

## FORTY-SIXTH ORDINARY SESSION

### *In re* FOLEY

#### Judgment No. 452

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Food and Agriculture Organization of the United Nations (FAO) by Miss Margaret Anne Foley on 30 May 1980, the FAO's reply of 4 August, the complainant's rejoinder of 19 September, the FAO's surrejoinder of 30 October, the complainant's statement of 12 December on the surrejoinder and the FAO's comments of 20 January 1981 on that statement;

Considering the applications to intervene filed by

Mrs. Rita H. Byrne and

Mrs. Maria Dolores López-Azcona;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Staff Rules 302.403 and 302.711;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. On 5 August 1968 the complainant, who is a British subject, was appointed to the staff of the FAO at grade G.3, step I, and under the rules then in force granted non-local status. On 2 July 1976 she resigned, having reached grade G.3, step V. On 7 March 1977 she applied for re-employment and from 6 June 1977 held a short-term appointment at grade G.3. On 1 October she was promoted to G.4 and granted a fixed-term appointment. On 1 February 1978 she was promoted to G.5 and she has now reached step III in that grade. On 29 June 1977 she had asked for reinstatement in non-local status at her former grade and step. Her application being refused, she appealed to the Director-General on 16 November 1971 and, having received no reply, appealed to the Appeals Committee on 19 December 1977. The Committee held that there had been no breach of the rules. The majority recommended dismissing the appeal, while two dissenting members believed that, because difficulties had been caused by the FAO Council's decision not to appoint non-local staff in the General Service category, and international recruitment had had to be resumed, reinstatement of the complainant would be in order. On 14 December 1979 the Director-General dismissed the appeal, and that is the decision impugned.

B. The complainant observes that the grounds given for refusing her reinstatement in non-local status are not that the Director-General exercised his discretion under Staff Rule 302.4031 ("... [re-employment] may, at the option of the Organization, be considered as reinstatement"), but that because of the FAO Council's decision of November 1974 to end non-local recruitment there was no reason to consider whether such discretion should be exercised. The complainant maintains that had she been duly informed of that policy when she resigned she would have applied for one year's leave without pay so as to keep her post and status. Her services have always been considered most satisfactory, and she believes that she has been discriminated against. First, staff members in the Professional category are allowed a choice. Secondly, a Miss Martí was reinstated in non-local status on 29 November 1978 with retroactive effect from 4 November 1974, after being appointed with local status and having had her application for reinstatement in non-local status originally refused. There has been a breach of the principle of equality in that over a year ago the FAO resumed international recruitment of General Service category staff and some 25 staff members so recruited have been paid sums due to non-local staff. She has suffered loss on that account, particularly in her pension rights, and the decision was "based on prejudice and extraneous factors arising from" the FAO's recruitment policy.

C. In her claims for relief she asks the Tribunal to order the FAO to reinstate her in non-local status and entitlements, as it reinstated Miss Pilar Martí, and at the grade and step at which she had arrived when she resigned from the FAO on 2 July 1976, since, when she rejoined the FAO on 6 June 1977, she paid contributions at grade G.5, step V, into the United Nations Joint Staff Pension Fund for the period during which she was not on the staff -

whereas she was taken on as a new staff member at grade G.3, step I, with local status - or at least to order the FAO to pay her travel and transport expenses and installation allowance (expenses in travelling from England to Rome when she returned to the FAO) and "repatriation travel and grant as given to other recruits who have joined FAO since 1 February 1975".

D. In its reply the FAO observes that Staff Rule 302.4031 allows the Director-General discretion in the matter of reinstatement, reinstatement being indeed the exception. The Director-General exercised his discretion: after careful and objective consideration of the case he decided against reinstating the complainant because the FAO Council had decided in November 1974 that there should be no further non-local recruitment. There was neither discrimination nor prejudice. The reinstatement of re-employed Professional category staff is not automatic and is allowed only if the Administration thinks it is not appropriate. Miss Martí was not reinstated. She served on the staff from 6 October 1969 to 3 November 1972 with non-local status and was then intermittently employed in 1973 and 1974 as a local staff member. In June 1974 she was reappointed as a non-local and again locally recruited at headquarters from 4 November 1974. On 1 May 1975 she was granted a fixed-term appointment. The FAO took the view that her last appointment had been negotiated before 29 October 1974, i.e. before the discontinuance of non-local recruitment, and that is why she was reappointed with non-local status - non reinstated - with retroactive effect from 4 November 1974. Lastly, the subsidiary claims for reimbursement of transport and other expenses are irreceivable since they were not submitted to the Appeals Committee or to the Director-General. As for the contention that for more than a year the FAO has been recruiting General Service staff members from overseas and granting them certain benefits, the benefits referred to the complainant are not particular to staff members recognised as non-local: they have been granted to General Service category staff recruited abroad in accordance with Staff Rules 302.7111(i)(b) and (vi). The FAO therefore invites the Tribunal to dismiss the complainant as unfounded and dismiss the subsidiary claims as both irreceivable and unfounded.

E. In her rejoinder the complainant points out that the FAO Council's decision of November 1974 was to end non-local recruitment. But she herself was not "recruited" since she had already served the FAO for eight years. The FAO contends that every application for reinstatement is considered on its merits, taking into consideration the applicant's preferences, and that no specific criteria or conditions apply. Yet it took no account of the complainant's preferences, and it did apply a specific criterion, namely the discontinuance of non-local recruitment. In applying such a criterion to a single staff category it followed a discriminatory policy. As for Miss Martí, she was in fact reinstated. She was reappointed at a time when she was living in Rome, whereas the complainant herself had come from London. Miss Martí is the only person to have been reinstated although she was reappointed, on 1 May 1975, several months after the decision of November 1974, whereas other staff members in the same position, who rejoined the FAO staff before 1 February 1975, were not reinstated. It was wrong to make the complainant pay pension contributions for grade G.5, step V, non-local, since she was reappointed at grade G.3, step I. The contributions would be due only if the Tribunal ordered her reinstatement. Her subsidiary claims are receivable because they formed part of her claim for reinstatement. As regards the General Service category staff who have recently been internationally recruited, she did not say that they were given non-local status but merely that they were granted non-local entitlements which she herself, despite her many years of service, was refused. She therefore presses all her claims for relief.

F. In its surrejoinder the FAO argues that, not being entitled to reinstatement, the complainant has suffered no prejudice. The absence of any specific criterion does not mean that the Director-General will not be objectively guided by other provisions of the Staff Rules or policy decisions of the FAO's governing bodies. Miss Martí was not reinstated, but merely reappointed. That is clear from the fact that the period between her former and new appointments was not bridged with leave without pay as provided for in Staff Rule 302.4032. There was no error in calculating the complainant's contributions to the Pension Fund. After any break in service a staff member may, if he wishes, pay the contributions which he would have paid had there been no such break and the amount of the contributions is then based on the prior grade. Lastly, the subsidiary claims for payment of transport expenses, installation allowance and so on are irreceivable: when a staff member is reinstated his period of service is treated as continuous and he is not entitled to such payments. The subsidiary claims cannot, as the complainant contends, form part of the claim for reinstatement.

#### CONSIDERATIONS:

##### Receivability

1. The complaint is against the decision of the Director-General given on 14 December 1979, refusing to reinstate

the complainant under the terms of Staff Rule 302.403. In her appeal to the Tribunal on 30 May 1980 against this decision the complainant added the request that if she was not so reinstated she should be paid certain travel and transport expenses. The complainant contends that it was implicit in her claim for reinstatement, but this is clearly not so. Consequently the claim was first made expressly direct to the Tribunal and is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute inasmuch as the complainant has not exhausted the internal resources available to her.

Merits

2. Staff Rule 302.4031 provides:

"A former staff member who is re-employed shall be given a new appointment. If re-employment takes place within 12 months of separation from service ... this may, at the option of the Organization, be considered as reinstatement."

From 5 August 1968 until 2 July 1976 the complainant was employed in the General Service category with non-local status. On 6 June 1977 she was re-employed in the General Service category but without being given non-local status. On 29 June she requested reinstatement under the above rule; this would have had the effect of continuing her former non-local status. But in the meanwhile, i.e. in November 1974, the Council of the Organization had decided that "it shall be the policy of the Organization to consider all General Service staff, whatever their nationality or place of recruitment, recruited after 31 January 1975, as local staff". On 21 July 1977 the complainant's request was refused and she was told that, having regard to the Council's decision as above, "reinstatement of General Service staff members on a non-local basis would not be authorised".

3. The complainant contends in the first place that this is not an exercise of the option give under the terms of Staff Rule 302.403; she means presumably that in exercising the option the Organization should consider only the particular circumstances of the applicant and not be motivated by general considerations. The Tribunal does not agree. The decision must not be made arbitrarily, but otherwise the Organization is free to have regard to all relevant considerations, general or particular.

4. The complainant contends secondly that the decision of the Council not to recruit non-local staff does not apply to reinstatement: reinstatement is not recruitment. The Tribunal will assume that this interpretation of the Council's declaration of policy, which as a matter of interpretation can certainly be strongly argued, is correct. But the fact that the Director-General could consistently with the Council's declaration have continued to reinstate non-local staff does not mean that he is required to do so. It is a matter for his discretion. Evidently he considers that to give effect to the Council's declaration in the spirit as well as in the letter, he ought not to reinstate where he cannot recruit. This is a matter within his discretion and the Tribunal cannot interfere.

5. The complainant contends thirdly that the Director-General has in the application of the policy as stated above discriminated in favour of a Miss Martí who was reappointed on 4 November 1974 and on 29 November granted non-local status with retroactive effect from 4 November. The chief reason for this was that in November 1974 she had been given reason to think that there were good prospects for a conversion to non-local status: by contrast, when the complainant was reappointed in March 1977, she was told that her re-employment would be on a local basis "as reinstatements are only authorised in exceptional circumstances". As the Tribunal has already stated, in the exercise of the option the Organization is free to have regard to all relevant considerations, general or particular. It is not required to follow a general policy if particular circumstances justify a distinction; it may discriminate so long as the discrimination is not arbitrary. In the opinion of the Tribunal there were sufficient grounds for discrimination in the case of Miss Martí.

The applications to intervene

6. Since the complaint must be dismissed, the applications to intervene also fail.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

André Grisel  
Devlin  
H. Armbruster

A.B. Gardner

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