

The Administrative Tribunal,

Considering the complaint filed by Mr N. P. against the United Nations Industrial Development Organization (UNIDO) on 12 July 2001 and corrected on 16 October 2001, UNIDO's reply of 23 January 2002, the complainant's rejoinder of 30 April, and the Organization's surrejoinder of 13 August 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, an Indian national born in 1957, began a one-year appointment with UNIDO as a Technical Adviser at grade L.4 on 4 June 1996. Correspondence leading up to this appointment refers to the fact that he was to be on secondment from the Government of India, but the contract he signed did not. Initially assigned to the Small and Medium Enterprises Branch, in July 1996 he was reassigned to Investment Services. In February 1997 he was granted a one-year extension until 4 June 1998. His Government subsequently agreed to this extension.

Due to budget constraints in 1998, the Organization implemented a Staff Separation and Redeployment Programme. Consequently, the complainant's post was identified for abolition and he was reassigned to a vacant post in the Investment and Technology Promotion Branch. On 27 May 1998 a personnel officer informed the complainant that his appointment would be extended to 31 December 1998, subject to the agreement of his Government, and on 29 May a *note verbale* to this effect was sent to the Permanent Mission of India in Vienna. The *note verbale* explained that due to budget constraints the Organization would be unable to extend the complainant's appointment beyond 31 December 1998. On 1 July the Permanent Mission replied, expressing agreement to the complainant's extension of "deputation". In a follow-up *note verbale* of 20 July, the Government sought elucidation of the reasons why the complainant's appointment could not be extended. In response to this, the Managing Director of the Field Operations and Administration Division met the Permanent Representative of India. In a memorandum of 10 November from the Director *ad interim* of the Staff Development and Management Branch the complainant was informed that UNIDO would not seek an extension of his deputation from the Indian Government beyond 31 December 1998.

On 8 December 1998 the complainant addressed to the Director-General, a request to review that decision. On 4 February 1999 the Director *ad interim* of the Staff Development and Management Branch replied on the Director-General's behalf that "the prerogative to request a secondment or its extension rests exclusively with UNIDO"; therefore, even though the Indian Government would have permitted a longer secondment, the Organization had no obligation to request any extensions. On 27 March 1999 the complainant appealed against this decision before the Joint Appeals Board.

In its report dated 23 March 2001 the Board found that it was UNIDO's prerogative not to extend the complainant's appointment. However, it concluded that as there had been certain "lapses" in procedure it recommended awarding the complainant one month's gross salary. The Director-General rejected the appeal in its entirety on 20 April 2001. That is the impugned decision.

B. The complainant refers to his secondment status as "putative" and points out that there was no mention of it made in his appointment letter, contract extensions or staff performance evaluations. He puts forward several pleas. First, he asserts that the decision was arbitrary and that UNIDO abused its authority and discretion by failing to provide a reason for the non-renewal of his secondment, even though he had made several requests to this effect. He submits that this breaches his rights as set out in the Tribunal's case law.

Furthermore, the Organization overstepped its authority by not taking into consideration the wishes of the Indian Government that his appointment be extended, even when expressly asked to do so. Moreover, it gave "mixed messages" to him and the Indian Government. It said that due to the Organization's budget constraints, no seconded employees would be retained; however, according to the complainant, at least one individual was seconded to UNIDO at the same time.

By failing to explain to him why his appointment was not renewed the Organization denied the complainant due process, as he was unable to properly appeal the decision or defend himself. He submits that there were also procedural errors. He points out that other colleagues were awarded a one-year extension in order to provide time for a selection process to take place and for the incumbent to apply so he, too, should have been allowed to participate in a competitive selection process before his separation took effect. Furthermore, UNIDO applied the wrong Staff Rules series to him and it should not have applied the Director-General's Administrative Instruction No. 10 of 6 November 1998.

He argues that the decision was "based on a mistake of law" and therefore is subject to review by the Tribunal. The complainant contends that he had a legitimate expectation that his contract would be renewed, based on very positive feedback concerning his performance at UNIDO as well as the policy of the Organization at the material time regarding contract renewal.

The complainant asserts that the Administration replaced him with another Indian national who was not selected through a competitive process, who had been placed in the complainant's Branch just before the impugned decision was taken, and who was a relative of the then Permanent Representative of India to UNIDO at Vienna. He states that this created the appearance of, if not an actual, impropriety and he accuses the Organization of "blatant nepotism".

Lastly, he submits that there was breach of equal treatment, and that he has suffered damage to his professional reputation and career prospects.

He asks the Tribunal to order the production of several documents. He makes the following claims for redress: the quashing of the decision not to renew his contract; reinstatement in his former position, including payment of all benefits, salaries and emoluments, with retroactive effect from 31 December 1998 until the date any awards ordered are fully paid; the granting of an additional one-year fixed-term contract with effect from the date of this judgment and with the condition that he be allowed to undergo the established competitive selection process; an award of both moral and compensatory damages; an award for costs; and any other relief that the Tribunal deems reasonable, just, and necessary.

C. The Organization rejects the complainant's assertions that he was not on a true secondment simply because some of the relevant documents did not specify this; as proof it attaches copies of the exchange of correspondence between the Indian Government and UNIDO on this subject. It asserts that his contractual status was always clear and that he could have no doubts about it.

It submits that even though it had no legal obligation to do so, it did provide the complainant with the reasons why his contract was not renewed; thus the Organization did not commit a mistake of law nor did it breach his right to appeal against the decision. The complainant was well aware of the reduction in posts taking place at UNIDO: in fact his own post had been abolished in March 1998 and he had then been transferred to a new one. In addition, the staff at large had been kept informed of changes in the policy regarding extensions of contracts in two separate administrative instructions, one issued on 14 May 1998 and the other on 6 November. More directly, he had been informed in a letter of 4 February 1999, written in response to his request for an administrative review of the decision, that it had been "based on the needs and interests of the Organization, and it should not be seen as a negative reflection on [his] past services". UNIDO had also informed the Indian Government in its *note verbale* dated 29 May 1998 that due to a reduction in budget the complainant's appointment could not be extended beyond 31 December 1998.

UNIDO contends that the complainant errs in arguing that it failed to take into account the wishes of the Indian Government and points out that doing so is not the same as having to abide by these wishes. It is the prerogative of the Director-General to appoint and to extend the contracts of staff, and it is his duty to take such decisions under the principle of independence and in accordance with the Organization's Constitution and Staff Regulations.

The Organization denies that the decision was procedurally flawed and states that the complainant was in a different legal situation from other staff members mentioned in his complaint. His secondment status having been determined by an agreement between UNIDO and the Indian Government and being temporary, he could have no legitimate expectation that his contract would continue to be extended. In addition, the complainant has submitted no evidence to support his allegation that he was prevented from applying for any vacant posts, and the Organization's records show that, although there were posts advertised that were suitable to the complainant's skills and background, he did not apply for any of them. It did not apply the wrong Staff Rules series to him, nor was there anything in Administrative Directive No. 10 that prevented UNIDO from applying it to the complainant.

Rejecting the complainant's allegations that appointing another Indian national was an "impropriety" the Organization notes that he has furnished no proof in this regard. This person had not been recruited on secondment but as a "direct candidate". Additionally, it states that the appointment of the person in question did not breach Staff Rule 203.06 on family relationships, which restricts the appointment of a family member of someone already on staff.

UNIDO contends that there was no breach of equal treatment and it denies that the complainant suffered any damage to his professional reputation. It underscores that the decision was not based on any issue regarding the complainant's performance, which it found to be of a high quality. It notes for the Tribunal that all the documents requested by the complainant have been provided as annexes to its reply.

D. In his rejoinder the complainant refutes that he was on secondment from the Indian Government, and argues that consequently he should have been treated in the same way as other staff members and given a one-year contract extension. He reiterates that there were breaches of due process: he was informed only six weeks before the end of his contract that it would not be renewed, but the Indian Government had been informed six months in advance. Furthermore, UNIDO failed to communicate to him the reasons for the decision.

He states that he did not apply for his own post when it was advertised in January 2000 because he had already filed his appeal and did not believe that, under the circumstances, his application would be treated "fairly". He states that UNIDO "cannot truthfully deny" that it extended the contracts of other seconded staff members, and it even continued hiring new ones after its "separation exercise".

He disagrees that he has received access to all relevant documents and therefore presses his request in this regard.

E. In its surrejoinder the Organization maintains that the complainant was on secondment and points out that the complainant has referred to this status during the internal appeals procedure and again in some of his submissions before the Tribunal. It argues that it has demonstrated to the complainant that its decision not to extend his contract was indeed justified and the reasons were communicated to him.

It refutes his allegations about the secondment status of other staff members and it reiterates that it never prevented him from applying for suitable posts. In that regard, it notes for the Tribunal that it was not the complainant's post that was advertised in January 2000, but rather one for which he would have been suitable.

It presses its other arguments and maintains its position regarding the requested documents.

CONSIDERATIONS

1. The complainant's claims all stem from the position that he has a right to the renewal of his fixed-term contract, which expired on 31 December 1998.
2. The fact that the complainant was on secondment from the Government of India to UNIDO was evident from the exchange of correspondence in the file dating back to 12 June 1995 when the Director-General wrote to the Indian Government asking if the complainant "could be seconded for services with UNIDO".
3. Secondment is a special type of appointment whereby an entity, in this case the Government of India, releases an employee to a receiving agency, UNIDO in this instance, for a fixed period on the basis of an agreement between them.

4. As a general rule, the effect of secondment is to suspend the contractual relationship between the releasing agency and the employee, who retains the right to return to the releasing agency upon expiry of the secondment term without having to seek other employment. During secondment, he is subject to the staff regulations and rules of the receiving agency.

5. As chief administrative officer of the Organization, the Director-General is responsible for the appointment of his staff, including those on secondment. In performing these functions he exercises discretionary authority. Consequently, while he may consult with a releasing agency, such as the Government of India, he is not bound to follow the releasing agency's recommendations concerning matters of personnel policy. In keeping with a firm line of precedent (see for example Judgment 1759) the Tribunal will not interfere with the discretionary decision not to extend an appointment unless it shows certain flaws. The complainant fails to show any of the flaws in the decision that would warrant quashing it.

6. Unlike the expiry of fixed-term appointments of staff members of an organisation, the expiry of the period of appointment of an official under secondment is governed by the terms of the agreement between the releasing and receiving agencies (see Judgment 703). In the present case, although there was no need to explain the expiry of the appointment to the complainant, UNIDO gave its reasons several times both to him and to the Government of India.

7. Although the quality of the complainant's work was never questioned by the Organization, he is not justified in claiming any legitimate expectancy of renewal. In fact, his contracts all include the statement:

"This appointment carries no expectancy of renewal or of conversion to any other type of appointment in any activity of the United Nations Industrial Development Organization."

8. The material on file being sufficient to allow the Tribunal to rule on the case, the complainant's request for the production of documents is not allowed.

9. The complainant's claims for damages are without merit as his contractual relationship with the Government of India did not cease during his appointment with UNIDO. It is the essence of secondment that the official concerned shall return to and resume his employment with the releasing organisation upon expiry of the agreed term. Since he was aware of such terms of employment, the complainant cannot be entitled to moral or compensatory damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet