SIXTY-FIFTH SESSION

In re HILL (No. 2)

Judgment 938

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Paula Elizabeth Hill against the Food and Agriculture Organization of the United Nations (FAO) on 8 October 1987 and corrected on 22 December, the FAO's reply of 31 March 1988, the complainant's rejoinder of 19 July as corrected on 27 July and the FAO's surrejoinder of 9 September 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.09, FAO Staff Rules 302.621, .622 and .907 and FAO Manual provisions 303.1311, 315.235 and 331.32;

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 worked for the FAO in Rome as a typist from 1971 under special service agreements and then under short-term and fixed-term appointments. She was continuously employed from July 1976. She was a staff union representative from 1980. The step increment due to her on 1 December 1983 was withheld for a year. She was transferred in 1985 to the World Food Programme. She challenged the withholding of the increment due to her on 1 December 1985 in her first complaint, which the Tribunal allowed in Judgment 869.

By a minute of 15 May 1986 the director of her division informed her that because of her "unsatisfactory performance and negative attitude" her appointment, which was to end on 30 June, would not be renewed: her supervisor found her "a difficult and an unwilling worker" and did not want to keep her, and there was no suitable vacancy elsewhere. On 27 May she lodged an appeal with the Director-General under Manual provision 303.1311.

She submitted a medical certificate signed by her doctor in Rome, Dr. Tabegna, on 20 June saying that she had spastic colitis and prescribing sick leave. Dr. Tabegna wrote another certificate on 27 June stating that her condition was chronic and she needed hospital treatment. On 30 June the FAO's medical service, having failed to reach her, sent her a telegram at home summoning her for examination on 2 July. She answered that she could not go. On 4 July the FAO got another application from her for sick leave for an unstated period and a certificate signed on 20 June by another doctor saying that she was suffering from anxiety and depression. She was in hospital from 14 to 23 July and was found to be suffering from an "irritable colon syndrome".

A letter of 26 June had rejected her appeal on the Director-General's behalf on the grounds of her many shortcomings. On 1 August she lodged an appeal with the Appeals Committee under Manual provision 331.32 claiming the grant of a continuing appointment or financial compensation, sick leave and the payment of her 1983 increment as from the due date. In its report of 20 March 1987 the Committee unanimously recommended that her claims to sick leave and to the increment be rejected but that "the possibility of payment of a lump sum be explored on humanitarian grounds". The majority recommended rejecting her claim to a continuing appointment. In a letter of 6 July 1987, which the complainant got on 12 July, the Deputy Director-General told her that the Director-General had rejected her appeal and decided against any ex gratia payment.

B. The complainant gives an account of her career, pointing out that for many years she got good reports. Indeed the General Service Staff Selection Committee recommended in November 1980 giving her a continuing post. But her supervisors took umbrage at her staff union activities and put pressure on her to give them up by threatening not to renew her appointment. In a minute of 28 November 1983 to a senior official her supervisor carped at her union work and so the senior official recommended withholding her increment and had her transferred. Though she got good reports for assignments in 1984, personal hostility again thwarted her hopes of a continuing post and she was kept on temporary work until transferred to the Programme in 1985. She was refused non- local status. On her transfer she had to learn text- processing and though given no proper training did it well. Yet still she was refused the continuing appointment and the promotion she was entitled to.

The non-renewal took her unawares because no-one had ever voiced discontent with her work or conduct. If there were bad reports about her she ought to have been told. Besides, the decision was not taken by the official authorised under Staff Regulation 301.09 to terminate her, the Director of Personnel of the FAO.

The Programme did not have its own director of personnel until November 1986.

It was wrong to terminate her on 30 June 1986 because she was then on sick leave. The chief medical officer granted her leave only from 19 to 30 June 1986 though she had put in a medical certificate prescribing three weeks' leave. He refused longer leave on the callous grounds that her ailments were of a kind to be expected in someone who had lost a job. On 18 March 1987 she asked the FAO to convene a medical board, but the director of personnel of the Programme refused, though he was not competent to do so.

She claims reinstatement on the strength of the principles set forth in Judgment 675. She denies that there was no suitable vacancy. She alleges grave injury: she has lost her job, health insurance and pension rights; she has been ill and still is.

She claims a continuing post and payment of salary from 1 June (sic) 1986 or, failing that, material damages amounting to 85,000 United States dollars for loss of pay and pension rights; repatriation as prescribed by Italian law; the same termination indemnity as is due to a staff member with a permanent appointment; the award of her step increment for 1983 from the due date; her reinstatement in the sickness insurance scheme; and costs amounting to $3,500.

C. The Organization replies that the complainant's tendentious account of her career and selective quotations of reports hide her shortcomings. Had she put her talents to better use she would never have had any trouble. When she set her mind to it she worked well enough, but most of the time she was a shirker and awkward to get on with.

The Organization addresses first what it sees as the procedural and administrative issues. It contends (1) that the 1983 step increment was properly withheld under Manual provision 315.235 because she got on badly with others and had adverse effects on her section, her work was poor and she spent too much time on union business. The correct procedure was followed for withholding the increment. Besides, her objections were time-barred. (2) Assignment to a continuing post confers no right to a continuing appointment: the reason why she was not declared eligible for the grant of one was that her work was poor. (3) The medical adviser refused sick leave after 30 June 1986 because her condition was chronic and anxiety and depression were a normal reaction anyway to the loss of her job. (4) As she had been on the staff of the Programme, its director of personnel, who had been appointed in November 1986, did have authority to refuse her application for referral to a medical board. (5) According to Staff Rule 302.907 a fixed-term appointment expires "automatically and without prior notice on the expiration date", so that no decision was required. (6) A staff member who leaves before retirement may apply for the continuance of medical coverage for three months after his departure. Though so informed, the complainant did not apply even for that. (7) She has no right to compensation for loss of pension rights for a period in which she is not on the staff. (8) Since she had local status she has no right to repatriation under the FAO's own rules, and Italian law is immaterial.

Turning to the issues of substance, the FAO (9) rejects her charges of intimidation and hostility because of union activities. She was never denied her rights as a union representative; she abused them because she took more than the time allotted to her as such. (10) Her work was consistently poor. Any good reports she got covered only short spells and even then were not wholly in her favour. She had increments withheld three times for poor performance. (11) Although a long-serving official may indeed expect renewal he has no right to it if his work is bad. The complainant was on the staff for ten years, and the renewals she got were supposed to enable her to get back to the standard of work she had shown to begin with. Unlike her, the official whose complaint the Tribunal allowed in Judgment 675 had a good record. The decision not to renew her appointment was neither arbitrary nor irrational; there were sound reasons for it, and they were stated.

D. In her rejoinder the complainant goes over her account, pointing out what she sees as mistakes or distortions in the Organization's. She seeks to refute the FAO's pleas and develops her own on the quality of her performance, the authority of the director of personnel of the Programme, the withholding of her increments, the meaning of Judgment 675, her right to a continuing appointment, her right to sick leave after 30 June 1986, the hostility aroused by her union work, her right to repatriation under Italian law, and the amount of her costs. She asks the FAO to disclose reports that show her work to have been poor.

E. In its surrejoinder the Organization submits that the complainant's rejoinder adds nothing of substance to her case. It develops its pleas on the issues the rejoinder addresses, contending in particular that the case is about non-renewal, not about termination of appointment; that the applicable procedure was correctly followed; that the withholding of a within-grade increment is a distinct issue; that the criteria for non-renewal set forth in Judgment 675 were fully respected; and that the complainant was no longer on sick leave by the date of separation. The FAO discloses minutes and other papers which in its submission bear out its view that on the whole her work was poor. It rejects her allegations of hostility and her claim to repatriation under Italian law.

CONSIDERATIONS:

1. The decision the complainant impugns is one the Director-General of the FAO took on 6 July 1987 on the Appeals Committee's report to him of 20 March 1987. The issues raised in the case are the following:

(1) Should the decision not to renew the complainant's fixed- term contract be set aside on the grounds (a) that it was made without authority by an official, not of the FAO, but of the World Food Programme (WFP), and, furthermore, by an official who was not authorised to make it; and (b) that it was based on prejudice due to the complainant's staff union activities?

If the decision were set aside there would arise the question of her reinstatement in "a continuing post" or an award of compensation in lieu.

(2) Is her claim to retroactive grant of her within-grade salary increment for 1983 receivable?

(3) Was she entitled to sick leave after 30 June 1986, the date on which she was separated from service?

(4) Is she entitled to (a) reinstatement in membership of the FAO's sickness insurance scheme, (b) the costs of repatriation and (c) the same termination indemnity as staff with a continuing appointment?

2. Having been continuously employed in the FAO since July 1976 the complainant accepted a post with the WFP in March 1985. The Organization renewed her fixed-term appointment in March 1986 for three months, up to 30 June 1986. Mr. El Mindani, the Director of External Relations and General Services (WPX), who was at the time in charge of personnel matters for the Programme, informed her on 15 May 1986 that her appointment would not be renewed on expiry. The Executive Director of the Programme confirmed by a memorandum dated 28 May that WPX had complete authority to deal with the matter. On 26 June 1986 the decision was confirmed on behalf of the Director-General of the FAO, and the complainant lodged her appeal with the Appeals Committee.

3. The WFP is an organ of both the United Nations and the FAO. Its Executive Director is the head of its secretariat and reports to the Secretary-General of the United Nations and to the Director-General of the FAO. He administers the staff of the Programme in accordance with the FAO Staff Regulations and Staff Rules together with such special rules proposed by him as the Secretary-General and the Director-General may approve.

The complainant has produced the text of "Joint comments" agreed to by the Secretary-General and the Director-General and dated October 1984. The text states that the Programme will exercise authority in accordance with the FAO Staff Regulations and Staff Rules to make decisions on personnel matters, including appointment, promotion, transfer and termination. Where there is delegation of authority to the WFP its secretariat is required to give the Secretary-General and the Director-General regular information on the exercise of its authority. The text further states that the Secretary- General and the Director- General "are satisfied that these new arrangements will provide the Executive Director with all the essential management and administrative authority and flexibility needed to enable the continued growth of the Programme, to maximise its efficiency and the impact of WFP activities in support of developing countries". Lastly, the text says that "actions to implement decisions" on personnel matters may "begin forthwith, i.e. in mid 1985".

The non-renewal

4. When the complainant's appointment was expiring, at the end of June 1986, a decision had to be taken whether or not to renew it. According to the text referred to above the WFP had full authority to make decisions on personnel matters in accordance with the FAO's Rules, including appointment, transfer and termination and including presumably decisions to renew or not to renew fixed-term appointments. The rules do not require the Director-General of the FAO to make such decisions. It is true that they authorise him to terminate a continuing

appointment or a fixed-term one before expiry (Staff Regulation Art 301.0911), but they do not say who may decide not to renew. The text of the agreed comments makes it plain that it was the WFP that had that authority. Furthermore, the official in charge of personnel matters at the material time was the Director of WPX, as indeed the Executive Director of the Programme confirmed. In any event the decision was not confined to the WFP. The Personnel Division of the FAO (AFP) was informed and it was determined that no other suitable post was available at the FAO. It was in those circumstances that the separation procedure began in the WFP.

5. The Tribunal concludes that the WFP had authority to take the decision and that within the WFP the Director of WPX had specific authority to take it.

6. The complainant's allegations of prejudice relate to her staff union activities up to 1983. In its report the Appeals Committee recounts that it asked the representatives of both parties to comment on the agreement reached between Personnel and the Union of General Service Staff in 1983 which had resulted in extension of the complainant's appointment. Mr. Bolner-Garampi, who was Secretary-General of the Union and who represented her, explained that agreement had been reached between the complainant, the Director of AFP and the representatives of the union that she "would cease her activities as elected representative of the Union and that her contract would be renewed for another year". In reply to a question put by one of the members of the Committee, Mr. Bolner-Garampi, further stated that the Union had "advised her to cease her activities" as its representative.

In a statement of 15 December 1987 which he addresses to the Tribunal and which the complainant appends to her original brief Mr. Bolner-Garampi states that it was the Director of AFP who asked that she abandon union activities.

Whichever is the true version, it is not disputed that agreement was reached after negotiation between the Union, management and the complainant and that the agreement was implemented by all parties. The complainant had the opportunity of consulting the Union at that time. What she now seeks to establish is that despite the agreement the Organization kept up its persecution of her over the next three years - refusing her within-grade salary increment in 1983, refusing her a continuing appointment and moving her from one difficult post to another.

At the heart of the matter, however, is the question of the quality of the complainant's services. The history of her employment shows that her salary increment was withheld in 1980, though later restored, and another was withheld in 1983, but not restored. A third increment was withheld in 1985. It was restored by Judgment 869 because of a procedural flaw, the Organization having failed to prove that the decision had been made by someone competent to make it. But the merits of that decision were never investigated - indeed the complainant did not challenge it on the merits - so that the Tribunal's reinstatement of the salary increment does not prevent the Organization from showing that her services were unsatisfactory. The Organization contends indeed that on the whole the complainant's performance was poor, as is clear from a number of reports on her personnel file, some of which it discloses.

7. The Tribunal is satisfied that the Director of WPX was right in basing his decision on the complainant's unsatisfactory performance and on her negative attitude towards work and colleagues, that those were the grounds for the decision, and that it was not based on any prejudice by reason of her union activities, which had ceased over three years before.

The salary increment

8. Any appeal against the decision not to grant the complainant's within-grade salary increment for 1983 has long since been time-barred. The last decision on the matter was dated July 1984, when the Director of AFP informed her that the increment, which had been suspended, would not be granted. She failed to appeal in time.

Sick leave

9. The question of sick leave first arose after the complainant had been told that her contract would not be renewed. She supplied a certificate dated 20 June 1986 from her own doctor, Dr. Tabegna, stating that from 19 June she was not fit to perform her duties because of aggravation of her spastic colitis. The certificate was received by the Organization on 25 June. She sent another one from Dr. Tabegna dated 27 June certifying spastic colitis and saying that she would have to go into hospital for tests. The FAO received it on 30 June and on the same day sent a telegram asking her to come for a medical examination. On 3 July she replied that she was unable to attend. She

was in hospital from 14 to 23 July for the tests. The Organization wrote to her on 17 July saying that neither of the certificates from Dr. Tabegna gave the expected date of her recovery and that the medical information was insufficient to determine whether she might properly be separated on 30 June. She was asked to contact the medical service or get her doctor to do so on her behalf. In reply she got in touch with the medical service while still in hospital. She sent in further medical evidence consisting of her hospital records, another certificate from Dr. Tabegna dated 27 July certifying that she needed 10 days' rest and therapy from 24 July, and two certificates from another doctor, Dr. Lorenzini. In all the medical certificates covered the period from 19 June to 2 August 1986. The complainant saw Dr. Lantorp, the chief medical officer, on 14 November. On 19 November Dr. Lantorp wrote to her on behalf of the Organization to say that there were no grounds for approving her sick leave after the date of expiry of her contract; the diagnoses made by her doctors following the termination of her contract could not justify certified sick leave; and the symptoms identified were to be considered "normal reactions in these circumstances".

10. Staff Rule 302.621 provides that staff members who are unable to perform their duties because of illness or injury shall be granted sick leave which must be authorised by the Director of AFP. The staff member is responsible for informing his supervisor as soon as possible of absence due to illness or injury, and sick leave is not granted for more than three consecutive working days unless a certificate of incapacity from a duly qualified medical practitioner is produced stating the nature of the illness and the probable duration of incapacity. The certificate has to be sent to the chief medical officer not later than the fourth working day following the initial absence from duty. On receipt of the certificate the chief medical officer recommends whether sick leave should be granted.

According to Rule 302.6217 staff members may be required at any time to submit medical certificates as to their condition or to undergo examination by a medical practitioner named by the Director of AFP, and further sick leave may be refused if the Director is satisfied that the staff member is able to return to duty.

According to Rule 302.622, when there is a serious difference of opinion on the medical facts relating to the staff members' ability to perform their duties or regarding sick leave under the rules, the Director-General may, if circumstances so warrant, refer the matter to an independent medical practitioner or to a medical board for advice.

11. The complainant objected to the chief medical officer's decision and asked that the matter be referred to an independent medical practitioner. The Director of Personnel of the Programme answered in a letter of 16 January 1987 that sick leave was authorised from 19 to 30 June 1986; since there was insufficient information on which to base a decision and no way of retroactively determining her status she had been "given the benefit of the doubt"; Rule 302.6217 was not applicable as she had ceased to be a staff member on 30 June 1986; and because there was no serious difference of opinion on the medical facts there were no circumstances warranting referral to an independent medical practitioner or to a medical board for advice.

12. The complainant was not called for any medical examination after the one scheduled for 2 July, which she was unable to attend. Dr. Lantorp's decision of 19 November 1986 can be faulted. First, he said that the diagnoses had been made following the termination of her contract, when they had in fact been made before 30 June. Then he said that her symptoms were to be considered "normal reactions" in the circumstances: that is entirely irrelevant. What the medical service had to determine was not the cause of the complainant's ailments but whether they prevented her from performing her duties and then whether further sick leave should be refused because of ability to return to duty. It is that ability that is the issue. The Organization is wrong in saying that Rule 302.6217 does not apply because her contract ended on 30 June: a staff member cannot be separated while on sick leave. The medical service should therefore have determined the complainant's ability to return to work so that she could be separated on that date. It follows that the decision on sick leave must be set aside because it was based on wrong information and applied the wrong test.

13. Since the Organization does not contest the medical certificates supplied, it is accepted that the complainant needed leave until 2 August 1986 and she is entitled to have her separation calculated as of that date, not 30 June.

Membership of the sickness insurance scheme

14. The complainant's claim to reinstatement in the FAO sickness insurance scheme after the date of separation is not sustainable. Membership is confined to staff members and retired staff members who meet prescribed conditions, and she is not eligible.

Repatriation

15. Nor is she entitled to be repatriated under the staff rules or regulations: she was recruited on local status.

In her rejoinder she contends that a note verbale was sent to the Organization stating that on termination the FAO is obliged under Italian law to repatriate a foreigner. The Organization says it did not receive such a note and is unaware of its existence, and the complainant offers no evidence in support of her contention. In those circumstances the claim is unsustainable.

Termination indemnity

16. The complainant addresses no arguments to her claim to payment of the same termination indemnity as staff on continuing appointments. Since she did not hold such an appointment she is not entitled to the indemnity payable to such staff.

DECISION:

For the above reasons,

1. The decision to separate the complainant on 30 June 1986 is set aside.

2. The date of her separation is 2 August 1986.

3. The Organization shall pay her arrears of salary up to 2 August 1986, adjusted as necessary, plus interest at the rate of 10 per cent a year.

4. All other claims are dismissed.

5. The Organization shall pay the complainant 2,000 United States dollars in costs.

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 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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