

**In re LOROCH**

**Judgment No. 297**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Kim Lorocho on 12 March 1976 and brought into conformity with the Rules of Court on 8 April 1976, the FAO's reply of 26 July 1976, the complainant's rejoinder of 5 October 1976 and the FAO's surrejoinder of 15 December 1976;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.111 and FAO Staff Rule 302.907;

Having examined the documents in the dossier and disallowed the complainant's request for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the FAO on 11 October 1969 as Chief of the Transport Branch of the World Food Programme at grade P.5. Having been offered a three-year appointment, he obtained leave for that period from his former employer, the Port of New York Authority. His appointment was extended in turn to 31 December 1973, 30 June, 30 September and 10 October 1974. By letter of 9 September 1974 he informed the Director-General that he protested and appealed against the decision to let his appointment end of 10 October 1974. By letter of 23 September the Director-General dismissed his appeal. The complainant appealed to the FAO Appeals Committee on 30 September. In its report of 27 August 1975 the Appeals Committee unanimously recommended the Director-General - the complainant calls it a "decision" - that "every endeavour be made to redeploy [him] within the Organization in duties with less operational implications, yet in his own sphere of competence". By letter of 10 December 1975 the Director-General informed the complainant that he accepted the Committee's recommendation "in principle" in that he agreed that his application for any suitable vacancy should "receive the fullest consideration". The complainant took the view that the Director-General's statement was not in accordance with the Committee's recommendation and so informed him by letter of 15 December 1975. On 27 January 1976 the Deputy Director-General replied that the Director-General confirmed the terms of his letter of 10 December 1975. The complainant then lodged his complaint.

B. The complainant maintains that the Appeals Committee "rejected the FAO's grievances" against him and that he "will simply abide by the Committee's own approach". He therefore invites the Tribunal to "confirm that approach and hence the Committee's decision". In his view the Committee's "decision" may be regarded not as a mere recommendation but as indeed a decision, accepted as it was "in principle" by the Director-General, who has a duty to abide by the "decision" and reinstate him. That duty existed whether or not there was a vacancy: the FAO was bound to reinstate him in a suitable post. The Committee's recommendation and the Director-General's acceptance of it "in principle" gave rise to a new legal position, against which it was impossible to plead the inevitable expiry of his appointment on 10 October 1974, and obliged the FAO to keep him on and appoint him to a suitable post or even create one for him.

C. In his claims for relief, as supplemented in his rejoinder, the complainant asks the Tribunal:

(1) to quash the Director-General's decision not to renew his appointment;

(2) to declare that the Director-General should give full effect to the Appeals Committee's unanimous recommendation of 27 August 1975;

(3) accordingly to declare -

(a) that the Director-General has a duty to reinstate the complainant in the FAO (or the World Food Programme or any affiliated body), if necessary by creating a post for him;

(b) that he should therefore be granted a further appointment, or an extension of his appointment, in any event up to 1 January 1978 and with retroactive effect from 11 October 1974;

(c) that under that appointment he should enjoy at least the same emoluments, bonuses, grading and cost-of-living allowances and any other social benefits prescribed in the FAO Staff Regulations and Staff Rules as he enjoyed under his last appointment, which expired on 10 October 1974, and any increases granted by the FAO since that date;

(d) that in any event the FAO should be ordered to pay him damages equivalent to the salary and other allowances which he would have received had his appointment been renewed from 11 October 1974, up to the date on which he is reinstated;

(4) to allow the Director-General such period as the Tribunal deems fit to meet the claims set out under heads (1), (2) and (3) above;

(5) to declare that, should the FAO or the World Food Programme or any other FAO body show that its efforts to reinstate him have failed for want of a suitable vacancy, he should receive damages equivalent to -

(a) the salary to which he would have been entitled up to the age of retirement, with effect from 11 October 1974;

(b) the lump-sum capital equivalent of the pension to which at retirement age he would have been entitled under the Staff Regulation and Staff Rules, and any other benefits to which he would have been entitled as an employee of the FAO or any FAO body;

(6) to declare that for the moral prejudice caused to him by the failure to carry out the Appeals Committee's recommendation he is entitled to financial compensation, the amount to be fixed "ex aequo et bono" by the Tribunal;

(7) to order the FAO to pay him the prescribed rate of interest on the sums claimed under heads (3)(d), (5)(a), (5)(b) and (6) above;

(8) to reserve to the complainant any rights which he derives from his poor state of health and which he has claimed in his appeal to the FAO's Consultative Committee on Compensation Claims;

(9) to order the FAO to pay his costs, including lawyer's fees and the cost of official certification amounting to 1,590 Swiss francs, the amount to be fixed by the Tribunal.

D. The FAO replies that neither in making its recommendation nor in its report did the Appeals Committee ever allow the complainant's right to be appointed to his former post or any other; the Committee merely invited the Director-General to make every endeavour to redeploy him within the FAO. The Director-General accepted the Committee's recommendation only "in principle" and set a limit on the FAO's commitment by stating that any application he made for any suitable vacancy should receive the fullest consideration. When the complainant's appointment ended there was no suitable vacancy. Since he did not apply for any vacancy after leaving, the question of the FAO's performance of the obligations arising from qualified acceptance of the Appeals Committee's recommendation does not arise. The Director-General's position is quite straightforward, and the complainant's contention that the FAO assumed a duty to keep him on and even to create a post for him is clearly unfounded.

E. The FAO adds that, in accordance with the Staff Rules and in particular Staff Rule 302.907, the complainant's appointment ended when his fixed-term contract expired. Neither in his appeal to the Appeals Committee nor in his complaint has he relied on any provision of the Staff Regulations or Staff Rules to support his claims. Moreover, he had no reason to expect that his appointment would be extended. It was due to expire on 31 December 1973 and because of the difficulty he had in getting on with his supervisor he himself felt, as indeed he said in a minute of 15 November 1973, that for the sake of his career he should look for employment elsewhere. It was at his own express request, and only to give him time to talk things over with possible new employers, that his appointment was extended to 30 June and then to 30 September 1974. The sole purpose of his last extension, to 10 October 1974, was to enable him to complete five years' service and so acquire benefits from the United Nations Joint Staff Pension Fund. Thus it appears that "the complainant had no reason to expect to have his appointment extended again after 10 October 1974 and knew and perfectly understood the reasons for the FAO's unwillingness to keep him on in the same post". Not only had he no right to extension of his fixed-term appointment but he had "not the

slightest expectation" of an extension. Since his conditions of service were fully respected he is not entitled to damages.

F. The FAO concludes that -

(1) the complainant's conditions of service were fully respected, as he has implicitly recognised since he does not rely upon any provision of the Staff Regulations or Staff Rules to support his claims;

(2) the Director-General's qualified acceptance of the Appeals Committee's recommendation laid no obligation on the FAO either to reinstate the complainant, be it in the FAO or in the World Food Programme, or to create a new post for him;

(3) the termination of his appointment was quite in keeping with the Staff Regulations since he had no right to extension of his appointment;

(4) in the light of points (1) to (3) above the complainant is entitled neither to reappointment nor to the damages he claims.

In the light of these arguments the Organization asks the Tribunal "to dismiss as unfounded the complainant's claims for reinstatement in the FAO and for damages".

#### CONSIDERATIONS:

As to the Tribunal's power of review:

1. The impugned decision not to extend the complainant's appointment after 10 October 1974 falls within the Director-General's discretionary authority. Hence the Tribunal will interfere with that decision only if it was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if the decision is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the dossier.

Moreover, there is no reason to consult the experts whom the complainant wishes to call.

As to the alleged error of law:

2. The complainant argues that the Director-General was bound by the Appeals Committee's recommendation and in failing to act on it committed an error of law. Though he does not actually describe that recommendation as a decision the complainant tends to impute to it the force of a judgment. It is true, he admits that his view squares neither with the texts in force nor with the ease law; but he asks the Tribunal to reconsider its view of the effects of a recommendation by the Appeals Committee.

According to Staff Regulation 301.111 the Appeals Committee shall advise the Director-General; and indeed its function is purely advisory. The Tribunal is competent only to find breaches of terms of appointment and of the Staff Regulations. It cannot treat the above regulation as an exception and, passing over the law in force, regard the Appeals Committee's recommendations as mandatory.

The Tribunal might go as far as to impute an error of law to the Director-General if the impugned decision were tainted with an inconsistency. But it is not. Contrary to what the complainant suggests, the Director-General apparently accepted the recommendation unreservedly and did not overlook it: indeed he actually explained how he would take account of it.

As to the alleged to take account of essential facts:

3. The complainant contends that the Director-General failed to take account of such essential facts as the complainant's loss of his employment with the Port of New York Authority, his age, his family commitments, his state of health, the absence of any criticism of his performance and conduct, his high professional qualifications, and so on.

That argument is irrelevant. In its report the Appeals Committee set out the parties' allegations and commented on

them. The Director-General knew of the Committee's report since he expressed his views on it. He was therefore aware of the facts which the complainant alleges were essential, and there is nothing to suggest that he disregarded them.

As to the allegation that mistaken conclusions were drawn from the dossier:

4. Two conclusions may be drawn from the dossier. First, the complainant has professional and other merits, as is clear from his degrees, his publications and the praise which he received. Secondly, according to his own correspondence his relationship with the chief of his division had deteriorated to the point of precluding co-operation between them.

In the circumstances the Director-General might have considered several solutions: (1) to transfer or dismiss the chief of division; (2) to create within the Organization a post better suited to the complainant than the one he had; (3) to accept his application for a vacancy; or (4) to terminate his services on the expiry of his appointment. It appears from the documents produced by the parties that there was no reason to prefer the complainant to the chief of his division by adopting the first solution. Nor was the Director-General bound to adopt the second one, namely to change the Organization's structure so as to provide a post for the complainant. As to the third solution, it is not proved that either before or after the termination of the complainant's appointment there was any vacancy suited to his skills and personal qualities. In any event the Appeals Committee did not maintain that there was. Hence in adopting the fourth solution, i.e. in refusing to renew the complainant's appointment, the Director-General did not draw clearly mistaken conclusions from the dossier.

The complainant contends that he had obtained three years' leave from his former employer, the Port of New York Authority, so that he could join the staff of the Organization and that because his appointment was extended after that leave had expired he was unable to return to his former employment. On the expiry of the period of three years he himself asked for renewal of his appointment with the FAO and thus accepted the risk that the Port of New York Authority would not reinstate him.

There is no reason to consider the complainant's contention that his illness was due to his inability to get on with the chief of his division and his consequent claim to compensation by the Organization. Those matters have been referred to the authorities of the Organization and are not germane to the present proceedings, which relate solely to the renewal of the complainant's appointment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 6 June 1977.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet