EIGHTIETH SESSION

Judgment 1482

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. B. J. R. against the United Nations Industrial Development Organization (UNIDO) on 1 April 1994 and corrected on 7 August, UNIDO's reply of 19 December 1994, the complainant's rejoinder of 7 April 1995 and the Organization's surrejoinder of 21 July 1995;

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

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

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

A. The complainant, a citizen of the United States who was born in 1942, joined the staff of UNIDO in November 1985 as an industrial information officer at grade P.3 under a fixed-term appointment for two years. In 1989 UNIDO promoted her to grade P.4. It granted her three extensions of contract, the last of which was to run until 14 November 1994.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division told her that the Organization's financial straits required retrenchment of staff, her appointment was therefore "likely to be terminated in the near future" and the Administration intended to discuss the "modalities of separation" with her.

In a memorandum of 6 October to the Director she explained her personal and professional circumstances and asked him to review her case.

In the absence of a reply she asked the Director-General in a memorandum dated 8 November 1993 for his "assistance" or for a hearing. In another memorandum of even date she told the Director of Personnel what the loss of her job might mean for her family and said: "... should UNIDO insist on my agreed termination, it is clear that my children and I can only survive ... with a better financial arrangement".

In his reply of 10 November 1993 the Director expressed appreciation of her "interest in agreed termination", set out the terms of a financial settlement and described them as "the most" that UNIDO could offer. It would, he said, put her on special leave with full pay from 1 December 1993 until 30 September 1994 and on special leave without pay from 1 October 1994 until 30 November 1997. It would pay her a termination indemnity, repatriation grant, grants for the education of her two children in 1993-94, four-fifths of the costs of her travel and removal on repatriation, and insurance contributions.

On 12 November she wrote at the bottom of the Director's letter of 10 November: "I accept the above offer. In view of my financial situation I would request exceptional approval of 100% payment". In a memorandum also dated 12 November she told the Director that she accepted the offer but would like the Director-General to grant her a further month's salary in lieu of notice.

By a letter dated 26 November the Director told her that, noting that she had "requested an agreed termination", the Director-General had decided to terminate her appointment under Staff Regulation 10.3(c). (The text provides for the discretionary termination of fixed-term appointments.) The Director set out her entitlements.

On 3 December she signed a statement underneath the text of the Director's letter of 26 November confirming that she accepted the terms of termination under Regulation 10.3(c) and would "not contest this agreed termination".

B. The complainant impugns the implied rejection of the claim in her memorandum of 8 November 1993 to the Director-General. She submits that the "agreed termination" was unlawful because the Organization "forced" her to agree by threatening to dismiss her with only one month's notice and loss of financial benefits. By thus securing her consent under duress it failed in the duty of care it owed her. It was guilty of bad faith, misuse of authority and arbitrariness. It denied her right to appeal. It failed to explain why she rather than others had to go. Its real reasons were "personal", or else a desire to "advance the careers of [her] male colleagues".

She seeks: (1) material damages in an amount equivalent to what she would have earned at UNIDO up to the age of compulsory retirement, which is 60, plus the Organization's contributions to the pension and health funds and education allowances for her children; (2) reinstatement, if feasible; (3) 50,000 United States dollars in moral damages if her claim to material damages is allowed, $300,000 if it is not, and $500,000 if the Tribunal holds that she was the victim of "racial and/or gender and/or national prejudices"; (4) some $100,000 in moral damages for her daughter; (5) some $50,000 in moral damages for her son; (6) the entry in her personal file of an "acceptable" letter of recommendation and the prior submission to her of any appraisals of her performance since 1991 that are to be put in that file; and (7) an order that, should she find another job while on special leave, "UNIDO may not refuse [her] permission" to hold it without explaining why it might be at odds with the Organization's interests. She claims costs.

C. In its reply UNIDO contends that the complaint is irreceivable. By 8 November 1993, the date of the memorandum in which the complainant says she submitted her claim, it had taken no "final administrative decision" on her case. Besides, all she sought in that memorandum was a hearing by the Director-General and his "assistance" in the request for review she had made in her memorandum of 6 October to the Director of Personnel. So she failed to exhaust her internal remedies, the challengeable decision being in the Director's letter of 26 November 1993.

In any event the reason why she did not challenge the termination of her appointment was that she had agreed to it and undertaken not to challenge it. She was under no duress, and the agreement is as binding on her as on the Organization.

On the merits UNIDO maintains that the termination of her appointment was a lawful measure taken for the sake of sound management and in the context of the retrenchment of staff. She knew full well the reasons for it before she consented to the generous terms on offer. In any event she had no legitimate expectancy of renewal up to the age of retirement.

There was nothing discriminatory about the retrenchment of staff: over fifty other officials, including men, left too. Besides, UNIDO did its best to heed the complainant's personal circumstances.

As for her claim to an "acceptable" letter of recommendation she has only to ask for a statement under Staff Rule 110.12 on the nature of her duties and the quality of her services. She may also obtain a report on her performance from January 1991 to December 1994 by applying for one under Staff Regulation 4.5 and Staff Rule 104.08.

D. In her rejoinder the complainant argues that her complaint is receivable and she enlarges on her earlier pleas. She maintains that she was discriminated against since according to the Administration's guidelines the retrenchment need not have affected her.

She broadens her claims. Under the head of material damages she claims compensation also for payment of her own contributions to the pension and health funds until she reaches the age of retirement. In the event of reinstatement, which she seeks in the form of a fixed-term appointment up to that age, she asks the Tribunal to order that an official whom she names should not be her supervisor and that UNIDO should "abstain from circulating negative information about [her] to other organizations in the UN system and ... support [her] in any future attempts" to find work in the system. She claims at least $10,000 in costs.

E. In its surrejoinder the Organization presses its objections to receivability and maintains that the agreement to terminate her appointment was lawful and binding. It observes that it has already assured her it would support her in seeking employment elsewhere.

CONSIDERATIONS:

1. The complainant joined UNIDO at its headquarters in Vienna on 15 November 1985 as an industrial information officer at grade P.3. She held a fixed-term appointment for two years. She had it thrice extended, the last time for three years from 15 November 1991. She was promoted to grade P.4 in 1989. Her complaint is that by a memorandum dated 4 October 1993 the Organization conveyed to her a decision to "end [her] employment prematurely"; that by a memorandum dated 8 November 1993 to the Director-General she made a request for review of that decision; that she did so in accordance with Staff Rule 112.02(a); that, the Director-General having failed to reply within sixty days, she might infer refusal; and that she appealed directly to the Tribunal within

ninety days in accordance with Staff Rule 112.02(b)(ii) and Article VII(3) of the Tribunal's Statute.

2. Staff Regulation 10.3 includes the following provisions:

"(a) The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service.

(b) The Director-General may also terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and is not contested by the staff member concerned.

(c) In the case of a staff member with a fixed-term appointment which has been confirmed following completion of an initial period of probationary service, the Director-General may terminate the fixed-term appointment prior to its expiration date for any of the reasons specified in paragraphs (a) and (b) above or for such other reason as may be specified in the letter of appointment."

Article 10.6(a) says:

"If the Director-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. ..."

Staff Rule 112.02(a) reads:

"A serving or former staff member who wishes to appeal an administrative decision ... shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The staff member who receives no reply within sixty days may appeal to the Joint Appeals Board or to the Tribunal.

3. In the second half of 1993 UNIDO was carrying out an extensive exercise for the retrenchment of staff. An account of that exercise appeared in Judgment 1448 (in re Perez-Venero) under 2 to 4 and 6. At several meetings from 12 October until 12 November 1993 personnel officers of UNIDO discussed with the complainant the question of ending her appointment in the context of that exercise and the terms of termination. In the circumstances set out below the complainant signed four documents containing references to the "agreed" termination of her appointment.

4. The first was a letter of 10 November 1993 from the Director of the Personnel Services Division. The letter listed the payments that the complainant would receive on agreed termination, and he explained that those conditions would have to be approved by the Director-General and that her written request would be needed. On 12 November 1993 she added in her own handwriting at the foot of that letter words accepting the offer and requesting immediate payment in view of her financial situation.

5. Secondly, on the very same day, 12 November, she signed a memorandum which had been drafted in the Director's office and whereby she made a formal request for agreed termination and confirmed her acceptance of the terms offered in the Director's letter of 10 November.

6. The Director replied in a letter of 26 November:

"... the Director-General, noting that in your memorandum dated 12 November 1993 to the Director, Personnel Services Division, you have requested an agreed termination of your fixed-term appointment, has decided to terminate your fixed-term appointment in accordance with Staff Regulation 10.3(c). This letter constitutes the official notice of termination which will take effect at close of business on 30 November 1997."

The letter then set out the terms. At the foot of the text there was also set out the following clause which the complainant was invited to sign, and which she signed on 3 December 1993:

"I confirm my agreement to termination of my fixed-term appointment in accordance with Staff Regulation 10.3(c)

(copy attached) and under the conditions outlined above and, accordingly, I will not contest this agreed termination."

That was the third document.

7. Fourthly and lastly, the complainant signed on 3 December 1993 a "personnel payroll clearance action" form in which her termination was described as having been "agreed" in accordance with Staff Regulation 10.3(c).

8. She filed this complaint on 1 April 1994. She pleads therein that the termination was unfair and flawed for several reasons: breach of the Staff Regulations and of due process; failure to give reasons for the decision; an abuse or misuse of the procedure for the reduction of staff calculated to put a new recruit on her post or to transfer another staff member to it; the inducement of her consent to termination by deception, duress and the suppression of material information; discrimination on grounds of sex, race and nationality; and breach of the rules on redeployment. Her claims are as set out in B and D above.

9. UNIDO submits that her complaint is irreceivable. First, it argues, there was no final decision which she could have impugned in her memorandum of 8 November 1993; and in any event that memorandum made no request for review of an administrative decision, as Staff Rule 112.02(a) required. Secondly, the actual decision by the Director-General to terminate her appointment was communicated to her on 26 November 1993, and since she failed to ask for administrative review of it in accordance with Staff Rule 112.02 her complaint is irreceivable because she has failed to exhaust the internal remedies. Thirdly, the termination was an "agreed" one and fell within the meaning of Regulation 10.3(c); she is therefore not entitled to question it.

10. It is clear from the correspondence that what took place between the complainant and UNIDO from 12 October until 12 November was negotiation about termination and the terms thereof. As she herself acknowledges in her original brief:

"The letter that I received on 4 October 1993, states that my contract might likely be terminated. It does not state that my contract will be terminated. In other words, I never received a letter from the Director-General specifically stating that he had made a decision to terminate my contract for ... specific reasons ..."

The "letter", or rather memorandum, of 4 October 1993 communicated no decision by the Director-General to terminate her appointment. So on 8 November, when she wrote her memorandum to the Director-General, she had not yet received an "administrative decision", within the meaning of Rule 112.02(a), about the termination of her appointment, the date at which it would take effect, or the terms.

11. Besides, in her memorandum of 8 November 1993 to the Director-General she merely complained that she had not yet had a reply to her memorandum of 6 October 1993 to the Director of Personnel and sought help in getting one; she described her qualifications and experience and, in an attachment, the consequences to her of termination; and she said she would like to see the Director-General. She did not ask him to review any decision, and so her memorandum was in any event not a valid appeal under Rule 112.02(a).

12. Insofar as her complaint seeks to impugn any action the Organization took before 26 November 1993 it is irreceivable under Article VII(1) of the Tribunal's Statute because she is not impugning a final decision.

13. Even supposing that her memorandum of 8 November had constituted a proper request for the review of an administrative decision, the express decision to terminate her appointment was communicated to her on 26 November 1993. She may not, once such express decision has been made, challenge under Article VII(3) of the Tribunal's Statute a rejection she infers from the Administration's silence during sixty days: see Judgment 532 (in re Devisme) under 5.

14. Since she agreed not to contest the decision of 26 November 1993 the termination was an agreed one. Even supposing that she had grounds for appeal against that termination she failed to submit an appeal to the Director-General within the time limit of sixty days in Rule 112.02(a). So again any appeal to the Tribunal against the "agreed termination" is irreceivable for failure to exhaust the internal remedies.

15. The conclusion is that the complaint is irreceivable in its entirety and that the complainant's claims must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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