

EIGHTY-FOURTH SESSION

In re Broere-Moore (No. 2)

Judgment 1703

The Administrative Tribunal,

Considering the second complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 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's career at UNIDO is summed up under A in Judgment 1483, which was about her first complaint. Appended to the Organization's final brief in that complaint was a letter of 17 November 1994 from her former supervisor to the acting chief of the Personnel Administration and Social Security Section.

The letter referred to "two contradictory versions" of a report appraising her performance, to her failure "despite repeated reminders" to return the report for his signature and to his dissatisfaction with "promotional" aspects of her work.

By a letter of 17 August 1995 she asked the Director-General to review, among other matters, "the Administrative decision" to misuse the contents of the letter of 17 November 1994 in order to "obfuscate" the termination of her appointment. In a reply dated 8 September 1995 the Director of the Personnel Services Division told her on the Director-General's behalf that since she had already put to the Tribunal "most of the issues" she was raising it would be "inappropriate" to comment any further. In a letter of 31 October 1995 she lodged her appeal with the Joint Appeals Board.

In its report of 4 April 1996 the Board recommended rejection on grounds of receivability: it was competent neither to advise the Director-General in the absence of an appealable administrative decision nor to review a performance appraisal report. By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had decided to endorse its recommendation. That decision, of which she got notice on 20 May, is the one under challenge.

B. The complainant submits that by withholding her former supervisor's statement on her performance UNIDO led her to agree to separation under false pretences. Since the Administration had her sign the termination agreement in ignorance of an "essential" fact of her employment it voided the agreement. She pleads breach of good faith and of the Organization's duty to tell her "what the termination was really about". The Appeals Board was mistaken in treating the letter of 17 November 1994 as an appraisal report: she had no reason to challenge a report that said she had fully achieved the expected results.

She invites the Tribunal to set aside the decision to make use of the letter of 17 November 1994; to order UNIDO to keep on file the performance appraisal report which gave her "full ratings in Section 2 and 4.1" and remove from her file and destroy any "adverse" documents that contradict the report, including the letter of 17 November 1994; to compensate her for loss of salary from 1 January 1994 and for moral injury; to restore the *status quo ante*; and to award her costs.

C. UNIDO replies that her complaint is irreceivable. Production of a document in a brief to the Tribunal is not an appealable administrative decision within the meaning of the Staff Rules. What is more, none of her claims save her first was included in her request for review and internal appeal.

In subsidiary argument on the merits UNIDO observes that her pleadings are mainly a "rehash" of her first complaint. So any matter they raise is *res judicata*. In any event she left under the terms of an agreed termination, not for unsatisfactory performance. She has only herself to blame for any confusion about the authenticity of her appraisal report since she acknowledged amending it before she signed it.

D. In her rejoinder the complainant enlarges on her earlier pleas and dwells on alleged defects in the Tribunal's ruling on her first complaint. She takes issue with UNIDO's comments on her appraisal report, on which it based the decision to terminate her appointment. She presses her claims.

E. In its surrejoinder the Organization observes that her supervisor's appraisal has nothing to do with the termination of her appointment, which came about by mutual agreement. The "new" reasons she cites for termination are neither here nor there.

CONSIDERATIONS

1. The complainant joined UNIDO on 19 May 1992 as the chief of its Public Relations and Information Section under a fixed-term appointment for two years. The Organization prematurely terminated her appointment in the course of a staff-reduction exercise and by virtue of an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). The complainant challenged that termination in her first complaint on the grounds, among others, of breach of due process, abuse or misuse of procedure, deception, duress and the suppression of material information.

2. In the pleadings on her first complaint ("the previous proceedings") UNIDO referred to the report, signed by her supervisor and herself, appraising her performance from 19 May 1992 to 18 May 1993. The Organization contended that the requisite procedures had not been followed and in particular that the Director-General had not countersigned it. In her rejoinder, the complainant made extensive submissions challenging the accuracy and regularity of that report.

3. In the surrejoinder it filed on 12 June 1995 UNIDO submitted that "the available copies of the performance appraisal report cannot be considered to form part of the complainant's official record with UNIDO, due to the irregularities pointed out" in a letter written by her supervisor on 17 November 1994 to the acting chief of the Personnel Administration and Social Security Section. One irregularity alleged was that there were "two contradictory versions" of that report. The first was a photocopy of the original appraisal report, which had been made after the supervisor had given her a "fully achieved" rating for each work assignment and had signed it; the second version was the original report, which contained, besides those ratings, detailed comments which the supervisor said he had not made but which the complainant had herself added after her supervisor had signed that section of the report and returned it to her. In his letter of 17 November 1994 her supervisor also made the following comments which he had not recorded in the report itself:

"I discussed with her on several occasions the sensitive nature of her function and the importance the Organization attached to the promotion of better image and strong public relations. I also informed her that I was not fully satisfied as far as her effort in the direction of the promotional aspects of her work is concerned."

4. In Judgment 1483 the Tribunal held that her first complaint was irreceivable and that her claims must fail. It said:

"14. Insofar as her complaint seeks to impugn any action which 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.

...

16. Since she agreed not to contest the decision of 30 November 1993 the termination was an agreed one. Even supposing 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."

The Tribunal did not take into account, one way or the other, either her supervisor's letter of 17 November 1994 or any aspect of her performance, or her performance appraisal report, or the appraisal procedures.

5. The complainant says that she became aware of the letter of 17 November 1994 only on receiving the surrejoinder on her first complaint. Within 60 days, by a letter of 17 August 1995, she asked the Director-General:

"to review the Administrative decision to misuse the contents of the letter in order to obfuscate the wrongful and unlawful termination of my contract with UNIDO, i.e. by using the unfounded allegations regarding my performance, the alleged irregularity of my performance appraisal report, and to review the administration's procedural flaws and lack of due process in doing so."

The Director-General replied on 8 September 1995 that her first complaint referred to most of the issues contained in her letter and that it would be "inappropriate" to make additional comments at that stage.

6. On appeal the Joint Appeals Board held that neither the letter of 17 November 1994 nor UNIDO's decision to produce that letter in the previous proceedings before the Tribunal constituted an administrative decision notified to the complainant in writing, within the meaning of Staff Rule 112.02(a) and insofar as her appeal related to her performance appraisal report she should have had recourse to the procedure laid down in Appendix M of the Staff Rules. The Board concluded that it was neither competent to review that report nor to advise on the legality of the use made of it in the proceedings before the Tribunal. The Board recommended rejecting the appeal and the Director-General did so.

7. In this, her second, complaint to the Tribunal the complainant has claimed the redress set out in B above.

The letter of 17 November 1994

8. The complainant's contentions about the letter of 17 November 1994 may be summed up as follows. UNIDO used it in its surrejoinder on her first complaint "to justify the unlawful termination of [her] contract by invoking unfounded allegations regarding [her] performance, and by alleging irregular procedure in processing the performance appraisal report". In her view termination for that new reason, namely unsatisfactory performance, had to be based on a detailed contemporaneous memorandum, not on one written long afterwards. Further, UNIDO ought to have sent her a copy of that letter promptly so that she could have answered it on receipt and in her rejoinder, and its failure to do so was a procedural flaw and an obstruction of due process. Instead it used the letter "as an essential part of the Administration's motivation and action to justify engineering the termination of [her] contract". The way in which it used that letter indicates that it intended to withhold information necessary to enable her to make up her mind about the approach to take to the Director-General's decision to terminate her contract. It "thus abused power throughout by deliberately hiding this letter which would expose as illegal the Director-General's decision to terminate [her] contract under the ostensible penumbra of a staff reduction exercise". The agreed termination is therefore void. She also expresses doubts about the authenticity of the letter.

9. The letter did not contain any decision and was not communicated to the complainant. It was written long after the "agreed termination" and it could have had no influence whatever either on UNIDO or the complainant in regard to that termination. Even if the Organization had thought the letter of some value as evidence in the previous proceedings it was under no duty to send a copy to her in advance so as to let her reply. Neither the writing of the letter, nor the delay in bringing it to the complainant's notice, nor the use made of it by UNIDO in those proceedings was an administrative decision subject to review under Staff Rule 112.2(a). The complainant's claims in those respects are therefore irreceivable.

10. In her rejoinder on her first complaint she said that she had been told before the "agreed termination" that performance was not a criterion for the selection of staff for retrenchment because the performance appraisal reports showed that all the staff were performing well. In ruling on that complaint the Tribunal did not consider any aspect of the complainant's performance, of her performance appraisal report or of the appraisal procedures. And even supposing that UNIDO's intention was to rely on the adverse comments in the letter of 17 November 1994 to show unsatisfactory performance, those comments were of no probative value: they were not only belated but also contradicted by the unqualified "fully achieved" ratings admittedly given in the formal appraisal process. It was that process that mattered. Thus the letter was not relevant to the outcome of the previous proceedings and had no effect on it. So the complainant's claims as to the letter fail on the merits as well.

Other claims

11. The complainant contends that Judgment 1483 ruled only that her first complaint was irreceivable and did not dismiss it on the merits; that the "agreed termination" was vitiated by material error, non-disclosure of essential facts, deception, blackmail and duress, which the Tribunal should now consider; and that the letter of 17 November 1994 is new evidence that warrants review of Judgment 1483. She asks that the performance appraisal report signed by her supervisor and giving her "fully achieved" ratings be kept in her file and that all documents that are inconsistent with it be expunged; in effect, she wants UNIDO to treat that report as having been duly made final.

12. The request which the complainant made on 17 August 1995 for review was confined to "the Administrative decision to misuse the contents of the letter" of 17 November 1994 and the "procedural flaws and lack of due process in doing so". Her other claims, relating to the "agreed termination" and the performance appraisal report, fall outside the scope of that request and are irreceivable on account of her failure to exhaust her internal remedies. Further, her claims in respect of the "agreed termination" were dismissed by Judgment 1483, and the letter of 17 November 1994 had no relevance to that termination and affords no ground for review of that judgment.

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