

## EIGHTY-EIGHTH SESSION

### *In re Ortiz Rodriguez*

#### Judgment 1924

The Administrative Tribunal,

Considering the complaint filed by Mr Jose Luis Ortiz Rodriguez against the United Nations Industrial Development Organization (UNIDO) on 11 November 1998 and corrected on 7 December 1998, UNIDO's reply of 19 March 1999, the complainant's rejoinder of 26 April, his additional submission of 7 June and the Organization's surrejoinder of 5 August 1999;

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 was born on 12 February 1944 and is of Guatemalan nationality. He joined the staff of UNIDO in 1980 as an industrial development officer at grade P.3 and was promoted to grade P.4 in 1985. He served in the Programme for Latin America and the Caribbean of the Country Strategy and Programme Development Division. At the material time he held the post of area programme officer.

In 1995 UNIDO introduced a two-phase staff reduction programme. The first phase consisted of a voluntary separation programme and the second phase, announced by bulletin UNIDO/DGB(M).5 of 16 January 1996, involved non-voluntary measures. A joint body called the Advisory Group on Human Resource Planning was established for the purpose of making recommendations to the Director-General for the retention or separation of staff members. By a memorandum dated 23 February 1996 the new Managing Director of the Country Programmes and Funds Mobilization Division informed the complainant that his post was to be abolished. The Advisory Group carried out a review of his situation but was unable to identify a suitable post for him. Its initial proposal notified to him on 20 May was to recommend to the Director-General that the complainant's appointment be terminated on 21 June 1996.

The complainant having informed the Advisory Group that he would accept a field assignment, the Director of Personnel Services wrote to him on 25 June 1996 telling him that the Director-General had decided to extend his appointment to 31 August so that his application for field posts could be considered. By a memorandum of 30 August 1996, the Director of Personnel Services informed the complainant that his contract was extended for a further two months, but that his appointment would be terminated on 31 October 1996 if no suitable position could be identified for him in the meantime. On 20 September the Director confirmed the termination of his appointment under Staff Regulation 10.3(c) as from 30 October 1996. The complainant received a termination indemnity under Regulation 10.6(a).

On 16 October the complainant asked the Director-General to review his decision but a letter of 11 December 1996 from the Director of Personnel Services informed him that it was maintained. On 10 February 1997 the complainant appealed to the Joint Appeals Board. The Board found in his favour, recommending in its report of 14 July 1998 that he should be reinstated, or alternatively that a mutually acceptable agreement should be negotiated with the complainant, such as his being placed on special leave without pay from the date of separation until the age of fifty-five, with payment by UNIDO of his pension fund and health insurance contributions.

On 18 August 1998 the Director-General addressed a memorandum on the complainant's case to the secretary of the Joint Appeals Board saying "while reinstatement is not currently possible due to the lack of suitable posts, efforts should be made to find an alternative settlement which would be mutually acceptable".

An offer was made to him by the Chief of the Entitlements and Social Security Section in a letter dated 16 October 1998, proposing inter alia that he should be put on special leave without pay from 12 November 1996 to 28 February 1999 when he would reach early retirement age. The complainant replied on 22 October setting out different terms for a settlement. He asked in particular to be put on special leave with full pay from the date of his termination until he could be reinstated or, if reinstatement was not possible, until February 1999. On 29 October 1998 the complainant received a short letter from the same officer saying it was "not possible to reach a settlement that would be mutually acceptable". The complainant therefore filed his complaint impugning the Director-General's decision of 18 August 1998.

**B. The complainant is challenging the termination of his fixed-term contract and UNIDO's refusal to negotiate adequate compensation. He submits that the conclusion of the Joint Appeals Board was that his post had not in effect been abolished and that the Organization's search to find him a suitable post had not been exhaustive. Since it appears from the memorandum of 18 August 1998 that the Director-General accepted the findings of the Board, he should be properly compensated for the harm done to him. Moreover, he was not informed of the true reasons for the termination of his contract.**

In considering remedies open to him he says that heed should be paid to the provisions cited by the Board in its conclusions. As the complainant had served on a series of fixed-term contracts, the Board drew the attention of the Director-General to paragraph 5 of section IV of United Nations General Assembly resolution 37/126 which says that staff members on fixed-term appointments who have completed five years of continuing good service should be given every reasonable consideration for a career appointment. It also referred to UNIDO Staff Regulation 4.2 which provides that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization".

He contends that the negotiations between him and UNIDO following the memorandum of 18 August were not carried out in good faith because the content of the discussions was in no way reflected in the offer he received on 16 October. The "negotiations" consisted of a demand that he accept "what UNIDO had unilaterally offered".

He claims the following relief:

"1. ... to be reinstated retroactively in accordance with the recommendation of the Joint Appeals Board and be placed on Special Leave With Full Pay (SLWFP), effective from the date of the termination of [his] last contract (30 October 1996) until the date when UNIDO places [him] on an equivalent and suitable post, at headquarters or in the field as a UNIDO representative.

2. ... if ... not reinstated on a suitable post, the period on [special leave with full pay] to be from 31 October 1996 until 31 August 2000, when I would have 20 years of [pension] coverage, plus

2.1 Compensation for damages in an amount of at least US\$ 75,000.

2.2 Retain all termination payments including indemnity received in October 1996.

3. During the period of [special leave with full pay] under either plea 1 or 2, UNIDO is to pay retroactively and then currently, [his] full salary (including step-in-grade increases) and other emoluments, including its contribution to [the United Nations Joint Staff Pension Fund], and the Van Breda health insurance, as well as retroactive, current and future allowances such as home leave and education grants.

4. General costs including legal fees, in an amount of US\$ 10,000.

5. Correction of the reasons given for the termination of [his] contract in the letter of the Director of Personnel Services dated 20 September 1996. This correcting letter, which is to be placed in [his] official files and given to [him], should indicate that the decision to terminate [his] contract was unjustified."

He explains that in October 1997 he was assaulted and seriously injured in Guatemala. As he had no international health insurance coverage he had to meet a large proportion of the medical costs he incurred in Guatemala and subsequently in Vienna. As additional relief he asks that UNIDO be ordered "to pay the residual costs" if he is unable to obtain reimbursement through the health insurance for UNIDO staff or the Austrian social security system.

**C. In its reply the Organization holds that in challenging the decision to terminate his contract the**

complainant shows no cause of action, inasmuch as in his letter of 18 August 1998 the Director-General accepted that compensation should be granted to him in lieu of reinstatement. It is clear from the negotiations which followed that the complainant was also prepared to accept compensation. The form the compensation was to take and the amount were the only outstanding issues.

The Organization rejects the complainant's allegation that it refused to negotiate adequate compensation: negotiations took place between 18 August and 16 October 1998. It is true that the parties had not reached a settlement when the time limit for the filing of the complaint with the Tribunal was about to expire. It had offered a settlement that was "serious, complete and equitable" and did not break off negotiations. Some of the complainant's demands could not be accommodated but that is no reason to conclude that UNIDO did not negotiate in good faith.

Under the terms of the letter of 16 October 1998 outlining UNIDO's proposed arrangement the complainant was allowed to keep all the indemnities paid upon termination. It rejects his claim to a "correcting letter", as there is no legal basis for issuing one.

As for his claim to the medical costs related to his accident in Guatemala, the Organization states that the incident happened after his separation from service and that since his request for such costs was not made in his internal appeal, it constitutes a new claim and is, therefore, irreceivable.

D. In his rejoinder the complainant emphasises that at no stage did he abandon his claim to reinstatement. Had he been retroactively reinstated he would subsequently on termination have been entitled to additional benefits provided for under UNIDO bulletins DG/B.201 and DGB(M).78.

The complainant submits that UNIDO abruptly indicated to him in its memorandum of 29 October 1998 that it would not be possible to reach "a mutually acceptable settlement" and thereafter it refused to negotiate an alternative one. He points out that by a letter of 11 December 1998 he accepted the terms of the arrangement proposed in the letter of 16 October. He then had the necessary medical examination, made further enquiries but heard no more from UNIDO.

He clarifies what he is claiming by way of medical expenses and adds that his claim was in fact submitted to the Joint Appeals Board although no comment was made on it in the Board's report.

He explains that because of his hope for reinstatement and pending negotiations, he was unable to respect the deadline of 31 December 1998 for shipping his household goods back to his home country. He sets his resultant loss at 40,000 dollars for which he claims compensation.

In additional comments to his rejoinder the complainant draws attention to a letter dated 26 May 1999 in which UNIDO informed him that examination of the settlement under discussion with him had brought to light that costs related to the United Nations Joint Staff Pension Fund would be higher than foreseen. It therefore preferred that the matter go to the Tribunal.

E. In its surrejoinder the Organization concurs that it was the new information about pension fund costs which led it to prefer a ruling by the Tribunal instead of further negotiating with the complainant, although it still dealt with his enquiries either orally or in writing.

The complainant's claim to additional benefits under the bulletins he cites is a new one. Furthermore, bulletin DG/B.201 established a programme of voluntary separation for which he did not apply, and he was no longer a staff member when bulletin DGB(M).78 entitled "UNIDO Voluntary Separation Programme" was implemented in 1998 and so could not benefit from its terms.

UNIDO rejects his claim to medical expenses as having no foundation in law. His claim to the shipment of his household goods is a new claim and as such is irreceivable.

## CONSIDERATIONS

1. The complainant challenges the termination of his contract and claims reinstatement. The final decision of the Director-General, which is impugned, is dated 18 August 1998. The Director-General said that, since reinstatement was not then possible due to the lack of suitable posts, efforts should be made to find an

alternative settlement which was acceptable to both the complainant and the Organization.

2. On 16 October 1998 the Chief of the Entitlements and Social Security Section made an offer providing for:

- (i) retention of indemnities and entitlements received upon termination on 30 October 1996;
- (ii) a new appointment consisting of special leave without pay from 12 November 1996 to 28 February 1999 when the complainant would reach early retirement age;
- (iii) payment of the complainant's and the Organization's contributions to the pension fund during the period of leave without pay;
- (iv) payment of UNIDO's and the complainant's health insurance contributions for February 1999;
- (v) 85,000 United States dollars compensation.

The settlement was subject to medical clearance.

3. The complainant countered that offer on 22 October 1998 by requiring reinstatement under certain conditions or otherwise:

- (i) special leave with full pay from 31 October 1996 to February 1999, including allowances and other benefits, viz. pensions and health insurance contributions, home leave and education grant;
- (ii) 60,000 dollars in moral damages;
- (iii) 40,000 dollars for shipment of his household goods;
- (iv) 5,000 dollars for legal fees;
- (v) retention of the termination indemnity he had already received.

He added that a medical examination should not be a condition for a settlement.

4. The Organization wrote on 29 October 1998 to say that it was "not possible to reach a settlement that would be mutually acceptable".

5. After filing this complaint on 11 November 1998, the complainant wrote to UNIDO on 26 November to say that he was reconsidering the offer of 16 October and requested that the compensation be increased from 85,000 to 90,000 dollars. The Organization refused the increase in a letter of 9 December 1998 and asked to be informed by 15 December 1998 if the complainant was "considering the offer ... favourably". By a letter of 11 December 1998 he said he was; furthermore, he was prepared to take the medical examination immediately. He understood, he added, that if the offer was withdrawn because the results were unfavourable he would be given an opportunity to consider an alternative offer.

6. In his rejoinder the complainant claims that he accepted UNIDO's offer by his letter of 11 December 1998. He took the medical examination on 18 and 22 December and was informed on 5 January 1999 by the Chief of the Medical Centre that the outcome was satisfactory. On 8 April 1999 he wrote complaining about not hearing from the Organization since his acceptance, on 11 December 1998, of its offer of 16 October and asked if a settlement could be effected before 20 April 1999.

7. In a letter dated 26 May 1999 UNIDO told the complainant that an examination of the settlement had revealed that costs related to the United Nations Joint Staff Pension Fund would be considerably higher than foreseen. The Organization, therefore, preferred the case to be adjudged by the Tribunal.

8. The Organization offered terms to the complainant which were countered by suggestions from him. He says he accepted the offer by his letter of 11 December 1998: the words he used were that he was "considering [it] favourably", and that is exactly what the Organization had asked him to do. He passed the medical examination and confirmed his acceptance clearly in his letter of 8 April 1999. The complainant says

that on 26 May 1999 the Organization withdrew the offer.

**9. In the opinion of the Tribunal, UNIDO should be held to its offer, which was not withdrawn until after it had been accepted.**

**10. Efforts made for the resolution of disputes are to be encouraged and the principle of good faith requires that if an offer is accepted the other party cannot then withdraw from it. The offer of 16 October 1998 should, accordingly, be implemented.**

**11. The complainant, however, is not entitled to his additional claims for moral damages, medical expenses, a corrective letter for his official file and the cost of shipping his household goods.**

**12. He is entitled to a sum for legal costs which the Tribunal fixes at 5,000 dollars.**

## **DECISION**

**For the above reasons,**

**1. The Organization's offer of a settlement dated 16 October 1998 shall be implemented by the Organization.**

**2. The complainant is entitled to 5,000 United States dollars for costs.**

**3. All his other claims are dismissed.**

**In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 3 February 2000.**

**Michel Gentot  
Mella Carroll  
James K. Hugessen**

**Catherine Comtet**