

## THIRTY-EIGHTH ORDINARY SESSION

*In re* LABARTHE

**Judgment No. 307**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Enrique Labarthe on 9 May 1976, the FAO's reply of 27 July 1976, the complainant's rejoinder of 15 September 1976 and the FAO's surrejoinder of 20 October 1976;

Considering Article II, paragraphs 5 and 6(a), of the Statute of the Tribunal, FAO Staff Regulation 301.111 and FAO Staff Rules 302.402, 302.403, 302.907, 303.111 and 303.131;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

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

A. Between 1952 and 1965 the complainant was in the service of the FAO from time to time and for about three years in all, either as a consultant or as a regular staff member. On 25 March 1966 he was given a fixed-term appointment up to 24 March 1967 and sent to Port-of-Spain as a rural institutions officer at grade P.4. On 27 May 1966 he was transferred to St. Lucia. His appointment was then extended to 31 January 1968. From 1 February 1968 he was seconded to the United Nations Development Programme (UNDP) as Senior Agricultural Adviser for Central America and stationed in El Salvador. His secondment was originally for two years, but the FAO asked him whether he would be interested in a P.5 post as Deputy Chief of the Latin America Service of the Area Services Division and when he said that he would the FAO asked to have him released from his secondment. The UNDP agreed and he returned to the FAO on 18 June 1968 and had his appointment extended in turn to 17 June 1971, 17 June 1972, 31 July 1972, 15 August 1972, 31 August 1972 and 31 October 1972, when it came to an end.

B. On 1 March 1972, before his last appointment expired, the FAO proposed his name to the UNDP as Senior Agricultural Adviser for the Caribbean Area. The UNDP approved his candidature in June 1972, but clearance still had to be obtained from the Government of Trinidad and Tobago. On 20 October 1972 the UNDP told the FAO that the Government had not given clearance and had asked it to suggest someone else. On 23 October the FAO proposed a Mr. Peritz. Meanwhile the complainant's appointment had lapsed and he left the FAO on 31 October. Seven months later the FAO heard from the UNDP that the Government of Trinidad had changed its mind about the complainant and now found him acceptable. The FAO therefore got in touch again with the complainant and asked him, if he was still free, to obtain medical clearance and say whether he would rather have reinstatement than a new appointment. The complainant answered that he was free and that he would rather be reinstated. The FAO then began the arrangements for his appointment. But on 29 June 1973 the UNDP told the FAO that the programme to which he was to be assigned was undergoing review and asked it to drop the matter for the time being. The complainant was so informed.

C. On 28 January 1974 the complainant appealed to the Director General of the FAO, protesting against the failure to appoint him to the post and asking for \$25,000 in compensation. The Director-General dismissed his appeal on 28 February and on 9 March the complainant appealed to the FAO Appeals Committee. The Committee reported on 26 September 1975. It held that the offer of appointment made to the complainant had not been formalised to the point of constituting a contract, but had unquestionably given rise to a moral obligation and that the FAO should have defended the complainant's interests when the UNDP had backed down. The Committee expressed surprise that in the circumstances the FAO should have failed to find him some other appropriate post at headquarters or in the field. It recommended that in view of his legitimate expectations and the FAO's moral commitment towards him the Organization should offer him a field assignment or a position at headquarters similar to the one he had held at the time of his separation. If he was not found a mutually acceptable assignment within one year of the transmittal of the report the Committee recommended paying him compensation equivalent to one-and-a-half years' salary and related emoluments at the step in grade P.5 to which he would have been entitled had he been reinstated. By letter of 16 February 1976 to the complainant the Director-General rejected the appeal and the Appeals Committee's conclusions and recommendations. That is the decision the complainant now impugns.

D. The complainant takes the view that the exchange of letters between him and the FAO on his posting to Trinidad implied a commitment towards him on its part and that the reasons given by an FAO official, Mr. Menz, for his being turned down on the first attempt to fill the post were slanderous. The complainant asks the Tribunal (a) to quash the Director-General's decision of 16 February 1976; (b) in view of the impossibility of ordering the specific performance of the contractual obligation entered into by the Organization, to reinstate the complainant in the staff of the FAO in the capacity of Senior Agricultural Adviser for the Caribbean Area for a minimum period of three years, beginning his new assignment at P.5, step 8, the grade he held on 31 October 1972; and in view of the fact that because of the Organization's action he kept himself immediately available for service with the FAO, to order the FAO to pay him compensation equivalent to two years' salary and related emoluments, account being taken of the within-grade salary increments which he would have received had he been duly reinstated; and (c) in view of the fact that the complainant was fifty-seven years old when the Organization failed to reinstate him and that he would have reached retirement age during the period of his new assignment, to order the FAO to pay into the United Nations Joint Staff Pension Fund the actuarial amount necessary to ensure his retroactive participation in the Fund until 31 October 1974, it being understood that the complainant will pay as his contribution to the Fund only 7 per cent of two years' salary; (d) should the FAO fail to make such payment into the Fund within three months after the judgment ordering it to do so, to order the FAO to pay the complainant as compensation the actuarial amount referred to under (c), to be determined by the secretariat of the United Nations Joint Staff Pension Board; (e) in view of the slanderous innuendo made by one of the FAO's agents against the complainant and of the FAO's failure to take prompt and energetic action to dispel such insinuations; of the further circumstance that such innuendo was conveyed to third parties and of the harm caused thereby to the complainant's reputation, moral integrity and career prospects, to order the FAO to pay the complainant as compensation a sum of 25,000 Swiss francs; (f) to order the FAO to pay the complainant 2,500 Swiss francs as legal costs; and (g) to order the FAO to pay the complainant on the compensation claimed in paragraphs (b) and (e) interest at the rate of 8 per cent a year from the date when he began the appeal proceedings, i.e. from 9 March 1974.

E. In its reply the FAO sums up its case as follows: (a) the complainant left on 31 October 1972 on the expiry of his fixed-term appointment and any claim relating to his separation would be time-barred; (b) Mr. Menz's report on the reasons for the Government's rejection of the complainant's candidature for the post of Senior Agricultural Adviser in the Caribbean was made in the performance of his official duties; it was not inspired by any malicious motive; and it had no adverse effect on the complainant's candidature for the post, either in 1972 or in 1973; (c) the complainant has not brought any evidence to show that the diffusion of the report - for which responsibility lies with the complainant rather than the FAO - occasioned any harm to his "reputation, moral integrity and career prospects"; and his claim for compensation on this count has no basis in law; (d) as regards the FAO's failure to re-employ the complainant in 1973, the complaint is irreceivable because it relates to events which took place after the complainant left the service of the Organization; (e) as to the merits, no binding commitment or formal offer of re-employment was made to the complainant and the exchange of cables in June 1973 cannot be construed as amounting to such a commitment or offer, either in substance or in form; (f) the negotiations for the complainant's re-employment in 1973 led to nothing because of circumstances beyond the FAO's control; (g) any decision which the complainant may have chosen to take not to seek or accept alternative employment after his separation on 31 October 1972 was a purely personal option which he was free to exercise but could in no way give rise to any obligation towards him on the part of the FAO; (h) there are no grounds for paying the complainant either compensation for the salary he would have received had he been reinstated for two years or actuarial amounts calculated on the basis of participation in the United Nations Joint Staff Pension Fund; and (i) in the light of the foregoing the complainant's claims to legal costs, to compensation and to interest thereon are utterly unfounded.

F. The Organization accordingly asks the Tribunal to dismiss the complaint.

#### CONSIDERATIONS:

As to receivability:

1. It does not appear to the Tribunal that the complainant is making any complaint in respect of the non-renewal of his appointment on 31 October 1972; but in deference to the submission of the Organization, the Tribunal rules that any such complaint would be time-barred and so irreceivable.

2. As to the complaint arising out of the report of Mr. Menz made in September 1972, this complaint is likewise time-barred and irreceivable.

3. (a) The main claim is for compensation for breach of a contract, alleged by the complainant to have been made on or about 18 June 1973, to appoint him to the position of FAO representative in Trinidad and Tobago. The Organization submits that the claim is not within the Tribunal's competence as defined by Article II of its Statute. Under paragraph 5 of Article II the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials; and under paragraph 6 it is open to the official, even if his employment has ceased.

(b) The relevant facts are that the complainant was an official of the Organization whose employment ceased on 31 October 1972. At this time the complainant had been, proposed for the appointment mentioned above. When on 22 August 1972 Dr. Hartmans, the Director of the Area Services Division, notified the complainant that his employment would cease, he added that the notice would be retracted if the new appointment became effective. Under Staff Rule 302.403 if a former staff member is re-employed within twelve months of being separated from service, he may at the option of the Organization be reinstated; and on reinstatement his services shall be considered as having been continuous. Since the Organization denies that any contract was made in June 1973, the complainant has not been formally reinstated. Neither has he received a new letter of appointment.

4. (a) In these circumstances there appear to be three possible ways in which the complainant can bring his case before the Tribunal, namely

(1) as an official at the date of his complaint to the Tribunal, i.e. on 9 May 1976,

(2) as on that date a former official,

(3) as a person who, whether or not he has the status of an official or former official, is alleging nonobservance of terms of appointment.

(b) As to the first, the case for saying that the complainant was actually an official at the date of his complaint rests, assuming that a binding contract was made in June 1973, upon the effect of the letter of 22 August 1972. It is contended by the complainant that by this letter the Organization in effect exercised conditionally and in advance its option under Staff Rule 302.403 with the result that, when the contract of appointment was made, the notice of termination was automatically retracted. It is however doubtful whether the Organization by this letter was pledging itself in advance; it seems more reasonable to interpret the letter broadly as indicating that the notice of termination was not necessarily final. The Tribunal will not decide the question of jurisdiction on this ground.

(c) As to the second, it is not disputed that the complainant had at the material time the status of a former official. It is however contended by the Organization that in the case of a former official the complaint, to be receivable, must be founded on events which took place during his period of employment. For reasons which will appear in the next subparagraph the Tribunal will not decide the question of jurisdiction on this ground.

(d) The essence of the claim is that the Organization agreed to appoint the complainant and then broke their agreement. In relation to the receivability of such a claim it is a mere accident that the complainant was formerly an officer of the Organization. Such a claim might equally well be made by a person who had no previous connection with the Organization. It would be illogical if the Tribunal were to treat such claims as in general irreceivable, but to receive them if the complainant could show that he had been, possibly for a short time and in the remote past, an official of the Organization. Accordingly the Tribunal will decide whether or not a claim made by a person who alleges non-observance of a binding contract by the Organization to appoint him to a post, but who has not, received a formal letter of appointment, is receivable under Article II of its Statute. Paragraph 5 in the English text refers to non-observance of "the terms of appointment", but in this context the word "appointment" is not in the opinion of the Tribunal to be restricted to the narrow sense of a formal appointment. It must be treated as embracing a contract to make an appointment, and in this sense it is consistent with the French text, *contrat d'engagement*. Accordingly, the question of whether or not the Tribunal has jurisdiction depends upon whether or not the complainant can establish the existence of a contract of appointment within paragraph 5, and so by virtue of paragraph 7 it is a question which the Tribunal is itself competent to decide. If the complainant does establish that he has such a contract, it is not disputed that in the circumstances of this case his claim must succeed. Thus the issue between the parties on jurisdiction is also the issue between them on the merits, and it is convenient to deal with it under the latter head.

As to the merits:

5. The contract relied upon by the complainant is alleged to have been concluded at an interview in Lima, Peru, between himself and a Mr. Bernheim, acting as the spokesman for the FAO, on 18 June 1973. The complainant relies upon this interview and upon the previous correspondence between himself and the Organization. It is quite often the case that, when a contract of this sort has been concluded, it will be followed by a formal document; in the case of a large organisation which is accustomed to use its own forms, there will almost certainly be a letter of appointment. This does not mean that there can be no binding contract until the letter of appointment has been issued. There is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement.

6. These principles are not contested by the Organization. Their contention is that what is represented by the complainant as an offer of the job and an acceptance by him was in truth only an enquiry about his availability and that essential terms and conditions had still to be settled. On this view there was no intention to contract and no complete agreement on terms; the matter was still under negotiation. Before any commitment was made on either side, the Organization contends, the negotiations had to be abandoned for reasons beyond their control.

7. It is therefore the Tribunal's duty to determine whether or not the communications between the parties resulted in a completed contract; for this purpose it is necessary to examine, not merely the final event, but the whole course of correspondence between the parties and the circumstances in which it took place. The narrative begins in 1972. The position of FAO representative in Trinidad and Tobago, which was held by a Dr. Kelton, was to become vacant on 30 June of that year. The complainant, who had had since 1966 a series of contracts with the FAO in which he held various appointments in the field, was reaching the end of an appointment as Deputy Chief of the Latin America area of service. He was undoubtedly well qualified to succeed in Trinidad. The post was one which is the joint concern of the FAO and another international organisation, the UNDP. The arrangements between the two organisations provided that the appointment was to be made, normally for a period of three years, by the FAO, but with the concurrence of UNDP who paid two-thirds of the cost.

8. Early in 1972 FAO offered the post to the complainant. It is well understood that the appointment of a representative to a country has to be cleared with the government of the country. An unofficial enquiry made by Dr. Kelton in February ascertained that the complainant would be acceptable Ministry of Agriculture; the post of representative is coupled with that of Senior Agricultural Adviser so that this Ministry was the one mainly concerned. On 1 March 1972 FAO sought the concurrence of the UNDP and on 23 June the UNDP gave their approval. All that remained was to get the "formal official clearance" (this is how it is described by the Organization in its surrejoinder) of the Trinidad Government through the Ministry of External Affairs. The approach to this Ministry was undertaken by the UNDP, to whom, when appointed, the complainant would be seconded. Evidently the approach had already been made by the UNDP since on 27 June they cabled to Mr. Hartmans: "Hold action re secondment as government's clearance not yet received". It seems clear that the appointment would have followed immediately on the clearance and that the complainant would have been expected to get to work at once. A cable to Mr. Hartmans on 7 July from the UNDP said that they would cable approval as soon as the clearance was received along with travel authorisation and asked that the complainant should be given all administrative details.

9. In spite of pressure throughout July from the UNDP, and indirectly from FAO as well, the Ministry of External Affairs took no action except to say that a decision might be expected soon. Eventually at the end of July after what the UNDP in Trinidad described as "repeated urgings" the Ministry wrote: "As soon as a decision is reached it will be communicated to you". The FAO endeavoured to find out from some of its officials in touch with the Trinidad Government, notably Mr. Menz, what was in the Ministry's mind, but nothing was said officially until 23 October, when there was a request for another name. There was at the time much conjecture about the significance of this, based on conversations with Ministry officials. Mr. Menz, to whose report the complainant strongly objected (see paragraph 2 above), said that the complainant had definitely been turned down and speculated about the reasons for his downfall. Another view, which seems in the light of what happened subsequently to be nearer the truth, was that the Ministry wanted an alternative name so as to give them freedom of choice. At any rate after 23 October the FAO ceased to press and accepted the delay. An alternative name was supplied to the Ministry. Mr. Cunliffe, a project manager in Trinidad, was appointed as Acting Representative to take over from Dr. Kelton. The complainant's contract with the Organization expired, as has been noted, and he went home to Lima.

10. Nothing happened for six months. The complainant kept in touch with Mr. Cunliffe through Mr. Bernheim, who was the UNDP representative in Lima. On 18 April 1973 Mr. Cunliffe sent a message for the complainant to Mr. Bernheim that the situation was unchanged but that he was hopeful for an early reappraisal. On 4 May the

UNDP representative in Trinidad cabled Mr. Hartmans that he had been advised unofficially that the complainant was being reconsidered and that he expected a favourable decision soon. On 17 May the same official cabled the Government's formal concurrence as to the complainant's candidature direct to the FAO in Rome and also to the UNDP in New York. The complainant heard of this but only informally. On 30 May he telephoned Mr. Cunliffe who told him of the cable giving the concurrence, and that they had all been expecting the news of his appointment. On the next day he discussed the position with the UNDP representative and they concluded that there was probably some administrative delay in processing the appointment. Mr. Cunliffe wrote to the complainant to this effect.

11. The dossier does not disclose what consideration the FAO were giving to the new situation; at any rate they gave themselves ample time for reappraisal. On 31 May they received another cable from the UNDP New York which asked them to cable whether the complainant was still available. They took no action until 15 June when Mr. Hartmans sent the following cable to Mr. Bernheim:

"For Bernheim are ready to take immediate action for appointment Labarthe who is now cleared by Trinidad and Tobago Government primo confirm immediate availability of Labarthe for SAA/FAO Country Representative post in the Caribbean secundo Labarthe to obtain medical clearance tertio ascertain whether Labarthe wishes reinstatement instead of new appointment quarto please inform Labarthe not to travel until all documentation is cleared and been instructed to do so - Hartmans Foodagri Rome."

12. Mr. Bernheim gave the complainant a copy of this cable on which he wrote: "At last! Congratulations." The complainant in evidence given to the FAO Appeals Committee said he treated the cable as ample evidence that the FAO and the UNDP had sanctioned his re-employment. There must have been an interview either with Mr. Bernheim or with his deputy, for on 18 June the latter cabled to Mr. Hartmans that the complainant was available, that he was starting medical check-up that day (it was in fact completed) and that he preferred reinstatement.

13. The Organization thereupon initiated what they describe as "the administrative procedures" for the complainant's appointment. While these were going on, on 29 June the UNDP New York cabled to Mr. Hartmans saying that the Caribbean Field Establishment was under review and asking him to retain Mr. Cunliffe on an interim basis and delay any action on the complainant. The complainant was told of this on 3 July. There discussions between the FAO and the UNDP about other possible postings for the complainant but he was not kept informed. On 25 October he asked for a definite decision. This was not given to him until 17 January 1974 when the Director of the Personnel Division wrote to tell him that possibilities of employment had not materialised and that, until the offer of an appointment was confirmed by the Personnel Division and the tickets released, the Organization was not legally committed.

14. On these facts the first question to arise is whether the cable of 15 June 1973 is to be read as an offer or as an enquiry. Whichever it was, the Tribunal is satisfied that in handing it or in reading its contents to the complainant, Mr. Bernheim did only what was to be expected of him; it is therefore to be treated as a communication from the FAO to the complainant. The Tribunal is satisfied also that, if it was an offer of an appointment, it was accepted and the acceptance communicated to the FAO by the cable of 18 June. The second question is whether all the essential terms of the appointment were agreed.

15. On the first question the Tribunal concludes that, in the light of the history of the matter as recounted above, the cable of 15 June is to be read as an offer and not as a mere enquiry. Had it been merely an enquiry, it would have consisted of that and nothing more. Had there not been an interval of six months, there would have been no need even for an enquiry; the formal appointment would have followed immediately the Government's approval. Since there was such an interval, it was necessary to make sure that both parties were still of the same mind. By the cable the Organization was announcing that it was still of the same mind - "ready to take immediate action for appointment". It was making or renewing an offer which it expected to be accepted; the instructions were not to ascertain but to "confirm" immediate availability; immediacy is stressed in both offer and acceptance.

16. The three other points mentioned in the cable do not vitiate the offer and acceptance. "Secundo" doubtless made it a condition of the offer that the complainant should obtain medical clearance, but it is not contended either that he could not or did not obtain it. "Tertio" shows that the Organization, before exercising its option under Staff Rule 302.403, wanted to know the complainant's preference; this introduced no uncertainty into the contract since the complainant would be bound under the regulation by the Organization's choice. "Quarto" relates to the time when the appointment is to become effective, which falls to be determined under Staff Rule 302.402. But there is a clear

distinction between a contract to appoint and the appointment itself, and it is normal to have an interval between the two so as to allow for the preparation of the formal documents. The payment of salary and the start of the official's duties, including the duty to travel to his place of work, would naturally be contemporaneous and begin on a date to be fixed by the letter of appointment. "Quarto" does not, as contended by the Organization, make the clearance of documentation a condition of the contract; on the contrary, it assumes that documentation will be cleared and instructs the complainant not to travel until then.

17. On the second question the Organization contends that two essential points were left unsettled by the cable of 15 June 1973, namely, the duration of the assignment and the grade and salary attached to it. It is difficult for the Organization now to contend that these points were unsettled. It can hardly be contested that the object of the cable was at least to obtain all the information necessary for the immediate preparation of a letter of appointment; if the points mentioned above called for further negotiation it would be surprising to find them omitted from the cable. In fact the Organization knew the answers. On the first point, the complainant would obviously accept whatever was the normal period for such an assignment; the understanding between the FAO and the UNDP made it three years. On the second point the Organization had in the cable set out in paragraph 11 above asked the complainant whether he preferred reinstatement to a new appointment and he had replied that he did. Reinstatement would of course mean that the complainant would carry on in the grade and at the salary already fixed. No doubt the Organization were not bound to respect the complainant's preference. But if the alternative of the new agreement had meant a different grade and salary to those already fixed, the new grade and salary proposed would surely have been specified in the cable. Both parties must have understood the difference between reinstatement and a new appointment as a difference in form only and that the grade and salary, whether the old contract was continued or replaced, would be the same as before.

18. Finally, the Organization contends that the appointment was subject to UNDP consent. Assuming this to be so, the consent, first given on 23 June 1972, was clearly renewed. The UNDP was active in obtaining the Government's approval on 17 May 1973 and, if they had intended to withhold their own, they would have made some reservation in their cable of 31 May (paragraph 11 above). It was through the UNDP representative in Lima that the contract with the complainant was made. If the FAO had not taken the UNDP's consent for granted, they would obviously have sought to obtain it as soon as the complainant's availability was confirmed and before initiating, as they say they did, the administrative procedures for the appointment.

19. The Tribunal therefore concludes that a binding contract was made between the parties in June 1973 and that, since the Organization has not observed it, the complainant is entitled to compensation. At the time of the breach he was fifty-seven years old and he did not obtain any other employment. While the Tribunal shares the surprise expressed by the Appeals Committee that the FAO was unable to find an alternative post for so able and experienced an official, it does not consider that at his age he would have obtained employment from any organisation to which he was not known. The Committee, while taking the view that there was no formal contract, considered that there was a moral obligation towards the complainant and that he had a legitimate expectation of employment, and on this basis recommended that he should be compensated with the equivalent of one-and-a-half years' salary and related emoluments. The complainant claims two years' salary and, on the basis that he had a binding contract, the Tribunal considers this to be reasonable.

#### DECISION:

For the above reasons, the Tribunal

1. Quashes the Director-General's decision of 16 February 1976 as requested in head (a) of the claim.
2. In satisfaction of head (b) of the claim, orders the Organization to pay to the complainant compensation equivalent to the amount of salary and related emoluments which he would have received if he had been reinstated on 1 July 1973 and continued in the Organization's employment until 30 June 1975.
3. In satisfaction of heads (c) and (d) of the claim, orders the Organization to pay to the complainant compensation equivalent to the contributions which it would have had to pay on his behalf to the Pension Fund and other Social Security and Insurance Funds if he had been reinstated and employed as aforesaid.
4. Dismisses as irreceivable the complaint under head (e) of the claim.

5. Orders the Organization to pay to the complainant 2,500 Swiss francs for legal costs.

6. Orders the Organization to pay to the complainant interest at the rate of 8 per cent per annum running from 1 July 1975 on the sums awarded under paragraphs 2 and 3 above.

In witness of this judgment 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, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 6 June 1977.

M. Letourneur  
André Grisel  
Devlin

Roland Morellet