

SEVENTY-FIFTH SESSION

In re HAILE-MARIAM

Judgment 1285

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gebre-Tsadik Haile-Mariam against the Food and Agriculture Organization of the United Nations (FAO) on 13 October 1992, the FAO's reply of 17 December 1992, the complainant's rejoinder of 23 February 1993 and the Organization's surrejoinder of 2 April 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulation 301.11, Staff Rule 303.13, and FAO Manual paragraphs 319.11, 319.12, 319.25, 332.221 and 332.222;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The World Food Programme (WFP) was set up under resolutions that the Conference of the FAO and the General Assembly of the United Nations adopted in 1961. It is an affiliate of the FAO and has its headquarters in Rome. It runs a "Transport Operation" in Ethiopia, known as the WTOE, under agreements it has had with the Government of that country since 1968. At the material time the latest agreement was dated 7 November 1985. The WTOE is in charge of the distribution of emergency supplies to distressed areas of the country and has several hundred lorries, tractors and trailers at its disposal for the purpose. The competent Government agency is the Relief and Rehabilitation Commission, known as the RRC. Both the WTOE and the RRC have headquarters in Addis Ababa.

The complainant is an Ethiopian citizen who was born in 1942. In 1985 the RRC was employing him as co-ordinator in its Road and Water Transport Organization. By a letter of 30 November 1985 a deputy commissioner of the RRC informed the project manager of the WTOE that in accordance with the 1985 agreement the Commission was appointing the complainant head of the Administration Department of the WTOE as from 1 December 1985. On 19 December 1985 he concluded a "special service agreement" with the WTOE whereby he was to serve as its head of Administration from 1 December 1985 to 30 November 1986.

By a letter of 27 June 1986 another deputy commissioner of the RRC informed the project manager of the WTOE that the complainant's appointment as head of Administration would be "withdrawn effective July 1, 1986" and that he was to go back to his old job as co-ordinator with the Commission. But by a letter of 17 October 1986 to the project manager the commissioner of the RRC reappointed him to the WTOE as co-ordinator of transport from 20 October 1986. He entered into a new special service agreement that was valid until 30 November 1986. His appointment was later extended in turn to 30 June 1987, 30 June 1988 and 31 December 1991.

By a letter of 8 August 1991 the Director of Operations of the WFP in Addis Ababa informed him that he was suspended from duty forthwith until further notice; that the reasons could not be stated "at the present time"; and that he must not communicate with any member of WTOE staff until he was reinstated. In a letter of 14 August to the Director of Operations the complainant described his suspension as "outrageous", "arbitrary" and "presumptuous" and demanded an explanation by 19 August. In a letter of 8 November the Director of Operations and the Deputy Director of the Office of Personnel and Administrative Services of the WFP, in Rome, told him of an investigation by staff of the WFP and the WTOE and by national auditors. Their findings were, said the letter, that building materials had disappeared from bases at three Ethiopian towns, Assab, Harar and Kombolcha, and that shuttle drivers employed by the WTOE had been delivering stone and cement at the complainant's own dwelling. The letter further charged the complainant with assault on 11 September 1991 on a WTOE official who had served on the team of investigators. It informed him that his appointment would be terminated in accordance with clause 2 of the special service agreement, which read:

"This agreement shall ... expire ... not later than the above-noted expiration date, unless sooner terminated under the terms of this agreement. Either party may terminate this agreement at any time by giving the other party 30 days' notice in writing of its intention to do so."

In a letter of 18 November 1991 the complainant denied the charges of theft. He pointed out that as a mere co-ordinator of traffic he had no control over WTOE property at any of the three places mentioned; recent work on his dwelling had nothing to do with the WTOE and raised no presumption of theft by him of building materials; and if need be he could satisfy an independent body that the materials used had come from elsewhere. As for the assault, it was "entirely a private matter" and no business of the WTOE's: it had occurred outside WTOE premises and was unconnected with the performance of his duties; in any event he had been the butt of "provocation" and had acted in "self-defence". He maintained that failing to let him comment on the charges before dismissing him amounted to a serious breach of due process. He described the letter of 8 November 1991 as defamatory and asked that it be withdrawn.

In a letter of 20 December 1991 the WFP's Deputy Director of Personnel and Director of Operations informed him that his appointment would end without notice in accordance with clause 2 of the service agreement at the prescribed date of expiry, 31 December 1991, but that non-renewal did not amount to "termination" within the meaning of the rules. The letter rejected his contention that the assault was a private matter and observed that since he had been neither physically attacked nor even threatened it was inexcusable.

In the January 1992 number of WTOE News it was stated under the heading "Letter from the Project Manager" that the reason for recent changes in senior staff had been "the discovery of serious cases of nepotism, theft and misappropriation of food".

In a letter of 25 May 1992 to the Director of Personnel and Administrative Services of the WFP in Rome the complainant again asked for withdrawal of the letter of 8 November 1991, objected to what he saw as further libel in WTOE News and demanded apologies and damages for the "persistent and unwarranted attacks" on his good name.

In a reply of 8 June the Director reaffirmed that his appointment had not been "terminated" but had simply expired; as regards the alleged libel, the excerpt he had quoted from the Project Manager's letter in WTOE News did not apply to his case; besides, it did not say that former senior staff had themselves been guilty of nepotism and theft but merely that the discovery of malpractices had led to the changes in management.

That is the decision the complainant is impugning.

B. The complainant pleads wrongful termination, breach of due process and libel.

First, he submits that the original special service agreement he held with the WTOE was stated to apply for an "indefinite period" and was subject to termination only in the event of "redundancy or abolition of the post" or of his offending "against the rules of good behaviour or conduct". The Organization's letter of 20 December 1991 contradicted its letter of 8 November 1991, which made a causal link between termination of the agreement and the charges of theft and assault.

Secondly, the complainant pleads breach of due process: the Organization failed to hold an open and impartial inquiry into the charges, to inform him properly of its case against him and to let him answer. In support he cites Article 10 of the Universal Declaration of Human Rights and the Tribunal's own case law. The investigation which the Organization alleges it carried out disregarded proper procedural safeguards. Where and when was it made, by whom, and with what terms of reference? He was never told; he was never shown the report on the investigation, or asked to comment, or even told what the basis for the findings might be. In fact he was condemned unheard. The WTOE made him the scapegoat for malpractices it had been rebuked for in the press.

Thirdly, he argues that the "spurious allegations" in the Organization's letter of 8 November 1991, the WTOE newsletter and articles in the press have "defamed and made [him] contemptible among his fellow employees" within the Organization and in society at large. Though not denying the libel, the Organization has continued to spread it, and he cites examples.

He claims his reinstatement as from 8 August 1991, together with all his entitlements; the withdrawal by the Organization of the libellous allegations in its letter of 8 November 1991; an apology; and awards of 1 million United States dollars in damages and of costs.

C. In its reply the FAO submits that on four counts the complaint is irreceivable.

First, the plea of wrongful termination shows no cause of action against the Organization. Any redress the complainant might be entitled to under the special service agreement he ought to have claimed from the United Nations, with which he concluded the agreement, and not from the FAO. The last agreement that the complainant signed identifies the United Nations no fewer than thirteen times as the other contracting party and makes it plain in particular that the United Nations shall pay for his services and may terminate the agreement.

Secondly, even if the agreement did establish a contractual relationship between the FAO and the complainant the Tribunal is not competent to hear the case. According to Regulation 301.112 only a staff member or someone who may have rights under the Organization's Regulations and Rules has access to the Tribunal. Clause 4 of the agreement reads:

"The subscriber shall be considered as having the legal status of an independent contractor [and] shall not be considered in any respect as being a staff member of the United Nations."

The FAO's Manual provides in paragraph 319.11 that "a subscriber [i.e. the holder of a special service agreement] is in no way considered to be a staff member of the Organization" and in 319.12 that "the Staff Regulations and Staff Rules do not apply to subscribers". The agreement does not provide for access to the Tribunal in the event of dispute over its execution or interpretation. On the contrary Manual paragraph 319.25 says that "any dispute arising out of the terms of a special services agreement is settled by arbitration" and "decisions rendered by the arbitrators constitute the final adjudication of the dispute".

Thirdly, even supposing the complainant did have the right to appeal to the Tribunal his complaint would still be irreceivable because it is not directed against a final decision by the Organization. Article VII, paragraph 1, of the Tribunal's Statute, which Manual paragraphs 332.221 and 332.222 reproduce, requires him first to exhaust the internal means of redress provided for in Regulation 301.11 and Rule 303.13. He has not done so. In particular he did not appeal to the Appeals Committee against the decision not to renew his appointment or ask the Director-General to take a final decision.

Fourthly, his claim to damages for libel is irreceivable for the same reasons as is his claim to damages for wrongful termination; the Organization had no contractual relationship with him and is not liable for the actions of his superiors. Besides he is not alleging any breach of the terms of his appointment or of the Staff Regulations or Staff Rules and again he has failed to exhaust the internal means of redress.

D. In his rejoinder the complainant objects to the Organization's failing to answer his case on the merits and therefore takes it to accept his allegations of fact.

He maintains that he had a contractual relationship with the FAO which as "principal" is liable for the actions of its "agent", the United Nations Development Programme (UNDP). After all, the letter of 8 November 1991 terminating his appointment was written on the WFP's writing paper and signed by its own officials, not by an official of the United Nations. It was, again, an WFP official who confirmed the termination. The Programme must be held liable for any actions of its officials which is in breach of "fair play" and "due process", even though in Ethiopia it carries on its work through the UNDP. Since the Programme is an affiliate of the FAO those whom it appoints have access to the Tribunal.

The complainant believes that he has exhausted the internal remedies: his letters of 18 November 1991 and 25 May 1992 to the WFP in Rome constituted his internal appeal, and the WFP's letter of 8 June 1992, which rejected it and which he is challenging, was the final decision within the meaning of Article VII(1) of the Tribunal's Statute.

E. In its surrejoinder the Organization presses its objections to receivability. It explains that the UNDP is responsible for the WFP's local field staff and its Resident Representative in Addis Ababa has delegated authority to sign special service agreements on behalf of the United Nations to the Director of Operations and the project manager of the WTOE. Since the complainant was serving the WFP under an agreement with the United Nations it is to the United Nations that he should have addressed any claims arising out of his contract.

The FAO has been mistakenly involved in a dispute to which it is not a party, in the wrong forum, and in circumstances that do not meet the requirements of the Tribunal's Statute. That being so, it sees no need to go into the merits.

CONSIDERATIONS:

1. The Government of Ethiopia entered into an agreement in 1968 with the World Food Programme (WFP) for the supply of food to support projects for economic and social development and to meet emergency needs in that country. According to the defendant the WFP is a joint programme of the United Nations and the FAO. At the material time locally recruited field staff of the WFP were subject to United Nations Staff Regulations and Staff Rules and the United Nations Development Programme (UNDP) took care of staffing matters through its office in Addis Ababa. The agreement concluded with the Government in 1968 was signed by the UNDP's Resident Representative in Ethiopia as the duly appointed representative of the WFP.
2. In November 1985 the Relief and Rehabilitation Commission (RRC) of Ethiopia entered into another agreement with the WFP on the Government's behalf to set up a "Transport Operation", to be known as the WTOE, to alleviate the shortage of means of distributing emergency relief supplies by maintaining a fleet of several hundred lorries and other vehicles.
3. The complainant was first employed under a special service agreement from 1 December 1985 to 30 November 1986 as head of Administration of the WTOE in Addis Ababa. He was reappointed as co-ordinator of transport of the WTOE under another such agreement as from 20 October 1986. He had its duration extended to 30 June 1987, and another special service agreement was concluded with him for the period from 1 July 1987 to 30 June 1988. This agreement was extended from time to time, the last time by a telex dated 24 June 1991 from the WFP in Rome extending the contracts of all local staff to 31 December 1991.
4. The complainant was summarily suspended from duty on 8 August 1991. The WFP communicated the reason to him by a letter of 8 November 1991, namely fraudulent misappropriation of the WTOE's resources and property and further accused him of physical assault on 11 September 1991 on a WTOE official. The letter informed him that the WFP had reached the conclusion that his special service agreement should be "terminated" in accordance with clause 2, which provided for termination with thirty days' written notice, and that he was allowed five working days in which to reply. He replied in a letter of 18 November 1991 that the first allegation was false and libellous, and that he had been condemned unheard; he asked for the withdrawal of the WFP's libellous letter; and he maintained that the second allegation, the one of assault, was entirely a private matter: the assault had occurred outside the WTOE's premises and was unrelated to his duties and the outcome of gross provocation. By a letter dated 20 December 1991 which he received on 17 February 1992 the WFP replied that it did not intend to renew his agreement upon expiry at 31 December 1991 but that the non-renewal did not amount to termination.
5. The complainant did not appeal against the decision not to renew his special service agreement. On 25 May 1992 he wrote to the WFP drawing attention to his letter of 18 November 1991 and again asked for the withdrawal of the libellous allegations, apologies and an award of damages for the attack on his reputation. In his reply of 8 June 1992, which he received on 24 July 1992, the Director of Personnel and Administrative Services of the WFP repeated that he had not been terminated. It is against that decision that he is appealing.
6. He claims exoneration on all the charges in the WFP's letter of 8 November 1991; reinstatement; the withdrawal of the libellous allegations; and awards of material and moral damages in a sum of 1 million United States dollars and costs.
7. Without addressing the merits the defendant asks that the complaint be dismissed on the grounds that the complainant's special service agreement was with the United Nations, and not with the FAO; his claim, if there be any, to redress for wrongful termination lies properly against the United Nations, and the Tribunal therefore lacks competence.
8. The Tribunal accepts that argument. The complainant does not deny that the WFP was a joint endeavour of the United Nations and the FAO. Although in some circumstances an agreement signed by the WFP might have bound the Organization, in this case every special service agreement that the complainant signed stated that it was between him and the United Nations. The fact that the contract provides for services to the WFP and the WTOE does not make either of those bodies or the Organization itself a party to the contract or liable thereunder.
9. The conclusion is that the Tribunal is not competent to hear the case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

Mella Carroll
E. Razafindralambo
Mark Fernando
A.B. Gardner

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