

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

FIFTY-EIGHTH ORDINARY SESSION

In re ILOMECHINA

Judgment No. 729

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. Chike Peter Ilomechina on 29 April 1985 and corrected on 26 June, the FAO's reply of 10 September, the complainant's rejoinder of 20 November and the FAO's surrejoinder of 20 December 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Staff Rule 302.4102;

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

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

A. The complainant, a Nigerian, joined the FAO in 1967 as a personnel officer. Since 1976 he has been employed in the FAO's office in Accra as regional administrative officer, and he holds grade P.4. On 28 December 1983 the FAO published in Rome an announcement of a vacant P.5 post for a senior personnel officer at headquarters, the closing date for applications being 25 January 1984. Not until 10 January was the announcement sent to the pouch service in Rome for despatch to the field offices. The complainant went on mission on 5 February and returned to Accra on 9 February to find the text of the announcement, which had been delivered at some date which is in dispute. On 10 February he sent the Director of the Personnel Division in Rome a telex expressing interest and a letter of application. But the Director answered by telex on 15 February that the selection committee had made its choice of candidate on 8 February. On 17 February he submitted an appeal to the Director-General. It was rejected and he lodged an appeal with the Appeals Committee on 30 April alleging breach of Staff Rule 302.4102: "When a vacancy is to be filled in an established post of one year or more from G.2 to P.5 levels, it shall be advertised to the staff...", and of an office memorandum on Professional recruitment procedures. In its undated report the Committee held that the complainant had not established any prejudice. But it recommended that "recognition be conveyed" to him of the FAO's failure to fulfil its obligation under Rule 302.4102 and that he be properly considered for any suitable P.5 post that fell vacant in future. By a letter of 30 January 1985, the impugned decision, the Deputy Director-General informed him that the Director-General had rejected his appeal.

B. The complainant submits that he did suffer prejudice from the FAO's failure to distribute the announcement properly. As the Appeals Committee acknowledged, the FAO was negligent in that it took 12 or 13 days to send the text of the announcement to the pouch service for distribution and failed to see that the text reached Accra, where it was delivered presumably after 5 February, at an earlier date. Although the impugned decision of 30 January 1985 said he would be considered for suitable vacancies in the future, that is no remedy for the injury. Not for the first time he was denied his right to compete for a post he would have stood a fair chance of getting. He will be unable to compete fairly with headquarters staff until the FAO recognises its duty to advertise vacancies under Rule 302.4102. He asks the Tribunal to order his personal upgrading to P.5 as compensation for the alleged injury.

C. In its reply the FAO submits that the date of delivery of the announcement in Accra is unknown but that the evidence suggests it was delivered by 2 February. Had the complainant reacted promptly his application would have reached Rome before the selection committee's meeting of 8 February. His case rests on two misconceptions. The first is that the FAO is denying its obligation to advertise posts: what it does deny is that it must ensure that all staff get announcements before the closing date for applications. It need only take reasonable steps to see that staff receive them in time, and in this case it did. The complainant's second misconception is that any administrative shortcoming confers a right to compensation: there must be actual injury, and it must be a direct consequence. The complainant has failed to show any such injury. There is no reason to suppose either that the selection committee would have recommended him or that the Director-General would have accepted such recommendation. Lastly, personal upgrading is a measure taken at discretion to reward outstanding performance and is an inappropriate

form of compensation for the sort of injury the complainant alleges.

D. In his rejoinder the complainant comments in detail on the issues of fact raised in the reply and he develops his case. He reaffirms that what the FAO's laxity has denied him is not the post but the right to compete for it. The Organization persists in denying its obligation to advertise posts properly. Even supposing the announcement arrived in Accra just before the closing date -- though he believes it did not -- he was discriminated against by being prevented from competing on equal terms with headquarters staff. He has never contended that the FAO must ensure that every staff member see announcements, but that it must take reasonable steps to distribute them in time, and that is something it has consistently failed to do. He presses his claims for relief.

E. The Organization submits in its surrejoinder that the rejoinder has failed to address the pleas in its reply, which it develops. It discusses further the disputed issues of fact and observes that the complainant advances no argument which in any way impairs the validity of its contention that his claims are devoid of merit.

CONSIDERATIONS:

The duty to announce vacancies

1. FAO Staff Rule 302.4102 reads: "When a vacancy is to be filled in an established post of one year or more from C.2 to P.5 levels, it shall be advertised to the staff, except in certain specified circumstances." In paragraph 4 of an office memorandum dated 1 November 1983 the Director of the Personnel Division declared that "the posting period of internal vacancy announcements" was four weeks, but might be longer if action began six months before the vacancy occurred.

Under 302.4102 the FAO is bound to inform the staff of any vacancy covered by the rule. The phrase "it shall be advertised" imposes a duty and "to the staff" means that it is a duty towards all FAO officials. Indeed the principle of equality, which is binding on an international organisation even if it is not stated in the rules, requires that when a vacancy occurs all members of the staff should have the same opportunity of securing it.

The Organization is not of course bound to ensure that the notice of a vacancy should actually reach everyone. Its duty goes no further than to issue the notice by some suitable means and with suitable promptness.

The memorandum of 1 November 1983 is a set of administrative instructions and creates not only duties for the staff but rights as well, and in particular, insofar as it requires advertising a vacancy for four weeks any staff member who wants to apply may rely on it.

The breach of the Organization's

2. The advertising of the vacancy the complainant unsuccessfully applied for began on 28 December 1983. The notice said that 25 January 1984 was the deadline for applications and 15 March 1984 the date of taking up duty.

No more than the four weeks provided for in the office memorandum elapsed from the beginning to end, viz. from 28 December 1983 to 25 January 1984. The period was short, but there can be no objections on that score.

But the Tribunal holds that the FAO did not act with proper care and therefore failed to discharge its duty. As is clear from 1 above, all officials, including the field staff, were entitled to hear of the vacancy early enough to be able to make up their minds and, if they so wanted, get their application in by the deadline. In this case the Organization infringed that right, at least in respect of the complainant and other staff members in the Regional Office for Africa in Accra.

As the FAO acknowledges, the notice intended for the staff in Accra was not delivered to the despatch service in Rome until 10 January 1984, or thirteen days after the advertising began. That the delay occurred over the holiday period is no excuse. It had consequences which ought to have been avoided. First, it gave an unfair advantage to headquarters staff, who -- says the complainant, and the FAO does not challenge the point -- knew of the vacancy by 28 December 1983, over staff like the complainant who did not get to hear of it until at best a fortnight later. Secondly, it left the field staff far too little time to decide whether to apply.

It is not known when the notice left Rome or when it reached Accra. The FAO concedes that it may have gone off after 10 January 1984; it cannot even rule out the possibility that the notice did not reach Accra until 2 February. In

such circumstances the rule is that it is up to someone who undertakes a course of action to prove that it was completed. Even if the FAO's statement is accepted and the date of delivery of the notice in Accra is taken to be 2 February 1984, the complainant was not informed in time. By then the deadline for applications had passed and in any event the FAO could not expect him to act at once. Although, if the notice arrived on 2 February, the complainant could in theory have got his application off that very day or on the morrow -- they were both working days -- it is not certain that the notice came to his attention then or at any date before he went off on mission, on 5 February. Besides, he could not be required to decide in a day or two on a matter of such importance to his own future and his family's.

The Tribunal concludes, since the notice did not leave Rome before 10 January 1984 and reached Accra at some unknown date, that the FAO may be deemed to have been in breach of its duty.

The complainant's claim to compensation

3. The complainant does not ask that the competition be held again but that he be granted personal upgrading to P.5.

Such a claim would succeed only if the complainant would have been likely to get the post had his application been lodged in time or if, at the very least, his qualifications warranted promotion to P.5. The Tribunal cannot take either condition to be fulfilled: for reasons he does not question he seems to have had little hope of getting the appointment, and it is not for the Tribunal to express an opinion on his qualifications.

But that does not mean he has no right to compensation. First, though not great, the prospects he was denied were not necessarily worthless. Secondly, if a selection committee had taken up his application, he might have had a better chance of success in a further competition. Thirdly, he suffered moral injury in realising he had been improperly excluded from a competition. The Tribunal will therefore award him *ex aequo et bono* damages amounting to 2,000 United States dollars.

It is immaterial that the complainant has not expressly claimed financial compensation. His claim to upgrading to P.5 may be treated as in part a claim to financial compensation, and the award of a specific sum in damages therefore comes within the scope of his claims.

The Tribunal need not declare in the text of its decision below that the Organization was in breach of duty since that is explicit in 2 above.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant 2,000 United States dollars in damages.
2. It shall pay him \$1,000 in costs.
3. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

Devlin

