L.

v.

FAO

131st Session **Judgment No. 4333**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs T. L. (K.) against the Food and Agriculture Organization of the United Nations (FAO) on 4 October 2018 and corrected on 7 November 2018, the FAO's reply of 21 January 2019, the complainant's rejoinder of 21 February and the FAO's surrejoinder of 10 May 2019;

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, for which neither party has applied;

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

The complainant challenges her effective entry on duty (EOD) date under a fixed-term appointment.

At the material time, the complainant was employed at grade G-2 under a short-term appointment which was due to expire on 25 December 2015.

On 21 December 2015 staff members were informed that Staff Rule 302.3.51 had been amended to record that only staff members recruited under a continuing or a fixed-term appointment before 1 January 2016 would be entitled to a pensionable language allowance.

By an email of 22 December 2015 the Office of Human Resources was informed that the Director-General had approved the recommendation to appoint the complainant to a G-3 position under a one-year fixed-term

appointment as from 1 January 2016. A copy of this email was forwarded to the complainant.

On 28 December an HR assistant forwarded to the complainant a first version of her terms of employment, which he requested her to review. It was mentioned that the EOD date was 26 December 2015. The complainant noted a mistake relating to her emoluments. The HR assistant acknowledged the mistake and stated that the terms of employment would be amended accordingly. He also requested her to "come to work". On 29 December the complainant was provided with a second (modified) version of her terms of employment. The complainant signed a copy that she sent back a few minutes later. An HR Officer immediately requested her to "disregard this contract" and informed her that "an updated one" would be sent to her shortly. One hour later, the complainant received a third version of her terms of employment, in which the EOD date had been modified to 1 January 2016. It was mentioned that this modification was "in line with the Director-General's approval". In the evening of that day, the complainant sought clarification from the HR Officer about the modification of her EOD date. She requested that it be left "as agreed before".

On 31 December 2015 the complainant wrote to the HR Officer, explaining that she was concerned by the modification of her EOD date as it would affect her entitlement to the language allowance. On 4 January 2016 the complainant reported to work. On 6 January the HR Officer apologised for the errors contained in the terms of employment that she received on 28 December and explained her appointment would be confirmed as from 1 January 2016 as soon as she had accepted the "revised offer" and passed the prescribed medical examination.

By an email of 11 January 2016 an HR Associate informed the complainant that it was not appropriate for her to report to work as she did not have a valid contract. She therefore requested her to sign the third version of her terms of employment. On 15 January the complainant signed that version. On the same day, she was informed that her appointment was confirmed and that the effective date would be 15 January 2016.

On 22 March the complainant lodged an appeal with the Director-General, challenging the decision of 29 December 2015 to "revoke a duly offered and signed contract" and the decision of 15 January 2016 to "designate [that day] as the effective date of her appointment". As this appeal was rejected on 6 May, the complainant lodged an appeal with

the Appeals Committee on 20 May 2016. She requested the reversal of the 6 May decision, the payment of her salary for the period 26 to 31 December 2015 and for the full month of January 2016, the modification of the date of her next within-grade step increment in order to reflect the accumulated service accrued as from 27 January (sic) 2015 (an obvious reference to 26 December 2015), an award of moral damages and costs.

In its report of 9 March 2018 the Appeals Committee found that the FAO had no right to revoke the second version of the terms of employment but stated that in signing the third version, the complainant "had accepted to nullify the previous terms of employment". It recommended that the EOD date be changed to 1 January 2016 and that the complainant be paid compensation for days worked from 29 to 31 December 2015.

By a letter of 10 July 2018 the Director-General informed the complainant that he had decided to reject the findings of the Appeals Committee and its recommendation that the EOD date be changed. He accepted to grant her compensation but only for 29 December 2015, as she was only instructed to come to work that day. That is the impugned decision.

The complainant requests the Tribunal to quash the impugned decision and to reverse the decision that her EOD was 15 January 2016, to order the payment of her salary with all applicable retroactive adjustments, including language allowance, for the full month of January 2016 and for the days worked on 29, 30 and 31 December 2015, to order that the date of her next within-grade step increment be modified to reflect the accumulated service accrued as from 26 January (sic) 2015 (an obvious reference to 26 December 2015) and to award her moral damages and costs. She also asks the Tribunal to order any other redress it deems just and fair.

The FAO requests the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant challenges her effective entry on duty (EOD) date under a fixed-term appointment. If this date was 26 December 2015 as she contends, she would receive different entitlements, including a pensionable language allowance for two languages, from that date.

The version of Staff Rule 302.3.51 which was in force at the material time relevantly states as follows:

> "FAO staff members who were recruited under a continuing appointment or a fixed-term appointment before 1 January 2016 shall be entitled to a pensionable language allowance [...]"

2. The FAO contends that 15 January 2016 was the effective EOD date of the complainant's appointment under a fixed-term contract. The complainant however asserts that the effective EOD date was 26 December 2015 under the second version of her terms of employment which she signed and which an HR Officer signed on behalf of the FAO on 29 December 2015. In the impugned decision, the Director-General upheld the decision to set 15 January 2016 as the complainant's EOD date, thereby rejecting the Appeals Committee's conclusion that that date was 1 January 2016.

3. The Appeals Committee had found that the second version of the complainant's terms of employment was valid. It however noted that the complainant signed a third version on 15 January 2016 with the EOD date as 1 January 2016. It observed that this version explicitly stated that it superseded the second version and that it was valid since the complainant did not sign it under duress, as she had alleged. The Committee concluded that by signing it the complainant had agreed to nullify the second version. It however recommended that the EOD date be changed to 1 January 2016, that she be paid salary for the period 1 January to 14 January 2016 and that she be adequately compensated for the days which she worked between 29 and 31 December 2015 given the confusion that ensued as on 28 December 2015 she was requested "to come to work".

In the impugned decision, the Director-General rejected the Appeals Committee's conclusion and recommendations and confirmed that the complainant's EOD date under a fixed-term appointment was 15 January 2016. The Director-General however decided to compensate her for 29 December 2015 as she was asked to come to work on that day.

4. In the present proceedings, the complainant insists that the correct EOD date was 26 December 2015 because the second version of her terms of employment was valid, entitling her to the language allowance. She argues that the third version was vitiated because she

signed it under duress. Ultimately, she contends that this third version was "merely a device to deny [her]" the benefit of the language allowance. She accordingly asks the Tribunal to set aside the impugned decision; reverse the decision therein that her EOD was 15 January 2016 "instead of the lawful EOD [date] of 26 December 2015"; order that she be paid salary for the full month of January 2016 and for 29 to 31 December 2015, with all applicable adjustments, including language allowance; order that the date of her next within-grade step increment be modified to reflect the accumulated service accrued as from 26 January (sic) 2015. The complainant contends, moreover, that after she initially refused to sign the third version "she was treated in a disrespectful and humiliating way by the [FAO]". She accordingly claims moral damages for the FAO's "breach of the duty of care and good faith". The complainant also claims costs.

5. Determining the complainant's EOD date under a fixed-term appointment, and, concomitantly, whether the FAO breached the second version of her terms of employment which she signed on 29 December 2015, is essentially a function of interpretation of the various versions. The Tribunal relevantly stated the following in considerations 1 and 9 of Judgment 3483:

> "1. [...] 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).
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> [...]
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> 9. [...] 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."

6. An email from the General Service Selection Committee (GSSC) Secretariat, dated 22 December 2015, to the Office of Human Resources (OHR) informed it that on 18 December 2015, the Director-General had approved the GSSC's recommendation to appoint three persons, including the complainant, as Office Assistants at grade G-3 and requested OHR to proceed to hire them. That email, which was transmitted to the complainant on 22 December 2015, noted that she was already working in the FAO. It referred to Manual paragraph 311.2.5 concerning the effective date of transfer of a staff member. It noted its provision that when the effective date of a transfer takes place no later than the 15th day of a month, the effective date of the promotion or change of category is the first day of the month, but when the effective date of a transfer is after the 15th day of a month, the effective date of the promotion or change in category is the first day of the following month. Accordingly, the email requested OHR to arrange for the complainant's appointment with effect from 1 January 2016.

7. On 28 December 2015 an HR assistant sent to the complainant a first version of her proposed terms of employment under a fixed-term appointment. An HR Officer had signed it on that same date. Under the heading "TERMS OF EMPLOYMENT", that document stated "General Service Category CONVERSION FROM SHORT-TERM TO FIXED-TERM". Among other things, the proposed EOD date therein was 26 December 2015; it stated the grade and step as G-3.01; it stated the type of appointment as "Fixed Term: one year from entry-on-duty date"; it set out the emoluments. It stated that the appointment was subject to passing the prescribed medical examination.

These terms remained the same in the second version, except that the complainant's emoluments were amended to reflect her correct emoluments. Another HR assistant asked her to review the terms and to return a signed copy "to confirm [...] acceptance of the offer of employment". The complainant returned a signed copy within minutes. One hour later, the HR assistant sent a third version to the complainant with 1 January 2016 as the new EOD date "in line with the Director-General's approval". The complainant wrote that evening to an HR Officer stating

that she had already started work; that she could not understand why the EOD date was changed and asking her to clarify and leave the EOD date "as agreed before". She signed that third version on 15 January 2016 and was informed that this was the effective date of her fixed-term appointment. The EOD date remained 1 January 2016 in this version.

8. The complainant submits that "[t]he terms of employment are quite clear and unambiguous and in [...] keeping with the provisions of Manual paragraph 311.6.1 which governs conversion of short-term appointments to fixed-term appointments". Undoubtedly, the terms of employment were clear and unambiguous. However, the purported conversion was not in keeping with Manual paragraph 311.6.1 which states that "[a] conversion of a short-term appointment to a fixed-term appointment takes place if the short-term appointment remunerated on a monthly basis is extended so that the total period of service amounts to 12 months or more". The complainant states that she was employed by FAO from September 2009 to 25 December 2015 on a series of short-term appointments in the Temporary Assistance Pool. She was not employed continuously. Her successive short-term appointments never exceeded 11 months in duration. Each time a contract expired there was a break, usually of one month, before the next one began. This prevented the operation of Manual paragraph 311.6.1, because the condition whereby a short-term appointment must be "extended so that the total period of service amounts to 12 months or more" was never fulfilled.

9. The complainant further submits that "[t]here is no overwhelming evidence, or any evidence for that matter, that the parties to the contract signed on 29 [December] 2015 [the second version], had a contrary intention expressed in the text". This submission misstates that aspect of the principle, referred to in Judgment 3483 for example, that 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".

10. In the present case, the email dated 22 December 2015 (referred to in consideration 6 of this judgment) had informed the complainant that her EOD date would be 1 January 2016. The complainant was aware even before she received the first version of her terms of employment that the Director-General, who under FAO's regulatory regime has the

ultimate authority to appoint staff members, had specified that date. That, in the Tribunal's view, constitutes overwhelming evidence that the parties' real intention was that 1 January 2016 was to be, and is, the EOD date. She accordingly knew that the purported conversion of her short-term appointment to a fixed-term appointment with 26 December 2015 as the EOD date was in error. That error vitiated the second version of her terms of employment and the FAO was entitled to replace it. It replaced it with the third version, which the complainant signed on 15 January 2016. Moreover, the complainant's plea that this contract is vitiated because she signed it under duress is rejected. With reference to the case law that is stated, for example, in consideration 9 of Judgment 3680, she provides no evidence to prove that she signed it under duress.

11. In the impugned decision, the Director-General confirmed the prior decision that the EOD date was 15 January 2016. This was wrong. The prior decision was made on the basis that the complainant did not have an employment contract before that date. However, the EOD date was fixed at 1 January 2016 in the third version of the terms of employment in keeping with the Director-General's approval mentioned in the email of 22 December 2015. It is noteworthy that the 1 January 2016 EOD date was confirmed in an email communicated to the complainant by the HR Officer on 6 January 2016. The HR Officer stated therein that the complainant's fixed-term appointment would be confirmed with 1 January 2016 as the EOD date once she signed and returned it. That version became valid and binding on the parties as the complainant signed and returned it. Only formalities and clearances remained that required no further agreement. It was unlawful for OHR to change the EOD date specified by the Director-General and which was a term in the third version of the terms of employment to 15 January 2016 and so notifying the complainant by email about an hour after she had returned the signed third version.

12. For the foregoing reasons, the impugned decision will be set aside to the extent that it confirmed that the complainant's EOD date under her fixed-term appointment was 15 January 2016. The EOD date is determined in this judgment to be 1 January 2016. Accordingly, the FAO shall pay the complainant salary and all related benefits due to her for the period 1 January to 14 January 2016.

The FAO will take this EOD date into account with all legal consequences, including when determining the complainant's eligibility for her within-grade step increment.

Inasmuch as the EOD date is 1 January 2016, the complainant's request to order the FAO to modify the date of her next within-grade step increment to reflect accumulated service accrued from 26 January (sic) 2015 is rejected. Additionally, by virtue of Staff Rule 302.3.51, the complainant is not entitled to the language allowance as her EOD date was not before 1 January 2016.

13. The complainant seeks payment of salary for the period 29 to 31 December 2015. The Director-General correctly determined, in the impugned decision, to pay her for 29 December 2015 only, as she was requested to work on that day and did so. Her contention that the Director-General unlawfully rejected her claim to be paid for 30 and 31 December 2015 is unfounded given her evidence, in an email of 31 December 2015, that she was asked by OHR not to report to work on those days.

14. The complainant alleges that following her refusal to sign the third version of her terms of employment, she was treated in a disrespectful and humiliating way by the FAO, contrary to the principle according to which "the relations between an international organization and a staff member must be governed by good faith, respect, transparency and consideration for their dignity". The complainant states that given her long and dedicated service to the FAO, she did not expect to be treated callously by the lack of timely and informative communication about her contractual status; the threat hanging over her of potential job loss, which, as a head of household caused her extreme anxiety and distress and the warning that she would have been expelled from the premises if she failed to sign the third version. This latter reference is to an email which an HR Associate transmitted to the complainant on 11 January 2016. It stated, among other things, that "[i]t has come to our attention that you are currently in the office and ostensibly working. This is not appropriate as you do not have a valid employment contract. We would therefore request that you sign and return the employment contract offered by the [FAO], otherwise we will have to request that you leave the premises."

15. Regarding bad faith, the Tribunal has consistently stated, for example, in consideration 11 of Judgment 3902, that bad faith cannot be presumed and must be proven and that it requires an element of malice, ill-will, improper motive, fraud or similar dishonest purpose. The complainant has provided no evidence of any action or omission on the part of the Administration to prove any of these elements. Neither has she proved that the FAO breached its duty of care towards her. In the Tribunal's view, although the circumstances that unfolded at the material time would have been unpleasant and stressful to the complainant and the wording of the email of 11 January 2016 was somewhat harsh, they are attributable to administrative confusion rather than to a lack of duty of care towards the complainant by the Administration. Accordingly, the plea and consequentially the claim for moral damages are dismissed.

16. Given that the complainant has succeeded in part on this complaint, she will be awarded costs in the amount of 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside to the extent that it confirmed that the complainant's effective EOD date under her fixed-term appointment was 15 January 2016.
2. The FAO shall pay the complainant salary and all related benefits due to her for the period 1 January to 14 January 2016.
3. For the purpose of the complainant's within-grade step increment, the FAO shall consider that 1 January 2016 was her EOD date under a fixed-term appointment.
4. The FAO shall pay the complainant 1,500 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