

FIFTY-SIXTH ORDINARY SESSION

In re PEREZ DEL CASTILLO

Judgment No. 675

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. Gonzalo Pérez del Castillo on 24 August 1984 and corrected on 12 September, the FAO's reply of 12 December 1984, the complainant's rejoinder of 1 March 1985, the FAO's surrejoinder of 19 April, the further statement supplied at the Tribunal's request by the complainant on 18 April and the FAO's observations thereon of 10 May 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.151 and .1572, Staff Rules 302.4112 and 302.907 and Manual section 307;

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 Uruguayan agronomist born in 1946, joined the FAO in Rome in 1969 at grade P.1 under a fixed-term appointment. He was granted 13 extensions of appointment and had reached P.4 by 1978. As from 1 July 1980 he was seconded for two years to the United Nations Development Programme (UNDP) on an appointment which was to expire on 30 June 1982. His duty station was Santiago de Chile. The UNDP wanted extension of his secondment by two years, but in May 1982 the FAO said they had decided to extend neither his appointment nor his secondment. On 26 May he sent a telex to the Director of Personnel in Rome claiming payment of the termination indemnity to which he said a permanent staff member would have been entitled in the circumstances. By a telex of 2 June the Director refused, a decision he repeated, after further correspondence, in a telegram received by the complainant on 2 August. On 10 September the complainant appealed to the Director-General. The Assistant Director-General for Administration and Finance rejected his appeal on 6 October, and on 4 November he appealed to the Appeals Committee. In an undated report the majority of the Committee recommended rejecting the appeal but considering the applicability of Judgment 544 of the Tribunal. By a letter of 2 May 1984, which the complainant received on 21 June and which is the impugned decision, a Deputy Director-General informed him that the Director-General considered that Judgment 544 did not apply and rejected the appeal.

B. The complainant observes that he had given 13 years' satisfactory service, his post had not been abolished, and he had been seconded to another organisation to gain field experience. His termination ought therefore to have been based on decisive facts. It constitutes an abuse of authority because the FAO has never given him any explanation, not even in the course of the internal appeal proceedings. There was breach of established procedures, in particular in that the FAO ignored the inter-agency agreement which safeguards the return rights of the seconded staff member. The FAO did not offer him his former post back, or look seriously for any other for him, or arrange his transfer to the UNDP, or even agree to a formal extension of secondment. He says that a personal letter which he received on 15 May 1982 from Mr. Yriart, an Assistant Director-General, led him to expect extension of the secondment. The FAO is in bad faith in relying on Staff Regulation 301.1572: "No termination indemnity shall be paid to ... a staff member whose fixed-term appointment is completed on the expiration date..." It should have granted him the indemnity under Staff Regulation 301.151, which provides for awarding it to "staff members whose appointments are terminated upon abolition of post, reduction of staff, or in the interest of the good administration of the Organization". Besides making his 13 years at the FAO a bad investment of time, the decision damaged his career prospects and caused him the loss of various benefits and entitlements and financial security. His case was so handled as to arouse suspicion that he was being got rid of for mysterious reasons. He claims the termination indemnity under 301.151, plus interest thereon from June 1982, as part compensation for the denial of his legitimate expectations of employment, and damages for material and moral injury amounting to 50,000 United States dollars.

C. While not disputing the basic facts of the case, the FAO replies that the complainant misreads and distorts them.

His appointment was correctly terminated under Staff Rule 302.907: "A fixed-term appointment shall expire automatically and without prior notice on the expiration date ... Separation as a result of the expiration of any such appointment shall not be regarded as a termination of appointment within the meaning of the Staff Regulations and Staff Rules." There was no abuse of authority: no explanation need be given for non-renewal, a matter at the Director-General's discretion. The complainant's former post, though vacant at the time, was to be altered in content and moved to another unit. He produces no evidence to show that the FAO ever promised the UNDP or him that his secondment would be extended. Mr. Yriart's letter was personal and did not bind the Organization. There was no breach of the inter-agency agreement, which does not safeguard any right to "return" to the seconding organisation, but "rights of employment", and these did not go beyond the rights conferred by his fixed-term appointment. There is no proof of his contention that the FAO did not try to find him other employment. His claim to the indemnity is unsound: 301.157 says it shall not be paid to "a staff member whose fixed-term appointment is completed on the expiration date". His claim to damages should also fail: he sustained no material injury since as from 2 July he held a two-and-a-half year appointment with the UNDP, also at grade P.4. On separation he was paid a repatriation grant of \$19,709, and he had other benefits, as the FAO explains.

D. In his rejoinder the complainant enlarges on his contentions that the Director-General's decision was tainted with abuse of authority and in breach of established procedures, including the inter-agency agreement, and that no serious attempt was made to place him elsewhere. The decision, for which no sound reason has yet been revealed, was a blemish on his record, played havoc with his and his family's life, and threatens to dog him till the end of his career. He discusses the events leading up to the decision and concludes that he was given to understand that his secondment would be extended and was told too late of the refusal for him to be able to exercise in time his right to return to the FAO. He cites Tribunal judgments in support of his plea that the FAO was in breach of its duty to protect the reputation and dignity of its staff. He presses his claims.

E. In its surrejoinder the FAO develops the pleas in its reply and seeks to refute the arguments in the rejoinder, in particular explaining why the Tribunal cases the complainant cites are not relevant. It submits that his claim to the indemnity is unsound on any true reading of the rules and he has failed to prove any injury for which it is liable.

CONSIDERATIONS:

THE FACTS

1. The complainant is a Uruguayan who went to an Australian university where he got a degree in agronomy. On his way back home he was interviewed in Rome by the Organization and later given a place in their Junior Professional Career Training Programme, whose object is to recruit young professionals for a career in the Organization. This was in 1969 and he was then 22. After his training he was given an appointment for a fixed term. He had ten successive extensions of his term, progressing from P.1 to P.4. When in 1976 he asked about a conversion of his contract from "fixed-term" to "continuing", since, as he said, all his colleagues had Permanent Appointment status, he was told that his post was classified as "continuing: to be filled on a fixed-term basis", the object of this, he was told, was to achieve "a rotation in these posts with officers coming in from the field".

2. In June 1980 he was offered and accepted a secondment for two years to take up a position in Chile with the UNDP. Under the inter-agency agreement, which is set out in the FAO's Staff Manual in section 307, the effect of the secondment was to suspend the complainant's contractual relationship with the FAO (307.9a) and impose upon the UNDP the cost of his salary, allowances and pension fund contribution (307.33a). But he retained his right of employment in the FAO (307.2d). His current fixed term was then being extended to 30 June 1982 and he was informed in writing by the FAO Director of Personnel that his return rights at the FAO were guaranteed until 30 June 1982, but not beyond.

3. The inter-agency agreement provides (307.2d) for an extension of secondment by agreement among all the parties concerned. In January 1982 the UNDP asked the complainant to accept an extension for another two-year period and he agreed. Mr. Vegega, the UNDP Regional Director in Latin America, approached Mr. Yriart, the Assistant Director-General in the FAO who had negotiated the first secondment. In April Mr. Yriart told him that a request for secondment would be considered favourably. On 4 May there was another telephone conversation in which Mr. Vegega was told to send the request for secondment to the Director-General. But on 10 May Mr. Yriart discussed the request with the Director-General and was told that it should be refused.

4. Mr. Vegega, as he was later to tell Mr. de Meredieu, the head of the Office of the FAO Director-General (see

paragraph 5 below), had been under the impression that the secondment would continue and the UNDP had made its arrangements with that in mind. Likewise the complainant had arranged for his continued stay in Chile. The first communication he himself received from the Organization was to tell him not only that he would not be seconded but also that he had lost his job. It was a notice that his contract would not be renewed and that he would be separated from the service on 30 June; separation travel would be paid for from Chile to Uruguay direct; there would be no need for him to come to Rome. The notice is not in the dossier and there is a difference of opinion about when he received it. The Organization says 12 May, "sufficiently in advance": the complainant says 20 May. The first reference to it in the dossier is in a telex of 26 May from the complainant to the Director of Personnel. The complainant's first object was to ask for the indemnity that would be given to a permanent staff member; unfortunately for him, the Staff Regulations do not provide for any indemnity at the end of a series, however prolonged, of fixed terms. His second object was to obtain an authorisation for travel to Rome. He had not, he said, been given the reason for the non-renewal; moreover, his dependants and household goods were in Rome and he had much to organise. This was answered on 12 June by a brief telex refusing both the indemnity and the travel. The complainant decided to travel to Rome at his own expense and notified the Organization that he would be in Rome on 21 June.

5. Meanwhile, on 4 June, Mr. Vegega, who was in Rome, had an interview with Mr. de Meredieu. The note he made of the conversation reads in part as follows.

"I told Mr. de Meredieu that our impression had been that the secondment arrangement will continue for a while, and that therefore we made arrangements with that in mind. We regretted the lack of early enough notification, so that we could have adjusted to the changing circumstances. As of now, when the UNDP has a very strict hiring freeze, it will not be possible to absorb Mr. Pérez del Castillo in the UNDP, while his sudden departure will create for us very serious management problems in the office in Chile."

