

EIGHTY-FIFTH SESSION

In re Zaunbauer

Judgment 1782

The Administrative Tribunal,

Considering the complaint filed by Miss Christl Zaunbauer against the United Nations Industrial Development Organization (UNIDO) on 29 September 1997 and corrected on 10 October, UNIDO's reply of 19 January 1998, the complainant's rejoinder of 6 March and the Organization's surrejoinder of 27 April 1998;

Considering Article II, paragraph 5, 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, an Austrian citizen who was born on 11 January 1943, joined the staff of UNIDO in October 1967 on a fixed-term appointment at grade G.4 as a clerk in the Budget Section. The Organization gave her the first of several promotions in 1968 and granted her a permanent appointment in 1969. In 1972 it reassigned her to the Budgetary Accounts Unit as an accounting clerk, where she became a finance assistant and reached grade G.7. In 1978 she got another promotion, to G.8 - the equivalent of G.7 under the present grading system - with the title of accounting assistant. On 1 January 1994 it reassigned her to the Buildings Management Service.

Staff Rule 110.02(a) reads:

"If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service. ..."

There was a deficit in the Organization's budget. The Director-General set up an Advisory Group on Human Resource Planning by instructions he issued in bulletin DG/B.193 of 28 July 1995 to review staffing needs and recommend a strategy of redeployment. By bulletin DG/B.201 of 20 November 1995 he announced a programme for voluntary separation that offered incentives to apply for early retirement or agreed separation. By a circular dated 14 December the Organization extended the deadline for such applications from 15 December 1995 to 8 January 1996. By bulletin DGB(M).5 of 16 January the Director-General announced a set of "non-voluntary measures" to retrench staff.

By a letter of 22 February 1996 the Managing Director of the Division of Administration informed the complainant that her post was to be abolished and that the Advisory Group would be making a recommendation about her. At the Group's wish she was interviewed for two posts, one at G.6 and one at G.7, both held at the time by fixed-term officials. By a letter of 24 May she asked the chairman of the Group to let her see all the documents it had on her case and to tell her of anything it was doing to find a job for her outside the Organization, possibly on secondment. The chairman replied on 29 May that the procedure did not require disclosure of all the documents to the staff member. By a memorandum of 31 May she asked the Group to consider her for several posts in the General Service category as well as any suitable ones at P.1 and P.2, which she would be willing to take at G.7 pay.

By a letter dated 19 June 1996 the Director of Personnel Services gave her notice of the Director-General's decision, "based on" a recommendation by the Advisory Group, to end her appointment at 28 June under Staff Regulation 10.3(a) on grounds of abolition of post and to pay her, besides her other entitlements under the rules, three months' salary in lieu of notice. By a letter of 25 June she asked the Director-General to review that decision, claiming entitlements equivalent to those offered "a few months ago" under the voluntary separation programme. The Director of Personnel Services told her in a reply dated 11 July 1996 that the Director-General was maintaining his decision but would put her on leave without pay until she qualified for early retirement if she were willing to pay both her own and UNIDO's contributions to the United Nations Joint Staff Pension Fund. On 11 July

she submitted a further request for review to the Director-General, this time against termination. By a letter of 28 August the Director of Personnel Services informed her that the Director-General had confirmed termination.

On 24 October 1996 she lodged an appeal against that decision with the Joint Appeals Board. In its report of 6 June 1997 the Board found breach of due process in the Group's failure to make a proper attempt to find her a suitable post at a lower level. It recommended paying her compensation equivalent to six months' salary less staff assessment and reinstating her as from 28 June 1996 on special leave without pay. On 4 July 1997 the secretary of the Board sent her a copy of a memorandum of even date from the "Officer-in-Charge" of UNIDO informing the secretary of his decision to reject the appeal. That is the decision she is impugning.

B. The complainant submits that the decision is unlawful on two counts. For one thing, it infringes Staff Rule 110.02(a) by denying her continued service in preference to officials it kept on even though they held fixed-term appointments. For another, it is at odds with the criteria the Director-General laid down in DGB(M).5 of 16 January 1996 for reducing staff. They include integrity, efficiency and length of service. She sees as inadequate the Group's efforts to find a suitable post for her, "even at a lower level", and charges it with bad faith and failing to give her qualifications their full due. She argues that her transfer to the Buildings Management Service in 1994 left her on a "vulnerable" post.

She wants the Tribunal to (1) "uphold" the findings of the Joint Appeals Board, (2) set aside the impugned decision and (3) order her reinstatement in a suitable post as from the date of termination with payment of all salary and allowances less any terminal entitlements already paid or, failing reinstatement, order UNIDO to pay her compensation in an amount equivalent to the salary and allowances she could have expected from the date of termination until 11 January 1998, when she qualifies for early retirement. She claims (4) moral damages and (5) costs.

C. In its reply the Organization denies infringing her rights under Staff Rule 110.02(a). It contends that the Advisory Group was at pains to find her a suitable post. Her plea of bad faith is "incorrect and unsubstantiated". At her grade the Organization had only 18 posts. Permanent staff held all but two and she was not qualified for either of them. Nor did her qualifications match any available post at P.1 or P.2. Although she was willing to go down to G.4, that would not have been "practicable" or in keeping with "the administrative expediency of the staff reduction programme". Her transfer to the Buildings Management Service in 1994 is neither material to this case nor still open to challenge.

D. In her rejoinder she enlarges on her pleas and rebuts the defendant's reply. She maintains that her assignment in the Buildings Management Service is "central" to her complaint since it led to her "dismissal". The number of G.7 posts vacant was greater than UNIDO makes out. Flaws in the procedure for redeployment deprived her of possible assignments.

E. In its surrejoinder the Organization observes that the arguments she bases on her assignment to the Buildings Management Service are unsound in law. She is mistaken about the number of available posts. UNIDO abided by the rules: though it failed to find her another post, it made ample effort to look.

CONSIDERATIONS

1. In October 1967 the complainant entered the service of UNIDO, which was at the time a subsidiary organ of the General Assembly of the United Nations. She was a clerk in the Budget Section of the Division of Administration and she held a fixed-term appointment at grade G.4. In 1969 the Organization granted her a permanent appointment. In 1972 it transferred her to the Budgetary Accounts Unit of the Accounts Section. By 1978 it had promoted her as an accounting assistant to G.8, the equivalent of G.7 under the system of grading introduced in 1991. She was in charge of that unit until the end of 1993.

2. In 1993 UNIDO carried out an exercise in staff reduction and restructuring. One result was that it abolished the complainant's post and transferred her to the Buildings Management Service on 1 January 1994. It converted her appointment from a full-time to a part-time one as from 1 February 1994. She appealed to the Joint Appeals Board and on its recommendation it reinstated her in full-time employment.

3. The Organization had to make a drastic reduction in its budget for 1996-97 because of a substantial drop in financial support from the United States, the main contributor. It accordingly carried out another exercise in staff

reduction, which was in two stages: first, a scheme of "voluntary separation", for which staff might apply by 8 January 1996, and then non-voluntary measures.

4. The complainant did not apply by the deadline for voluntary termination. By a letter of 22 February 1996 the Managing Director of the Division of Administration informed her that her post was to be abolished and that an Advisory Group on Human Resource Planning which had been set up in August 1995 would, after review, recommend to the Director-General either keeping her on or ending her appointment.

5. UNIDO Staff Regulation 10.3(a) provides:

"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."

Staff Rule 110.02(a) provides:

"If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service. ..."

According to a bulletin, DGB(M).5, issued by the Director-General on 16 January 1996, the Advisory Group was to apply the following principles:

"In accordance with staff regulation 10.3 and staff rule 110.02, staff members whose posts are abolished will be measured against available suitable posts to ascertain whether their services can be effectively utilized in those posts. In all such cases due regard shall be paid to the following criteria:

- Relative competence
- Integrity
- Efficiency and effectiveness
- Qualifications and skills related to key priority themes, programmes and essential functions
- Length of service
- Geographical and gender balance.

... The term 'available suitable posts' in which the staff member's services can be effectively utilized means posts occupied by other staff members or available vacant posts in areas with similar qualification requirements."

6. In submissions it put to the Joint Appeals Board on 23 December 1996 the Organization explained as follows what the Advisory Group had done:

(a) Starting in March 1996 it had "obtained information on, and reviewed the qualification requirements of", vacant posts "available for possible staff redeployment". It had analysed "the background, expertise, experience and service record" of staff whose posts had been abolished and "established which staff members would match the requirements of one or several vacant posts". It then invited a further evaluation of each candidate from the "manager" - i.e. the head of the unit - who was supposed to give "an objective assessment of the candidate's suitability".

(b) Next the Group had "reconsidered the situation of all staff members with permanent appointments who had not been found suitable for a vacant post" to see whether they would do for any post held by a fixed-term official. It identified posts "with similar qualification requirements", and again it asked the manager to assess each candidate who met them.

(c) If no suitable post had by then turned up the Group had made an "initial conclusion" recommending termination.

At that point it had allowed an "informal recourse procedure" whereby a staff member might point out to it any "new elements" warranting reconsideration.

(d) If the Group still found no suitable post even after further review, it recommended termination.

7. At its seventh meeting the Advisory Group noted that there was no vacant G.7 post for the complainant. At its 15th meeting it considered whether she would be suitable for two G.7 posts held by staff on fixed-term appointments; it decided that she lacked the specialised technical knowledge needed for one of them; and it asked the Managing Director of the Investment and Technology Promotion Division to review her candidature for the other post, which was for an administrative assistant in that Division.

8. The Advisory Group invited the complainant to attend its 17th meeting and present her case. She then told it that she preferred to work in, say, Financial Services, Internal Audit or the Industrial Statistics Branch, and was willing to go down one grade. In consequence the Advisory Group decided that she should be considered also for an occupied G.6 post for a statistical clerk in the Industrial Statistics Branch. But both those who interviewed her found her unsuitable on the grounds, among others, that she had what her performance reports called "problems with inter-personal relations".

9. The upshot was that the Advisory Group sent the complainant its "initial proposal", dated 20 May 1996, which was for ending her appointment. After considering her response it made a recommendation to that effect to the Director-General. On 19 June 1996 she was given notice of the termination of her permanent appointment at 28 June. She made a request to the Director-General for review of that decision, he refused, and she appealed to the Joint Appeals Board, mainly on the grounds of breach of her rights under Rule 110.02(a).

10. In its report of 6 June 1997 the Board imputed a material oversight to both interviewers in failing to consider her latest performance report, the one for the period from February 1994 to December 1995. That report had said of her:

"The staff member was redeployed without consultations from an administrative to a technical environment. However, for whatever tasks were ... given to her, she established a very effective team work and showed a very good attitude towards the supervisors and colleagues."

The Board also held that the Advisory Group should at the outset have asked her whether she was willing to be considered for a post at a lower grade. For those and other reasons the Board concluded that termination prejudiced the complainant's "rights to due process under Staff Rule 110.02(a) as the attempts made by the [Advisory Group] to retain [her] in service even at a lower level had not been adequate and in good faith". It recommended compensation, reinstatement and - so that she might contribute to the United Nations Joint Staff Pension Fund - special leave without pay from 28 June 1996 up to the date of her early retirement. But by a decision of 4 July 1997 the "Officer-in-Charge" of UNIDO rejected those recommendations and her appeal. In this complaint, which impugns that decision, she is claiming the relief set out at the end of B above.

11. The Tribunal will take up first her plea of breach of her rights under Rule 110.02(a). What that rule entitles staff members with permanent appointments to is preference to "suitable posts in which their services can be effectively utilized", and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: *in re* Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well. The Advisory Group should have asked the complainant at the outset whether she would accept a G.6 post. Because it failed to do so, it considered her for vacant posts at G.7 only and deprived her of the opportunity of being considered for G.6 vacancies. One unit for which she had expressed a preference was Internal Audit. It had a G.6 post for an audit assistant held by someone under a fixed-term contract that was to expire at 30 April 1996. The list of UNIDO staff in May 1996 confirms that that post was by then vacant, and it was even advertised in October 1996. Yet the complainant was not considered for it, even after she had invoked the informal recourse procedure. The conclusion is that the Advisory Group failed to respect her right to preference under Rule 110.02(a).

12. Moreover, as to the two posts for which she did get interviews, UNIDO has produced neither the "fact sheets" that went to the interviewers and the Advisory Group, nor the interviewers' reports. Its plea that her latest appraisal was considered is therefore unsupported by evidence. So the conclusion that she was not suitable for those posts overlooked a material fact.

13. For the foregoing reasons the decision to end the complainant's appointment is flawed and must be quashed, there being no need to take up any of her other pleas. Since further staff reduction took place in January 1998, the Tribunal will order her reinstatement as from 29 June 1996 only up to January 1998, the month in which she qualified for early retirement, and payment of full arrears of salary, allowances and other benefits less any amounts she was paid on termination. If she had any occupational earnings during the period from the date of termination up to January 1998 she shall also give credit for the net figure. UNIDO shall pay its share of contributions for her to Van Breda, the health insurance brokers, and to the United Nations Joint Staff Pension Fund up to the same date. She shall be deemed for all purposes to have left on early retirement in January 1998 and be entitled to all benefits due upon such retirement. On account of the moral injury she has suffered the Tribunal awards her the sum of 30,000 United States dollars in moral damages. She is also entitled to 2,000 dollars in costs.

DECISION

For the above reasons,

1. The decisions of 19 June 1996 and 4 July 1997 are quashed.
2. UNIDO shall reinstate the complainant as from 29 June 1996, treat her as having taken early retirement in January 1998, and pay her the sums due in accordance with 13 above.
3. It shall pay her 30,000 United States dollars in moral damages.
4. It shall pay her 2,000 dollars in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner