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

EIGHTY-SEVENTH SESSION

In re Serlooten (No. 2)

Judgment 1877

The Administrative Tribunal,

Considering the complaint filed by Mr Gérard Serlooten against the International Telecommunication Union (ITU) on 2 November 1998 and corrected on 9 December 1998, the ITU's reply of 14 January 1999, the complainant's rejoinder of 12 February, and the Union's letter of 15 March 1999 informing the registrar of the Tribunal that it did not wish to enter a surrejoinder;

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 career of the complainant at the ITU is set out in Judgment 1679 of 29 January 1998, in which the Tribunal ruled on his first complaint. He left the Union on 31 December 1997 on taking his retirement.

The complainant held grade P.4 until 31 December 1994, when he asked to return to the General Service category - to which he had initially belonged - at grade G.7, as from 1 January 1995, while continuing to perform the same duties. He contested certain details of this change of category, especially the refusal to grant him a special post allowance at grade P.4, and he filed a complaint with the Tribunal to obtain this allowance. In Judgment 1679, mentioned above, the Tribunal allowed the complainant's claim and ordered the payment of the allowance in question as from 1 January 1995.

Following that Judgment, the complainant submitted a series of requests to the Personnel and Social Protection Department on questions related to education grants, home leave and repatriation grants. In particular he asked that leave he had taken in France - his country of origin - from 10 to 25 July 1997, should be considered as home leave. By a letter of 13 March 1998, the Secretary-General informed him of the decisions taken in application of Judgment 1679. He told him that his requests in respect of education grant and repatriation grant had been admitted, but that the request concerning home leave could not be granted. The Secretary-General based this last decision on the fact that under Staff Rule 5.3.1, the leave in question was only granted if the staff member continued to work for the Union for at least six months beyond the date of his return from home leave. This condition was not fulfilled by the complainant, since he had taken retirement on 31 December 1997.

In a memorandum of 23 March 1998, the complainant asked the Secretary-General to reconsider his decision, but the Secretary-General maintained it and on 4 May the complainant submitted an appeal to the Appeal Board. The report of the Board, delivered on 13 July 1998, contained two recommendations: one came from two members of the Board who declared themselves in agreement with the Secretary-General, and the other, from the third member, who recommended that the complainant's request be granted. In a letter of 4 August 1998 the Secretary-General told the complainant that he had decided to endorse the majority recommendation of the Appeal Board. That is the impugned decision.

B. The complainant has two pleas.

First, the defendant has acted contrary to the principle of good faith. In the complainant's view it is paradoxical that the Union should now refer to a regulation in support of its arguments which, despite his express requests, it had earlier denied was applicable to him thus obliging him to turn to the Tribunal. Had the Union admitted from the start that the complainant could benefit from the special post allowance and advantages deriving from the post he effectively occupied, he would have been able, in 1997, to comply with the regulations governing Professional category staff members, and in particular, fix the dates of his leave in accordance with the time scale stipulated in Rule 5.3.1 of the Staff Regulations. However, the complainant's status was only firmly established following

Judgment 1679.

Secondly, the execution of Judgment 1679 was incomplete. In this connection, the complainant contends that full execution of the Judgment would involve granting him all the advantages which he would have enjoyed had his request for special post allowance been accepted at the time of the decision to allow him to return to the General Service category. He believes that home leave is one of these advantages and, in so far as his right to it had been recognised retroactively, he ought to be able to benefit from it irrespective of the application of Rule 5.3.1.

The complainant asks the Tribunal to set aside the decision of 4 August 1998, to order the ITU to pay him the leave in question and to award him 4,000 Swiss francs in costs.

C. The Union asserts that the complainant's argument that Rule 5.3.1 is not applicable to him is illogical. Indeed, in granting him a special post allowance at grade P.4, the Tribunal based its judgment on the fact that he had continued, since 1 January 1995, to perform Professional category staff duties, in spite of his return to the General Service category. It was precisely because the complainant had, by virtue of the special post allowance, once again entered the Professional staff category, with retroactive effect as of 1 January 1995, that he could claim to benefit from rights granted to staff of that category. Obviously, these rights were subject to the conditions laid down in the Staff Regulations. As far as home leave was concerned, the conditions stipulated under Rule 5.3.1 had not been fulfilled in respect of the leave taken by the complainant from 10 to 25 July 1997 inasmuch as he had taken retirement on 31 December 1997.

The defendant believes that the complainant's plea whereby Judgment 1679 has not been fully executed is superfluous. It does not contest that the main thrust of that Judgment was to restore all the complainant's rights as a staff member performing the duties of Professional category staff. Home leave is among those rights. But, in the exercise of this right, the Staff Rules stipulate a restrictive condition, and the defendant sees no reason why the complainant should be exonerated from this condition.

D. In his rejoinder, the complainant notes that, since in 1997 he was still only at grade G.7, to refuse him home leave was taking him to task for failure to respect a Staff Rule which at the time was not applicable to him.

He maintains that the Tribunal has only one issue on which to decide - whether his "re-entitlement to the rights of Professional category staff does not imply setting aside the time limit contained in Rule 5.3.1, given that the *a posteriori* application of this rule made it impossible [for him] to respect it retroactively".

