

EIGHTIETH SESSION

In re BROERE-MOORE

Judgment 1483

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 15 April 1994 and corrected on 6 August, UNIDO's reply of 14 November 1994, the complainant's rejoinder of 7 March 1995 and the Organization's surrejoinder of 12 June 1995;

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, who has British and Dutch citizenship and was born in 1939, joined UNIDO's staff in Vienna on 19 May 1992 under a two-year appointment as chief of its Public Relations and Information Section at grade P.5. The contract was later extended.

At a meeting on 15 October 1993 with the Director of the Personnel Services Division she learned that UNIDO was to end her appointment. There followed correspondence between her and the Administration about the terms. In a letter of 19 November she told the Director-General that she would like a settlement that promised her "adequate financial resources" and continuing employment "in the UN system". By a letter dated 30 November 1993 the Director told her that the Director-General had decided to terminate her fixed-term appointment under Staff Regulation 10.3(c) as from 31 March 1995. Also on 30 November she signed a statement at the foot of that letter agreeing to its terms and waiving any right to challenge "this agreed termination".

In a letter of 27 January 1994 she sought the Director-General's help in fulfilling what she saw as her legitimate expectation of continued employment in the United Nations system. In his reply of 22 February the Director-General denied having given her any expectation of reassignment but promised to help her to find work elsewhere.

Having learned that UNIDO had put her former post up for competition, she asked the Director-General in a letter of 7 March 1994 to reinstate her or, failing that, assign her to an equivalent post.

Having got no answer, on 15 April 1994 she filed the present complaint challenging what she took to be the rejection of the claims in her letter of 19 November 1993.

B. The complainant submits that UNIDO terminated her appointment unlawfully. Her objections to termination are procedural and substantive. She charges the Organization with failing to state the reasons for termination and securing her agreement to it under duress. She pleads misuse of authority, breach of the rules on the retrenchment of staff, the overlooking of essential facts and discrimination against women. In her submission the Director-General fraudulently relied on what purported to be reduction of staff so as to replace her with someone more to his liking.

She seeks reinstatement in her old post or in an equivalent one "which will not be abolished", at grade P.5 or above, under a fixed-term appointment for seven years; or else damages in an amount equivalent to what she would have received in salary, allowances, pension and other entitlements from 1 January 1994 until retirement at the age of 62, plus interest at the rate of 10 per cent a year. She claims damages for impairment of her career prospects; the payment of removal expenses; damages for moral injury and injury to her health; an order that UNIDO give her an "acceptable" letter of recommendation and a list of posts for which she might qualify and which have been vacant, "frozen" or abolished since 4 October 1993; and an award of costs.

C. In its reply UNIDO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies open to her. She is wrong to treat her letter of 19 November 1993 as a request for review of a decision to terminate her appointment: not until 30 November 1993 did the Director of Personnel give her notice of that

decision. Her letter of 19 November merely expressed hope that the Director-General would seek "an amicable solution" to her problems of employment, and it made no request for review of termination. She failed within the set time limit to seek review of the decision of 30 November.

On the merits UNIDO maintains that the termination shows no fatal flaws. The parties thoroughly negotiated the terms over six weeks. There was no breach of the rules on the reduction of staff. Only in the context of agreed termination could she have got such generous financial and other advantages. UNIDO is not bound to state the reasons for agreed termination. In any event the decision was not arbitrary.

D. In her rejoinder the complainant maintains that her complaint is receivable, the Director-General having taken before 15 October 1993 the final decision to terminate her appointment and her letter of 19 November being a request for review of that decision.

She challenges the Organization's pleas on the merits and lodges new claims.

E. In its surrejoinder UNIDO maintains that the complaint is irreceivable and takes up issues raised in the rejoinder.

CONSIDERATIONS:

1. The complainant joined UNIDO in May 1992 as chief of the Public Relations and Information Section at grade P.5. She held a fixed-term appointment. She contends that the Director-General of the Organization ended her appointment in order to appoint someone of his own choice to her post and as a pretext made use of an exercise for the retrenchment of staff.

2. Staff Regulation 10.3 includes the following provisions:

"(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, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service.

(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.

(c) In the case of a staff member with a fixed-term appointment which has been confirmed following completion of an initial period of probationary service, the Director-General may terminate the fixed-term appointment prior to its expiration date for any of the reasons specified in paragraphs (a) and (b) above or for such other reason as may be specified in the letter of appointment."

Staff Rule 112.2(a) reads:

"A serving or former staff 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."

The staff member who receives no reply within sixty days may appeal to the Joint Appeals Board or to the Tribunal.

3. In the second half of 1993 UNIDO was carrying out an extensive exercise for the retrenchment of staff. An account of that exercise appeared in Judgment 1448 (in re Perez-Venero) under 2 to 4 and 6. The Director of the Personnel Services Division informed the complainant orally on 15 October 1993 that a decision had been taken to terminate her fixed-term appointment. From 15 until 29 October personnel officers discussed with her the question of ending it in the context of staff reduction and the terms of termination. In a letter of 29 October to the Director the complainant stated that she would "be in a position to consider" those terms on her return from approved sick leave, which was to start the next day. In his reply of 1 November the Director listed the various payments that had been discussed. He said:

"... if you wish the above conditions to be applied in your case, which would have to be approved by the Director-General, we would need your written request as soon as possible ..."

He made no reference, however, to any actual decision to terminate her appointment. While on sick leave the complainant replied in a letter of 17 November to the Director in which she went over in detail the terms she was being offered.

4. While she was still on sick leave the complainant wrote the Director-General a letter dated 19 November 1993 in which she said:

"Please recall that it was only on 15 October that the Director of Personnel informed me of your decision to vacate and move me from my post, and to terminate my contract because of restructuring and staff reduction.

Therefore, I would be most appreciative of your kind consideration and approval, through the flexible approach discussed, for reaching an amicable solution, guaranteeing adequate financial resources and employment continuity in the UN system."

5. The complainant had a further discussion with the chief of the Personnel Administration Section on 26 November 1993 after her return from sick leave. On 28 November she wrote to the Director of Personnel as follows:

"I write with reference to the Director General's decision that I vacate my post to make way for recruiting another incumbent and consequently terminate my present contract but without reassigning me to another post which will not be abolished ... Since involuntary termination is the only alternative you give me to the various terms and payments put forward for terminating my contract, I have to accept the latter arrangement to lessen the consequent economic hardship and insecurity, as I am the breadwinner for my family."

6. The Director replied in a letter of 30 November:

"... the Director-General, noting that in your letter dated 28 November 1993 to the Director, Personnel Services Division, you have requested an agreed termination of your fixed-term appointment, has decided to terminate your fixed-term appointment in accordance with Staff Regulation 10.3(c). This letter constitutes the official notice of termination which will take effect at close of business on 31 March 1995."

The letter then set out in detail the terms of termination. At the foot there appeared the following clause, which the complainant was invited to sign and signed the same day:

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

7. She submitted no appeal to the Director-General against the notice of termination dated 30 November 1993, and on 22 December 1993 she signed a "personnel payroll clearance action" form setting out the payments UNIDO was to make her.

8. At a chance encounter with the Director-General on 14 January 1994 she told him that she had not yet found another post and was in financial straits. On 27 January 1994 she wrote to him referring to that encounter and saying that it had then been "understood, agreed and promised" between them that the Organization would find an equivalent post for her on its own staff or within the system of the United Nations by reassignment or transfer or otherwise. Though she said that it had not yet done so and asked him for "positive action to put the matter right", she did not seek review of the decision to terminate her appointment. In the ensuing correspondence the Director-General maintained that at no point in the extensive negotiations leading to the agreed termination and agreed financial package had UNIDO entered into any commitment to reassign her within the Organization or to find her employment elsewhere.

9. The complainant pleads in her rejoinder that a duly authorised official, the Director of the Personnel Services Division, had taken a final decision to end her employment prematurely and had communicated it to her orally on 15 October 1993; that that decision was embodied in a letter he had written her on 1 November 1993; that her letter of 19 November 1993 to the Director-General was a request under Rule 112.02(a) for review of that administrative decision and for an equitable solution; and that since the Director-General did not reply within sixty days she was entitled under Rule 112.02(b)(ii) and Article VII(3) of the Tribunal's Statute to appeal directly to the Tribunal.

10. In her original brief she submits that the termination was unfair and flawed for several reasons: breach of the rules and of due process; failure to give reasons for the decision; an abuse or misuse of the procedure for the retrenchment of staff calculated to put a new recruit on her post; the inducement of her consent to termination by deception, duress and the suppression of material information; discrimination on grounds of sex and breach of the rules on redeployment. Her claims are as set out in B above.

11. The defendant submits that her complaint is irreceivable. First, it argues, no administrative decision had yet been taken which she could have impugned in her letter of 19 November 1993; and in any event that letter made no request for review. Secondly, the actual decision by the Director-General to terminate her appointment was communicated to her on 30 November 1993, and she failed to ask for administrative review of that decision within the time limit of sixty days set in Rule 112.02(a). Thirdly, the termination was an "agreed" one and fell within the meaning of Regulation 10.3(c); not only did she expressly undertake not to contest it but by accepting the agreed payments she confirmed her agreement to termination.

12. It is clear from the correspondence that what took place between the complainant and UNIDO from 15 October until 28 November 1993 was negotiation about termination and the terms thereof; the letter of 1 November was only a part of such negotiation and neither embodied, nor referred to, any actual decision to terminate; and the Director-General had not at that date approved her termination. So up to 30 November 1993 she had not yet received an "administrative decision", within the meaning of Rule 112.02(a), about the termination of her appointment, the date at which it would take effect, or the terms.

13. Besides, her letter of 19 November 1993 was not a request for review of an administrative decision but just another step in the continuing negotiation: it was in any event not a valid appeal under Staff Rule 112.02(a).

14. Insofar as her complaint seeks to impugn any action the Organization took before 30 November 1993 it is irreceivable under Article VII(1) of the Tribunal's Statute because she is not impugning a final decision.

15. Even supposing that her letter of 19 November 1993 had constituted a proper request for review of an administrative decision, the express decision to terminate her appointment was communicated to her on 30 November 1993. She may not, once such express decision has been made, challenge under Article VII(3) of the Tribunal's Statute a rejection she infers from the Administration's silence during sixty days: see Judgment 532 (in re Devisme) under 5.

16. Since she agreed not to contest the decision of 30 November 1993 the termination was an agreed one. Even supposing that she had grounds for appeal against that termination her letter of 27 January 1994 was not an appeal which satisfied the requirements of Rule 112.02(a). So again any appeal to the Tribunal against the "agreed termination" is irreceivable for failure to exhaust the internal remedies.

17. The conclusion is that the complaint is irreceivable in its entirety and that the complainant's claims must fail.

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 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

