

FIFTY-NINTH ORDINARY SESSION

In re THRESHER

Judgment No. 758

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Philip Brian Thresher against the Food and Agriculture Organization of the United Nations (FAO), addressed to the Secretary-General of the United Nations on 4 June 1985, forwarded to the Registrar of the Tribunal on or about 23 September, received at the Registry on 7 October and corrected on 12 November 1985, the FAO's reply of 29 January 1986, the complainant's rejoinder of 7 March, the FAO's surrejoinder of 16 April and further observations of 18 April, and the complainant's comments of 12 and 13 May 1986 on the further observations;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulation 301.07, FAO Staff Rule 302.771 and FAO Manual provisions 332.232 and 420.64;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a citizen of Canada born in 1925, joined the FAO in 1972. In 1981 he was assigned to a project in Barbados. On 1 January 1982 he was promoted to grade D.1. His appointment ended on 15 July 1983, and he was entitled to repatriation and removal of his household goods under Staff Regulation 301.07 and Staff Rule 302.771. A travel authorisation dated 1 June 1983 said he was entitled to ship to British Columbia either by air, if the goods did not exceed 1,200 kilograms, or by surface, if they were not over double that weight. By a telex of 16 June he asked the FAO to let him send the goods to California instead, and by air, on the understanding that they would not exceed 2,400 kilograms and that he would pay the difference in freight costs himself. In a telex of 1 July the FAO agreed to shipment to California. He drew up an inventory in which he stated that the total value insured was 20,184 United States dollars. The FAO took out a policy for that amount, which he signed, with C.T. Bowring (London) Limited. Shipment was delayed while the FAO looked into his request that it be made by air. The Organization asked their shipping agent in Rome to find out about ocean freight rates and other matters and much time was spent in communicating with a carrier in Barbados, Forbes International, who had custody of the goods. On 27 October 1983 the FAO sent a telex to their office in Barbados authorising shipment by air and urging that Forbes ship immediately. But on the night of 9/10 November 1983, before anything had been done, there was a fire in Forbes' warehouse in Bridgetown and the complainant's goods were destroyed.

On 7 June 1984 the complainant wrote to the Director-General setting out the "irreplaceable, yet uninsurable losses" he had sustained: "materials forming the basis of future earnings", books, letters, photographs, autographs, memorabilia and "vital documents". He alleged gross negligence by Forbes, condoned and compounded by the FAO, and claimed \$452,500 in damages. In a letter to him of 5 July 1984 the FAO said they were not liable. On 6 August 1984 Bowring agreed to pay him the total insured less \$50 in final settlement. On 13 August he wrote again to the Director-General. In a letter of 19 September 1984, the decision impugned, which reached him on or about 9 October, the Assistant Director-General in charge of Administration and Finance notified the Director-General's final rejection of his claims. The complainant then followed various other channels. Not until 4 June 1985 did he address his complaint to the Secretary-General of the United Nations in New York asking that it be forwarded to the Tribunal.

B. The complainant invites the Tribunal to entertain his claims even though he has failed to respect the 90-day time limit in Article VII(1) of its Statute, on the grounds that he did not know that appeal would lie, nor the Tribunal's address, and that the FAO were dilatory, evasive and guilty of bad faith in failing to inform him how to proceed.

As to the merits, he accuses the FAO of gross negligence in failing to ensure reasonably prompt shipment and in choosing, in Forbes, a slovenly and untrustworthy shipping agent. FAO officials paid no heed to his warnings and would not hear of employing any other carrier. He explains how he reckons the value of the material lost.

He seeks \$400,000 as damages "for the loss of working materials forming the basis of future earnings", \$50,000

"for the loss of irreplaceable property" and \$2,500 "for the loss of original records of self and family members".

C. The FAO reply that the complaint is time-barred. The final decision was sent to the complainant on 19 September 1984, and he did nothing for about nine months. It is surprising that someone of his grade and seniority had never heard of the Tribunal and that he took so long to find out when he could simply have asked the FAO. A letter written on his behalf to the FAO on 12 November 1985 also mistakenly argued that "there has never been a formal full denial" of the claim. The terms of the letter of 19 September 1984 were plain, and his later subsequent behaviour shows he understood them.

The complaint is devoid of merit. (1) Though required to pay removal costs, the FAO are not responsible for the removal: the contract for shipment is between staff member and carrier. For the sake of convenience the FAO prefer to deal with a single shipping agent in Rome, and removals are carried out by that agent's correspondents in other countries, in this case Forbes. (2) The delay was no fault of the FAO's but due to the need to compare charges for freight by air and by surface and to difficulties in communication with Bridgetown. (3) The FAO cannot be liable for loss due to an act of God. (4) The complainant has produced no evidence to support his claims. If the material lost was worth so much he should have known better than to say nothing of it to Bowring. As FAO Manual provision 420.64 warns, "Staff members should satisfy themselves that the full value of the goods and effects is insured".

D. In his rejoinder the complainant corrects the FAO's version of the facts where he sees misrepresentation or distortion.

As to receivability he says it is mistaken to accuse him of doing nothing for nine months after 19 September 1984: he was trying to find out what to do next. The FAO failed in their duty to inform him.

As to the merits he submits that the FAO did bear responsibility for the removal since shipment depended on their approval and was entrusted to a carrier of their own choosing.

Their stubborn refusal to get another, despite warnings of Forbes' incompetence, engaged their liability. There was no need for inquiry into freight charges since he had agreed to pay the excess. The inventory could not include items that were uninsurable. The FAO ignore the nub of the case. The tone of their reply is scornful and their attitude callous. Though it is hard to put a figure on his loss, his claims are reasonable.

E. In its surrejoinder the FAO presses its objections to the receivability of the complaint, observing that the complainant's attempts to find out what to do did not suspend the time limits. It did all it could be expected to do in the circumstances, and there was no reason why someone of the complainant's age and experience should not have known better how to proceed.

As to the merits, it submits that it cannot be held liable for the consequences of the fire, and it observes that he has already received full payment of the value insured.

CONSIDERATIONS:

1. The complainant joined the staff of the FAO on 1 July 1972 as a resource economist at grade P.4 and was posted in Kenya. From November 1977 until July 1981 he was attached to headquarters, working in a technical subdivision which was exclusively involved in the preparation of agricultural field projects for investment by the World Bank. On 15 July 1981 he was assigned to a project in Barbados as team leader. He left the FAO on 15 July 1983 having reached the grade of D.1 on 1 January 1982.

On separation from the FAO the complainant was entitled to repatriation and to having his household and personal effects shipped to Kelowna, British Columbia, Canada. On 16 July 1983 he delivered his effects to the local agent of shipping contractors designated by the FAO. On the night of 9 November 1983 the agent's warehouse was destroyed by fire causing the total loss of the complainant's household and personal effects.

The complainant claims compensation arising out of the failure of the FAO to carry out with due diligence its responsibility to ensure that his personal effects were repatriated within a reasonable period of time. The FAO objects to the complaint as irreceivable and subsidiarily as unfounded on the merits.

The application for oral proceedings

2. The complainant applies for oral proceedings "if necessary to establish FAO culpability" by proving (i) the FAO's failure to instruct and pre-pay properly and in timely fashion the designated shipper, (ii) its failure to follow up any instructions given, and (iii) the designated shipper's poor reputation. He seeks to call as witnesses the former FAO Representative in Barbados and the Administrative Officer at the UNDP office at Bridgetown, Barbados. The Tribunal refuses the application for the reasons which will appear from paragraph 4 below. The issue of receivability

3. The destruction of the complainant's property took place between 9 and 10 November 1983. On 7 June 1984 he wrote to the Director-General at the address of the FAO's Liaison Office in Washington D.C. claiming a compensatory settlement in the sum of \$452,500.

On 5 July 1984 the FAO replied rejecting the claim. On 13 August 1984 the complainant again wrote to the Director-General asking that his claim be given further attention. On 19 September 1984 the Assistant Director-General in charge of Administration and Finance wrote to the complainant confirming the FAO's final decision not to entertain his claim for compensation.

On 4 June 1985 the complainant wrote to the Secretary-General of the United Nations requesting him to forward his claim for compensation to the Administrative Tribunal. The claim was forwarded on 23 September 1985 and the complainant complied with the requirements of Article 7 of the Rules of the Tribunal on 12 November 1985.

Article VII of the Statute of the Tribunal imposes on a complainant a requirement to file his complaint within ninety days of notification of the decision impugned, and the requirement is mandatory and absolute. It is reproduced in FAO Manual provision 332.232.

The complainant states that he was unaware of the existence of this Tribunal. He consulted insurance company officials and lawyers specialising in insurance legislation. Following these consultations he decided to pursue non-legal channels as far as possible before resorting to legal ones. He states that it was only on 20 May 1985 that he discovered that there was within the United Nations system a body known as the Administrative Tribunal.

It seems to the Tribunal that the complainant's inquiries as to his right to challenge the FAO's decision were singularly ill-directed, possibly because he was alleging negligence on the part of the FAO and its agents rather than a breach by the FAO of a term of his contract. However this may be, having regard to the lapse of time involved, the means open to him to obtain information and his lack of diligence in pursuing his remedies, this case does not fall within the very exceptional class of cases where the Tribunal will grant relief for failure to observe the requirements of Article VII of the Statute. The complaint is therefore irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 12 June 1986.

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

