

SEVENTY-FOURTH SESSION

In re PEÑA-MONTENEGRO

Judgment 1250

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alberto Peña-Montenegro against the Food and Agriculture Organization of the United Nations (FAO) on 17 December 1991, the FAO's reply of 7 April 1992, the complainant's rejoinder of 12 June and the Organization's surrejoinder of 10 August 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.012 and 301.0911, FAO Staff Rules 303.1311 and FAO Manual paragraphs 311.422, 330.151, 330.152, 330.24 and 330.325;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a national of Chile who was born in 1942, joined the FAO in 1974. It granted him a three-year fixed-term appointment at grade P.3 and assigned him to the Action for Development Unit of its Freedom-from-Hunger Campaign, known as FFHC/AD, in the Development Department at headquarters in Rome. On 1 December 1975 it promoted him to P.4 and transferred him to its Regional Office in Chile. It converted his fixed-term appointment to a continuing one on 1 January 1978. On 26 February 1979 he returned to headquarters and became the officer-in-charge of the unit responsible for FFHC/AD at grade P.5. On 1 January 1982 his title was changed to Co-ordinator, still at P.5.

On 14 July 1989 he learned from the officer-in-charge of the Development Department that he might be transferred as the FAO's Representative to the Dominican Republic. In a note of 24 July 1989 to that officer he said that he would be hard put to it to take that job: his wife had been offered a career appointment in Rome by the International Fund for Agricultural Development (IFAD) and for that and other family reasons he could not go abroad.

In a memorandum of 29 August 1989 the Assistant Director-General in charge of the Development Department told him that because of reform of his unit he would have to be transferred soon, but in view of what he had said in his note of 24 July the Personnel Division would look for a suitable post for him at headquarters. If none turned up by the end of October he would be sent out to the Dominican Republic.

In a memorandum of 27 September the Director of the Personnel Division informed him that no post at headquarters had yet been found, or was likely to fall vacant by 31 October and called upon him to accept by 1 October the transfer to the Dominican Republic. In a reply of 4 October he said that he was awaiting the outcome of five applications he had made for posts at headquarters. On 26 October the Director informed him that someone else was to go to the Dominican Republic and that applications from him for posts at headquarters would be considered under the usual procedures.

In a memorandum of 22 February 1990 the Assistant Director-General offered him an appointment as the Organization's representative in Benin or in El Salvador; if he turned down both posts he would be dismissed. On 28 February he wrote asking for postponement of a final decision pending the outcome of his applications for posts at headquarters. On 8 March the Director of Personnel repeated the offer of 22 February and asked for an answer by 16 March. In reply to a query from him of 16 March the Assistant Director-General said in a memorandum of 5 April that he was not the best candidate for any vacancy at headquarters; he had three days in which to choose between Benin and El Salvador; thereafter he would be transferred to El Salvador, the post thought "the most suitable", or face dismissal.

By a memorandum of 6 April he explained that he was loth to part from his family just for the sake of his career and asked for review of the matter. On 30 May the Director of Personnel warned him that the Organization would brook no further delay: he must answer within three days or would be dismissed.

In a memorandum of 1 June he refused to answer unless he was told why he could not be put on one of two P.5 vacancies at headquarters. The Director retorted on 20 June that he was not qualified for either of them and that his failure to answer would be taken as tacit consent to transfer to El Salvador. In a memorandum of 21 June the complainant stated that he was unable to reply yet. On 26 July the Assistant Director-General summed up the whole incident, quoted the definition of "misconduct" in FAO Manual paragraph 330.151* ("... conduct which is incompatible with the staff member's undertaken or implied obligation to the Organization ...". Manual paragraphs 330.152(iv) and (viii) define misconduct to include: (iv) "Any action calculated to impede the effective operation of the Organization". (viii) "... refusal to obey instructions".) and said that there was a proposal to dismiss him for such misconduct; in accordance with Manual paragraph 330.325 he had five working days in which to comment. He did so in a memorandum of 3 August denying misconduct. On 17 August the Director of Personnel sent him a form headed "Request for Personnel Action" and called upon him to sign it in token of consent to the transfer. He sent the form back unsigned on 22 August and cited Manual section 311.422* ("... In considering the transfer of a staff member ... the Director-General takes into account both (i) ... the interests of the Organization and (ii) the qualifications, suitability, capacity, health, personal situation, and interests of the staff member concerned."); he was not refusing the transfer but wanted to know just what had been done to keep him at headquarters.

In a memorandum of 7 September the Director of Personnel confirmed his transfer. On 12 September he lodged an appeal under Rule 303.1311. On 25 September the Assistant Director-General in charge of Administration and Finance summed up the facts of the dispute, maintained that there had been "serious and thorough investigation of a placement" for him at headquarters, inferred from his attitude that he refused the transfer and imposed on him with immediate effect the disciplinary measure of dismissal for misconduct under Manual paragraph 330.24. On 12 November he lodged two separate appeals, one against the disciplinary measure and the other against transfer to El Salvador.

In two letters of 12 December 1990 the Director-General told him of the rejection of his two appeals, and on 29 January 1991 he went to the Appeals Committee. In its report of 24 June 1991 the Committee recommended rejecting his claims but suggested converting his dismissal into "agreed termination" because of his seniority and record. The Director-General rejected his claims and told him so by a letter dated 19 September 1991, the decision impugned.

B. The complainant objects both to transfer and to dismissal.

(a) As to the transfer he observes, first, that though he was told that his post would soon have to be abolished it was not. On 2 October 1990, soon after he had been dismissed, someone else was made officer-in-charge of his former unit "pending the appointment of a Co-ordinator", and the duties were much the same as those he used to have. The Director-General said in one of his letters of 12 December 1990 that "a determination will be taken on the possible abolition of your former post"; so abolition, and the consequent need to find the complainant another posting, were just a possibility. The decision of 29 August 1989 to reassign him immediately rested on a mistaken conclusion of fact. Since the Administration carried over reforming his unit he can hardly be charged with dilatory tactics of his own. The true purpose of the transfer was to get rid of him altogether.

His second plea is that the Director-General overlooked the essential point that his wife had to stay on in Rome because of her appointment with IFAD and that he could not therefore consent to leaving. For that reason and because of his seniority and age the Organization should have tried harder to keep him at headquarters. Its attitude was wayward: it thought him suitable for posts as its representative in three countries even though he had had no experience of such work; yet it made out that he was unsuitable for any of the posts he himself picked out at headquarters. It has failed to show that it made any proper review of suitable posts. What it did was perfunctory. At the very least it could have kept him on his former post pending abolition or a radical change of his duties or grade.

(b) As for his dismissal, he submits that since his transfer was unlawful so too was the decision to dismiss him on the grounds of his refusal to accept it. And even supposing his transfer was lawful the dismissal was in any event tainted with mistakes of law.

One was to assume that he was guilty of misconduct on three counts. To the charge of conduct incompatible with his undertaken or implied obligations within the meaning of Manual paragraph 330.151 he answers that refusal to accept reassignment is not a disciplinary offence unless there is failure to obey instructions. But when the disciplinary proceedings started all he had done was turn down an "offer" of appointment to another post. So he could not be guilty on the second charge either, that of disobeying instructions under Manual paragraph

330.152(viii). As to the third charge, that of acting to impede the Organization's operations under Manual paragraph 330.152(iv), how could he have tried to hold up a process of restructuring in which he had no part? Besides, there is no proof that he did hold it up.

The other mistake of law is that the sanction of dismissal was out of proportion to the offence. Under the circumstances an agreed termination would have been more fitting.

He wants the Tribunal (1) to quash the impugned decision; (2) order his reinstatement at headquarters as from the date of dismissal or, failing reinstatement in the six months after the Tribunal's ruling, negotiation of an agreed termination under Staff Regulation 301.0911; and (3) award him the equivalent of 24 months' salary and allowances in damages for moral injury and loss of career prospects. He also claims costs.

C. In its reply the FAO denies committing mistakes of law. As the complainant acknowledges, transfer is at the Director-General's discretion. In his case it was warranted by the forthcoming reorganisation of his unit and abolition of his post. Indeed the whole unit was later abolished. There was no misuse of authority: the Organization followed the prescribed procedure for looking for another job for him and the post it later established in the new unit did not carry the same duties as his.

There is no substance to his charge that it overlooked essential facts by disregarding his personal circumstances. It patiently allowed him more and more time in the hope that some suitable post would turn up at headquarters; it tried to find one itself and when that failed offered him posts abroad. In the circumstances the Director-General had to act in the Organization's wider interests, which entailed reorganising his unit and appointing a representative to the Dominican Republic.

It is mere quibbling to describe his rejection of its offers as anything but disobedience. Any reasonable construction on the facts shows that a "decision" was taken and he refused to comply with what were indeed instructions, though couched in polite terms.

Citing the case law, the FAO submits that refusal by an official on merely personal grounds to take up a post he is assigned to is a grave breach of duty warranting termination by the employer. It is odd that the complainant should want an agreed termination after spurning just that when it was still feasible after the Appeals Committee had reported.

D. In his rejoinder the complainant submits that the Organization has replied only in general terms to the specific issues of fact and law he has raised.

He rejects its explanation for transferring him in August 1989: it was, he says, too early at the time for it to say that he had to be "reassigned shortly to another post". In any event its disregard of his "serious dilemma" shows that it is "out of touch with sound social, religious and political thinking on the significance of marriage, the integrity of the family, and the position of women in society".

The complainant observes that its memorandum of 20 June 1990 speaks of an "offer", not an order; of separation, not dismissal for misconduct; and of a decision - which never came - to reassign him to another post "in due course". It is not quibbling to expect administrative decisions to comply with the Tribunal's rulings. For want of a decision the charge of serious misconduct does not hold and the summary dismissal is unwarranted.

He presses his claims, pointing out that in the letter conveying the final decision the Director-General merely said he had "noted" the Appeals Committee's suggestion of agreed termination. He is seeking agreed termination only if no suitable post can be found at headquarters.

E. In its surrejoinder the FAO says the complainant has not brought to light any new facts or put forward any new pleas.

Though he suggests that the Director-General may not break up a family, his view of the international civil service is untenable since it would keep the Director-General from safeguarding the Organization's interests. The allegations that he got neither a warning before disciplinary proceedings began nor a clear decision are "wishful thinking after the fact".

CONSIDERATIONS:

1. This complaint challenges a single final decision dated 19 September 1991 whereby the Director-General of the FAO rejected internal appeals by the complainant against two closely related decisions. One of those decisions was to transfer him as the Organization's Representative to El Salvador and the other to dismiss him for misconduct for refusing the transfer.

2. FAO Staff Regulation 301.012 reads:

"Staff members are subject to the authority of the Director-General, who may assign them to any of the activities or offices of the Organization, and to whom they are responsible in the exercise of their functions."

And FAO Manual paragraph 311.422 provides:

"... staff members are transferred when their services are required in a new post in the same or in a different locality and when the duties of the new post are comparable with those presently performed or the Director-General considers that the staff member concerned is qualified for the new post. In considering the transfer of a staff member to another post or duty station, the Director-General takes into account both (i) the necessities of the work programme and the interests of the Organization and (ii) the qualifications, suitability, capacity, health, personal situation, and interests of the staff member concerned."

3. The complainant served at the Organization's headquarters, in Rome, from 1974 to 1989, save from December 1975 to February 1979, when he was in Chile. It is common ground that he served loyally and efficiently throughout. His wife found employment in Rome, with the International Fund for Agricultural Development (IFAD), first as a free-lance consultant for eighteen months and thereafter on a two-year appointment up to 31 July 1990. Their children were at school in Rome.

4. On 14 July 1989 the officer-in-charge of his Department told him orally that the Director-General was intending to appoint him as the FAO's Representative in the Dominican Republic. There is no doubt that but for family reasons the complainant would have accepted, to use his own words, the "interesting new assignment" because "a transfer to a FAO Representative post represents an honour and a career advancement". He asked for a week's time to consider. On 21 July his wife was offered a "career appointment" with IFAD for five years from 1 August 1990. In a note of 24 July 1989 to the officer-in-charge of the Development Department the complainant said that that appointment would give his wife opportunities for professional satisfaction and bring financial benefits to the family as a whole, especially his own mother, who required constant medical assistance. He therefore said he was unable to accept the assignment.

5. The Organization had two reasons for the transfer. The first was that in view of the complainant's experience and abilities the Director-General considered that his assignment as Representative in the Dominican Republic would serve the Organization's best interests. The second reason was that the Director-General intended to reorganise the unit of which the complainant was then the head, and that intended reorganisation "in the near future ... will entail the necessity that [he] be reassigned shortly to another post, whether it be in Rome or elsewhere". He was first so informed by a memorandum of 29 August 1989, which said that, for the family reasons he had mentioned, the Director-General was asking the Personnel Division to see whether a suitable post would be available for him at headquarters, but that if none could be found by the end of October a formal proposal would be made to assign him to the Dominican Republic.

6. On 19 September 1989 the complainant discussed the question of reassignment with the Director of the Personnel Division and submitted a list of vacant posts which he thought suitable. He formally applied for five posts on 21 September. By a memorandum of 27 September the Director of Personnel informed him that a careful review had been made of available vacancies at headquarters but that no suitable position had been found for him and none was expected to occur by 31 October; his application for a specified post would be duly considered, but no candidate could be imposed on any division of the Organization; and he was asked to give a final reply on the transfer by 1 October. He replied on 4 October expressing interest in several vacancies at headquarters. The Organization did not insist on his transfer to the Dominican Republic pending the outcome of his applications. Since the Dominican Republic wanted an immediate appointment someone else was chosen instead.

7. In a memorandum to him of 22 February 1990 the Assistant Director-General in charge of the Development Department said that despite the lapse of several months a suitable post had not been found, offered him a choice between Representative in El Salvador and Representative in Benin, and added: "Should you decline the offer ...

the Organization will have no alternative but to initiate steps to separate you". His request that a final decision on his assignment to a post as Representative be postponed was refused by a memorandum of 8 March, which repeated the previous offer.

8. The Organization attempted again and again to induce him to accept such transfer. Thus the Assistant Director-General wrote on 5 April: "... unless you respond to the offer [within three days] and advise me which post you prefer ... you will be transferred to El Salvador. ... If you decline to accept this move, steps will be initiated to separate you for failure to accept a transfer". In a memorandum of 6 April he said that he was unwilling to part from his family for the sake of his career and that he fully recognised and respected the Director-General's right to redeploy him in the interests of the Organization in accordance with the Director-General's plans for restructuring the unit which he then directed, but that he had not refused the transfer.

Again, on 30 May, the Director of Personnel wrote "... it is now absolutely imperative that you respond to the offer of the post of FAO Representative in El Salvador. ... In the absence of a positive response, the Administration will have no other choice than to take action to separate you".

By a memorandum of 20 June the Organization gave him the benefit of the doubt by not treating his failure to "reply to the specific request ... regarding [his] acceptance of the offer of the ... El Salvador [post]" as a tacit refusal which would lead to his separation. Instead, treating him as having tacitly accepted, it informed him that procedures would start forthwith to appoint him to that post.

In a memorandum of 21 June 1990, however, he said that he could neither accept nor decline the offer of the El Salvador post. On the grounds that his failure to reply was deemed to be a refusal to accept the new assignment, a proposal to dismiss him for misconduct was duly served on him on 26 July 1990. He submitted his reply on 3 August, repeating what he had said on 6 April.

In view of his denial, and to make his position clear, the Director of Personnel sent him, under cover of a memorandum dated 17 August 1990, a form headed "Request for Personnel Action" and dated 16 August transferring him to El Salvador with effect from 1 October 1990. He returned the form on 22 August asking, among other things, that "due consideration be given to ... Manual section 311.422" and that his attitude not be taken as refusal of the post in El Salvador.

The Organization replied on 7 September that due consideration had been given to that Manual section and sent him the form for signature. On 12 September he again returned the form unsigned, saying that he was compelled to appeal to the Director-General against the decision to transfer him; he was not refusing transfer but merely asking for proper search for other posts at headquarters.

On 25 September 1990 he was dismissed for misconduct.

Transfer

9. The complainant's position is that he did not refuse the offer of the post in El Salvador and that his several requests for further time to decide whether to accept it were justified because the Organization failed -

- (a) to state why his immediate transfer was necessary and why he could not be allowed to remain in his post until it was abolished or its functions were radically changed;
- (b) to explain why it was not possible to find a suitable post for him at headquarters;
- (c) to reveal the reason why he was not considered suitable for the specific posts for which he had applied; and
- (d) to take account of his personal situation and interests.

10. It was by his memorandum of 22 August 1990 that the complainant first disputed that reorganisation would necessitate his immediate transfer and sought clarification as to why it was inevitable. In his complaint he argues that the "restructuring study could, in the absence of preconceived conclusions easily have led to the retention of [him] in the same kind of activities as he was then performing" and suggests that a prior transfer was not necessary, as he could have continued in his post pending the study of restructuring.

The Organization's position, as set out for example in the Director-General's letter of 12 December 1990, is that after review management had to decide whether to abolish his post or give it new functions and another grade.

11. The complainant challenges the decision to transfer him on two main grounds:

(a) that the declared reason for the transfer, if it was not tainted by an abuse of authority, could only have been based on mistaken conclusions; and

(b) that there was utter failure to take account of a material fact, namely the dilemma that his wife's own career put him in.

a) Mistaken conclusions or abuse of authority

12. The complainant's contention is that the decision to transfer him was tainted with "mistaken conclusions or abuse of authority" in that the reason stated in the memorandum of 29 August 1989 "clearly suggests that it was intended 'shortly' to abolish complainant's post". In his submission the Director-General indicated in a letter of 12 December 1990 that at August 1989 there had been only a possibility of abolition of his post. The impugned decision was therefore based on the clearly mistaken assumption that its abolition was inevitable.

The complainant further submits that the Director-General had decided by August 1989 to remove him before the restructuring was carried out. To his mind, though the Director-General may have refrained from frankly conveying the true reason in order to avoid bad feeling, and though he is not alleging that there was necessarily ill-will on the part of the Director-General, the Organization's persistent silence about the true reason points not just to a mistake but to abuse of authority.

Lastly, he argues that on 2 October 1990 a senior liaison officer was moved into his old unit "pending the appointment of a Co-ordinator", that the new post carried duties similar to those he himself had been performing, and that he was fully qualified for it.

13. The complainant's argument rests on a misinterpretation of the reason the Assistant Director-General in charge of the Development Department gave for reassigning him in the memorandum of 29 August 1989. The memorandum did not make any reference to the abolition of his post; it merely said that future reorganisation in the Department would entail his reassignment. That is plainly consistent with the Director-General's position in the letter of 12 December 1990 that the reorganisation might or might not result in the abolition of the complainant's post, depending on the outcome of a managerial review.

As to the appointment of someone else "pending the appointment of a Co-ordinator", it is true that a new Office for External Relations (OER) was set up and within it a post for a senior liaison officer. But, despite some similarities, such as the grade, with the complainant's former post, the new one was substantially different. The terms of reference included the development of a new programme of co-operation with non-governmental organisations and streamlining and reallocating the tasks of the units which used to be in charge of relations with them, the aims being to develop a coherent approach and clearly distinguish between the OER and other FAO units.

The complainant has failed to show that the new post of senior liaison officer carried duties similar to those he previously performed. But even if it did it does not follow that the creation of that post made his transfer retroactively unlawful. There was a need to appoint someone as Representative in the Dominican Republic, and later in two other countries, and the Director-General acted properly in seeking to assign the complainant, who was qualified, to one of them. All the queries raised by the complainant from time to time were sufficiently answered by the Organization and the Tribunal is satisfied that the Director-General acted in good faith.

(b) Disregard of a material fact

14. The complainant was allowed two months initially, and ultimately twelve, to sort out the matter of his wife's career or obtain a suitable post at headquarters. He argues that he had more than "ordinary family needs". But there is nothing out of the ordinary about a situation where spouses each have a job at one and the same duty station, and neither wishes to give it up. Nor are the educational needs of children an insurmountable problem. Certainly such circumstances do not confer immunity against transfer on an international official. At 14 July 1989 the complainant's wife had an appointment that was to expire on 31 July 1990; so a request for postponement of the transfer until 1 August 1990 was not unreasonable, and the Organization granted it. The postponement of transfer

by fourteen months is evidence of adequate consideration of his "family situation and interests". But, when set against the Organization's own interests in filling the important post of Representative in a member State his family circumstances did not warrant any further restriction on transfer. The Tribunal is satisfied that the Director-General did take account of his family circumstances.

As to the failure to find an alternative post, the correspondence between September 1989 and June 1990 reveals that the Organization explained to him that the Personnel Division had failed to find a suitable post for him at headquarters because his qualifications and experience did not match the then vacancies at his grade. He had failed to get any of the posts for which he had applied because he was not considered the best qualified, and indeed in at least four cases was not qualified at all. The Personnel Division could not interfere with the process of selection by imposing a candidate.

15. The conclusion is that the complainant's objections to transfer fail.

Dismissal

16. The complainant submits that, even if the decision to transfer him was lawful, his dismissal shows two mistakes of law:

- (a) his behaviour did not constitute misconduct; and
- (b) the sanction of dismissal was disproportionately severe.

(a) Misconduct

17. It was the memorandum dated 26 July 1990 from the Assistant Director-General that informed the complainant of the formal proposal to dismiss him for misconduct. It observed that the Director-General had authority to transfer staff; that the complainant had been informed one year previously of the necessity for his transfer; that he was later given the choice between El Salvador and Benin; that he was finally assigned to El Salvador; and that he refused the assignment. His delay in responding to the offers made to him had led to questions from the government of a member State about the undue delay in filling the Representative's post. His refusal to accept the assignment was, said the memorandum, "conduct which was incompatible with the staff member's undertaken or implied obligation to the Organization" under Manual paragraph 330.151, in particular the obligation in Regulation 301.012, "action calculated to impede the effective operation of the Organization" under Manual paragraph 330.152(iv) and "refusal to obey instructions" under Manual paragraph 330.152(viii).

18. The complainant contends that before 26 July 1990 the Director-General had taken no decision to transfer him which had laid an obligation on him and which he might have challenged. In his submission it was only afterwards that such a decision was taken, against which he appealed on 12 September 1990. Disobedience, he argues, could not afford the basis of dismissal since he had not been given the right of reply required by Manual paragraph 330.325. He further submits that before 26 July 1990 there had been a series of mere offers, to which he had failed to respond, and that that could not warrant disciplinary action. To his mind there was no "refusal to obey instructions" because he was never instructed to go to El Salvador; the Administration only sought his reply to various offers and told him merely that failure to reply would be interpreted as rejection. Lastly, he contends that there was no "action calculated to impede the effective operation of the Organization". Though accused of delaying the restructuring, he could not have delayed a process of which he was kept in utter ignorance and the Organization adduces no evidence to show that he was the cause of the delay.

19. In his memorandum of 22 February 1990 the Assistant Director-General, though he called it an "offer", was clearly conveying to the complainant a decision to transfer him to a post as FAO Representative away from headquarters. It was an "offer" only insofar as he was allowed to choose between El Salvador and Benin as his duty station. In any event, when that memorandum was read together with those of 8 March and 5 April 1990, there should have been no doubt in his mind that a definite decision had been taken to transfer him as FAO Representative. If he exercised the option the place of transfer would be the one he chose, but if not it would be El Salvador. Only the date of transfer was not definite. Indeed he was not left in any doubt whatever that there was a decision to transfer, for he was told that if he declined "to accept this move" action would be taken "for failure to accept a transfer".

His subsequent conduct, avoiding a definite answer one way or the other, did not mean that he accepted transfer.

By 26 July 1990 he had clearly refused the appointment to El Salvador. Issuing a Request for Personnel Action thereafter did not mean that the decision to transfer him was taken only then: as the Director of Personnel told him in the memorandum dated 17 August 1990 referred to in 8 above, the request form was issued to clarify his position because he had once again denied refusal of transfer. His negative response to the form was thus not his first refusal but confirmation of a continuing refusal of transfer.

20. Moreover, his refusal of the El Salvador assignment was in breach of his obligation to the Organization to comply with a transfer under Regulation 301.012. In view of the responsibilities of the post of Representative, that refusal impeded the effective operation of the Organization - to quote Manual paragraph 330.152(iv) - and amounted to misconduct.

Had he made a bona fide challenge to the validity of transfer, that would have been a satisfactory explanation for non-compliance: for a precedent, see Judgment 392 (in re Duran No. 2), under 6. For family reasons the Organization refrained for five months until 22 February 1990, from taking action on the decision to transfer the complainant. Thereafter he did not challenge the transfer but sought to circumvent or delay it by raising a series of questions and by evading a direct response.

The conclusion is that he was guilty of misconduct.

(b) Proportionality

21. The complainant submits that the imposition of the sanction of summary dismissal was inconsistent with the principle of proportionality.

22. His attention was repeatedly drawn, from 22 February 1990 onwards, to the likely consequences of refusing to accept a transfer away from headquarters. Dismissal was not a sudden decision. Furthermore, even after the proposal for dismissal he was given two opportunities to change his mind.

23. If he had accepted the El Salvador post, even after disciplinary proceedings had been initiated, the Organization would have been willing to discontinue them and still transfer him to El Salvador. He submits that that indicates that the principle of proportionality had been ignored. If the offence was so serious as to deserve dismissal, last-minute repentance would not have justified his elevation to the post of Representative. Dismissal was, in his submission, not the only and not the appropriate solution.

The Organization's willingness to accept his last-minute repentance shows good faith, not disregard of proportionality. It had taken and communicated a decision to transfer the complainant, and upon his refusal to accept that transfer, it was unnecessary to take any further steps in implementation of that transfer. The decision to dismiss was a proper exercise of the discretion of the Organization and did not infringe the principle of proportionality.

The Tribunal's ruling

24. The complainant's appeals to the Director-General were rejected on 12 December 1990 and he appealed to the Appeals Committee on 29 January 1991. While recommending that his appeals against the transfer and his dismissal for misconduct be rejected, the Committee, considering that the complainant might not have fully understood the consequences of his dilatory attitude and taking account of his record of long service, of his age and future career, suggested that "consideration be given to converting dismissal for misconduct into a termination under Staff Regulation 301.0911, subject to the condition that [he] recognizes his misjudgment and apologizes for his disobedience, and agrees to such a measure".

The Director-General's letter of 19 September 1991 conveying his final decision accepted the Committee's report but took note of its suggestion.

25. One of the complainant's grievances is that the Organization did not propose "an agreed termination under Staff Regulation 301.0911". The Organization observes in its reply that it was the complainant who "declined to seize an opportunity which became possible as a result of the Report of the Appeals Committee and which could have led to that outcome". The Organization does not, however, clearly state that the opportunity is no longer available to him.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 10 February 1993.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner