Registry's translation, the French text alone being authoritative.

EIGHTY-SECOND SESSION

In re del Valle Franco Fernandez

Judgment 1610

The Administrative Tribunal,

Considering the complaint filed by Mrs. Ana del Valle Franco Fernandez against the Customs Co-operation Council (CCC) on 7 October 1995, the Council's reply of 31 January 1996, the complainant's rejoinder of 17 May and the Council's surrejoinder of 19 September 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence and disallowed the complainant's application for hearings;

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

A. On 23 June 1989 the Council issued a notice of vacancy for a post of technical officer at grade A3 in the Valuations Directorate. The notice said that the appointment would be for five years but extension was possible up to ten.

The complainant, who is Argentinian, was appointed to the post on 29 January 1990. In July 1991 the Government of the Argentine released her on administrative leave without pay. After two years in its employ the Council put her on a post as public relations officer.

At its 1993 and 1994 sessions the Council discussed a proposal by the Secretary General to reform the secretariat and change policy on the reappointment of technical officers. One of his proposals was to make a single five-year appointment the rule for staff in category A, which included the complainant, reserving extension for exceptional cases and limiting it to two years.

On 30 March 1994 the complainant asked the Director of Valuation to extend her appointment by five years. In a minute dated 12 July the Secretary General told her he would extend it by 12 months, to 28 January 1996.

By a letter of 7 October she asked the Secretary General to refer the matter to the Appeals Board under Staff Regulation 29. She said she was objecting to the refusal of a five-year extension and alleged that failure to consult the Administration Committee was at odds with the procedure laid down in staff circular 187 and Staff Rule 9.1. She applied for but was refused leave to be represented by counsel in the internal proceedings. In a report dated 2 June 1995 the Board recommended that the Secretary General should consult the Committee. By a minute of 4 July 1995 the chairman of the Appeals Board told the Secretary General that, in the light of the information that the Secretary General had given, he gathered that there had been such consultation.

In a letter of 10 July 1995, the impugned decision, the Secretary General confirmed that the complainant's appointment would not be extended beyond 28 January 1996.

B. The complainant pleads procedural and substantive flaws.

She charges the Council with failing to account properly for the decision: either it gave no reasons at all or else it gave them, in merely general and formal terms, after the decision had become irrevocable.

It acted in breach of staff circular 187. Staff Rule 9.1, under which the circular was issued, requires the Secretary General to consult the Administration Committee before deciding whether to allow an official's application for extension of appointment.

She alleges breach of her right to be represented by counsel for the purposes of her internal appeal. Neither Rule

29.2(d) nor paragraph 8 of staff circular 197, which says that appellants may be assisted by another staff member, bars representation by counsel.

In her submission there was breach of Rule 31.3, too, which requires the Secretary General to consult the Staff Committee on "any question of a general nature affecting the interests of the staff or arising out of the Staff Regulations and Staff Rules". Though the new policy that the Secretary General was proposing for reappointment met both those conditions, he had failed to consult the Staff Committee.

On the merits she contends that the Secretary General failed to apply binding decisions that the Council had taken at its session of June 1994 on reform of the secretariat and on the new policy of reappointment.

He committed an obvious mistake in assessing her performance. The reason that he eventually gave for the decision, namely that her work was not good enough to warrant extension by five years, was at odds with the views held by senior officers of the Council and by the Government of the Argentine.

The decision offended against the Council's long-standing and legally binding custom of granting a second five-year appointment to nearly everyone who wanted it provided that the government department approved.

There was breach of equal treatment. The Council has decided not to apply to serving officials a new policy limiting the reappointment of directors. Technical officers like the complainant are entitled to the same sort of treatment.

Lastly, she pleads misuse of authority: the real reason why the Secretary General refused to extend her appointment was that he intended to assign her duties to the head of his own office and allot the funds used to finance her post to one for his special assistant.

She asks the Tribunal to set aside the decision of 10 July 1995 and grant her material damages in an amount equivalent to the sums she would have earned in salary and allowances had her appointment been extended by five years, plus interest to be reckoned at the rate of 10 per cent a year as from the date at which the amounts fell due. She claims 250,000 Belgian francs in moral damages and the same amount in costs.

C. In its reply the CCC rebuts each of her pleas.

It says that it gave her the reasons for non-renewal on 11 July 1994 and on several later occasions orally or in writing. For one thing, the Council had decided as a matter of consistent policy not to reappoint technical officers for five years; for another, the quality of her performance did not warrant an exception.

The Staff Committee, which knew of the Secretary General's proposals, had expressed its views to him when the proposals for change were being mooted. So there was no point in consulting it formally.

Even though consistent practice is not to consult the Administration Committee about the reappointment of staff, the Secretary General did consult it about the complainant's case.

Neither custom nor the rules allow representation by counsel in internal appeal proceedings.

There was no misuse of authority. Though the Council transferred the complainant from one unit to another, she kept her post, so that the transfer released no budgetary funds. It was a former Secretary General who transferred her, and he never had any intention of creating a post for someone to head his own office.

The complainant, a technical officer, may not benefit from rules that apply to directors. So there was no breach of equal treatment.

Technical officers have no right to extension of appointment. The practice that the complainant is relying on is not long-standing and not as broad as she makes out. Debates in the Council in June 1994 disclosed no disagreement with the Secretary General's proposals. The impugned decision is quite in keeping with the wishes of the Council, which gave its approval to the "five-year" rule even though it trusted that the Administration would not apply it too strictly to serving staff. That is why the Secretary General came to extend the complainant's appointment by only one year.

A report by her former first-level supervisor makes it plain that her performance was poor.

Since she is no longer in the service of the Government of the Argentine -- as the Council has learned only from her complaint -- it would have been wrong anyway to extend her appointment further.

D. In her rejoinder the complainant enlarges on her pleas.

She denies concealing her administrative status. There is no rule that requires a technical officer to be on secondment from a government department or even a civil servant in the home country.

She raises to 500,000 Belgian francs the amount she seeks in moral damages.

E. In its surrejoinder the Council presses its pleas.

The material issue is not whether she was still a member of the civil service of her home country but whether she was a customs official. That is the basis of recruitment of technical officers. The complainant no longer met that requirement when she applied for reappointment.

CONSIDERATIONS

1. The Customs Co-operation Council (CCC) was set up in 1952 and employs some 120 staff headed by a Secretary General. The complainant joined its staff on 30 January 1990 under a five-year fixed-term appointment as a technical officer at grade A3.

2. On 30 March 1994 she applied for a five-year extension of appointment. At the time the Secretary General was drawing up a new policy for the renewal of staff contracts. A report dated 29 April 1994 by an *ad hoc* working party went to the Policy Commission and to the Council in June 1994. The Secretary General proposed tightening policy for the renewal of the fixed-term appointments of technical officers, one change being to limit to five years the length of new appointments. Subject to transitional measures the proposals went through.

3. By a minute of 12 July 1994 the Secretary General accordingly told the complainant that he was intending to extend her appointment by only one year, to 28 January 1996. In another application for extension she said she wanted to put her case herself to the Administration Committee. The Secretary General answered her on 1 September 1994 that since she wanted time to make arrangements for her family to go back to the Argentine he was confirming his offer of only twelve months' extension. In a letter of 7 October 1994 to the Secretary General she acknowledged his offer, pressed her claim to a hearing by the Committee and asked him to put her case to the Appeals Board.

4. The Secretary General refused her leave to speak to the Committee. Before he had got a report from the Appeals Board he wrote her a letter dated 7 February 1995 again offering, with the agreement of the Argentine Government department, to grant her the extension to 28 January 1996. He also promoted her to grade A4 as senior technical officer. She submitted a brief to the Appeals Board on 29 March 1995. In his reply of 21 April 1995 thereto the Secretary General explained his decision by reference to the terms of her appointment and to the Staff Regulations and Staff Rules. In a "confidential" minute of 11 May 1995 to the Board he said that he had discussed the matter of renewal of her appointment with the members of the Administration Committee. He added that, as he had already told her in a conversation in 1994, the quality of her work did not warrant renewal. In a report dated 2 June 1995 the Appeals Board concluded that the Secretary General still had to seek formal advice from the Committee. He did so on 23 June 1995. In a minute of 4 July 1995 to the Secretary General the chairman of the Appeals Board said that, that being so, the case was closed and the Secretary General had only to take his final decision. By a letter of 10 July 1995 the Secretary General informed the complainant that he was confirming his earlier decision. That is the decision she is impugning.

5. Though the Secretary General enjoys broad discretion over extension, his exercise of it is still subject to review. The Tribunal will indeed set his decision aside if it was taken *ultra vires* or in breach of a formal or procedural rule, or if there was a mistake of fact or of law, or if some material fact was neglected or a plainly wrong conclusion is drawn from the evidence, or there was misuse of authority. Here indeed the complainant is pleading several such flaws.

6. She submits that the Secretary General failed to state reasons for his "decision" of 12 July 1994; that, that

"decision" being irrevocable, the later one of 1 September 1994, which offered reasons that were merely formal and general in character, did not remove the flaw; and that the minute of 21 April 1995 that the Secretary General put to the Appeals Committee showed the same flaw.

7. The Tribunal is satisfied on the evidence that there is no merit in the plea. For one thing, there was not, as the complainant contends, anything "irrevocable" about the minute of 12 July 1994. It contains no decision at all, let alone a final one, since it merely tells her that the Secretary General will not be extending her appointment by more than a year. His minute of 1 September 1994 may not be treated as a decision either: it simply confirms his offer of a reappointment of only 12 months and asks her to say whether she accepts. At all events there were two reasons for his offer of the twelve-month extension: one was his commitment to stricter application of the material rules and the other his wish to make an exception and, as she had asked, let her have time to make arrangements for her family's return to the Argentine. Being expressly related to the complainant's own circumstances, those reasons were neither formal nor general.

8. In a "confidential" minute of 11 May 1995 in answer to the complainant's comments on his reply to her internal appeal the Secretary General remarked that though he had agreed to extend her appointment by one year "the quality of her work did not merit a renewal" at all; and though his earlier letters had not said so he told her so in the course of a conversation in 1994 when he had warned her he was not minded to grant her any extension whatever. The Tribunal sees no reason to question that statement.

9. The conclusion is that the complainant was sufficiently informed of the Secretary General's reasons for letting her have only another year and so was able to argue her case. Moreover, as is said in 17 and 18 below, she had the opportunity of answering the unfavourable appraisal of her work. The plea fails.

10. She pleads several breaches of due process, the first being that the Secretary General failed to consult the Administration Committee properly: no report by the Committee was entered in the case records and in any event the Secretary General did not consult it before taking his decision of 12 July 1994.

11. That plea too fails. It is true that circular 187 requires under (c) that the "Secretary General will consult the official's Director and the official's home Administration before deciding, after seeking the advice of the Administration Committee, whether the official should be reappointed". As was said in 7 above, however, the Secretary General's minutes of 12 July and 1 September 1994 did not amount to decisions to reappoint her: they simply state his willingness to extend her appointment by one year and invite her to say whether she accepts. The actual decision did not come until he wrote her his letter of 7 February 1995, "with the agreement", as he put it, "of your home Administration". And it is plain from the minutes of the Administration Committee's meeting of 23 June 1995 that the Committee had been consulted on 24 November 1994 and had then given an opinion on the complainant's reappointment. So the formal requirement of consultation was met before the Secretary General took his decision of 7 February 1995.

12. The complainant further objects to breach of her right to be assisted or represented by counsel in the internal appeal proceedings. But she is mistaken. Staff Rule 29.2(d), on the procedure before the Appeals Board, says that "the appellant may be represented or assisted by any member of the Secretariat". In refusing the complainant's application the Secretary General was merely applying the rules, and there was no breach of due process since it was still open to her to seek help from a fellow staff member.

13. The complainant pleads breach of Rule 31.3 in the Secretary General's failure to consult the Staff Committee. She points out that the Administration is bound to seek the Committee's advice on matters of general interest to the staff or arising out of the Staff Regulations and Rules, but failed to seek such advice on the policy of renewal.

14. The plea cannot be sustained. A minute which the complainant herself has submitted as evidence and which the chairman of the Staff Committee wrote to the Secretary General shows that that Committee knew of the proposal to limit the reappointment of technical officers to five years. It made comments on that and other subjects to the Policy Commission at its 31st Session in June 1994 and to the Council at its 83rd and 84th Sessions in the same month, and the texts are in the case records.

15. Her other pleas bear on the merits. One is that the impugned decision flouted those that the Council had itself taken at those sessions in June 1994. In her submission the Council did not approve the Secretary General's proposals for changing the policy of reappointment; instead it asked him to propose transitional measures; so his

decision shows a mistake of law insofar as it purports to rest on decisions of the Council's.

16. She is thereby misreading the relevant records of the sittings the Council held from 20 to 22 June 1994. Point 270 of those records says, about the total duration of appointments of technical staff, that the Secretary General announced his intention to apply more strictly the rule in the Manual which provided for extension beyond five years only in exceptional cases, and that the Policy Commission broadly agreed. There is no evidence to suggest that the Council took any decision whatever about reappointment; so there can be no question of the Secretary General's failure to comply with any such decision.

17. The complainant says that the Secretary General's appraisal of her performance was plainly mistaken.

18. In a case of non-renewal the Tribunal will be especially cautious in reviewing any appraisal by a supervisor of the staff member's performance: the supervisor has the technical background and the knowledge of the staff member's work and personality that qualify him better than anyone else to advise the head of the secretariat on that score. Some appraisals of the complainant's performance are not good. As she admits, though her first-level supervisor saw some merit in her work he found her lacking in the "special training and skills" her post required. And though she does produce letters of commendation from several quarters, it is not for the Tribunal to choose between conflicting assessments: it is the executive authority that has discretion to do so. Besides, circular 187 says in (b) that "applications for renewal will be considered only in the case of particularly meritorious officials". In the absence of evidence to suggest that the complainant was such an official there was no obvious error in rating her performance.

19. The complainant takes the Secretary General to task for departing from a custom of extending five-year appointments and, in a subsidiary plea, for breach of certain general precepts which she describes as the defendant's "duty of fair treatment" and her own "career prospects" and "rightful expectations".

20. She relies on what she says was the Council's established practice of granting another five years to nearly everyone who wanted them provided that the "home Administration" gave its assent.

21. To be binding in law a practice must be so constant and consistent as to reflect a general rule: see for example Judgment 1080 (*in re* Barahona No. 3 and others) under 7. Contrary to what the complainant contends, the *ad hoc* working party never expressly cited any general and consistent practice in the matter of renewal. At all events, an organisation may always put an end to a practice provided it does not thereby infringe any provision of the rules and the change is properly announced and not brought in retroactively: see Judgment 767 (*in re* Cachelin) under 9. That is just what the Council did. As it points out, its Secretary General proposed in a report of April 1994 on reform of the secretariat that a single five-year appointment should be the rule for officials in category A, who should get an extension only in exceptional circumstances and even then for only up to two years. He repeated that proposal in addressing the Policy Commission and the Council in June 1994. His proposal plainly squared, too, both with Rule 9.1 and with (b) of circular 187, which reads:

"Applications for renewal will be considered only in the case of particularly meritorious officials whose reappointment would be in the best interest of the Council."

So all staff in category A had reason to expect the Council to be applying to them the new policy thus announced, which superseded the one followed till then, including of course any practice implementing it. The complainant's plea is rejected.

22. Insofar as the refusal of more than one year's extension was warranted in law the Council did not act in breach of any expectation she may have had to the grant of her request for five years.

23. She is mistaken in pleading breach of the Council's "duty of fair treatment". Before he took his final decision the Secretary General was at pains to see her and tell her what he had in mind; he offered her a shorter extension; and he saw her again at the end of 1994. He gave her one year to let her arrange for the return of her family to Argentina. The conclusion is that the attitude of the Secretary General, whose good faith she herself does not challenge, cannot be deemed to constitute breach of any duty of fair treatment he owed her.

24. Nor was there any breach of her "career prospects". Career prospects are not something that exist independently. If the refusal of renewal is lawful, so is the ending of the career. Since the complainant got a renewal for one year, her career with the Council ended lawfully on expiry of that year. For her plea to succeed the

decision to extend her appointment would have to be set aside. As for her claims to reinstatement or, failing that, to an award of damages, they can likewise succeed only if the decision is set aside.

25. The plea of breach of equal treatment is disallowed. A strong line of precedent says that for that plea to succeed there must be different treatment of officials who are in like case both in fact and in law. The complainant is protesting at the Council's failure to apply to technical officers like herself a rule it has applied to directors. But staff in the two categories are not in like case either in fact or in law.

26. There is greater cogency in her plea of misuse of authority. The real reason for the impugned decision, she says, was the Secretary General's plan to shift her duties as public relations officer to the new head of his own office and so release budget funds to finance a post for a special assistant for himself.

27. There will be misuse of authority when an administration seeks to attain some purpose other than those which the authority is supposed to serve or, to put it more broadly, one that is irrelevant to the organisation's interests at large. So the plea cannot succeed without proof of the unlawful purpose which the exercise of discretion -- here the renewal -- was intended to serve. The charge may not be presumed but must be proved.

28. In support of her plea the complainant points to the Secretary General's whole attitude; he said nothing of having his "special assistant", i.e. the head of his own office take over her duties, when that was obviously the purpose of his decision.

29. The evidence does not bear out the charge. In a letter of 27 September 1995 the Secretary General informed the heads of delegation on the Council that the post of senior technical officer in the Division of Human Resources Development Services was to become vacant on 28 January 1996 and he asked them to name candidates. That point alone, which the complainant cannot challenge, suffices to answer what she says about the post in the Secretary General's office.

30. She makes further allegations in support of her plea of misuse of authority: the Secretary General's explanations were merely formal, and inconsistent and clearly wrong besides; he refused to consult the Administration Committee; and his "decision" of 12 July 1994 was "plainly irreceivable". The Tribunal has already rejected her allegations as immaterial or devoid of merit. What she says is mere conjecture, and she offers not a shred of evidence in support. That is plain from the phrases she uses: "it is conceivable", "it may well be", "the restrictions imposed by member States may be genuine in general", and so forth. There being no proof of misuse of authority, nor any need to entertain her other arguments, which are either irrelevant or superfluous, the plea fails.

31. Since her main claim to the quashing of the decision must fail, so do her claims to awards of damages and costs.

DECISION

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner

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