

108th Session

Judgment No. 2902

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. A. against the United Nations Industrial Development Organization (UNIDO) on 9 January 2008, UNIDO's reply of 6 May, the complainant's rejoinder of 11 July, the Organization's surrejoinder of 23 October, the complainant's corrigendum dated 14 November 2008, his additional submissions of 25 May 2009 and UNIDO's final comments thereon of 31 July 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. In the first half of 1992 UNIDO and the Government of Greece signed an agreement to establish an Investment and Technology Promotion Office (ITPO) in Athens. The agreement provided that the Government would fund the ITPO for two years, with a possibility of extension subject to periodical evaluations. In 1994, 1996, 1999, 2003 and 2005 joint evaluation missions were undertaken, subsequent to which funding was extended.

The complainant, a Greek national born in 1950, joined the ITPO, Athens, in July 1992 as Investment Promotion Expert at level L-2 under a project personnel appointment. Later that year his functional title was changed to Deputy Head of the Office with effect from the date of his appointment, and after three subsequent promotions he reached level L-5 in 2001. UNIDO recommended him for the post of Head of the ITPO, Athens, in 2003. However, the Greek Government did not endorse this recommendation and the complainant was promoted to Acting Head instead.

By a letter of 25 November 2005, the Managing Director of UNIDO's Division of Administration informed him that his appointment would not be renewed upon its expiry on 31 December 2005. Referring to the report issued on 14 November 2005 of a joint evaluation mission, which took place in September 2005, and to a recommendation contained therein to restructure the Office, he explained that the new staffing requirements entailed the abolition of several posts, including that of the complainant. On 8 December the latter wrote to the Director-General and asked him to review the decision to abolish his post and not to renew his appointment, contending that the evaluation report did not contain any recommendation to restructure the ITPO, Athens. A week after his separation from service, in a memorandum dated 8 January 2006, he reiterated his request. However, by a letter of 31 January the Director-General informed him that he had decided to maintain the decision, on the grounds that the decision to abolish several posts, including the complainant's, had been taken after careful deliberation and reinforced by the recommendations made in the 2005 evaluation report. The complainant filed an appeal with the Joint Appeals Board on 24 March 2006 and in February 2007 he was notified of the composition of the panel which had been set up to consider his appeal.

In its report dated 10 July 2007 the Board found that UNIDO had failed to substantiate properly the decision to abolish the complainant's post and it recommended that he be awarded financial compensation equivalent to 12 months' salary and entitlements. However, it concluded that his allegations of prejudice and discrimination fell outside its jurisdiction. The Director-General

disagreed with the latter finding. He convened a meeting with the Board and members of the Administration in order to “clarify the matter”, and he sent the case back to the Board for it to review the allegations. On 21 September the latter issued an addendum to its report, in which it found that the allegations of prejudice and discrimination were unsubstantiated, but it maintained the recommendations made in its report of 10 July. By a memorandum of 9 October 2007 the complainant was informed that the Director-General had decided to dismiss his appeal in its entirety. That is the impugned decision.

In the meantime, the complainant, who had asked to be considered for the post of Head of the ITPO, Athens, which had become vacant on 1 September 2006, was advised that candidates would be nominated by the Greek Government. After having been informed that another person had been appointed to the post in question, he filed another appeal on 27 June 2007 alleging, inter alia, unequal treatment, which forms the subject of a second complaint before the Tribunal.

B. The complainant submits that there was no justification for the abolition of his post, particularly in view of the fact that he was a long-serving staff member with a very good performance. In his opinion, the fact that only his post was abolished constitutes evidence of prejudice and discrimination against him. He contends that the restructuring of the Office was not warranted by any objective reason, but merely served to facilitate the recruitment of another person who had the support of the Greek Government and who was subsequently appointed Head of the ITPO, Athens. He refers to an e-mail of 23 December 2005 in which the ITPO Coordinator at UNIDO’s Headquarters in Vienna advised him that the “position” of the Government had not changed and denounces what he considers to be Government interference in the administration of staff.

The complainant maintains that he was entitled to the same safeguards as those afforded to staff members at Headquarters when posts are abolished, yet the Organization did not examine his performance appraisal before deciding not to renew his appointment. Additionally, in failing to convey the true reasons for the abolition of

his post, it denied him the right to defend his interests properly and in a timely manner.

According to the complainant, UNIDO breached the duty of care it owed him in several respects. It did not inform him that the post of Head of the Office had become vacant in the course of 2006, nor did it offer him any alternative post. Furthermore, in contrast to all other staff members in the ITPO, Athens, he was not given a contract extension.

He contends that the internal appeal procedure was tainted with irregularities, particularly because the meeting convened by the Director-General in his absence casts doubt on the independence of the Board and the integrity of the internal appeal process. He holds that the meeting was not necessary and deplores the Board's rejection of his request for hearings. He asserts that, in alluding to his political opinions, the Board changed the basis of his allegations of prejudice and discrimination. Lastly, he points out that there were inordinate delays in the internal appeal proceedings, noting in particular that the Director-General withheld his final decision longer than the statutory month, although the addendum to the Board's report was confined to the issue of prejudice and discrimination.

The complainant asks the Tribunal to quash the impugned decision and to order his re-employment at level P-5 or L-5 at an "appropriate step", under a contract of at least two years, and retroactive payment of the corresponding salary and entitlements from 1 January 2006 to the date of re-employment, together with interest. In the event that re-employment is not possible within three months of the Tribunal's decision, he seeks compensation in an amount equivalent to seven years' salary and entitlements based on the level and step he held when he was separated from UNIDO. In addition, he claims 200,000 euros in compensation for the professional and moral injury he suffered, and 5,000 euros in costs.

C. In its reply the Organization submits that the decision to abolish the complainant's post was a discretionary one and that it was taken in the interests of the ITPO, Athens. It denies any hidden motive

for the decision and rejects the allegations of prejudice and discrimination. The restructuring, which had initially been considered by a joint evaluation mission conducted by UNIDO and the Greek Government in 2003, was based on objective grounds – to wit achieving “an appropriate level and skills mix of the [O]ffice staff” in order to improve its performance within the available budgetary resources – in line with the ITPO’s draft work programme for 2006. Thus, UNIDO did not need to consider the complainant’s performance or merits before deciding to abolish his post. The defendant also rejects the allegation of improper interference by the Greek Government, arguing that it informed the complainant of the decision to abolish his post in due time and that it was under no obligation to give him an opportunity to state his position before taking that decision.

UNIDO maintains that it had no duty to offer an alternative post to the complainant, as he was employed under a technical cooperation project personnel appointment, which was limited by its terms to service on a particular project. Nonetheless, it did consider him for alternative employment, but the complainant did not accept any of the solutions it suggested. Contract extensions were offered to staff members whose functions or post were not affected by the restructuring.

As regards the internal appeal procedure, UNIDO holds that the meeting convened by the Director-General did not compromise the independence of the Board or the integrity of the internal appeal process; its purpose was to discuss the issue of jurisdiction with respect to the allegations of prejudice and discrimination. The complainant did not object to it, nor did he request to attend it at the time. Furthermore, it was the complainant who alluded to political interference to sustain the allegations in question. The Organization considers that the appeal was concluded within a reasonable time,

emphasising that the Director-General was right in waiting for the issuance of the addendum to make his final decision. UNIDO invites the Tribunal to reject the complainant's claims in relation to his re-employment as they are the subject of another appeal, and it contends that there are no exceptional circumstances warranting such a measure.

D. In his rejoinder the complainant presses his pleas. He argues that the failure to appraise his performance before deciding not to renew his appointment also constitutes a breach of his terms of employment, given that from 1999 onwards his letters of appointment stated that his performance would be evaluated in accordance with the Director-General's Administrative Instructions applying to staff members at Headquarters. He adds that his appointment was not "finite in nature" and that UNIDO failed to distinguish between project personnel employed in developing countries and personnel employed in the ITPO network offices.

E. In its surrejoinder the Organization asserts that the complainant has not identified in what manner he has been treated differently from staff members at Headquarters and that, even if his performance had been appraised, it would not have entitled him to retain his post or receive a contract extension. It points out that the complainant has not identified any vacancy for which he could have been considered in November or December 2005 and submits that there is no legal basis for drawing a distinction among project personnel.

F. In his additional submissions the complainant adduces evidence which, he asserts, shows that the Organization conspired with the Greek Government to remove him from the ITPO.

G. In its final comments the defendant argues that the evidence produced by the complainant in his additional submissions is incomplete, misconstrued and irrelevant and that it does not call into question the reasons for abolishing his post.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision of 9 October 2007 to dismiss his appeal and thus to maintain the decision not to renew his appointment upon its expiry. The Director-General dismissed the appeal in its entirety for the following reasons:

- (1) The Joint Appeals Board's recommendation that the complainant be awarded financial compensation had no basis in fact and in law.
- (2) The Board's finding that it was the Organization's duty to consider a solution less drastic than the non-renewal of the complainant's appointment was not supported by either the 200 Series of the Staff Rules or the terms of the complainant's employment.
- (3) The reasons given for the abolition of his post were adequate and justified in light of the decision to restructure the ITPO, Athens.
- (4) He accepted the Board's finding that the complainant's allegations of prejudice and discrimination were unsubstantiated.

