

## NINETY-FIRST SESSION

***In re Fialkowski***

**Judgment No. 2072**

The Administrative Tribunal,

Considering the complaint filed by Mr Konrad Rafal Fialkowski against the United Nations Industrial Development Organization (UNIDO) on 18 August 2000, UNIDO's reply of 28 November 2000, the complainant's rejoinder of 4 January 2001, and the Organization's surrejoinder of 30 March 2001;

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 Polish national born in 1939, joined the staff of UNIDO on 1 January 1982. By the time his service with the Organization ended in 1997 he was at grade P.5.

A deficit in its budget led the Organization to establish a staff reduction programme and by bulletin UNIDO/DG/B.201 of 20 November 1995 the Director-General announced a programme for voluntary separation that offered incentives to certain staff members to consider agreed separation or early retirement. Staff members aged 54 and above were encouraged to consider taking early retirement (paragraph 5 of the bulletin). Paragraph 13 read as follows:

"If they so wish, and subject to the age limits for employment, staff members opting for agreed termination will be considered for re-employment by UNIDO under staff rule 103.03, in the event of an improvement in the financial situation of the Organization and the availability of a suitable post."

On the same day the Director of Personnel Services wrote to the complainant, asking him "to seriously consider" applying for early retirement. On 23 January 1996, in a memorandum to that Director, the complainant accepted the conditions on early retirement offered by the Organization. By a letter of 14 February 1996 the Director informed the complainant that under the voluntary staff separation programme his fixed-term appointment would terminate in accordance with Staff Regulation 10.3 (c) with effect from 31 December 1997 and that he would be granted special leave without pay for 21 months, from 1 April 1996 to 31 December 1997. On 20 February 1996 the complainant confirmed his agreement by signing the letter of 14 February 1996. During the time he was on special leave without pay the complainant continued to provide his services as Scientific Editor to a UNIDO publication.

On 10 December 1997 the complainant asked the Director-General, on the basis of paragraph 13 of the bulletin, to re-employ him on a two-year contract up to retirement age. The Director of Personnel Services replied to him on 8 January 1998 that since the Organization was still reducing the number of staff the possibility of re-employment was rather low. On 20 February the complainant requested the Director-General to review "this administrative decision" and on 20 March the same Director replied on the Director-General's behalf that the situation was the same.

On 31 March the complainant requested authorisation to appeal directly to the Tribunal but the Administration denied it on 17 April. Therefore, on 7 May 1998 he filed his appeal with the Joint Appeals Board against the decision denying consideration of his request for re-employment in disregard of paragraph 13 of the bulletin and of Staff Rule 103.12(a)(ii) which says that when appointment is to be made preference is given to staff members

already in the service of the Organization. In its report of 18 May 2000 the Board recommended that the appeal be rejected. It had concluded that the Organization did not have an obligation under paragraph 13 of the bulletin to re-employ the complainant at the end of his special leave without pay: the financial situation had not improved, there was no availability of a suitable post, and there was no evidence that the complainant's rights had been violated under Staff Rule 103.12 (a) (ii). On 15 June 2000 the Officer-in-Charge of UNIDO endorsed the recommendation. On 19 June that decision was forwarded to the complainant by the Alternate Secretary of the Board as the "Director-General's decision", and is the one under challenge.

B. The complainant points out that in a memorandum of 14 December 1995 to the Director of Personnel Services, applying for voluntary separation under the terms of bulletin DG/B.201, he had expressly asked for the inclusion of a clause regarding re-employment under paragraph 13 to be added to the conditions governing his special leave without pay. Therefore, this memorandum constitutes "irrefutable evidence" that his acceptance of separation was voluntary "in form only" and had "been obtained under duress and force of circumstance".

He contends that at the end of his special leave without pay UNIDO denied him the opportunity to return to active duty by depriving him of consideration of his candidature. Citing the Tribunal's case law he says he should have had priority over outside candidates when UNIDO was seeking to fill vacancies and that such is made clear by Staff Rule 103.12(a)(ii). He was also denied the opportunity to be compared with other candidates as recruitment went ahead without any vacancy notices being issued.

Further, the Organization had a commitment to consider his return to active duty under paragraph 13 of the bulletin. But it failed to recognise that the three conditions for re-employment contained therein had been met. He fulfilled the first, regarding age limits, since he was below the mandatory retirement age when he sought re-employment. The other two required that there be an improvement in the financial situation of the Organization and that a suitable post be available: those conditions were met. Vacancies were available. Indeed there is "incontrovertible evidence" that new staff members had been and were being recruited by UNIDO. He points to the Joint Appeals Board's finding that external recruitment had taken place at the time when he was seeking re-employment. Consequently, the Organization breached paragraph 13.

He submits that the Joint Appeals Board erred in its finding and disregarded evidence. It made no reference to "denial of consideration" which constituted the principal claim put forth in his appeal. It found that the services he rendered as Scientific Editor were offered on a voluntary basis, even though he had written to the Director-General stating that he would claim remuneration for his work. Moreover, he says it was up to the Administration to finalise his working relationship in writing. Its failure to do so did not release it from the obligation to remunerate him for the work performed.

Finally, he accuses the Organization of lacking good faith and intentionally delaying the Joint Appeals Board proceedings.

The complainant asks the Tribunal to: (1) quash the decision upholding "the denial of consideration of [his] return to active duty" and award him compensation of 111,000 United States dollars; (2) declare "invalid" the statement made by the Joint Appeals Board that his services as Scientific Editor were voluntarily rendered and order payment of remuneration of 93,000 dollars for these services; (3) award him compensation of 30,000 dollars for "obstruction of the course of justice"; and (4) award him 50,000 dollars in moral damages.

C. In its reply the Organization states that the complainant applied for voluntary separation in accordance with UNIDO Staff Regulation 10.3 (c) and the voluntary separation programme outlined in bulletin DG/B.201. He was treated in a way that fully safeguarded his rights as a staff member and the conditions of his separation were "the most generous and advantageous" the Organization could grant. Furthermore, it maintains that paragraph 13 of the bulletin was properly applied to the complainant's case; this paragraph does not guarantee re-employment for employees opting for agreed termination, it establishes the conditions under which UNIDO will "consider" them for re-employment. At the time the complainant wished to be re-employed there had been no improvement in the financial situation of UNIDO nor was there a position suitable to his skills or experience. Additionally, the complainant did not apply for P.5-level vacancies that were advertised between April 1996 and December 1997. The complainant's reliance on the case law is misplaced. He has not shown that the Organization breached any rule regarding re-employment or the filling of vacancies; it was not in a "legal position" to provide the complainant with an appointment.

UNIDO refutes the complainant's claim to remuneration for his services as Scientific Editor: he has not proven that the Organization had agreed to pay him. In fact, it could not have agreed to that when he was on special leave without pay. Furthermore, he undertook this work at his own initiative.

Regarding the complainant's claim to compensation for obstruction of justice, it states that there were no intentional delays in handling his appeal, nor has he produced any evidence of this. Any delays were a result of the increased number of cases due to the staff reduction exercise in 1996.

D. In his rejoinder the complainant contends that the Organization attempted to modify the substance of his case by reformulating the issues. He submits that the case law he relies on is indeed relevant: it is linked to "the abolition of a post and the search for another post". He notes that UNIDO did not deny in its reply that it was engaged in recruitment during the time period he wished to be re-employed. It issued contracts to two former colleagues that had similar professional profiles as the complainant. He denies intending to perform his work as Scientific Editor on a voluntary basis and he "explicitly expressed" that fact in his letter to the Director-General dated 10 December 1997. He presses his accusation regarding the intentional delay in dealing with his appeal.

E. In its surrejoinder UNIDO maintains that neither paragraph 13 of the bulletin nor Staff Rule 103.03 (referred to therein) create an obligation for it to re-employ a former staff member. The complainant did not apply for any advertised vacancy during his special leave without pay and the Organization was under no obligation to compare his qualifications with those of candidates who submitted applications. It recalls that the complainant chose to take advantage of the separation agreement and he cannot now contest it. The Organization reiterates that the case law cited by the complainant is of no relevance because he was not in the same situation in fact or in law as the complainants in the cases he refers to. As for his argument regarding the contracts issued to two of his former colleagues, UNIDO reiterates that the complainant did not apply for the posts in question. Furthermore, the appointments were made in February and March 1998, when he was no longer a staff member.

It denies the accusations that it has intentionally delayed the proceedings before the Joint Appeals Board.

## CONSIDERATIONS

1. The complainant joined UNIDO on 1 January 1982. As from 1 May 1982 he was awarded a fixed-term appointment for two years which was renewed regularly until UNIDO decided to implement a programme for voluntary separation as a means of reducing its expenditure. In a memorandum of 14 December 1995 the complainant sought special leave without pay until the end of 1997 and expressed his intention of resuming service whenever that became possible. He agreed to take part in the voluntary programme having negotiated the terms of his acceptance with Personnel Services. By a decision of 14 February 1996 the Director of Personnel Services set 31 December 1997 as the date on which the complainant's appointment would terminate. He would be placed on special leave without pay as from 1 April 1996 for a period of twenty-one months during which he would continue to pay his contributions to the United Nations Joint Staff Pension Fund and the sickness insurance scheme administered by the insurance brokers Van Breda. On 20 February 1996 the complainant confirmed his acceptance and undertook not to challenge his separation or seek any further compensation.

2. On 10 December 1997 he wrote a letter to the Director-General explaining that he had been "forced to leave the Organization". He also sought a two-year contract to bring him up to retirement age, citing paragraph 13 of the Director-General's bulletin UNIDO/DG/B.201 of 20 November 1995 in support of his request. After a negative reply from the Director of Personnel Services, he asked the Director-General to reconsider his decision, but was informed by a letter of 20 March 1998 that UNIDO was still in financial straits, which considerably limited the possibility of its re-employing former staff. The complainant therefore asked for leave to take his case straight to the Tribunal. His request having been refused, he filed an appeal with the Joint Appeals Board on 7 May 1998.

3. The Board did not report until 18 May 2000. It recommended that the Director-General reject the appeal, on the grounds that paragraph 13 of the bulletin laid no obligation on the Organization to re-employ the complainant at the end of his special leave without pay. Indeed two of the conditions stipulated therein had not been met, and there was no evidence of any breach of Staff Rule 103.12(a)(ii) which says that in filling vacancies preference must be given to staff members already in the service of the Organization. By a decision of 15 June 2000, notified to the complainant on 19 June 2000 by the Alternate Secretary of the Board, his appeal was rejected on the basis of that

recommendation.

4. In his complaint, the complainant seeks the quashing of the decision to uphold UNIDO's refusal to consider his return to active service at the end of his special leave without pay. He claims 111,000 United States dollars in compensation for the injury the decision caused him. He also asks the Tribunal to declare "invalid" the Board's assertion that his services as Scientific Editor to a UNIDO publication while he was on special leave were voluntary, and to award him 93,000 dollars for his editorial work. Lastly, he claims 30,000 dollars in compensation for UNIDO's obstruction of the course of justice, and 50,000 dollars in moral damages.

5. In challenging the refusal to consider his request for re-employment, the complainant cites two provisions - paragraph 13 of the bulletin which says:

"If they so wish, and subject to the age limits for employment, staff members opting for agreed termination will be considered for re-employment by UNIDO under staff rule 103.03, in the event of an improvement in the financial situation of the Organization and the availability of a suitable post."

and Rule 103.12(a)(ii) under which, in filling vacancies preference is normally given "where qualifications are equal, to staff members already in the service of the Organization and staff members in other organizations participating in the United Nations common system".

6. As to paragraph 13 of the bulletin, it is plain on the evidence that despite staff retrenchment, UNIDO's financial position had not so improved as to allow it to offer new posts to staff members who had left under the voluntary programme; and that the complainant applied for none of the five P.5 posts that fell vacant between April 1996 and December 1997, since none of them really matched his profile, as the Board rightly pointed out. Consequently, the Organization cannot be taken to task for not considering him for posts for which he had not applied, or for not offering him another one while it was still in financial straits. The conclusion is that the complainant's plea of breach of paragraph 13 of the bulletin must fail.

7. So too must his plea of breach of Rule 103.12(a)(ii). The Organization did fill a number of posts in 1998, some of which might have suited him, but it was not obliged to inform him about such vacancies, since from 1 January 1998 the complainant was no longer a staff member. As to the posts at the complainant's level filled before that date, they were advertised but the complainant either could not or did not apply, as already noted. Lastly, there is no evidence of any post of his level being filled between 10 December 1997, when he asked to be re-employed and 1 January 1998, when he left the Organization.

8. The complainant stresses - and he may well be justified in doing so - that the nub of the case he put to both the Director-General and the Appeals Board was the following: UNIDO overlooked him in considering candidates for the vacant posts, and that denial of prior consideration is the basis of his pleas and of his main claim to compensation. However, the Tribunal can find no fault with the conclusion reached by the Board - and by UNIDO, which acted on its recommendations - that the Organization was not bound to re-employ the complainant at the end of his special leave. In so concluding the Organization did not overlook the complainant's pleas; and there is no evidence that UNIDO never intended to honour its obligation under paragraph 13 of the bulletin, as the complainant alleges.

9. As for the complainant's editorial work while he was on special leave without pay, the Joint Appeals Board rightly noted that he undertook it voluntarily, and however great its scientific worth, there exists no statement by UNIDO that it was to be remunerated. In the absence of any agreement and, it would appear, any formal request from the complainant before he gave up the editing work, there are no grounds for ordering the Organization to compensate him for a job he volunteered to do.

10. It is nonetheless true that the appeal procedure was inordinately long: the case was before the Committee for two years, yet it was not a very difficult one and it needed to be settled promptly in view of the nature of the decision to be taken and the complainant's age. In these circumstances, the delay in resolving it amounts to negligence warranting compensation. The Tribunal therefore considers that the complainant is entitled to redress, and it sets the amount at 3,000 United States dollars.

11. Since his complaint partly succeeds, he is also entitled to costs, which the Tribunal sets at 1,000 dollars.

## DECISION

For the above reasons,

1. UNIDO shall pay the complainant 3,000 United States dollars in compensation.
2. It shall pay him 1,000 dollars in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet