

THIRTY-FOURTH ORDINARY SESSION

In re GRAFSTROM

Judgment No. 257

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO), drawn up by Mrs. Inga Grafstrom on 23 August 1974, the Organization's reply of 25 October 1974, the complainant's rejoinder of 18 December 1974 and the Organization's surrejoinder of 31 January 1975;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.11, FAO Staff Rule 302.3103 and FAO Manual provisions 302.310*3103, 302.442 308.442, 311.23 and 333.312;

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. Mrs. Grafstrom joined the service of the FAO on 31 May 1950 at grade G.3. In March 1951 she was promoted to grade G.4. On 17 December 1952 she was given a permanent appointment. In May 1956 she was promoted to grade G.5 and in September 1958 to grade G.6. In July 1966 she was promoted to grade G.7, in which she reached step IX. On 1 November 1969 she was promoted to the Professional category at grade P.1, step IX.

B. The complainant then found that her promotion to the Professional category, i.e. her promotion from grade G.7 to grade P.1 had had the effect of reducing her pensionable remuneration because of the overlap between the salary scales for the General Service and Professional categories. She pointed out the anomaly to the Administration and under Staff Rule 302.3103 was regraded, with retroactive effect from 1 November 1969, at grade P.2, step III, so as to give her pensionable remuneration which at the date of her promotion was higher than that which she had enjoyed at grade G.7, step IX.

C. Meanwhile General Service salaries had been increased, and the complainant realised that when she retired - which she had originally intended to do in 1973, but in fact did on reaching the retirement age, on 30 June 1974 - her pension would be much smaller than it would have been had she remained in the General Service category. Believing such a situation to be contrary to the letter and spirit of the relevant staff rules, she wrote to the Administration and the Director-General. Having failed to obtain satisfaction, she appealed to the Appeals Committee.

D. The Appeals Committee, with one dissenting voice, held that the rules had not been infringed; but that there was nevertheless an anomaly in that after twenty-three years' satisfactory service and after being promoted four years earlier on the grounds of such service the complainant had suffered thereby in that her pension was about 100 dollars a month less than it would have been if she had not been promoted but had remained in the General Service category. The Appeals Committee held that it would be unfair to her not to correct the anomaly. In its view that required either her retroactive downgrading to grade G.7, or her promotion to grade P.3, step XIII, with retroactive effect from 1 May 1973, or again her promotion to grade P.4, step XII, with retroactive effect from 1 November 1973. The Committee recommended the Director-General to adopt one of the three remedies and expressed a preference for the third. By letter of 13 June 1974 the Director-General informed the complainant that he could not endorse the Committee's recommendations. The complainant is now impugning the decision of 13 June 1974.

E. In her claims for relief the complainant asks the Tribunal to order the FAO to take retroactive measures to ensure that her average pensionable remuneration at the date of her retirement at the age of sixty-two is in line with her total length of service (i.e. twenty-three years and nine months, including nineteen years and one month in the General Service category and four years and eight months in the Professional category), so that she receives a pension based on the final average remuneration at grade G.7, step XI, had she stayed in that category or as if contributions had been based on General Service pensionable remuneration in line with Manual provision 302.442, or that other arrangements are made to ensure that after serving four years and eight months in the Professional category her pension is proportional to her total length of service, account being taken of the fact that she served

nineteen years in the General Service. She complains that the FAO did not make the proper arrangements while she was still in its service, and asks the Tribunal to ensure that she receives a pension commensurate with the length of her service and determined on the basis of the average pensionable remuneration, including non-residence allowance, equivalent to that received by someone who retires at grade G.7, step XI, with three years' service at that level.

F. In its reply the Organization points out that FAO Manual provision 311.23, which lays down criteria for calculating salary on promotion from the General Service to the Professional category, was fully observed: the complainant's net revised salary on her entry into the Professional category - determined on the basis of the salary scale in force at the time of her promotion - was at least one increment higher than the net salary she would have received had she not been promoted. Full effect was given to Staff Rule 302.3103 and Manual provision 308.442, which provide for special arrangements to maintain at its previous level the pensionable remuneration of a staff member promoted from the General Service to the Professional category. No rule prescribes that adjustments shall be made in the salary scale of the Professional category to take account of subsequent changes in the rates of remuneration of the General Service category. The terms of the complainant's contract of appointment were not infringed and her claims for relief are unfounded. The Organization therefore prays that the Tribunal dismiss the complaint.

CONSIDERATIONS:

1. This case is concerned with the problems which arise when a promotion is made from the General Service category to the Professional category. The two categories have separate salary scales and are subject to different systems of calculation for variations and adjustments to meet cost of living increases and so forth. The problems stem from the fact that there is no inter-relationship between the two systems with the consequence that, unless special provision is made, promotion could leave the staff member promoted financially worse off. These problems are not made any easier of solution by the fact that there are in the staff rules three separate special provisions, all of which are obviously intended to deal with the situation and which are not related to each other.

2. The first is Manual provision 311.231 which deals with "salary upon promotion". 311.231 provides in effect that when a staff member is promoted to a higher grade he has to be treated at least as well financially as if, instead of being promoted to a new grade, he had been moved up a step in his old grade. This result is achieved by the selection for his promotion of that step in the new grade which carries with it the rate of salary required. 311.231 applies to all promotions, including those from the General Service category to the Professional category; this is clear from 311.232.

3. "Pensionable Remuneration" is the same, at any rate in the complainant's case, as gross salary. Nevertheless, the Staff Rules contain another set of provisions for dealing with the situation in which promotion from the General Service to the Professional category results in a decline in pensionable remuneration. They are as follows:

"302.3103 When, on his promotion from the General Service to the Professional category, a staff member's pensionable remuneration would otherwise be reduced, special arrangements may be made for maintaining the said remuneration at its previous level."

"302.442 When, on his promotion from the General Service to the Professional category, a staff member's pensionable remuneration would otherwise be reduced, the said remuneration may, at his option, be maintained at its previous level, with the staff member and the Organization making their contributions accordingly, until this level is overtaken by the rising pensionable remuneration under his new status. At the time of promotion, the staff member is informed in writing of his right to exercise this option."

4. The question in this case is whether the rules above cited apply only to the present, that is, the situation arising at the date of promotion, or whether they are applicable to the future, that is, to a change in the situation arising after promotion. After the complainant's promotion the changes which occurred in salary scales and adjustments in the General Service category were more beneficial to the staff than those which occurred in the Professional category. When the complainant retired on 30 June 1974 she was at P.2, step VIII, and her final average pensionable remuneration was \$15,157. Had she remained in G.7 her final average pensionable remuneration would have been \$17,244. The consequence is that her annual pension is now \$1,157 less than it would have been if she had not accepted promotion. If the rules are given a strict and literal interpretation the complainant must accept this consequence as an unexpected misfortune.

5. The Tribunal does not propose to analyse all three rules. If any one of them is on its proper construction applicable to the future as well as to the present, that is sufficient to decide the matter. The rule most favourable to the complainant in this respect is 302.3103. There are in the opinion of the Tribunal three good grounds for giving it a wide interpretation.

The first is that a wide interpretation is necessary in order to give effect to what is clearly the object which rules of this type are intended to achieve. This object is that a staff member does not suffer from promotion.

The second is that the rule is dealing with a fluid state of affairs. The comparative increase in the salaries and related benefits in the General Service category is a fairly recent development. This type of rule was framed to take account of this development, but obviously failed to foresee that the development might proceed so far as to affect the future as well as the present. It is difficult to believe that, if this larger development had been foreseen, the rule would not have been framed widely enough to treat the future in the same manner as the present.

Thirdly, it is to be noted that if both 302.3103 and 302.442 are literally construed, they would both be dealing with the same situation, i.e. the present, in different and conflicting ways. This conflict is avoided if one is interpreted as dealing with the present and the other as dealing with the future. On this approach the one that should be interpreted as dealing with the future as well as the present is clearly 302.3103; for whereas 302.442 offers a precise solution applicable to the present where the facts are known, 302.3103, dealing with the future where the facts cannot be precisely foreseen, leaves the solution to special arrangements to be made for maintaining the pensionable remuneration at its previous level. If the word "on" is construed as meaning "on or after" and the phrase "at its previous level" is construed as meaning "at the level at which it would otherwise have been", the word "maintaining" can be given its full effect as relating to the future as well as to the present. Having regard to the manifest object of the rule, the Tribunal does not consider that this reading of it puts a strain upon the language which it cannot bear.

DECISION:

For the above reasons,

The appeal is allowed and

1. The decision of the Director-General of 13 June 1974 is quashed.
2. The case is remitted to the Director-General to enable him, if he thinks fit, to make such special arrangements as may now be appropriate to ensure that the complainant's pension is not less than it would have been if at the time of her retirement her pensionable remuneration had been the figure attached to G.7, step IX.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right 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 5 May 1975.

M. Letourneur
André Grisel
Devlin

Roland Morellet