2. The complainant advances a number of arguments in support of his claim that the impugned decision should be set aside. Firstly, he contends that the reasons he was given were not the real reasons for the decision not to renew his appointment. He alleges that the restructuring was a "sham", that unlawful government interference was the cause of the non-renewal and that the Director-General misconstrued the findings of the 2005 evaluation report to justify his separation from service.

3. The complainant bases his allegation of government interference on the e-mail of 23 December 2005 from the ITPO Coordinator in Vienna and events subsequent to his separation concerning the eventual appointment of a former government employee as Head of the ITPO, Athens.

4. The Tribunal finds that this allegation is not supported by the evidence. The e-mail from the ITPO Coordinator upon which the complainant relies is subject to more than one interpretation. This is particularly so since the “position” referred to in the e-mail is not identified as being a position taken on the renewal of the complainant’s appointment. The Tribunal also observes that the memorandum dated 8 January 2006 undermines the complainant’s allegation. In this memorandum he describes a meeting he had on 30 November 2005 with a member of the Greek Government in the following terms:

“[...] At that meeting, I was given to understand that in a case such as mine, the decision would rest entirely in the hands of UNIDO Headquarters. After all, the ITPO Athens is administered by UNIDO and I have been a long-serving UNIDO staff member. The Greek Government’s concurrence would normally be required for a new appointee but not for extension of contract of a long-serving staff member.”

5. Moreover, in the Tribunal’s view, while the subsequent staffing of the ITPO does raise other questions, the complainant’s allegation is based on conjecture and not on facts upon which a reasonable inference of government interference can be drawn.

6. Although the evidence falls short of establishing that government interference motivated the abolition of the complainant’s post and the non-renewal of his appointment, the question remains as to whether restructuring was the real reason for the decision not to renew the complainant’s appointment.

7. UNIDO submits that restructuring first became a possibility as a result of the 2003 evaluation report, and that the 2005 evaluation report gave impetus to the move to restructure by identifying the need for an improved work environment, consistency and efficiency in the ITPO. The defendant also argues that the reasons for restructuring given by the Director-General are consistent with the ITPO draft work programme for 2006.

8. Although the record supports the Organization's assertion that a restructuring has occurred, it does not reflect that a decision to restructure and a decision regarding the abolition of specific posts had been taken prior to 25 November 2005, when the complainant was informed that a recommendation to restructure had been approved and that new staffing requirements meant that his post and others would be abolished. It was only in his letter of 31 January 2006 that the Director-General elaborated that the decision to restructure had been taken after "careful deliberation over time by the Government of Greece and UNIDO" and reinforced by the findings of the 2005 evaluation report.

9. Given the importance of a decision to restructure with a view to ensuring the viability of the ITPO, Athens, and the lengthy deliberations leading up to such a decision, it would be expected that the decision to restructure and the process for its implementation would be well documented. However, UNIDO has failed to produce any evidence demonstrating that that decision and the decision to abolish a number of posts were taken prior to 25 November 2005. The draft work programme for 2006 to which the defendant refers does not give any insight as to when the decision was taken. This document dated 5 April 2006 and identified as a "Draft for Discussion" states, among other things, that the recommendations of the evaluation report of November 2005 have been incorporated into the work programme. Under the heading "Staffing" it states:

"The evaluation report pointed out the need for a new set of skills required for ITPO to achieve its objectives, especially with regard to investment climate/country risk and to technologies related to renewable energy and environmental issues. In addition, the evaluation report noted the problematic working environment in the Office and recommended that this be addressed expeditiously.

The Greek Administration and UNIDO agreed to re-organize the Office and establish a new structure. [...]"

The draft work programme goes on to note that several existing posts were abolished with a view to creating a new structure and states

how the ITPO, Athens, “should” be staffed to carry out the work programme; it does not indicate when the decisions at issue were actually taken.

10. The fact that the evaluation report was issued on 14 November 2005 and the decision was communicated to the complainant on 25 November, the fact that UNIDO refers to the lengthy deliberations prior to reaching a decision, and the lack of any documentation stating that a decision had been taken prior to 25 November, lead to the conclusion that, at the material time, no decision on restructuring had been taken. Accordingly, the decision not to renew the complainant’s appointment must be set aside. However, the evidence does indicate that restructuring was being contemplated and has in fact occurred. In these circumstances, reinstatement is not an appropriate remedy. Rather, the complainant is entitled to be paid the salary and other allowances he would have received had his appointment been renewed for six months, together with interest at the rate of 8 per cent per annum from due date until the date of payment. The complainant must give credit for any earnings for the period from 1 January 2006 to 30 June 2006.

11. Secondly, the complainant contends that UNIDO’s failure to conduct a performance appraisal before deciding not to renew his appointment constitutes a breach of procedure and a breach of his terms of employment as his letters of appointment stated that he would be evaluated on a yearly basis. To the extent that the complainant relies on the 100 Series of the Staff Rules to ground his claims of breach of procedure, his argument must be rejected as at all material times the 200 Series of the Staff Rules applied. The defendant argues that since the non-renewal of the appointment was not based on performance, it is irrelevant whether a performance appraisal was or was not conducted. The Tribunal rejects this argument. UNIDO had a contractual obligation to conduct yearly performance appraisals. International organisations routinely require applicants for positions to provide at least their most recent performance appraisal from a prior

employer. UNIDO's failure to provide the complainant with an appraisal has deprived him of the use of a critical tool in his search for future employment.

12. Thirdly, the complainant argues that the Organization breached its duty of care in failing to accommodate him in another post or in a manner less drastic than the non-renewal of his appointment. He proposes a number of alternative solutions including a contract extension such as those granted to other staff members and contends that he should have been given an opportunity to apply for the position of Head of the ITPO, Athens. This latter submission will not be addressed as it is the subject of another complaint.

13. The complainant disputes UNIDO's assertion that he stated he was not willing to downgrade to an L-4 position. He explains that when he was asked whether he would accept such a position, he simply replied: "Would you if you were me?" In terms of the offer that he be given out-put based contracts, the complainant takes the position that, having regard to his circumstances, this could not be taken as a genuine attempt to accommodate him.

14. The Organization had no obligation under the 200 Series of the Staff Rules to find an alternative post for the complainant. However, it had a duty to explore with him possible options prior to his separation. The failure to do so was an affront to his dignity and showed a lack of respect for him as a highly regarded long-serving staff member.

15. Fourthly, the complainant alleges that he was the target of prejudice and discrimination on the part of UNIDO. Although the Joint Appeals Board was incorrect in its narrow interpretation that discrimination had to be linked in some way to a personal characteristic, the complainant has failed to adduce sufficient evidence to show that the non-renewal decision was motivated by malice, ill will or bad faith or that it was motivated by a plan to make way

for a former government employee. As to the allegation of unequal treatment, the Tribunal recalls that the principle of equality means that those in like circumstances should be treated alike. The evidence in this case shows that the staff members whose contracts were extended for short periods of time were not in like circumstances to those of the complainant. Accordingly, his allegations of prejudice and discrimination are rejected.

16. Lastly, the complainant contends that the integrity of the internal appeal process was undermined by delay and the meeting convened by the Director-General to “clarify the matter” regarding his allegations of prejudice and discrimination. The Tribunal finds that by any standards a delay of nearly 19 months to complete the internal appeal process is unreasonable.

It also finds that the convening of the meeting of the Board and members of the Administration without affording the complainant an opportunity to attend constitutes a breach of due process. While the Tribunal accepts that it was within the authority of the Director-General to remit the matter to the Board for the purpose of considering the allegations of prejudice and discrimination, a meeting was not required to achieve that purpose.

17. In addition to the salary and other allowances payable in accordance with consideration 10 above, the complainant is entitled to moral damages in the amount of 10,000 euros for UNIDO’s failure to conduct a performance appraisal, its failure to treat the complainant with dignity and respect, and for the breach of due process as well as the delay in the internal appeal process. He is also entitled to costs in the amount of 1,000 euros. All other claims must be dismissed.

DECISION

For the above reasons,

1. The decision of the Director-General of 9 October 2007 dismissing the complainant's appeal is set aside, as is the earlier decision not to renew his appointment.
2. UNIDO shall pay the complainant the salary and allowances he would have received had his appointment been renewed until 30 June 2006, together with interest at the rate of 8 per cent per annum from due date until the date of payment. The complainant is to give credit for earnings, if any, in the period from 1 January 2006 until 30 June 2006.
3. UNIDO shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay him costs in the amount of 1,000 euros.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet