

TWENTY-FIFTH ORDINARY SESSION

***In re* LOOMBA**

Judgment No. 169

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Kewal Krishan Loomba on 28 August 1969, the Organization's reply dated 26 February 1970, the complainant's rejoinder of 4 April 1970, the Organization's surrejoinder of 30 June 1970, the complainant's further observations dated 20 July 1970 and the Organization's reply thereto of 14 September 1970;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.0913, 301.103 and 301.153 and Manual section 305.6;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 3 October 1967 the complainant, who is of Indian nationality, was appointed at grade G.6 to the staff of the FAO Office in New Delhi and assigned as administrative assistant to a project relating to a pre-investment study of forest resources. He received a one-year contract which was to terminate on the completion of the project and was subject to six months' probation.

B. By a minute dated 5 January 1968 the project manager expressed grave dissatisfaction with the complainant's work performance. He criticised Mr. Loomba's failure to co-operate harmoniously with other members of the project staff, his practice of delegating duties to persons whom he mistakenly treated as subordinates, his tendency to complicate the work of the expert staff by arbitrary and unwarranted administrative action and his inability to meet the clerical requirements of his post. In a letter of 15 January 1968 to the project manager the complainant vigorously protested against these criticisms, which he felt to be totally unfounded. He maintained that his work performance had fully met the standards required; that he had strictly followed his superiors' instructions; and that he had never shown discourtesy or lack of co-operation towards his colleagues. He alleged, moreover, that for some time the project staff had been claiming reimbursement of fictitious expenses and payment of unauthorised allowances and that he had considered himself bound to do his utmost to curb the fraudulent practices rife in the office. In his view, the other project staff and particularly the project manager were simply victimising him for having refused to connive at wholesale misappropriation of project funds.

C. Thereafter the project manager made several oral appeals to the complainant to show a more co-operative attitude and increase his output. He continued however to be dissatisfied with the complainant's performance. By a letter of 14 March 1968 to the Chief of Personnel in Rome he reported Mr. Loomba's inability to co-operate with the experts and their repeated criticisms of his work and recommended that his appointment should not be confirmed but be allowed to terminate on the expiry of the probation period, on 2 April 1968. Mr. Loomba came to hear unofficially of this recommendation and by letter of 18 March 1968 himself wrote to the Chief of Personnel repeating his charges that the project staff were claiming unwarranted expenses and asking the Organization to carry out a full inquiry. He also quoted from a letter of 6 March 1968 from the project manager to the Director of Field Services in Rome in which the former recognised that there had been misappropriation of funds in his office, and stated that the post of administrative assistant had been filled in October 1967 and that since then the project accounts had been "handled by the new incumbent in a fully satisfactory way". Headquarters decided to postpone action on the project manager's recommendation in order to ascertain whether there was any truth in the complainant's allegations. The probation period was extended by telegram of 28 March 1968 until 30 April 1968 and again by telegram of 24 April until 15 May 1968. The complainant wrote many letters during this period to the Director-General and to senior officials repeating in detail his charges of corruption and misappropriation of funds on the part of project staff and accusing the project manager of wanting to get rid of him because of his refusal to

allow the illicit practices to continue.

D. The Organization asserts that a careful inquiry was held at headquarters in the course of which the project manager was asked to comment on the complainant's accusations. An audit of the project carried out in November 1967 had revealed none of the alleged irregularities; but headquarters ordered a further inventory of project equipment and "all matters were finally cleared up to the satisfaction of the competent services". The complainant's accusations being thus, in the Organization's view, without foundation, it thereupon decided, in accordance with Staff Regulation 301, not to confirm his appointment and he was so informed by telegram of 15 May 1968.

E. By a letter of 7 June 1968 to the Director-General Mr. Loomba appealed against this decision; by letter of 13 August 1968 the appeal was rejected. By letter of 9 July, however, he had lodged a further appeal with the FAO Appeals Committee in Rome. In his appeal he set out in great detail many charges of misappropriation of funds and of black-market selling of goods imported free of customs. In his view, the decision not to confirm his appointment was a disciplinary measure inspired by prejudice and by fear that he would disclose further details of such improprieties. He also claimed that he had never received the telegrams informing him of the extensions of his probation; that he was therefore entitled to assume that his contract had been tacitly confirmed; that he had never been given a written statement of the reasons for the decision, to which he was entitled under Staff Regulation 301.103; and that he had not been paid his full entitlements on termination. By letter of mid-September 1968 to the Director-General he also submitted a detailed claim for certain payments, including salary due, terminal indemnity, etc. He accordingly asked for the rescinding of the decision not to confirm his appointment, payment of his claims in full and compensation for mental suffering. The Organization replied that the Director-General had terminated the complainant's appointment in accordance with Staff Regulation 301.0913, which provides for termination during the probation period without giving reasons; that the measure was not disciplinary; that confirmation of an appointment could not be tacitly assumed; and that the complainant had failed to establish prejudice on the part either of the project manager or of the headquarters officials. The complainant being on sick leave at the time, the two telegrams announcing the extension of the probation period had been given to one of his colleagues who regularly collected mail on his behalf.

F. The Appeals Committee asked the Organization for further information as to why it had dismissed Mr. Loomba's charges so that it could determine whether termination had been motivated by prejudice. The Organization refused to supply this information on the grounds that the Committee was not competent to investigate the substance of Mr. Loomba's charges of corruption. The Appeals Committee reported on 9 June 1969. It held that although the procedure adopted for termination of the appointment had been somewhat lax in that the two telegrams had been handed over to an official who had already been suspended from duty, it was reasonable to assume that Mr. Loomba had received the telegrams. As to the question of prejudice, it held unanimously that the Organization did have grounds for terminating the appointment, although there appeared to have been an element of prejudice the weight of which the Committee was unable to assess. It held that the complainant was therefore entitled to some compensation and recommended the Director-General to grant it, using as a guideline the provisions of Staff Regulation 301.153 concerning indemnity pay for fixed-term officials. By letter of 25 July 1969, which contains the final decision impugned by the complainant, the Deputy Director-General informed him of the Committee's findings and confirmed the termination of his appointment with effect from 16 May 1968. He accepted the recommendation that Mr. Loomba should receive the termination indemnities to which he would have been entitled had his appointment been confirmed.

G. In his appeal to the Tribunal the complainant repeats the claims and arguments which he submitted to the Appeals Committee and draws attention to certain conclusions of the Committee in his favour. The Director-General's decision, he maintains, was based on Staff Regulation 301.0913, which applies to officials on probation, whereas his appointment was tacitly confirmed on 2 April 1968 on the expiry of the probation period. Under Staff Regulation 301.103 - which applies to established staff - he was entitled to a written statement of the reasons for termination. The decision was, moreover, tainted with prejudice and based on extraneous considerations. He contends that the compensation paid to him is inadequate and observes that the Committee failed to decide on his many monetary claims.

H. In its memoranda the Organization contends that it is immaterial whether or not Mr. Loomba received the telegrams informing him of the extension of his probation since an appointment cannot be tacitly confirmed. Since his appointment was terminated within the probation period, the Director-General could terminate it without supplying a written statement of the reasons. As for the allegations of prejudice, the Organization's readiness to extend the probation period in order to investigate the complainant's accusations showed its freedom from

prejudice. He has entirely failed to produce cogent evidence in support of his charges. Besides, even if one of his allegations proved true, that would not suffice to offset his obvious unsuitability for his post. His behaviour was unco-operative and detrimental to the project; he was lacking in tact and discretion; and it was clearly in the Organization's interests that he should leave. As regards the complainant's monetary claims, the Organization submits copies of letters addressed to him in which, it maintains, these claims were answered in detail. In fact he received more than he was strictly entitled to, since he received a termination indemnity in accordance with the Appeals Committee's recommendation.

I. The Organization accordingly prays the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS:

1. According to Staff Regulation 301.0913, the Director-General is entitled to terminate at any time the appointment of an official serving a probationary period if in his opinion such action would be in the interests of the Organization. Such a decision falls within his discretion. The Tribunal cannot therefore interfere with it unless it is in irregular form or tainted by procedural irregularity, or based on an error of law or incorrect facts, or essential facts have not been taken into consideration, or there has been misuse of authority, or again, if conclusions which are clearly false have been drawn from the documents in the dossier.

2. According to its terms, Staff Regulation 301.0913 applies during the period of probation. This must be understood to mean not only the trial period prescribed by the contract of appointment but also any period by which the probation is expressly or tacitly extended. In the present case about six weeks elapsed between 2 April 1968, the date on which the probation period was due to terminate under the contract of appointment, and 15 May 1968, the date of dismissal. The question thus arises as to whether the period of probation was in any way extended to the later date.

The Organization claims to have extended the complainant's period of probation by telegrams, first to 30 April and later to 15 May 1968. The question arises, however, as to whether the complainant received these telegrams, which were apparently to be given to him by an official who at the time had been suspended from his functions. It is therefore doubtful whether there was properly any express extension of the probation period.

On the other hand, it appears at least from the circumstances of the case that the complainant's period of probation was extended to the date of his dismissal in such a way that he was able to learn of that extension. Having learnt that the project manager had proposed his dismissal on 14 March 1968, the complainant, on 18 March, himself asked for an inquiry, which the Organization immediately ordered. Since he was informed of the uncertainty of his position, he could not reasonably interpret the absence of a decision before the normal termination of the probation period to mean that the Organization would not have recourse to Staff Regulation 301.0913 or that it implicitly agreed to keep him in its employment. On the contrary, he must have known that the Director-General would await the results of the investigation which had been ordered before reaching a decision, that is, that the probation period was tacitly extended for as long as a formal decision still remained to be taken. Accordingly, there are grounds for holding that at the date of termination of his employment Staff Regulation 301.0913 still applied and that the decision cannot therefore be impugned on the grounds that it was taken after the prescribed period.

At all events the complainant has failed to prove that he suffered from the uncertainty of the position in which he found himself because of his own action. Besides, even if he did suffer prejudice which can be attributed to the Organization he was amply compensated by the indemnity recommended by the Appeals Committee and granted by the Director-General.

3. The complainant cannot properly plead violation of Staff Regulation 301.103, which provides that the official concerned should receive a written statement of the reasons for dismissal and gives him the right to supply explanations, also in writing. This provision is included in the chapter on disciplinary measures and does not apply to the termination of an official on probation, since such a decision is not of a disciplinary nature. Moreover, since he had received a letter of warning addressed to him by the project manager on 5 January 1968 and had been informed of the proposal to dismiss him made by the project manager on 14 March 1968, the complainant was perfectly aware of the grounds for terminating his services.

4. The complainant's charges against the project manager are not supported by any document in the dossier. There is no reason to suppose that the senior official implicated sought to get rid of the complainant in order to conceal

any misconduct of his own or of other officials. Although in a letter of 6 March 1968 he refers to misappropriation in his service, he certainly does not mean that corruption was rife; he was referring rather to the misconduct of only one official, who had been dismissed for disciplinary reasons. The official who for several months was paid two salaries, one from his government and the other from the Organization, himself brought his position to the attention of his superiors before the appointment of the complainant, who cannot properly claim to have discovered the improper double payment. In the circumstances, because of its tone as well as its content the complainant's correspondence shows a mentality incompatible with the performance of the duties of an international official. In terminating his appointment the Director-General therefore neither misinterpreted the facts brought to his attention nor drew clearly mistaken conclusions from the documents in the dossier. It is irrelevant that in the above-mentioned letter of 6 March 1968 the project manager described as satisfactory the complainant's services as an accountant; it is not his professional competence but his character which is at issue.

5. In view of the foregoing the impugned decision is not tainted with any of the defects which would lay it open to review by the Tribunal. The complaint must therefore be dismissed in its entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 17 November 1970.

(Signed)

M. Letourneur
André Grisel
Devlin
Bernard Spy