SIXTY-FOURTH SESSION

In re ROSSETTI

Judgment 910

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Penelope Rossetti against the Food and Agriculture Organization of the United Nations (FAO) on 4 August 1987, the FAO's reply of 20 November 1987, the complainant's rejoinder of 29 January 1988 and the FAO's surrejoinder of 10 March 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.16 and 301.136, FAO Staff Rules 302.3041, 302.4061, .4062 and .4063, 302.53, 302.531, 302.711 and 303.131 and FAO Manual provisions 316.111(iv), 316.12 and 331.311;

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

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

A. An account of FAO policy on the grant of non-local status appears in Judgment 506 (in re Hoefnagels), under 2 to 4.

The complainant, an Englishwoman married to an Italian, held several short-term contracts with the FAO at its headquarters in Rome in 1973 and 1974. As from 13 January 1975 she was granted another appointment at grade G.3 and had it extended until 31 December 1975. On 1 January 1976 she got a fixed-term appointment and on 1 January 1980 a continuing one. Since 1 April 1983 she has served at grade G.4. She has always had local status.

In a letter of 18 December 1985 to the Director-General she claimed non-local status as from 13 January l975 on the strength of Judgments 506, 676 (in re Brocard) and 679 (in re Redfern), which granted such status to other FAO headquarters staff in the General Service category. After reminders the Assistant Director-General for Administration and Finance wrote to her on 18 June 1986 to say that the Director-General had rejected her appeal under Manual provision 331.311 because she had never been given a non-local appointment or any expectation of one. On 15 July she appealed under Staff Rule 303.131. In its report of 10 March 1987 the Appeals Committee made no recommendation, some members being in favour of her claim and others not; it simply put both points of view. In a letter to her of 14 May 1987, the final decision she impugns, the Deputy Director-General said that since she had had no "realistic expectation of conversion to non-local status" the Director- General had rejected her appeal.

B. The complainant discusses the definitions of local and non-local status in Staff Rules 302.4061 and 302.4063 and the rules on the benefits of non-local status in 302.3041, 302.53, 302.531, 302.711 and 302.4062.

(1) She alleges that while she was under contract in 1974 the Personnel Division told her that General Service category staff like herself got non-local status on completing twelve months' unbroken service. When she went back on 13 January 1975 the FAO did not warn her, as it ought, that it had since changed its policy and would no longer grant non-local status to staff in her position. The test applied by the Tribunal in the earlier cases was whether there had been breach of good faith in that the staff member had or might have been informed of his eligibility for the status. The complainant alleges such breach in her case.

(2) Only in 1974 did the FAO start granting local status to all General Service category staff under local appointments, and on 29 October 1974 the Programme and Finance Committee of the FAO Council recommended making that the policy. The FAO was wrong to make that the critical date since the Council had not yet approved the recommendation. The material date for the change in policy was 1 February 1975, the one the Council itself approved. The new policy should not have been applied to someone who, like the complainant, was recruited earlier.

(3) She alleges breach of equal treatment. Several secretaries recruited from Brussels in November and December

1974 were granted non-local status, and so were others, including Mrs. Brocard, Miss Hoefnagels and Mrs. Redfern, whose position did not materially differ from her own. She names three staff members and says there were others who, though recruited after 1 February 1975, got some of the benefits of non-local status.

(4) She alleges that the form of her appointment on 13 January 1985 was improper: the FAO put her on a "conference" appointment to avoid giving her a fixed-term one.

She claims non-local status and all the benefits thereof as from 13 January 1975 and says she is "querying" FAO practice.

C. In its reply the FAO distinguishes the complainant's case on the facts from the others she relies on.

When recruited in 1974 she was properly granted local status because she was then resident within commuting distance of her duty station. When she left in August 1974 she had no prospects of further employment and could therefore have had none of obtaining non-local status. She was not in the course of being recruited before the end of October 1974. By the time she was reappointed in January 1975 the practice had changed and no personnel officer could possibly have told her then that she might get the status. Why should she have been warned of the change in policy? After an absence of five months it was for her to find out what she might expect, not for the FAO to tell her what she might not.

There was no breach of equal treatment. The others who did get non-local status were or might have been informed before the end of October 1974 that they might qualify for it. As for those who the complainant says got some of the benefits of the status after 1 February 1975, she has never alleged that she qualified for such benefits under Staff Regulation 301.16 and Staff Rules 302.711(i) and (vi).

The sort of appointment to be granted is at the Director- General's discretion and there was no flaw in the exercise of his discretion. To "query" FAO practice does not constitute a valid claim.D. In her rejoinder the complainant again alleges confusion in FAO policy and breach of equal treatment. The policy cannot have been changed in October 1974 since the change did not properly take effect, by virtue of the Council's decision, until 1 February 1975. Staff cannot be expected to learn by hearsay of changes in their rights. It was wrong to give her short-term contracts to do continuing work. When recruited in 1973 her permanent place of residence was London, not Rome. She was led to believe in August 1974 that she could probably go back soon and the expectation of non-local status weighed heavily with her. She was "informed of the practice of obtaining non-local status". The FAO fails to bear out its contention that she was not told she might get such status. She presses her claim to the grant of it as from 1 February 1975, or at least 1 February 1976, when she completed twelve months' unbroken service.

E. The FAO addresses three issues in its surrejoinder. (1) According to the job application form the complainant filled up on 11 May 1973 she was then living in Rome. She was resident there in June 1973 when she took up duty and until she went back in 1974. In an FAO form she filled up on 24 September 1973 she stated her permanent home address to be Rome. When reappointed in January 1975 she was still in Rome and another form she filled up on 20 Janaury said so. The question of residence being one of fact, she would not have been entitled to non-local status anyway. (2) She does not explain what she means by "informed of the practice of obtaining non-local status". She has never said she was actually told she would get it. She did not even inquire about the matter. (3) Since she cannot prove any expectation she argues that the FAO was bound to tell her she would not get non-local status. The argument fails because the case law puts the onus on the staff member and no special circumstances shifted it to the FAO in this case.

CONSIDERATIONS:

1. In general the status of local and non-local staff members at the FAO used to be determined by nationality under former Staff Rules 302.40611 and 302.40621. The exception was staff on short-term contracts: their conditions of employment were determined by the Director-General under Staff Regulation 301.136 and in accordance with Staff Rule 302.011 the staff rules applied to them only to the extent indicated in the FAO Manual or in the terms of their appointment. But the Organization's practice used to be to allow staff on short-term contracts the possibility of acquiring non-local status on completion of 12 months' continuous service. Under former Manual provision 316.111(iv) employees on special service contracts were not considered to be staff members.

2. A change of policy was recommended by the Finance Committee of the FAO Council in October 1974: all staff

in the General Service category were to be local, regardless of nationality and place of recruitment, but existing entitlements were to be preserved. The Council having approved the recommendation, former Staff Rules 302.40611 and 302,40621 were repealed as from 1 February 1975 and replaced by a new provision, Staff Rule 302.40631, prescribing non-local status for staff in the General Service category recognised as non-local staff at 31 January 1975 under the staff rules then in force.

3. The change in policy prompted several staff members to file complaints with the Tribunal.

In Judgments 505 (in re Clegg-Bernardi) and 506 (in re Hoefnagels) the Tribunal drew a distinction between those who had short-term appointments before the end of October 1974 and those who were recruited after the end of October 1974 but before l February 1975, the critical date being 31 October 1974. Those who were recruited before the end of October 1974 were or might have been informed of the possibility of qualifying for non-local status and accordingly were entitled to non-local status in accordance with the practice. Those who were recruited after that date were not so informed and therefore had no reason to expect non-local status and could not claim it by virtue of the principle of equality. Mrs. Clegg-Bernardi failed because she was employed on 19 December 1974, after the critical date; Miss Hoefnagels succeeded because she was recruited before the date.

In two other cases, on which the Tribunal ruled in Judgments 676 (in re Brocard) and 679 (in re Redfern) the complainants were at the time of the change in policy serving under special service appointments, not short-term contracts. The Tribunal held that the point at issue was whether each of them had good reason to expect non-local status on obtaining a fixed-term appointment. In the special circumstances of each case the Tribunal held that each was entitled to non-local status. In Judgment 680 (in re Sadek) the Tribunal held that the complainant, though also serving under a special service agreement, had failed to show that he had been or might have been informed of eligibility for non-local status, and he was therefore unsuccessful.

The ratio decidendi of all cases heard by the Tribunal was whether there was or might have been reasonable expectation of acquiring non-local status in accordance with the practice.

4. The facts of this case are that the complainant was employed on short-term appointments, first in September 1973 for two weeks and then in 1974 from 22 April to 31 May and from 12 June to 12 July. Then she worked under a special service agreement until 16 August 1974. At that time she had no prospect of further appointment and went home to England. She returned to Rome in January 1975 and approached the Organization. She was re-employed on 13 January 1975 on "conference lines" on a series of short-term appointments until 31 December 1975, when her contract was converted to a fixed-term one. Later it was converted to a continuing one as from 1 January 1980.

5. The decision she impugns is one the Director-General took on 14 May 1987 not to grant her non-local status as from 13 January 1976 on her completion of one year's continuous service. She says that during the earlier period of her employment ending in August 1974 she was informed of the practice of conversion to non-local status on completion of one year's continuous satisfactory service and that when she returned to Rome in January 1975 expectations of non-local status were uppermost in her mind. When she was re-employed in January 1975 she was not told that there had been a change in policy and she contends that she should have been.

6. It is not reasonable for a former employee who had been absent for five months to assume that there had been no change in policy affecting the rights of employees during the period of her absence. If the prospect of non-local status was indeed an important factor in her applying for further employment it was incumbent on her to find out whether the same practice applied as before. Had she done so she would have been told that it did not. Since she failed to do so she may not rely on the Organization's failure to inform her of the change since there was no such duty on the Organization. Her re-employment in January 1975 after five months was a new contract, not an extension of an earlier appointment after a negligible break. Since her employment began after 31 October 1974 she falls into the second category the Tribunal identified in Judgment 505: she did not have non-local status on 31 January 1975 and she is not entitled to it.

7. Her plea that when she was employed in January 1975 she should have been employed as non-local staff is not sustainable. She travelled to Rome and applied for employment. At the time of her application she was residing within commuting distance and the Organization were entitled to recruit her as local staff under Manual provision 316.12. The Director- General has discretion under Staff Regulation 301.136 to determine the kind of appointment to be granted, the exercise of his discretion was not tainted by any alleged flaw, and the nature of the complainant's

appointment cannot now be challenged.

8. The complainant further contends that non-local status was granted to others whose position was similar to her own, namely Mrs. Borradaile-Cicconi, Mrs. El Kharboutly and Miss Martí. These other cases were cited in Judgment 505 and their circumstances were not similar to the complainant's. Mrs. Borradaile-Cicconi was recruited as a short-term official in September 1974. Mrs. El Kharboutly was given a short-term appointment on 1 April 1974, left on 21 December 1974 and, after a negligible break, was reappointed on 13 January 1975. Miss Martí held non-local status for a period and was then reappointed on 4 November 1974 as a result of negotiations begun the month before. All three were either already employed or in the process of being engaged at the end of October 1974, and all three were or might have been informed before the end of October 1974 of the possibility of their qualifying for non-local status.

9. The complainant alleges that the practice of recruiting non-residents as short-term "locals" was improper. The Tribunal has already ruled on the issue against the complainants in Judgments 676, 679 and 680. The complainant's case is no different. The series of contracts on "conference lines" under which she was employed in 1975 and the short-term appointment which followed have long since ended. They were not challenged while in force and are beyond challenge now.

10. The complainant cites the case of three staff members who after 1 February 1975 were granted some international entitlements which she was refused. The benefits mentioned were granted under Staff Rules 302.3091 and 302.7111(b)(i) and (vi) to persons recruited abroad: the complainant does not qualify under those rules.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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