

108th Session

Judgment No. 2903

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. A. against the United Nations Industrial Development Organization (UNIDO) on 29 October 2008 and corrected on 15 November 2008, UNIDO's reply of 4 February 2009, the complainant's rejoinder dated 23 April and the Organization's surrejoinder of 3 August 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. Facts relevant to this case are to be found in Judgment 2902, also delivered this day, in which the Tribunal ruled on the complainant's first complaint. Suffice it to recall that on 25 November 2005 the complainant, who held the post of Deputy Head of UNIDO's Investment and Technology Promotion Office (ITPO) in Athens, at level L-5, was informed that his post was to be abolished and that his project personnel appointment would not be renewed upon its expiry. Having separated from service on 31 December 2005, he filed an appeal against the decision to abolish his post and not to renew his

appointment, but his appeal was dismissed by the Director-General in October 2007, following which the complainant filed his first complaint with the Tribunal.

Meanwhile, on 31 August 2006, the complainant wrote to the Director of the Human Resource Management Branch, explaining that he had been informed that the Head of the ITPO, Athens, was to separate from service that same day and that he wished to apply for the post thus left vacant. He was advised by a letter of 22 September that candidates for the post would be nominated by the Greek Government and appointed by the Director-General after consultation with the relevant Greek authorities. An exchange of correspondence ensued between the complainant and the Administration, in which he contested this selection procedure.

Having been informed that Mr K. had been appointed Head of the ITPO, Athens, the complainant enquired in a letter of 2 April 2007 to the Director of the Human Resource Management Branch as to the reasons for rejecting his application. He received no response and lodged a second appeal on 27 June 2007, alleging inter alia unequal treatment, breach of the principle of fair competition and breach of the Organization's duty of care. In its report the Joint Appeals Board concluded that the complainant could not avail himself of the internal appeal procedure as he was a former staff member, and that he had failed to identify any administrative decision taken against him. It accordingly rejected his appeal as irreceivable. In a memorandum of 30 July 2008, the Director-General stated that he endorsed those findings and that he had decided to dismiss the appeal as irreceivable. That is the impugned decision.

B. The complainant submits that the rejection of his second appeal on receivability grounds was incorrect and grossly unfair. He argues that the breach of UNIDO's duty of care which he alleged could only become apparent in the months or years that followed his separation from service. He considers that the Organization did take a decision against him, to wit the decision to exclude him from the competition for the post of Head of the ITPO, Athens, though it did not convey that decision to him.

He contends that nomination by the Greek Government was not a prerequisite for appointment to a post in the ITPO, Athens, and points out that he himself was not nominated by the Government when he joined the Office in 1992. He emphasises that nothing in the Agreement between UNIDO and the Greek Government on the establishment of the ITPO in Athens or in the applicable rules prevents the Organization from identifying good candidates for an important project post. On the contrary, it has a duty to do so. In this instance, he was a suitable candidate who had already been recommended by UNIDO in 2003 for the post of Head of the Office. The complainant submits what he considers to be further evidence of the Greek Government's interference in the ITPO staff administration since the filing of his first complaint and he argues that, in nominating Mr K., who simultaneously held Government positions, the Greek Government sought to gain control over the ITPO. He notes that the Organization did not check up on Mr K.'s integrity, a "paramount consideration in the employment of the staff" according to Staff Regulation 3.2, and he denounces what he regards as a "tripartite conspiracy".

The complainant asserts that the selection process for the post of Head of the ITPO, Athens, was "rigged" and breached the principle of fair competition. Staff Regulation 4.2, by virtue of which internal applicants are given priority over external applicants, conferred an unfair advantage on Mr K. as he was the only internal candidate.

He maintains that, having served 13½ years under project personnel appointments, he had acquired long-term status according to Staff Rule 203.02 and was therefore entitled to the same treatment and career expectations as staff members at UNIDO's Headquarters. However, the Organization excluded his application for the post of Head of the ITPO, Athens, and failed to accommodate him in an alternative post. This, he asserts, amounts to general discrimination against staff members serving away from Headquarters. In addition, he submits that he was the victim of persecution, prejudice and discrimination.

The complainant asks the Tribunal to quash the impugned decision and to cancel the appointment of Mr K. to the post of Head of the ITPO, Athens. He also asks to be appointed to that post at level L-5 under a contract of at least one year, with the possibility of extension. In the alternative, he asks the Tribunal to order his appointment to any other acceptable post at level P-5 or L-5 at an “appropriate step” under a contract of at least two years, with the possibility of extension. In the event that no such post is available within three months of the Tribunal’s decision, he seeks compensation in an amount equivalent to five years’ salary and entitlements based on the level and step he held when he was separated from UNIDO. In addition, he claims compensation for the professional and moral injury he suffered, in an amount equivalent to the salary and entitlements at the same level and step from 1 January 2006 until the date of execution of any of the above measures. Lastly, he claims 5,000 euros in costs.

C. In its reply the Organization objects to the receivability of the complaint on the grounds that the Tribunal is open to a former official only if his or her claim is connected with his or her previous contract. In the present case, the complainant alleges that a breach of UNIDO’s duty of care occurred a long time after the expiry of his appointment, but he has not advanced any good reason to depart from the case law according to which a former staff member who applies for a post in an organisation after separation from it may not rely on the rules that governed his appointment and so does not have access to the Tribunal. Besides, the complainant failed to exhaust internal means of redress. He did not write to the Director-General to seek review of the decision before submitting his appeal to the Joint Appeals Board, as prescribed by Staff Rule 212.02(a). His letter of 2 April 2007 was merely a request for information addressed to the Director of the Human Resource Management Branch.

On the merits it submits that, by virtue of the Agreement between UNIDO and the Greek Government on the establishment of the Office and the Guidelines for the Functioning of ITPOs, the post of Head of the Office is subject to a specific recruitment procedure, entailing an

obligation for UNIDO to consult the host Government. This obligation is normally fulfilled by notifying the Government of a forthcoming vacancy and selecting a candidate from a list proposed by the Government. This procedure was explained to the complainant on several occasions and duly followed. The Organization takes the view that the complainant's letter of 31 August 2006 was not an application but merely an expression of interest in a post which was neither advertised nor opened to competition. UNIDO could not select the complainant as he was not nominated by the Greek Government, and it had no obligation to propose his candidacy.

The Organization rejects the allegations of persecution, prejudice, discrimination and conspiracy. At the Tribunal's request, it invited Mr K. to comment on the case, and it produces a statement by the latter which, in its opinion, convincingly rebuts the complainant's allegations against him.

D. In his rejoinder the complainant argues that there was no statutory requirement to include only candidates nominated by the Government in the selection process, emphasising that the post of Head of the ITPO, Athens, is technical rather than political in nature. He avers that his letter of 31 August 2006 cannot be considered as a mere expression of interest in the post of Head of the Office and notes in this respect that all of his communications were headed "Application" for the post in question. He maintains that UNIDO has not provided unequivocal evidence to disprove his allegations of Mr K.'s concurrent employment.

E. In its surrejoinder the Organization responds that the fact that the complainant headed his letters "Application" does not mean that there was in fact a competition in which he could participate. It adds that

when he wrote to the Director of the Human Resource Management Branch on 31 August 2006, the Government had already nominated candidates and the selection process was thus quite advanced.

CONSIDERATIONS

1. The factual background to the present case is detailed in Judgment 2902.

2. It is convenient to recall that the Head of the ITPO, Athens, separated from service on 31 August 2006. By a letter of even date the complainant, a former staff member of the ITPO, stated that he wished to apply for the post. He was advised that specific procedures governed appointments to professional positions, including that of the Head of the Office.

3. Subsequently, there was a lengthy exchange of correspondence in which the complainant sought reassurance that his application would be considered. On 2 April 2007 he wrote to the Director of the Human Resource Management Branch, stating that he had been informed of the appointment of Mr K. as Head of the ITPO, Athens, and requested reasons as to why his application was unsuccessful. He did not receive a reply and on 27 June 2007 he filed an appeal with the Joint Appeals Board.

4. The Board found that, as a former staff member, the complainant was not entitled to use UNIDO's internal appeal procedures. It also found that he had failed to identify any administrative decision that had been taken against him. Based on these two findings, the Board recommended that the appeal be dismissed as irreceivable. The Director-General endorsed that recommendation by a decision of 30 July 2008, which the complainant is now challenging before the Tribunal.

5. The complainant submits first that the rejection of his appeal on receivability grounds was incorrect and unfair. He argues that not

allowing him recourse to the internal appeal procedure deprived him of the ability “to challenge the Organization” after separation. He relies on Judgment 2111, under 6:

“[...] the Tribunal acknowledges that the relationship between officials and international organisations does not come to an end when they cease to work (see in this respect Judgment 986). It must therefore be recognised that former officials who consider that the terms of their contracts of employment or staff regulations have been disregarded, or that the administration has not accorded them the protection and guarantees deriving from their position as international civil servants, may avail themselves of the means of recourse available for the recognition of their rights, and therefore seek redress under Article 13.2 of the Staff Regulations. It should also be noted that in the impugned decision the competent authority did not tell the complainant that her capacity as a former official prevented her from filing an internal complaint [...].”

He also submits that an administrative decision was taken not to accept his application for the position of Head of the ITPO, Athens, but he was not informed that it had been taken. He contends that UNIDO acted wrongfully in the handling of his application.

6. UNIDO replies that the complaint is irreceivable. It argues that the Tribunal only has jurisdiction to hear complaints arising from the non-observance of the terms of an official’s appointment and that former officials do not have recourse to the Tribunal with respect to claims unconnected to their contracts and which arise after their departure from the Organization.

7. It also argues that the complainant’s situation is indistinguishable from that of the complainant in Judgment 2157. In that judgment the Tribunal held that although it was *ratione personae* competent to hear the complaint, it was not competent *ratione materiae* on issues raised by former officials with regard to events arising after separation.

8. Moreover, UNIDO argues that the complaint is irreceivable on the grounds that the complainant did not exhaust internal means of redress, as required by Staff Rule 212.02(a). He should have submitted a letter to the Director-General to seek review. The letter of

2 April 2007 should not be considered as a request for review because it was not addressed to the Director-General. As such, in accordance with Article VII, paragraph 1, of the Tribunal's Statute, the complaint is not receivable and should be dismissed.

9. The Tribunal finds that the complaint is irreceivable. Staff Rule 212.02 provides that a former staff member may bring an internal appeal against administrative decisions in accordance with Staff Regulation 12.1. That latter provision limits the internal appeal procedure to appeals of administrative decisions in relation to the non-observance of the terms of appointment, including all pertinent regulations and rules.

10. In the present case, the complaint arises from circumstances occurring after the complainant's separation from UNIDO and, therefore, is excluded by the Staff Regulations and Rules.

11. Further, although former officials may file complaints with the Tribunal, the Statute limits the Tribunal's jurisdiction to complaints alleging the non-observance of an official's terms of appointment and such provisions of the relevant Staff Regulations applicable to the case.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 November 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