

Translation, the French text alone being authoritative.

#### FOURTH ORDINARY SESSION

In re McINTIRE

Judgment No. 13

THE ADMINISTRATIVE TRIBUNAL,

Having had referred to it a complaint made against the Food and Agriculture Organisation of the United Nations on 8 April 1954 by Mr. Gordon McIntire, formerly an official of that Organisation, seeking the rescission of a decision of the Director-General of that Organisation not to confirm his appointment at the end of the probationary period;

Considering the additional memorandum submitted by the complainant on 1 August 1954;

Considering the memorandum of reply of the defendant Organisation dated 19 May 1954;

Having had referred to it a statement submitted in his own name on 24 August 1954 by Mr. X. Leutenegger, Chairman of the Staff Association;

Having heard, on oath, in public sitting, on 26 August 1954, Mr. Irving L. Posner, witness cited by the complainant, whose deposition, certified true, is in the dossier;

Considering that the complaint is receivable in form;

Considering that the facts of the case are as follows:

(1) The complainant, a citizen of the United States of America, entered the service of the defendant Organisation on 5 June 1952; his post came under the Budget and Administrative Planning Branch, directed by Mr. Posner; his contract was of five years' duration; towards the end of the year 1952, most of the temporary contracts having been changed to permanent contracts, the complainant was informed that his appointment had been changed to a permanent appointment with effect from 1 July 1952, the probationary period having commenced on 5 June 1952, as provided for in the initial contract;

(2) The probationary period was thus, in any event, to expire on 4 June 1953 (subject to a possible six month's extension);

(3) The services of the complainant gave rise in the beginning to serious doubts on the part of his chiefs as to his fitness for the duties entrusted to him, although his goodwill, good intentions and devotion were not called into question; his immediate chief, Mr. Posner, made verbal remarks to him concerning these doubts on several occasions, endeavoured to help and guide him during this trial period and communicated to him in writing, on 14 January 1953, when a report was made on his first six months of service, the substance of these remarks and this advice;

(4) The complainant endeavoured to improve his work and Mr. Posner considered, towards the end of March, that his efforts had been fruitful and deserved encouragement; on 30 March 1953, at the request of the complainant that he be given the title of Chief of the Policy and Procedures Section which had been set up within the Budget and Administrative Planning Branch - a request made by the complainant because he considered this title would give him prestige - Mr. Posner felt able to reply in the affirmative and so informed Mr. Weisl, his own responsible chief, Director of Administration, who raised no objection; this title was moreover used inside the Organisation as from 30 March 1953 and was known to the heads of the administrative units;

(5) On 8 April, that is to say a few days later, Mr. Weisl informed the complainant, in a letter couched in the following terms, that his appointment would not be confirmed:

“8 April 1953

CONFIDENTIAL

Dear Mr. McIntire,

It is with regret that I have to inform you that I have decided after full consideration that it will not be possible for me to confirm your present appointment at the end of your probationary period. As you know, both Mr. Posner and I have had doubts about your suitability for the post which you occupy and, although there has been some improvement in your work in the last two or three months, I am now convinced that your abilities do not lie in the field of procedures work.

2. Under Section 310.52 of the Administrative Manual, a staff member may be separated at any time during or at the end of his probationary period if, after a fair trial, he does not perform satisfactorily the duties of the post to which he is assigned. I consider that you have been given a fair trial but have not performed your duties satisfactorily. You may, therefore, take this letter as your notice of separation, to be effective 31 May 1953, in accordance with the terms of the Administrative Manual. You are entitled, of course, to payment for any accrued annual leave, to the appropriate payment under the United Nations Joint Staff Pension Fund regulations and to the payment of travel expenses to your home, for yourself and your dependants. Under the regulations, you are not entitled to the payment of the cost of the removal of your household goods to your home, but I am recommending to the Director-General that, in your case, the regulation in this respect should be waived and your costs reimbursed. I have no doubt that the Director-General will approve my recommendation.

3. May I say how sorry I am that it has become necessary to take this action and how much I hope that you will succeed in finding new activities in keeping with your obvious talents.

