

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

## FORTY-EIGHTH ORDINARY SESSION

In re LOK

Judgment No. 488

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. Siepko Hendrik Lok and dated 15 July 1981, the FAO's reply of 8 October, the complainant's rejoinder of 10 December and communication of 13 December 1981, and the FAO's surrejoinder of 17 February 1982;

Considering Article II, paragraphs 1 and 5, of the Statute of the Tribunal, FAO Staff Rule 302.4102 and Manual provisions 311.421, 422 and 522;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of Canada, joined the staff of the FAO in 1965 on a permanent appointment as an agricultural economist at grade P.4. He served in turn in Cairo, Rome, Thailand, Sri Lanka, Fiji and the Maldives, in later years at grade P.5, in which by 1980 he had reached step IX. On 1 June 1980 he was transferred to a P.4 post (step XII) at headquarters as a commodity specialist. From 1 February 1981 he served in Nepal on an appointment as a senior training adviser at grade D.1 On 19 July 1980 he appealed to the Director-General against his transfer to the P.4 Post in Rome, alleging that according to Manual provision 311.522<sup>(1)</sup>

the Organization ought first to have explored appropriate vacancies carrying a grade equivalent to the one he had held in the field. By a letter of 21 August the Assistant Director-General for Administration and Finance, writing on the Director-General's behalf, rejected the appeal on the grounds that the Manual provision did not put the options in order of priority. On 26 August the complainant appealed to the Appeals Committee. In its report of 2 February 1981 the Committee unanimously recommended that the complainant should "retain the grade and step that he gained in the field, until such time as Manual provision 311.522(i) can be applied to his case or ... [he] obtains whatever post he has applied for". By a letter of 22 May 1981 the Deputy Director-General informed the complainant that the Director-General had concluded that the transfer to the P.4 post did not violate any staff regulation or staff rule and he therefore rejected the Committee's recommendation. He also decided, however, "on an exceptional basis and in view of the relative imminence" of the complainant's retirement, to grant him enough additional steps in the D.1 grade he held in Nepal to bring him to the step he would have received in that grade had he been promoted from grade P.5, step IX, the step he had last held in the field. It is the decision of 22 May 1981 that is now impugned.

B. The complainant contends that the Organization has failed to respect the requirements of the Manual. First, Manual provision 311.522 states an order of priority: where options are not equivalent the intention is that the first stated should be given priority. The Organization should therefore have offered him "a suitable headquarters ... post equivalent in grade level to the post he held under the project". Secondly, the FAO applied the wrong criteria in determining whether he qualified under the first option. In the internal proceedings it conceded that he was qualified for the vacant P.5 posts he had applied for, and it is irrelevant for the purposes of Manual provision 311.522 that others may have been more exactly qualified. Nor should the application of the provision depend on operational convenience. Thirdly, there is no evidence of any effort on the part of the Personnel Division to place him in one of the P.5 posts. Fourthly, the assignment to the P.4 post was a transfer and as such governed by Manual provision 311.422, which required the FAO to take account of his "qualifications, suitability, capacity, health, personal situation and interests". Manual provision 311.522 also required that he should be given a "suitable post". He explains why in his view the P.4 post was not suitable: it meant his changing to a new field of specialisation after many years, and on the eve of his retirement. The reason why he accepted a D.1 post in the field was to

escape from the utterly unsuitable assignment at headquarters. He invites the Tribunal to order the FAO (1) to restore to him grade P.5 and relevant benefits from 1 June 1980 until 1 February 1981, together with normal increments; (2) to place him in a P.5 or D.1 post in the FAO Investment Centre when he has to return to headquarters; and (3) to pay him compensation for financial loss and inconvenience to his family caused by his untimely departure from headquarters and for the mental stress he has suffered.

C. In its reply the FAO rejects the complainant's contention that Manual provision 311.522 sets an order of priority: nothing in the wording suggests that the FAO is required to begin with the option listed first. Indeed there is a presumption of a contrary intention when the fourth option alone is clearly indicated as being of lower priority than the first three. Where an order of priority is intended it is expressly stated, as in the Manual provisions on reductions in force. As to the complainant's second argument, the criteria the FAO applies are entirely consistent with Manual provision 311.522. A staff member returning from the field to headquarters is normally given the same grade as that which he held before transfer; otherwise he would be bypassing the promotion procedures applicable to headquarters posts. Thus reassignment to headquarters normally follows option (ii) in the Manual provision. Cases in which option (i) has been followed are few and exceptional; in any event they confer on the complainant no right to have the option applied to himself. Moreover, option (i) may raise practical difficulties: the higher the grade in the field, the more difficult it is to place the staff member at headquarters in that grade. Even if the complainant met the essential requirements of a P.5 vacancy at headquarters, the Manual provision afforded no reason for exempting him from competition. The terms of reference of the Professional Staff Selection Committee do not prescribe preferential treatment for a placement case unless the vacancy carries the same grade as that of the previous headquarters post. In this instance the Committee did not consider the complainant to be the best candidate. Nor was there anything unsuitable about the P.4 post: the complainant had good academic qualifications in both economics and agriculture. Manual provision 311.422 was therefore complied with. The complainant's second claim for relief (see B above) is irreceivable since he cannot allege any breach of rights relating to his conditions of employment at some future date. His other claims are unfounded.

D. In his rejoinder the complainant develops his arguments. In particular he submits that even by the FAO's own criteria he was qualified for option (i) in Manual provision 311.522 and should have been offered one of the three suitable P.5 vacancies. Instead the FAO applied option (ii) to put him on the P.4 post. There is nothing in the provision which says that option (i) is applied - as the FAO admits applying it - only in exceptional cases. There are no grounds for having general selection procedures take precedence over the application of Manual provision 311.522 because, for one thing, someone who qualifies for an option under the provision enjoys a special status. There is no evidence to suggest that the FAO made any effort to apply option (i). Moreover, for reasons which the complainant sets out in detail, it is quite unconvincing to say that his P.4 post was suitable, since he did not meet its requirements. Suitability has two sides to it, as Manual provision 311.422 recognises, and this the FAO ignored. The complainant explains the financial and other inconvenience and strain he and his family suffered on account of his being callously put on a quite unsuitable post in Rome. His second claim is a logical extension of his first, and therefore receivable: he fears that at the end of his assignment in Nepal he may again be transferred to a P.4 post at headquarters under option (ii). In an appendix to his rejoinder he corrects or supplements what he considers to be mistaken or incomplete statements in the FAO's reply.

E. In its surrejoinder the FAO repeats its contention that options (i), (ii) and (iii) are not in order of priority. Even if there is a headquarters post at a higher grade for which the staff member returning from the field has the essential qualifications the FAO is not obliged to put him on it: had that been intended Manual provision 311.522 would have been worded differently. The staff member returning to headquarters may be assigned under option (i), (ii) or (iii), at the FAO's discretion, provided he is qualified and there is no prejudice or other extraneous factor. There is nothing unreasonable or arbitrary about the FAO's practice, which is normally to apply option (ii). In accordance with Staff Rule 302.4102 placement of a returning staff member at his previous headquarters grade is not subject to headquarters selection procedures, but his promotion to a higher grade is. There were therefore no grounds for excluding competition for the three P.5 posts for which the complainant applied, and for which he was not the best candidate. For reasons which it explains at length the FAO rejects his allegation that he did not meet the requirements of the P.4 post: all his qualifications and experience were taken into account in assigning him to it. It did make a real effort to place him satisfactorily and there is no evidence of disregard for his feelings. As for his return to the field, that was his own choice. The FAO comments on the points of detail raised in the appendix to his rejoinder. It observes that he has failed to refute the argument that his second claim is irreceivable and it continues to maintain that his other claims are unfounded.

CONSIDERATIONS:

1. The complainant is impugning the decision of 22 May 1981 and the Tribunal's judgment on his complaint turns on the construction it puts on FAO Manual provision 311.522.

This is the material provision where employment on a field project ceases to be available for a staff member with a permanent or indefinite appointment, the position the complainant was in on being called back to headquarters in 1979.

Manual provision 311.522 sets out, in clauses (i), (ii) and (iii), three possibilities which the Organization may adopt in such cases, viz. where an official with a permanent or indefinite appointment ceases to be employed under a field project and returns to headquarters. Unlike the fourth possibility - set out in clause (iv) - which is subsidiary in character, the three possibilities are not set out in any order of priority which the Organization is bound to follow. In fact they are three options, any one of which the Organization may prefer, at its discretion and in the light of the Prevailing circumstances and its requirements, the only proviso being that there should be no abuse or misuse of authority in the exercise of that discretion.

The option which, for the reasons given in its reply and in its surrejoinder, the Administration most commonly prefers is (ii), even though it will resort to the others, particularly (i), if possible. Applying option (ii) in the present instance meant giving the complainant a post at grade P.4 - the same grade as the post of agricultural economist he had held during his earlier period of employment at headquarters.

The Tribunal accordingly holds that the Organization's decision constituted no breach of Manual provision 311.522.

2. According to Article II, paragraph 1, of its Statute, the Tribunal may hear complaints alleging the non-observance, in substance or in form, of the terms of appointment and of the Staff Regulations. Thus it reviews the lawfulness of the decision, not its desirability. Although the Tribunal is sympathetic to the latter consideration, on which the Appeals Committee's recommendation was founded, it cannot find in the complainant's favour.

3. On his last return to headquarters the complainant was not selected for any of the P.5 posts which were vacant at the time and in which he expressed interest. But the posts were filled in accordance with the normal selection procedure, the complainant's applications being considered together with the others, and the Tribunal holds that the procedure followed by the Organization was correct and that there was no breach of any of the applicable rules. Moreover, the fact that the complainant was promoted to grade D.1, at step VI, shows the absence of any prejudice against him.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

1. The provision reads: "... when employment on a field project ... ceases to be available for a professional staff member with a permanent or indefinite appointment ... the Organization endeavours to offer the staff member:

- (i) a suitable headquarters or regional office post equivalent in grade level to the post he held under the project; or
- (ii) a suitable headquarters or regional office post at the same grade level as his previous headquarters or regional office post; or
- (iii) a suitable project post equivalent to the staff member's previous post at headquarters or at the regional office; or
- (iv) a headquarters or regional office post at a lower grade level than his previous headquarters or regional office post when no post of the types indicated in (i) through iii) above is available."

Updated by PFR. Approved by CC. Last update: 7 July 2000.