

EIGHTY-FOURTH SESSION

In re Masens

Judgment 1700

The Administrative Tribunal,

Considering the complaint filed by Miss Liana Yvonne Masens against the United Nations Industrial Development Organization (UNIDO) on 19 July 1996 and corrected on 1 October, UNIDO's reply of 9 January 1997, the complainant's rejoinder of 20 March and the Organization's surrejoinder of 25 June 1997;

Considering Articles II, paragraph 5, and VII 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 States who was born in 1934, joined UNIDO on 1 January 1968 on probation as a junior administrative assistant at grade G.5. On 1 August 1968 she got a permanent appointment. In 1970 UNIDO promoted her to grade P.1 as an assistant officer for industrial development. By the time of her retirement, on 31 August 1994, she was an industrial development officer and held grade P.4.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division informed her that to save money UNIDO had to reduce staff and was likely to be ending her appointment in the "near future". In a memorandum of 6 October she asked the Director to state the criteria for retrenchment and said she would accept redeployment.

In a memorandum dated 2 November 1993 the Director notified to her the Director-General's decision under Staff Rule 107.02(a) to put her on special leave with full pay from 1 January 1994 until the due date of her retirement, the end of August 1994. In a memorandum also of 2 November to the Director-General she claimed financial compensation for chronic deafness in one ear, improper treatment by another staff member, discrimination and mistakes in the reckoning of pension entitlements. In a letter dated 15 November the Director-General replied that he had taken "due note" of her "concerns" and assured her that it was the need to clear posts by the end of the biennium that had led to his decision to put her on special leave with full pay. In a letter of 14 December 1993 she told him she was declining the Director's offer of 2 November on financial grounds and because of the "strange" circumstances in which it had been made.

By a memorandum of 13 January 1994 she told the Director-General that she was claiming the "right to appeal" against his decision though she would wait until 28 January for a reply from the Director of Personnel Services to questions she had put in her letter of 14 December 1993. After speaking to her the Director replied in a letter dated 11 February 1994. In a letter to him of 1 March she said that she was still waiting for a reply from the Director-General to her appeal and again sought review of the decision to put her on special leave. In a letter of 22 April the Director gave her information about her financial position and entitlements; as to her appeal he merely referred her to the relevant provisions in the rules.

On 27 April she saw the Director-General. The same day she sent him a note saying she had not agreed to go on special leave with full pay and asking for a "golden handshake" instead. By a letter of 18 January 1995 she reminded him that she was still waiting for a reply. By a letter of 28 February he said he had reviewed the issues once again and was satisfied that his decision to grant her special leave with full pay had neither caused her financial loss nor impaired her entitlements.

By a letter of 27 April 1995 to the secretary of the Joint Appeals Board she appealed against the letter of 28 February 1995. In its report of 25 March 1996 the Board recommended rejecting her appeal as time-barred.

In a letter of 23 April 1996 the secretary of the Joint Appeals Board sent her a copy of the Director-General's decision of 19 April 1996 to endorse the Board's recommendation. That is the decision she is impugning.

B. The complainant submits that the rejection of her internal claims was unlawful. She alleges mistakes of fact and law. On 13 January 1994 she had sought review of the decision of 15 November 1993 within the 60-day time limit set in Staff Rule 112.02(a). The Director-General's decision to see her on 27 April 1994 was a positive reply within the meaning of 112.02(b)(ii) to her request for review and it was proper for her to await his final decision of 28 February 1995 before lodging her appeal.

On the merits she contends that the decision to put her on special leave with pay without her consent offended against Rule 107.02(a), which says that such leave may be granted, not imposed. Besides, none of the conditions for the grant of special leave was met. Though the lack of money that the Director-General pleaded might indeed have warranted termination, he failed to abolish her post and gave her duties to someone else. Her offer to accept redeployment having been brushed aside, she alleges financial and moral injury.

She seeks payment of the full termination indemnity she would have got if she had not been on special leave with pay; three years' pay in damages for UNIDO's unlawful treatment of her "over eleven years"; inclusion of the Tribunal's decision in her "updated and completed" personnel file; and an award of costs.

C. In its reply UNIDO contends that her complaint is irreceivable because she failed to exhaust the available internal remedies in time. The memorandum of 2 November 1993 was the administrative decision challengeable within the time limit of 60 days under 112.02(a). The Organization denies that she sought review of that decision in her memorandum of 13 January 1994 and that there were exceptional circumstances warranting waiver of the time limit. It never tried to mislead her: it drew her attention in its letter of 22 April 1994 to the rules on appeals.

On the merits it observes that leave with full pay was the course "least harmful" to her that the Director-General might choose since it safeguarded her entitlements until retirement. Though its attempts to redeploy her failed, she suffered no financial loss. Her allegations of discriminatory treatment are unfounded: UNIDO treated her more generously than others. If she had had improper treatment for years, why had she spurned the grievance procedure?

D. In her rejoinder the complainant presses her case. Although the rules neither spell out what form a request for review must take nor how the Administration should treat such request, negotiations were going on with the Director-General and showed that her objections to the decision were being entertained and she had to await a final decision. She challenges the Organization's pleas on the merits and insists that the imposition of special leave was a misuse of authority.

E. In its surrejoinder UNIDO denies that "endless communications" from the complainant meant that "negotiations" were going on: it never gave her to understand that it might reverse the decision of 2 November 1993. Nor had it any grounds for doing so.

CONSIDERATIONS

1. After working for the United Nations in New York for two years the complainant moved to UNIDO in Vienna on 1 January 1968 at grade G.5. She reached grade P.4 on 1 April 1982 and the compulsory age of retirement on 31 August 1994.

2. On 4 October 1993 the Director of the Personnel Services Division informed her that she was one of several staff members whose appointments were likely to be terminated, the financial difficulties the Organization was undergoing at that time making it necessary to reduce staff. She replied on 6 October 1993 that she was willing to be redeployed.

3. On 2 November the Director wrote to say that the Director-General had decided not to terminate her appointment but to grant her special leave with full pay from 1 January to the end of August 1994. The Director set out a schedule of payments due. His memorandum crossed one from the complainant of the

same date in which she raised a number of matters under the heading "Financial Damages Claim against UNIDO".

4. She received a reply dated 15 November 1993 from the Director-General referring to the letter of 2 November from the Director of Personnel Services and assuring her that the grant of special leave with full pay until she retired was "based on the need to vacate a certain number of posts prior to the end of the biennium". It was an alternative to termination and took into account her long service and closeness to retirement.

5. On 14 December 1993 she wrote to the Director-General to say that the payments offered in the letter of 2 November were "not enough" and she could not accept. She asked for compensation for loss of hearing in her left ear and said she awaited "an early and just decision". By a memorandum dated 13 January 1994 to the Director-General she claimed, pending a satisfactory response by 28 January 1994 from the Director of Personnel Services to the points raised in her letter of 14 December 1993, and "within the deadline established", the right to request review of his administrative decision "according to Staff Rule 212.02" (properly 112.02). That memorandum was not answered.

6. On 11 February 1994 the Director dealt with the queries she had raised orally and in her letters of 2 November and 14 December 1993, including the reasons for putting her on special leave with full pay. By a letter dated 1 March 1994 she contested his explanations and pointed out that she still did not have a reply to her memorandum of 13 January 1994.

7. Another letter dated 22 April 1994 from the Director referring to her letter of 1 March set out further detailed explanations.

8. On 27 April she saw the Director-General, having first drafted a note containing the points she was going to discuss with him. She wrote on 14 May 1994 to thank him and to remind him that he had said he would be writing to her within a few days.

9. She says that she then saw the Director-General's personal assistant on several occasions to discuss a settlement.

10. On 2 January 1995 she wrote in reply to enquiries from the secretary of the Pension Committee about her pension status.

11. The secretary replied on 13 January to say that administrative action would be based on the information provided by the Director of Personnel Services in his letters of 11 February and 22 April 1994.

12. On 18 January 1995 the complainant wrote to the Director-General referring to her meeting with him on 27 April 1994 and to talks she had had with his personal assistant on 15 December 1994 pending his final decision about outstanding financial entitlements. She hoped for a "positive reply" from him.

13. The Director-General replied on 28 February 1995 that he had reviewed her points about the circumstances of her retirement. He referred to his letter of 15 November 1993. He said that, having reviewed her case once more, he was still satisfied that her special leave with full pay had not caused her any financial loss and that all her entitlements under the Staff Regulations and Rules had been granted. He urged her to provide instructions about payment of her pension.

14. On 27 April 1995 she filed a statement of appeal against the Director-General's decision in his letter of 28 February 1995.

15. In a report dated 25 March 1996 the Joint Appeals Board held that her appeal was not receivable. It took the view that what she was contesting was her being put on special leave with full pay and that it was the memorandum dated 2 November 1993 from the Director of Personnel Services which was the administrative decision within the meaning of Staff Rule 112.01. The period of 60 days mentioned in Rule 112.02(a) had, in the Board's view, expired on 2 January 1994. The Board saw the complainant's memorandum of 13 January 1994 as a request by her for review of the "contested and other decisions". It concluded that she should have submitted her appeal, in accordance with Staff Rule 112.02(b)(ii), no later than ninety days after 14 December 1993. Though she had "continued to contest the decision in subsequent

letters and memoranda", the correspondence had "essentially covered financial implications resulting from past incidents or administrative decisions neither directly related nor made objects of a separate Appeal". A staff member could not dodge a deadline by describing objections as "preliminary" or as "subject" to a satisfactory reply to a claim.

16. The Board also considered whether there were exceptional circumstances justifying waiver of the time limit in accordance with Appendix K to the Staff Rules. On that score its conclusions were as follows:

"46. For this purpose, the Board not only reviewed the case file in view of any impediments which, in fairness to the Appellant, could have justified such waiver, but also whether severe financial or other implications and the legal merits of the claim may have warranted such exceptional measure.

47. Considering that the Board was not competent to address various claims for compensation or redress which the Appellant raised in the course of contesting the decision under appeal;

48. - considering further that, financially, the contested decision did not affect the earnings and pension status of the Appellant until the date of mandatory retirement;

49. - considering finally, that in the view of the Board, the administration's decision of not pursuing the Appellant's request for an agreed termination with corresponding indemnities, was not obviously illegal;

50. The Board unanimously agreed that it could not waive the normal time requirements provided for appeals and concluded that it should not entertain deliberations on the main legal issues, namely whether for placing the Appellant on special leave with full pay, the administration would have needed her consent."

The Board concluded that the complainant's appeal was not receivable under Appendix K(k) of the Staff Rules and it recommended rejecting it.

17. By a memorandum dated 19 April 1996 the Director-General endorsed the recommendation and the complainant was so informed by a letter dated 23 April. That is the decision impugned.

18. Rule 112.02(a) provides:

"A serving or former member who wishes to appeal an administrative decision ... shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

19. UNIDO contends that the memorandum of 2 November 1993 from the Director of Personnel Services to the complainant constituted an "administrative decision" within the meaning of 112.01(a) and that she did not seek review within the time limit of 60 days in 112.02(a) but went on addressing abundant correspondence to the Organization until 1995. It submits that it never gave her to understand that the decision to grant her special leave with full pay might be changed; the purport of all subsequent correspondence and meetings with her was that the decision was "adopted, maintained and executed". The reason why the correspondence between her and the Organization went on until 1995 was that she refused its explanations, clarifications and replies and pressed her claims in repetitive and voluminous letters. The 60 days elapsed on 1 January 1994. Her letter of 14 December 1993 to the Director-General contained no request for review of the decision of 2 November 1993 to put her on special leave with full pay.

20. The complainant argues that she had 60 days from 15 November 1993 in which to request review under Rule 112.02(a) and that she did so on 13 January 1994. She then had, she says, another 60 days, i.e. until 13 March, in which to await a decision. Having received no reply, she was entitled to submit an appeal within 30 days or go to the Tribunal within 90. Meanwhile, however, the Director of Personnel Services replied directly to some of her claims and the Director-General to her request for review by inviting her to see him and discuss her claims. She saw him on 27 April 1994. She contends that her request for review of the decision to put her on special leave was in time, but she awaited the Director-General's final decision of 28 February 1995 before filing her appeal. She therefore met all the time limits under Rule 112.02 for requesting review and for filing an appeal.

21. She argues that the memorandum of 2 November 1993 did not give her notice of special leave but rather confirmed that informal discussions had taken place with her about a proposal to place her on such leave

without offering her the alternatives of reassignment or termination with indemnities. She says it was the letter of 15 November 1993 which contained the Director-General's decision on how he was going to proceed. In her rejoinder she submits that "a review of the decision [to place her on special leave with full pay] was undertaken which only became final with the Director-General's decision of 28 February 1995".

22. An appeal against an administrative decision which is challengeable under Rule 112.01(a) is one "in which the staff member alleges the non-observance of his or her terms of appointment, including all pertinent regulations and rules ...". What the complainant contested was a decision to put her on special leave. The Tribunal is satisfied that it was first notified to her in the memorandum of 2 November 1993 from the Director of Personnel Services, which said:

"I wish to assure you that the content of your memorandum was indeed taken into consideration before the Director-General decided not to terminate your permanent appointment, but to grant you special leave with full pay in accordance with Staff Rule 107.02(a), effective 1 January 1994 until 30 August 1994, the month during which you reach mandatory retirement age.

In practical terms this would mean that you cease your activities as a staff member of the Organization effective 31 December 1993 ..."

There is nothing tentative about that decision, which was taken by the Director-General. The decisions in the letters of 15 November 1993 and 28 February 1995 were repetitions of the one in the memorandum of 2 November 1993 and set off no new time limit.

23. The time limit began once the complainant received the memorandum of 2 November 1993 and expired 60 days after she received it. Since she failed to request review by the Director-General within the time limit of 60 days, she did not meet the first requirement of the internal appeal process under Rule 112.02(a). Her letter of 13 January 1994, which she headed "Appeals - Rule 212.02 - relating to proposed separation", was too late. So the time limit for her filing an appeal with the Joint Appeals Board does not come into play.

24. Appendix K to the Staff Rules says in paragraph (k):

"An appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) of staff rule 112.2 ... have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

25. In answer to the ruling by the Joint Appeals Board that there were no exceptional circumstances warranting waiver of the time limit the complainant contends that her plea of continuing discriminatory treatment was within its competence and that it was disingenuous in concluding that putting her on the special leave with pay had no adverse financial consequences: she was thereby denied termination indemnities and agreed termination. Currency fluctuations affected her pension. She was subjected to "unnecessary frustration and embarrassment". The Board ignored the issue as to "whether the termination indemnities in the Staff Rules could be legally circumvented after a decision had been made to dispense with the complainant's services by forcing her on special leave". She says that the Board ignored too her explanation of delay in submissions. She was never advised that her appeal had to be filed by a particular date to preserve her cause of action. Since UNIDO had once before altered its decision on termination it was not unreasonable for her to conclude that the Director-General might again alter his approach.

26. The Organization replies that the Board found no exceptional circumstances. The matters raised by the complainant - says the defendant - relate not to exceptional circumstances but rather to substantive issues such as her termination indemnities, pension entitlements, special leave, agreed termination and compensation claims. In its submission she has not proved any exceptional circumstances. There is no evidence of any circumstances beyond her control which prevented her from making a request for a review or filing an appeal in time.

27. Discretion to determine whether there are exceptional circumstances is vested in the Joint Appeals Board. It is the Board's decision which is relevant, and the question does not arise of substituting the Tribunal's opinion for the Board's. Only if there is some fatal flaw in the Board's decision may the Tribunal intervene. No such flaw exists. The Board explained its reasons adequately. It reviewed the whole case and reached its conclusion accordingly. There was no factor which prevented the complainant from making in time her initial request for review.

28. The explanation may be, as she has said herself, that she was negotiating without help from counsel and

that no-one warned her of the time limit. But staff members are expected to know their rights: ignorance of the law is no excuse. No more legitimate is her plea that, since UNIDO had altered its decision before, it was not unreasonable for her to conclude that the Director-General would do so again. Any staff member who receives a final decision must be alert enough to ask for review within the time limit so as to preserve the cause of action and to follow up the request, if necessary, with a timely internal appeal. That should not prevent negotiation. Indeed a staff member can negotiate from a position of greater strength in the knowledge that there is no time bar.

29. The complainant failed to initiate the internal appeal procedure with a timely request for review, and the Joint Appeals Board was not at fault in concluding that no exceptional circumstances warranted waiver of the time limit. It follows that the complaint is irreceivable.

DECISION

For the above reasons

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner