

The Administrative Tribunal,

Considering the complaint filed by Mr Y. M. against the United Nations Industrial Development Organization (UNIDO) on 2 November 2005, UNIDO's reply of 20 February 2006, the complainant's rejoinder of 5 May and the Organization's surrejoinder of 21 August 2006;

Considering Article II, paragraph 5, 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. The complainant, a Japanese national born in 1946, joined UNIDO in 1995, at level D.2, as Managing Director of what later became the Investment Promotion and Institutional Capacity-Building Division. In addition to his function as Managing Director he was for certain periods designated Deputy to the Director-General. He had a series of fixed-term appointments; the last of which was due to expire on 31 December 2002. As a result of restructuring in 2002, he was designated Officer-in-Charge of the Programme Coordination and Field Operations Division. From 1 September 2002 he was reassigned to the Office of the Director-General in an advisory capacity, remaining at level D.2.

In November 2002 the complainant was advised that the post of Regional Director of the UNIDO Office in India, which was at the L.6 level (equivalent to D.1), would soon be vacant. He was asked to indicate if he was interested in the post. The complainant wrote to the Director-General on 10 December 2002, saying that before he could make a final decision certain elements of the offer would need to be clarified. Replying that same day, the Director-General confirmed that the post was that of "Regional Director of the UNIDO Office in India at the L.6 level based in New Delhi". Concerning other aspects of the appointment, the Director-General urged him to consult with the Managing Director of the Division of Administration and the Director of the Human Resource Management Branch. The complainant met with those two officials.

However, on 20 December 2002 the complainant received a letter of appointment offering him a two-month assignment in Vienna as "Regional Director Designate, UNIDO Office in India". The appointment was from 1 January 2003 to 28 February 2003. He did not sign that offer. By letter of 10 January 2003 UNIDO's Officer-in-Charge informed the complainant that if he had not taken a decision by 14 January 2003 it would be assumed that he was not interested in taking up the assignment. She pointed out that he had been offered a two-month appointment "pending medical clearance and Government concurrence" and that "[u]pon receipt of the required clearances an offer of appointment for two years [was] foreseen". The complainant replied on 14 January, stating that the offer did not appear to be in line with the one previously made to him. He also commented that he had not yet been contacted by the Joint Medical Service in connection with the required medical clearance.

Under cover of a letter of 17 January 2003 the complainant was sent an amended letter of appointment. A special clause had been added. It stipulated that the appointment was subject to Government and medical clearances, and that upon receipt of both "an offer of appointment for two years at [L.6] in New Delhi" would be made. The offer was to remain valid until 20 January 2003. The complainant was told that if he did not accept it, separation formalities would ensue.

The Director of the Human Resource Management Branch wrote to the complainant on 31 January 2003, pointing out that as the complainant had not signed the amended letter of appointment, the Organization was "left with no option but to proceed with the separation formalities in connection with the expiration of [his] contract as at 31 December 2002". He informed the complainant that the Director-General had exceptionally agreed that a lump sum, calculated at level L.6, would be paid to him for his period of presence in the office in January 2003.

On 4 February 2003 the complainant wrote to the Director-General, indicating that he would be willing to sign the

proposed contract but wanted the paragraph mentioning the deadline of 20 January to be removed from the covering letter attached to the letter of appointment of 17 January. He wrote to the Director-General again on 13 March 2003, asking him to reconsider the decision to separate him from service. The Director of the Human Resource Management Branch replied to both letters on behalf of the Director-General. In response to the letter of 4 February, he said that the appointment offer made on 17 January had been valid only until close of business on 20 January 2003. To the letter of 13 March 2003, he replied that the complainant's separation from service was due to the expiration of his fixed-term appointment as well as his decision not to accept the offer made to him by UNIDO.

The complainant filed an appeal with the Joint Appeals Board, challenging the decision to allow his contract to expire at 31 December 2002. In its report issued on 27 July 2005, the Board recommended by a majority that the case be dismissed in its entirety. The minority considered that UNIDO was in breach of contract and recommended paying the complainant financial compensation. The Secretary of the Joint Appeals Board forwarded the Board's report to the Director-General under cover of a memorandum dated 28 July 2005. In a handwritten note on that memorandum the Director-General indicated on 29 July that he accepted "the recommendation of the majority of the Board". That is the decision the complainant impugns. It was forwarded to him with a letter of 9 August from a Secretary of the Board, and he received it on 16 August 2005.

B. The complainant submits that the issue to be decided is whether legally binding contracts had been made between UNIDO and him, and whether the Organization failed to observe their terms, thus entitling him to redress.

He considers that, with regard to the post of Regional Director in India, the Organization made him a legally binding offer which he accepted. He pleads breach of contract inasmuch as the Organization failed to follow through and appoint him to that post.

He alleges that UNIDO also failed to "honour and implement" the two-month "bridging contract" that he was offered, pointing out that he notified his acceptance of that contract in writing on 4 February 2003. He submits that the concerns he had were justified and he could not have signed that contract in its initial form. The terms it contained were different from those relating to the post of Regional Director in India, since the posting was to be in Vienna and for a period of only two months. In its initial form, the bridging contract could have led to his unemployment at the end of February 2003, as nothing required the Organization to implement the subsequent appointment in India. Moreover, he was surprised that he would not stay at D.2 level up to the point when the appointment in India took effect. He also argues that "by operation of law" his fixed-term appointment was extended by one month to the end of January 2003, given that he was "present and working at UNIDO" until that date.

The complainant further argues that the Organization breached its duty of care. It treated his legitimate concerns about the two-month contract with complete lack of respect. In the end it unilaterally decided to cancel the contract for the Regional Director post in India simply because he would not put his signature to a two-month bridging contract that had been presented to him with "demeaning ultimatums". He questions whether the Organization was acting in good faith, particularly as it appeared that the incumbent of the said post had not been advised that he was being recalled to Headquarters. In addition, he points out that in breach of Staff Rule 110.05(c) his notice of separation, instead of being given to him in advance, came one month after the expiration of his appointment.

The complainant seeks the quashing of the impugned decision. He wants to be reinstated with effect from 1 January 2003 with "continuity of employment until retirement in June 2008". He further claims material damages in an amount equivalent to what he would have received in salary and emoluments over the period from 1 January 2003 until the date of his reinstatement, plus interest; moral damages in an amount of 25,000 euros; and costs.

C. In its reply the Organization rejects any suggestion that by virtue of his presence at UNIDO in January 2003 the complainant's appointment was extended. In accordance with its terms, his contract came to an end on 31 December 2002, and he had no right or expectation of renewal. However, when implementing his separation the Director-General agreed exceptionally to pay him an *ex gratia* lump sum.

UNIDO argues that the complainant has failed to show that it breached either of the contracts he refers to. Firstly, with regard to the "apparent" contract to appoint him as Regional Director in India, it took all reasonable steps to implement its commitment, by first putting in place the mechanism of a bridging contract.

Secondly, drawing up a bridging contract was a valid discretionary decision. Such a contract was necessary both to

allow for completion of the formalities that preceded an appointment to the field and to avoid a break in service. The Organization in fact paid heed to the complainant's concerns about the duration of the bridging contract by revising it to incorporate the special clause. It had been pointed out to him that owing to financial measures announced in the Director-General's Bulletin UNIDO/DGB(M).91, of 14 November 2002, it was not possible to accede to his wish for an appointment at the D.2 level. It was ultimately his failure to sign the two-month bridging contract that frustrated the further implementation of the Organization's commitment to appoint him to the post of Regional Director in India. There were no reasonable grounds for the complainant to believe that he might face unemployment by signing the bridging contract. UNIDO notes that his purported acceptance of that contract on 4 February 2003 was not unconditional, and points out that since no bridging contract was ever concluded, the Organization cannot be deemed to be in breach of that contract.

UNIDO denies that it breached its duty of care, or acted in bad faith. It showed forbearance with regard to deadlines and amended the bridging contract to take account of the complainant's concerns. He too had a duty to show good faith in his dealings with the Organization and any injury he ultimately suffered was the result of his own actions. It adds that since the complainant's appointment as Regional Director did not materialise, the incumbent of the post remained in New Delhi.

D. In his rejoinder the complainant raises procedural objections, alleging flaws in the internal appeal procedure and unreasonable delay.

On the merits, he asserts that he was under no obligation to negotiate or accept a bridging contract. He could have waited for the Organization to complete the formalities, and then taken up the post in New Delhi. In that regard, he argues that his contract was extended by "operation of law" after the expiry date of his fixed-term appointment in view of the contract for the post in New Delhi. Moreover, in a personnel list dated 28 January 2003, he was still listed as Special Adviser to the Director-General. He claims that when it has entered into a contract the Organization does not have the right to introduce additional terms thereto. Yet that is what it did, as the terms of the bridging contract fundamentally amended the terms of the contract for the post of Regional Director in India.

E. In its surrejoinder the defendant acknowledges that the internal appeal process took two years to complete, but denies that the cause of the delay was in any way attributable to the Organization.

It reiterates that the complainant had no automatic right to the extension of his appointment at the D.2 level, and no extension was agreed. Insofar as the complainant claims that he was under no obligation to negotiate or accept a bridging contract, he cannot now hold the Organization liable for his separation from service which resulted from his refusal to accept that contract. It stresses that the bridging contract did not cancel or supersede the "apparent" contract to appoint, which, on the assumption that it existed, would have remained binding.

CONSIDERATIONS

1. The complainant commenced employment with UNIDO in 1995 at level D.2. He was employed on a series of fixed-term appointments the last of which was due to expire on 31 December 2002. From 1 September 2002 he was reassigned to the Office of the Director-General in an advisory capacity.

2. On 22 November 2002 the complainant met with the Director-General to discuss his future with the Organization. The Director-General informed him that the post of Regional Director of the UNIDO Office in India would soon become vacant and, if he wished, he could be appointed to that post. Thereafter, he received a memorandum from the Director of the Human Resource Management Branch, inviting him to express his interest in the post. The complainant also had a further meeting with the Director-General who wrote to him on 6 December stating that he would like to have a written response with respect to the post no later than 10 December 2002.

3. The complainant replied to the Director-General on 10 December that he was willing to consider favourably the proposal but that "before making a final decision [...] certain elements of [the] offer would need to be clarified". The Director-General replied the same day informing the complainant that "the main elements" were that the post was that of "Regional Director of the UNIDO Office in India at the L.6 level based in New Delhi". He also expressed his understanding that the complainant might wish to discuss other elements, including "the timing and length of the assignment" or "related entitlements". The complainant replied the next day, informing the

Director-General that he would prefer a posting in Qatar but stating that, if that were not possible, he “would accept the posting in India”.

4. By a memorandum dated 13 December 2002, but not received until 16 December, the complainant was informed that a posting in Qatar was not possible and, thus, the Director-General “ha[d] [...] noted [his] acceptance of the post of Regional Director of UNIDO’s Office in India, based in New Delhi, at the L.6 level”. The memorandum stated that UNIDO would be submitting his candidature to the Government of India and, in due course, he would be sent “details in connection with this assignment”.

5. On 20 December 2002 the complainant was presented with a letter of appointment offering him an appointment for a period of two months as “Regional Director Designate, UNIDO Office in India” based in Vienna at a salary equivalent to L.6, step 09. The letter of appointment made no reference to the New Delhi post although a personnel action sheet attached to it stated:

“Staff member’s appointment as Regional Director and change of duty station to New Delhi, India, pending medical clearance and government concurrence.”

6. The complainant did not sign the letter of appointment. Instead, he spoke with the then Officer-in-Charge of the Human Resource Management Branch on 23 December. His handwritten note of the meeting indicated that he raised the following points:

- (i) the terms of the letter of appointment differed from the offer made to him by the Director-General;
- (ii) the appointment was only for two months and there would be a problem if clearances were not obtained within that period;
- (iii) he had agreed to a post at L.6 in New Delhi, but not in Vienna.

At that meeting he also sought information on housing subsidies and other allowances payable in New Delhi. The Officer with whom he spoke indicated that she would obtain that information for him.

7. In early January 2003 UNIDO requested clearance from the Government of India so that the complainant could take up the post of Regional Director. On 10 January UNIDO’s Officer-in-Charge wrote to the complainant referring to the letter of appointment presented to him on 20 December 2002. She stated:

“In line with your acceptance of the position of Regional Director, UNIDO Office in India, [the letter of appointment] offered you an appointment for two months at level [L.6] effective 1 January 2003 [...] pending medical clearance and Government concurrence. Upon receipt of the required clearances an offer of appointment for two years is foreseen.” (emphasis added)

The letter, which was not received until 13 January, concluded with the statement that, if the complainant did not accept the offer by close of business on Tuesday 14 January 2003, it would be considered that he was “not interested in taking up the assignment in question”.

8. The complainant replied to that letter on 14 January 2003, noting that the letter of appointment did not reflect the offer of the New Delhi post and that he was still awaiting information requested at the meeting of 23 December 2002. He concluded by reiterating his “acceptance of the post of Regional Director [...] at the L.6 level”. He also noted that he had not been contacted with respect to the necessary medical clearance.

9. On 17 January 2003 UNIDO’s Officer-in-Charge again wrote to the complainant. Attached to her letter was a new letter of appointment showing a salary which was again said to be the equivalent of “level 6 step 09”. However, the new letter of appointment contained a special clause as follows:

“Appointment as Regional Director, UNIDO Office in New Delhi, India is subject to receipt of Government and medical clearances. Upon receipt of both clearances an offer of appointment for two years at [L.6] in New Delhi, India will be made.” (emphasis added)

The letter, which was not received until 20 January, stated that the “validity” of the offer would be until close of business that day i.e. 20 January and, if the offer was not accepted, the Human Resource Management Branch

would initiate steps for the complainant's separation from the Organization.

10. The complainant neither replied to the letter of 17 January nor signed the new letter of appointment. UNIDO's Officer-in-Charge invited the complainant to a meeting on 24 January at which she again urged him to sign the amended letter of appointment. He did not do so. The parties differ as to what was said at the meeting with respect to the 20 January deadline, the complainant claiming that the Officer-in-Charge said it was merely a "warning". The complainant did nothing further and on 31 January he was presented with a memorandum from the Director of the Human Resource Management Branch in which it was said:

"I note with regret, that despite all the efforts made by the Organization you did not sign the Letter of Appointment presented to you. We are, therefore, left with no option but to proceed with the separation formalities in connection with the expiration of your contract as at 31 December 2002."

11. On 4 February the complainant wrote to the Director-General pointing out that he had been unable to ascertain why the proposed contract was only for two months but that he had decided to accept "the intermediate offer of two months". He recalled that he had continuously expressed his willingness to serve as the Regional Director in New Delhi, at the L.6 level. He said that he found the imposition of a deadline in the letter dated 17 January "insulting and [...] unnecessary at this stage" but that he would be willing to sign the proposed intermediate contract provided that the last paragraph be removed from the aforementioned covering letter.

12. Having received no reply to his letter of 4 February, the complainant wrote again to the Director-General on 13 March reiterating his acceptance of the offer of the post in New Delhi and stating that he was surprised that the Permanent Mission of India in Vienna had been informed that he had withdrawn his candidature. He said he assumed that this was a misunderstanding. He asked the Director-General to reconsider the decision to separate him from the Organization. The Director of the Human Resource Management Branch replied to the complainant's letter of 4 February on 28 March. He stated that the complainant appeared to have imposed a condition on his signing the letter of appointment and added:

"I should like to point out that, as stated in [the] letter of 17 January 2003 the offer was valid until close of business on Monday, 20 January 2003. Therefore, it has expired."

13. By letter of 9 May 2003, in response to his letter of 13 March, the complainant was informed that the decision to separate him from UNIDO was maintained. Thereafter, the complainant lodged an appeal with the Joint Appeals Board which issued its report on 27 July 2005.

A majority of the Board found that "the bridging mechanism was to be considered as an essential term and condition for the offer of employment as Regional Director [...] in New Delhi" and that "there was only one contractual arrangement since the bridging and the main contracts pertained to the same post". As the complainant had not signed the bridging contract, the majority concluded that UNIDO "did not transgress [...] the [complainant's] rights" and recommended that his appeal be rejected.

The minority view of the Joint Appeals Board was that the Vienna and New Delhi posts were different and involved separate offers of employment, and that the Organization was in breach of contract with respect to the New Delhi post. Accordingly, the minority recommended that the appeal be allowed and financial compensation be paid.

By a notification of 9 August the complainant was informed that the Director-General had decided, on 29 July 2005, to accept the recommendation of the majority of the Joint Appeals Board. That is the impugned decision.

14. It is well settled by the Tribunal case law that "[t]here is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement". (See Judgment 307.) Save for the question of the complainant's status after 31 December 2002, and pending his formal appointment to the post of Regional Director in India, it is clear that the complainant and the Director-General intended there to be a contract. In this regard, it is sufficient to note the terms of the complainant's memorandum to the Director-General of 11 December and the memorandum of 13 December that he received in reply. In the former, the complainant notes "the offer for the post [...] in India" and states that if Qatar was not available, he "would accept the posting in India". The subsequent memorandum states that the Director-General had "noted [his] acceptance of the post [...] in India". The words "offer" and

“acceptance” are classically words signifying intention to enter into contractual relationships.

15. The memoranda mentioned above did not identify all the terms relating to the said post, particularly the commencement and duration of the assignment. However, the complainant had earlier been invited to discuss those matters with the relevant official and, in the absence of any evidence to the contrary, it is to be assumed that he had done so and that his acceptance of the Director-General’s offer on 11 December indicated agreement with respect to the terms relating to commencement and duration and other matters pertaining to his future assignment. Indeed, UNIDO does not contend otherwise. Accordingly, the matter is to be approached on the basis that there was complete agreement on everything except what was to happen between 31 December 2002 and the complainant’s formal appointment to the post of Regional Director in India. On that basis, the first question that arises is whether, on the one hand, it was intended that arrangements for that period should be comprehended in the contract relating to that post or, on the other hand, be the subject of a separate contract.

16. Various matters indicate that it was intended that the period from 31 December 2002 until the complainant’s formal appointment should be covered by a separate contract. First, and contrary to the view taken by the majority of the Joint Appeals Board, the New Delhi post and the Vienna post, which was under consideration for the intervening period, were different posts based in different countries. Secondly, as the complainant apparently tried to explain, the letters of appointment presented to him did not guarantee that there would be no gap between the conclusion of the bridging contract and his appointment as Regional Director. Moreover and more importantly, the subsequent correspondence indicated that the Administration was treating the bridging contract and the appointment to the post in India as separate issues. Thus, for example, the first letter of appointment presented to the complainant made no specific reference to the post; the letter of 10 January 2003 from UNIDO’s Officer-in-Charge, while linking the bridging contract to the complainant’s acceptance of the post in India, stated that when clearances were obtained a two-year appointment to that post was “foreseen”; and the second letter of appointment presented to the complainant for his signature completely separated the two issues by purporting to make the post “subject to” Government and medical clearances, in which event an “offer” would be made.

Having regard to these matters, it is impossible to conclude that it was intended that the period preceding the complainant’s formal appointment to the post of Regional Director was intended to be comprehended within the contract relating to that post. Rather, it must be concluded that the intention was that it should be the subject of a separate contract. That being so and there being no dispute that the complainant and UNIDO had agreed on all relevant terms with respect to the post in India, it must be further concluded that a binding contract with respect to that post had come into existence not later than 16 December 2002 when the complainant received the memorandum informing him that the Director-General had noted his acceptance of the post.

17. It is necessary to note two further matters. First, UNIDO argues that, in declining to sign the two-month bridging contract, the complainant “effectively frustrated the further implementation” of the Organization’s commitment to appoint him to the post of Regional Director in India. Additionally, it is put that, by not accepting the bridging contract, the complainant “effectively turned down” that position. Both these arguments must be rejected. At all stages, the complainant made it clear that he had accepted and maintained his acceptance of the post in New Delhi notwithstanding that he did not accept the terms of the bridging contract. More significantly, UNIDO presents no material to show that the complainant’s appointment to New Delhi could not be effectuated even if his immediate employment came to an end.

18. As already indicated, the majority of the Joint Appeals Board was of the view that it was an essential term of the contract with respect to the post that the complainant sign one or other of the letters of appointment presented to him. If so, his failure to do so amounted to a repudiation of that contract. In this regard, it is to be noted that there was no express term requiring the complainant to sign a bridging contract and thus the question is whether such a term is to be implied. The majority of the Board considered that it should be implied on the basis that it would not have been reasonable to permit the complainant’s appointment to expire on 31 December 2002 and that that “would have likely been the subject of an appeal”. Those matters provide no basis for the implication of an essential term that the complainant was obliged to sign a bridging contract, much less a bridging contract in terms dictated by the Organization. An essential term is only implied if it is strictly necessary for the contract to be performed and if its content is clear. Rejecting the Organization’s argument that the complainant “effectively frustrated the further implementation” of the Organization’s commitment to appoint him to the post of Regional Director in India, it is impossible to conclude that a bridging contract was strictly necessary for the implementation of the commitment. And it is impossible to conclude that it was strictly necessary for the complainant to accept a bridging contract in the terms presented by UNIDO.

19. The complainant argues that not only was there a binding contract with respect to the post in New Delhi but that, by his letter of 4 February 2003, he accepted the offer of the interim post in Vienna and that a bridging contract then came into existence in accordance with the second letter of appointment presented to him. That argument must be rejected. It is clear that it was intended that that offer be accepted by his signing that document. He did not do so. Accordingly, no bridging contract ever came into existence.

20. Although, as pointed out above, the absence of a bridging contract has no bearing on the binding nature of the contract with respect to the post in New Delhi, the circumstances surrounding that contract, including the expiry of the complainant's previous contract on 31 December 2002, imposed an obligation on both parties to negotiate in good faith with respect to the period between then and his formal appointment as Regional Director of the UNIDO Office in India. The complainant's dilatoriness after 20 January 2003, when he received the letter of UNIDO's Officer-in-Charge imposing an almost immediate deadline with respect to his signing the letter of appointment then presented to him, indicates a failure on his part to negotiate in good faith. However, there was no attempt at all by UNIDO to negotiate. It simply presented the complainant with letters of appointment for his signature and took no account of the problem which he had identified in the event that he did not receive the necessary clearances within the two months specified. Moreover, the deadline imposed in the letter of 17 January, received on 20 January, was entirely unreasonable. It was equally unreasonable for the Director-General to rely on its expiry in refusing to reconsider the complainant's separation and in treating his failure to meet that deadline as signifying his rejection of the post notwithstanding his repeated written statements to the contrary. These matters entitle the complainant to an award of moral damages as well as material damages for breach of the contract with respect to the post in New Delhi. Material damages should be calculated on the basis that that contract would have resulted in an appointment for a period of two years commencing on 1 March 2003. However, the complainant must give credit for any earnings received in that period.

21. Given the time that has elapsed since the events in question, the complainant's request for reinstatement must be rejected.

DECISION

For the above reasons,

1. The decision of the Director-General, dated 29 July 2005, rejecting the complainant's appeal is set aside.
2. UNIDO shall pay the complainant material damages equivalent to the amounts of salary and related emoluments that he would have received for the period 1 March 2003 to 28 February 2005 had he been appointed as Regional Director of the UNIDO Office in India, together with compound interest at the rate of 8 per cent per annum calculated every month starting from 1 April 2003 until the date of payment. The complainant is to give credit for earnings, if any, in the period from 1 March 2003 to 28 February 2005.
3. UNIDO shall also pay the complainant moral damages in the sum of 10,000 euros and costs in the sum of 5,000 euros.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.