

EIGHTY-FOURTH SESSION

In re Broere-Moore (No. 5)

Judgment 1706

The Administrative Tribunal,

Considering the fifth complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII 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. Judgment 1483, which dismissed Mrs. Broere-Moore's first complaint, sums up under A her career with UNIDO. Having taken part in a competition to fill her former post, she learned that on 1 September 1994 the Director-General had chosen someone else. In a letter of 23 September 1994 to the Director-General she objected, among other things, to that appointment. In a reply of 17 October 1994 the Director of the Personnel Services Division told her on the Director-General's behalf that it would be not be "appropriate" to comment on issues she had already raised in her first complaint.

In a letter of 17 August 1995 she asked the Director-General to review the "administrative decision" not to address in the Organization's surrejoinder on that complaint the "inequity and gender discrimination of appointing an outside male candidate" to her former post. Replying again on behalf of the Director-General, the Director of Personnel Services told her in a letter of 8 September 1995 that her "non-selection" did not warrant administrative review because the matter had no bearing on the terms of her appointment.

By a letter of 31 October 1995 she lodged an appeal with the Joint Appeals Board. In its report of 4 April 1996 the Board recommended rejection on the grounds that there had not been an "administrative decision" within the meaning of Staff Rule 112.01 and it was not competent to advise on the Administration's refusal to comment on a particular matter in pleadings before the Tribunal; as for what it called "the indirectly challenged decision of not selecting her" it said the matter was unrelated to her terms of appointment and "would not have been receivable". By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had endorsed its recommendation. That is the impugned decision, of which she got notice on 20 May.

B. The complainant submits that the decision to pick an outside male candidate for her former post shows "inequity and gender discrimination". He was not more qualified than she and it was wrong to appoint him while she was still on the staff, the more so since the Director-General was terminating her appointment for reasons of staff reduction.

She wants the Tribunal to order UNIDO to grant "redress and pay due compensation" for appointing an outside male candidate to her former post. She also seeks an award of costs.

C. In its reply UNIDO contends that her complaint is irreceivable. At the time of the challenged appointment she was no longer on its staff, the date of expiry of her special leave having been advanced to 31 July 1994 to allow her to withdraw her contributions to the United Nations Joint Staff Pension Fund. It follows that the appointment impaired none of her rights and no appeal lay against it. Even if she had been on special leave without pay at the time it would have been no breach of the terms of her appointment to put someone else on a post she had left under an agreement.

UNIDO's pleas on the merits are subsidiary. It denies discriminating against her. The choice of another

candidate to fill her former post, which it had no reason to abolish, was a proper exercise of discretion.

D. In her rejoinder the complainant seeks to refute UNIDO'S reply. She dwells on the "error of fact" in Judgment 1483 about "agreed termination": she had not entered freely into the agreement and so there was no agreement at all. Her first complaint having failed on receivability, the Tribunal's comments on the merits do not "constitute *res judicata*". She presses her claims.

E. In its surrejoinder the Organization describes her rejoinder as a further attempt to reopen the matter of agreed termination, on which the Tribunal has ruled.

CONSIDERATIONS

1. On joining UNIDO on 19 May 1992 the complainant became chief of its Public Relations and Information Section. Her grade was P.5 and she held a fixed-term appointment for two years. The Organization prematurely terminated it in the course of an exercise in staff reduction and by an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). She made that the subject of her first complaint, which the Tribunal dismissed in Judgment 1483. One of the terms of termination was that she was to be put on special leave without pay from 1 January 1994 to 31 March 1995.

2. The reduction of staff affected women more than men in senior posts in the Professional category. Thus none of the 74 men at grade P.5 went, but five out of the eight women did, their departure increasing what the complainant calls the "gender imbalance" at that grade.

3. When the complainant went on special leave the Director-General appointed as officer-in-charge from 1 January 1994 a man who had been an unsuccessful applicant for the post of chief of the Public Relations and Information Section, which had gone instead to the complainant.

4. On 22 February 1994 UNIDO advertised the vacant post of chief of the Public Information Section. It is not disputed that this post was identical to the one the complainant had held, the required qualifications and the functions being the same. The notice of vacancy stated that "interested female candidates" were "particularly encouraged to apply". The complainant applied before the closing date, which was 10 March 1994.

5. On 1 September 1994 UNIDO appointed a man who was an external candidate, and by her letter of 23 September 1994 the complainant asked for review. By a letter dated 17 October 1994 UNIDO replied that her first complaint referred to "most of the issues contained in the above-mentioned letter" and that "it would not be appropriate to make any additional comments". In a letter of 17 August 1995 the complainant said that the Organization's pleadings on that complaint had not dealt with the issue and she repeated her request of 23 September 1994. She received a similar reply dated 8 September 1995 from the Director of Personnel Services.

6. On appeal the Joint Appeals Board held that it lacked competence because her appeal did not relate to an administrative decision within the meaning of Staff Rule 112.01(a) and her objections to the appointment of a man were not based on non-observance of the terms of her appointment: she was alleging discrimination, and for that UNIDO had, like other United Nations agencies, established a specialised body known as the "Panel on Discrimination and Other Grievances", which alone was competent.

7. In this, her fifth complaint the complainant is asking that UNIDO be ordered to grant "redress and pay compensation for the inequity and gender discrimination in appointing an outside male candidate to [her] post".

8. She contends, first, that she was an internal candidate and so entitled to the benefit of Staff Rule 103.12(a)(ii), which provides:

"... the appointment and promotion bodies shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the service of the Organization ..."

9. Her second contention is that the chief of Personnel Administration acknowledged that:

"In principle, the Organization supports the various resolutions adopted by the [United Nations] on the status of women. The Organization has also to implement its governing bodies' policies for increasing the participation of women at all levels."

Such policy was, she observes, also reflected in the vacancy notice, which encouraged women to apply; but UNIDO failed to comply and instead resorted to "gender discrimination".

10. Finally, she alleges that the successful candidate had been an employee of the Organization of Petroleum Exporting Countries (OPEC); that "under pressure of OPEC's Secretary-General, his compatriot, UNIDO's recruitment chief, felt obliged to put the name of this OPEC candidate on the UNIDO roster when UNIDO was downsizing"; and that that was why the notice invited applicants from the roster. She contends that the successful candidate did not satisfactorily complete probation, which UNIDO extended by a year, and it reassigned him to its Office in Geneva. In support of her plea of discrimination she adds that on the expiry of his contract it gave him a six-month extension for the sole purpose of sending him on a peace-keeping mission. Yet in a similar situation in 1994, when the Office of Human Resources Management of the United Nations had selected her for a peace-keeping mission while she was on special leave without pay, the Director-General had refused to let her go despite his earlier assurances that UNIDO would continue to help her to find employment elsewhere. The post of chief of Public Information was then filled, on 1 September 1995, by promoting another staff member, junior to the complainant, who had been promoted to P.5 only in early 1994.

11. UNIDO has not denied any of those allegations. It maintains that the recruitment took place at a time when the complainant had ceased to be a staff member. Although originally she had been put on special leave until 31 March 1995, it changed the date because she wanted to withdraw her contributions from the United Nations Joint Staff Pension Fund: by a letter dated 13 September 1994 the Director of Personnel Services informed her that the Director-General had agreed to her request that the date of expiry of her special leave be changed to 31 July 1994. UNIDO argues that in consequence it cannot have violated any of her rights by a decision taken on 1 September 1994. By then she was no longer a staff member and, even if she had still been on special leave at that date, yet "in the light of a lawful agreed termination, there [were] no rights of the Complainant ... that could have been violated by appointing an outside male to her former post". In the Organization's submission the impugned appointment did not amount to any failure to observe the terms of her employment; she would have been estopped from making such a claim; and her complaint is therefore irreceivable.

12. On the merits UNIDO points out that there were eighteen candidates, including four internal ones, and that the successful candidate was "selected by a lawful discretionary decision as the candidate best suited for the post": there was no "gender discrimination".

13. UNIDO does not say that the complainant was one of the four internal candidates or that she was treated as if she were such a candidate. Indeed its contentions that she had ceased to be a staff member when the impugned appointment was made on 1 September 1994 and that because of the agreed termination she had no rights that could have been violated indicate that it did not regard her as an internal candidate. Further, while it pleads that the selected candidate was the "best suited" for the post, it does not contend that his qualifications were better than hers. The Tribunal must therefore infer that her qualifications were at least equal to his but that she was not given preference over him.

14. The question then is: was the complainant a staff member at the material time? The selection process was completed by 1 September 1994. As far as the selection committee was concerned the date of expiry of her special leave was, even on 1 September 1994, still 31 March 1995 and had not yet been advanced; so to all intents and purposes she remained a staff member throughout the selection process. At the date at which that committee made the recommendation that formed the basis of the impugned decision it had no right or power to deny the complainant preference under Rule 103.12(a)(ii). To do so was thus in breach of her rights as a staff member, and the breach was not removed by the subsequent change, on 13 September 1994, in the date of expiry of her leave. Although the change was retroactive it could not affect the process of selection, which had by then been concluded.

15. Particularly in view of the drastic impact that the staff reduction exercise of 1993 had on women holding senior posts in the Professional category, UNIDO's professed policy of increasing the number of women staff at all levels required at least that, other things being equal, it should give preference to applications from

women; indeed encouraging women to apply was consistent only with their right to such preference. For the reasons set out in 13 above the Tribunal assumes that the complainant's qualifications were at least equal to those of the selected candidate and holds that she was not given preference over him.

16. The Tribunal further holds that the "agreed termination" did not in any way restrict her rights under the Staff Rules, while she remained a staff member, to preference over an outside male candidate in any future competition, where qualifications were equal.

17. As for the special panel set up to deal with allegations of discrimination, neither the Joint Appeals Board nor UNIDO cites any provision of the Staff Rules which compels recourse to that panel. The complainant's failure to put her grievance to it does not make her complaint irreceivable. Where a matter is otherwise within its jurisdiction the Tribunal can and will entertain related allegations of discrimination.

18. The conclusion is that the denial of preference to the complainant was a violation of Rule 103.12(a)(ii) and of her rights as a woman candidate and contrary to the declared policy of UNIDO and to the terms of the vacancy notice. Not only is the complaint receivable but it succeeds on the merits. So it is unnecessary to take up any of her other pleas.

19. Since the post in question is now held by someone else the Tribunal makes her awards of damages which it sets *ex aequo et bono* at 45,000 United States dollars for material injury and 25,000 dollars for moral injury. She is also awarded a sum in costs.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant damages in the amounts of 45,000 United States dollars for material injury and 25,000 dollars for moral injury.

2. It shall pay her 1,000 dollars in costs.

3. All her other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner