

## NINETIETH SESSION

*In re Fraquelli*

Judgment No. 2014

The Administrative Tribunal,

Considering the complaint filed by Mr Italo Danilo Coitinho Fraquelli against the United Nations Industrial Development Organization (UNIDO) on 20 November 1998 and corrected on 17 March 1999, UNIDO's reply of 23 June, the complainant's rejoinder of 23 October and the Organization's surrejoinder of 16 December 1999;

Considering Article II, paragraph 5, 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, a Brazilian national born in November 1939, joined the staff of UNIDO in 1989 under a one-year contract as a chief technical adviser in Maputo, Mozambique. From 1990 he had a series of fixed-term appointments. In April 1991 he became UNIDO's Country Director (UCD) for Mozambique and Swaziland, at grade L5, and subsequently took over responsibility for Angola and Lesotho as well, but remained stationed at the UCD office in Maputo. On 1 May 1996 his contract was extended to 31 December 1997.

An internal audit and inspection of the office in Maputo took place in the first week of September 1996. On 8 October the complainant received a fax from UNIDO headquarters summoning him to Vienna for further consultation on the results of the audit. On 14 October, after his arrival in Vienna, he received a draft copy of the internal auditors' report - No. 13/96 - and was given until the following day to prepare his comments on it. The report criticised aspects of his management of the office in Maputo, particularly his use of the official car for private purposes and of the Organization's resources to promote businesses run by his family. He submitted his comments as required and, on 16 October 1996, was sent a final copy of the auditors' report - No. 14/96 - which maintained all the allegations against him and further mentioned that he had removed one of the computers from the office in Maputo and used it in his home for several months prior to the inspection. In a covering letter, sent with the report, the Director of Personnel Services informed the complainant that he was relieved of his duties as Country Director, with immediate effect, and was to remain in Vienna until further notice. He was stationed in Vienna for the next five months.

At a meeting with the complainant in mid-November 1996 the Director warned him that disciplinary proceedings could ensue. He was offered the opportunity to resign but did not take up that option. On 28 November the Administration referred the matter to the Joint Disciplinary Committee and gave him until 12 December 1996 to prepare a statement in his defence. He complied and the Committee heard him on 15, 16 and 17 January 1997.

The Committee's report, dated 20 January 1997, listed five charges that were brought against the complainant: (1) a degree of involvement in family business that was incompatible with his duties at UNIDO; (2) unauthorised use of the official car; (3) unauthorised removal and use of a UNIDO computer; (4) acceptance of remuneration for non-official work; and (5) the use of his official position to further private interests. The Committee recommended that the complainant be dismissed for misconduct and "failure to meet the highest standards of integrity" and that no termination indemnity should be paid to him. In a letter of 31 January 1997 the Director of Personnel Services informed the complainant that the Director-General had endorsed the Committee's recommendation and he would therefore be dismissed with effect from the following day. He also told the complainant that a sum of 13,920 United States dollars would be deducted from other amounts due to him to cover his private use of the official car.

The complainant appealed to the Joint Appeals Board on 27 February 1997. It issued its report on 16 July 1998.

The Board dismissed one of the five charges brought against him, and upheld the two charges relating to the use of the car and removal of the UNIDO computer. It found "valid" although "insufficiently documented" the two remaining charges relating to his involvement in family business and use of his official position, but it too concluded that the complainant should be released from his duties. It was of the opinion, however, that there were mitigating circumstances inasmuch as the complainant had not been adequately supervised in his role as Country Director and there was limited evidence to support the charges. It recommended that UNIDO pay him the maximum amount of termination indemnity to which he was entitled, which would be 50 per cent of the normal termination indemnity. In a letter of 17 August 1998 to the alternate secretary of the Appeals Board the Director-General maintained the decision to dismiss the complainant but made payment of the indemnity conditional on his agreeing that it was in settlement of all his claims against UNIDO. That decision, which the complainant is now challenging, was notified to him on 24 August.

The complainant chose not to accept the offer and raised the question of a negotiated settlement. On 23 September 1998 he submitted his terms for a settlement to the Special Advisor to the Director-General. The Director-General did not agree to them and upheld his decision of 17 August 1998.

B. The complainant submits that the impugned decision is unlawful. He contends that the report of the Joint Appeals Board was flawed on two counts.

First, there was breach of due process. His ability to defend himself was impaired because he did not see all the documentary evidence on which the charges were based. From January to June 1996 a Junior Professional Officer (JPO) had worked under his supervision in Maputo. Unbeknown to him, that official had produced a confidential report about the functioning of the office and sent it to UNIDO headquarters before leaving Mozambique in early July. It was a crucial document in the context of his case because it triggered the inspection by the internal audit team in September 1996. UNIDO'S subsequent accusations against him were therefore based on a confidential report that, in spite of his requests, he had never seen, and the Board failed to take that into account. UNIDO "detained" him in Vienna against his wishes, removed the hard disk from the computer used by him in Maputo, and prevented him from having access to sources of information in Mozambique which he needed to consult in order to prepare his defence. Furthermore, he maintains that neither the Joint Disciplinary Committee nor the Joint Appeals Board took any notice of the long letter, dated 6 November 1996, which he wrote to the auditors in his defence with regard to the use of the official car and the storage at his home of the computer which he had removed from the office in Maputo.

In addition, the accusations against him were founded on hearsay and rumours. In its report the Joint Appeals Board admitted that the evidence against him in the internal audit report was weak and that the auditors had relied primarily on "testimonial evidence which was not made available to the Board in its original form". The Board had, therefore, gathered more evidence from selected staff members. Citing the Tribunal's case law, the complainant says that, because there was no convincing proof of the charges against him, he should have been given the benefit of the doubt.

Second, there was breach of the principle of proportionality. Two charges brought against him were recognised by the Board in its conclusions as being insufficiently documented and the sanction of dismissal was, therefore, disproportionate to his alleged misconduct.

The complainant submits that, because of all of the foregoing, the report and recommendation of the Joint Appeals Board cannot stand, nor therefore can the Director-General's decision of 17 August 1998 confirming his dismissal in February 1997.

He seeks: (1) the quashing of the impugned decision; (2) a confidential letter of apology from UNIDO; (3) an official letter of recommendation to be kept on his personal file and used in the future by UNIDO to the exclusion of any other written or oral recommendations; (4) the removal from his personal file at UNIDO headquarters of everything related to this case except the letter of recommendation; (5) retroactive reinstatement or an award of material damages equal to the amounts he would normally have received between the date of his dismissal and November 1999 (when he attained the age of 60), by way of salary, post adjustments, UNIDO's "subsidy payments" towards his pension, health insurance and life insurance and all other emoluments linked to his post as Country Director or his family situation; (6) an award for "grave moral damages" equal to five years' salary including post adjustments; (7) payment of the sum of 13,920 dollars which UNIDO deducted from the amount it paid him on dismissal; (8) payment of the sum of 10,000 dollars for "financial costs" incurred between October

1996 and February 1997 while he was in Vienna, particularly for three return journeys to Mozambique and phone calls to Maputo; and (9) a further 10,000 dollars in legal costs.

C. In its reply the Organization rejects the complainant's allegation that he was "detained" in Vienna while it was investigating his case. On the basis of Staff Regulation 4.1 he was assigned to Vienna by the Director-General where his presence was necessary because of the investigation. He received salary and a daily subsistence allowance and kept normal office hours. Facilities were made available to him so that he could prepare his defence; he was also authorised to go to Mozambique from 16 December 1996 to 8 January 1997.

The fact that the complainant did not see a report by the JPO assigned to Maputo did not constitute breach of due process. The report did not form part of the documentary evidence on which the charges against him were based; nor was it ever put in his personal file. The charges brought against him were based on the findings of the internal audit team. The Organization also holds that it had a legitimate right to remove the hard disk from the computer the complainant had used in Maputo. Financial Rule 109.39 provides for "unrestricted access to all records" in the context of an internal audit. The complainant was also allowed access to information on the hard disk in question but he did not make full use of the opportunity he was given.

It is clear from their reports that the Joint Disciplinary Committee and the Joint Appeals Board carefully considered the evidence at their disposal. There is no foundation for the complainant's allegation that they did not take account of his defence. UNIDO maintains that the Director-General took the decision to dismiss the complainant on the basis of those charges which the Joint Appeals Board had upheld. In so doing he properly exercised his discretionary power and did not infringe the principle of proportionality.

D. In his rejoinder the complainant says that the case 'built up' against him had nothing to do with the way he managed the UCD office. Had there been any truth underlying any of the charges his immediate supervisor, the Resident Representative of the United Nations Development Programme, would have raised the issues with him long ago and his contract would not have been extended.

He maintains his view that UNIDO denied him access to the facilities he needed in order to prepare his defence. His statement had to be completed by 12 December 1996: it was only after that date that he was authorised to go to Mozambique. On the matter of his defence he also says that, during the week the auditors were in Maputo, they contacted people whose existence they could only have learnt about from the JPO's confidential report. He therefore repeats his assertion that there was breach of due process as his case was built on that officer's report and he still has not seen a copy of it. On 13 November 1996 the former Director-General acknowledged the existence of the report and said a copy would be made available to him the following day. He wants the Tribunal to hear the former Director-General as a witness as he could testify on matters regarding the report.

E. In its surrejoinder the Organization makes it clear that the complainant was not deprived of his right to be heard at any level. While he was in Vienna he was offered the opportunity to take time off to prepare his defence. It was only on 9 December that he requested annual leave to go to Mozambique later in December.

As both the draft version and the final version of the audit reports made clear, the audit was conducted at the request of the Director-General "as part of the on-going management audits of UNIDO field offices". It points out that the audit team did not receive a copy of the JPO's report.

## CONSIDERATIONS

1. The complainant was appointed UNIDO Country Director (UCD) in Maputo (Mozambique) on 1 April 1991.
2. An internal audit and inspection of the UCD office in Maputo was carried out from 2 to 6 September 1996 by the internal audit section of the Organization. It produced a draft report - No. 13/96 - dated 14 October which was shown to the complainant for comment, and then a final report - No. 14/96 - dated 15 October. Its report criticised the management of the UCD office and said that the complainant had failed to meet the highest standards of integrity and conduct referred to in the Staff Rules and Regulations by using the official car for unofficial purposes and the Organization's resources to promote his family's business interests during working hours and by accepting outside activities against remuneration.

3. On 8 October 1996 UNIDO summoned the complainant to Vienna. By a memorandum dated 16 October he was relieved of his duties as UCD in Mozambique with immediate effect and asked to remain at headquarters and report to the Officer-in-Charge of the Country Programmes and Funds Mobilization Division.
4. Following an exchange of correspondence, the Director of Personnel Services informed the complainant on 28 November 1996 of five charges against him amounting to "unsatisfactory conduct requiring dismissal". He pointed out that the Director-General had authorised him to submit the matter to the Joint Disciplinary Committee in accordance with Article XI of the Staff Regulations and Chapter XI of the Staff Rules.
5. On 29 November the complainant asked for access to information which he needed for his defence. In particular, he requested a copy of the report prepared by a JPO who had worked in Maputo, which he claimed was "the origin" of his problems, and also a copy of all the contents of the hard disk of the computer he had used in Maputo.
6. The Organization told him on 2 December 1996 that it had never officially received a report from the JPO, that the charges were not based on such a report nor did such a report form part of the evidence. It also said the hard disk was UNIDO property and he was not entitled to have a full copy of it, but he would nonetheless be granted supervised access to it.
7. The Joint Disciplinary Committee issued a report on 20 January 1997 and recommended dismissing the complainant with no termination indemnity. On 31 January 1997 the complainant was notified that the Director-General had decided to dismiss him, with effect from 1 February 1997. He appealed against that decision to the Joint Appeals Board which reported on 16 July 1998. It recommended dismissal but with payment of 50 per cent of the normal termination indemnity, the maximum allowed by the rules on separation for disciplinary reasons.
8. On 17 August 1998 the complainant was informed that the Director-General had decided to maintain his decision to dismiss him but would agree to the payment of 50 per cent of normal termination indemnity on condition that it would be in settlement of all his claims against UNIDO and that he would not appeal against the decision. This is the decision impugned.
9. Five accusations were made originally against the complainant:
  - (1) By his involvement in family business he had engaged in activities that were incompatible with the proper discharge of his duties with UNIDO.
  - (2) Unauthorised use of the official car for private purposes.
  - (3) Unauthorised removal of a computer and use of it at home.
  - (4) Unauthorised acceptance of remuneration for non-official work performed either during or outside office hours.
  - (5) Use of his official position to facilitate private interests.
10. The Joint Disciplinary Committee stated that, based on the documents before it as well as written and oral statements, it had established that:
  - (1) There was extensive involvement of the complainant in family business.
  - (2) The official car was regularly used for his own and his family's transport.
  - (3) There had been unauthorised removal of an office computer but it could not verify that it had been used at his home.
  - (4) The charge of unauthorised acceptance of remuneration for non-official work was not established.
  - (5) There was strong evidence of the complainant's use of his position and inside knowledge of UNIDO to facilitate the private interests of his son.
11. When the matter came before the Joint Appeals Board on appeal, the Board made a number of findings. In its report it said that "the body of tangible evidence ... was rather shallow". The Board found that much of the

disciplinary proceedings had relied on the auditors' report and that the accusations in that report were based on testimonial evidence which was not made available to the Board in its original form in view of its confidential nature. The report also said that, taken individually, the charges did not warrant the severity of the action taken against him. Taken together, however, they would appear to betray a character flaw. So the Board interviewed (pursuant to Appendix K(q) of the Staff Rules) selected staff members to build "a fair and ... objective picture of the [complainant's] personality".

The Board analysed the charges and evidence underpinning the disciplinary action.

(a) Concerning his involvement in family business: while not considering that keeping data on a UNIDO computer was proof of inappropriate conduct *per se* and making allowance for the variation across different cultures of the extent of family obligations, the Board found the complainant's behaviour in this respect excessive.

(b) As regards his use of the official car: the Board found that the accusation was convincingly documented by the auditors.

(c) As regards the removal of the computer and the use of it at home: although its removal was not contested by the complainant, the Board did not consider the complainant's justification for his action to be fully convincing. (It did not deal with its use, which, in any event, the Joint Disciplinary Committee did not find proved.)

(d) The Joint Appeals Board did not consider the accusation about remuneration for non-official work as it was dropped by the Joint Disciplinary Committee.

(e) Concerning the use of his official position to facilitate private interests, the Board said that the auditors' report was very vague on this subject and relied on testimonial evidence which it described as "poorly documented accusations [that] were disputed by the [complainant]".

12. The Joint Appeals Board found that the evidence contained in the draft internal auditors' report was insufficient to warrant disciplinary action. It, accordingly, attempted to complement the information available in the file by extensive interviews with a number of staff members who had interacted in some capacity or other with the complainant. The Board then referred to the evidence of the staff members interviewed who confirmed having heard rumours in Maputo "about the complainant's behaviour".

13. The interviews also dealt with the complainant's professional behaviour. In answer to the complainant's excuse that he had never had a proper briefing before taking up his position, the Board took the view that he "lacked discernment on behavioural issues" and had "failed to exercise sensible judgment on procedural and administrative matters".

14. In its conclusions the Board upheld, in view of "convincing evidence", the charges of unauthorised use of an official vehicle and unauthorised removal from the office of a computer. It dismissed the charge of unauthorised acceptance of remuneration for non-official work and found "valid, though insufficiently documented", the charges of involvement in family business and use of his official position to facilitate private interests.

15. The Joint Appeals Board agreed with the conclusion of the Joint Disciplinary Committee that the complainant had failed to meet the standards of conduct expected of an international civil servant and should be relieved of his duties. However, it considered that the severity of the disciplinary action should be reduced in view of the limited evidence advanced to support the charges and because he had not been adequately supervised during the five years preceding the action taken against him. The Board, therefore, recommended rejecting the appeal but paying the complainant 50 per cent of the normal termination indemnity.

16. The arguments which the complainant puts forward fall under two broad heads: breach of due process of law and lack of proportionality.

Under the heading of breach of due process of law he submits that:

(a) He was never given a copy of the JPO's report which was the source of his troubles.

(b) He was denied access to his sources of information in Mozambique when preparing his answers to the auditors' report.

(c) The Joint Disciplinary Committee had made its mind up that he was guilty before he sent in his written statement on 12 December. They met on 3, 4, 6 and 9 December 1996 and on 14, 15, 16, 17 and 20 January 1997, the hearing being on 15, 16, and 17 January. Since they met four times before 12 December they were convinced of his guilt before he made his submissions.

(d) Confidential information given to the auditors was not shown to him, the Joint Disciplinary Committee or the Joint Appeals Board.

(e) The Committee and the Board disregarded his defence on the two minor charges regarding his use of the car and the storage at his home of the computer.

(f) The Board was so in doubt about the two other charges upheld against him that it considered as "alleviating circumstances" the limited evidence produced to support them.

(g) There were contradictions in the Board's report, such as: the reference to "the body of tangible evidence" being "shallow"; that, individually, the charges did not warrant the severity of the action; that the auditors' report was very vague regarding the use of his official position to facilitate private interests; that the accusations were poorly documented; and that the evidence in the internal auditors' report was insufficient to warrant disciplinary action. He claims the Board should have stopped there in its investigation because of lack of sufficient proof.

(h) Lack of evidence cannot be construed as "alleviating circumstances" and that the benefit of the doubt, if it exists, must be given to the accused staff member.

(i) Although he does not complain about the fact that the Board interviewed selected staff members under Appendix K(q) of the Staff Rules, he does complain that it admitted hearsay (i.e. rumours) and that it raised the issue of professional performance which was not relevant.

With regard to the principle of proportionality, the complainant submits that, according to the rule of proportionality, there must be some reasonable connection between the offence and punishment, particularly when an official is dismissed on disciplinary grounds. According to Judgment 203 (*in re Ferrecchia*) breach of that principle is an error of law.

17. The Tribunal holds:

(a) The report of the JPO referred to by the complainant, which the Organization says it never officially received, never formed part of the case against him and was therefore irrelevant. The case was based on the report from the internal audit section. The complainant was not entitled to the production of any irrelevant documents.

(b) The complainant was given the facility of accessing the hard disk of the office computer under supervision which he partially exercised and then gave up without sufficient reason.

(c) The findings of the Joint Disciplinary Committee were replaced by those of the Joint Appeals Board but the complainant's allegation against the Joint Disciplinary Committee cannot be ignored. It is disrespectful to the members of that Committee to allege that they had made their minds up before considering his submissions. They were perfectly entitled to meet and discuss their business as they thought fit and there is no substance to the complainant's allegation.

(d) It is true that confidential information given to the auditors was not made known to him, the Joint Disciplinary Committee or the Joint Appeals Board. This puts that evidence in the realm of unsubstantiated hearsay which should not have been relied on. It is contrary to due process to require an accused staff member to answer unsubstantiated allegations made by unknown persons. The staff member is entitled to confront his or her accusers. In the present case, if the Organization was not willing to disclose the identity of the complainant's accusers, and had no other independent evidence to rely on, the charges should not have been brought.

(e) There is no evidence that the Joint Disciplinary Committee or the Joint Appeals Board disregarded his defence concerning the unauthorised use of the official car and the removal of a computer. Both bodies were entitled to weigh his defence against the case made by the Organization and find him guilty if there was admissible evidence on which such a finding could be made. In respect of these two charges there was evidence on which a finding of

guilty could be based.

(f) to (i) The Joint Appeals Board's report contains a number of contradictions. Paragraph 35 says that the evidence contained in the internal audit report was insufficient to warrant disciplinary action, yet paragraph 30 says the Board found the complainant's involvement in family business to be excessive. Paragraph 31, referring to his use of the official car, says that the Board felt that this accusation was "convincingly documented" by the auditors, whereas paragraph 32, regarding the removal of the office computer (not denied by the complainant), states that the Board did not consider the complainant's justification for his act to be "fully convincing". The Board said that it had attempted to complement the information in the file by extensive interviews with a number of staff members in order to build a picture of the complainant's personality. Appendix K(q) of the Staff Rules permits the Board "to call members of the Secretariat who may be able to provide information on the issues before it". The issue in this case was not the complainant's personality. The only reference in the Board's report to the evidence obtained from these interviews mentions confirmation of rumours about the complainant's behaviour, which was not admissible evidence, and his professional performance, which was not relevant to the charges. In view of the convincing evidence, the Board concluded by upholding the charges of unauthorised use of a UNIDO vehicle and of unauthorised removal from the office of a computer. It dismissed, for lack of evidence, the charge of unauthorised acceptance of remuneration for non-official work and found valid although "insufficiently documented" the charges of involvement in family business and the use of his official position to facilitate private interests. The Board adhered to the Joint Disciplinary Committee's conclusion that the complainant had failed to meet the standards of conduct expected from an international civil servant and should therefore be relieved of his duties in the interests of the Organization. However, it noted alleviating circumstances which it said ought to "mitigate the severity" of the disciplinary action. One of these was the limited evidence to support the charges.

Since the Joint Appeals Board had already said there was "convincing evidence" of the first two charges mentioned above but insufficient documentation of the second two charges, the Tribunal must assume that the reference to "limited evidence" refers to the last two charges.

18. The Tribunal considers that either there was sufficient admissible evidence of the guilt of the complainant as an accused staff member or there was not. If there was not enough admissible evidence to convince the person making a decision, the charge should have been dismissed; if there was enough such evidence, then there should have been a finding of guilty. What is not permissible is to take a stand somewhere between the two, which is what the Board did. The Board found the complainant guilty on two of the charges although the evidence was inadequate, and, because of limited evidence to support the charges, recommended mitigation.

19. The Board should not have embarked on an enquiry into the complainant's personality, which was not relevant. The issue was whether he did what he was accused of. Also, his professional activities in general were not at issue. The Board should not have relied on any evidence from unidentified sources in the auditors' report. The end result is that the Board's report cannot be relied on to justify its findings even as regards the two minor charges (misuse of the official car and removal of an office computer).

20. In taking the decision which is now under challenge the Director-General gave no reasons himself. He did not say that he based his decision on the Board's report and recommendation. But he did follow its recommendation, with the additional provision that payment of 50 per cent of the normal termination indemnity was conditional on the complainant's not appealing against the decision. Assuming that he did rely on the Board's report, the Tribunal is satisfied that in view of the contradictory statements of the Board and the unorthodox way in which they conducted their enquiry, the complainant was not accorded due process and accordingly the impugned decision cannot stand.

21. In view of the disregard of the complainant's right to due process he is entitled to an award of damages for moral injury which the Tribunal sets at 1,000 United States dollars. He is also entitled to a sum of 1,000 dollars in costs. Since the decision is quashed, it follows that the complainant is entitled to his salary and emoluments until the date on which he would have retired in November 1999.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay the complainant arrears of salary and emoluments until the date on which he would have retired, in November 1999.
3. The Organization shall pay the complainant 1,000 United States dollars in compensation for moral injury.
4. It shall also pay him 1,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 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 31 January 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet