

## SEVENTY-FIFTH SESSION

### *In re* MULATE

#### Judgment 1286

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paulos Mulate against the Food and Agriculture Organization of the United Nations (FAO) on 10 July 1992, the FAO's reply of 28 October 1992, the complainant's rejoinder of 12 January 1993 and the Organization's surrejoinder of 15 February 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 decided not to order hearings, which neither party has applied for;

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 1946. He concluded a "special service agreement" with the WTOE in December 1988 for the period from 1 December 1988 to 30 June 1989. In accordance with the Transport Operation Agreement the RRC appointed him deputy project manager of the WTOE. The WFP extended his special service agreement several times, the last extension expiring at 31 December 1991.

By a letter of 8 August 1991 the WFP's Director of Operations at Addis Ababa and the project manager of the WTOE 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 the WTOE's staff until reinstated. In an undated reply he questioned the procedure followed and asked about the reasons for his suspension; he argued that, though under contract with the WFP, he worked for the Government of Ethiopia and it alone could suspend him.

In an undated report the WFP outlined the charges against him: failure to monitor administrative practice and procedure in the WTOE, incompetence and wilful disregard of rules, and nepotism.

By a letter of 19 September 1991 he informed the chief commissioner of the RRC of his suspension and raised many objections to it.

The Deputy Director of the Office of Personnel and Administrative Services and the Director of Operations of the WFP answered in a letter of 8 November 1991 that the findings of an investigation by staff of the WFP and the WTOE and by national auditors were that he had abused his position by recruiting relatives and friends and stealing building materials. In his reply of 20 November he rejected the allegations and pleaded breach of due process.

On 27 November 1991 the *Globe and Mail*, a Canadian newspaper, published an article headed "Food supplies just keep disappearing", in which the Director of Operations was quoted as saying that the complainant "employed about 50 friends and relatives at the trucking unit". In a letter of 18 February 1992 to the *Globe and Mail* the Director said that the quotation was wrong in attribution and in substance.

The January 1992 edition of WTOE News 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".

By a letter of 20 December 1991 the WFP's Deputy Director of Personnel and Director of Operations rejected the complainant's explanation in his letter of 20 November 1991 and informed him that his contract would end without notice, on expiry at 31 December 1991, but that that did not amount to "termination" within the meaning of the rules. In a letter to him of 26 December 1991 the project manager of the WTOE confirmed that his contract would not be extended beyond 31 December 1991.

In letters of 20 February and 19 March 1992 to the WFP in Rome and to its Director of Operations in Addis Ababa, the complainant asked for review of the decision. In an appeal dated 7 April 1992 to the Programme's Deputy Director of Personnel and its Director of Operations he again asked that the decision be reconsidered in the light of new circumstances.

In his reply of 21 April 1992 the WFP's Director of Personnel rejected his case and that is the decision he is impugning.

B. The complainant denies the charges against him and pleads wrongful termination, breach of due process and libel.

He pleads several breaches of due process: the initial letter of 8 August 1991 did not state any reasons for his suspension; 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; and the final decision from the Programme's Director of Personnel is based, not on his final appeal of 7 April 1992 which included new elements, but on his letter of 20 February 1992.

He submits that the WFP has libelled him and he is therefore unlikely to find worthwhile employment elsewhere.

He claims: damages for wrongful termination and moral injury; the withdrawal by the Organization of its libellous allegations, the letters of termination and the charges in the undated report; an apology from the Programme; the publication of apologies in the *Globe and Mail* and in the WTOE's newsletter; and 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.

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 submits that the Organization's objections "are not raised in good faith but with the object of delaying the proceedings".

On receivability he argues that although the special service agreement "is headed United Nations and ... United Nations appears in several places", it is in a standard form used by all United Nations bodies. He maintains that his employer was the WTOE and that he was employed by virtue of the agreement between the Ethiopian Government and the WFP, which shows that the WTOE is responsible to the Programme, the Programme to the FAO and the FAO to the United Nations. In his three years with the WFP he took instructions from and reported to the FAO and to the Programme and at no time had any working relationship with the United Nations. It was the FAO that paid him and the Programme's Director of Operations and the FAO in Rome that terminated his special service agreement. Moreover, when he asked the FAO to review his case it never raised the objection to receivability.

He cites the letter of 8 November 1991 from the Deputy Director of the Office of Personnel and Administrative Services and the Director of Operations of the WFP in support of his contention that he was an employee of the WTOE and that it had authority to suspend him. He submits that the Organization may not now shift ground and deny being his employer.

E. In its surrejoinder, the Organization presses its objections to receivability. It explains that the United Nations Development Programme (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.

Finally, the Organization says that it never meant to suggest that the complainant was an employee of the United Nations: his special service agreement with the United Nations gives him the status of an independent contractor and he was never an employee of the WFP.

#### 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 1988 to 30 June 1989 with the WTOE at Addis Ababa. He had its duration extended to 31 December 1991. The extensions from 1 July 1989 to 31 December 1989 and from 1 April 1990 to 30 June 1990 were granted by letters; the last one by a telex dated 24 June 1991 from the WFP in Rome announcing the extension of the appointments of all local staff to 31 December 1991. He was at some time appointed deputy project manager of the WTOE, but it is not clear when.

4. He was summarily suspended from duty on 8 August 1991. The WFP communicated the reasons to him by a letter of 8 November 1991, namely poor management, nepotism, corruption and misappropriation of building materials belonging to the WTOE. 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 20 November 1991 pointing out procedural flaws in the investigation, answering the WFP's charges in detail, and asking that the allegations against him be withdrawn. 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. Instead he wrote to various officials of the WFP and the WTOE on 20 February, 19 March and 7 April 1992, asking for further investigation and reconsideration of the decision to "terminate" his services. In his reply dated 21 April 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. By a letter of 8 June 1992 the Deputy Director of Personnel and Administrative Services reiterated the administration's position.

6. The complainant seeks the withdrawal of the charges against him, awards of damages for wrongful termination and for libel, an apology and the publication thereof, 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.

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