

EIGHTY-EIGHTH SESSION

In re Bauer

Judgment 1906

The Administrative Tribunal,

Considering the complaint filed by Mr Stefan Bauer against the United Nations Industrial Development Organization (UNIDO) on 8 February 1999, UNIDO's reply of 20 May, the complainant's rejoinder of 5 July and the Organization's surrejoinder of 8 October 1999;

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 national who was born in 1963, joined the staff of UNIDO on 1 August 1996 as an investment promotion expert and Deputy Head of the Investment Promotion Service (IPS) in Vienna on a one-year fixed-term contract at grade L.2.

By a memorandum of 6 May 1997 the Officer-in-charge of the Project Personnel Service informed the complainant that his contract, due to expire on 31 July 1997, would not be extended. He confirmed in a memorandum of 27 May to the complainant that the reason for the non-renewal of his appointment was his failure to comply with the requirements of his job description. He told the complainant that whereas his job description required him to carry out his duties "under the supervision of the Head of IPS/Vienna" he had "been working independently without integrating [his] activities into the activities of the Office as a whole" which hampered the functioning of the IPS. In a memorandum of 30 June the complainant asked the Director-General to review the decision not to renew his appointment, but it was maintained and the Director-General so informed him in a letter of 29 July. The complainant filed an appeal on 22 September 1997 with the Joint Appeals Board. One of the Board's findings was that he had not complied with the terms of his job description, and it recommended that the appeal be dismissed. The Director-General endorsed its recommendation in his decision of 19 November 1998 which the complainant impugns.

B. The complainant contends that the decision not to renew his appointment was "flawed and biased", and was taken in breach of UNIDO's directives on the performance evaluation procedure. An appraisal was the only valid way of assessing his performance, but his supervisor and the Personnel Services failed to complete even the initial steps of the evaluation process. He submits that any advance warning to him about the way he was performing his duties should have been substantiated by a completed report.

He refutes allegations made by the Organization in the internal appeal procedure that he did not comply with his job description and "overstepped" the limits in negotiations with an Austrian bank. He was preparing a draft agreement and his actions did not contravene UNIDO standard practices.

He says that new charges were brought against him during the appeal procedure to bolster the Organization's stand, including allegations of "financial misconduct", such as use of the official phone for private purposes. The Organization drew biased conclusions from those accusations. If there had been any truth in them it would have taken steps to terminate his employment at an earlier stage.

He argues that he had a legitimate right to be considered for an extension of appointment. The Organization still needs the type of services he provided.

During the internal appeal procedure it was alleged that he had misrepresented facts regarding his previous employment in his personal history form. He maintains that the Organization was simply trying to discredit him.

He seeks the quashing of the decision not to renew his appointment; the equivalent of one year's net salary by way of redress; and moral damages equivalent to a year's net salary in view of the "gross misrepresentation" of the facts surrounding both his previous employment record and subsequent service with UNIDO.

C. In its reply the Organization contends that the impugned decision was lawful, and was not flawed by the absence of a performance evaluation report. The complainant held up the issuing of the report by not filling in the part relating to a work plan despite reminders he was given. On 16 January 1997 his direct supervisor drafted a work plan for him and sent him a revised version of it on 11 February; he was expected to give his opinion on it. When he failed to comply his supervisor sent a confidential report, dated 17 February, to the Officer-in-charge of the Project Personnel Service criticising the complainant's services.

The Organization asserts that the complainant's conduct fell short of the standards expected of a staff member. The complainant questioned the authority of his supervisor and concealed information from him. He also failed to comply with the procedure for preparing and negotiating agreements as set out in bulletin DG/B.19 governing the establishment of relations between UNIDO and other organisations. He made phone calls to countries he did not need to contact as part of his work, a matter that was brought to his attention before the start of the internal appeal proceedings.

It was within the Director-General's discretionary power not to renew the complainant's contract, and reasons for not doing so were given. Citing the case law of the Tribunal, the Organization also submits that the Director-General may simply allow a contract to expire even when the conduct of a staff member warrants disciplinary action. UNIDO did not, therefore, err in choosing non-renewal instead of instituting disciplinary proceedings against him.

In view of his conduct and the nature of the contract he had the complainant could not reasonably have believed that his appointment would be extended beyond 31 July 1997. He had received repeated warnings about his conduct and his relationship with his supervisor was impaired. The contract he signed on 1 August 1996 specified that the appointment carried "no expectancy of renewal". Moreover, under the terms of Staff Rule 210.02(b), "separation as a result of expiration of a fixed-term appointment shall take place automatically ... on the expiration date specified in the letter of appointment".

The Organization states that facts relating to his personal history form became known during the internal appeal procedure and played no part in the decision not to extend his contract. There are no grounds for an award of damages to the complainant, and he has adduced no evidence of moral injury.

D. In his rejoinder the complainant presses his pleas and reasserts his claim for damages. As regards the work plan he had to prepare as part of his evaluation, he observes that he was not given a performance evaluation form, and the work plan he was given was only a "vague description of his functions".

He says that his supervisor had been informed about the project with the Austrian bank and he had asked his supervisor to have the agreement forwarded to the Legal Service for clearance. He maintains that the telephone calls at issue were job-related.

Regarding the confidential report on him sent by his supervisor to the Officer-in-charge of the Project Personnel Service on 17 February 1997 - produced by the Organization with its reply - he points out that he did not know about it at the time it was despatched and was, therefore, deprived of his right to reply.

E. In its surrejoinder UNIDO maintains its arguments and comments on issues raised by the complainant. It rejects the complainant's assertion that he had not received the evaluation form. Besides, the complainant knew what the formal requirements of the evaluation exercise were.

With regard to the agreement with the Austrian bank, the Organization states that the complainant has not put forward any proof to show that he had informed his supervisor of the agreement or that it went to the Legal Service before it was communicated to the bank.

The Organization rejects the complainant's allegation that he had been deprived of his right to reply to the confidential report on him. Personnel Services had discussed the issue with him at the time and the complainant had received a copy of it as he indeed says in his internal appeal.

CONSIDERATIONS

1. The complainant attacks a decision of the Director-General of the United Nations Industrial Development Organization (UNIDO) dated 19 November 1998 accepting the recommendation of the Joint Appeals Board and rejecting the complainant's appeal against the administrative decision of 29 July 1997 not to extend his one-year contract when it expired on 31 July 1997.

2. The decision not to renew or extend a fixed-term appointment upon its expiry is a matter falling squarely within the discretionary authority of an international organization. The Tribunal will not interfere with such a decision unless it can be shown that it is vitiated by one of a very limited number of errors. The threshold for review is high and the Tribunal will not second-guess the Administration's decision simply because it might itself have come to a different conclusion.

3. The complainant takes four points which he frames as attacks upon the recommendation of the Joint Appeals Board:

(a) no valid performance evaluation report was completed prior to the decision not to renew his appointment;

(b) the Appeals Board erred in concluding that the complainant had not properly complied with the terms of his job description;

(c) the complainant had a legitimate expectation of renewal;

(d) the complainant did not misrepresent facts about his previous employment.

There is no merit to any of these arguments.

4. The Tribunal is satisfied that the absence of a performance evaluation report was due entirely to the complainant's own failure to participate and cooperate in the preparation of such a report.

5. With respect to the complainant's performance of the duties of his position, the Administration has presented convincing evidence that he exceeded his authority and entered into improper and unauthorised negotiations on behalf of the Organization, failing to keep his supervisor properly informed and to comply with the latter's directions. The complainant's attempt to write a special role for himself into a draft agreement which he negotiated with an Austrian bank was rightly viewed by his superiors as unacceptable.

6. There were a number of other relatively minor instances of insubordination and improper activity by the complainant which were noted by UNIDO. The complainant argues that, since none of these was ever made the object of disciplinary proceedings against him, they cannot be invoked as reasons in support of the decision not to renew his contract. The complainant is wrong. An organization is never under an obligation to launch disciplinary proceedings against a staff member and, where that person's appointment is drawing to an end, the fact that there are possible disciplinary infractions on his part may properly be considered when the Administration is deciding whether or not to offer him a new contract.

7. In Judgment 1405 (*in re* Moore) the Tribunal said:

"Since disciplinary proceedings are irrelevant to non-renewal of a fixed-term appointment the complainant may not properly allege hidden disciplinary action. Disciplinary proceedings, and the safeguards they afford, are relevant in the event of misconduct warranting disciplinary action while an official is under contract, and one possible sanction is termination of the appointment, whatever its duration may be. Disciplinary proceedings do not apply in the event of due expiry of a fixed-term appointment, when the issue is whether in the light of past performance the contract should be renewed. An organisation must be allowed full freedom to decide the issue without having to go through the disciplinary procedure. So there is no question of abuse of process."

8. The complainant had no legitimate expectation of renewal of his contract. As a fixed-term official he of course had a right to be considered for reappointment and, if not reappointed, to be given the reasons for such decision. If, however, as was the case here, the reasons for non-renewal are grounded primarily in the official's own unsatisfactory performance and date back to well before the time that the contract was due to expire, the Administration is quite entitled to undertake a search for a replacement prior to the contract's

date of expiry. When an official by his own actions renders himself unacceptable for reappointment there is no longer any obligation on the part of the organization to consider him for such reappointment. That is what happened in the present case.

9. Finally, whatever be the rights or wrongs of the suggestion that the complainant did not frankly reveal the reasons for leaving his previous employment the Organization concedes that this was not a factor in the decision not to reappoint him.

10. For the foregoing reasons, the Tribunal is unable to find any defect in the decision not to extend the complainant's contract after its expiry that would be of such a nature as to permit the Tribunal to intervene.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet