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

NINETY-SECOND SESSION

***In re* Hendi** **Judgment No. 2086**

The Administrative Tribunal,

Considering the complaint filed by Mr Peter Hendi against the International Telecommunication Union (ITU) on 4 April 2001, the ITU's reply of 23 May, the complainant's rejoinder of 29 June and the Union's surrejoinder of 1 August 2001;

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 Swedish citizen born in 1943, joined the ITU on 16 November 1981 and was in charge of developing, setting up and maintaining a computer system. He was initially given a short-term appointment, which was extended four times, until 2 September 1983. After a further short-term contract from 3 October to 31 December 1983, the ITU gave him a one-year fixed-term appointment as an analyst/programmer at grade P.3 as from 1 January 1984. His duties did not change. On 1 March 1984 he was transferred to a P.4 post, having won a competition, and was promoted to that grade as from 1 May of the same year. His fixed-term appointment was extended until 31 December 1989, and as from 1 January 1990 he was given a permanent appointment in another post, but at grade P.3.

On 22 November 1999 the complainant sent a memorandum to the Chief of the Personnel and Social Protection Department asking to be promoted to grade P.4 as from 1 January 2000. He considered that he met the first three requirements set out in Service Order No. 99 of 17 September 1998 on personal promotion: he had completed eighteen years' uninterrupted service with ITU, had not been promoted in the last ten years and had been at the highest step in his grade for more than a year. On 28 January 2000 the Chief of Personnel replied that he was not eligible for promotion: he did not meet the first requirement since short-term appointments are not counted in reckoning length of service. On 9 March the complainant asked the Secretary-General to reconsider that decision. Having received no reply he appealed to the Appeal Board in a memorandum of 24 May. In its report of 27 November 2000 the Board pointed out that Service Order No. 99 stated clearly the types of appointment to be counted in considering someone for personal promotion, and short-term contracts were not among them. It nonetheless found breach of the rules on short-term contracts in the complainant's case and recommended that the Secretary-General treat him as having been in continuous service since 16 November 1981, which made him eligible for personal promotion as from 16 November 1999. By a letter of 8 January 2001, the impugned decision, the Secretary-General rejected the appeal.

B. The complainant contends that his contracts between 1981 and 1983 ought to be reclassified so that they can be counted as part of a single period of service on either a fixed-term or an indefinite appointment. The Union broke its own rules by giving him a series of short-term contracts amounting to more than twelve months. Right from 16 November 1981, when the ITU first hired him, his duties were permanent in nature since he performed them for more than two years and after his transfer another official took them on. Therefore, the Union improperly refers to the type of appointments given to him in order to deny him promotion.

Furthermore, the ITU is in breach of the duty of good faith it owes to its staff: it treated him with negligence in that the Secretary-General failed to answer his request to have the Chief of Personnel's decision reconsidered, and time

limits were exceeded in the internal procedure.

He wants the Tribunal to quash the impugned decision, declare that he met the length of service requirement and send the case back to the ITU for consideration of his claim. He seeks 5,000 Swiss francs in compensation for the injury caused by shortcomings in the internal procedure, and costs.

C. The ITU replies that the complaint is time-barred since the complainant seeks reconsideration of administrative decisions that date back to the period from 1981 to 1983. For reasons of expediency he is attempting to get his early contracts reclassified so that he meets a requirement set by a system of promotion which was elaborated and came into being nearly twenty years later.

In subsidiary pleas the ITU observes that it is easy enough *a posteriori* to assert that the complainant's duties were permanent. But when it first hired him, the Union was not in a position to tell whether the work would warrant keeping him on beyond the initial appointment. It denies breach of good faith in the way it treated his request.

D. The complainant retorts that he is not challenging his contracts for the period between 1981 and 1983. He submits that the ITU Administration, "paralysed by its own ... rules, had no choice but to break them". It may not rely on such "subterfuge" to deny him his right to promotion.

When the Union first employed him it knew full well that his assignment would last for more than twelve months. It hired him on the basis of a tacit agreement that his appointment would be long term. Indeed, his future supervisor had so assured him orally, otherwise he would not have accepted the offer. It was the Union, not he, who classified his early appointments wrongly at the time and it may not now hold him to blame. In his submission short-term contracts are omitted from Service Order No. 99 as counting towards length of service because they may not, as a rule, be longer than twelve months. But having broken that rule, the ITU must take them into account.

E. In its surrejoinder the ITU maintains that it was right to classify his appointments as short term. The assurances, if there were any, given by his former supervisor are not binding on the Union and have no implications for the classification of contracts. It denies circumventing its own rules and resorting to "subterfuge": on the contrary, giving him short-term appointments "was rational ... in view of the circumstances at the time". Lastly, it maintains that whether or not his duties are permanent has no bearing on the classification of his contracts.

CONSIDERATIONS

1. The complainant joined the ITU on 16 November 1981 on a short-term appointment, which was extended a few times, until 2 September 1983. After a break of one month the Union gave him a further short-term contract, from 3 October to 31 December 1983, and as from 1 January 1984, a fixed-term appointment for one year as an analyst/programmer at grade P.3. Having won a competition he was transferred to a P.4 post as from 1 March 1984 and was promoted to that grade as from 1 May of the same year. Then, his fixed-term appointment was extended until 31 December 1989. After winning another competition he was appointed to a P.3 post on a permanent appointment. He states that he preferred to forego the higher grade (P.4) in favour of a permanent appointment and employment stability.

By a memorandum of 22 November 1999 he asked the Chief of the Personnel and Social Protection Department for promotion to grade P.4 as from 1 January 2000, pursuant to Service Order No. 99 of 17 September 1998 on personal promotion.

On 28 January 2000 the Chief of Personnel replied that the complainant was not eligible for personal promotion because he did not meet the first requirement for it: completion of eighteen years of continuous service "under a fixed-term, MRT [managed renewable term] or permanent contract".

On 9 March the complainant asked the Secretary-General to reconsider that decision. In his submission the period covered by short-term contracts at the beginning of his career should be taken into account, particularly as at the time the Union had broken the rules. Accordingly, the requisite eighteen years' uninterrupted service should be considered as being completed.

Having received no reply the complainant appealed to the Appeal Board on 24 May. On 27 November 2000 the

Board recommended allowing his appeal, but the Secretary-General rejected it on 8 January 2001. That is the impugned decision.

2. The complainant is asking the Tribunal to quash that decision, to declare that he satisfied the length of service requirement for personal promotion and to send the case back to the ITU. He also seeks 5,000 Swiss francs for the injury he suffered owing to shortcomings in the internal procedure, and costs.

The Union contends that the Service Order is quite clear: short-term appointments are not to be counted. The contracts themselves state that they were short term, and since they carry the authority of final administrative decisions, there are no grounds to "reclassify" them *a posteriori* in order to rule on personal promotion.

3. (a) Personal promotion is awarded to enable the beneficiary to earn more than the remuneration corresponding to the post.

A decision to grant a personal promotion is by nature discretionary and, as such, subject only to limited review. The Tribunal will interfere only if it shows some fatal flaw, such as a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, or if it was *ultra vires*, or if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence (see, for example, Judgments 1500, *in re* Pary No. 4, 1815, *in re* Gutiérrez and 1973, *in re* Siegfried).

(b) The ITU introduced personal promotions in 1998. Service Order No. 99 sets the conditions and arrangements for awarding them.

Paragraph 1 to the Annex to Service Order No. 99 sets criteria for eligibility for personal promotion, of which there are six. The first reads:

"a) the staff member has completed at least

- **18 years** (Professional category)

- **20 years** (General Service category)

of continuous service in ITU, under a fixed-term, MRT or permanent contract;"

(c) The parties are in dispute as to how the provision requiring eighteen years of uninterrupted service is to be construed and applied.

The complainant argues that right from the start the intention on both sides was that he should remain in the organisation. Consequently, for the purposes of applying Service Order No. 99, the Union should treat his short-term appointments like his other appointments. He would then have served for eighteen years without a break. The Appeal Board argued likewise.

In rebuttal the Union makes two pleas. First, having opted for short-term contracts, the parties are now bound by them since they came into force unopposed. Secondly, the Union is adamant that its original intent was to employ the complainant for a short time. The job it hired him to do being a new one, it had no way of knowing at the time how long it would last. That was why it offered him a series of short-term contracts. Budgetary constraints also prevented it from giving him more stable employment. In any event he suffered no financial hardship from this "precarious" status, quite the contrary. As to the fact that the complainant's first short-term appointment exceeded the twelve months prescribed in Rule 1.A of the Staff Rules Applicable to Staff Members Engaged for Conferences and other Short-term Service, the Union observes that it can only cite the Secretary-General who, in his decision of 8 January 2001, found "no valid justification" in the complainant's personal file for an exception to the rule which has in any case caused him no injury. What is more, the complainant raised no objection at the time. As to the break between contracts from 3 September to 2 October 1983, the Union contends that it was in keeping with the rules on short-term appointments then in force. The ITU does not deny that the next short-term contract - for the end of 1983 - had been concluded before 3 September 1983.

4. The ITU is arguing that, in accordance with the principle of stability in administrative decisions, in determining whether the complainant fulfilled the first requirement, that is the completion of eighteen years of uninterrupted service, reference must be made to clauses of the contracts which came into force unopposed. In other words, what

were short-term contracts at the time are also short-term contracts for the purposes of applying Service Order No. 99.

The approach is too rigid. The principle of stability in administrative decisions might have been relevant if the issue was one of applying or interpreting the complainant's early appointments, but it is not. It is a matter of applying a rule which is currently in force and which concerns the legal nature of former contractual relationships between the parties. In other words, in the light of the current rule, what type of appointment did the early contracts establish? It should be noted that the name they were given will not necessarily express the actual relationship (see Judgments 701, *in re* Bustos and 702, *in re* Guissi, and also Judgment 1385, *in re* Burt).

5. (a) There is no proof that, when the first contract was signed, the Union already intended to employ the complainant beyond the short term. In fact, the ITU denies any such intention and it alone was in a position to assess its own requirements. It is not implausible that the ITU originally intended to limit the length of the complainant's appointment. It cannot therefore be concluded that the parties' real intention was not the one expressed by the short-term contracts, but to conclude one of the types of contract listed in Service Order No. 99.

(b) But the complainant's position in law may have changed once the maximum duration prescribed for short-term contracts - twelve months - was exceeded.

No sanction is prescribed for such a breach of the rules. The Tribunal has noted several times in the context of another organisation whose rules on short-term appointments provide that where the maximum period allowed for short-term contracts is exceeded, the rules applicable to officials on fixed-term appointments will also apply (see Judgments 1385, 1666, *in re* Bedrikow and 1687, *in re* Bedrikow No. 2).

That begs the question of whether, by analogy with the treatment accorded staff in other organisations and even in the absence of such rules, there are grounds for counting the months in excess of the twelve-month limit for short-term contracts towards the eighteen years of uninterrupted service specified in Service Order No. 99.

While there may be arguments for doing so, they do not suffice for the complaint to succeed: there would in any event be a shortfall in the requisite eighteen years, since the first twelve months are not counted. Besides, the Tribunal sees no reason to rule on a matter which is not current.

6. The complainant claims compensation in particular for alleged shortcomings in the internal procedure.

But the shortcomings are not fatal. Although it warranted thought and attention, the case was not such as to require particularly expeditious treatment. What is more, the complainant fails to show that he suffered any injury warranting redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.