CONSIDERATIONS

1. The complainant was employed by the ITU from 1 May 1961 until 31 December 1997, when he retired. The facts at the basis of the present case can be found in Judgment 1679, delivered on 29 January 1998. He entered the General Service category at grade G.4, and was regularly promoted; from 1982 he performed the duties of a post that was graded P.2 in the Professional staff category, with a special post allowance. He was promoted to P.2 on 1 July 1986 and to P.4 on 1 November 1994. As from 1 January 1995, he returned to the General Service category, at grade G.7, in order to avoid the negative consequences of his promotion to the Professional category on his retirement expectations, which would otherwise have been less favourable.

At its 1995 session the Council of the Union had expressed concern at the unfavourable treatment as to pension, and pay as well, of staff who had been promoted from the General Service to the Professional category. The Council had asked the Secretary-General to tackle the problem. After consulting the working party, the Secretary-General, in a letter of 12 December 1995, allowed the complainant to choose between remaining in the Professional category and returning to the General Service category; on 13 December 1995 the complainant chose the latter. However, the parties disagreed over the consequences of the choice. The ITU asked the complainant to return the difference in pay between P.4 and G.7 for 1995 and refused to allow him a special post allowance pursuant to Article 3.8 of the Staff Regulations.

In Judgment 1679, the Tribunal found refusal of this post allowance to be unlawful. However, it found that the staff member could not for one and the same period get both the pay of a P.4 grade and a special post allowance for having performed duties and assumed responsibilities corresponding to that grade.

2. After that Judgment, which only concerned the provision of the special post allowance, the ITU believed that the complainant was to be considered as a Professional category staff member. He does not contest this.

Moreover, he enjoyed the benefits pertaining to this category. However, the Secretary-General refused to recognise as home leave a journey he undertook to his home country in 1997, on the ground that he did not fulfil all the conditions; under Staff Rule 5.3.1, this leave is subject to the staff member remaining in the service of the Union for at least six months after the date of return from home leave; in this instance, the complainant returned on 25 July 1997, and then took his retirement on 31 December 1997.

The complainant does not challenge the existence of the rule, but asserts that the time limit therein is not applicable to him, since he could not have known before the date of the Judgment of 29 January 1998 that he would be considered as a Professional category staff member, and that Rule 5.3.1 would thereby become applicable to him. He had thus not been able to adapt his actions accordingly. Had he known the rule would be applicable to him, he would have taken his holiday in the first six months of 1997. His claim should be granted on the grounds of his good faith.

The Union bases its reasoning on the lawfulness of the Administration's action, and equality of treatment for staff members.

By a majority decision the Appeal Board recommended dismissing an appeal filed by the complainant, although a minority had found in his favour. The Secretary-General confirmed his decision to dismiss the appeal. The complaint came before the Tribunal, with both parties pressing their pleas.

3. The ITU rightly asserts that out of respect for the lawfulness of the Administration's action and the equality of treatment of staff it is obliged to respect rules prescribing time limits (see Judgment 1502, *in re* Baillon, under 6 and the judgments cited therein). However, both organisation and staff members are each required to respect the rules of good faith (see Judgment 1756 *in re* Awoyemi, and the judgments cited therein), especially in cases of respect for time limits. "If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour" (see Judgment 1502 under 6). The Tribunal also noted that the time limit for claims must start "at the date at which payment becomes due. If that were not so, the lapse of time would work to the claimant's detriment for as long as the rules precluded his making the claim" (see the same Judgment under 9).

4. (a) The Union's argument, based on the lawfulness of the Administration's action, assumes that the context in which the rule is applied to the staff member's case is clear, coherent and sufficiently understandable.

This was not the case at the time the complainant chose the date of his holidays. The ITU Council detected an anomaly in the Staff Regulations and asked the Secretary-General to tackle the problem. The executive bodies of the Union thus already admitted that there were shortcomings which had to be rectified (see Judgment 1679, under C and E: "there was no precedent for the offer", "an offer that was made outside the context of the rules"). When the administrative authority rectifies the shortcomings of a regulation applied to a staff member in good faith it cannot subsequently apply to the latter a rule restricting his rights by imposing a time limit of which he could not previously have been aware.

(b) Moreover, before the issuing of Judgment 1679, both parties considered the complainant as a General Service staff member, and as such not entitled to home leave allowance under rules applicable to Professional category staff.

(c) There is no evidence to suggest that the staff member was to blame for not knowing that the rule at issue could be applied to him. Its terms should not allow for any ambiguity. While it may certainly be difficult to draft rules which do not need to be rectified subsequently, an organisation should not allow staff members to suffer the full consequences of such shortcomings.

(d) The restrictive rule as applied after the event, was insufficiently clear for a staff member in the complainant's position, when taking leave, to make his choices accordingly.

(e) Under Rule 5.3.1 right to home leave is lost if it is not taken before the beginning of the six-month period preceding termination of the staff member's duties. The time limit was not respected by the complainant in this instance, but through no fault of his own, since he was unaware that this rule could be applied to him, and that he could be penalised for failure to observe the time limit. Had he been previously informed, he would have been able

to take his leave during the first six months of 1997. The complainant is to be believed when he asserts that he would have availed himself of this possibility.

In the circumstances, the rules of good faith, as referred to above, overrule the limitative regulation in the complainant's case, and he shall be granted home leave for 1997, irrespective of the moment when he took his leave (see also Judgments 966, *in re* Maugis No. 2, under 9, and 997, *in re* Maugis No. 4, under 8).

5. The complaint succeeds: the complainant is awarded costs.

DECISION

For the above reasons,

1. The contested decision is set aside.

2. The Union shall pay the complainant the amount due to him for his home leave ending on 25 July 1997.

3. It shall pay him 3,000 Swiss francs in costs.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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