TWENTY-FIFTH ORDINARY SESSION

In re KIEWNING-KORNER CASTRONOVO

Judgment No. 168

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mrs. Marilyn Kiewning-Korner Castronovo on 30 July 1969, the reply of the Organization dated 9 September 1969, the complainant's rejoinder dated 15 November 1969 and the Organization's reply thereto dated 13 February 1970;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rule XXXVI of the General Rules of the Organization, FAO Staff Rule 302.4073 (repealed on 5 October 1965) and Staff Rules 302.3023 and 302.811;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mrs. Kiewning-Korner Castronovo entered the service of FAO on 21 March 1966 under a one-year contract as a stenographer at grade G.3, classified as "non-local", and was assigned to the World Food Programme in Rome. At that time she was a British national and unmarried. On 21 March 1967 her appointment was extended up to 31 December 1968. On 12 October 1967 she married in England Mr. Roberto Castronovo, an Italian national. On 1 April 1968 she was offered and accepted the conversion of her appointment from fixed-term to indefinite as a stenographer in grade G.3, step 3, with non-local status.

B. On 12 July 1968 the Personnel Division informed the complainant that as a result of her marriage her status would in future be governed by Manual provision 311.633 and Staff Rule 302.3023, and that she had been transferred from non-local to local status; she was also requested to return her commissary card and her identity card, and this she did on 27 August 1968, while reserving her position on the question of the reimbursement within ten months of a sum of US$ 298.17 by which she had been overpaid and which on 26 August 1968 the Personnel Division had asked her to repay. On 20 August 1968 the complainant appealed to the Director-General against the Administration's decision to change her status as a result of her marriage. She referred to the terms of her appointment and to the confirmation of her non-local status when she received her indefinite appointment on 1 April 1968. The Director-General replied on 8 October 1968 that the delay in changing her status had been due to an administrative oversight (the inclusion of a non-resident's allowance of US$ 373 when her contract was converted into an indefinite appointment), which came to light in the course of a check of staff files, and could not constitute an acquired right. Arrangements were, however, made to facilitate the reimbursement of the overpayment.

C. In the meantime Mrs. Kiewning-Korner Castronovo had submitted an appeal to the FAO Joint Appeals Committee. She contended that her appointment was governed in particular by Staff Rules 302.4071, 302.4072 and 302.4073 issued on 1 September 1965, and on that ground claimed recognition of her status as a British national, entitlement to a non-resident's allowance, entitlement to the purchase of duty-free goods, home leave, repatriation grant and repatriation travel if necessary, full payment of her salary for August 1968 and withdrawal of the demand for repayment. The Organization replied that Staff Rule 302.4073 on which the complainant relied was no longer in force at the time of her appointment and had been superseded by Administrative Memorandum AM 65/60 of 5 October 1965 (incorporated on 12 December 1966 into the Staff Rules as Rule 302.3023), applicable to General Service staff appointed on or after 1 January 1966 and providing that entitlement to non-resident's allowance, but not to certain other benefits, would cease if a female staff member married a person who, if appointed by the Organization, would be considered resident in Italy. Moreover, the administrative error committed in the "Report of Personnel Action", which in any case could not be regarded as a formal contract, could not confer any right on the complainant. Lastly, it was pointed out that she had in fact acquired Italian nationality de jure by reason of her marriage. In her rejoinder, the complainant maintained that Administrative Memorandum AM 65/60 was illegal, that Rule 302.4073 alone was applicable to her case, that under Rule 302.4081 FAO could recognise only one nationality for each staff member, and that Article 15(2) of the Universal Declaration of Human Rights laid down that no one should be arbitrarily deprived of his nationality. The Organization replied that it could not agree to the

proposition that Administrative Memorandum AM 65/60 was illegal, since the Staff Council had been consulted as far back as the beginning of 1965 and had even submitted comments on the proposed new provisions. In its report dated 20 March 1969, the Joint Appeals Committee recommended that the Director-General should not grant the complainant non-resident status but, if she so desired, should recognise her entitlement to home leave and to repatriation grant and repatriation travel expenses in accordance with Administrative Memorandum AM 65/60, paragraph V (b). The Committee also recommended that the Director-General should exercise his discretion to waive the recovery of the amount due from the complainant, since she was not responsible for the administrative error resulting in overpayment. The Director-General accepted the first two recommendations, but rejected the third and communicated his decision to the complainant on 9 April 1969.

D. In her complaint to the Tribunal, Mrs. Kiewning-Korner Castronovo contends that Staff Rule 302.3023 is invalid because it prejudices the complainant's acquired rights, was specifically rejected by the Staff Council, is contrary to the terms of her contract, and creates sex discrimination in favour of male staff members. Similarly, Memorandum AM 65/60, of which she was not aware at the time of her appointment, was not applicable to her for the reasons given above. Further, under Staff Rule 302.4082 she ought to be considered a British national for several reasons, and specifically because her marriage took place in England and English law should therefore be her national law. Accordingly, she considers herself entitled to the status and benefits of a non-resident staff member. She therefore prays that the Tribunal may be pleased to quash the Director-General's decision of 9 April 1969 and to rule that she is entitled to non-local status and to all the benefits and allowances due to non-resident staff as from the date of her marriage.

E. In its reply the Organization states, first, that the provisions of Memorandum AM 65/60, later incorporated into the Staff Rules and amended by document DGB/674 of 5 October 1966, are entirely valid because the procedure for consultation with staff representatives was observed and the Director-General is entitled to amend the Staff Rules and the Administrative Manual by such means as he may consider most appropriate - in the case at issue by means of an administrative memorandum - and furthermore that the provisions in question do not prejudice acquired rights or establish any category or sex discrimination. Secondly, the Organization repeats that Memorandum AM 65/60 became effective on 1 January 1966, although it was not yet incorporated in the Staff Rules at that date, and that between the date of the first renewal of her contract on 21 March 1967 and its conversion into an indefinite appointment on 1 April 1968 the complainant ought to have made herself acquainted with the new provisions of the Staff Rules. The question of nationality is immaterial since the applicable criterion in respect of the cessation of entitlement to a non-resident's allowance and certain other benefits accorded to non-local staff is marriage to a person who would be regarded as resident or local if recruited by the Organization, this being the situation in the present case. The Organization accordingly prays that the complaint be dismissed.

F. In her rejoinder Mrs. Kiewning-Korner Castronovo argues that, while the Director-General certainly has power to amend the Staff Rules, he must do so with due regard to internal procedures (Staff Regulation 301.081 and Staff Rule 302.811). The Staff Regulations themselves can be amended only by the Conference or Council of the FAO, and "without prejudice to the acquired rights of staff members" (Staff Regulation 301.121). The procedure by which Memorandum AM 65/60 was adopted and enforced was illegal, since it was undisputed that between 1 January and 18 November 1965 there was no elected Staff Council and the consultation which took place was merely on a personal basis with staff members who had no mandate to represent the staff. The complainant further contends that the provision in question violates acquired rights of staff members. Moreover, Memorandum AM 65/60 has had undesirable psychological effects and has encouraged immorality because in order to avoid losing their privileges as non-local staff members many women have formed common law unions or gone through private religious ceremonies without civil formalities, or have married secretly. The number of illegitimate children, she alleges, has increased since the enforcement of Memorandum AM 65/60. The Organization states in reply that it was not possible to consult the Staff Council because of delay, for which the staff was responsible, in its reconstitution, and that the members of the former Staff Council were in fact consulted. It contests the validity of the complainant's allegations of immorality resulting from the application of Memorandum AM 65/60 and quotes a relevant extract from a letter from the Director-General expressing the view that the concept of marriage would be reduced to a very low level if it were to be calculated in terms of the loss of commissary cards and of a few other privileges.

CONSIDERATIONS:

1. It is not disputed that if Staff Rule 302.3023 is applicable to this claim, the claim must fail because under the provisions of that rule the complainant is not after her marriage entitled to non-resident benefits. Likewise it is not

disputed that if the earlier Rule 302.4073 is applicable the claim must succeed because under the provisions of that rule the complainant, notwithstanding her marriage, is so entitled. At the time of her marriage the complainant was employed under the contract dated 21 March 1967 which was made subject to the Staff Rules. The current edition of the Staff Rules was that dated 12 December 1966 which incorporated Rule 302.3023. Accordingly the claim must fail unless the complainant can show that Rule 302.3023 was either invalid or inapplicable to her. In that case the earlier Rule 302.4073 would apply and the claim would succeed.

2. As to invalidity, four grounds are alleged by the complainant, namely, sex discrimination, category discrimination, lack of agreement with the Staff Council and lack of consultation with the Staff Council. As to the first three, the Tribunal considers that, even if the allegation was well founded in fact, it would not affect the validity of Rule 302.3023 inasmuch as the Director-General by making the rule would not be exceeding the powers conferred upon him under Rule XXXVI of the General Rules of the Organization. As to the fourth, the Tribunal finds that before Rule 302.3023 was incorporated on 12 December 1966, there had been consultation with the Staff Council and the Council had had ample opportunity of making proposals to the Director-General in accordance with Staff Rule 302.811: consequently this allegation fails on the facts.

3. As to inapplicability, the complainant contends in the first place that she is not bound by Rule 302.3023 because it was not brought to her knowledge and accepted by her at the time of her appointment. In the opinion of the Tribunal, this contention fails. The contract was expressly made subject to the Staff Rules and Regulations and it is not necessary that any particular rule should be brought to the notice of the employee or specifically accepted by her.

4. Further as to inapplicability, the complainant contends in the second place that under her earlier contracts of employment, beginning with the contract dated 21 March 1966, she had acquired a right to enjoy non-resident status in accordance with the terms of Rule 302.4073 and that the Director-General had no power to make a new rule depriving her of that right. It is unnecessary for the Tribunal to consider whether the complainant had under her earlier contracts acquired such a right. If she had, the right did not survive the contracts themselves, the latest of which expired before her marriage.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 17 November 1970.

M. Letourneur
André Grisel
Devlin
Bernard Spy

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