

NINETY-FOURTH SESSION

Judgment No. 2208

The Administrative Tribunal,

Considering the complaint filed by Mrs P. E. C. against the United Nations Industrial Development Organization (UNIDO) on 11 July 2001 and corrected on 5 September 2001, UNIDO's reply of 13 February 2002, the complainant's rejoinder of 26 April and the Organization's surrejoinder of 1 November 2002;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a national of Cameroon born in 1959, joined the Office of the United Nations Development Programme (UNDP) in Yaoundé, Cameroon, on 21 June 1983 as a senior secretary at grade G.6. Her initial contract was for three months and was renewed once. As from 1 January 1984 she was granted a three-month fixed-term contract stipulating that she would work for the Senior Industrial Development Field Advisers Programme (SIDFA), a joint programme of UNIDO and UNDP. This contract was extended several times. As from 1 October 1988 the complainant was granted a permanent appointment with UNDP.

In 1989 the UNDP and UNIDO signed a Memorandum of Understanding, as a result of which the complainant was granted a two-year fixed-term contract which specified that she would be seconded to UNIDO as from 1 January 1990; this contract was renewed several times, ultimately until 28 February 1998. The complainant had nevertheless retained her permanent appointment with UNDP.

Meanwhile, in 1996, a new agreement had been concluded between UNIDO and UNDP. Relying on the terms of that agreement, the complainant resigned from UNDP on 13 March 1998 and accepted a one-year fixed-term appointment with UNIDO as from 1 March. This contract, which stated that she would work for UNIDO's representative in Cameroon, was renewed until 31 December 1999.

On 30 December 1999 the new UNIDO representative in Cameroon wrote a memorandum to the complainant stating that her behaviour was "incompatible with the smooth running of the Office". The complainant denies having received the memorandum at that time. The representative offered the complainant a six-month contract, until 30 June 2000, and made it clear that during that time the complainant's behaviour and performance would be closely monitored. The complainant signed the contract on 4 January 2000. On 4 May the representative wrote to the complainant stating that she had not noticed any improvement in the quality of her work. She gave numerous examples of the complainant's failure to carry out her duties and concluded by stating that these "intolerable work conditions [could] no longer continue". On 23 May the Managing Director of the Field Operations and Administration Division informed the complainant by fax that her contract would not be renewed. By a fax of 24 May the complainant asked him to review his decision. On 16 June she sent a written protest to the acting Chief of the Office of Legal Affairs, with a copy to the Director-General. In that document, which was dated 12 June, the complainant objected to the "wrongful termination of her contract". She also sent a copy to the Bureau for Workers' Activities at the headquarters of the International Labour Office (ILO). On 26 June the Managing Director informed the complainant that the decision of 23 May 2000 was maintained. Under section 3(a) of the Tribunal's complaint form the complainant states that she is challenging an express final decision of 20 June 2000. She also filled out section 3(b) of the form stating that she had not received an express decision regarding a claim that she

had allegedly submitted to the Organization on 16 May 2000.

B. The complainant submits that she appealed on 24 May 2000 against the decision not to renew her contract. Having not received a reply from the Director-General within the 60-day limit, she was, in her view, entitled under Staff Rule 112.02 to go straight to the Tribunal within 90 days. Her protest of 12 June 2000 was sent to the Bureau for Workers' Activities at the headquarters of the ILO, which forwarded it to the Registrar of the Tribunal on 16 November 2000. The complainant considers that the Registrar should have treated that document as initiating proceedings before the Tribunal.

The complainant considers that she has been "unfairly dismissed". Her resignation from UNDP was, in her opinion, tainted with deceit on the part of UNIDO, which made her a false promise not to terminate her contract whilst omitting to inform her of the contractual conditions that bound her to the Programme and to the Organization. She alleges that one of the aims of the Organization was to undermine her employment relationship and to save money by avoiding the termination of her contract with UNDP. The complainant points out that since the memorandum of 30 December was not given to her at that time, she was unable to improve the quality of her work and to assert her rights. She denounces the "lack of politeness and respect" which the managing officials of UNIDO displayed towards her. In order to support her argument that no reasons were given for the decision not to renew her contract, she replies in detail to the accusations made against her. Furthermore, she considers that the UNIDO representative in Cameroon was intent on dismissing Cameroonian staff members of the Organization and cites several examples. She points out that throughout her 17 years of service her work had "always been highly appreciated".

The complainant asks the Tribunal to award her 117,108,000 CFA francs in compensation and 5,000,000 francs in costs.

C. In its reply UNIDO submits that the complaint is irreceivable due to the complainant's failure to exhaust the internal means of redress. The complainant requested a review on 24 May 2000 and the Organization replied on 26 June. It is this decision which should have been challenged before the Joint Appeals Board. However, without waiting for UNIDO's reply, the complainant submitted the protest dated 12 June 2000, which was therefore premature. The Organization points to inconsistencies in the complainant's brief and errors she made on the complaint form. The complainant cannot base her complaint on Article VII(3) of the Statute of the Tribunal since the Administration replied within the statutory time limits to her request for review. Moreover, the aforementioned protest does not constitute a complaint within the meaning of Article 6 of the Rules of the Tribunal.

With regard to the complainant's allegations of misrepresentation, UNIDO submits that she has not discharged the burden of proof. It contends that the complainant knew full well that by resigning from UNDP she was giving up a permanent appointment for a fixed-term one. UNIDO emphasises that the memorandum of 30 December 1999 was attached to the contract she signed on 4 January 2000. In view of the criticism that had been expressed concerning the quality of her work and the "profound deterioration" of her relations with the representative in Cameroon, it was in the Organization's interest not to renew her contract. UNIDO emphasises that the decision was taken in accordance with the applicable texts.

The Organization rejects as unfounded the accusations levelled at its representative. In its opinion, the evaluation of the complainant's performance in 1999 highlighted serious issues casting doubt on her competence, integrity and commitment.

D. In her rejoinder the complainant maintains that her complaint is receivable as she complied meticulously with the provisions of Rule 112.02. Having never received a reply from the Director-General to her protest of 12 June 2000 she was entitled to go straight to the Tribunal. She considers that the Administration's silence made the decision of 23 May 2000 final. Consequently, she identifies that decision as being the impugned decision, thereby going back on the statement she made in the complaint form. She equally denies having obtained a decision from the Organization concerning the claim notified to it on 16 June 2000. In her opinion, her request for review of 24 May and the Managing Director's reply of 26 June 2000 merely amounted to an exchange of administrative correspondence, given that the Managing Director had no authority to deal with the application in the absence of an express delegation of powers by the Director-General. Lastly, she points out that she had considered her protest as a complaint to the Tribunal.

The complainant considers that the UNIDO representative has not substantiated the allegations against her. Her alleged shortcomings are in fact merely "details" which cannot justify the decision not to renew her contract.

Furthermore, dismissal on grounds of unsatisfactory performance must be preceded by a formal written warning sent to the staff member concerned, which did not occur in this case. The memorandum of 30 December 1999 was only communicated to her on 23 May 2000. In accordance with the case law, because of this "procedural defect" the impugned decision must be quashed. Lastly, she does not consider herself responsible for the deterioration of her relations with the UNIDO representative.

E. In its surrejoinder UNIDO reiterates its objection to receivability. Given that paragraphs 1 and 3 of Article VII of the Tribunal's Statute are mutually exclusive, the complainant cannot file a complaint with the Tribunal on the basis of both paragraphs. It considers that the decision of 23 May 2000 was the initial administrative decision which should have been the starting point of the internal appeal procedure, rather than the "final" administrative decision. UNIDO maintains that the complainant requested a review of the decision of 23 May on 24 May to which the Managing Director replied on 26 June. It considers that the latter had the authority to make the decision of 26 June on behalf of the Director-General, and likewise the decision of 23 May 2000. The Organization argues that the protest of 12 June 2000 cannot constitute both a request for review and a complaint before the Tribunal.

UNIDO also asserts that the complainant was informed by the memorandum of 30 December 1999 that her behaviour and performance needed to be improved. The decision not to renew her contract was justified given that the representative in Cameroon was dissatisfied with the complainant and that relations between them had deteriorated.

CONSIDERATIONS

1. The complainant joined UNIDO on 1 March 1998, after having worked at the UNDP, under a one-year fixed-term appointment which was renewed until 31 December 1999 and subsequently until 30 June 2000. According to the Organization, the complainant was informed in a memorandum of 30 December 1999 that her work was unsatisfactory. The complainant denies having received the memorandum.

On 4 May 2000 the UNIDO representative in Cameroon wrote to the complainant stating that she had not noticed any improvement in the quality of the complainant's work. On 23 May the Managing Director of the Field Operations and Administration Division informed the complainant by fax that her contract would not be renewed. On 24 May the complainant asked him to review his decision. On 26 June the Managing Director confirmed his decision of 23 May 2000 and informed the complainant accordingly.

Meanwhile, on 16 June, the complainant had sent a protest dated 12 June, concerning the "wrongful termination of her contract", to the acting Chief of the Office of Legal Affairs with a copy to the Director-General of UNIDO. In the protest, which she had also sent to the ILO, she requested a review of her case and the payment of end-of-service entitlements; she submitted documents to support her claims. The Organization did not reply.

The copy of her protest sent to the ILO was forwarded to the Tribunal on 16 November 2000. The Registrar acknowledged receipt of it on 21 November 2000 and informed the complainant of the procedure to be followed in lodging a complaint.

2. In her complaint of 11 July 2001, the complainant asks for financial compensation and costs. She maintains that her complaint is receivable. In her opinion, since the Director-General did not reply to her request for review of 24 May 2000, she could appeal directly to the Tribunal. The time limit for doing so was complied with, as her protest, which was dated 12 June 2000 and despatched on 16 June, was received at the Tribunal on 16 November.

The Organization maintains that the complaint is irreceivable due to the complainant's failure to exhaust the internal means of redress. It points out that a reply to the request for review of 24 May 2000 was given on 26 June 2000; it was that decision of rejection which could have been challenged within 60 days of its notification, by submitting an appeal in writing to the Secretary of the Joint Appeals Board, in accordance with UNIDO Staff Rule 112.02 (b)(i). Since no such appeal was submitted, the complainant did not exhaust the internal means of redress.

3. There is no reason for excessive formality in relations between an organisation and a staff member; the actions of a staff member must be interpreted in the light of the circumstances and of the meaning that can reasonably be attributed to them (see Judgment 2017 and the case law cited therein).

The question is whether the protest dated 12 June 2000 is an appeal within the meaning of Rule 112.02.

On this issue, the complainant's actions demonstrate that she did not have sufficient information to know how to proceed. The correct procedure was not indicated in the decision rejecting her request for review. Under those circumstances, the complainant may well have believed that her protest would suffice to initiate a review by UNIDO of the Managing Director's decision not to renew her contract. She was not disabused by the Organization.

There is no doubt that an appeal filed on 16 June 2000 was premature, since the request for review of 24 May 2000 had not yet been rejected. However, a premature act is not necessarily void and inoperative. In this case, the complainant could reasonably have assumed that the Managing Director's decision did not render her appeal to the Director-General redundant. If it did not wish to consider her protest as an appeal, the Organization, which owed a duty of care to the complainant, should at the very least have replied to it indicating to the complainant the correct procedure to follow. Since the Organization failed to do so, the aforementioned protest must be considered as an appeal.

Thus, the complainant took the necessary steps to exhaust the internal means of redress.

However, the case cannot be ruled on as the internal procedure has not been completed. The case must be sent back to the Organization in order that the internal procedure may be implemented.

4. Since her pleas succeed in part, the complainant is entitled to 1,500 euros in costs.

DECISION

For the above reasons,

1. The case is sent back to the Director-General of UNIDO for implementation of the internal appeal procedure as indicated under 3, above.
2. The Organization shall pay the complainant 1,500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet