

SEVENTY-EIGHTH SESSION

In re SCHIMMEL

Judgment 1380

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sheila Ruby Schimmel against the United Nations Industrial Development Organization (UNIDO) on 2 February 1994 and corrected on 10 February, UNIDO's reply of 29 April, the complainant's rejoinder of 7 August and the Organization's surrejoinder of 13 October 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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 citizen of the United Kingdom, joined the staff of UNIDO at its headquarters in Vienna in July 1970 at grade G.4. She was promoted to G.5 in 1972, to G.6 in 1975 and to G.7 in 1983. Until 31 December 1993 she held a post as a research budget assistant in the Field Representation and Co-ordination Section of the Special Measures and Activities Division (SMA) of the Department for Programme and Project Development (PPD). At that date she ceased to have active status and was put on special leave with full pay in accordance with Staff Rule 107.02. She has a permanent appointment up to the end of January 1996, the month in which she will reach sixty, the compulsory age of retirement.

(1) On 15 April 1991 the Director of SMA signed a report appraising her performance in 1989-90 in which he said, among other things, that she had "surpassed the expected results". The Deputy Director-General in charge of PPD countersigned the report on 15 May. The complainant signed it on 16 May, albeit with reservations.

On 8 August she received an altered version of the report in which a new page had been glued on top of another so as to cover the Director's and her own comments. The new text bore the comment, made by an earlier Director of SMA on 22 July, that she had "partly achieved the expected results" and another signature added by the Deputy Director-General on 24 July. On 26 August she wrote an inter-office memorandum in accordance with UNIDO Staff Rule 112.02 to the Director-General asking him to review the decision and to uphold the original version of the report.

In a memorandum of 6 September an "officer-in-charge" explained to her that the original version had been wrong in that the official who had written it had become Director only after the end of the period the report covered; the later version bore the signature of the official who had been her supervisor at the material time.

By a memorandum of 29 October 1991 she lodged an appeal with the Joint Appeals Board under Rule 112.02 against the memorandum of 6 September and the alteration of the report.

In its report dated 23 September 1993 the Board held that changing part of the original version of the report had been "an illegal act" and recommended restoring that version. Its secretary sent the Director-General the text of its report under cover of a letter dated 24 September 1993. In an undated note handwritten at the foot of the page the Director-General said: "I accept the [Board's] recommendation but note with concern the unjustified statements regarding 'illegal procedures followed by Personnel', as they acted in line with the rules for performance reports". That decision, which the secretary sent the complainant on 10 November, is the first of the two she is impugning.

(2) As from 1 January 1990 a "personnel action" form that the Organization approved on 25 May 1990 changed the numbers of the complainant's post and of the "allotment account" it came under; according to an entry in the form under "Remarks" the changes were being made "for administrative purposes only". In a memorandum of 28 October 1991 to the Director-General she said that she had first seen a copy of that form "on reviewing my personal files on 16 October 1991"; the effect was to change the number of her post from one corresponding to grade G.8 to one that went with G.7; that was in breach of her right to "career development" under Regulations 4.2 and 4.3; and she wanted the decision to be reversed.

In a letter of 13 November 1991 the Director-General answered that since she herself held grade G.7 there was no need for her to be on a budgetary position graded G.8; her post - which on 23 March 1990 the Organization had upgraded to G.8 after a desk audit - was still at that grade; and the "temporary exchange of budgetary posts" was neither against the rules nor harmful to her prospects of transfer and promotion. Being dissatisfied, she lodged a second appeal on 20 December 1991 with the Joint Appeals Board.

In its report of 14 September 1993 the Board held that, though the Organization had said that the grading of the complainant's post was still G.8 and the temporary reallocation of the post did not harm her career, "the purpose of the classification may be negated by a continuing absence of the budgetary provision for the post" at that grade. The Board therefore recommended restoring the G.8 budget provision for the post.

Its secretary sent the Director-General its report by a letter of even date on which the Director-General wrote "Reinstatement of G.8 post could be made once a post is available in Mrs. Schimmel's department". The secretary so informed the complainant by another memorandum of 10 November, and that is the second decision she is challenging.

B. The complainant submits, as to the first decision, that by granting her neither promotion nor transfer and by making no proper assessment of her performance UNIDO has barred the fair development of her career. Because of retrenchment of staff she had to leave active service at the end of 1993 and the "correction" of her career was abandoned. The Organization took three years to correct her report but even then the Director-General denied that the Personnel Services Division had acted unlawfully.

As to the second decision she impugns, she pleads breach of the rules on promotion. She cites rulings by the Administrative Tribunal of the United Nations which she sees as bearing out her case. The Director-General's acceptance of the Board's recommendations came too late for her to get promotion to grade G.8 since she left at the end of 1993. Rule 106.12(b) provides:

"... a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

UNIDO paid her special post allowance at grade G.8 from July 1991 until December 1993. But since she took on the higher duties in October 1988 she should under 106.12(b) have been paid the allowance as from the fourth month thereafter, i.e. February 1989.

The Director-General failed to reply to her appeals within the time limit of 60 days in Rule 112.02(b)(ii).

The complainant claims the equivalent of two years' net salary, i.e. 1,473,794 schillings, in material and moral damages for each of the two impugned decisions. She also claims 449,985 schillings in special post allowance from 1 February 1989 to 31 January 1996 and 250 United States dollars in costs.

C. In its reply UNIDO observes that she did not leave its employ at the end of 1993: she is still a member of its staff. It explains its policy for the retrenchment of staff. It observes that she is on special leave on terms which she herself proposed in a memorandum of 1 December 1993 to the Director of the Personnel Services Division and which UNIDO agreed to. She has challenged neither the terms of her agreement with the Organization nor the payment she has received thereunder. So any claim to further payment is irreceivable under Article VII(1) of the Tribunal's Statute because she has failed to exhaust the internal means of redress.

The Director-General's decision on her first appeal was executed on 10 November 1993, when the Chief of the Personnel Administration Section had the improper report and correspondence about it removed from her personal file. Staff retrenchment having left her untouched, her claim to compensation - which the Appeals Board did not recommend - must fail.

Since she made no claim to damages in her second appeal, that claim too is irreceivable under Article VII(1) of the Statute. In any event being on a post at a higher level than the grade she held did not confer any right to promotion upon her: the grant of promotion is discretionary.

So too is the grant of special post allowance under Rule 106.12. Besides, since the complainant agreed to UNIDO's offer of special post allowance for a period of 30 months, from 1 July 1991 to 31 December 1993, she may not now seek payment for a longer period.

The Organization points out that Rule 112.02(b)(ii) applies only to cases where "no reply has been received from the Director-General within 60 days". But the complainant heard from him in time on both her appeals.

D. In her rejoinder the complainant maintains that UNIDO forced her out under the guise of retrenchment. She was a victim of "gender/national/racial prejudices" which the success of her internal appeals aggravated. She says that only under duress did she agree to take special leave. The reason why she made no claim to moral damages in her second internal appeal was that she expected UNIDO to straighten things out quickly.

E. In its surrejoinder UNIDO points out that the complainant's dismissal was part of a reduction in staff and came after negotiations between her and the Administration. In her memorandum of 1 December 1993 she had made the suggestion, and the Director of the Personnel Services Division agreed to it in a memorandum of 7 December. She is estopped from challenging a binding agreement. In any event she has failed to exhaust the means of internal appeal. Lastly, UNIDO repeats that her claim to damages is at present irreceivable.

CONSIDERATIONS:

1. The complainant has combined in a single complaint appeals against two final decisions.
2. The first appeal arises out of a report appraising her performance in the period from 1 January 1989 to 31 December 1990, of which one page had been put on top of another so as to conceal the original text. In the internal appeals procedure she sought the reinstatement of the original text and a grant of compensation. In its report of 23 September 1993 the Joint Appeals Board recommended considering the original report signed by the complainant to be the only valid one and reinstating it. The Board found no grounds for compensation and did not recommend granting her any. The Director-General endorsed the Board's recommendation and the secretary of the Board so informed her by a letter dated 10 November 1993, which is the first decision impugned.
3. Her second appeal is against a "personnel action" form numbered P5 PPD/116/90 and dated 25 May 1990. It was stated to be issued "for administrative purposes only" and it recorded a change in the number of her post and the allotment account that it came under. The post she then held was graded G.8 whereas the allocated post was only G.7. In a report of 14 September 1993 the Joint Appeals Board recommended asking the Personnel Services Division "to take appropriate measures with a view to reinstating the G.8 level budgeted post to the post currently encumbered" by the complainant. The Director-General endorsed the recommendation in the following terms:

"Reinstatement of G.8 post could be made once a post is available in Mrs. Schimmel's department."

The secretary of the Board so informed her on 10 November 1993, and that is the second decision impugned.
4. The Director-General's decision on her first appeal was complied with on 10 November 1993. An entry bearing that date in the complainant's "personal status file" states that a copy of the original page 4 of her performance appraisal report for 1989-90 is reinstated and the altered page removed.
5. On the subject of her second appeal the Organization says that events overtook the implementation of the Director-General's decision to reinstate the G.8 post. At the time a process of reorganisation was taking place in the secretariat. After discussions with the Personnel Services Division the complainant sent a memorandum dated 1 December 1993 to the Director of the Division setting out the conditions under which she was "prepared to accept" special leave with pay from 1 January 1994 to 31 January 1996. The Director sent her a memorandum in reply dated 7 December 1993 agreeing to grant her up to 31 January 1996 - the month in which she would reach the compulsory retirement age - special leave with full pay; dependency allowance for her husband; salary increments in accordance with UNIDO Staff Rule 106.02; "special post allowance to the level G-7, Step VIII" for the thirty months from 1 July 1991 to 31 December 1993; and an end-of-service benefit amounting to some 344,000 schillings. Of those payments 90 per cent were to be made at the beginning of the period of special leave and the rest at the end, on 31 January 1996, together with compensation for the sixty days' annual leave by then accrued. She was to complete her part of the "final clearance certificate" so that payment could be made.
6. The Organization having made the payments agreed on, the complainant's status will until 31 January 1996 be

that of a staff member on special leave with full pay. So the Director-General's decision, which was to reinstate her post at G.8 once one was available at that grade in her department, was indeed overtaken by her agreeing to the terms for putting her on special leave with full pay. It then became clearly superfluous to reinstate the G.8 post.

7. The complainant contends that during the staff reduction exercise the administration told her, for undeclared reasons, that she would have to accept separation. But she has not in fact been separated. If she is objecting to being put on special leave with pay, she has not impugned the agreement to grant it to her, and the large sums provided for therein have been paid. The Tribunal is satisfied that she freely entered into the agreement, which was made on the terms set out in her own memorandum of 1 December 1993.

8. In respect of her first appeal the complainant claims an award of damages equivalent to two years' net annual pay at grade G.7, step XII, or 1,473,794 schillings. In her second appeal she alleges failure to carry out the Director-General's decision and claims the same sum - 1,473,794 schillings - plus 449,985 schillings by way of special post allowance from 1 February 1989 to 31 January 1996 and 250 United States dollars in costs.

9. She argues that because of the alteration of her performance appraisal report and the removal of the G.8 post UNIDO obstructed the development of her career in the form of promotion, transfer, post reinstatement and the grant of the applicable allowances. The Organization replies that her reinstatement in her old post would not necessarily have brought her promotion. Though recommended for promotion to G.8 in 1986, 1990 and 1992, she did not obtain it. She addressed to the Appointment and Promotion Panel in 1985, 1986, 1990, 1991 and 1992 objections to her being denied such promotion. The Panel consistently replied that re-examination of her case did not reveal any omissions so significant as to afford grounds for changing its mind.

10. As for her losing the possibility of transfer or reinstatement the Organization points out that the Joint Appeals Board said in the context of her second appeal that the temporary reallocation of her post did not in principle prejudice the development of her career.

11. As to her first appeal the Board found no grounds for granting her compensation. She did not suffer any injury which hampered her career and is therefore not entitled to any award of damages. The mere fact that a decision was initially flawed does not suffice to warrant awarding her damages for moral injury. The flaw was corrected on the Board's recommendation. To be entitled to moral damages she must show that she has suffered more severe injury than that which an improper decision ordinarily causes. She has not done so to the Tribunal's satisfaction.

12. As regards her second appeal, she sought no award of damages for injury from the Joint Appeals Board. The claim is irreceivable under Article VII(1) of the Tribunal's Statute because she has not exhausted the internal means of appeal.

13. One other matter which she raises deserves comment. She says that the Administration failed to observe the time limit of sixty days when it replied to the Joint Appeals Board on both appeals by letters dated 24 February 1992, in breach of Rule 112.02(b)(ii). This provision has no application to the Organization's reply in the internal appeals procedure: the time limit of sixty days applies to the Director-General's reply to a written request under Rule 112.02(a) for review of an administrative decision.

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 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

