

## EIGHTY-SEVENTH SESSION

### *In re Harada*

#### Judgment 1863

The Administrative Tribunal,

Considering the complaint filed by Mrs Catherine Sunan Harada against the Food and Agriculture Organization of the United Nations (FAO) on 4 May 1998 and corrected on 1 July, the FAO's reply of 15 October 1998, the complainant's rejoinder of 5 February 1999 and the Organization's surrejoinder of 20 April 1999;

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

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 American citizen born in 1946, has worked for FAO on several occasions and with various types of employment status since 1981. On 4 June 1991, her short-term contract as audio-typist at grade G.3 in the Translation Service was converted to a fixed-term contract until 31 December 1991. It was subsequently renewed.

On 4 July 1994 she was transferred to the Sales Unit of the Distribution and Sales Section. Her work consisted mainly of processing orders for publications and preparing the corresponding invoices. In a memorandum dated 8 February 1996, she complained to the chief *ad interim* of the Production and Distribution Branch that it was not possible for her to use the computer invoicing programme, which meant that her work was very time-consuming. She therefore requested that her productivity not be compared to that of her colleagues, who had access to the programme. She also observed that she had never officially been transferred to the post that she was occupying. The chief *ad interim* replied on 23 February that the invoicing programme was available on her computer and that she should use it for her work; that her productivity was not compared with that of her colleagues, since the work required to process an order could vary considerably, but that the backlog in processing orders was a matter of concern; and that the Division Director would contact her concerning her post.

By a letter of 28 June 1996, the Director of the Personnel Division informed her that over 200 posts would be abolished. He did not state whether the complainant's post was concerned, but assured her that every effort was being made to identify a suitable post for her.

In accordance with Manual paragraph 308.411, staff members at grades G.1 to G.6 benefit from a salary increment to the next step within the grade every two years if their service is satisfactory. The complainant should normally have received such an increment as from 1 November 1996. In a memorandum of 21 August, the Director of the Information Division communicated to her a memorandum from her supervisor, of the same date, which criticised the backlog of outstanding orders, her difficulties in team-working, her prolonged absences during working hours and her lack of computer skills. The Director informed her that she was recommending that the Director of the Personnel Division withhold the increment until her services were considered satisfactory. The complainant replied in detail to these criticisms by a memorandum of 25 September. On 16 October, the Director of the Information Division informed her that she had maintained her decision and on the same day, she requested the Director of the Personnel Division to withhold the increment.

On 24 October 1996 the Director of the Personnel Division informed the complainant that he had accepted the recommendation to withhold her increment. With reference to that decision and the abolition of her post, he informed her on 5 November that her fixed-term contract which was due to expire on 31 December 1996 would not be renewed.

The complainant appealed to the Director-General against these two decisions on 20 January 1997. On 19 March, she lodged an appeal with the Appeals Committee. The next day, the Assistant Director-General in charge of Administration and Finance dismissed her first appeal on behalf of the Director-General. In its report of 17 November, the Appeals Committee recommended that the Director-General dismiss her second appeal, which he

did by a letter of 3 February 1998. That is the impugned decision.

B. The complainant submits that she had not worked in the post in the Translation Service for over two years and contends that she was deliberately left in a post that was destined to be abolished and that this constituted discrimination. She says that the Director of the Personnel Division showed bad faith in assuring her that every effort would be made to find her another post.

She contends that, in accordance with Manual paragraph 308.416, separation can only be justified where service has been reported as unsatisfactory "for two successive qualifying periods". She says that the Director-General therefore made an error of law by deciding not to renew her contract when her increment had been withheld for one qualifying period only. She adds that the withholding of an increment is normally temporary, thereby allowing the official to improve, but that no such chance was given to her. She considers that she was a victim of personal prejudice and explains that her productivity could not be compared to that of her colleagues because she did not have access to the computer invoicing programme, she had never been asked to work overtime and had been absent on sick leave for long periods without being replaced. She adds that no criticisms had been made of her performance since her transfer to the Sales Unit.

The complainant seeks the quashing of the impugned decision, her reinstatement as of 1 January 1997 and the granting of her within-grade salary increment.

C. In its reply, the Organization states that in 1994 the complainant was transferred together with her post from the Translation Service to the Distribution and Sales Section. It explains that the complainant's post was abolished on 31 July 1996 and that she was placed on a temporary post in the Sales Unit with the same functions that she had been performing since July 1994. The efforts made to find her a suitable post were discontinued when her supervisor considered her work to be unsatisfactory. The decision not to renew her contract was therefore based on her poor performance.

The Organization states that Manual paragraph 308.416 only concerns the within-grade salary increment and that it does not seek to qualify other provisions of the Manual, including those governing the expiration of fixed-term appointments.

D. In her rejoinder, the complainant challenges the allegation made by the Organization that she was transferred with her post to the Distribution and Sales Section. She submits that the letter of the Director of the Personnel Division of 5 November 1996 clearly states that the decision not to renew her appointment was based, not only on the withholding of her within-grade increment, but also on the abolition of her post.

She refutes the Organization's interpretation of Manual paragraph 308.416 and contends that it also applies to staff members holding fixed-term contracts. She adds that the problem of productivity was generalised throughout the Sales Unit due to the poor organisation of work.

The complainant submits that the criticisms made by the Administration served as "pretexts for withholding [her within-grade increment] which in turn was used as an argument for terminating [her] appointment since a post that [she] was not occupying was abolished". Finally, she states that Manual paragraph 314.222 was not respected, because she never received from her Division Director a written statement setting forth the specific reasons for the envisaged action.

E. In its surrejoinder, the Organization submits that the complainant retained her post until it was abolished. It observes that it is not unusual for an official to hold a post while performing tasks that do not correspond to the post description.

The Organization observes that Manual paragraph 314.222 is in the context of termination for unsatisfactory service. However, the complainant's contract came to an end, not because of dismissal, but because her contract expired.

## CONSIDERATIONS

1. After working as a typist on various short-term appointments at a daily rate, the complainant was given a short-term (monthly rate) appointment on 4 December 1990 to 3 June 1991 in the Translation Service. On 4 June 1991 her appointment was converted to a fixed-term appointment and extended to 31 December 1991, when it was

subsequently renewed.

