

EIGHTY-FOURTH SESSION

In re Felkai

Judgment 1696

The Administrative Tribunal,

Considering the complaint filed by Miss Eva Felkai against the Customs Co-operation Council (CCC) on 15 December 1996, the CCC's reply of 12 March 1997, the complainant's rejoinder of 23 May and the Council's surrejoinder of 14 August 1997;

Considering Articles II, paragraph 5, and VII 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 1944, joined the Council on 11 April 1994 as a publications officer at grade B4. Her contract was for three years, including six months' probation.

On 29 August 1994 her supervisor drafted a probation report in which he acknowledged her "undoubted abilities" but said she had a difficult temperament. His conclusion was to propose the extension of her probation by six months. The Secretary General agreed and informed her, at a meeting of 6 September and in a letter of 27 September, that her probation was extended from 10 October 1994 to 10 April 1995.

From 1 October 1994 there was a new supervisor, Mrs. Trolle. In a probation report which she wrote on 22 February 1995 and which covered the further six months of probation she confirmed the earlier assessment of the complainant's abilities and shortcomings, said that her administrative work was not up to scratch, and recommended terminating her appointment.

By a letter of 24 February the Secretary General told her that her appointment would not be confirmed. The reason he gave was that she was tactless and awkward in her dealings with others and fell far short in her administrative work. By a letter of 10 March she asked the Secretary General to review his decision. He refused in a letter of 13 March 1995. She then appealed to the Appeals Board. She filed a brief in support of her appeal on 28 November 1995. In its report of 9 August 1996 the Board concluded that "the Secretary General has no obligation to alter his decision of 24 February 1995". On 2 September 1996 the Secretary General told the complainant that his final decision was not to confirm her appointment. That is the one impugned.

B. The complainant has four pleas.

The first is that there was breach of Regulation 9(b) inasmuch as the Staff Committee was not consulted before the decision was taken to terminate her appointment.

Secondly, there was breach of her right to a hearing as set out in Judgment 1386 (*in re Bréban*) and other rulings. The probation report of 22 February 1995 was not communicated to her, and she was allowed only severely restricted access to her personal file.

Thirdly, the terms of her probation were improper in that the organisation ignored the official description of her duties in several respects. She was not allowed to delegate any duties to subordinates, her proposals for reform were overlooked and she was not given due written warning.

Fourthly, only 27 days went by after the change of supervisors before Mrs. Trolle wrote the probation report

of 22 February 1995. It is obvious from earlier rulings by the Tribunal that that period was not long enough. The Secretary General misjudged or overlooked material facts, such as the substantial change in the publications officer's duties with the addition of technical, commercial and legal responsibilities, and the lack of cooperation from the complainant's subordinates and of help from her supervisors.

The complainant asks the Tribunal (a) to set aside the Secretary General's decisions of 24 February 1995 and 2 September 1996 and (b) to order the Council to pay her material damages corresponding to the difference between the salary and other allowances due to her from 11 April 1995, the date of termination, up to the date at which her three-year appointment would have expired had it been confirmed; the salary and allowances which she would have earned between those two dates; moral damages amounting to 1 million Belgian francs; interest at the rate of 10 per cent a year on those sums as from 11 April 1995; and costs.

C. In its reply the Council denies breach of Regulation 9(b). According to consistent practice only the Staff Committee's chairman and vice-chairman had to be consulted, and they were.

The Council acknowledges that the probation report of 22 February 1995 was not at the outset passed on to the complainant. But it points out that her right to a hearing was in no way infringed and that Judgment 1386 is irrelevant in determining whether the organisation is under the duty of communicating the probation report before the decision not to confirm the appointment. Time and again the complainant was told of the criticisms of her performance and she had the opportunity of discussing them both before the decision was taken not to confirm her appointment and in the proceedings before the Appeals Board. It is also plain from her pleas that she did have full access to her personal file.

The Council observes that she acknowledges having had the post description that was appended to the notice of vacancy, and she does not deny that it did correspond to her actual duties. There was nothing wrong with her probation. She was duly warned about her shortcomings.

The Council contends that the period of 27 working days that had elapsed before the new supervisor wrote the probation report of 22 February 1995 was quite long enough and that she was quite fit to assess the complainant. In taking account of her supervisors' concurring opinions the Secretary General committed no obvious error of appraisal and did not overlook any material fact.

D. In her rejoinder the complainant contends, as to the lack of consultation of the Staff Committee, that according to the *patere legem* rule administrative practice warrants no exception to the Staff Regulations. The Council has failed to show anyway that there was such practice. The chairman of the Staff Committee is not qualified to represent the Committee. The complainant produces a letter from its vice-chairman challenging the Council's point of view.

As to the breach of her right to a hearing, she contends that Judgment 1386 contains a ruling of general and not particular application and that the defendant is confusing the rules on warnings during probation with the rules on probation reports.

She reaffirms and presses her other pleas.

E. In its surrejoinder the Council submits that the practice it is relying on as to consulting the Staff Committee does not so much constitute any exception to the rules as determine how to apply them.

It is, in its view, clear from the case law that the probationer must be told of any shortcomings in his performance, not that the actual probation report must be notified to him.

The Council presses the pleas in its reply.

CONSIDERATIONS

1. The complainant joined the staff of the Council on 11 April 1994 under a three-year appointment, the first six months being probationary.

A probation report that her then supervisor, the head of Financial Services, wrote on 29 August 1994 said

that though she had "undoubted abilities" her temperament was awkward. He recommended extending the period of probation. The Secretary General saw her on 6 September. He told her about the extension and he must then have given her the reasons for it. He confirmed the extension in writing on 27 September, and she accepted.

A new supervisor, Mrs. Trolle, who was head of Administrative Services, wrote a second probation report on 22 February 1995. It said much the same thing as the first and recommended that unless the complainant improved she should go.

On 23 February 1995 the Administration spoke to the chairman of the Staff Committee, the vice-chairman too being present. The chairman saw no need to consult the Committee as a whole and endorsed the recommendation for termination of the complainant's appointment.

The chairman was to be absent for three weeks and the vice-chairman replaced him. By a memorandum he wrote later on 23 February the vice-chairman asked the head of Administrative Services to write a note on the case to be put to the full Committee; failing that, he explained, the Committee could not give the "preliminary opinion" required of it as an advisory body. In her reply of 24 February Mrs. Trolle said that the chairman had already been consulted and was in favour of termination. The same day the vice-chairman wrote back maintaining that according to Regulation 9 there still had to be a plenary meeting of the Committee.

In a letter of 24 February the Secretary General gave the complainant notice of termination at 10 April, releasing her from the duty to report for work after 10 March. His letter set out the reasons: though very good at preparing publications, she was tactless and clumsy in her dealings with others and poor at administrative work.

By a detailed memorandum of 8 March 1995 the vice-chairman told the head of Administrative Services that at a meeting on 6 March the Staff Committee had taken the view that the Administration had a duty to consult it under Regulation 9. He accordingly asked for further information and commented on the termination.

On 13 March the Secretary General rejected a request from the complainant for review of the decision not to confirm her appointment.

She appealed to the Appeals Board. In a report dated 9 August 1996 it concluded that the Secretary General's decision of 24 February 1995 to terminate her appointment showed neither formal nor substantive flaws and might stand.

On 2 September 1996 the Secretary-General gave her notice of his final decision to end her appointment.

2. The complainant seeks the quashing of the decisions of 24 February 1995 and 2 September 1996; material damages in an unspecified amount equivalent to the cost to her of the termination of her three-year appointment, viz. the sums that the Council should have paid her less her actual earnings in the remainder of the three-year period; 1 million Belgian francs in moral damages; interest at 10 per cent a year as from 11 April 1995 on those amounts; and costs.

She pleads as follows:

(1) The failure to consult the Staff Committee was in breach of Regulation 9.

(2) (a) She did not see the probation report of 22 February 1995 before the Secretary General took his decision of 24 February.

(b) She had restricted access to her personal file.

(3) Her probation was improper in that the Council did not let her have adequate support or give her due written warning.

(4) The termination was an unlawful exercise of discretion:

(a) Her supervisor did not have long enough to assess her before writing the probation report of 22 February 1995.

(b) She showed no serious shortcomings. Her difficulties were mainly the fault of colleagues or attributable to breach of duty by other officials.

The Council asks the Tribunal to dismiss her complaint and rebuts each of her pleas.

3. Regulation 9 reads:

"(a) Officials shall be appointed for a fixed term or an indefinite term.

(b) The first six months of service by an official shall be a probationary period. At the end of this period, the Secretary General shall decide:

(i) to confirm the appointment; or

(ii) exceptionally, with the consent of this official and after consultation with the appropriate advisory body, to prolong this probationary period for a further period of not more than six months; or

(iii) after consultation with an advisory body, to terminate the appointment upon giving one month's notice or upon payment of one month's emoluments."

Staff Circular No. 136, which implements Regulation 9, provides:

"Any actions taken under the terms of this Regulation shall be notified to the official concerned in writing. The appropriate advisory body to be consulted under (b) (ii) and (iii) shall be the Administration Committee in the case of an official in category A and the Staff Committee in the case of all other categories."

4. According to precedent a decision to end an appointment is a discretionary one and may be set aside only if it was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was an obviously wrong inference from the evidence or misuse of authority. The Tribunal will apply those criteria with even greater caution in reviewing the case of a probationer, else probation fails to serve as a period of trial. An organisation must be allowed the widest discretion in the matter and its decision will stand unless the defect is especially serious or glaring. What is more, where the reason for non-confirmation is poor performance the Tribunal will not replace the employer's assessment of the complainant with its own. See Judgments 1161 (*in re B.*), under 4; 1175 (*in re Scotti*), under 5; 1183 (*in re Hernández Quintanilla*), under 7; 1246 (*in re Pavlova Nos. 1 and 2*), under 3; 1352 (*in re Offerman*), under 12; 1386 (*in re Bréban*), under 17; and particularly 1418 (*in re Morier*), under 6.

5. As both parties acknowledge, the wording of Regulation 9 (b) (3) is plain: the decision to terminate an appointment at the end of probation may be taken only "after consultation with an advisory body", the Staff Committee.

But was the Committee's opinion properly sought and obtained in this case? On that score the parties disagree. The Council says that it need only speak to the chairman, such being its practice to date. The complainant demurs: the Committee should, she maintains, have met in plenary to take up the matter and make a recommendation. Although the chairman supported the Council's contention, a meeting of the members chaired by the vice-chairman preferred the complainant's.

Regulation 9 requires consultation of the Committee, and the Committee has several members who are supposed to function as a single body.

The Council's argument postulates prior delegation of authority to the Committee's chairman or officers. But to be valid such delegation must have some basis in the rules (so said Judgment 1477 (*in re Nacer-Cherif*), under 7). Failing that, any action will be *ultra vires*.

The Council cites no rule that allows the Committee to delegate authority. And the practice on which it does rely can have no effect in law. The conditions that make a practice an enforceable custom are not met. The alleged rule is not widely recognised as binding; indeed opinion varies on what it actually is.

So there was wrongful failure to consult the Staff Committee; the Secretary General was wrong to decide on the case before he had consulted it; and, in line with *patere legem*, the impugned decision and the others he took in breach of his duty to consult it must be set aside. Authority for that is to be found in Judgments 1488 (*in re Schorsack*), under 10; 1525 (*in re Bardi Cevallos*), under 3; and the others cited therein.

6. Since that plea succeeds there is no need to entertain the complainant's other arguments, which become irrelevant.

7. The complainant claims, not reinstatement, but compensation for any earnings she lost in the now expired period of three years following 11 April 1994, the date of her appointment. Since she had one year's probation on full pay, the loss she alleges was in the last two years of that period.

The Council was not free to end her appointment until it had consulted the Staff Committee and it did not consult the Committee within the three-year period. The parties have not argued the amount of her losses or of her actual or potential earnings in the last two years of the period. The Tribunal will therefore make her an award *ex aequo et bono*.

8. She claims moral damages on the grounds that "her workload was unduly heavy for almost a year, conditions were very distressing, she suffered nervous collapse and the termination harmed her professional and personal standing".

Article VII(1) of the Tribunal's Statute says that for a complaint to be receivable the internal remedies must be exhausted. So the Tribunal would not entertain any claim to damages that had no direct connection with the impugned decision. That decision being about termination, the only material issue is whether termination caused her actionable moral injury.

For want of consultation of the Staff Committee the decision is unlawful. But could the Committee have found in her favour and, if so, could that have swayed the Secretary General? It looks unlikely. And her other pleas do not warrant moral damages: she saw her file; the Council respected her right to a hearing or later made good any omission to do so; she got the probation report before probation expired; and the mere extension of probation was stark enough warning. Besides, she must have realised that while she was still on probation her position was precarious.

As was said in 4 above, the Secretary General has wide discretion in the matters of confirmation of the complainant's appointment. Had he decided against it even after going through the proper procedure, he could hardly have been accused of abuse of discretion. His first duty is to safeguard the Council's interests. Having found that the complainant got on badly with other staff, he was free to conclude that it was in the Council's interest to let her go even if she was not the only one at fault nor even mainly to blame.

9. The upshot is that the Council shall pay her damages for both material and moral injury in the amount of one year's pay at the rate applicable to her last month on actual duty, plus interest to be reckoned at the rate of 8 per cent a year as from 28 November 1995, the date at which she filed with the Appeals Board the brief in support of her internal appeal.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Council shall pay her damages to be reckoned as set out under 9 and interest thereon at the rate of 8 per cent a year as from 28 November 1995.
3. It shall pay her 100,000 Belgian francs in costs.
4. Her other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and

Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

**Michel Gentot
Julio Barberis
Jean-François Egli**

A.B. Gardner

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