

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

## FORTY-NINTH ORDINARY SESSION

In re DIAZ DE BORSODY (No. 2)

Judgment No. 512

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Celia Diaz de Borsody on 10 July 1981 and brought into conformity with the Rules of Court by 14 September, the FAO's reply of 3 November, the complainant's rejoinder of 30 December 1981 and the FAO's surrejoinder of 2 February 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Manual provisions 308.411 and 315.321 to 324;

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. As is recounted in Judgment No. 511 under A, the FAO imposed a written censure on the complainant, a G.5 research clerk, on 6 September 1979. On 1 July 1979 she would have obtained a salary increment had her service in the previous two years been declared satisfactory. In a memorandum of 31 May, however, the director of her division informed her that he was deferring the decision until the matter of the written censure had been settled. In a memorandum of 29 June he criticised her performance, accusing her, in particular, of insubordination, and stated that he did not recommend granting her the increment. On 10 October the Assistant Director-General for Administration and Finance wrote saying that her increment had been suspended under Manual section 315(1). On 30 October she claimed back-payment of the increment from July. On 17 January 1980 the Director of Personnel replied that it would be withheld until her division director declared her service to be satisfactory. An appeal to the Director-General was rejected on 18 February on the grounds of her "unwillingness to establish a reasonable working relationship", and she appealed to the Appeals Committee on 17 March 1980. The Committee recommended rejecting her appeal, and on 13 April 1981 she received a letter of 25 March 1981 - the impugned decision - saying that the Director-General accepted the recommendation.

B. The complainant's first argument is that there is a procedural flaw. According to Manual provision 315.323 she should have received an explanatory memorandum from her division director before 1 June 1979, the increment falling due in July. His memorandum of 31 May neither stated that the increment would be withheld nor explained his attitude. The reference to the censure was no explanation since the censure was not for conduct which would justify withholding the increment. The memorandum of 29 June did constitute what was required, but came too late, and the decision taken on 17 January 1980 was therefore invalid. Manual provision 315.324 does allow deferment of the certificate of satisfactory service, but then the director may no longer recommend withholding the increment. The complainant's second plea is that the decision was not correctly based on unsatisfactory service, the only reason for which an increment may be withheld. The grounds for the decision were quite plainly the same as for the written censure, namely insubordination. The Tribunal has held that, to bring insubordination within the concept of unsatisfactory service, it must have affected the quality of the official's service and it must not give rise to a dispute. Neither condition is met. The complainant disagrees that she has been insubordinate - she has been given work for which she is not qualified - and the quality of her service has not been affected. She seeks the quashing of the decision of 25 March 1981, payment of the increment from 1 July 1979, plus interest at 10 per cent a year from the dates on which each monthly salary fell due, and costs.

C. In its reply the FAO contends that the decision respected the letter and intent of the Manual provisions. With a decision on the written censure pending, the division director could recommend neither withholding nor granting the increment, and the only solution was to suspend the matter under 315.324. The complainant's interpretation of

this provision would mean that, however unsatisfactory service was later found to be, the increment would have to be granted. In fact the second sentence applies only where service is found to have been satisfactory. Since in this case it was not, the FAO followed 315.323. The clear implication of the division director's memorandum of 31 May 1979 confirmed expressly in his complementary memorandum of 29 June was that the increment would be withheld unless the inquiry into the matter of the written censure showed that to be unwarranted. The reasons were also clear from the memorandum of 31 May. Thus the FAO may be deemed either to have suspended the matter under 315.324 and then decided to withhold the increment under 315.323, or else to have withheld under 315.323 on the recommendation in the memorandum of 31 May as complemented by that of 29 June. The FAO further denies the allegation of a substantive flaw. Both the conditions for bringing insubordination within the concept of unsatisfactory service were met. First, she has never seriously disputed the facts on which the censure was based, nor indeed lost the protection of the disciplinary procedure by having her insubordination charged as unsatisfactory service, since if the Tribunal now set aside the decision on censure, which she is also challenging, the FAO might review the decision on her increment. Secondly, the FAO seeks to show by a detailed account of incidents occurring since 1977 that her persistent attitude of non-cooperation with her supervisors and stubborn refusal to do some kinds of work have affected her performance and impaired the effectiveness of her unit. It would be inconsistent to impose a censure for insubordination directly affecting her work and yet declare her

service satisfactory. In any event she is not entitled to back-payment of the increment since she has failed to show that her service ought to have been certified as satisfactory.

D. In her rejoinder the complainant maintains her arguments and claims. The reason why she did not challenge the censure on substantive grounds was that she regarded her procedural objections as conclusive. She has, she believes, never been insubordinate, but had to refuse work for which she was not qualified. She rejects the FAO's charges and maintains that despite the incidents it mentions she is doing valuable day-to-day work.

E. The FAO's surrejoinder discusses further the Tribunal's case law and concludes that on the facts the conditions for bringing the complainant's insubordination within the concept of unsatisfactory service were met. It elaborates on the incidents which it believes show that her attitude affected the quality of her service. Whatever the quality of any work she might have done independently of her supervisors, it was reasonable to hold that her uncooperativeness warranted declaring her service unsatisfactory.

## CONSIDERATIONS:

### Procedural issues

1. According to FAO Manual provision 308.411 within-grade step increments in salary are granted for satisfactory service during a qualifying period. The conditions for granting and withholding increments are laid down in Manual provisions 315.321 and 315.324.

According to provision 315.321 the Personnel Division forwards to each division director at least three months in advance and in duplicate a checklist of the staff members in the division whose increment is due.

Under 315.322, if the director approves the increments, he returns a copy to the Personnel Division with the appropriate annotations before the first of the month prior to that in which the increments are due.

According to 315.323, however, if he considers that the increment should be withheld from someone on his list, he notifies the staff member accordingly by memorandum, explaining the reason; a copy of this memorandum must reach the Director of Personnel before the first of the month prior to that in which the increment is due. After ensuring that withholding the increment is justified, the Director of Personnel withholds it and advises the staff member accordingly.

Lastly, the material rule where the division director does not certify satisfactory service is 315.324. This says that the increment is suspended until notification is received and that upon endorsement by the division director it is granted retroactively.

The Manual does not expressly cover the case where the division director, having failed to report within one month on the staff member's performance, later makes an adverse report. But it does not follow, as the complainant would have it, that the staff member has an automatic right to the increment in such circumstances. That would be unreasonable. The correct procedure is the one prescribed in 315.323, even though the one-month time limit can no

longer be observed.

2. The Tribunal will now determine whether the rules were complied with in this case.

On 31 May 1979, or exactly one month before the complainant's increment fell due, the director of her division informed her that he was not in a position to certify her performance as satisfactory and was therefore deferring the matter until the disciplinary procedure initiated by him against her had been completed. Having expressed neither formal approval nor disapproval of the grant of the increment, he was not in the position covered by 315.322 or 323. In fact his approach came under 315.324, which covers the case of absence of certification of satisfactory service.

Accordingly, from 31 May 1979 there were two possibilities open to the division director: either he acknowledged the complainant's service as satisfactory, or else he did not. If he did, then by virtue of 315.324 the increment would have been payable, with retroactive effect, at the end of the period of deferral. If he did not, then under provision 315.323, which the Tribunal has declared applicable in 1 above, the division director was required to notify the complainant to that effect by memorandum and to send a copy to the Director of Personnel. That is in fact what he did. On 29 June he sent a memorandum to the complainant - and a copy of it to the Director of Personnel - referring to a further refusal by the complainant to have discussions with her immediate supervisor and stating that he had no alternative but to recommend against the increment.

It might, of course, have been more consistent with the position the division director took on 31 May 1979 for him to have awaited the outcome of the disciplinary procedure before reporting on the complainant's performance. Be that as it may, the memorandum of 29 June 1979 had no effect on the outcome of the question of her increment. Whether her division director made his recommendation before or after the imposition of the disciplinary measure, the question of the increment was exactly the same. Accordingly, even if there was a formal defect, it does not impair the validity of the impugned decision.

The merits

3. As appears from the FAO's reply, the complainant's increment was withheld largely because of her refusal to accept the supervision of her immediate superior. As to this the FAO observes: (1) that on 11 December 1978 she failed to attend a meeting to which she and others had been invited to discuss matters of work; (2) that on 9 April 1979 she declined her immediate supervisor's invitation to discuss work procedures with him and asked him to communicate with her in future in writing; and (3) that she took the same attitude on 11 June 1979.

The complainant contends that the impugned decision runs counter to the Tribunal's reasoning in Judgment No. 247. According to that judgment, to bring insubordination within the concept of unsatisfactory service - and to withhold an increment on that account - two conditions must be fulfilled. The positive condition is that it must be established that the insubordination did in the particular case affect the quality of the officer's service. The negative condition is that the insubordination must not in the particular case give rise to a dispute. Contrary to what the complainant contends, both conditions were fulfilled in this case.

4. First, it is clear on the evidence that the complainant's insubordination was such as to affect the quality of her service. It is immaterial whether she was actually ordered to attend the meeting on 11 December 1978 and whether the incident on 11 June 1979 came too late to be taken into account. One thing is established: she refused to speak to her immediate supervisor and she wanted to communicate with him only in writing. Behaviour of that kind is bound to waste time and cause misunderstanding and delay which are damaging to the performance of subordinate and supervisor alike. The complainant is therefore mistaken in denying a causal link between her insubordination and her work attitude.

5. As for the second point, what the Tribunal said in Judgment No. 247 was succinct: it held that the insubordination must not give rise to a dispute. By that it meant that the charge should not provoke objections on the staff member's part which he has not had a chance to put forward in disciplinary proceedings. The complainant had every opportunity to state her case in the disciplinary proceedings, and there is therefore no reason why the insubordination of which she was found guilty should not be treated as affording grounds for reporting her service as unsatisfactory and withholding her increment.

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 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

1. The section reads:

.323 If the [division] director considers that the [increment] should be withheld ... he notifies the staff member accordingly by memorandum, explaining the reasons; a copy of this memorandum ... must reach the Director [of Personnel] before the first of the month prior to that in which the increment is due. The Director ... after ensuring that withholding an increment is justified, withholds the increment and advises the staff member accordingly.

.324 In the absence of certification from the division director of satisfactory service, the granting of the [increment] is suspended until such time as notification is received. Upon endorsement by the division director ... the increment is granted retroactively...