

Registry's translation, the French text alone being authoritative.

FORTY-EIGHTH ORDINARY SESSION

In re ALEXSON

Judgment No. 483

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Miss Lorraine Alexson on 3 January 1981 and brought into conformity with the Rules of Court on 24 February, the FAO's reply of 14 April, the complainant's rejoinder of 30 June and further communication of 8 July, and the FAO's surrejoinder of 7 August 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.16, FAO Staff Rules 302.3091, 302.3092, 302.405, 302.40631, 302.531, 302.711, 303.28, former Staff Rule 302.7111(v), Staff Rules Appendix A, and FAO Manual provision 420.3;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of the United States, went on a private visit to Rome in December 1975 from her home in Connecticut, applied at headquarters for employment with the FAO and passed a test in typing but not in shorthand. By a letter of 16 December addressed to Connecticut a personnel officer told her that she qualified as an English-language typist and could take the shorthand test again in Washington. On 29 December she answered from Connecticut that she need not go to Washington for the test since she would soon be going back to Rome anyway. She did so in February 1976, only to find no post vacant for her. She stayed on in Rome, in financial straits, until 2 August, when she began a three-month appointment with the Organization as a typist at grade G.2. On 30 October 1976 she was granted a fixed-term appointment as a stenographer at grade G.3. One year later she obtained a "continuing" appointment. She resigned from the staff on 31 March 1980. On 26 January 1979, however, she had written to the Assistant Director-General for Administration and Finance claiming reimbursement of her travel expenses and payment of the installation allowance and repatriation benefits. Her claims were refused on 21 March, and on 23 May she appealed to the Director-General. The appeal was rejected by a letter of 22 August from the Assistant Director-General. On 24 September 1979 she appealed to the FAO Appeals Committee claiming "non-local status" or at least travel and transport expenses, installation allowance and repatriation benefits. In its report of 9 June 1980 the Committee observed that since 1 February 1975 the Staff Rules had made no provision for the grant of non-local status and that the complainant had been appointed after that date. Nor did she qualify for the entitlements under the rules. Moreover, the circumstances which had justified granting them to other non-Italian General Service category staff were not present in her case. The Deputy Director-General informed her by a letter of 22 September 1980, which was notified to her on 4 October and is the decision she impugns, that the Director-General had accordingly rejected her appeal.

B. The complainant contends in her memorandum that in the circumstances set out under A above she was recruited by the FAO in the United States. FAO Staff Rule 302.7111 stipulates that "the Organisation shall pay the travel expenses of staff member ... (1) on initial appointment: (a) for internationally recruited staff when, at the time of appointment, they were not residing within commuting distance of the duty station". Having been "internationally recruited", the complainant believes she is entitled to travel expenses. Moreover, although non-local status was abolished in 1975 the FAO has since recruited several General Service category staff from outside Italy and granted them the benefits of such status, such as installation allowance, travel and transport expenses and repatriation benefits. There has therefore been unequal treatment of the staff. The complainant appends to her complaint items of evidence, particularly those relating to her internal appeal, which set forth her arguments in greater detail. She invites the Tribunal to order the FAO to refund the costs of her travel and transport of her personal effects from her home in Connecticut to Rome, to pay her the installation allowance at the current rate or

at the rate obtaining at the date of her recruitment, travel expenses on repatriation and the repatriation grant prescribed in Staff Regulation 301.16, and interest on those sums from the date on which payment fell due.

C. In its reply the FAO contends that the complainant was not "internationally recruited" within the meaning of Staff Rule 302.7111(i)(a). The term applies exclusively to staff members who had non-local status on 31 January 1975, and under Staff Rule 302.531 the benefits of international recruitment accrue only to General Service category staff within the definition of Staff Rule 302.40631, viz. those who have retained non local status since 1 February 1975, and not to other General Service category staff even if they were recruited outside Italy. In any case the complainant was recruited in Rome. Her recruitment did not even begin in the United States. She did not go to Rome at the FAO's request, and it had entered into no commitment towards her. Besides, even if she had been "internationally recruited" she did not qualify for travel expenses since at the time of appointment, on 2 August 1976, she was residing "within commuting distance of the duty station". Since she was not entitled to travel expenses on appointment, she failed, under Staff Rule 302.3091, to qualify for the installation allowance. Besides, the allowance is normally payable, under Staff Rule 302.3092, only if the appointment is expected to continue for a year or more: the complainant's initial appointment was for only three months. She also failed under former Staff Rule 302.7111(v) and Staff Regulation 301.16 to qualify for travel expenses on separation and for repatriation grant and consequently, under Manual provision 420.3, for the costs of transporting her personal effects. Lastly, there has been no inequality of treatment. Staff Rule 302.7111(i)(b), the relevant rule, provides for the payment of travel expenses on appointment "when, in the view of the Director, Personnel Division, such payment is required in order to recruit...". Since the complainant was recruited in Rome, no inducement was needed to recruit her. The Appeals Committee found that a few General Service category officials who had been granted appointment and repatriation travel expenses and installation allowance on an exceptional basis either had special language qualifications or had been recruited by FAO missions abroad, that they had all received the offer of appointment in their own countries, and that there were not such exceptional circumstances in the complainant's case. The FAO accordingly invites the Tribunal to dismiss the complaint as devoid of merit.

D. In her rejoinder the complainant challenges the FAO's version of the facts and maintains that she was recruited in the United States: if the FAO did not want to recruit her there it should not have written to her in Connecticut telling her that she qualified as a typist and suggesting a test in Washington. The grant of benefits to only a few non-Italian recruits after 31 January 1975 made for inequality. Besides, some of them were recruited in similar circumstances. The term "international recruitment" should be given its natural meaning, namely recruitment from outside the duty station, and the complainant believes she therefore qualifies for the benefits under Staff Rule 302.7111(i)(a). When she was tested in Rome she was not residing there. Miss Hertz and Miss Warren travelled to Rome at their own expense to take the test, and yet they had their expenses repaid. Moreover, there was an irregularity in the Appeals Committee proceedings in that the Committee heard evidence, in her absence, from FAO officials. She accordingly presses her claims.

E. In its surrejoinder the FAO points out that the term "internationally recruited" in Staff Rule 302.7111(i) should be read in the context of the Staff Rules as a whole and therefore cannot bear the meaning the complainant gives to it. It is clear on the evidence that the complainant was not recruited in the United States. She twice went to Rome on her own initiative. The FAO is naturally interested in having a list of qualified secretaries for possible recruitment, and the mere fact of testing the complainant gave her no reason to believe that she was being recruited. It was only exceptionally that Miss Hertz and Miss Warren had their expenses repaid, because they had been sent offers of employment in England. As for the allegation of a procedural irregularity in the Appeals Committee, the Committee heard evidence from personnel officers, not as representatives of the Organization, but on the nature of the policy of recruitment of General Service category staff, and the Committee had not considered the presence of the parties to be necessary. The FAO again urges the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS:

Appeals Committee proceedings

1. The complainant objects that the Appeals Committee heard evidence from FAO officials without notifying her beforehand or inviting her to attend.

The argument is sound in principle. A judicial body is bound to respect the right to a hearing, and it is a breach of that right to take evidence without the parties' knowledge. The Appeals Committee is a judicial body in the wide sense, and if it wishes to hear evidence it should invite the parties to attend and to comment. It is immaterial that in

this case it merely heard evidence from FAO officials on general matters such as the interpretation and application of staff rules: the complainant might have wished to comment, and she had the right to do so.

In this instance, however, not only has the complainant had every opportunity to state her case in these proceedings but the Tribunal will decide proprio motu the points on which the Appeals Committee heard evidence from the officials. The flaw in the appeal proceedings is therefore of no consequence and is to be regarded as corrected by the present proceedings.

The application of Staff Rule 302.7111(i)

2. The complainant cites Staff Rule 302.7111(i)(a) in support of her claims. The Tribunal will therefore begin by considering the claims in the light of that rule. But it will also take account proprio motu of Staff Rule 302.7111(i)(b) and comment on the question of applicability.

(a) According to Staff Rule 302.7111(i)(a) the FAO shall pay the travel expenses incurred on initial appointment by "internationally recruited" staff members who at the time of appointment were not residing within commuting distance of the duty station. Staff Rule 303.28 defines "commuting distance" as the distance within which a staff member can conveniently travel each day between the place of residence and the place of work. But the Tribunal need not consider whether at the time of her appointment the complainant was resident within commuting distance. The plea will fail if she was not "internationally recruited" within the meaning of Staff Rule 302.7111(i)(a).

She argues that the words should be given their normal and natural meaning: since she was resident outside Italy at the time of appointment she had to change residence from one country to another to take up her duties in Rome, and her recruitment was therefore "international".

The FAO submits that she was not "internationally recruited". Its argument runs: the words denote only Professional and higher category staff and General Service category staff with non-local status; under Staff Rule 302.40631 a General Service category staff member is non-local only if recognised as such on 31 January 1975 and in continuous service since; the complainant became a General Service category member after 31 January 1975 and has never held non-local status; and she was therefore not "internationally recruited".

If these words stood by themselves the complainant's argument might well be preferred to the FAO's, but they must be interpreted in their context in the Staff Rules. There are two reasons why the FAO's view is preferable. First, it is based on Staff Rule 302.405, which states that all Professional and higher category staff are "internationally recruited", and on Appendix A to the Staff Rules, which describes as "internationally recruited" the non-local staff in the General Service category. Secondly, only the FAO's view will square with Staff Rule 302.40631, the effect of which is that, not having held non-local status on 31 January 1975, the complainant is a local staff member. It would be inconsistent to treat a staff member as both local and "internationally recruited". Staff Rule 302.7111(i)(a) therefore does not apply.

(b) Staff Rule 302.7111(i)(b) says that the FAO shall also pay the travel expenses of other staff when, in the view of the Director, Personnel Division, such payment is required in order to recruit them. The complainant's claims fail under this head as well.

She volunteered her services. By her own account she wrote two letters to that effect, one from Ireland in September 1974 and the other from the United States in October 1975. She was then warned that she would have to pay the expenses of travel to take tests. She was sent an application form, which she filled in and returned. During a visit to Rome, on 9 and 11 December 1975, she passed a test in typing and failed one in shorthand. The FAO then wrote to her saying that she might try the shorthand test again in Washington. Instead she went again to Rome, and there, in February 1976, she qualified as a shorthand typist. Her initial appointment began on 2 August 1976.

Thus not only did she offer her services, but she took the tests of her own accord, knowing full well that she would have to meet her own expenses. Nor did she make repayment a condition of her acceptance of appointment. Thus it cannot be said that the payment she is now claiming was required in order to recruit her, and Staff Rule 302.7111(i)(b) is also inapplicable.

The complainant argues that in so far as the application of the rule depends on the view taken by the Director of Personnel it is arbitrary. The point need not be settled, but in fact it is mistaken. The Director of Personnel does

enjoy some discretion under the rule, but he cannot exercise it as he pleases: he has to consider in each case whether or not payment was required in order to recruit, and the exercise of his discretion is subject to review by an administrative as well as by a judicial body.

Unequal treatment

3. The complainant objects that she was not given the same treatment as other staff members who received under Rule 302.7111(i)(b) the benefits she was refused. The FAO answers that the circumstances in which the others were appointed warranted applying the rule in their favour.

As the Tribunal finds below, although the complainant was treated differently, the facts of her case were different, and there was therefore no breach of the principle of equality.

(a) The FAO granted the benefits provided for in Staff Rule 302.7111 and other rules to staff members who had special skills such as a knowledge of Chinese or Arabic, or who - for example Mr. Goolamallee - were to do specialised work. There is keen demand for such staff, and they would probably not have gone to Rome had they not been led to expect the benefits they received. Moreover, Mr. Goolamallee was given a formal promise of repayment, and that made his claim even stronger. The staff whom the complainant regards as privileged were needed to provide special services, and since they were not in the same position there were grounds for different treatment.

(b) From 1977 the FAO sent missions abroad to recruit staff whom it could not find in Italy. Unlike the complainant, they were invited to join the staff and had not already volunteered their services. It was therefore only reasonable for them to expect the benefits the complainant was refused.

(c) lastly, staff members such as Miss Warren and Miss Hertz received offers of employment from the FAO while they were resident abroad. They had a reasonable expectation of repayment of their travel expenses and of other benefits. They were therefore in a position which was similar to that of staff recruited by missions and which was therefore different from the complainant's. Miss Warren and Miss Hertz were granted the benefits, not on appointment, but only after claiming them. But the complainant is mistaken in inferring that it was wrong to grant them. The text of the correspondence submitted in evidence shows that there was delay over paying the benefits because of ambiguity in the offer of appointment.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner