108th Session **Judgment No. 2878**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. B. against the United Nations Industrial Development Organization (UNIDO) on 23 May 2008, UNIDO's reply of 22 September, the complainant's rejoinder of 4 December 2008 and the Organization's surrejoinder of 11 March 2009;

Considering Articles II, paragraph 5, and VII 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 an Italian national born in 1968. He joined UNIDO Headquarters in Vienna in December 1998 as an Associate Expert under a one-year fixed-term contract. His contract was renewed several times and on 1 April 2001 he was assigned to the Investment and Technology Promotion Office (ITPO) in Bologna, Italy, as an Investment Promotion Officer. His one-year contract was extended up to December 2003, when he was offered a three-month

extension, i.e. until 31 March 2004. By a letter dated 13 December 2003 the complainant asked for an explanation concerning the fact that his contract was to be extended only for a short period.

On 15 January 2004 the Director of UNIDO's Human Resource Management Branch informed the complainant that the Government of Italy had requested that the ITPO offices in Bologna and Milan be relocated and merged into a new office that would be established in Rome; consequently, pending budgetary clearance, the staff concerned had been offered contract extensions of three months. He added that "all staff [would] be offered the opportunity of continuous appointment in the new office" and asked the complainant to indicate whether he would be interested in continuing his service for the ITPO in Rome. On 21 January the complainant replied that he was surprised to hear for the first time about a possible relocation of the Office and of the short notice given but indicated that he was available to discuss the possibility of continuing his service with the Organization outside Bologna. His contract was subsequently renewed several times for short periods pending a final decision on the relocation. On 22 December 2004 he was offered a further extension of his contract to serve in the Bologna Office from 1 January 2005 to 31 December 2005.

By a letter of 25 November 2005, received by the complainant on 29 November, he was informed that his post, amongst others, would be abolished due to the closure of the Office's premises in Bologna by the end of 2005 and that his contract would consequently not be renewed upon its expiry on 31 December 2005. He separated from service on that date.

On 14 February 2006 the complainant wrote to the Director-General asking him, inter alia, whether he considered that the decision to abolish his post and to terminate his contract was made in conformity with UNIDO's Staff Rules and Staff Regulations. He added that he had received no performance appraisal reports for the years 2001 to 2005, and that he had thus been unable to provide evidence of his achievements at UNIDO when applying for other positions within the United Nations system. By letter of 23 March

the complainant confirmed that his earlier letter of 14 February was a "formal appeal" against the decision to abolish his post and to terminate his contract. The Managing Director of the Programme Support and General Management Division replied on 28 March 2006 that over the past two years the complainant had been kept fully informed of the measures taken with respect to the relocation of the ITPO offices to Rome. In his view, no further action was required on the part of the Organization. He stressed that the complainant's post was a "project post" and not a regular budget post.

By a letter dated 26 May 2006 the complainant filed an appeal with the Joint Appeals Board challenging the decision of 25 November 2005 not to renew his contract. He alleged bad faith on the part of UNIDO and questioned the reasons given to justify the abolition of his post. He also objected to the fact that the Organization had not made a written offer to transfer him to another duty station, and that no performance appraisal reports were available in his official status file.

In its report of 5 February 2008 the Board noted that the complainant had not requested the review of the contested decision of 25 November 2005 within the prescribed 60 days from the date of notification. Consequently, it recommended dismissing the appeal as irreceivable. By a memorandum of 20 February 2008, which is the impugned decision, the Director-General endorsed the Board's recommendation. The complainant was so informed by letter of 22 February 2008.

B. The complainant contends that he was prevented from challenging the decision he received on 29 November 2005 within the 60-day period prescribed by Staff Rule 212.02 because the Organization had promised him on 22 December 2005 that he would be offered a new contract. In his view, UNIDO acted in bad faith in doing so and contravened the Tribunal's case law according to which time limits should be applied in good faith. He argues that he could not have filed an internal appeal while at the same time negotiating a new contract. He further states that the fact he was given only one month's notice before separation from service and that a concrete contractual offer

was made only several months later are further evidence of UNIDO's failure to act in good faith.

According to the complainant, the Organization had no good reason not to renew his contract since, at the time he separated from service, there was neither a reduction in the number of posts nor any shortage of funds. In fact, he had a "reasonable expectation" that his contract would be renewed as he had been working for the Organization for more than seven years and his performance had never been criticised. Moreover, UNIDO offered him a new contract long after he had separated from service and the contract contained such unfair terms that he had no choice but to refuse the offer.

The complainant also alleges that UNIDO breached Staff Regulation 4.2, which provides that, in filling vacancies, the fullest regard shall be had to the requisite qualifications and experience of persons already in the service of the Organization. After the closure of the Bologna Office, several Investment Promotion Expert posts were opened in the new Office in Rome but the Organization did not ask him to apply for one of these posts.

He further contends that the failure to provide him with performance appraisal reports for the period 2001-2005 constituted a violation of Staff Regulation 4.5, which requires that the service of staff be the subject of counselling, evaluation and reporting from "time to time". He argues that he was disadvantaged when he applied for other positions within the United Nations system as applicants are requested to submit their two last appraisal reports. He also submits that UNIDO failed in its duty to respect his dignity and that the Joint Appeals Board took an excessively long time to process his internal appeal, i.e. approximately 21 months.

The complainant asks the Tribunal to quash the decision of 20 February 2008 and to order UNIDO to issue him with a letter of reference stating that his performance was excellent. He seeks a "separation payment" in an amount equivalent to "two annual salaries based on a reasonable contract". He also claims material and moral damages and costs.

C. In its reply UNIDO submits that the complaint is irreceivable on several grounds. Firstly, the complainant has failed to exhaust internal means of redress available to him. It is by a letter dated 14 February 2006 that he asked the Director-General to review the decision of 25 November 2005; his request was consequently made after the prescribed time limit of 60 days from notification. Moreover, he has produced no evidence of exceptional circumstances warranting a waiver of the time limit under paragraph (k) of Appendix K to the Staff Rules. According to the case law, there is no reason why a staff member cannot keep to the time limit laid down in an organisation's rules while negotiating a settlement. UNIDO underlines that it made two contractual offers after he had initiated his internal appeal, the first on 29 March 2006 and the second on 7 April 2006. Likewise, the complainant failed to exhaust internal remedies with regard to his claim for a letter of reference and to his claim for moral damages in respect of the Organization's failure to provide him with performance appraisal reports; indeed, these claims are new. It denies having breached the duty of care it owes him, arguing that UNIDO was under no obligation to ensure that he respect the time limit and that, in any event, the applicable regulations and rules were available to him.

Secondly, it submits that the complaint is irreceivable insofar as it is based on the allegation of breach of a promise to offer the complainant a contract. According to Article II, paragraph 5, of its Statute, the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials and of the provisions of the Organization's Staff Regulations and Staff Rules. The second offer of a consultancy contract was made to the complainant on 7 April 2006, that is to say after he had separated from service; consequently, the claims he makes on that basis are irreceivable.

On the merits the Organization asserts that it acted in good faith and, in particular, that it gave the complainant reasonable notice of the decision not to renew his contract. He knew since the autumn of 2003 that the continued existence of the Bologna Office was not guaranteed

and that the future of his post depended on the priorities agreed upon by the ITPO and the donor. It denies having left him uncertain as to his future; indeed, in a letter of 16 December 2005 the Administration merely indicated that it would contact him when his services were required, and not that it would offer him a new contract.

