

## EIGHTY-FIFTH SESSION

### *In re Tueni*

#### **Judgment 1772**

The Administrative Tribunal,

Considering the complaint filed by Mrs. Ariane Elisabeth Tueni against the United Nations Industrial Development Organization (UNIDO) on 12 August 1997 and corrected on 12 September, UNIDO's reply of 18 December, the complainant's rejoinder of 23 February 1998 and the Organization's surrejoinder of 20 April 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

A. The complainant is an Austrian citizen who was born on 17 February 1943. She joined the staff of UNIDO, then a subsidiary organ of the General Assembly of the United Nations, on 1 January 1973. She was granted a probationary appointment as a secretary at grade G.5. In January 1974 she got a permanent appointment and promotion to G.6, a grade that later became G.5 under a revised grading system. In 1980 she became a clerk in the Project Personnel Recruitment Section. On 1 January 1986 UNIDO, which had by then become a specialized agency, granted her a permanent appointment at G.6 on transfer from the United Nations. In August 1987 she joined the Fellowship Training Unit and in January 1989 became a senior fellowship clerk. Her last two assignments were in the Human Resource Development Branch and the Project Personnel Service.

Staff Rule 110.02(a) reads:

"If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service ..."

Because of a budget deficit the Director-General wanted to review staffing needs and adopt a strategy of redeployment. He set up an Advisory Group on Human Resource Planning by instructions he issued in a bulletin of 28 July 1995, No. DG/B.193. By bulletin DG/B.201 of 20 November 1995 he announced a programme for voluntary separation which offered incentives to apply for early retirement or agreed separation. By a circular dated 14 December the Organization extended the deadline for such applications from 15 December 1995 to 8 January 1996. By Bulletin DGB(M).5 of 16 January the Director-General announced a set of "non-voluntary measures" to reduce staff.

By a letter of 22 February 1996 the Managing Director of the Division of Administration informed the complainant that her post was to be abolished. In a confidential note of 22 April 1996 to the officer-in-charge of the Project Personnel Service her supervisor, the chief of the Fellowship Training Unit, "strongly" recommended keeping her on because she was the only clerk who had "the very specialized qualifications needed". In a memorandum dated 23 April she asked the Managing Director to honour her "bumping" rights to the post of fellowship clerk, which was held by someone on a fixed-term appointment, and on 24 April she sent a copy of her memorandum to the chairman of the Advisory Group. By a memorandum of 20 May he told her that the Group had reviewed her case but failed to find "an available suitable post"; since it intended to recommend termination as at 21 June 1996 she might comment within ten working days. Replying by a memorandum of 28 May, she objected to the proposal, referred to her supervisor's recommendation of 22 April and asked for review. On 17 June she was interviewed by the acting Director of Operational Support Services and the officer-in-charge of the Project Personnel Service for the post of senior training and fellowship clerk. By a letter of 19 June 1996 the Director of Personnel Services gave her notice of the Director-General's decision, "based on" a recommendation by the Advisory Group, to end her appointment at 28 June and pay her three months' salary in lieu of notice.

By a letter of 11 July 1996 she asked the Director-General to review his decision, claiming reinstatement or, failing that, voluntary separation on the terms he had offered in November 1995. The Director of Personnel Services told her in a letter of 3 September 1996 that the Director-General stood by his decision. On 22 October she appealed to the Joint Appeals Board. In its report of 11 April 1997 the Board recommended rejection. By a letter of 14 May the secretary of the Board sent her a copy of the report and of the Director-General's decision of 13 May endorsing the Board's recommendation. That is the decision she impugns.

B. The complainant submits that the challenged decision is unlawful. She alleges, first, that her post has not been "operationally abolished": the Administration assigned her former duties to someone on a fixed-term contract whose qualifications and seniority were inferior to her own. The Organization erred in relying on assessments of her suitability from officials who were less qualified than her supervisor to make them. She pleads breach of Staff Rule 110.02(a), under which she had priority over officials on fixed-term appointments, other things being equal. The Advisory Group overlooked her for possible openings, and the Administration has failed to show that it considered her for all suitable posts then available. UNIDO might have saved money by keeping her on. Lastly, she was discriminated against insofar as the Administration gave other staff members notice of abolition of their posts and so let them apply for voluntary termination.

She claims (1) reinstatement on her former post or "on the equivalent existing post" or failing that (2) assignment to "a substantially equivalent post"; and (3) the award with retroactive effect of all salaries and allowances, including pension and health insurance contributions from the date of termination, less the amount of her terminal entitlements, in the event that claim (1) or (2) succeeds. If neither claim succeeds, she claims (4) the benefit of the terms offered under DG/B.201 on voluntary separations, in particular another 50 per cent in terminal entitlements, special leave without pay until February 1998, and payment by the Organization of its contributions for her to the health insurance plan, underwritten by the brokers Van Breda, and to the United Nations Joint Staff Pension Fund until that date. She seeks (5) "full pay less deductions" from the date of termination until she gets notice of "the decision of UNIDO to acquiesce" to her appeal.

C. UNIDO replies that her complaint is unfounded. It points out that her post was duly abolished under Staff Regulation 10.3 and Rule 110.02(a) on abolition of post because of "the necessities of the service". The specific reason for abolition was the need to save money after a "major contributor" had defaulted. It was sound management practice to assign some of her former duties to other officials. The Administration seriously considered her for the available posts but found her unqualified. It did not assign her former duties to a less qualified official. Nor did it give her any grounds for expecting that her post would not be abolished: she had the same opportunity as other officials to take up its offer of the voluntary measures and has only herself to blame for missing it.

D. In her rejoinder the complainant enlarges on her pleas and seeks to rebut those in the reply. She says the Organization has not put forward "sufficient" evidence to back up its case. It advised others, but not her, to take agreed termination and thereby put her at an unfair disadvantage.

E. In its surrejoinder the defendant presses its earlier pleas and comments on remarks in her rejoinder. It maintains that her post was "totally" abolished and denies her charge of failure to follow the applicable procedures.

## CONSIDERATIONS

1. On 1 January 1973 the complainant joined the staff of UNIDO, which was then a subsidiary organ of the General Assembly of the United Nations, as a secretary. On 1 January 1974 it granted her a permanent appointment. On 1 August 1987 it assigned her to the Fellowship Training Unit as a clerk, and in January 1989 changed her title to senior fellowship clerk. She is appealing against the termination of her appointment on 28 June 1996.

2. The Organization had to make a drastic reduction in its budget for 1996-97 because of a substantial drop in financial support from the United States, the main contributor. It accordingly carried out a staff reduction exercise in two stages: first, a scheme of "voluntary separation", for which staff might apply by 8 January 1996, and then non-voluntary measures.

3. The complainant did not apply by the deadline for voluntary termination. By a letter of 22 February 1996 the Managing Director of the Division of Administration informed her that her post was to be abolished and that an Advisory Group on Human Resource Planning which had been set up in August 1995 would, after review,

recommend to the Director-General either keeping her on or ending her appointment.

4. UNIDO Staff Regulation 10.3(a) reads:

"The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service."

Staff Rule 110.02(a) provides:

"If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service ..."

According to a bulletin, DGB(M).5, issued by the Director-General on 16 January 1996, the Advisory Group was to apply the following principles:

"In accordance with staff regulation 10.3 and staff rule 110.02, staff members whose posts are abolished will be measured against available suitable posts to ascertain whether their services can be effectively utilized in those posts. In all such cases due regard shall be paid to the following criteria:

- Relative competence
- Integrity
- Efficiency and effectiveness
- Qualifications and skills related to key priority themes, programmes and essential functions
- Length of service
- Geographical and gender balance.

... The term 'available suitable posts' in which the staff member's services can be effectively utilized means posts occupied by other staff members or available vacant posts in areas with similar qualification requirements."

