

## EIGHTY-FIRST SESSION

### *In re* GERY-POCHON

#### Judgment 1544

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Line Rose Marie Gery-Pochon against the United Nations Industrial Development Organization (UNIDO) on 18 July 1995, UNIDO's reply of 23 October, the complainant's rejoinder of 20 November 1995 and the Organization's surrejoinder of 19 February 1996;

Considering Article II, paragraph 5, 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, a French citizen who was born in 1953, joined UNIDO on 13 February 1983. It assigned her as an expert to the Investment Promotion Service at its office in Paris. It gave her a fixed-term appointment, which it extended until 1988. On 1 September 1991 it granted her a new fixed-term appointment for one year as its country director at Harare, in Zimbabwe. On 31 August 1992 its Personnel Administration Section offered her an extension of appointment until 31 December 1993.

By a fax of 13 July 1993 the Director of the Personnel Services Division told her that by way of a reduction in staff the Director-General had decided to end her appointment prematurely. By a fax of 27 July she asked the Director to explain where she stood. The Director sent her an undated fax saying that she was to stop work at 13 August; that since her letter of appointment stated that her service with UNIDO was limited to the post of country director at Harare she could have no reassignment within UNIDO; and that her appointment would end at 15 October. In answer to a request she made on 3 August the Director informed her in a fax of 10 August that the Director-General would hold the date of her departure over to 31 October and terminate her contract on grounds of a reduction of staff in accordance with Staff Regulation 10.3(c).

By a memorandum of 6 September 1993 she informed the Director-General of her intention to appeal against the decision to dismiss her as from 31 October. By a letter of 3 November, which went to her by fax on the 9th, the Director-General upheld his decision.

By a memorandum of 27 December 1993 she appealed to the Joint Appeals Board. In its report of 22 May 1995 the Board concluded that UNIDO dismissed her for a reason other than the one given by the Administration, and deprived her of her right to a hearing. It therefore recommended that the Director-General withdraw the decision to dismiss her, reinstate her in the rights that were hers under her appointment that expired on 31 December 1993 and take a new decision on the renewal of her appointment, to be applied retroactively.

By a fax of 21 June 1995 the Secretary of the Appeals Board conveyed to her a decision taken by the Director-General on 19 June postponing her termination but "confirming" that her appointment would not be renewed. That is the decision she impugns.

By a letter of 6 July she asked the Director-General to reconsider his decision, but he upheld it in a letter of 2 August.

B. The complainant points out that the Joint Appeals Board upheld her appeal on the grounds of misuse of authority and denial of her right to a hearing. She submits that by rescinding the decision to terminate her appointment, the Director-General acknowledged that it was unlawful.

She challenges the lawfulness of the decision of 19 June 1995 which refused renewal of her appointment beyond 31 December 1993, and which purportedly confirmed an earlier one. First, she alleges that until 19 June 1995 the Director-General took no express decision to terminate her appointment. No such decision was ever brought to her notice or mentioned by the Administration in the internal appeal proceedings. The purported confirmation of an

earlier decision that was never taken is mere "sleight of hand" calculated to mask an attempt to take a retroactive decision. A decision to terminate an appointment must be properly notified to the staff member before it can take effect.

Since the decision to terminate her appointment, which was unlawful, has been rescinded, by implication her appointment has been renewed.

Lastly, there was no report on her performance before the decision of 19 June 1995 was taken, and it was not substantiated anyway.

She seeks (1) the quashing of the decision of 19 June 1995 purporting to confirm the non-renewal of her appointment beyond 31 December 1993; (2) payment of her salary, the post adjustment allowance at the rate applying in France, and other allowances from 1 November 1993 to the date of the judgment, plus interest; (3) reinstatement under a two-year appointment or, failing that, three years' pay made up as set out in (2) above; (4) moral damages; (5) 120,000 French francs, in material damages; and (6) 25,000 francs in costs.

C. In its reply UNIDO asserts that it paid the complainant all her entitlements up to the expiry of her appointment on 31 December 1993 and that she accepted the payment.

