

FORTY-THIRD ORDINARY SESSION

***In re* BABBAR**

Judgment No. 388

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Food and Agriculture Organization (FAO) by Mr. Madan Mohan Babbar on 30 August 1978, the FAO's reply of 21 November, the complainant's rejoinder of 26 January 1979, the FAO's surrejoinder of 6 March 1979, the complainant's application of 26 March for an expert investigation and oral proceedings and the FAO's reply thereto of 24 April 1979;

Considering that the complainant died on 22 November 1979, that by a letter dated 7 December 1979 his wife stated, on her own behalf and on that of her infant children, that she wished to pursue the proceedings and that by a power of attorney dated 7 February 1980 the complainant's two sons by his first marriage appoint Mrs. Babbar to represent them in the proceedings;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Manual sections 370.831(i) and (iii);

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

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

A. Having been seconded from the University of Costa Rica, on 26 October 1955 the complainant joined the staff of the FAO on a one-year appointment as an agricultural statistician. On 7 January 1957 he was given a P. 4 appointment which was successively extended, and on 1 August 1964 a "programme appointment", i.e. an appointment without limit of time which may be terminated if no reassignment is available in the FAO programme. Under that appointment he carried out assignments in El Salvador, Costa Rica, Mexico, Brazil and Indonesia. His services were found satisfactory and he got the usual yearly salary increments and reached grade P.5.

B. On 1 June 1972 he took up a post with the Government of Zambia as a planning co-ordinator in the Ministry of Rural Development. An FAO expert who is seconded in that way is engaged by a government under contract. For the duration of the contract he is put on leave without pay, except that the FAO will make up his government salary. When the government appointment expires he goes back to the FAO. In April 1973 the Zambian Government asked for an extension of the complainant's secondment to 31 May 1975. The complainant agreed, although he was disappointed at being refused the promotion to grade D.1 which he had asked for on 29 December 1972. In his reply of 6 February 1973 the Director of the Policy Analysis Division had refused that promotion because of doubts about the complainant's professional competence. The complainant had expressed surprise that the standard of his work on previous assignments was now being questioned and that he should have been appointed to such a senior post as the one in Zambia if he were a "proven incompetent". In a letter of 29 August 1974 the complainant expressed shock at "being told that [he] had failed in this assignment" - the one in Zambia - and resigned. Later he sought to withdraw his resignation and on 2 January 1975 he was authorised to do so. He stayed in Zambia. On 27 January the Ministry of Rural Development informed the FAO that his post as planning co-ordinator had been abolished, but that it wanted to keep him for another five months as a "special adviser to the Permanent Secretary". The FAO agreed, and he continued to work in Zambia until 31 May 1975. He then went on leave. On 2 July he was officially informed that, no appropriate reassignment being available, his appointment would be terminated on 30 September 1975 under Manual section 370.831(i). (That provision states that experts may be terminated for abolition of post when no appropriate reassignment is available in the programme.) The Director-General upheld the decision on 6 August and the complainant appealed to the Appeals Committee on 20 August. The FAO filed a statement on 12 February 1976, the complainant a counter-statement on 4 May and the FAO a further statement on 14 February 1977. At last, on 13 January 1978, the Appeals Committee reported to the Director-General.

C. The majority of the Appeals Committee held that the termination of the complainant's appointment was lawful

but recommended increasing his indemnities for termination by some 9,000 United States dollars to take account of his length of service. The minority considered that his termination had been improperly influenced by allegations of unsatisfactory service. On 30 May 1978 the Director-General informed the complainant that he endorsed the recommendation of the majority. That is the decision impugned.

D. On 23 October 1978 the complainant submitted to the Tribunal several items of evidence which he wished to append to his complaint of 30 August 1978 and which had a bearing on a matter of travellers' cheques dating back to 15 November 1974. At that date the complainant had sent from Zambia to the FAO Credit Union in repayment of a loan one series of travellers' cheques amounting to US\$1,400 and another amounting to £1,000. The Chief of Internal Audit and Inspection informed the complainant on 27 January 1975 that Barclays Bank had refused to honour the cheques, which had been reported as lost or stolen. The complainant immediately remitted a sum of money in place of the cheques and explained in his reply of 14 February 1975 how he had been obliged for reasons of monetary convertibility to acquire the cheques from a third party. There were still cheques unaccounted for of a value of £95, which apparently the bank has declared neither valid nor invalid. In his letter of 23 October 1978 submitting the items the complainant asked the Tribunal to help him to secure from the FAO a reply to two questions which he had put to it on the subject on 11 October 1978 but to which he had received no reply: (1) Where were the cheques, whether they were good or not, which were still his property? and (2) for what purpose had the FAO been using them for almost four years?

E. The complainant contends that the decision to terminate his appointment was taken without any serious attempt to find him a new assignment. None was made before he filed his internal appeal and thereafter the efforts were feigned and their sole purpose was to ensure the success of the FAO's defence against his appeal. The posts offered to him did not match his qualifications and it would have been humiliating to accept. An assignment could have been found for him at headquarters. He also objects to the termination on the grounds that it constituted an abuse of authority: the FAO relied on Manual section 370.831(i), which relates to abolition of post, to conceal its intention of getting rid of him. It wanted to do so because of prejudice against him and unproved criticisms of his work. He accuses the FAO of bringing an end to his assignment in Zambia by having his post converted to that of special adviser and then, after he had gone, replacing him with another official.

F. In his claims for relief the complainant asks the Tribunal: (1) to quash the decision of 30 May 1978 and order his reinstatement with effect from 1 July 1975 and payment of his salary allowances and pension and social security benefits; (2) to award him indemnity for the moral and material damage caused to him by the FAO's wrongful action before and after the termination of his appointment; (3) should the FAO contend that his reinstatement is neither possible nor advisable, to inform him fully and so give him an opportunity to defend himself and, if necessary, present a further claim for compensation. Furthermore, in paragraph 26, of his complaint he states that he is likely to increase his claim for compensation when full facts have emerged from the investigation which he suspects the FAO has been carrying out into his transactions with the Credit Union.

G. In its reply the FAO contends that under the terms of his appointment all that the complainant could expect was that the FAO should look for a reassignment for him in its field programme. As regards its other programmes, the complainant is on a par with any other candidate. Should it prove difficult to reassign an expert, the common practice is to give him notice of termination and continue to make efforts to find him a reassignment during the period of notice, and cancel the termination if one is found. It is therefore only reasonable that efforts to find the complainant a reassignment should not really have begun until after 30 June 1975, even though the complainant received payment in lieu of the period of notice, which would otherwise have come to an end on 30 September 1975. It is true that the Policy Analysis Division had reservations about the complainant's competence which perhaps made it difficult to find him a post there, but the Agricultural Operations Division had none and if a post had been found he would certainly have got it. The three posts proposed for him - in Ghana, Iran and Brazil - were all graded P.5 and matched his qualifications as closely as anything that could be found. There was nothing humiliating about them. The complainant has failed to show that there was any other post which would have suited him. The efforts to find him a new assignment were made in good faith, but were all the more difficult because the United Nations Development Programme (UNDP) was going through a financial crisis and government clearance was required. The post for a planning adviser in Zambia which was filled after the complainant had gone was quite different from the complainant's and was financed by the UNDP. Had the Zambian Government wanted the complainant to have that post, it would have said so. Lastly, the FAO rejects any charge of abuse of authority: it never took the view that the complainant's services had been so unsatisfactory as to warrant termination under Manual section 370.831(iii).

I. In its surrejoinder the FAO contends once again that it made many genuine attempts to find the complainant another assignment. "Bridging" employment between assignments is granted only when reassignment is almost certain. The FAO rejects outright the complainant's accusation that for many years it has practised intrigue and shown prejudice against him. It was only the Policy Analysis Division that regarded his services as unsatisfactory, and no account was taken of that opinion by the Organization as a whole. The affair of the travellers' cheques is immaterial since it had no effect whatever on the impugned decision. The FAO has never carried out an investigation. It takes the view that there is no need for the expert investigation which the complainant applied for in his letter of 26 March 1979. It therefore asks the Tribunal to dismiss his claims for relief in their entirety.

CONSIDERATIONS:

As to the complainant's pleas:

1. The impugned decision was taken under Manual section 370.831(i), which provides that the appointment of FAO experts may be terminated for abolition of post if no appropriate reassignment is available in the programme to which they have been assigned.

The complainant objects to the application of that provision in his case, and his pleas come under three heads. The first set of pleas relates to the abolition of his post and to the accompanying decision to assign him to new duties from 1 January to 31 May 1975. The second relates to the FAO's attempts to find him a reassignment. The third relates to travellers' cheques which the complainant gave in repayment of a loan from the FAO Credit Union and which were not honoured.

2. For three reasons the Tribunal will not consider the third group of pleas. First, the matter of the travellers' cheques is not the subject of the impugned decision and therefore has no bearing on this case. Secondly, the complainant does not contend that the matter gave rise to any express decision which may be impugned, nor does he allege any implied decision to dismiss his claim. Thirdly, the complainant's dispute is with the FAO Credit Union. The terms of his appointment and the Staff Regulations and Staff Rules have no bearing on the matter, and the dispute therefore falls outside the competence of the Tribunal, which hears only allegations of breaches of those texts.

3. As to the first and second groups of pleas, the decision falls within the scope of discretionary authority. Hence the Tribunal will quash it only if it was taken without authority or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or left essential facts out of account, or was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

As to the abolition of the complainant's post:

4. The complainant holds the Organization liable for having caused the removal of his post in Zambia and its replacement with a national counterpart post. That plea fails.

The decision to abolish the complainant's post and create a new one was taken by the Zambian Government, which alone was competent to take it. It was not for the FAO to impose such a decision and so interfere in the internal affairs of the Zambian authorities. Nor is it established that it sought to influence those authorities. Indeed it had no reason to oppose the wishes of the Zambian Government, which was free to decide what form assistance from international organisations should take.

5. As regards the abolition of his post, the complainant contends that the Organization did wrong not to consult him before approving the decision to assign him to temporary duties from 1 January to 31 May 1975. That plea also fails.

The change in duties to which the complainant objects was the corollary of the abolition of his post. Having agreed to the latter, the FAO had to consent to the former. There are other reasons why the complainant has no grounds for grievance. First, he himself tacitly agreed to the change in his duties in the letter he wrote on 14 February 1975 to the FAO country representative in Lusaka. Secondly, as he himself admits, the Zambian Government invariably treated him, at least formally, as the incumbent of his former post. And thirdly, the change plainly caused him neither material nor moral prejudice.

As to the attempts to reassign the complainant:

6. The complainant contends that the attempts to find him other employment failed because they did not begin until he had lodged his appeal with the Appeals Committee and were therefore too late. The FAO retorts that it followed its usual practice of pursuing its attempts during the period of notice and up to the expiry of the contract, i.e. in the present instance, in July, August and September 1975.

The FAO purports to have based its decision to terminate the appointment solely on Manual section 370.831(i), and it is bound by that provision. It appears from the text that before terminating an expert's appointment the Organization must make sure that it cannot find him a reassignment in the programme on which he has been employed. In so doing it must show the diligence which the circumstances of the case require. The complainant was in his fifties, had worked in the FAO for about 20 years, was looking forward to early retirement, and had several children. As soon as it had been decided to abolish the post, therefore - in January 1975 - the FAO ought to have started looking for a vacancy for him.

The Organization was dilatory. The date of termination of the complainant's appointment was 30 June 1975. At a "matching session" held on 11 March 1975 members of the Agricultural Operations Division discussed the allocation of several vacant posts. But, apart from that, all that the FAO did before 30 June was to tell the complainant through the Personnel Division, that the question of reassigning him was under study. It was only in September 1975, i.e. at the end of the period of notice, that it made an attempt, to no avail, to find the complainant an assignment in Ghana, in Iran or in Brazil. On 2 July 1975 it informed him that no reassignment was available and that his appointment was therefore terminated. On 6 August it confirmed that decision. That was a hasty decision and one which had not been preceded by any prompt inquiries.

7. The complainant further contends that the Organization was inconsistent. On the one hand, it relied upon Manual section 370.831(i) and purported to be terminating his appointment for abolition of post, no reassignment being available. On the other hand, it behaved as if it wanted to get rid of him because of the allegedly unsatisfactory nature of his services. The Organization's answer is that it wished to rely solely on Manual section 370.831(i) since, despite some criticism, the complainant's services could not be described as unsatisfactory.

On that score, again, the Organization's behaviour should be judged in the light of the stand it took in the proceedings. In other words, it could not terminate the complainant's appointment under Manual section 370.831(i) until it had done its utmost to find him another assignment. There were two divisions which should have looked for one - the Agricultural Operations Division and the Policy Analysis Division. The former did try, though belatedly, to find him a vacancy; the latter did nothing. It appears from the minutes it wrote particularly those of 13 March and 16 May 1975, that the Policy Analysis Division, despite appeals from the Personnel Division and the Agricultural Operations Division, refused to help in finding the complainant a suitable assignment. The Organization more or less expressly admits that in its memoranda, which refer to the "reluctance" of the Policy Analysis Division. Hence there is reason to regard its attitude as contrary to Manual section 370.831(i): it acted on the strength of controversial criticisms of his performance and did not even ask him to comment on them at the time when they were made.

8. Lastly, the complainant objects to the FAO's refusal to take account of his application for various vacancies at headquarters. The FAO replies that under Manual section 370.831(i) he was entitled to a post, not at headquarters, but only in the programme on which he had been employed, and that he had no preferential claim to other posts.

What the Organization says is partly true. It is true that under Manual section 370.831(i) the complainant may be reassigned only as an expert under a particular programme. But staff members who lose their employment under that provision are quite free to apply for any vacancy in the Organization. Though most of them will presumably be treated like any other candidates, there was reason to make an exception of the complainant because of his age, seniority and family responsibilities and the expectation that he would soon retire. For those reasons the complainant had a certain right to preference, even over more highly qualified candidates. That does not mean, of course, that he should have been appointed in preference to any other candidate. Nevertheless, in putting him on the same footing as the others, the Organization failed to take due account of all the relevant factors of his case.

As to the validity of the complaint:

9. It appears from the foregoing that the complainant's allegation that the FAO was in breach of its duties under Manual section 370.831(i) is well founded: it made belated attempts to find him another assignment; the Policy

Analysis Division refused to help; and the Organization failed to give him the preferential treatment which, to some extent, was his due.

Several years having elapsed, the precise consequences of the Organization's negligence can scarcely be determined. It nevertheless seems quite possible that, had the two divisions made prompt and proper inquiries, co-operated actively in looking for another assignment for the complainant, and given his applications the consideration they deserved, he would have obtained another post. In view of the reservations about him, however, the Tribunal considers that it is justified to award him damages and will set the amount *ex aequo et bono*. The complainant appears to have been reluctant to seek even temporary employment outside the FAO, and the Tribunal cannot determine with any certainty the effects of the Organization's negligent attitude. On these grounds the Tribunal is inclined to award rather modest damages. It will also take account, however, of the material and moral prejudice which the complainant suffered because of the extraordinary dilatoriness of the internal appeal proceedings: the FAO took an inordinately long time to file its memoranda and reach its final decision and was therefore partly to blame for the delay.

As to the effects of the judgment:

10. The complainant died on 22 November 1979, after the complaint had been filed. His heirs have stated that they wish to pursue the proceedings in his place. The present judgment will therefore take effect for their benefit.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant's heirs damages equivalent to the amount of his final salary for one year, i.e. the net salary excluding sums deducted at the source, but including allowances such as post adjustment.
2. The complainant's other claims are dismissed.

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

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy