Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Gomes Pedrosa** **Judgment No. 1983**

The Administrative Tribunal,

Considering the complaint filed by Mrs Volia Gomes Pedrosa against the United Nations Industrial Development Organization (UNIDO) on 1 July 1998 and corrected on 21 October 1998, UNIDO's reply of 3 February 1999, the complainant's rejoinder of 25 May and the Organization's surrejoinder of 16 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Brazilian citizen born in 1964, was recruited on 22 August 1994 as a typist at grade G.2 by the UNIDO Service in France for the Strengthening of Industrial Co-operation between France and Developing Countries (hereinafter UNIDO Service in France). Her initial appointment was for one month and ten days and it was followed by a series of short-term contracts - the last one expiring on 31 December 1997. She was assigned to work with the Brazilian delegates successively appointed to the Service.

The Director of the UNIDO Service in France spoke with her on 6 November 1997 and told her that the Organization did not intend renewing her contract when it expired on 31 December.

On 7 November she left for Brazil on mission. In a fax message of 11 November the Brazilian delegate, the complainant's supervisor, "confirmed" that "by mutual agreement" the complainant's appointment would not be renewed after 31 December and explained that what she needed was a "secretary with shorthand and typing", whereas the complainant wanted an appointment as a technical assistant which did not tally with the needs of the service. In a second fax message of 20 November she explained what she meant by "mutual agreement": she referred to the fact that the complainant had told her of her intention to return to Brazil and had asked for her help in finding a job there. She repeated that her contract would not be renewed. In a reply she faxed to her supervisor on 23 November 1997 the complainant said that the decision not to renew her appointment had arisen from a misunderstanding since she had not yet come to a final decision about returning to Brazil.

On 5 January 1998 the complainant went to see the Director of the UNIDO Service in France. The upshot of the talk was that she was no longer to come to work. By a letter of 13 January she asked him to confirm the non-renewal of her appointment in writing, deeming the Brazilian delegate's decision to be of no legal value. By a letter of 16 January the Director replied that the Brazilian delegate had "full authority ... to choose her staff" and confirmed the non-renewal.

By a letter of 6 February 1998 the complainant requested the Director-General to reconsider this decision or else allow her to go straight to the Tribunal. Having received no reply, she filed this complaint.

B. The complainant objects that she was informed of the decision not to renew her contract by "a mere fax" while she was on mission abroad, which was contrary to the Staff Rules and Regulations and there had been no indication that such a decision was likely. She submits that the Organization had "purely and simply" dismissed her in breach of its duty of good faith and loyalty towards her.

The decision was not taken by the competent authority. As UNIDO was her employer, it should have been taken not by the Brazilian delegate but by the Director-General of the Organization. UNIDO also failed to give her one

month's notice.

She denies having expressed any firm intention of returning to Brazil. There was no mutual agreement between herself and the Brazilian delegate and the latter had no good reason not to renew her appointment.

Lastly, she contends that her job title over the period from 1994 to 1997 was inaccurate. Right from the start she was a "special assistant" and indeed she possessed a card that said so. Her pay never matched the duties she performed and she estimates the difference in salary as equal to 433,600 French francs for the entire period of her service at UNIDO.

She asks the Tribunal to quash the implied rejection of the request she made in her letter of 6 February 1998 and to order all consequent redress. She claims 200,000 francs in damages, 433,600 francs in back pay and 40,000 francs in costs.

C. In its reply the Organization objects to the receivability of the complaint. The complainant should have challenged the message faxed to her on 11 November 1997, which contained the decision not to renew her contract. The later communications merely confirmed that decision.

She appealed to the Director-General only on 6 February 1998 and so exceeded the time limit of sixty days prescribed in UNIDO Staff Rule 112.02(a).

Her claim to back pay is irreceivable because she failed to exhaust the internal remedies.

In subsidiary argument it explains that the procedure to be followed by the Administration in communicating its decisions is not indicated in the Staff Rules and Regulations. Citing the case law, it notes that the Tribunal allows the use of communication methods such as telexes.

It did not dismiss the complainant but merely refused to renew her contract, and she was informed of that decision forty-eight days before it expired. It adds that notice of non-renewal is not required by the rules.

The needs of the service changed with the arrival in January 1997 of the new Brazilian delegate. What she wanted was a secretary/shorthand typist to perform secretarial duties. But that job did not suit the complainant, who wished to be recruited as a technical assistant. The fact that she had taken on more activities did not mean she was "released" from her initial duties, nor did it create any new obligations on the part of UNIDO.

It observes that it was not required to obtain her agreement to the decision not to renew her appointment. The Director of the UNIDO Service in France took his decision on 6 November and conveyed it to her orally. The Brazilian delegate's fax message merely notified to her in writing a decision of which she had already been informed verbally.

The amounts she claims correspond to the salary of a different category of staff - which was not the one specified in her contracts. Her claim to back pay is therefore devoid of merit.

D. In her rejoinder the complainant asserts that it was the Director's letter of 16 January 1998 which constituted the written notice of non-renewal as it was the only final administrative decision and is the decision under challenge. Her appeal of 6 February 1998 to the Director-General was therefore filed within the time period specified in Rule 112.02(a).

Citing the case law she submits that an organisation may not end someone's appointment without first warning that person of his or her shortcomings. Furthermore, reasons must always be given and the decision notified within a reasonable period. However, UNIDO gave her no warning and did not officially inform her of the non-renewal until 16 January 1998, after her last contract had expired.

She points out that she never refused to perform the duties of a typist. The decision not to renew her appointment was therefore "purely arbitrary" in that it was prompted by the Brazilian delegate's wish to be rid of her "for personal reasons" that had nothing to do with "the proper running of the service". Since the duties of "special assistant" were not part of her contract, they were of indefinite duration. UNIDO never withdrew those duties.

She alleges that her claim to back pay is simply the consequence of an abuse of authority and must therefore be

declared receivable.

E. In its surrejoinder UNIDO presses its arguments and rebuts the pleas put forward by the complainant in her rejoinder.

It submits that she provides no evidence of bias on the part of the Brazilian delegate. Besides, the latter stated that in February 1997 the complainant had herself admitted that she did not want to do typing work.

CONSIDERATIONS

1. The complainant was recruited in August 1994 as a typist by the UNIDO Service in France. After an initial appointment of one month and ten days, she was given a series of short-term contracts, the last of which, signed on 16 July 1997, expired on 31 December 1997. On 13 November 1997 while she was in Brazil on mission for the Organization she received a fax message dated 11 November from her first-level supervisor, the Brazilian delegate to the UNIDO Service in France, "confirming" that "by mutual agreement" her contract, due to expire on 31 December 1997, would not be renewed in 1998 and that her wish to be recruited as a technical assistant did not tally with the needs of the service. A second fax message, dated 20 November 1997, confirmed the first one and its author explained that the reference to a "mutual agreement" stemmed from the fact that a few months earlier the complainant had sought her help in finding work in Brazil where she planned to return to live. On 23 November 1997 the complainant answered the two messages. She expressed surprise at their content and stated that she had never agreed to the non-renewal of her appointment; that she had not reached a decision about returning to Brazil; and that although the duties she performed were not those of a typist but of a technical assistant, she was ready to continue performing them. She confirmed those statements in a fax message dated 28 November 1997.

2. On returning to Paris after taking authorised leave in Brazil, the complainant went to the UNIDO Service in Paris on 5 January 1998, but the Director of the Service reminded her that her appointment had not been renewed and asked her not to return to her former work place. On 13 January 1998 she wrote a letter of protest to the above Director in which she stated that her supervisor's intentions were of no legal value without a letter of confirmation from the Director, as he alone was her employer. The Director wrote to her on 16 January 1998 confirming the non-renewal of her appointment. He also reminded her that her supervisor, the Brazilian delegate, had full authority over her and that the successive renewals of her appointment had always been notified to her by the serving Brazilian delegate. In a letter of 6 February 1998 to the Director-General of UNIDO, the complainant submitted a request, pursuant to Staff Rule 112.02, for a review of the decision contained in the letter of 16 January. She also asked, in the event of a negative response, to be allowed to come straight to the Tribunal without having to go before the Joint Appeals Board. Having received no reply, she filed this complaint, in which she seeks the quashing of the implied decision, and claims 200,000 French francs in damages, 433,600 francs in back pay for the salary she would have been entitled to had she been paid in accordance with the duties she actually performed for forty months, and 40,000 francs in costs.

3. The Organization raises several objections to receivability. Its arguments concerning her claim to back pay are undoubtedly sound: the claim was submitted directly to the Tribunal without having been made in an internal appeal. Contrary to what the complainant asserts in her rejoinder, it is quite separate from her claim concerning the non-renewal of her appointment; and that she was allegedly underpaid bears no relation to the injury caused by the termination of her appointment. The claim is therefore irreceivable since she failed to exhaust the internal remedies.

4. However, her claim to compensation for the injury caused by the non-renewal of her contract is receivable. The defendant cites Staff Rule 112.02(a), which states:

"A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, 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 Organization contends that the non-renewal decision was given in the letter of 11 November 1997, received by the complainant on 13 November, and that she therefore had until 12 January 1998 to ask the Director-General to review it. Since she submitted it on 6 February 1998 her request was out of time. The plea fails: although the Brazilian delegate's letter of 11 November 1997 told the complainant clearly that her contract would not be renewed, it was a personal letter referring to a "mutual agreement" which obviously did not exist. The letter could

not be regarded by the complainant as an administrative decision taken by the competent authority which could set off a time limit for appeal. It is true that the complainant was aware of the Organization's intentions, having been informed of them several times, in particular, in a talk with the Director of the UNIDO Service in France on 6 November 1997 and by the fax messages of 11 and 20 November 1997. Nevertheless, she was right to wait for official notification of an administrative decision from the competent authorities of UNIDO before challenging the measure. Although the letter of 16 January 1998 signed by the Director of the UNIDO Service in France appears to be merely a letter of confirmation, it is the only official administrative decision adversely affecting the complainant. Her letter of 6 February 1998 seeking a review of it was therefore in time.

5. In support of her claim to the quashing of the decision, the complainant submits that UNIDO was in breach of its duty of good faith and loyalty towards her, particularly since it failed to inform her in good time of its intention not to renew her contract; and that the termination of her appointment was based on wrong facts, which amounts to failure to provide reasons.

6. The evidence shows that, being employed under a series of short-term contracts, the complainant knew that her appointment was not automatically renewable. In the absence of convincing written evidence - other than the fax messages of 11 and 20 November 1997 - it cannot be denied that there was tension between the complainant and the Brazilian delegate, prompted in part by the discrepancy between the tasks the complainant actually performed and the Service's need for a real secretary - the job for which the complainant had been recruited - and not a technical assistant. Consequently, the complainant may not allege that the non-renewal of her contract came as a surprise and that she was given no warning - which would have been contrary to the principles that govern relations between an organisation and its staff. As to the absence of one month's notice, UNIDO rightly points out that the obligation arising from the provisions of the Staff Regulations applies to dismissal and not to non-renewal of a fixed-term appointment. Nonetheless, the case law says that an organisation must always give the reasons for a decision not to renew an appointment and those reasons must be notified to the staff member within a reasonable time.

7. In this case, there is some doubt as to the Organization's real reasons. The first fax message addressed to the complainant referred to a "mutual agreement" which clearly did not exist. The fact that she did not actually perform the duties of a secretary was undoubtedly one of the reasons for the final decision. But that situation was not new. UNIDO seems to have accepted it and apparently issued no warnings on that score. A letter, submitted in the surrejoinder, addressed by the delegate of Brazil to the Director of the Service and dated 2 February 1999, mentions that "she [the complainant] never did her work properly and refused to help Mrs C.", which does imply that there were personal criticisms of the complainant, though the evidence includes no assessment of her work. In short, taken together, the above elements indicate that the explanation given for the non-renewal of the complainant's appointment is far from clear and precise reasons are lacking. As the Tribunal recalled in Judgment 946 (*in re* Fernandez-Caballero):

"As a rule the reasons for any administrative decision must be stated. Non-renewal is plainly a decision of great consequence to a staff member and, though the Director-General is free to make his own assessment of the material facts, the staff member is entitled to know the reasons for the Director-General's conclusion so that he may, if he chooses, lodge first an internal appeal and then, if need be, a complaint with the Tribunal."

8. The impugned decision of 16 January 1997 merely informs the complainant, without any statement of reasons, that the Brazilian delegate "has full authority ... to choose her staff and, of course, define their duties". The reasons given by the Brazilian delegate - who has only such authority as is mandated by the general management of UNIDO - being neither clear nor established as regards the complainant's agreement to the non-renewal of her appointment, the Tribunal considers that the decision under challenge must be set aside for want of an adequate explanation. The complainant seeks neither reinstatement nor a new contract, but redress for injury which the Tribunal sets at 50,000 French francs.

9. Since the complaint succeeds in part, she is entitled to costs, which the Tribunal sets at 20,000 francs.

DECISION For the above reasons,

1. The challenged decision is set aside.

2. UNIDO shall pay the complainant compensation in an amount of 50,000 French francs.

3. UNIDO shall pay the complainant 20,000 francs in costs.

4. Her other claims are dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.