

## FORTIETH ORDINARY SESSION

### *In re* CAGLAR

#### Judgment No. 334

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Telecommunication Union (ITU) by Mr. Celal Caglar on 25 October 1976, the ITU's reply of 25 January 1977, the complainant's rejoinder of 31 March 1977 and the ITU's surrejoinder of 23 May 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the ITU Staff Regulations and Staff Rules, particularly sections 4.14.1, 4.14.2(a) 8.1.2(b), 9.1(a), 9.1(b), 9.1(d), 9.1(e), 9.1(f), 9.5.2(a), 11.1.1, 12.1.5 and 12.3;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant joined the staff of the ITU on 21 July 1969 as a temporary member of the Pension and Insurance Division at grade P.1. On 24 December 1970 he was given a probationary appointment at grade P.2 as a cashier in the Finance Department, a post in which all agree he worked satisfactorily. On 20 November 1972, according to the complainant, or on 1 January 1973, according to the ITU, he was given a permanent appointment. In 1973 he was transferred to the Division of Relations with Members and in the spring of 1974 back to the Finance Department.

B. The secretariat was reorganised and in June 1975 the Administrative Council of the ITU adopted a resolution, No. 759, abolishing nine posts, including the complainant's. By a minute of 29 August 1975 the Secretary-General told him that his post had been abolished but that his case would be referred to the Joint Advisory Committee. The Committee met in September and recommended the Secretary-General to "do his utmost to transfer Mr. Caglar to another post". On 23 September the Secretary-General wrote to the complainant: "there is no vacancy for which you have the right qualifications and I have therefore no choice ... but to end your appointment with the ITU on 31 December 1975". On 24 September the Secretary-General told the administrative services of the ITU that the complainant should be automatically regarded as a candidate for any suitable post from grade P.1 to P.3 which was put up for competition. Also on 24 September the complainant asked the Secretary-General to reconsider the decision notified to him the day before. In a letter of 9 October the Secretary-General answered: "The Administration is anxious ... to serve both the ITU's interests and your own".

C. By letter of 20 October the Secretary-General upheld his decision of 23 September but offered the complainant "on trial" the post of a staff member in the Technical Co-operation Department who had resigned. On 5 November the complainant appealed to the Joint Appeal Board, in particular against the decision that his appointment should end on 31 December. The Board made its report and on 22 December the Secretary-General told the complainant that he would keep the post which he held on trial until further notice but that if his supervisor's report on him at the end of March 1976 proved unfavourable his appointment would end forthwith. The performance report suggested that it was not possible to form any final opinion of the complainant's fitness for the post and on 29 March the Secretary-General decided to extend the trial period by three months.

D. On 5 May 1976 the complainant again appealed to the Joint Appeal Board against the decision to give him an assignment "on trial" and to put him through probationary periods. The Board reported on 25 May. On 27 May the Secretary-General decided again to extend the trial period, by one month to 31 July. After reading the final report by the complainant's supervisor the Secretary-General informed the complainant on 30 June 1976 that the report did not suggest that he was qualified for the post he had held on trial and, there being no other suitable post, his appointment would end on 31 July. By letter of 22 July the complainant protested against that decision and asked the Secretary-General, should he uphold it, to permit him to lodge a complaint directly with the Administrative

Tribunal. The Secretary-General granted such permission on 27 July, and the complainant lodged his complaint.

E. In the meantime the complainant fell ill. On 31 October 1976, when his appointment came to an end, he was still on sick leave.

F. The complainant believes that the abolition of his post was only a pretext to get rid of him and that the ITU could easily have found him some other post had it really been anxious to do so and applied the relevant Staff Regulations and Staff Rules properly. He asks the Tribunal:

- to quash the Secretary-General's decision to terminate his appointment on 31 July 1976;
- to order his reinstatement in the post he held from November 1975; and
- to order that "such reinstatement be effected without any reference to 'trial' or 'probation'";

or, alternatively:

- to order "the adoption of proper procedures in line with United Nations practice in order to conform with Regulation 9.1(b) and (d) and, failing that, in due time, proper procedures in fulfilling the provisions of Regulation 9.1(e)";

or:

- to order "the payment of the equivalent in cash of the salary and allowances of which the decision in question would deprive [the complainant], namely the salary and allowances that [he] would reasonably expect to receive during the period between the effective date of termination and the date of his projected retirement"; and
- to note that "the above redress is sought without prejudice to any relief or compensation the complainant may request subsequently for damage to his health and his future career prospects and earnings as a result of the manner in which his situation has been handled".

G. The ITU contends that, though the complainant served satisfactorily as cashier, he lacked "certain qualities essential to the proper performance of the technical duties on which the efficiency of an international intergovernmental organisation depends". Every effort was made to employ him effectively in some other post and he has not proved that the ITU committed any impropriety either in the procedure it followed or in putting him "on trial". It was the ITU's interests which governed the Secretary-General's decision, and he is "wrong to contest it".

H. The ITU therefore asks the Tribunal to dismiss the complainant's claims as unfounded and to note the ITU's undertaking to grant the complainant the benefit of the obligations laid down in Regulation 9.1(e) throughout the period specified in the Regulation.

#### CONSIDERATIONS:

As to the relevant provision:

1. According to Regulation 9.1(b) of the ITU Staff Regulations and Staff Rules a staff member with a permanent appointment whose post is abolished shall be retained in a suitable post in which his services can be "effectively utilised", in preference to staff members holding all other types of appointment. Moreover, Regulation 9.1(e) requires the Union to offer a staff member whose post is abolished "another suitable post for which he is considered to possess the necessary qualifications, if one becomes vacant during the two years after the date on which the termination becomes effective".

In his original memorandum the complainant relies upon Regulation 9.1(e), which he appears to interpret differently from Regulation 9.1(b). In its reply the ITU relies upon Regulation 9.1(b), but contests the different interpretation by the complainant. In his rejoinder the complainant implicitly consents to the application of Regulation 9.1(b). He is right to do so. The impugned decision was taken before the two years prescribed in Regulation 9.1(e) started to run and so there is no question of relying upon that provision. The only relevant provision is Regulation 9.1(b), which applies when decisions are taken, like the one impugned, before a staff member's appointment ends.

It should be recorded in the complainant's favour, however, that, though seeking the dismissal of the complaint, the organisation undertakes to fulfil its obligations towards him

under Regulation 9.1 (e).

As to the Tribunal's power of review:

2. Regulation 9.1(b) is applicable only if there is a suitable post in which the staff member's services can be "effectively utilised". Applying it requires knowledge of the duties of vacant posts and of staff members' qualifications and so raises matters of discretion. Hence the Tribunal may quash a decision taken under that provision only if it was taken without authority, or violated a rule of form or procedure, or was based on a mistake of fact or of law, or if essential facts were overlooked, or if the decision was tainted with abuse of authority or if clearly mistaken conclusions were drawn from the facts.

In this case, which turns on Regulation 9.1(b), the impugned decision is subject only to the Tribunal's limited power of review as so defined. For the reasons given below none of the complainant's objections to the decision may be allowed.

As to the alleged procedural flaws:

3. On 4 September 1975 the Secretary-General of the ITU invited the Joint Advisory Committee to consider the case of the complainant, whose post the Administrative Council had abolished. In his original submissions to the Appeal Board the complainant said that he had never seen the documents which the Secretary-General had communicated to the Joint Advisory Committee nor been summoned by that Committee for a hearing. There is no need to consider whether those allegations are true. Even if a breach of procedure did occur it had no effect whatever since the Joint Advisory Committee found in the complainant's favour and recommended assigning him to some other post.

Contrary to what the complainant contends, the Secretary-General was not bound to seek another recommendation from the Joint Advisory Committee before he took the impugned decision on 30 June 1976. Such an obligation is neither expressly prescribed in Regulation 9.1(d) nor in any other provision of the Staff Regulations and Staff Rules, nor even, since it would serve no purpose, implied. It was open to the complainant to appeal against the decision of 30 June 1976 to the Appeal Board - in other words, to obtain its opinion on the matter and then another decision by the Secretary-General. Thus he had an opportunity to defend his interests properly, even without a further referral to the Joint Advisory Committee. Hence he cannot properly hold the Secretary-General to blame for not having referred the matter again to the Joint Advisory Committee and he must bear the consequences of his own freely taken decision not to go to the Appeal Board.

As to the alleged mistakes of law:

4. The complainant argues that as a permanent staff member who had lost his post he was entitled to be appointed to a suitable vacant post without being tested beforehand. This is to misconstrue Regulation 9.1(b). The priority granted under that provision to a staff member whose post is abolished is not absolute but subject to two conditions. The first is the existence of a suitable vacant post; the second is the staff member's capacity to give useful service in that post. To determine whether the two conditions are met it may sometimes be necessary to test the staff member whose post has been abolished. True, that will not be necessary if the organisation can offer him a post identical to one in which he has already given fully satisfactory service. But that hypothesis does not apply here, since the complainant's supervisors had - more than once reported his shortcomings. Hence the Secretary-General made no mistake of law in putting the complainant on trial before appointing him to a new post. The period of trial was adequate and not unduly long. In any event, since he was not on probation, he could not ask to have the provisions on probation applied to him.

The complainant is mistaken in objecting to the Secretary-General's taking account not just of the reports for the trial period but of earlier ones as well. Since the priority granted under Regulation 9.1(b) is not absolute, the question to be decided was whether priority was deserved - in other words whether the complainant was qualified for the post offered to him and could give useful service in that post. Accordingly the Secretary-General had to take account of all the information he had on the complainant. It is wrong to reproach him for having considered the reports on the trial period in the light of the earlier reports on the complainant's performance in the ITU.

It is immaterial that in its report of 15 December 1975 the Appeal Board criticised the fact that an initial trial period was set but that the complainant's appointment was still to end on 31 December 1975. On 22 December the Secretary-General postponed the date of dismissal because of that criticism, for which he cannot now be taken to task.

As to the alleged abuse of authority:

5. The complainant contends that the Secretary-General made no real attempt to find him a post to replace the one abolished. To bear out that contention he says, first, that when the Secretary-General referred the matter to the Joint Advisory Committee he made it clear that he intended to end the complainant's appointment on 31 December 1975; secondly, that it was only under pressure that he took steps to find another post; and, thirdly, that even before the last trial period was over he had proposed that the Administrative Council should "freeze" the post offered to the complainant.

There is no need to consider the complainant's allegation that the Secretary-General was prejudiced against him. The Tribunal merely observes that the impugned decision would be tainted with abuse of authority only if there had been no objective grounds for it. As appears below, however, there were such grounds.

As to the allegation that clearly mistaken conclusions we draw:

6. During the trial period the complainant's immediate supervisor wrote three reports on him. In the last one he describes, with an obvious desire to be impartial, the complainant's qualities and shortcomings. "In short", he says<sup>(d)</sup>, "Mr. Caglar has most of the qualifications required but not enough experience, so that he can perform only some of the present duties of the post at a standard corresponding to the grade. He has tried hard but, no doubt for lack of experience, is unable to grasp fully the complicated questions of technical co-operation which may crop up in his work. As I said above, in two years he should manage to acquire the knowledge of Spanish he at present lacks."

There is no need to consider the complainant's contention that duties mentioned in the third report do not appear in the original description of the post in which he was put on trial. Be that as it may, it is doubtful whether the Secretary-General was right to conclude from reading that report alone that the complainant was not qualified. As the Tribunal has said, however, the Secretary-General was bound to take account of the reports on the complainant's performance in the several posts he had held. His supervisors at all times after the period in which he worked as cashier and was given a permanent appointment made more or less severe criticisms of him. That was why on 22 November 1974 the Secretary-General told him that pending further review he could not be given a step increment. Moreover, in a letter of 9 October 1975 the Secretary-General reminded him that his employment was insecure: "for many months", he said, "and with our help you have been looking for a post elsewhere better suited to your qualifications than any we in the ITU can offer you".

Accordingly, and in view of all the documents in the dossier, it cannot be said that the conclusions drawn by the Secretary-General - that the complainant was not fit for the post and that the termination of his appointment was therefore warranted - were clearly mistaken.

DECISION:

For the above reasons,

1. The complaint is dismissed.
2. The Tribunal records the ITU's undertaking to fulfil its obligations towards the complainant under Regulation 9.1(e) of the Staff Regulations and Staff Rules.

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 8 May 1978.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

1. Registry translation.

Updated by PFR. Approved by CC. Last update: 7 July 2000.