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

NINETY-SEVENTH SESSION

Judgment No. 2372

The Administrative Tribunal,

Considering the complaint filed by Miss A. P. against the Food and Agriculture Organization of the United Nations (FAO) on 26 September 2003 and corrected on 5 November 2003, the FAO's reply of 12 January 2004, the complainant's rejoinder of 11 March and the Organization's surrejoinder of 16 April 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is an Italian national and was born in 1945. She joined the FAO in 1965. In May 1967 she was transferred to the World Food Programme (WFP) – an autonomous joint subsidiary programme of both the United Nations (UN) and the FAO – and was promoted to grade G.3. In 1968 her appointment was converted to a continuing one. Between 1971 and 1989 she was promoted several times and worked for some years in the field. From May 1990 she worked at grade G.6 as a Shipping Assistant in the Operations Department, at WFP headquarters in Rome.

By a memorandum of 12 July 2000 the Director of Human Resources announced a "limited program of agreed separations". On 23 August the complainant sent in a formal request applying for separation under the programme. By a memorandum of 26 September she was informed that her request had been approved; it set out the terms of the agreement. As specified, her last day of duty was to be 30 September 2000 and she was granted three months' salary as compensation in lieu of notice as per FAO Manual paragraph 314.411. She was also to receive a termination indemnity equal to 12 months' salary, as defined in Staff Regulations 301.151 and 301.155*, an additional 50 per cent of termination indemnity, and various other accrued entitlements. The memorandum gave the amounts she was to be paid under each head, and went on as follows:

"Please note that the above amounts, which are based on the UN salary scale effective 01 November 1999, are given as an approximation since they are subject to any possible change in the salary scale occurring prior to your departure. Your final emoluments will be calculated based on the salary scale that is in effect on 30.09.2000."

The complainant signed the agreement on 27 September 2000.

On 2 November 2001 Administrative Circular No. 2001/27 announced a new salary scale for General Service staff in Rome holding continuing or fixed-term appointments. It resulted in a salary increase of 4.25 per cent which was to be implemented retroactively from 1 November 2000. As a result of enquiries made by the complainant, the salary and allowances paid to her for November and December 2000, during her notice period, were adjusted to take account of that increase. However, the other terminal emoluments were not adjusted.

On 17 December 2001 the complainant lodged an appeal with the Executive Director of the World Food Programme, asking that her other terminal emoluments be recalculated to take into account the salary increase that came into effect on 1 November 2000; she wanted them recalculated as at 31 December 2000 – the date she officially left the Organization.

By a letter of 1 February 2002 the Executive Director informed the complainant that her terminal emoluments had been correctly calculated on the basis of the salary scale in effect on 30 September 2000. She rejected the complainant's appeal as unfounded. On 15 April 2002 she lodged an appeal with the Appeals Committee, which

found largely in her favour. It criticised the WFP's lack of transparency and recommended recalculating all her terminal emoluments "on the basis of the salary scale effective 1 November 2000". The Director-General of the FAO did not follow its recommendation and by a decision of 28 June 2003 informed her that the decision taken on 1 February 2002 would stand. That is the impugned decision.

B. The complainant submits that her terminal emoluments should be recalculated, because, under the applicable rules, they should be based on net base salary, and that had increased by 4.25 per cent with effect from 1 November 2000. It was also unambiguously stated in the memorandum of 12 July 2000 announcing the separation programme that the termination indemnity would be calculated in the way defined in Staff Regulation 301.155, that is to say on the basis of net base salary.

It appears to her that the whole of the termination process was conducted without due regard for the Staff Regulations and Rules of the FAO/WFP. Although the separation package was in essence the same as that provided for in Staff Regulation 301.15 she notes that the Organization is now trying to establish *post factum* that the agreed termination must be considered as a "special" legal agreement.Given that she signed the separation agreement only two days before she ceased her duties, in the interests of transparency and equality the Organization had a duty to bring to her notice any way in which the agreement diverged from the Staff Rules or Manual.As it was, she signed the termination agreement in good faith, and the WFP did not make her aware of all the implications. With hindsight, she realises that the whole process of her termination was confused, lacked transparency, and was not a 'negotiated' agreement. From the Organization's position paper in the internal appeal she realises that the FAO is invoking Staff Rule 303.222 under which exceptions to the provisions of the Staff Rules may be made. However, in the separation agreement itself there was nothing to indicate that the Organization was invoking that rule.

The complainant draws attention to Manual paragraph 314.411 which states that "terminal emoluments are calculated as if employment had continued until the end of the notice period". Based on that wording, she sees inconsistency in the Organization's actions given that on the one hand it applied the new salary scale to her salaries for November and December 2000, and on the other it maintained that the terminal emoluments payable to her on separation were to be paid on the basis of the UN salary scale that was in effect on 30 September 2000.

The complainant seeks the quashing of the impugned decision; the recalculation of her terminal emoluments to reflect the 4.25 per cent increase in salary that was implemented with effect from 1 November 2000; moral damages; and costs.

C. In its reply the FAO submits that the complaint is unfounded. The complainant's terminal emoluments were calculated and paid in accordance with both the applicable Staff Regulations and Rules, and the terms of the separation agreement. It contends that there are no grounds for awarding damages. Her separation occurred as a result of a mutual agreement, to which both parties freely assented. By signing the agreement she agreed to be bound by its terms. The memorandum of 26 September clearly indicated that the terminal emoluments payable to her would be calculated based on the salary scale in effect on 30 September 2000. The terms she agreed to did not derogate from or breach any applicable Staff Regulations.

The FAO submits that there was no lack of transparency, because the complainant was clearly informed of the terms of her separation. Nor can it be said that the Administration failed to point out any divergence from the Staff Rules, given that in this instance it was self-evident that the agreement would take precedence over any applicable rules governing separation benefits.

It points out that Manual paragraph 314.411 relates only to the payment of compensation in lieu of notice, and she cannot therefore claim that the terms of that paragraph should be applied in relation to the payment of her termination indemnity. Unlike the termination indemnity paid to her, the emoluments corresponding to compensation in lieu of notice were not part of the separation package negotiated between the parties. It is clear from the memorandum sent to staff on 12 July 2000 that the matter of compensation instead of notice was left to the discretion of the WFP. Because of that, the WFP was able to adjust the complainant's salary and allowances for the last two months of 2000. She is not entitled to a similar recalculation of the other emoluments that were due to her. There was therefore no inconsistency in the action taken by the WFP. The Administration acted in good faith towards the complainant. It accommodated her request to be paid compensation instead of working for the full three months of the notice period. That was done in a way that was most favourable to her, since it agreed to pay retroactively the salary and language allowance increases.

D. In her rejoinder the complainant presses her pleas. She again contends that she did not have enough time to assess the consequences of signing the separation agreement.

E. In its surrejoinder the defendant asserts that the agreement did not provide for any future adjustment of the termination indemnities. If she had wanted such a provision to be incorporated she could have negotiated it with the Organization or refused to sign the agreement. Furthermore, it had no particular duty to inform the complainant of anything other than the terms of the proposed agreement and the actual sums to be paid.

CONSIDERATIONS

1. The complainant requested an agreed separation on 23 August 2000 under a programme that had been announced to staff of the WFP on 12 July 2000. Her request was approved by the Director of the Human Resources Division, in a memorandum dated 26 September 2000. According to this memorandum, her last day of duty was to be 30 September 2000, as she had requested, and she was granted compensation equivalent to three months' salary in lieu of the notice to which she was entitled, plus a termination indemnity equal to 12 months' salary, an additional 50 per cent of termination indemnity, and various other accrued entitlements, including the balance of her annual leave. It was specified that the amounts indicated, which were based on the UN salary scale effective 1 November 1999, were given as an approximation since they were subject to any possible change in the salary scale occurring prior to her departure. It was also stipulated in the memorandum, which the complainant signed on 27 September 2000, that her "final emoluments [would] be calculated based on the salary scale […] in effect on 30 September 2000".

2. By an administrative circular of 2 November 2001, a new salary scale was announced, which gave certain General Service staff in Rome a salary increase of 4.25 per cent with retroactive effect from 1 November 2000. The complainant asked for that increase to be applied to all the amounts she had been paid, but the Administration applied it only to the salary and allowances paid to her in lieu of notice, that is, for the period from 1 November to 31 December 2000, and refused to apply it retroactively to her other terminal emoluments. The Executive Director of the WFP confirmed the Administration's position in a decision of 1 February 2002, which the complainant appealed before the FAO's Appeals Committee. The latter took the view that, although there was no breach of rules and regulations, the WFP had not "respected the duty to inform clearly [the complainant] in order to protect her interests". It considered that the WFP should have been more transparent in bringing to her attention the fact that the agreement of 26 September 2000 prevented the application of Manual paragraph 314.411, which provides that terminal emoluments due to staff leaving the Organization "are calculated as if employment had continued until the end of the notice period". The Committee was furthermore of the view that the complainant's official separation date was 31 December 2000, since she had been paid a salary until that date. It considered that the WFP's argument that the complainant was not entitled to have the new salary scale applied to her terminal emoluments was contradicted by the fact that it had adjusted her salary for November and December 2000 to reflect the new scale. It recommended that, in the circumstances, all the complainant's terminal emoluments should be recalculated on the basis of the salary scale effective 1 November 2000.

3. In a decision of 28 June 2003, the Director-General of the FAO said he would not follow the Committee's recommendation, on the grounds that the complainant had been clearly informed about her entitlements, that it had been stipulated that her last day of duty would be 30 September 2000 and that her terminal emoluments would be calculated in accordance with the salary scale in effect "on [that] date", which meant that Manual paragraph 314.411 was not applicable, except for the salary and language allowance adjustments that were due to her until 31 December 2000.

4. The complainant seeks the quashing of that decision and the recalculation of her terminal emoluments to reflect the 4.25 per cent increase in salary that was implemented with effect from 1 November 2000. She also claims damages for moral injury, and costs. She reiterates the pleas she submitted in her internal appeal, arguing that her terminal entitlements should be calculated in accordance with the terms of Staff Regulation 301.15 and Manual paragraph 314.411 and that, by not drawing her attention to the fact that the agreement she was offered departed from those rules, the Organization had shown a lack of transparency and good faith.

5. For its part, the defendant considers that the terms of the agreement entered into by the complainant were clear: the final emoluments to which she was entitled were to be calculated on the basis of the salary scale effective at 30 September 2000, the date of her departure which she had herself chosen. The Organization contends that,

while it applied the provisions of Manual paragraph 314.411 to the emoluments corresponding to compensation in lieu of notice, it had no obligation to apply them to the separation package negotiated between the parties, which stipulated expressly that the applicable salary scale was that of 30 September 2000.

6. Manual paragraph 314.411 reads as follows:

"Compensation in lieu of notice […] is paid on the basis of all salary, allowances and benefits which would have accrued to the staff member had he/she served the period of notice. Accordingly, if otherwise eligible, the staff member receives post adjustment, non-resident's allowance, dependency allowances, language allowance, special post allowance, mobility and hardship allowance, night or service differential, separation payment, education grant and any similar allowance payable. Terminal emoluments, including the accumulation of annual leave and its commutation on separation, are calculated as if employment had continued until the end of the notice period. If the staff member so desires, the Organization continues to contribute, in respect of the notice period, its share of the cost of participation in any health insurance scheme in which the staff member participates."

7. The complainant argues that the Organization was bound by the stipulation that "terminal emoluments […] are calculated as if employment had continued until the end of the notice period". To this the defendant replies quite rightly that the mutual separation agreement was binding on the parties which signed it. While the complainant makes the point that the agreement was not "negotiated", it is nevertheless true that she expressly agreed to its terms by signing the memorandum of 26 September 2000, thus acknowledging that she had understood the terms and conditions of termination of her appointment set out in that memorandum. The fact that the memorandum was signed only shortly before her appointment was effectively terminated does not cast doubt on the Organization's good faith, since the complainant had several weeks between the announcement of the agreed separation programme and the time she signified her acceptance by signing the memorandum to find out more, had she so wished, about the terms on which her appointment would be terminated. Furthermore, the defendant's apparent failure, in its reply, fully to appreciate the services rendered by the complainant for 33 years does not affect the outcome of the dispute, which concerns only the salary level to be taken into account for the calculation of her terminal emoluments and not the length of her employment. While it might have been preferable – as the Appeals Committee pointed out – for the Organization to have drawn the attention of those applying for the agreed separation programme to the fact that the conditions offered, which included substantial benefits, were special and took precedence over other rules governing separation in different circumstances, the terms of the agreement signed by the complainant were clear and the impugned decision cannot be said to be tainted with any error of law or of fact.

8. Since the claim for the decision to be set aside fails, the claims for compensation must also fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G Gaudron

Catherine Comtet

* Staff Regulation 301.155 provides as follows:

“The [termination] indemnity provided for in Staff Regulation 301.151 shall be calculated on the basis of net base salary.”

Updated by PFR. Approved by CC. Last update: 19 July 2004.