

**SEVENTY-SEVENTH SESSION**

***In re* CARRETTI (No. 5)**

**Judgment 1360**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Miss Giuliana Carretti against the Food and Agriculture Organization of the United Nations (FAO) on 8 July 1993, the FAO's reply of 1 October, the complainant's rejoinder of 31 December 1993 and the Organization's surrejoinder of 22 March 1994;

Considering Articles II, paragraphs 5 and 6, and VII, paragraphs 1 and 3, of the Statute of the Tribunal, Article 301.151 of Annex III to the FAO Staff Regulations, FAO Staff Rules 302.9034, 303.113 and 303.1311, and FAO Manual paragraphs 308.411, 311.44, 314.221, 314.222, 314.714, 323.512 and 374.41;

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's career is summed up under A in Judgment 1162, which dismissed her first complaint. In that complaint she asked to be given a stable position after serving the FAO for many years in which she had had several reassignments. As was said in that judgment, the Organization created a temporary post for her at grade G.5 in a division known as GIL. It created the post at the end of November 1991 as from 1 October 1991 and described it as a step towards the "final solution to her placement". She took the view that it did not match her qualifications and was an "imposition" and filed an application for review, which Judgment 1294 dismissed. The duration of the post was extended several times and she was still holding it at the material time.

By a memorandum of 22 December 1992 sent through the Director of the Personnel Division the Director of GIL addressed her a warning about her attitude to work and gave her two months in which to show that she was able to work satisfactorily and get on well with fellow staff. On 15 January 1993 he sent her a second warning. By a memorandum of 19 January 1993 to the Director of Personnel she challenged the warning of 22 December 1992 as unfounded and grossly libellous. On 11 February 1993 she supplied a medical certificate and applied for three months' sick leave as from 8 February.

By a memorandum of 20 April 1993 the Director of Personnel notified to her a decision to dismiss her, on the Director of GIL's recommendation, on grounds of unsatisfactory service under paragraph 314.222 of the FAO Manual; the termination was to take effect at 8 May 1993, when her sick leave was to end, and she was to be paid compensation under Staff Rule 302.9034. By a letter of 21 April to the Director of Personnel she acknowledged receipt of the memorandum and challenged the contents.

On 30 April she produced a second medical certificate and applied for extension of sick leave from 28 April to 31 July. By a telegram of 19 May the head of the Medical Service informed her that on 27 May she was to undergo a medical examination on FAO premises, that her sick leave was extended only to 26 May and that any further extension would depend on the findings of the examination. By a telegram of 25 May the Director of Personnel reminded her of her appointment for examination on the next day but one and pointed out that it was a necessary terminal formality. In a fax of 26 May to the head of the Medical Service she said she wanted to have the examination outside the Organization.

By a telegram of 28 May the Director of Personnel told her she must undergo examination in the Medical Service and get in touch with it at once. By a fax of 1 June she replied that she had already answered the telegram of 19 May from the head of the Medical Service and was waiting for a written reply to her request of 26 May. By a telegram of 4 June the Director of Personnel refused outside examination, confirmed that her sick leave would not be extended and asked her to report to the Medical Service on 9 June.

By a fax of 7 June which she sent to both the head of the Medical Service and the Director of Personnel she challenged that decision, repeated her demands and asked why the Organization had not extended her sick leave, citing Manual paragraph 323.512 ("if a staff member is on certified sick leave on the date of separation the effective date of separation will be extended until the end of his/her period of certified sick leave").

By a telegram of 8 June 1993 the head of the Medical Service pointed out that it was up to the FAO to grant sick leave and reminded her of her appointment for examination on the morrow. She failed to keep it. By a letter of 18 June the Director of Personnel told her that further sick leave was refused because she had not undergone the examination. In her reply of 7 July 1993 she held to what she had said before.

It is the decision of 20 April 1993 to dismiss her that she is challenging.

B. The complainant submits that her complaint is receivable. She contends that being no longer an employee of the Organization she is not subject to the rule in Article VII(1) of the Tribunal's Statute that all internal means of redress must be exhausted.

On the merits she has five pleas. The first is that the warning and the decision to dismiss her should have come, not from the Personnel Division and the Legal Office, but from the division director. That is what Manual paragraph 314.222 requires on termination for unsatisfactory service. She contends that, having tried in vain to "persuade" the Director of GIL to approve the warning, the Personnel Division took advantage of his absence to get it signed by someone else in GIL. So the dismissal procedure is doubly flawed: it was started ultra vires, and there was breach of her right to a hearing as laid down in Manual paragraph 374.41.

She denies unsatisfactory service or conduct. The other staff said several times that they got on well with her, and her performance reports that she always did her work conscientiously. Relations with her supervisors soured because she expressed reservations about her post in GIL, which was pointless and a "sham" intended just to "mislead the Tribunal". The post was abolished on the date of her separation, her duties were few and they matched neither her qualifications nor her grade. By not giving her a suitable post the Organization failed to meet the commitments it had given the Tribunal and its obligations under paragraph 311.44 of the Manual.

The Organization offers not a jot of evidence in support of the charges against her. It overlooked material facts and drew clearly mistaken conclusions from her file. That she fell foul of personal prejudice is plain from the many attempts to dismiss her. The first came before the warning of 22 December 1992, which was just a pretext for getting rid of her.

Lastly, she cites the requirement in Manual paragraph 314.221 that the Administration try staff out elsewhere before dismissal for unsatisfactory service. By refusing to put her on trial elsewhere, despite her repeated requests, the Organization caused her unnecessary and undue injury.

Her second plea derives from the first one and is about her advancement to step XI in grade G.5. In support she repeats her previous arguments and quotes what Judgment 1163 said in 9 about her second complaint, namely that the Organization erred in law in construing and applying Manual paragraph 308.411. It has made the same error in this case.

In her third plea she asks that the date of termination be set at 31 July 1993. She contends that the Organization may not end the appointment of a staff member who is on sick leave and that it was prejudiced against her: contrary to common practice in the Medical Service she was not allowed to consult an outside doctor.

In her fourth plea the complainant denies that she was dismissed for unsatisfactory service and submits that the compensation due to her is that provided for in Article 301.151 of Annex III to the Staff Regulations. Citing Manual paragraphs 311.44 and 314.714 she alleges that she was dismissed because her post was abolished, and with no regard for any but the FAO's own interests, at a time when she was on sick leave and could not defend her case. She refers to several staff members in the same situation who did get such compensation.

In her fifth plea she seeks damages for moral injury and for the impairment of health caused by improper working conditions and the Organization's arbitrary treatment of her.

She asks the Tribunal to set aside the decision of 20 April 1993 dismissing her for "unsatisfactory service", as well as the recommendation of dismissal of even date and the warning of 22 December 1992; to have them withdrawn

from her personal file together with the correspondence on the subject; and to order the Organization:

to pay her 25,000 Swiss francs in damages for moral injury;

to pay her as from the date of dismissal damages for material injury equivalent to the earnings she would have received had she stayed on until 30 April 1996, when she was to take early retirement, and to pay her in full as of 1 June 1993 until the same date her own and the FAO's contributions to the United Nations Joint Staff Pension Fund; and, subsidiarily, to continue regularly her monthly pay as from the date of dismissal until 30 April 1996, subject to the usual deductions and contributions;

to grant her as from 1 June 1993 advancement to step XI in grade G.5 for the period of service from 1 June 1991 to 31 May 1993, plus interest on the arrears at the rate of 10 per cent a year, the new salary at step XI to be taken into account in reckoning her separation entitlements including the termination indemnity;

to set the date of dismissal at 31 July 1993 instead of 26 May 1993 and pay her salary adjusted as above until that date, subject to any necessary changes, plus interest at the rate of 10 per cent a year;

to pay her the termination indemnity granted to staff members with continuing appointments under Article 301.151 of Annex III to the Staff Regulations, plus interest at the rate of 10 per cent a year as from the date of dismissal;

to pay her 10,000 Swiss francs in costs.

C. In its reply the FAO submits that the complainant's being no longer its employee does not relieve her of the obligation to exhaust the internal means of redress. Staff Rule 303.1311 allows former employees to appeal. By going straight to the Tribunal the complainant has failed to observe Article VII(1) of its Statute.

The Organization asks the Tribunal to dismiss her complaint as irreceivable and, subsidiarily, if it be declared receivable, to invite a reply on the merits.

D. In her rejoinder the complainant maintains that her complaint is receivable. She warned the Director of Personnel that she would be going to the Tribunal and sent him a "complaint" on 21 April 1993. Since it went unanswered she may go directly to the Tribunal in accordance with Article VII(3) of its Statute. Besides, if there was a risk that her complaint was irreceivable the Registrar would surely tell her in good time. He did not do so. In any event the Appeals Committee would not have been competent to hear her "complaint", and it is not impartial.

By failing to address the merits the Organization has robbed her of her right to rejoin. She presses her pleas and, as to her claim about the date of dismissal, seeks payment in lieu of three months' notice, from 1 August to 31 October 1993.

E. In its surrejoinder the Organization reaffirms that the complaint is irreceivable.

Citing the "complaint form" that the complainant has filed it submits that the decision she is impugning is the one of 20 April 1993. If, as she makes out, she is challenging the implied rejection of her claims, she would have said as much in point 3(b) of the form; instead she has just entered "not applicable".

Her doubts about the Appeals Committee's competence are irrelevant. Rule 303.113 states that "the Committee shall determine its own jurisdiction in cases when its competence is in doubt". It is odd of her to question its impartiality when it found in her favour in an earlier dispute.

#### CONSIDERATIONS:

1. The complainant joined the staff of the FAO in 1976 as a bilingual shorthand-typist at grade G.4 under a two-year contract. The Organization confirmed her appointment in 1977 and promoted her to G.5 in 1978. From 1984 onwards she was kept on short-term assignments and given no permanent post despite her repeated demands for one. She lodged her first complaint in 1990, after the Director-General had refused one such demand, and the Tribunal dismissed it in Judgment 1162 of 29 January 1992.

2. By a memorandum of 22 December 1992 she was given under Manual paragraph 314.221 a "formal warning" signed by the Director of her unit, the Library and Documentation Systems Division (GIL), on the grounds of

unsatisfactory performance. She sent the Director of the Personnel Division a memorandum of 19 January 1993 giving explanations. Meanwhile, by a memorandum of 15 January, she was given a second warning, again signed by the Director of GIL, and to that she answered on 27 January. In a memorandum of 9 February 1993 the Director of Personnel said that he fully endorsed the warnings of 22 December 1992 and 15 January 1993.

3. The Organization granted her sick leave from 8 February until 8 May 1993 and later extended it to 26 May.

4. By a memorandum dated 20 April 1993 the Director of GIL told her of his recommendation to the Director of Personnel for her dismissal and by a decision of even date the Director of Personnel dismissed her for unsatisfactory performance on 8 May 1993, when her sick leave was at that time to end. The next day she wrote a letter to the Director of Personnel acknowledging receipt of the decision, asking that she be informed of the allegations and evidence against her and "rejecting" the dismissal as "based on unfounded charges". Moreover, by her present complaint, which she lodged with the Tribunal directly on 8 July 1993, she is asking for the quashing of the decision of 20 April.

5. The FAO submits that her complaint is irreceivable, mainly on the grounds that she is impugning a decision by the Director of Personnel, not a final one taken by the Director-General on the advice of the Appeals Committee in accordance with the internal appeal procedure that the Staff Regulations and Rules lay down. The FAO further observes that on her own admission she has wittingly failed to comply with the requirement in Article VII(1) of the Tribunal's Statute that she exhaust the internal means of redress.

6. In support of the view that her complaint is receivable the complainant argues first that there are three reasons why she put no appeal to the Director-General: "delay" in getting hold of the material documents; her sick leave; and the harshness of the dismissal.

7. Those contentions hold no water. The only material document she needed for an appeal to the Director-General and later, if need be, to the Appeals Committee was the decision of 20 April 1993. Since she got it the very next day there was no "delay" whatever. Since she acknowledged receipt of it on 21 April while still on sick leave it is plainly mistaken for her to allege that such leave or the harshness of dismissal barred her from resorting to the internal remedies at her disposal.

8. She then pleads that the requirement in Article VII(1) of the Tribunal's Statute does not apply because she was no longer in the FAO's employ after she got notice of termination on 21 April 1993.

9. She is wrong on that score. She was still on the staff until the dismissal took effect, viz. at first 8 and then 26 May 1993. So she was free as a serving official until the latter date to appeal to the Director-General. Besides, the requirement in VII(1) applies to any complaint lodged with the Tribunal: to quote Article II(6), the complainant may be "the official, even if his employment has ceased".

10. In her rejoinder the complainant pleads Article VII(3) in support of the view that she was free to come straight to the Tribunal with a claim to the quashing of the implied rejection, to be inferred from sixty days' silence, of the internal "appeal" she says she lodged on 21 April 1993.

11. Again her plea fails. For one thing, her letter of 21 April 1993 was just an acknowledgment of receipt of the memorandum of 20 April and did not amount to an appeal. For another, she may not in her rejoinder challenge a decision - which she says was "implied" - other than the one she impugns in her complaint. Since she made no appeal there could be no implied decision to reject one.

12. Lastly, she is mistaken in arguing that although she stated in writing her intention of going straight to the Tribunal the Registrar did not advise her at the time to appeal first to the Organization. The Registrar does not make preliminary rulings on receivability, an issue which only the Tribunal may decide.

13. Since the complainant has failed to exhaust the internal means of redress her complaint is irreceivable under Article VII(1) of the Tribunal's Statute and therefore fails in its entirety.

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. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas  
Mella Carroll  
E. Razafindralambo  
A.B. Gardner

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