

107th Session

Judgment No. 2841

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. A. against the United Nations Industrial Development Organization (UNIDO) on 28 February 2008, UNIDO's reply of 17 June, the complainant's rejoinder dated 27 August and the Organization's surrejoinder of 17 December 2008;

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

Having examined the written submissions;

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

A. The complainant, an Italian national born in 1962, joined UNIDO's Investment and Technology Promotion Office (ITPO) based in Rome (Italy) on 1 September 2000 as a Financial Analyst. He was employed on a part-time basis under a fixed-term contract which was extended several times. On 2 November 2005 he was told by the Head of ITPO that his contract would not be further extended. By a letter of 25 November, which the complainant received on 29 November, the Managing Director of UNIDO's Division of Administration notified him that his appointment would expire on 31 December 2005 and

explained that the new work programme and staffing requirements entailed the abolition of several posts, including his. The complainant replied on 2 December by pointing out that the Head of ITPO had promised him that he would be offered a different contract and expressing surprise at the fact that the letter of 25 November contained no “counterproposal”. In a letter of 16 December the Officer-in-Charge of the Human Resource Management Branch noted that the Head of ITPO had proposed that use should be made of his services, when required, on the basis of a Special Service Agreement. He was separated from service on 31 December 2005.

By a letter dated 27 February 2006 the complainant drew the Director-General’s attention to the fact that no abolition of posts had occurred and he enquired about his intentions. He alleged that, on 2 November 2005, he had been promised that he would be granted a consultancy contract since it was not possible to maintain his former post owing to budget limitations, but that this promise had not been honoured. By a letter of 28 March the Managing Director of the Programme Support and General Management Division acknowledged that discussions had been held in relation to a possible consultancy contract under a Special Service Agreement, but denied that those discussions constituted any commitment on the part of the Organization. He also informed the complainant of the maximum salary and duration of contract which could be offered to him.

In the meantime, on 23 March 2006, the complainant and two other staff members had requested a review of the decision regarding the abolition of their posts, since they alleged that it was not justified by shortage of funds or work programmes and that the promises to offer them consultancy contracts had been breached. On 3 April the complainant again enquired about the Director-General’s intentions. He reiterated his enquiry on 28 April and sought permission to appeal directly to the Tribunal. By a letter of 19 May, the Managing Director of the Programme Support and General Management Division, replying on behalf of the Director-General, denied the request. That same day the complainant was offered a six-month consultancy contract commencing on 1 June 2006. He declined the offer on

23 May 2006 and filed an appeal with the Joint Appeals Board shortly thereafter, alleging bad faith and breach of promise. In its report dated 8 November 2007 the Board recommended that the appeal be dismissed as time-barred. The complainant was notified by a memorandum dated 16 November 2007 that the Director-General had decided to endorse the Board's recommendation and to dismiss his appeal. That is the impugned decision.

B. The complainant submits that UNIDO acted in breach of good faith in several respects. First, the Organization prevented him from submitting his internal appeal against the decision of 25 November 2005 in due time by continually telling him that he would be offered a new contract and leaving him in uncertainty as to his future until February 2006. In addition, it prevented him from finding a new job under "reasonable conditions" because it informed him of the non-renewal of his contract only one month before it expired. Moreover, it abolished his post for no good reason while, at the same time, further personnel were recruited. The complainant considers that the Organization should have retained his services because of his particular knowledge and his involvement in a project which was to continue for another two years.

He alleges a breach of the "principle of legitimate expectation". In view of the length of time he had worked for the Organization and his involvement in the above-mentioned project, he had a reasonable expectation that his existing contract would be renewed or that he would be offered another similar contract. UNIDO fostered that expectation but it was not until 19 May 2006, that is almost five months after the termination of his contract, that a new contract was offered to him on such disadvantageous terms that he refused to accept it. Referring to the European Convention on Human Rights, he also alleges a breach of the "right to a fair trial" on the grounds that the Joint Appeals Board failed to hear him and that there was an unreasonable delay in the internal appeal proceedings. He asserts that the principle of equal treatment was violated given that the new contract entailed a 50 per cent reduction in his salary.

He also alleges a breach of duty of care as he received different information from UNIDO and ITPO owing to mismanagement and lack of cooperation between the Organization and the Office. He contends that the Organization further failed in its duty of care by delaying the offer of the consultancy contract and by failing to issue a performance appraisal report for 2004/2005, in breach of the Staff Rules. The fact that UNIDO delayed the negotiations concerning the consultancy contract, that such contract contained less favourable terms, and that other staff members continued his work on the project also injured his dignity and professional reputation.

The complainant applies for hearings. He asks the Tribunal to quash the decision of 16 November 2007 and order that a letter of reference be issued by the Organization, stating that his performance was excellent and that his contract was terminated for financial reasons. He seeks a separation payment amounting to two years' salary "based on a reasonable contract" and he asks the Tribunal to determine a fair compensation for the material and moral damages he suffered. He also claims costs.

C. In its reply UNIDO submits that the complaint is irreceivable because the request for review of the decision of 25 November 2005 was not submitted to the Director-General within 60 days of the date of its notification, as required by the Staff Rules. It disputes the complainant's contention that it prevented him from submitting his internal appeal in due time and asserts that he was not promised a new contract but simply informed that he might be contacted "as and when [his] services [would be] required". Citing the Tribunal's case law, according to which a request for review does not preclude a negotiated settlement, it argues that it had no duty to provide the complainant with procedural guidance as there was no indication that he was mistaken or uncertain as to when he needed to request a review. It rejects as irreceivable the complainant's argument concerning the failure to issue a performance appraisal report and his claim for a letter of reference, as they were not mentioned in his internal appeal. Insofar as it exceeds the compensation originally claimed in his internal appeal, his claim for the award of two years' salary "based on a reasonable contract" is

also irreceivable. UNIDO submits that the Tribunal is not competent to examine the allegation of breach of promise concerning the consultancy contract, since its competence extends only to complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. Individuals who are offered consultancy contracts cannot be considered to be officials of UNIDO and are not covered by its Staff Regulations and Staff Rules. Additionally, the alleged breach of promise does not arise out of the relationship between the complainant and the Organization that ended in December 2005 upon the expiry of his appointment.

On the merits UNIDO challenges several factual assertions made in the complaint. The complainant was originally informed of the non-renewal of his appointment on 2 November 2005, that is almost two months before the expiration of his contract. No additional staff members were recruited after his separation from service. Moreover, there is nothing to suggest that there was any lack of cooperation between UNIDO and ITPO, and the record shows that the Organization and the Office “worked as a team”.

The Organization contends that the abolition of the complainant’s post was a legitimate exercise of managerial discretion, based not only on financial reasons but also on the new operational priorities. The complainant’s knowledge of and involvement in a specific project did not preclude the abolition of his post. Moreover, both his letter of appointment and the Staff Rules made it clear that the contract carried no expectancy of renewal or of conversion to any other type of appointment. UNIDO submits that the complainant’s reliance on the European Convention on Human Rights is misplaced and that there was no unreasonable delay in the internal appeal proceedings. It asserts that he has not established that there was a breach of the principle of equal treatment and emphasises that under his new contract he had no right to receive a new salary equal to that of his former position. According to the defendant, there was no injury to the complainant’s dignity or professional reputation, as the abolition of his post was not based on his performance. The Organization offered him, in good faith,

a consultancy contract as soon as possible after his post was abolished and under the most favourable conditions possible.

It opposes the complainant's application for hearings and contends that his claim for the award of two years' salary is not justified as any extension of his final contract would only have been for a period of 12 months. It also submits that the Tribunal cannot order the issuance of a letter of reference.

D. In his rejoinder the complainant presses his arguments. He explains that, as a lay person, he was not in a position to appreciate properly the importance of the performance appraisal reports and letter of reference, as well as the full extent of the financial injury he suffered at the time he lodged his internal appeal. He submits that the Tribunal is competent to examine the allegation of breach of promise since the discussions concerning a consultancy contract began while he was still a UNIDO staff member, and that the right to a fair trial is applicable as a general principle of law. Lastly, he notes that the consultancy contract encompassed all of his previous tasks.

E. In its surrejoinder UNIDO maintains its position. It adds that the complainant's argument that he is a lay person is unconvincing, as he could have sought legal advice before or during the internal appeal proceedings, and that the consultancy contract entailed work on only one project.

CONSIDERATIONS

1. The complainant, who joined UNIDO on 1 September 2000 as a Financial Analyst, was employed under a part-time fixed-term contract which was extended numerous times.

2. During a meeting on 2 November 2005 he was told that he could no longer be employed because in 2006 it was foreseen that the new work programme and staffing requirements would result in abolition of posts, including his. He was subsequently informed by a letter of 25 November, which he received on 29 November, that

his post would be abolished and that his contract would not be renewed upon its expiry on 31 December 2005. On 27 February 2006 the complainant wrote to the Director-General and contested that decision. An exchange of correspondence ensued between the complainant and the Administration and on 27 May 2006 the complainant filed an appeal with the Joint Appeals Board challenging the decision of 25 November 2005. Meanwhile, on 19 May 2006, he had been offered a six-month consultancy contract, which he did not accept.

In its report of 8 November 2007 the Joint Appeals Board concluded that the appeal was irreceivable and recalled that, according to Rule 212.02, serving or former project personnel who wish to appeal against an administrative decision should first address, within 60 days of the written notification of the decision, a letter to the Director-General requesting that the decision be reviewed. The Director-General endorsed the recommendation of the Board and dismissed the appeal.

3. The complainant asks the Tribunal to quash the Director-General's decision of 16 November 2007 dismissing his appeal as irreceivable. His other claims are set out under B, above.

4. He puts forward the following pleas in support of his complaint: breach of the principles of good faith, "legitimate expectation", equal treatment, duty of care and of respect for dignity and breach of the right to a fair trial.

5. The Organization objects to the receivability of the complaint and submits that it is unfounded.

6. Having reviewed the written submissions and deemed them sufficient, the Tribunal disallows the complainant's application for hearings.

7. The Tribunal is of the opinion that the complaint is irreceivable. The evidence on file shows that there was only one

communication from the Organization to the complainant between 29 November 2005, when he received the letter of 25 November notifying him of the decision not to further extend his contract, and 27 February 2006, the date of his letter requesting the Director-General to review that decision. That communication, a letter of 16 December 2005 from the Officer-in-Charge of the Human Resource Management Branch, made it clear that the letter of 25 November “addressed solely the expiration of [the complainant’s] fixed-term appointment”. It further stated that “any future plans [...] w[ould] be dealt with separately as and when [his] services [would be] required”. This cannot be construed, as claimed by the complainant under the breach of the principle of good faith, as an initiation of settlement negotiations which could have suspended the time limit for submission of a request for review. The Organization made no promise to offer the complainant a specific contract by a specific date. Thus there was no reason why the complainant could not submit his request for review within the 60-day time limit provided for in Staff Rule 212.02, and the Joint Appeals Board was correct in recommending that his appeal be dismissed as time-barred.

8. To the extent that they concern the issues of his performance appraisal report and a letter of reference, the complainant’s claims are irreceivable as these issues were raised for the first time in the complaint.

9. However, the Tribunal finds that the Organization failed to deal with the complainant’s appeal in a timely and diligent manner. According to well established case law, “[s]ince compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed” (see Judgment 2197, under 33). In the present case, the internal appeal process lasted for approximately 18 months which is unacceptable in view of the simplicity of the appeal which hinged primarily on a question of receivability. The Tribunal therefore awards the complainant 1,500 euros in damages.

10. As he succeeds in part, the complainant is entitled to costs set at 800 euros.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 1,500 euros in damages for the delay in the internal appeal process.
2. It shall also pay him 800 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Catherine Comtet