Yours sincerely,

(Signed)  
Frank Weisl  
Director of Administration”

(6) The complainant appealed, in accordance with the normal procedure, to the Appeals Committee established under the terms of the Staff Regulations; his grievances were as follows: (a) established procedures were not followed in giving him his termination notice; (b) the charge of unsatisfactory services was based on misunderstanding, prejudice or some other extraneous factor;

(7) When he was heard by the Appeals Committee, the complainant dropped the first of these grievances (a) and modified the second (b), suppressing the words (“misunderstanding” and “prejudice” and maintaining only that the decision of the Director-General was based on some extraneous factor;

(8) In its report, the Appeals Committee stated: (a) that it had failed to find sufficient evidence that there was a justifiable grievance under the terms of the Administrative Manual, section 320.12; (b) that, in any event, article XI of the Staff Regulations (paragraph 301.0912) left no doubt that the Director-General was at full liberty to take any factors into consideration when deciding to terminate the appointment of a staff member serving a probationary period and that his sole judgement should prevail as to whether such action was in the interests of the Organisation;

(9) In an undated letter addressed to the complainant immediately after the deliberations of the Appeals Committee, that is to say towards the end of May 1953, the Director-General accepted the conclusions of the Appeals Committee and confirmed that the appointment was terminated with effect from 4 June 1953.

IN LAW:

Considering that the Director of Administration, in his letter of 8 April 1953, had based the decision to terminate the appointment of Mr. McIntire on section 310.52 of the Administrative Manual, which provides inter alia that a staff member on probation may be separated at any time during or at the end of his probationary period for unsatisfactory service, provided he receives a statement giving the specific reasons for this action;

Considering that the Appeals Committee, to which the complainant appealed, believed there might be another possible justification for the measure taken against the complainant in the event of the interests of the Organisation being invoked in accordance with article IX, paragraph 301.0912 of the Staff Regulations;

Considering that the recourse to article IX suggested by the said Committee is devoid of all relevance; that it is only in the event of the Director-General having expressly invoked the said article as a basis for the decision to terminate the appointment of an official on probation that this senior official would have acted in the full exercise of his prerogative, without the Tribunal having the power to judge the reasons involving the interests of the defendant Organisation;

That, while he accepted the conclusions of the Appeals Committee, he limited himself to confirming the decision of 8 April;

That, in addition, at that stage of the procedure, a change of grounds would have vitiated the procedure; that the Administrative Tribunal of the United Nations, in its judgment No. 4,

stated “That, while it is not for the Tribunal to substitute its judgment for that of the Secretary-General with respect to the adequacy of the grounds for termination stated, it is for the Tribunal to ascertain that an affirmative finding of cause which constitutes reasonable grounds for termination has been made, and that due process has been accorded in arriving at such an affirmative finding.”;

Considering that the only explanation which has ever been given expressly to the complainant was based on the unsatisfactory nature of his services;

Considering that the discretionary power of the Director-General in this matter cannot be exercised for reasons not clearly specified; that he cannot invoke one reason for exercising his powers when in reality his action is based on another reason since this would constitute misuse of power likely to lead to rescission of the decision;

WHEREON, pronouncing judgment on the substance:

Considering that it cannot be conceived, unless a new circumstance arose in the meantime, that Mr. Weisl agreed, on 30 March 1953, that the complainant be authorised to use the title of chief of section whereas he himself, on 8 April of the same year, was to decide immediately to dismiss the complainant, the matter appearing so urgent to him that he could not wait for the normal end of the probationary period (which was to expire less than two months later) or for the verification of the progress noted since Mr. Posner’s report of 14 January 1953, or even hear the explanations of the complainant beforehand;

Considering that the existence of this new circumstance is shown; that it is established that between 30 March and 8 April Mr. Dodd, then Director-General, received a letter from Mr. Hickerson, Assistant Secretary of State of the United States of America, concerning the person of the complainant; that the defendant Organisation has recognised that this was so since its representative declared in public sitting that the facts related in that letter were the official confirmation of information given verbally to the Director-General, Mr. Dodd, during his visit to Washington one month previously, without any steps having been taken against the complainant at that time, but also without the complainant having been informed;

Considering that the complainant asks that this letter be produced during the discussion, being of the opinion that the Tribunal would thus be in a better position to assess the influence of this document on the change of attitude of Mr. Weisl and on the decision communicated to the complainant on 8 April;

Considering that, in the following terms, the defendant Organisation has refused to accede to this request:

“27 August 1954

Sir,

I have taken note of the letter dated 26 August 1954 which you were kind enough to communicate to me and in which Maître J. Mercier, Counsel for Mr. McIntire, asks that the Tribunal order the production of the letter received by the Director-General of the F.A.O. from the Government of the United States and which has been mentioned in the course of the

discussions.

I have the honour to confirm the statement which I made during the sitting held this afternoon in camera, namely that the Director-General would have been happy to have been able to communicate this letter to the Tribunal, but that he does not consider that he should do so as this "confidential" letter comes from the Government of a sovereign State and must for that reason be treated in the same way as a diplomatic communication. Its production, without the authorisation of the Government concerned, would constitute a violation of diplomatic usage in such matters.

I have the honour to be, etc.,

(Signed)

Sir John Serrao, Attorney at the Supreme Court of Appeal in Rome  
G. Saint-Pol, Chief of the Legal Affairs Section of the F.A.O."

Considering that the Tribunal, while it has not the power to express an opinion as to the merits of the reason given by the defendant Organisation, deems it inadmissible that the considerations alleged by that Organisation can in any way prejudice the legitimate interest of the complainant; that the existence of a secret document concerning the complainant, the content of which is unknown to him and against which he is consequently powerless to defend himself, obviously vitiates the just application of the Regulations to the complainant and affects not only the interests of the staff as a whole but also the interests of justice itself (vide, judgment No. 15 of the Administrative Tribunal of the United Nations: "The Applicant cannot be penalised because certain information is considered by the Respondent as confidential and the Applicant has no opportunity either of knowing that the reason is or of challenging it.");

That, in consequence, it is the duty of the Tribunal to consider as established the fact that the decision of 8 April is not really based on the grounds of unsatisfactory service but on personal considerations extraneous to such grounds; that it therefore constitutes an act of misuse of power and must be rescinded;

Considering that, in the event of the defendant refusing consequently to authorise the complainant to resume his duties, it is necessary to make a financial award against the defendant with a view to compensating the complainant for the damage which the decision has caused him in depriving him of the possibility of being accepted for permanent employment at the end of the trial period; that, in addition, the complainant has been subjected for a long time to conditions of material and moral insecurity causing him serious suffering, a state of affairs which it should be recognised the present Directorate of the FAO has tried to make easier by all means within its power;

**ON THE GROUNDS AS AFORESAID**

Rejecting any wider or contrary conclusions,

The Tribunal orders the rescission of the impugned decision of 8 April 1953 and the undated decision of the Director-General regarding the whole procedure followed in consequence;

And,

Failing the reinstatement of the complainant in its service by the defendant Organisation,

Orders that Organisation to pay the complainant, by way of compensation in reparation, an amount equivalent to fifteen months' salary, together with interest at 4 per cent. as from 5 June 1953, an amount of three thousand dollars to be added to the whole by reason of the material and moral damage incurred by the complainant between 8 April 1953 and the date of the present judgment, independently of repatriation expenses,

Orders the defendant Organisation to pay the complainant the sum of 300 dollars by way of participation in the cost of his defence,

With regard to the statement of Mr. Leutenegger, declares that statement receivable insofar as it is made in his own name and orders the defendant to bear any expenses which arise from that statement and for which justification is provided.

In witness of which judgment, pronounced in public sitting on 3 September 1954, by His Excellency M. Albert Devèze, President, Jonkheer van Rijckevorsel, Acting Vice-President, and M. Iasson Stavropoulos, Deputy Judge called upon to sit owing to the inability of a titular Judge to attend, the aforementioned have hereunto subscribed their signatures as well as myself, Wolf, Registrar of the Tribunal.

Albert Devèze  
A. van Rijckevorsel  
Iasson Stavropoulos  
Francis Wolf