But Mr. de Meredieu had already said that the decision not to renew the contract "had been made some time ago, was totally independent of his secondment and would not be reviewed".

6. Some time in June the complainant obtained an interview with the Director of Personnel when he was given the following information.

1. The Organization did not see fit to agree to the extension of his appointment proposed by the UNDP.
2. He was being separated from FAO service as of 30 June 1982 by a decision of the Director-General in the use of his prerogative which leaves to his discretion the extension of fixed-term appointments.
3. No explanation could be given as to the motives leading the Director-General to his decision save that the separation was not due either to unsatisfactory services or to cancellation of post.
4. He could not be offered a return to the post he had occupied nor to any other post.

The interview was not entirely fruitless. The Director agreed to reimburse him for his travel to Rome and to pay his travel expenses from Rome to Uruguay. The complainant's request for an indemnity on separation had already been refused; the Director promised to place a renewed request before the Director-General personally. This request was later presented and rejected.

7. The complainant then returned to Chile to complete his interrupted work for the UNDP. They told him that because of the recruitment freeze they could not give him a contract. He was still in Chile on 16 September 1982 when he was visited by the UNDP Director of Personnel and Mr. Vegega. They told him that the efforts to regularise his situation had not been successful and that he should actively seek other employment. But on 29 April 1983, after what he describes as a damaging and costly period of uncertainty, the UNDP gave him a contract which was made retroactive to 2 July 1982.

THE LAW

8. The complainant now claims compensation for the loss of employment expectation and alleges that the failure to give a reason for the non-renewal constituted an abuse of authority. The Organization replies that no reason or explanation is required when under the Staff Regulations the appointment expires automatically. In his rejoinder the complainant makes a claim for what is in effect moral damage for the manner of his termination and his

treatment by the Organization. The case therefore raises the question whether the decision was vitiated, either by error of law or by abuse of power. The Tribunal will consider both grounds together since they are closely connected on the facts. The failure to give a reason will in many cases lead to the conclusion either that the Director-General mistakenly thought that he held an arbitrary power to do as he liked or that his decision was in fact arbitrary or wrongly motivated.

9. Staff Rule 302.4112 provides that a fixed-term appointment shall be an appointment for a continuous period of one year or more and shall have a specified expiration date. Staff Rule 302.907 provides that a fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. The Organization stresses the word "automatic" in the latter rule, but in truth the two rules are on this point the same. There is no disputing that as a matter of law a specified term expires at the end of its last day without the need for either party to take a decision to that effect. What the Director-General has to take a decision about is something that is technically quite different. It is a decision about whether or not the contract shall be renewed. In practice renewal is much the same thing as extension of term, but in law what happens on a renewal is that the old contract expires and a new contract is created in the same terms as the old.

10. Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly.

11. Such a decision is discretionary. But this does not mean that it can be arbitrary or irrational. There must be a good reason for it and the reason must be given. The consequences of the failure to give any reason have been stated in paragraph 8 above. In *re Bordeaux*, Judgment No. 544, the decision not to renew was quashed by this Tribunal as an error of law. This decision was mentioned in the Appeals Committee's recommendation to the Director-General in this case. The Director-General, in giving the decision impugned, distinguished the judgment in *re Bordeaux* on the ground that it applied to the Staff Regulations of CERN, which differ from those of the defendant Organization with respect to fixed-term appointments. Thereby he fell into a further error of law. As explained above, the rule that the non-renewal of a staff member's contract is not automatic but must be the subject of a reasoned decision does not depend upon the Staff Regulations. It is an implication or principle of law. There is nothing in the text of the Staff Regulations of CERN and the FAO to make the application of the principle different in the two cases.

12. The decision impugned must therefore be quashed for error of law. It is attacked also as one that is vitiated by prejudice and an abuse of power; it is for this aspect of it that the complainant claims compensation for moral damage. He alleges that his abrupt termination was an "attempt to ruin the career of an international civil servant and play havoc with his personal life for no reason at all". There are two features of the case which give support to this interpretation of the Organization's behaviour. Before examining these features it is desirable to consider more fully the circumstances in which the complainant was terminated.

THE LACK OF REASON

13. The only explanation, if such it can be called, given to the complainant for the non-renewal was contained in the interview recorded in paragraph 6 above. This record is taken from paragraph 8 of the complainant's statement of facts in these proceedings. No comment on it is made in the FAO's reply where there is no suggestion that a reason for the non-renewal was ever given to the complainant himself. In its reply and surrejoinder the Organization gives a reason for the non-renewal which, it contends, was not arbitrary. This does not answer the complaint in so far as it is based on the non-renewal and nothing more. The staff member is entitled to know the reason at the time; it is only with that knowledge that, when he is seeking other employment, he can answer the inquiries of prospective employers. In so far, however, as the complaint is based on abuse of power, it is relevant to

know whether or not there was an unstated reason. But a statement that appears for the first time in the course of legal proceedings and then only as part of the argument cannot carry the same conviction as one that is immediately and readily given.

14. The reason given in paragraph 8 of the reply is that although at the time of the non-renewal the complainant's previous post was vacant, it was known that the post requirements were to be modified substantially and the post itself to be transferred to another unit. No corroborative detail is given and it is odd that the restructuring coincided exactly with the complainant's return. It would not, of course, be odd if the Organization was anticipating an extension of the secondment. This points to the heart of the matter. Since the complainant's previous post was, as is alleged, being made unsuitable for him and since, as is alleged, there was no other post available for him in the Organization, the obvious solution was the extension of the secondment. Why was it not adopted? The Organization's answer to this is as follows.

15. The secondment in 1980 was arranged as part of an exchange which included the secondment by the UNDP to the FAO of one of their staff, Mr. MacEachen. It is another coincidence that in 1982 not only was the complainant's post being changed to make it unsuitable for him but so at the time was Mr. MacEachen's. If the secondment was continued, the Organization argues, the FAO would have to keep Mr. MacEachen for whom it had no use and pay his salary. But this explanation does not fit the facts. At the interview on 4 June (paragraph 5 above) Mr. Vegega told Mr. de Meredieu, as he recorded in his note, that the UNDP was "completely flexible" and ready either to continue Mr. MacEachen's secondment or to receive him back.

CONCLUSION

16. The Tribunal can now examine the two features mentioned in paragraph 12 above. The first is the manner in which the termination proceedings were conducted: the second is the apparently wanton attempt to block the alternative means of livelihood open to the complainant.

17. As to the first, the stark fact is that a family man of 35, who had spent the whole of his working life in the service of the Organization without any criticism of his performance, was given hardly more than a month's notice to get out and not a cent more than his strict entitlement. He was offered no letter of explanation or regret nor any commendation of his services such as might have helped him to get another job. He was in the field, far from headquarters. The Organization's plans for him did not contemplate that he should, save at his own expense, come to headquarters to discuss his position or to make arrangements for his wife and child who were in Rome. The question on this aspect of the case is not whether such treatment was lawful but whether it was of such callousness as to suggest that some prejudicial influence was at work.

18. Such a suggestion is strongly reinforced by the Organization's attitude to the complainant's secondment. It had from the first been contemplated that the secondment might be extended beyond two years. Indeed, a note on the file of 6 May 1980 envisages the distinct possibility that, when it ended in 1982, the complainant might ask for a permanent transfer. It would therefore have been natural for the defendant Organization, if they did not want the complainant back, to have responded at once to the approach by the UNDP. Instead, the Organization waited until almost the last possible moment which decency would permit before notifying the other interested parties. The position then was that an extension of secondment would secure the complainant against at least temporary hardship, release the UNDP from its administrative difficulties and cost the Organization nothing. All that was necessary for the secondment was that the complainant's contract should be formally renewed. The Organization's attitude was simply that the decision not to renew was final and could not be reviewed.

19. This makes a strong prima facie case that some pernicious influence was at work. It is of course possible that all this, as well as the maltreatment recorded in paragraph 12 above may have been caused simply by bureaucratic rigidity. But no explanation of this sort or of any other sort has been given to the complainant or is to be found in the dossier. The silence of the Organization leaves the Tribunal with no alternative to the conclusion that the decision impugned was wrongly motivated and an abuse of power.

RELIEF

20. The main relief for which the complainant asks is compensation for the unlawful termination of his contract and for the manner in which it was effected. There are minor heads of compensation, but since any sums recovered under them would diminish the award under the main head, it is unnecessary to examine them. The complainant

has not proved any direct monetary loss. Since his contract with the UNDP was made retroactive, there has been no loss of salary. The gains and losses resulting in minor ways from the change of employment are not sufficiently significant to be treated separately from the main claim for moral damage.

21. The Tribunal holds in the circumstances that the complainant sustained especially grave moral injury and that he is entitled to damages which it sets *ex aequo et bono* at 15,000 United States dollars.

DECISION:

For the above reasons,

The Director-General's decision of 2 May 1989 is quashed the complainant is awarded the sum of US\$15,000 as compensation and the sum of \$4,000 as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner