

SEVENTY-SIXTH SESSION

***In re* SHARAPOV**

Judgment 1305

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. Evgeny Sharapov against the United Nations Industrial Development Organization (UNIDO), received by the Registrar of the Tribunal on 13 October 1992 and corrected on 21 December 1992, UNIDO's reply of 19 March 1993, the complainant's rejoinder of 26 April and the Organization's surrejoinder of 7 June 1993;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, Articles 6 and 7 of the Rules of Court and UNIDO Staff Rule 103.04;

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, a Russian, was born in 1934 in the former Soviet Union (USSR). He joined the staff of UNIDO, in Vienna, in 1983 under a fixed-term appointment for two years as an industrial development officer at grade P.4. His field was transport development and marine engineering. The Organization extended his appointment by further periods of two years in 1985 and 1987, stating in each letter of appointment that he was "on secondment" from the Government of the USSR.

In a memorandum of 28 April 1989 the chief of the Personnel Administration Section of the Personnel Services Division informed him that the Director-General wanted to extend his appointment, which was to expire on 30 November 1989, by another two years and that the Administration would be sending him the letter of appointment once it had medical clearance and "the consent of your Government to your continued secondment".

In response to the Organization's request for the Government's consent the Permanent Mission of the Soviet Union in Vienna informed the Administration by a communication of 16 June 1989 that the Government agreed to a one-year extension until 30 November 1990. On 23 June 1989 UNIDO offered to extend his appointment "on secondment" from the Soviet Government by one year from 1 December 1989 and the complainant accepted by signing the letter of appointment on 7 July.

A personnel officer saw him on 11 June 1990 and in a note for the file written on that day reported telling him that the Director-General had decided not to grant him any further extension because his department no longer needed anyone in his field. In a memorandum of 30 August to the chief of the Personnel Administration Section the complainant said that although his last contract had been shortened to only one year "because of the secondment" he had "never discussed" or agreed to secondment: he had in fact "retired" from the service of the USSR in 1983 before coming to UNIDO. Referring to changes in Soviet law and a recent ruling by the United Nations Administrative Tribunal, he said he wanted to be considered for further employment in UNIDO. In a memorandum of 18 September 1990 he asked the Director-General to extend his appointment at least until November 1991 as "originally intended in 1989".

In a memorandum of 24 September 1990 the chief of the Personnel Administration Section told him that his secondment - which, in any event, he had agreed to by signing the letter of appointment of 23 June 1989 - had nothing to do with the non-renewal, which was wholly due to the Organization's work programme.

In a memorandum of 15 November 1990 one of his supervisors, the Director of the Industrial Operations Technology Division, asked Personnel to extend the complainant's contract by three months "pending recruitment of his successor, who will have a different technical profile". In a memorandum dated 18 January 1991 the Administration informed him that it had extended his appointment by three months from 1 December 1990 to 28

February 1991. By a letter of 11 February 1991 he asked the Director-General for a further extension. A personnel officer refused it in a letter of 18 March, pointing out that the Director-General had already given him three months "to make private arrangements".

He appealed to the Joint Appeals Board on 6 May 1991. In its report of 29 February 1992 the Board recommended that the Director-General should reject the appeal. By a letter of 4 March the secretary of the Board submitted the report to the Director-General, who on 9 March wrote the words "I agree with the recommendations of the Joint Appeals Board" on the secretary's letter. On 9 March 1992 the secretary sent the complainant an unregistered letter informing him of the Director-General's decision. The date at which he got that communication, which he impugns, is unstated.

On 13 October 1992 Mrs. Judy Lavnick-Wainstead, the president of the Staff Union of UNIDO, sent a fax to the Registrar of the Tribunal saying that her office had sent the Tribunal on 18 May a "submission" from the complainant dated 14 May. The Registrar invited the complainant by a letter of 15 October to provide written evidence of the despatch of the "submission" of 14 May. In his reply of 5 November the complainant said he had "lost track" of his brief after entrusting it to the Staff Union in May 1992 and referred the Registrar to a letter of 5 November from the president of the Staff Union. In her letter the president asked the Registrar to "accept my word" that the complaint had been despatched "during the last days of May 1992".

B. The complainant submits that by refusing to extend his appointment UNIDO bowed to "unlawful interference" from the Permanent Mission of the USSR. He says his problems began in 1990, when he waged a campaign for "fair treatment" of citizens of the USSR who were employed in the United Nations system. That angered the Government, and when the Administration sought consent to extending his contract by another two years it got permission for only one.

After he submitted proof that he had severed contractual links with his former employer in 1983, UNIDO changed tack, alleging that what had prompted non-renewal was changes in its work programme, not problems over secondment. But there was ample work in his field to warrant keeping someone with his record of achievement on.

He seeks reinstatement or, failing that, a termination indemnity in the amount of eight months' gross salary, and continuing health insurance coverage.

C. In its reply UNIDO submits that the complaint is irreceivable because there is no proof of the filing of it within the time limit of ninety days in Article VII(2) of the Tribunal's Statute. The complainant himself admits to having lost track of it after leaving it with the Staff Union and so reveals "negligence and carelessness". At all events it was not for the Registrar to seek to determine the date of despatch: Article 7(4) of the Rules of Court empowers the Registrar to ask for only such corrections as are necessary to meet the requirements of Article 7, whereas proof of despatch is covered by Article 6(3). UNIDO "notes with approval" that the Registry has left blank the box on the complaint form for entering the "date of filing of the complaint".

On the merits UNIDO contends that in seeking government consent before extending the complainant's appointments it merely followed established practice. By waiting until August 1990 to tell the Administration that he was not on secondment he was in breach of Rule 103.04, which requires officials to inform UNIDO of any changes that may affect their status; in any event he is estopped from relying on a fact which he himself withheld. The Soviet Government had nothing to do either with his final extension - from 1 December 1990 to 28 February 1991 - for which UNIDO did not seek its consent, or with the non-renewal. Both decisions were at the Director-General's discretion, the non-renewal being due to the low priority of the complainant's work, which the General Conference described in 1989 as the sort that could be "curtailed or terminated during the biennium".

D. In his rejoinder the complainant identifies several mistakes of fact in the reply and develops his earlier pleas. He says that most of the projects he worked on in his last two years in the Organization had high priority. Deploring the length of the internal appeal proceedings, he questions the independence of the Joint Appeals Board, whose secretary is in charge of recruitment in the Personnel Services Division.

E. In its surrejoinder UNIDO contends that there are no new material facts or pleas in the rejoinder. It disagrees that most of his work fell in areas of high priority: the main part of his assignment, in keeping with his background, concerned "land-based and water-based transport equipment" and had low priority.

CONSIDERATIONS:

1. The complainant, who used to be on the staff of UNIDO, seeks the quashing of a decision which the Director-General of the Organization took on 9 March 1992 to terminate his contract of service. As a corollary he claims reinstatement in his former employment and payment of his salary since the date of separation, 28 February 1991, and up to reinstatement. Should reinstatement prove impossible, he seeks damages equivalent to eight months' pay and admission to UNIDO's health insurance scheme.

The background to the dispute

2. A citizen of what was then the Soviet Union, the complainant joined the United Nations - of which UNIDO formed part at the time - in 1983 on the nomination of the Soviet Government and under a fixed-term appointment for two years. He had his contract extended in 1985 by two years and in 1987 by another two. In 1986 UNIDO became an independent specialised agency of the United Nations.

3. To each extension of his appointment the Organization sought the Soviet Government's prior consent through its Permanent Mission in Vienna. Each letter of appointment that the complainant countersigned bore the words "On secondment from USSR Government".

4. By an "inter-office memorandum" of 28 April 1989 the chief of the Personnel Administration Section told the complainant that the Director-General wanted to extend his appointment by another two years from 1 December 1989 but that the letter of appointment could be issued only after the Soviet Government had given its consent. Also on 28 April the Organization sent a memorandum to the Permanent Mission of the Soviet Union inviting it to seek the Government's consent to extension of the complainant's secondment to 30 November 1991. In its reply of 16 June 1989 the Mission said that the Government consented to seconding him only up to 30 November 1990.

5. UNIDO thereupon made out a letter of appointment on 23 June 1989 for a one-year extension from 1 December 1989 to 30 November 1990. As before the letter bore the words "On secondment from USSR Government". The complainant accepted on 7 July 1989. On 11 June 1990 the Personnel Administration Section told him that the Director-General had decided against extending his appointment further on the grounds that his work was not needed any more and his post would serve to recruit someone in a different area of work, and the formalities of termination would be carried out in due course.

6. In a memorandum of 30 August 1990 to the chief of the Personnel Administration Section the complainant said that he had been given an offer of renewal for two years, that the matter of his secondment had never been discussed with him and that he had never agreed to it. In a further memorandum of 18 September 1990 to the Director-General he pointed out that the extension had been docked to one year solely because of his "secondment" and that such status was "no longer valid" in the light of a judgment, No. 482, delivered by the United Nations Administrative Tribunal on 25 May 1990 on the Qiu, Zhou and Yao case.

7. In reply the chief of the Section sent the complainant a memorandum dated 24 September 1990. He acknowledged that the original offer had been for two years but explained:

"As your Government approved the extension of your secondment to this Organization for one year, an extension of appointment for the corresponding period was offered to you."

He had accepted the terms - the memorandum went on - by signing the letter of appointment, and the reason why the Director-General had decided against further extension was "programmatic requirements" and had nothing to do with his "secondment".

8. Meanwhile the formalities of termination had gone ahead, but before they were completed the Director-General granted the complainant one last extension of three months, to 28 February 1991. Yet again the decision bore the explanation "extension of fixed-term appointment for three months on secondment from the USSR Government".

9. On 6 May 1991 the complainant lodged an internal appeal with the Joint Appeals Board of UNIDO. The Board reported to the Director-General on 4 March 1992. It held that throughout his successive appointments the complainant had been on secondment and he had accepted that status as long as he was being offered extensions. As to the abolition of his post after the expiry of the last extension, the Board found no inconsistency in UNIDO's position inasmuch as his own area of work was given "lowest priority" in the Organization's Programme for 1990-

91. The Board therefore made "no recommendation in support of the appeal".

10. The Director-General rejected the appeal by writing a few words to that effect on the covering letter forwarding to him the text of the Board's report. The Organization says that the secretary of the Board sent him a photocopy of that letter on 9 March 1992. It is unknown at what date he received that decision.

The filing of the complaint

11. The time limit of ninety days in Article VII(2) of the Tribunal's Statute started on the notification to the complainant of the decision of 9 March 1992. Since the date of such notification does not appear on the evidence, he must be deemed to have had notice of the decision not later than the date at which he says he signed a communication filing his complaint with the Tribunal, i.e. 14 May 1992. Even if that latest possible date is taken to have set off the ninety-day time limit the complaint received at the Registry of the Tribunal was out of time.

12. Not until 13 October 1992 did the Registry get a fax from Mrs. Judy Lavnick-Wainstead, the president of the UNIDO Staff Union, including a photocopy of a complaint brief dated 14 May 1992 which she said she had despatched to the Tribunal on 18 May.

13. By a letter of 15 October 1992 the Registrar informed the complainant that the communication had not been received at the Registry and that in view of the date of the impugned decision the ninety-day time limit had presumably already expired. He quoted Article 6(3) of the Rules of Court: "In the application of paragraph 2 of Article VII of the Statute of the Administrative Tribunal, the date of despatch of the complaint shall alone be taken into account". He said that the complainant must provide written evidence of some kind, such as a photocopy of a receipt from the post office, to show despatch of his communication of 14 May 1992 before the ninety days had expired. The Registrar appended the Statute and Rules of Court, a set of forms for filing the complaint correctly and instructions on how to do so.

14. On 5 November 1992 the complainant sent back the forms, which showed many defects, together with several appendices. He was unable to offer any evidence to show that his complaint had been despatched on 18 May 1992, save a letter from Mrs. Lavnick-Wainstead saying that she remembered having "during the last days of May 1992" sent "a rather bulky package in a brown A4 envelope" but admitting she had not found "any record on our files" of such despatch. On 8 January 1993 the Registrar forwarded the complaint to the Director-General of UNIDO setting out the background and pointing out the flaws in the papers.

15. In its reply the Organization challenges the receivability of the complaint on the grounds that it was filed outside the time limit in Article VII(2) of the Tribunal's Statute. It further objects to the Registrar's "attempt to assist the complainant in meeting the deadline for filing" and helping him "to alter ex post facto information as to whether and at what date the complaint was received". It contends that the Registrar thereby exceeded his authority under Article 7(4) of the Rules of Court.

Receivability

16. In answer to the Organization's criticisms of the Registrar the Tribunal has the following comments to make. The Registrar's manifold responsibilities, which go far beyond the ambit of Article 7(4) of the Rules of Court, include the general task of maintaining relations between the Tribunal and the parties and the just as important task of ensuring proper compilation of records on cases lodged with the Tribunal. In performing those tasks the Registrar is empowered ex officio to take any action he deems fit to safeguard due process.

17. Since those who fall within the Tribunal's jurisdiction live far and wide and are free to plead their own case, it is the Registrar's particular duty to see that complaints filed with the Tribunal are correctly presented and to offer a complainant such comment or advice as he thinks proper for the correction of the papers. In sending the complainant the letter summed up above the Registrar, so far from acting ultra vires, did what he was required to do.

18. Turning to the issue of receivability, the Tribunal observes that its Rules of Court are liberal in that for the purpose of reckoning the time limit Article 6(3) takes the date of despatch and thereby relieves the complainant of liability for any faulty transmittal after despatch.

19. That makes it the more important to establish the date of despatch beyond doubt in each case. As the

Organization rightly points out, the complainant has failed to adduce any evidence of the despatch of his complaint. He says that at a time of emotional and physical distress he entrusted it to the Staff Union. But the explanation he offers on the issue does not allow of any assumption about the very point on which the timely filing of his complaint depends according to the Rules of Court, namely the date of despatch. Although the Tribunal does not question the sincerity of the complainant or the president of the Staff Union, it cannot treat their assertions as if they were objective evidence: if it did so it would be affording an opportunity for fraudulent evasion of time limits.

20. Although the complaint raises important legal and humanitarian questions, the Tribunal cannot but declare it irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner