

SIXTY-SECOND ORDINARY SESSION

Judgment 824

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. A. L. M. against the Food and Agriculture Organization of the United Nations (FAO) on 9 October 1986, the FAO's reply of 12 December, the complainant's rejoinder of 21 January 1987 and the FAO's surrejoinder of 10 March 1987;

Considering Article II, paragraph 5, of the Statute of

the Tribunal, FAO Staff Regulation 301.111 and FAO Staff Rules 302.40612, 303.1311, 303.1314 and 303.26;

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 Indian, worked in the Organization from 1966 to 1968 and joined it again in April 1979 at grade G.6 as a "senior programme assistant" in the Office of the FAO Representative for India in New Delhi. He has a continuing appointment. He was promoted in 1980 to grade G.7/A and in 1983 to G.7/B. Starting with a letter of 8 October 1984 to the Representative, he held a correspondence with the Organization in which he expressed discontent on more than one count. In the end, on 21 February 1985, he sent a long letter to the Director-General in Rome which purported to be an appeal under Staff Regulation 301.111. He had three main themes: (1) he feared that the appointment of an international "programme officer" in the Representative's office would blight his own career; (2) he sought for himself a Professional category post as a programme officer in Bhutan; and (3) he wanted to take a staff training course. In a letter of 26 April 1985 the Assistant Director-General for Administration and Finance told him that his letter was not a valid appeal under 301.111 since he was alleging no breach of the terms of his appointment or of the rules; besides, for reasons he had been given often enough, his claims were unsound. On 21 June 1985 he appealed to the Appeals Committee. By a minute of 31 October 1985 headquarters told him to take up a G.7/B post as assistant to the director of a project in New Delhi. He informed the Appeals Committee and the Administration of his objections to the transfer. A telex of 2 December from Rome rejected his objections and confirmed the transfer. In its report of 6 May 1986 the Appeals Committee recommended rejecting his claims as falling outside the ambit of Regulation 301.111, though it said his work record was good and suggested giving him a chance to work outside the Representative's office. In a letter of 11 July 1986, the decision impugned, the Deputy Director-General informed him that the Director-General rejected the appeal.

B. The complainant traces the history of his many grievances, which he maintains do amount to a valid appeal under Regulation 301.111 because his rights have been constantly infringed.

He submits that it was he the FAO ought to have put on the P.4 post for a programme officer because he was fully fitted for it and indeed had been doing the work for some time. He had some of his own duties taken away to lend substance to the post. Comparison of his own duties, as set out in vacancy announcement FAO/83/1 of 20 July 1983, with the programme officer's, as defined in announcement 80-DDF of 28 October 1985, shows them to be much the same. Yet his application of 15 January 1985 for the post was scorned. He was told that an Indian had no hope since India was over-represented on the staff. But under Rule 302.40612 "Recruitment of General Service staff shall not be subject to the system of geographical distribution". His transfer is belittling because he is in charge of only one project as against nearly a score in the Representative's office. Besides, the post for an "assistant to the director" of the project is a bogus one. His career has suffered for want of the regular "service evaluation reports" required by Staff Rule 303.26. His success aroused the envy and malice of other staff in New Delhi and in Rome. For example, Mr. Dhital, a senior adviser to the Decentralisation Support Unit in Rome, wishes him ill. He enlarges on various other grievances. He invites the Tribunal to set the transfer aside and reinstate him in his old post, order that he be considered for programme officer, order "implementation" of his job description and award him costs.

C. In its reply the Organization gives its own account of the facts of the case, observing that for years the complainant has got on badly with supervisors and fellow staff.

It submits that his claim to cancellation of the transfer is irreceivable because he did not follow the appeal procedure and there is no final decision on the matter. He lodged his appeal in June 1985, whereas his transfer did not take effect until 2 December 1985. Besides, his objections are unsound. The post is not bogus but has existed since 1970. The former incumbent is now in the Representative's office, having switched places with the complainant. There is nothing demeaning about his duties: he has the same grade as before and duties that warrant it. He was never "in charge of" a score of projects: he did not deal with them in the same way as he is required to deal with the one. Even if his transfer were unlawful his return to the Representative's office would be inadvisable.

His claim to consideration for the P.4 post is futile. Being subject to the rules on geographical distribution, the post can go to an Indian only if he is far superior to anyone from a country not over-represented on the Professional category staff. Besides, the complainant may still apply. Being in the General Service category he is an external candidate for any Professional category post and must stand his chance with all the others. Rule 302.40612 clearly does not apply since the vacant post is not in the General Service category. There has been no breach of the terms of his appointment, and he is not entitled to any redress under this head.

As to his claim to staff training, he has no enforceable right to attend a course.

His job description has been fully respected. The FAO analyses his duties and the programme officer's and points out differences. The officer is expected to do more analytical and creative work whereas the complainant's duties are mainly clerical.

Other matters he raises being immaterial, the FAO invites the Tribunal to dismiss his claims as either irreceivable or devoid of merit.

D. In his rejoinder the complainant enlarges on his narrative, develops his pleas and seeks to rebut the Organization's arguments, many of which he believes he has already answered in his original brief. He submits that his challenge to the transfer is receivable because the issue was linked with his internal appeal and since it arose pendente lite he was entitled to bring it within his appeal. He denies that he got on badly with other staff. He again maintains that there was no post of assistant to the project director. He never agreed to the transfer, which has damaged his career, and the denial of staff training is further evidence of the Organization's vindictiveness. He presses his claims.

E. In its surrejoinder the FAO, after discussing various matters raised in the rejoinder, again submits that the complaint discloses no breach of the terms of the complainant's appointment or of the rules. Many of the subjects he dwells on are irrelevant to the main issues - his transfer and career ambitions - on which the rejoinder says nothing to weaken the Organization's pleas.

CONSIDERATIONS:

1. The complainant joined the FAO on 11 April 1966 under a renewable one-year appointment at grade G.4. He was transferred to the United Nations Development Programme in 1968 but went back to the FAO in 1979 as a senior programme assistant at grade G.6. He was promoted to G.7/A and on 27 September 1983 to his present grade, G.7/B. His main claims date back to 8 October 1984, when he wrote the FAO Representative for India in New Delhi a letter which spoke of (1) the appointment of an international programme officer in the Representative's office at grade P.5, (2) his own assignment as a programme officer in the field and (3) a staff training course. In sum he believed he had all the qualifications that were to be required of an international programme officer; he sought appointment as the field programme officer; and he wanted to take the course.

Mr. Beringer, the Director of the Field Programme Development Division, answered on 9 January 1985 (1) that the FAO was going to create a post for a programme officer in the Representative's office and to fill it by international recruitment; (2) that as an Indian the complainant had no hope of being appointed field programme officer; and (3) that the course had been postponed.

On 15 January 1985 the complainant wrote applying for

the post of international programme officer in New Delhi.

On 21 February he appealed to the Director-General against Mr. Beringer's letter, asking for a "final decision". An Assistant Director-General answered in a letter of 26 April that his claims could not be treated as "an appeal" within the meaning of Staff Regulation 301.111 and were rejected. On 21 June he submitted an appeal to the Appeals Committee. Over and above the three claims put forward in his letters of 8 October 1984 and 15 January 1985 he demanded compensation for "belated upgrading", "extra hours" and "unutilised leave", and "implementation of job description". By a minute of 31 October 1985 the FAO Representative in New Delhi told him he was transferred to a post as assistant to the director of a project, IND/78/020, and by a letter of 20 November he asked the Appeals Committee to entertain a further claim by him to have the transfer set aside.

The Appeals Committee reported on 6 May 1986. It held the transfer to be a new and unconnected issue and declined to entertain the further claim, and it found that the complainant's other claims neither disclosed any breach of the terms of his appointment nor related to issues within the scope of Staff Regulation 301.111. It therefore recommended rejecting the appeal. The Director-General did so and his final decision was notified to the complainant by a letter of 11 July 1986 from the Deputy Director-General.

2. The complainant says he is impugning the Appeals Committee's "decision" of 8 May 1986 communicated to him by the letter of 11 July. Since the letter merely endorsed the Committee's recommendation the Tribunal takes it that he is also challenging the final decision.

There are five heads of claim:

- (a) that the transfer be rescinded and the complainant be reinstated in his former post;
- (b) that he be considered for the post of international programme officer in accordance with the rules and regulations governing service conditions;
- (c) that there be "implementation" of his post description in accordance with vacancy announcement FAO/83/1;
- (d) that his counsel in India be heard by the Tribunal; and
- (e) that he be awarded "exemplary costs".

The transfer

3. The Organization submits that the complainant's claim to the quashing of the transfer is irreceivable: he put his challenge to the decision, which was taken on 31 October 1985, straight to the Appeals Committee, though the matter was quite different from those he had raised in the appeal already before it.

A complainant may impugn not only a decision on the merits but also one on receivability. In determining whether the complaint is receivable the Tribunal will not consider whether the claim before the internal appeals body was receivable, for example whether it was in time or came within the material provisions of the rules. The Tribunal will rule on receivability solely by the lights of its own Statute.

Article VII of the Statute reads:

"1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned ...".

VII(1) means that a complainant must have exhausted any means of redress that may be available to him within the organization, whatever the authority competent to hear his claims.

The material rules in this case are Staff Rules 303.1311 and 303.1314. Implicit in 303.1311 is a stipulation that no appeal will lie to the Appeals Committee until the Director-

General has taken a final decision on an appeal by the staff member; and 303.1314 sets a time limit for an appeal to the Committee of 30 days for headquarters staff and 60 days for others from "the date of receipt of the Director-General's reply".

The complainant appealed straight to the Appeals Committee against the transfer notified in the minute of 31 October 1985 and he has therefore failed to exhaust the internal means of redress.

He is mistaken in his contention that the transfer formed part of the issues he had raised in his appeal to the Committee and was just another fact that bore out his case. The quashing of the transfer was a new claim and his appeal was about quite other matters.

On these grounds alone his challenge to the transfer is irreceivable, even though his complaint to the Tribunal was undoubtedly in time.

4. There is no need to go into the complainant's detailed objections to the lawfulness of the transfer and to the reasons given for it. In any event the Tribunal may not replace with its own the Director-General's assessment of a staff member's conduct, work and qualifications. All it may

do in the matter of an appointment, promotion or transfer is review the decision to see whether it was taken without authority, or whether there was a procedural or formal flaw,

or a mistake of law or of fact, or abuse of authority, or a mistaken conclusion from the evidence, or whether some essential fact was overlooked.

The complainant's case is indeed that the transfer shows flaws that entitle the Tribunal to set it aside in the exercise of that limited power of review. But his arguments are in substance the same as those he urges against the elements of the impugned decision that he may, having exhausted the internal means of redress, properly challenge. For the reasons set forth below those arguments are sound neither in fact nor in law.

The appointment of an international programme officer

5. For reasons related both to competence and to the merits the Appeals Committee recommended rejecting the complainant's claim to the international programme officer's post, and the Director-General endorsed the recommendations. He said: "... the grounds for grievance you have raised do not refer to any specific breach of your terms of appointment and do not relate to issues that fall under the scope of Staff Regulation 301.111". In any event the claims failed because they were "either time-barred or unsubstantiated".

Staff Regulation 301.111 says that the Appeals Committee advises the Director-General on "cases of appeal by individual staff members regarding a grievance arising out of disciplinary action or arising out of an administrative decision which staff members allege to be in conflict, either in substance or in form, with the terms of their appointment or with any pertinent Staff Regulation, Staff Rule or administrative directive".

The complainant's main grievances before the Committee were that the Organization had disregarded reports on his performance, misread what the rules said about the geographical distribution of staff, and committed an abuse of authority. Such charges can scarcely be dismissed as irrelevant to the terms of appointment and the Staff Regulations.

Although, as the complainant observes, the Appeals Committee was required to entertain his claim, in fact it did hold itself to be competent since it gave reasons related to the merits for rejection. The Tribunal will therefore determine whether the rejection was correct in law and it will entertain his various pleas insofar as he repeats and enlarges on them in his complaint.

6. In his rejoinder he says he was a candidate for a P.2/3 post but never for a P.4 one. His challenge to the plea that the international programme officer's post carried grade P.4 is out of time. In any event there is no evidence to bear out the allegation; indeed all the material evidence, whether it comes from the FAO or from the complainant himself, shows that the post was graded P.4. Though there are announcements of vacant posts that are graded P.2/3, they date from 1982-83 whereas the complainant applied in 1984. In his letter of 8 October 1984 he actually said that the post he wanted was graded P.5, and in his original brief observes that the post he wants is the one in announcement 80.DDF of 28 October 1985.

The Tribunal cannot but conclude that the Director-General committed no mistake of fact in rejecting the complainant's application for a P.4 post: that was precisely the grade mentioned in the announcement.

7. Though the complainant says that he fell foul of Mr. Dhital, a senior adviser, who was prejudiced against him, there is no evidence to bear out that contention. What seems more likely is that, as the Appeals Committee said, "the problems that had occurred ... were based on a personal conflict". For their part, the Committee showed no prejudice towards the complainant and were as one in acknowledging the quality of his work, conscientiousness, ability and professional skills. His charges of a policy of harassment - which he sees, for example, in not letting him take the training course, in giving him an assistant and in "shunting" him from the UNDP to the FAO - are immaterial because he fails to show there was anything arbitrary about such action.

8. He further alleges failure to give him service evaluation reports. The charge is vague, he can scarcely deny there are evaluations in his records, and there is no evidence in support. The charge is rejected.

9. There is more substance to his objection to the Organization's argument that India was over-represented on the staff: he submits that his being an Indian citizen was no sound reason for turning him down since the criterion of geographical distribution applies only to outside recruitment, not to promotion within the Organization.

As the Organization points out, it was not that criterion that afforded the basis of the challenged decision. Besides, it may be inferred a contrario from Staff Rule 302.40612, which he relies on, that the criterion does apply to the recruitment of staff in the Professional and higher categories. As Mr. Beringer told him in a letter of 9 January 1985, the FAO had resolved to appoint an international programme officer at grade P.4 on a post for which an announcement had already been issued. His argument that the criterion did not apply holds no water, and the claim fails.

"Implementation" of the complainant's job description

10. The complainant alleges "non-implementation" of his post description as set out in announcement FAO/83/1 of 20 July 1983.

This is really just another way of challenging the decision not to appoint him to the P.4 post. He says descriptions of his own G.7/B post and of the P.4 one are alike and argues that his own appointment to the latter would simply have given proper effect to the description in announcement FAO/83/1.

The evidence before the Tribunal, which it has no reason to question, shows that the two posts carry quite different duties.

For the same reasons as stated above the claim fails.

The application for hearing counsel and for oral proceedings

11. The complainant asks the Tribunal to summon his counsel, who live in India, to appear before it at hearings. He has argued his case in his original brief and in his rejoinder, which his counsel signed and to which many items of evidence are appended, and he has had a full opportunity to answer in writing the submissions and evidence filed by the defendant. The Tribunal holds that the submissions before it permit a ruling on all the material issues.

There being no need for oral proceedings, the Tribunal holds the complaint to be devoid of merit.

Costs

12. Since the complaint fails, so too does the application for costs.

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 Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
E. Razafindralambo
A.B. Gardner

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