

EIGHTY-FIRST SESSION

***In re* CESARI**

Judgment 1501

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Vezio Cesari against the Food and Agriculture Organization of the United Nations (FAO) on 24 November 1994 and corrected on 26 April 1995, the FAO's reply of 18 August, the complainant's rejoinder of 18 October, the Organization's surrejoinder of 7 December 1995, the complainant's further submissions of 11 March 1996 and the Organization's comments thereon of 10 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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, an Italian who was born in 1940, joined the FAO on 30 December 1967 as a messenger at grade G.1 at the Organization's headquarters in Rome. From 15 December 1982 to 30 May 1990 he was employed as a clerk at grade G.5.

On 1 June 1990 the FAO transferred him to the Field Programme Development Division (DDF) and gave him a field assignment in the Yemen as from 1 April 1991. On 1 September 1992 it transferred him from the Yemen to the office of the FAO's Representative in Teheran as an administrative officer at grade P.2. He was to hold that grade while in Iran: the assignment was originally for seven months but was extended until 31 March 1994.

From 1 June 1993 he was on sick leave in Rome. By a letter of 6 June to the Senior Adviser of the Decentralization Support Unit (DDFO) the FAO's Representative in Iran, Mr. W.J. Collett, asked that the complainant be recalled to headquarters in his own and the Organization's interests. By a memorandum of 24 June the officer-in-charge of the Personnel Division told the complainant that Mr. Collett did not want him to go back; that his "behaviour and responsibility on this issue" would be reviewed, "relevant action" would be taken in due course and he was transferred to headquarters forthwith. By memoranda of 13 July to the chief of the Personnel Policy and Entitlements Service (AFPE) and of 21 July to a personnel officer he asked why he was transferred.

On 22 July he returned to Iran to arrange for departure. As soon as he got back to Rome the chief of AFPE informed him in a memorandum of 9 August that the effective date of transfer was that very day, that his grade would be G.5 and that the Organization would continue to look for a post for him.

By a memorandum of 20 August to the chief of AFPE he claimed compensation for the financial losses he had incurred on transfer to headquarters and the repayment of education expenses for his daughter, who was at school in Rome. He again asked about the reasons for transfer. By a memorandum of 13 September the chief of AFPE sent him a copy of a report of 26 July by Mr. Collett. It gave an account of the incidents that had prompted Mr. Collett to propose his transfer: he had, it said, been seen several times between January and April 1993 in the company of Mr. Collett's secretary, an Iranian woman; since it was an offence against Iranian custom for a woman to be seen in public with a man other than her husband or a close relative the Government of Iran had asked that the complainant leave the country. In a memorandum of 17 September the complainant sent the chief of AFPE some "clarifications" of Mr. Collett's account of what had happened.

On 24 September 1993 the complainant wrote to the Director-General claiming compensation for the financial losses he had incurred and the grant of grade P.2 on his transfer to headquarters. In reply to his memoranda of 20 August and 17 September the chief of AFPE informed him in a memorandum of 29 September that the FAO was not liable for the consequences of transfer and would not meet his claims. By a letter of 22 October the Assistant Director-General in charge of the Administration and Finance Department informed him of the rejection of his

claims of 24 September.

By a memorandum of 23 November the complainant lodged an appeal with the Appeals Committee against the decision of 22 October. The Committee reported on 29 June 1994. It held that the FAO had acted by the rules and recalled the complainant to headquarters in its own interests. It recommended rejecting his claims. In a letter of 29 August 1994 - the impugned decision - the Director-General endorsed the recommendation.

B. The complainant states that he is challenging, not his transfer to headquarters, but the injury it caused him.

First, he alleges that the effects of the decision are tantamount to hidden disciplinary action. Since the Organization failed to bring disciplinary proceedings, it denied him the procedural safeguards in paragraph 330.13 of the FAO Manual.

Secondly, he submits that the Organization failed in its duty to respect his dignity and caused him unnecessary and undue injury. The transfer to headquarters caused him heavy financial loss: his pay fell because he was relegated from P.2 to G.5, and the Organization refused him the education grant and the lump-sum portion of the assignment grant. Precedent requires an organisation to give its staff genuine duties; instead the FAO left him idle for months after his recall and made no real effort to find him a post. His transfer has ruined his career and damaged his professional reputation. His wife, who is also with the FAO, left him on learning the reasons for his transfer.

He asks the Tribunal to quash the decision of 29 August 1994 and order the Organization to find him a secure post in keeping with his experience and qualifications and pay him damages for the financial losses he incurred on transfer - 1,600 United States dollars for having to sell his motor car and \$2,000 for ending the lease of his flat - the education grant and the lump-sum portion of the assignment grant. He seeks moral damages equivalent to five years' pay at the rate of his last monthly salary in Iran, and costs.

C. In its reply the Organization submits that it had no reason to contemplate disciplinary action: the complainant's recall to headquarters was prompted by objections from the Iranian Government, not by any of its own. Besides, he did have his say in the internal appeal proceedings.

His own behaviour was the sole cause of his transfer and the "financial losses" he alleges. The FAO discharged its obligations by determining his entitlements on recall to headquarters. Though finding a post for a General Service staff member returning from the field is no easy matter, it found him work in March 1995 in the Forestry Department.

D. In his rejoinder the complainant objects to the Organization's "tendentious" account of the events that prompted his transfer to headquarters.

He maintains that the FAO is liable for the consequences, which amount to a sanction. Lodging an appeal did not make up for denial of the safeguards that disciplinary proceedings would have afforded.

E. In its surrejoinder the FAO argues that it merely did what it had to to safeguard its own and the complainant's rightful interests.

F. In further submissions the complainant observes that, though the FAO promised him a secure post, he has since 19 February 1996 been "on temporary loan" to the Budget and Finance Group on a two-month assignment.

G. In final comments the Organization states that it is still looking for a suitable post for him and that his employment at the FAO is safe.

CONSIDERATIONS:

The background

1. The complainant, who was born in July 1940, joined the FAO on 30 December 1967 as a messenger at grade G.1. From December 1982 to May 1990 he worked as a clerk at grade G.5 in the Office of Internal Audit. On 1 June 1990 the FAO transferred him to the Field Programme Development Division at the same grade, though it granted him a special post allowance at grade G.6. On 1 April 1991 it transferred him to the office of its Representative in the Yemen with temporary promotion to G.6 while he was there. A letter of 8 April 1991, which

he countersigned, said that he had the right to return to headquarters at grade G.5. On 1 July 1991 he was appointed administrative officer in the Yemen and granted promotion to P.2 for as long as he stayed there. After a good start his performance tailed off. He was transferred to Teheran at 1 September 1992, still at grade P.2 for as long as the assignment might last. His performance proving satisfactory, his assignment was extended to 31 March 1994. There then occurred several incidents that are recounted below. At 9 August 1993 the Organization transferred him to headquarters at grade G.5. It felt it had to recall him from Teheran in his and its own interests because the Iranian Government had objected to his breach of local custom in being seen in public with a married woman in the absence of her husband or a member of the family. The transfer was intended to safeguard FAO work in Iran and to remove him from the threat of reprisal. He is not challenging the actual transfer. His claims are set out in B above.

Receivability

2. According to Article VII, paragraph 1, of the Tribunal's Statute a complaint is not receivable unless all internal means of redress have been exhausted. One of the complainant's pleas is that on return to Rome he did not get the within-grade step increment due to him in May 1994. The claim is irreceivable because it formed the subject neither of the impugned decision nor of his internal appeal. Besides, as the Organization points out and as he acknowledges in his rejoinder, there was mere delay in paying the increment.

The merits

3. The complainant's first plea rests on the the case law: the Organization may not punish unsatisfactory conduct - as against unsatisfactory service - without following a disciplinary procedure that affords definite safeguards. He cites Judgment 247 (in re Nemeth). But he misreads that case. It was about action of a kind that might be properly deemed disciplinary, namely refusal of an increment for insubordination. The text actually says in 15 that a supervisor is not to be prevented, simply because there have been some acts of insubordination, from declaring service to be generally unsatisfactory. What the Tribunal will determine in each case is whether in the light of all the evidence the impugned decision may be treated as disciplinary action requiring the prescribed disciplinary procedure. It saw such action, for example, in summary dismissal for serious misconduct (Judgment 87, in re Di Giuliomaria, under 3), but not in the refusal to renew a fixed-term appointment (Judgment 1405, in re Moore, under 6), while transfer may amount to disciplinary action according to circumstance (Judgment 1496, in re Güsten, under 8).

4. The present complainant's quarrel is not with the actual transfer; nor does he disagree that it was in the Organization's and his own interests. What he is objecting to is just the Director-General's refusal to let him have compensation for the drop in pay due to his relegation from P.2 to G.5, to pay him part of the assignment grant, to meet the costs he incurred on premature recall to headquarters, and to grant him compensation for moral injury. His claims rest, not on any express provisions of the Staff Regulations, but on the general principle that an organisation must not cause its employees undue injury: see 5 below. In this narrower context the issue is whether the injury was attributable to the Organization or to the employee. That is plainly not a disciplinary matter, and it does not call for the further safeguards that disciplinary proceedings afford. The ordinary procedure suffices to safeguard his rights in full. His plea therefore fails. For the same reasons so does his contention that the measure is unlawful because it amounts to disciplinary action that is not provided for in the Staff Regulations.

5. The complainant rests his case on the doctrine that action taken in the Organization's interests must still respect the staff member's dignity and not cause undue injury. So the Organization should - the argument runs - put him just where he would have been had it not transferred him prematurely in its own interests: though he is now back at headquarters it should pay him a salary equivalent to the P.2 pay he was earning in Iran, or at least the G.6 pay he was getting temporarily before he was sent to the Yemen. It should also pay him compensation for the financial loss he incurred in ending the lease of his flat in Teheran (2,000 United States dollars) and in the hasty sale of his car (\$1,000). It should pay the costs of his daughter's schooling in Rome in 1993 (8,217,800 lire). He cites, among others, Judgment 832 (in re Ayoub and others).

There is no need here to define the right he claims to protection against undue injury since one condition of fulfilment is lacking: though transfer was ordered in the Organization's interests the reason for it was his own conduct.

6. The facts set out in A above are not in dispute. Before going out to Iran the complainant was briefed on the

social precepts and customs - particularly about the place of women in society - which he must observe and which the Government of that country strictly enforces. The office of the FAO's Representative in Teheran was in the building of the Ministry of Agriculture and was watched right round the clock by guardians of the revolution. The Representative's Iranian secretary had an Iranian husband and lived with him near Teheran. The complainant says that his family and hers had struck up a friendship, his own wife having visited Teheran on holiday. While on holiday in January 1993 the Representative was told by telephone that she and the complainant had been seen together either on business at the airport or privately. In January 1993 the two turned up at the office but were refused admittance until someone came along from the Ministry. Back at the office the Representative spoke to them about the incident. The complainant went to Rome on leave on 17 March 1993; so did the woman, the next day, only to return to Teheran shortly after. On 14 April a representative of the Iranian Government asked for the complainant's removal. On 24 April he went back to Teheran. On 27 April the FAO's Representative saw the Deputy Director-General in Rome and talked about the trouble that the complainant's behaviour was causing. On 6 May the Permanent Representative of Iran told the FAO that the Government was disturbed about the matter. The complainant says that in mid-May he got threats - though whether he told his supervisors is unclear - and for that reason changed his address in Teheran. At the time he applied for leave to go to Rome. He says that he wanted to allay any suspicions his wife might have on the matter and that she sought and got a divorce on the strength of information from the FAO that it should have kept confidential. He stoutly denies having an affair. In June 1993 the FAO's Representative asked the Organization to recall him.

7. It is plain on the evidence that the complainant knew the ethics of the host country and that his disregard of them aroused the resentment that prompted his transfer. What the consequences may have been for his private life is immaterial. The proper performance of his mission by an international civil servant requires him to avoid such infringement of the ethical rules of the host country as may hamper or prevent the discharge of duty. It must have been obvious to the complainant that any disregard of Iranian customs as to the place of a married woman in society would compromise the FAO's mission in Iran. His breach of those rules was conduct warranting transfer.

He does not contend that the transfer was unrelated to his own behaviour, and on that score he is right. So he may not treat the Organization as liable for the financial consequences of a decision for which he was solely to blame. His claims to compensation for a drop in pay and to damages for premature transfer are therefore without merit.

8. He puts forward the following arguments in support of his claim to moral damages. The impugned decision was unlawful - he says - and that in itself warrants an award; even if it were not unlawful the seriousness of the injury would warrant it: he cites Judgment 630 (in re Rudin No. 3). He submits that (1) in the appeal proceedings the Organization wrongly accused him of improper behaviour with a woman who was not his wife; (2) since his return to headquarters the Organization has not found him a secure and suitable job; (3) he did not even have his own office until February 1995 and has since been lodged in a storage area; (4) he did not get the salary increment due to him in May 1994; and (5) the Organization revealed confidential information about the incidents and his wife, on the strength of the Representative's account, among other things, sought and got a divorce.

There was nothing unlawful about the transfer as such. Contrary to what the complainant says, the FAO did not accuse him of having an affair but of offending in public against Iranian ethics and so undermining the Organization's work. It denies giving confidential information to any unauthorised third party. Although the complainant expresses surprise at his wife's knowing the "story" he fails to show how the Organization was to blame for that or what particular revelation brought about the divorce. His claim over tardy payment of an increment is irreceivable because he did not make it in his internal appeal, and the delay was not serious anyway. The Organization admits that on his return to Rome it gave him sundry jobs instead of lasting duties, but it explains that that was because his return was unexpected, no suitable post was available, and there was restructuring going on. In March 1995 it did assign him to the Forestry Department. In a further brief he points out that on 19 February 1996 he was lent for two months to the Budget and Finance Group. The difficulty of finding him a job at headquarters may be regrettable, and the Organization ought to find him steady work but there is no reason to suppose that it has missed any opportunity or wilfully kept him out of such work. The same is true about finding him an office. In any case the difficulties are to some extent due to his lack of success in the field, and on that score the Organization is not liable. In view of all the circumstances there are no grounds for awarding him moral damages and costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot
Julio Barberis
Egli
A.B. Gardner

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