

NINETY-EIGHTH SESSION

Judgment No. 2385

The Administrative Tribunal,

Considering the complaint filed by Mr M. A. against the International Telecommunication Union (ITU) on 1 September 2003 and corrected on 21 November 2003, the ITU's reply of 3 March 2004, the complainant's rejoinder of 5 April, and the Union's surrejoinder of 12 May 2004;

Considering Articles II, paragraph 5, and VII 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 is a citizen of Bahrain and was born in 1948. He joined the ITU in 1986 as an Engineer/Translator-Reviser, at grade P.4. From May 1987 he was employed in the Conferences and Common Services Department as Coordinator of the Arabic Language Service, at grade P.5. With effect from 15 November 2000 he was transferred to the position of Coordinator of the Arab Unit, in the Telecommunication Development Bureau (BDT), for a period of three and a half months. He applied for that post but by a letter of 12 April 2001 was informed that his application had not been successful. He subsequently became Special Advisor in the Common Services Department.

On 28 May 2001 the complainant wrote to the Secretary-General, requesting a review of the decision not to select him for the post in the Arab Unit. He sent a memorandum dated 20 July 2001 to the Chairman of the Appeal Board, wanting the time limit for filing his internal appeal to be extended until 30 September 2001. In mid-September he asked for it to be extended indefinitely "pending the Administration's decision on its efforts to resolve [his] status". By a memorandum of 17 February 2003 he requested a "new" extension until 15 May 2003, and attached a memorandum dated 27 January relating to the non-renewal of his contract.

By that memorandum of 27 January 2003 the complainant was informed that due to "budgetary constraints" his post of Special Advisor "would no longer be funded in the 2004-2005 budget subject to confirmation by [Council] in May 2003"; nor was it possible to fund his post for the whole of 2003. The memorandum went on to say that the Secretary-General had therefore decided not to extend the complainant's appointment after 31 May 2003. It informed him that "the Personnel Department [would] try to re-deploy [him] to a suitable vacant post". The Chief of the Personnel and Social Protection Department wrote to the complainant on 24 April 2003 saying that although the ITU hoped to assist him in finding employment with another UN Agency, he was obliged to confirm that his appointment would come to an end on 31 May. By a letter of 6 May 2003 to the Secretary-General the complainant requested "a final review" of the decision of 24 April. The Secretary-General's response was notified to the complainant in a letter of 23 May 2003 from the Chief of the Personnel and Social Protection Department.

On 15 May the complainant had filed an internal appeal against the decision not to renew his contract. The Appeal Board reported on 30 May 2003. It took the view that his appeal was time-barred and irreceivable as the decision regarding the non-renewal of his contract had been taken on 27 January 2003. It nonetheless recommended that the Secretary-General should consider granting the complainant a six-month extension of contract. In a letter of 6 June 2003 the Secretary-General reiterated that the appeal was time-barred, and maintained the decision not to renew the complainant's contract. He did not endorse the Board's recommendation to extend his contract to the end of the year. The complainant impugns that decision.

B. The complainant submits that his complaint is directed against the following decisions. Firstly, he is appealing against the decision of 12 April 2001, advising him that his application for the post of Coordinator of the Arab Unit had not been successful. Secondly, he is challenging the decision definitively informing him that his contract was to end – notified to him on 24 April 2003 and upheld by the Secretary-General on 6 June 2003.

He contends that the internal appeal he filed was receivable as the Chairman of the Appeal Board had granted him a series of extensions for the filing of his appeal against the decision of 12 April 2001 and he had filed it in a

timely manner on 15 May 2003. That appeal, he argues, was directed against the decision of 24 April 2003, and not against the notification of 27 January 2003, as held by the Appeal Board. Correspondence he addressed to the Administration made it clear that he was challenging the decision of 24 April. By failing to inform him that it held a differing opinion as to which decision could be challenged, the Administration acted in bad faith. That failure amounted to misuse of authority. He was denied any opportunity for a hearing and was not accorded procedural fairness.

The complainant perceives his case to be one of “constructive dismissal” which took place over a period of more than four years. Long before he learned of the non-renewal of his contract, attempts were made to take duties away from him. He speaks of unfair and prejudicial treatment on the part of his former supervisor, which he considers amounted to moral harassment. It appears to him that his transfer to the Arab Unit constituted misuse of authority. He takes issue with the organisation’s subsequent failure to find him satisfactory alternative employment. The ITU, he contends, failed to follow its internal policies regarding both staff retrenchment and redeployment.

He seeks the quashing of the decision by which he was removed from his position in the Arabic Language Service as well as the “illegal decisions” which led to the abolition of that post, and wants to be restored to that position. Alternatively, he wants the results of the competition for the post of Coordinator of the Arab Unit to be set aside so that he can be transferred to that position, previously held by him on an acting basis. He further seeks the quashing of the decision not to renew his contract, and reinstatement as a staff member from 31 May 2003 with payment of all salary and allowances that he would have received had he not been separated on that date; moral damages; costs; interest on all sums awarded to him; and such other relief as the Tribunal deems appropriate. He also puts forward claims for payment of accrued annual leave and repatriation grant. Additionally, he wants the ITU to produce various documents relating to his case.

C. In its reply the Union contends that the complaint is irreceivable, on the grounds that the complainant’s internal appeal was itself time-barred and irreceivable. The letter of 24 April 2003 that he challenged was no more than the usual administrative communication sent to any staff member whose contract was coming to an end. The decision against which appeal lay was notified to him on 27 January, and he could have filed an appeal within six weeks of that date. Claims arising from events occurring in previous years are likewise time-barred and irreceivable. Thus, the complainant cannot now challenge decisions relating either to his transfer in 2000 or to the decision of 12 April 2001 informing him that he had not been selected for the post of Coordinator in the Arab Unit.

Furthermore, the Union states that the complainant has submitted no material evidence to prove that he had an appeal that was pending before the Appeal Board and that the Board had expressly granted him various extensions over a period of two years. Besides which, there is no legal basis in the Staff Regulations and Rules for the Chairman of the Appeal Board to grant him such an extension. Pursuing its argument of irreceivability, the ITU adds that the complainant’s internal appeal was also premature, having been filed a mere nine days after he submitted his request for review of 6 May 2003 to the Secretary-General and without allowing time for any reply to that letter.

Replying on the merits, the ITU states that in order to support his allegation of “constructive dismissal” the complainant has made arbitrary links between successive decisions taken throughout his career. It limits its reply to matters concerning the decision of 27 January 2003 not to renew his contract, holding the view that decisions taken prior to that date were not properly challenged by the complainant at the appropriate time. It points out that separation upon the expiry of a fixed-term contract cannot be regarded as a termination within the meaning of the Staff Regulations and Rules, and consequently no indemnity was due to the complainant; nonetheless, it made considerable efforts to find him another assignment – but its attempts proved unsuccessful. It argues that all statutory prescriptions were fully respected. It asks the Tribunal to reject the complainant’s application for hearings. It also asks the Tribunal to reject his claims for redress, pointing out that some of them were not put forward in his internal appeal.

D. In his rejoinder the complainant reiterates his view that his internal appeal was receivable, given that the memorandum of 27 January 2003 contained information that was “subject to confirmation” in May 2003, and was not therefore an appealable decision. It did not constitute a final decision in respect of his employment. Rather, it was the notification of 24 April that was confirmatory in character and not contingent on any further confirmation. Additionally, he contends that he had indeed obtained a series of extensions from the Chairman of the Appeal Board for the filing of his appeal. That affirmation was sent to him by way of personal communications.

E. In its surrejoinder the Union maintains its arguments. It says that the complainant has not convincingly established that he had been granted successive extensions of deadlines for filing his internal appeal.

CONSIDERATIONS

1. From May 1987 until November 2000, the complainant held the post of Coordinator of the Arabic Language Service in the Conferences and Common Services Department of the ITU's General Secretariat. On 15 November 2000 he was transferred to the post of Coordinator of the Arab Unit, in the Telecommunication Development Bureau, for which post he subsequently applied.
2. The complainant was informed by a letter dated 12 April 2001 that his application for the post of Coordinator of the Arab Unit had been unsuccessful. On 28 May 2001 he sought a review of that decision. It is not clear from the pleadings what precisely happened thereafter. It is said in the complainant's rejoinder that he "negotiated the prolongation of his contract from April 12 2001, which was postponed by mutual agreement". Certainly, he referred to such negotiations in memoranda of 20 July and 18 September 2001 addressed to the then Chairman of the ITU Appeal Board. By those memoranda, the complainant sought an extension of time – in the case of the memorandum of 18 September, an indefinite extension – within which to file an appeal with respect to the decision of 12 April 2001.
3. Whether as a result of negotiations or otherwise, the complainant was transferred to the Common Services Department as a Special Advisor on 1 February 2002 and his fixed-term contract was then extended to 31 January 2003. He was informed by a memorandum dated 27 January 2003 that, because of budgetary constraints, the Secretary-General had "decided not to extend [his] current fixed-term appointment after 31 May 2003". The memorandum also informed him that "the Personnel Department [would] try to re-deploy [him] to a suitable vacant post". On 17 February 2003, without having requested a review of the decision, the complainant again forwarded a memorandum to the Chairman of the Appeal Board; he referred to the memorandum of 27 January and requested an extension of time within which to file an appeal – that is until 15 May 2003.
4. By letter dated 24 April 2003, the complainant was informed that the Personnel and Social Protection Department was "obliged to [...] confirm that [his] fixed-term appointment [would come] to an end on 31 May 2003 and that it [would] not be renewed beyond that date". On 6 May the complainant wrote to the Secretary-General, referring to the letter of 24 April and asking for "a final review of that administrative decision to terminate [his] employment with the ITU". He also indicated in that letter that, if his appointment were not renewed, he intended to appeal to the Appeal Board and to "request the Board to join this latest appeal with the one [...] currently pending before it". His request for review was refused on 23 May 2003. In the meantime, the complainant filed an appeal, on 15 May, with the ITU Appeal Board, again referring to the letter of 24 April 2003.
5. In its report dated 30 May 2003, the Appeal Board held that the administrative decision in issue before it was that notified to the complainant in the memorandum dated 27 January 2003 and that the period of six weeks for filing an appeal had expired on 7 March 2003. In consequence, it held that the appeal was not receivable. Nevertheless, it recommended that, having regard to the complainant's length of service and other matters, the Secretary-General give consideration to the possibility of extending his contract for a further six months.
6. The complainant was informed by a letter dated 6 June 2003 from the Secretary-General that the "decision not to renew [his] contract beyond 31 [M]ay 2003 [was] maintained". It is that decision which is the subject of the present complaint by which the complainant seeks to impugn the decision of 12 April 2001 rejecting his application for the post of Coordinator of the Arab Unit, as well as the decision "dated 24 April 2003 [...] stating that his fixed-term appointment [would come] to an end on 31 May 2003". He claims that these decisions amounted to constructive dismissal and seeks, amongst other relief, reinstatement in employment with the ITU. He also seeks a "public" hearing in which to call evidence, including evidence that the then Chairman of the Appeal Board extended the time for filing an appeal with respect to the decision of 12 April 2001.

Receivability

Claims regarding the decision of 24 April 2003

7. It is convenient to deal first with the question whether the administrative decision not to renew the

complainant's contract beyond 31 May 2003 was communicated by the memorandum dated 27 January or the letter dated 24 April 2003. The former contains a clear statement that the Secretary-General had decided not to renew the complainant's contract, whilst the latter merely expresses itself to be confirmatory of that decision. Consistent with the established case law of the Tribunal, notably Judgment 698, later correspondence which merely confirms an earlier administrative decision neither constitutes a new decision nor operates to fix new time limits for the filing of an appeal.

8. There was nothing in the correspondence to justify the view, apparently taken by the complainant, that the decision not to renew his contract was contained in the letter of 24 April 2003, rather than the memorandum of 27 January. The fact that he made his view in that regard known to the ITU cannot change the fact that the decision was notified by the earlier communication.

9. The ITU Appeal Board held that the appeal before it was not receivable because the six-week time limit for filing an appeal had expired on 7 March 2003. Whether it expired then or some time later, as suggested in the complainant's rejoinder, there is a more fundamental reason why the appeal was not receivable. No request was made for the Secretary-General to review the decision notified in the memorandum of 27 January 2003. Thus, the appeal to the Appeal Board was premature and was, on that account, not receivable.

Claims regarding the decision of 12 April 2001

10. It is not contended that an appeal was filed with the Appeal Board in respect of the decision of 12 April 2001 within the time limit specified in the ITU Staff Rules. Rather, the complainant states that he "was granted a series of extensions by the Chairman of the Appeal Board, up until 15 May 2003, by which time his appeal was filed in a timely manner". As already indicated, the complainant wants a "public" hearing in which to call evidence in support of that contention.

11. The complainant first wrote to the Chairman of the Appeal Board on 20 July 2001 seeking an extension of time until 30 September 2001 to file an appeal with respect to the decision of 12 April 2001. A second memorandum was sent by e-mail on 18 September of that year. That memorandum referred to the Chairman's "agreement to extend the deadline [...] to 30 September 2001". For present purposes, it may be assumed, without deciding the issue, that the Chairman did agree to that course.

12. The request made in the memorandum to the Chairman of the Appeal Board on 18 September was for "the deadline [to] be extended indefinitely", it being said that the complainant "reserve[d] the right to proceed with [his] appeal at any time in [his] sole discretion". It is inconceivable that the Chairman would have agreed to such an open-ended request. More significantly, however, the only power by which an extension of time can possibly be granted is conferred by Staff Rule 11.1.1.2 (c) which provides:

"An appeal shall not be receivable by the Appeal Board unless the above time limits have been met; the Board may, however, waive the time limits in exceptional circumstances."

Thus, even if the Chairman did indicate his preparedness to grant the extraordinary request contained in the memorandum of 18 September, it could not bind the Appeal Board. The same is true of the subsequent requests made on 11 April and 13 May 2003. Accordingly, no appeal was or could be instituted before the Appeal Board with respect to the decision of 12 April 2001.

13. It follows that internal appeal procedures were not pursued with respect to the decision of 12 April 2001. And as the internal appeal filed with respect to the decision not to renew the complainant's contract was not receivable, it must similarly be held that internal appeal procedures were not pursued in respect of that decision (see Judgment 654). That being so, the complaint is not receivable.

14. The question of receivability must be decided against the complainant. Thus, there is no necessity for an oral hearing.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet