Registry's translation, the French text alone being authoritative.

EIGHTY-SEVENTH SESSION

In re Petter

Judgment 1885

The Administrative Tribunal,

Considering the complaint filed by Miss Renate Petter against the United Nations Industrial Development Organization (UNIDO) on 30 March 1998, the UNIDO's reply of 3 September, the complainant's rejoinder of 10 November 1998, and the Organization's surrejoinder of 16 February 1999, the complainant's further submissions of 14 April and the Organization's comments thereon of 6 May 1999;

Considering Article II, paragraph 5, 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, an Austrian born in 1943, joined UNIDO (at the time, a subsidiary organ of the General Assembly of the United Nations) in 1973 on a fixed-term appointment as a shorthand typist at grade G.4. Following three years of probationary appointment, UNIDO granted her a permanent appointment in 1976. It assigned her to the Office of the Executive Director in the Special Advisory Group on Energy in 1979, and promoted her to G.5 in 1982. She was reassigned in 1987 as a programme clerk, and promoted in 1990 to senior programme clerk at G.6 - corresponding to G.5 under the present grading system. After a UNIDO reorganisation in 1994, she was assigned to the Industrial Sectors Fund Unit.

Between 1993 and 1996, in response to serious financial difficulties UNIDO implemented several expenditure and staff reduction programmes. In the Organization's 1996-97 programme and budget, 46 posts (of which 32 were General Service staff posts) were identified for abolition under the non-voluntary phase of the staff reduction programme. The complainant's post was one of those affected. The procedure was that the Advisory Group on Human Resource Planning would make a recommendation to the Director-General concerning a staff member's retention, or separation from service. By a memorandum of 20 May 1996 the Chairman of the Advisory Group informed her that it would recommend that her appointment be terminated as of 21 June 1996.

On 31 May the complainant wrote to the Advisory Group to provide them with information about her case. By a memorandum dated 18 June she applied for separation under the voluntary separation programme. On 19 June she received from the Director of Personnel Services her official notice of termination of permanent employment, with effect from 28 June 1996.

She wrote to the Director-General on 20 June 1996 asking him to review the proposed terms of her separation, and then, more formally on 25 July appealing under Staff Rule 112.02(a) against the decision to terminate her appointment. On 18 September, the Director of Personnel Services replied on the behalf of the Director-General that the Advisory Group had been "... unable to identify a suitable post in which [her] services could be effectively utilized", and that the decision to terminate her appointment would be maintained. She appealed against that decision to the Joint Appeals Board on 14 November 1996, which in a report of 22 December 1997 recommended the rejection of her appeal in its entirety. By a memorandum dated 16 January 1998, the Director-General endorsed the recommendation of the Joint Appeals Board. That is the impugned decision.

B. The complainant contests the abolition of her post; the duties of the post were transferred to another secretary under a fixed-term contract and with fewer years of experience, so the post was never abolished.

She claims that the decision to terminate her permanent appointment with UNIDO violated Staff Rule 110.02(a) since as a staff member with a permanent appointment she should have been retained "in preference to those on fixed-term appointments". It was improbable that no suitable grade G.5, G.4 or G.3 "fixed-term post" was available, particularly given her performance and experience over twenty-three years. UNIDO did not act in "good

faith" in her case nor did it conduct an effective search for alternative posts, since only a few posts were properly considered.

She states also that the Joint Appeals Board misinterprets Staff Rule 110.02(a) because it defines "available suitable posts" as posts occupied by other staff members or vacant posts available in areas with similar qualification requirements. The phrase "availability of suitable posts" means that as a permanent staff member, she had a right to be considered and placed against any post for which she was qualified, regardless of whether the post was similar to the post abolished.

The termination of her appointment, she submits, is inconsistent with criteria applied for determining if a staff member is to be retained as set out in bulletin DGB(M).5 of 16 January 1996. She fulfills those criteria, particularly those of "relative competence," "integrity," and "efficiency and effectiveness;" so she could have been easily appointed to another assignment in the Organization.

She states that she was given the "false impression" that her appointment was secure because she received many verbal assurances from her supervisor and UNIDO management that "[she] would be alright" and that a post among the G.4 and G.5 fixed-term staff would be found for her. Had this not been the case, she would have accepted a post at a lower grade immediately, searched for other vacancies or opted for the "voluntary separation programme".

She claims that UNIDO showed "hostility" towards permanent staff members or at least a "lack of interest" in protecting them. It focused on the reduction of permanent staff at all costs. She also states that the Organization failed to provide her with assistance in securing employment elsewhere.

She seeks the following redress: (a) the quashing of the findings of the Joint Appeals Board dated 22 December 1997; (b) the quashing of the Director-General's decision of 16 January 1998 confirming her dismissal on 28 June 1996; (c) reinstatement and placement on any post she is qualified for at her grade (or a lower one); and, (d) payment of salary and "other benefits including pension fund and health insurance" from the date of termination up to her reinstatement, less any terminal payments already received; or, (e) payment equivalent to the salary and allowances that the complainant has been deprived of by the challenged decision (in particular, the salary and allowances that she would have been reasonably expected to receive from the date of termination up to the date of her early retirement, that is 2 March 1998); alternatively, the grant of two-and-a-half years' leave with pay; alternatively, if reinstatement is not possible, an "enhanced termination indemnity (i.e. plus 50 per cent and the Organization's commitment to contribute its share toward the Pension Fund and [health insurance] for 30 and 21 months respectively) thus placing her on par with the staff that had negotiated their voluntary separation"; (f) damages for moral injury, and (g) costs.

C. The Organization requests that the complaint be dismissed in its entirety as it is unfounded. It states that the complainant's assertion that her post was not abolished but merely reassigned to a colleague of a lower grade is unfounded. Her post was indeed abolished as it was deleted from the UNIDO programme budget as of January 1996 and the professional for whom she had worked was reassigned to other duties in a different unit.

The complainant contends that she had the false impression that her job was secure. That impression stemmed from her personal desires and her own interpretation of certain conversations. She had until 8 January 1996 to apply for the voluntary separation package but she did not do so in time, and therefore could not be considered.

The allegations of the improper application of the staff retention criteria as set out in bulletin DGB(M).5 and the violation of Staff Rule 110.02(a) are not substantiated by the facts of her case. The Advisory Group identified four potential posts for her placement. The complainant's position was considered in the course of fifteen sessions, but the Group decided to recommend to the Director-General that her appointment should be terminated on 28 June 1996.

Staff Rule 110.02(a) which states that staff members with permanent appointments are to be retained in preference to those on fixed-term appointments, paying due regard to "relative competence," "integrity" and "length of service" must be supplemented by paragraph 8 of the bulletin which provides additional criteria such as "efficiency" and "qualifications and skills related to key priority themes, programmes and essential functions".

The Organization states that the complainant was considered for available posts, including lower-level posts, and was found not suitable for any of them. She was measured unsuccessfully against two fixed-term G.5 staff, and

against other permanent staff. It maintains that the complainant received fair and objective consideration for suitable available posts in accordance with its rules, policies and procedures.

D. In her rejoinder, the complainant enlarges on her pleas.

She maintains that no careful search was made for a post for her, although she identified in a memorandum the posts that she was qualified for and she had discussions about them with heads/chiefs of unit. According to her, the Advisory Group chose to ignore this memorandum in violation of its own procedures. There was a "lack of transparency" and no respect for the "letter and spirit" of Staff Rule 110.02(a). This prejudiced her position.

The Organization has not addressed why her colleague was ultimately retained in preference to her, and why she could not have continued to perform these same duties.

E. In its surrejoinder the Organization rejects the complainant's claim that the Advisory Board failed to respect its own procedure as unfounded.

Regarding the definition of "availability of suitable posts," the Organization adds that in connection with the preferential retention of permanent staff stipulated by Staff Rule 110.02(a), there is also the requirement which states "in which their services can be effectively utilized". This determination is within the discretion of the Advisory Group which concluded that no suitable post could be identified in which the complainant's services could be effectively utilised.

The Organization rejects the complainant's claim that UNIDO was disinterested in protecting permanent staff, and that it even showed "hostility" toward them. The Advisory Group was established with staff and administration members to implement the separation programme in an "orderly and equitable manner". The Organization also provided assistance in finding employment, of which the complainant chose not to avail herself.

F. In further submissions the complainant states that she did in fact respond to a letter dated 8 July 1996 from the employment assistance workshop organiser, and subsequently attended that workshop. It was not helpful since it made no suggestions as to potential employers that might be approached, and since more concrete personal assistance could only be provided at her own cost.

G. In comments on those submissions the Organization rejects as unfounded the complainant's assertion in the matter of the employment assistance. It states that two companies were retained and would provide services to individuals affected by the non-voluntary separation programme, for which the Organization would pay.

CONSIDERATIONS

1. The complainant is of Austrian nationality and joined UNIDO in 1973. She received a permanent appointment in 1976 and she has been at grade G.5 since 1982. As part of the staff reduction policy undertaken by the Organization to deal with financial difficulties it had been facing since 1993, her post was abolished and, upon failure of the attempts to redeploy her, her appointment was terminated as of 28 June 1996 by a decision contained in a letter sent on 19 June. She appealed against this decision, but the Director-General endorsed the recommendation of the Joint Appeals Board to reject the appeal. The Tribunal has before it a complaint which is receivable, concerning the impugning of the decision of the Director-General of 16 January 1998 confirming the decision of 19 June 1996.

2. Before examining the merits of the complaint, it is worthwhile to recall the process engaged by the Organization to attain its aim of restructurisation and staff reduction since 1996. By instructions of 28 July 1995, the Director-General created an Advisory Group on Human Resource Planning, a joint body comprising an equal number of administration and staff representatives, with the responsibility of evaluating staff needs and recommending a redeployment strategy. Then, in a bulletin of 20 November 1995, he announced a voluntary separation programme which provided favourable measures for staff members who requested early retirement or agreed separation. To benefit from these advantages requests had to be submitted before 8 January 1996. Finally, the Director-General announced, in a bulletin of 16 January 1996, that the voluntary separation programme had not yielded sufficient results and that it was therefore necessary to introduce non-voluntary staff reduction measures: in a first phase, managers were responsible for identifying, before the end of January, programmes which should be scaled down or discontinued and, as a result, the posts which should be abolished. Then, in a second phase, Staff Regulation 10.3(a) and Staff Rule 110.02(a), concerning post abolition as a result of the necessities of the service would be

applied. Article 10.3(a) of the UNIDO Staff Regulations reads as follows:

"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 relevant competence, to integrity and to length of service ..."

3. According to the Director-General's bulletin of 16 January 1996, the Advisory Group was to recommend retention or termination of staff members whose posts had been abolished by applying 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."

4. The complainant did not wish, at least initially, to benefit from the advantages given to staff members who agreed to voluntary termination since she thought, as she believed herself to have been told by her immediate supervisor, that her post was not in danger. Having learned by a memorandum of 23 February 1996 that her post was identified for abolition, she made several applications to UNIDO heads/chiefs to obtain a post, stressing her seniority and the very positive evaluations obtained throughout her career and she defended her position before the Advisory Group. Her applications were examined for several posts, but preference was given to other staff members and, on 20 May 1996, she was informed that the Advisory Group had been unable to identify a post where her services could be effectively utilised. She submitted, as she had been invited to do, additional information to the Advisory Group, but the Group maintained its position. On learning that two posts in which she had been interested had been filled by other permanent staff members, she asked on 18 June 1996 to benefit from the provisions regarding voluntary separation but such a request should have been notified to the Organization by 8 January, and on 19 June, she received a letter notifying her of the termination of her appointment.

5. To obtain the quashing of the decision that she impugns, the complainant asserts first, that her post was not abolished. She claims that her functions were in fact reassigned to a staff member of a grade lower than hers. But the defendant demonstrates that the abolition of the post was due to the merger of two divisions and by the assignment of the professional staff member for whom the complainant had worked to another unit. The abolition of this post (GS 100331) cannot be regarded as unconnected to the interests of the service and the restructurisation process carried out by the Organization.

6. Secondly, the complainant contends that the impugned decision was in breach of Staff Rules 110.02(a) quoted above, in so far as preference was not given to her, a permanent staff member, but rather to staff members holding fixed-term contracts: the Administration should at the least have indicated to her the existence of other fixed-term posts, even those held by other staff members at a lower grade than hers, and given her preference over the staff members in these posts, whose contracts were renewed. However, there were conditions attached to the preference referred to in the provision cited by the complainant, and the Organization legitimately compared the suitability of the complainant with that of other staff members before retaining those most competent to carry out the particular duties.

7. Moreover, assessment of the competence of staff had to be carried out in accordance with the Director-General's bulletin of 16 January 1996. On this point, the complainant maintains that the criteria set out in the bulletin were not properly taken into account. But no element in the file supports this: while the complainant is right to highlight her excellent and faultless career, the file shows that the process for measuring her suitability against those in competition with her was carried out according to the rules and guarantees set out by the Director-General's bulletin. The Advisory Group began by examining her suitability for ten posts potentially open to her, then more particularly for four posts. In two cases where she would have replaced fixed-term employees, it appeared first, that she lacked the proficiency in Spanish required from a secretary in a Latin American programme; and secondly that the person with whom she had exchanged a post in 1994, and with whom she was now in competition, had been performing her duties satisfactorily and had been given very positive evaluations for sixteen years. She was also considered for two other posts, in competition with candidates holding permanent contracts, and was interviewed by the relevant heads of unit. But in both instances she was ranked below the other candidates. There is no evidence that the examination by the Advisory Group and the Director-General of the suitability of the complainant and the other staff members failed to take the criteria in the Director-General's bulletin into account.

8. The file also shows, contrary to allegations, that the Organization did indeed seek a post for the complainant and it did not lack sensitivity to her particular case, where after twenty-three years of very good service, she had lost her post and had been placed in difficult personal circumstances. In this case there are none of the reasons which led the Tribunal to quash decisions of termination of employment carried out by UNIDO under their staff reduction programme (see Judgments 1772 *in re* Tueni, 1782 *in re* Zaunbauer and 1830 *in re* Weber). The Organization took its decision after a long and complicated procedure before the Advisory Group, and has committed no formal irregularity. The fact that the complainant's career description carries no express reference to her seven-year period as secretary to the Special Advisory Group on Energy, could not have prejudiced her, since it was quite clear that at that time she was working in the office of the Executive Director, to which the office of the Special Advisor on Energy was subordinate. Neither was the fact that she had not been clearly consulted to find whether she would accept to be redeployed in a post at grade G.4 harmful to her case, since one of the posts for which she was considered was a G.4 post which had fallen vacant but she was not found suitable for that post.

9. There is no evidence in the file showing that the Organization has not acted in good faith in this case. The complainant believed herself to be secure from the staff reduction programme, possibly as a result of misplaced encouragement by her supervisor who, according to the complainant, informed her that her post was safe. But no formal or informal promise had been made to her and, while it is regrettable that the complainant realised too late that it was in her interests to take advantage of the voluntary separation programme, there is no legal argument to justify the quashing of the impugned decision.

10. Finally, the allegations by the complainant that the Organization did not help her to find employment elsewhere are not supported by the items of evidence: in a letter of 8 July 1996 the head of the competent service listed clear proposals to assist the complainant in seeking employment. Moreover, the complainant admits to having participated in a workshop organised to facilitate recruitment elsewhere of persons in her situation, but, in her further submissions, she complains that the training was too general in character, and states that further sessions of training of a more specific nature would have had to be funded by her. However, the defendant shows that this last allegation is not correct and the Tribunal is of the opinion, given the circumstances, that the Organization has acquitted itself of its obligation to assist her.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot

Jean-François Egli
Seydou Ba

Catherine Comtet

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