

NINETIETH SESSION

In re Verma

Judgment No. 2019

The Administrative Tribunal,

Considering the complaint filed by Mr Tuhin Verma against the United Nations Industrial Development Organization (UNIDO) on 25 October 1999 and corrected on 23 November 1999, UNIDO's reply of 2 March 2000, the complainant's rejoinder of 8 May, and the Organization's surrejoinder of 10 August 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. On 1 September 1986 the complainant, who was born in 1945, was seconded from the Government of India to UNIDO on a two-year fixed-term appointment at grade P.5. His secondment was subsequently extended until 31 December 1989. On 19 December 1989, the Government of India accepted his voluntary retirement from government service, but his employment with UNIDO continued.

In March 1996 he was appointed as the Officer-in-Charge *ad interim* of the Asia and Pacific Bureau in the Country Programmes and Funds Mobilization Division. Another staff member was eventually appointed to the post, so on 1 October 1996, the complainant was reassigned as a Senior Area Programme Officer at grade P.5 on a post "borrowed" from another bureau within the Division. His contract was to expire on 31 December 1996.

In a memorandum of 16 December 1996 the Director of Personnel Services informed the complainant that his supervisor had rated five out of six performance elements in part II of his performance evaluation report for the period from 1 January to 30 September 1996 as "needs improvement", therefore his within-grade salary increment was being suspended until the report had been completed. The sixth element was rated "fully meets expectations". The Director of Personnel Services also stated that his fixed-term contract would be extended for six months, until 30 June 1997, and that any extension beyond that date would be considered in the light of his performance. The complainant completed the staff member's portion of the report on 30 January 1997. His second reporting officer, the Director-General, gave him the overall rating "needs improvement". On 25 April 1997 the complainant lodged a rebuttal against his performance evaluation report. Since he and the Administration were unable to agree on the composition of the Panel, the rebuttal procedure was never completed.

On 28 February 1997 the Director of Personnel Services had informed the complainant that the Director-General was reassigning him to the Enterprise Development and Restructuring Branch of the Human Resource, Enterprise and Private Sector Development Division. Additionally, his contract would be extended until 31 August 1997 in order to allow for a six-month period to evaluate the complainant's performance in this new job. On 14 July, his supervisor sent the Director of Personnel Services a special performance evaluation report on the complainant. Although he found the complainant's performance to be satisfactory, the supervisor noted that, because the nature of the work in the Division was incompatible with the complainant's skills and experience, he had been unable to assign the complainant meaningful work. On 23 July the Director of Personnel Services informed the complainant that his appointment in the Division could not be extended further. However, other reassignment possibilities would be explored but, should none materialise, his contract would be allowed to expire.

On 22 August 1997 the Director of Personnel Services informed the complainant that his contract would terminate on 31 August because it had not been possible to identify a suitable post for him. On 28 August the complainant wrote to the Director-General requesting a review of that decision. The Director of Personnel Services replied on 29 August on the Director-General's behalf stating that, although the decision still held, his contract would be

extended for one month on "humanitarian grounds".

On 23 October 1997 the complainant appealed to the Joint Appeals Board against the decision not to extend his contract and, on 8 July 1999, the Board issued a report to the Director-General in which it recommended dismissing the appeal. On 5 August 1999, the Secretary of the Joint Appeals Board sent the complainant the decision of the Director-General dated 4 August rejecting his appeal. That is the impugned decision.

B. The complainant makes three pleas. First, he submits that the decision not to extend his contract was tainted with prejudice and discriminatory treatment. He had a legitimate expectation of continued employment as he had served the Organization for more than ten years with excellent performance reports. When he retired from government service he expected his employment with UNIDO to continue until he reached retirement age. He was "illegally" removed from his post because his supervisor disliked him and the Director-General believed that the complainant had something to do with his unsuccessful bid for re-election.

Secondly, he argues that the decision was procedurally flawed. The manner in which he was passed over for promotion for the post of Director of the Asia and Pacific Bureau violated the placement and promotion system which the Director-General announced in circular DG/B(M).68 and which came into effect from 1 January 1996. As the incumbent of that post, even if temporarily, he should either have been promoted or reassigned to another post at his existing grade. Instead, he was placed on a "borrowed" post and this deprived him of any career prospects. Additionally, he should have been given truthful and proper reasons for the decision not to extend his contract. He claims that a negative performance evaluation report had been written by his new supervisor "in stark contrast" to his previous reports. He was led to believe that an extension of his contract was contingent upon improving his performance. However, when he fulfilled this condition the reason shifted to the unavailability of a suitable post. Not only were his previous evaluation reports very positive but also the Director-General had himself signed some of them and in September 1996 publicly commended the complainant for his outstanding work.

Withholding his salary increment also constituted a procedural flaw. No special evaluation report was prepared, as required by the Staff Rules. Additionally, the increment should have been based upon the most recent report in his personnel file: that one justified awarding the increment.

Thirdly, he contends that he was denied due process and a fair hearing during the appeals proceedings. He claims that one of the members of the Joint Appeals Board was substituted for an ally of the Director-General.

He requests the Tribunal to order UNIDO: (1) to reinstate him with effect from 1 October 1997 and restore all due benefits and entitlements, including pension fund contributions and insurance coverage or if reinstatement is not possible, to pay him the equivalent of his full salary, including benefits and entitlements, from 1 October 1997 until he reaches sixty years of age; (2) to pay him his within-grade salary increment from 1 November 1996; (3) to award him three years' pay as compensation for the injuries caused by the "procedural irregularities, discrimination and ill treatment, and abuses of authority"; (4) to remove all adverse material, including the contested performance evaluations, from his personnel file; and (5) to pay him interest on all payments due, and costs.

C. In its reply UNIDO states that the complainant was separated from service when his fixed-term contract came to an end; this was done in observance of the rules. Furthermore, according to Rule 103.10(a) then in force a "fixed-term appointment does not carry any expectancy of renewal". Therefore, the decision not to extend the complainant's contract did not constitute an abuse of the Director-General's authority nor was it tainted with prejudice: a post suitable for him could not be found. Furthermore, on 23 July 1997, he was given the reasons why his contract could not be extended; these had no connection with his poor performance evaluation report in 1996; his allegations of prejudice and discriminatory treatment are therefore unfounded.

The Organization submits that it was not a procedural error to deny the complainant a salary increase. The rating "needs improvement" in his performance evaluation report for 1996 had been anticipated even if the report had not yet been completed. His supervisor was therefore justified in not recommending him for a salary increase.

It contends that his claim for an award of three years' pay as compensation for injury is irreceivable as it goes beyond the scope of the claims presented in his appeal. The Organization rejects all other claims made by the complainant.

D. In his rejoinder the complainant contends that the only condition for the further extension of his contract was

satisfactory performance, and fulfilment of that condition created a legally binding obligation. Furthermore, the change in his status from that of a staff member seconded from the Government of India to that of UNIDO staff member created "a clear expectation of a full career within the organization". He argues that the Tribunal's case law emphasises the good faith required by all the parties when entering into agreements.

He contends that the Organization did not make sufficient efforts to redeploy him as required by the Tribunal's interpretation of Staff Rule 110.02(a).

E. In its surrejoinder UNIDO presses its plea that the complainant has put forward only unsubstantiated allegations of prejudice against him. It was due to the restructuring of the Organization that the complainant, along with other staff members, had to be reassigned in 1996; he was not a target of "unlawful reassignment". All of the complainant's reassignments have been justified. Staff Regulation 4.1 gives the Director-General authority to assign staff "to any of the activities or offices of the Organization". It attempted to find a suitable post for the complainant but was not successful.

The Organization reiterates that staff members on fixed-term appointments cannot expect continued employment until retirement. When the complainant's contract came to an end and no suitable post could be found for him, his service with UNIDO ceased. In addition, the complainant's performance was "uneven".

CONSIDERATIONS

1. The complainant was seconded to UNIDO from the Government of India on 1 September 1986. He received successive appointments to different positions and on 19 December 1989 he voluntarily retired from service with the Government.

2. On 16 December 1996 the Director of Personnel Services transmitted to the complainant his performance evaluation report for the period from 1 January to 30 September 1996, part II of which had been completed by his supervisor after a meeting with him. Part III was to be completed by the complainant. The report would subsequently be submitted to the Director-General for completion of parts IV and V.

Unlike previous evaluation reports, in which the complainant was given high ratings, the 1996 report showed that five out of six performance elements had been marked "needs improvement"; the remaining element was rated "fully meets expectations" (the overall rating eventually given by the Director-General, as the second reporting officer, in part IV was "needs improvement").

Consequently, the complainant was informed that his within-grade salary increment, which was due in November, had been suspended until his performance evaluation report was completed. He was also informed that the Director-General had decided that his fixed-term appointment, which was due to expire on 31 December 1996, would be renewed for another six months, until 30 June 1997. A suitable assignment and terms of reference would be determined to measure his performance during this period. Any further extension of the contract would be considered in the light of his performance during those six months.

On 28 February 1997 the Director of Personnel Services informed the complainant that he was being reassigned to another Division and that his appointment had been extended to 31 August 1997. Any further extension would be contingent upon the complainant's meeting the terms of reference established by his new Division for the period from 1 March to 31 August 1997.

3. In the meantime, on 25 April 1997, the complainant lodged a rebuttal of his evaluation report for the period of 1 January to 30 September 1996.

4. On 14 July 1997 the complainant's new supervisor issued a special performance evaluation stating that, while the complainant had completed all the assignments given to him during the four-month period, he had "found it impossible to fully utilize the very specific profile and skills of [the complainant] in such a way as to provide him with meaningful full-time employment commensurate with his qualifications and grade. Indeed, for one month now, [he] has been without any assignment".

5. In view of such an assessment, on 23 July 1997 the Director of Personnel Services informed the complainant

that his appointment in the Division could not be extended further; the possibilities for reassigning him would be explored, and if no assignment could be identified, his contract would expire on 31 August 1997. On 22 August the Director informed him that his appointment would not be renewed.

6. On 28 August the complainant requested the Director-General to review this decision. The next day, the Director of Personnel Services, on behalf of the Director-General, confirmed the reasons for the non-extension of the appointment. However, he informed the complainant that the Director-General had decided to extend his appointment by one month based on "humanitarian grounds".

7. Meanwhile, the rebuttal lodged by the complainant against his evaluation report was not pursued due to his inability, and that of the Administration, to resolve a deadlock with respect to the composition of the investigation panel. The disputed report was regarded as final when the deadlock could not be resolved by mid-December 1997.

8. On 6 August 1997 the Director of Personnel Services requested the Managing Directors of three divisions to inform him if any suitable posts were currently available for the complainant. However, the result of this inquiry proved to be negative either because no post was available or because the complainant's qualifications were not appropriate.

9. On 23 October 1997 the complainant filed an appeal with the Joint Appeals Board under Staff Rule 112.02(b) against the decision not to extend his contract further. The Board met ten times from 11 February 1999 to 6 July 1999. Aside from the complainant, four other persons were heard. On 8 July the Board released its report recommending that the complainant's appeal be rejected in its entirety. The Director-General endorsed this recommendation on 4 August.

10. On 25 October 1999 the complainant filed this complaint in which he substantially reiterated the claims he had put before the Board, namely:

(1) that he be reinstated in service with effect from 1 October 1997, and that all benefits and entitlements due, including pension fund contributions and insurance coverage be fully restored;

alternatively, that in lieu of reinstatement, he be paid his full salary, including all benefits and related entitlements, from 1 October 1997 until he reaches sixty years of age;

(2) that the Organization pay him the within-grade salary increment, which was withheld, from 1 November 1996 onwards;

(3) that he be awarded compensation in an amount equivalent to three years' pay for the "procedural irregularities, discrimination and ill treatment, and abuses of authority which have caused him irreparable injury";

(4) that UNIDO expunge all adverse documents from his personnel records, including the contested performance evaluations;

(5) that the Organization reimburse him for the costs of this complaint and that he be awarded interest on all payments due to him.

11. The complainant's principal claim that he be reinstated in service as from 1 October 1997 is based on his assertion that the decision not to extend his fixed-term contract which was due to expire on 31 August 1997 but was extended to 30 September, was "tainted by prejudice and other extraneous factors, that it was procedurally flawed and that the review of his appeal denied him the benefits of due process and a fair hearing".

12. Having served for eleven years with UNIDO, the complainant considers that he had a legitimate expectation of continued employment. The initial rationale for not extending his contract for another two years was the negative performance evaluation report by his new supervisor indicating that he "needs improvement" which contrasted with "the glowing evaluation" from the preceding years. Subsequently, the reason for the decision shifted to the lack of an available post.

13. The complainant also alleges that there were irregularities in the handling of his reassignments, which had less to do with the Organization's restructuring and his own qualifications and more with the Director-General's antipathy towards him in connection with his failed bid for re-election. There were no serious or good faith efforts

to place him in another post.

14. Adverting to the complainant's plea for reinstatement, the Organization emphasises that he was separated from UNIDO as a result of the expiry of his last fixed-term appointment. He had accepted it subject to the conditions specified in the letter of appointment and those laid down in the Staff Regulations and Rules. Staff Rule 103.10(a) provides: "the fixed-term appointment does not carry any expectancy of renewal". Staff Rule 110.05(a) states: "A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

15. UNIDO claims that, if it did not extend the complainant's appointment, it was not due to poor performance but rather the failure "to identify a *suitable post* for him after it had been ascertained that his skills could not be utilized effectively by [his Division]". Neither did it inform the complainant that his appointment would not be extended because of poor performance.

Non-availability of a suitable post was the explanation proffered by a member of Personnel Services in a memorandum of 16 February 2000 to the Chief of the Office of Legal Affairs. Hence, there was no shift in UNIDO's argument.

16. The complainant learned from the Director of Personnel Services as early as 23 July 1997 - almost two months before the expiry of his contract - the reasons why his appointment might not be renewed. On 22 August he was informed that his contract would expire on 31 August. He requested the Director-General to review this decision; the result was that he was granted a one-month extension on "humanitarian grounds".

17. As regards the complainant's plea that no search in good faith was undertaken to find a suitable alternative post for him, UNIDO asserted that there was ample evidence to show that the Director of Personnel Services addressed inquiries to the Managing Directors of several divisions in July and August 1997 asking them to identify posts where the complainant's qualifications and experience could be utilised. The various replies were as follows: "He does not have the requisite skills to formulate and develop new programs"; "The professional qualifications and experience of Mr Verma will not be required ... [either] in the present configuration [or] in the future one"; "in view of the present budget exercise ... the possibility of Mr Verma's transfer ... was not envisaged".

The Organization points out that it exerted efforts to locate a suitable post for the complainant despite the fact that it had no obligation under its Staff Regulations and Rules, or his letter of appointment, to seek alternative employment for him.

18. The Organization rejects the complainant's allegation that "the review of his appeal denied him the benefits of due process and a fair hearing". The Joint Appeals Board carried out a thorough review of the case during ten meetings and interviewed four other staff members. In his decision of 4 August 1999, the Director-General endorsed the recommendation of the Board to reject the complainant's appeal.

19. With respect to the withholding of the complainant's salary increment, UNIDO claims that this was lawful since the case specifically falls under paragraph (g) of Appendix M to the Staff Rules which stated that a salary increment will be withheld if the overall rating in the evaluation report indicates that the performance "needs improvement". The disputed report covering the period from 1 January to 30 September 1996 showed that five out of six performance elements needed improvement.

20. In its reply to the complainant's claim to compensation for moral injury on a number of counts, the defendant asserts that there is no precise evidence to justify such an award. It adds that, since neither the original appeal of the complainant nor his additional comments contain any such claim, this now constitutes an enlargement of the claims submitted in his appeal which should be rejected.

21. Lastly, UNIDO says that the complainant's demand that it expunge all adverse documents from his personnel records, including his contested performance evaluation reports, should not be granted as such information consists of correspondence which is objective, impartial and non-defamatory. As such, there is no legal basis for removing such documents from the Administration's files.

Non-renewal of fixed-term contract

22. Anyone who enters into a contract of employment for a fixed term must abide by its terms and is not entitled to

automatic renewal or conversion to another type of appointment. The complainant accepted his appointment subject to whatever conditions were laid down in the letter of appointment and the provisions of the Staff Regulations and Rules.

23. A decision by an organization not to renew such a contract is within its power and authority. In a long line of cases the Tribunal has held that such a decision, being discretionary, "may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority". (Judgment 1262, *in re* Scherer Saavedra, under 4) Not one of these conditions is present in this case. (See also Judgments 600, *in re* Freeman, under 1; 972, *in re* Unninayar, under 6; 1249, *in re* Reznikov, under 8; 1405 *in re* Moore, under 4; and 1617, *in re* Lebtahi, under 1.)

24. The allegations of discriminatory treatment made by the complainant remain mere allegations since they have not been proved. Therefore, the Tribunal rejects them.

25. An official's lengthy record of service does not suffice to justify a legitimate expectation of continued employment. Not being a contractual right, it remains in the realm of speculation and has no basis in law; more a product of fancy than of fact.

26. Nor may an official insist on the renewal of a fixed-term appointment on the basis of what he or she perceives as past exemplary performance. The evaluation by the complainant's supervisors in the report for the period from 1 January to 30 September 1996 is indubitably an objective and accurate gauge of performance. Unlike his high ratings in the past, the disputed report disclosed that five out of six performance elements had been rated "needs improvement". Quite expectedly, the overall assessment of the second reporting officer - the Director-General - was likewise "needs improvement".

27. The Organization stressed that the non-renewal of the complainant's employment was based, not on performance, which was not exemplary, but on the lack of an available position suitable to the complainant's qualifications and experience.

28. The complainant has employed interchangeably the terms "termination", "forced separation" and "involuntary separation" in referring to his situation. These terms should not be confused with the term "expiration of the fixed-term contract" which is the technically correct and accurate term applicable to this case.

29. In the light of the foregoing, reinstatement is not a relief to which the complainant can claim to be entitled inasmuch as his employment with UNIDO ceased for a lawful cause. It follows that his claim to "benefits and entitlements due, including pension fund contributions and insurance coverage" cannot be granted.

30. The complainant's employment with UNIDO having ceased lawfully, and since it has been shown that he is not entitled to reinstatement, the complainant's alternative claim to payment of the "equivalent of his full salary, including all benefits and related entitlements for the period 1 October 1997 until he reaches the mandatory age of retirement", cannot be allowed.

Within-grade salary increment

31. The claim to a within-grade salary increment has no legal basis since at the material time paragraph (g) of Appendix M to the Staff Rules stated: "The within grade salary increment ... shall be withheld if the overall rating given in part IV of the staff performance evaluation report is that the performance needs improvement ...".

Additional compensation for irreparable injury

32. The claim to additional compensation in the amount of three years' pay for "procedural irregularities, discrimination and ill treatment, and abuses of authority which have caused him irreparable injury", is apparently not linked solely to the non-renewal of his appointment. It also relates to the manner in which he was assigned and re-assigned to different sections within the Organization, as well as to alleged bias and prejudice on the part of his supervisors. The complainant concludes in his rejoinder that "the illegal behaviour of the defendant calls for the award of exceptional compensation".

33. The complainant discerns sinister motives in the actions of his supervisors that were detrimental to his interests.

In particular, he accused his immediate supervisor, who had just become the Officer-in-Charge of his Division of "hostility, bias and harsh treatment" arising in part from the fact that the complainant was "a convenient scapegoat" for the disagreements that Officer had had with the complainant's previous supervisor.

34. The Director-General himself has not been spared from the complainant's diatribes. From a personal record the complainant has kept reporting on two conversations he had with the Director-General, he contends that the Director-General stated that he could expect little support for renewal of his contract or any kind of generosity given his involvement in schemes to undermine his re-election, as well as all kinds of intrigues against him.

35. Such unsubstantiated and sweeping accusations imputing ill-will, malice and bias against his supervisors can hardly be made the basis for an award of damages.

36. Since the complainant's principal claims fail, so too do the claims to other forms of relief, namely, to expunge all adverse documents from the complainant's personnel records and reimbursement for costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Florida Romero

Catherine Comtet