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

SIXTY-FOURTH SESSION

In re SANDRINI

Judgment 909

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Italo Sandrini against the Food and Agriculture Organization of the United Nations (FAO) on 2 March 1987 and corrected on 10 April, the FAO's reply of 23 July, the complainant's rejoinder of 23 November 1987 and the FAO's surrejoinder of 26 February 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.10 and 301.151 and .152, FAO Staff Rules 302.52, 302.6214, 302.624 and 3O3.O1 to .04 and FAO Manual section 330;

Having examined the written evidence;

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

A. The complainant, an Italian born in 1930, held a grade G.3 post with the FAO in Rome. In 1981 he began to have heart trouble and saw a specialist, Dr. Lioy. In the autumn of 1983 he collapsed at work and was granted sick leave. By February 1984 he had used up his entitlement under Staff Rule 302.6214 ("Staff members whose past continuous service and unexpired term of appointment equal or exceed three years shall be granted sick leave not exceeding 18 months in any four consecutive years. The first nine months shall be on full salary and the second nine months shall be on half salary.") to sick leave on full pay and was put on half-pay. He was at work for two months but fell ill again. In June 1984 the chief medical officer, Dr. Gatenby, said he would be fit by 17 July. He went back to work, but in October again applied for sick leave. Dr. Gatenby and Dr. Lioy disagreed about him and another specialist, Dr. Rulli, was consulted. Dr. Rulli saw him on 18 March 1985 and in a report of 19 March to Dr. Gatenby said he had no "organic heart disease" but advised caution in declaring him fit. On 12 April Dr. Gatenby passed that opinion on to Dr. Lioy, who on 26 April wrote that the complainant was suffering from a serious heart disorder and would be ill-advised to resume work. On 30 April 1985 a personnel officer wrote to tell him that his sick leave would end on 3 May and if he did not go back to work on 6 May his absence would be "unauthorised".

He did not go back but in a letter of 8 May answered that he was still under medical treatment. In a letter of 13 May 1985 the Director of the Personnel Division said that his absence was unauthorised and he was put on unpaid leave as from 6 May. In a letter of 23 May he objected to the decision and asked for sick leave on half-pay. On 4 June he went back to work, but on 21 June he collapsed again. The medical service authorised sick leave from 1 July until 17 August. He stayed off work thereafter and a letter of 6 November from the Director told him, among other things, that all his leave entitlement would be used up by 15 October 1985. On 2 December he informed the Organization that he was not yet fit. On 20 December 1985 the personnel officer wrote to him to say that, though the period from 18 August to 30 November was still under review, he was put on special leave without pay as from 1 December.

On 23 December he put in a claim to a disability pension from the United Nations Joint Staff Pension Fund, but the FAO Staff Pension Committee rejected it on 10 April 1986 on the grounds that the state of his health did not warrant such a pension. On 14 May he applied to the Staff Pension Committee for review of its decision.

On 14 March 1986 he submitted an appeal to the Director- General, who rejected it on 22 April, and he appealed to the Appeals Committee on 13 May. In a report of 23 September 1986 the Appeals Committee recommended rejecting his internal appeal, but, noting that his claim to a disability pension was under review, suggested convening a medical board soon. The board met on 21 October. In a letter of 2 December 1986, the decision he impugns, the Deputy Director-General informed him that the Director-General had rejected his appeal.

The medical board reported on 20 May 1987 and on the strength of its findings the Staff Pension Committee confirmed on 2 July 1987 its earlier decision that he was not entitled to any disability benefit.

B. The complainant submits that there is nothing inconsistent about objecting to the unpaid leave and also claiming a disability pension; the two matters are distinct, as the FAO has acknowledged. Though his work has declined since 1983 because of poor health, he should not suffer on that account. The FAO has misapplied the rules. Rule 302.624 says: "Subject to Staff Rule 302.523, the Director-General may grant special leave without pay to a staff member who has exhausted the sick leave permitted under these rules". But 302.523 is about the staff member's "other entitlements", and the material rule seems to be 302.524: "Any unauthorised and unjustified absence from duty shall be charged to special leave without pay, independently of any other action which may be taken under Chapter X of these rules" (Chapter X is about "disciplinary measures"). The true reason for putting the complainant on unpaid leave was his alleged shirking. Had it been his illness the FAO ought to have cited 302.521, which provides for leave without pay "in cases of extended illness". He worked well for years until his health broke down, and when he did stay off work it was on his doctor's orders. Dr. Rulli advised caution in March 1985; Dr. Lioy warned in April against letting him work; and he collapsed at work in June; yet Dr. Gatenby still held to the mistaken view that his absence was unjustified.

He alleges a formal flaw in the decision in the letter of 13 May 1985 from the Director of the Personnel Division in that it did not say what rule the decision was based on. In any event, even if formally correct, the measure is in his submission disproportionate to his alleged offence.

He invites the Tribunal to quash the decisions of 13 May 1985 and "2 December 1985" (sic) and to award him costs.

C. In its reply the FAO submits that the complainant has failed to exhaust the internal means of redress. No decision was taken on 2 December 1985, but whether the complainant is challenging the one of 20 December 1985 or the one of 2 December 1986, his complaint is irreceivable because he has changed his pleas and his claims.

As to the merits the FAO submits (1) that the complainant was fit for work. Though Dr. Lioy thought he was not, everyone else found that he was, and the Organization's evaluation of the state of his health was and is valid. (2) The action it took was justified and provided for in Staff Rule 302.52 and intended merely to correct the complainant's administrative status. He was treated considerately, every effort being made to help him, and he was actually offered lighter duties and shorter working hours. (3) The action was not disciplinary, and the complainant did not even plead in the internal proceedings that it was. The Organization did not take any of the disciplinary measures that are listed in Staff Regulation 301.10, Staff Rules 303.01 to .04 and Manual section 33O. (4) The action taken was not "disproportionate" since it was not disciplinary and the principle of proportionality does not apply. (5) There was no formal flaw in the decision of 13 May 1985. Even though the decision did not refer to 302.52, it was always explained to him whether he was being put on leave with full pay or half pay or without pay. Besides, even if the omission did amount to a formal flaw it caused him no injury.D. In his rejoinder the complainant maintains that the purpose of his internal appeals was the same as that of the present complaint. He discusses the state of his health and the medical treatment and examinations he underwent in 1985-87 and submits the findings of doctors who examined him and who have declared him utterly unfit for work. He maintains that the Organization's refusal to accept such evidence was so stubbornly mistaken as to suggest bad faith. Depriving him of pay amounted to a wholly undeserved disciplinary action and was an unscrupulous abuse of authority. The harassment of him caused him strain and distress. He cites Swiss law and precedent in support of his contention that the FAO is in breach of the employer's duty to consider the employee's health. He claims damages amounting to 35,000 Swiss francs for abuse of authority and the withholding of his pay and 15,000 francs for harassment and injury to health.

E. In its surrejoinder the FAO observes that the complainant has amended his claims yet again by adding claims to damages. It submits that the rejoinder is largely irrelevant. The complainant has shifted ground and is now relying on medical evidence subsequent to the filing of his complaint and on pleas that do not address the arguments in the reply. The Organization enlarges on its earlier replies to the allegations of improper disciplinary action, breach of the principle of proportionality and the formal flaw. It submits that under the Statute of the Tribunal Swiss law is irrelevant. It discusses the medical evidence, observing that in the last resort it is its chief medical officer who is competent to determine the state of the complainant's health.

CONSIDERATIONS:

1. The complainant joined the staff of the FAO on 15 March 1965 at grade G.1. He was promoted to G.2 and on 1 January 1972 to G.3.

By September 1983 the state of his health warranted granting him several periods of sick leave. By February 1984, however, he had used up his entitlement to sick leave on full pay and was put on half pay.

At the request of the Organization's chief medical officer he had a check-up on 10 June 1984. Since the findings differed from his own doctor's he was examined by another specialist whose findings prompted the Organization to grant him sick leave only from 25 February to 3 March 1985. Instead of going back to work he then produced a medical certificate covering the period up to 31 May 1985. On the chief medical officer's recommendation the Director of the Personnel Division put him on unpaid leave as from 6 May and so informed him in a letter of 13 May. On 27 June he was granted further leave up to 17 August but he did not go back to work thereafter. On 6 November the Organization told him that he had been granted no further leave since that date and that even if he had he would have used up his entitlement to leave with pay or even half pay by 15 October 1985. On 20 December 1985 the Organization put him on unpaid leave from 1 December 1985, his status between 18 August and 30 November 1985 being still under review.

On 14 March 1986 he appealed to the Director-General against the decision of 20 December 1985. His appeal having been rejected, he went to the Appeals Committee asking for an honourable discharge under Staff Regulations 301.151 and 301.152 and the grant of the maximum termination indemnity. On the Committee's recommendation the Director-General rejected his claims by a decision of 2 December 1986, the one he impugns.

Receivability

2. In the original statement of his claims the complainant asks the Tribunal (a) to quash the decision of 13 May 1985 on the grounds of breach of the principle of proportionality; (b) to quash the decision of 2 December 1985 (recte 1986) on the grounds of a formal flaw and failure to cite the legal basis for the decision and, subsidiarily, on the grounds of breach of the principle of proportionality; and (c) to award him costs, including his counsel's fees.

3. He restates his claims in his rejoinder: he asks the Tribunal to order the Organization to pay him (1) 50,000 Swiss francs in compensation for wrongful termination and in damages and (2) costs.

4. As a rule claims put forward in a rejoinder are receivable only if they come within the ambit of the claims as stated in the complaint.

There is no difficulty over the receivability of the claim to costs.

The scope of claim (1) becomes plain from the pleas in the rejoinder that support it. What the complainant says is that he is challenging the decision to terminate his appointment and that he is claiming 35,000 Swiss francs in damages both for the wrongful dismissal and for the withholding of his pay. He is also claiming 15,000 francs in damages for the Organization's cavalier treatment and constant harassment of him, which he says have caused serious and irreversible damage to his health.

Although the matter of compensation for the withholding of his pay - if not the amount - does come within the scope of claims (a) and (b) - to the quashing of the decisions of 13 May 1985 and 2 December 1986 - the remainder of claim (1) does not. The decision of 13 May 1985 put him on unpaid leave from 6 May 1985 and, as is clear from what happened later, had nothing to do with the termination of his appointment. The decision of 2 December 1986 rejected his appeal and confirmed the one of 20 December 1985 to put him on leave without pay from 1 December 1985 and again had nothing to do with the termination. Indeed in his appeal of 13 May 1986 to the Appeals Committee he acknowledged that his appointment was still in force.

For the foregoing reasons claim (1) is for the most part irreceivable.

5. The FAO also pleads that the complaint is irreceivable insofar as he seeks the quashing of the decision of 13 May 1985.

As it observes, he did not appeal against that decision either to the Director-General or to the Appeals Committee, and indeed his complaint is to that extent irreceivable for failure to exhaust the internal means of redress.

6. The Organization pleads that his objections to the decision of 2 December 1986 are immaterial because the decision was taken on the Appeals Committee's recommendation and that the complaint is irreceivable because the

purpose of the suit and the cause of action are not the same as in the internal proceedings.

The plea fails. In its report of 23 September 1986 the Appeals Committee observed that what the complainant was challenging was the decision to put him on unpaid leave and it held that decision to be lawful. Since it was on the Committee's consequent recommendation that the Director-General took the impugned decision of 2 December 1986 the purpose of the suit is exactly the same as in the internal appeal: the complainant is challenging the lawfulness of the decision to put him on unpaid leave.

As for the cause of action, the complainant does for the first time allege a formal flaw, the lack of reference to the legal basis of the decision, and breach of the principle of proportionality. But the rule is that the pleas put to the Tribunal need not be the same as those that were put in the internal appeal proceedings. Enlarging on the submissions that were put to an internal appeal body does not alter the scope of the claims, and there is, after all, no reason why the complainant should not put to the Tribunal pleas on which it may in any event rule proprio motu. This objection to receivability is unsound.

The merits

7. In support of his claim to the quashing of the decision of 2 December 1986 the complainant objects to the lack of reference to the legal basis of the decision. The point is developed in his submissions, in which he observes that the Organization has failed to give any indication of the basis for the decision in law, and indeed has not even said whether it is 302.521 or 302.524 that is material.

What he is alleging is a formal flaw in that an essential element of the impugned decision is lacking.

8. The plea fails.

This case is about the decision to put the complainant on leave without pay and indeed that was the main subject of the internal proceedings that culminated in the impugned decision of 2 December 1986. It was the decision of 20 December 1985 to put him on unpaid leave from 1 December 1985 that prompted those proceedings, including his appeal to the Appeals Committee. The Committee held that because he had not gone back to work the decision was in keeping with the rules on special leave and that was the reason the Director-General gave in his decision of 2 December 1986 rejecting the internal appeal.

The Committee's report stated in clear and unambiguous terms the basis in law for the impugned decision since the reference in it to the rules on special leave plainly denoted 302.524, the provision on the grant of special leave without pay in the event of unauthorised absence. There was therefore no formal flaw, at least of the kind the complainant is relying on.

9. Nor was there the breach he alleges of the principle of proportionality. What he seems to mean is either that the FAO misconstrued its rules or else that it committed an abuse of authority. Whichever he means is immaterial. As the Appeals Committee held, the Organization concluded from the medical certificate submitted by the complainant that he was fit to resume work. Since he nevertheless refused to do so it had no choice but to apply 302.524, which allows no discretion in the matter. Contrary to what the complainant says, the decision was not a disciplinary one and the principle of proportionality therefore does not apply: 302.524 says that a decision to put someone on special leave without pay is without prejudice to any other measure that may be taken in Chapter X of the Rules, i.e. disciplinary action.

The plea therefore fails.

Oral proceedings

10. Although the complainant says in the complaint form that he reserves the right to call doctors as expert witnesses, he has made no formal application for oral proceedings for the purpose.

In any event the Tribunal has ample evidence before it and need not take evidence from the doctors, whose opinions are reproduced in the pleadings anyway.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

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