

## SEVENTY-FOURTH SESSION

### *In re ZAIDI*

#### **Judgment 1210**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Syed Muhammad Mohsin Zaidi against the Food and Agriculture Organization of the United Nations (FAO) on 28 April 1992, the FAO's reply of 9 July, the complainant's rejoinder of 4 August and the Organization's surrejoinder of 20 October 1992;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulation 301.102, FAO Staff Rules 303.01 and 303.03 and FAO Manual paragraphs 330.13, 330.24, 330.152 and 330.328;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Pakistan, served in several United Nations agencies in that country from 1 July 1970 to May 1979. He was then transferred to the FAO on a continuing appointment as senior administrative assistant at grade G.7A in the office of the Organization's Representative at Islamabad. In June 1982 he was given the title of senior finance assistant.

By a memorandum of 19 July 1989 the FAO Representative authorised the complainant's secondment as from 23 July to the Afghanistan Agricultural Rehabilitation Programme of the United Nations, which was based in Pakistan, and said that his new assignment would, if funds allowed, give him temporary promotion for one year.

In a memorandum of 7 August 1989 the complainant informed the Coordinator of the Programme that failing promotion he would go back to his old job in the Representative's office. On 17 August the Coordinator put in a request for a field post for him in the General Service category of staff and recommended promoting him to grade G.7C.

On 22 August the administrative assistant who had taken over his duties in the Representative's office sent the Representative a confidential memorandum reporting that on opening a safe that the complainant had been in charge of he had found a cash deficit of 18,950 Pakistan rupees; the complainant had, he said, spent that amount "privately" but had offered to pay it back in a month or two.

In a memorandum to him dated 27 August, which the complainant denies receiving, the Representative said that he would refrain until September from telling FAO headquarters in Rome about his use of FAO funds for private purposes but called upon him to sort the matter out by then. By a telex of 26 September 1989 the Representative informed the executive officer of the Field Programme Development Division at headquarters of the complainant's "illegal" use of official cash and failure to pay it back in full. The Administration thereupon apparently suspended his secondment and started an inquiry.

On 30 October 1989 the complainant paid back the amount due. On 16 December he received a memorandum of 27 November from a senior officer of the Field Programme Development Division saying that he had recommended dismissing him for misconduct and inviting him to comment within five working days. Also on 16 December he got a memorandum dated 7 December from the Assistant Director-General in charge of Administration and Finance suspending him with pay under Staff Rule 303.03 and Manual paragraph 330.328\* as of the date of receipt and pending investigation of charges of misconduct. (\* Rule 303.03 reads: "If a charge of misconduct is made against a staff member and the Director-General so decides, the staff member may be suspended from duty, with or without pay, pending investigation, the suspension being without prejudice to the rights of the staff member." And Manual paragraph 330.328 provides: "During the course of the above procedure, the staff member may be suspended from duty pending investigation, in accordance with Staff Rule 303.031.") On 18 December the complainant demanded withdrawal of the charges and reinstatement on the grounds that by a note of 19 July the Representative had authorised a loan to him and that no office funds were at stake. Though the Representative denies authorising the loan, it is common ground that the funds came from cash which he kept

outside the office's "imprest account" and which was made up of sums left over at the end of one year to be spent in the next.

There was an audit in February and March 1990. The auditor saw the complainant, got from him a written statement dated 4 March 1990 and in a report of June 1990 concluded that he had taken the money without the Representative's consent.

In a memorandum of 17 August 1990 the Assistant Director-General dismissed him for misconduct under Manual paragraph 330.24 for the reasons set out in paragraph 330.152(i)\*. (\*Manual paragraph 330.241 reads: "Dismissal for misconduct is termination for unsatisfactory conduct as defined below: (i) Dismissal for misconduct is a termination for unsatisfactory conduct that has jeopardized, or would in the future be likely to jeopardize, the reputation of the Organization and its staff;" And 330.152(i) states: "... the following are specific examples of unsatisfactory conduct: (i) Use of official position, authority, or property for pecuniary gain or advantage for staff member or others.") He said that, though the funds had not been obtained "in the normal manner", the evidence showed that they were intended to further the Organization's work and that the Representative had signed no authorisation. The complainant's dismissal took effect on 26 August.

On 30 October 1990 he lodged an appeal with the Director-General, who rejected it on 11 February 1991. He went to the Appeals Committee on 23 March 1991.

Also on 30 October 1990 he put a claim to the Assistant Director-General for payment of the difference in salary between grade G.7A and P.1 as from 23 July 1989 to the date of termination. Having got notice on 31 December 1990 of the rejection of the claim, he lodged a second appeal with the Director-General on 1 March 1991. It too was rejected, on 23 May 1991, and again he appealed to the Appeals Committee, on 1 July 1991.

The Committee joined the two appeals and in its report of 2 December 1991 recommended rejecting them. By a letter of 31 January 1992, the decision under challenge, the Deputy Director-General endorsed the Committee's recommendation on the Director-General's behalf.

B. The complainant submits that his dismissal shows several flaws. The money he borrowed came, not from official FAO funds, but from a special deposit which the Representative had set up in breach of accounting procedures. Having come by the funds unlawfully, the Representative and his administrative assistant would have embezzled them had this dispute not prevented it.

The penalty, he submits, is out of proportion to his offence of "borrowing a meagre money for a short span of three months". Being an active supporter of the staff association, he believes that he was victimised for "staff-related activities", and that is why his supervisor disowns the authorisation he signed on 19 July 1989.

The reasons given for his dismissal correspond to those set out in Manual paragraph 330.152(i) and relate to "unsatisfactory conduct", which warrants only "written censure" or "written reprimand". Moreover, since Manual section 330 specifically brings the obtaining of "pecuniary gain" under mere "unsatisfactory conduct", the FAO is wrong to dismiss him for "misconduct". Under paragraph 330.241(i) "misconduct" includes misrepresentation that jeopardises or is likely to jeopardise the Organization's reputation. But for an official to get a salary advance with written leave and later repay it in no way jeopardises the Organization's reputation. So his dismissal under 330.24 was unwarranted and ultra vires.

The complainant alleges procedural flaws. He says that there was no thorough investigation and, in breach of Manual paragraph 330.13, he was not allowed to state his case. Nor did the Organization explain what he had done to harm its good name. He was further denied the right to reply and access to the auditor's report which had prompted the decision.

As for his claim to payment of the difference in salary between G.7, step XII, and P.1/P.2 as from 23 July 1989, he submits that the Representative's memorandum of 19 July 1989 made him a binding promise of promotion to P.1. That his successor served on a "senior P[rofessional] level post" shows that sufficient funds were available. One thing that made him accept the offer of secondment was the promise of "definite promotion".

He claims (1) reinstatement as from 26 August 1990 with full salary and entitlements; (2) an award of 50,000 United States dollars "as compensation for defamation, demoralization and the negative effects on [his] career" of his dismissal; and (3) payment of the difference in salary between G.7, step XII, and P.1/P.2 as from 23 July 1989,

plus interest, and another \$25,000 "for demoralization". He also seeks costs.

C. In its reply the FAO submits that the money the complainant took was the Organization's own, that he embezzled it, and that his dismissal was therefore lawful.

The special account from which the complainant drew 18,950 rupees for his own use was set up "in good faith" at a time of financial crisis and "to assure the proper functioning" of the Representative's office in Pakistan by carrying over savings from one year to the next instead of returning them to headquarters. Since that method was at odds with FAO rules, the Representative and another officer were disciplined. But that is immaterial: the account contained a cash reserve intended to meet the office's commitments.

As to the Representative's alleged authorisation of the withdrawal, the note dated 19 July 1989 was typed at a later date on one of the blank forms which the Representative signed and left for subordinates to use when he was absent. That such a note is genuine will not square with the facts: the complainant said nothing of it on 22 July when the discrepancy came to light; though it purportedly authorised him to withdraw the equivalent of one month's salary, the amount he took was greater, and the note bears the same date as the notice of transfer, at which date it was the Afghan Programme, not the Representative's office that would have had to approve advances to him anyway.

The FAO maintains that it fully complied with the disciplinary procedure. As required by the material rules it informed the complainant of the charges of unsatisfactory conduct and of the penalty to be imposed, sought his comments and made an investigation in the light of his reply. Only after a careful reading of the auditor's report did the Assistant Director-General in charge of Administration and Finance dismiss him.

The punishment was not out of proportion to the offence. The use of official resources for pecuniary gain amounts to serious misconduct within the meaning of Regulation 301.102 and fully warrants dismissal, the more so in the case of a senior finance assistant.

The FAO rejects the complainant's subsidiary claim to payment of the difference in salary between G.7, step XII, and P.1/P.2. It says it entered into no binding commitment to promote him to P.1/P.2. Proposals for promoting field staff are subject to headquarters procedures requiring budgetary clearance, post establishment and classification, and it would have been unreasonable to let those procedures go ahead after the complainant turned out to have acted improperly.

The charge of victimisation is gratuitous: the grounds for his dismissal have nothing whatever to do with his staff union work.

D. In his rejoinder the complainant points out what he sees as mistakes of fact in the reply and enlarges on his pleas. He objects to the FAO's relying on documents it has not produced. He disputes the use of the term "account" for the special deposits unlawfully obtained by the Representative and another official and alleges that taking "mild actions" in their case and "drastic" action in his own was in breach of equal treatment.

He had no reason to refer on 22 July 1989 to the authorisation of a loan since no-one noticed the withdrawal until 22 August. There was nothing wrong with his getting an advance in salary from the Representative's office, which continued to pay him while his secondment was going through. The FAO refers to net monthly salary whereas the amount he borrowed did not take account of deductions. The audit concerned accounts alone and was no substitute for a proper investigation. He presses his claims.

E. In its surrejoinder the FAO observes that the complainant raises no new issues in his rejoinder. In its view the failure by the officials who set up the special account to comply with FAO rules does not make the complainant's conduct any less serious. They acted in good faith to ensure the proper functioning of the Representative's office at a time of financial crisis: it was proper for the disciplinary action against them to be less drastic than the penalty he suffered for embezzlement.

#### CONSIDERATIONS:

1. The complainant joined the service of the FAO in 1979 and was promoted in 1982 to senior finance assistant in the office of the Organization's Representative at Islamabad. By a memorandum of 19 July 1989 the Representative informed him that he was to be seconded as from 23 July 1989 to the Afghanistan Agricultural Rehabilitation

Programme of the United Nations. His successor, to whom he accordingly handed over the Representative's accounts and financial records, found the cash in a safe containing a special deposit account to be short by some 18,950 Pakistan rupees. He was charged with misappropriation of FAO funds and after investigation was dismissed for misconduct under Manual paragraph 330.152(i).

The complainant's application for hearings

2. The complainant wants the Tribunal to hold hearings at which he may call witnesses and comment orally on some of the issues. But since the issues of fact and law are fully set out in the parties' pleadings his application is disallowed.

The complainant's pleas

3. The complainant first argues that the funds in question did not belong to the Organization anyway but were personal funds under the Representative's control.

He is mistaken. It is true that the FAO's financial rules do not provide for a special deposit account. But in order to deal with a financial crisis caused by a reduction in credits the Representative set up an account into which budgetary savings were paid at the end of the financial year instead of being remitted to headquarters, and the funds could then be used in the following year. Any savings made by the Representative on budgeted expenditure remained the property of the Organization and the Representative was acting merely as custodian.

4. Secondly, the complainant argues that the Representative gave him leave by a note dated 19 July 1989 to withdraw the equivalent of one month's salary for his own use and that the Representative's denial of that was prompted by malice because of his staff association work.

The evidence does not support those contentions. The note was not disclosed to his successor; the sum withdrawn was more than one month's salary; no receipt was put on record; and no credible reasons are advanced for the alleged malice on the Representative's part.

5. Thirdly, the complainant argues that the FAO did not make a thorough investigation and failed to afford him an opportunity of stating his case.

The complainant set out his defence in writing in great detail; and the fact that he did not see the auditor's report is immaterial because the only issue was whether or not the note purporting to authorise his withdrawal of the 18,950 rupees was genuine.

The complainant's claim to promotion

6. The complainant claims payment of the difference in salary between his G.7 post and the post he was seconded to on 23 July 1988.

The question of his promotion, be it temporary or permanent, had to be decided at headquarters and in the event no decision was ever taken. His claim is therefore irreceivable because he has failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires.

The fitness of the sanction

7. The complainant argues that the penalty of dismissal was disproportionate to his offence.

Dismissal is duly provided for in Staff Rule 303.01, which reads:

"Disciplinary measures imposed by the Director-General upon staff members whose conduct is unsatisfactory shall consist of written censure, suspension without pay, demotion, or dismissal for misconduct ...". What is more, Manual paragraph 330.152 gives what it terms "specific examples of unsatisfactory conduct", and they include, under (i), "Use of official position, authority, or property for pecuniary gain or advantage for staff members or others" and, under (ii), "abuse of authority or trust to the detriment of the Organization, or any conduct of such character which is detrimental to the name of the Organization".

There is no evidence before the Tribunal to suggest that the penalty of dismissal was in any way excessive or unreasonable in the circumstances of this case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

William Douglas  
Mark Fernando  
Michel Gentot  
A.B. Gardner