

SEVENTY-FOURTH SESSION

In re PANDIT

Judgment 1227

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Prem Nath Pandit against the United Nations Industrial Development Organization (UNIDO) on 19 March 1992 and corrected on 21 April, the Organization's reply of 26 June, the complainant's rejoinder of 6 August and the UNIDO's surrejoinder of 27 August 1992;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNIDO Staff Regulations 3.1 and 3.6 and UNIDO Staff Rules 206.09, 209.06 and 209.07 and Appendices G and K;

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 citizen who lives in Bombay, worked for UNIDO from 1977 until 1987 under short-term appointments as a consultant for technical co-operation projects. His last assignment was from 26 October to 25 December 1987 on a project in Vietnam for which UNIDO was the executing agency of the United Nations Development Programme (UNDP). An offer of appointment of 10 August from the acting head of the Project Personnel Recruitment Branch at UNIDO headquarters in Vienna stated:

"The duration of your appointment will include your round-trip travel, briefing and debriefing in Vienna if required and the completion of your final report."

The complainant accepted the offer by letter of 20 August and asked for leave to return to Bombay by London "as it is my base for technical information". But UNIDO replied in a telex of 9 September prescribing the following itinerary: Bombay/Vienna/Bangkok/Hanoi/Ho Chi Minh City/Hanoi/Vienna/Bombay; travel to London would, it added, be at the complainant's own expense. One day was allowed for briefing in Vienna and two days for "debriefing" there at the end of his assignment.

The complainant was briefed in Vienna on 26 October 1987 by an official known as the "backstopping officer". A note for the file dated 28 October 1987 said that approval both by the UNDP's office in Hanoi and by UNIDO would be needed if he had to spend time in Bombay. While in Vienna he signed a letter of appointment naming Ho Chi Minh City and Vienna as his official duty stations.

He arrived in Ho Chi Minh City on 2 November and in Hanoi on 10 December and left for Bombay on 16 December. On 21 December he sent headquarters from Bombay a claim to the expenses of "outward travel" stating that he was spending two weeks on official duty in that city. Since no official duty had been authorised for Bombay and his contract was to expire on 25 December, UNIDO asked for an explanation from the UNDP's office in Hanoi. In a telex of 12 January 1988 the UNDP confirmed that the complainant had not been authorised to work in Bombay and that debriefing in Vienna was no longer necessary. His report would be taken to Vienna by UNIDO's chief technical adviser (CTA) for the project, who would be in Bombay in January and would go over the final text with him; for that purpose two days' official duty was authorised.

Meanwhile, on 25 December 1987 he had written to the backstopping officer at headquarters saying that after consultation with the CTA and UNDP staff in Hanoi it had been agreed he should work in Bombay until 30 December; since the CTA was to be in Bombay in January they would travel together to Vienna on 24 January "to finalise the report in consultation with you".

By a telex of 15 January 1988 the UNDP in Hanoi informed UNIDO headquarters that it had been agreed that the rest of his work and his final report might be completed in Bombay; it added that he would get no daily subsistence allowance or extension of contract. A telex of 19 January from UNIDO informed him that there was no need for debriefing in Vienna and he should put in his claim to travel expenses together with the stubs and the unused Bombay/Vienna/Bombay part of his airline tickets. He denies having got that telex. In further correspondence

UNIDO asked for his final report and he asked for leave to go to Vienna.

He turned up in Vienna on 14 March 1988, having travelled on the airline ticket UNIDO had given him. The backstopping officer for the project was on mission. The Organization later docked the cost of the Bombay/Vienna/Bombay part of his ticket from his terminal entitlements, which it had withheld pending receipt of his report.

The UNDP's Resident Representative in Vietnam wrote UNIDO a letter on 11 October 1988 recommending against re-employing him on the grounds that, though his qualifications and experience were adequate, his refusal to submit his report on time "due to a dispute with UNIDO" had held up the drafting of the project document.

On 20 October 1988 the complainant filed an appeal with the Director-General against "unjust alteration of terms of contract offered and irrational suppression of facts by UNIDO staff member". He said that he had been sent no answer to ten letters he had written, got no pay for the two weeks' work in Bombay and two days' debriefing in Vienna and had the cost of his journey to Vienna subtracted from the final payment. The Deputy Director-General answered on 21 November that the Organization had already made any payments required by his letter of appointment and had no choice but to charge him the cost of his trip to Vienna. He enclosed copies of UNIDO's replies to letters which the complainant said he had not received.

On 24 December 1988 the complainant filed a further appeal against "Inappropriate alteration of the terms of contract" and asked for "an impartial inquiry".

In its report of 26 September 1991 on his two appeals the Joint Appeals Board concluded that the decision that he should not go to Vienna for debriefing and the recovery of the costs of the ticket was not in breach of the terms of his appointment. The want of replies to communications he had sent in February and March 1988 about his debriefing might have prompted him to go to Vienna, but on 19 January 1988 he had been told not to.

The Secretary of the Joint Appeals Board submitted the Board's report to the Director-General under cover of a letter of 7 October 1991 quoting paragraphs (t) and (u) of Appendix K of the Staff Rules which read:

"(t) Within one month after the [Board] has forwarded its report, the final decision on the appeal shall be taken by the Director-General and shall be communicated to the staff member, together with a copy of the [Board's] report. ...

(u) To enable staff members to exercise their right to make application to the competent Administrative Tribunal, the Secretary of the Joint Appeals Board shall, at the request of the staff member, communicate to him or her the report of the [Board], if the Director-General has not made a decision upon the report within a period of one month after the date on which the report was submitted to the Director-General."

Also on 7 October 1991 the Director-General wrote by hand on the covering letter from the Secretary of the Board "I agree with the Board's recommendation" and said he wanted his decision to be communicated by the "acting Director-General". In a reply dated 4 December 1991 to a letter from the complainant of 19 November 1991 the Secretary of the Joint Appeals Board sent him a copy of the Board's report. It is that report, which the complainant received on 10 January 1992, that is under challenge.

B. The complainant gives his own account of the case.

He challenges the Appeals Board's finding that his debriefing took place in Hanoi on the grounds that he did most of his work later in Bombay

His letter of 20 August 1987 accepting the appointment set store by debriefing in Vienna and UNIDO did not say no. During a visit to Bombay in February 1988 the CTA gave him a copy of a telex the CTA had sent from Ho Chi Minh City on 16 February 1988 to the Chief of Technical Co-operation Personnel Administration and to the backstopping officer at headquarters. The telex read:

"Please refer telephonic conversation of 15 February. Report received from Dr. Pandit. Kindly issue instructions for his debriefing visit to Vienna as suggested".

The Appeals Board was unable to determine whether that telex had ever been sent, but he spoke of it in later letters

to the Organization, which never denied having received it. UNIDO has removed it from the records. His purpose in visiting Vienna for debriefing was to show how much work he had been doing in Bombay. Besides, only at headquarters could important decisions on the project be taken.

He never got the telex of 19 January 1988 saying that he need not go to Vienna for debriefing. In any case the telex sent by the CTA on 16 February did ask for debriefing in Vienna.

He claims payment of 766 United States dollars for one week's extra work in Bombay, \$400 as two days' subsistence allowance for debriefing in Vienna, the refund of \$1,500 to cover the air fare Bombay/Vienna/Bombay and an award of damages.

C. In its reply UNIDO understands the complainant to be impugning "the decision of 7 October 1991 of the Director-General concurring with the report of the Joint Appeals Board of 26 September 1991". It submits that debriefing in Vienna was not a term of the complainant's appointment. As the offer of appointment of 10 August 1987 said, and indeed as the Joint Appeals Board acknowledged, there was to be such debriefing only if necessary. So the Organization's telex of 19 January 1988 saying that debriefing was no longer required was superfluous anyway. That telex was sent to the complainant's then and present home address in Bombay and presumably he got it. Yet two months later he saw fit to travel to Vienna of his own accord and - or so he wanted - at UNIDO's expense.

A clause in the letter of appointment said that he was subject to the Staff Regulations and Staff Rules governing project personnel. Rule 209.06(b) provides that "Project personnel are responsible for ensuring that they have written authorization before commencing travel". After 10 years of assignments with UNIDO he should have been well aware of that rule.

The Organization denies ever having received the telex of 16 February 1988 from the CTA asking for travel authorization for the complainant. It observes that the absence of replies to his communications of February and March is in any case irrelevant.

He is not entitled to two days' subsistence allowance. According to paragraph (t) of Appendix G to the Staff Rules the allowance is paid only for authorised travel.

UNIDO recovered the cost of the airline ticket for Bombay/Vienna/Bombay in accordance with Rule 206.09(b)(ii), which allows deductions from salary and other emoluments to discharge a debt to the Organization.

In answer to the complainant's claim to one week's pay for work done in Bombay after the expiry of his contract UNIDO maintains that, since the contract ended on 25 December 1987 and no extension beyond that date was ever agreed to, no payment is due. Inferences he may have drawn from contacts with UNDP staff or with the CTA of the project lay no contractual duty on UNIDO. Under Regulations 3.1 and 3.6 the power of appointment belongs to the Director-General or an official acting on his behalf. In any case the telex of 15 January 1988 sent to UNIDO by the UNDP office in Hanoi expressly excluded extension and the payment of subsistence allowance.

UNIDO rejects the claim to damages: it treated him well considering that the CTA had to pick up part of his report in Bombay and the final text came two months late.

D. In his rejoinder the complainant insists that he "has not appealed against the decision of 7 October 1991 of the Director-General". He dwells on several issues of fact, enlarges on his earlier pleas and seeks to refute UNIDO's reply. He points out that if he had not had good reason to go to Bombay on 16 December 1987 he would have stayed in Hanoi to finish his assignment. Although he had asked for a three-week extension of contract to let him work in Bombay he made do with one week as the most the UNDP office in Hanoi would allow. He claims payment for three weeks' work in Bombay instead of the one week he asks for in his complaint since the month's work he did there may be deemed to have been performed under an implied contract of service.

If he had indeed been allowed to go with the CTA to Vienna in January he could have finished his job quickly. UNIDO was wholly to blame for the delay in making over his report. As for its assertion that the CTA had to go to Bombay just to get it, the CTA often went to Bombay on mission anyway and had other things to do there too. Besides, Bombay lies on the air route from Vienna to Vietnam. He presses his claims.

E. In its surrejoinder the Organization maintains that the complaint should be taken as directed against the decision

of 7 October 1991, not the report of the Joint Appeals Board, which is but a recommendation. It takes up several issues of fact and of law raised in the complainant's rejoinder. It rejects his view that the absence of replies to his telexes of 29 February and 11 March 1988 amounted to tacit agreement to his debriefing. Having travelled to Vienna against the instructions in the telex of 19 January 1988, he infringed both Rules 209.06 and 209.07(c) and the letter of appointment. There was no new "implied" contract after expiry of the express one: indeed the telex of 15 January 1988 from the UNDP in Hanoi expressly excluded extension of his assignment.

CONSIDERATIONS:

1. The complainant, an expert in dyestuff technology, was employed by the UNIDO under a series of short-term appointments on technical co-operation projects. By a letter dated 10 August 1987 he was appointed as a consultant for a period of two months with a project in Vietnam. He contends that the Organization is in breach of certain terms of his contract. After submitting his claims he lodged an internal appeal with the Joint Appeals Board, which made no recommendation on his appeal. On 4 December 1991 the Secretary of the Joint Appeals Board sent the complainant a copy of the Board's report dated 26 September 1991 and the Director-General's handwritten comment thereon, dated 7 October, that he agreed with "the Board's recommendation". The complainant got that communication on 10 January 1992. On 19 March 1992 he filed this complaint stating in the complaint form that "the challenged decision" is "Report No. 10 Case No. 91-01 Date: 26 September 1991, UNIDO".

2. In its reply to the complaint the Organization states that it understands the complainant's appeal to lie against the Director-General's decision of 7 October 1991 concurring with the report of the Joint Appeals Board. Yet in his rejoinder the complainant insists that he is not appealing against the Director-General's decision and he points out what he regards as errors and omissions in the Board's report. Since he himself expressly refuses to countenance that his case be treated as an appeal against the Director-General's decision, the Tribunal may deal with it only on the terms which he himself formally states in his complaint.

3. Article VII, paragraph 1, of the Tribunal's Statute reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Paragraph (t) of Appendix K to the UNIDO Staff Rules states:

"Within one month after the [Joint Appeals Board] has forwarded its report, the final decision on the appeal shall be taken by the Director-General and shall be communicated to the staff member, together with a copy of the [Board's] report ...".

The report of the Joint Appeals Board plainly does not constitute a final decision within the meaning of the UNIDO Staff Regulations and Staff Rules. The complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

William Douglas
Mark Fernando
Michel Gentot
A.B. Gardner

