

EIGHTY-FOURTH SESSION

In re Geyer

Judgment 1714

The Administrative Tribunal,

Considering the complaint filed by Mr. Philip Gerhard Geyer against the United Nations Industrial Development Organization (UNIDO) on 17 October 1996, UNIDO's reply of 27 January 1997, the complainant's rejoinder of 28 April and the Organization's surrejoinder of 11 August 1997;

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 South African who was born in 1957, joined the staff of UNIDO on 13 January 1995 under a one-year appointment as an expert in database design and implementation at grade L.4. He was assigned to Colombo, in Sri Lanka, on project No. SRL/93/010/A/01/99 to set up a network of information on industrial technology and markets. UNIDO and a Sri Lankan public company, Industrial Technology and Market Information Network Ltd. (ITMIN) were to carry out the project with funding from the United Nations Development Programme (UNDP). The description of the complainant's job said that he would be "attached" to ITMIN.

By a memorandum of 31 May 1995 the board of directors of ITMIN told him that it had decided to award a contract to the IBM World Trade Corporation to "provide a total solution" and thanked him for his help in "arriving at this decision".

In a memorandum dated 20 June the complainant informed the chairman of ITMIN that he was "surprised and disturbed" by the decision because the offer from IBM was technically and commercially "unacceptable".

In line with a decision of 23 June by ITMIN's board and talks with the Sri Lankan Government and representatives of UNIDO and the UNDP the chairman invited the Secretary of the Sri Lankan Ministry of Industrial Development in a letter of 26 July to recommend removing the complainant from the project on the grounds of his "general conduct, attitude, reluctance to adapt to ... local working conditions and uncooperative manner". He also wanted the complainant to "minimise his presence" on ITMIN's premises pending official notice of his exclusion from the project.

By a memorandum of 28 July the chief technical adviser of the project gave him notice of the chairman's wishes and asked him to "cope" with them "until further notice". By a letter of 25 August the complainant informed the UNDP's resident representative that he was leaving the following week for Australia. He gave an address and telephone number there.

In a letter of 28 August the complainant asked the Director-General to terminate his appointment under Staff Regulation 10.3(d). He left Sri Lanka the next day. By a fax dated 14 September the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) told him that the Administration was treating his communication of 28 August as resignation under Staff Rule 210.01; in another fax, dated 25 September, the officer-in-charge confirmed that and announced that UNIDO was stopping his salary as from 1 September 1995. By a letter of 28 September the complainant told the Director-General that he had neither resigned nor intended to resign.

By a minute dated 5 October the competent "backstopping officer" at UNIDO headquarters in Vienna told the officer-in-charge that the complainant's attitude was "uncooperative": he had problems adapting to work on the project and to life in Colombo.

Replying to the complainant's letter of 28 September the officer-in-charge said in a fax dated 6 October that his unauthorised departure from Sri Lanka on 29 August amounted to *de facto* separation from service for abandonment of post under Staff Regulation 10.5 which reads:

"A staff member absent from duty without satisfactory explanation for more than 15 working days shall be considered to have abandoned his or her post and the staff member shall be separated from service without indemnity provided that the Organization shall make every reasonable attempt to locate such a staff member prior to his or her separation from service. The Director-General may, however, withhold the separation action if he or she is satisfied that the absence is due to circumstances beyond the staff member's control."

On 26 October the complainant left Australia for South Africa. In a fax message which he sent on 1 November to OSD/PFS from Johannesburg he asked for payment of salary for September and October. By a letter dated 20 November the head of OSD/PFS confirmed that UNIDO had terminated his appointment under Regulation 10.5 for abandonment of post on 29 August 1995.

By a letter of 12 December 1995 he lodged an appeal with the secretary of the Joint Appeals Board against "all the administrative decisions made since August 1995". In an undated report the Board recommended, among other things, reversing the decision to separate him for abandonment of post and terminating his appointment as at 11 September 1995 with payment of one month's salary in lieu of notice and of one week's pay "for each month of uncompleted service plus repatriation entitlements minus proportional adjustment of hardship allowance, assignment allowance and education grant". The Board recommended rejecting his claim to material and moral damages.

In a letter of 21 August 1996, which he impugns, the officer-in-charge told him that the Director-General had endorsed the Board's recommendations.

B. The complainant submits that the decision to terminate his appointment as at 11 September 1995 is unlawful. He never abandoned his post or neglected his duties: it was UNIDO that asked him to stay away from the office in July 1995 and kept him idle thereafter. His contract ran to 12 January 1996, when it expired. He alleges misuse of authority in the Administration's resorting to "coercion where persuasion had failed". He charges the Organization with mistakes of fact, many of them in the backstopping officer's report of 5 October 1995, and with failure to give him a hearing or issue a warning. He never got any substantive reasons why it gave him no more work. Only "prejudice or resentment" can explain the Organization's breach of good faith and duty of care.

He seeks the following relief:

- "1. Acknowledgement of appropriate and lawful completion of my contract to the end of the contract period, and issuance of a certificate of service to that effect;
2. Acknowledgement of satisfactory performance of my duties during the contract period, and issuance of a testimonial to that effect;
3. Full payment of the education grant for my daughter - as applicable to a medium-term appointment - in the amount of ZAR [South African rand] 2,125;
4. Full payment of post-adjusted salary for the period 1 September 1995 to 12 January 1996 in the amount of USD [United States dollars] 31,707;
5. Full re-imburement of medical insurance carried by me since cessation of the payments in August 1995, equivalent to the value of my previous UNIDO medical insurance with JC van Breda, from 1 September 1995 to 12 February 1996 in the amount of USD 372;
6. Full credit for the 4 days of annual leave taken from 18 to 21 July 1995 despite having been absented from duty;
7. Full commutation payment of 25 days annual leave (30 days' entitlement minus 5 days consumed) in the amount of USD 5,933;
8. Payment of interest at a compounded rate of 12 per centum per annum on the above amounts, all of which are in arrears, calculated from due date to date of payment;
9. Removal of the Backstopping Officer's reports from my personnel file;
10. Insertion of the Judgement of the Tribunal on this matter into my personnel file;

11. Full re-imburement of the Costs of claim in the amount of ATS [Austrian schillings] 21,740."

C. In its reply UNIDO contends that the complaint is irreceivable for failure to exhaust the available internal remedies. The complainant's statement of his claims to the Joint Appeals Board was confined to "appropriate and lawful termination" of his contract, payment of unpaid salary and allowances, compensation for moral and material injury and apologies. Since his appeal succeeded in the main with the Director-General's decision of 21 August 1996 to terminate his appointment, his claim to credit for completing his contract is a new one. His fourth and seventh claims too are much broader than those he put to the Board.

On the merits UNIDO observes that it lawfully terminated his appointment as at 11 September 1995. He himself asked the Director-General to do so as early as 28 August 1995, when he said he could "no longer work" on the project. The grant of his request was in keeping with his letter of appointment and the rules on notice and terminal entitlements. In any event his misbehaviour towards his counterparts and inability to adapt to life in Sri Lanka were not what UNIDO expects from an international expert. The technical information from the backstopping officer being objective and impartial, there was no reason to strike it from the file. Even if he had worked out his appointment, UNIDO would not have owed him payment by way of education grant because he has not provided any evidence of expenses incurred.

D. In his rejoinder the complainant seeks to clear up points of fact and rebut arguments in the reply. His internal claim was to "appropriate and lawful" termination but the decision to terminate his appointment retroactively was tainted with fatal flaws. The charge that he failed to adapt to local conditions is just an opinion and not borne out by any proper investigation. He produces evidence of education expenses he incurred for his dependent daughter, which he says he had seen no reason to submit as long as the impugned decision stood. He seeks a further 4,704 Austrian schillings in costs and presses his other claims.

E. In its surrejoinder the Organization comments on his pleas in the rejoinder. The complainant having sought the lawful termination of his contract in his internal appeal, his present claim to credit for completing his contract is contradictory and plainly irreceivable. Besides, there was nothing improper in its termination of his appointment as he had requested once it was plain that neither UNIDO nor the UNDP could solve his problems in Sri Lanka.

CONSIDERATIONS

1. The complainant joined UNIDO as an expert in database design and implementation for a UNIDO project in Sri Lanka for the establishment of an industrial technology and market information network. He received an appointment for one year, from 13 January 1995 to 12 January 1996, at grade L.4, step VI.

2. The description of the post indicated that the expert would be attached to Industrial Technology and Market Information Network Ltd (ITMIN), a Sri Lankan company that was the implementing agency for the project, and that the tasks would include participation (a) in the preparation of computer hardware and other equipment specifications as well as the identification of contractors to undertake software development and (b) in the evaluation and selection of offers received, and assistance to the chief technical adviser and the managing agent of ITMIN in making recommendations to ITMIN for final selection.

3. On 31 May 1995 ITMIN informed the complainant that it had decided to award a contract for the computer system to IBM World Trade Corporation so as to "provide a total solution". It expressed appreciation of the assistance rendered by the three members of the Evaluation Committee, including the complainant.

4. By a memorandum dated 20 June, the complaint told ITMIN that he was "surprised and disturbed" by that decision, that "some aspects of the IBM proposal" were technically and others commercially unacceptable, and that "the agreed procedure of final negotiations with short-listed Vendors" had been "simply disregarded".

5. On 23 June the board of directors of ITMIN resolved to ask UNIDO, with the concurrence of the competent Ministry as the executing agency, to withdraw the complainant from the project, mainly on the grounds of "his general conduct, attitude, reluctance to adapt to ... local working conditions and unco-

operative manner, which, if continued, [would] seriously hinder a healthy office environment, thus impeding the progress of the project". The board decided to take the matter up first with the secretary to the Sri Lankan Ministry of Industrial Development (the executing agency), the office of UNIDO/UNDP (United Nations Development Programme) in Colombo, and the chief technical adviser before making such formal request for the complainant's removal.

6. In July 1995 the representatives of UNIDO, the UNDP and the Government discussed the situation with the complainant and with ITMIN officers and sought clarifications from UNIDO's backstopping officer at headquarters in Vienna. It transpired that during the month of May there had been some concern that the specifications originally prepared by the complainant exceeded the requirements of the project and would be too costly; the complainant had revised the specifications, and fresh quotations were called for and evaluated. Consequently, differences of opinion had arisen between the complainant and other UNIDO staff. It seemed that in writing to ITMIN on 20 June 1995 to question its award of the contract to IBM - which was within its competence - he had overstepped his advisory role under the project. There had also been minor difficulties for some time in communication and personal relations between the complainant and ITMIN staff.

7. Officers of ITMIN also made allegations of corruption against the complainant but were quite unable to furnish any material in support.

8. All efforts at reconciliation failed. On 15 July 1995 ITMIN asked that the complainant be told to keep away from its premises until further notice. By a letter dated 26 July 1995 it communicated its decision to the executing agency and requested that a recommendation be made to UNIDO for withdrawing and replacing him. However, no request for his withdrawal was made: the resident representative asked the executing agency not to do so because efforts were being made to arrive at a settlement.

9. The chief technical adviser wrote to the chairman of ITMIN on 9 August pointing out that it was not acceptable for UNIDO to keep an international expert away from work for such a long period without giving any reason; he asked ITMIN either to state its reasons or to modify its request for withdrawal of the complainant. There was no response.

10. Though there followed discussions between the complainant and UNIDO's backstopping officer, no agreement was reached. The officer suggested only that the complainant should resign on personal grounds, which he was quite unwilling to do.

11. On 25 August 1995 the complainant informed the UNDP's resident representative that he was leaving for Australia and intended to stay there until February 1996 and then return to Austria. On 28 August 1995 he wrote to the Director-General saying that it was quite clear that he could no longer work on the project and that he saw no reason to resign and could not afford to do so anyway. He asked UNIDO to consider terminating his appointment under Staff Regulation 10.3(d) as it was hardly in UNIDO's interest to pay him "for sitting at home". He also asked for an increased indemnity under Regulation 10.6(b). He cited other personal and domestic reasons why he had no further desire to remain in Sri Lanka. He gave his address and telephone and fax numbers for the place in Australia where he would be until mid-October. His letter reached UNIDO on 11 September 1995.

12. The backstopping officer sent a fax on 28 August 1995 to the acting resident representative in which he stated that he had been unable to reach the complainant by telephone; he set out UNIDO's proposals in the event of the complainant's resignation on personal grounds, namely payment of his salary for September and October and of repatriation travel and grant. The complainant left Sri Lanka early in the morning of 29 August and did not receive that fax until 5 September, in Australia.

13. By two fax messages, one dated 14 and the other 25 September, the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) informed the complainant that UNIDO was treating his communication as a letter or resignation in terms of Staff Rule 210.01, that it accepted his resignation and that his salary payments would be stopped as from 1 September, since he had left Sri Lanka on 29 August. Reversing that position, the officer-in-charge told him in another fax dated 6 October and the head of OSD/PFS in a letter dated 20 November that his leaving Sri Lanka amounted to abandonment of his post within the terms of Staff Regulation 10.5, reproduced under A above.

14. On appeal the Joint Appeals Board observed that the backstopping officer had confirmed to the Board that he was aware of the complainant's plan to leave Sri Lanka and that the complainant had explained his reasons by his letter of 28 August, which the UNIDO had received by 11 September, "within the 15 days specified in Staff Regulation 10.5". The Board concluded that he had not abandoned his post but that his request for termination was *de facto* resignation at 11 September, and it recommended paying his entitlements on that basis.

15. The Director-General accordingly decided that the effective date of termination of the complainant's appointment would be 11 September 1995 and that he would be paid one month's salary in lieu of notice, plus one week's salary for each month of uncompleted service and repatriation entitlements, "minus proportional adjustment of hardship allowance, and assignment grant". The officer-in-charge so informed him by a letter of 21 August 1996.

16. In his complaint to the Tribunal the complainant asks for the redress set out under eleven heads in B above.

17. The Tribunal need not consider whether there was any lapse on the complainant's part which led to ITMIN's request for his withdrawal. Even on the assumption that he was in no way to blame, his letter of 28 August 1995 puts it beyond doubt that he was no longer able to discharge his duties under his contract and indeed no longer wished to work on the project or even to remain in Sri Lanka. Thus further performance of his contract had been brought to an abrupt stop by extraneous causes for which neither he nor UNIDO, whose efforts at conciliation unfortunately proved unsuccessful, was responsible. The Tribunal holds that his contract came to an end no later than 11 September 1995, when his letter reached UNIDO. Not having worked after that day, he then ceased to be entitled to salary: see Judgments 314 (*in re* Rempp), 566 (*in re* Berte and Beslier) and 615 (*in re* Giroud and Beyer).

18. The complainant's claims to acknowledgement that he satisfactorily served for the full contract period are consequential and must fail, as must also his claims to the payment of salary up to 12 January 1996; to "commutation payment" for annual leave as if he had worked for the full contract period, to medical insurance coverage and to the payment of interest on all the sums he claims.

19. As for the payment of education grant for his daughter, UNIDO cites paragraph (l) of Appendix E to the Staff Rules, which requires that claims be submitted in writing, and it points out that the complainant has not yet submitted any such claim. In his rejoinder the complainant admits that he kept the relevant forms and he submits copies to the Tribunal. The claim should first have been submitted to UNIDO and it is irreceivable under Article VII(1) of the Tribunal's Statute on the grounds of his failure to exhaust his internal remedies.

20. The complainant claims the removal from his personnel file of two reports which the backstopping officer had submitted. He alleges that they are "false" and "defamatory". UNIDO contends, and he denies, that they contain technical information on the project. The Tribunal rules that the reports set out the facts as perceived by that officer, and even though they may contain some inaccuracies they are neither false nor defamatory. The claim fails.

21. Finally, the complainant asks that a copy of the judgment be inserted in his personnel file. Since UNIDO says it has no objection, it is not necessary to rule on the claim.

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.