

## **EIGHTY-SEVENTH SESSION**

### ***In re Coates (Nos. 1 & 2)***

#### **Judgment 1871**

The Administrative Tribunal,

Considering the complaint filed by Mr David Coates against the Food and Agriculture Organization of the United Nations (FAO) on 23 December 1996 and corrected on 7 February 1997, the FAO's reply of 21 May, the complainant's rejoinder of 18 December 1998 and the Organization's surrejoinder of 17 March 1999;

Considering the second complaint filed by Mr David Coates against the FAO on 24 November 1998 and corrected on 18 December 1998, the FAO's reply of 16 March 1999 and the complainant's letter of 13 April 1999 informing the Registrar that he did not wish to enter a rejoinder;

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, who is British and was born in 1952, joined the staff of the FAO in February 1987 as technical adviser at grade P.4 in a project to enhance fish stocks in Papua New Guinea. His last contract, which was due to expire on 28 February 1997, was extended until 31 March 1997. The last grade he held was P.5.

In a special bulletin on FAO restructuring, dated December 1994, the Field Staff Association indicated that the Director-General's recruitment policy favoured candidates from non-represented or under-represented countries and that, until these objectives were achieved, the chances of field staff coming from other member States being selected for regular programme posts in the FAO were very slim. A list was annexed of non-represented and under-represented countries. Germany was included in the second category.

By a letter of 13 July 1995 the complainant applied for a post as Fishery Resources Officer (Inland Fisheries) at grade P.4. The contract was for three years at headquarters in the Fishery Resources Division of the Fisheries Department. In his application for the vacancy, the complainant indicated that he was of British nationality, but that he wished to acquire the nationality of Papua New Guinea, for which purpose he had taken the appropriate steps in December 1994. The post in question was officially published in a vacancy announcement of 15 September 1995.

On 18 January 1996 an official responsible for the Fishery Resources Division completed the document for the submission of a short list of four candidates to the Professional Staff Selection Committee. The complainant was placed first and an applicant of German nationality, Mr Gerd Marmulla, was last on the short list. On 14 February, the Committee finalised the document by adding its recommendations: it confirmed the list, but modified the order of preference by giving second place to Mr Marmulla.

By a telex dated 19 January 1996 the Senior Fishery Resources Officer requested the complainant to clarify his nationality status. He replied, by a letter dated 24 January, that he was still British and that his application to the Government of Papua New Guinea was still pending.

In a memorandum dated 11 April the Director-General asked the heads of department and offices and the regional and subregional representatives to ensure that every effort was made to identify candidates from non-represented and under-represented countries and that they were seriously considered for each vacancy.

Following an exchange of correspondence between the Administration and the complainant, the latter learnt that his application had been rejected in favour of the German candidate.

By a letter of 6 June the complainant requested the Senior Fishery Resources Officer to provide him with a written

explanation of the circumstances leading to his failure to be selected and to place a copy of this document in his personnel file. In a letter of 13 June the secretary of the Field Staff Association replied that, in view of the confidentiality of the procedures, it was not possible to provide him with the explanations that he had requested. In another letter, also dated 13 June, the Personnel Officer of the Fisheries Department stated that his application had been rejected, but that no record of it would be kept in his personnel file.

By a letter of 8 August 1996 the complainant appealed to the above Personnel Officer against the decision not to select him for the post awarded to Mr Marmulla. Not having received a reply, he filed his first complaint on 23 December 1996.

By a letter of 3 January 1997 he appealed to the Director-General. In a letter dated 4 March the Assistant Director-General in charge of Administration and Finance informed him that his appeal had been dismissed.

On 1 May 1997 the complainant brought his case to the Appeals Committee, which issued its report on 9 June 1998. By a letter dated 26 August the Director-General transmitted to the complainant a copy of this report, in which the Appeals Committee accepted that the appeal was receivable, but recommended its dismissal. He informed the complainant that he had decided to accept this recommendation. The complainant challenges that decision in his second complaint, filed on 24 November 1998.

B. In his first complaint, the complainant explains that his complaint is receivable, in accordance with Article VII(3) of the Statute of the Tribunal, since the Administration had not taken a decision on the appeal that he lodged on 8 August 1996.

He submits that the rejection of his application is an unlawful decision. In accordance with the case law of the Tribunal, the successful applicant must have all the minimum qualifications required in the notice of vacancy. He observes that, in contrast with Mr Marmulla, his own qualifications were higher than those required in the vacancy announcement.

Citing various texts, he contends that, although the Director-General has discretionary power concerning the appointment of staff members, he has to make his choice on the basis of the qualifications of the applicants and has to give priority to staff members of the Organization. Although the principle of equitable geographic distribution admittedly has to be taken into account, it is only of a "subsidiary nature".

The Professional Staff Selection Committee, as well as the members of the Fishery Resources Division, had recognised that he was the best candidate for the post. In his view, the Director-General took his decision solely on the basis of the nationality of the candidates. He alleges that the impugned decision violates the principle of equal treatment because it was founded on discrimination on the ground of nationality.

The complainant asks the Tribunal to order the Organization to pay him an amount equivalent to three years' salary and his statutory entitlements, as well as compensation for the moral injury that he suffered and "costs to cover legal expenses and allied expenses arising from geographical separation".

In his second complaint, the complainant presses his pleas and asks for the two cases to be joined.

He reiterates his pleas, and particularly that the rejection of his application is an unlawful decision. Citing the FAO Manual, he adds that, where several candidates are equally well qualified, the criterion of seniority prevails over that of nationality. The order of selection criteria is "extremely clear" and is confirmed by the vacancy announcement, which only refers to qualifications and experience. In the material case, he considers that the Director-General abused his power by selecting Mr Marmulla.

C. In its reply to the first complaint, the FAO submits that the complaint is irreceivable. It explains that the letter of 8 August 1996 never reached the Personnel Officer of the Fisheries Department, and so it could not be treated as an appeal by the complainant. It adds that the complainant did not appeal to the Director-General until 3 January 1997, which was over seven months after he had been notified of the decision not to select him, and that he was therefore time-barred. Moreover, he had not exhausted the internal remedies.

Subsidiarily, it observes that the principle of geographic distribution is "enshrined" in Article VIII of the Constitution and FAO Manual paragraph 305.433.

It contends that the references made by the complainant to the case law are not relevant to the present case, because it respected its selection criteria and the Selection Committee and the Fisheries Department considered that the selected candidate had the required qualifications. It adds that the Tribunal recognises the possibility for organisations to determine quotas "for recruitment for the purpose of preserving or developing the international character of the staff" (Judgment 551 *in re* Spangenberg).

In its reply to the second complaint, the FAO does not oppose the joining of the two cases and presses its subsidiary pleas.

D. In his rejoinder, the complainant affirms that he provided proof of the transmission of the letter of 8 August 1996, by which he lodged his appeal.

He says that, by declaring his first appeal receivable, the Director-General implicitly recognised that it was well-founded and that he was justified in having recourse to the Tribunal. The FAO should therefore pay him costs.

E. In its surrejoinder, the FAO further submits that, by appealing to the Director-General after he had filed his complaint with the Tribunal, the complainant demonstrated his awareness that he had not exhausted the internal procedures, as required. It therefore opposes the payment of costs incurred by the first complaint on the grounds that it was filed before the complainant had exhausted his internal means of redress.

### CONSIDERATIONS

1. In his first complaint, dated 23 December 1996, the complainant, invoking Article VII(3) of the Statute of the Tribunal, challenges what he considers to be an implicit rejection of his appeal by the FAO. In his second complaint, he challenges the explicit rejection of the appeal.

The FAO submits that the first complaint is irreceivable.

As the complainant requested the joinder of the two cases and the FAO did not raise objections to it, the cases are joined and there is therefore no need to deal with the question of receivability of the first complaint. The second complaint is receivable and the Tribunal will examine the case on its merits.

2. The complainant joined the staff of the FAO in February 1987 as technical adviser for a project executed by the Fisheries Department in Papua New Guinea. His fixed-term contract was renewed on several occasions, the last one was extended to 31 March 1997. He had been promoted to grade P.5 in 1991.

3. On 13 July 1995, he applied for a post as Fishery Resources Officer at grade P.4 in the Fisheries Department at FAO headquarters.

From the ninety-seven applications received for the post, the Fisheries Department submitted the names of four applicants, classified by order of preference, to the Professional Staff Selection Committee. The complainant was placed first on the list.

In its report to the Director-General, the Selection Committee confirmed the choices made by the Fisheries Department, but changed the order of preference: the fourth-placed applicant was raised to the second place, while the complainant remained in first place.

4. On 10 May 1996, when examining the Selection Committee's report, the Director-General gave his preference to the second-placed applicant on the grounds that he was a national of a country which was "under-represented" on the Professional staff of the FAO, while the complainant was a national of a country with "equitable representation".

5. Considering that the choice made by the Director-General was contrary to the recommendations of the Fisheries Department and the Selection Committee, that the selection had been made on non-professional criteria and that the candidate selected was clearly less well qualified, experienced or able than himself, the complainant appealed to the Director-General on 3 January 1997.

By a letter of 4 March 1997 he was informed that his appeal had been dismissed by the Director-General.

On 1 May the complainant appealed to the chairman of the Appeals Committee. In its report to the Director-General, dated 9 June 1998, the Appeals Committee recommended that the appeal should be dismissed as being unfounded.

By a letter of 26 August 1998 the Director-General informed the complainant of the dismissal of his appeal. It is this decision which is challenged in the second complaint to the Tribunal, filed on 24 November 1998.

6. The complainant asks that the FAO be ordered to pay him an amount equivalent to three years' salary and his statutory allowances, compensation for the moral injury suffered and an amount to cover costs, including the costs of legal counsel and allied expenses arising from geographical separation.

He contends that the decision not to select him is unlawful on the grounds that the Director-General breached both the Constitution of the FAO and its General Rules and Staff Regulations, that he also misused his power and, finally, that he breached the principle of equal treatment.

7. Article VIII, paragraph 1, of the Constitution of the FAO provides that:

"The staff of the Organization shall be appointed by the Director-General in accordance with such procedure as may be determined by rules made by the Conference."

and paragraph 3 of the same Article states that:

"In appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible."

Rule XXXIX, paragraph 1, of the General Rules provides that:

"The staff of the Organization shall be appointed by the Director-General, having regard to paragraph 3 of Article VIII of the Constitution. Selection and remuneration shall be made without regard to race, nationality, creed or sex. ..."

and paragraph 4 of the same Rule states that:

"Except as provided in paragraph 1 of this Rule, the Director-General shall act in his unfettered judgement in appointing, assigning and promoting staff personnel, and shall not be bound to accept advice or request from any other source."

Appendix A to section 305 of the FAO Manual indicates that, for appointments and promotions to posts of one year or more, the Selection Committee "recommends for selection the candidate whose qualifications and experience most closely meet the requirements of the post set out in the vacancy announcement" and that if several candidates are equally well qualified, "the order of preference for selection could be as follows:

- (i) a staff member holding a continuing appointment who is without, or shortly to be without, an assignment ...;
- (ii) seniority with the Organization ...;
- (iii) a candidate from a country not geographically over-represented;
- (iv) a staff member of another UN organization."

and Manual paragraph 305.433 states that:

"In filling a vacancy in the Professional category at Headquarters or a regional office, priority is given to qualified candidates who are nationals of Member States 'under-represented' or 'non-represented' on the staff. The consideration of geographic distribution is also applied ..."

8. The above provisions and the case law of the Tribunal show that the Director-General has discretion with regard to the appointment of staff members, which can only be subject to a limited power of review, for example as to whether he exercised his power in accordance with the basic texts of the Organization and the general principles of law governing the international civil service.

9. The Tribunal observes that the Director-General gave paramount importance to the principle of geographic distribution, which resulted in him selecting the applicant who was second in the list recommended by the Selection Committee because that applicant was a national of an "under-represented" country, while the complainant, who

was in first place, was a national of an "equitably represented" country.

10. Analysis of the above provisions and the facts of the case show that the Director-General was mistaken in his interpretation of these provisions. The Constitution of the FAO clearly states that "the highest standards of efficiency and of technical competence" are of paramount importance in appointing staff.

The Selection Committee is under the obligation to recommend for selection the candidate whose qualifications most closely meet the requirements of the post.

Therefore the essential qualifications required are the priority criterion. Consideration of other criteria, including seniority of service and geographic distribution, which appear to be of a subsidiary nature, is only envisaged where several candidates are equally well qualified. Moreover, even in that case, "seniority with the Organization" prevails over the criterion of geographical under-representation or non-representation.

11. It is not contested that the qualifications of the complainant were considered to be more pertinent to the post than those of the other candidates, both by the Fisheries Department and the Selection Committee, which both placed him first on the list.

In addition, of the four candidates, the complainant alone could be considered to be an internal candidate with a certain seniority of service with the Organization. It must therefore be concluded that the Director-General, who assigned paramount importance to the criterion of geographic distribution, acted in breach of the applicable provisions by rejecting the complainant's application in favour of another candidate on the sole ground of nationality.

12. The complainant was therefore wrongly passed over in favour of an applicant whose qualifications were less pertinent and who had no seniority in the Organization.

The Tribunal consequently considers it fair to award the complainant the sum of 100,000 United States dollars in compensation for the injury he suffered under all heads.

## DECISION

For the above reasons,

1. All the other claims having been dismissed, the FAO shall pay the complainant 100,000 United States dollars in compensation for the injury he suffered under all heads.
2. The FAO shall pay the complainant 8,000 Swiss francs in costs.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

*(Signed)*

Michel Gentot  
Julio Barberis  
Seydou Ba

Catherine Comtet