

EIGHTY-SEVENTH SESSION

In re Sharaf (Nos. 1, 2, 3 and 4)

Judgment 1882

The Administrative Tribunal,

Considering the four complaints filed by Mrs Maha Akram Sharaf against the Food and Agriculture Organization of the United Nations (FAO) on 15 December 1997 and corrected on 5 April 1998, the FAO's reply of 23 July and the complainant's letter of 11 November 1998 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII 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 is of Egyptian nationality and was born in 1952. She joined the FAO's Regional Office for the Near East, in Cairo, on 1 February 1992 on a one-year contract. She was employed as a telephone operator at grade G.3. The FAO confirmed her appointment at the end of the probationary period and extended it to the end of 1993 and then to 31 December 1995.

By a memorandum of 15 February 1995 the FAO's Regional Representative in Cairo told her that having reviewed her personal file and the "essential qualifications" listed in her job description she was to sit an English language test in June at level "C".

In order to obtain level "C" she sat the proficiency test three times. She took it on 29 June 1995, while unwell, and failed it, her knowledge of English being rated "inadequate". On 8 October she sat it again, but only attained level "B" instead of the higher level "C" required by her job description. The Representative gave her a third and last chance to take the test on 12 November, but she did not pass. The complainant says she was not well on that occasion either, went to hospital later in the day, and sent in a medical certificate bearing that date.

After her unsuccessful first attempt at the test the Regional Representative warned her in a memorandum of 4 September 1995 that failure to attain the required language level might "jeopardize" the extension of her fixed-term contract and could result in her separation on 31 December 1995 on the expiry of her contract. After her second attempt he wrote to her on 9 November, repeated his warning and informed her that her within-grade step increase was being withheld since her performance had not improved and had been "negatively affected" by her poor command of English.

As she failed the third test, a personnel officer from the Personnel Policy and Entitlements Service at headquarters, in Rome, sent her a letter dated 27 November, which she received on 30 November, informing her that her contract, due to expire on 31 December 1995, would not be renewed as she had not reached the level of English required to discharge the duties of her post. That is the decision under challenge. She wrote back to the personnel officer on 10 December protesting against the non-renewal of her contract. His reply of 22 December confirmed that she would be separated on 31 December under Staff Rule 302.907.

On 26 December the complainant asked for sick leave from 27 December to 2 January 1996. The Medical Service gave its agreement and the effective date of separation was deferred to 2 January. An exchange of correspondence ensued relating to non-extension, separation formalities and sick leave.

A medical officer in Rome wrote to her on 15 July 1996 informing her that as she was separated from the Organization it was not possible to take into consideration a medical certificate from her covering the period 29 November 1995 to 16 May 1996, dated 16 May 1996 but received by the Medical Service on 10 May 1996. In a reply of 2 August 1996 she informed the officer that before the end of her contract she had submitted to the Regional Office in Cairo a medical certificate dated 18 November 1995 and covering a period of six months. She also sent the Chief Medical Officer in Rome a medical certificate dated 16 May for four months and one dated 25

July 1996 for a year.

She received payment of a withdrawal settlement from the United Nations Joint Staff Pension Fund on 12 September 1996, but further correspondence followed in 1997 between the complainant and the Pension Unit at FAO headquarters, as it appeared that the Unit had not received the necessary completed "Pension Fund Payment Instructions" form from her.

On 16 June 1997 the Assistant Director-General in charge of Administration and Finance told her that a letter from her dated 29 May 1997 would be treated as an appeal to the Director-General under Manual section 331. He wrote again to her on 28 July 1997, on the Director-General's behalf, dismissing her appeal as irreceivable and devoid of merit.

The complainant wrote to the secretary of the Appeals Committee on 5 August 1997 and asked how to proceed with an appeal against the refusal of Van Breda, the administrator of the staff health insurance, to reimburse certain dental expenses. In a letter of 27 August the secretary replied that the letter she might challenge, within sixty days of receiving it, was the one of 28 July constituting the Director-General's reply to her appeal. The Assistant Director-General in charge of Administration and Finance wrote to her in similar terms on 15 October 1997. She filed her four complaints with the Tribunal on 15 December 1997.

B. The complainant opposes the non-renewal of her fixed-term contract. She pleads that she was "subjected to injustice" on the part of her supervisors in Cairo, and that as she had stood up to them they wanted her to go. For four years she had been performing the same duties with no complaints about her ability to do her work or any criticism about her ability to communicate in English.

Her first complaint centres on the three English tests that she sat. She maintains that her supervisors treated her unfairly and she cites examples. She was ill for the first exam on 29 June 1995, but the Regional Representative would not postpone it. Neither would he postpone the third one on 12 November; he gave her only two days' notice and she felt ill on that day too. With regard to the second exam on 8 October, she alleges that the "test record" form sent to her giving her rating as only level "B" was not the original result, and did not include the marks for the "reading" and "questions" parts of the test.

She finds it unfair that of the eleven staff members who had previously failed the exam she was the only one asked to sit it for the third time, and the only one who was separated from the Organization. Moreover, the FAO, she asserts, arranged free English lessons for her colleagues who had not passed the test.

Her second complaint focuses on the medical certificates she provided during her illness. She pleads that the Regional Office did not forward all of them to headquarters in Rome. Certificates dated 12 and 19 November 1995 were not sent on. She therefore forwarded copies of them to the Chief Medical Officer in Rome, which she was able to do, she states, as she was still in the employ of the FAO and had not signed her separation form or pension form.

In her third complaint she objects to further "injustice" from her supervisors with regard to her pension forms. The Representative, she alleges, refused to let her sign her separation and pension forms, because he "wanted" her separation, but did not want her to receive money due to her from the FAO. The separation form was sent to headquarters without her signature: she argues that she was therefore in service until the end of 1996.

Her fourth complaint lists the appeals that she sent to the Director-General and to the Appeals Committee. On 12 December 1995 she sent an appeal to the Director-General against her separation, but received no reply. She sent him more than ten letters between 1995 and 1997.

She affirms that on 29 May 1997 she wrote to the Appeals Committee, with a copy to the Director-General. That letter was an appeal to the Committee, but the Assistant Director-General in charge of Administration and Finance told her by a reply of 16 June 1997 that it had been decided to treat it as an appeal to the Director-General. By his letter of 28 July informing her that the Director-General had dismissed that appeal he told her she could appeal against that decision to the Committee within sixty days. She submits that she sent one dated 10 August 1997 by registered mail, with all her documents, and that it constituted her second appeal to the Committee. Having received no reply she had come to the Tribunal.

She seeks the renewal of her appointment, pay for the years 1996 to 1998 "or more", a monthly pension or, failing

that, a suitable post in a United Nations agency in Cairo.

C. The complainant has submitted four complaints to the Tribunal stemming from the same events and in its reply the Organization asks for their joinder.

The Organization argues that the four complaints are irreceivable under Article VII(1) of the Statute of the Tribunal for failure to exhaust the internal means of redress. On 28 July 1997 the Assistant Director-General in charge of Administration and Finance had informed her that her appeal to the Director-General of 29 May was dismissed because it was out of time and devoid of merit. He said that his letter constituted a reply from the Director-General under Manual paragraph 331.311, and under Staff Rule 303.131 she could appeal to the Appeals Committee within sixty days of receiving it. Instead of filing her internal appeal she has come directly to the Tribunal.

The FAO acknowledges that the complainant had written to the Committee on 5 August 1997 to ask it to help her in her "problem with Van Breda". The secretary of the Committee informed her by a letter of 27 August 1997 that it was the letter of 28 July that she might appeal against, within sixty days of receipt, as that letter constituted the Director-General's reply to her appeal.

The Organization assumes that in all four complaints, the complainant is seeking redress for the decision not to renew her contract, communicated to her by the letter of 27 November 1995. It submits that it did not renew her contract as her performance was unsatisfactory: in particular, her knowledge of English was insufficient to allow her to perform the duties of her post and this was evident from her failing the test in English three times.

The FAO observes that in her second complaint she is seeking extension of her contract "to allow her to exhaust her sick leave entitlements". It produces her sick leave record showing that she was on authorised sick leave for various periods up to 2 January 1996. The application for six months' sick leave, dated 18 November, and which the complainant produces as evidence for the Tribunal, does not figure on the list and seems to be "at odds with the applications received by the Medical Service, for shorter periods". It rejects the complainant's allegation that the Regional Office did not forward the medical certificates to headquarters.

In her third complaint she is protesting at the way the FAO handled her separation, terminal emoluments and pension formalities. From the incidents mentioned in her complaint it is not clear what redress she is seeking or which administrative decisions she is seeking to reverse.

The Organization wrote to the complainant several times and told her that her terminal entitlements were being withheld pending an investigation by Van Breda into a claim she made for dental expenses. They have now been paid to her.

She challenges "the handling of her separation, including terminal emoluments and payment of medical bills, and even about not receiving replies to her letters and appeals".

The Organization takes note of the letter dated 10 August 1997 to the Appeals Committee produced by the complainant. It assumes she sent it before she received the letter of 28 July from the Assistant Director-General communicating to her the dismissal of her appeal to the Director-General.

CONSIDERATIONS

1. The complainant joined the FAO's Regional Office for the Near East in Cairo on 1 February 1992 as a telephone operator at grade G.3 on a fixed-term contract for one year. It was later extended to 31 December 1993 and for a further two years to 31 December 1995.
2. By a letter dated 27 November 1995, and received on 30 November, a personnel officer at headquarters wrote to the complainant regarding an English language examination which she had taken on 12 November 1995. He informed her that she had failed to show the language knowledge required for the discharge of her duties and that her fixed-term appointment, which was due to expire on 31 December 1995, could not be extended. She replied on 10 December requesting renewal of her contract and on 12 December she wrote to the Director-General asking him to continue her employment. However on 22 December 1995 the personnel officer confirmed the decision of 27 November.
3. On 26 December 1995 the complainant applied for sick leave from 27 December 1995 to 2 January 1996. It was

approved by the Medical Service and the effective date of her separation was postponed to 2 January.

4. On 10 May 1996 the Medical Service received an application for sick leave from 29 November 1995 to 16 May 1996. It was refused. A further application, also dated 16 May, for sick leave from 16 May to 16 September 1996 was also refused.

5. On 24 May 1996 the complainant wrote to the personnel officer claiming to have been sick at the time of her separation. She repeated that claim in a letter to him of 2 August 1996. She also enquired about salary and reimbursement of medical claims by Van Breda, the administrator of the staff health insurance. Over the following months she wrote several letters to headquarters, including one requesting compensation, which was refused.

6. On 29 May 1997 the complainant wrote to the Appeals Committee setting out all her complaints concerning the English examinations, her unfair treatment while sick and her separation. The secretary of the Committee passed the letter to the Assistant Director-General in charge of Administration and Finance who replied on 16 June 1997 saying that her letter of 29 May would be treated as an appeal to the Director-General under Manual section 331.

7. By a letter of 28 July 1997 the Assistant Director-General informed the complainant that her appeal had been dismissed as irreceivable and unfounded. He dealt with her complaints about unfair treatment, the English examinations, sick leave applications, separation and the medical claims submitted to Van Breda. He added that his letter constituted the Director-General's reply as provided for in Manual paragraph 331.311; if she wished to appeal against that decision to the Appeals Committee she might do so in accordance with Staff Rule 303.131 and Manual section 331 within sixty days of receipt of the letter.

8. The complainant wrote on 5 August 1997 to the Appeals Committee asking for help with her problem with Van Breda. She also wrote to the Committee on 10 August 1997 detailing problems about her separation and pension forms, troubles with Van Breda and about the English language examinations. She asked for help to obtain a payment of 485.90 United States dollars from headquarters in Rome.

9. On 27 August 1997 the secretary of the Appeals Committee acknowledged receipt of her letter of 5 August and told her that the letter of 28 July from the Assistant Director-General constituted the reply to her appeal to the Director-General. If she wished to challenge that decision she could file an appeal with the Appeals Committee within sixty days of receipt. He enclosed the Manual section 331 about the appeals procedure.

10. The complainant lodged four complaints with the Tribunal on 15 December 1997. In her first three complaints she identifies the letter of 27 November 1995, received on 30 November 1995, as the decision impugned.

11. Three of her complaints are as follows: the first, about the three English language examinations she was asked to sit; the second, about unfair treatment when she was sick; and the third, about her treatment in connection with the separation and pension forms. No specific redress is claimed in those three complaints.

12. In her fourth complaint she seeks renewal of her contract, salary from 1 January 1996 until 1998 or beyond, a monthly pension ("salary") or alternatively recruitment to any suitable post in a United Nations agency in Cairo. In this complaint she merely sets out details of different letters sent at different times without advancing any arguments; she concludes by saying that she sent a second appeal to the Appeals Committee by a letter of 10 August 1997 to which she received no reply and has therefore come to the Tribunal. She identified the first appeal as the letter of 29 May 1997.

13. Since all four complaints are based on the same subject matter, the Organization has asked the Tribunal to join them, which the Tribunal agrees to do.

14. The Organization claims that under Article VII of the Tribunal's Statute, none of the complaints is receivable because the complainant has failed to exhaust the internal means of redress. The FAO claims that a reply to her letter of 10 August 1997 was unnecessary because it was presumably sent to the Appeals Committee before she received the letter of 28 July, and in any case before she received the reply from the Committee's secretary of 27 August 1997 to her letter of 5 August.

15. By waiving her right to file a rejoinder the complainant has chosen not to contest the Organization's argument regarding irreceivability.

16. The Tribunal considers that the complainant was clearly informed in the letter of 27 August 1997 that the letter of 28 July 1997 was the reply to her appeal to the Director-General and that if she wished she could file an appeal within sixty days of receipt of that letter. She was given the necessary information for the presentation of her appeal to the Committee. She was again reminded of this in a letter of 15 October 1997, from the Assistant Director-General. She chose not to follow that route. Despite being a prolific and lengthy letter writer, she did not say in reply to either letter that she considered she had already lodged an appeal with the Appeals Committee by her letter of 10 August 1997. In fact, she did not reply to the letter of 27 August from the secretary of the Committee.

17. In any event, it is the letter of 29 May 1997 that she identifies in her fourth complaint as remaining unanswered by the Organization. Yet this was answered in detail on 28 July 1997.

18. The Tribunal is satisfied that the first three complaints are irreceivable because of failure to exhaust the internal means of redress, and the fourth complaint is dismissed as unfounded.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
Mark Fernando

Catherine Comtet