

NINETY-SEVENTH SESSION

Judgment No. 2360

The Administrative Tribunal,

Considering the complaint filed by Mr M. V. against the Food and Agriculture Organization of the United Nations (FAO) on 19 May 2003 and corrected on 25 July, the Organization's reply of 10 November 2003, the complainant's rejoinder of 19 January 2004, the additional appendix to the rejoinder submitted by the complainant on 10 March and the FAO's surrejoinder of 29 March 2004;

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

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

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

A. The complainant, an Italian national born in 1961, worked for the FAO from February 1985 to January 1988 as an office clerk, at grade G-1 and then G-2. He rejoined the FAO in February 1989, as a G-2 office clerk (statistics). In June 1992 he was appointed Statistical Clerk and promoted to grade G-3 in the Raw Materials, Tropical and Horticultural Products Service (ESCR) of the Commodities and Trade Division. In June 1997 the complainant was assigned, on a temporary basis, to the Office of the Assistant Director-General in charge of the General Affairs and Information Department (GID) to work on a programme called TeleFood. In 1999 (in January according to the complainant, in August according to the defendant), the complainant was placed under the supervision of the Assistant Director-General, Special Adviser to the Director-General (hereinafter the ADG/SAD) and continued to work for the aforementioned programme. On several occasions, the latter expressed satisfaction with the complainant's work and asked for his administrative situation to be regularised. In January 2000 the complainant requested and was granted special leave without pay from February to June 2000.

In a memorandum of 30 November 2000 to the ADG/SAD and to the Assistant Director-General in charge of General Affairs and Information (hereinafter the ADG/GI), the complainant requested "written confirmation that the commitment to establish and place [him] on an appropriately graded post at the professional level in January 2001 will be honoured". He also asked to be "remunerated according to the level of the functions [he had] been carrying out for the last three years and that such remuneration be retroactive for [that] whole period". In a memorandum of 4 December 2000, the ADG/SAD wrote to the ADG/GI that he had been trying to find the complainant a satisfactory post in an appropriate department, including his own, but without making any commitment. On 4 May 2001 the complainant was informed that a desk audit of his functions in the TeleFood programme would be conducted.

In a memorandum of 17 July 2001, the Director of the Personnel Division, referring to the complainant's memorandum of 30 November 2000, informed the latter that no suitable vacancy had been found for him in the Office of the Special Advisers to the Director-General (SAD). She added that the desk audit of his duties in the TeleFood programme had concluded that they should be graded at the P-3 level. The Director-General had therefore exceptionally approved that he be paid a Special Post Allowance for that grade retroactively to 1 November 1998, because, in accordance with Staff Rule 302.3171, an allowance must be claimed within two years of the date on which the entitlement arose. She also proposed an agreed termination of service, with payment of a termination indemnity calculated on the basis of a grade G-3 salary and increased by 50 per cent. If he did not accept the proposal, he would be reassigned to a grade G-3 post. In his reply dated 31 July, the complainant asked for the allowance to be retroactive to 1997 and for his case to be reconsidered with a view to finding him a suitable placement, failing which he requested an agreed termination reflecting the injuries he had suffered. The Director of Personnel informed the complainant, in a memorandum of 15 October, that his requests had been rejected, that he would be redeployed to a grade G-3 post and that he would be paid a special post allowance covering the period

from 1 November 1998 to 30 September 2001. She reminded him that promotions within the Organization were granted only on the basis of competitive selection procedures and invited him to apply for any vacant posts which he considered to be commensurate with his qualifications and experience. In a memorandum of 19 October 2001 concerning the regularisation of his situation, the ADG/GI told him that the chief of his unit had been instructed not to assign professional level tasks to him. According to the complainant, after that date and until the end of October 2002, he was assigned no further tasks by the Organization.

On 7 January 2002 the complainant filed an appeal with the Director-General against the decision of 15 October 2001. He contended that the decision betrayed the promises made to him in June 2000 and that the withdrawal of all P-3-level duties had impaired his dignity and caused him undue injury. He asked to be appointed with retroactive effect from 1 January 2001 to a post at an appropriate level, related to the P-3-level duties he had been assigned until October 2001 or, failing that, to be allocated compensation equivalent to three and a half years' salary at grade P-3, step 1. When the Director-General rejected his appeal, the complainant challenged that decision before the Appeals Committee on 19 March. In its report of 29 October 2002, the Committee issued a recommendation that was very critical of the Organization, which, in its view, even if it had "not breached internal rules [...] could nevertheless have handled the case in a more professional manner". The Committee considered that there was no proof that any promise had been made to the complainant, even though the latter might have entertained legitimate expectations, and that it was deplorable that an official whose performance had been outstanding should have remained inactive for a year after the decision was taken to withdraw his duties. In the light of the particular circumstances of the case, the Committee recommended that the Organization "reconsider the complainant's request concerning his agreed termination compensation and [...] calculate termination indemnities taking account of the P-3-level work performed by him in his last assignment". Alternatively, it recommended that the Organization "make every effort to find a suitable post for the complainant, in compliance with the internal selection procedure, taking into account his three and a half years' experience at the P-3 level". On that same day the Director of Personnel informed him that, as from 1 November, he was being assigned to the post of Statistical Clerk, at grade G-3, in the Basic Data Branch of the Statistics Division in the Economic and Social Department.

In a letter of 21 February 2003, the Director-General informed the complainant that he accepted the Appeals Committee's recommendations: the complainant would be offered a separation from service under agreed terms with termination indemnities that took into account the P-3-level work he had done from November 1998 to September 2001 and if the complainant declined the offer, the Organization would try to find him an appropriate post, "in compliance with the internal selection procedure" and considering his above-mentioned P-3 experience. On 11 March the Director of Personnel sent him details of the Organization's offer. The termination indemnity was calculated taking into account, on a pro-rata basis, the period during which he was paid the allowance. On 4 April the complainant rejected this offer and asked to be immediately transferred back to the Information Division to perform duties in the journalistic/promotion field. He filed his complaint on 19 May, challenging the Director-General's decision of 21 February 2003. On 4 June the Director of Personnel informed him that there were currently no vacant grade G-3 posts in the journalistic/promotion field within the Information Division and encouraged him to continue to apply for vacant posts for which he considered himself qualified.

B. The complainant puts forward three pleas in support of his complaint. Firstly, he accuses the FAO of not keeping the promise made by the ADG/SAD to find him a post at a suitable level (which meant, in his view, at grade P-3) within SAD starting in January 2001. He considers that the Appeals Committee's report is ambiguous in that respect, since it states that, "even if the conditions for a promise as [stipulated in the Tribunal's case law] were fulfilled, there was no proof that the ADG/SAD had made such a promise". He argues that the fact that the promise did exist is confirmed by the evidence on file and by several testimonies.

He also submits that, by withdrawing his grade P-3 duties, depriving him of any duties for a year and then assigning him to a post of Statistical Clerk at grade G-3, the Organization breached its obligation not to impair the dignity of its staff or to cause them unnecessary and undue injury. He asserts that he was subjected to moral harassment aimed at forcing him to resign or to accept a separation on unilateral terms.

Lastly, he accuses the defendant of having shown bad faith and of having employed dilatory tactics, since, in his view, it never intended to implement the impugned decision, and the Director-General merely pretended that he would be given a post at an appropriate level. That is probably why he was never selected for the grade P-3 posts for which he applied.

The complainant contends that he suffered very significant material and moral injury, insofar as the FAO's attitude

seriously affected both his career and his health.

He requests that the Tribunal set aside the impugned decision; order the defendant to pay him a P-3 salary as from October 2001 (including steps) and related pension entitlements, as well as interest on those amounts at the rate of 8 per cent per annum; order the Organization to assign him to a grade P-3 post suited to his qualifications and experience within one month of the notification of the Tribunal's ruling, subject to a penalty of 200 euros per day for default; and award him 85,000 euros in compensation for moral and physical injury and the harm done to his career, as well as costs incurred for the internal appeal proceedings and for the proceedings before the Tribunal.

C. In its reply the defendant accuses the complainant of having falsified the facts in his brief and of making ever-increasing claims. In that respect, the claims relating to the payment of a P-3 salary and assignment to a post at that grade are irreceivable because they were not submitted at the time of the internal appeal.

On the merits, the FAO contends that, from the point of view of both the law and the Tribunal's jurisprudence, no promise existed. Any such promise would in any case have been unreasonable and would have contravened the Staff Regulations and Rules. Contrary to the complainant's assertions, it believes that it made every effort to satisfy his successive demands and that it showed understanding for his case. His reassignment to a grade G-3 post was the logical consequence of an administrative decision taken in accordance with existing rules, since promotions in the Organization are subject to competition. It accuses the complainant of bad faith, saying that he has distorted the meaning of the documents he produces and that, while he was employed at the FAO, he worked for several Italian media. It adds that it intends to initiate an administrative inquiry in that respect. It contends that the injury claimed is "false", insofar as no financial loss may be deemed to arise from the "non-fulfilment of purely hypothetical aspirations" and that no mention was made earlier of moral injury and a poor state of health.

D. In his rejoinder the complainant charges the Organization with failing to reply to many of his arguments, which, in his view, reflects the quandary it is in. As an example, he refers to its decision to withdraw all his duties for a year, which, according to the FAO's own rules, constitutes a form of harassment. He also accuses the defendant of engaging in "tactics" to discredit him before the Tribunal and of bringing pressure to bear by threatening him with an administrative inquiry for having entertained contacts with the Italian media, whereas it had in fact taken ample advantage of his contacts in those circles. As far as the receivability of his claims is concerned, he submits that they amount to no more than he requested on internal appeal.

On the merits, the complainant contends that the Organization's denials of the existence of a promise contradict the facts and that the allegation of incompatibility with the Staff Regulations and Rules cannot constitute a legally acceptable excuse for renegeing on a promise. With regard to the respect for his dignity, he explains that, after performing P-3 duties for four and a half years to everyone's satisfaction, he expected to be treated with more consideration by the Organization. He accuses the latter of having tried to save on the termination of his appointment by offering separation indemnities that did not take account of those duties, and of responding to his refusal by depriving him of all duties for a year. He draws a link in that respect between the Appeals Committee's report condemning the way his case had been handled and the decision to transfer him back to a grade G-3 post. He blames the FAO for denying him any career prospects, as shown by the fact that he was not selected for any of the posts he applied for between October 2001 and November 2003.

In a letter of 10 March 2004, the complainant informed the Tribunal that he had tendered his resignation to the Director General the previous day and that he was therefore withdrawing his claim for the Tribunal to order the Organization, with a penalty for default, to assign him to a grade P-3 post.

E. In its surrejoinder the FAO maintains its objections to the receivability of some of the claims. It points out that it was the complainant himself who reported that he had a professional activity outside the Organization, which constitutes a flagrant violation of the standards of conduct required of international civil servants and justifies an administrative inquiry.

Referring back to the complainant's participation in the TeleFood programme, it explains that the programme "rested essentially on the voluntary work of officials acting not so much as employees of the Organization but rather as volunteers with a personal commitment to sustainable development work. [...] it was initially intended only as a part-time activity and none of the volunteers was reassigned to a different post for that purpose". The defendant reiterates that no promise was ever made and that therefore all arguments based on the promise are groundless. Lastly, it submits that, considering the favourable separation terms he was offered, the complainant

shows bad faith in pleading that his dignity was impaired.

CONSIDERATIONS

1. In a letter of 21 February 2003, the Director-General of the FAO informed the complainant that he accepted the Appeals Committee's recommendations and that the complainant would be offered separation from service under agreed terms. Failing an agreement on this offer, the Organization would try to find him an appropriate post, "in compliance with the internal selection procedure", taking into account his experience at the P-3 level. The complainant refused the offer made in accordance with that decision and filed his complaint on 19 May.
2. He initially claimed the following relief: that the Organization be ordered to pay him a P-3 salary as from October 2001, with interest at the rate of 8 per cent per annum; that it assign him to a grade P-3 post within one month of the notification of the Tribunal's ruling; that it pay him 85,000 euros in compensation for the harm done to his career and for moral and physical injury; and that it pay him costs for the internal appeal proceedings and for the proceedings before the Tribunal.
3. Since filing his complaint, the complainant has resigned from the FAO, with effect from 1 July 2004. He subsequently informed the Registrar of the Tribunal that he was withdrawing his claim for the Organization to assign him to a grade P 3 post corresponding to his qualifications and experience. The Tribunal records this partial withdrawal.
4. The defendant objects to the receivability of some of the complainant's other claims. It considers that the claims for retroactive payment of a P-3 salary, for assignment to a grade P 3 post and for compensation for certain heads of injury were not submitted during the internal appeal proceedings and must therefore be dismissed as irreceivable.
5. With regard to the complainant's claim to be assigned to a P 3 post, the withdrawal of that claim renders the objection the defendant appears to maintain in its surrejoinder redundant.
6. As far as the claim for retroactive payment of a P-3 salary is concerned, the Organization is wrong in asserting that it was not included among the claims submitted in the course of the internal appeal, since the complainant did ask the Director-General on 7 January 2002 to be appointed retroactively "to a post at an appropriate level, related to the P-3 duties [he had] been assigned from June 1997 to October 2001 or, failing that, to be allocated compensation equivalent to three and a half years' salary (with related allowances) at the grade P-3, step 1".
7. Lastly, the claims to compensation for moral injury and for breach of the complainant's rights were put forward in the internal appeal, though in a different form, and are certainly receivable, even though some heads of injury, concerning the complainant's state of health in particular, had not been enlarged upon, since the complainant had stated in his appeal of 7 January 2002 that the decision he contested caused him "undoubted material and moral injury".
8. The complainant submits that the decisions he is challenging are unlawful in three respects: he contends that the Organization reneged on its promise to assign him to a post at an appropriate level as from January 2001; that it failed to honour its obligation not to impair the dignity of its staff and not to cause them unnecessary or undue injury; and that it acted in bad faith.
9. The complainant submits that in June 2000 he was promised by his supervisor, the ADG/SAD, that he would be assigned to a post at an appropriate level within SAD as from January 2001. According to him, it was because of that promise that he had turned down a post offered by an Italian television channel, for which he had been selected by competition. It seems certain at all events that the ADG/SAD insisted that the complainant, whose work met with full approval, should resume his duties after his unpaid leave. It is also likely that the ADG/SAD hoped to obtain enough funding to create a new post in his department. In a memorandum of 4 December 2000, however, he wrote that, although he had tried to help the complainant by finding him an appropriate post, he had made no commitment and had to admit that his efforts had been unsuccessful. In memoranda of 5 February and 9 April 2002, he expressly confirmed that he had not made the complainant any promise. The complainant in support

of his arguments refers to the fact that the Director of the Commodities and Trade Division had requested his transfer, having indicated in a memorandum of 4 October 2000 that it was his understanding that SAD would be able to fund a post to enable the complainant to continue his cooperation with the TeleFood programme.

But there is nothing in that memorandum, or in the testimony of the Personnel Officer or that of the chief of the Unit for Liaison with National Committees which were produced before the Appeals Committee, to support the view that the complainant had been given the assurance that a post would be created and, moreover, that he would be promoted to a grade P-3 post, which in any case would have been impossible without complying with the rules governing staff promotions. The only testimony which supports the complainant's position is that of a former staff member of the General Affairs and Information Department, who has certified that, at a meeting to discuss the complainant's situation, ADG/SAD had "assured [them] that SAD would be able to fund [the complainant] in 2001, establishing a post at an appropriate level, and enabling him to continue his cooperation with TeleFood". It also emerges from that former staff member's testimony that the complainant "always had a clear and legitimate expectation to continue his collaboration with SAD and TeleFood Italia through a post that would have been created for him in SAD". In this respect, while there is no doubt that the complainant expected his situation to be regularised, he cannot prove that he was actually given a substantive promise, bearing in mind that the originator of the alleged commitment denied on several occasions having given him any assurance, which he was in any case not in a position to give, since he had no control over the funding he was hoping for nor over the conditions governing the assignment and promotion of a staff member to a new post which might have been created. The plea whereby the Organization did not keep a substantive promise, which, according to the Tribunal's case law (see Judgment 782), would have created a right for the staff member, must therefore fail.

10. On the other hand, the conditions in which the complainant's situation was regularised call for serious criticism, as noted by the Appeals Committee. No doubt the complainant had no right to be appointed to a P-3 post, or even to retain the duties he had performed under the TeleFood programme, even though it is ascertained that those duties were of a P-3 level and that he performed them satisfactorily. It was not unlawful, either, to keep him at grade G-3, which he had always kept. But the Tribunal can only endorse the findings of the Appeals Committee, whose recommendation was in fact accepted by the Director-General:

"The Committee noted a great number of deplorable aspects, which reflect bad handling of this case, and regretted in particular that the complainant remained inactive for a year after the ADG/GI's decision to withdraw all his duties. The upshot is that the complainant, who prior to working for the TeleFood programme held an indefinite appointment, now finds himself without a post and without work, after making a noteworthy contribution to the success of one of the Organization's projects. The Committee also noted the inadequacy of the efforts made by the Organization to find him a post, the expectations generated by the Organization and the belated audit of the complainant's duties."

11. The Tribunal reaches the same conclusions. It recalls its case law, whereby every employee has the right to a proper administrative position, which means that he or she should both hold a post and perform the duties pertaining thereto and should be given real work (see, for example, Judgment 630). In the circumstances, even though the complainant had no right as such to continue working for the TeleFood programme, or to be promoted to grade P-3, he was entitled to a proper administrative position and to be given duties that matched his grade and his abilities, which was taken care of only belatedly. While the complainant's accusation of bad faith against the Organization does not stand in the circumstances – it being noted that the defendant's counter-accusations of bad faith against the complainant and the debate as to the appropriateness of an administrative inquiry into the latter's behaviour are irrelevant to this dispute – the Tribunal considers that, in its handling of the problems related to the assignment of the complainant, the FAO failed to show due respect for the latter's dignity. Since no material injury is proved, the complainant is entitled to compensation for the moral injury caused by the Organization, which shall be ordered to pay him the sum of 5,000 euros under that head.

12. As he partially succeeds, the complainant is entitled to costs, which shall be set at 2,000 euros. However, there is no reason to award him compensation for the expenses he incurred during the internal appeal procedure, which are in any case not specified.

DECISION

For the above reasons,

1. The complainant's withdrawal of his claim to be assigned to a grade P-3 post within one month of the notification of this judgment is hereby recorded.
2. The FAO shall pay the complainant 5,000 euros in compensation for moral injury.
3. It shall also pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet