

## SEVENTY-FIFTH SESSION

### *In re* FAGOTTO

#### Judgment 1260

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Flavio Fagotto against the Food and Agriculture Organization of the United Nations (FAO) on 14 September 1992, the FAO's reply of 11 December 1992, the complainant's rejoinder of 4 January 1993 and the Organization's surrejoinder of 18 March 1993;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal and FAO Staff Regulation 301.043;

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, an Italian born in 1935, first served the FAO for one month in 1980 on a project in Tanzania under a special service agreement. He returned to the project on two-week missions as a consultant in January and May 1981. He was offered a contract to cover a mission he was to carry out in Tanzania in September 1981 but it had to be cancelled because he proved not to be available.

On 23 October 1985 the FAO offered him a one-year fixed-term appointment in Zambia as an agronomist at grade P.4, step I, at a basic yearly salary of 32,605 United States dollars, plus a monthly post adjustment allowance of \$1,304 and what it called a "financial incentive". After accepting the offer on 7 November 1985 he objected to the pay. In a telex of 22 November the FAO said that though it was willing to offer him step III in the same grade his duty station "presently" carried a negative post adjustment that would lower his yearly pay by \$5,474. The telex also said "financial incentive not repeat not applicable". On 29 November he signed the revised terms of employment and notified his acceptance by a telegram on 19 December 1985. But by a memorandum of 21 February 1986 he informed the Administration that "in the light of new events" he could not accept after all.

He continued to seek employment with the FAO but got no further offers. On 11 February 1992 he wrote to the Director-General about his failure to get work. Replying on the Director-General's behalf on 7 April 1992, the officer in charge of the Personnel Division said that there were no suitable openings for him and that indeed for lack of money there were fewer than before.

In a letter of 1 June 1992 to the Director-General he alleged that the reason why he could not get back into the FAO was that "somebody had put an obstacle, seven years ago after my refusing the Zambia job", and he asked for a final decision as to "whether this obstacle ... can be removed or not". By a letter of 28 July 1992, the decision under challenge, the Director of the Personnel Division confirmed what the letter of 7 April 1992 had said.

B. The complainant submits that he has a right to appointment with the FAO on five grounds: (1) he performed well on the three missions he carried out in 1980-81; (2) the FAO offered him the job in Zambia in 1985; (3) FAO officers chose him for several missions thereafter, including one in Yugoslavia in 1989; (4) four other international organisations have employed him of late; and (5) his qualifications have met the requirements of several FAO posts.

Having branded him as someone who "cannot be recruited", the FAO is in breach of general principles of law and of its own Staff Regulations. It has denied him the right to a hearing and infringed "the general principle of prescription" by throwing away his application forms just two years after receiving them. Its policy of "personal gratuitous discrimination" offends against Staff Regulation 301.043, which says that "selection shall be made on a competitive basis".

He wants the Tribunal to order the FAO to "cancel the obstacle put on [his] name to get jobs" since 1985 and to give the cancellation full circulation among staff. He seeks damages for loss of earnings from the FAO since November 1985.

C. In its reply the FAO submits that the complaint is irreceivable *ratione personae*. Since the complainant is not an "official" within the meaning of Article II(6)(a) of the Tribunal's Statute and does not fall into any other admissible category of litigants he does not have access to the Tribunal.

Though he was in the Organization's employ in 1980-81 he does not make out that it infringed his contractual rights at that time. Even if he did, his claims would be out of time. What he is relying on is a right to appointment with the FAO by virtue of his "intrinsic worth". There being no basis in law for such a right, the Tribunal may not entertain his claims.

D. In his rejoinder the complainant seeks to refute the FAO's arguments and develops his own. He maintains that his claims arise out of the contractual links he had with the FAO in November 1985. He traces the dispute back to the Organization's lowering the figure of pay in its original offer of 7 November 1985 by \$8,768. His claim to removal of the obstacle to recruitment turns on "specific breaches" of the Staff Regulations, not on his own intrinsic worth. Was it not his long experience that prompted the FAO's technical officers to pick him "many times" for missions? He presses his claims.

E. In its surrejoinder the FAO submits that before the complainant accepted the revised offer of appointment in December 1985 it had warned him by telex of the change in his post adjustment allowance. Since the decision he challenges does not relate to the two contracts he signed - but did not honour - in November 1985, he has no *locus standi*. Besides, recruitment is at the Organization's discretion and its exercise of it is not subject to review by the Tribunal.

#### CONSIDERATIONS:

1. Between August 1980 and May 1981 the complainant carried out short missions in Tanzania under three contracts of appointment with the FAO. A contract to cover another mission in September 1981 was cancelled because he was not available.
2. In October 1985 the Organization offered him a fixed- term contract for one year in Zambia. He accepted the offer and signed the contract on 7 November 1985. After some negotiations over pay the Organization offered him revised terms which he accepted; and he signed a second version of the contract on 29 November 1985. He now states that the revised terms were unfavourable to him and that he signed it against a promise of improvement. But in a telegram of 19 December 1985 he again stated his acceptance and in February 1986 he went to Rome for briefing. There is no evidence to suggest that he had any further discussions with the FAO about the terms of the contract. In a memorandum of 21 February 1986 he informed it that "in the light of new events" he was not in a position to accept the appointment.
3. Although the complainant makes out that the Organization unilaterally cancelled the contract during renegotiation it is clear from his own communications that it was he who reneged.
4. His grievance is that in consequence of his rejecting the appointment in Zambia in 1985, an "obstacle" - in the form of an endorsement "cannot be recruited" - has been put against his name by the Personnel Division of the Organization. Thereafter, he says, written offers of employment made to him by officers of the Organization, who, like him, were unaware of that "obstacle", did not mature into contracts. He therefore seeks an order from the Tribunal for the cancellation of that unjust and unlawful "obstacle", appropriate publicity within the Organization and an award of damages for being excluded from employment since November 1985.
5. The Organization makes the preliminary objections that the complainant had no contractual relationship with it after 1981; that his present claims do not arise out of any alleged failure to observe the contracts he held in 1980 and 1981; and that even if they did they would be time-barred.
6. According to the complainant the alleged "obstacle" was the consequence of his rejection of the contract in 1985 and it had nothing to do with those he had held in 1980 and 1981. The Tribunal's competence is restricted under Article II(5) of its Statute to hearing complaints alleging the non-observance, in substance or in form, of the terms of appointment of an official or of provisions of the organisation's Staff Regulations. The complaint fails because the Tribunal lacks competence to entertain it.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, 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 14 July 19934.

(Signed)

José Maria Ruda  
Mella Carroll  
Mark Fernando  
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.