

SEVENTY-SECOND SESSION

In re VIANNEY

Judgment 1158

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. John Joseph Vianney against the United Nations Industrial Development Organization (UNIDO) on 5 August 1990 and corrected on 30 September, UNIDO's reply of 29 November 1990, the complainant's rejoinder of 14 January 1991 and the Organization's surrejoinder of 11 March, the brief filed by Miss Robina Sokal on 3 July 1991, the complainant's further submissions of 22 August and the Organization's letter of 20 September 1991 informing the Registrar that it did not wish to file a further brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 3.3 and 4.2 and Rules 106.12 and 112.02 of UNIDO's Staff Regulations and Staff Rules;

Having examined the written evidence and decided not to order oral proceedings, 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 Somali who was born in Aden in 1931, took up duty at UNIDO's headquarters in Vienna in 1977 as a press officer at grade P.3. After holding fixed-term appointments he was granted a permanent one in January 1982. He was promoted to P.4 in April 1982. At the material time he was employed as a P.4 audio-visual officer in the Public Relations and Information Section (INF) of the Department of External Relations, Public Information, Language and Documentation Services (EPL).

The P.5 post of chief of EPL/INF being vacant, the complainant served as "Officer-in-Charge" from 1 August 1984 to 15 January 1989 and as such was paid a special post allowance corresponding to P.5 under Rule 106.12 of UNIDO's Staff Rules from 1 February 1987.

The Director-General paid an official visit to the Philippines in November 1987. Miss Robina Sokal, a United States citizen who was then head of the United Nations Information Centre in Manila, helped over the arrangements and on his return to Vienna the Director-General wrote a letter on 2 December 1987 to the Secretary-General of the United Nations praising her "unique and innovative assistance", "dedication and commitment" and "fine services"; the United Nations was, he said, "fortunate to have such an exemplary representative".

An internal vacancy announcement went out on 15 January 1988 for the post of chief of EPL/INF, the deadline for applications being 27 January. The complainant was absent from Vienna on mission when he got word but he applied by cable in time. Miss Sokal and thirteen others also applied. The matter was referred to the Appointment and Promotion Board, which made a recommendation to the Director-General.

The Organization issued an external vacancy announcement in much the same terms on 8 February.

By a memorandum of 22 December 1988 the acting Chief of the Recruitment Section of the Personnel Services Division informed the complainant that someone else had been chosen. Miss Sokal - for it was she - took over as chief of EPL/INF on 15 January 1989. On 2 May 1989 the complainant wrote a long minute to the Director-General in accordance with Rule 112.02(a) making a request for review of the appointment of Miss Sokal. On 13 June the Director-General rejected his request and on 15 June he filed an appeal with the Joint Appeals Board under Rule 112.02(b)(i).

In its report of 1 June 1990 the Board concluded that there had been no breach of the terms of the complainant's appointment and that the appointment of Miss Sokal had been in keeping with the rules; it made "no recommendations in support of the appeal". In a decision of 8 June, which the complainant says he got notice of on 12 June and which he impugns, the Director-General said he concurred with the Board's "recommendation".

B. The complainant gives an account of his career before and since joining UNIDO. He says that he was well

qualified to head the section and had widely acknowledged success in running it. He traces the events that led to the dispute and sees in them a firm resolve on the Administration's part to have Miss Sokal appointed in his stead. That was the outcome sought from the outset, and it was not the first sham process of selection in EPL/INF.

Though it was the Director-General who in the end was to make the appointment, he was writing a glowing recommendation of Miss Sokal in a letter to the Secretary-General of the United Nations at a time when he knew she would be considered for the post. The Deputy Director-General in charge of EPL, who made the initial evaluation of the applicants, was hardly likely to disregard the Director-General's evident wishes in the matter. A covering letter which a junior member of EPL/INF sent Miss Sokal on 8 December 1987 with a copy of the Director-General's letter gives the game away: it invited her to pursue "the opening we discussed" and promised to tell the United States mission in Vienna.

The decision to appoint her overlooked essential facts. One was that the post required a sound knowledge of German, which his performance appraisal reports show the complainant had, but which Miss Sokal did not; another was that his experience was not inferior to hers.

The decision was a departure from standard practice in the matter of selection and contrary to Regulation 4.2 of the UNIDO Staff Regulations, which says that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization".

Procedural and other flaws in the Appeals Board proceedings also taint the final decision. The Board did not hear everyone concerned or make a proper inquiry into the case records, and its secretary was the acting Chief of the Recruitment Section in 1988.

(a) The complainant asks the Tribunal to quash the Director-General's decision of 8 June 1990. (b) He claims 5,000 United States dollars in damages for material and moral injury. (c) He claims payment of the difference between the salary and pension benefits he would have had at grade P.5 had he continued to run INF or been made chief of it and the sums he has actually been entitled to. (d) He seeks \$4,000 in costs.

C. The Organization submits that according to Article II(5) of the Tribunal's Statute the complaint is irreceivable insofar as he is alleging misapplication of the rules to the case of someone else.

As to the merits UNIDO points out that the Director-General has discretion over appointments, his decisions are subject only to limited review, and there was no flaw in his decision to appoint Miss Sokal.

There was no breach of Regulation 4.2, which adds: "This consideration [the one cited in B above] shall also apply on a reciprocal basis to staff in the United Nations family of organizations". That sentence put Miss Sokal, who was an employee of the United Nations, on a par in law with the complainant.

There was nothing unusual or improper about the Director-General's writing a letter commending Miss Sokal. Besides, such letters are not submitted to the Appointment and Promotion Board.

In writing a letter to Miss Sokal on 8 December 1987 the junior member of EPL/INF was just offering some personal advice. There is no link between that letter and the Director-General's decision. The fact that a mission in Vienna may know of or even support an application for a post does not invalidate the appointment of the applicant.

The requirement of proficiency in German in the notice of vacancy was waived so that Miss Sokal could be considered for the post. The Director-General properly took the view that her experience in handling the press was such that her not having German would not matter. Besides, the waiver applied to all applicants alike and the complainant was not proficient in German either. As the Joint Appeals Board held, United Nations experience counted more heavily than knowledge of German. There was nothing improper about waiving the requirement of German since it was just one of several criteria. The evaluation of the educational attainments of candidates is at the Administration's discretion. The complainant's performance as officer-in-charge gave him no preference for the post and was duly taken into account anyway.

There were no flaws in the proceedings in the Appeals Board. The Board is free to determine whom to take evidence from and what inquiries to make. It does not evaluate candidates: that is the task of the Appointment and Promotion Board. The Appeals Board's secretary is not a member and his involvement in the recruitment of staff in 1988 was irrelevant.

Lastly, even if the appointment of Miss Sokal were flawed the complainant would have no right to be appointed to the post and his claims to damages must therefore fail.

D. In his rejoinder the complainant enlarges on his account of the facts of the case. He objects to UNIDO's contention that he is not entitled to damages even if there has been breach of his rights: that is tantamount to saying that it does not matter how the Director-General wields his authority. Indeed the thrust of the reply is that the Director-General can do as he likes.

The complainant develops his pleas. In particular he again questions the Appeals Board's impartiality on the grounds that its secretary played a key part in the selection as head of recruitment. He reaffirms that its inquiries were perfunctory. It persisted in misconceptions notwithstanding the contrary evidence he gave it. His case is just one example of the "political games" UNIDO plays over appointment and promotion. The formal waiver of the requirement of German had the sole purpose of helping Miss Sokal. The requirement was fluency, not "proficiency", and he did satisfy it. The criteria for comparing her and his experience were obscure. She won out of sheer favouritism, her appointment being made arbitrarily, in breach of Regulation 4.2 and in disregard of essential facts. He presses his claims.

E. In its surrejoinder the Organization corrects a number of misconceptions in the rejoinder and enlarges on the pleas it put forward in its reply. Since the complainant failed to claim financial relief during the internal appeal his claim to damages for moral and material injury and to compensation for losses "due to non-promotion" are irreceivable under Article VII of the Tribunal's Statute. UNIDO objects to the disparaging comments he directed at fellow officials and a member State; those remarks in any event are immaterial.

F. In comments on the pleadings submitted at the Tribunal's request by Miss Sokal - whose appointment as chief of EPL/INF the complainant challenges - she gives her view of the issues that concern her. She denies knowledge of any "plot" to appoint her to the post and reviews her qualifications, finding them stronger than the complainant's insofar as information is taken to mean "results-oriented, interest-generating activities to attract media and public attention".

G. In his further submissions the complainant takes issue with a number of Miss Sokal's comments and answers the Organization's plea in its surrejoinder that his claims to financial relief are irreceivable. He says that it is untrue that he never put specific claims to the Joint Appeals Board: his claims were implicit in a memorandum of 14 December 1989 and he presses them.

CONSIDERATIONS:

1. The complainant is impugning a final decision which the Director-General of UNIDO took on 8 June 1990, on the Joint Appeals Board's recommendation, to reject the complainant's appeal against the decision to appoint Miss Robina Sokal to a post for which he had himself applied, that of chief of the Public Relations and Information Section (INF) of the Department of External Relations, Public Information, Language and Documentation Services (EPL).

Receivability

2. For the first time in its surrejoinder the Organization submits that the complainant's claims under (b), (c) and (d), to financial compensation are irreceivable on the grounds that he did not put them to the Joint Appeals Board. One reason for ordering further submissions from the parties was to give the complainant an opportunity to answer that objection, and he has done so in his additional brief of 22 August 1991.

3. Claims (b), (c) and (d) are to awards of damages for material and moral injury, of compensation for loss of salary and pension entitlements and of costs. His main claim, under (a), is to the quashing of the decision of 8 June 1990, and indeed such quashing is the main remedy he has sought from the outset of the proceedings. The Organization does not deny that the decision of 8 June 1990 is a final one and that the claim to the quashing of it is receivable under Article VII(1) of the Tribunal's Statute.

Even if the three other claims did not form part of the internal appeal put to the Joint Appeals Board, the Tribunal will still entertain them in the context of the present complaint. If it allowed the main claim but declined to entertain the others as irreceivable, its judgment would be deprived of practical effect. Claims (b), (c) and (d) are

not independent, but corollaries, of claim (a), and whether they are to succeed will turn on the Tribunal's ruling on claim (a).

The merits

4. In paragraph 30 of its report of 1 June 1990 on the complainant's internal appeal the Joint Appeals Board concluded that "the selection process which led to the recruitment of Ms. Sokal as Chief, Public Relations and Information Section was in accordance with the pertinent rules and regulations and that the allegations of the appellant that the administration had not observed the rules and regulations were unfounded".

The complainant, who was already on the staff of UNIDO when he applied for the post, alleges that the appointment of Miss Sokal was both a departure from standard United Nations practice as to recruitment and selection and a breach of Regulation 4.2 of UNIDO's own Staff Regulations, which reads:

"Subject to the provisions of regulation 3.2 above and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization. ..."

The Organization denies breach of Regulation 4.2 on the grounds that it was quite in line with that provision to put Miss Sokal, an official of the United Nations, on a par with the complainant. That, it says, is plain from the sentence which follows the above quotation from 4.2, and which reads:

"This consideration shall also apply on a reciprocal basis to staff in the United Nations family of organizations."

5. The Organization's answer is correct: under Regulation 4.2 officials of other United Nations organisations are to be put on a footing of equality with UNIDO officials. Yet the answer, though correct, is insufficient. Regulation 4.2 fits into the broader context of the rules on selection, and one of those rules is in Regulation 3.3, which reads:

"Selection of staff shall be made without distinction as to race, sex, religion or disability, among candidates who meet the qualifications required. So far as practicable, selection shall be made on a competitive basis."

The Tribunal is required to determine whether in considering all the case records before it, the Organization has properly identified the qualified candidates. In doing so the Tribunal will make sure that the criteria which are to be applied have not been put to improper use. And there would be such improper use if, for example, the above-stated principle of equality were treated as a privilege.

6. UNIDO has no duty under Regulation 3.3 to hold a competition in every case where there is a vacancy to be filled: the words "So far as practicable" keep the policy flexible. But if the Organization does decide to hold a competition - the procedure ordinarily followed in making appointments in the United Nations system - it must abide by the conditions it has itself set for the competition: *patere legem quam ipse fecisti*. Any decision it takes in breach of rules of its own making will be flawed and cannot stand, and the application of that principle means that the conditions of entry for a competition may not properly be altered once the process of selection is under way.

7. On 15 January 1988 UNIDO circulated an internal vacancy announcement for the post of chief of EPL/INF. The announcement referred to the qualifications required and, under the heading "Languages", it was specified:

"Fluency in English, French and German. Knowledge of other official United Nations languages desirable."

On 8 February 1988 the Organization issued an external vacancy announcement which, though it gave some additional information, was in essence the same as the one of 15 January.

8. In assessing the candidates, however, the Organization took a different view. It waived altogether the stated requirement of fluency in German, which it found that Miss Sokal did not meet, on the grounds that her practical experience in handling the international press made her the best candidate and that her lack of German would not impair her performance of her duties.

In answer to the complainant's objection to such waiver the Organization points out that it applied to all the candidates alike.

The material issue is not the conditions under which the waiver was applied, but whether the Organization might, in mid-competition and while assessing the candidates, alter the requirements it had itself already declared for the post. For the reasons explained in 6 above it was wrong to do so. Had fluency in German not been an express requirement, no doubt others might have entered the competition.

The Tribunal's ruling

9. The conclusion is that UNIDO failed to abide by its own requirements established for the post described in the vacancy announcements of 15 January and 8 February 1988, which made "fluency" in German a basic requirement. So the Joint Appeals Board was mistaken in its view, expressed in paragraph 27 of its report, that "the evaluation of candidates was properly and systematically carried out by the immediate supervisor of the post". An essential condition for the competition was waived during such evaluation, and such waiver impaired the fairness and lawfulness of the process of selection. For that reason alone the impugned decision must therefore be set aside and the complainant's claim under (a) is allowed, there being no need to entertain his other objections.

10. Under claim (c) the complainant seeks damages in the amount of the difference in the salary and pension he would have been entitled to as from 16 January 1989 had he been appointed chief of EPL/INF instead of Miss Sokal. Although the result of the competition was flawed the complainant would not necessarily have been appointed to the post had the competition been properly conducted since, as was said in 8 above, there might have been other applicants in the first place had fluency in German not been a stated requirement. Claim (c) is therefore disallowed.

Claims (b) and (d) are, however, allowed: the Tribunal awards 3,000 United States dollars in damages for the material and moral injury the complainant has sustained by reason of the unlawful process of selection, and 2,000 dollars in costs.

DECISION:

For the above reasons,

1. The challenged decision is set aside.
2. The Organization shall pay the complainant the sum of 3,000 United States dollars in damages for material and moral injury.
3. The Organization shall pay the complainant \$2,000 in costs.
4. His remaining claims are dismissed. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
José Maria Ruda
A.B. Gardner