It submits that she had no reason to expect renewal: the letter of appointment sent to her on 31 August 1992 said that it carried no expectancy of renewal and was confined to her post in Zimbabwe.

In his letter of 19 June 1995 the Director-General informed her that the postponement of dismissal made no difference to the decision on non-renewal. Though separate, the two decisions were complementary. It would be contrary to give notice of termination only to contemplate renewal of contract a few months later.

The Tribunal held in Judgment 1317 (in re Amira) that it might in exceptional cases order reinstatement of someone who had held a fixed-term appointment; but there are no exceptional circumstances here.

D. In her rejoinder the complainant maintains that until 19 June 1995 UNIDO took no express decision not to renew her contract. It would have been absurd for the Director-General to decide when her appointment had already been terminated. Accepting her entitlements under the contract which expired on 31 December 1993 did not mean acquiescence in the decision of 19 June 1995.

E. In its surrejoinder UNIDO repeats that the complainant had no legitimate expectancy of a renewal. Her supervisors had warned her early in 1993 that her appointment would not be extended.

#### CONSIDERATIONS:

1. The complainant served on the staff of UNIDO from 1983 to 1988. She rejoined UNIDO as its country director in Zimbabwe on 1 September 1991. She was granted a fixed-term appointment for one year and had it extended to 31 December 1993. The nub of her complaint is that it was not renewed thereafter.

2. Her letter of appointment stipulated that what she had was a "project personnel appointment"; that it could be terminated before the date of expiry under the Staff Rules and Regulations by giving one month's notice in writing; that it was "limited to service as UNIDO Country Director in Zimbabwe"; and that it carried "no expectancy of renewal or of conversion to any other type of appointment". UNIDO Staff Rules 203.02 and 210.02 applicable to project personnel also provide that a fixed-term appointment carries no expectancy of renewal and ends, without notice, at the date of expiry stated in the contract.

3. The complainant's supervisor was the Resident Representative of the United Nations Development Programme (UNDP) in Zimbabwe. Her work was undoubtedly satisfactory. On 19 May 1992 the Representative appraised her performance as excellent and recommended extending her appointment. Later, when the UNDP asked UNIDO to suggest from among women on its staff candidates for posts as resident representative and co-ordinator the Personnel Administration Section put her name forward. And again, late in July 1993, the Director of the Personnel Services Division confirmed that there was no adverse report on her performance.

4. In October 1992 the UNDP appointed a new Resident Representative in Zimbabwe. The complainant did not get on well with him, and on 29 April 1993 asked the Director-General to consider assigning her elsewhere because of

what she called an "unhealthy climate of work".

5. On 21 June 1993 the Director-General issued a bulletin announcing reduction of staff. One of the guidelines of the exercise - said the bulletin - was that only if voluntary measures proved insufficient would he eventually be resorting to termination, and staff might apply by 21 July 1993 for "agreed termination". Even before that date, however, the Director-General decided to withdraw the complainant from Zimbabwe, and she was so informed by a fax from the Director of the Personnel Services Division dated 13 July 1993, which gave her one month to finish her work in that country. Having protested that that was not long enough, she was given until 15 October. By a fax of 10 August 1993 the Director told her that her appointment would end at 31 October 1993.

6. In a memorandum of 27 December 1993 the complainant appealed against that decision to the Joint Appeals Board claiming reinstatement and compensation. She contended that termination was for reasons other than staff reduction and that the premature termination deprived her of a reasoned decision on the matter of renewal of her appointment. She claimed compensation for the damage to her career prospects as well as for the losses which she had incurred because her precipitate recall from Zimbabwe had required the urgent sale of a motor car and household effects.

7. In her appeal the complainant cited a memorandum which the Director of the Area Programmes Division wrote on 24 May 1993 to the Director of the Personnel Services Division. The Director of Area Programmes asked headquarters to recall her from Zimbabwe by 4 July 1993 and suggested repatriating her and putting her on leave until the end of her contract. She pointed out that in a letter dated 18 June 1993 to the Director-General she had said that on 24 May the Director of Area Programmes had telephoned her in Zimbabwe to give her a confidential warning of official notice from headquarters that her contract would not be renewed after December 1993 and to tell her that because of conflict with the Representative she was to leave by 1 July 1993. Her letter went on to say that she had asked the Director "whether the Director-General was fully informed and concurred with these decisions", but that she had got no straight answer, and that she had not received the official notice he had warned her of. The Director-General - said the complainant - did not reply. Instead there came her recall and the termination of her appointment.

8. In reply to her appeal UNIDO told the Joint Appeals Board that the Director of the Area Programmes Division "was not authorised to act or make statements on behalf of the Director-General on personnel matters, [and] therefore anything he allegedly said in this regard carries no weight".

9. In its report of 22 May 1995 the Board concluded that the termination was not in conformity with the criteria and guidelines for staff reduction but had been ordered for other reasons; by failing to tell her of those other reasons UNIDO had denied her right of defence and committed misuse of authority. The Board recommended reinstating her up to the date of expiry of her appointment with the "right to obtain from the Organization a substantiated decision on the renewal or non-renewal of her appointment beyond 31 December 1993, which she may then challenge, if she so wishes". But the Board added that it had

"no authority to challenge the discretion of the Director-General regarding the outcome of a decision on renewal/non-renewal, and cannot therefore, at this stage, make assumptions to determine whether [she] deserves additional compensation based on her claim to have had a justified expectancy of renewal."

The Board concluded that the termination and her recall before the expiry of her contract together constituted "a decision with negative effect on the staff member, involving loss of professional credibility", but she had suffered no loss of career prospects, only of earnings and pension rights up to 31 December 1993.

10. By a letter of 19 June 1995 the Director-General informed her that he was reversing the decision to terminate her appointment and she would receive all payments due up to 31 December 1993, but he was confirming his decision to grant no further extension. That is the decision she is impugning.

11. A firm line of precedent has it that though a fixed-term appointment ends automatically at the scheduled date of expiry the staff member must be told the true grounds for non-renewal and given reasonable notice of it even if the contract does not expressly so require.

12. Though the Director of the Area Programmes Division did make her aware, in his telephone conversation with her on 24 May 1993, that non-renewal was being considered, no definite decision was communicated to her then or

later. In any event UNIDO has denied his authority to take or even communicate any such decision.

13. UNIDO contends that the Director-General's decision, taken in July 1993, to terminate the complainant's appointment at 15 October 1993 implied a complementary one not to renew it after 31 December 1993: he would not have given notice of termination in October and still contemplated renewal beyond the end of the year. But even if the Tribunal were to accept that contention any such implied decision was flawed because she was not told the true reasons for non-renewal. In fact, as the Appeals Board held, "by terminating the appointment prior to its expiry, the Administration avoided the necessity of having to decide on the renewal or non-renewal of the [complainant's] expiring appointment". UNIDO failed to take any decision on non-renewal. That being so, it cannot succeed either in its further plea that the impugned decision of 19 June 1995 must stand because it confirmed an earlier decision: there was no valid earlier decision. The conclusion is that UNIDO did not at any time make and communicate a valid decision not to renew the complainant's appointment. The impugned decision must therefore be quashed.

14. Reinstatement would not be appropriate in the circumstances of the case. The complainant's appointment was limited to service in Zimbabwe. From the beginning of 1993 she knew that relations with her first-level supervisor were so unsatisfactory that she could not continue to serve in that country; indeed she herself had made several requests for transfer. She could have had no expectancy of renewal of her appointment in Zimbabwe. She is, however, entitled to damages for the material and moral injury she suffered on account of the premature termination of her appointment and the failure to give her due notice of non-renewal. The Tribunal sets the amount at 25,000 dollars. She is also entitled to a sum in costs.

#### DECISION:

For the above reasons,

1. The Director-General's decision of 19 June 1995 is quashed insofar as it refused to renew the complainant's appointment.
2. UNIDO shall pay the complainant 25,000 United States dollars in material and moral damages.
3. It shall pay her 3,000 dollars in costs.
4. Her other claims are 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