

EIGHTY-FOURTH SESSION

In re Halloway

Judgment 1699

The Administrative Tribunal,

Considering the complaint filed by Mr. Stephen Halloway against the United Nations Industrial Development Organization (UNIDO) on 21 August 1996 and corrected on 1 October, UNIDO's reply of 9 January 1997, the complainants rejoinder of 12 March and the Organization's surrejoinder of 19 June 1997;

Considering Articles II, paragraph 5, and VII 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, a citizen of the United States who was born in 1946, joined the staff of UNIDO on 29 April 1990 under a fixed-term appointment for two years as the Director of its Office in New York at grade D.1. UNIDO extended his appointment by two years on 29 April 1992.

In a memorandum of 25 February 1994 a personnel officer gave him information about his terminal entitlements on the expiry of his appointment on 28 April 1994. By a fax of 28 February he told the Director of the Personnel Services Division that the memorandum of 25 February was not in line with the drift of talks he had been having with the Director-General about keeping him on from the expiry of his old appointment until the start of a new one. By a memorandum of 7 April 1994 the Director informed him that the Director-General had granted him a "final" three-month extension of appointment. On 29 July 1994 he got a two-month extension. By a memorandum of 15 September the Director informed him that the Director-General had decided to extend his appointment by another month, until 28 October 1994: the extension would be "final" unless "in the meantime, or shortly thereafter" the Government of Jamaica approved his candidature for the post of Director of the UNIDO Office in that country.

By a fax of 23 October 1994 he asked the Director-General to extend his appointment on account of the delay in getting clearance from Jamaica. By a fax dated the 28th the acting chief of the Personnel Administration and Social Security Section informed him that he would get a one-month extension of appointment from 29 October on special leave without pay. By a memorandum of 28 October to the Director-General the complainant said that, since his assignment to Jamaica was "proceeding", he wanted review of the decision to put him on special leave without pay. By a memorandum of 4 November the complainant asked the Director-General to act on a request he had made on 24 September 1993 for an investigation into the conduct of another official; he also asked, in order to safeguard his rights, to be assigned to an appropriate position while the matter was pending.

By a letter of 29 November 1994 the Director-General told him that since the Jamaican Government had rejected him UNIDO would have to let him go and, in answer to his request for an investigation that two internal audits had not revealed "any breach of conduct".

In a memorandum of 12 December 1994 the complainant asked the Director-General to keep him on special leave without pay from 1 December 1994 until 30 April 1995 to improve his chances of getting work elsewhere and to let him have the minimum of five years' participation in the United Nations Joint Staff Pension Fund that would qualify him for a pension. On 15 February 1995 the complainant signed a letter of appointment extending his special leave from 29 November 1994 to 30 April 1995 "for the sole purpose of enabling him to pay all relevant contributions" into the United Nations Joint Staff Pension Fund: it carried "no expectancy of renewal".

In a letter of 21 April 1995 the complainant said that the "misfeasance, nonfeasance and malfeasance" of senior officers had frustrated his expectations of another assignment and he asked for a suitable

appointment. In a reply of 30 May the Director-General referred to his letter of 29 November 1994 and to the memorandum of 15 September from the Director of Personnel Services and told him to complete the formal arrangements for termination.

By a letter of 20 July 1995 to the secretary of the Joint Appeals Board he appealed against the Director-General's decision of 30 May. In its report of 22 April 1996 the Board recommended rejecting his appeal as time-barred. In a letter of 20 May 1996 the secretary informed him that the Director-General had decided to endorse the Board's recommendation. That is the decision he is impugning.

B. The complainant submits that his internal appeal was not time-barred: the "final" decisions he had received before the letter of 30 May 1995 were superseded by further extensions of his appointment. Not until he got the decision of 30 May did he have reason to doubt that the Director-General would settle the matter by offering him reassignment. Like the requests for review he had submitted earlier, his appeal was timely.

He pleads discriminatory treatment and procedural flaws. The Administration bungled his nomination to the post in Jamaica; its refusal to let him go back to his vacant post in New York or consider him for another was in breach of good faith. It was not he who first applied for special leave: his agreement to the letter of appointment putting him on special leave and his later application for the extension of it were extorted under duress. Not until long after his departure did he get an appraisal of his performance in his last year and it was not made in keeping with the rules. And not until he had gone did UNIDO act on his request for investigation into unfair treatment by his former supervisor.

He seeks reinstatement; payment of salary and entitlements for the time he spent on special leave without pay; and the equivalent of three years' pay in damages. He claims 7,500 United States dollars in costs.

C. In its reply the Organization argues that the complaint is irreceivable. The Director-General gave him in the letter of 29 November 1994 an explicit decision not to extend his appointment and that decision never changed. The grant of his application for an extension of special leave to allow his pension entitlement to accrue affords no basis in law for waiver of the time limit. So his appeal of 20 July 1995 was time-barred.

On the merits UNIDO denies his charges of discriminatory treatment and procedural flaws. The decision not to extend his fixed-term appointment was a proper exercise of discretion. The Organization did its utmost to appoint him to the post in Jamaica, and while the matter was pending it agreed to extend his appointment on special leave. Since he failed to discuss his last performance report with his supervisor while in Vienna, it would have been too costly to bring him back from the United States just for that purpose. As for his allegations of improper treatment on the part of his supervisor, he had only to put the matter to the Panel on Discrimination and Other Grievances instead of keeping it to himself for eleven months.

D. In his rejoinder the complainant maintains that his complaint is receivable: not until his appointment actually ended did the decision to separate him from service become final. Like several others before it, the "final" decision of 29 November 1994 was changed to allow him five more months' special leave. In any event it would be wrong to penalise him for trying to settle a dispute amicably. He charges the Director-General with misusing his authority in order to get rid of him.

E. In its surrejoinder the Organization presses its pleas on receivability and insists that the letter of 30 May 1995 was "purely confirmatory". There was nothing improper in the decision not to extend his appointment. Nor has he adduced any evidence of misuse of authority.

CONSIDERATIONS

1. The complainant entered the Organization's service on 29 April 1990 as the Director of its Office in New York. He got a contract for two years and then for another two. A personnel officer informed him on 25 February 1994 that his fixed-term contract would expire on 28 April 1994.
2. At that time negotiations on further employment for him were in progress. He was given on 7 April 1994 a three-month extension and on 29 July a further extension of two months, until 28 September.
3. On 26 August the Director of Personnel Services submitted to the resident representative of the United

Nations Development Programme (UNDP) in Jamaica the complainant's candidature for the post of country director of UNIDO in Kingston, where he was to cover other Caribbean countries as well.

4. A memorandum dated 15 September told him he was to have another one-month extension to 28 October and said:

"It is understood that this is a final extension unless in the meantime, or shortly thereafter, confirmation is received from Kingston concerning your acceptance for the ... post in Jamaica. In the event that this confirmation is received at a later date, it would be subject to a new letter of appointment."

5. On 26 September the resident representative in Kingston informed the Director of Personnel Services that he was still awaiting a reply from the Jamaican Government.

6. In a memorandum of 23 October to the Director-General the complainant asked for an appropriate extension of contract until the matter was final so that he would have no break in service.

7. On 28 October the Organization decided to extend his appointment by one month as from 29 October and to put him on special leave without pay in that period; it would be making no payments for him to the United Nations Joint Staff Pension Fund or to the health insurance fund; but he could make payments himself.

8. By a memorandum dated 4 November 1994 to the Director-General he repeated a request he had made on 24 September 1993 for investigation into the conduct of a supervisor, whom he named, and asked to be kept on in the Organization in the meantime.

9. By a fax message dated 28 November the resident representative reported to the Director of Personnel Services that the Jamaican Government had informed him officially that UNIDO should suggest other candidates.

10. In a letter of 29 November the Director-General reviewed the complainant's "contractual status in the course of this year" and informed him that the Jamaican Government had not accepted his candidature and he would have to go. The Director-General said that the correspondence concerning the complainant's supervisors had not affected that decision.

11. In a memorandum of 1 December to the Director-General the complainant objected to the handling of his case, said he did not intend to let matters rest there and sought a discussion with the Director-General. In a letter dated 2 December the Director-General explained the procedure adopted and stated that since he had not been selected for the post in Kingston no further extension of his appointment could be justified.

12. On 12 December the complainant wrote to the Director-General asking that his special leave without pay be extended to 30 April 1995. The reasons he gave were:

(i) By retaining his status as a United Nations employee he would be "able to be considered for positions posted for internal recruitment" within the United Nations system.

(ii) He could also be considered for employment with another United Nations agency otherwise than by competition, i.e. by transfer.

(iii) He could complete five years' participation in the Pension Fund.

13. The Managing Director of the Division of Administration replied on 21 December 1994 that the Organization "would in principle be prepared to consider" his request further but suggested he ask the Pension Fund about his pension benefits. The complainant confirmed on 23 January 1995 that he had consulted the Fund and he again asked for the extension of his special leave. A letter of appointment dated 7 February 1995 granting him such extension made it subject to the following condition:

"At the request of Mr. H. Stephen Halloway, this appointment is granted to him on special leave without pay for the sole purpose of enabling him to pay all relevant contributions into the United Nations Joint Staff Pension Fund ... It carries no expectancy of renewal or of conversion to any other type of appointment in the Secretariat of UNIDO."

The complainant signed that letter on 15 February 1995.

14. After some correspondence he wrote on 21 April 1995 to the Director-General contending, among other things, that there had been "ongoing negotiations concerning his next assignment" in UNIDO and that "administrative irregularities" had "undermined" his assignment to Jamaica. He set out his version and maintained that the matter of his next assignment remained unresolved. He sought an answer by 30 April and reserved the right to follow the procedures in Staff Rules 112.02 and 112.03 and Appendix K to the Rules.

15. The Director-General replied on 30 May 1995. He said that his letter of 29 November 1994 had explained the complainant's contractual status in 1994. He reminded the complainant that as a holder of a fixed-term appointment he had no expectations of renewal and that he had got the special leave without pay from 29 October to 28 November 1994 only pending a decision on his candidature for the post in Jamaica and then until 30 April 1995 at his own request and for the purposes of his pension; so he would now have to go.

16. The complainant submitted an appeal to the Joint Appeals Board on 20 July 1995 referring to the Director-General's letter of 30 May 1995.

17. The Board held that his appeal was not receivable. The memorandum of 15 September 1994 had, it held, contained an unambiguous administrative decision: the extension to 28 October 1994 was final unless he got the Kingston appointment. The Board said that the Director-General's decisions of 29 November and 2 December 1994 had amounted to review and confirmed the earlier one as final. In its view he should, in accordance with Rule 112.02(b)(i), have appealed against the decisions in the letters of 29 November and 2 December within sixty days of receiving the one of 2 December. Not having been submitted until 20 July 1995, his appeal was out of time. The Director-General's letter of 30 May 1995 had set off no new time limit since it had contained no new decision: it was mere repetition of the one already taken. Nor were there exceptional circumstances warranting waiver of the time limit. There was in particular no documentary evidence to suggest that negotiations had been continuing after the Director-General's letter of 29 November 1994: the unilateral proposals made by the complainant had not constituted negotiations.

18. The Board recommended that the Director-General "reject the appeal in toto". The Director-General endorsed its recommendation in a memorandum of 16 May to its secretary, who so informed the complainant in a letter of 20 May 1996. That is the decision he impugns. The relief he seeks is that the Tribunal declare the decision not to renew his fixed-term appointment to have been tainted with prejudice and procedural irregularities, to order his reinstatement and to award him consequential payment of salary and allowances for the period of his unpaid leave, together with damages and costs.

19. Rule 112.02 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.

(b)(i) If the staff member wishes to make an appeal against the answer received from the Director-General, the staff member shall submit his or her appeal in writing to the Secretary of the Joint Appeals Board within 60 days from the date of receipt of the answer;

(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 Organisation in accordance with the provisions of its Statute."

20. The complainant argues that he met all the applicable time limits in Rule 112.02 for requesting review and filing an appeal. He reasonably believed, he says, that he was not free to appeal until he got the Director-General's reply of 30 May 1995 to his letter of 21 April asking that his status be resolved through reassignment; and he did appeal within sixty days of getting that reply. He said that for him to have appealed earlier would have prevented the negotiation of a settlement. He submits that several purportedly "final" decisions were superseded by further extensions and that according to the Board's reasoning he would have had to appeal against each of them in order to avoid the time bar. He cites precedent in support of the view that time limits are "not supposed to be a trap or a means of catching out a staff member who

acts in good faith": Judgments 607 (*in re* Verron) under 8 and 1247 (*in re* Kurukulanatha) under 6. He submits that the decision to let him go was contingent on the Organization's being unable to reassign him and therefore did not become final until his contract had in fact ended.

21. The Organization submits in reply that the administrative decision not to extend the complainant's paid appointment was in the letter of 29 November 1994, that the grant of five months' special leave without pay afforded no grounds for his disregarding the time limit for appeal against that decision, and that the letter of 2 December 1994 was mere confirmation of it.

22. In accordance with the defendant's contention the Tribunal accepts the letter of 29 November 1994 as the final administrative decision not to renew the complainant's contract and to end his appointment after the expiry of one month's special unpaid leave. That being so, he should have sought review by the Director-General within the sixty days' time limit set in Rule 112.02(a). The Organization and the Joint Appeals Board have treated the Director-General's reply of 2 December 1994 to the complainant's memorandum of 1 December as the review of that decision. But in that memorandum the complainant did not ask the Director-General to review the decision in the letter of 29 November: he does not even mention it. He talks of the post in Kingston and of the solutions offered by him and says that before taking further action he would like to discuss matters with the Director-General so as to understand his position better.

23. That does not appear to be a request under Rule 112.02(a) for review of an administrative decision. While such a request does not have to take any particular form it should at the very least identify the administrative decision of which review is sought.

24. The conclusion is that the complainant made no request for review by the Director-General within the period of sixty days from notice of the decision in the letter of 29 November 1994 and therefore failed to meet the time limit for the first step in the internal appeal procedure. Nor would it help his case to treat the letter of 2 December as review by the Director-General under Rule 112.02(a). In that case the letter would have set off a time limit of sixty days for him to appeal to the Joint Appeals Board. No matter how his case is looked at he was out of time when he filed an appeal with the Board on 20 July 1995.

25. He is mistaken in his argument that time did not run until he got the Director-General's letter of 30 May 1995. That letter was mere repetition of the decision in the letter of 29 November 1994 and such repetition sets off no new time limit.

26. The separation of the complainant was not contingent on the Organization's failing to find him a new job. The Director-General's letter of 29 November 1994 was clear on that score:

"As we have not received a positive decision on your candidature, I regret to inform you that the Organization has to carry out the usual separation formalities."

And again in his letter of 2 December 1994 the Director-General said:

"the fact remains that you were not selected for the post and there the matter rests. Consequently, a further extension of your appointment cannot be justified."

In his letter of 30 May 1995 the Director-General referred to staff members who were granted appointments for a fixed term and said that such appointments did not carry any expectancy of renewal or of conversion to another type of appointment and that the complainant had been clearly informed of his contractual status by the memorandum of 15 September 1994.

27. The five months' extension of special leave without pay that the complainant was given at his own request did not affect the finality of the decision in the letter of 29 November 1994. The sole purpose of that extension was to enable him to complete five years' contributions to the Pension Fund.

28. The complainant submits that according to the Joint Appeals Board's reasoning he would have had to lodge an appeal against each decision so as to avoid the time bar. That may be true, but it is a consequence of having time limits. Any staff member who has a purportedly final decision and fails to ask within sixty days for review but merely hopes it will be changed runs the risk of being time-barred. In this case some final decisions were changed within the sixty-day period; some were changed after it. But the relevant

decision is the last "final" one that is not changed.

29. The 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.

30. Appendix K to the Staff Rules says under (k):

"An appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) of staff rule 112.2 or 212.2 have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

31. The complainant argues that the Joint Appeals Board was wrong to find no exceptional circumstances warranting waiver of the time limit for appeal. Although such a ruling is discretionary it may not be based on misinformation or on ill-founded conclusions. The complainant says that the Board overlooked several facts, namely that the Director-General had extended his contract on several previous occasions, that the final decision on filling the post in Kingston had still not been taken by the end of 1994, and that he had originally been forced to accept special leave without pay while his assignment was still pending. He points out that although he proposed the continuation of his unpaid leave in lieu of separation he did so under duress and in the expectation of getting alternative employment without a break in service. He submits that it was not unreasonable of him to hope that UNIDO would alter its decision again. He attributes delay in the negotiations to the Organization's failure to complete before he had gone his performance appraisal and investigation into his charges of discriminatory treatment by his former supervisor. He maintains that his allegations of such treatment and of irregularities in procedures are well founded and that he was denied a hearing on the substance of those allegations.

32. There is no reason to find any flaw in the Board's ruling that there were no exceptional circumstances to warrant waiver of the time limit. That ruling rested neither on misinformation nor on ill-founded conclusions.

There was no evidence to suggest that there were any negotiations about paid employment still going on after the Director-General told him in the letter of 2 December 1994 that no further extension of his contract would be justified. There was no substance to his allegation that it was with a view to employing him again that he was put on special leave. The first time he was put on such leave was during the period when the result of his candidature for the Kingston post was unknown. The second time he was granted the leave it was at his own request and so as to enable him to complete five years' contributions to the Pension Fund. It was after considering the other elements too of his contention that the Board decided that none of them warranted waiver.

33. The fact that he has had no hearing on the substance of his allegations is a consequence of his failure to observe the time limit: it affords no grounds for waiver.

34. The complainant failed to observe the time limit for internal appeal and the Joint Appeals Board cannot be faulted for ruling that there were no exceptional circumstances to justify waiver. It follows that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he failed to exhaust the internal means of redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando

James K. Hugessen

A.B. Gardner

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