

## THIRTY-FIFTH ORDINARY SESSION

### ***In re* AL-JOUNDI**

#### **Judgment No. 259**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Telecommunication Union (ITU) drawn up by Mr. Faraj Al-Joundi on 17 December 1974, the ITU's reply of 14 February 1975 and the complainant's rejoinder of 24 March 1975;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, ITU Staff Regulations 4.14, 5.3, 9.1, 9.5 and 11.2 and ITU Staff Rules 4.14.1, 4.14.2, 5.3.1 and 11.1.1;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the service of the ITU on 20 August 1969 on a probationary appointment at grade P.2, step 1, as an administrative assistant in the Finance Department. Probationary appointments are normally granted for a period of two years but may be shortened or lengthened by one year. On 11 December 1969 the complainant's first performance report stated that he had not made the progress that might have been expected, had failed to apply himself sufficiently to his work and had a very limited knowledge of French and English. In a minute addressed on 31 July 1970 to the Chief of the Personnel Department the Chief of the Finance Department recommended withholding the complainant's annual increment on the grounds of unsatisfactory performance. On 2 September 1970 the Chief of the Finance Department noted that, although the complainant's performance was not up to P.2 standard and he could not be entrusted with full responsibility, he had made some progress. Accordingly, on 1 October 1970, i.e. two months late, the Secretary-General granted the annual increment. At the same time he warned the complainant that he was still on probation and would therefore have to prove his competence if he was to be judged fit for a permanent appointment.

B. The complainant's next annual report, dated 23 June 1971, admitted that he had tried to improve his languages, but said that his performance was still below par. The Secretary-General therefore extended his probation by one year. In an interim report dated 18 February 1972 the Deputy Chief of the Finance Department said that the complainant could not yet be entrusted with full responsibility. His next annual report, dated 29 June 1972, stated that he was still making progress of the kind mentioned in the report of June 1971. The Secretary-General took the view that an official who had not proved his fitness could not be given a permanent appointment, but since his supervisors had reported some progress offered him a fixed-term two-year appointment, which the complainant accepted and which began on 20 August 1972.

C. The complainant's annual report dated 8 June 1973 stated that his performance was still well below the minimum P.2 standard and that he would have to make a real effort to perform his duties satisfactorily. At the beginning of 1974 the complainant asked the Chief of the Finance Department for a personal opinion of his prospects so that, if need be, he could see to his own and his family's future welfare. In a letter to the complainant dated 26 March 1974 the Secretary-General stated: "To enable you to take proper precautions I wish to inform you now that your fixed-term appointment expiring on 31 August 1974 will not be renewed." By letter of 16 August 1974 the complainant asked the Secretary-General for a final decision. In his reply of 19 August 1974 the Secretary-General pointed out that the final decision - not to renew the appointment - had been notified to the complainant on 26 March. On 22 August 1974 the complainant again asked the Secretary-General to notify his final decision and on 23 August the Secretary-General replied to the same effect.

D. On 4 September 1974 the complainant appealed to the Appeal Board of the ITU. The Board held the appeal to be time-barred since it had not been filed within the six weeks following 26 March 1974. It also held that even if

the appeal had been receivable it would have been unfounded. On 30 September 1974 the Secretary-General communicated the Board's conclusions to the complainant without comment. On 17 December 1974 the complainant appealed to the present Tribunal. He "impugns" the "decision" of 30 September 1974 and asks that the "decision" of 19 August 1974 be quashed.

E. Believing that his performance was satisfactory and that he has suffered from animosity on the part of his supervisors, the complainant pleads "exceptional circumstances which prevented him from instituting the appeal proceedings in time" and in his claims for relief asks the Tribunal: as to the form: to declare the complaint receivable inasmuch as it was lodged in the form and within the time limits prescribed by the Statute and Rules of Court of the Administrative Tribunal; as to the substance: to quash the decision by the Secretary-General of the International Telecommunication Union dated 19 August 1974 to refuse Mr. F. Al Joundi a permanent appointment in accordance with the provisions of the ITU Staff Regulations and Staff Rules; to reinstate him in the service of the International Telecommunication Union; and to award him compensation for the prejudice suffered by him owing to the Secretary-General's decision of 19 August 1974.

F. In its reply the ITU first contests certain points of fact in the complaint. It maintains that the decision impugned by the complainant was not taken on 30 September 1974, nor indeed on 19 August 1974, as the complainant states in his claims for relief.

G. The ITU further contends that the complaint is irreceivable. In order to determine whether the complaint is time-barred the decision which it impugns must be identified. In his letter of 16 August 1974 the complainant states that in the communication of 26 March 1974 "you informed me that my fixed-term appointment will not be renewed" and, without referring to a permanent appointment, asks the Secretary-General to review his position. In his appeal to the Appeal Board at one point the complainant states his intention of appealing against the final decision communicated to him by the Secretary-General on 19 August 1974 not to renew his fixed-term appointment and at another point as his main request asks the Appeal Board to recommend the Secretary-General to quash his decision of 19 August 1974 and grant the complainant a permanent appointment with effect from 1 September 1974. In his complaint to the Tribunal the complainant makes no further reference to non-renewal of his fixed-term appointment but asks that the Secretary-General's decision of 19 August 1974 be quashed in so far as "he refused to grant Mr. F. Al Joundi a permanent appointment in accordance with the provisions of the ITU Staff Regulations and Staff Rules". "This claim", says the ITU, "is utterly inexplicable since not only did the Secretary-General take no decision on 19 August 1974 but his minute of that date and the letter of 16 August to which it was a reply do not allude to any permanent appointment". Hence the complaint is irreceivable because it is not the same decision - if indeed there was any - which the complainant has impugned in the course of the appeal proceedings. Moreover, he failed to observe the prescribed time limits: if he wishes to protest at the refusal to renew his fixed-term appointment, the corresponding notification, which is quite unambiguous and leaves no room for interpretation, was given to him on 26 March 1974. since he delayed five months before reacting the complainant is time-barred. If he wishes to protest at the refusal of a permanent appointment he should have done so in August 1972, when his probationary appointment expired. Two years later his appeal is plainly irreceivable. At the various stages of the procedure the appeal was presented neither in the form nor within the time limits prescribed. The ITU therefore prays that the Tribunal dismiss the complaint as irreceivable.

H. The ITU then argues that if the appeal had been examined on the merits it ought to have been dismissed as unfounded. From the outset the complainant's reports have referred to his inadequacies. All his reports were discussed with him and he was given every possible warning and encouragement. For his own sake and that of his family he was offered a fixed-term appointment when his probationary appointment could no longer be extended, he freely accepted it, and it did not entitle him to expect any extension. "The Secretary-General took the decision or decisions impugned in the complaint in good faith, advisedly and in the exercise of his discretionary authority. To appeal against those decisions at the time would have been pointless, but the complainant did not do so within the time limits. The complaint is clearly time-barred and therefore irreceivable."

#### CONSIDERATIONS:

According to ITU Staff Rule 11.1.1, paragraph 2, a staff member who wishes to appeal against an administrative decision must do so within six weeks from the day on which he received notification of the decision in writing.

It appears from the documents in the dossier that on 26 March 1974 the Secretary-General of the ITU sent the complainant a letter in which he said: "To enable you to take proper precautions I wish to inform you now that

your fixed-term appointment expiring on 31 August 1974 will not be renewed."

That letter constituted a decision not to renew the appointment which the complainant held until 31 August 1974 and thus determined that date as the date of termination of the contractual relationship between the complainant and the ITU.

That decision was detrimental to the complainant and under Staff Rule 11.1.1 he had a period of six weeks in which to appeal against it.

No appeal having been lodged within that period, the decision had already become final by 16 August 1974, when the complainant asked for review of his case. The Secretary-General and subsequently the Appeal Board therefore acted lawfully in dismissing his request on that ground.

It is true that in accordance with paragraph 2(c) of Staff Rule 11.1.1 the Board was empowered to make a waiver in the complainant's favour; but it was entitled to do so only in exceptional circumstances warranting a derogation from the prescribed time limits. In the present case the Appeal Board was right in taking the view that no such exceptional circumstances existed.

If the complainant also wishes to appeal against a decision of the Secretary-General of 19 August 1974, that decision merely upheld the decision of 26 March 1974 and could not therefore give rise to new time limits for the lodging of an appeal by the complainant.

It appears from the foregoing that the complaint should be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 27 October 1975.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet