

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

111th Session

Judgment No. 3044

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. R. against the International Telecommunication Union (ITU) on 6 July 2009, the ITU's reply of 19 October, the complainant's rejoinder of 13 November 2009 and the ITU's surrejoinder of 15 February 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In accordance with the decisions on the ITU's budget taken by the Marrakesh Plenipotentiary Conference of 2002, the ITU Council decided, at its 2003 session, to implement a staff reduction plan. In order to achieve the objectives set in the plan the Secretary-General, on 24 November 2003, adopted Service Order No. 03/21, introducing a voluntary separation programme and an early retirement programme. These programmes, offered until 31 December 2003, were intended to facilitate the redeployment of staff members whose posts would no longer be financed.

The complainant was working under a fixed-term contract as a clerk, at grade G.4, when he was notified orally, in November 2003, that his post was to be abolished on 31 December 2003. In accordance with the above-mentioned Service Order, he was redeployed in February 2004 to a post at the same grade in the Communications Services. The post he filled had previously been held by Mr F., who had been detached to a post of clerk, at grade G.5, which had become vacant following the voluntary separation of its incumbent. On 14 October 2005 the complainant was reassigned to a G.4 grade post in the Department of Common Services, and on 23 April 2007 the ITU granted him a permanent appointment in that post.

In a memorandum dated 10 November 2005, addressed to the Chief ad interim of the Personnel and Social Protection Department, the complainant asked why he had not been redeployed to the above-mentioned G.5 grade post of clerk, and why that post had not been filled on a competitive basis when it became vacant. He received a reply on 28 November 2005 stating that redeployments had to be carried out to posts at equivalent grades, and that it had not been possible, for budgetary reasons, to hold a competition to fill the post in question. It was explained that the voluntary separation of the post's incumbent had been agreed in order to allow for the complainant's "indirect redeployment".

The G.5 grade post of clerk was opened for competitive recruitment in November 2006 and the complainant applied for it. On 8 October 2007 a corrigendum to the vacancy notice was issued, announcing that the deadline for applications was being extended.

The vacancy notice was cancelled on 14 December 2007 and reissued in February 2008. The complainant submitted his application, and was informed by an e-mail of 1 July 2008 that it had not been successful. The person appointed by the ITU was Mr F., who had been detached to the post since 2004.

On 9 July 2008 the complainant asked the Secretary-General to review the decision to reject his application, and called for "strict implementation" of Service Order No. 03/21. On 19 August his

request was turned down, and on 18 November 2008 he lodged an appeal with the Appeal Board. In its report of 10 February 2009 the Board concluded that the application of the Service Order in the complainant's case was "tainted with a procedural irregularity" and that an administrative error had been committed. It recommended inter alia that the Secretary-General grant the complainant, on an exceptional basis, a personal promotion to grade G.5, while keeping him in his existing post. The Board also considered that he could be paid compensation for the financial losses caused by the decisions of which he had complained. By a letter of 14 April 2009, which constitutes the impugned decision, the Secretary-General informed the complainant that he did not accept the Board's recommendations and was maintaining the decisions of 1 July and 19 August 2008.

B. The complainant relies on the conclusions of the Appeal Board, which took the view that the Administration had "erred in its application" of Service Order No. 03/21. He states that the Union described his redeployment as "indirect", a concept which is absent from the Service Order, and argues that he was the person who should have been redeployed to the post of clerk following the voluntary separation of the incumbent, since he had all the necessary qualifications, whereas it was Mr F. who "paradoxically" was appointed to the post, despite the fact that he did not meet the criteria set out in the Service Order. He also complains that the ITU failed to respond to his repeated requests for the Service Order to be applied, and that the selection process was extremely protracted.

He seeks the restoration of his rights on the basis of a strict implementation of Service Order No. 03/21, through the cancellation of Mr F.'s appointment and his own appointment to the post in question. He also claims compensation for the material and moral harm suffered, and costs.

C. In its reply the ITU argues that the complaint is irreceivable *ratione materiae* because it is based on matters prior to the publication of the vacancy notice for the post of clerk in November 2006, namely

the implementation of Service Order No. 03/21 and its effect on the complainant's redeployment. The complainant's unreserved acceptance of his redeployment to the G.4 grade post in the Communications Services is proof, in the defendant's opinion, that he renounced the possibility of his redeployment to the post of clerk at grade G.5; he cannot therefore challenge a redeployment decision taken several years previously.

The Union also contends that the complaint is irreceivable *ratione temporis*, as the first occasion on which the complainant challenged the implementation of the above-mentioned Service Order was when he sent his memorandum of 10 November 2005. By that time, he was already time-barred.

Relying on the Tribunal's case law, the Union submits that the complainant has been unable to point to any flaw, of either form or substance, that might have vitiated the selection process. It emphasises that Mr F. was the best candidate for the post.

The defendant observes that the complainant interprets the conclusions of the Appeal Board in a "highly personal" way. Indeed, the Board recommended keeping the complainant in his existing post, but it never questioned the appointment of Mr F. Moreover, in the defendant's opinion the argument that the Service Order was not applied is devoid of merit. On the one hand, the detachment of Mr F. to the G.5 grade post was lawful and was justified by the needs of the service, including the need for continuity; and, on the other hand, the voluntary separation of the incumbent of that post had in fact "facilitated the redeployment" of the complainant. Moreover, it was impossible to redeploy him to a higher grade post as there is "no legal basis" for such a decision. Finally, as the complainant had held a permanent appointment since April 2007, he could no longer evoke his precarious contractual status to argue that he should receive "any advantage or priority in the recruitment process" for the post of clerk.

Having invited Mr F., at the Tribunal's request, to comment on the case, the defendant annexes to its reply the e-mail in which he states that he has nothing to add.

D. In his rejoinder the complainant states that he accepted the assignments offered by the Union because of his “vulnerable employment status” but had never renounced the possibility of redeployment to the post of clerk. In his view, the appointment of Mr F. to that post defeated the object of Service Order No. 03/21 and undermined equality of opportunity when the applications for this post were considered.

E. In its surrejoinder the defendant maintains its position.

CONSIDERATIONS

1. In 2003 the Council of the ITU decided to implement a drastic staff reduction plan, in the light of the decisions taken by the Plenipotentiary Conference of 2002. In order to achieve the objectives laid down, Service Order No. 03/21, entitled “Voluntary Separation Programme and Early Retirement Programme”, was published on 24 November 2003. As certain posts were to be abolished, including the post held by the complainant, who was employed as a clerk at grade G.4 under a fixed-term contract, the complainant was redeployed to a G.4 grade post in the Communications Services equivalent to the post he had held previously. It was possible to assign him to that post because of the voluntary separation of a staff member in accordance with Service Order No. 03/21. That staff member had been occupying the G.5 grade clerk post to which Mr F. was detached, having previously held the G.4 grade post which, on becoming vacant, permitted the complainant’s redeployment. On 12 February 2004 the complainant accepted this redeployment without reservation. On 16 February 2004 he submitted some observations, without however making any formal claim.

By a decision of 14 October 2005 the complainant was reassigned, because of budgetary constraints, to another post of clerk, at grade G.4, in the Department of Common Services, to which he was subsequently transferred. On 23 April 2007 he was granted a permanent appointment in that post.

It should be noted that the complainant made no claim, nor did he lodge any appeal, relating to any of these measures.

2. The post of clerk at grade G.5 to which Mr F. had been detached was opened for competitive recruitment on 15 November 2006. A corrigendum to the vacancy notice was published on 8 October 2007. The notice was subsequently withdrawn, on the recommendation of the Chairman of the Appointment and Promotion Board, “in order to ensure complete transparency in the selection process”.

On 1 February 2008 a new vacancy notice was issued for the same post. The complainant, who had applied for the post, was included on the shortlist of candidates. Finally, Mr F., who had been detached to the post in 2004, was appointed to it with effect from 1 July 2008.

3. The request sent by the complainant to the Secretary-General for a review of the decision not to appoint him to the post in question was dismissed as unfounded on 19 August 2008, and on 18 November 2008 the complainant lodged an appeal with the Appeal Board requesting “cancellation of the appointment of the present holder of the post [of clerk at grade G.5] and a recommendation to the Secretary-General that [he] should be appointed to the post”. In its report, dated 10 February 2009, the Board recommended that the Secretary-General “grant the [complainant], on an exceptional basis, a personal promotion to grade G.5 while keeping him in his present post”. It also took the view that “compensation could be paid to [him]”. By a letter of 14 April 2009 the Secretary-General informed the complainant that he could not accept the recommendations of the Appeal Board and that he had decided to maintain the decisions of 1 July and 19 August 2008. That is the decision that the complainant impugns before the Tribunal.

4. The complainant requests the Tribunal “to restore his rights on the basis of a strict application, by the Administration of the ITU, of Service Order No. 03/21 [...], by cancelling the appointment of

[Mr F.] and appointing him to the post [of clerk at grade G.5]”. He also requests fair compensation for the material and moral harm he has suffered, and costs.

5. Mr F., to whom the complaint was communicated at the Tribunal’s request on 1 October 2009, has not made any comment.

6. The defendant submits that the complaint should be dismissed as devoid of merit. It does not challenge its receivability insofar as it relates to the decision not to appoint the complainant following the selection process relating to the vacancy notice of 1 February 2008. It does, however, challenge its receivability, *ratione materiae*, “insofar as the complainant bases his complaint on facts and pleas prior to the publication of the vacancy notice [...] of 15 November 2006”.

7. In support of his claims, the complainant relies on the conclusions of the Appeal Board’s report, which in his view showed that the Administration of the ITU “erred in applying” Service Order No. 03/21. He states that he cannot “himself renounce his rights, which are imprescriptible”. That is why he requests a strict application of the Service Order.

He considers that he should normally have been redeployed to the post of clerk at grade G.5 which was opened for competitive recruitment, since he had all the required qualifications. Yet it was Mr F. who was appointed, even though he “did not meet the criterion set in Service Order No. 03/21” and held a permanent appointment.

8. However, the Tribunal notes, as already stated above, that when Service Order No. 03/21 was implemented the complainant, whose post had been abolished, was redeployed to a G.4 grade post in the Communications Services, was subsequently reassigned and transferred, and was then given a permanent appointment at grade G.4, without his making any claim or lodging any appeal.

The complainant cannot therefore, without the risk of undermining the necessary stability of legal relationships, challenge a redeployment

decision taken by the Administration and accepted by him in February 2004, after which other decisions on reassignment or transfer were made without challenge.

9. It follows from the foregoing that, contrary to the opinion of the Appeal Board, the case before the Tribunal does not relate to the application to the complainant of Service Order No. 03/21, or to “the whole of an administrative process the lawfulness of which has to be verified”, but rather to the lawfulness of the procedure followed in connection with the competitive recruitment to fill the post to which the complainant aspired, the lawfulness of the rejection of his candidature for that post and the lawfulness of the appointment of the person selected for it.

10. According to the Tribunal’s case law, an international organisation has a wide discretion in relation to the appointment and promotion of staff. For this reason, decisions in such matters are subject to only limited review by the Tribunal. That is, the Tribunal will only interfere if the decision was taken without authority, if it was based on an error of law or fact, if some material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, if it was taken in breach of a rule of form or of procedure, or if there was an abuse of authority (see Judgment 2835, under 5, and the case law cited therein).

11. In this case, all the complainant’s arguments are based on alleged non-compliance by the ITU with Service Order No. 03/21.

This line of argument cannot be accepted, for the reasons given above.

As no admissible criticism has been made of the lawfulness of the competitive recruitment procedure or the lawfulness of the appointment of the person selected, the impugned decision, which has none of the flaws that would justify the Tribunal’s censure, cannot be set aside.

The complaint must therefore be dismissed, without it being necessary for the Tribunal to rule upon the objection to receivability raised by the defendant.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2011, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet