

SIXTY-EIGHTH SESSION

***In re* BACCACHE**

Judgment 987

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Georges Baccache against the Food and Agriculture Organization of the United Nations (FAO) on 3 November 1988, the FAO's reply of 17 February 1989, the complainant's rejoinder of 23 May and the FAO's surrejoinder of 11 August 1989;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal, FAO Staff Regulation 301.0913 and FAO Staff Rule 302.9033;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. In 1985 the FAO, the United Nations Development Programme (UNDP) and the Government of Chad jointly launched a project to foster agriculture and rural development in that country.

The FAO appointed the complainant, a French citizen born in 1930, for one year from 9 July 1986 to a grade P.5 post attached to the project in Chad as an economist and expert in rural development. He was on probation. After spending a few weeks at headquarters in Rome he arrived at N'Djamena, in Chad, on 4 August.

Trouble broke out almost at once between him and other staff, some of whom accused him of being overbearing. In a letter of 10 September 1986 the project co-ordinator, who was his supervisor, told him to keep to his stated duties, which he recapitulated. In a minute of 20 October to the co-ordinator the complainant set out many grievances and criticisms. In his reply of 24 October the co-ordinator pointed out that he was not carrying out all his duties and told him to stop being argumentative.

By a letter of 11 November 1986 the Director of the Agricultural Operations Division (AGO) at headquarters reminded the complainant of the need to get on with the other staff, told him to keep to his set duties and to put in his first work report. He thereupon submitted the report. In a minute of 17 November to headquarters Mr. Levasseur commented on his report, concluding that all he had done was work on the computer and pick quarrels; he refused to carry out his duties; he did not fit into the team; and he was proposing no proper work programme. On 12 December the Director of AGO wrote to him repeating those criticisms and telling him to draft a full programme. The head of the Development Policy Studies and Training Service (ESPT) went to Chad in January 1987, saw the complainant, and reported unfavourably about him to the Director of AGO.

In a letter of 9 March 1987 the Director told him that his work had fallen far short of expectations and he had produced a quarrelsome correspondence that showed difficulty in fitting in; the Director-General would therefore dismiss him. The Director of the Personnel Division (AFP) sent him a telex on 16 March repeating the grounds for dismissal, giving him 30 days' notice under Staff Rule 302.9033 and terminating his probationary appointment under Staff Regulation 301.0913: "In the case of staff members serving a probationary period ... the Director-General may at any time terminate the appointment, on finding that such action would be in the interests of the Organization". A personnel officer wrote to him on 24 March confirming that his appointment would end on 15 April. He sent a telex on 21 March to the Directors of AGO and of AFP and a letter to the Director of AGO on 3 April stating his objections. He left on 15 April.

He appealed to the Director-General on 7 June. The Assistant Director-General in charge of Administration and Finance informed him by a letter of 6 August that the Director-General rejected his appeal, and on 5 October 1987 he appealed to the Appeals Committee. In its report of 25 May 1988 the committee unanimously recommended rejecting his appeal, and by a letter to him of 11 August 1988, the decision impugned, the Director-General did so.

B. The complainant recounts the events leading up to his dismissal. He alleges that his appointment aroused resentment in a faction that had backed another candidate and that plotted his downfall.

In his work report of November 1986 he described the work which he had done, at the request of the co-ordinator and the national director of the project, on a computer programme and which, as even the Director of AGO had to concede, had had "creditable results". But his report also revealed the mismanagement of the project and made those he had criticised even more anxious to get rid of him: from that point whatever he did was bound to be condemned. The head of ESPT, which was not in charge of the Chad project anyway, made no objective evaluation of it but was deeply prejudiced against him and simply brought more grist to his enemies' mill. The grounds for dismissal stated in the letter of 9 March 1987 were trumped up after a mere "discussion" with the head of ESPT. The resident representative of the UNDP in Chad was dismayed at the highhanded treatment of him. So was the Minister of Agriculture and Rural Development, who wrote to the Director-General on 13 April 1987 praising him. Going to headquarters in June, he saw many senior officials there who expressed sympathy with his point of view, but his foes saw to it that this attempts at reconciliation got nowhere.

He alleges many flaws in the impugned decision. There was breach of due process. The decision was taken before he had been given any opportunity to refute the charges against him, and, as the Appeals Committee said, he should have been duly warned of the dissatisfaction with his performance. The Director-General overlooked his achievements. He was the victim of personal prejudice, of which he cites many examples. Double standards were constantly applied that were strict for him but indulgent for others. The decision was taken out of a vindictive desire to harm and discredit him.

He seeks (1) the quashing of the impugned decision; (2) reinstatement in his former or in another suitable post or else damages equivalent to three years' pay; (3) arrears of pay from 15 April 1987 up to the date of reinstatement, plus interest at the rate of 12 per cent a year; (4) an increase in pay to that corresponding to grade D.1, step 1, as a reward for the work which he was asked to do and did beyond his set duties; (5) refund of the cost of travel to headquarters and of his stay in Rome from 10 to 19 June 1987; (6) payment of 15,000 French francs to cover the cost of transporting 1,500 kilograms of baggage by air freight from Chad; (7) an award of one year's pay in smart-money; and (8) 40,000 French francs in costs.

He contends that oral proceedings are needed in which he may call witnesses to show how unfairly he was treated.

C. In its reply the FAO gives its own version of the facts, observing that, like the complainant's work in Chad, his complaint puts the incidental and the irrelevant before the essential.

The only issues of law are whether the Director-General was competent to dismiss him and acted by the rules. The Director-General was empowered to end the complainant's probationary appointment under Staff Regulation 301.0913 "at any time" on finding that "such action would be in the interests of the Organization". The Director-General came to that view on the strength of appraisal by the complainant's supervisor, information from the head of ESPT and technical assessment of the only work he had done, which amounted to mere compilation of data. The decision was duly notified to him in the telegram of 16 March 1987. The Director of AGO had already told him in the letter of 9 March of the reasons for the proposed dismissal, which were the failings he had been warned about before, namely his unhelpfulness and failure to produce results. He was not denied a hearing but had many opportunities to answer the criticisms. He was able to state his case to the head of ESPT and did so again in his telex of 21 March to the Directors of AGO and of AFP and in his letter of 3 April to the Director of AGO. His dismissal was not prompted by vengefulness and he offers no evidence to show that it was. His other allegations are the mere figment of wild speculation.

The hearings he asks for would serve no purpose but to let him air irrelevant grievances.

D. In his rejoinder the complainant further discusses the facts, develops his pleas and seeks to refute the Organization's. In his submission the Director-General acted without authority because the decision was not in the FAO's interests and so did not meet the requirement in Staff Regulation 301.0913. It was malicious and therefore an abuse of authority. It was based on a prejudiced report from the head of ESPT and on equally prejudiced and unwarranted criticisms by his supervisor. Further evidence of the ill will and the conspiracy against him was the failure to inform him in good time of the grounds for dismissal and let him state his case in writing before the decision had been taken. Indeed that was the very objection he raised in his telex of 21 March and his letter of 3 April 1987 to headquarters. He presses his claims. He further claims 5,214 United States dollars as compensation

for unused leave.

E. In its surrejoinder the FAO contends that the complainant's rejoinder merely obscures the material issues of fact and in no way weakens its own pleas, on which it enlarges. The purpose of the complaint being to challenge the termination of his appointment, the question of his professional skills is irrelevant: the fact is that he did not put them to the purpose he had been recruited for but instead did work that suited his own preferences. The Director-General correctly terminated the appointment in the light of the FAO's interests as he saw them. The complainant was given several warnings, as early as 10 September 1986, that his performance was below par. He was also given a proper hearing. The further claim in his rejoinder is out of time and in any event, since his entitlement were properly calculated, devoid of merit.

CONSIDERATIONS:

1. The FAO appointed the complainant to a project in Chad, No. 83/021, as an economist and expert in the evaluation and preparation of projects. His duty station was N'Djamena and his appointment was for a fixed period of one year during which he was on probation. It began on 9 July 1986 and after a few weeks at headquarters the complainant took up duty at N'Djamena on 4 August.

Before the period of probation had ended a telex dated 16 March 1987 and delivered to him the next day said that his appointment was terminated, the termination to take effect thirty days after he got the telex. He appealed, the Director-General rejected his appeal on 11 August 1988, and that is the decision he now impugns.

2. The telex of 16 March 1987 cited Staff Regulation 301.0913, which reads:

"In the case of staff members serving a probationary period ... the Director-General may at any time terminate the appointment, on finding that such action would be in the interests of the Organization".

The reason given for terminating the complainant's appointment was his unsatisfactory performance and termination on such grounds may be deemed to be action in the Organization's interests. The Director-General having wide discretion in the matter, the Tribunal will quash the decision only if it was taken without authority or in breach of a rule of form or of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if some mistaken conclusion was drawn from the evidence.

The complainant has two pleas, one that the decision was taken in breach of his right to a hearing, and the other that it was unwarranted.

3. As to the first plea, though the termination of a probationer on grounds of unsatisfactory performance is not actually a disciplinary sanction it is a measure directed ad personam. The right to a hearing, which is a general principle of law, means that the Organization may not terminate a staff member unless it has already informed him of its intention and of the grounds for termination.

Such information must be given before the notification of the termination and not at the same time, and the giving of thirty days' notice of termination is immaterial, that being merely part of the arrangements for putting the termination into effect. It was on 17 March 1987 that the complainant learned of his termination, and so it was before that date that the Organization should have allowed him to exercise his right to a hearing.

4. Of the two letters the FAO produces the earlier one, signed on behalf of the Director of the Agricultural Operations Division, was sent to the complainant on 9 March 1987 and briefly sets out the criticisms of him.

Though that letter did bear a date earlier than that of the actual termination the complainant says, and the FAO does not deny, that he did not get it until afterwards, on 19 March.

Several days later, on 24 March, a personnel officer sent him the second of the two letters, which confirmed the terms of the telex of 16 March.

Since both letters reached him after he got notice of the decision to terminate he was granted no proper opportunity to state his case.

5. In support of its contention that there was no breach of his right to a hearing the FAO cites earlier facts which it

submits show that the complainant knew full well that his position was, to say the least, uncertain.

Though there are no special rules on the subject and the procedure will depend on the circumstances of each case, the Organization has a duty to show that the staff member cannot reasonably have failed to realise he was under threat of termination.

The papers the FAO produces, while they show that all was not well in its relations with the complainant, do not suggest that the burden had shifted to him to take the initiative and state his case in anticipation of termination. The latest of the papers put forward as evidence bears the date of 12 December 1986, three months before that of the impugned decision, and may not be treated as a statement of charges requiring him to state his case in reply.

It is worth noting by the way that, though the Appeals Committee recommended rejecting the appeal, it did add:

"Quite apart from this case the Committee recommends reviewing the arrangements for assessing probationers to make sure that they know what the opinion of their performance is and have a chance to comment before the Organization decides on their future.

6. The conclusion being that the termination was in breach of the complainant's right to a hearing and therefore unlawful, there is no need to entertain his other plea.

7. In accordance with Article VIII of its Statute the Tribunal will not set aside the impugned decision, the period both of probation and of the appointment having expired. But it will order the Organization to pay the complainant damages for material injury. Some of the complainant's claims to financial compensation are irreceivable and some are plainly extravagant. Be that as it may, he will have fair redress in the circumstances in a lump-sum award of damages amounting to 50,000 French francs, to bear interest at the rate of 10 per cent from 16 April 1987.

8. The Organization shall also pay him 4,000 French francs in costs.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant 50,000 French francs in damages and interest thereon at the rate of 10 per cent a year from 16 April 1987 up to the date of payment.

2. It shall pay him 4,000 French francs in cost.

3. His other claims are 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 23 January 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner