G. (No. 2)

v.

UNIDO

124th Session **Judgment No. 3840**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. G. against the United Nations Industrial Development Organization (UNIDO) on 16 May 2014 and corrected on 17 July, UNIDO's reply of 23 October 2014, the complainant's rejoinder of 26 January 2015 and UNIDO's surrejoinder of 11 May 2015;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision not to renew his fixed-term contract.

In December 2010 the complainant, a grade P-5 official, was informed that he was reassigned with effect from January 2011. He went on indefinite sick leave from November 2011. While he was on sick leave he was informed that his post was abolished. The decision to abolish his post and the previous decision to reassign him to that post are challenged in the complainant's third complaint.

The complainant reported for duty in August 2013. By a memorandum of 2 October 2013, provided to him "in the interest of good order", he was informed of his separation entitlements upon the

expiry of his fixed-term contract on 31 December 2013 and that this was "without prejudice to the outcome of efforts made by the Organization since [his] return to the office on 26 August 2013, to place [him] to a suitable position". The memorandum stated that the divisions contacted by the Administration had so far confirmed the non-availability of suitable vacant positions at the complainant's level and that lower level positions had not been explored at his request.

On 8 October the complainant requested the review of the "decision" of 2 October. By a memorandum of 1 November he was informed that, as all efforts made to reassign him to a suitable position at the same level had not yielded any positive results, the Director General had decided (on 29 October) to allow his appointment to expire on 31 December 2013. The complainant then enquired whether that memorandum constituted the reply from the Administration to his request for review. Unsatisfied with the response he received, he filed an appeal with the Joint Appeals Board on 7 November 2013 against the "answer on behalf of the Director General" to his request for review, asking for the suspension of the decision not to renew his appointment. By a memorandum of 8 November he was informed that the memorandum of 2 October did not contain any administrative decision relating to his employment. As the memorandum of 1 November contained the decision not to renew his fixed-term contract, the complainant was advised to correct and resubmit his request for review within 60 days of the date of receipt of that memorandum. The Administration answered his request for review on 18 November.

On 16 December 2013 the complainant requested the review of the decision of 1 November 2013. He appealed before the Joint Appeals Board against the rejection of his request, which led to the Director General's decision – taken in January 2015 – to endorse the Joint Appeals Board's recommendation to dismiss his internal appeal and to confirm the decision not to renew his fixed-term contract. That decision is challenged in his fifth complaint before the Tribunal.

Meanwhile, in its report of 17 January 2014, the Joint Appeals Board found that the memorandum dated 2 October 2013 did not constitute the decision of the Director General to allow the complainant's contract to

expire and that the request for review the complainant had filed on 8 October 2013 was premature. It recommended dismissing the appeal as irreceivable and rejected the complainant's request to recommend a suspension of the decision not to renew his fixed-term contract. By a letter of 17 February 2014 the complainant was informed that the Director General had decided on 11 February to endorse the Joint Appeals Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order UNIDO to reassign him to a position commensurate with his grade level and experience, with retroactive effect from the date of his separation. Alternatively, he asks for three years of salary with all benefits and entitlements. He claims 200,000 Swiss francs in moral damages and costs, with interest on all amounts awarded.

UNIDO requests the Tribunal to dismiss the complaint and the complainant's claim for moral damages as irreceivable for failure to exhaust internal remedies. Subsidiarily, it submits that the complaint is without merit. In its surrejoinder it also disputes the receivability of any claim that is based on decisions that are impugned in other proceedings.

CONSIDERATIONS

1. The complainant was employed by UNIDO though his employment concluded on 31 December 2013 as a result of the non-renewal of his contract. Some of the relevant background is found in Judgment 3669.

2. In this complaint, the complainant seeks to impugn a decision of the Director General communicated to him by letter dated 17 February 2014 dismissing as irreceivable an internal appeal dated 7 November 2013. UNIDO argues that the complaint to the Tribunal is irreceivable on several grounds. It is, at this point, only necessary to set out the facts relevant to this issue.

3. On 8 November 2011 the complainant took indefinite sick leave. On 26 August 2013 he reported for duty without prior notice. Steps were then taken to identify a position the complainant could take

up and on 6 September 2013 he met with the Officer-in-Charge of the Human Resource Management Branch (HRM), Mr I., to discuss steps already taken to identify a position and how things might proceed thereafter. The complainant was asked to explore suitable vacancies and placement possibilities himself. A further meeting on this general topic took place on 20 September 2013.

4. On 2 October 2013 the complainant received a memorandum from the Director of the Human Resource Management Branch (PSM/HRM). The subject of the memorandum was said to be "Expiration of fixed-term appointment – entitlements upon separation". The memorandum commenced with the following paragraph:

> "This memorandum is to inform you of your separation entitlements, upon expiration of your fixed-term appointment [...] at close of business on 31 December 2013. This is without prejudice to the outcome of efforts made by the Organization since your return to the office on 26 August 2013, to place you to a suitable position. As communicated to you by Mr [I.], the divisions have so far confirmed the non-availability of suitable vacant positions at the P-5 level. Lower level positions were not explored, as per your request. The information contained in this memorandum is provided to you in the interest of good order." (Original emphasis.)

The memorandum then set out, in detail, the separation entitlements. It also requested the complainant to return all official documents issued by UNIDO and any diplomatic license plates the complainant may have had. It later contained a paragraph (paragraph 7) saying: "Your last working day will be Friday, 20 December 2013, with 31 December 2013 being regarded as your official travel day. You will receive your salary and allowances, including compensation for up to 60 days of accrued annual leave, through 31 December 2013."

5. In response to this memorandum, the complainant sent a memorandum dated 8 October 2013 to the Director General seeking a review under Staff Rule 112.02 of what the complainant characterised in his memorandum as "the decision not to extend [his] appointment beyond 31 December 2013".

6. On 18 October 2013 the Director PSM/HRM wrote to the Director General seeking a decision as to whether UNIDO would allow the complainant's fixed-term appointment to expire on 31 December 2013. A notation on that memorandum indicates that a decision not to extend the complainant's appointment was made by the Director General on 29 October 2013. By memorandum dated 1 November 2013 to the complainant, the Director PSM/HRM informed him that "the Director General has [...] decided to allow your appointment to expire at close of business on 31 December 2013".

7. On 7 November 2013 the complainant sent a document to the Joint Appeals Board. The subject matter was identified as "Appeal against the Answer on behalf of the Director General to my request to review and reconsider the decision to allow my fixed-term appointment to expire". In that document the complainant refers to the memorandum of 1 November 2013 and, in substance, treats that as the response to his request for review of 8 October 2013. On 8 November 2013 the Director PSM/HRM sent a memorandum to the complainant addressing questions raised by the complainant in two earlier emails (of 4 and 5 November 2013). The first was the date of the administrative decision by the Director General to let the complainant's contract expire on the due date. The Director PSM/HRM disputed the position of the complainant that the memorandum of 2 October 2013 contained a decision concerning the extension of his appointment, namely that it would not be extended. The Director PSM/HRM said it did not and, later in the memorandum, invited the complainant to "correct and resubmit [his] request for review, within 60 days as of the date of receipt of the memorandum of 1 November 2013". As appears later, the complainant persisted with his approach that the memorandum of 2 October 2013 was a final administrative decision amenable to review and internal appeal.

8. In a further memorandum of 18 November 2013, the Director PSM/HRM indicated she was replying to the request for review of 8 October 2013. The substance of what was said by the Director PSM/HRM was, firstly, that the only decision concerning the complainant's employment was the decision communicated to him in

the memorandum of 1 November 2013, secondly, it was that decision that he must seek to have reviewed and, thirdly his appeal of 7 November 2013 was premature.

9. The complainant persisted with his appeal to the Joint Appeals Board as originally framed in his letter of 7 November 2013. He did so then knowing that the administrative decision not to renew his contract had, as a matter of fact, been made on 29 October 2013 and notified to him by memorandum of 1 November, that he had not sought review of that decision and that he had later been invited to correct and resubmit the request for review. Ultimately the Joint Appeals Board concluded his internal appeal was irreceivable and on 17 January 2014 recommended to the Director General that the appeal be dismissed. On 11 February 2014 the Director General decided to dismiss the internal appeal for the reasons given by the Joint Appeals Board. By a letter of 17 February the complainant was informed of the Director General's decision. This is the impugned decision. The basis of the decision was that the complainant had not followed the procedures in Staff Rule 112.02(b)(ii). Staff Rule 112 relevantly provides:

> "(a) A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.
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> [...]
>
> (b) [...]
>
> (ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Secretary of the Joint Appeals Board; alternatively, the staff member may, within the following 90 days, apply directly to the Administrative Tribunal of the International Labour Organi[z]ation in accordance with the provisions of its Statute."

10. Central to the complainant's argument challenging the reasoning of the Joint Appeals Board, adopted by the Director General in the impugned decision, is that the memorandum of 2 October 2013

was a final administrative decision because it constituted notification to the complainant that his contract would not be renewed. Accordingly, having regard to Judgment 3141, consideration 21, that memorandum is to be treated as a decision having legal effect for the purposes of Article VII, paragraph 1, of the Tribunal's Statute. It was then (when notified of the decision embodied in the memorandum of 2 October 2013), the complainant argues, that time began to run and he was entitled to act as he did. The fact that a decision that had the same effect was made later (on 29 October 2013) did not alter his position (see Judgments 660, consideration 3, and 2011, consideration 18).

11. The Tribunal is satisfied that the memorandum of 2 October 2013, objectively construed, did not, in all the circumstances of the case, constitute an administrative decision in respect of which review could be sought under the Staff Rules (see Judgment 2739, consideration 13). There is an obvious qualification in the first paragraph set out earlier that what the complainant was being told in a letter about his entitlements was conditional. That is to say it was subject to the outcome of attempts to find another position for the complainant. These matters had been the subject of discussions between the complainant and UNIDO in September 2013. It is true that paragraph 7 speaks, explicitly, of when the complainant's last day of work would be. However that paragraph should not be taken out of context and, in particular, the context created by the first paragraph. Moreover, and significantly, no decision had, at this time, been made not to renew the complainant's contract and such a decision was not made by the Director General until 29 October 2013, which was a matter known to the complainant when he lodged his internal appeal.

12. Thus the conclusion of the Joint Appeals Board that the internal appeal was irreceivable was correct because it did not concern an administrative decision. The impugned decision of the Director General based on that conclusion was also correct. Accordingly there was not, relevantly, a final administrative decision in respect of which the complainant could file a complaint with the Tribunal as he has sought to do in these proceedings. Thus the complaint is irreceivable.

The Tribunal notes that UNIDO fairly and properly afforded the complainant an opportunity to seek review of what was the administrative decision (notified in the memorandum of 1 November 2013) and explained what he should do. Accordingly, this is not a case where UNIDO has failed in its duty of care towards the complainant to help him exercise his appeal rights (see, for example, Judgments 2345, consideration 1, 2713, consideration 3, and 3754, consideration 11).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