

## **EIGHTY-SIXTH SESSION**

### ***In re de Munck***

#### **Judgment 1796**

The Administrative Tribunal,

Considering the complaint filed by Mr. Roland de Munck against the Food and Agriculture Organization of the United Nations (FAO) on 10 July 1997 and corrected on 12 September, the FAO's reply of 30 December 1997, the complainant's rejoinder of 23 April 1998 and the Organization's surrejoinder of 10 July 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, a Belgian who was born in 1939, joined the staff of the FAO on 20 November 1989. He was the coordinator of a project for regional cooperation in the development of market-garden produce in West Africa. His grade was P.5 and he was stationed at Dakar, in Senegal. His original appointment was for one year, but he had it renewed several times. He was promoted to grade D.1 on 1 October 1993. His last contract was to expire on 31 December 1995.

At a meeting at the end of May 1995 the FAO's Representative in Senegal told him of a decision to remove him from the project for not keeping office hours. By a memorandum of 12 June the Representative informed the Director of the Field Operations Division that the Senegalese "counterpart authority" had objected to the complainant's poor time-keeping and absences, he had ordered an inquiry, and the objections were upheld; so the complainant must go, and he was asking the Director to "confirm" his decision. At a meeting at headquarters, in Rome, on 26 June the Director handed over to the complainant the text of the Representative's memorandum and asked him to answer. The complainant did so in writing the next day.

By a telegram of 13 July 1995 the Director of the Division of Personnel told him that he would be dismissed on 31 August 1995 under paragraph 370.531(vi) of the FAO's Manual. On 24 August he lodged an appeal with the Director-General. By a letter of 18 September the Assistant Director-General in charge of Administration and Finance told him that the dismissal was revoked, that he was reinstated in the staff but not in his former duties, and that he was to take on other work until his appointment ran out on 31 December 1995. His appointment would not be renewed beyond that date. Was he pressing his appeal? If so, the letter was an interim reply to it. By a letter dated 20 September the complainant answered that he did press his appeal and he claimed both reinstatement as regional coordinator of the project and the renewal of his appointment.

By a letter of 22 November 1995 the Deputy Director-General told him that the Director-General had rejected his appeal.

On 14 February 1996 he went to the Appeals Committee. In its report of 24 January 1997 the Committee held that since his post was to be abolished the Organization had been "right to reassign him and not to renew his contract beyond the scheduled date of expiry". Yet, since the behaviour of the Representative in Senegal had caused him serious moral injury, the Committee recommended granting him financial compensation and treating with "proper administrative objectivity" any application he might make for a field post.

By a letter of 15 April 1997, the impugned decision, the Director-General told the complainant that he was endorsing the Committee's recommendations and was, among other things, willing to offer him 18,537.99 United States dollars - the equivalent of three months' salary - in compensation for the moral injury the Committee had referred to and in "full and final settlement of any claim" he might have under his appointment. The complainant refused that offer.

B. The complainant has four pleas.

First, he contends that he was denied due process. The Organization did not safeguard his right to a hearing and indeed refused to let him have the material he wanted.

Secondly, the conclusions it drew from the evidence were blatantly wrong. As to the decision to take away from him his duties as coordinator, he contends that the allegations in the Representative's memorandum of 12 June 1995 are mistaken. The hours he was keeping were what the efficient working of the project demanded and were due to the unusual physical conditions in which it was being carried out. As for the refusal to renew his contract, the Appeals Committee went beyond the ambit of the defendant's case and was in any event mistaken because the post of coordinator was not abolished.

Thirdly, there was abuse of authority. The complainant says that the FAO's Representative and several headquarters officials caused him injury. He sees in the decision an "ill-concealed disciplinary sanction".

Fourthly, the decision harmed his standing and reputation.

He asks the Tribunal to set aside the decision of 15 April 1997 insofar as it refused to renew his contract and to order the FAO to pay him damages equivalent to three-and-a-half years' salary and allowances at grade D.1, step 9; compensation for the loss of pension entitlements; moral damages; and costs.

C. In its reply the FAO says that the evidence at its disposal shows that, as the complainant has himself acknowledged, he failed to keep office hours.

It sees no point in determining whether it observed the rules on dismissal since it has revoked the dismissal. And it complied with the rules on non-renewal of a fixed-term appointment.

It did not draw clearly mistaken conclusions from the evidence. There was nothing fanciful about the objections from the Senegalese counterpart authority. Nor did the Appeals Committee get the facts wrong: the project did come to an end on 31 December 1995.

There was no prejudice against the complainant. At the meeting of 26 June 1995 he was shown a copy of the attendance sheets which it appends to its brief.

It has already offered him compensation for any injury to his standing and reputation.

D. In his rejoinder the complainant seeks to refute the defendant's pleas. He says that the FAO has never abolished the post of coordinator. Though it did revoke the dismissal, it threw him out of his job and discredited him. The three months' pay that the Director-General is offering him in compensation is just the amount of the termination indemnity and so affords no redress for the discountenance and other injury he has suffered.

He puts the material injury at 677,000 United States dollars.

E. The FAO presses its pleas in its surrejoinder. In answer to the complainant's claim to material damages it points out that a fixed-term appointment carries no expectancy of constant renewal.

## CONSIDERATIONS

1. The Food and Agriculture Organization of the United Nations recruited the complainant on 20 November 1989 under a fixed-term appointment for one year. He served at grade P.5 as coordinator of a regional project in West Africa and he was stationed in Dakar. The Organization renewed his appointment several times and promoted him to grade D.1 on 1 October 1993. By a letter of 21 November 1994 it told him of the renewal of his appointment up to 31 December 1995.

2. Late in May 1995, at a meeting he did not attend, the FAO's Representative in Senegal said that he was intending to take the complainant off the project. The Representative told him orally on 31 May 1995 of the decision.

3. On 12 June 1995 the Representative wrote to the Director of the Field Operations Division in Rome to say that

he had looked into "oral criticisms" from the Senegalese "counterpart authority" about the complainant's time-keeping and attendance; he had found the criticisms warranted; the complainant himself had acknowledged as much; he had offered an unacceptable explanation; and he must leave the project. The Director had not, he said, wanted to "cast into perdition" someone who had, after all, won everyone's support for the project and who had suffered "a nasty shock"; but he wanted the decision to be confirmed and the complainant to be removed "from the project and from Senegal". He was against disciplinary proceedings, which "might lead to more drastic action".

4. While on home leave the complainant was summoned to headquarters in Rome. There on 26 June the Director handed over the Representative's letter and called on him to explain orally his conduct in Dakar and to comment in writing. His explanations proved unavailing. By a telegram sent on 13 July 1995 to his address in Belgium the Director of the Division of Personnel told him that he would be dismissed on 31 August 1995. On 24 August he appealed to the Director-General against the decision on both procedural and substantive grounds.

5. On 18 September 1995 the Assistant Director-General in charge of Administration and Finance told him that the decision of 13 July to dismiss him had been revoked; he was reinstated in the staff and in the meantime had been put on special leave with full pay; he would be performing new duties until 31 December 1995, when his appointment, which would not be renewed, was to expire; if he pressed his appeal, he should treat the letter as an interim reply.

6. On 19 September the complainant received, back in Dakar, a description of new duties. They were to consist mainly in "supplementing the technical summing-up of the results of the regional project" and "drafting a synopsis of all the work done and results obtained under contractual service agreements put into effect by the project". In a letter of 20 September to the Assistant Director-General he said that he was pressing his appeal and wanted not only the quashing of the Representative's decision but reinstatement as regional coordinator of the project and the renewal of his appointment. On 22 November 1995 the Deputy Director-General wrote to confirm his new duties and the expiry of his appointment at 31 December 1995. On 14 February 1996 he went to the Appeals Committee.

7. In its report of 24 January 1997 to the Director-General the Committee declared his appeal "receivable as to the reassignment and the non-renewal". It went on: "the project having since undergone change, the Organization was right to reassign him and not to renew his contract beyond the scheduled date of expiry". Yet -

"since the behaviour of the FAO's Representative ... caused him serious moral injury, the Committee recommends prompt payment of financial compensation for such injury. Moreover, should he wish to apply for a suitable vacancy in the field, the Organization should treat his application with proper administrative objectivity and in line with the procedure."

8. By a letter of 15 April 1997 the Director-General conveyed the Committee's report to the complainant, endorsed its recommendations and offered him moral damages amounting to 18,537.99 United States dollars, the equivalent of three months' pay or the sum he would have got in termination indemnity under the Staff Regulations for "abolition of post, reduction of staff, or in the interest of the good administration of the Organization". That is the final decision he wants to have set aside in that it refused to renew his appointment.

9. He submits that the decision is unlawful because the FAO denied him due process, drew blatantly wrong conclusions from the evidence, and harmed his standing and good name.

10. The Organization replies that it abided by the rules on non-renewal and that he was given his full say: his letters to the Director of Personnel show full awareness of what the attendance sheets said and his submissions at every stage in the proceedings bear out that he had access to the records. It observes that he failed to keep office hours though he neither had leave to set his own, nor had agreed with other staff that they would turn up in the forenoon and he only in the afternoon. It cites a memorandum by the Representative recording the Senegalese counterpart authority's oral criticisms of his poor time-keeping and absences and the attendance sheets of the centre for horticultural development, where his project had premises. It adds that the head of the national institute for agricultural research confirmed the criticisms and the complainant has himself accepted them. The Director-General has discretion to set someone to other duties if he sees fit. According to Staff Rule 302.907 fixed-term appointments expire "automatically and without prior notice on the expiration date specified in the letter of appointment" and, according to FAO Manual paragraph 305.5123 "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".

11. According to a strong line of precedent both transfer and renewal are at the executing head's discretion and will ordinarily be subject to review only if the decision is *ultra vires*, or if there is a formal or procedural flaw or a mistake of law or of fact, or if a material fact was overlooked or some obviously wrong conclusion drawn from the evidence, or if there is abuse of authority.

12. Here the impugned decision flowed directly from the Representative's memorandum of 12 June 1995 reporting on an inquiry which he said had showed up the complainant's record of attendance and time-keeping as poor. Nothing happened thereafter to warrant the action which, once the dismissal had been revoked, the Organization took. That is plain from the Appeals Committee's report, which the Director-General endorsed and which said that the complainant's hours of attendance had sat loosely to the official timetable and had, on his own repeated admission, failed to match those of the other staff. The Committee saw the charges of absenteeism and "low output" as gratuitous.

13. Contrary to the FAO's assertions - partly echoed by the Appeals Committee - the complainant did not explicitly admit to the charges. They rest on nothing but attendance sheets that show when vehicles entered and left the centre's premises. In his letter of 27 June 1995 to the Director of the Field Operations Division the complainant maintained that, whatever hours he kept, he was working properly and efficiently as coordinator; his accusers were lying in trying to make out - on the pretext of his irregular hours - that he was spending only a half or a quarter of his time on the project. Also in that letter he said that, bit by bit and with the consent of the other staff, he had adapted his hours to the changing pattern of work at the centre: in five years the number of experts and associate experts on the project team had risen from two to "ten or so", all using the same telephone and fax and photocopying machines in his own office and, for a while, the services of the same secretary. In support of the charges the defendant cites the letter from the head of the institute. But that letter, too, relies on the attendance sheets as evidence of a "discrepancy between the official time-table at the Centre and the times of [the complainant's] comings and goings". The complainant offers evidence in rebuttal of the attendance sheets. Lastly, there is no proof that the Senegalese counterpart authority actually did make oral criticisms of him.

14. The statements by the Representative and by the complainant are at odds and there is no irrefutable evidence before the Tribunal. The conclusion is that what was needed was a proper inquiry to see whether on the strength of reliable evidence the charges against him stood up.

15. What is more, the FAO's treatment of him looks like punishment for conduct it disapproved of and for low output. So there should first have been due disciplinary process affording him full safeguards. Indeed the Representative acknowledged by implication in the memorandum which prompted the impugned decision that disciplinary proceedings were the right course: as was said in 3 above, he suggested waiving them on the grounds that that "might lead to more drastic action". The Appeals Committee thought such waiver a pity on the grounds that "disciplinary proceedings would no doubt have served to sort out this issue".

16. The FAO argues that because the project was soon to be wound up the complainant could not expect renewal of his appointment: as regional coordinator he knew full well that the second phase would end in 1995 and Belgian financing of the third one was far from sure. As he has pointed out, however, "the order of events shows that stripping him of his duties as coordinator on 31 May 1995 had nothing to do with the start of the third phase, which, as the Organization concedes, came sixteen months later".

17. The conclusion is that without the safeguards of due process he suffered action which amounted to a sanction. As the Appeals Committee said in its report, the decision had harmed his dignity and good name and had, on the Representative's own admission, given him a "nasty shock". The Committee made severely critical comments about the Representative's behaviour and felt that the case had proved damaging to the Organization's reputation too.

18. Because there was no due process, because the complainant's standing and good name were harmed and because he had served the Organization long and well the Director-General's decision of 15 April 1997 must be set aside and the complainant awarded damages. The amount is set at 75,000 United States dollars. His other claims are dismissed.

## DECISION

For the above reasons,

1. The Director-General's decision of 15 April 1997 is set aside.
2. The FAO shall pay the complainant 75,000 United States dollars in damages.
3. It shall pay him 20,000 French francs in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 13 November 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 28 January 1999.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner