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

SIXTEENTH ORDINARY SESSION

In re VARLOCOSTA-PATRONO

Judgment No. 92

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the Food and Agriculture Organisation of the United Nations drawn up by Mrs. Anna Varlocosta-Patrono on 9 September 1965, brought into conformity with the Rules of Court on 21 September 1965, and the Organisation's reply of 14 December 1965;

Considering Article VIII of the Statute of the Tribunal, Articles 301.00 and 301.0913 of the FAO Staff Regulations, and Sections 314.221, 340.231, 331.332 and 303.138 of the FAO Manual;

Having heard in public sitting, on 4 October 1966, Mr. Jacques Mercier, counsel for the complainant, and Mr. G. Saint-Pol, agent of the Organisation;

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

A. The complainant entered the service of the FAO on 23 September 1956 as a stenographer under a contract of indefinite duration. She was assigned successively to 32 different posts for periods of varying but generally short duration, and none of the services to which she was assigned wished to keep her on permanent assignment. The reports on her work vary, but several of them are unfavourable.

B. In the course of her employment the complainant was given several warnings. On 28 November 1960 she was informed that in spite of certain hesitations she would be granted her annual increment, but that if her performance continued to fall short of the normal standard the question of her continued employment by the FAO would arise. As shown by a memorandum of 20 October 1964, the complainant was informed that if she did not secure a permanent assignment her appointment would have to be terminated. Furthermore, the annual increment due to her on 1 September 1964 was withheld.

C. On 29 December 1964 the complainant was informed that as she had never been selected for permanent assignment to any post she could no longer continue to act merely as a replacement and that her appointment would therefore be terminated on 31 January 1965 in the interests of the Organisation, under Staff Regulation 301.0913.

D. The complainant appealed to the Director-General, and by a decision of 1 February 1965, the decision to terminate her appointment was confirmed, but on the ground of unsatisfactory service in virtue of Section 314.221 of the FAO Manual, while the period of notice was altered to begin as from the date of this new decision. The new decision was based on the same facts as the previous one.

E. The complainant appealed to the Appeals Committee of the FAO, which recommended that the decision to terminate the appointment should be confirmed, but on the ground of the interests of the Organisation instead of unsatisfactory service. This recommendation was accepted by the Director-General, and on 9 June 1965 the complainant was informed that her appointment had been terminated under Staff Regulation 301.0913, as specified in the original decision, and no longer for unsatisfactory service.

F. In her complaint to the Tribunal the complainant prays for the rescinding of the sections of the FAO Manual under which she had been refused access to the full text of the Appeals Committee report, and the production of various documents, and for the quashing of the decision to terminate her appointment, on the ground of incorrect application of Staff Regulation 301.0913 which had been invoked to effect in a disguised manner the termination of her appointment for unsatisfactory service, which termination was unjustified, and of the retroactive character of the decision of 9 June 1965. The Organisation prays the Tribunal to dismiss the complaint.

CONSIDERATIONS:

On the production of documents

1. The complainant had requested the production of various documents, namely: the reports relating to her service in the Organisation; an offer of employment on the "'World Food Programme"; the full text of the report of the Appeals Committee to the Director-General. The Organisation has complied with these requests, a fact which the complainant does not deny.

On the rescinding of Section 331.332 of the Administrative Manual of the Organisation

2. Section 340.231 of the Organisation's Manual distinguishes between two kinds of documents classified as "restricted material", namely "privileged" and "non-privileged" material. Unlike "non-privileged" material, "privileged" material marked "confidential" may not be communicated to staff members. In accordance with Manual Section 331.332 the reports of the Appeals Committee are classified as "privileged restricted". Moreover, while Manual Section 303.138 provides for the communication to the officials concerned of the recommendations in Appeals Committee reports, it makes no mention of the communication of the reasons on which these recommendations were based.

3. The complainant's request for the rescinding of Section 331.332 is not receivable. Under Article VIII of its Statute, the Administrative Tribunal may order the rescinding of the decision impugned or the performance of the obligation relied upon. There is nowhere any reference to the rescinding of a general provision, by whomsoever it may have been issued. Hence, when a complainant prays for the rescinding of such a provision, the Administrative Tribunal must confine itself to considering the legality of the provision and, if it is found to be invalid, to rescinding the decision by which it was applied or the consequential decisions. Thus, in the present case the Tribunal must consider whether, as the complainant claims, Section 331.332 is in contradiction with a general principle of law, and if so, whether the decision impugned should consequently be rescinded.

4. It is, of course, a general principle that every official has the right to be heard before a final decision detrimental to his interests is taken. This right applies even where not expressed in a definite text, and it implies that every official shall have the opportunity of consulting the documents needed to defend his legitimate interests. In particular, an official who is the subject of a decision which can be brought before the Administrative Tribunal may require access to all the documents on which that decision was based, and specifically to the full text of the Appeals Committee's report to the Director-General. It is in fact the examination of this report that will enable him to make an informed estimate of his chances of a successful appeal to the Administrative Tribunal. It is unnecessary to consider whether the Organisation might, in clearly exceptional circumstances withhold from the official concerned certain parts of the report which it regarded as confidential, since in the present case there was obviously nothing secret in any part of the report which has been produced.

5. It follows from what is said above that in transmitting to the complainant only the recommendations of the report, without the reasons stated therein, the Organisation ignored the official's right to be heard. The violation of this right cannot, however, entail the rescinding of the decision impugned unless it actually affected the sense of the decision. In other words, the complainant cannot base her claim on the refusal to allow her access to the full report of the Appeals Committee unless she would either have been discouraged by the report from filing her complaint with the Administrative Tribunal, or have been deprived of the possibility of defending her legitimate interests before the Tribunal. However, neither of these possibilities arises. Even if she had been informed of the contents of the report as a whole the complainant would certainly have filed the present complaint, which is based on arguments quite unconnected with those put forward by the Appeals Committee. On the other hand, as a result of the production of the full report during the present proceedings the complainant has been able to rely on it to submit any arguments which she considered suitable to support her claim. It follows that, while the right to be heard was ignored, at the administrative proceedings stage, this did not in fact affect the sense of the decision complained of and, consequently does not involve the quashing of that decision.

On the decision concerning termination

6. Under Staff Regulation 301.0913 the Director-General may terminate the appointment of a staff member who, like the complainant, holds an appointment of indefinite duration if in his opinion such action would be in the interests of the Organisation. In accordance with Staff Regulation 301.00 the Director-General specified the scope of Staff Regulation 301.0913 by inserting into the Manual a section 314.221, which provides that a staff member whose services are unsatisfactory may be terminated after a written warning.

7. Although the complainant has produced a certain number of favourable reports, it is clear from several other documents that during her eight years of service in the Organisation she had had 32 assignments, without ever having attained the standard of competence proper to her grade, that she had thus shown herself to be unfit for any permanent assignment, and that before the first decision to terminate her appointment she had received written warning of the consequences of her unsuitability, in particular by a memorandum of 2 October 1964. It follows that the complainant could legitimately have been terminated for unsatisfactory service under Staff Regulation 314.221.

8. While it is true that the Director-General abandoned his reliance on this regulation, to which he had referred in his earlier decision, and based the decision impugned on Staff Regulation 301.0913, it should be noted that the complainant not only agreed to this change of motivation, but herself requested it. In her memorandum to the Appeals Committee, after criticising the date at which her services were terminated, she complained of having been terminated on 1 February 1965 for unsatisfactory services and thus having been as it were penalised for having appealed against the first decision based on Staff Regulation 301.0913. Still more, while claiming that "the slur of unsatisfactory service" was in no way justified, she begged that she should be freed from this reproach which might reduce her chances of finding employment in another organisation. She thus implicitly asked that if the termination of her appointment were to be maintained it should be based on Staff Regulation 301.0913. It is hardly fitting, therefore, that she should now challenge the application of this provision.

On the retroactivity of the decision impugned

9. Although the decision impugned is based on Staff Regulation 301.0913, whereas that of 1 February 1965 refers to Staff Regulation 314.221, both these decisions are based on the same facts and provide for the termination of the complainant's appointment. The last decision, taken as a result of the complainant's appeal and after recommendation of the Appeals Committee, confirms the solution adopted earlier. In taking this decision on 9 June 1965, therefore, the Director-General acted correctly in fixing the date previously decided upon, namely 5 March 1965, as the date at which the complainant's services should terminate. Contrary to the complainant's submission, the maintenance of this date did not result in giving retroactive effect to the decision impugned.

DECISION:

For the above reasons, The complaint is dismissed. In witness of this judgment, delivered in public sitting in Geneva on 11 October 1966 by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

(Signed)

M. Letourneur
André Grisel
Devlin
Jacques Lemoine

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