

SIXTY-EIGHTH SESSION

In re ROBIN

Judgment 1010

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Charles Jean Robin against the Food and Agriculture Organization of the United Nations (FAO) on 31 January 1989 and corrected on 17 February, the FAO's reply of 9 June, the complainant's rejoinder of 26 July and the Organization's surrejoinder of 4 September 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulations 301.0912 and .0913, FAO Staff Rules 302.4112 and .622 and 303.1311 and FAO Manual paragraphs 305.522, .5221 and .5243, and 370.94 (as in force at the material time) and Appendix A to Manual section 390;

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. The FAO appointed the complainant, a Frenchman born in 1927 and an agronomist, for thirty months from 5 September 1983 at grade D.1 as chief technical adviser to a project in the Lebanon. He was on probation for twelve months. Because of turmoil in the Lebanon he could not go there at once and did other work at headquarters in Rome for some months. In mid-January 1984 he took up duty in Beirut. But the FAO's office in Beirut had to close down and he was evacuated to Cyprus in mid-February. He was told to go back to Beirut on 13 March. He put in a certificate saying that he was ill from the 19th to the 24th and he went back on the 26th.

His wife accompanied him at all times. The FAO asked him to relieve it of liability for her, and he made a statement to that effect on 21 May. The FAO granted her official permission on 22 June to accompany him.

He made trips, though not on official mission, to the northern Lebanon.

In a letter of 18 July 1984 the Director of the Agricultural Operations Division (AGO) told him that, his performance being poor, the extension of probation under Staff Rule 302.4112 and the withholding of a within-grade salary increase due to him on 1 September 1984 were recommended. By a letter of 2 August the Director of the Personnel Division (AFP) informed him of the acceptance of those recommendations. He protested in letters of 3 and 15 August.

On 21 December 1984 the Director of AFP wrote to give him one month's notice of termination of his appointment under Regulation 301.0913, which empowers the Director-General to end a probationary appointment "at any time ... in the interests of the Organization". The complainant protested in a memorandum of 10 January 1985 to the Director but left on 1 February 1985.

On 26 March 1985 the FAO offered him a new appointment at grade P.5, this time at Niamey, in Niger. On 27 March he wrote asking for grade D.1, the Director of AGO refused on the 28th, and he accepted the offer on 11 April. His appointment started on 20 May 1985. It expired on 17 May 1986. He left Niamey on 19 May 1986. He underwent medical examination at headquarters on 4 June.

From his home in France, at Cap d'Agde, he wrote on 1 July 1986 to the Assistant Director-General in charge of Administration and Finance to say that he had been ill and to submit a certificate of 23 June from a French doctor affirming that he could not work for a month from that date. He sent the Assistant Director-General on 28 July another certificate from the doctor dated the 22nd prescribing a further thirty days' rest. In a telex of 28 July he claimed an extension of appointment on grounds of poor health. The Director of AGO sent him a telex on 2 August refusing that claim. In a telex of 25 August he said that because of ailments contracted in the winter of 1985 he was still unfit; he again claimed the extension and asked the FAO to apply Rule 302.622. (The rule says that if there is

"a serious difference of opinion on the medical facts" the Director-General may "refer the matter to an independent medical practitioner or to a medical board for advice".) In a telex of 30 September the Assistant Director-General said that the medical examination of 4 June had shown him to be fit, he had no right to sick leave, and there was no reason to apply 302.622. On 19 November he wrote a letter to the Assistant Director-General pressing his claim to the extension of his appointment.

In a letter of 19 February 1987 to the Director-General he claimed (1) a salary increment for his employment in the Lebanon; (2) compensation for lack of salary from 2 February to 17 May 1985; (3) subsistence allowance at the rate applicable in Rome for the same period; (4) the difference in pay between grade P.5, step 4, and grade D.1, step 2, and then between steps 2 and 3 of D.1 for his employment in Niger; (5) subsistence allowance for his wife from 12 September 1983 to 20 June 1984; (6) installation allowance for a longer period than he had been granted in Beirut; (7) an allowance for travel in the Lebanon; (8) an evacuation allowance for his stay in Cyprus; and (9) compensation for loss incurred on the sale of household goods on his leaving Beirut. All those claims were expressly refused in a letter of 11 May 1987 from the Deputy Director-General.

On 7 March 1987 he had appealed to the Director-General against the decisions not to put him on sick leave up to 22 August 1986 and not to apply 302.622. That appeal, too, was rejected in the letter of 11 May.

While he was still in Niger AGO had sent him a telex on 9 May 1986 ordering him to report in Rome on the 12th, but on the same day he sent a telex to say that he would leave on the 19th and report on the 26th. AGO answered in a telex of the 16th that since his appointment was to end on the 17th he must come before the 26th. In a memorandum of the 16th to the FAO Representative in Niger he said that "because of work requirements" he could not yet leave and he would have to put up at an hotel until he did.

On 16 March 1987 he wrote to the Director of AGO claiming hotel expenses under Manual paragraph 370.94. The Director refused on 13 April and he appealed to the Director-General on 29 May, but his appeal was rejected on 28 July.

He filed three appeals with the Appeals Committee in 1987: on 29 April, on 16 June and on 24 October. The first was against an implied decision to reject his nine claims to additional payments (later expressly rejected by the abovementioned letter of 11 May 1987); the second against a decision of 11 May 1987 rejecting his claim to sick leave up to 22 August 1986; and the third against the decision of 28 July 1987 refusing to meet his hotel expenses in Niamey.

In a report of 21 June 1988 the Committee recommended paying an allowance for his wife's stay in Cyprus and the expenses of his own travel in the Lebanon but dismissing the other claims in his first appeal and his second and third appeals.

By a letter of 4 November 1988, the decision impugned, the Director-General informed him that if he filled up a claim form he would be paid the cost of travel in the Lebanon; his other claims were rejected.

B. (1) The complainant objects to the extension of his probationary appointment in the Lebanon. The reasons for it - which he objected to in letters he sent the Director of AGO on 3 and 15 August 1984 - had nothing to do with the project or with his duties, and the criticisms of him were unproven.

Though the project in the Lebanon was making progress and he was assured that his appointment would continue, the Director suddenly came to the view that it should end, as he informed the Assistant Director-General in charge of Development in a memorandum of 29 November 1984. The termination was an abuse of authority because the reasons for it were personal and contrary to the Organization's interests. So was the rejection of his claims to damages for material and professional injury. Though he accepted another assignment, which he was given to understand would again be at D.1, he never acquiesced in the wrongful termination.

He discusses and presses his claims to damages.

(2) He submits that the FAO was wrong not to apply Rule 302.622 so as to establish that ill health entitled him to extension of his appointment in Niger from 17 May to 22 August 1986. Its medical service at headquarters gave him wrong advice in May 1985 about precautions against malaria. He submitted in time medical certificates to show the serious decline in his health due to the malaria he had caught in Niger and to the hardships of working there and in the Lebanon. The decline had plainly begun before he left the FAO.

(3) He explains that because he had to stay in Niamey until 19 May to finish work he and his wife incurred hotel expenses from 1 to 18 May. Headquarters impeded his work so that they could again accuse him of doing it badly, and the delay was not his fault.

He seeks the quashing of the Director-General's decision of 4 November 1988 and the earlier ones rejecting his claims. He further claims: as to his appointment in the Lebanon, salary increment (4,000 French francs), salary (226,000 francs) and subsistence allowance in Rome (60,000 francs) from 2 February to 17 May 1985; as to his appointment in Niger, the pay corresponding to a higher grade (60,000 francs), subsistence allowance for his wife from 12 September 1983 to 20 June 1984 (39,300 francs), installation allowance for his stay of 60 days from 26 March 1984 in Beirut (71,560 francs), 45 days' allowance for travel in the Lebanon (34,650 francs), further subsistence allowance for his own stay in Cyprus and payment of the allowance for his wife's stay there and of her travel to and from that country (21,560 francs) and compensation for loss and expense incurred on leaving Beirut (84,500 francs); and interest at the rate of 9.5 per cent a year as from 29 April 1987 on the total, which comes to 601,570 francs.

He seeks the application of Rule 302.622 and, subsidiarily, an award of 148,000 francs corresponding to pay from 17 May to 22 August 1986, plus interest at the same rate as from 16 June 1987.

He claims 10,368 francs, the amount of his hotel bill in Niamey from 1 to 18 May 1986, plus interest at the same rate as from 24 October 1987.

He claims costs.

C. In its reply the FAO submits that the complaint is irreceivable insofar as it challenges the extension of his probation and the termination of his appointment because he failed to exhaust the internal means of redress. The extension was notified to him on 2 August 1984, and the termination on 21 December 1984; he failed to appeal against either within the 90-day deadline in Rule 303.1311.

As to the merits the Organization submits that there was no flaw in the decision to extend the complainant's probationary appointment in the Lebanon. A headquarters official who inspected the project there was severely critical of the complainant's performance in a report of July 1984 to the Director of AGO. In the proper exercise of their discretion the Director endorsed the criticisms and the Director of AFP extended his probation by six months under Rule 302.4112 and Manual paragraph 305.522 and suspended the grant of a salary increment under Manual paragraph 305.5221.

The decision to end his appointment was in the FAO's interests and in keeping with Regulation 301.0913. He had no right to any higher step because his increment was rightly withheld and he failed to qualify for it retroactively under Manual paragraph 305.5243(i) because his appointment was not confirmed.

He is not entitled to salary or subsistence allowance from 2 February to 17 May 1985 because he was not then under contract.

He was not promised grade D.1 in Niger; he was offered P.5 and accepted it.

He had no right to payment for his wife before 22 June, when she was authorised to go to Beirut; until that date she was there at his own responsibility.

He was paid installation allowance in full in Beirut and 600 United States dollars on taking up duty there, and was entitled to no further amount from 26 March 1984.

The Director-General has agreed to pay for his travel in the Lebanon and he will get his due if he fills up a proper claim.

His wife had no right to payment for travel to or from Cyprus or for her stay there: she was not authorised to accompany him. He is entitled to no further subsistence allowance for his stay in Cyprus: he was paid 30 days' allowance, the maximum allowed under Appendix A to Manual section 390 in the event of evacuation.

The FAO is not liable for private expenditure or for any loss incurred on the sale of household goods because he

had to leave Beirut.

His claims related to the alleged state of his health are irreceivable. His request for the application of 302.622 was out of time: the decision he was objecting to was the Assistant Director-General's telex of 30 September 1986, and under 303.1311 he had 90 days in which to challenge it. Yet he did not do so until 7 March 1987. Nor may he properly plead that he was too ill to appeal in time since in December 1986 he wrote a report on the project he was working on.

His claim to the payment of his hotel bill in Niamey is unfounded. According to circular 83/47 of 10 October 1983 such "pre-departure expenses in respect of hotel accommodations" will be refunded only to a staff member "reassigned to another duty station from a non-headquarters city". The Manual paragraph in force at the material time - 370.942 (now 371.411) - said: "... pre-departure expenses are not reimbursed ... upon separation". Besides, the complainant was given authorisation for repatriation travel as early as 8 April 1986 and had ample time to plan his departure so that he need not have stayed in an hotel.

D. The complainant rejoins that his internal appeal against the extension of his probation and the termination of his appointment was not time-barred. The Director of AFP's letter of 2 August 1984, which merely agreed with the Director of AGO's recommendation for extending the probation, was not a challengeable decision. Besides, he protested at once against the recommendation in letters of 3 and 15 August.

The Director of AFP's letter of 21 December 1984 did not properly notify termination because it did not come from the Director-General, as Regulation 301.0912 required, and was not registered. In any event he replied at once in his letter of 10 January 1985 to the Director. Neither of the Director's letters gave the time limit for appeal. He respected the time limits in all cases. He cites French law. He submits that, communication with Beirut being difficult, he acted with reasonable promptness in the circumstances.

He enlarges on his contentions that extension and termination were abuses of authority and he presses his claims to compensation.

His claim to sick leave is receivable, his internal appeal not being time-barred: a mere telex - that of 30 September 1986 - was not proper notification of rejection and set off no time limit for appeal. Besides, even if his appeal was out of time, he was constantly in poor health, with a short respite only in December 1986 that let him finish his report on the project.

He develops at length his pleas on the merits of his claim.

As to his claim to hotel expenses, which he presses, he contends that since Manual paragraph 370.941 did not come into force until 20 December 1985 the material rules are those that were in force at the date of his appointment. He further explains why he believes the FAO to be liable for payment.

E. In its surrejoinder the FAO enlarges on its main pleas, contending that it has already answered most of the arguments the complainant repeats in his rejoinder and that it need not therefore again refute each of his many claims in detail. It maintains in particular that his claims relating to the extension of the probation period and to termination of his appointment in the Lebanon are irreceivable because he failed to observe the time limit for an internal appeal and that there is no circumstance warranting the opening of any new time limit. As to the merits, it again explains why those two decisions were fully justified and show no defect.

CONSIDERATIONS:

1. The issues in this case arise out of two appointments which the complainant, an agronomist, held with the FAO.

His first appointment, signed in April 1983, was for thirty months from 5 September 1983, starting with twelve months on probation. His grade was D.1 and the country of assignment the Lebanon.

Things did not turn out as expected, perhaps because of the state of affairs in the Lebanon, perhaps for other reasons. In any event the Director of the Personnel Division (AFP) informed him by a letter of 2 August 1984 that the period of probation, which was to have come to an end on 5 September 1984, was extended.

A few months later, on 21 December 1984, the Director gave him one month's notice of dismissal, the actual date

of termination to be 1 February 1985.

Just under two months later, on 26 March, the Organization offered him a new fixed-term appointment for twelve months as a grade P.5 agronomist at Niamey, in Niger. There followed discussion about his grade and other matters and a contract was concluded on 11 April for his appointment from 20 May 1985 to 17 May 1986.

2. The complainant lodged three internal appeals with the FAO Appeals Committee.

The first, which he filed on 29 April 1987, was about his appointment in the Lebanon and challenged a decision, which he inferred from the Director-General's failure to answer, to reject a set of claims he had made on 19 February 1987.

His second and third appeals related to his appointment in Niger. The second one was filed on 16 June 1987 and challenged a decision the Deputy Director-General had taken on 11 May 1987; his third appeal, lodged on 24 October 1987, challenged a decision of 28 July 1987 by the Assistant Director-General in charge of Administration and Finance.

The Appeals Committee took his three appeals together and reported on them on 21 June 1988: it recommended rejecting all but two lesser claims that arose out of his appointment in the Lebanon.

By a decision of 4 November 1988 the Director-General decided *ex gratia* to allow one of those two lesser claims, provided that he made it out properly, and rejected the rest.

This complaint, which he filed on 31 January 1989, covers all the issues in dispute. That is correct procedure inasmuch as all three internal appeals stated his claims against the FAO and prompted a single decision from the Director-General, but for the sake of clarity the Tribunal will take up in turn the issues raised in each of the appeals.

Claims arising out of the first appointment

3. The FAO submits that the complainant's claims arising out of his appointment in the Lebanon are irreceivable.

They rest on two decisions: one, taken on 2 August 1984 by the Director of the Personnel Division, to extend his probation and withhold a salary increment due to him on 1 September 1984; the other, which the Director took on 21 December 1984, to end his appointment on 1 February 1985.

Only much later, on 19 February 1987, did the complainant lodge an appeal with the Director-General alleging all the unlawful acts and wrongs on which he founds his present claims.

4. Staff Rule 303.1311 reads:

"Staff members who wish to lodge an appeal shall state their case in a letter to the Director-General, through their division director. The letter shall be despatched within 90 days from the date of receipt of the decision impugned. ..."

The complainant has admitted to having got the Director's letter of 2 August 1984 on 5 September and the one of 21 December 1984 on 2 January 1985. Yet not until 19 February 1987 did he lodge his appeal with the Director-General and by that date the time limits in 303.1311 had long expired.

5. The complainant pleads that his claims are nevertheless receivable.

He argues first that the Director's letter of 2 August 1984 did not amount to a decision that set off the time limit for appeal.

The argument fails because the Director's letter is quite explicit and at the time the complainant had no doubt about treating it as a binding decision. The talks he cites, even though they broached the possibility of reversing the decision, came to nothing, as his own letter of 10 January 1985 to the Director makes plain.

His second argument is that an unregistered letter from someone other than the Director-General cannot constitute

proper notice of dismissal or of extension of probation.

That plea fails too: provided that the staff member is given official notice of a decision the time limit starts to run and there is no need for special procedural formalities. And the absence of the Director-General's signature can have no effect on the time limit for appeal even though it may in some circumstances warrant setting the decision aside.

Thirdly, the complainant points out that he was never told of the time limits in the rules.

Though that plea might succeed in exceptional cases it cannot in this one, since the complainant was given a copy of the Staff Regulations and Staff Rules on conclusion of the contract of appointment. French law, which he cites, is irrelevant. And so are the difficulties he says he encountered in the Lebanon - though the Tribunal does not deny them - since he lodged his appeal over a year after he had returned home.

Lastly, though the Organization did not answer his appeal of 19 February 1987, the implied decision to reject it merely confirmed the earlier decisions and set off no new time limit for appeal.

6. Article VII(1) of the Tribunal's Statute lays down that a complaint shall not be receivable unless the staff member has exhausted the internal means of redress provided for in the organisation's regulations. To satisfy that requirement he must not only appeal to the internal appeal bodies but do so in time. As was said above, the complainant did not, and his claims under this head are therefore irreceivable.

Claims arising out of the second appointment

Sick leave

7. The complainant's appointment in Niger expired at the set date, 17 May 1986. Although he was supposed to report in Rome a few days earlier for "debriefing", he asked for postponement and did not turn up until 22 May. In June he began to object to the date of termination of his appointment. There ensued correspondence between the parties, he put in medical certificates, and the upshot was that on 2 August 1986 the Director of the Agricultural Operations Division (AGO) sent him a telex which read: "On 7 July 1986 our medical service declared you fit after full end-of-service check-up at headquarters on 4 June 1986. Regret cannot accept your claim to extension of contract".

In a telex of 25 August the complainant pressed his claims. After getting another telex from the FAO confirming its refusal he sent it a registered letter on 19 November 1986 repeating his objections and reserving his right to claim extension of appointment.

On 7 March 1987 he lodged with the Director-General an internal appeal about the subject of the telexes and letters mentioned above, and on 11 May the Deputy Director-General wrote him a letter rejecting it as time-barred and in any event devoid of merit.

He thereupon submitted to the Appeals Committee his second appeal dated 16 June 1987 against the refusal of sick leave. The Committee reported, a letter of 4 November 1988 rejected his appeal, and that is the decision he is impugning.

8. The FAO contends that the claim was submitted out of time and is therefore now irreceivable. In its submission the original decision to reject it was in the above-mentioned telex of 2 August 1986 from the Director of AGO and was confirmed by another one of 30 September 1986 from the Assistant Director-General. There is no question about the dates at which he got the two telexes. Yet he did not appeal to the Director-General until 7 March 1987, and by then the time limit of 90 days in Rule 303.1311 had long expired.

The complainant again pleads that his claim under this head is receivable.

9. There is no need to repeat what was said in 5 above, that reasoning applying also to his claim to sick leave, and only his additional pleas about the claim will be taken up here.

One is that a telex cannot constitute a challengeable decision: when a staff member gets a telex he cannot tell who sent it, and so there is a risk of error.

When an international organisation with many staff working far afield takes a decision a telex is an up-to-date and acceptable method of communicating it. It would indeed be unreasonable to disallow the sending of telexes. The few disadvantages there may be can be easily got round and in any event the FAO's rules do not preclude notifying decisions by that method.

Although this time the FAO does state its reasons for rejecting the claim, the complainant cannot properly maintain that the Organization thereby reopened inquiry into the matter and so set off a new time limit for appeal. There being no need to rule on that plea, suffice it to observe that the main reason stated in the letter of 11 May 1987 for rejecting the internal appeal is that it was time-barred and therefore irreceivable. Whatever the letter may go on to say about the merits of his claim the comments are subsidiary and intended merely to dispose of the issues he had raised.

The claim under this head is irreceivable.

The date of expiry of the appointment

10. The contract for the complainant's appointment in Niger was concluded between the parties on 11 April 1985 and expired on 17 May 1986.

So as to respect that date the Organization told the complainant to report in Rome on 12 May for debriefing. But he felt that for reasons beyond his control his work required him to delay his departure from Niger by several days, and by a telex of 9 May he told the Organization that he would be leaving on the 19th and would be at his supervisors' disposal from the 26th.

Because he had stayed on longer in Niamey he put in a claim to compensation, which he addressed on 16 March 1987 to the Director of AGO, under Manual paragraph 370.94 as in force at the date of his appointment. The Director-General rejected the claim after exhaustion of the internal means of redress in the decision of 4 November 1988 mentioned in 7 above.

11. Manual paragraph 370.94, on which the complainant rests his claim, is indeed the material provision because at the date of conclusion of the contract of appointment it still formed part of the formal rules he was given a copy of. But as quoted by the Organization the text states, under the heading "Reimbursement of pre-departure expenses", that such expenses are not refunded "upon separation" from the Organization. So the complainant may not rely on that provision.

Even supposing that he is right in saying that he was not to blame for the delay in reporting at headquarters for debriefing, the Organization had already set the date of his departure and ordered him to abide by it. By acting of his own accord and postponing his return to Rome without permission he ran the risk of forfeiting the amount of the further expenditure he incurred.

12. Lastly, there is no evidence to bear out his charge of abuse of authority.

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 23 January 1990.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

