

SIXTY-FIFTH SESSION

***In re* FELLHAUER**

Judgment 937

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gerhard Fellhauer against the United Nations Food and Agriculture Organization (FAO) on 4 December 1987 and corrected on 24 February 1988, the FAO's reply of 6 June, the complainant's rejoinder of 8 September and the FAO's surrejoinder of 21 October 1988;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, FAO Staff Regulations 301.10, 301.102 and 301.154, FAO Staff Rules 302.53, 302.7335 and 303.01 and FAO Manual paragraphs 330.15 and 330.24;

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. The complainant, a citizen of the United States, joined the staff of the FAO on 31 March 1968 under a continuing appointment at grade P.3. He was promoted to P.4 in 1972. On 14 November 1984 the findings of an inquiry into his claims to travel expenses and leave were submitted to the Assistant Director-General in charge of Administration and Finance. He was asked to explain several anomalies the inquiry had brought to light. The Organization found his answers unsatisfactory and in a minute of 5 September 1985 the Director of the Administrative Services Division charged him with serious misconduct and warned that the FAO had it in mind to dismiss him in accordance with Staff Regulation 301.10, Staff Rule 303.01 and Manual paragraphs 330.15 and 330.24. He answered on 22 October 1985 with a request for review. By a minute of 19 February 1986 the Assistant Director-General informed him of his dismissal for misconduct under Manual paragraph 330.24 as from the date on which he got the minute; he was entitled to compensation in lieu of notice but the sums he owed the Organization would be subtracted. On 26 February he wrote to the Director-General claiming six months' pay in termination indemnity under Regulation 301.154. By a letter of 12 May the Assistant Director-General rejected his claim on the Director-General's behalf and said that the cost of airline tickets he had been given for travel on home leave in 1982 and 1984 and for his son's repatriation in 1983 would be docked from his repatriation grant to leave a net total of 705.81 United States dollars. He appealed on 14 May against the dismissal and on 11 June against the deduction of the cost of the tickets given for his home leave travel in 1982 and 1984. He did, however, agree to the deduction of the cost of the ticket his son had not used for repatriation. His two appeals were rejected on 13 June and 10 July and were together referred to the Appeals Committee on 18 July. In its report of 23 June 1987 the Committee recommended rejecting them and by a letter of 7 September 1987, the impugned decision, the Deputy Director-General told the complainant that the Director-General had done so.

B. The complainant's case is that the reason for his dismissal was not the acts he was accused of but the writing of press articles by a journalist friend of his to whom he was suspected of having passed confidential information. As early as 1983 the Administration resolved to trump up charges against him and after transfer to another branch he was constantly barred from doing his work properly. By 1984 his name was even struck off the telephone list.

He takes up the charges against him in chronological order and seeks to show that not a single head of accusation amounted to misconduct. He is said, for example, to have been absent without leave in 1980 before going on mission to Bangladesh and to have declared in a minute that he was on mission from 10 October 1980 to 19 March 1981 although he did not set off until 17 October 1980. He admits to having been in Geneva on 13 and 14 October undergoing medical treatment, but his minute was just an affidavit to be put to the Italian courts for the purpose of a divorce suit. Again, he is accused of being absent without leave in 1982: after a mission in Tanzania he took a holiday in the Seychelles instead of going back to Rome. To that he retorts that he was given retroactive permission. He was absent again at the end of a mission to Bangladesh: he explains that he did have to go to the

Federal Republic of Germany to have medical treatment. After seeing a doctor there he applied for sick leave and it was later granted. Lastly, on his return from a mission to Chad in 1984 he went to the Federal Republic to see his mother, who was ill. Since there was no telephone he could not let the Organization know where he was. He himself fell ill, as he could show by producing medical certificates.

Other charges against him have to do with his home leave, which he was entitled to take at Fond-du-Lac, in Wisconsin. The FAO says that in 1982 and in 1984 he failed to follow the originally proposed route between Rome and Fond-du-Lac and that in 1984 he drew financial benefit in the form of a round-the-world trip for himself and his daughter. His answer is that it is common at the FAO to reroute duty travel and travel on home leave. Staff Rule 302.7335 provides that where the actual route costs more the staff member shall make up the difference. Besides, he did spend a "substantial period" of his yearly leave - as Rule 302.53 requires - in 1985 in the United States, a country he has lost touch with, and in 1984 in Canada, a country geographically and culturally close to the United States. The decision to demand refund of the fares is therefore unlawful.

As for the ticket provided for his son's repatriation in 1983, because of illness and "university commitments" his son was unable to make the journey and used the ticket for other purposes, but did so without his consent. Since his divorce in 1978 he has had no hold over his son. He is willing to pay the fare back, though surprised that the FAO took three years to claim it.

He maintains that his dismissal was in breach of several principles. First, it was contrary to the principle of proportionality. Although he was guilty of a few mistakes they were harmless enough and in any event do not warrant the sanction imposed, one of the two most drastic provided for in the rules. Secondly, the FAO acted unfairly by failing to warn him on learning the facts: it was in breach of good faith and committed an abuse of authority. Thirdly, it acted in breach of the principle of equality by departing from practice and asking him to pay back the full cost of his home leave travel in 1982 and 1984.

He asks the Tribunal to quash the decision of 7 September 1987 dismissing him for misconduct and order his reinstatement and grant of his consequent entitlements or, failing that, to award him a fair amount in material damages and one year's pay in moral damages; to quash the decision of even date making him pay back the cost of home leave travel for himself and his daughter in 1982 and 1984 and the cost of the ticket provided for his son's repatriation travel in 1983, less, in particular, his son's repatriation expenses and the difference between the value of the tickets he used in 1982 and 1984 and the ones the FAO provided; and to award him 50,000 French francs in costs.

C. The FAO replies that the complainant was dismissed because he wilfully broke its rules and made use of his position for solely personal gain. Since the FAO Manual defines "misconduct" as conduct that jeopardises the Organization's reputation, his dismissal was fully warranted. According to Rule 302.53 an official who takes home leave must go to his home country, the one he is treated as a citizen of. If the complainant had lost touch with his own country he need not have taken home leave and besides he never tried to get the place of his recognised home changed. The Organization has never put up with misuse of the right to home leave. Rule 302.7335 is immaterial because it meets the case of unexpected rerouting.

The FAO denies breach of proportionality. Although the charges were grave it did not impose on him the severest sanction, which is summary dismissal for serious misconduct. It is astonished that he still ventures to maintain that he was never warned of the charges. Its treatment of him was neither unfair nor in breach of good faith. The Organization cannot but punish any sort of misbehaviour or fraud that rumour says is rife. The right procedure was followed and the right sanction imposed. The FAO therefore invites the Tribunal to dismiss the complainant's claims in their entirety.

D. In his rejoinder the complainant observes that though the accusations against him are serious the FAO fails to show how he jeopardised its reputation and to answer his contentions about the true reasons for his dismissal. He offers to produce tape recordings of conversations he had with senior FAO officers. He maintains that he never meant to break the rules and says that it was the Organization that acted with premeditation by first deciding to get rid of him and then sifting through his records in search of some pretext for doing so.

He cites cases where staff were allowed to take home leave outside their home country, for example an Ethiopian in the United States and a British subject in Australia, where his parents were living. Others who did not make any prior application for a change in the place recognised for the purpose of home leave have merely been asked to pay

back the cost of travel and got off with nothing worse than a reprimand. He presses his claims.

E. In its surrejoinder the FAO objects to the making and to the disclosure of tape recordings. It observes that it did answer the complainant's arguments in the original complaint. The reason for his dismissal was the constant and wilful trickery and cheating he was guilty of over his travel claims and his children's. Although some staff members have been allowed, after consideration of their circumstances, to change the place of their home leave, they were quite special cases, and the complainant was not. Besides, he never applied for such a change. His repeated misdemeanours warranted the sanction.

CONSIDERATIONS:

1. The complainant, who joined the FAO in 1968 on an appointment of indefinite duration, had an uneventful career until 1984. In that year he was transferred to the Administrative Services Division, in which he had already served from 1972 until 1974. Towards the end of the year the Assistant Director-General in charge of Administration and Finance was given a report on an investigation that had brought to light improprieties in the complainant's claims to travel expenses and to leave. On 12 and 13 March 1985 he was asked to comment and he did so on 29 March and 10 April. Being dissatisfied with his answers, the FAO started disciplinary proceedings on 5 September, setting out in detail the formal charges against him and warning that his "misconduct" might warrant dismissal. He replied on 22 October. A memorandum dated 19 February 1986 informed him that he was dismissed for misconduct under Manual provision 330.24 with immediate effect; he would be paid compensation in lieu of notice and the sums he owed the Organization would be docked from his final emoluments.

On 26 February 1986 he applied for a termination indemnity amounting to six months' pay, but a letter of 12 May refused the indemnity and told him how much he would get in repatriation grant, the sums he owed the Organization to be subtracted therefrom.

On 18 July he lodged internal appeals against those decisions. After taking both written and oral submissions from both sides the Appeals Committee recommended by a majority that the Director-General reject the appeals both against the dismissal and against the deductions. The Director-General endorsed that recommendation and in a letter of 7 September 1987 the Deputy Director-General so informed the complainant. He then lodged this complaint, within the time limit in Article VII of the Statute of the Tribunal.

2. He has two heads of claim, one relating to the dismissal and the other to the deductions.

Dismissal

3. The complainant was dismissed under Staff Regulation 301.102, which says that the Director-General "may impose disciplinary measures on staff members whose conduct is unsatisfactory, and may summarily dismiss a member of the staff for serious misconduct". There is more on the subject in the Staff Rules and in the Manual, which defines "dismissal for misconduct" as termination for conduct that jeopardises the reputation of the Organization.

4. The first of the complainant's pleas is that his conduct did not warrant dismissal, the improprieties he is charged with not being tantamount in themselves to misconduct.

5. The FAO's charges come under two heads, one being fraud over duty travel and sick leave.

6. The first charge under that head is that in 1980 he was absent from duty without authorisation before leaving on duty travel to Bangladesh and that he made a false statement about his whereabouts at the time.

The complainant went from Rome to Geneva to keep appointments with a dentist on 13 and 14 October 1980. But no application by him for leave for that purpose has come to light, and some years later, in a minute of 7 July 1983, he told a personnel officer that he had been on mission in Bangladesh from 10 October 1980 until 19 March 1981. To account for the discrepancy he states that his minute was intended for submission to a divorce court in Italy, even though the divorce decree had been issued several years earlier.

The Tribunal need only observe that his submissions are implausible, though his statement that he did not claim the cost of travel to Geneva is not challenged.

7. The second charge is that he was again absent from duty without permission at the end of duty travel to Tanzania in 1982 and again misstated his whereabouts. The matter arose over a side-trip he made to the Seychelles on his way back to London.

The Tribunal notes that the FAO repaid his expenses for that private excursion. In any event his explanations are not decisive and the charge is not disproved.

8. The third charge is that he was absent from duty yet again without authorisation at the end of a mission to Bangladesh in 1983. Instead of going straight to Rome he went to see a doctor in the Federal Republic of Germany.

That is true, but his late return to Rome plainly did not in itself warrant a drastic measure like dismissal.

9. Fourthly, in 1984, on the way back from duty travel to Chad, he failed to report at headquarters in Rome and instead visited his mother, who was ill, in the Federal Republic. While there he himself fell ill - or so he says - and he did not turn up in Rome until 29 instead of 22 October. He alleges that, not having access to a telephone, he could not let the Organization know he would be late in coming back, and indeed he says he can submit to the Tribunal medical certificates which he did not produce in the internal appeal proceedings.

Here again the Tribunal finds his comments implausible.

10. He cites further similar allegations that were made against him in the internal proceedings, but since they were not among the formal charges and did not support the impugned decision the Tribunal need not consider them.

11. The second head of charges is the defrauding of the Organization over travel on home leave and on repatriation. There are three charges under this head, of which two may be taken together.

12. According to the Staff Rules "staff members who are serving outside their home country and who are otherwise eligible shall be entitled once in every two years of qualifying service to visit their home country at the Organization's expense for the purpose of spending in that country a substantial period of leave". The home country is the country of which the staff member is treated as a national. On coming back from home leave the staff member may be asked to show that he did spend a substantial part of his leave in his home country, and the Manual says that ordinarily "a period of about two weeks" will do.

The texts do allow the staff member some leeway but, as the Tribunal said in Judgment 271, the primary purpose is not to make him a monetary concession: it is to an international organisation's advantage that staff should maintain their links with their home countries.

At the date of appointment the complainant was a citizen of the United States and he came from Fond-du-Lac, in Wisconsin. That was where he was expected to take home leave and indeed where he sought and obtained permission for himself and his daughter to take such leave in 1982 and 1984. On neither occasion, however, did he keep to the route he had put to the FAO.

He says that he had lost touch with family still living at Fond-du-Lac. In such a case the FAO sometimes makes an exception to let the staff member take home leave in a country other than his own, such as the one where he went to university, and the complainant cites, among other examples, the case of a British subject allowed to take home leave in Australia because his parents lived there.

The answer to that is that the complainant never applied for an exception and that even though he might have applied for permission to take home leave at his mother's place of residence, in West Germany, he does not in fact seem to have gone there.

He also cites the case of staff members who have made use of their home leave entitlements to go on holiday trips. On discovery of such breach of the rules, he says, the practice is for the Organization merely to claim back the travel costs and impose a reprimand.

Yet the complainant was twice in breach of the letter and spirit of the rules on home leave. Though the rules do allow rerouting, it must not be more than a minor change in travel arrangements. The complainant's rerouting of two successive trips suggests, and the last charge against him under this head tends to confirm, that he was guilty of swindling.

13. The last charge is misuse of an air-line ticket issued in 1983 for the repatriation of his son to Fond-du-Lac. His son failed to make the journey because, the complainant says, of illness and "university commitments". Be that as it may, the ticket the FAO paid for was used to make up the cost of tickets for a world tour by the complainant and his daughter in 1984, purporting to be home leave travel.

His answer to that charge is that the ticket was changed without his consent; he explains that because of his divorce in 1978 he no longer had any hold over his son; he is surprised that the Organization let three years go by before trying to get the cost of the ticket back; but he admits that it is entitled to repayment.

All that need be said is that it was the complainant who had asked for the issue of the ticket in the first place and that although the Organization did wait for three years before claiming the amount back he must have realised by 1984 that his world tour had been paid for in part by crediting him with the value of the unused ticket.

14. Such are the charges supporting his dismissal for misconduct, none of which, in his submission, amounts in itself to misconduct.

Indeed some of them do not, but what is serious is that there are several. The complainant has failed to prove his own good faith and his answers to each of them are unsound. The Tribunal is satisfied on the evidence that he was in gross breach of duty.

He further alleges breach of proportionality, a rule which the Tribunal has stated several times and which says that when disciplinary action is out of all proportion to the offence according to both objective and subjective criteria there is a mistake of law that warrants setting the impugned decision aside.

There must be the closest scrutiny when the measure is dismissal. On such scrutiny of the evidence before it in this case the Tribunal cannot regard the complainant's behaviour over the years as just carelessness that was partly excusable and in any event did not call for dismissal: he was guilty of cheating, and the Director-General did not draw wrong conclusions from the evidence or exceed his discretionary authority in imposing a severe sanction.

15. The complainant submits that in several ways the treatment of him was unfair, prejudiced and contrary to good faith.

16. First, he maintains that in rerouting his home leave travel in 1982 and 1984 he merely followed a practice the FAO condones.

The point was mentioned in 12 above. For one thing, there is a difference between rerouting and cheating; for another, it is the complainant's behaviour seen as a whole that confirms the view that none of the charges rested on any mistake of fact.

17. Secondly, he argues that the definition of misconduct in the Manual - cited in 3 above - does not fit the charges: the FAO's reputation cannot suffer from inside squabbling.

The plea is mistaken. Harm to the Organization's good name does not require the knowledge of the public at large since reputation may be impaired even within a closed community. To allow the plea would be to construe the principle too narrowly.

18. Thirdly, the complainant alleges abuse of authority. The FAO's attitude was, he says, prompted by the Director-General's suspicions that he had betrayed confidential information. In 1983 a friend of his, a West German newspaper reporter, had written press articles taking the FAO and its Director-General to task, and he believes that that was when the decision was taken to get rid of him. The first step was to transfer him to a post in another branch where he had nothing to do. Then there came a minute refusing to extend his appointment beyond 31 December 1984 and his name was struck off the October 1984 edition of the staff telephone list. At the same time his personal records were carefully picked over and the charges about his absences from duty and his travel were trumped up to get rid of him because, though he worked well, he had come to arouse dislike.

Again - so his argument runs - the conduct of the dismissal proceedings shows prejudice against him: even though there was no procedural flaw, he cites, among other things, the fact that he was not given his say until the investigation was over.

Such treatment being unfair, prejudiced and contrary to good faith, he was, he maintains, the victim of an abuse of authority.

19. To prove abuse of authority the complainant must show that the reason for his dismissal had nothing whatever to do with serving the Organization's interests.

For one thing, he adduces no substantive evidence in support of his allegations. For another, as has been said, the charges against him are proven, whatever the motives may have been, including suspicion about possible indiscretions that may have carried some weight in the decision to discipline him.

The deductions

20. The foregoing makes it plain that the complainant and his daughter were not travelling for the purpose of home leave in 1982 and 1984. Home leave is not compulsory and a staff member may waive his right to it. In trying to get the Organization to pay his expenses he acted improperly and is therefore to be deemed to have waived his right to home leave on those occasions.

He pleads that since he did keep to part of the authorised route he should not lose the full amounts of expenses: in 1982 he made a stopover in the United States and in 1984 his daughter was not bound to spend any minimum period there.

He also alleges breach of equality: in his submission the FAO's practice in the event of rerouting is to claim back only additional expenses it has been wrongly charged.

His pleas fail. Even supposing that the FAO does as he says, a staff member may not rely on unlawful practice in support of his own case. In any event the charge is that he made his employer pay for travel on home leave which he had not taken.

21. In its surrejoinder the FAO objects to the complainant's obtaining evidence in the form of tape recordings. The Tribunal has not made use of them and therefore need not rule on the issue; nor indeed would it do so unless it had first invited observations from the complainant.

22. There being no need for the submission of the further evidence the complainant suggests, his complaint fails.

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. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner