



PARTIAL DECISION ON ADMISSIBILITY AND MERITS
(delivered on 4 April 2003)

Case no. CH/99/2239

Jadranka CIPOT-STOJANOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 5 March 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Andrew GROTRIAN

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

Having considered the aforementioned application introduced 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;

Recalling its partial decision on admissibility and merits delivered on 9 June 2000;

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement and Rules 52, 57 and 58 of the Chamber’s Rules of Procedure:

I. INTRODUCTION

1. The applicant, a citizen of Bosnia and Herzegovina of Croat origin, is a chemical engineer from Grbavica, Municipality of Novo Sarajevo. She was working in the tobacco factory “Fabrika duhana” in Sarajevo as from 1984. During the war, when Grbavica was under the control of Serb forces, the applicant found herself unable to come to work because the factory was situated on the other side of the front-line, in the part of town that was controlled by the Army of the Republic of Bosnia and Herzegovina. The applicant left Sarajevo in April 1992 and stayed abroad until May 1996.

2. After the integration of Grbavica into the Federation of Bosnia and Herzegovina (“the Federation”) on 19 March 1996, the applicant returned to Sarajevo in May 1996 and wished to take up her work in the factory again. However, on 2 September 1996 she received a procedural decision stating that her employment relationship was terminated as of 4 May 1992, because she had abandoned her working post voluntarily. The applicant sought legal redress to regain her position but her action was rejected in the first instance. After two decisions of the Municipal Court that were quashed on appeal, the Cantonal Court, on 7 February 2002, transferred the case to the Cantonal Commission for the Implementation of Article 143 of the Law on Labour. The proceedings before that Commission are still pending to date.

3. On 9 June 2000 the Chamber delivered a partial decision in this case finding a violation of Article 6 of the European Convention on Human Rights (“the Convention”) with regard to the, already then, unreasonable length of proceedings, and suspending consideration of the remainder of the application.

4. Therefore the Chamber will consider the part of the application raising issues in regard to discrimination in the enjoyment of the right to work and related rights as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).

II. PROCEEDINGS BEFORE THE CHAMBER

5. The application was introduced on 31 May 1999 and registered on the same day.

6. On 3 November 1999 the Chamber decided to communicate the application to the respondent Party. The Federation sent observations on 21 January and 15 February 2000. The applicant replied and submitted a claim for compensation on 24 February 2000. The Federation submitted observations on the compensation claim on 14 April 2000. Further submissions were received on 28 February and 12 May 2000, 10 July and 16 December 2002 from the applicant and on 28 July and 30 August 2000, 10 and 17 December 2002 from the respondent Party.

7. The Chamber deliberated on the case on 3 November 1999, 11 May and 7 June 2000. On the latter date the Chamber adopted a partial decision in this case finding a violation of Article 6 of the Convention and suspending consideration of the remainder of the application. In its decision, the Chamber concluded that the applicant’s right to a hearing within a reasonable time under Article 6 paragraph 1 of the Convention was violated. It further ordered that the Federation, through its authorities, take all necessary steps to ensure that the Municipal Court decides on the applicant’s claim in an expeditious manner.

8. The Chamber further deliberated on the remainder of the complaint on 8 November 2002, 7 February and 5 March 2003. On the latter date the Chamber adopted this decision.

III. ESTABLISHMENT OF THE FACTS

9. The applicant was working as an expert in tobacco manufacturing technology with the tobacco factory, Fabrika duhana Sarajevo d.d. (“FDS”), from 1984 until the outbreak of hostilities in April 1992. When the conflict erupted, the Management Board of the factory sent all employees on “collective vacation” which lasted from 1 April until 15 April 1992. Previously the applicant had

undergone several cancer surgeries, and she intended to use this vacation to go abroad with the approval of the Management Board to undergo cancer treatment in Zagreb, Croatia.

10. According to the applicant, it was impossible from her place of residence, in Grbavica, to communicate with her employer on the other side of the front-line, let alone to come to work after the "collective vacation" had ended. At the end of April 1992 the applicant managed to leave Sarajevo. She went to Zagreb via Serbia and Hungary. During the war she stayed abroad since she did not consider it safe enough to return to Sarajevo. The applicant states that she contacted the factory by telephone. In May 1995 she also tried to meet with a representative of the factory in Zagreb, who allegedly refused to talk to her.

11. The applicant underwent an operation at a hospital in Zagreb on 20 February 1996 and returned to Sarajevo at the end of May 1996. In the meantime, Grbavica had become part of the Federation of Bosnia and Herzegovina as of 19 March 1996. After her return, she wished to resume working in the factory, but was apparently told at a meeting with its director in June 1996 that she was "dismissed and nothing could be done about it".

12. On 2 September 1996 the applicant went personally to FDS with the aim to regulate her legal labour status. On that occasion the procedural decision by the Management Board of the factory dated 23 March 1993 terminating her employment retroactively as of 4 May 1992 was delivered to her. The reasoning referred to Article 15 of the Law on Labour Relations and stated that she had abandoned her working place voluntarily and that she had failed to come to work for 20 consecutive working days while she was under a compulsory work order.

13. On 9 September 1996 the applicant appealed against the procedural decision to the Management Board, but her appeal was rejected by the Board on 17 October 1996. The reasons given were that she had stayed away from work without good cause and that it was established that she had left Sarajevo via Serbia and stayed abroad during the war.

14. The applicant instituted court proceedings against the factory before the Sarajevo Municipal Court II on 28 October 1996. She requested the court to annul the procedural decision terminating her employment, to re-instate her into her working position and to recognise the period until her re-employment as "years of service". On 11 February 1999 the Municipal Court rejected her claim. The judgment declared the request for re-instatement ill-founded and the Management Board's decision to be in accordance with law. Moreover, it was considered that the applicant had failed to substantiate that she was prevented from coming to work within 15 days after Grbavica was integrated into the territory of the Federation, as required by Article 10 of the Law on Labour Relations.

15. On 5 May 1999 the applicant appealed against the Municipal Court's judgment to the Cantonal Court in Sarajevo. On 20 October 1999 the Cantonal Court accepted the appeal, finding that the Municipal Court had incompletely and incorrectly established the facts of the case. Thereafter, the case was returned to the Municipal Court II Sarajevo, which on 11 January 2001 rejected for the second time the applicant's request.

16. The applicant appealed again against this procedural decision to the Cantonal Court in Sarajevo. On 7 February 2002 and for the second time, the Cantonal Court issued a decision in which it modified the first instance judgement and ordered that her case be transferred to the Cantonal Commission for the Implementation of Article 143 of the Law on Labour. The proceedings before that Commission are still pending to date.

17. The applicant found new employment in the Ministry of Foreign Affairs of Bosnia and Herzegovina in Sarajevo as of 3 January 1997.

IV. 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 realisation of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily."

19. 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

20. 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

21. The Law on Labour (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "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 Labour (OG FBiH no. 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.

22. 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, colour, 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 a particular 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 relations to the infringement of their rights;
2. If the complainant presents obvious evidence of discrimination prohibited by this Article, then 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, then 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.”

23. 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 the 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.”

24. 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

25. 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.”

26. 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.

V. COMPLAINTS

27. The applicant alleges that she was discriminated against in her right to work on the ground of her ethnic origin. She asserts that workers of Bosniak origin were re-employed by the factory following the end of the war despite their failure to report to work within the prescribed time-limit and that the director of the factory, at that time, advertised vacancy announcements for positions with similar required qualifications as the one she held.

28. The applicant further complains that her rights under Articles 6 and 13 of the Convention have been violated due to the length of the proceedings and because no final decision has been taken yet.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

29. Regarding the admissibility, the respondent Party alleges that the case is still pending before domestic organs. It further considers that the Chamber is not competent to examine the case *ratione temporis*.

30. On 15 February 2000 the respondent Party sent additional observations concerning the ownership of the Fabrika duhana Sarajevo and the privatisation process. According to the respondent Party, the factory, at that date, was a company owned by the Federation.

31. The respondent Party alleges that the applicant deserted her work on her own free will and she had no reason to report to work as late as 2 September 1996 because her medical operation in Zagreb had taken place on 20 February 1996.

32. The respondent Party considers that the applicant's request for reinstatement into her job should be declared manifestly ill-founded since she has found new employment.

33. On 10 December 2002 the respondent Party sent additional information concerning the persons that were reinstated into their position with FDS after the war. In its observations, the respondent Party states that in total 5 workers were reinstated into their pre-war positions after having applied for that after the conflict. All those persons' labour relations were terminated in a similar manner as the applicant's during the conflict. Out of these 5 persons, 2 are of Serb origin, 1 is of Croat origin and 2 are of Bosniak origin; all of them were living in Grbavica.

B. The applicant

34. As to the disputed facts, the applicant states that during the armed conflict there was no possibility for a resident of Grbavica to cross the river to the place where the factory was located. Moreover, it was not safe for her to remain in Grbavica until this area was integrated into the territory of the Federation on 19 March 1996. She asserts, upon her return, that she requested an interview with the director of the factory, but he refused to meet with her until June 1996, when he told her that she had been dismissed. She contends that after she left the Zagreb hospital on 23 February 1996, she was undergoing rehabilitation treatment and was not able to travel to Sarajevo. She further alleges that she informed the director through her father already in April and May 1996 about her situation and her intention to continue working.

35. In her observations of July 2002, she stresses that her case is still pending before the Cantonal Commission for Implementation of Article 143 and that she is still waiting for the decision of the Chamber regarding the discrimination that she faced due to her Croat origin. Furthermore, she stated that other workers of Bosniak origin who had not reported within the prescribed time-limit were re-employed and that, after the war, the director of the factory put vacancy announcements in the newspaper for jobs similar to the one she was doing before.

36. Regarding compensation, she wishes to be compensated for lost salaries and working benefits, but she leaves it to the Chamber to award her compensation for non-pecuniary damage as well.

37. On 16 December 2002 the Chamber received further information from the applicant. The applicant stresses that in her opinion the Commission will never function. Even if it was to function, it will not solve her legal status since she has never been on the waiting list. Therefore she requests the Chamber to decide upon her case without waiting for the decision of the domestic organs. Concerning the request from the Chamber that she should specify her allegation that she was treated differently on the ground of her origin, the applicant gives the names of 3 persons of Bosniak origin that were fired like she was. The applicant, however, does not give any further details, such as whether these colleagues were reinstated, and she states that the Chamber should request this kind of information from the respondent Party.

VII. OPINION OF THE CHAMBER

A. Admissibility

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

1. Competence *ratione temporis*

39. The respondent Party argues that the Chamber is not competent *ratione temporis*. The Chamber notes, however, that according to legal norms of labour relations in the Federation of Bosnia and Herzegovina, a decision to terminate employment does not become effective until the employee is notified of his or her dismissal (see *Brkić*, case no. CH/99/2696, decision on admissibility and merits, delivered on 12 October 2001, Decisions July-December 2001, paragraph 54). On 2 September 1996 the applicant received a procedural decision by the Management Board of the factory dated 23 March 1993 terminating her employment retroactively as of 4 May 1992. The respondent Party apparently considers the applicant's employment to have been effectively terminated on 4 May 1992. However the decision terminating the applicant's employment was taken on 23 March 1993 and brought to the knowledge of the applicant only on 2 September 1996. Then the applicant initiated administrative and court proceedings against the termination of his employment. Accordingly, all acts complained of fall within the Chamber's competence *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

40. The Federation argues that the applicant has not exhausted effective domestic remedies. The Chamber must 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. It is incumbent on the respondent Party arguing non-exhaustion to show that there was a remedy available to the applicant other than her application based on the Agreement and to satisfy the Chamber that the remedy was an effective one.

41. Article 143 paragraph 2 of the Law on Labour provides that a person who does not work for his/her (former) employer anymore, but who was employed on the day of the entry into force of the Law on Labour and who did not work for any other employer since that date, shall be considered to be an employee on the waiting list. According to the wording of the paragraph, this effect is restricted to persons who addressed their former employers to resume work within three months as from 5 November 1999 (i.e., until 5 February 2000). Pursuant to paragraph 4 of this Article, their employment relations shall be regarded as terminated by force of law on 5 May 2000 if the employer does not invite them to resume work before that day. This means that the working relations of all remaining employees on the waiting list cease on 5 May 2000 (see paragraphs 1 and 4 of Article 143). All persons laid off by force of law shall only be entitled to severance pay.

42. The Chamber concludes that the proceedings before the Commissions for the Implementation of Article 143 of the Law on Labour do not provide effective domestic remedies for the applicant to obtain reinstatement. The application is therefore admissible against the Federation of Bosnia and Herzegovina with regard to the discrimination of the applicant in the enjoyment of her right to work and free choice of employment.

B. Merits

43. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation 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 recognised 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.

44. The Chamber will consider the applicant's claim concerning her alleged discrimination in the enjoyment of her right to work and free choice of employment as guaranteed by Articles 6 and 7 of the ICESCR.

45. Under Article II of the Agreement, the Chamber 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.

46. The Chamber has repeatedly held that the prohibition of discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Article II(2)(b) of the Agreement affords the Chamber 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 (see *Kraljević*, case no. CH/01/7351, decision on admissibility and merits, delivered on 12 April 2002, paragraph 62).

47. Article 6 (1) of the ICESCR, as far as relevant, reads as follows:

“The States Parties to the present Covenant recognise 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.”

48. Article 7 of the ICESCR, as far as relevant, reads as follows:

“The States Parties to the present Covenant recognise 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. Definition of “discrimination”

49. The Chamber has held that it must attach a particular importance to the prohibition of discrimination (see *e.g.*, case no. CH/97/45, *Hermas*, decision on admissibility and merits of 16 January 1998, paragraph 82, Decisions and Reports 1998).

50. Before examining whether there has been discrimination contrary to the Agreement, the Chamber recalls that it has adopted a similar jurisprudence to the one developed by the European Court of Human Rights and the United Nations Human Rights Committee. Therefore it is first necessary to determine whether the applicant was treated differently from others in the same or relevantly 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 of proportionality between the means employed and the aim sought to be realised (see *e.g.*, case nos. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraph 120, Decisions January – July 1999; CH/97/50, *Rajić*, decision on admissibility and merits of 3 April 2000, paragraph 53, Decisions January – June 2000; CH/98/1309 *et al.*, *Kajmaz and others*, decision on admissibility and merits of 4 September 2001, paragraph 154).

51. In the light of the said, the Chamber will first determine whether the applicant in the instant case was treated differently from others in the same or relevantly similar situations. The Chamber will hold any difference in treatment discriminatory, if it does not pursue a legitimate aim and if the measure employed was not proportionate to the legitimate aim pursued.

b. Impugned acts and omissions

52. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the termination of the applicant's labour relations and the failure to re-employ her after the end of the armed conflict.

53. These acts affect the applicant's enjoyment of the rights guaranteed by Articles 6(1) and 7 of the ICESCR. The Chamber will therefore examine whether the Federation has secured protection of these rights without discrimination.

c. Differential treatment and possible justification

54. The Chamber 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 realised. 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 Brkić*, case no. CH/99/2696, decision on the admissibility and merits, delivered on 12 October 2001, Decisions July-December 2001, paragraphs 70 and 71).

55. The applicant asserts that her employment was terminated and her request to be re-employed rejected solely because of her Croat origin. The respondent Party does not dispute that the applicant was employed by FDS but argues that her employment was lawfully terminated. The Federation claims that the employment was terminated by the procedural decision dated 23 March 1993, terminating her employment retroactively as of 4 May 1992 because the applicant was absent from work for twenty consecutive days. The respondent Party further submits that FDS reinstated some employees of different origins into their pre-war positions and therefore that no discrimination can be alleged.

56. Concerning the termination of the labour relations, the Chamber notes that the employer's decision to terminate the applicant's employment was based on her unjustified absence from work for twenty consecutive days under the Law on Fundamental Rights in Labour Relations.

57. The applicant lived in Grbavica. When the war broke out and this neighbourhood fell under the control of the Bosnian Serb armed forces at the beginning of April 1992, she was prevented from going to work since FDS was situated on the other side of the frontline. The applicant managed to leave the country at the end of April 1992 and seek refuge in Croatia.

58. As the Chamber has already stated "persons of Serb [and Croat] origin[s] living in Grbavica and employed in the Federation were generally unable to report to work during the armed conflict and were the persons most likely to suffer termination of their employment by operation of the statutes in place at the time the applicant stopped reporting to work" (case no. CH/99/1714 *Vanovac*, decision on admissibility and merits of 4 November 2002, paragraph 49). The application of this regulation by the decision terminating the applicant's labour relations could be seen *per se* as having a differential impact on persons depending on their place of residence and their ethnic origin. However, the Chamber also notes that the applicant left the country less than a month after the outbreak of the conflict. From the point of view of FDS, the termination could have been justified by economic reasons, especially in a situation of war where the production of goods is limited. To sum up, the decision to terminate the applicant's employment could be seen to have an objective justification. On the other hand, it was delivered to the applicant only in 1996, when such justification had arguably ceased to exist. The Chamber will now turn to the decision not to reinstate the applicant.

59. The Chamber notes that a difference of treatment exists between the 5 employees that were reinstated into their pre-war positions in FDS and the applicant. However, while these 5 employees were of different origins (i.e. two Serbs, two Bosniaks and one Croat), all of them were living in Grbavica. All these persons' labour relations were terminated because they had not come to work during the conflict. Four of these persons filed objections to the decision terminating their labour

relations, which were accepted. The status of the last one was changed from unpaid leave to active labour status after he had proved that had been absent for good cause.

60. Having in mind these uncontested facts, the Chamber considers, on the balance of the evidence before it, that the Federation has demonstrated that the difference in treatment between the applicant and the other employees who were reinstated into their pre-war positions was not motivated by her Croat origin. Therefore the difference of treatment was not discriminatory within the meaning of Article II(b) of the Agreement.

61. The Chamber concludes that the applicant has not been discriminated against 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.

VIII. CONCLUSION

62. For these reasons, the Chamber decides,

1. unanimously, to declare the application admissible with regard to discrimination in the enjoyment of the right to work and free choice of employment; and

2. unanimously, that the Federation of Bosnia and Herzegovina has not violated the applicant's right not to be discriminated against 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 International Covenant on Economic, Social and Cultural Rights.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel