DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/00/5965

Borjanka KOVAČEVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 3 November 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. The application concerns the termination of the applicant's employment with the company "UPI Holding d.o.o.", now "UPI Business Systems d.d." in Sarajevo ("the company").

2. The application raises issues under Article 6 of the European Convention on Human Rights ("the Convention") and in relation to discrimination in the enjoyment of the right to work and related rights protected under Articles 6(1) and 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced on 23 October 2000 and registered on the same day.

4. On 16 July 2004 the Commission transmitted the application to the Federation of Bosnia and Herzegovina under Articles 6 and 13 of the Convention and in relation to discrimination in the enjoyment of the right to work protected by Articles 6(1) and 7 of the ICESCR and Article 26 of the International Covenant on Civil and Political Rights ("ICCPR").

5. On 19 August 2004 the respondent Party submitted its observations on the admissibility and merits of the application to the Commission.

6. On 23 August 2004 the Commission transmitted the respondent Party's observations on the admissibility and merits to the applicant.

7. On 3 September 2004 the applicant submitted her response to the respondent Party's observations on the admissibility and merits.

8. On 7 September 2004 the Commission transmitted the applicant's responsive observations to the respondent Party. On the same day the Commission requested additional written observations from the respondent Party.

9. On 30 September 2004 the respondent Party submitted its additional written observations to the Commission. On 12 October 2004 the Commission transmitted these additional written observations to the applicant.

10. On 5 and 6 October 2004 the Commission requested additional observations from the respondent Party concerning the Employer's ownership structure and persons that the Employer hired after 1996.

11. On 12 October 2004 the respondent Party submitted its additional written observations to the Commission. On 15 October 2004 the Commission transmitted these additional written observations to the applicant.

12. On 20 October 2004 the applicant submitted her response to the respondent Party's additional written observations. On 21 October 2004 the Commission transmitted the applicant's response to the respondent Party.

13. On 8 July 2004, 8 September 2004, and 3 November 2004 the Commission deliberated on the admissibility and merits of the application. On the latter date it adopted the present decision.

III. FACTS

14. The applicant worked with the company from 1980 until 30 April 1992, when the company's Director, U.U., and a member of the Company's Steering Board, S.B.,[1] gave her approval to use her vacation and to travel to Montenegro for medical treatment. Having completed the medical treatment, the applicant made phone contact with the company's Director, U.U., who told her that she could not return to Sarajevo because the city was under a blockade. He proposed that she wait to return until the situation had settled down.

15. After the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Agreement") was signed, the applicant returned to her apartment in Grbavica. On 8 March 1996 she reported to the company's Director, S.B., who told her to report back after "the reintegration of Grbavica".

16. On 19 March 1996 Grbavica was reintegrated and came under administrative governance of the Federation of Bosnia and Herzegovina.

17. On 21 March 1996 the applicant orally addressed the company's Director with a request for resolution of her working-legal status.

18. On 9 May 1996 the applicant requested the company in writing to resolve her working-legal status.

19. On 5 June 1997 the applicant received a written procedural decision on termination of her employment for not reporting to the work. According to this procedural decision, the applicant's employment was terminated retroactively effective 30 June 1992.

20. The applicant filed an objection with the company's Steering Board against the procedural decision terminating her employment. On 17 July 1997, however, the company's Steering Board issued a conclusion rejecting the applicant's objection.

21. On 15 August 1997 the applicant filed a lawsuit against the company before the Municipal Court in Sarajevo to establish the unlawfulness of the decision terminating her employment, an requesting to be reinstated into work and compensated for costs of the proceedings. On 16 March 1999 the Municipal Court issued a judgment in favour of the applicant, declaring the procedural decision on termination of employment and the conclusion rejecting the applicant's objection against that procedural decision invalid. The court obliged the company to establish that the applicant had a pause in her employment from 1992 to 1996, to assign the applicant to a position in accordance with her professional qualification, and to pay her compensation and contributions for social insurance for that period.

22. The company filed an appeal before the Cantonal Court in Sarajevo against the judgment of the Municipal Court. By its procedural decision of 12 July 2000 the Cantonal Court in Sarajevo revoked the first instance judgment and returned the case to the Municipal Court for renewed proceedings.

23. On 9 July 2002, having conducted renewed proceedings, the Municipal Court again issued a judgment in the applicant's favour. The Municipal Court established by its judgment that the procedural decision terminating the applicant's employment and the conclusion rejecting her

[1] S.B. was the Director of "UPI Holding" d.o.o. at the time when the General Framework Agreement for Peace in Bosnia and Herzegovina was signed and when reintegration of the Sarajevo residential area Grbavica, which was under the control of the Army of the Republika Srpska during the armed conflict and from which it was not possible to go to the part of Sarajevo under the control of the Army of Republic of Bosnia and Herzegovina during the conflict, was returned to the administration of the Federation of Bosnia and Herzegovina.

objection against the procedural decision were invalid. The court ordered the company to establish that the applicant had a pause in her employment for the period from 30 June 1992 until 31 March1996 and to reemploy the applicant effective 21 March 1996, assigning her to a position in accordance with her professional qualifications and skills and to compensate her for the expenses of the proceedings. The applicant alleges that S.B. told her on the way out of the courtroom that "the position of the Party of Democratic Action was that no returnee of Serb or Croat origin could be reinstated to work and if the Municipal Court issued positive decisions they would revoke them in the Cantonal Court because there were their judges".

24. The company again filed an appeal before the Cantonal Court against the Municipal Court judgment. On 27 January 2004 the Cantonal Court modified the first instance judgment of the Municipal Court and ordered proceedings in the case suspended until the proceedings before the Commission for Implementation of Article 143 of the Law on Labor of the Canton Sarajevo ("the Cantonal Commission") have effectively ended.

25. On 14 January 2000 the applicant filed an appeal before the Cantonal Commission for regulation of her working-legal status. On 10 October 2001 the Cantonal Commission ordered the company to act in accordance with Article 143, paragraphs 2-4 of the Law on Labor. Specifically, the company was ordered to re-establish the applicant's status as a worker on the waiting list from the date she filed her request until 5 May 2000, and to decide on termination of the applicant's employment in accordance with the law. The Cantonal Commission also ordered the company to determine an amount of severance pay and to conclude a contract on the payment of severance pay. The company filed an appeal against this procedural decision before the Federal Commission for Implementation of Article 143 of the Law on Labor ("the Federal Commission"). By its procedural decision of 4 December 2003, the Federal Commission rejected the company's appeal and confirmed the Cantonal Commission's procedural decision of 10 October 2003. The company acted upon the Cantonal Commission's procedural decision and invited the applicant to report on 28 May 2004 in order to conclude a contract on severance payment and to receive her severance payment. The applicant did not respond to the invitation, and she refused to receive the severance payment.

26. On 1 July 2003 the applicant became employed with the Municipality Novo Sarajevo in Sarajevo as a clerk.

27. From 19 May 2000 (the date of privatisation) the ownership structure of the company was as follows:

- Private capital 16.14439 %
- State capital 83.85561 %

From 20 May 2000 until 4 July 2001 the Employer's ownership structure was as follows:

- Universal banka d.d. Sarajevo 51%
- Natural persons 16.3207 %
- Legal entities 9. 0998 %
- State capital 23.5795 %

From 4 July 2001 the Employer's ownership structure has been as follows:

- Universal banka d.d. Sarajevo 51%
- Natural persons and legal entities 49%

28. Until 4 July 2001 the Employer recruited 17 workers with secondary school qualifications, the same as the applicant's. Of these 17 workers, 16 workers were of Bosniak origin and one was of Croat origin. The Employer did not recruit any workers of Serb origin until that date.

IV. RELEVANT LEGISLATION

A. The Law on Labor Relations

29. The Law on Labor Relations was published in the Official Gazette of the Republic of Bosnia and Herzegovina (hereinafter "OG RBiH") no. 21/92 of 23 November 1992. It was passed as a Decree with force of law, and was later confirmed by the Assembly of the Republic (OG RBiH, no. 13/94 of 9 June 1994). It remained in force until 5 November 1999.

30. The Law contained the following relevant provisions:

> Article 7
>
> "An employee whose work becomes temporarily unnecessary due to a reduced amount of work during the state of war or in case of immediate danger of war may be put on the waiting list no longer than until the cessation of these circumstances.
>
> "An employee on the waiting list shall be entitled to monetary compensation in the amount defined by the director's or the employer's decision in accordance with material assets of the company or other legal person, i.e. the employer….
>
> Article 10:
>
> "An employee can be sent on unpaid leave due to his or her inability to come to work in the following cases:
>
> > if he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.
> >
> > if taken prisoner….
> >
> > if there is no information available of his/her whereabouts…
>
> …
>
> "Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended."

B. The Law on Fundamental Rights in Labor Relations

31. The Law on Fundamental Rights in Labor Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (OG RBiH no. 2/92).

32. Article 23 paragraph 2 of the Law provides that:

> "A written decision on the realization of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily."[2]

[2] The Law on Labor does not contain regulations on the time when decisions become final and binding, if a worker's place of residence is unknown. However, according to Article 96 paragraph 1 of the Law on General Administrative Procedure ("Official Gazette of SFRY", no. 47/86), which was taken over as the Republic Law ("Official Gazette", no. 2/92), which the company might have applied as a public company reads as follows: When a party or it legal representative change its place of residence or an apartment during the proceedings, they have to inform the body which conducts the proceedings about that" Paragraph 2:"Should they fail to do so….the body will order that all further submissions for that party in the proceedings be made by putting a notice on the information board of the body that conducts the proceedings". Paragraph 3:"The

C. The Law on Labor

33. The Law on Labor (OG FBiH no. 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labor (OG FBiH no. 32/00), which entered into force on 7 September 2000, with the particular effect that certain new provisions, including Articles 143a, 143b and 143c, were inserted.

34. Article 5 of the Law on Labour provides that:

> "(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labour contract or other issues arising out of labour relations.
>
> "(2) Paragraph 1 of this Article shall not exclude the following differences:
>
> 1. which are made in good faith based upon requirements of particular a job;
>
> 2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;
>
> 3. activities that have as an objective the improvement of the position of persons who are in unfavourable economic, social, educational or physical position.
>
> "(3) In the case of breach of paragraphs 1 and 2 of this Article:
>
> 1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;
>
> 2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on discriminatory grounds;
>
> **3. If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, or the provision or restoration of any right arising from the contract of employment."**

35. Article 143 of the Law on Labour provides that:

> "(1) An employee who is on the waiting list on the effective date of this law shall retain that status no longer than six months from the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline.
>
> "(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law (5 February 2000), addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had not accepted employment from another employer during this period, shall also be considered an employee on the waiting list.

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delivery shall be regarded performed after expiration of 8 days after it was put on the information board of the body that conducts the proceedings".

"(3) While on the waiting list, the employee shall be entitled to compensation in the amount specified by the employer.

"(4) If a waiting list employee referred to in paragraphs 1 and 2 of this Article is not requested to return to work within the deadline referred to in paragraph 1 of this Article, his or her employment shall be terminated with a right to severance pay which shall be established according to the average monthly salary paid at the level of the Federation on the date of entry of this Law into force, as published by the Federal Statistics Institute.

"(5) The severance pay referred to in paragraph 4 of this Article shall be paid to the employee for the total length of service (experience) and shall be established on the basis of average salary referred to in paragraph 4 of this Article multiplied with the following coefficients:

Experience	Coefficient
- up to 5 years	1.33
- 5 to 10 years	2.00
- 10 to 20 years	2.66
- more than 20 years	3.00."

...

"(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed."

Article 145 of the Law on Labor provides that:

"Proceedings to exercise and protect the rights of employees, which were instituted before this law has come into effect, shall be completed according to the regulations applicable on the territory of the Federation before the effective date of this law, if this is more favorable for the employees."

36. In the Law on Labor, a new Article 143a was added that reads as follows:

"(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labour Affairs (hereinafter the "Cantonal Minister").

"(2) The Federal Commission for Implementation of Article 143 (hereinafter the "Federal Commission"), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.

"(3) In the case when the Cantonal Commission is not performing tasks for which it is established, the Federal Commission shall overtake the jurisdiction of the Cantonal Commission.

"(4) If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of procedure."

37. The new Article 143c provides as follows:

"The Federal/Cantonal Commission may:

1. hear the employee, employer, and their representatives;
2. summon witnesses and experts;

3. request appropriate authority organs and employers to submit all relevant information.

"Decisions of the Federal/Cantonal Commission shall be:

1. final and subject to the court's review in accordance with the law;
2. legally based;
3. transmitted to the applicant within 7 days."

38. The Law on Amendments to the Law on Labor further added the following Articles 52, 53 and 54:

Article 52

"This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labour prior to the date of entry into force of this Law (i.e. 7 September 2000).

Article 53

"This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law (7 September 2000) in the application of Article 143 of the Law on Labour.

Article 54

"Procedures of realization and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law (7 September 2000), if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

39. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01, delivered on 12 December 2001, held that the decisions of the Cantonal Commission and Federal Commission do not have the legal nature of administrative acts. In its opinion, the Supreme Court stated that the Commissions are not organs that conduct proceedings under the laws regarding administrative proceedings, but they are *sui generis* bodies unique to the field of labour relations. Therefore, their final decisions are not subject to judicial review under regular administrative dispute procedures, which are limited to review of administrative acts. Extra-judicial remedies cannot be filed against the Commissions' decisions because they can only be filed against effective judicial decisions. Commission decisions should, however, be subject to review by competent regular courts subject to the Law on civil procedure.

D. The Law on Civil Proceedings

40. On 11 November 1998 the Law on Civil Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 42/98 and 3/99). Article 426 of this Law stipulates that, in proceedings concerning labor relations, the court shall generally have regard to the urgency of such matters, especially in scheduling hearings and setting time limits. A new Law on Civil Procedure took effect on 5 November 2003 (OG FBiH no. 53/03).

V. COMPLAINTS

41. The applicant complains that her right to work has been violated and she claims she has been discriminated against on the basis of her national origin. She initially requested in her application that the Chamber reinstate her into her work and issue a final decision ordering compensation of her lost salaries and ordering that her years of service be recognized for the period from 1992 until the date a "final and binding decision" of the Chamber was issued. She

further requested to be paid compensation for moral damages, poor health, and material expenses in the amount of 17,000 convertible marks ("KM"). The applicant has also expressed her dissatisfaction with the length of the court proceedings in her case. By her submissions to the Chamber and Commission of 19 March 2003 and 3 September 2004, the applicant modified her complaints because she became employed in the meantime (see paragraph 26 above). The applicant requests the Commission to issue a judgment ordering the respondent Party to calculate and pay her all contributions, including unpaid contributions for pension and health insurance from 21 March 1996 until 1 July 2003, as well as compensation for pecuniary and non-pecuniary damages for moral suffering and physical suffering from bad heath from 21 March 1996 to the present in the amount of 17,000 KM.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

42. The respondent party primarily objects to the Commission's competence *ratione temporis* in relation to the issues raised in the application concerning the events that occurred before the Agreement entered into force. It primarily refers to the fact of termination of the applicant's employment.

43. In relation to the discrimination allegations, the respondent Party points out the company acted upon the decisions of the Cantonal Commission and that the facts of the case do not show that the applicant was discriminated against.

44. As to the allegations related to Article 6 of the Convention, the respondent Party considers that there has been no violation of the applicant's right to a fair hearing and that the proceedings before the courts and commissions were decided within reasonable time.

2. As to the merits

45. The respondent Party considers the application ill-founded on the merits.

46. As to the alleged discrimination, the respondent Party stressed that the facts and circumstances do not show what actions have constituted discrimination and it therefore considers that the allegations of discrimination are not substantiated. As to Articles 6 and 7 of the ICESCR, the respondent Party argues that these Articles have not been violated. The respondent Party asserts that the war circumstances, and later on the economic situation in the country, due to which many workers lost their jobs, both influenced the applicant's work conditions. The respondent Party further considers that the fact that the company employed workers of non-Bosniak origin (see paragraph 28 above) confirms that the applicant has not been discriminated against. In relation to Article 26 of the ICCPR, the respondent Party states that it has acted in accordance with the law and that this Article has not been violated in the present case.

47. In regard to Article 6 of the Convention, the respondent Party stresses that the courts of the respondent Party, having acted in accordance with valid legal regulations, decided on the applicant's requests within a reasonable time and that decisions were issued in all the proceedings. Thus, the courts have complied, in this case, with the provisions of Article 143, paragraph 4 of the Law on Labor by suspending the proceedings. The respondent Party also stressed that the applicant was not denied the opportunity to pursue regular and extraordinary remedies and that the applicant's request was decided within a reasonable time by the Cantonal and Federal Commissions. The respondent Party further considers that Article 13 of the Convention has not been violated in the present case.

3. As to the compensation claim

48. As to the compensation claim, the respondent Party points out that the applicant's working-legal status was resolved in accordance with the decisions of the Cantonal and Federal Commissions, that the compensation claim set in the application has been resolved, and that the compensation request is therefore ill-founded in its entirety and should be declared inadmissible.

B. The applicant

49. The applicant alleges that she addressed the company within the legal time limit with a request to be reinstated to her pre-war work position, and that S.B. promised her she would be reinstated to her pre-war work position, but on 5 June 1997 she received a procedural decision on termination of her employment according to which her employment was terminated effective 30 June 1992. She also maintains that her case does not fall under Article 143 of the Law on Labor and that the Cantonal Court in Sarajevo was mistaken when it suspended the proceedings in her case and transferred the case to the Cantonal Commission. The applicant further alleges that S.B. told her on the way out of the courtroom that "the position of the Party of Democratic Action was that no returnee of Serb or Croat origin could be reinstated to work and if the Municipal Court issued positive decisions they would revoke them in the Cantonal Court because there were their judges". As proof of this the applicant points out that the judge who worked on her case was not re-elected as a judge. The applicant considers that by employing 17 new workers with secondary school qualifications (16 Bosniaks and 1 Croat) the company discriminated against her on the basis of her national origin.

VII. OPINION OF THE COMMISISON

50. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

51. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …." and "(c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

A. Admissibility

1. Competence *ratione temporis*

52. The Commission will first address the issue to what extent it is competent *ratione temporis* to consider this case, taking into account that the respondent Party files an objection, in relation to the admissibility, that the issues raised in the application do not fall within the Commission's competence *ratione temporis.*

53. Although the respondent Party considers the applicant's employment to have been effectively terminated on 30 June 1992, the Commission observes that the procedural decision on termination of employment was only delivered to the applicant on 5 June 1997 and that the

company's Steering Board issued a conclusion on 17 July 1997 rejecting the applicant's objection to the procedural decision. The Commission further observes that these decisions were delivered to the applicant during the time when the Chamber was competent to consider these events. The same is true of the actions of the organs of the respondent Party in applying Article 143 of the Law on Labor, according to which the applicant's employment was terminated by force of law. Accordingly, all actions the applicant complains of fall within the Commission's competence *ratione temporis.*

2. Requirement to exhaust effective domestic remedies

54. The Commission must further consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of her complaints and, if so, whether she has demonstrated that it has been exhausted, although the respondent Party did not file an objection based on non-exhaustion of effective remedies.

55. Article 143, paragraph 2 of the Law on Labor provides that a person who was employed on 31 December 1991 and who directly addressed her employer in writing or directly for establishment of her working-legal status within three months after 5 November 1999, and who was not employed with another employer during this period, shall be also regarded as a worker on the waiting list. According to paragraph 4 of this Article, their employment was terminated by force of law on 5 May 2000 if the employer did not invite them to resume work before that day. This means that the working relations of all employees remaining on the waiting list ceased on 5 May 2000. All persons laid off by force of law are only entitled to severance pay. A statement of claim for severance pay can be filed with the Cantonal Commission.

56. Regardless of whether the applicant's employment status was affected by the company Director's decision of 30 June 1992, her labor relationship was terminated by force of law on 5 May 2000. The Law on Labor, in Article 143, terminates the working relations of all employees still on the waiting list on that date, without exception. Accordingly, the applicant had no remedy available that she could be required to exhaust to obtain a decision from the courts or the Commission allowing her to resume work.

57. In any case, the applicant has tried to resolve her case through the domestic court system. She even succeeded to obtain two judgments of the Municipal Court in her favour. In the appeal submitted by the company against the second judgment in her favour, however, the Cantonal Court in Sarajevo modified the judgment of the Municipal Court and suspended the court proceedings until the proceedings before the Cantonal Commission were completed, although these proceedings had already been validly completed by the procedural decision of the Federal Commission at the time the judgment was issued.

58. The Commission further observes that, although the company acted upon the decision of the Cantonal Commission and invited the applicant on 28 May 2004 to report in order to conclude a contract on severance payment and to be paid the severance payment, which the applicant has not done, this could not provide full satisfaction for the applicant in her case. The applicant also requests that the company should be ordered to calculate and to pay her all contributions, including unpaid contributions for pension and health insurance from 21 March 1996 until 1 July 2003, as well as compensation for pecuniary and non-pecuniary damages for her moral suffering and damaged health from 21 March 1996 until today. Regardless of the decisions of the Cantonal and Federal Commission, the applicant's case should be returned again to the competent court that, following the law, might only confirm or repeat the referral of the case to the Cantonal Commission without any prospect for the court to hear her real requests. Under the circumstances, the Commission finds that the applicant cannot be required, within the meaning of Article VIII(2)(a) of the Agreement, to further continue the proceedings before the bodies of the respondent Party.

3. Conclusion on Admissibility

59. Having regard to these considerations, the Commission concludes that the application is admissible in its entirety against the Federation of Bosnia and Herzegovina.

B. Merits

60. Under Article XI of the Agreement the Commission must next address the question whether the facts found disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", including the rights and freedoms provided for by the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Discrimination in the enjoyment of the right to work as well as to just and favorable conditions of work, as guaranteed by the ICESCR

61. Under Article II of the Agreement, the Commission has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the sixteen international agreements listed in the Appendix to the Agreement on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

62. The Chamber repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber (and now the Commission) must attach particular importance. Article II(2)(b) of the Agreement affords the Commission jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, including the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (see case no. CH/01/7351, *Kraljević*, decision on admissibility and merits, delivered on 12 April 2002, para. 62).

63. The Commission further notes that the basis of discrimination in Bosnia and Herzegovina often rests upon the perceived ethnic or national differences expressed in terms such as Bosniak, Croat and Serb. Therefore, the Chamber uses this terminology in discrimination cases without endorsing it. By Bosniak, the Chamber refers to persons who can be considered to have a Bosnian Muslim cultural heritage (*see Brkić*, case no. CH/99/2696, decision on the admissibility and merits, delivered on 12 October 2001, paragraph 64).

64. The Commission will also consider allegations of discrimination pursuant to Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the Covenant, which, in relevant part, reads as follows:

> Article 6(1) of the Covenant:
>
> "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> Article 7 of the Covenant:
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:

(i) fair wages and equal remuneration for work of equal value without distinction of any kind, …
(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant; …"

(a) Impugned acts and omissions

65. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to re-employ the applicant after the end of the armed conflict and the hiring of others to the company. These acts affect the applicant's enjoyment of the rights guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Commission will therefore examine whether the Federation has secured protection of these rights without discrimination.

(b) Differential treatment and possible justification thereof

66. The Commission must first determine whether the applicant was treated differently from others in the same or similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship or proportionality between the means employed and the aim sought to be realized.

67. The burden is on the respondent Party to justify otherwise prohibited differential treatment based on grounds explicitly enumerated in Article II(2)(b) of the Agreement (*see, e.g.*, case no. CH/99/2696, *Brkić*, decision on admissibility and merits of 8 October 2001, paragraph 71, Decisions July-December 2001).

68. The applicant worked with the company from 1980 until 30 April 1992, when the company's Director, U.U., and a member of the Company's Steering Board, S.B.,[3] gave the approval that the applicant would use her accrued vacation time and travel to Montenegro for medical treatment. Having completed the medical treatment, the applicant made phone contact with the company's Director, U.U., who told her that she could not return to Sarajevo because the city was under a blockade. He proposed that she wait to return until the situation had settled down. Even if the applicant had been able to return to Sarajevo (most likely to Grbavica because her home was there), however, she would not have been able to return to work because of the outbreak of the armed conflict, and her employer surely knew that she lived in a part of the city where conflicts would have prevented her from reporting to work.

69. The Commission observes that, in these circumstances, persons of Serb origin who lived in Grbavica before the war, and who were employed in the Federation, generally were not able to report to work during the armed conflict. These were the persons whose employment was usually terminated by application of regulations in force at the time the applicant ceased reporting to work.[4] In the light of the stated considerations, the Commission finds that the applicant has been treated differently in comparison with persons of other nationalities. Before 4 July 2001 the company employed 17 new workers with secondary school qualifications, the same qualifications as the applicant. Of these 17, 16 were of Bosniak origin and one was a Croat. There is no evidence that

[3] S.B. was the Director of "UPI Holding" d.o.o. at the time when the General Framework Agreement for Peace in Bosnia and Herzegovina was signed and when reintegration of the Sarajevo residential area Grbavica, which was under the control of the Army of the Republika Srpska during the armed conflict and from which it was not possible to go to the part of Sarajevo under the control of the Army of Republic of Bosnia and Herzegovina during the conflict, was returned to the administration of the Federation of Bosnia and Herzegovina.

[4] The legislation passed after that explicitly forbade termination of employment of persons who were not able to report to work due to the conflict (see paragraph 30 above)

the applicant's treatment was objectively justified by law, both during and after the armed conflict. In this regard, the Commission observes that the Municipal Court, in the two judgments issued in the applicant's favour, found no legal ground for issuing a procedural decision on termination of the applicant's employment. The Commission, therefore, concludes that the authorities of the respondent Party have actively discriminated against the applicant through the company because of her Serb origin. The Municipal Court tried to remedy this violation in its two judgments, but they were later altered by the procedural decisions of the Cantonal Court in Sarajevo. The Cantonal Court in Sarajevo revoked the judgment by its first procedural decision and returned the case to the Municipal Court for renewed proceedings, while by its second procedural decision, it modified the first instance judgment of the Municipal Court and suspended the proceedings until the proceedings before the Cantonal Commission ended with a final and binding decision, although these proceedings were already validly decided by the procedural decision of the Federal Commission.

(c) Conclusion

70. The Commission concludes, therefore, that the respondent Party, through the company, discriminated against the applicant in the enjoyment of her right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation of Bosnia and Herzegovina thereby being in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the ICESCR.

2. Article 6 of the Convention

71. Article 6, paragraph 1of the Convention provides, in relevant part, as follows:

> **"**In the determination of his civil rights and obligations …, everyone is entitled to a … hearing within a reasonable time by an independent and impartial tribunal established by law."

(a) Length of the proceedings

72. The Commission observes that the applicant initiated the proceedings on 15 August 1997 and obtained the first judgment of the first instance court on 16 March 1999. This judgment was revoked, after the company's successful appeal, by the 12 July 2000 procedural decision of the Cantonal Court in Sarajevo, and the case was returned to the Municipal Court for renewed proceedings. Having conducted the renewed proceedings, the Municipal Court issued a judgment in the applicant's favour for the second time on 9 July 2002. The second judgment of the Municipal Court was modified by the 27 January 2004 procedural decision of the Cantonal Court in Sarajevo, and the proceedings in the applicant's case were suspended until the proceedings before the Cantonal Commission were completed. The Commission further observes that the applicant addressed the Cantonal Commission on 14 January 2000, requesting that her working-legal status be resolved. On 10 October 2001 the Cantonal Commission issued a procedural decision finding the applicant's appeal founded (see paragraph 25 above). The Employer filed an appeal against the procedural decision of the Cantonal Commission. Having conducted the appellate proceedings, the Federal Commission rejected the Employer's appeal by its procedural decision of 4 December 2003 and confirmed the procedural decision of the Cantonal Commission of 10 October 2001.

73. When assessing the length of proceedings for the purposes of Article 6, paragraph 1 of the Convention, the Commission must take into account, *inter alia*, the conduct of the applicant and the authorities and the matter at stake for the applicant (see the aforementioned *Brkić* decision, paragraph 85). The issue in the applicant's case is whether her working relationship was terminated in accordance with law. The issues are not of a particularly complex nature, and there is no indication that the length of the proceedings can be imputed to the applicant. The respondent

Party has not provided any explanation from which it would appear that the delays could not be imputed to its judicial authorities.

74. The failure to bring proceedings to a conclusion within a reasonable time is further compounded by the fact that an employee, who considers that her working relationship was wrongly terminated, has an important personal interest in a speedy outcome of the dispute and in securing a judicial decision on the lawfulness of this measure, considering that her very livelihood depends on it. Domestic law requires that matters concerning employment are to be resolved as a matter of urgency.

75. Under these circumstances, the fact that the applicant's case was pending before the courts for almost six and one-half years before it was suspended without a final and binding court decision being issued, constitutes a violation of her right to a fair hearing within a reasonable time under Article 6, paragraph 1 of the Convention.

76. The violation is exacerbated by the suspension of the proceedings in the case before the Cantonal Court in Sarajevo. The Municipal Court established on two occasions that the applicant was entitled to be reinstated into work and to compensation. The Cantonal Court, however, wrongly suspended the proceedings by its judgment of 27 January 2004, referring to the proceedings before the Cantonal Commission that had already been decided by an effective procedural decision of the Federal Commission. In these circumstances, the Commission finds that the judgment of the Cantonal Court in Sarajevo of 27 January 2004 has further caused unjustified delay in the applicant's case.

77. The Commission therefore finds that the respondent Party has violated the applicant's right to a fair trial within a reasonable time under Article 6, paragraph 1 of the Convention.

(b) Access to court

78. The Commission finds that the unjustified judgment of the Cantonal Court in Sarajevo of 27 January 2004 also left the applicant without access to court.

79. Proceedings before the Cantonal Commission, according to the Supreme Court of the Federation of Bosnia and Herzegovina, are *sui generis* proceedings (see paragraph 39 above). The Cantonal Commission could only have ordered the legally prescribed amount of compensation, which it did. It was not competent, however, to order reinstatement of the applicant or full payment of lost salaries and contributions, as requested by the applicant. The same is true of the Federal Commission that is competent only to decide upon an appeal against the Cantonal Commission's decision.

80. Moreover, it is not clear what court review of the decisions of the Cantonal or Federal Commissions, if any, is available. The Supreme Court of the Federation of Bosnia and Herzegovina has clearly stated that the decisions of the Cantonal or Federal Commissions are not subject to the court review in regular proceedings in administrative disputes. Although the Supreme Court has stated that the decisions of the Cantonal or Federal Commissions should be subject to review by competent courts according to the laws on civil procedure, it does not appear that such review would be of any value to the applicant. It further appears, however, that courts, following the law, may only confirm or repeat the referral of the case to the Cantonal Commission. The applicant would have no prospects of success in the resolution of her requests before the courts, such as a decision on her discrimination allegation. It appears that the existing system places the applicant in an endless procedural circle, without any prospect for the court to hear her real requests.

81. In these circumstances, the Commission concludes that the respondent Party has violated the applicant's right to access to the court, as guaranteed by Article 6, paragraph 1 of the Convention.

(c) Conclusion

82. Having regard to the above, the Commission concludes that the applicant's rights under Article 6, paragraph 1 of the Convention have been violated, for which the respondent Party is responsible.

3. Other provisions invoked

83. Considering its conclusions reached above, the Commission finds that it is not necessary to examine whether there has been violation of the applicant's rights under Article 13 of the Convention or Article 25 of the ICCPR.

4. Conclusion on the merits

84. The Commission concludes that the applicant's rights guaranteed by Article 6 of the Convention have been violated and that she has been discriminated against in enjoyment of her rights under Article 6(1) and Article 7(1) of the ICESCR for which the respondent Party, the Federation of Bosnia and Herzegovina, is responsible.

VIII. REMEDIES

85. Under Article XI(1)(b) of the Agreement the Commission must next address the question of which steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which the Commission has found, including orders to cease and desist, and monetary relief.

86. The applicant requests the Commission to issue a decision ordering the Federation of Bosnia and Herzegovina to calculate and to pay her all contributions, including unpaid contributions for pension and health insurance from 21 March 1996 until 1 July 2003, as well as compensation for pecuniary and non-pecuniary damages for her moral suffering and bad health from 21 March 1996 until today in the amount of 17,000 KM.

87. The Federation of Bosnia and Herzegovina objects to the applicant's requests and alleges that the requests are unjustified and ill-founded.

88. The Commission has established that the Federation of Bosnia and Herzegovina has violated its obligations under the Agreement by discriminating against the applicant in enjoyment of her rights under Articles 6 and 7 of the Covenant on the basis of her ethnic and national origin, as well as by a failure to ensure her rights as guaranteed under Article 6 of the Convention.

89. The Commission will order the Federation of Bosnia and Herzegovina to calculate and pay the applicant all contributions to the appropriate funds, including unpaid contributions for pension and health insurance from 21 March 1996 until 1 July 2003, to be paid within one month of the date of receipt of this decision.

90. The Commission will further order the Federation of Bosnia and Herzegovina to pay to the applicant, by way of compensation for pecuniary and non-pecuniary damages for the sense of injustice that she suffered, the amount of 15,000 KM, to be paid within one month from the date of receipt of this decision.

91. Additionally, the Commission will award 10% (ten percent) interest per annum on the sums referred to in the preceding paragraph. The interest shall be paid from the due date until the date of settlement in full.

IX. CONCLUSION

92. For these reasons, the Commission decides,

1. unanimously, to declare the application admissible;

2. unanimously, that the applicant has been discriminated against in the enjoyment of her right to work guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights in relation to Article II(2)(b) of the Agreement on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

3. unanimously, that the applicant's right to a fair hearing within a reasonable time under Article 6, paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that the applicant's right to access to the court under Article 6, paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to calculate and pay the applicant all contributions to the appropriate funds, including unpaid contributions for pension and health insurance from 21 March 1996 until 1 July 2003, to be paid at the latest within one month from the date of receipt of this decision;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, by way of compensation for pecuniary damage and non-pecuniary damage for the sense of injustice which she suffered, the amount of 15,000 KM (fifteen thousand convertible marks), to be paid at the latest within one month from the date of receipt of this decision;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10% (ten percent) per annum over the sum stated in conclusion no. 6 or any unpaid portion thereof from the due date until the date of settlement in full; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission, or its successor institution, within two months of its receipt of this decision, on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission