Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A. *v.* FAO

120th Session **Judgment No. 3483**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M.A. against the Food and Agriculture Organization of the United Nations (FAO) on 25 January 2013, the FAO's reply of 19 June, the complainant's rejoinder of 31 July and the FAO's surrejoinder of 12 September 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings;

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

The complainant challenges the FAO's decision not to pay her a daily subsistence allowance (DSA) during her appointment in Rome, Italy. She was hired as a consultant on 1 September 2008 under an eleven-month fixed-term contract, which according to the FAO rules, gives her access to both internal proceedings and the Tribunal. At the time of her recruitment, the complainant was a resident of the United States.

The Offer of Appointment stated:

> "If you are appointed for duty away from your permanent residence you will receive, in addition to your honorarium, a daily subsistence allowance (DSA) payable at the current UN rates in accordance with the Organization's rules governing travel […]. You are required to complete a Travel Expense

> Claim (TEC) for each assignment. Late submission of your TEC together with all receipts could result in the delay or even non-payment of honorarium. […]"

According to her Terms of Appointment, she was to be paid an honorarium of 7,000 United States Dollars and DSA "at applicable UN rates for the periods worked when in travel status".

Upon her arrival at the FAO in September 2008 the complainant enquired as to whether she was entitled to DSA payments and was advised that she was not.

On 6 March 2009 the complainant raised the issue of the DSA payments with the Human Resources Management Division. She was informed by an e-mail of 17 March 2009 that the reference to the payment of DSA in her contract had probably been the result of a clerical error. The e-mail stated that the contract offer made to the complainant for the amount of 4,000 dollars was approximately equal to the complainant's salary from her previous employment, and that an additional amount of 3,000 dollars was added in consideration of the complainant's living expenses. The type of contract offered had been changed to a consultancy in order to assist her in obtaining a visa for herself and her family, and the FAO's Shared Services Centre must have forgotten to delete the standard clause on DSA payments contained in all International Consultancy Agreements when it prepared her Terms of Appointment and Offer of Appointment. However, the e-mail stated that it was clear that the amount of 7,000 dollars was a lump sum and that no other monies were owed to the complainant. Copied to this e-mail was the Human Resources Officer involved in the complainant's recruitment, who was asked to amend her contract and to send it to the complainant for her signature, in order to correct the error.

In July 2009 there were discussions concerning the renewal of the complainant's contract on the same basis as her revised consultancy contract of March 2009. However, the process was put on hold and, in August 2009, the complainant left the FAO.

In March 2010 the complainant wrote to the Director-General requesting payment of the amount of 94,560 dollars in DSA which,

she alleged, was due under the terms of her contract. Her request was denied on 17 May 2010 on the ground that, in the FAO's view, the complainant neither believed that she was entitled to DSA payment nor relied on the promise of such payments when she accepted the consultancy contract in September 2008. In the FAO's view, the complainant subsequently sought to take advantage of an administrative error in her contract which resulted in payment terms that did not reflect the intention of the parties.

In its report of 5 April 2012 the Appeals Committee found that an error had been made by the FAO in omitting to delete the standard clause on DSA in the complainant's contract. While recognizing that the complainant was entitled to what was provided in her contract, the Appeals Committee found that the amount claimed by the complainant was excessive. It unanimously recommended that an appropriate amount be paid and suggested a sum of 33,000 dollars based on the monthly 3,000 dollars initially intended as a contribution to the complainant's living expenses.

The complainant was informed by a letter of 26 October 2012 that the Director-General considered the Appeals Committee's findings and recommendation unfounded, but that he had nonetheless decided as a gesture of goodwill and in accordance with the Appeals Committee's recommendation, to pay the complainant 33,000 dollars in full settlement of her claims. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that the FAO pay her a DSA in the amount of 90,000 dollars, with interest, from August 2008 and at the governing rates. She also claims costs.

The FAO rejects the complainant's claims as unfounded.

CONSIDERATIONS

1. The provision that is at issue in this case is expressly stated in the contract of employment into which the complainant and the FAO entered in 2008. The Tribunal is required to interpret that term in

order to determine whether the complainant is entitled to the daily subsistence allowance which she claims, but the FAO has denied. The Tribunal has often stated that the function of a court of law is to interpret and apply a contract in accordance with the real intention of the parties as expressed in the language of the contract. It is basic principle that when a term of employment is clear and unambiguous the parties are bound by that term unless there is evidence that warrants looking behind the mere wording of the text to ascertain the parties' real intention (see, for example, Judgment 1385, under 12). The Tribunal has also stated that where any term of employment is expressed in writing, the intention of the parties is to be ascertained from the documents that are produced. A contract or term therein may be vitiated or varied if there is overwhelming evidence that the parties had a contrary intention to that which is expressed in the text (see, for example, Judgment 1634, under 21).

2. The term of employment that is at issue in the present case is quite clear and unambiguous. The aspect that is relevant for the main issue states as follows:

> "If you are appointed for duty away from your permanent residence you will receive, in addition to your honorarium, a daily subsistence allowance (DSA) payable at the current UN rates in accordance with the Organization's rules governing travel."

The complainant resided in Charlotte, North Carolina, United States of America, at the time when the FAO appointed her under an eleven-month employment contract for assignment in Rome, Italy, away from her place of permanent residence. The applicable daily subsistence allowance rate was the UN rate for Rome for the period that she worked when in travel status.

3. In denying the complainant's entitlement to the daily subsistence allowance, the FAO argues, in effect, that the above term was vitiated because it (the FAO) did not intend it to be a part of the complainant's terms of employment. The FAO insists that it became a term of the contract because of a clerical or administrative error. By way of explanation, the FAO states as follows: the complainant was

first offered a Personal Services Agreement which did not contain a provision for the payment of a daily subsistence allowance. However, this was changed to an International Consultancy Agreement in order to assist her to obtain a visa for herself and her family to travel to Rome. The provision for the payment of the daily subsistence allowance is contained in the standard form International Consultancy Agreement, and should have been removed from the complainant's contract but for the omission by the Organization to do so. The FAO's Shared Services Centre mistakenly issued the contract containing not only the monthly honorarium, but also containing the standard form provision for the payment of the daily subsistence allowance. The Organization did not intend this latter term to have been retained in the complainant's International Consultancy Agreement when that type of employment contract was offered to her instead of the standard form Personal Services Agreement that was first contemplated. The Human Resources Management Division must have forgotten to delete the standard clause from the International Consultancy contract.

4. The FAO relies on Judgment 2906, among others, to support its assertion that it was entitled to correct the clerical error that occasioned the retention of the clause providing for the payment of the daily subsistence allowance in the complainant's contract. In consideration 8 of that Judgment, the Tribunal reiterated the general principle that, in the absence of specific provisions governing the conditions for their reversal or revocation, an individual administrative decision which affects a staff member of an organization becomes binding upon the organization that made it. It creates rights for the staff member concerned as soon as he or she is notified of it in the manner prescribed by the applicable rules. Such a decision may only be reversed if the decision is unlawful and if it has not yet become final. Where, however, such a decision does not create any rights for the staff member, it may be reversed at any time provided that the principle of good faith is respected.

5. In Judgment 2906 the subject administrative decision, which caused the complainant to be notified that he had been promoted to

grade A5, stemmed from a clerical error and not from a genuine intention on the part of its author. The Tribunal considered that the decision did not create any rights for the complainant and could therefore be subsequently reversed, because it was based solely on a clerical error. It was reversed. The Tribunal further found that the decision was also manifestly unlawful in that it was contrary to the applicable legal rules governing promotions. This was because the post to which the complainant was promoted corresponded, under the applicable regulations, to a post within the A4/A1 group of grades and not the A5 grade.

6. Three things are noteworthy in the foregoing statement of principle and the application of it in Judgment 2906. One is that the basic principle in that case speaks to the reversal or revocation of an administrative decision. The contention in the present case is not based on an administrative decision, but arises from a term in a contract of employment. In the second place, an administrative decision creates rights for the staff member and is binding upon the organization as soon as it is communicated to her or him. In that event, the decision may only be reversed or revoked if it is unlawful and has not yet become final. In the third place, where there is a genuine clerical or administrative error in such a decision, the decision does not create any rights for the staff member and the organization may reverse or revoke the decision subsequently.

7. In the present case, the FAO relies on its allegation, summarized in consideration 3 of this Judgment, that the term contained in the complainant's employment contract for the payment of a daily subsistence allowance, in addition to the honorarium, resulted from a clerical error. The FAO insists that, notwithstanding that the term in issue in the present case is clear, it (the FAO) could have reversed the "decision" subsequently because the term was included in the contract by clerical error and did not create any right to the subsistence allowance in favour of the complainant. The fallacy, however, is that the present case does not simply involve an

administrative decision, as was involved in Judgment 2906 and kindred cases.

8. The present case involves a contractual term, reproduced in consideration 2 of this Judgment, for the payment of daily subsistence allowance that is expressly and clearly stated in a provision of the complainant's contract of employment. Additionally, the appended "Terms of Offer of Appointment" document, which the parties signed, sets out two specifically related items as follows: "Travel Itinerary: Charlotte (NC, USA)/Rome/Charlotte" and "Daily Subsistence Allowance: At applicable UN rates for the periods worked when in travel status". These are not conducive to a conclusion that inclusion of the provision for the entitlement to a daily subsistence allowance stemmed from a clerical error in an administrative decision that would permit the FAO to reverse or amend it in accordance with the principles set out in Judgment 2906. Moreover, the provision was not unlawfully included in the complainant's contract. Paragraph 317.3.3 of the FAO Manual states that, if specified in their terms of employment, consultants who are appointed for duty away from their permanent residence may receive a daily subsistence allowance, in addition to their honorarium.

9. In the present case the subject term may only be deleted so as to obviate the complainant's right to the daily subsistence allowance if the evidence shows that the parties had a mutual or shared intention at the time that they entered into the agreement on 1 September 2008 that the allowance was not to be included in the agreement. In Judgment 1385, under 12, the Tribunal found that there was "overwhelming evidence" that warranted looking behind the mere wording of the text in order to ascertain the parties' real intention. In Judgment 1643 the overwhelming evidence that showed the complainant's awareness of the error in her contract was provided in letters that were exchanged between the Secretary-General of the organization and the complainant, which established that she had full knowledge when she gave her consent (see especially consideration 5 of that Judgment). The cases confirm the trite and consistent principle

that a written contract or a provision therein may be revoked or amended for error or mistake where the minds of the parties meet in agreement that what is expressly provided does not reflect their real intention.

10. In the present case, the evidence which the FAO provides to support its assertion that the complainant shared that same intention is mainly concerned with events that occurred after the agreement was concluded. They do not assist in the determination of the parties' mutual intention at the time that they entered into the agreement. The FAO points, for example, to a statement made by the Chief of the recruiting division concerning the time when the complainant was hired, stating that "it was understood by all parties that DSA were not payable". That statement was actually made in an internal email communication of 13 March 2009. This was some months after the parties had entered into the agreement. There is no evidence that the complainant saw that email communication or agreed with that statement. There is no evidence that the provision for the daily subsistence allowance became a term of the agreement as a result of a mutually accepted clerical or administrative error. Neither is there any evidence that the complainant may not have believed in good faith that she was entitled to that benefit. Accordingly, the term for the payment of the daily subsistence allowance remained a proper term of the contract. The complainant was entitled to claim under it and her complaint on this ground is well founded.

11. The FAO argues that, in any event, the complainant cannot now receive payment of the daily subsistence allowance because she has not complied with the rules by which her claim should have been made. The relevant aspect of the term of the agreement states as follows:

> "You are required to complete a Travel Expense Claim (TEC) for each assignment. Late submission of your TEC together with all receipts could result in the delay or even non-payment of honorarium. For long assignments over 90 days you are advised to submit a first interim TEC."

The plain words of this provision mean that the late submission of the TEC could at worst lead to the non-payment of honorarium,

which is not at issue in this complaint. It may be argued that because this provision is subsumed under the heading "Daily Subsistence Allowance", the reference is really to the non-payment of the daily subsistence allowance. However, the ordinary meaning of the words also suggests that non-payment of the allowance as a result of the late submission of a TEC is not mandatory. The acceptance of this would mean, as the Appeals Committee observed, that the late submission of a TEC would not automatically result in the loss of the right to the daily subsistence allowance. There are no circumstances that suggest that the complainant had lost the benefit. She was entitled to claim it when she did, particularly given the uncertainty created by the FAO's inconclusive responses to the complainant's enquiries concerning the entitlement. The claim on this ground of the complaint is therefore also well founded.

12. The Appeals Committee found that the complainant's claim for 90,000 United States dollars was excessive, but provided no reasons for this finding. It recommended that she be paid 33,000 dollars based on the monthly amount of 3,000 dollars as, according to the Committee, the FAO initially intended to pay her that amount as a contribution to living allowances during the eleven-month contract.

13. In the impugned decision, contained in the letter of 26 October 2012, the Director-General considered the Appeals Committee's findings and recommendation unfounded, but decided as a gesture of goodwill and in accordance with the Committee's recommendation, to pay the complainant 33,000 dollars in full settlement of her claims. As the Tribunal has found that the complainant's claims are well founded, the impugned decision will be set aside. The complainant is entitled to the amount that she would normally have recovered as daily subsistence allowance during the eleven-month subsistence of her employment contract, rather than the twelve-months which she claims. The Organization shall pay that amount to her, less the 33,000 dollars already paid to her, plus 5 per cent interest from 6 March 2009 when she first raised the issue of the DSA payment, and, in addition, 6,000 dollars in costs.

DECISION

For the above reasons,

1. The impugned decision dated 26 October 2012 is set aside.
2. The FAO shall pay the complainant the amount that she would normally have recovered as daily subsistence allowance during the eleven-month subsistence of her employment contract, less the 33,000 dollars already paid to her, plus 5 per cent interest calculated from 6 March 2009.
3. The FAO shall pay the complainant 6,000 dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