

SIXTY-THIRD SESSION

In re HENSON

Judgment 857

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Valerie Janet Henson against the Food and Agriculture Organization of the United Nations (FAO) on 14 November 1986 and corrected on 22 December, the FAO's reply of 7 April 1987, the complain-

ant's rejoinder of 1 August and the FAO's surrejoinder of 17 September 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Rules 302.102, .621, .9031, .9033, .907 and .913 and FAO Manual provisions 108.562 and 323.412;

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

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

A. The complainant, a citizen of the United States who has training in computer work, joined the FAO in Rome in 1978 and served under fixed-term appointments. In 1981 she was promoted to a grade P.3 post in Internal Audit (AUD) and had her appointment extended to 31 August 1984. In August 1984 the Chief of AUD, Mr. Mehboob, told her it would be extended by one year, to 31 August 1985. As from 1 November 1984 she was put on another post in AUD. A memorandum which Mr. Mehboob sent her on 9 July 1985 said that in August 1984 he had informed her he was recommending extension for only one year because AUD needed, not computer staff, but people who were "by training and experience auditors". She wrote to Mr. Mehboob on 2 August demanding reinstatement in her old post in AUD.

On 5 August 1985 she had a heart attack and went into hospital. On 1 September she had her appointment extended for the duration of her sick leave. On 27 November she wrote to the Director-General arguing that AUD did need computer staff and claiming extension. In replies of 10 December 1985 and 24 January 1986 the Assistant Director-General for Administration and Finance repeated that what AUD wanted were financial auditors. There was further correspondence. On 4 February the FAO's chief medical officer, Dr. Gatenby, wrote to a personnel officer to say he had spoken the day before to the complainant's own doctor, Dr. Silvestri, and they had agreed that her sick leave, and appointment, might end on 8 February. The personnel officer wrote to tell her so on 12 February. She appealed on 14 March seeking reinstatement and objecting to the termination of her sick leave on 8 February, and her case went to the Appeals Committee. In its report of 14 July 1986 the Committee recommended rejecting her appeal against non-renewal. It held that it might not advise on the matter of sick leave but that the FAO should say what sort of medical information it wanted and, on getting it, decide promptly. By a letter of 14 August 1986, which she got on 25 August and now impugns, the Deputy Director-General said the Director-General had rejected her appeal against non-renewal; as to her sick leave, the medical service had written to her and to her two doctors on 6 August asking for further information and a decision would be taken once he got it. Neither she nor the doctors supplied any further information, and by a letter of 6 November 1986 the Deputy Director-General confirmed the end of her sick leave on 8 February 1986.

B. The complainant argues that, though renewal is at discretion, refusal of it in her case was wrong.

(1) She was not given reasonable notice. Though in August 1984 Mr. Mehboob did speak of a one-year extension he did not make it clear it would be the last. Nor did she have any reason to think so since her post was not a temporary one. She submits a transcript of her own notes on a meeting of 1 August with him. Mr. Mehboob should in any case have warned her in writing. Staff Rule 302.903 requires not less than three months' written notice of termination of a continuing appointment, and that is a reasonable period that should apply to holders of fixed-term appointments as well. The first written notice she got was Mr. Mehboob's memorandum of 9 July 1985, only fifty days before expiry of her then contract.

(2) It was wrong to end her appointment while she was on sick leave. Rule 302.6214 entitles staff with at least three years' service to 18 months' sick leave in any four consecutive years, and Manual provision 323.412 reads: "If an internationally recruited staff member falls sick during his period of notice and is otherwise entitled to sick leave under Staff Rule 302.102, the effective date of separation may be extended until he recovers or until his entitlement to sick leave is exhausted (whichever occurs first) ...". On 4 February 1986 Dr. Silvestri certified she needed rest until the end of February and the medical service got the certificate the same day. Yet the chief medical officer wrote, also on 4 February, authorising termination on 8 February on the grounds that Dr. Silvestri had told him on the telephone the day before that she was fit for office work, and wrongly disregarding the certificate. He should have made a proper inquiry before setting it aside. Besides, he has no right to give medical advice in Italy. Moreover, although according to Rule 302.913 she ought to have had a medical check-up "on separation", she did not until 25 July 1986.

(3) No good reason was given for the non-renewal. AUD needed computer staff while she was there and afterwards, as is borne out by the Director-General's programmes of work and budget for 1982 to 1987. For example, in the programmes for 1986-87 he said that "computer-assisted audit methods" would make for efficiency.

(4) The decision is tainted with prejudice. She aroused resentment, particularly in the Assistant Director-General for Administration and Finance, by writing a report in April 1984 on the audit of a system for word-processing in which she revealed "uncomfortable truths for top management". That was when her troubles began, with her transfer from a safe post to one with only temporary funding, even though the external auditor later confirmed her report.

She asks the Tribunal to quash the decision of 14 August 1986, order her retroactive reinstatement or, failing that, grant her damages for material and moral injury, and award her costs.

C. In its reply the FAO points to what it sees as misrepresentation of fact in the complainant's account. It also seeks to refute her arguments.

(1) She was given timely notice of the decision not to renew her appointment. She was told quite plainly in a lengthy talk with Mr. Mehboob on 1 August 1984 at which others were present that he would offer her only one year's extension because AUD preferred financial auditors. He wrote to her on 9 July 1985 summing up that talk and she challenged his account neither orally, nor in her memorandum to him of 2 August 1985, nor even in her memorandum of 27 November 1985 to the Director-General. Her verbatim account of the talk is unreliable since she made no notes at the time.

She is wrong to liken non-renewal to termination for the purpose of notice. Though the Tribunal has said there must be reasonable notice of non-renewal, actual notice will do, be it oral or written. The complainant was well warned, for the first time over a year before expiry, that her appointment would not be renewed. Rule 302.9033 expressly provides for only thirty days' written notice of the termination of a fixed-term appointment and she herself admits she got fifty. Besides, her appointment was not terminated but expired.

(2) According to a minute by Dr. Gatenby in the complainant's medical file Dr. Silvestri had agreed on 3 February 1986 that she was fit for office work. Since on 4 February Dr. Silvestri certified she was still unwell and since her health had not grown worse since the day before, it is up to her to explain the sudden change in her own doctor's opinion. Dr. Gatenby was acting as an international civil servant, and under Manual provision 108.562 it is the medical service he heads that "reviews requests for sick leave". The complainant has failed to show any irregularity in applying the rules on sick leave. (3) There were sound reasons for the non-renewal. As early as March 1984 her immediate supervisor told the Chief of AUD that her work was not up to standard. Other staff had to correct her work. Her qualifications for auditing were limited. What was worse, she showed no interest in it and was unwilling to try to learn how to do it. She failed to turn up for briefing courses. There can be no inconsistency between what AUD told her and what the Director-General's programmes say since AUD itself drafts the passages on auditing. In its ordinary audit work it uses computers where appropriate: that does not mean it needs computer staff instead of professional auditors.

(4) Her charges of prejudice are unfounded. AUD's reports are often critical of management, but the author is not punished on that account. In any case the external auditor did not confirm the criticisms in her report. There is a straightforward and rational explanation of the non-renewal. The reasons for the complainant's transfer to another post were budgetary.

D. In her rejoinder the complainant goes over the issues of fact in detail, pointing out where she believes the FAO's version to be wrong or misleading. In seeking to refute the FAO's pleas she develops her own main submissions. She was punished for having written a report that criticised senior management. The non-renewal was arbitrary and improper. She should still have been on sick leave when her appointment ended and in accordance with Rule 302.6217 she supplied sufficient evidence to show that she should. The FAO has improperly changed the reason for non-renewal from the staffing needs of AUD to her own alleged shortcomings. The grounds stated to her for the non-renewal were trumped up and unreasonable. It is wrong to accuse her of unwillingness to learn how to perform her duties: she did her best to improve and got no support from AUD for the purpose. She did her job well. She was never given due notice. She fell victim to a policy of constant harassment actuated by personal prejudice and vengefulness.

E. The FAO's surrejoinder dwells further on the issues of fact, of which it observes that its own version is largely at odds with the complainant's. It seeks to correct what it sees as misrepresentations in her account. It enlarges on its pleas on the issues of law, particularly on the giving of notice, the termination of the complainant's sick leave, the reasons for the decision not to renew and her charges of prejudice, and it again invites the Tribunal to dismiss the claims as devoid of merit.

CONSIDERATIONS:

The issues

1. The following are the issues in this case.

(a) Was the complainant given proper notice?

(b) Was it wrong to end her appointment on 8 February 1986 when - so she maintains - she was still entitled to sick leave?

(c) Was there good reason not to renew her appointment?

(d) Was the decision not to renew tainted with prejudice? Notice

2. The complainant held a fixed-term appointment and a post in Internal Audit, known as AUD. Under FAO Staff Rule 302.907 fixed-term appointments expire automatically and without prior notice on the date of expiry. Their renewal or extension is at the Director-General's discretion.

3. The complainant was given timely notice of the decision not to renew her appointment. On 1 August 1984 she was told plainly in a lengthy talk with Mr. Mehboob, the Chief of AUD, at which others were present, that he would offer her only one year's extension because AUD preferred to employ people who were auditors by training and experience. He wrote to her on 9 July 1985 summing up that talk and she challenged his account neither orally, nor in her memorandum to him of 2 August 1985, nor in her memorandum of 27 November 1985 to the Director-General. Her verbatim account of the talk is unreliable since she made no notes at the time.

4. Besides, her appointment was not terminated but, being for a fixed term, simply expired. She is wrong to liken non-renewal to termination for the purpose of notice. The Tribunal has said there must be reasonable notice of non-renewal, with due regard to the particular circumstances of each case. But she was well warned, for the first time orally over a year before expiry and in writing fifty days before, that her appointment would not be renewed.

Sick leave

5. The Tribunal is satisfied that the complainant's appointment was not ended while she was still on sick leave. 6. On 5 August 1985, a few weeks before the expiry of her appointment, she had a heart attack and went into hospital. In accordance with the Staff Regulations her appointment was extended on 1 September for the duration of her sick leave. On 3 February 1986 the FAO's chief medical officer, Dr. Gatenby, spoke to her own doctor, Dr. Silvestri, and they agreed that her sick leave and appointment might end on 8 February. Dr. Gatenby so stated in a minute which was put in her medical file and he also reported the conversation to a personnel officer.

7. Although on 3 February Dr. Silvestri had agreed that she was fit for office work, the very next day he certified

that she was not. But the burden is on her to account for the sudden change in her own doctor's opinion.

In its report of 14 July 1986 the Appeal Committee held that it might not advise on the matter but that the Organization should say what sort of medical information it wanted and, on getting it, decide promptly. On 6 August the medical service wrote to her and her doctors. Neither she nor her doctors supplied any further information.

In the circumstances the FAO cannot be held liable for acting on the assumption that on 3 February she was fit for work and accordingly ending her sick leave and her appointment five days later, on 8 February.

8. Besides, what matters in reviewing a request for sick leave is not the opinion of the official's own doctor but, under Manual provision 108.562, that of the medical service headed by Dr. Gatenby, an international civil servant. The complainant has failed to show any irregularity in the application by the Director-General of the rules on sick leave.

The reasons for non-renewal

9. The Tribunal is also satisfied that there were sound reasons for not renewing the complainant's appointment.

10. As early as March 1984 her immediate supervisor told the Chief of AUD that her work was not up to standard. Other staff had to correct her work. Her training was for computer work and her qualifications for auditing were limited. She showed no interest in it and was even unwilling to learn since she failed to attend briefing courses. And even though in its ordinary audit work AUD does use computers where appropriate, it prefers professional auditors to computer staff.

Allegations of prejudice

11. The complainant's charges of prejudice are unfounded. The Tribunal has no reason to suppose that where AUD's reports are critical of management the author is punished on that account. In any case the external auditor did not confirm the criticisms in her report. There is a straightforward and rational explanation of the non-renewal, which was neither arbitrary nor improper.

The reasons for the complainant's transfer to another post in November 1984 were not and could not be related to the expiry of her fixed-term contract. Her transfer came several months after her contract had been extended for one year and the Tribunal is satisfied that the reasons were budgetary.

DECISION:For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner