

NINETY-FOURTH SESSION

Judgment No. 2207

The Administrative Tribunal,

Considering the complaint filed by Mr O. T. against the Food and Agriculture Organization of the United Nations (FAO) on 25 October 2001, the FAO's reply of 4 February 2002, the complainant's rejoinder of 20 March and the Organization's surrejoinder of 24 May 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1943, joined the World Food Programme (WFP), which is an autonomous joint subsidiary programme of both the United Nations and the FAO, in November 1995. He held a two-year fixed-term appointment as Deputy Director in charge of the Finance and Information Systems Division at grade D.1. His evaluation reports, though largely satisfactory, revealed certain shortcomings, particularly in the area of interpersonal skills. In September 1998 he was transferred to Nairobi (Kenya) and appointed to the post of Senior Regional Finance Officer, at grade P.5. He was given a continuing appointment.

During his stay in Nairobi, problems arose due to an affair between the complainant and a young Kenyan woman, Ms W. According to the complainant, Ms W. was single, but a Kenyan citizen asserted that he had married her in accordance with a local custom. The situation deteriorated to such an extent that the complainant received threats. In a memorandum of 8 March 2000 the Director of the Human Resources Division told the complainant that the matter was no longer a private one and that it was damaging to the image of the WFP. The Director also stated that she would be obliged to reassign him if he refused to end his relationship with Ms W. The complainant replied on 13 March that he was willing, in principle, to be reassigned.

By a *note verbale* of 15 March the Kenyan Ministry of Foreign Affairs asked the WFP to put an end to the relationship in question. In an e-mail dated 23 March the complainant asked to be transferred. On the same day the Director of Human Resources offered him a temporary assignment to East Timor for a period of six to eight weeks, which the complainant refused for health reasons. He left Nairobi on 25 March. He also subsequently refused an offer of a mutually-agreed separation. He was on certified sick leave until 19 April. The Director of Human Resources wrote to the complainant on 20 April 2000 that, despite efforts to find him a suitable assignment, none had been found. These efforts had been hampered by the fact that his appraisal reports had highlighted shortcomings in both his managerial and interpersonal skills. Consequently, it had been decided to terminate his appointment with immediate effect, in accordance with Staff Regulation 301.091 and FAO Administrative Manual paragraph III.311.44, and to grant him three months' pay in lieu of notice.

On 21 June 2000 the complainant appealed to the Executive Director of the Programme, who rejected the appeal on 19 September. He appealed to the Appeals Committee of the FAO on 13 October 2000. The Committee concluded that the Programme had not taken all necessary steps to reassign the complainant and informed the Director-General of the FAO of this in its report dated 4 June 2001. The Committee suggested that the complainant be reinstated and that he be offered a suitable posting. By a letter of 17 September 2001 - the impugned decision - the Director-General informed the complainant that he could not accept the Committee's recommendation but offered him the equivalent of 24 months' net salary in full and final settlement, which the complainant refused.

B. The complainant alleges that certain essential facts have been overlooked: although there were several posts which would have been suitable for him, the Programme either did not offer them to him or rejected his application. He states that he did "not ask for [his] posting to be terminated but for the implementation of the decision to transfer him which had already been made". He left the country in the context of his annual leave.

According to him, the Programme violated the provisions of Manual paragraph III.311.44, particularly by offering him a temporary posting rather than an appointment. The WFP was also wrong to apply this provision to sanction his alleged professional shortcomings. Paragraphs III.311.441 and III.311.443 were not applicable to his case. Lastly, he considers that the provisions of the Manual put forward to justify his dismissal are void as they are contrary to the Staff Regulations.

The complainant contends that his dismissal was tainted with misuse of authority and aimed at "eliminating an official who was too scrupulous in applying the financial regulations". In the course of his duties he noticed "abnormal practices" involving his hierarchical superior. Consequently, as from late 1999, everything was done to make him leave Nairobi: disciplinary action was threatened, his professional achievements were belittled, accusations of abuse of authority and corruption were levelled at him, etc.

He also stresses that the WFP has consistently refused to explain how the affair between himself and Ms W. was a source of embarrassment for the Organization. The Programme should have initiated an enquiry and supported him pending its outcome, instead of accepting the hypothesis of a customary marriage and simply dismissing his evidence to the contrary. Thus, the Programme did not honour its duty of transparency and support to its staff members.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement with retroactive effect. In respect of his moral injury he seeks 50,000 United States dollars in damages and the publication of the present judgment on the WFP's intranet. He also claims 10,000 dollars in costs. In the event that the Tribunal does not order his reinstatement, he claims 400,000 dollars plus interest in material damages.

C. In its reply the Organization argues that the applicable law in the present case is Staff Regulation 301.091 as supplemented by the provisions of Manual paragraph III.311.44. It fails to comprehend how these provisions, which reflect the situation of staff members holding a continuing appointment temporarily posted to the field, could be incompatible with the Staff Regulations.

The FAO denies that it did not take all the necessary steps to reassign the complainant. Some of the posts to which the complainant refers never existed and others had already been filled. A post had been available in Uganda but in view of the geographical proximity with Kenya and the organic and functional links between the two regional offices, it was not considered appropriate to assign the complainant to it. When the need to reassign him to another post arose, the complainant's posting in Kenya had not yet ended. That is why the only possible solution at the time was a temporary posting to East Timor, with the possibility of finding another posting in the long term. The Organization points out that the WFP had to take into account the duties which the complainant had performed in his previous position and ensure that good working relations were maintained. The complainant having later refused a mutually-agreed separation "under particularly favourable terms", the Programme had been left with no other alternative than to end his appointment in accordance with the applicable provisions. Thus, there is no basis for the present complaint.

The Organization considers that the Programme was simply concerned about the impact of the complainant's affair on its status and activities; it never condemned his behaviour. It nevertheless considers that the complainant may have breached the standards of behaviour required of international civil servants. The FAO asserts that the complainant did in fact request his transfer from Kenya in an e-mail dated 23 March 2000.

According to the FAO, the complainant alleges bias on the part of his hierarchical superior solely in order to justify his own actions in the light of their consequences. It considers the complainant's allegations of threatened disciplinary action, and likewise his other accusations, to be unfounded.

Lastly, the Organization considers that the WFP had no means to establish whether or not Ms W. was married and that it would have been unreasonable to have asked it to carry out an enquiry. It adds that this matter has caused it a great deal of embarrassment.

D. In his rejoinder the complainant explains that he left Kenya in the context of his annual leave and that the WFP took advantage of this to forbid him to return to his job for security reasons. In his opinion, the Organization has not proved that there was no available post to which he could have been reassigned. Such posts existed but were not offered to him since the decision to "eliminate him" had already been made on the grounds of his alleged professional shortcomings. However, his work cannot be criticised. On this issue, he points out that his refusal to endorse certain financial practices coincided exactly with the sudden appearance of Ms W.'s alleged husband. In fact, the real reason for his dismissal was his affair with Ms W. and its "alleged impact on the Service".

E. In its surrejoinder, the Organization presses its arguments.

CONSIDERATIONS

1. The complainant was assigned in September 1998 to a grade P.5 post in Nairobi under a continuing appointment.

2. During his stay in Nairobi, the complainant had an affair with a Kenyan citizen. Following a series of incidents in connection with the relationship, the Director of the Human Resources Division informed the complainant on 8 March 2000 that if he refused to end the relationship she would be obliged to reassign him for security reasons.

In a letter dated 13 March the complainant pointed out, *inter alia*, that "[p]erhaps in the interest of [his] personal safety, and certainly in the interest of a more serene atmosphere at work", he was prepared, in principle, to accept reassignment to a "suitable" post.

In a *note verbale* dated 15 March the Kenyan Ministry of Foreign Affairs asked the WFP to put an end to the relationship in question.

3. On 23 March the complainant was offered a temporary posting to East Timor, which he refused on medical grounds.

Having been allowed to take annual leave the complainant left Nairobi on 25 March. On the basis of a medical certificate, he was subsequently placed on sick leave until 19 April 2000.

By a letter of 14 April he enquired as to what he should do when his sick leave ended. On 20 April the Director of Human Resources informed him of a decision to terminate his appointment with immediate effect, in accordance with Staff Regulation 301.091 and FAO Administrative Manual paragraph III.311.44, on the grounds that its attempts to find him a suitable posting had proved unsuccessful.

On 21 June the complainant appealed to the Executive Director of the WFP, who rejected the appeal on 19 September. On 13 October 2000 he lodged an appeal with the Appeals Committee of the FAO. The Committee, in its report of 4 June 2001, concluded that the impugned decision was not justified and unanimously recommended the reinstatement of the complainant with retroactive effect from the date of his dismissal.

By a letter of 17 September 2001 the Director-General of the FAO informed the complainant that he could not accept the Committee's recommendation. Nevertheless, he offered him a sum equivalent to 24 months' net salary in full and final settlement.

It is the decision of 17 September which is impugned in the present complaint.

4. The complainant asserts that the WFP has overlooked certain essential facts and based its findings on incorrect facts. He submits that the impugned decision was taken in breach of the provisions to which it referred, adding that these provisions are not applicable to his case. He considers that the provisions of the Manual invoked to justify his dismissal are void as they are contrary to the Staff Regulations, and that his dismissal is tainted with misuse of authority.

5. In its reply the Organization argues that the applicable law in the present case is Staff Regulation 301.091 as supplemented by the provisions of Manual paragraph III.311.44. These are the texts which are expressly referred to in the letter terminating the complainant's appointment.

Staff Regulation 301.091 provides that:

"The Director-General may terminate the appointment of a staff member who holds a continuing appointment (i) if the necessities of the service require abolition of the post or reduction of staff, or (ii) whose services prove unsatisfactory, or who is, for reasons of health, incapacitated for further service."

Manual paragraph III.311.441 reads as follows:

"A staff member with a continuing appointment who is transferred to a post of limited duration retains his/her continuing appointment status."

Manual paragraph III.311.443 states that:

"When the assignment of a staff member transferred under the conditions specified in para. 311.441 comes to an end the staff member is reassigned as specified under para. 311.442. [...]"

6. The Organization considers that these provisions were applicable to the complainant's case. In fact, according to the FAO, the complainant's posting to Kenya had come to an end due to the "dramatic" development of a situation of his own making. This situation had made necessary a transfer which the complainant himself had requested in an e-mail of 23 March 2000. The Organization asserts that the "necessary administrative consequence of his departure was the cessation of his functions at that duty station", in accordance with the provisions of Manual paragraph III.311.443.

7. The Tribunal considers that although the complainant's actions may have rendered his transfer necessary, the arguments put forward by the defendant concerning the applicability of Staff Regulation 301.091 and Manual paragraph III.311.44 to the present case cannot be accepted.

Regulation 301.091 enables the Director-General to terminate the appointment of a staff member holding a continuing appointment only in a limited number of cases, namely, if the necessities of the service require the abolition of the post or reduction of staff, or if the staff member's services prove unsatisfactory, or if he is incapacitated for further service for reasons of health.

The evidence on file shows that it was never mentioned anywhere that the complainant's post was to be abolished. The complainant left Nairobi on approved annual leave after he had refused the offer of a temporary posting to East Timor. The Programme did not invoke a reduction in staff; nor did it follow any procedure aimed at establishing the complainant's professional shortcomings or incapacity for service due to health reasons before taking the impugned decision.

8. The Tribunal concludes that the decision to terminate the complainant's appointment could not be based on the provisions of Regulation 301.091, as supplemented by those of Manual paragraph III.311.44. In any event, these provisions only apply to cases where a staff member holding a continuing appointment is transferred to a post of limited duration. This is clearly not the case here, since the complainant took his annual leave and was then placed on sick leave following his refusal of the offer of a temporary posting to East Timor.

9. In view of the particular circumstances of the case, it is perfectly legitimate to conclude that it was in the Organization's interest to terminate the complainant's assignment in Nairobi in order to maintain an untroubled working atmosphere in the service and to preserve its good relations with the host country.

However, in accordance with the Tribunal's case law (see, in particular, Judgments 269 and 1231), the defendant could not terminate the complainant's appointment solely on that basis, without having taken appropriate steps to find him a new assignment.

The defendant asserts that it made efforts to find the complainant a suitable posting but that nothing came of them. Nevertheless, having examined the evidence on file, the Tribunal concludes that the Organization has not established satisfactorily that it took all necessary steps to reassign the complainant, as was also pointed out by the Appeals Committee.

10. The result is that the impugned decision, which contravened the provisions to which it referred as well as the Tribunal's case law, must be set aside. Since it would be inappropriate to reinstate the complainant in view of his

age, he shall be awarded damages equivalent to the salary, allowances and other benefits to which he would have been entitled until the end of May 2003, when he would have been able to claim pension rights.

11. The complainant claims relief for the moral injury he suffered as a result of the WFP's breach of the rights of the defence and of the "duties of investigation, support and transparency owed to its employees". He seeks an award of 50,000 United States dollars and the publication of the judgment on the WFP's intranet.

Taking into account all the circumstances of the case and particularly the complainant's own behaviour, this claim is unjustified and must be rejected.

12. The complainant claims 10,000 dollars in costs. The Tribunal considers that he is entitled to 5,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall pay the complainant damages equivalent to the salary, allowances and other benefits to which he would have been entitled until the end of May 2003.
3. It shall pay him 5,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet