signed her second report, which was about her performance from 1 August 1995 to 30 June 1996. It reflected the views of both her first-level supervisors, contained adverse comment and gave her a general rating between "satisfactory" and "unsatisfactory".**

**On 19 September 1996 she saw the deputy chief of the Personnel Department. By a letter of 10 October 1996 the chief of the Department told her that her probation was extended by six months to 30 April 1997. She had talks with officials of the Department. On 7 February the Secretary-General sent her a letter to say that her appointment was to end at 30 April. By a letter of 18 March she asked the Secretary-General to reconsider and to transfer her to some other post where she might continue her probation. On 25 April the**

**Secretary-General answered that the decision to end her probationary appointment was the outcome of objective assessment of her performance and skills. He referred to the warning of 31 January 1996, said that it had shown up her "shortcomings", refused her application for transfer and upheld the decision of 7 February.**

**By a letter of 30 April 1997 she filed an internal appeal with the chairman of the Appeal Board under Staff Rule 11.1.1.2(b). The Board reported on 1 July 1997. It saw no objection to upholding the impugned decision, though it recommended keeping more closely to the timetables for staff reports and having some procedure for recording in writing what had been said in talks that led to important decisions on staff matters. By a letter of 10 July 1997, which is the impugned decision, the Secretary-General told the complainant that he was upholding his decision of 7 February 1997.**

**B. The complainant maintains that the Union never told her that it found her work below par. When the deputy chief of the Personnel Department saw her on 19 September 1996 he merely told her to take training in communications; he made no other criticisms and never spoke of refusing to confirm her appointment.**

**She says that the criticisms of her were never made known to her orally and that the decision of 7 February 1997 is unexplained. It is not, in her view, based on any failure to do what she was told to do. Nor was there any assessment of her performance in the extended period of probation.**

**She contends that the Union made an "incomplete assessment" of her performance from the outset. Her staff reports approved of her performance of most of the duties in the description of her post. Mrs. Jouffroy's adverse comments in her first report were about her performance of a task that fell outside that description. She asks the Union to produce the reports on her performance in the period of her short-term contracts. She says that the Union never lets short-term staff see their reports.**

**She submits that the Union has set too much store by the incident that prompted the warning of 31 January 1996.**

**The reason why she lost her job was that she did not get on with Mrs. Jouffroy and she suggests that there may have been abuse of authority.**

**She asks the Tribunal to set aside the decision of 7 February 1997, order her reinstatement in a G.5 post as from 1 May 1997 and award her 5,000 Swiss francs in moral damages and 10,000 in costs. Failing reinstatement, she claims the equivalent of four years' salary and allowances, less any occupational earnings since 30 April 1997.**

**C. In its reply the Union argues that the complainant's behaviour was unsatisfactory. So much is plain both from the warning, her reports and the talks she had with her supervisors. Although her performance was on the whole satisfactory in the period covered by the first report, it was not in the period covered by the second one. The reports on the period in which she was under short-term contracts are irrelevant because the decision to end her appointment was not based on appraisal of her performance in that period.**

**The Union says that it did explain that decision. When the deputy chief of the Personnel Department saw her on 19 September 1996 he told her why the Union was extending her probation and advised her to look for a job elsewhere. She saw on 5 February 1997 the deputy chief and on the 6th the chief of the Personnel Department, and both of them told her that if she behaved no better the reported criticisms and others would hold good.**

**The defendant maintains that in any event the material provisions of the Staff Rules and Staff Regulations did not empower it to grant the complainant's application for extension of her probation. Rule 4.14.2(a) says that "At the end of the probationary service, the holder of a probationary appointment shall be granted a permanent appointment, or be separated from the service".**

**The Union submits that the complainant is "making light of her responsibility". She was given the warning of 31 January 1996 because she had failed to perform her duties: she had acted in breach of the confidentiality of information about serving officials and of the immunity enjoyed by the Union under the headquarters agreement with Switzerland.**

**D. In her rejoinder the complainant presses her application for the disclosure of the reports assessing her performance while she was on short-term contracts. She says that the only talks she had about her work were on 19 September 1996 with the deputy chief of the Personnel Department and that he did not say that there was any intention of ending her appointment.**

**In her submission the warning cannot constitute valid or sufficient reasons for refusing confirmation of her appointment and it would run counter to a basic precept of law to impose a further sanction on her for the same incident.**

**E. In its surrejoinder the defendant points out that the warning of 31 January 1996 was only one of several reasons why the Union found her performance unsatisfactory. So the ending of her appointment was not a new penalty for the incident that had already warranted the warning.**

## CONSIDERATIONS

**1. The complainant joined the staff of the International Telecom- munication Union (ITU) on 26 June 1991 under a short-term appointment as a secretary and typist in the Bureau of Telecommunications Development. On 1 August 1991 the Union appointed her as a clerk at grade G.4 in the Personnel and Social Protection Department, again under a short-term appointment. On 21 July 1994 it granted her a short-term contract at grade G.5. She won a competition for post No. PE5/G5/766 for a clerk and it appointed her on 1 November 1994 to that post on probation for two years. On 10 October 1996 it extended the period of probation, by six months, to 30 April 1997. On 7 February 1997 it gave her notice of the ending of her appointment on 30 April 1997.**

**2. On 18 March 1997 she asked the Secretary-General to reconsider and in particular to keep her on probation on another post. Her request having been turned down, she went to the Appeal Board. She got its report on 4 July 1997 and the Secretary-General's final decision on 10 July. That is the decision she is now impugning.**

**3. She asks the Tribunal to:**

**"declare the Secretary-General's decision of 10 July 1997 to be in breach of the Staff Regulations and general principles of law;**

**set it aside insofar as it upholds the one of 7 February to end her probationary appointment;**

**order her reinstatement on a post at grade G.5 as from 1 May 1997;**

**award her 5,000 Swiss francs in moral damages;**

**award her 10,000 francs in costs; and**

**subsidiarily, should the Tribunal not order reinstatement, award her damages under all heads of injury in an amount equivalent to four years' salary and allowances, less any earnings she may have had since 30 April 1997."**

**4. In her submission the decision to end her appointment was in breach of due process and not accounted for. Never - she argues - did the Union warn her that her work was too poor to warrant a permanent appointment; indeed she got words of encouragement from her supervisors, and the "objectives" they set in appraisal reports suggested that she was already up to standard: she merely had to improve in some respects. She sees the Union's failure to explain its decision in "the lack of any mention in her last report of the standards she fell short of and the failure to assess her anew at the end of her probation".**

**5. The Union replies that its decisions meet the formal requirements of the Staff Regulations and Rules and rested on a fair and thorough assessment of her professional conduct.**

**6. According to precedent a decision to deny a probationer a permanent appointment must stand unless it was taken *ultra vires*, there is some mistake of law or of fact, or some material fact was overlooked, or a plainly wrong conclusion was drawn from the evidence, or there is misuse of authority. That was affirmed,**

**for example, in Judgment 503 (*in re* Maier), which said:**

**"... the purpose of probation is to discover whether the official has the qualities which warrant keeping him on the staff. It is for the [executive head] to decide, in the light of the evidence before him, whether to dismiss the official or to grant him a permanent appointment."**

**Review of a decision not to confirm a probationary appointment must be especially cautious; otherwise probation would fail to serve as a period of trial. In such cases the executive head may exercise the widest discretion and where the reason for the decision is poor performance the Tribunal will not replace the organisation's assessment with its own.**

**7. The Tribunal finds no evidence of breach of due process. She got warning after warning: disciplinary action that she did not even challenge; then reports that contained adverse comment; and, lastly, the extension of her probation, which, again, she did not challenge. All that should have alerted her to what the Union still expected and led her to mend her ways. The parties differ about what was said in talks in February 1997. It was never put in writing, and that was something the Appeal Board thought a pity. But that does not mean that the Union overlooked any material fact; nor may the Tribunal on that account replace the Union's opinion of her with its own, especially since she herself took part in the process of appraisal and signed the reports.**

**8. As for the alleged lack of explanation, she saw her supervisors before each of the decisions was taken and so had the opportunity of learning the reasons. As was held in Judgment 1590 (*in re* Nies) under 7, the Union need not state those reasons in the actual text of its decision.**

**9. The conclusion is that none of her pleas being sustained, her complaint must fail.**

## DECISION

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment, adopted on 15 May 1998, 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 9 July 1998.**

***(Signed)***

**Michel Gentot**
**Jean-François Egli**
**Seydou Ba**

**A.B. Gardner**

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