The defendant contests the complainant's allegation that his post was abolished for no good reason and submits a document showing that in 2006 the number of employees in the ITPO in Rome was reduced. It states that the decision of 25 November 2005 indicated that the complainant's post was to be abolished due to the closure of the Bologna Office and constituted a proper exercise of managerial discretion. In its view, the complainant had no legitimate expectation of renewal since it was clearly stated in his final letter of appointment that the "appointment carrie[d] no expectancy of renewal or of conversion to any other type of appointment in any activity" in UNIDO. It adds that its duty of care did not encompass offering him other employment. In any event, it did in fact make an effort to find him alternative employment; he was offered a new assignment in late March 2006, which he accepted, and on 7 April 2006 he was offered a six-month consultancy contract, but he declined this offer. Contrary to the complainant's contention, the last offer was made in good faith and there was no disrespect for his dignity; moreover, the terms of the contract offered were in conformity with the Organization's policy on the remuneration of consultants.

UNIDO denies having acted in breach of the Staff Regulations. It asserts that Staff Regulation 4.2 is not applicable to individuals who, like the complainant, are recruited as project personnel; consequently, he had no right to be reassigned to Rome when his assignment on the project in Bologna ended. Furthermore, there were no vacancies in Bologna in respect of which his qualifications and experience could have been given the "fullest regard". Concerning the alleged violation of Staff Regulation 4.5, it states that the impugned decision was not taken on the basis of the complainant's performance; his post was merely abolished. It further rejects the allegation of undue delay in processing the complainant's internal appeal.

D. In his rejoinder the complainant asserts that his complaint is receivable. He submits that the case law on which UNIDO relies to contend that his complaint is irreceivable is not relevant as, in his case, there was no ongoing negotiation for a settlement but negotiation for the conclusion of a new contract.

On the merits he contends that he was not offered the possibility of being reassigned to Rome and that the decision to abolish his post was taken for personal reasons and not for any managerial purpose. He submits that, contrary to the Organization's assertion, the number of consultants in ITPO, Italy, was at its highest in 2006. He stresses that his work involved missions and did not require that he stay in a specific office; consequently, he could have been "relocat[ed]". Moreover, the projects on which he used to work were ongoing at the time of his separation.

E. In its surrejoinder UNIDO maintains its position. With regard to receivability, it submits that the case law to which it referred in its reply clearly indicates that a staff member negotiating alternative employment must still comply with the prescribed time limit for appealing a contested decision.

It maintains that the abolition of the complainant's post was a "rational consequence" of the closure of the Office in Bologna and rejects the allegation that that decision was made on personal grounds. It adds that since the complainant's post had been abolished he could not have been transferred to Rome, and emphasises that when he was asked whether he would agree to serve there he showed no willingness to do so.

CONSIDERATIONS

1. The complainant, who joined UNIDO as an Associate Expert in December 1998, was employed under a one-year fixed-term contract which was renewed several times. He was assigned to the ITPO in Bologna on 1 April 2001, first as an Associate Expert,

and then as an Investment Promotion Officer. In a decision dated 25 November 2005 the complainant was notified that the Office in Bologna would be closed and his post abolished, and that his contract would not be renewed upon its expiry on 31 December 2005.

2. The complainant filed an appeal dated 26 May 2006 with the Joint Appeals Board challenging the administrative decision of 25 November 2005 not to renew his contract. In its report of 5 February 2008 the Board noted that the complainant had failed to address a letter to the Director-General requesting a review of the decision within 60 days from the date of receipt of the decision as prescribed by Staff Rule 212.02. The complainant received written notice of the decision on 29 November 2005 and his first letter to the Director-General was dated 14 February 2006 (i.e. 76 days later); the Board therefore concluded that the appeal was irreceivable and recommended that the case be dismissed in its entirety. The Director-General endorsed the Board's recommendation and dismissed the appeal accordingly. The complainant was notified of this by a letter dated 22 February 2008.

3. The complainant asks the Tribunal to quash the decision of the Director-General dated 20 February 2008 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: Staff Rule 212.02 is not applicable in his case because he was in the process of negotiating a new contract with the Organization and therefore the deadline should have been suspended; Staff Regulations 4.2 and 4.5 were ignored; there was a breach of the principles of good faith, of legitimate expectation, of the duty of care and of respect for dignity, as well as a breach of the right to a fair trial.

5. UNIDO argues that the Director-General correctly dismissed the appeal as irreceivable and that the complaint is also irreceivable and without merit. It states that the complainant did not respect the 60-day time limit provided for in the Staff Rules for writing to the

Director-General to request a review of the decision of 25 November 2005 and that therefore he did not exhaust his internal means of redress, thereby failing to comply with Article VII, paragraph 1, of the Statute of the Tribunal. It denies having promised the complainant a new contract or having entered into contract negotiations that would have suspended the time limit for filing a request for review and refers to Judgment 1699, under 29, which states that "[t]he Tribunal does not accept that a request for review precludes a negotiated settlement. There is no reason why a staff member cannot keep to the time limit laid down by the Staff Regulations and Rules and at the same time negotiate. And he will be in a stronger negotiating position if he has lodged a timely appeal."

6. The Organization submits that "[t]here is no legal or factual foundation to the arguments that [it] ignored the staff regulations and breached general principles of the law of the international civil service". The closure of the Bologna Office was a valid operational decision, and the resulting abolition of the complainant's post and non-renewal of his contract was a valid exercise of managerial discretion. It argues that in accordance with the complainant's terms of appointment, he had no right to or expectancy of renewal. Regarding the claim for a letter of reference, the Organization contends that that claim was not included in the internal appeal and it is therefore irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal.

7. UNIDO points out that following the complainant's separation from service it offered him reasonable consultancy contracts in March and April 2006 and therefore did not breach a promise to offer him a new contract. Furthermore, in response to the complainant's claim that Staff Regulations were ignored, the Organization notes that Staff Regulation 4.2 reads, in relevant part, as follows: "Subject to the provisions of regulation 3.2 above and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of

the Organization" and Staff Regulation 4.5 stipulates that: "Under conditions prescribed by the Director-General, the service of staff shall be the subject of counselling, evaluation and reporting made from time to time by their supervisors." UNIDO argues that as the complainant was no longer a staff member at the time that new vacancies opened in Rome, it had no obligation to consider him for the positions as Regulation 4.2 refers only to the rights of current staff members, and that in regard to Regulation 4.5 it is irrelevant to the complaint whether or not the complainant had received any performance appraisal reports for the period 2001-2005 as "the decision challenged was not based on performance and did not take performance into account". It asserts that "the complainant's post was abolished simply because the office in Bologna was shut down".

8. In the Tribunal's opinion, 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 withdraw it later if necessary. The Joint Appeals Board was correct in recommending that his appeal be dismissed as time-barred. So far as concerns the applicable time limits, there was no breach of the principles of good faith, legitimate expectation, respect for dignity, or duty of care. The complainant refers to Judgment 2584, under 13, according to which "[i]f an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions as extending the time for the taking of any further step". However, as in the case concluded in Judgment 2841, in the present case there was only one official communication from the Organization to the complainant between the date of the letter notifying him of the decision not to further extend his contract, that is 25 November 2005, and the date of his letter requesting the Director-General to review that decision, that is 14 February 2006. The letter of 16 December 2005 from the Administration made it clear that the letter of 25 November 2005 "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, as an initiation of settlement negotiations which could have suspended the time limit for submission of a request to review the decision.

9. The decision that the internal appeal was time-barred has the consequence that the other claims for relief with respect to performance appraisal reports and for a letter of reference are also time-barred.

10. The Tribunal finds that the Organization failed to deal with the complainant's appeal in a timely and diligent manner as the internal appeal process lasted for approximately 21 months, which is unacceptable in view of the simplicity of the appeal which hinged primarily on a question of receivability (see Judgment 2841, under 9). Therefore the Tribunal awards the complainant 1,500 euros in damages.

11. 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. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet