

EIGHTY-EIGHTH SESSION

In re Ndhlovu

Judgment 1898

The Administrative Tribunal,

Considering the complaint filed by Mr Cephas Ndhlovu against the Food and Agriculture Organization of the United Nations (FAO) on 6 July 1998 and corrected on 13 December 1998, the FAO's reply of 16 April 1999 and the complainant's waiver of his right to rejoin;

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

Having examined the written submissions 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. The complainant, a citizen of Zimbabwe born in 1959, entered the service of the FAO on 16 January 1996 on a "casual labour" contract basis as an accounts clerk/administrative assistant at the Sub-Regional Office for Southern and East Africa, in Harare. He was given a series of such short-term contracts at grade G.5. The first contract ran from 16 January to 15 April 1996, and was followed by several others, with no break in service. The last one covered the period from 1 December 1996 to 31 January 1997.

In a letter of 4 January 1996 to the complainant, the acting Sub-Regional Representative told him his employment would be on a casual labour basis and would be probationary until it was confirmed by FAO headquarters; it was also subject to satisfactory performance. Each contract he received included the clause: "Should dismissal for misconduct or unsatisfactory performance be deemed necessary, this contract may be terminated by the Organization with immediate effect upon written notice".

Because his services were not deemed satisfactory the complainant's contract was not renewed beyond 31 January 1997. He therefore wrote a letter of appeal dated 7 February 1997 to the Director-General challenging his termination. In the letter he made comments about the management at the Sub-Regional Office and asked for a review of his situation. On 7 May the Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf. He told the complainant that the Organization had never indicated to him that he would be offered the job on a permanent basis and that, in view of problems concerning his work, there were no valid grounds for extending his contract. Nevertheless, he informed the complainant that the FAO would be treating his total period of service as a regular appointment at grade G.5 under a fixed-term contract. Payments due to him for that period had been calculated accordingly and he would receive an amount of 12,011.06 Zimbabwean dollars (approximately 1,053 United States dollars), representing the difference between what he had already been paid and what he would have received in terms of salary and annual leave as a G.5 fixed-term staff member.

The complainant was not satisfied with the sum proposed and on 26 June 1997 appealed to the Appeals Committee. However, he subsequently accepted the amount offered. He addressed a further letter to the Committee on 31 July specifying that by way of redress he wanted the Organization to reinstate him and treat him as a permanent staff member at grade G.5 from 16 January 1996. In a report of 12 February 1998 the Committee recommended rejecting his appeal, a recommendation endorsed by the Director-General in a letter to the complainant dated 15 April 1998. That is the decision he now impugns.

B. The complainant states that the FAO infringed the terms of its Administrative Manual since contracts for temporary assistants are given for periods not exceeding three months whereas he had served on a temporary basis for more than a year. On joining the FAO he had hoped to stay much longer than a year. The complainant was constantly told that the FAO headquarters in Rome was to blame for the delay in clarifying his contractual situation. In calculating his revised pay the pension issue was never addressed by the Organization even though a fixed-term appointment carries pension benefits.

The complainant says the Appeals Committee spoke of the "disciplinary" nature of his case, but no

disciplinary proceedings were taken. He has had no opportunity to state his case or justify his actions in matters concerning his work. The working atmosphere he was exposed to was intimidating and "scary" and he was subjected to abusive language from his supervisor, the Administrative Officer.

He is seeking reinstatement at the G.5 level as an accounts clerk/ administrative assistant; financial compensation for the period between separation and reinstatement, and "review of [his] entry point at G.5 considering [his] previous salary".

C. In its reply the Organization observes that it did not mislead the complainant with regard to his contractual status. Under the terms of the contracts he signed he could have expected no more than a series of temporary appointments. Paragraph 4 of each of his temporary contracts specified that "the signatory shall not be entitled to any benefit, payment, subsidy, compensation or pension from the Organization, except as expressly provided in the contract". Appendix D to Manual section 374 stipulates that "casual labourers" are not considered to be staff members of the Organization and are not entitled to any of the benefits afforded to FAO staff members.

The complainant was told several times that his performance was unsatisfactory. The Administrative Officer had told him at three meetings of the problems in the administration of the Office's finances. Two audits had revealed problems in his area of work, some of which were attributable to him.

The FAO acknowledged its error in appointing the complainant on contracts that went beyond the three months allowed by Manual section 374 and had compensated him accordingly. The complainant did not appear to question the level of salary paid, but raised the issue of a pension. The Organization based its calculation on the salary and allowances that it would have paid him had he been on a fixed-term contract. It made no deduction for pension contributions or medical insurance, but did allow for an increase in salary that he would have received from September 1996 had he held such a contract.

The Organization considers the complainant's claims to reinstatement, additional compensation and review of salary entry level to be "untenable" and, in the absence of any reasoning by the complainant in support of his claims, it is unable to respond further.

CONSIDERATIONS

1. The complainant held a series of six temporary contracts on a "casual labour" basis until 31 January 1997.

2. Appendix D to Manual section 374 provides:

"Employment as 'casual labour' does not require prior approval by Headquarters and may be offered for periods not exceeding three months. It may be given repeatedly to the same individual, provided that there is a reasonable interruption between periods, and that the total period of employment does not exceed six months in any 12-month period."

3. He complained to the Director-General on 7 February 1997 about the non-renewal of his contract and the behaviour of the Administrative Officer in charge of the Office, including the use of abusive language.

4. The Assistant Director-General in charge of Administration and Finance replied on behalf of the Director-General on 7 May 1997. He told the complainant there had been "no commitment on the Organization's part that the post would be offered [to him] on a permanent basis", and that because of his unsatisfactory performance his contract had not been renewed. However, the Assistant Director-General said that it had been decided to treat his period of service with the FAO from 16 January 1996 to 31 January 1997 as a regular appointment at the G.5 level under a fixed-term contract. In addition his emoluments would be adjusted in accordance with his status as a staff member, and the amount due to him had been calculated at 12,011.06 Zimbabwean dollars.

5. On 26 June 1997 the complainant appealed against this decision to the Appeals Committee. The redress he sought was to be considered as a permanent staff member as from 16 January 1996 at grade G.5 (step 7 or 8), to be reinstated and paid compensation for loss of earnings from 1 January 1997 to the date of reinstatement.

6. In its report dated 12 February 1998 the Appeals Committee, recognising that the contractual situation had been adjusted and the relevant emoluments paid, was of the opinion that the complainant should have been informed, in conformity with relevant procedures, that his performance was no longer considered satisfactory towards the end of 1996. It noted that the Administrative Officer had acknowledged in the course of a staff meeting held on 3 December 1996 that she had not warned the complainant in writing about his poor performance. The Committee felt that the working environment at the Sub-Regional Office was "tense and problematic" and noted that the Administrative Officer had been transferred in the meantime. It recommended, however, that the appeal be rejected as unfounded but that "particular attention be given to the timely application of the Organization's rules and regulations in field offices".

7. On 15 April 1998 the Director-General dismissed the appeal as being without merit. That is the decision impugned.

8. In his brief the complainant submits that the Organization violated its rules on temporary employment, and says the Appeals Committee cited his case as a disciplinary one but the disciplinary rules were not followed. He is mistaken in this as the Appeals Committee specified that the case did not arise out of a disciplinary action. The complainant further says he was never asked to respond to the issues highlighted in the audit report relating to his field of work. Lastly, he says the Organization admitted its mistake by giving him a fixed-term contract for the period of his service. He queries the calculation of the extra pay due and says that the FAO did not include him in the pensions scheme. His salary was paid net, not gross, and he wonders what happened to the difference.

9. The Organization submits that, if the complainant had been given a fixed-term contract at the outset, his appointment would have been governed by Manual paragraph 374.5 which provides:

"Fixed-term appointments do not carry an expectation of, or imply any right to, extension or conversion to any other type of appointment. Such appointments expire according to their terms, without notice or indemnity."

10. The FAO acknowledges that the complainant was not informed in writing of his shortcomings, but it does claim that he was informed orally on three occasions of problems concerning the administration of the Office's finance. He was also aware of the reports which criticised work in his field. Also the Organization acknowledged its error concerning his contractual status by treating his service as being under a fixed-term contract and paying the difference in salary. No deductions were made for pension contributions or medical insurance. The figures were net insofar as the staff assessment tax was deducted, as is usual for fixed-term contracts.

11. The Organization submits that the complainant's claim for a review of his entry point on the G.5 scale is not supported by any arguments and there is no basis on which it could be argued. No rejoinder was submitted by the complainant.

12. Since the complainant's period of service was retrospectively treated as a regular appointment under a fixed-term contract, he must be considered a staff member. However, even as such he had no right to expect a renewal of his contract. He is not, therefore, entitled to reinstatement. There is no evidence that the additional emoluments paid were wrongly calculated. Since the complainant is not entitled to reinstatement, the questions of compensation pending reinstatement and reconsideration of the entry level in the grade G.5 do not arise.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 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 3 February 2000.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet

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