



DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/98/986

Dušanka BEŠTA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 1 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 Articles 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 application concerns the applicant's request to regain his pre-war working position in the Public Utility Company "Vodovod i kanalizacija" Sarajevo ("the Company").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

2. The application was introduced on 28 September 1998 and registered on the same day. On 13 June 2001 the Chamber transmitted the application to the respondent Party under Article 6 of the European Convention and Protocol 12 to the Convention as well as Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and Article 26 of the International Covenant on Civil and Political Rights ("ICCPR"), in conjunction with Article II(2)(b) of the Human Rights Agreement.

3. On 13 August 2001 the respondent Party submitted its written observations to the Chamber. On 27 August 2001 the Chamber received additional observations of the respondent Party, containing information that the Cantonal Commission for Implementation of Article 143 of the Labour Law had resolved the applicant's request in her favour.

4. On 14 September 2001 the Chamber forwarded the respondent Party's observations to the applicant for her comments. On 17 October 2001 the applicant sent her reply.

5. Further submissions were received from the Respondent Party on 12 November 2001, 16 May 2003, 19 June 2003, 10 February 2004, and 9 August 2004.

6. Further submissions were received from the applicant on 24 April 2003, 4 June 2003, 30 June 2003, 26 January 2004, and 15 March 2004.

7. The Chamber considered the case on 9 May 2001. The Commission considered the case on 6 May 2004, 5 July 2004, 7 September 2004, and 1 November 2004. On the latter date the Commission adopted the present decision.

III. FACTS

8. Due to outbreak of hostilities, the applicant, who is of Serb origin, left Sarajevo in April 1992 and moved in with her parents in Vojvodina. She alleged that she had lived in the area "Špicasta stijena", on the front line of the armed conflict. When the minimum conditions were met, she immediately returned to Sarajevo.

9. The applicant reported to work after she returned to Sarajevo on 10 June 1996. At that time she was informed that her labour relation had been terminated because she had been absent from work without leave for more than five consecutive days. The applicant, at that time, received the decision on termination of her labour relation effective as of 1 May 1992. This decision was passed on 3 August 1994 and it was issued by the Director General of the company. The applicant appealed against the decision to the Director. By his decision of 13 June 1996, the Director confirmed the first decision on termination of labour relation.

10. On 20 June 1996 the applicant initiated proceedings before the Municipal Court II in Sarajevo. On 7 October 1997 the Court issued a judgment in the applicant's favour, quashing the decision on termination of her labour relation and ordering the company to reinstate the applicant into her work.

11. On 25 February 1998 the company appealed against the judgment to the Cantonal Court in Sarajevo. On 22 June 1998 the Cantonal Court modified the judgment of the Municipal Court II in Sarajevo and rejected the applicant's request in its entirety. The Cantonal Court found the reasons for the termination of the applicant's labour relations well founded, that she did not have any

written approval to be absent from work, and that she failed to report to work within 15 days after the cessation of the state of war, which was an obligation under the then-valid regulations.

12. On 13 December 1999 the applicant submitted a request to the Commission for Implementation of Article 143 of the Law on Labour of the Canton Sarajevo ("the Cantonal Commission"). By its procedural decision of 17 July 2001, the Cantonal Commission accepted the applicant's appeal ordering the Company to act in accordance with Article 143 paragraphs from 2 to 4 of the Law on Labour, i.e. to reinstate the applicant's labour status of laid off employee starting with the date when she submitted her request until 5 May 2000 and to decide on the termination of applicant's labour relations in accordance with the law. The Cantonal Commission also ordered the Company to determine the amount of severance pay and to reach an agreement with the applicant on the payment thereof.

13. Unsatisfied with the procedural decision issued by the Cantonal Commission, because it did not provide for her reinstatement to work, the applicant submitted an appeal to the Federal Commission for Implementation of Article 143 of the Law on Labour ("the Federal Commission"). By its procedural decision of 15 November 2002, the Federal Commission rejected the applicant's appeal as ill founded.

14. The Company acted pursuant to the 17 July 2001 procedural decision of the Cantonal Commission, and, by its procedural decision of 7 November 2001, it established the applicant's legal status as an employee on the waiting list, determined the termination of her employment, and offered the applicant a contract on payment of severance pay which she did not accept. The applicant is not satisfied with this solution because she still wants to resume her job.

15. Between August 1994 and May 2001, the company employed 415 employees. Of these, it appears to the Commission that nine were of non-Bosniak origin.

IV. COMPLAINTS

16. The applicant alleges that she has been discriminated against in the enjoyment of the right to work on the basis of her national origin. She also alleges a violation of her right to a fair hearing under Article 6 of the European Convention.

17. The Commission considers that the case may raise issues under Article 6 of the European Convention and Protocol 12 to the Convention as well as Articles 6 and 7 of the ICESCR and Article 26 of the ICCPR in conjunction with Article II(2)(b) of the Human Rights Agreement.

V. RELEVANT LEGAL PROVISIONS

A. The Law on Fundamental Rights in Labour Relations

18. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of SFRY, nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" - no. 2/92). 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."¹

¹ The Labour law does not contain regulations determining the moment when decisions become effective if the whereabouts of the employee are unknown. But according to the Article 96, paragraph 1 of the Law on General Administrative Proceedings (OG SFRJ no. 47/86), which was taken over as Republic Law (OG SRBiH no. 2/92), and which a public Company could apply: "In cases in which the person or his/her legal representative changes his/her place of residence during the proceedings, they must report such change to the administrative body." Paragraph 2 prescribes that "[i]f they fail to do so, ... the administrative body shall determine that all further deliveries shall be performed by placing decisions on the advertising board of the

Article 75 of the Law provides for the termination of a working relationship. Paragraph 2(3) of that Article reads as follows:

"The working relationship ends without the consent of the employee, ... if he or she stayed away from work for five consecutive days without good cause."

B. The Law on Labour Relations

19. The Decree with Force of Law on Labour Relations during the State of War or Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992) entered into force on the day of its publication. It was later confirmed by the Assembly of the Republic (OG RBiH no. 13/94 of 9 June 1994) and applied as the Law on Labour Relations. It remained in force until 5 November 1999. The Law contained the following relevant provisions:

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.

"..."

"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."

Article 15

"The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

C. The Law on Labour

20. The Law on Labour (OG FBiH 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labour (OG FBiH 32/00) with the particular effect that certain new provisions, including Articles 143a, 143b, and 143c, were added and entered into force on 7 September 2000.

21. 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;

institution." Under paragraph 3, "[t]he delivery is considered as accomplished upon expiration of 8 days after the decision is placed on the advertising board."

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."

22. 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.

"(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."

23. Article 145 of the Law on Labour 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 favourable for the employees."

D. The Law on Amendments to the Law on Labour

24. In the Law on Amendments to the Law on Labour, a new Article 143a was added to the Law on Labour 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."

25. In the Law on Amendments to the Law on Labour, a new Article 143b was added to the Law on Labour as follows:

"(1) Members of the Federal/Cantonal Commission shall be appointed by the Federal/Cantonal Minister on the basis of their professional experience and demonstrated ability for performance of their function.

"(2) Members of the Commission have to be independent and objective and may not be elected officials or have any political mandate.

"(3) The Federal Ministry or competent organ of the Canton shall bear the expenses of the Federal/Cantonal Commission."

26. In the Law on Amendments to the Law on Labour, a new Article 143c was added to the Law on Labour 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."

27. The Law on Amendments to the Labour Law 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."

28. 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.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

29. The respondent Party considers the application inadmissible *ratione temporis*, because the General Framework Agreement for Peace in Bosnia and Herzegovina was signed on 14 December 1995 and the Commission is only competent to consider events that occurred after that date or events that occurred before if a violation continued after that date. Because the applicant's employment was terminated on 1 May 1992 by the decision of the Company's general manager of 3 August 1994, the respondent Party proposes that the application should be declared inadmissible.

30. The respondent Party also contested the admissibility of the application, on the ground of non-exhaustion of domestic remedies because, at the time of the respondent Party's submission of these observations, the proceedings before the Cantonal Commission were still pending.

2. As to the merits

31. As to a possible violation of Article 6 of the Convention, the respondent Party considers the application ill founded because the criteria provided for in Article 6 have been complied with in this case.

32. As to the allegations on a violation of Protocol 12 to the Convention, Articles 6 and 7 of the ICESCR, and Article 26 of the ICCPR, the respondent Party asserts that the applicant lost her right to work exclusively by her own behaviour.

33. In its additional observations, the respondent Party also stated that the applicant's allegations that she was discriminated against on the ground of her national origin were arbitrary and unsubstantiated, and the applicant had not proved any such discrimination.

34. The respondent Party has submitted a list of employees who established their labour relations with the Company between August 1994 and May 2001. From the list it appears that a total of 415 persons were employed during this time period. The respondent Party did not indicate how many of these 415 persons are of Serb origin.

B. The applicant

35. The applicant alleges that she has been discriminated against on the basis of her national origin, that the national composition of the employees of the company is now 98% Bosniak, and that the persons who have been employed after the war are of Bosniak origin. As an example, she quotes three names: L.S., K.M. and M.H, whom she alleges to have the same qualifications as she does.

VII. OPINION OF THE COMMISSION

A. Admissibility

36. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on 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.

37. Before considering the merits of the application, the Commission must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement.

1. Competence *ratione temporis*

38. 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: ... (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."

39. The respondent Party contends that the Commission lacks competence *ratione temporis* to consider the application because the applicant's employment was terminated before the entry into force of the Agreement. The procedural decision terminating the applicant's labour relations was only delivered to her in writing, as required by Article 78 of the Law on Fundamental Rights in Labour Relations, on 10 June 1996. And it appears that the situation the applicant complains of is her employer's failure to hire her back, which is of an ongoing nature. Further, the applicant's request for reinstatement was refused on 3 July 1998. The applicant's grievances relate to a situation that took place after the Agreement entered into force, and the Commission concludes that it is competent *ratione temporis* to consider the application insofar as it relates to events after 14 December 1995.

40. On 20 June 1996 the applicant initiated court proceedings for the protection of her rights with regard to the termination of her labour relations. Also, beginning 13 December 1999, proceedings were conducted before the bodies of the Federation under Article 143 of the Law on

Labour. Consequently, the application falls within the competence of the Commission *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

41. 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"

42. The Federation argues that the applicant has not exhausted effective domestic remedies because, at the time the applicant addressed the Chamber, the proceedings before the Cantonal Commission for Implementation of Article 143 of the Law on Labour were pending. The Commission notes, however, that these proceedings have now been concluded.

43. The Commission further observes that the applicant has exhausted legal remedies before the Cantonal and the Federal Commission for Implementation of Article 143 of the Law on Labour, obtaining a final procedural decision on her legal and working status. Although the decisions of the Federal Commission are subject to review by initiating a labour dispute before the competent court, which was a possibility after the issuance of the decision of the Federal Commission, it does not appear that this legal remedy would be effective. The applicant, before the proceedings before the Cantonal and the Federal Commission, obtained court decisions by which this issue had already been considered. Thus the applicant would likely have her claim rejected as *res judicata*.

3. Conclusion on admissibility

44. The Commission further finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Commission declares the application admissible.

B. Merits

45. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above 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 in the Convention and other international agreements listed in the Appendix to the Agreement.

1. Discrimination in the enjoyment of the right to work

46. 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.

47. 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).

48. 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 Commission uses this terminology in discrimination cases without endorsing it. By Bosniak, the Commission 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). The Commission will consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR which, in relevant part, read as follows:

49. Article 6(1) of the ICESCR, in relevant part, provides as follows:

"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."

50. Article 7 of the ICESCR, in relevant part, provides as follows:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable 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

51. 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

52. 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. 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).

53. The applicant asserts that she was subjected to continued discrimination in the enjoyment of the right to work due to her national origin. She alleges that the national composition of the company's employees is 98% Bosniak and that the company, while she was struggling to resume her job, hired a number of new employees whom she states are Bosniaks, out of which she mentioned three persons of Bosniak origin with the same qualifications as she has.

54. The respondent Party claims that the applicant's employment was terminated on the basis of the Law on Fundamental Rights in Labour Relations because of her unjustified absence from work for five consecutive days and because she did not have any written approval to leave the country. The respondent party considers that the applicant's arguments relating to the alleged discrimination are arbitrary and unsubstantiated, and that the applicant has not proved any such discrimination.

55. The respondent Party submitted a list of persons employed during the relevant time period when the applicant had been trying to return to work. The Commission notes from this list of newly

employed workers that the applicant's company hired a large number of new employees in the period after the war. The company indeed hired the three persons the applicant indicated in her allegations. The three newly hired employees have the same qualifications as the applicant and are of Bosniak origin. There is no data on the positions held by these persons, but they were employed in 1997 and 1998, during the time period when the applicant was trying to resume her job.

56. As to the question of whether the applicant was treated differently from other employees on the ground of her national origin, the Commission notes that, except for a general refutation, the respondent Party failed to contest the applicant's arguments or to offer evidence proving that the applicant was not subject to differential treatment. The Commission concludes taking into account the applicant's efforts to return to her pre-war position as well as the fact, admitted by the Federation, that there was a need to hire new employees, that there was no justification for not reinstating the applicant into her work. Furthermore, the respondent Party has not refuted the applicant's allegations with regard to the new employees. In light of all these considerations, the Commission finds that the applicant has been subjected to differential treatment in comparison with persons of different ethnic origin.²

57. Having found that the applicant was treated differently in comparison with her colleagues of Bosniak origin, the Commission will consider whether there is any possible justification for such treatment. In this regard, the Commission notes that the company continued to operate after the war and obviously had the need and the means to employ many new employees. At the same time it chose to employ new persons, the company failed to reinstate the applicant, an experienced employee, to her work. The respondent Party stresses that her labour relations were terminated lawfully, but it provides no substantive argument as to why the applicant could not have been reinstated into her pre-war position or why the company hired new persons without considering the possibility of rehiring the applicant.

58. Having regard to the totality of these circumstances, the Commission is unable to find any reasonable or objective justification in law for this treatment. Nor can the Commission discern any legitimate aim served by the company's failure to reinstate the applicant into her work.

59. The Commission concludes, therefore, that the respondent Party, through the Public Utility Company "Vodovod i kanalizacija" Sarajevo, 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

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

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

a. As to the length of the court proceedings and the proceedings before the Commissions for Implementation of Article 143 of the Law on Labour

61. 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).

² This unbalanced situation was temporarily corrected by the Municipal Court II in Sarajevo, which ordered the company to reinstate the applicant into her pre-war job, but this decision was modified by the Cantonal Court in Sarajevo, which rejected the applicant's claim, thereby perpetuating her situation.

62. The Commission notes that the applicant initiated court proceedings before the Municipal Court II in Sarajevo on 20 June 1996 and that the Court issued a judgment on 7 October 1997. The Cantonal Court in Sarajevo issued a decision in the appeal on 22 June 1998.

63. The proceedings initiated by the applicant lasted a total of two years. The Commission considers this a reasonable length of time and concludes that the respondent Party has not interfered with the applicant's rights under Article 6(1) of the Convention in relation to the court proceedings.

64. As to the proceedings before the Commission for Implementation of Article 143 of the Law on Labour, the applicant filed her request to the Commission for Implementation of Article 143 of the Law on Labour of Canton Sarajevo on 13 December 1999. On 17 July 2001 the Cantonal Commission issued a decision, and the proceedings on appeal were concluded on 15 November 2002 by the decision of the Federal Commission. Taking into account a huge number of the requests before the Cantonal and the Federal Commission during the period when the applicant's request was subject to consideration, more expedient action on the applicants' request could not be expected. In the circumstances, the Commission considers this a reasonable length of time and concludes that the respondent Party has not interfered with the applicant's rights under Article 6(1) of the Convention in relation to the Commission proceedings.

b. As to the fairness of the proceedings

65. The proceedings in the first instance were completed in the applicant's favour. In the second instance, the judgment was altered and her statement of claim rejected, because the Cantonal Court found that the applicant did not meet the legal conditions for reinstatement to work and that the first instance judgment was based on wrongly established facts and incorrect conclusions. It appears from the judgments of the Municipal Court and the Cantonal Court that the applicant took part in the first instance proceedings on an equal basis and that she was afforded an opportunity to present her statement and the relevant facts.

66. The applicant has not offered any argument proving that the proceedings on appeal were not fair. Nor can the Commission, on its own motion, find any evidence that the Cantonal Court conducted the applicant's proceedings on appeal in an unfair manner in comparison to any other proceedings, under the procedures provided for by the law.

67. In the proceedings before the Commissions for implementation of Article 143 of the Law on Labour, the Commission has not found any evidence of unfairness. The Commissions appear to have decided this case in accordance with the applicable legal provisions, resolving the applicant's case in manner favourable to her.

68. Accordingly, the Commission does not find any special circumstances justifying a conclusion that the respondent Party has violated the applicant's rights under Article 6 of the Convention with regard to the proceedings conducted in the applicant's case.

3. Conclusion

69. The Commission concludes that the applicant has been discriminated against in the enjoyment of her rights under Articles 6 and 7 of the ICESCR in conjunction with Article II(2)(b) of the Agreement and that the applicant's rights as guaranteed under Article 6 of the Convention have not been violated.

4. Other provisions of the Agreement

70. Considering the above conclusion on discrimination, the Commission considers that it is not necessary to examine whether there has also been a violation of the provisions of Protocol 12 to the Convention or discrimination against the applicant in relation to Article 26 of the ICCPR.

VIII. REMEDIES

71. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

72. The applicant requests that the Federation be ordered to reinstate her to work. The applicant has not submitted a compensation claim.

73. The Commission considers it is appropriate to order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in her right to work and to just and favourable conditions of work, and that she be offered the possibility of resuming her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position.

74. The Commission has found the Federation to be in breach of its obligations under the Agreement. In the circumstances, the Commission finds it appropriate to award the applicant, by way of compensation, within one month of the date of delivery of this decision, a lump sum of 15,000 KM covering pecuniary and non-pecuniary damages suffered during the period from 10 June 1996 through 31 December 2004.

75. The applicant shall also receive, on the first day of each month, 300 KM, from the date of its receipt of this decision, until she is offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position.

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

IX. CONCLUSIONS

77. For the above 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 as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, in conjunction with Article II(2)(b) of the Human Rights Agreement, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

3. unanimously, that there has been no violation of the applicant's right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights;

4. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the applicant is immediately offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position;

5. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, not later than one month after receipt of this decision, the amount of 15,000 KM by way of compensation for pecuniary and non-pecuniary damages suffered during the period from 10 June 1996 through 31 December 2004;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay 300 KM to the applicant on the first day of each month, from the date of its receipt of this decision, until she is

offered the possibility to resume her previous position, or another position appropriate to her skills and training, with a salary commensurate to her previous position;

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 sums stated in conclusion nos. 5 and 6 or any unpaid portion thereof from the due date of each payment 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 three months of the date of 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