

SEVENTY-FIFTH SESSION

In re AVRALIOGLU

Judgment 1277

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Osman Zeki Avralioglu against the Food and Agriculture Organization of the United Nations (FAO) on 31 August 1992, the FAO's reply of 24 November 1992 and the complainant's letter of 28 March 1993 informing the Registrar that he did not wish to rejoin;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulation 301.012 and Staff Rules 302.524, 303.1311 and 303.1313;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Turkish citizen who was born in 1934, served the FAO from 1972 to 1974 as an agricultural statistics officer at grade P.4 in Nigeria. In September 1980 the Organization re-employed him at its Regional Office for Africa. In July 1982 it promoted him to a headquarters post at P.5 as senior officer in the Statistical Development Service (ESSS) of the Statistics Division. He held a continuing appointment there until 22 November 1992, when he took early retirement.

In a memorandum of 30 April 1991 to the Division director the chief of the Service named the official who was to replace him during his absence on mission from 3 to 10 May. Since the complainant was to be off work in the same period save on 8 May the officer-in-charge was the next in rank in the Service, a P.4 official. In a memorandum to the director also dated 30 April the complainant objected to putting that P.4 official in charge on 8 May.

When he reported for duty on the morning of 8 May he found the P.4 official in charge. After talking the matter over with the director he failed to turn up in the afternoon. Instead he saw his doctor, who said he was suffering from high blood pressure and prescribed five days' rest.

By a memorandum of 15 May 1991 to the Assistant Director-General of the Economic and Social Policy Department the complainant asked whether it was right to put a P.5 official under the orders of a P.4 one. Replying in a memorandum of 21 June, the Division director said that there were no express rules on naming officers-in-charge, but that "pragmatism and simplicity" favoured putting one staff member in charge for the whole period. Observing that disagreement with a supervisor's decision did not warrant absence he asked the complainant to "regularize" the half day he had taken off.

By a memorandum of 4 September the director gave the complainant until 10 September to apply for leave; failing that, he would have his pay docked for "unauthorized and unjustified" absence under Staff Rule 302.524. On 12 September 1991 he appealed to the Director-General under Rule 303.1311 against the docking of one half-day's pay and asked the Appeals Committee to recommend amendments in the rules to govern the designation of officers-in-charge.

In a letter of 10 October 1991 the acting Assistant Director-General in charge of the Administration and Finance Department informed him on the Director-General's behalf that, his absence having been certified as sick leave, he had no cause of action in respect of the salary deduction; and following the appeals procedure was not a proper way to get the rules changed.

On 5 December the complainant put his case to the Appeals Committee in pursuance of Rule 303.1313. In its report of 6 May 1992 the Committee concluded that the appeal was irreceivable: his objection to the deduction of one half-day's pay showed no cause of action and his request for review of the Staff Regulations and Rules was not a challenge to any administrative decision. By a letter of 5 June, the impugned decision, the Director-General endorsed the Committee's recommendation.

B. The complainant submits that the decision to put a junior official in charge was arbitrary and humiliating. In the absence of written rules on the naming of officers-in-charge respect for the hierarchy should prevail over pragmatism and simplicity. In any event the FAO has not shown what harm putting him in charge on 8 May might have done to the Service. Had he stayed in the office and bowed to the P.4 official's authority for no good reason he would have suffered irreparable moral injury. He eschewed that by staying away but what had happened took its toll by raising his blood pressure.

He wants the Tribunal to declare that his failure to report to work on the afternoon of 8 May was "legitimate defence" against being put under the orders of a junior official and to award him one United States dollar in token damages for injury to his health.

C. In its reply the FAO submits that the complaint is irreceivable because the complainant has failed to exhaust the internal means of appeal: his present claims are new ones. What he sought in his appeal to the Appeals Committee were changes in the rules and pay for the afternoon he took off.

On the merits the FAO contends that failing to report for work is not a proper means of resisting an administrative decision. He should have followed the appeals procedure laid down in the Staff Regulations and Rules. To allow disgruntled staff to sidestep the procedure as they see fit would undermine efficiency.

Staff Regulation 301.012 says that "Staff members are subject to the authority of the Director-General, who may assign them to any of the activities or offices of the Organization, and to whom they are responsible in the exercise of their functions". So the decision under challenge was at the Director-General's discretion. It did not infringe any of the complainant's rights; nor could it be the cause of high blood pressure.

CONSIDERATIONS:

1. At the material time the complainant was a P.5 official in the Statistical Development Service (ESSS) of the FAO. He took leave without permission on the afternoon of 8 May 1991 because he refused to serve on that day under a P.4 official named as officer-in-charge of the Service while the chief was absent on mission. He appealed to the Appeals Committee on 5 December 1991. In its report of 6 May 1992 the Committee recommended rejecting his appeal as groundless.

