

THIRTY-THIRD ORDINARY SESSION

In re NEMETH

Judgment No. 247

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. John Nemeth on 10 December 1973, the Organisation's reply of 22 April 1974, the complainant's rejoinder of 3 June 1974, the Organization's surrejoinder of 26 July 1974, and the complainant's further communication of 16 August 1974;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.012, 301.0911, 301.132, 301.152 and 303.132, FAO Staff Rules 301.221, 302.211, 302.22, 302.23, 302.4102(iv) and 302.9012, and FAO Manual sections 280.313, 280.321, 280.411, 301.102, 301.303, 303.111, 303.112, 308.411, 308.414, 308.416, 311.231, 314.23, 314.322, 315.132, 315.322, 315.332, 330.022, 330.131, 330.152, 330.212 and 330.32;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

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

A. The complainant entered the service of the Organization on 14 January 1961 at grade P.3 as Chief of the Reference and Loans Section in the Library. He was granted a permanent appointment. On 1 May 1965 he was transferred to another branch and then on 1 February 1970 again transferred to the Library as Chief of the Processing Section. With effect from 1 January 1972 his post was upgraded and he was promoted to grade P.4. His post was abolished with effect from 1 January 1974, but he is still employed in the Library.

B. As a result of the complainant's promotion his within-grade salary increment should ordinarily have been paid on 1 September 1972. On 14 July 1972 Mr. Aubrac, the Director of the Library and Documentation Division, informed the Personnel Division that he could not recommend paying the complainant his within-grade increment because, despite several written warnings, he had adopted an offensive attitude towards Mr. Harada, his immediate supervisor, whom he did not even acknowledge as such. Having examined the case, the Personnel Division informed the complainant on 5 September 1972 that his increment would be withheld on the grounds of unsatisfactory service under FAO Manual section 315.322 and in accordance with Staff Regulation 301.132.

C. The complainant appealed to the Director-General against that decision and, his appeal having been dismissed, on 16 October 1972 appealed in turn to the FAO Appeals Committee. In its report of 2 August 1973 the Committee held that the complainant had been too severely punished and that withholding his within-grade increment for three months would have been adequate. It also recommended taking steps to keep the complainant in the FAO's service. By letter of 18 September 1973 the Director-General informed the complainant that he could not endorse the Appeals Committee's view that the within-grade increment should have been withheld for no more than three months. Since there had been no significant improvement in his services after his increment had been withheld for three months, continuing to withhold it had been justified. As regards the abolition of the complainant's post, the Director-General acknowledged that his appointment was a permanent one and expressed the hope that an alternative post could be found for him. The complainant is now impugning the decision in the Director-General's letter of 18 September 1973.

D. In the complainant's view both the withholding of his increment and the abolition of his post as part of an experimental reorganisation of the Library, which had the effect of leaving him only minor duties, are the result of complicated intrigue by Mr. Aubrac to get rid of him and ruin the end of his career. In the belief that the decisions taken against him infringed FAO Staff Regulations and Staff Rules, the complainant asks the Tribunal to order:

- (1) deletion of all adverse comments in his personal files;
- (2) replacement of a letter of 29 February 1973 from Mr. Aubrac notifying abolition of his post and advising him to

seek employment elsewhere by a letter bearing the same date but not containing such advice;

3) payment by the Organization of the amounts necessary to provide him with the pension which he had had reasonable expectation of obtaining on retirement at the end of October 1977;

(4) payment by the Organization of arrears of his "illegally" withheld increment plus 6 per cent interest;

(5) that the complainant be given an assurance that Mr. Aubrac will never again interfere with the complainant's work or in regard to his status, such assurance to take the form of a notice by the Director of Personnel to be put in his personal file; and

(6) payment of a token amount in damages.

Should the Organization terminate his appointment, to order:

(1) payment by the Organization of the equivalent of four years' salary at grade P.4, steps 9 to 12; and

(2) payment by the Organization of the statutory nine month's termination indemnity on the basis of salary at grade P.49 step 12, increased by 50 per cent in accordance with Staff Regulation 301.152, plus repatriation grant, travel expenses and compensation for annual leave and home leave which the complainant was prevented by Mr. Aubrac from taking.

E. In its reply the Organization points out that from mid-1970 onwards, and in particular when the complainant received two written warnings and had his increment withheld, the complainant and Mr. Harada were in the position of subordinate and supervisor. The complainant's stubborn refusal to acknowledge Mr. Harada as his immediate supervisor constituted "unsatisfactory service" and justified the Division Director's recommendation to withhold the increment. The change in the complainant's functions due to the experimental reorganisation of the Library did not constitute any infringement of the terms of his appointment. The decision to withhold his increment was not a disciplinary measure and was taken in accordance with the prescribed procedure. The abolition of his post has no bearing on the complaint and in any case was not an infringement of the terms of his appointment. His charges of animosity on the part of Mr. Aubrac are unfounded and their truth has not been established. For all these reasons the complainant's claims listed in paragraph D above cannot be met.

F. The Organization therefore asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. The complainant has a number of grievances against the Organization and the extensive reliefs which he claims are set out in paragraph D above. The Tribunal's competence under its Statute is limited to hearing complaints alleging non-observance, in substance or in form, of the terms of the Staff Regulations; the complaint must be made against a specific decision; and the relief which the Tribunal can grant is limited to ordering the rescinding of a decision or the performance of an obligation, or if this is not possible or advisable, the award of compensation.

2. The final decision impugned in this case is contained in a letter from the Director-General dated 18 September 1973. By this decision the complainant was denied a within-grade salary increment which would otherwise have been paid to him on and after 1 September 1972. Manual section 315.132 provides that these increments are awarded on the basis of satisfactory service. Manual section 315.332 provides that if the Division Director does not endorse the payment of the increment, he sends a statement to that effect to the Director of Personnel who ensures that withholding an increment is justified.

3. The decision to withhold an increment from an officer is thus a discretionary decision depending upon an evaluation made by the officer's superiors. The Tribunal will not interfere with such a decision unless it is based, among other things, on an error of law or a clearly mistaken conclusion on the facts. In the opinion of the Tribunal the decision in this case is based upon an error as to what constitutes unsatisfactory service within the meaning of the Staff Regulations and an erroneous appreciation of the facts which are said to constitute it. To understand the nature of this error it is necessary in the first place to understand the nature of the relationship between the complainant and Mr. Harada.

4. In 1961, when the complainant joined the Library, it was divided into two sections - a Reference and Loans

Section and a Preprocessing Section - the latter, the complainant says, being "traditionally graded lower". The complainant joined as the Chief of the Reference and Loans Section with the rank of P.3. Mr. Harada was then one of his subordinates. In charge of the Library was the Chief Librarian and the Library was within a division known as the Library and Documentation Division, of which the Director was Dr. Moulik.

5. In 1965 the complainant left the Library to work in another section of the Organization and was succeeded by Mr. Harada as Chief of the Reference and Loans Section. On 1 January 1970 the post of Chief Librarian was abolished and its powers and duties merged in those of the Division Director. About this time the post of Chief of the Processing Section became vacant; the complainant applied for it and was appointed on 1 February 1970, still with the rank of P.3. Mr. Harada now had the rank of P.4.

6. On 15 May 1970 Dr. Moulik issued an office memorandum to the Library staff in which he designated Mr. Harada as "Librarian-in-Charge" and said: "In this capacity he will be responsible to me for all routine and technical work of the Library, and will report to me on all administrative and policy matters". In this memorandum a Miss Schneider was appointed to "take complete charge of the Reference and Loans Section and to report to Mr. Harada". It was also stated that the official who during the complainant's absence on home leave was in charge of the Processing Section was to report to Mr. Harada. These arrangements apparently worked satisfactorily until the end of the year 1971.

7. In December 1971 Mr. Aubrac, who had succeeded Dr. Moulik as Director, circulated office memoranda dated 13 and 17 December, in which he proposed a comprehensive scheme of reorganisation of the whole division into four subdivisions of which the Library was to be one. The Library itself was to be divided into four units. The scheme provided that "Mr. K. Harada will keep his responsibility as Librarian". The complainant, as chief of one unit, was put on a level with the other three chiefs and all four were to "report to Mr. K. Harada directly". The scheme would also involve the abolition of the post of Chief of the Processing Section and the complainant's transfer, as he put it, "to a new post of an experimental nature". At about this time it seems to have been made known that Mr. Harada would be promoted to P.5 and the complainant to P.4; the announcement of these promotions was made on 31 January, to take effect as on 1 January.

8. The complainant vigorously opposed the new scheme and put forward his objections in several memoranda in which he proposed alternative methods of reorganisation under which he would keep his position. But on 7 April 1972 the Director's scheme, described as one of "experimental redeployment", was put into effect. Under it the complainant's function was limited to "Technical Preprocessing of Monographic Material" and was put "under the direct supervision of Mr. K. Harada".

9. Meanwhile the complainant's conduct had been giving dissatisfaction to the Division Director. On 28 January 1972 the complainant, when sending to Mr. Harada a copy of one of his memoranda, attached to it a note in which he congratulated Mr. Harada on his promotion to P.5, commenting upon the rapidity with which it had been achieved, reminding Mr. Harada of his previous inferior position and suggesting that his promotion owed much to the complainant's help. The Director regarded the tone of this note as inappropriate and on 23 February addressed to the complainant a written reprimand (which under the Regulations is not a disciplinary measure but a formal warning) in which he said that it was "offensive to your superior officer".

10. On 29 March 1972 the Director again rebuked the complainant for "inappropriate and offensive comments on your supervisor". This arose out of an incident in which Mr. Harada appears to have dealt tactlessly with a letter on a matter that was of interest to the complainant. The complainant believed that the letter in question had been addressed personally to him and he made a written complaint to the Director. The Director found that the letter had not been addressed personally and had not been mishandled. The comment which he particularly objected to was contained in a paragraph of the written complaint to him in which the complainant observed that "knowingly withholding mail of others constitutes a punishable offence under the postal regulations of any country".

11. The process by which the increment was refused began with a recommendation to that effect made on 14 July 1972 by the Division Director, Mr. Aubrac, pursuant to Manual section 315.322. The decision was made on 5 September 1972 by the Director of Personnel; and then on appeal from him was followed on 27 September by a decision of an Assistant Director-General acting for the Director-General. The reason for each of these decisions is differently expressed, but what is common to them all is the statement, expressed or implied, that the complainant failed to acknowledge Mr. Harada as his superior. The complainant denies that at the material time Mr. Harada was in fact his superior. He distinguishes also between unsatisfactory service and unsatisfactory conduct and argues that

unsatisfactory conduct is not a ground for curtailing salary. The Organization contends that "a direct superior-subordinate relationship" was established by Dr Moulik's memorandum of 15 May 1970 and that unsatisfactory service covers insubordination. The Tribunal will consider, in the first instance and as a general matter, to what extent insubordination falls within the concept of unsatisfactory service. The Tribunal will then consider whether there was a direct superior-subordinate relationship between the complainant and Mr. Harada and, if there was, whether the complainant's conduct amounted to insubordination.

12. The Staff Regulations distinguish between unsatisfactory conduct and unsatisfactory service. The latter is covered by Manual section 315.322 and can lead only to the withholding of increment, and this, as the Organization rightly insists, is not a disciplinary measure. Unsatisfactory conduct on the other hand is naturally a subject for disciplinary action which is covered by Manual sections 301 and 330. Manual section 301.102 provides that the Director-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. Eleven specific kinds of unsatisfactory conduct are set out in Manual section 330.152, of which the eighth is "insubordination, such as impertinence to a superior officer or refusal to obey instructions". Manual sections 301.303 and 330.32 lay down the formal procedure that must be followed in disciplinary cases so as to ensure that the charge is stated in writing and an opportunity given for reply.

13. Unsatisfactory conduct may or may not affect the quality of the service given. It would be easy to pick out from the eleven specific examples of misconduct a number which could not affect the service at all. It would also be easy to imagine acts of insubordination or pieces of impertinence which would not affect the service given; on the other hand an officer who is constantly insubordinate cannot be giving good service. But insubordination is primarily a disciplinary matter. To bring it within the concept of unsatisfactory service, two conditions, one positive and the other negative, must in the opinion of the Tribunal be fulfilled. The positive condition is that it must be established that the insubordination did in the particular case affect the quality of the officer's service. The negative condition is that the insubordination must not in the particular case give rise to a dispute. In the present case neither of these conditions is fulfilled.

14. As to the first, the alleged insubordination was declaratory only. No act of disobedience is alleged. No respect in which the complainant's service was impaired is alleged. There are general allegations (not levelled at the time against the complainant but to be found in the Organization's case) of failure to co-operate and impeding the smooth working of the Library Service. But the non-cooperation and the impeding are left as assumptions from the fact that the complainant denied Mr. Harada's superiority; this denial is the only fact specifically alleged, and it does not follow from it that the quality of his service was thereby impaired.

15. The negative condition is necessary to preserve the true relationship in the Staff Regulations between disciplinary and non-disciplinary measures. When an act of disobedience is alleged and disputed, it is wrong to deprive the accused of the protection afforded by the disciplinary regulations by charging it only as an item of unsatisfactory service. On the other hand, a supervisor is not to be prevented from concluding that service is generally unsatisfactory simply because some of the items he takes under consideration are to be classified as admitted pieces of insubordination. But in the present case there was a substantial matter in dispute. The complainant did not dispute the commission of an act because he was not charged with the commission of an act; of an act because he was not charged with the commission of an act; but being charged with an insubordinate attitude, he disputed that he owed a duty of subordination.

16. Accordingly, the offence, if any, of the complainant was an offence against discipline and the Director General erred in dealing with it as a matter of unsatisfactory Service. But he erred also in his implicit determination (the point was never dealt with expressly) that there was a duty of subordination. In the ordinary way such a duty, where it exists, arises clearly and obviously from the hierarchical relationship between the superior and the inferior. In the present case, it was not made clear in this manner. Until 7 April 1972 the complainant and Mr. Harada were equal in rank, each being the head of his own department in the Library under the Director of the Library and Documentation Division. The Tribunal will assume, without deciding the question, that it is within the competence of a Division Director to delegate his authority in certain matters to one of the officers in his division. But if that is to be done, clear words must be used which leave the other officers in no doubt that one who is hierarchically their equal is being invested with the right to command. Phrases such as "report to" may not by themselves be sufficient; they may be consistent with an intention by the Director to create only a convenient channel through which matters are to reach him for his decision and not to deny the right of access by others. Moreover, it does not in the least follow that because a Director confers upon one of his subordinates a limited authority in certain matters, that subordinate is thereby raised hierarchically and entitled to exact all the respect which is due to a superior.

17. The Tribunal concludes that judged by these tests, the memorandum of 15 May 1970 upon which the Organization relies was insufficient to create Mr. Harada as the superior of the complainant. The complainant regarded it as the delegation by the Director of "part of his authority for the supervision of daily routine work". He states in his complaint (paragraph 78) that he "continued to report directly to the Director in all such instances in which question of policy ... required a decision on the higher level". This statement has not been challenged by the Organization. It would indeed be surprising if a few months after the complainant had been appointed to a post which the vacancy announcement described as being "under the general supervision of the Division Director", his former subordinate had during his absence and with the informality of an office memorandum been appointed his superior in all respects and thereby designated as a man to whom communications of a character which as between equals would be described as blunt or at worst teasing, would thereafter be reprimanded as offensive.

18. Finally the Tribunal considers that if the Director-General had taken into account all the relevant factors, he would not have found the complainant guilty of insubordination. It has already been noted that, when the various decisions to deny the complainant his increment were taken, three different reasons were expressed, and it is therefore necessary to examine each.

19. The Division Director based his decision on the two instances of inappropriate and offensive comments. It is possible that the first instance, considered by itself, might be regarded as a piece of impertinence. But the matter must be looked at in the light of all the circumstances. Rank in the hierarchy is not the only consideration; what would be impertinence from a young man to a much older one or from a junior officer to the Director-General in person, is not necessarily impertinence when addressed to a near equal. Likewise, allowance must be made for things said or written under stress. The complainant was at the time being threatened with the abolition of his post. The Appeals Committee, whose opinion on such a point is well worthy of attention, considers that there was provocation and that "inadequate attention was given to the problem by the responsible personnel management services". As to the second instance, the Tribunal can find no evidence at all of offensive or impertinent behaviour. It is not alleged that in accusing Mr. Harada of tampering with his personal mail the complainant was making a charge which he knew to be false. If it had been so alleged the matter would have fallen within the disciplinary measures; see Manual section 330.152(iii). If it is not so alleged, then it must be open to one official, when making a complaint about another, whether his superior or not, to state what he honestly believes without fear of its being treated as insubordination.

20. The reason given by the Director of Personnel is that the complainant deliberately ignored the fact that Mr. Harada was his supervisor. It is certainly the fact that the complainant denied that at the material time Mr. Harada was his superior. The material time for this purpose is to be taken as running from 15 May 1970 to 7 April 1972. On the latter date, when the new scheme was first brought into effect, Mr. Harada was expressly named as the complainant's supervisor, but the Tribunal can find no clear evidence, and indeed no specific allegation, that the complainant challenged the position as it was after that date. Before that date it would not be enough to affirm that, contrary to the view expressed in paragraph 16 above, the memorandum of 15 May 1970 on its true construction did create Mr. Harada as the complainant's superior. The memorandum is certainly not unambiguous; and for 18 months the complainant acted without rebuke on a different interpretation of it. When thereafter he submitted, albeit incorrectly, in a reasoned argument that Mr. Harada was not his superior, he cannot sensibly be accused of insubordination.

21. The reason given by the Assistant Director-General was that the complainant "had refused to recognise the incumbent of the post of Chief Librarian P.5 as your supervisor". It is contended by the Organization that when Mr. Harada was promoted to P.5 with effect from 1 January 1972 his post was re-allocated with the title of Chief Librarian; it is further contended that by an oversight his title was not changed until April 1972 when it was done with retroactive effect. These operations could hardly have been conducted without the issue of some documents and none have been produced; it was said in a letter to the complainant, dated 50 August 1972, that "the action did not call for any official announcement for general distribution". The Tribunal is at a loss to understand how the complainant can be expected to recognise Mr. Harada as the incumbent of an office to which his promotion was not announced.

For these reasons, namely,

1. That the Director-General erred in law in treating the complainant's attitude towards Mr. Harada as unsatisfactory service;

2. That he erred in law in concluding that at the material time Mr. Harada was the complainant's superior or supervisor;

3. That in concluding that the complainant was guilty of insubordination he drew a clearly mistaken conclusion from the facts:

DECISION:

The decision of the Director-General of 18 September 1973 is quashed and it is ordered that the complainant be paid the increment due to him on and from 1 September 1972 with interest thereon at six per cent per annum.

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

Delivered in public sitting in Geneva on 21 October 1974.

M. Letourneur
André Grisel
Devlin

Roland Morellet