

EIGHTIETH SESSION

In re GÜSTEN

Judgment 1496

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rolf Güsten against the United Nations Food and Agriculture Organization (FAO) on 15 September 1994 and corrected on 29 December 1994, the FAO's reply of 18 May 1995, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 29 September 1995;

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 German who was born in 1932, joined the FAO in Rome in September 1987 as Director of the Organization's Investment Centre, which is part of its Development Department. He held grade D.2.

In December 1992 the Director-General ordered an audit of the Investment Support Programme (ISP), one of the Centre's two branches. The audit took from January to April 1993, and the auditors asked the complainant for information. In a report of 30 April 1993 they spoke of mismanagement of the Programme's Management Support Unit. By a memorandum of 31 May 1993 to the Assistant Director-General in charge of the Development Department the complainant rejected the charges, though he said he found the report "fair and balanced".

In July 1992 the Organization had recruited a Mrs. Silverberg at grade P.5 to work for a new unit of the Centre under an appointment that was to run from 1 September 1992 to 31 August 1993. But the plan came to naught and the Director-General decided in February 1993 to end her appointment. When the complainant saw the Director-General on 16 February he objected, it appears, to the decision. The Director-General confirmed it, and the complainant wrote to him the same day offering to resign. But he withdrew his offer in a letter of 10 March 1993 on the grounds that the matter at issue had been "resolved". Mrs. Silverberg's appointment ended for all the complainant's attempts to have it extended.

On 2 June 1993 the Deputy Director-General saw the complainant, told him that the Director-General no longer trusted him to run the Centre and asked him to resign. By a memorandum of 4 June 1993 the Assistant Director-General in charge of the Development Department gave him a written warning under paragraph 314.22 of the FAO Manual on the grounds of mismanagement of the Centre and told him he was transferred as from Monday 7 June to be a special adviser in the Development Department, still at grade D.2.

On 27 August 1993 he appealed to the Director-General against the decision of 4 June. By a letter of 24 September the Assistant Director-General in charge of the Administration and Finance Department told him that the Director-General had rejected his appeal.

On 5 October 1993 he went to the Appeals Committee. In its report of 29 April 1994 the Committee recommended rejection but suggested doing something to remove his "sense of injustice". In a letter of 27 June 1994 - the impugned decision - the Director-General upheld the earlier decision on the grounds, among others, that the complainant was about to retire anyway. He retired at 30 June 1994.

B. The complainant pleads breach of due process: the review was not objective; nor was the conduct of it adversarial, since he was not given his say.

He contends that his transfer amounted to a sanction which he drew on himself by his stance over Mrs. Silverberg. The FAO did not provide the guarantees that staff should enjoy when it takes disciplinary action.

The Director-General misused his authority by exercising his management prerogatives for purposes that the rules do not allow.

The circumstances of his transfer show the Organization's disregard for the dignity and good name of staff.

He seeks the quashing of the Director-General's decision of 27 June 1994 and awards of moral damages and costs.

C. In its reply the Organization finds fault with the complainant's version of the facts. In its submission the transfer was no sanction but a decision taken in none but the Organization's interests. The reason why the Director-General ordered the audit was that the World Bank had made a change of policy that affected the funding of many of the Centre's projects. Though the audit showed the need for reforms the complainant was not the one to carry them out: he was about to retire, and he had given no inkling of the steps he would be taking to stop the mismanagement reported by the auditors.

His new post was comparable to the old one: it carried the same grade and senior responsibilities.

D. The complainant rejoins that the reply says nothing of his stand over Mrs. Silverberg, which he says started the dispute. He was willing to take steps to reform the management of the Centre. The Organization has failed, in his view, to answer the pleas in his complaint.

E. In its surrejoinder the FAO observes that the complainant's pleas rest on mere speculation and ignore the facts of the case. It maintains that the transfer did serve its own proper interests.

CONSIDERATIONS:

1. The complainant, who was born in 1932, joined the FAO in September 1987 at its headquarters in Rome as Director of its Investment Centre, which comes under the Development Department, and his grade was D.2.

2. By a memorandum of 4 June 1993 the Assistant Director-General in charge of the Development Department gave him a written warning on the Director-General's behalf under FAO Manual paragraph 314.22 on the grounds of shortcomings which auditing had disclosed in the work of the Centre and his unsuitable reaction. The Assistant Director-General told him that in the Organization's interests the Director-General was transferring him to another post in the Department as "special adviser" at the same grade as from 7 June 1993. The stated reason for the decision was the need to overhaul the Centre because of new agreements with the World Bank. The complainant appealed to no avail against the transfer. In a final decision of 27 June 1994 the Director-General confirmed it on the recommendation of the Appeals Committee, even though in its report of 29 April 1994 the Committee had expressed serious misgivings on the score of procedure and had taken the Administration to task for treating him inconsiderately.

3. In the complainant's submission the decision was a hidden disciplinary sanction or even an act of reprisal for his having disagreed with the Director-General about the termination of the appointment of one of the Centre's employees. The Director-General had thought that the Organization's interests warranted the termination whereas the complainant saw it as wrong on both legal and moral grounds.

4. The complainant pleads flaws in the auditing procedure: he was not warned that his transfer was mooted and so was denied his say; the transfer was unwarranted since he was able to carry on as before until the end of his appointment; and it was a serious blow to his dignity to shift him at but a day or so's notice to an almost meaningless job.

5. The FAO's answer is that the transfer was dictated by nothing but its own interests: a new method of funding by the World Bank had brought about change in its investment policy; internal and external auditing had shown up the complainant's shortcomings; the Director-General had lost confidence in him; and since he was retiring anyway it was time for younger people to take over and carry out the reforms that the Centre's new ventures called for.

6. FAO Staff Regulation 301.012, which is about transfer, reads:

"Staff members are subject to the authority of the Director-General, who may assign them to any of the activities or offices of the Organization, and to whom they are responsible in the exercise of their functions."

and Manual paragraph 311.412 says:

"A staff member who is subject to an interdivisional/interdepartmental transfer is informed in writing by Personnel Division of the proposed transfer and its reasons and given the opportunity to present possible observations. However, in accordance with Staff Regulation 301.012, the final decision rests with the Director-General or with the officer so delegated."

7. A long line of precedent allows the Director-General discretion over transfer and so his decision is subject only to limited review. The Tribunal will not set it aside unless it is ultra vires, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority.

8. Thus the Tribunal would allow a complaint against such a decision if it were a hidden disciplinary sanction because there are specific procedural rules to protect a staff member when disciplinary action is taken: see for example Judgments 126 (in re Danjean Nos. 1 and 2) under 4 and 9, 1078 (in re Schaack) under 16, and 1407 (in re Diotallevi No. 3) under 18. In processing, ordering and notifying transfer an organisation must heed the staff member's dignity and good name and not cause unnecessary hardship: see Judgments 367 (in re Sita Ram) under 13 and 14, 631 (in re Go) under 27 and 28, 942 (in re Leprince) under 4, and 1234 (in re Crockett) under 15 and 19. And the decision must follow a proper enquiry: see Judgment 942 under 4.

9. As to the staff member's right to have his say before transfer Judgment 631 said in 28:

"... whether or not there is a specific provision in the Staff Rules, as a matter of contractual obligation the Administration ought not to take a decision injuriously affecting a staff member's career without first, as a matter of natural justice, giving him the reasons for the decision and getting his response."

Again, in Judgment 810 (in re Najman No. 5) a passage in 7 said:

"What good faith requires is that when someone is transferred he should be given proper notice, and not just of a vague intention, but of the nature of the post he is to get and of the duty station. The principle does have to be applied flexibly, and transfer may be lawful even if no notice is given provided that there is enough time before it takes effect."

In that case the condition was not met: the staff member heard of the transfer only a few days beforehand, though there was neither word nor evidence of urgency, and was not even told what the new job was to be. In Judgment 1234 the Tribunal ruled in 19:

"Of course [the Organization's] own interests are paramount, but it must still, for the sake of proper management and mutual confidence, treat its staff fairly. If it is transferring a staff member it must let him have a degree of responsibility corresponding to his grade and respect his dignity. It must give him a statement of the reasons for the transfer and the opportunity of responding."

So one requirement of the case law is that the staff member be given a hearing beforehand when the transfer may harm his dignity or private interests and is not a matter of urgency.

10. The complainant pleads both formal and substantive flaws in the decision he is challenging. The Tribunal will not go into the merits of the internal and external audits the Organization ordered. But it is obvious that the FAO did fail to follow the proper procedure for transfer. It neglected to tell him before transfer that it was looking into the matter or even that a transfer was being mooted, and he was given no opportunity of stating his views on the subject.

11. There were several reasons why it should have given him a hearing. Having been in charge of the Centre for over six years, he was bound to find it very wounding to be shunted into an ill-defined non-managerial post. Transfer came, for no apparent reason, as a bolt from the blue; and that was the more unfortunate in that there was seemingly no attempt to check that his new post was the one best suited to his qualifications and position. Even the Organization's own rules required it to give him a hearing before transfer. The Appeals Committee regretted the secretiveness of the Director-General's move, the want of discussion on the findings of the two audits, the suddenness of the transfer, and the discrepancy between the complainant's duties old and new. The Organization's flagrant disregard of his right to a hearing was a breach of due process, and by following a procedure that offended

unnecessarily against his dignity and personal feelings the Organization failed in the duties it owes to its staff. For those reasons the impugned decision cannot stand. That being so, there is no need to entertain the complainant's pleas about substantive flaws in the decision itself.

12. Since the complainant has retired the Tribunal may not order his reinstatement and it would serve no purpose to send the case back to the Organization for proper resumption of the procedure. The question is whether the injury warrants some other type of redress.

13. The abruptness of the complainant's transfer could scarcely be put down to the Organization's needs. As the Appeals Committee said, his new job was not on a par with the old one or in keeping with his qualifications. The point of it was not explained to him at the time and it seems unlikely that the Organization even tried to find him a more suitable one. The manner of it was calculated to offend his dignity, and the FAO proved inconsiderate. The conclusion is that its unlawful behaviour and the seriousness of its offence warrant redress. The letter of appreciation that the Director-General sent him on retirement will not suffice since it failed to acknowledge the unnecessary injury he had suffered. The Tribunal will therefore order the Organization to pay him moral damages, and in the circumstances it sets the amount at 10,000 United States dollars. He is also awarded costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 June 1994 is set aside.
2. The Organization shall pay the complainant 10,000 United States dollars in damages for moral injury.
3. It shall pay him 20,000 French francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Mella Carroll
Egli
A.B. Gardner