

NINETY-NINTH SESSION

Judgment No. 2435

The Administrative Tribunal,

Considering the complaint filed by Mr L.F.R. against the International Telecommunication Union (ITU) on 20 August 2004 and corrected on 7 September, the ITU's reply of 12 November, the complainant's rejoinder of 16 December 2004, and the Union's letter of 19 January 2005 informing the Registrar of the Tribunal that it did not wish to file a surrejoinder;

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, a Portuguese national born in 1957, joined the ITU in December 1987. At the material time he held a grade P.5 post as Head of the Information Exchange Division within the Information Services (IS) Department. On 21 March 2003 a proposal concerning the restructuring of the IS Department was circulated by the Chief of the Department to his senior staff. The proposal was subsequently modified twice and on 31 July 2003 Service Order No. 03/14 was issued by the Secretary-General, setting out the new structure of the IS Department.

On 7 April 2003 Office Memorandum No. 03/08 on the policies and procedures for staff reduction during 2003 was published. Among the measures set out therein was an invitation to individuals wishing to leave the ITU on "a voluntary basis with some incentive", to contact the Personnel Department to discuss their situation. It was noted that the measures set out remained "within the discretionary authority of the Secretary-General and [would] only be applied in the interest of the Organization".

By an e-mail of 15 May 2003 sent to the Personnel Department, the complainant expressed interest in leaving the ITU, in accordance with Office Memorandum 03/08, and in considering an offer for early retirement or a mutually agreed separation. He reiterated this interest in a memorandum he sent to the Secretary-General, dated 12 August 2003. Discussions on this issue took place between the complainant and various senior officials and on 28 August the Chief of the Personnel and Social Protection Department sent the Secretary-General an evaluation of the complainant's request to be considered for a mutually agreed termination. The Secretary-General concluded in a handwritten note that it would not be in the best interest of the Union to let such a good staff member go; the Chief of Personnel notified the complainant in an e-mail of 12 September that his request for termination of service had not been accepted.

On 18 September the complainant sent a memorandum to the Secretary-General, asking for reconsideration of the decision. The Chief of Personnel replied on the Secretary-General's behalf on 26 September that mutually agreed terminations were at the discretion of the Secretary-General and that the latter had decided that it was "not in the interest of the good administration of the Union" to terminate the complainant's appointment. On 1 October the complainant tendered his resignation, effective 31 October 2003.

On 22 December 2003 the complainant filed an appeal before the ITU Appeal Board. In its report dated 25 March 2004 the Board recommended that the Secretary-General consider amicable solutions consistent with his discretionary authority. On 20 May 2004 the Chief of Personnel informed the complainant on the Secretary-General's behalf that his appeal had been rejected. That is the impugned decision.

B. The complainant submits that under the restructuring of the IS Department, he was to be assigned to an "illusory post" which had no clear function and which was not equivalent to his post as Head of the Information Exchange Division. He considers this assignment as "constructive dismissal". He argues that the Union is estopped from denying him compensation in respect of his resignation because by abolishing his post and unit it had forced him to resign. He says that representations were made "that an appropriate termination package would be negotiated" and that he had to take a decision, within "a window of opportunity", as to whether to return to his

home country. He had relied on the representations made, but they were reneged upon and he suffered “consequential loss”.

He submits that there has been misuse of authority because the Administration did not follow the proper procedures either in abolishing his post or in redeploying him to a new one. Citing the Tribunal’s case law he says that some contractual elements of a post may only be changed following consultation with the staff member concerned. A staff member is also entitled to be consulted before a transfer takes effect.

The complainant contends that the abolition of his post was “motivated” by a desire to sideline him and that it was tainted with abuse of authority. Furthermore, the decision to redeploy him was based on prejudice, ill will, bad faith and malice. He argues that the Secretary-General’s decision not to agree to his voluntary separation from service was not in the best interests of the Union. An agreed separation would have met all the criteria set out in Service Order 03/21 published on 24 November 2003. He alleges that the organisation’s behaviour towards him constitutes harassment.

The complainant requests: reconsideration of the Secretary-General’s decision not to award him a termination indemnity; damages in compensation for his constructive dismissal; damages to be awarded in respect of the decision “not to accept [his] forced resignation”; moral damages; compensation for “lost opportunity”; reimbursement of legal fees; and any other redress that the Tribunal considers “equitable, necessary, and justified”.

C. In its reply the ITU objects to the receivability of the complaint because the complainant did not comply with the statutory provisions before he filed his internal appeal. The Union raised objections to the receivability of his internal appeal and now leaves it to the Tribunal to consider the receivability of his complaint in light of the position taken before the Appeal Board.

The ITU submits that the complainant’s resignation was motivated by personal reasons. It notes that he had informed the Personnel and Social Protection Department on 15 May 2003 of his intention to leave the Union; this was well before the publication of Service Order 03/14, setting out the new structure of the IS Department, on 31 July 2003. It considers that the complainant’s counsel has tried to distort the facts by implying that no decision had been taken by the complainant to leave the ITU until after the Secretary-General’s decision of 26 September 2003. It invites the Tribunal to consider the Chief of Personnel’s memorandum of 28 August in which it was stressed that, during the various conversations held with the complainant, the latter emphasised the fact that “personal and family reasons” had led him to the decision to leave the Union.

The ITU denies that it reneged on an offer of a settlement package after the complainant had accepted it, and says that “no offer whatsoever was made to the complainant by the defendant organization”. It recalls that Office Memorandum 03/08 stated that the measures set out therein remained “within the discretionary authority of the Secretary-General and [would] only be applied in the interest of the Union”. The Secretary-General was under no obligation to accept the complainant’s request for an agreed termination and his decision was taken within the proper application of his discretionary authority and the statutory provisions.

The ITU points out that the Secretary-General examined the complainant’s request and he considered that the latter was “one of the good staff” in his Department, that he would be “a possible candidate for the chief in [the] future”, that he was “indispensable for the World Telecom” and that he would “play an important role in IS”. The Secretary-General concluded that the complainant’s “departure [would be] a loss for the Union” and as it would not be in the best interest of the Union, he decided not to accept the complainant’s request for an agreed termination.

The Union submits that the restructuring of the IS Department was undertaken to improve its efficiency in the best interest of the Union. It has provided the Tribunal with documents in which the objectives of the restructuring have been clearly set out. It also notes that the complainant was a member of the Ad Hoc Committee on the Information System Audit Report, a body that was created to analyse the findings and recommendations of the audit report in question. As part of the restructuring, three new posts at the complainant’s grade were announced by vacancy notices of 2 September 2003. He did not submit his candidature for any of these. Furthermore, he tendered his resignation before the restructuring of the IS Department had been completed.

D. In his rejoinder the complainant rebuts the ITU’s objection to receivability by referring to paragraph 3 of the report of the Appeal Board, which stated that his appeal was filed in conformity with the statutory provisions and was thus receivable.

He denies that his primary motivation for resigning was “for personal reasons”. He contends that his participation on the Ad Hoc Committee provided him with information which “enabled him to be aware” of the Union’s decision to “sideline” him through the restructuring. He maintains that representations were made to him by officials of the ITU regarding the termination “payout” he could expect, that he relied upon these representations, but that, subsequently, these were reneged upon by the Union; this constitutes breach of contract. The ITU, he argues, is trying to circumvent its responsibilities through reference to the Secretary-General’s discretion.

CONSIDERATIONS

1. The complainant is a former official of the ITU. He joined the Union in 1987 and at the material time he held the post of Head of the Information Exchange Division, at grade P.5, in the Information Services (IS) Department.
2. In March 2003 a proposal for the reorganisation of the IS Department was circulated by its then Chief. The proposal involved, among other things, the abolition of the complainant’s post. The complainant was not assigned to another post in that proposal. The proposal was modified on 27 June and, again, on 7 July and was updated on 10 July. The complainant’s name was attached to a post in the modified proposal of 7 July, but no person was assigned to any of the posts in the other two proposals.
3. The senior staff in the IS Department, including the complainant, wrote to the Deputy Secretary-General on 4 April 2003 criticising the lack of consultation with respect to the March proposal. They also wrote to the Secretary-General on 30 July, expressing the view that the updated proposal was unsatisfactory and that there had not been proper consultation. By Service Order 03/14 of 31 July, the Secretary-General announced a new structure for the Department to take effect from 1 September 2003. The new structure was similar to the updated proposal of 10 July; nobody was assigned to any of the positions identified in the new structure. Instead, the Secretary-General’s announcement included the statement that “[t]he administrative procedures required [...] are being carried out”. On 1 August the complainant submitted a detailed analysis of the new structure to the Deputy Secretary-General and the Chief of the Personnel and Social Protection Department. In that analysis, he criticised the creation of a Project Management Group without the allocation of resources and expressed the view that it would tend to under-utilisation of P.5 staff.
4. While the reorganisation of the IS Department was under consideration, Office Memorandum 03/08 had been issued on 7 April 2003. It announced various strategies to deal with budget constraints, including incentives for voluntary separation. In May the complainant approached the Personnel Department with a view to taking advantage of such an incentive. His proposal was apparently viewed favourably by that Department. On 6 August the complainant sent an e-mail to the Deputy Secretary-General, with whom he later discussed the matter, informing him that he required a decision on his request for mutually agreed separation that month so that he could enrol his children at school in his home country.
5. The complainant wrote to the Secretary-General on 12 August, referring to the abolition of his post and the absence of a post in the IS Department corresponding to the career path he had been following. He asked for an early decision on the question of termination by mutual agreement.
6. On 1 September the Secretary-General decided not to approve the payment of an incentive for the complainant’s voluntary separation, although that decision was not immediately communicated to him. The next day, 2 September, advertisements were issued calling for internal applications, by 16 September, for three P.5 posts and one P.4 post in the IS Department. The complainant was informed by e-mail on 12 September that the Secretary-General had decided not to approve his request for termination of service. This notwithstanding, he did not apply for any of the advertised P.5 posts.
7. The complainant, on 18 September, sought a review of the decision not to approve a mutual separation and was informed by a memorandum of 26 September that the Secretary-General had decided “that it was not in the interest of the good administration of the Union to terminate [his] employment”. He was also informed in that memorandum that, following the restructuring of the IS Department, a “P.5 post corresponding to [his] qualifications and experience would be available [...] and [he] would be redeployed to it”.
8. On 1 October 2003 the complainant submitted his resignation from the ITU stating that he confirmed his

“previously stated intention to definitively end [his] service with ITU as of October 31, 2003”. Thereafter, on 22 December of that year, he appealed to the ITU Appeal Board against the decision of the Secretary-General not to approve his request for a mutual separation. The Board considered that, in the circumstances, the Secretary-General’s refusal “could be interpreted as a sanction” and recommended that he consider “amiable solutions”. The Secretary-General rejected that recommendation on 20 May 2004. That decision is the subject of the complaint.

9. The complainant contends that the circumstances leading to his resignation amount to “constructive dismissal” and that, in that context, the decision not to approve a voluntary separation package was taken in bad faith. It is also claimed that the Secretary-General was estopped from refusing the complainant’s request for a mutually agreed termination payment and that the decision to redeploy him was based on prejudice, ill will, bad faith and malice and, thus, was an abuse of authority. Additionally, it is argued that the decision not to agree to his mutual separation was not in the best interests of the Union.

10. He also argues that the decision to abolish his post and to redeploy him was inconsistent with the relevant rules and procedures and that the course of conduct amounted to harassment.

11. By way of relief, the complainant seeks reconsideration of the decision not to award him a termination grant as well as material and moral damages for constructive dismissal, damages in respect of the decision “not to accept [his] forced resignation”, and costs. Additionally, he seeks an oral hearing in which to call witnesses.

Receivability

12. The Union contends that the appeal to the ITU Appeal Board was not receivable and that, in consequence, the complaint is also not receivable. It contends that the complainant did not request a review of the decision under challenge, as required by Staff Rule 11.1.1.2.a), before lodging his appeal with the Board. In this respect, it is claimed that the decision the complainant was appealing against was communicated to him by a memorandum dated 26 September 2003. That argument was rejected by the Board, the view being taken that the decision in question was communicated to the complainant by e-mail on 12 September, a review of which was sought by memorandum of 18 September and refused by the Secretary-General’s memorandum of 26 September. The memorandum of 18 September clearly requests review of the decision not to approve a mutually agreed separation and, equally clearly, the memorandum of 26 September is in reply to it. That being so, the Appeal Board was right to conclude that the appeal was receivable. It follows that the present complaint is also receivable.

Voluntary separation

13. Office Memorandum 03/08 of 7 April 2003 clearly specifies that incentives for voluntary separation are “within the discretionary authority of the Secretary-General and will only be applied in the interest of the Organization”. The reasons for the Secretary-General’s decision in the present case are clearly exposed in his handwritten note appended to a Personnel Department memorandum relating to the complainant’s request for payment of an incentive. That note reads:

“M. R. is one of the good staff of IS Department and he will be a possible candidate for the chief in [the] future. He is indispensable for the World Telecom. He will certainly play an important role in IS. I think his departure is a loss for the Union and I do not understand to pay more for his departure.”

14. The Secretary-General’s note indicated that he understood that the complainant might well leave the Union but that, in his view, that would not be in the Union’s interest. In those circumstances, he was well entitled to form the opinion that it would not be in the Union’s interest to provide any incentive which would certainly result in the complainant’s departure but, rather, that it was in its best interest to refuse his request in the hope that he might remain. That being so, the argument that the Secretary-General’s decision was not in the best interests of the Union because the complainant’s voluntary departure would permit the redeployment of other staff must be rejected.

15. The argument that the Secretary-General is estopped from refusing to approve an appropriate termination payment must also be rejected. For presently relevant purposes, an estoppel arises where one person suffers detriment by relying on a representation made by another person or an assumption engendered by that other person. However, reliance must be reasonable in the circumstances. Even if statements were made to the complainant by persons in the Personnel Department suggesting that he would receive a payment for voluntary separation – and there is no evidence that they did – Office Memorandum 03/08 made it abundantly clear that it was for the

Secretary-General to decide whether such a payment would be made. It would thus not be reasonable for the complainant to rely on any such statements. And there is no evidence to suggest that the Secretary-General said or did anything which might have led the complainant to believe that a payment would be made for separation on a voluntary basis. Further, the fact that the IS Department was to be reorganised and the complainant's post abolished provided no reason for him to assume that he would be given an incentive for leaving his employment voluntarily.

Constructive dismissal

16. Given the conclusion that it was open to the Secretary-General to form the view that it was in the best interests of the Union to refuse the complainant's request for payment of an incentive for his voluntary separation, it is difficult to see that that decision can be attacked on any basis other than that it was not the real reason for the decision. Seemingly, the contention that the complainant was constructively dismissed is intended to show that there was, in truth, another reason for the decision.

17. The notion of constructive dismissal is not novel. It is a convenient expression to indicate that an employer has acted in a manner inconsistent with the further maintenance of the employment relationship entitling the employee, if he or she so elects, to treat the employer's actions as terminating the employment. In the event that the employee so elects – usually by tendering his or her resignation – consequential rights and obligations are determined on the basis that it was the employer, not the employee, who terminated the employment. Of course, the fact that an employer has acted in a manner inconsistent with the further maintenance of the employment relationship may cast light on the reason behind some act or decision affecting the employee.

18. It is clear that the restructuring of the IS Department was undertaken in consequence of a recommendation to that effect by an external auditor and in the interest of the Union. It was an exercise in which the complainant and other senior staff were involved as members of the Ad Hoc Committee on the Information System Audit Report. It may be that there could have been more effective consultation, but there is absolutely nothing to suggest that it was influenced by any other than objective reasons relating to the efficient operation of the Department. In particular, there is nothing to suggest that any aspect of the restructuring was arbitrary or aimed at the complainant.

19. It was pointed out in Judgment 269 that “the purposes and structure of an organisation must move with the times and no institution is immune to change”. The Tribunal added that “such change [...] may entail the abolition of posts” even if “there is no express provision in the Staff Regulations or Staff Rules for such a measure”. That being so, the abolition of a person's post in the course of restructuring and his or her consequential redeployment is not inconsistent with the further maintenance of the employment relationship. At least that is so if the person concerned is redeployed to an equivalent post that corresponds to his or her experience and qualifications or is informed that that will occur. The complainant was told that he would be appropriately redeployed and there is absolutely nothing to suggest that that would not have occurred.

20. It is unnecessary to consider whether the restructuring of the IS Department involved any departure from the Staff Rules or established procedures. There is nothing to suggest that such departure, if any occurred, affected or would have affected the complainant in any way that could not have been remedied by resort to the ITU Appeal Board and, if necessary, this Tribunal. Certainly, the claims of the complainant in this regard provide no basis for treating the abolition of his post and proposed redeployment as a constructive dismissal.

Other issues

21. The various considerations which lead to the conclusion that the complainant was not constructively dismissed also lead to the conclusion that, contrary to the claims in the complaint, neither the restructuring of the IS Department nor the decision not to approve a payment for his voluntary separation involved any element of prejudice, ill will, bad faith or malice towards the complainant. The same considerations lead to the conclusion that there was neither abuse of authority nor harassment.

Oral hearings

22. Taken at their highest, the facts alleged in the complainant's pleadings are incapable of supporting his claims. Accordingly, there is no need for an oral hearing and the application is refused.

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, 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 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet