

EIGHTY-FOURTH SESSION

In re Wang

Judgment 1730

The Administrative Tribunal,

Considering the complaint filed by Mrs. Damei Wang against the Food and Agriculture Organization of the United Nations (FAO) on 31 October 1996, the FAO's reply of 23 January 1997, the complainant's rejoinder of 18 April and the Organization's surrejoinder of 7 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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 complainant, a Chinese citizen who was born in 1946, was employed by the FAO from 1974 to 1978 at grade G.4 and from 1983 to 1986 at P.3. At the material time she held a fixed-term appointment at P.3 as a translator and reviser starting on 9 July 1991. In between contracts she was in government service in the People's Republic of China.

By a letter of 15 April 1993 the Director of the Personnel Division told her of the outcome of talks with the Chinese Government: Chinese language staff would thenceforth be recruited by the same procedure as any other language staff, including examination, and anyone already under contract would have to pass the examination to qualify for an extension of appointment.

The complainant took the examination on 15 May 1993. By a letter of 21 September the Director of Personnel told her that she had failed but would get an extension, until 30 June 1994, to allow her to try again. She did so on 14 April 1994. In a letter of 19 October the Director of Personnel informed her that she had again failed; the workload of the Chinese translation group was "under review with a view to rationalizing the staffing level"; and she would get one last extension until 31 December 1994.

By a letter of 21 November 1994 she lodged an appeal with the Director-General. In a letter dated 20 December the Assistant Director-General in charge of Administration and Finance rejected it on the Director-General's behalf. By a memorandum of 3 February 1995 she put her case to the Appeals Committee. In its report of 10 January 1996 the Committee unanimously recommended reinstating her. But by a letter of 8 August 1996, to which was appended the Committee's report, the Director-General rejected her appeal. That is the decision she is impugning.

B. The complainant observes that until 1993 the system of recruitment left the choice of Chinese language staff and the length of their appointment to the Chinese Government. That, she says, was in breach of the basic principles of the international civil service. One outcome was that she could never build up a long enough unbroken period of service to qualify for a permanent appointment. Citing Judgment 1249 (*in re Reznikov*), she contends that it is wrong to make her suffer for the Organization's letting the Chinese Government "interfere with" the extension of fixed-term appointments.

It was wrong, too, to make renewal depend on passing the examination. The FAO failed to take proper account of her years of satisfactory service. She pleads discriminatory treatment in that it relieved other Chinese language staff of taking the examination. As the Appeals Committee held, the "testing process" was "anything but transparent".

The real reason why the FAO did not extend her appointment was its desire to retrench staff: the Director of Personnel's letter of 19 October 1994 said as much.

She seeks the quashing of the impugned decision and reinstatement in her former or an equivalent post and

payment, with interest, of salary and allowances and social security coverage as from 1 January 1995 until the date of reinstatement. Failing the quashing of the decision, she claims payment of the same sums and of one year's salary and allowances as from the date of delivery of the Tribunal's judgment. She claims moral damages and 5,000 United States dollars in costs.

C. In its reply the FAO submits that the Chinese Government exerted no influence on the decision not to extend her appointment. The precedents she cites are therefore immaterial.

What is material is whether it had the right to make her take an examination before it granted her an extension and whether the examination was properly run. There was, in its view, nothing wrong with having the same procedure for Chinese language staff as for staff proficient in other languages, and priority was given to serving officials. Thanks to help from the Offices of the United Nations in Geneva and New York, the testing was confidential and impartial.

D. In her rejoinder the complainant denies suggesting that the FAO acted on instructions from the Chinese Government. What she maintains is that for years the Organization used to let the Government interfere in decisions on renewal and that precedent laid on it the duty to protect her from any injury attributable to its dropping that practice.

As for the examination, the definition of the "required level" was vague and left the FAO free to act arbitrarily. The system of marking and the minimum mark for passing were not determined beforehand but merely improvised as the need arose. So the procedure did not pass muster. The complainant has doubts about the real reason for refusing her an extension, and the failure to fill her post after she left does nothing to dispel them.

E. In its surrejoinder the FAO contends that because of the long intervals between contracts she was not entitled to a permanent one. Nor did her fixed-term appointment carry any expectation of renewal. The Organization was free to hold an examination if it thought fit.

She is citing Judgment 1249 out of context. That judgment rejected the Organization's contention that, having been appointed in the first place because of government pressure, the complainant was estopped from pleading that non-renewal had been due to similar pressure. The complainant's case is quite different since, as she herself acknowledges, the Organization acted under no outside pressure.

The testing was quite impartial. It was not properly a competitive examination but merely a means of "evaluation" to help in deciding whether to renew the contracts of staff.

CONSIDERATIONS

1. The complainant, a citizen of the People's Republic of China, was first employed on the Organization's staff as a typist and proof reader from September 1974 to April 1978 at grade G.4. She then returned to China.
2. At that time the Organization had arrangements with the Chinese Government whereby it employed for limited periods translators and interpreters made available by the Ministry of Agriculture. On their return to the Ministry they were replaced by other Chinese civil servants, but many came back for further periods of employment.
3. The complainant was employed again by the Organization as a translator and reviser at grade P.3 from 21 September 1983 to 20 December 1986 and from 9 July 1991 at grade P.3 under a fixed-term contract for two years.
4. In November 1992, after discussion with the Government the Organization decided that from then on it would be recruiting Chinese staff in accordance with its own rules and by a process of open competition. Since the Chinese staff then employed had not been chosen by that process and the professional qualifications of some of them might not be up to standard, the FAO decided to require them to sit examinations to test their competence. The translators in the other translation sections had all been so tested. The Chinese language translators on the staff were not, however, required to enter an open competition, they were given priority in that they had only to take tests of competence.

5. On 15 April 1993 the Director of the Personnel Division wrote to the complainant to say that after discussion with representatives of the Government the Organization had decided that "the recruitment of Chinese language staff will henceforth follow established FAO procedures, including a competitive language examination as organized in respect of other language staff". It had further decided, he said, that "all Chinese language staff currently serving in the Organization will also be required to undertake this examination", success in which was "a prerequisite for extension of appointment with the Organization".

6. The complainant took the examination on 15 May 1993. The FAO then extended her appointment to 31 December 1993. The Director of Personnel informed her by a letter dated 21 September 1993 that she had been unsuccessful but would be given another chance to take the examination again the following year, so her appointment was again extended, to 30 June 1994. She took the second examination on 14 April 1994. The Director informed her by a letter of 19 October 1994 that she had "failed to reach the required level"; the workload in Chinese translation was "under review with a view to rationalizing the staffing level"; and her appointment was extended to 31 December 1994, when she would leave.

7. On 21 November 1994 she appealed to the Director-General. The Assistant Director-General in charge of Administration and Finance informed her on 20 December 1994 that the Director-General had rejected her appeal. She went to the Appeals Committee on 3 February 1995. In a report dated 10 January 1996 the Appeals Committee found in her favour. The main grounds for its doing so were lack of clarity in the reasons given for making her take the test; lack of "transparency" in the process and in the "consequences" of testing, breach of the rule against the retroactivity of an administrative decision, and failure to put her on a par with other members of the translation group. The Committee mentioned her seniority and good professional record and recommended reinstating her. By a letter of 8 August 1996, however, the Director-General informed her that he did not accept the Committee's recommendations and set out the reasons why. That is the decision impugned.

8. The complainant argues that the decision not to renew her fixed-term appointment on the grounds of her failure to pass the two tests was flawed because it disregarded essential facts, because clearly mistaken conclusions were drawn from the facts and because there was misuse of authority. In support of those pleas she says that the FAO did not take into account "the disadvantages which she suffered as a result of the Organization's acquiescence to recruitment procedures" whereby renewal of appointment was "at the whim of the Chinese Government". Those procedures cost her the continuity of service which would have entitled her to a continuing appointment, although she is not, she says, claiming one. She contends that it is not because the Organization originally failed to apply normal recruitment procedures that she should later suffer by having to sit an examination. To her mind it disregarded her satisfactory record of service. The manner in which it held the examinations lacked "transparency" and therefore proper safeguards of impartiality and fairness. She says that the reason why she failed both examinations was either that she is someone who underperforms in examinations or that the tests were incorrectly marked. She submits that the results should not prevail over her record of years of satisfactory service and that examinations are not necessarily a reliable method anyway of assessing ability to translate. It was, in her submission, an arbitrary and discriminatory decision to have her and other members of the Chinese language staff take an examination and make passing it a condition of renewal of contract. The chief of the translation group was not required to take it. In any event the Organization's real reason for not renewing her appointment was its wish to reduce the number of Chinese translators.

9. The Organization submits that the only "basic matter at issue" is whether it was right to require the complainant to pass a language test as a condition for renewing the appointment.

10. The question of renewal is governed by Staff Rule 302.907, which states:

"A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. ..."

and by Manual paragraph 305.5123, which states:

"Fixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment; such appointments expire according to their terms, without notice or indemnity."

The complainant does not challenge the application of those rules. So what is really at issue is whether the Organization is precluded from relying on the results of the two examinations to the complainant's detriment because she was originally recruited without taking the Organization's language test; alternatively, whether the favourable assessment of her work as a translator and reviser in previous periods of service should override the unfavourable results of the examinations.

11. Her allegations that the testing lacked "transparency" and was neither impartial nor fair do not stand up to scrutiny. All the Professional category staff in the Chinese language group took the same language examination for translators and revisers. Staff in the General Service category too were required to sit tests to prove their competence. It was the chief of the Translation Service who chose the examination material. Each staff member was assigned a number so as to conceal identity from the examiners. The examiners were not FAO staff but two Chinese revisers from the United Nations Office in Geneva. Three out of ten translators failed. The results show that the complainant's marks were poor. Anyone who failed the first time was given a second chance and was then examined by officials from the Chinese translation service of the United Nations in New York. Again, as may be seen from the results the FAO has produced, the complainant got a very poor rating.

12. The conclusion is that the tests were fair and impartial and there is no reason to believe that false results were obtained.

13. Since the Organization did not on recruitment test any of the Chinese translators and revisers who had to take the examination and since other members of the Translation Service were tested, it was neither arbitrary nor discriminatory to ask those who had not been tested on entry to take the examination. The fact that the chief of the Chinese translation group was not required to do so is irrelevant; he had retired by the time the complainant lodged her internal appeal.

14. Like any other organisation in the United Nations system, the FAO has a duty to ensure that its staff attain the highest standards of efficiency and technical competence. The arrangements made with the Chinese Government up to 1992 prevented the Organization from exercising its own discretion about the level of competence of Chinese recruits. The fact that the arrangements have ceased is to be welcomed and any surviving anomalies should be corrected, not perpetuated.

15. The Organization does not argue that the complainant's satisfactory record of service is wrong but maintains that it may not prevail over the results of the two later impartial examinations. The Tribunal accepts that plea: what must prevail is indeed the results of the examinations, which are objective assessments of her ability to meet the requirements of the job and which are later in time. The complainant having been found wanting in ability, the decision not to renew her contract was objectively justified. There was no misuse of authority; no mistaken conclusions were drawn from the facts; and no essential facts were overlooked. Nor did the Chinese Government influence the decision in any way. In that regard the case differs from the ones that the Tribunal allowed in Judgment 431 (*in re Rosescu*), where the Tribunal held that a director-general must not "bow unquestionably to the wishes of a government he consults", and in Judgment 1249 (*in re Reznikov*), in which it held that a director-general might not consider himself to be bound by the attitude of a particular government.

16. The complainant claims to benefit from anomalous arrangements that the FAO used to have with the Chinese Government which would not stand up to scrutiny under the Organization's rules. She contends that the Organization is bound by the recruitment procedures followed at that time. But if the anomaly had never existed she might not have been chosen in the first place. There is nothing discriminatory or unlawful about reforming the procedures. The Organization did make special allowance for the Chinese language staff in that it required them, not to enter an open competition, but merely to pass a test of proficiency. So it did not disregard the fact that they had prior service.

17. Although the complainant argues that examination is not the best way of evaluating proficiency, it is at least an objective method which can be scrutinised afterwards, as it has been in this case. In any event she did not object to the holding of the examinations.

18. There are no grounds for accepting the complainant's contention that the Organization's real reason for not renewing her contract was its wish to reduce the number of Chinese translators. The Tribunal is

satisfied on the evidence that the reason why her contract was not renewed was that in two examinations she had been found wanting in proficiency.

DECISION

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner