

EIGHTY-FOURTH SESSION

In re Geyer (No. 2)

Judgment 1715

The Administrative Tribunal,

Considering the second complaint filed by Mr. Philip Gerhard Geyer against the United Nations Industrial Development Organization (UNIDO) on 17 October 1996, UNIDO's reply of 27 January 1997, the complainant's rejoinder of 25 March and the Organization's surrejoinder of 2 July 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. The complainant, a South African citizen, joined UNIDO on 13 January 1995 under a one-year appointment as an expert in database design and implementation at grade L.4. He was assigned to Colombo, in Sri Lanka, on project No. SRL/93/010/A/01/99 to set up a network of information on industrial technology and markets.

On 6 June 1994 he had stated on "a personal history form" that he was "divorced". On 19 December 1994 he filled up a form headed "Status report and request for payment of dependency benefits", again saying he was "divorced" but claiming the payment of a dependency benefit for Miss Zsuzsanne Szabó, whom he called his "common-law wife". In another status report and request for payment of dependency benefits, which he signed on 19 June 1995, he said he was "married" and claimed dependency benefits for Miss Szabó as his "spouse". By a telex dated 28 August the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) asked him for copies of the "marriage certificate" and the birth certificate of his "spouse" so that UNIDO might change the definition of his status from "divorced" and adjust his entitlements accordingly.

In the circumstances that are set out under A in Judgment 1714 on his first complaint, also delivered this day, the complainant left Colombo on 29 August 1995. On 14 September the officer-in-charge sent him a fax in New South Wales, asking him once more to substantiate his claim to the change in status.

By a letter of 12 December 1995 he lodged an appeal with the secretary of the Joint Appeals Board against "all the administrative decisions made since August 1995". In its undated report the Board recommended, among other things, that the Director-General should make him no payments for Miss Szabó but pay him other terminal entitlements, 11 September 1995 to be taken as his last day of service.

In a letter of 21 August 1996, which he impugns, the officer-in-charge told him that for want of evidence the Director-General had decided not to change the definition of his marital status from "divorced" to "married". He had also decided to terminate his appointment at 11 September 1995 and award him "repatriation entitlements minus proportional adjustment of hardship allowance, and assignment grant".

B. The complainant submits that the Director-General's refusal to change the definition of his marital status was an improper exercise of discretion. It overlooked the essential fact that he was not single and had two dependants, Miss Szabó and a daughter by his first marriage. What is more, common-law marriages are valid under Austrian law, which the Organization had told him was applicable. Though he gave UNIDO a copy of his divorce decree he did so merely to get a dependency allowance for his daughter and the text afforded no "proof" of marital status. That the Administration helped to get Miss Szabó a visa for Sri Lanka shows that it accepted her status.

He seeks the following relief:

- "1. Acknowledgement of my *de facto* marital state;
2. Adjustment of my salary, allowances and benefits for the full period of contract at the rates specified for members of staff with two dependants;
3. Full payment of the dependency allowance for my wife for the total period of contract in the amount of USD [United States dollars] 1,270;
4. Full payment of the assignment grant for my wife for the first fifteen days of the contract in the amount of USD 1,800;
5. Full re-imburement of the costs of my wife's outbound travel equivalent to the cost of a normal business class ticket from Vienna to Colombo in the amount of ATS [Austrian schillings] 33,150;
6. Full re-imburement of the costs of my repatriation travel equivalent to the cost of a business class ticket from Colombo to Vienna in the amount of ATS 33,150;
7. Full re-imburement of the costs of my wife's repatriation travel equivalent to the cost of a business class ticket from Colombo to Vienna in the amount of ATS 33,150;
8. Full re-imburement of the costs incurred for packing, shipping, insuring, clearing and storing my personal effects transported from Colombo to Vienna in the amount of USD 3,456 plus ATS 20,730;
9. Payment of interest at a compounded rate of 12 per centum per annum on the above amounts, all of which are in arrears, calculated from due date to date of payment;
10. Full re-imburement of the Costs of claim in the amount of ATS 7,300."

C. In its reply UNIDO contends that the complaint is in part irreceivable and in any event devoid of merit. Claim 2, being a new one, is irreceivable because of the complainant's failure to exhaust his internal remedies. So is claim 8, to the refund of his storage costs. Claim 6 shows no cause of action: the Organization paid him the due amount on 16 October 1996 along with compensation for the packing and shipping expenses he is seeking under claim 8.

On the merits it observes that he himself reported his marital status as "divorced" and never provided it with any evidence of a change. The validity of common-law marriages under Austrian law is immaterial. Since he failed to establish, as he was required under the rules, that he was married he is not entitled to any benefits for a second dependant.

Claim 2 is also devoid of merit: UNIDO did not owe him pay for any period after termination on 11 September 1995.

Claim 8, to payment of the costs of insurance and customs clearance, is also devoid of merit because he failed to provide UNIDO with proper evidence of such expenditure.

D. In his rejoinder the complainant seeks to counter the pleas in the reply. He denies having reported that he was divorced: it was a personnel officer who put that information on the official form after he had signed it. Nor was there any change in his status while he was on UNIDO's staff: he was married throughout. It was "arbitrary" to require a marriage to be concluded before a representative of government authorities and inconsistent of UNIDO to put itself above national law yet demand documents issued by such authorities. There would have been no point in his submitting evidence of expenditure while he was challenging a decision that granted him "proportional, estimated costs". He seeks a further 3,320 schillings to cover the costs of his rejoinder.

E. In its surrejoinder the Organization disputes facts and challenges the reasoning in the rejoinder. In its submission the complainant has failed to provide any "clear" evidence to show when and where his "traditional" marriage took place. UNIDO's helping Miss Szabó to get a visa was a mere courtesy, not acceptance of her as his wife. None of his claims warrants any further payment.

CONSIDERATIONS

- 1. The complainant joined UNIDO on a one-year appointment, which ended prematurely in the**

circumstances set out in Judgment 1714 on his first complaint. He went to Sri Lanka and worked there from 13 January 1995. In this, his second, complaint he is seeking (a) recognition of his *de facto* marital status and of his entitlements to dependency allowances, costs of travel to and from Sri Lanka and other benefits in respect of a dependent spouse, and (b) the costs of his own travel, and of the transport of his personal effects, from Sri Lanka.

Dependent spouse

2. In a "personal history form" which he completed on 6 June 1994 he described his marital status as "divorced" and named his daughter as his only dependant. He says that on 14 October 1994 his "second marriage was solemnised as a traditional ceremony".
3. Thereafter he submitted two forms headed "Status report and request for payment of dependency benefits". Each form contains five boxes relating to marital status, marked "Single", "Married", "Widowed", "Divorced" and "Legally separated", and two boxes, marked "Yes" and "No", for information as to change of marital status since the previous "status report".
4. In the first status report, which he submitted on 19 December 1994, he had ticked the boxes marked "Divorced" and "No" had been ticked. He explains, however, that as the form did not provide the option of "*de facto* marriage" he did not tick any of the five boxes and he presumes that it was a personnel officer who ticked "Divorced". In the section for information about his "Spouse" he wrote "common-law wife", gave her name, Miss Zsuzsanne Szabó, and her nationality, which is Austrian, and claimed dependency benefits for her. The personnel officer told him orally the same day that UNIDO would not recognise his marriage without a marriage certificate issued either by his own country, South Africa, or by his country of residence, Austria. Since neither country issues certification of *de facto* marriage, he informed his "backstopping officer" that he wished to withdraw his "candidacy" for assignment to Sri Lanka; but that officer, he says, "undertook to arrange and supervise personally the recognition of [his] wife's status". Notwithstanding the disagreement about his marital status he went to Sri Lanka, bearing the cost of her air ticket himself.
5. In the second status report, which he submitted on 19 June 1995, he ticked the boxes marked "Married" and "No".
6. UNIDO neither recognised that he was married nor paid him any of the allowances or benefits due for a dependent spouse. It was only on 25 August 1995, on the eve of his departure from Sri Lanka, that he made a written claim to payment of dependency benefits, medical insurance coverage and costs of travel for her. Though again asked to submit a marriage certificate, he did not do so.
7. On appeal the Joint Appeals Board held that Miss Szabó could not be recognised as an eligible dependant and that he was not entitled to any payments for her. By a letter of 21 August 1996 UNIDO informed him that the Director-General endorsed the Board's conclusions.
8. The Staff Rules and Regulations do not define a "spouse". They do define a "dependent spouse", but only by reference to annual occupational earnings.
9. The complainant argues that although a certificate can be furnished for a marriage concluded before a registrar appointed by the national authorities, it cannot for a "traditional" marriage; however, Austrian law recognises the concept of "*de facto* marriage" which gives rise to the status of "common-law spouse". He submits that the issue is not so much a matter of national law as whether the Director-General's powers and discretion allowed him to ignore the *de facto* situation: "Dependants are", he observes, "dependants because they are maintained by the staff member". His "common-law wife" had been living with him since October 1994, and she was a dependant whom he maintained.
10. In order to be a "dependent spouse" someone must be not only the dependant but also the "spouse" of the staff member. As a general rule, and in the absence of a definition of the term, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal accepts, however, that there may be *de facto* situations, of which "traditional" marriages are examples, and which some States recognise as creating the status of "spouse". In each such case where there is no definition

of "spouse" it will be up to the staff member to prove not only the existence of the relevant fact but also the precise provisions of local law which give it consequences and the exact nature of those consequences, and he must show that such law is applicable in the context of the organisation's staff regulations and rules.

11. The "traditional" marriage which the complainant contends altered his marital status is not supported by evidence. Not only did he fail to submit a marriage certificate but at no stage did he furnish any clarification at all as to the nature of that ceremony and the solemnities, let alone any proof that such a ceremony had taken place. Nor has he cited any provisions of Austrian law under which the union would be recognised as marriage.

12. In the circumstances the Director-General was not obliged to accept the complainant's unsupported assertion that he was married. His claims to the recognition of his marriage and to consequential payments, allowances and benefits fail.

Repatriation entitlements

13. Acting on the Joint Appeals Board's recommendations the Director-General decided that the effective date of termination of the complainant's appointment would be 11 September 1995, and allowed him his repatriation entitlements. He was paid 1,200 United States dollars, the estimated cost of a ticket for travel by air in business class from Colombo to Vienna, and 4,000 dollars, the estimated cost of packing his personal effects and shipping them to Vienna.

14. He claims (a) 33,150 Austrian schillings as the cost of the airline ticket, without deducting any concessions which the UNIDO may obtain, and (b) 3,456 dollars plus 20,730 schillings as the actual cost of packing, shipping, insuring, clearing and storing his personal effects.

15. He has furnished no proof that the cost of an airline ticket from Colombo to Vienna was more than 1,200 dollars and there is in any event no reason to ignore any concessions to which UNIDO was entitled.

16. In his appeal to the Joint Appeals Board he made no claim in respect of the storage of his personal effects in Vienna, the actual cost of which was 17,730 schillings. That claim is irreceivable because of his failure to exhaust his internal remedies. The sum of 4,000 dollars paid to him was enough to cover the actual cost of packing and shipping - 3,456 dollars - as well as the balance of 3,000 schillings claimed by him.

DECISION

For the above reasons,

The complaint is 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