

The Administrative Tribunal,

Considering the complaint filed by Mr A. G. A. against the United Nations Industrial Development Organization (UNIDO) on 31 October 2001, UNIDO's reply of 18 February 2002, the complainant's rejoinder of 15 March and the Organization's surrejoinder of 12 April 2002;

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 is a national of the Russian Federation and was born in 1952. He entered the service of UNIDO as an Industrial Development Officer on 1 February 1993, at grade P.3, under a short-term appointment, and thereafter was employed under various types of contract. From 7 January 1996 he was appointed as Industrial Investment Officer in the Investment Promotion Programme, under a one-year fixed-term appointment. In March 1996, following restructuring within the Secretariat, UNIDO reassigned him to Investment Services in the Investment and Technology Promotion Division, and extended his contract several times. In August 1998 it extended his appointment to 31 December 1998. By a notification of 24 April 1998 the Permanent Mission of the Russian Federation in Vienna had informed the Organization that the complainant was to be considered as on secondment from his Government.

In 1998 the Office of Internal Oversight issued two documents that looked into the funding arrangements of project TF/RUS/96/001 that the complainant had been managing. The first was Investigation Report 98/06, dated 17 August. As explained in the report, the objective of the project was to assist enterprises in selected Russian regions in attracting foreign partners for the implementation of investment projects in the food-processing and agro-industry. In order to start funding the project a Trust Fund Agreement was drawn up between UNIDO and an Austrian company called PREMAG. Problems arose with the way funding was raised. The report made various recommendations, one of which was that the project should be closed. On 18 August the Director-General took the decision to both close it and initiate a detailed evaluation.

A second document - Audit Observation 98/36 - was produced by the Office of Internal Oversight on 16 November 1998. It was critical of the complainant's actions as project manager stating, inter alia, that he failed to manage UNIDO resources prudently and misrepresented UNIDO to private companies. The report recommended that disciplinary action be taken against him. A Senior Evaluation Officer carried out a further study of the project and issued a desk evaluation report on 24 November 1998.

In a memorandum written to the complainant on 25 November 1998 the Director-General expressed dissatisfaction with the way the complainant had managed the project. In a note of 26 November he told the Managing Director of the Field Operations and Administration Division that the complainant's appointment should not be extended, and asked him to take the necessary action to inform the complainant accordingly. By a memorandum of 30 November 1998 the acting Director of the Staff Development and Management Branch informed the complainant that, for the reasons given in the memorandum of 25 November, his contract would not be renewed beyond 31 December 1998. The complainant wrote to the Director-General on 4 December 1998 requesting a review of that decision, but the decision was upheld. On 23 February 1999 the complainant filed an internal appeal seeking immediate renewal of his contract as well as material and moral damages.

In its report of 6 September 2001 the Joint Appeals Board found that the procedure chosen by the Organization to discontinue its contractual relationship with the complainant was "unwarranted" and "unfair" and recommended

paying him the damages he was claiming. In a memorandum addressed to the Alternate Secretary of the Joint Appeals Board on 3 October 2001 the Director-General stated that he was "not in agreement with [the Board's] analysis and conclusions" since they did not "provide the basis" for the recommendations it made; for that reason he was not endorsing the Board's recommendations. That is the impugned decision.

B. The complainant believes it was because of "internal intrigues at the senior management level" that his contract was not renewed. There was "well-orchestrated misinformation" and ill-advising of the Director-General by those who were behind the preparation of Investigation Report 98/06 and the desk evaluation report on project TF/RUS/96/001. The non-renewal was made to look as if it stemmed from the evaluation of the project, but the decision had already been taken - on the basis of false accusations - and the evaluation was carried out *post factum*. He rejects all the accusations contained in the memorandum of 25 November 1998, deeming them to be "biased, non-objective and fabricated". UNIDO discriminated against him. The Director-General sent letters of reprimand to other officials too, but he was the only one whose contract was not extended. By its actions it offended against his dignity and did not take his impeccable track record into account. Indeed, on 7 October 1998 his supervisors confirmed his performance by signing a notification recommending a within-grade salary increment.

In further pleas he states that he was deprived of his right to defend himself. He says that Investigation Report 98/06 was not made available to him, the allegations made about his management of project TF/RUS/96/001 were never proved, they were never made in a formal manner and in any case did not result in disciplinary action against him. The 30 days' notice he was given was insufficient, particularly as his visa for Austria expired on the same day as his contract. The non-renewal also caused him to lose out on pension rights.

The impugned decision of 3 October 2001 was, he argues, flawed on procedural grounds. First, because the memorandum communicating the decision was not signed by the Director-General himself, which could conceivably leave doubt as to whether the Director-General himself took a decision on the recommendations of the Board, as required by the Staff Rules. Secondly, there was breach of his right to confidentiality as the Director-General had released a copy of the Board's report to a third party without his consent. Thirdly, he surmises that the Director-General may not even have seen the Board's report. Lastly, the memorandum of 3 October rejects the recommendations made by the Board, without providing any reasonable justification.

He seeks reinstatement in UNIDO's Secretariat on a fixed-term basis for a minimum of three years; 36 months' salary by way of compensation for material and moral injury; 12 months' salary as compensation for breach of his right to confidentiality; and costs.

C. In its reply, the Organization rejects all the complainant's claims relating to internal intrigue, arguing that they are not supported by the evidence. It adds that under Staff Rule 103.10(a) a fixed-term appointment does not "carry any expectancy of renewal or of conversion to another type of appointment". The decision lay within the discretionary authority of the Director-General and was taken for objective reasons in the best interests of the Organization. The complainant's last contract extension was for four months and was to end on 31 December 1998. Being the holder of a fixed-term contract he could have had no legitimate expectation of continued employment with UNIDO. The 30 days' notice that he was given constituted reasonable notice, bearing in mind that he was on secondment from the Russian Federation.

It was on the grounds of unsatisfactory performance that the Director-General decided not to renew the complainant's contract. The decision was fully justified by facts that came to light in the two investigations produced by the Office of Internal Oversight and the document prepared by the Senior Evaluation Officer. The complainant's unsatisfactory performance resulted in financial liability for the Organization. His plea that the Director-General's decision was premeditated cannot be entertained; his assertion is based on hearsay, and he provides no evidence. Nor was there prejudice against him. Furthermore, UNIDO gave the complainant the opportunity to be heard. The content of the reports was made known to him by the Director-General.

In addressing the procedural matters raised by the complainant, UNIDO says that the impugned decision was signed "for" the Director-General by the Managing Director of the Field Operations and Administration Division, who was also the head of what is now the Human Resource Management Branch and had the authority to sign on the Director-General's behalf. The complainant objects to the fact that the Joint Appeals Board's report was passed to that official, but that would have happened automatically because of his authority in personnel matters.

D. In a brief rejoinder the complainant presses his pleas. Referring in particular to the Board's report, he states that

the Organization's position as expressed in its submissions to the Tribunal shows a "continued lack of appreciation" of the facts and reasons that obliged him to file his complaint.

E. In its surrejoinder the Organization maintains its position. It states that it has already both analysed in depth and replied to his contentions in its earlier submissions.

CONSIDERATIONS

1. At the material time the complainant held a fixed-term appointment with UNIDO. His contract, which had been extended for four months, was due to expire on 31 December 1998. At least as from late April 1998, the complainant was considered to be on secondment from the Government of the Russian Federation.
2. On 29 May 1998 UNIDO informed the Permanent Mission of the Russian Federation in Vienna that, because of changes within the Organization and in particular a budget reduction, the complainant's appointment would not be extended upon its expiry. On that same date, similar *notes verbales* regarding non-renewal of contracts were sent to the Permanent Missions of all countries which had seconded employees with UNIDO.
3. In a memorandum of 25 November 1998 the Director-General reprimanded the complainant for his role in the mismanagement of project TF/RUS/96/001. In a note dated 26 November, the Director-General informed the Managing Director of the Field Operations and Administration Division that the complainant's contract should not be extended beyond 31 December 1998 and instructed him to take the necessary action to inform the complainant. The latter was notified of the decision by a memorandum of 30 November 1998.
4. On 4 December 1998 the complainant requested that the Director-General review the decision not to renew his contract. In a letter dated 1 February 1999 the complainant was informed that the decision was maintained. By a letter dated 23 February 1999 the complainant appealed the decision. On 6 September 2001 the Joint Appeals Board concluded that the process by which the complainant's contract was not renewed was unfair, and recommended the complainant be paid 36 months' salary for material and moral damages. In a memorandum dated 3 October 2001, the Director-General decided not to follow the Board's recommendation and upheld his decision not to renew the complainant's contract. That is the impugned decision.
5. It is true that the Director-General indicated as early as May 1998 that he did not intend to renew the complainant's contract, and that this decision was based on budgetary constraints. However, since the notification of non-renewal given to the complainant in November referred specifically to the reprimand of 25 November 1998, the Tribunal will proceed on the assumption that the real and immediate reason the complainant did not receive an extension of his contract was because of his involvement in the mismanagement of project TF/RUS/96/001. Here are the relevant facts relating to that project.
6. In early 1996 the Managing Director of the complainant's Division issued instructions to the staff to demonstrate initiative and creativity by developing income-generating activities. Pursuant to these instructions, the complainant made proposals that led to the establishment of project TF/RUS/96/001. UNIDO's goal was to create links between western businesses and agro-development projects in Russia. In order to fulfil the "income-generating" aspect of the project, the complainant asked each company to provide 5,000 United States dollars. However, UNIDO's Financial Rules prohibit receiving direct contributions from private firms. In order to circumvent this rule, UNIDO signed a Trust Fund Agreement with a company by the name of PREMAG, who would receive the payments and then hold 99,196 dollars in trust for UNIDO to fund the project. Despite receiving around 150,000 dollars, PREMAG transferred only 38,000 dollars to UNIDO before declaring bankruptcy in 1998.
7. As a result of the insufficient funds, the project, according to UNIDO, was a failure. As well, some of the companies requested reimbursement of the 5,000 dollars and this caused tension between UNIDO and at least one of its member States.
8. On 17 August 1998 the Office of Internal Oversight issued Investigation Report 98/06 on project TF/RUS/96/001. It found that the Director-General had been fully briefed on and had approved the project. As well, the report found that the Managing Director of the complainant's Division had also been closely involved and encouraged his staff "to be creative and to take initiatives". It also found that the complainant had kept senior management informed of his activities, but that he had been unable to control PREMAG regarding the collection of

fees. The report recommended closing the project. On 18 August 1998 the Director-General took the decision to close it.

9. On 16 November 1998 the Office of Internal Oversight issued a second report, headed Audit Observation 98/36. Unlike the first report, this one focused on the complainant's actions with regard to the project and was highly critical of him. It found that he spent significant resources resulting in financial loss; that he engineered the scheme to collect money from private enterprises in exchange for services that never materialised; and that he misrepresented the services that UNIDO could offer. As a result, the report recommended that disciplinary action be taken against the complainant.

10. The complainant contests the decision not to renew his contract, alleging that he was "a victim of internal intrigues at the senior management level". He contends that the accusations against him were fabricated and that the decision not to extend his contract was motivated by prejudice and discrimination, and did not take into consideration his good performance record.

11. To support the claim of prejudice, the complainant points to the following:

(a) The internal audits of the project he allegedly mismanaged were initiated after the Director-General had already decided not to renew his contract. He argues that this fact supports his contention that the decision not to renew his contract had nothing to do with his performance.

If this is so, it is difficult to understand why UNIDO should go to all the trouble of building up an elaborate case against him when he had no right to a renewal of his contract and the decision not to renew was already well documented.

(b) The complainant also argues that the Director-General, while on an official visit to Russia, agreed with the Ministry of Foreign Affairs that all five Russians seconded to UNIDO would have their contracts renewed; however, he was the only Russian whose contract was not renewed.

Even assuming such an undertaking was given, however, and there is simply no independent evidence to support it, it does nothing to negate the existence of good grounds for releasing the complainant in November 1998.

(c) The complainant states that the Director-General based the decision not to renew his contract on the false assumption that he was using the project for self-enrichment purposes.

If that were true, however, it would be grounds for immediate termination and not merely non-renewal of a fixed-term contract.

(d) The complainant points to his impeccable track record over six years of service and the fact that in November 1998 both of his supervisors had told him that they were putting him on a list for a contract extension.

Again, however, if the criticisms of his performance on his project were justified, they would more than outweigh his earlier good conduct record.

(e) He also notes that he was the only employee whose contract was not renewed, out of all the employees reprimanded for involvement in the project.

Once more, if the action against him was justified, it matters not what was or was not done to others.

12. The complainant points to several extraneous factors, which he contends motivated the Director-General's decision. They included falsification of his performance; blackmailing from one of the private enterprises; internal intrigues at the senior management level; and misinformation by those close to the Director-General. These very serious allegations are not supported by any evidence.

13. Lastly, the complainant suggests that the non-renewal was procedurally flawed. He points out that the Director-General did not personally sign the decision of 3 October 2001 not to follow the Board's recommendations, and that there was no proof that, as required by the Staff Rules, it was the Director-General who made the decision. In addition, the complainant claims that his right to confidentiality was infringed because the Board's report was given to the Managing Director of the Field Operations and Administration Division.

These allegations are without substance: the Managing Director was specifically authorised to speak on the Director-General's behalf and the decision of 3 October was clearly the latter's. Likewise, because of his authority in personnel matters, the Managing Director was properly in receipt of the Board's report.

14. UNIDO insists that the complainant mismanaged the project and brought the Organization into disrepute. It states that UNIDO commissioned the internal evaluations of the project because of complaint letters it had received from various private enterprises involved. It relies on the internal evaluations of the project, which take issue with the complainant's management, in order to substantiate its argument that the decision not to renew the complainant's contract was based on objective considerations, squarely within the Director-General's discretion.

15. At the material time Staff Rule 103.10(a) read in part as follows:

"The fixed-term appointment does not carry any expectancy of renewal or of conversion to another type of appointment."

16. Given this rule, and given the Tribunal's precedents, it is clear that an executive head has substantial discretion when deciding whether to renew an employee's contract. However, the Tribunal has long ago established that this discretion is fettered by an obligation to act in good faith. In Judgment 266, the Tribunal stated the following:

"The total or partial renewal of a fixed-term contract, to which an official is in no way entitled, is a decision which falls within the discretionary authority of the head of the organisation alone. The Tribunal will not interfere with such a decision unless it was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts."

17. As mentioned, there is no serious evidence to indicate that the Director-General's decision was made in bad faith or that it was vitiated by any of the other grounds upon which the Tribunal might set it aside. The most the complainant can do is to point to some instances of incomplete or selective quotation from reports, in which parts favourable to him or which might serve to exonerate him, have been left out. While this does not reflect favourably on the Organization, it does not negate the serious criticisms of the complainant's management of his project. In fact, the overwhelming weight of the evidence indicates that the internal reports on the project were justified and were based on serious controversies surrounding it. There are, for example, numerous letters of dissatisfaction from participating companies. It would appear that the internal evaluations were necessary and justified in the circumstances and that the impugned decision could properly be based upon them.

18. Since the complainant has not proved that the decision he attacks is flawed, it follows that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

