COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Z. U. B. S. v. Australia

Communication No. 6/1995

19 August 1997

CERD/C/51/D/6/1995*

ADMISSIBILITY

Submitted by: Z. U. B. S.

Alleged victim: The author

State party: Australia

Date of communication: 17 January 1995 (initial submission)

Date of present decision: 19 August 1997

Decision on Admissibility

1. The author of the communication is Z. U. B. S., an Australian citizen of Pakistani origin born in 1955, currently residing in Eastwood, New South Wales, Australia. He claims to be a victim of violations by Australia of articles 2, 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. He contends that he has been the victim of racial discrimination by the New South Wales Fire Brigade Service (hereafter referred to as NSWFB) and by the New South Wales Anti-Discrimination Board (hereafter referred to as ADB).

The facts as submitted by the author

2.1 In February 1993 the author, who had by then been residing for approximately two years in Australia, was hired as an Engineering Officer by the NSWFB. Before being hired, he had applied for two higher level positions which he claims were commensurate with his qualifications, experience and skills. He was, however, interviewed and hired for a lower level position for which he had not applied, and for which he contends he was not provided with a job description. The author contends that he was not granted interviews for the other two positions, which went to two other applicants. 1/

2.2 According to the author, his position was identical to that of the other two officers on the

NSWFB. He claims that both of the other officers were of a "different race", without specifying to which race they belonged, and claims that the difference in treatment between himself and the other two officers was racially motivated. Such differentiation allegedly included that the author's qualifications exceeded those of his colleagues, that his salary was inferior to that of one of the officers, and that he was placed on six months probation, unlike one of the officers. In each case, he was treated the same as the other colleague, although he argues that he was not informed of the probationary requirement.

2.3 The author contends that he was given a heavier workload compared to his colleagues, that his participation in business trips was limited, and that his access to workplace information was curtailed. He alleges harassment and unfair treatment in the performance of his duties; he notes, for example, that one day he was ridiculed for refusing to drink beer with his colleagues towards the end of one day's duties, although he had pointed out that his origin and religion did not allow him to drink alcoholic beverages. The author does not give reasons for his belief that the difference in treatment compared to other colleagues was due to racial discrimination.

2.4 After he had filed two complaints with the relevant department under the Fire Brigade's grievance policy, the author contends that management prepared a report on his "poor performance". On 30 July 1993, he lodged a complaint of racial discrimination in employment with the ADB of New South Wales, indicating that the matter was "urgent". On 6 August 1993, his employment was terminated, allegedly without written notice. The author informed the ADB of this development by fax of 9 August 1993.

2.5 According to the author, the handling of his claim by the ADB was biased and discriminatory, and that the bias was racially motivated. The author bases this assessment on the delay in the handling of his case which, in his opinion, led to his being dismissed. Furthermore, the author contends that in a telephone conversation with a senior conciliation officer of the ADB on 12 August 1993, the ADB had taken part of his former employer, as ADB agreed with the employer's suggestion that he appeal to the Government and Related Employees Appeal Tribunal (GREAT). GREAT examines cases of wrongful dismissal, whereas ADB processes cases of racial discrimination. The author was therefore reluctant to file his grievances with GREAT, and took ADB's suggestion to mean that ADB did not believe that it was faced with a case of racial discrimination.

2.6 On an unspecified date, Mr. Z. U. B. S. consulted with solicitors of the NSW Legal Aid Commission (hereafter referred to as LAC) with a view to obtaining legal aid for proceedings before GREAT. On 18 August 1993, he was refused legal aid. He does not indicate whether he appealed this decision to the Legal Aid Review Committee within the 28 day limit stipulated in the applicable regulations. On 30 August 1993, the author addressed a letter to the ADB, confirming his decision not to proceed with an appeal before GREAT asking ADB to give priority to his complaint.

2.7 On an unspecified date, the author further contacted the New South Wales Council for Civil Liberties (NSWCCL) which informed him, on 1 July 1994, that his complaint had been forwarded to the Council's Complaints Sub-Committee for further consideration. The author does not elaborate any further on this contact.

2.8 On 19 December 1994, ADB informed the author that its investigation had been completed, and that it found that there was no merit in the complaint. No reason for this evaluation were provided. The letter to Mr. Z. U. B. S. advised him of his right to appeal the decision with 21 days of the Equal Opportunity Tribunal (hereafter referred to as EOT). At the time of his initial submission (17 January 1995), the author indicated that the procedure before the EOT is long and expensive. He argues that he cannot pay the costs for legal representation since he remained unemployed after his dismissal. He does not indicate, however, whether he applied for legal aid with the LAC of New South Wales.

The complaint

3. It is submitted by the author that the facts stated above amount to violations of articles 2, 5 and 6 of the Convention.

State party's observations

4.1 In a submission dated March 1996, the State party notes that when the author initially submitted his case to the Committee, it was clearly inadmissable for non-exhaustion of domestic remedies, as Mr. Z. U. B. S. had then instituted proceedings before the EOT. On 30 October 1995, however, the EOT handed down a judgement in the author's favour and awarded him $A 40,000 of damages and ordered his former employer to address a written apology (within 14 days) to him. While the EOT dismissed the author's claims of racial discrimination, it did find that the author had been victimized as a result of his complaint. Victimization of an individual who has initiated a complaint of racial discrimination is unlawful under section 50 of the New South Wales Anti-Discrimination Act of 1977.

4.2 The State party considers that with the judgement of the EOT, the author's case should be considered closed. It adds that the author could have appealed the judgement of 30 October 1995 on a point of law, but that no notification of appeal was ever received. This implies that if the author was dissatisfied with the judgement, he failed to exhaust available domestic remedies because he did not file an appeal within the statutory deadlines.

4.3 The State party summarizes the EOT's findings in the author's case:

- In respect of the author's claim that he had been racially discriminated in respect of his academic qualifications, the appointment terms and conditions and the probationary period of six months, the Tribunal found that there was "no doubt" that the author had been "treated differently" from his colleagues in respect of his salary and commencement date. It found that this was attributable to his lack of local experience. The EOT also found that the NSWFB's failure to advise the author of the probationary period "was unfortunate" and a "breach of contract", and that the author was probably exploited. But though the author was "treated adversely", the EOT considered that this "was not a ground concerning his race or a characteristic of his race or a characteristic imputed to his race".

- In respect of the author's claim of excessive workload, the EOT found that the evidence presented did not amount to discrimination. While the author was at one time working on

five projects and his two colleagues were working on only two, an analysis of the projects revealed that the colleagues' projects were of substantially greater complexity than the author's. In respect of the author's claim that he had to attend to duties of contract administration of a higher accountability than his colleagues, the EOT did not accept his case, as evidence produced by the respondent showed that the colleagues also attended to such duties at various times.

- As to the claim that the author was discriminated against because he was not allowed to attend two courses relevant to his work, the EOT found that he did in fact attend one course. Furthermore, "financial considerations restrained the allocation of personnel to other courses", and as the author lacked seniority, the respondent could justifiably exclude the author from attendance of the second course.

- As to the author's claim that he was vilified on account of his race or a characteristic pertaining to his race, the EOT found that the author's superior's instructions to Mr. Z.U.B.S. to finish some tender documents by the first working day after Easter "were robust, perhaps insensitive", but did not amount to discrimination. Several other comments alleged to have been made by the author's colleagues were carefully evaluated by the EOT, which concluded that they were isolated remarks made on "purely social occasions and did not reflect any vilification . . . or a basis for a finding of racial discrimination". In sum, the EOT found that Mr. Z. U. B. S. was not discriminated against by his employer in relation to the termination of his employment on the basis of his race.

4.4 Concerning the victimization issue, the State party notes that the EOT concluded that the author's case satisfied the major constitutive elements of victimization. EOT considered that Z.U.B.S.'s "complaints of racial discrimination significantly hardened" his superior's views of him. It considered that the author's complaint "was a substantial and operative factor upon the respondent adopting the view" that the author be dismissed rather than seeking to resolve the issue by resorting to a grievance procedure. The Tribunal also was of the view that although the respondent had stated, in a letter to the President of the ADB, that the author was dismissed because he refused to do certain work, the respondent had "subjected" the author "to a detriment, namely to termination of his employment without notice" because of his discrimination allegations: this, in the tribunal's opinion, was contrary to Section 50 of the Anti-Discrimination Act 1977.

5.1 In comments, the author reiterates that the attitude of the NSWFB violated his rights under articles 2, 3, 5(c), 5(e) (i) and 6 of the Convention. He bases his claims on:

(a) alleged race-based harassment and offensive behaviour on the part of former colleagues in his former workplace; and

(b) discrimination as to the terms of his appointment, discrimination in his employment conditions and in the termination of his employment. He reiterates that there "is a clear pattern of unfair treatment and discrimination against the petitioner on the ground of his race and unfair advantage to the officers of another race".

5.2 According to the author, the attitude of the ADB in his case violated his rights under articles 2,

5(a) and 6 of the Convention. In particular, he contends that the ADB did not handle his urgent complaint impartially, that it victimized and disadvantaged him; it is further submitted that by "delaying the case for 22 months", the ADB protected the personnel of the NSWFB.

5.3 The attitude of the EOT in the case is said to have violated the author's rights under articles 2, 5(a) and 6 of the Convention. It transpires from his submissions, however, that he primarily takes issue with the way EOT evaluated the facts and the evidence presented in his case, during the hearings held form 11 to 15 September 1995.

5.4 Mr. Z. U. B. S. claims that the office of the NSW Ombudsman, which he seized of his case, handled his grievances in violation of articles 2, 5(a) and 6 of the Convention: "The Ombudsman, without contacting the petitioner, accepted the ADB's version of the dispute. The conduct of the Ombudsman Office in this case was disappointing. It is worth noting that the NSW Ombudsman in office served as Race Discrimination Commissioner in the Federal Human Rights and Equal Opportunities Commission for several years and is fully aware of racism in Australia, including the ADB's general attitude in handling the complaints of race discrimination".

5.5 Finally, Mr. contends that the - reasoned - decision of the LAC of New South Wales not to provide him with free legal assistance violated his rights under articles 2, 5(a) and 6 of the Convention. It remains unclear whether factors other than the simple denial of his request for legal assistance are deemed to have been discriminatory.

6.1 Prior to the Committee's 49th session, the State party requested an opportunity to provide further comments on the admissibility of the author's claims, as the author has raised new arguments in his submission of April 1996. In June 1997, the State party transmitted to the Committee further admissibility observations.

6.2 The State party rejects the claim under article 2 of the Convention as inadmissible as incompatible with the provisions of the Convention, pursuant to rule 91 (c) of the rules of procedure; it points out in this context that the Committee has no jurisdiction to review the laws of Australia in abstracto, and that, in addition, no specific allegations against Australia have been made by the author in relation to article 2. If the Committee were to consider itself competent to review the allegation, the State party submits that it should be rejected as inadmissible rations materiae. It argues that the author's rights under article 2 are accessory in nature, and that if no violation under articles 3, 5 or 6 of the Convention can be established in relation to the conduct of the NSWFB, the ADB, the EOT, the Ombudsman's Office or the LAC (see below), then no violation of article 2 can be established either. Subsidiarily, the State party contends that if the Committee were to hold that article 2 is not accessory in nature, it remains the case that Mr. Z. U. B. S. did not provide prima facie evidence that the above bodies engaged in acts or practices of racial discrimination against him.

6.3 The State party rejects the author's claim of a violation of article 3 of the Convention in that he "was segregated . . . from English speaking background personnel during a trip to Melbourne and in an external training course": this is deemed inadmissible as incompatible ratione materiae with the Convention. For the State party, the author has failed to raise an issue in relation to article 3; subsidiarily, it is argued that the claim under article 3 has been insufficiently substantiated, for

purposes of admissibility: there is no system of racial segregation or apartheid in Australia.

6.4 The State party submits that the claim of a violation of article 5(a), (c) and (e) (i) of the Convention by the NSWFB, the EOT, the ADB, the Ombudsman and the LAC is inadmissible ratione materiae; in relation to the allegations against the conduct of the case by the EOT and the LAC, Australia further argues that the author has failed to exhaust available and effective domestic remedies.

6.5 As to the author's claim that the NSWFB violated his rights under subparagraph 5(c) to, inter alia, have equal access to public service and further violated his right, under subparagraph 5(e) (i), to work, to free choice of employment, to just and favourable conditions of work and just remuneration, the State party argues that:

- these allegations were reviewed by Australian tribunals in good faith and in a reasonable manner and in accordance with established procedures. It is submitted that it would be incompatible with the role of the Committee to act as a further court of appeal in these circumstances;

- subsidiarily, the State party submits that alleged racial discrimination in employment has been insufficiently substantiated, for purposes of admissibility, as Mr. Z. U. B. S. did not provide prima facie evidence which might give rise to a finding of racial discrimination.

6.6 As to the claim that Mr. Z. U. B. S.'s right to equal treatment before the ADB, the EOT, the Ombudsman and the LAC were violated, the State party argues that:

- these allegations (with the exception of the one against the LAC) are incompatible with the provisions of the Convention, on the ground that the Committee is not mandated to review the determination of facts and law of domestic tribunals, in particular in cases in which the complainant failed to exhaust available and effective domestic remedies;

- the claims related to the treatment of Mr. Z. U. B. S. by EOT and LAC are inadmissible, as the author failed to exhaust available domestic remedies, pursuant to article 14, paragraph 7(a), of the Convention. Thus, the allegations of unfair and unequal treatment could have been reviewed by the New South Wales Supreme Court, and the claims of unequal and unfair treatment by the LAC could have been reviewed by the Legal Aid Review Committee. Neither avenue was pursued by Mr. Z. U. B. S.

6.7 With respect to the author's contention that the NSWFB, the ADB, the EOT, the Ombudsman and the LAC violated his rights under article 6 of the Convention, the State party submits that:

- this allegation is inadmissible ratione materiae with the provisions of the Convention, as the alleged violations of the author's rights by the NSWFB and the ADB were properly reviewed by the domestic courts, "in a reasonable manner and in accordance with the law". The State party emphasizes that it "is incompatible with the role of the Committee under the Convention to act as a further court of appeal in these circumstances. Australia has a domestic system which provides effective protections and remedies against any acts of racial

discrimination". The mere fact that the author's allegations were dismissed is no reflection on their effectiveness.

- subsidiarily, the State party argues that the rights under article 6 of the Convention are similar to those enshrined in article 2 of the International Covenant on Civil and Political Rights. These are general rights which are accessory in nature and linked to the specific rights enshrined in the Convention. As no independent violation of articles 2, 3 and 5 of the Convention has been made out by the author, no violation of article 6 can be established.

- still subsidiarily, the State party submits that the allegations under article 6 have been insufficiently substantiated, for purposes of admissibility, as the author did not submit any prima facie evidence that he did not have the opportunity to seek effective protection and remedies against alleged acts of racial discrimination in his employment before these tribunals, in a manner similar to every individual in New South Wales subject to their jurisdiction.

6.8 In comments dated 3 August 1997, the author reiterates his allegations, claiming that:

- "six Anglo-Celtic officials" of the NSWFB "maliciously employed" him, treated him unfairly during his employment and victimized him when he complained about their attitude;

- he has exhausted all available domestic remedies under Australian anti-discrimination legislation, "although the remedies were unfair, extensively exhaustive and prolonged";

- he did not file an appeal against the decision of the LAC because the LAC's advice to him to appeal for a review of its decision "was not in good faith and misleading";

- finally, as far as the proceedings before the EOT were concerned, the case was conducted "in a biased environment. The author claims that a NSWFB barrister "tampered with subpoena documents" and removed files from the record, and that EOT "planted" a document in his personnel file "in order to dismiss the case of racial discrimination against the members of the dominant race".

Admissibility considerations

7.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the International Convention on the Elimination of all Forms of Racial Discrimination.

7.2 The author has alleged violations of articles 2 and 6 of the Convention by all the instances seized of his grievances, and of article 3 by the New South Wales Fire Brigade. The Committee does not agree with the State party's assessment that the author has failed to substantiate these allegations, for purposes of admissibility; Mr. Z. U. B. S. has formulated a prima facie claim of a violation of these provisions by the NSWFB. The Committee considers that only the examination on the merits would enable it to consider the substance of the author's claim.

7.3 The Committee notes that the author's claims under article 5(c) and (e) (i) against his former employer, the New South Wales Fire Brigades, were reviewed by the Equal Opportunities Tribunal in September 1995. It dismissed the author's claims as far as they related to racial discrimination by judgement of 30 October 1995, but awarded him $A 40,000 on the ground that the employer's handling of his grievances amounted to victimization. The Committee does not agree with the State party's argument that to admit the author's claim would amount to a review, on appeal, of all the facts and the evidence in his case. Only an examination on the merits would enable the Committee to ascertain whether the procedure before the ADB and the EOT in the author's case was compatible with the provisions of the Convention. At this, procedural, state of the admissibility of the author's complaint, the Committee is satisfied that his claims are compatible with the rights protected by the Convention, under rul 91 (c) of the rules of procedure.

7.4 The author has alleged a violation of article 5 (a) of the Convention by those administrative and judicial organs seized of his case. The Committee does not share the State party's argument that this claim is incompatible with the provisions of the Convention, since to declare it admissible would amount to a review of the determination of facts and law by Australian tribunals. Only an examination on the merits would allow the Committee to determine whether the author was treated by these organs in any way different from any other individual subject to their jurisdiction. The same considerations as in paragraph 7.3 above in fine apply.

7.5 Finally, the State party has claimed that Mr. Z. U. B. S. could have appealed the judgment of the EOT of 30 October 1995 to the Supreme Court of New South Wales, and could have availed himself of the opportunity to have the decision of the LAC to deny him legal aid reviewed by the Legal Aid Review Committee. The Committee considers that even if this possibility still remained open to the author, it would be necessary to take into account the length of the appeal process; as the consideration of the author's grievances took in excess of two years before the ADB and the EOT, the circumstances of the present case justify the conclusion that the application of domestic remedies would be unreasonably prolonged, within the meaning of article 14, paragraph 7 (a), of the Convention.

8. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with rule 94 of the Committee's rules of procedure, the State party shall be requested to submit to the Committee, within three months of the date of transmittal to it of the present decision, written explanations or statements clarifying the case under consideration;

(c) that any explanations or statements submitted by the State party pursuant to rule 94 shall be transmitted to the author of the communication under rule 94, paragraph 4, of the rule of procedure, for comments;

(d) that this decision shall be communicated to the State party and to the author of the communication.

[Done in English, French, Russian and Spanish, the English text being the original version.]

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*All persons handling this document are requested to respect and observe its confidential nature.

1/ It would appear from the file that the author was considered over-qualified for the two other positions.