5. In submissions it put to the Joint Appeals Board on 23 December 1996 the Organization explained as follows what the Advisory Group had done:

(a) Starting in March 1996 it had "obtained information on, and reviewed the qualification requirements of", vacant posts "available for possible staff redeployment". It had analysed "the background, expertise, experience and service record" of staff whose posts had been abolished and "established which staff members would match the requirements of one or several vacant posts". It then invited a further evaluation of each candidate from the "manager" - i.e. the head of the unit - who was supposed to give "an objective assessment of the candidate's suitability".

(b) Next the Group had "reconsidered the situation of all staff members with permanent appointments who had not been found suitable for a vacant post" to see whether they would do for any post held by a fixed-term official. It identified posts "with similar qualification requirements", and again it asked the manager to assess each candidate who met them.

(c) If no suitable post had by then turned up the Group had made an "initial conclusion" recommending termination. At that point it had allowed an "informal recourse procedure" whereby a staff member might point out to it any "new elements" warranting reconsideration.

(d) If the Group still found no suitable post even after further review, it recommended termination.

In sum the Group had - in the defendant's words - "measured" each holder of a permanent appointment "against

several posts in order to identify the most promising and serious placement possibilities". "All of them" - says UNIDO - "were the subject of discussions within the Advisory Group and with managers and supervisors".

6. In the first three weeks of April 1996 the complainant had interviews for three posts but nothing came of them. At its 10th meeting the Advisory Group held it undesirable to put General Service staff on jobs at any grade lower than their own. Yet the complainant's first interview was for G.4 posts, though she had been at grade G.5 or its equivalent since 1974. The interviewer said that, having been on a senior clerical post, she might find it difficult to adjust to a middle-ranking one. Her second interview was apparently not for a post demanding qualifications similar to those that her own post required, because the interviewer concluded that the duties were completely different from her own.

7. The complainant then discovered that on 22 April 1996 her own supervisor had interviewed two staff members for a G.5 post for a senior fellowship clerk in her unit; it was identical to her own and had not been abolished; and it was held at the time by a junior colleague, S, who had only a fixed-term appointment. By a memorandum dated 23 April she asked, presumably in accordance with Staff Rule 110.02, to be considered for that post. Her supervisor had sent a memorandum on the 22nd to the officer-in-charge of the Project Personnel Service stating that her work was fully satisfactory; that she was "the only clerk in possession of the very specialized qualifications needed to perform the duties of a fellowship clerk"; that she had been supervising S "for many years"; and that if anyone should be given preference over S on the grounds of contractual status it was she. The Advisory Group nevertheless decided that, since her memorandum of 23 April "pre-empted the informal recourse procedure", she would not then be evaluated for S's post; that the review of her candidature against S's would be made in the context of that procedure; and that "when she was informed of the initial proposal ... that she be separated from service", she would be told of the decision on her memorandum of 23 April. She got no reply to it.

8. On 2 May 1996 she had another interview, again for a G.4 post, but again nothing came of it.

9. The Advisory Group sent her its "initial proposal" dated 20 May 1996 for terminating her appointment. It told her, not that her claim to the post, but that her memorandum of 23 April 1996 would be "considered ... during the course of the informal recourse procedure".

10. In her reply dated 28 May she pressed her claim to S's post but even then was not told that she would be considered for it. On 6 June a chart prepared by the officer-in-charge went out showing the new structure of the Project Personnel Service. Although the Advisory Group had not yet ruled on her claim to the post, the chart omitted her but included S.

11. The acting Director of Operational Support Services in the Division of Administration and the officer-in-charge of the Project Personnel Service interviewed her on 17 June 1996. Among the reasons they gave for preferring to keep S on the disputed post were the following:

(a) The "fact sheets" showed that S's performance had been rated more highly in the last period: although she had "fully achieved" the results expected for eight of her tasks she had "exceeded" them for the others, whereas the complainant had "fully achieved" expectations - the lower rating - for all of them.

(b) The complainant worked only in English.

(c) According to the new structure the post would, if that was required, include the additional functions of appointment clerk and of secretary. The complainant had acknowledged that "her past experience had not made her thoroughly familiar with appointment and administration of staff and experts", though she had professed willingness to be trained provided she could keep her then duties.

(d) S had much better computer skills.

(e) The complainant had "limited flexibility and interest in undertaking different functions" while S was more versatile.

(f) The complainant had said that she would not consider working part-time or at a lower grade.

12. At its 32nd meeting the Group agreed with the views and recommendation of the acting Director of Operational Support Services; it observed, however, that since the complainant was able to work in French it was wrong of the

acting Director to say that she worked only in English. Indeed according to her performance reports she had worked in both languages and her knowledge of German too was "highly useful".

13. On 19 June the Director of Personnel Services gave the complainant notice of termination of her permanent appointment at 28 June 1996. The complainant asked the Director-General to review that decision, he refused, and she appealed to the Joint Appeals Board on the grounds that:

- (a) the termination was unlawful because her post had not been abolished;
- (b) her rights under Rule 110.02(a) had been disregarded; and
- (c) she had been improperly denied the opportunity of voluntary termination because her supervisor had encouraged her not to apply for it.

She asked for reinstatement in her own or a "substantially equivalent" post and arrears of salary and allowances, or else the benefits of voluntary termination, including special leave without pay until the age of early retirement, i.e. up to February 1998, UNIDO to pay its share of contributions for her to health insurance and to the United Nations Joint Staff Pension Fund.

14. In its report of 11 April 1997 the Board recommended rejecting her appeal and in a letter to her of 13 May 1997 the Director-General accepted that recommendation. She thereupon duly filed this complaint.

15. The Tribunal will take up first her plea of breach of her rights under Rule 110.02(a).

16. In its report the Board:

"noted the thoroughness with which the [Advisory Group] had dealt with the [complainant's] case. It had reviewed her background and experience, had reviewed her against the [relevant] criteria ... A further review took place with a view to her suitability for vacant posts as well as for posts occupied by fixed-term staff members ... The Board studied the interview reports prepared by the staff members who had interviewed [her] ... and heard three of them. The Board noted that [she] apparently showed a strong preference to continue to perform the same functions she had performed in the past. However, she showed willingness to accept different functions and to undergo training to fulfil them ...

From the interview reports the Board also found that [she] would not have met the requirements of posts she was interviewed for, which actually required different duties and responsibilities than the ones [she] had held in her previous position ...

The Board was of the opinion that [she] was fairly treated, that every effort had been made ... to find possibilities for her redeployment and that she had been given a fair chance by the interviewers. However, ... flexibility and effective teamwork were what was most needed and these were qualities [she] did not seem to exhibit."

17. UNIDO has produced S's fact sheet and her last three performance reports, which cover 1991 to 1995. Although her performance in 1995 had been rated slightly higher than the complainant's in 1994-95, only for four out of fifteen assignments did her last three appraisals say that she had "exceeded expected results".

18. The complainant's last three performance appraisals, which covered 1990 to 1995, said she had "exceeded expected results" in performing seven out of a total of twenty tasks. Further, her appraisal for 1992-93 recorded that because of her excellent performance for many years she had been chosen to act as training assistant on her supervisor's retirement in March 1993 and had since, despite "difficult conditions", "exceeded the expectations" in fulfilling her new duties. It also said that since 1 April 1993 she had been supervising two others; and since S's fact sheet showed that previously Mrs. Schurz had - jointly with Mr. Hanselmann - been supervising S's work, it is probable that from April 1993 the complainant supervised S's work, as Mr. Hanselmann himself had stated in his memorandum of 22 April 1996.

19. Those appraisals also show that S joined UNIDO in 1982, nine years after the complainant; although S became a fellowship clerk in 1982 and the complainant in 1987, the complainant was appointed senior fellowship clerk in 1989, one year before S; and when Mrs. Schurz retired in 1993 it was the complainant who was picked, in preference to S, to perform her duties. Her performance report shows that she did perform them, even though she

was not actually appointed to the post.

20. The appraisals thus afford material evidence in support of several of the complainant's assertions: that the length and quality of her service were by no means inferior to S's; that her career had progressed more rapidly; that she had supervised S's work; and that she was no less versatile than S and no less keen or able to take on different duties. In coming to conclusions unfavourable to the complainant without considering those appraisals the Advisory Group and the Joint Appeals Board disregarded material facts.

21. At its 15th meeting the Advisory Group had affirmed its commitment to obtaining a broad consensus on each case that bore in mind the views of managing directors and supervisors. In this case it took account too of the views of the acting Director of Operational Support Services and the officer-in-charge of the Project Personnel Service, who had been on their posts only since January 1996. S had been working as the acting Director's secretary from January 1996, and so neither he nor the officer-in-charge had direct knowledge of S's work as a fellowship clerk. The complainant says, and UNIDO does not deny, that neither of them had any contact with her regarding her work. Their ability to make a comparative assessment was thus severely limited. Although Mr. Hanselmann had been the direct supervisor of both S and the complainant for over six years, the two interviewers and the Advisory Group made no effort to obtain his views, nor did they consider what he had said in his memorandum of 22 April 1996. The Advisory Group thus failed to observe its own procedural rules. Further, the Joint Appeals Board heard, in the complainant's absence, the two interviewers and Mr. Hanselmann on another aspect of the case, but even then did not seek Mr. Hanselmann's views on the relative merit of the two staff members.

22. Rule 110.02(a) entitles staff members with permanent appointments to preference for "suitable posts in which their services can be effectively utilized". It was obvious from the outset that the complainant's services could have been used in the identical post then held by S; so the Advisory Group was bound to consider whether she would be more suitable than S. Yet it refused to do so, even when she claimed her rights, on the wholly untenable grounds that that "pre-empted the informal recourse procedure". It was unfortunate that one of the officers who later interviewed her on 17 June 1996 had already omitted her name from the chart of the new structure of the Project Personnel Service. Instead of considering her for the post most suitable for her the Advisory Group sent her for interviews for four posts, three of which either were at a lower grade or required qualifications not similar to hers. The Joint Appeals Board was wholly mistaken in concluding that the Advisory Group had dealt with the case with thoroughness and fairness: on the contrary, it failed to observe its own procedural rules and infringed her rights under Rule 110.02(a).

23. The decision to end the complainant's appointment is therefore flawed and must be quashed, there being no need to entertain any of her other pleas. Since further staff reduction took place in January 1998, the Tribunal will order her reinstatement as from 29 June 1996 up to February 1998, the month in which she qualified for early retirement, and payment of full arrears of salary, allowances and other benefits less any amounts she was paid on termination. If she had any occupational earnings during the period from the date of termination up to February 1998 she shall also give credit for the net figure. UNIDO shall pay its share of contributions for her to Van Breda, the health insurance brokers, and to the United Nations Joint Staff Pension Fund up to the same date. She shall be deemed for all purposes to have left on early retirement in February 1998 and be entitled to all benefits due upon such retirement. On account of the moral injury she has suffered the Tribunal awards her the sum of 30,000 United States dollars in moral damages. She is also entitled to 2,000 dollars in costs.

## DECISION

For the above reasons,

1. The decisions of 19 June 1996 and 13 May 1997 are quashed.
2. UNIDO shall reinstate the complainant as from 29 June 1996, treat her as having taken early retirement in February 1998, and pay her the sums due in accordance with 23 above.
3. It shall pay her 30,000 United States dollars in moral damages.
4. It shall pay her 2,000 dollars in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll  
Mark Fernando  
James K. Hugessen

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.