

SEVENTY-NINTH SESSION

In re PEREZ-VENERO

Judgment 1448

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alejandro Perez-Venero against the United Nations Industrial Development Organization (UNIDO) on 29 March 1994 and corrected on 6 July, UNIDO's reply of 6 October 1994, the complainant's rejoinder of 10 January 1995 and the Organization's surrejoinder of 20 April 1995;

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 Panamanian who was born in 1941, joined UNIDO in 1973 on a grade P.2 appointment. He was promoted to grade P.3 in 1977 and given a permanent appointment in June 1987. In 1993 he was transferred to the Coordinating Unit of the Industrial Development Decade for Africa.

In 1993 UNIDO started a procedure for the retrenchment of staff. The criteria and arrangements were explained in two bulletins issued by the Director-General on 21 June and 23 August 1993.

In a notice of 1 October 1993 the Personnel Services Division informed the staff that the action so far taken, which had led to "56 voluntary separations", was not enough to balance the books and that as a last resort terminations would therefore prove necessary.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division warned the complainant that he was one of those who were likely to have to go shortly. Citing the Director-General's bulletin of 21 June 1993, he said that the decision had been taken after "thorough review of priority programmes and staffing requirements".

On 1 November 1993 the complainant sent the Director-General a memorandum asking for review of the decision but he got no answer.

In October and November 1993 he had talks with a personnel officer about the arrangements for separation and financial compensation. At a meeting on 5 November with that officer he signed a memorandum bearing the same date, headed "Request for agreed termination" and claiming payment of termination indemnity equivalent to 12 months' salary in accordance with Staff Regulation 10.6(a); an additional indemnity of 50 per cent of the above amount; special leave with full pay from 1 January to 31 March 1994; special leave without pay from 1 April 1994 to 31 March 1996, during which the Organization would continue to contribute for him to the health insurance scheme and pension fund; and three months' salary in lieu of notice.

On 10 November 1993 the personnel officer gave him a letter bearing that date in which the Director of the Personnel Services Division notified the Director-General's decision to terminate his appointment on the terms in the memorandum of 5 November. A rider said that he agreed not to challenge the termination. He signed at the personnel officer's request.

B. The complainant pleads flaws in the procedure for the retrenchment of staff. No specific criteria were published or applied. The Administration showed bias against him and never informed him of the reasons for termination. He met none of the conditions in the Director-General's bulletin of 21 June 1993. The Organization failed to let him have equal treatment and in 1993 the Director-General had deliberately shifted him to a more "vulnerable" post.

Secondly, he contends that by not trying to reassign him to another post the Organization infringed his rights under the rules and his contract of service. It ought to have offered him reappointment once restructuring was over, especially since the programme he had been working on had priority.

Thirdly, he alleges breach of the rule of geographical distribution: there is now not a single Panamanian on the staff of UNIDO.

Lastly, he contends that he did not give consent freely but signed the "agreed termination" only under duress. The personnel officer threatened to cut his indemnity if he refused to sign, failed to alert him to his rights and pushed him into making up his mind. It was deceitful of the Administration to add to its letter of 10 November 1993 the rider that he would not challenge the decision. He submits that the letter has no force in law.

He seeks material damages equivalent to the earnings he would have had up to the age of 60, plus UNIDO's contributions to the health insurance scheme and pension fund; an award of moral damages in the amount of 50,000 United States dollars if his first claim is met, and of 200,000 dollars if it is not; an award of 50,000 dollars in damages for moral injury to his wife; damages for moral injury to his children in the form of a letter of apology from the Director-General; a letter of recommendation from the Organization; the filing of his latest performance appraisal; a letter from UNIDO explaining the requirements for a repatriation grant; another letter setting out his removal entitlements, which he is to conserve for one year after he reaches the age of 60; a letter setting out his own and his wife's entitlements to the cost of travel by air to Panama City up to the same deadline; the right while he is on special leave without pay to take on any work not in conflict with UNIDO's interests; and costs.

C. In its reply the Organization submits that the complaint is not receivable. In its view the complainant is treating his memorandum of 1 November 1993 as an internal appeal against its own one of 4 October. Its memorandum was not a challengeable final decision, and he never challenged the final decision in its letter of 10 November; indeed there was a rider to that letter saying he would not.

The Organization argues, on the merits, that the procedure for staff retrenchment was quite lawful. All its competent bodies approved that way of balancing the books and at the same time doing what was expected of it. The choice of the complainant was not arbitrary but met specific criteria that the Director-General had announced, for example in the bulletins of 21 June and 23 August 1993. Since the criteria applied to everyone alike the complainant may not plead breach of equality. The memorandum of 4 October was sent to 55 other officials. So the Director-General acted in exercise of the authority vested in him by Article 11(3) of the Organization's Constitution, which makes him responsible for the appointment, organisation and functioning of the staff.

The complainant must have known the circumstances in which he came to be dismissed. Besides, the duty to give reasons applies first and foremost to unilateral decisions, not to cases where termination is agreed under Regulation 10.3(b).

The Organization did try to place him but found no suitable post. Besides, he should have raised the issue before signing the letter of 10 November. There was no reason to put him on another post after the restructuring since what he was doing had not been considered to be essential or to warrant priority.

The principle of geographical distribution confers no rights on staff.

The Organization put no pressure on him: the personnel officer never threatened to reduce his indemnity, set no deadline, and did not try to trick him. The rider waiving his right of appeal was just a precaution the Organization took for the sake of proper administration.

D. In his rejoinder the complainant maintains that his complaint is receivable: the memorandum of 4 October 1993 was a final decision and showed many flaws. He presses all his pleas on the merits. He produces copious correspondence between members of his family and the Director-General's Office to show that he never consented to termination. He refers to recordings of talks with people in the Personnel Services Division and again pleads duress.

E. In its surrejoinder the Organization reaffirms that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress. It maintains that the procedure that led to the termination of his appointment was entirely lawful and that he was quite aware of his rights under the material rules.

CONSIDERATIONS:

1. The complainant joined UNIDO at its headquarters in Vienna in 1973 at grade P.2 under a fixed-term contract for two years. After a series of fixed-term contracts and promotion to P.3 he received a permanent appointment on

1 June 1987. The Organization financed all his appointments under its regular budget. On 1 May 1993 it transferred him as programme officer to the Coordinating Unit of the Industrial Development Decade for Africa, a post that the Organization financed under its operational budget. He contends that the Director-General gave him "notice of dismissal" on 4 October 1993 and took no action upon his request of 1 November 1993 for reconsideration of the decision to dismiss him. The relief he seeks is summed up in B above.

2. The Organization decided in 1992 that the Director-General should take steps to balance the operational budget by the end of 1993 at the latest by various means including the retrenchment of staff.

3. In a bulletin dated 21 June 1993 the Director-General announced that "the continuing depletion of financial resources caused by the shortfall in income from the operational budget" had made savings necessary and they would include the reduction of staff through voluntary measures, restrictions on recruitment, attrition through resignation and retirement, the expiry of fixed-term appointments, and termination. The last was to include action to terminate an appointment "on a mutually agreed basis", known as "agreed termination". Although several staff members applied for voluntary separation, further separations were considered necessary. So the Director-General issued a second bulletin on the subject on 23 August 1993.

4. Both bulletins drew attention to the offer of incentives which included payment of a termination indemnity under Staff Regulations 10.6(a) and, if funds permitted, 10.6(b), and the grant of special leave without pay for extended periods to staff members who were only two or three years short of early retirement at the age of 55, together with measures to protect health insurance and pension benefits until they reached that age. Staff were offered confidential advice from the Personnel Services Division on their options.

5. Regulations 10.3 and 10.6 provide:

"10.3(a) The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff ...

(b) The Director-General may also terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and is not contested by the staff member concerned."

"10.6(a) If the Director-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Director-General in accordance with the rates and conditions set out in schedule IV of the present regulations.

(b) The Director-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose permanent appointment is terminated under regulation 10.3(b) a termination indemnity not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations and Staff Rules."

6. The outcome was 56 voluntary separations. Since that figure was thought not yet enough to achieve the desired savings, the Personnel Services Division announced in a notice dated 1 October 1993 that termination by the Director-General would eventually be necessary if voluntary measures proved insufficient and that staff "whose appointments are foreseen for termination" would be invited in the next two weeks to discuss the terms of separation, which might include the special arrangements offered in the two bulletins.

7. On 28 October 1993, just after he had come back from home leave, the complainant got a memorandum dated 4 October 1993 telling him that he was "among those staff members whose appointments with UNIDO [were] likely to be terminated in the near future" and that the Personnel Services Division would be in touch with him to "discuss the modalities of separation ... and ... entitlements". That is the document which the complainant contends was "notice of dismissal".

8. It appears that the complainant saw a personnel officer four times, on 28 October and on 2, 5 and 10 November 1993, though there is much disagreement over what happened.

9. The complainant says that at his second meeting with the personnel officer, on 2 November, they discussed "agreed termination" and the officer mentioned, among other matters, the payment of termination indemnities, including a payment of 90 per cent in a lump-sum advance and of three months' salary in lieu of notice, the

payment of health insurance and pension fund contributions during that period, grants for repatriation and removal of household goods, and commissary rights. The complainant says that, although at the first meeting, on 28 October, there had been only brief discussion and he had been able only to jot down, incompletely and in a general way, some of the information given, at the second meeting he was handed a detailed typewritten note to consider.

10. At the third meeting, on 5 November, the personnel officer dictated to a secretary a memorandum for the complainant to sign, taking the details from the same typed note, which he had brought back with him. The complainant signed the text, which bore that day's date. The text referred to the memorandum of 4 October 1993 and requested the "agreed termination" of his permanent contract on the following conditions:

(1) the payment of twelve months' termination indemnity in accordance with Staff Regulation 10.6(a), increased by 50 per cent;

(2) the grant of special leave with full pay from 1 January to 31 March 1994 and of special leave without pay thereafter until 31 March 1996, during which period the Organization would pay its share of health insurance and pension fund contributions; and

(3) the payment of three months' salary in lieu of notice.

11. At their fourth meeting, on 10 November 1993, the personnel officer handed the complainant a letter of even date signed by the Director of the Personnel Services Division. It gave him notice that in response to his request of 5 November for termination the Director-General agreed to end his appointment under Regulation 10.3(b) at 31 March 1996. It stated that he would be entitled, over and above the benefits set out in the memorandum of 5 November 1993, to lump-sum payment at the end of December 1993 of 90 per cent of the termination indemnities as well as to compensation for accrued annual leave and to the repatriation grant. The letter contained the following clause:

"I confirm my agreement to termination of my permanent appointment in accordance with Staff Regulation 10.3(b) (copy attached) and under the conditions outlined above and, accordingly, I will not contest this agreed termination."

12. The complainant says that he objected to the clause saying he would not contest the termination, because he considered it illegal, but he signed nevertheless because the personnel officer assured him that it was "standard procedure".

13. The complainant had written to the Director-General on 1 November 1993 to say he was shocked at receiving what he called "notice of dismissal" and to ask for reconsideration. Yet after receiving the actual notice of termination dated 10 November 1993 he made no appeal whatever to the Director-General. Indeed, although he wrote as late as 21 February 1994 to the Director of the Director-General's Office describing his separation as irregular, unethical and illegal, he was quite explicit that that letter, like an earlier one of 29 November 1993, was "not valid as a legal document of grievance". He also said that he sought only a fairer offer of compensation by renegotiating the financial terms of separation.

14. While the complainant alleges that "UNIDO acted not only unethically in separating [him] from UNIDO, but also illegally", he does not "seek re-integration at UNIDO as long as the current administration is in power". He contends, first, that in picking on him for possible termination the Organization arbitrarily singled him out without stating any reason, observing the principle of equitable geographical distribution or taking time to consider him for other posts; and, secondly, that his request for termination and his agreement not to contest it were secured by deception, threats and duress. Accordingly, he maintains that the decision notified to him on 4 October 1993 and the agreed termination communicated on 10 November 1993 were fatally flawed.

15. While rejecting those contentions, the Organization pleads that the complaint is irreceivable. It says that the decision that the complainant challenged in his memorandum of 1 November 1993 was not the final one. The actual decision by the Director-General to terminate his appointment was notified to him on 10 November 1993, and he not only expressed his agreement then but failed thereafter to contest either the termination or his agreement thereto.

16. Staff Rule 112.02 provides that a staff member may appeal against an administrative decision by addressing a letter to the Director-General within sixty days of the notification of that decision and that if he receives no reply

within the next sixty days he may appeal to the Joint Appeals Board.

17. The Tribunal holds that the decision notified to the complainant by the memorandum of 4 October 1993 was not a final one, the object of that memorandum being only to initiate discussion: see Judgment 336 (in re Hayward). Although he had been identified as a staff member "likely to be terminated", there was at that time no actual decision that he would be terminated at such and such a date or on stated terms; nor had any such decision been communicated to him. So he was mistaken in assuming that the memorandum of 4 October 1993 constituted notice of dismissal. His contention that the Director-General failed to answer his memorandum of 1 November 1993 is also mistaken because what he was challenging in that memorandum was not a final decision.

18. Not until 10 November 1993 was the final decision to terminate his services communicated to him. But he failed to submit an appeal to the Director-General within the sixty days prescribed by the Staff Rules and thereby failed to exhaust the internal means of redress available to him. Accordingly, his complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

19. The complaint being irreceivable, it is unnecessary to consider the merits.

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 6 July 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner