

TWENTY-THIRD ORDINARY SESSION

***In re* KERSAUDY**

Judgment No. 152

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Georges Kersaudy on 10 April 1969, the Organization's reply of 23 June 1969, complainant's reply of 14 October 1969 and the Organization's reply thereto of 9 January 1970;

Considering Article II, paragraph 5 of the Statute of the Administrative Tribunal and the provisions of Staff Regulation 301.0913 and sections 307.41 and 305.431 of the Manual of the Organization;

Having examined the documents in the dossier, the oral proceedings requested by complainant having been disallowed;

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

A. After working on a permanent contract as a French translator in the United Nations Organisation from 1953 to 1963, and subsequently in the International Atomic Energy Agency (IAEA), Mr. Kersaudy applied for a post as translator/reviser in the FAO on 22 September 1966. On 9 January 1967 the Personnel Department of the FAO wrote to the IAEA requesting complainant's transfer to take up a "permanent appointment" with the FAO. The IAEA agreed, but added that Mr. Kersaudy was an appreciated translator whom it was sorry to lose. On 14 February 1967 complainant signed his contract of appointment with the FAO, which stated under the heading "Type of Appointment" that he was granted a "permanent appointment (first-year probationary)". He started work in the FAO at the beginning of April 1967.

B. On 17 November 1967 the Chief of the French Translation Section of the FAO sent a memorandum to Mr. Kersaudy to inform him that the quality and quantity of his work were not up to standard. This was followed by oral criticisms. Complainant replied in writing only on 15 March 1968, when he had had an opportunity to read minutes addressed by his superiors to the Personnel Department requesting extension of his probationary period by six months to 31 October 1968. Further to these written observations, he had several interviews and written exchanges of views with his superiors and with officials in the Personnel Department. He repeatedly rejected the assessment of his work, which, in his view, was quite up to standard both in quantity and in quality. He attributed the criticisms of his work to prejudice on the part of several of his colleagues who were anxious to get rid of him. He asked that his work should be subjected to assessment by outside experts. His probationary period was nevertheless extended by six months and it was decided not to have recourse to assessment by outside experts but to allow complainant the most favourable possible conditions of work. On 11 June 1968 he was therefore informed that in future he could himself select the texts which he wished to translate and that his output and the quality of his work would be assessed by the Chief of the Section with the assistance of four colleagues in whom he had expressed confidence.

C. On 11 September 1968 the Chief of the Section sent his superiors a minute in which he stated that complainant's work had not improved. Complainant had selected the easiest texts, full of passages already translated, and even so his output had remained at less than half the FAO average (2,500 words of unrevised translation a day). He had also committed many blunders in recording figures and units of measure. The Chief of the Section concluded that although the complainant was an intelligent and highly cultivated person familiar with a great many languages, he had failed to adjust to the requirements of the FAO Translation Service. He therefore recommended that Mr. Kersaudy's appointment should not be confirmed. The Chief of the Recruitment and Personnel Department informed Mr. Kersaudy on 23 September 1968 that his appointment was terminated in accordance with section 301.0913, which empowers the Director-General at any time to terminate the appointment of staff members on probation if, in his opinion, such action would be in the interests of the Organization.

D. Mr. Kersaudy lodged two appeals with the FAO Appeals Committee. In the first, dated 5 September 1968, he appealed against the withholding of his annual salary increment and the extension of his probation period. In the second, dated 10 October 1968, he appealed against the decision to terminate his appointment. The Appeals Committee heard complainant, the Chief of the Section and several French translator/revisers. In its report dated 10 December 1968 it found: (1) that complainant had been involved in political and religious arguments with some of his colleagues in the same Section; (2) that insulting remarks had been written in the margin of some of his translations by a reviser and by an unknown person on the name-plate outside his door; (3) that his translations, after correction and revision by other translators, had not been shown to him during his first fifteen months of service and that he had not therefore received the training to which he was normally entitled during his probationary period; (4) that the figures relating to his output did not afford fully convincing proof of his low output; and (5) that the evaluation report which had led to the decision to dismiss him had not been shown to complainant before despatch. The Appeals Committee therefore found the existence of prejudice against Mr. Kersaudy and recommended the Director-General that he be immediately reinstated in his employment. In a letter to complainant dated 13 January 1969 the Director-General informed him that he could not accept the Appeals Committee's finding of prejudice against him and could not agree to reinstate him. He added that his religious and political differences with his colleagues were not necessarily the cause of bias in the assessment of his work and that the Director of the Division, who had himself recommended the extension of his probationary period and subsequently the termination of his employment, had personally assessed the quantity and quality of complainant's work; he had moreover not taken any part in the discussions in which differences of view had become apparent and had not been in any way influenced by those discussions.

E. In his complaint against the Director-General's decision of 13 January 1969 complainant alleges that the obligation placed upon him to undergo a probationary period after fifteen years' service as translator with the United Nations and the IAEA constituted an infringement of his rights. He points out that he has not had a proper opportunity to defend himself, since the criticisms of his work were first brought to his attention only after seven months of the probationary period had elapsed and that, despite his repeated requests, it was not until 9 July 1968 that for the first time his translations were returned to him corrected by revisers. He considers that the Organization failed to respect the regulations in allowing one-and-a-half months to pass before transmitting his internal appeal, which should have been submitted to the Director-General within three days according to the provisions of FAO Manual section 303.131 and in giving effect to his dismissal without waiting for the Appeals Committee's recommendation. He further alleges misuse of authority in that the Director-General claimed to be acting under section 301.0913 (dismissal of an official on probation in the interests of the Organization), whereas in fact he was dismissed for allegedly unsatisfactory performance. He requests that the impugned decision should be quashed and that he should be reinstated in his employment without loss of entitlements and, failing that, that he should be awarded the sum of US\$135,620; and finally, in any case, that the Organization should pay him his expenses and fees arising out of the proceedings amounting to 6,000 Swiss francs.

F. The Organization prays that the complaint be dismissed.

CONSIDERATIONS:

As to the decision requiring Mr. Kersaudy to undergo a probationary period:

The requirement that a newly-recruited official shall serve a probationary period before his appointment is confirmed or before he receives a fixed-term or indeterminate appointment is a normal condition generally imposed in such cases.

Although FAO Manual section 307.41 provides that staff members recruited by FAO after serving with the United Nations or another specialised agency may be exempted from serving a probationary period, it is clear from the terms of this provision that it does not confer any right on the persons concerned, but merely gives the Chief of the Personnel Department authority to waive the requirement if he is satisfied that it is appropriate to do so.

It follows that Mr. Kersaudy's plea to quash the above-mentioned decision, which in any case is time-barred, is without foundation.

As to the decision extending Mr. Kersaudy's probationary period by six months:

As stated in Manual section 305.431, the Director-General has the right to extend the probationary period if the

probationer's performance gives rise to doubts justifying postponement of a final decision as to his appointment.

In the present case it appears from the evidence in the dossier, and in particular from a letter from the Chief of Personnel dated 13 March 1968, that complainant was notified on 12 March 1968 that the Director-General contemplated extending his probationary period for a further six months from 1 May 1968, and was informed of the reasons for this decision, and that he had the opportunity of making his observations upon it both orally and in writing.

Furthermore, the Director-General was in possession of material affording grounds for the provisional measure, namely the extension of the probationary period.

As to the decision of 23 September 1968 terminating the complainant's appointment at the end of the extended probationary period:

The Director-General's decision to terminate the complainant's appointment for unsatisfactory performance was based on Staff Regulation 301.0913, which provides that: "In the case of all other staff members, including staff members serving a probationary period for a permanent appointment, the Director-General may at any time terminate the appointment if, in his opinion, such action would be in the interests of the Organization".

Because of his provisional status an official on probation cannot enjoy the same guarantees as a staff member who is established or who holds a fixed-term or indeterminate contract. Specifically, as the purpose of the probationary period is to ascertain whether a probationer has the necessary professional qualifications for permanent appointment in the Organization, the Director-General is entitled to discharge him as soon as he has satisfied himself that this is not the case. Consequently the termination of a probationer's appointment for unsatisfactory performance may be regarded as a measure taken in the interests of the Organization.

The Tribunal is competent to review any decision of the Director-General to terminate the appointment of a staff member during or on the expiry of the probationary period if it is taken without authority, is in irregular form or tainted by procedural irregularities, or is taken on illegal grounds or based on incorrect facts, or if essential facts have not been taken into consideration or where there has been a misuse of authority, or if conclusions which are clearly false have been drawn from the documents in the dossier. But the Tribunal may not substitute its own judgment for that of the Director-General concerning the work or conduct of the person concerned or his qualifications for employment as an international official.

Mr. Kersaudy claims, first, that the decision to terminate his appointment was taken in violation of his right to a hearing, and secondly, that it was not justified.

On the first point, although the termination of a probationer's appointment for unsatisfactory performance is not in itself a disciplinary measure, it is nevertheless a measure affecting the staff member individually and cannot therefore legitimately be taken until he has been informed of the Organization's intention to terminate him and has had an opportunity of submitting his observations.

In this case, even though, as the Organization maintains, Mr. Kersaudy was in fact aware of the reasons for the measure taken with regard to him on 23 September 1963, nevertheless he was not informed of the Organization's intention to terminate his services nor invited to state his views. It is clear, however, that before the Appeals Committee the complainant was duly informed of the reasons for his termination and that he had an opportunity to discuss them. accordingly, in the special circumstances of the case, he could not validly allege any violation of the right to a hearing.

It follows that the Director-General's final decision to terminate the complainant's appointment, taken on 13 January 1969 after receiving the Appeals Committee's recommendation, which is the decision impugned, was not taken following any irregularities of procedure.

On the second point, the Director-General criticised Mr. Kersaudy for the unsatisfactory quality and quantity of his work.

While there may be some doubt as to the importance or value of the criticisms made of the quality of the complainant's translations, it is not sufficient to justify the Tribunal in finding that in basing his decision on the unsatisfactory quality of the complainant's work the Director-General drew conclusions that were clearly contrary

to the evidence in the dossier.

Moreover, even disregarding FAO's standards which for the purposes of evaluation can be taken into consideration only as one factor among others, it is a fact that, due allowance being made for the difficulty of the work and circumstances in which it was performed, Mr. Kersaudy did not produce the monthly output of translation which could be reasonably expected of him, and after being warned by the chief of his section in November 1967 did not improve his output. It is clear that unsatisfactory output is an important factor in unsatisfactory performance.

It follows from the foregoing that the complainant's claim that the decision impugned is tainted by any irregularity which the Tribunal is competent to review, including misuse of authority, is unfounded.

DECISION:

For the above reasons, the complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Kr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 26 May 1970.

(Signed)

M. Letourneur
André Grisel
Devlin
Bernard Spy