

NINETY-THIRD SESSION

Judgment No. 2165

The Administrative Tribunal,

Considering the complaint filed by Mr W. K. against the United Nations Industrial Development Organization (UNIDO) on 7 July 2001, UNIDO's reply of 17 October, the complainant's rejoinder of 25 November 2001, and the Organization's surrejoinder of 11 March 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. UNIDO Staff Rule 106.12 says:

"(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.

(b) Without prejudice to the principle that promotion shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

The complainant is a Polish citizen who was born in 1941. He joined UNIDO for the first time in 1973 under a grade P.3 appointment but he resigned from the Organization in 1980, at which time he was on a grade P.4 post. In October 1986 he joined UNIDO again, under a P.5 appointment. From September 1989 he was assigned as Senior Project Personnel Officer to the Project Personnel Recruitment and Administration Service (PRAS). From 14 May to 31 December 1993 he carried out the duties of Officer-in-charge of that service and was accordingly paid a special post allowance at D.1 level from 14 August 1993. From 1 January 1994 he resumed his former duties.

On 22 November 1995, with effect from 1 December, he was appointed Officer-in-charge of the Project Personnel and Fellowship Service (PPFS) - formerly the PRAS - in the Operational Support Division. The post of head of the PPFS, which was at grade D.1 was to become vacant, upon the retirement of the incumbent. As a result of reforms which took effect on 1 March 1996, the Operational Support Division was transferred to the Division of Administration and became the Operational Support Services, which included the Project Personnel Service (PPS), formerly the PPFS. The complainant was appointed as Officer-in-charge of the PPS and held that position until the end of February 1998. It would appear that that post was thereafter abolished. Until his retirement in August 2001 the complainant worked in the Staff Development and Management Branch (SDM), which later became the Human Resources Management Branch (HRM).

By a memorandum of 9 November 1998 addressed to the Acting Director of SDM, citing Rule 106.12(b) the complainant requested payment of a special post allowance for the period from 1 December 1995 to 28 February 1998 on the grounds that he performed D.1 level duties during that period. He noted that he had been paid the allowance in 1993. The Director replied on 14 January 1999, declining to award him the allowance. On 2 March the complainant wrote to the Director-General asking him to review that decision. In a memorandum of 26 April the

Acting Director of HRM replied on the Director-General's behalf that he saw no grounds for reversing the decision. He explained that following the reforms, an Acting Director of the Operational Support Services had been appointed and put in charge of managing and supervising the PPS as from 1 March 1996; consequently from that date the complainant had ceased to perform the duties of head of that Service.

On 22 June 1999 the complainant went to the Joint Appeals Board. In its report of 13 March 2001 the Board recommended granting the complainant the special post allowance for the period from 1 March 1996 to 28 February 1998. By a memorandum of 11 April 2001, the impugned decision, the Director-General asked the Board's Secretary to inform the complainant that he had decided not to allow the appeal.

B. Citing the Board's report the complainant submits that the decision to deny him the allowance is unwarranted because the duties he performed from 1 December 1995 to 28 February 1998 were at D.1 level, as the description of the post shows. Moreover, the Acting Director of the Operational Support Services testified before the Board that he asked the complainant to continue with the same duties. In the course of the internal appeal the Administration stated that it informed the complainant in writing that he would not be granted the allowance for budgetary reasons having to do with the appointment of the Acting Director of Operational Support Services. The complainant seeks disclosure of that written information.

He accuses the Administration of failing to notify to him the decision to downgrade his duties to P.5 level from 1 March 1996, thus denying him the possibility of challenging it. In his view, the refusal to grant him the special post allowance is based on mistakes of law and of fact and is discriminatory. Furthermore, when he took up the duties of Officer-in-charge of the PPS, the Director-General promised either to appoint him as head of the Service or to pay him the allowance. But none of those promises materialised.

He contends that ever since the present Director-General took office, the Administration has been intent on harassing him and destroying his career with a view to getting rid of him. In support of his contention he cites the abolition of his post in March 1998. UNIDO appointed a subordinate of his as head of the PPS in his stead who, to his mind, lacked the necessary qualifications; it thus deprived him of the opportunity to apply for the post himself. Thereafter, it made no effort to reassign him to a suitable job.

The complainant asks the Tribunal to quash the impugned decision and order UNIDO to grant him the special post allowance or, failing that, to send the case back to the Organization for reconsideration. He claims costs.

C. In its reply UNIDO submits that the complainant did not meet the criteria for the grant of the special post allowance set in administrative circular UNIDO/DA/PS/AC.76 of 28 January 1991 which issued guidelines for the application of Rule 106.12. It explains that on 1 March 1996 he stopped performing the full duties of a D.1 post and resumed duties at P.5 level. Following the publication of two bulletins by the Director-General in February and March 1996, he ceased to be Officer-in-charge of a branch previously headed by a staff member at D.1 level, whom he had replaced temporarily, and instead became Officer-in-charge of a service within the Operational Support Services, which were headed and supervised by an Acting Director at grade P.5, who was later promoted to D.1. The latter was the complainant's supervisor. Consequently, the duties attached to the D.1 post were never included in the complainant's job description because he took them over only for three months. Besides, an Acting Director of the Operational Support Services had been appointed so the funds earmarked for that post, which was a D.1 post, could not have been used to pay the special post allowance claimed by the complainant. UNIDO adds that the document of which the complainant seeks disclosure is one of the annexes he submitted with his complaint.

UNIDO contends that the complainant was informed through the Director-General's bulletins of the structural reforms and hence of the level of responsibility attached to posts. Consequently, he was not deprived of his rights of appeal.

Nor is there any merit in his allegations of harassment and discrimination. A memorandum of 19 March 1998 informed him of the abolition of his post, citing budgetary reasons among others. He has failed to prove that he was better qualified than the staff member appointed as head of PPS after his post was abolished, or that the duties to which he was later assigned were not at P.5 level.

D. In his rejoinder the complainant draws attention to the Joint Appeal Board's conclusion that for the entire period from 1 December 1995 to 28 February 1998 he retained the same job title, duties and responsibilities. That UNIDO

discounted that conclusion is, he says, regrettable. In his view, if the Administration was envisaging downgrading the post of head of PPS it would have altered the job description. But it did not, and the Director-General's bulletins gave no indication of any duties to be downgraded or transferred.

In his submission UNIDO drew obviously wrong conclusions from the bulletins in that it confused personal grades with grades attached to posts. Budgetary provisions for a special post allowance did exist because they were used to promote the Acting Director of Operational Support Services to grade D.1. He observes that the circular of 28 January 1991 sets out additional requirements for the grant of the special post allowance, though circulars are meant only to explain to staff how the rules are applied. He explains that, although he retained his personal grade after his post was abolished, he was forced to accept duties classified at P.4 level.

Lastly, he submits that he suffered moral injury because the Director-General took nearly two years to give a final decision on his appeal. He seeks appropriate redress on that account.

E. In its surrejoinder UNIDO reiterates that the Director-General is not bound by the Board's conclusions and recommendations. It denies drawing wrong conclusions from the bulletins: the duties the complainant performed as Officer-in-charge of PPS were at grade P.5. It rejects complainant's the allegation that it introduced additional criteria for the grant of the allowance by means of the above-mentioned circular. Lastly, it points out that the complainant was informed that the Board takes up appeals in chronological order; he therefore sustained no moral injury.

CONSIDERATIONS

1. Having joined UNIDO in 1973 under a grade P.3 appointment and left in 1980 while on a P.4 one, the complainant returned to the Organization in October 1986 at grade P.5. In May 1993 he was entrusted with the duties of Officer-in-charge of the Project Recruitment and Administration Service (PRAS) and was accordingly paid a special post allowance at D.1 level from 14 August to 31 December 1993. On 1 January 1994 he resumed his former duties. On 22 November 1995 he was appointed Officer-in-charge of the Project Personnel and Fellowship Service (PPFS) from 1 December 1995. Deeming that he had performed those duties until 28 February 1998 the complainant applied on 9 November 1998 for a special post allowance for the period from 1 December 1995 up until 28 February 1998, the date on which he was reassigned. In response the Organization pointed out to him that, as a result of reforms brought in on 1 March 1996, an additional level - that of Director of the Operational Support Services - had been introduced between that of the complainant and the Managing Director of his Division. As a consequence the complainant was still an Officer-in-charge of a service, which in the meantime had become the Project Personnel Service (PPS).

2. Having been informed on 14 January 1999 that he was not eligible for the allowance, the complainant asked the Director-General on 2 March to reconsider his decision. The decision having been upheld on 26 April, the complainant went to the Joint Appeals Board on 22 June 1999. In its report of 13 March 2001 the Board concluded that the complainant had been given D.1 duties as from 1 December 1995 and had performed them until 28 February 1998, and therefore qualified for an award of a special post allowance. Noting that such allowances are at the discretion of the Director-General, it recommended awarding one to the complainant, deeming that in his case it was justified on moral grounds. By a decision of 11 April 2001 the Director-General declined to follow that recommendation.

3. The complainant has come to the Tribunal seeking the quashing of that decision. In his rejoinder he adds a claim to redress for the moral injury he suffered as a result of his post being abolished. He objects that he was removed unlawfully from his duties and was unable, following the reform, to apply for the post he had held for more than two years. He also objects to the delay in processing his appeal.

4. In denying the complainant's claim to a special post allowance for the duties he says he performed between 1 December 1995 and 28 February 1998, UNIDO based its decision on the fact that award of the allowance is at the Director-General's discretion, and on administrative circular UNIDO/DA/PS/AC.76 of 28 January 1991 which specifies that one of the conditions for granting the allowance is "that the staff member is assigned the full functions of a post that has been duly classified at a higher level than his or her own and for which budgetary provisions exist". But the memorandum sent to the complainant on 26 April 1999 said that, as a result of the

organisational changes brought in on 1 March 1996, another staff member had been appointed Acting Director of the Operational Support Services one of whose duties was to manage and supervise the Project Personnel Service. It also said that because the Acting Director had been appointed at grade D.1, there were no budgetary provisions for the special post allowance.

5. In response the complainant first points out that the Joint Appeals Board acknowledged that up until 28 February 1998 the duties he performed were the same as those entrusted to him on 1 December 1995, and they were undeniably at D.1 level.

6. It is true that the Board concluded, after thorough examination of the case, that the Director-General ought, at least on moral grounds, to use his discretion to allow the complainant's claim. However, as UNIDO rightly points out, the Director-General was not in any way bound by the Board's conclusion, which has the force of a mere recommendation. But notwithstanding the soundness of that argument, the discretion conferred on the Director-General by Staff Rule 106.12(b) does not imply that the Administration is free to act arbitrarily. As the Tribunal has consistently held, discretionary decisions must not be tainted by any formal or procedural flaws, or rest on any mistake of law or of fact, or overlook any essential facts or draw obviously wrong conclusions from the evidence, or show abuse of authority.

7. The complainant submits that UNIDO made several mistakes of law. The gist of his argument is that until 28 February 1998 he performed without interruption the same duties as those entrusted to him on 1 December 1995, and that they were undeniably at level D.1 whereas his grade was P.5; as proof, he cites the fact that on the organisation chart his title continued to be Officer-in-charge.

8. In rebuttal UNIDO contends that following the reform introduced on 1 March 1996 for financial reasons, the complainant stopped being Officer-in-charge of the PPFS, a branch previously headed by a D.1 official, and was thereafter in charge of a service (PPS) within the Operational Support Services, headed and supervised by an official on grade P.5 who was later promoted to D.1. As a subordinate of that official, the complainant can hardly have been performing duties of a higher level than P.5.

9. To assess whether those arguments are sound, the Tribunal must ascertain whether, during the period concerned, the complainant can be regarded as having been "called upon to assume temporarily ... the duties and responsibilities of [a] higher level post ...".

The head of the PPFS, who was about to retire, did ask the complainant to act, as from 1 December 1995, as Officer-in-charge of the Service. At the time the PPFS was part of the Operational Support Division. It is common ground that the duties involved were at level D.1.

As from 1 March 1996 the Operational Services Division became part of the Division of Administration under the name of Operational Support Services. Headed by an Acting Director, those services included the Project Personnel Service, which was headed by an Officer-in-charge: the complainant. That assignment is confirmed by bulletin UNIDO/DGB(O).7 issued by the Director-General on 20 March 1996 which shows the complainant's grade as P.5 and that of the Acting Director of Operational Support Services likewise as P.5. The latter was later promoted to D.1.

10. Given the reform, the Tribunal finds the Organization's argument to be sound: the duties the complainant performed after 1 March 1996 were not fundamentally different from the ones entrusted to him temporarily by his former Director, but he no longer had the same level of responsibility because his service had been placed under a Director whose functions had been defined in January 1997 in a job description which stated that he was in charge of managing and supervising the services under his authority, which included the PPS. Furthermore, the complainant having been appointed in 1996 to head a service which was no longer called PPFS, but PPS, which was slightly different, it cannot be said that he was called upon to assume temporarily duties of "a post higher than his own".

11. The complainant hints that, in view of his responsibilities the description of his post ought to have been changed to allow classification at D.1, and cites in this connection Judgment 1677. The Organization's response is that the reform did not imply any change in the complainant's grade, that far from being downgraded he remained at the same level, P.5, reported to an official at grade D.1 and no longer performed the management duties that went with that grade. The Tribunal is satisfied that this response is sound in law. It is not for the Tribunal to

question the new organisational structure introduced by the 1996 reform, or to pass judgment on whether the incumbent of the D.1 Director's post was indeed carrying out management and supervisory duties.

12. The complainant objects that he was not given sufficient notice of the important structural changes and was therefore not able to make use of the available means of redress. But the evidence shows that bulletin UNIDO/DGB(O).6 issued by the Director-General on 29 February 1996 which set forth the organisational changes and reassignments of staff was made available to him as it was to all staff, and contained all relevant information on the consequences of the reform. The fact that the complainant's title was still down as Officer-in-charge gave him no entitlement to the special post allowance. Furthermore, there is nothing in the dossier to suggest that any evidence was withheld from him.

13. The conclusion is that, the complainant's position not being covered by Rule 106.12, UNIDO properly refused him the special post allowance. Accordingly, the Tribunal need not ascertain whether UNIDO lacked, as it asserts, the funds to pay the allowance, the complainant's plea on this point having become irrelevant.

14. Lastly, the complainant objects to the circumstances in which his post was abolished and to a number of decisions that affected his career until the time he retired. But the Tribunal is unable to entertain his objections since they are outside the ambit of his internal appeal and his complaint which is expressly limited to the refusal to grant him the special post allowance.

15. In the circumstances the Tribunal can only dismiss his claims to the quashing of the decision and to moral damages, since he has failed to prove that UNIDO showed bias or bad faith or made him any unconsidered promises.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet