

EIGHTY-FIFTH SESSION

***In re* Everts**

Judgment 1741

The Administrative Tribunal,

Considering the complaint filed by Mr. Daan Willem Everts against the Food and Agriculture Organization of the United Nations (FAO) on 12 February 1997 and corrected on 22 May, the FAO's reply of 4 September, the complainant's rejoinder of 9 December 1997 and the Organization's surrejoinder of 30 March 1998;

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 is a Dutchman who was born in 1941. On 31 August 1993 he joined the World Food Programme (WFP) which is a subsidiary body of both the United Nations and the FAO. He was Assistant Executive Director of the Operations Department of the Programme. He held the grade of Assistant Director-General under a two-year fixed-term appointment. On 10 June 1994, and as had been agreed at the time of recruitment, his title was changed to "Deputy Executive Director for Operations" without any change in grade.

Shortly before the end of his period of probation, on 19 August 1994, the Executive Director of the Programme saw him to take stock of his performance. She acknowledged some strengths but pointed out what she saw as weaknesses in his work. She told him in which respects she wanted to see improvement: they included management, staff relations and support for corporate and executive decisions. She set him "work goals". In an electronic-mail message of even date he disagreed with her appraisal.

In December 1994 he told her that the foreign ministry of the Netherlands might be offering him a senior post. She encouraged him to think seriously about it because for the time being she was not intending to extend his appointment. He turned down the offer nevertheless and told her so.

On 17 March 1995 she saw him again and announced that she would not be renewing his contract; she asked him to keep the matter to himself. On 31 March, however, she told the senior directors and on 3 April the complainant himself told the staff of the Operations Department. By a letter of 5 April the Director-General for Development at the European Commission, who was in charge of relations with the Programme, expressed "great concern" to the Executive Director lest the complainant's contract should not be renewed. By a memorandum of 21 April 1995 the Executive Director gave him notice of non-renewal. In a memorandum of 25 May he challenged the decision on the grounds of failure to explain it and of misuse of authority. He said it would cause both him and the Programme serious injury.

By a letter of 31 May 1995 the Dutch Minister for Development Cooperation asked the Executive Director to think again. On 15 June the complainant appealed against the decision and asked the Executive Director, if she rejected his appeal, for leave to go straight to the Tribunal. In a memorandum of even date she accused him of infringing the Staff Regulations and Rules and the Standards of Conduct in the International Civil Service by failing to stop a campaign being waged outside the Programme to make her change her mind. She said she had accordingly decided to relieve him of duty as from 22 June 1995 - the date was later changed to 24 June - and let him choose between working for the United Nations Department of Humanitarian Affairs and special leave until the expiry of his contract. By a memorandum of 22 June he denied her charges and refused to make any choice on the grounds that he was challenging the decision that had required one. On 24 July he appealed to the Executive Director against her decision of 15 June. By a letter of 14 September 1995 she rejected his two appeals and denied him leave to come

directly to the Tribunal.

On 16 October 1995 he lodged two appeals with the Appeals Committee of the FAO. In its report of 21 June 1996 to the Director-General of the FAO on the matter of non-renewal the Committee recommended "finding without delay a way to offset the grave moral damage sustained by the complainant" because of the "gossip and rumours" about his departure that had been spreading "beyond the confines of the Programme". It favoured rejecting his claim to material damages on the grounds that "all the shilly-shallying might have prompted him to think more seriously about the offer of employment from the Dutch Government". By a letter of 15 November 1996, which he impugns, the Director-General sent him the report and rejected his appeal.

B. The complainant submits that the Executive Director broke the rules on the procedure for appraisal. In his submission seldom does an official of his rank get comments on his work. But if appraisal reports there did have to be they should have been made six and then ten months after he had taken up duty. For want of such reports he pleads breach of the procedural safeguards that allow of challenge to appraisal of performance.

The Executive Director's view that he "had not reached the expected level" was plainly mistaken. It was at odds both with the "glowing praise" she lavished on him in his first year and with what the Programme's partners were saying about his work.

He charges the Executive Director with breach of good faith: she put off for months her decision not to renew his contract and took him to task for making it known when she herself had announced it to the senior directors on 31 March 1995. He says that she had told the Secretary-General of the United Nations as early as February 1995 that she was going to refuse him an extension because he had his sights set on her own post. That baseless allegation and the offer of transfer to a far lower post in the United Nations betray the Programme's breach of its duty to heed "the dignity of international civil servants".

He pleads misuse of authority and failure to apply the proper procedure: if the charge against him was disciplinary there should have been disciplinary proceedings.

Lastly, he alleges grave material injury - the loss of a senior post in the Dutch civil service - and moral injury - the disruption of his career and damage to his good name.

He seeks the quashing of the impugned decision and costs.

C. In its reply the FAO points out that according to its Staff Rules and Manual fixed-term contracts expire at the appointed date without notice and carry no expectation of renewal. The case law on the rightful expectations of a long-serving official are irrelevant because the complainant was still on his original contract.

The FAO says that it need not follow any particular procedure for assessing the performance of a director but that in any event on 19 August 1994 the complainant had the opportunity of answering his supervisor's oral and written comments. It was entirely up to the Executive Director to assess his performance. Though she acknowledged his strengths, she had had "serious reservations" all along about the quality of his work and told him so. As early as December 1994 she let him know what her decision was likely to be. It was he who, in breach of the Standards of Conduct in the International Civil Service, announced the decision both inside and outside the Programme so as to put pressure on her. That left her no choice but to make the announcement of 31 March 1995 to stem the tide of rumours.

There was nothing untoward about consulting the Secretary-General of the United Nations on renewal of the contract of someone above grade D.2 since his fiat is required for appointments at that level. The Organization says that the Executive Director denies ever imputing to the complainant the ambition of taking over as Executive Director. He has not even attempted to prove misuse of authority. The impugned decision cannot be seen as an act of discipline. He sustained neither material nor moral injury.

D. In his rejoinder the complainant relies on the case law of the International Court of Justice to bear out his contention that a decision not to renew a fixed-term appointment may amount to a breach of contract warranting judicial review. He cites the Tribunal's own rulings on rightful expectation of renewal.

He says that, though the decision required the approval of the Secretary-General of the United Nations and the Director-General of the FAO, neither was officially consulted beforehand. Notes that the Executive Director wrote

in anticipation of the meeting of 19 August 1994 were no proper appraisal. Besides, they did not warrant the decision since he was still on probation at the time. The "serious reservations" the FAO mentions

were really "mere guidelines", and none were stated later than November 1994. The defendant adduces no evidence of his having spread rumours. The only reason why he mentioned the decision to the Dutch Government was that he was looking for a job. The charge of breach of the Standards of Conduct shows that the reasons for the decision were disciplinary.

E. In its surrejoinder the FAO presses its pleas. In its submission the decision of 21 April 1995 was mere confirmation in writing of a decision the complainant had long been aware of. Although approval from the Secretary-General and the Director-General was not required for non-renewal, their views were sought. When confirming his appointment at the end of probation the Programme gave him "the benefit of the doubt" despite the "somewhat mixed results" he had achieved.

CONSIDERATIONS

1. The complainant joined the World Food Programme on 31 August 1993. The Programme is a subsidiary body of the United Nations and the Food and Agriculture Organization of the United Nations (FAO). His contract with the Programme was for two years, the first being probationary.

2. He was the Assistant Executive Director in charge of the Operations Department and held the grade of Assistant Director-General. He ranked third in the Programme, below only the Executive Director and the Deputy Executive Director. On 10 June 1994 his title was changed to "Deputy Executive Director for Operations" without any change in grade or rank.

3. In August 1994, before the end of probation, the Executive Director saw him to talk about his performance. She found both strengths and weaknesses and told him just how he must do better. On 29 August 1994 she confirmed his appointment.

4. On 17 March 1995 she called him in again to tell him what she thought of his work and that she would not be renewing his contract. She confirmed her decision in writing on 21 April 1995 saying that she was under outside pressure to review her decision not to renew his contract. She told him that the work of the Operations Department was being disrupted and the Programme threatened in consequence.

5. On 15 June 1995 he appealed under "WFP Staff Rule 303.1311" to the Executive Director. She sent him a memorandum the same day to say that she was relieving him of his duties as head of the Operations Department. She proposed either an assignment with the United Nations Department of Humanitarian Affairs or special leave until the expiry of his contract.

6. On 24 July he appealed to the Executive Director seeking the reversal of her decision of 15 June 1995. On 14 September she sent him a reply, which he got on the 18th, rejecting both his appeals as devoid of merit; she had, she said, taken her decision for the sake of the Programme and it took due account of his own circumstances.

7. On 16 October 1995 he went to the Appeals Committee of the FAO, the competent body. He claimed "reinstatement and the re-establishment of his career or, failing that, full rehabilitation, plus an award of damages in an amount equivalent to two years' salary and allowances for material and moral injury".

8. On 21 June 1996 the Appeals Committee reported to the Director-General of the FAO. It concluded:

"that the Committee may not appraise [the appellant's] professional shortcomings but merely review the procedure and see whether there was any misuse of authority. On that score it holds that, though the reasons given seem hardly to have warranted non-renewal, renewal is not to be taken for granted ...

Though it would reject his claim to material damages, the Committee recommends seriously looking into ways of repairing the grave moral damage he has sustained."

9. On 15 November 1996 the Director-General of the FAO gave the complainant notice of the rejection of his appeal against non-renewal. That is the decision he is impugning, and he filed his complaint on 12 February 1997.

10. In support of his claim to the quashing of the decision not to renew his contract he pleads breach of the rules on the procedure for assessing performance, obvious mistakes in the assessment, breach of good faith and of the Programme's duty to respect the dignity of staff, misuse of authority and abuse of process.

11. It is worth first recalling the firm line of precedent which has it that, though renewal is at discretion, there must be sound reasons for refusing it and they must be conveyed to the official. The decision must be *intra vires*, comply with the rules of procedure, show no mistake of fact or of law, nor any misuse of authority, and rest on no obviously wrong inference from the evidence. Where the decision is based on unsatisfactory performance the Tribunal will not substitute its own view of the complainant's fitness for duty for the organisation's.

12. There being no need to go into everything that happened after the Executive Director took her decision, and without supplanting her views with its own, the Tribunal will determine whether that decision met both the formal and substantive requirements.

13. The complainant pleads breach of the procedure for appraisal. According to paragraphs 305.5241(ii) and (iii) of the FAO Manual the first probation report should come six months after the staff member took up duty and a second one four months later, and the probationer's comments should be attached. The complainant submits that he never saw any first report and that the form which had been sent to the Executive Director to make the second one was not shown to him and was never filled up anyway. So, he says, the required reports were not made and the only appraisals of his performance were oral or took the form of notes that he did not see until June 1995, almost a year after the date by which he should have had his second report.

14. In its reply the FAO relies on Staff Rule 303.26, which is about the appraisal of performance. It reads:

"The service of a staff member shall be the subject of evaluation reports made from time to time by the supervisor. Such reports, which shall be shown to the staff member, shall form a part of the staff member's permanent cumulative record."

At the material time - the defendant argues - the performance of top officials was not subject to formal appraisal. The Executive Director did, however, take the view that she should respect the spirit of appraisal by assessing the highest-ranking directors, even though "there was no particular procedure or formal requirement she had to observe".

15. The plea fails. Whatever his rank was in the Programme the complainant was entitled to appraisal that was in keeping with the written rules or at least so far observed due process as to afford him the opportunity of adding any timely comments of his own for entry in his personal file.

16. The Appeals Committee was quite right: there was one appraisal, but it did not observe due process. Nor was any appraisal made after the period of probation. The conclusion is that for want of any properly made appraisal there is no objective and reliable means of reviewing the grounds for non-renewal. The impugned decision cannot stand.

17. It is plain on the evidence that the complainant has sustained actionable injury. But he held only a fixed-term appointment for two years, which ran its course. So he is awarded *ex aequo et bono* 40,000 United States dollars in damages under all heads of injury.

DECISION

For the above reasons,

1. The decision of 15 November 1996 is set aside.
2. The FAO shall pay the complainant 40,000 United States dollars in damages.
3. It shall pay him 20,000 French francs in costs.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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