

## EIGHTY-SIXTH SESSION

### *In re Lustig de Schönstein (No.2)*

#### **Judgment 1834**

The Administrative Tribunal,

Considering the second complaint filed by Mrs. Sonia Lustig de Schönstein against the United Nations Industrial Development Organization (UNIDO) on 3 December 1997, UNIDO's reply of 20 February 1998, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 17 August 1998;

Considering Article II, paragraph 5, 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, who is a Chilean and German citizen, joined the staff of UNIDO in 1971. Information on her career and other material facts are set out under A in Judgment 1464 of 1 February 1996. In that judgment the Tribunal dismissed her first complaint against the Organization in which she sought the quashing of a decision not to treat her intestinal illness as service-incurred.

On 1 August 1995 UNIDO put her on special leave without pay. By a letter of 25 January 1996 the Director of Personnel Services told her that in order to stay on special leave without pay she would have to provide medical certificates of inability to go back to work. He reminded her that she had failed to comply with requests for such certificates which UNIDO had sent her on 3 August, 1 September and 27 November 1995; unless she submitted a valid certificate or went back to work by 15 February 1996 the Organization would end her appointment at that date for unauthorised absence and breach of contract.

In her reply of 2 February she said that she had answered "all requests" in compliance with the rules and that the Administration had no reason "to put the blame on others" for refusing valid reasons for demanding further medical evidence. By a letter of 22 February the Director ended her appointment as at 15 February on grounds of "unauthorized absence, breach of contract and abandonment of post".

In a letter of 5 March 1996 the complainant protested to the Director that she could not be in dereliction of duty when her absence was due to poor health. Correspondence followed. On 2 July 1997 she appealed to the Director-General against the decision of 22 February 1996. By a letter dated 26 August 1997, which she got on 3 September, the Director-General told her that even though her appeal against the decision of 22 February 1996 was time-barred he found "no new elements" to warrant reversing it. That is the decision she impugns.

B. The complainant submits that the decision was in breach of Staff Rule 110.04, which required any decision on termination to be "initiated" by the Director-General himself. Here it was the Director of Personnel Services who took the decision. What is more, the Administration refused to issue a "personnel action form", the official document for an administrative decision.

She cites two new facts. One is the statement in a paper dated 12 September 1996 which was put to UNIDO's Industrial Development Board in November that "one staff member is being considered for a disability benefit under the regulations of the United Nations Joint Staff Pension Fund". Since it was she UNIDO was wrong to regard her as a former staff member. The other new fact that attests to her continuing status as a staff member is the payment of benefits after 15 February 1996 by the Temporary Disability Insurance Plan administered by the company Van Breda.

She claims the quashing of the decision notified in the letter of 22 February 1996 and reinstatement on special leave with full benefits as from 15 February 1996.

C. In its reply UNIDO does not challenge the receivability of her complaint inasmuch as she received the Director-General's reply more than 60 days after lodging her appeal.

On the merits the Organization points out that, as the Director-General told her in the impugned decision, the Director of Personnel Services terminated her appointment on his behalf and with the Director-General's prior approval. It is not UNIDO's practice to issue a personnel action form upon separation. The usual form is known as a "personnel payroll clearance action".

As to the facts she relies on the Organization points out that the official referred to in the Board's document was someone else. On that score she is mistaken. In keeping with the contract between UNIDO and the insurance company it was proper for her to receive benefits for up to 21 months under the Temporary Disability Insurance Plan she belonged to. That she continued to get benefits until April 1996 does not mean that she was still on the Organization's staff.

D. In her rejoinder the complainant comments on the reply and enlarges on her pleas. She denies that the decision of 22 February 1996 was taken on the Director-General's behalf: not until 26 August 1997 was there any mention of delegation of authority. UNIDO's chief medical officer gave her confirmation on 10 March 1997 that it was she who was being considered for disability pension. She objects to the reasons UNIDO gave for termination and accuses it of keeping information from her that might have helped her get a disability pension. She presses her original claims and further seeks awards of damages and costs.

E. In its surrejoinder the Organization observes that it has already refuted most of the pleas in her rejoinder in the reply. It produces a copy of her personnel payroll clearance action form, denies allegations of fact in the rejoinder and observes that she is under consideration for a disability benefit from the United Nations Joint Staff Pension Fund.

## CONSIDERATIONS

1. The complainant impugns the decision of the Director-General of the United Nations Industrial Development Organization (UNIDO) dated 26 August 1997 refusing to review a decision of 22 February 1996 to terminate her employment on 15 February 1996.

2. The defendant Organization does not contest the receivability of the complaint since it failed to answer the complainant's earlier internal appeal within the time limit of 60 days in the applicable staff rule and in the Tribunal's Statute. She advances four arguments in support of her complaint, none of which goes to the merits of the decision to terminate her employment.

3. The complainant's first plea is that the decision to terminate was not "initiated" by the Director-General, as Staff Rule 110.04 required. There is no merit to the point. While there is no doubt that notice was given to the complainant by the Director of Personnel Services, it is abundantly clear from the documents filed that the Director-General was himself consulted beforehand and approved of that action. In the context of the Staff Rule the word "initiated" does not mean that the Director-General himself must be the first person in the Administration to take any action at all; it simply requires that the action, when taken, be on the Director-General's behalf and with his prior approval.

4. Next the complainant alleges that UNIDO did not observe the prescribed administrative formalities for the termination of her employment. The legal basis for the decision - unauthorised absence from duty within the meaning of Regulation 10.5 - is clearly set out in the letter of termination sent to the complainant. Upon separation the procedure followed by UNIDO is to complete a personnel payroll clearance action form, which sets forth the entitlements and indicates the cause of separation as well as its effective date and the leave status of the employee. The form was duly completed and dispatched to the complainant together with a computation of final payment. The Tribunal holds that in this case UNIDO adequately documented the particulars of the complainant's separation and its legal and administrative implications.

5. The complainant asserts that since the initial decision to terminate new facts have occurred which justify its revision. The first of the alleged new facts is the publication by UNIDO's Industrial Development Board of a document, dated 12 September 1996, which indicated that "one staff member is being considered for a disability benefit". The complainant sees that as a reference to her but her evidence on the point is entirely of her own creation and the Organization has provided wholly satisfactory proof that the reference is in fact to another employee.

6. The second alleged new fact is the payment to the complainant of her temporary disability benefits by Van Breda after the date of termination. Such payment is strictly in accordance with the insurer's obligations under its policy and cannot have the effect of invalidating the termination. Accordingly, the plea again fails.

7. Finally, the complainant contends that her separation was in breach of her special leave status. In August 1995 she was put on special leave without pay and advised in writing that it would be necessary to submit monthly medical reports to the chief medical officer of UNIDO so as to enable him to certify her absence from duty for health reasons. Further requests to the same effect were sent to her in letters dated 1 September, 27 November 1995 and 25 January 1996. The receipt of such reports by the chief medical officer was clearly a condition of her maintaining special leave status. Her refusal, without persuasive justification, to submit the requested information is a breach of that condition and ample indication of her intent to abandon her post.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner