

SEVENTIETH SESSION

In re BOURGEOIS

Judgment 1090

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pierre Dominique Bourgeois against the Food and Agriculture Organization of the United Nations (FAO) on 12 April 1990 and corrected on 31 May, the FAO's reply of 31 August, the complainant's rejoinder of 25 September and the Organization's surrejoinder of 31 October 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.012 and 301.042, FAO Staff Rule 302.4103 and Regulation 14(j) of the General Rules of the World Food Programme;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The World Food Programme (WFP) was established under resolutions adopted in 1961 by the Conference of the FAO and the General Assembly of the United Nations.

The complainant, a Frenchman, joined the staff of the Programme on 5 July 1970 as a project management officer in Niger under a fixed-term appointment at grade P.3. After serving in Zaire and Benin he was transferred to WFP headquarters in Rome in September 1973 as a project management officer. He got a continuing appointment on 1 January 1977 and was promoted to P.4 on 1 February 1977 with the same title.

An office memorandum of 8 August 1986 from the Executive Director told the staff that there would be a New Personnel Policy from 1 September 1986. The underlying concept is of a "unified service" that covers everyone in the Professional category of staff at headquarters and in the field, apart from a few specialist posts, and in which there is "full interchangeability" of staff. On 13 November 1987 the complainant saw the Executive Director to talk about a field appointment and the possibility of transferring him to Tunisia as director of operations was mooted.

On 17 March 1988 the Executive Director sent all Professional category staff a memorandum asking them to fill up an appended questionnaire headed "Letter of intent" in which they were to choose one of five options ranging from "I wish to transfer to a country office during 1988" (option A) to "I would prefer not to be transferred to a country office in the foreseeable future" (option E).

On 22 March the complainant sent the Director of the Office of Personnel a memorandum saying he wanted to discuss any action to be taken in the light of the memorandum of 17 March on his talk of 13 November 1987 with the Executive Director. The Director of Personnel replied on 25 March that he was aware of that talk and was willing to discuss the matter, but that the complainant still had to fill up the questionnaire like everyone else. On 30 March 1988 he sent back the form blank with a handwritten note referring to his memorandum of 22 March.

On 6 April 1988 the Executive Director sent the staff two papers entitled "Provisional promotion guidelines and procedures for unified service posts in WFP" and "Provisional reassignment guidelines and procedures for unified service posts in WFP".

A report on the complainant's performance was made in May 1988. In the part headed "Staff development" he confirmed his "agreement in principle" to his "return to the field for one term" if the Executive Director so wished, but said he hoped that his "family constraints" would be "taken more into consideration". In a memorandum he sent the Director of Personnel on 19 May 1988 he summed up his meeting with the Executive Director and pointed out that when asked to state there and then whether he would serve for one term as director of operations in Tunisia if the post fell vacant he had given his consent. He also sent another copy of the "Letter of intent" in which, under option A, he wrote:

"As explained to the Executive Director in November 1987, and recalled recently to the Director of Personnel, personal circumstances restrain my willingness to serve in a fourth country office. However, and under the conditions explained by the Executive Director, I hereby confirm my agreement of principle to return to the field if and when the Programme so decides." On 15 July 1988 the complainant was granted promotion to P.5 as from 1 January 1988 on condition that he signed a statement, in keeping with section 4.4 of the "provisional promotion guidelines for unified service posts" in the Programme, that he was ready to serve anywhere he was assigned. On 22 August 1988 he signed a "Request for personnel action" mentioning the "transfer to Tunisia" as director of operations, providing the required statement and again referring to the meeting of November 1987. The Director of Personnel told him in a memorandum of 21 September that his transfer to Tunisia gave him no right to return to headquarters. In his reply of 30 September he said that his own position had been clear throughout and he asked for an explanation of the lack of response to the written observations he had made on several occasions. On 7 October the Executive Director informed him that he was withholding personnel action on the conditional promotion until he had given unqualified consent to transfer to Tunisia.

He submitted to the Director-General of the FAO on 13 December 1988 a request for review of the Executive Director's decision of 7 October 1988. By letter of 14 February 1989 the Assistant Director-General in charge of Administration and Finance informed him of the Director-

General's rejection of his appeal and on 27 February he put his case to the Appeals Committee. In its report of 13 July 1989 the Committee observed that "if there was any misunderstanding as to promotion, transfer and/or assignment procedure, the administration should have informed the complainant thereof as soon as possible and in any event before announcing his promotion on 15 July 1988". It recommended taking steps to promote him and transfer him to Tunisia for a single term. But by a letter of 15 January 1990, the decision impugned, the Director-General informed him of the final rejection of his appeal.

B. The complainant contends that the impugned decision is in breach of the FAO Staff Regulations and Staff Rules.

Regulation 14(j) of the General Regulations of the Programme states:

"The Executive Director shall administer the staff of the Programme in accordance with FAO Staff Regulations and Rules and such special rules proposed by the Executive Director as may be approved by the Secretary-General of the United Nations and the Director-General of FAO."

The New Personnel Policy documents do not qualify as special rules under 14(j) because the two competent authorities have not approved them. The complainant cites Judgment 869 (in re Hill) in support of his objection to any delegation of authority to the Executive Director. Besides, he says, the documents are at variance with the FAO's Staff Regulations and Staff Rules.

According to Staff Regulation 301.042 "The paramount consideration in the appointment, transfer, or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity". And Staff Rule 302.4103 says that "When a post becomes vacant, first consideration shall be given to the possibility of promoting a properly-qualified staff member". But section 3.2 of the guidelines on promotion sets three basic criteria: "merit, mobility and seniority, in that order". Section 3.2.2 states that field experience will normally be essential for promotion and that because of the larger number of posts in the field promotion prospects are greater for staff members who are willing to transfer to the field. To meet the criterion of "mobility" staff must fall into one of three categories: (1) those who are assigned to posts in country offices; (2) those who have already served in such offices and who are assigned to head-quarters posts, provided that the length of their service at headquarters does not exceed six years; and (3) those who are assigned to headquarters posts but give a written commitment to accept reassignment to a country office within a fixed period of time. So promotion and transfer are closely linked, and mobility is the most important criterion for promotion in the Programme, whereas under the FAO's rules it is competence that counts.

Secondly, the complainant contends that the Executive Director assured him at their meeting on 13 November 1987 that if the post of director of operations in Tunisia became vacant he might be appointed to it for one term. On several occasions thereafter he referred to the agreement they had made and not until 21 September 1988 did the Director of Personnel warn him that he would have no right to return to headquarters. So the Organization failed to keep its word or at least, if there was some misunderstanding, spoke up far too late and so left him in rightful

expectation.

His third plea is that the Organization acted in breach of the principle of equal treatment by applying its rules on promotion and reassignment to him but not to others in like case. Though he does have field experience, the criterion of mobility was more strictly applied to him than to others in grades P.5 and D.1, many of whom have no such experience but who are still getting steady promotion at headquarters.

He submits that the decision he challenges caused him both material and moral injury.

He asks the Tribunal to quash the Director-General's decision of 15 January 1990 and order that the Executive Director's decision of 15 July 1988 to promote him to P.5 from 1 January 1988 be put into effect. He seeks awards of material and moral damages in such amounts as the Tribunal deems fit and of 38,000 French francs in costs.

C. In reply the FAO submits that the complainant has provided no evidence in support of his allegation that the Executive Director promised to make him director of operations in Tunisia for a single term. His argument turns wholly on his own version of the meeting of November 1987, which does not square with the Executive Director's. Any misunderstanding there may have been was not of the Executive Director's making. The Director of Personnel wrote on 7 December 1987 a note for the file on the meeting which the FAO cited in its reply of 14 April 1989 to the Appeals Committee. The note reads: "He indicated that he would be happy to take the post of Director of Operations (P-5) in Tunisia", and "The Executive Director took note of that statement". What the complainant is trying to do is justify laying down his own terms for transfer, but his wishes do not amount to any rightful expectation.

He shows no breach of equality. Everyone but the complainant who was to be promoted under the New Policy complied with the prescribed procedure and duly signed the forms. The Organization seeks to show that the P.5 and D.1 officials he mentions all met the condition of mobility and it refers to the possible transfers the Programme has in mind for some of them.

There was no breach of the FAO's Staff Regulations and Staff Rules. A UN/FAO joint task force was set up in 1984 to consider relations with the Programme and on the strength of its findings the Secretary-General of the United Nations and the Director-General of the FAO drew up a joint report in May 1985 which they put to the Programme's Committee on Food Aid Policies and Programmes. The report delegated to the Executive Director authority to apply and construe FAO Staff Regulations and Staff Rules and allows him broad powers in such areas of staff policy as promotion and transfer. Judgment 869 is irrelevant. The Programme being what it is, it is only reasonable that the New Personnel Policy and the related procedures should, in the wider context of competence, make mobility such an important qualification for promotion.

D. In his rejoinder the complainant maintains that the impugned decision does offend against the principle of equality. He discusses what the FAO says about P.5 and D.1 officials and submits that, though the Organization speaks of the possible transfer of some of them, that is just an idea for the future and therefore irrelevant.

As for the matter of the Executive Director's promise, he contends that the burden of proof should shift to the defendant when there are strong and concurring presumptions in favour of what the complainant alleges.

He develops his charges of breach of the Staff Regulations and Staff Rules and points out in particular that the Committee on Food Aid Policies and Programmes has no authority to amend the General Rules or adopt special ones. Though it may propose amendments, it is the FAO and the United Nations that adopt them. Competence and future mobility are not at all the same thing. If his experience on earlier assignments is to count at all the complainant meets the conditions set in the guidelines on promotion.

E. In its surrejoinder the FAO enlarges on its pleas, observing that the complainant's rejoinder seeks to disguise the main issues. It submits in particular that, since it has never said that the New Personnel Policy amended the General Rules or the FAO's Staff Regulations and Staff Rules or that the Committee on Food Aid Policies and Programmes was empowered to amend the General Rules, what he says on those subjects is quite beside the point. He has raised no "strong and concurring presumptions" that the Executive Director made him a promise. Though important, mobility is not the main qualification for promotion.

CONSIDERATIONS:

1. The complainant joined the staff of the World Food Programme (WFP) on 5 July 1970 under a fixed-term appointment. He served as a project management officer at grade P.3. He was stationed first in Niger, then in Zaire, later in Benin and in 1973 at headquarters in Rome. He had his appointment converted into a continuing one in 1977 and was later promoted to P.4.

By a memorandum of 8 August 1986 the Executive Director of the Programme informed the staff of what he called a "Framework for a New Personnel Policy", based on the notion of a "unified service" and applying to all Professional category staff at headquarters and in the field save a few holding "specialist posts".

At a meeting with the Executive Director on 13 November 1987 the complainant discussed the subject of his transfer to the field, in Tunisia.

On 6 April 1988 the Executive Director sent the staff, under cover of a circular headed "Provisional Guidelines and Procedures Regarding Promotion and Reassignment of Staff on Unified Service Posts", two papers that set out the arrangements for putting the New Policy into effect.

A report reviewing the complainant's performance was signed on 9 May 1988. On 19 May he wrote a memorandum to the Administration summing up, "so as to leave no room for doubt", what had happened at his meeting of 13 November 1987 with the Director. In a "letter of intent" also of 19 May he recorded his willingness to accept transfer to a country office.

On 15 July 1988 the Executive Director announced his promotion to P.5 as from 1 January 1988 subject to his signing a statement that he was ready to serve anywhere he might be assigned. Instead of doing so, however, he merely cited what he said had been agreed at the meeting of 13 November 1987. On 21 September 1988 the Director of the Office of Personnel told him that his transfer to the field was "not linked to any 'return right' to headquarters". On 7 October the Executive Director informed him of a decision to withhold his "conditional promotion" until he had accepted without qualification his transfer to Tunisia.

He applied on 14 October for conciliation but was refused it. On 13 December he filed an appeal with the Director-General, who rejected it on 14 February 1989. He then went to the Appeals Committee. In its report of 13 July 1989 the Committee recommended, among other things, following the procedure for promotion and transferring the complainant to Tunisia for a single term.

By a decision of 15 January 1990, the one he is challenging, the Director-General rejected his appeal.

The alleged breach of the FAO Staff Regulations and Staff Rules

2. The complainant's main plea is that the provisions of the New Personnel Policy did not apply to him: not only did they not amount to special rules within the meaning of Regulation 14(j) of the WFP's General Regulations but they were at variance with the FAO's Staff Regulations and Staff Rules.

3. According to Regulation 14(j) the Executive Director "shall administer the staff of the Programme in accordance with FAO Staff Regulations and Staff Rules and such special rules proposed by the Executive Director as may be approved by the Secretary-General of the United Nations and the Director-General of FAO".

The complainant's case is that the texts that make up the New Personnel Policy, including the implementing provisions in the "Provisional Guidelines", were never put to the United Nations Secretary-General and the Director-General of the FAO and so never got the approval 14(j) requires.

The Organization objects that that argument disregards the procedure that applied in adopting the texts. A UN/FAO "joint task force" was set up in 1984 to see how to supply support services for the WFP and to look at its relationship with the FAO. On the strength of the task force's findings the Secretary-General and the Director-General drew up in May 1985 a joint report which was put to the WFP's Committee on Food Aid Policies and Programmes, known as the CFA, at its 19th Session.

That report, which they communicated to the Executive Director, records their decision to delegate greater authority to him in matters of staff policy and administration. Paragraph 21 of their report states that according to 14(j) the WFP has authority to decide on staff questions in keeping with the FAO Staff Regulations and Staff Rules, including appointment, promotion, transfer and termination. Paragraph 22 says that there is no distinction

between headquarters staff and field staff.

In a report of 25 March 1986 on the effect given to the decision by the Secretary-General and the Director-General the Executive Director said that the Programme was looking into arrangements for applying a transfer policy that would make for systematic rotation of staff between headquarters and the field. At its 21st Session (26 May - 5 June 1986) the CFA approved the Executive Director's report and noted with satisfaction that the new provisions had been put into effect in a spirit of mutual understanding.

The Organization is right. The New Personnel Policy as adopted on 8 August 1986 is undoubtedly the corollary of the decision by the Secretary-General and the Director-General and was introduced in exercise of the authority they had delegated to the Programme to construe and apply the FAO Staff Regulations and Staff Rules.

Implicit in that delegation of authority is the approval 14(j) requires and that is what gives the New Policy the force of special rules. There is no particular requirement of form for such approval and the complainant has not even contended, let alone shown, that the Secretary-General and the Director-

General have declared the New Policy to be ultra vires.

The complainant further argues that the CFA has but limited authority to amend the General Regulations. But that is beside the point. Though the CFA approved it, the New Policy was introduced in pursuance of the decision by the Secretary-General and the Director-General and 14(j) was complied with.

4. The complainant's second plea is that the new texts are at odds with the FAO Staff Regulations and Staff Rules. It carries no greater weight than the first.

Actually he puts forward no cogent argument to suggest such incompatibility. All he says is that, according to the notion of "unified service" in the New Policy, officials in the Professional category must be put on a par whether stationed at headquarters or in the field and all staff members are subject to transfer to any duty station.

Putting staff on a par is an idea that can hardly be in conflict with the Staff Regulations and Staff Rules, the less so when, as the complainant acknowledges, promotion is to be kept distinct from transfer under the New Policy.

5. The fact of the matter is that his objections address in the main the Provisional Guidelines on Promotion. The purpose of those Guidelines is of course to implement the New Policy and, like it, they do amount to special rules within the meaning of 14(j).

But the complainant is mistaken in seeing any conflict between them and the Staff Regulations and Staff Rules.

What he says is that the text of the Provisional Guidelines and the way in which they have been applied show that promotion and transfer are closely linked in the WFP, that, for one thing, mobility counts more for promotion than competence does, and that that is in breach of Staff Regulation 301.042 and Staff Rule 302.4103. Paragraph 3.2 of the Provisional Guidelines states "the three basic criteria for promotion", and they are merit, mobility and seniority. In the complainant's submission they do not square with the basic principle governing promotion as stated in Staff Regulation 301.042, namely "the necessity for securing the highest standards of efficiency, competence and integrity".

The text of paragraph 3.2.1 of the Guidelines shows the plea to be unsound. It says that as to "merit" "performance is the principal consideration" and "the key elements in performance" include "job knowledge", "effectiveness" and "integrity". So that definition of "merit" covers all the qualities Regulation 301.042 calls for.

6. Although 3.2.2 lumps together "mobility" and "compliance with the unified service reassignment policy", it does make rather more of the need for "field experience", which is "essential for promotion". (Actually the complainant is wrong in making out that it bars promotion altogether for "those officers who do not volunteer for service in country offices": what it says is that the volunteers' "promotion prospects" are "superior".)

The two elements stated in the first sentence of 3.2.2 link "mobility" with the duty of obedience staff members owe under Regulation 301.012, which says that "Staff members are subject to the authority of the Director-General, who may assign them to any of the activities or offices of the Organization ...". But "mobility" also makes for something broader, namely familiarity with WFP work, and therefore comes under "efficiency" as well. After all,

according to the New Personnel Policy, the Programme's "basic mission is to contribute to the development of developing countries and to assist in the alleviation of hunger and malnutrition", and "it is thus in the field [that] the ultimate results of WFP's work ... will be measured ...".

So it is irrelevant whether "mobility" may be brought under "competence" and whether, as the complainant contends, 3.2.2 refers only to future mobility as against competence already gained. All that matters is that by making "merit" and "mobility" basic criteria - "seniority" does not seem to be at issue here - the Provisional Guidelines are not at odds with the FAO Staff Regulations and Staff Rules.

The ruling in Judgment 869 (in re Hill) being also irrelevant, the conclusion is that the New Policy and the Provisional Guidelines fully comply with the standards set in the Staff Regulations and Staff Rules. The complainant's objections to applying them to his case are the weaker for his never having challenged the actual criterion of mobility in his internal appeal: all he asked was that he should be transferred to Tunisia for one term, in keeping with the promise he said the Executive Director had made him.

That issue is taken up below.

The alleged breach of promise

7. In support of his allegation of breach of promise the complainant refers to his interview of 13 November 1987 with the Executive Director, who he says then assured him that if a vacancy arose for director of operations in Tunisia he might be sent there for one term.

The FAO's answer in the internal appeal proceedings was to produce, on 14 April 1989, a memorandum which the Director of Personnel says he wrote on 7 December 1987, on the strength of the Executive Director's own account, recording the interview of 13 November 1987. The memorandum says that the complainant had expressed readiness to accept the grade P.5 post of director of operations in Tunisia and that the Executive Director had merely taken note of that. The Executive Director was not himself the author of the memorandum; it does not actually mention the question of the complainant's alleged readiness to serve in Tunisia only for one term; and not until 21 September 1988 did the Director of Personnel tell the complainant in so many words that the policy on transfer did not allow of any right to return to headquarters.

On the evidence before it the Tribunal concludes that the Organization took until that date to come down firmly against assigning the complainant for a single term, though it did not deny outright that the Executive Director had made him a promise. So, though required by the decision of 15 July 1988 to make the 4.4 declaration, he still had good reason to expect that the wording of 4.4 might, as the Appeals Committee believed, be stretched to cover his own case. Only belatedly did the Organization plead its own version of the interview - indeed not until it submitted its reply to the Appeals Committee on 14 April 1989 - and it turned down the complainant's application for conciliation. Such behaviour does not support the case it makes out and indeed caused the complainant at least moral injury for which he must have redress.

The alleged breach of equal treatment

8. The complainant contends that the Organization applied the new Guidelines on promotion and reassignment to him but not to others in a position like his own.

As many earlier judgments affirm, the principle of equal treatment means that those in like case must have like treatment while those who are in a different position may be treated differently. In support of his plea the complainant cites as examples headquarters officials in grades P.5 and D.1 who belong to the "unified service" and who, he says, have no field experience though some have been with the WFP for ten or even twenty years.

Actually the officials he lists are not in the same position in law since his grade is P.4. But his plea fails anyway. None of the other cases is quite on a par with his. The Provisional Guidelines, with their principle of rotation and their criterion of mobility, came into force on 6 April 1988. He is not alleging that since that date any of the other officials has been granted promotion without having to make the declaration under 4.4 of readiness to go to the field. In fact the FAO maintains that no-one has, and he fails to refute it. The Organization affirms that except him everyone promoted under the New Personnel Policy has complied with the implementing rules and duly signed the transfer form.

The conclusion is that there has been no breach of equal treatment.

9. Since his principal claim to the quashing of the impugned decision is rejected, so is his claim to redress for material injury, but not his claim to damages for the moral injury which the Organization's ambivalent attitude caused him and which alone warranted bringing the case.

DECISION:

For the above reasons,

1. The complainant's principal claim is dismissed.
2. The Organization shall pay him 15,000 French francs in damages for moral injury.
3. It shall pay him 5,000 French francs towards costs.

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

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

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