2. She was transferred on 4 July 1994 to the Sales Unit of the Distribution and Sales Section where she processed orders for publications and prepared invoices.
3. On 8 February 1996 she complained to her supervisor about her duties and in particular about not being allowed to use the computer invoicing programme. He replied on 23 February 1996 that it was available on her computer and she should be using it, since she had received training with her colleagues; and she was advised if there were difficulties to consult her group leader. He said that while her productivity was not being compared numerically to that of her colleagues he was concerned about the level of backlog of orders.
4. On 28 June 1996 the Director of the Personnel Division informed her of the abolition of posts but she was assured that every effort would be made to redeploy her. The Organization states that "she was then placed on a temporary post".
5. In August 1996, the Director of the Information Division told the complainant that she was recommending the withholding of her within-grade salary increment due on 1 November 1996 in view of her unsatisfactory performance over the last two years. Various shortcomings were listed: a backlog of orders, prolonged absences during working hours, difficulties in team-working and a lack of computer skills.
6. The complainant contested the criticisms made against her in a memorandum of 25 September to the Director of the Information Division who met her twice to discuss the matter. The complainant also had the opportunity to discuss the matter with the personnel officer of the Management Support Unit, the chief of that unit and her supervisor. On 16 October 1996 the Director of the Information Division replied to the points made in the complainant's memorandum and confirmed that she would recommend the withholding of her salary increment to the Director of the Personnel Division.
7. On 24 October the Director of Personnel informed her of his decision to withhold her increment. Subsequently, on 5 November he informed her that her contract, due to expire on 31 December 1996, would not be renewed.
8. The complainant appealed to the Director-General against both decisions and on 20 March 1997 that appeal was dismissed. The previous day, she had appealed to the Appeals Committee. In its report of 17 November 1997 it recommended rejecting her appeal. The Director-General endorsed the opinion of the Committee and on 3 February 1998 dismissed her appeal as unfounded. That is the decision impugned.
9. The relief sought by the complainant is the quashing of the decision of 3 February 1998, her reinstatement as of 1 January 1997 and the granting of her within-grade salary increment.
10. The complainant claims that neither the abolition of her post nor the withholding of her increment were valid reasons for the non-renewal of her contract. She claims she had not worked on the abolished post in the Translation Service for two-and-a-half years; and, she was working on a post in the Sales Unit that was not abolished and that "needed to be filled". She concludes that the Administration showed discrimination against her by leaving her on a post "of no purpose" which was destined to be abolished. The assurance by the Director of the Personnel Division that every effort was being made to identify a suitable post for her could not have been made in good faith because no steps were taken to transfer her to the post whose duties she had been performing. Also, the provisions of the Manual concerning the abolition of posts or the reduction of staff were not applied in her case.
11. She claims that under Manual paragraph 308.416, it is provided that only unsatisfactory service for two successive qualifying periods justifies the "transfer, demotion or separation" of a staff member. She had received salary increments up to the last qualifying period. It was therefore a mistake of law to decide on the non-renewal of her contract after the withholding of her increment for only one period. The withholding of a within-grade salary increment is not a definitive refusal as it can be granted later in cases of improvement.
12. In the complainant's view the withholding of her increment was unjustified. She seeks to refute each point put forward in 1996 by the Director of the Information Division. It was unreasonable to compare her productivity to that of her colleagues who were allowed to use the computer invoicing programme and worked overtime; she was not asked to work overtime and was absent on authorised sick leave for long periods without being replaced. Her work must have been satisfactory, otherwise she would not have been kept on in the Sales Unit for over two-and-a-half years. Further, her supervisors would have asked for her redeployment or, at the very least, have given her

warnings and criticised her.

13. The Organization points out that she was separated on the expiration of her fixed-term contract in accordance with Staff Rule 302.907 which provides:

"A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. Separation as a result of the expiration of any such appointment shall not be regarded as a termination of appointment within the meaning of the Staff Regulations and Staff Rules."

The reason for non-renewal was unsatisfactory work performance and this was explained to the complainant who was given an opportunity to reply. Manual paragraph 308.416, which is a sub-paragraph of 308.41 concerning within-grade salary increments in general, does no more than provide a separate basis for transferring, demoting or separating a staff member where there are two successive unsatisfactory reports. It does not affect the power not to renew a contract under Staff Rule 302.907.

14. Regarding the abolition of her post, the FAO states that it was effectively abolished on 31 July 1996. In accordance with the Organization's policy to seek the redeployment of staff, the complainant was placed on a temporary post until 31 December 1996, the date her contract was due to expire. Efforts were being made to identify posts for her but were discontinued after she received an unsatisfactory appraisal of her work performance. The decision was then made not to renew her fixed-term contract.

15. The Tribunal is of the opinion that the non-renewal of the complainant's contract falls within the scope of Staff Rule 302.907 entitled "Expiration of fixed-term appointments". The provisions of Manual paragraph 308.416 which refer to two successive unsatisfactory reports in relation to the granting of increments do not limit the application of Staff Rule 302.907 in its own right. The non-renewal of the complainant's contract was not based on the abolition of her post, therefore the Manual provisions relative to abolition of post or reduction of staff do not apply to her.

16. The complainant's allegation that the abolition of her post was discriminatory is not supported by evidence. Moreover, her contention that the assurances about finding her another post were not made in good faith remains unsubstantiated.

17. In relation to the salary increments, the Tribunal is satisfied that the complainant was given the opportunity to put forward her point of view and to make sure that her supervisors were aware of it. But having allowed the complainant ample opportunity to make her point, her supervisors made a final judgment, as they were entitled to do, on her work performance. There is no evidence of bias or unfairness in the procedure followed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot  
Mella Carroll  
James K. Hugessen

Catherine Comtet