2. By a decision of 5 June 1992 the Director-General of the FAO endorsed the Committee's view (1) that since the FAO's medical officer had recognised his absence for one half day on 8 May 1991 as sick leave he no longer had any grounds for appeal on that score, no deduction having been made from his pay; (2) that putting in charge of the Service an official who was junior in grade to him was not in breach of the FAO's Staff Regulations or Staff Rules or the terms of his appointment; and (3) that his request for amendments to the rules was outside the Committee's competence. The Director-General accordingly rejected his appeal "as not receivable as far as it is directed against a deduction from salary for 8 May 1991; as devoid of merit as far as you claim that you had a right to leave the office because you were not designated Officer-in-Charge, ESSS for 8 May 1991; as not receivable in as much as you seek an amendment to the rules of the Organization". That is the final decision impugned.

3. The relief that the complainant seeks is:

(1) a declaration that "my not coming to office in the afternoon of 8 May 1991 is a legitimate defence against the administrative action aimed at putting me, a P.5 officer, under the supervision of a P.4 officer without a just cause"; and

(2) an award of one United States dollar as "a symbolic compensation for causing me to suffer from high blood pressure by ignoring my repeated requests to correct the administrative action".

He does not, as he did in his internal appeal, ask for amendments to the rules to provide for the naming of officers-in-charge and so he may be deemed to have abandoned the claim.

Receivability

4. In its reply the FAO submits that his complaint is irreceivable on the grounds that the relief he sought in his internal appeal was "totally different" in "nature" from the relief he seeks before the Tribunal. In his appeal - says the Organization - he did not seek a declaration that putting the other official in charge was invalid but instead

asked that no deduction be made from his pay on account of his absence from work on the afternoon of 8 May 1991.

The complainant himself offers no answer to the argument since he has not seen fit to file a rejoinder.

5. Article VII(1) of the Statute reads:

"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."

According to the case law - see, for example, Judgment 435 (in re Zihler) - the rule that the complainant must have exhausted the internal remedies means, first, that his complaint must rest on the same essential facts as his internal appeal and, secondly, that his claims must not be wider than those he put forward in that appeal.

6. The present complaint rests on the same essential facts as those underlying the appeal to the Appeals Committee. So the first condition is met.

7. As to the second one, in his appeal of 5 December 1991 to the Appeals Committee the complainant asked that his "absence in the afternoon of 8 May 1991 be considered as a legitimate defence against the administrative action aimed at putting [him] under the supervision of a P.4 Officer, and that the salary cut be stopped for this reason". Likewise he said in his counterstatement that he was asking the Appeals Committee to hold that his "not coming to office in the afternoon on 8 May 1991 was a legitimate defence and it is because of this reason that no salary cut should be effected". It is true that in his memorandum of 12 September 1991 to the Director-General he challenged an administrative "action" of the same date deducting one half-day's pay from his entitlements and the acting Assistant Director-General's answer of 10 October 1991 referred only to that matter. But in his appeal of 5 December 1991 to the Appeals Committee he added a claim to a ruling on the lawfulness of his taking the afternoon of 8 May 1991 off. It was on both claims that the Appeals Committee made recommendations and that the Director-General gave the decision that is now impugned. The conclusion is that those claims are receivable because, contrary to what the Organization maintains, he has exhausted the internal means of redress.

8. But his claim to an award of token damages for injury to health is a new one: he did not put it to the Appeals Committee and it is therefore irreceivable under Article VII(1) of the Tribunal's Statute.

The merits

9. The material issue is whether a staff member may be justified in leaving work because a less senior officer has been put in charge of his unit in his stead.

10. The nub of the complainant's case is that since there are no specific rules on the appointment of the officer-in-charge the observance of the hierarchical structure of the Organization must, contrary to what the FAO says, prevail over administrative "simplicity" and "pragmatism". In his submission it is unacceptable to put a P.4 official in charge even for one day when a P.5 official is on duty.

11. The Organization contends that going absent from work is not a lawful means of challenging an administrative decision; that the only proper course of action is to follow the appeals procedure provided for in the Staff Regulations and Rules; and that, even supposing that putting the less senior official in charge infringed any right of the complainant's, he might not properly protest by just making off.

12. The Tribunal upholds the Organization's contention. Acknowledging that a staff member has a right to leave work by way of protest against an administrative decision he does not care for would indeed mean letting him take the law into his own hands and do justice unto himself. The right of "legitimate defence" and self-help that the complainant is claiming is alien to due process and, if tolerated, would wreak havoc in any administration.

13. The two claims that are receivable are therefore devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
William Douglas
P. Pescatore
A.B. Gardner

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