

EIGHTY-FIRST SESSION

In re ZHU

Judgment 1509

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Weiyi Zhu against the United Nations Industrial Development Organization (UNIDO) on 10 June 1995 and corrected on 8 July, UNIDO's reply of 13 October, the complainant's rejoinder of 6 December 1995 and the Organization's surrejoinder of 13 March 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to grant the complainant's application for the hearing of witnesses;

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

A. The complainant, a Chinese citizen born in 1959, joined the staff of the United Nations (UN) in New York on 23 February 1990 on secondment from the Government of China. He was granted a fixed-term appointment for two years as an associate translator at grade P.2. He was assigned to the joint Languages and Documentation Service of the United Nations and UNIDO at Vienna, which came under the administration of UNIDO until 31 March 1995.

By a telex of 17 February 1992 an official in the Office of Human Resources Management (OHRM) of the secretariat of the United Nations told UNIDO that the complainant's appointment was being extended by one year, until 22 February 1993, and that he was no longer on secondment. On 20 February 1992 the complainant agreed to the extension by signing a letter of appointment which put him under the Staff Regulations and Rules of the United Nations.

By a memorandum which he addressed on 6 August 1992 to the Secretary-General of the United Nations and to the Director-

General of UNIDO he tendered his resignation from the UN and UNIDO as at 24 August 1992. In a memorandum dated 7 August a personnel officer of UNIDO told him that the Administration had waived the requirement of one month's notice and accepted his resignation at the date he had proposed.

By a letter of 29 August 1993 the complainant appealed to the UNIDO Joint Appeals Board against what he identified in later correspondence as the Director-General's offer on 18 February 1992 of a one-year extension of appointment.

In its report of 30 March 1995 the Board recommended rejecting his appeal and in a memorandum of 25 April 1995 the Director-General informed its secretary that he endorsed the conclusions of the Board. The complainant got that decision on 4 May, and it is the one he is impugning.

B. The complainant submits that he resigned under duress. He alleges victimisation by his supervisor, flaws in the reporting procedure, misuse of authority, breach of *patere legem quam ipse fecisti*, neglect of essential facts, the drawing of mistaken conclusions from the evidence and undue delay in processing his appeal.

He objects not only to the one-year extension of appointment but also to UNIDO's withholding promotion to P.3 and refusing to reinstate or re-employ him.

He claims reinstatement or re-employment at grade P.3 under a fixed-term contract with the United Nations or UNIDO, and awards of 100,000 United States dollars in damages and of \$110,000 in costs.

C. In its reply UNIDO contends that the Tribunal is not competent to hear the case. As the complainant was a staff member of the secretariat of the United Nations and the decision to extend his appointment by one year was taken by that Organization it is the Administrative Tribunal of the United Nations that has jurisdiction. The fact that the

Joint Appeals Board thought itself competent, without saying why, does not afford access to this Tribunal. As for UNIDO's refusal to re-employ him, the Tribunal again lacks competence because he held no contract with the Organization at the material time.

In subsidiary argument on the merits UNIDO maintains that the one-year extension was lawful under the Staff Regulations and Rules of the United Nations. UNIDO put no pressure on him to resign and he adduces no proof of any. Having freely resigned, he has no right to reinstatement.

D. In his rejoinder the complainant seeks to refute the arguments in UNIDO's reply. He enlarges on his own pleas, presses his claims and applies for temporary employment in the Organization by way of provisional relief.

E. In its surrejoinder the Organization presses its objections to the Tribunal's jurisdiction. It observes that the complainant's application for temporary employment is just the same claim cast in the guise of provisional relief.

CONSIDERATIONS:

1. The complainant joined the staff of the United Nations (UN) in 1990. He was granted a fixed-term appointment for two years from 23 February 1990 as an associate translator into Chinese at grade P.2 and was assigned to the joint Languages and Documentation Service of the United Nations and the United Nations Industrial Development Organization at Vienna. UNIDO, which has its headquarters there, administered the Service.

2. In a report on his performance in 1990-91 his supervisors initially rated it partly satisfactory, but he raised objections, and after discussion they altered their rating in October 1991 to fully satisfactory. On 16 January 1992 the Personnel Administration Section of UNIDO recommended to the Office of Human Resources Management of the United Nations in New York that his appointment be extended by one year. The Office having given its approval on 17 February 1992, he had his appointment extended accordingly, still at P.2.

3. The complainant was given letters of appointment to the staff of the United Nations both for the original fixed term and for the extension. Each of the letters referred to an "appointment in the Secretariat of the United Nations ... subject to the provisions of the Staff Regulations and Staff Rules" and was signed by an official of UNIDO for the "Director of Personnel, on behalf of the Secretary-General" of the United Nations. Both letters provided for termination by the Secretary-General subject to notice and the grant of an indemnity. The complainant signed the standard printed forms, which were addressed to the "Director of Personnel, United Nations".

4. On 6 August 1992 the complainant wrote a memorandum which he addressed both to the Secretary-General of the UN and to the Director-General of UNIDO offering to resign "from UN and UNIDO" at 24 August. In a memorandum of 7 August a personnel officer of UNIDO accepted his offer, waiving the requirement of one month's notice of resignation, and told him that the Office of Human Resources Management would be informed. In a memorandum of 17 August to the Director-General and other officials of UNIDO the complainant said that he had been "pushed to resignation" because seriously flawed management practices, discriminatory treatment, deliberately adverse and delayed performance appraisals and threats of dismissal by his supervisors had ruined his career prospects. He returned to New York and started a three-year course at the Law School of Columbia University.

5. In March 1993 he received his supervisors' report appraising his performance from February 1991 to August 1992, which they again rated fully satisfactory. On 27 May 1993 he wrote to UNIDO asking for reinstatement, explaining that he had reconsidered his position in the light of that appraisal and the circumstances of his resignation. UNIDO answered in a letter of 24 June that although it had carefully reviewed the matter "severe budgetary constraints facing UNIDO at present and in the foreseeable future" were preventing regular recruitment.

6. By a letter of 29 August 1993 the complainant appealed to the Joint Appeals Board of UNIDO seeking redress for the refusal of a two-year extension of appointment and of promotion to grade P.3, which he attributed to serious procedural irregularities and delays in the appraisal of his performance; for being coerced into resignation; and for the refusal of reinstatement.

7. While disputing those three claims on the merits, the Organization raised the preliminary objection that the Board lacked competence on the grounds that the complainant had at all times been on the staff of the United Nations. But in its report of 30 March 1995 the Board declared, without saying why, that it did have competence; it entertained the claims and recommended rejecting them.

8. In a memorandum of 25 April 1995 to the secretary of the Board the Director-General endorsed the Board's recommendation; he said nothing of its ruling on competence though he did express reservations about some of its other conclusions. That is the impugned decision.

9. Article II, paragraph 5, of the Tribunal's Statute provides:

"The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organization approved by the Governing Body which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure."

10. UNIDO pleads that the Tribunal lacks competence on the grounds that the complainant was never a member of its staff. He retorts that the Organization may not raise the issue because the Joint Appeals Board held that it did have competence and the Director-General endorsed its recommendation without expressing any reservations on that matter. He observes that UNIDO has recognised the Tribunal's jurisdiction and that its Staff Regulations were applied to him, particularly in regard to the appraisal of his performance. He concludes that the Tribunal is competent to hear his complaint because, in accordance with Article II(5), he is alleging non-observance of provisions of the Staff Regulations of UNIDO.

11. It was the United Nations that offered him both the appointments which he had while he was at Vienna, and it was to the United Nations that he addressed his acceptance of each offer, thereby concluding a contract of employment with the UN. Indeed that is why he addressed his letter of resignation to the Secretary-General of the UN. True, he addressed it to the Director-General of UNIDO as well, but that was merely in recognition of UNIDO's supervision of his work and did not mean that the UN had ceased to be his employer. In sum, he was an official, not of UNIDO, but of the UN.

12. Article II(5) empowers the Tribunal to hear a complaint which an official of an international organisation that has duly recognised its jurisdiction has filed and which alleges non-observance of either the terms of the official's appointment or the Staff Regulations. As the Tribunal said in Judgment 231 (in re Sletholt), those are "two conditions which in practice coincide". The reference to "Staff Regulations" means those of the organisation of which a complainant is or was an official and does not include the staff regulations of any other.

13. The fact that UNIDO was administering the Languages and Documentation Service made neither the complainant one of its officials nor the Organization a party to the contract of employment. According to his letters of appointment the complainant was subject to the Staff Regulations and Staff Rules of the United Nations, not of UNIDO. And even if in administering the Service UNIDO did apply its own Staff Regulations to the complainant he did not on that account become a member of its staff. So any complaint by him that UNIDO failed to apply, or misapplied, its Staff Regulations to him is not within the Tribunal's competence.

14. The Tribunal's competence is determined by the provisions of its Statute. Neither the ruling by the Joint Appeals Board on its own competence nor the Director-General's endorsement or acquiescence can give the Tribunal jurisdiction which its Statute does not.

15. Insofar as the complainant is objecting to the denial of a two-year extension and of promotion and to being coerced to resign, his claims require consideration of the terms of his appointment to the UN and of the UN Staff Regulations. Allowing them would mean directing the UN, not UNIDO, to grant him the extension and the promotion he wants and to ignore his resignation. The Tribunal lacks competence to entertain his claims and to give any such directions.

16. Lastly, he objects as to UNIDO's refusal of reinstatement. When he made his claim on that score he was neither a serving nor a former official of UNIDO, to which he was no more than an outside applicant for employment and whose decision was in fact a refusal to recruit him. That decision raises no question of non-observance of the terms of appointment of an official of UNIDO, or of its Staff Regulations. So again the Tribunal may not entertain the claim.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.