EIGHTY-NINTH SESSION

***In re* Cody** **Judgment No. 1961**

The Administrative Tribunal,

Considering the complaint filed by Mr John Richard Cody against the United Nations Industrial Development Organization (UNIDO) on 23 March 1999 and corrected on 10 May, UNIDO's reply of 9 September, the complainant's rejoinder of 27 October 1999 and the Organization's surrejoinder of 2 February 2000;

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, a United States citizen born in 1942, was employed as an economist with UNIDO as from 31 July 1973. At the time of his separation from UNIDO he had a permanent appointment at grade P.4.

In 1995 UNIDO introduced a two-phase staff reduction exercise. A joint body called the Advisory Group on Human Resource Planning was established in August 1995 for the purpose of making recommendations to the Director-General for the retention or separation of staff members. The first phase announced by the Director-General on 20 November 1995 consisted of a voluntary separation programme for which the deadline to

apply was 8 January 1996. The second phase, announced on 16 January 1996 by the Director-General, involved non-voluntary measures. By a memorandum of 23 February 1996 the Managing Director of the Country Programmes and Funds Mobilization Division informed the complainant that his post would be abolished and a recommendation would be made by the Advisory Group as to whether he would be separated from service or retained.

On 8 March the complainant wrote to the Chairperson of the Advisory Group setting forth reasons for his being retained. Among other things he mentioned that after twenty-three years of service with UNIDO, he was only two years away from early retirement with full pension and that termination at his age without this possibility would cause him considerable financial hardship. On 20 May the Chairperson informed him that the Advisory Group had studied his case and had been unable to identify a suitable post; it would therefore recommend to the Director-General that the complainant's appointment be terminated as from 21 June 1996. The complainant replied to the Advisory Group on 31 May, identifying a range of possibilities for his retention. On 19 June the Director of Personnel Services notified the complainant that his permanent appointment would be terminated on 28 June 1996 in accordance with Staff Regulation 10.3(a). He would receive, inter alia, three months salary in lieu of notice.

On 24 June the complainant requested to be put on special leave without pay from 28 June 1996 until 31 July 1998, at which point he would have contributed to the United Nations Joint Staff Pension Fund for twenty-five years. On 2 July 1996 the Chief of the Personnel Administration and Social Security Section informed the complainant that his request had been granted.

On 14 August the complainant requested the Director-General to review the decision to terminate his appointment and to consider him for two posts. On behalf of the Director-General the Director of Personnel Services wrote to him on 8 October 1996 saying that the decision to terminate his appointment was upheld.

On 9 December 1996 the complainant appealed to the Joint Appeals Board against the decision of 8 October 1996. On 8 December 1998 the Board recommended that the Director-General reverse the decision to terminate the complainant's contract and reinstate him; if reinstatement was not possible it recommended that "a mutually acceptable agreement leading to an alternative settlement should be negotiated with the [complainant]". The

Director-General accepted this recommendation on 7 January 1999 but since that time the complainant and UNIDO have been unable to agree upon a settlement; therefore, the complainant has filed this complaint with the Tribunal.

B. The complainant puts forward two pleas. First, his post was not actually abolished; all his duties were given over to another staff member. He argues that "unlike many others" he was not informed that his post was targeted for abolition until after the deadline for voluntary separation had expired. In addition, he would still be with the Organization if he had not been transferred to a new post in 1994 without notification and for which he lacked certain qualifications. Secondly, he contends that the Advisory Group disregarded his rights under Staff Rule 110.02(a) by making little effort to identify a suitable post for him. He was interviewed for only two posts - one for which he clearly lacked the requisite language skills - although he had suggested many available posts for which he was qualified.

Relying on the findings and recommendations contained in the Joint Appeals Board's report the complainant asks that the decisions of 19 June 1996 and 7 January 1999 be set aside and that he be reinstated with back pay and benefits. If reinstatement is not possible, he asks for payment by UNIDO of arrears of pay and benefits from his date of dismissal until 31 July 1998, the date on which he would have reached twenty-five years of service, including the restoration of payments made by the complainant to the pension fund and for his children's schooling; the inclusion, in the pension fund, of rights for a dependent child born during the period in question; and restored participation in the Van Breda insurance scheme for pensioners. He also asks for moral damages and costs.

C. In its reply the Organization refutes the allegation that the complainant was not given adequate information regarding the voluntary separation programme. The bulletins of the Director-General on both the voluntary and involuntary programmes indicated the procedures for each one. It was specified that the posts to be abolished would not be identified until the end of January 1996, which was after the voluntary programme would have ended. In addition, the Director-General's Bulletin of 20 November 1995 clearly stated that "staff members aged 54 and above are being specifically addressed to consider the possibility of early retirement". The complainant could have applied for the voluntary programme but failed to do so. It also denies that it disregarded the complainant's rights under Staff Rule 110.02(a). He was considered for available posts in UNIDO but was not found suitable.

Based on the above, UNIDO contends that the complainant is not entitled to moral damages and costs. It also points out that it was because of the complainant that the mutual settlement was not reached.

D. In his rejoinder the complainant presses his argument that the Organization and the Advisory Board did not take adequate steps to find a suitable post for him. He reiterates that one of the only two posts identified had a language requirement that he obviously could not satisfy. In addition, there was a lack of understanding about his experience and expertise.

E. In its surrejoinder UNIDO again denies the accusation that it did not take adequate action before terminating the complainant's appointment. The recommendations made following interviews with him indicated that he was not the candidate best suited for the posts in question; having no other alternative the Organization had to terminate his appointment.

CONSIDERATIONS

1. On 19 June 1996, as a part of its general staff reduction brought about by budgetary constraints, UNIDO decided to terminate the complainant's permanent appointment with effect from 28 June 1996. His internal appeal was heard by the Joint Appeals Board which recommended on 8 December 1998 that the decision be reversed and that he be reinstated but that, should reinstatement not be possible, a mutually acceptable agreement be reached with him. By a decision of 7 January 1999, the Director-General maintained the original decision to terminate the complainant's appointment and directed that efforts be made to find a mutually acceptable settlement. Efforts to reach such a settlement having failed, the complainant impugns the decision of 7 January 1999.

2. The complainant seeks the reversal of the impugned decision, reinstatement with full pay and benefits to at least 31 July 1998, the date at which he would have been entitled to take early retirement with full pension, moral damages and costs.

3. The complainant alleges that the decision to terminate his appointment was in breach of Staff Regulation 10.3(a) and of Staff Rule 110.02(a), the relevant texts of which read as follows:

"Regulation 10.3(a):

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 reason of health, incapacitated for further service."

"Rule 110.02(a):

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 ..."

4. The complainant's principal arguments are that the post which he occupied at the time his appointment was terminated was never in fact abolished and that no proper efforts were made to redeploy him in accordance with the priority to which his permanent appointment entitled him under the terms of Rule 110.02(a) cited above. He also argues that the Administration acted unfairly in terminating him after twenty-three years of service and with two years to go before he became eligible for early retirement with full pension. He also contends that he should have been warned that his position might have been in danger prior to the decision being made to abolish it so that he would have been able to take advantage of the voluntary separation programme.

5. The complainant's argument that his position was not really abolished, which found favour with the Joint Appeals Board, is based upon his assertion that most or all of his former duties were assigned to another staff member. This argument confuses the abolition of a post with the disappearance of the duties attached to that post. In Judgment 139 (*in re* Chouinard), the Tribunal made it clear that it did not consider the assignment of the duties of an abolished post to other staff members as an indication that there had been an abuse of authority, provided that the evidence showed that the number of staff members was in fact reduced. That is the case here and it is clear from the evidence that the number of staff employed by UNIDO was substantially reduced at the time the complainant's position was abolished.

6. As regards the complainant's argument that he was not granted the priority to which he was entitled in the efforts to redeploy him, the evidence shows that the complainant was considered for a number of available positions in UNIDO but was not found to be suitable for any of them. The complainant takes issue with the opinions expressed by various persons by whom he was interviewed for such positions, but these are essentially matters of personal judgment with which, in the absence of evidence of fraud or improper motive, the Tribunal will not interfere.

7. The complainant's contention that he should have been warned of the possible abolition of his post in time to allow him to take advantage of the voluntary separation programme is equally without merit. The deadline for applying for voluntary separation was 8 January 1996 and it is clear that this was established precisely for the purpose of allowing the employer, who was facing drastic budget cuts, to know how many members of the staff would be leaving voluntarily before it had to undertake involuntary terminations and identify the posts which would have to be abolished. It would in fact have been impossible to tell the complainant, prior to that date, that his post was likely to be abolished.

8. The complainant can draw no comfort from Tribunal decisions - for example Judgments 1772 (*in re* Tueni) and 1782 (*in re* Zaunbauer) - in which other former staff members of the Organization were successful in showing that their rights under Staff Rule 110.02(a) had not been respected. Each case is dependent on its own facts as established by the evidence presented. The fact that an Organization may have failed in its duty to some staff members is not evidence that it has done so in respect of others. The complainant has not shown that he was not fully and fairly considered for all the available posts prior to being terminated.

9. The complainant's case is undoubtedly a sympathetic one and was viewed as such by the Organization. He served it long and faithfully and was released with a scant two years to go before he would have been entitled to take early retirement with full pension. Following the impugned decision of 7 January 1999 and in accordance with the terms thereof, the Organization made an offer to the complainant in terms which would have allowed him to take early retirement with full pension and other benefits on 31 July 1998 and with reimbursement of his contributions to the pension fund which he had paid out of his own pocket during the period of special leave without pay from June 1996 to July 1998. Although that offer had a limitation date on it which has now expired,

the Tribunal hopes, without imposing any obligation, that the Organization will still make it available to the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.