

SIXTY-NINTH SESSION

In re RAI

Judgment 1046

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ambrish Kumar Rai against the Food and Agriculture Organization of the United Nations (FAO) on 29 May 1989, the FAO's reply of 8 September, the complainant's rejoinder filed on 12 September and the Organization's surrejoinder of 17 November 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Rules 302.907, 303.1311 and 303.1313 and FAO Manual paragraph 305.5123;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, an Indian born in 1953, joined the staff of the FAO at headquarters in Rome in July 1980 under a short-term contract as a clerk in the Statistics Division at grade G.3. After several extensions his appointment ended in September 1981. On 9 October 1981 he was reappointed under a special services agreement and he worked under another such agreement for the first ten months of 1982 as a messenger. On 1 November 1982 he was granted a short-term appointment as a messenger at grade G.1 and on 1 June 1983 a fixed-term appointment. He replaced a filing clerk for three months in 1984. His appointment was extended to 31 December 1985 and then to 31 December 1987.

By the end of 1987 the Organization was in financial straits because of a sharp fall in the value of the United States dollar, the currency of account, against the lira, the currency in which salaries at headquarters are paid. In a speech to the staff on 10 December 1987 the Director-General spoke of the difficulties but said that he had "decided" to extend appointments, like the complainant's, that would expire at the end of the month, the extension to be for one year for anyone recruited before 1985.

As things turned out, however, the Organization had to take drastic measures such as stopping recruitment and abolishing posts. It did away with sixteen messenger posts, including the complainant's, at 31 December 1987. He was transferred to a service known as the temporary clerical assistance pool (TCA) and had his appointment extended by two months, to 29 February 1988. He served in January 1988 as a messenger.

In a memorandum of 28 January 1988 a recruitment officer informed him that from 1 February he would be working as a filing clerk with the Credit Union but that, "because of current budgetary difficulties, it may not prove possible ... to offer you a further renewal of your contract and, in this event, the Organization will be obliged to proceed with your separation ...".

On 5 February the Manager of the Credit Union wrote to the Chief of Central Recruitment to say that the complainant was not qualified, had an "easy-going attitude", had let the filing pile up and, though he had been warned on 2 and 4 February, was doing no better.

In a memorandum to him also of 5 February a recruitment officer mentioned the Manager's dissatisfaction and said that "in the circumstances" his appointment would not be renewed at the end of the month.

On 26 February he appealed to the Director-General against that decision under Staff Rule 303.1311; the Assistant Director-General in charge of Administration and Finance rejected that appeal in a letter of 25 March; and he lodged an appeal with the Appeals Committee on 22 April under Rule 303.1313.

In his appeal he cited what the Director-General had said to the staff on 10 December 1987. In a letter of 27 June 1988 the Assistant Director-General told him that "in consideration of your possible reliance on an extension based on statements made by the Director-General" he was granted the indemnity due to someone whose fixed-term

appointment did not expire but was terminated; the amount would come to just over 4.5 million lire. In a letter of 5 August to the chairman of the Appeals Committee the complainant said that he still wanted to go on with his appeal. The Committee reported on 4 January 1989. The majority held that the appeal should be rejected and that the termination indemnity was "appropriate compensation"; one dissenting member said that he had been unfairly treated because, despite several years' loyal service, his performance in his new job had been declared poor after a few days and no real effort had been made to find him other work.

By a letter of 14 March 1989, the impugned decision, the Director-General informed him that on the majority's recommendation his appeal was rejected.

B. The complainant submits that his was not a straightforward case of expiry of contract: the reason for the non-renewal was unsatisfactory performance in the Credit Union, as the recruitment officer's memorandum of 5 February 1988 made plain. The finding was unfair. It was made only four days after he had taken up duty with the Credit Union. He was given no written warning and no opportunity to explain. He was not shown at the time the memorandum of 5 February from the Manager of the Credit Union: he did not see it until he got the FAO's reply of 6 September 1988 to his appeal, to which it was appended. That memorandum and the one telling him of the non-renewal bear the same date: as the dissenting member of the Appeals Committee pointed out, the decision was taken at once on the strength of a hasty condemnation he had neither seen nor had a chance to comment on.

He had seven years' service to his credit, including fourteen months as a statistics clerk and three as a filing clerk; his performance reports were good and he got salary increments regularly. So why was he given only a two-month extension, especially since in December 1987 the Director-

General had publicly promised people like him a year's extension? And why was he warned in the memorandum of 28 January 1988 that he might get no renewal after the end of February? He believes that the FAO never intended to keep him on and merely made a show of offering him something. The criticisms of him were in breach of the proper procedure for appraising performance.

He claims retroactive reinstatement and damages for material and moral injury.

C. The FAO submits that the complaint is devoid of merit. The complainant's fixed-term appointment expired on 29 February 1988 in accordance with Rule 302.907 ("A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment") and Manual paragraph 305.5123 ("Fixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment ..."). He was given adequate notice of non-renewal and told the reasons for it.

The FAO acknowledges that the Director-General's announcement that he could reassure staff to some extent may have given him cause to expect renewal, and that is why it offered him *ex gratia* the termination indemnity. But that is the most he can reasonably expect in the circumstances: he has had the compensation he would have got if the financial crisis had come a month later and if he had already been given an extension of contract to the end of 1988. In that event the FAO would have assigned him to the Credit Union and, since he was unfit, his qualifications being limited, would have terminated him at the date at which he did leave and paid him the indemnity.

D. The complainant rejoins that the FAO fails to address, let alone refute, his main pleas. The Director-General did not just "reassure" staff: he announced a decision. So why was there a sudden change in the complainant's case? His qualifications were not "limited": besides having a degree in commerce, he had worked for thirteen months as a clerk in statistics to his supervisors' full satisfaction. The rules the FAO cites did not warrant refusing renewal of contract on the strength of criticisms he was not allowed to answer at the time, especially when he had had no proper warning of the threat of separation. The hypothesis the FAO relies on, besides being an afterthought, assumes that his work would in any case have been so poor as to warrant getting rid of him: that is the very charge he has been objecting to all along. The fact is that in time he would have managed to do properly any clerical job that matched his experience. He presses his claims.

E. In its surrejoinder the Organization submits that it has answered all his material arguments and it enlarges on its reply. It interprets the Director-General's speech and explains that the financial difficulties grew much worse in the last few days of December 1987 and called for tough action. The complainant's qualifications and experience did not fit him for much since he had worked mostly as a messenger. The purpose of the two-month extension to 29

February 1988 was to allow time to look for something for him to do over a longer period, but a genuine search produced nothing. The non-renewal was based not on allegations of unsatisfactory performance in general, but on his inability to work properly in the Credit Union. Granting him an indemnity the rules did not entitle him to was fair compensation.

CONSIDERATIONS:

1. The FAO first recruited the complainant as a statistical clerk at grade G.3 on 21 July 1980. After holding several posts he became a messenger at grade G.1 on 1 November 1982 under a short-term appointment. He was granted a fixed-term appointment as from 1 June 1983 up to 31 December 1983. He had it extended to 31 December 1985 and then to 31 December 1987, when the post of messenger he held in the Forestry Department was abolished.

On 10 December 1987 the Director-General had announced to the staff his decision to extend by one year the appointment of anyone who, like the complainant, had been recruited before 1 January 1985. On 1 January 1988 he was transferred to the "temporary clerical assistance" pool along with ten other messengers. The duration of the transfer was "not to exceed" 28 February 1988. He did not know that, however; indeed he was left quite unaware of the administrative arrangements that had been made for him and as far as he knew his appointment had been extended to 31 December 1988.

Throughout January 1988 he continued to work as a messenger in the Forestry Department, but on the 28th of that month he was informed that because of budgetary difficulties his fixed-term appointment might not be extended beyond the end of February 1988. He was told to take up a vacancy for a filing clerk in the Credit Union.

2. The complainant reported for duty with the Credit Union on 1 February. On the 5th the Manager of the Credit Union wrote a memorandum to the Chief of Central Recruitment saying that he had come to the conclusion that the complainant did "not possess the necessary aptitude to successfully carry out duties as Filing Clerk". His account was that the complainant had been briefed in the morning of 1 February and given "a gentle warning" in the evening of the 2nd "to accelerate output" and "a stronger warning" on the 4th. On the 5th the Manager "perceived no improvement in his performance, though he states that he is doing his best". The Manager asked for his immediate replacement. Also on the 5th, a recruitment officer wrote to the complainant: "... we have received an unsatisfactory report concerning your assignment in the Credit Union". She summed it up and concluded: "In the circumstances it will not be possible for the Organization to renew your contract beyond its current expiry date".

3. The complainant unsuccessfully appealed to the Director-General and then to the Appeals Committee. The majority of the Committee held that he had been terminated, not on the grounds of unsatisfactory service, but on the expiry of his fixed-term appointment. As to his claim to a one-year extension based on the Director-General's announcement to the staff in December 1987, the majority held that, the Organization having granted him the same termination indemnity as he would have got if his contract had been extended by twelve months and then terminated, such compensation was appropriate.

The Director-General's decision of 14 March 1989, which is the one impugned, essentially follows the recommendation by the majority of the Committee.

4. The main issue is whether the complainant was terminated for unsatisfactory performance - which the FAO denies - or on the expiry of his fixed-term appointment.

He was in a particularly delicate position. If he did well in the job of filing clerk he could stay on for several months in that assignment. If he did not the odds were against finding him another, and indeed none was found.

5. It was incumbent on the Manager of the Credit Union to give him a fair trial in the job, and the Tribunal is satisfied that for him to ask after the lapse of only four days for an immediate replacement was to act with undue haste.

The recruitment officer acted in even greater haste. On the very day on which she got the Manager's unsatisfactory report she wrote to the complainant citing that report and saying that "in the circumstances" his contract would not be renewed. He was not even given an opportunity to discuss the report before the decision was taken. On the evidence the inescapable conclusion is that the decision was made to separate him because the Organization had found him unsuitable for the job of filing clerk, not because it did not intend to renew his two-month appointment. The test is that if it had not found him unsuitable it would not have told him to go.

6. The Director-General's decision confirming the complainant's termination must be set aside because he was not separated for the reason it gave.

7. Whether the complainant had a two-month contract expiring on 29 February 1988 or, because of the expectations raised by the Director-General's announcement a twelve-month one expiring on 31 December 1988, the Organization acknowledges that for the purpose of determining his termination indemnities he should be treated as if he had held a twelve-month contract. Yet it is inconsistent to acknowledge the existence of a twelve-month contract for one purpose and to argue the existence of a two-month contract for another. As far as the complainant gathered from the Director-General's announcement, he had a twelve-month contract. The first inkling he had that the Organization had a different intention was from the memorandum of 28 January 1988, which he received on 1 February, hastily followed on 5 February by notice that he would not be kept on after 29 February 1988. Since, however, he succeeds on the grounds that the decision was not made for the reason the Organization gave, there is no need to determine how long a contract he in fact had.

8. Since he held just a fixed-term appointment it is not appropriate to order reinstatement: an award of damages is sufficient.

DECISION:

For the above reasons,

1. The Director-General's decision of 14 March 1989 is set aside.
2. The Organization shall pay the complainant damages equivalent to the amount of his salary and allowances up to 31 December 1988 less the termination indemnity he was paid.
3. It shall pay him 1,500 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 26 June 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner