

NINETY-EIGHTH SESSION

Judgment No. 2394

The Administrative Tribunal,

Considering the complaint filed by Mr I. M. against the Food and Agriculture Organization of the United Nations (FAO) on 16 October 2003 and corrected on 2 March 2004, the Organization's reply of 14 June, the complainant's rejoinder of 6 September and the FAO's surrejoinder of 28 October 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's request for the hearing of witnesses;

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

A. The complainant, a Swiss national and former permanent representative of his country – from 1993 to 1998 – with the FAO and the World Food Programme (WFP), an autonomous joint subsidiary programme of both the United Nations and the FAO, joined the WFP on 1 April 2000, after being granted unpaid leave by the Swiss Confederation, under a two-year fixed-term contract subject to a 12-month probationary period ending 31 March 2001. He was assigned to Maseru, Lesotho, as Country Director at grade P-5 with the Regional Bureau for Eastern and Southern Africa.

In October 2000 the possibility of offering the complainant an indefinite appointment was considered. When he was informed of this, the complainant replied that, in view of his status with his national administration, the signing of such a contract would have to be deferred until the end of his fixed-term contract. In December 2000 it was decided that an offer of an indefinite appointment would be made only after the satisfactory completion of his probationary period.

Following an initial probationary performance appraisal report dated 28 December 2000, and although the complainant's services were described in that report as satisfactory, his probationary period was extended for six months, until 30 September 2001. The complainant was informed of this by memorandum of 28 February 2001 from the acting Director of Human Resources.

In April and May 2001, an inspection was carried out at the Programme's office in Maseru.

In a second probationary performance appraisal report of 20 July 2001, the complainant's performance was described as unsatisfactory and it was recommended that his appointment be terminated at the end of the probationary period. The Director of Human Resources informed the complainant accordingly in a memorandum of 27 July and invited him to send her his comments. In a fax of 22 August the complainant acknowledged receipt of that memorandum. He protested at the proposed measure and said that he had never received copies of his probationary reports. The Director sent him these with a memorandum of 23 August and, by an e-mail of 28 August, the complainant sent her his comments, in which in particular he expressed his disagreement with the content of the reports and complained that his right to be heard had been disregarded. In a memorandum dated 29 August 2001 the Director, while regretting that the complainant had not been provided with copies of the various probationary reports in a more timely manner, confirmed the decision to terminate his appointment on 30 September 2001 on the grounds of unsatisfactory performance. On 28 November the complainant appealed against that decision to the Executive Director of the Programme who rejected the appeal by a decision of 14 December 2001, which apparently the complainant did not receive at the time.

On 28 March 2002 the complainant filed an appeal with the Appeals Committee of the FAO. He sought the reversal of the decision to terminate his contract, a reprimand against those who had committed irregularities and compensation for financial and moral damage. In its report dated 31 March 2003, the Committee expressed serious concerns with the way the administrative procedures had been handled. It recommended that the decision of 29 August 2001 be set aside and that the complainant be paid his full emoluments for the last six months of his initial

appointment (from 1 October 2001 to 31 March 2002). It considered, however, that he had not sufficiently substantiated his claim for compensation for financial and moral damage. In a letter of 28 June 2003, which constitutes the impugned decision, the Director-General of the FAO informed the complainant that he had decided to accept the recommendations of the Appeals Committee.

B. The complainant contends that because he had formerly been a representative on the WFP's Executive Board, his appointment as Country Director was looked upon by long-standing "field officers", and especially by his immediate supervisor, as unacceptable interference. He maintains that his supervisor, who shifted from an attitude of latent mistrust to undisguised hostility, ended up by systematically withdrawing her support from his initiatives in disregard for the Organization's fundamental interests.

According to the complainant, "in his decision of 28 June 2003 the Director-General of the FAO recognised several violations of [his] right to be heard [...] in connection with the extension of his probationary period, the establishment of the disputed [probationary] performance appraisal reports and the termination of his appointment, without, however, referring specifically to the applicable rules". Quoting what he considers to be the relevant statutory provisions, he asserts that several irregularities were committed: the two probationary performance appraisal reports were not drawn up by the required dates and were not forwarded to him in good time; he was not duly notified of the reasons why his probationary period was being extended; and his post was advertised before he had even had a chance to comment on the recommendation to terminate his appointment. According to the complainant, those irregularities rendered the extension of the probationary period from 1 April to 30 September 2001 and the termination of appointment notified to him on 29 August 2001 null and void.

The complainant submits that the termination of his appointment entailed "immense suffering" for himself and for his family and that his national administration had given him to understand that, in view of the problems which had arisen with the WFP, it did not wish to employ him any longer. He contends that in view of the "dramatic consequences" the termination of his contract has had on his personal situation, considering that he has been unemployed since November 2002 and has forfeited all the benefits of the career he had built up prior to his appointment with the WFP, the allegation that he had not substantiated his claims of financial and moral damage is "particularly out of place".

He asks the Tribunal:

"PRINCIPALLY

1. To set aside the decision of the Director-General of the FAO of 28 June 2003 insofar as it accepts the validity of the termination of the employment contract, signed on 15 and 18 October 1999 by [himself] and the WFP, while extending [his] emoluments until 1 April 2002. Also to set aside this decision insofar as it rejects [his] claims for damages and for payment for moral injury.
2. To declare that the decision of 29 August 2000 [*recte* 2001] to terminate his contract is null and void.
3. To order [his] full reinstatement in his post or in an equivalent post from 1 October 2001 and the restoration of his career from that date.
4. To order the WFP to refund [him] the sum of 15,000 Swiss francs plus 5 per cent interest from 31 July 2001 for home leave expenses incurred by [him] for himself and his family and which were not reimbursed owing to the premature termination of his contract by decision of 29 August 2001.
5. To order the WFP to refund [him] a further sum of 20,000 Swiss francs plus 5 per cent interest from 30 September 2001 for additional damage arising from [his] inability to resell his tax-free private car locally on account of the premature termination of his contract by decision of 29 August 2001.
6. To order the WFP to pay [him] compensation for moral injury of 50,000 Swiss francs.

Alternatively

To order the WFP to pay [him] an amount equivalent to five years' salary in damages (for lost earnings).

To order the WFP to pay [him] the sum of 15,000 Swiss francs with interest of 5 per cent from 31 July 2001 in

compensation for the home leave travel expenses incurred by [him], that were not reimbursed on account of the termination of his appointment by decision of 29 August 2001.

To order the WFP to refund [him] an additional sum of 20,000 Swiss francs with interest at 5 per cent from 30 September 2001 for additional damage arising from [his] inability to resell his private car locally owing to the premature termination of his contract.

To order the WFP to pay [him] the sum of 50,000 Swiss francs in compensation for moral injury.

7. To order the WFP to pay all costs of the proceedings, including part of [his] lawyer's fees."

C. In its reply the Organization contends that most of the claims put forward by the complainant differ considerably, both in letter and in spirit, from those filed with the Appeals Committee. It lists the claims which in its view are irreceivable, either because the complainant has already obtained satisfaction, or because the alleged damage is not sufficiently proven, or because they were not put forward in the course of the internal appeal proceedings, such as the claim for costs.

The defendant considers that the complainant has "excessively broadened" the statements of the Director-General; in his letter of 28 June 2003, the latter merely informed the complainant that the Appeals Committee had expressed concerns over the way administrative procedures had been handled and had considered that his right to be informed in a timely manner of the contents of the performance appraisal reports had been impaired. It points out that as the WFP recognised that the decision to terminate his appointment was tainted with procedural errors, the decision was annulled.

Noting that the complainant wants the Tribunal to set aside "the decision of the Director-General [...] of 28 June 2003 [and] the decision of 29 August 2000 [*recte* 2001] to terminate his contract", the Organization suggests that any outside observer might well be struck by this double claim, which in fact amounts to a request for "cancellation of a cancellation" ordered earlier in response to the complainant's express claim. According to the defendant, the complainant's method of proceeding may be explained by the fact that from a material point of view he is not satisfied with the cancellation decision of 28 June 2003, for two reasons. Firstly, if the complainant acknowledges that his claim for the quashing of the decision of 29 August 2001 has been accepted by the Director-General, the related claims for compensation for financial and moral damage become groundless; he is obliged, therefore, to deny that that decision has been cancelled in order to avoid losing any hope of receiving further payments under the present complaint. Moreover, if the complainant were merely to accept the Director-General's cancellation decision, his claims implying that a contractual relationship continued to exist after the end of the initial appointment would become irrelevant.

While pointing out that the complainant's appointment was not renewed on account of his unsatisfactory performance, the defendant contends, on the basis of the relevant provisions of its Manual and the Tribunal's case law, that the complainant's claim to continued employment is totally unfounded. It rejects his allegations of bias, which it considers are aimed at masking the fact that his supervisors found his performance unsatisfactory.

D. In his rejoinder the complainant denies that the claims he submits to the Tribunal differ "considerably" from those he submitted to the Appeals Committee: throughout the proceedings, he has asked to be reinstated and to be compensated for financial and moral damage.

According to him, the Appeals Committee did not give a clear and full ruling on whether his termination was null and void and what the financial implications were. In particular, in its assessment of the damage, the Committee did not take account of the fact that he had been offered an indefinite appointment as early as October 2000.

The complainant emphasises that his "alternative claim" for the payment of a sum equivalent to five years' salary was entered in the light of the fact that his reinstatement and the restoration of his career might prove difficult in view of the time elapsed since the material facts.

He denies that the termination of his appointment was at all due to professional shortcomings on his part.

He reiterates that it is on account of the criticism made by the Programme against him that he has been unable to resume his employment with the Confederation and calls for the WFP to produce its exchange of correspondence with the latter.

E. In its surrejoinder the defendant reasserts that it was only for procedural reasons that the decision to terminate the complainant's appointment was cancelled. On the merits, the decision not to renew his contract would have been amply justified by his unsatisfactory performance.

It denies ever having made the complainant a formal offer of an indefinite appointment.

The Organization argues that the many documents produced as evidence do not support the conclusion that the non-renewal of the complainant's contract could have caused him damage, given that he was able to obtain another appointment with his national administration.

It points out that what the complainant asked the Director-General for was essentially the cancellation of the decision to terminate his appointment. The Director-General acceded to that request.

CONSIDERATIONS

1. The complainant, a former senior official of the Swiss Confederation, was permanent representative of Switzerland with the FAO and the WFP from 1993 to 1998. After rejoining the Federal Department of the Economy on 1 November 1998 as scientific attaché, he was approached by the WFP with an offer of a two-year fixed-term appointment as Country Director. His duty station was to be Maseru, in Lesotho. In October 1999 he signed a two-year fixed-term contract, subject to a one-year probationary period extendable to 18 months, and he took up his duties on 1 April 2000 after obtaining a two-year leave of absence from his administration. To begin with he experienced difficulties in his new post. He reports that he found the WFP office in Lesotho in a state of disarray, but that whatever efforts he made to improve the situation were defeated by the mistrust and subsequent hostility of his immediate supervisor. Whether these allegations are true or not, it seems that, after recommending in October 2000 that the complainant be offered an indefinite appointment subject to a satisfactory probationary period, on 28 December 2000 his immediate supervisor issued a first probationary performance appraisal report, in which she found his performance "satisfactory" while recommending an extension of the probationary period until the end of September 2001 in view of certain limitations. On 20 July 2001 she signed a second probationary report giving a very negative assessment of the complainant's performance, which was deemed to be "not satisfactory", and recommending termination of his contract at the end of the probationary period.

2. The Director of Human Resources informed the complainant on 27 July 2001 that it had been recommended that his appointment be terminated. In reply, the complainant contested that termination, based as it was on probationary reports which he had not seen. He then received copies of the reports and, on 28 August, submitted his comments, whereupon he found out that his post had already been advertised. By a memorandum of 29 August 2001 from the Director of Human Resources, he was notified that his appointment was being terminated as from 30 September 2001. The Director admitted that the probationary reports should have been provided to him in a more timely manner, but did not consider that the lapse was of sufficient gravity to warrant a cancellation of the proposed measure. The complainant appealed to the Executive Director of the Programme against that decision on 28 November 2001. His appeal was rejected in a decision of 14 December 2001, which does not appear to have reached him at the time. He took his case before the Appeals Committee of the FAO on 28 March 2002 requesting *inter alia* that the termination of his contract be revoked.

3. In a strongly reasoned report dated 31 March 2003, the Appeals Committee expressed concerns over the way administrative procedures concerning the probationary period had been handled, insofar as the failure to provide the complainant with the probationary reports in good time had deprived him of the safeguards to which newly recruited staff members are entitled. Citing Judgment 1386, the Appeals Committee recommended setting aside the decision to dismiss the complainant in view of the preceding procedural irregularities and paying him his full emoluments for the unserved period of his contract, but considered that he had not sufficiently substantiated his claim for compensation for financial and moral damage.

4. In a decision dated 28 June 2003, the Director-General of the FAO informed the complainant that he accepted those recommendations.

5. The complainant's claims are listed under B above.

6. Regarding the claims concerning the termination of the complainant's appointment, the Tribunal finds that

they are without substance: the Director-General has expressly accepted the Appeals Committee's recommendation to set aside the termination of the complainant's appointment. The complainant therefore has no interest in seeking the reversal of a decision which gives him satisfaction on that point, or in asking the Tribunal to declare null and void a decision which has already been set aside at his request.

7. Similarly, the complainant cannot validly claim reinstatement and the "restoration of his career". In the light of the Director-General's decision, he must be considered as having completed the two-year period stipulated in his fixed-term contract, and he had no right to have that contract converted into an indefinite appointment. In response to his objection to the non-renewal of his contract, the Tribunal recalls that such decisions lie at the discretion of the organisations and are subject to only limited review by the Tribunal. In this case, no mistake of law or of fact nor any clearly mistaken conclusion may be discerned in the Organization's implicit decision not to extend or not to renew the complainant's two-year contract. Moreover, there is no evidence in the file to support the allegations of misuse of authority and bias, although it does appear that the ill feelings between the complainant and his supervisor would partly account for the severity of his last probationary report.

8. The complainant's claims for compensation for financial and moral damage, on the other hand, are receivable and partially succeed. It is true, as the defendant points out, that some of these claims, for instance those concerning the refund of his travel expenses and compensation for the loss incurred as a result of his inability to resell his car locally, were not put forward in the course of the internal appeal proceedings. But it emerges quite clearly from the file that the irregularities committed by the WFP and recognised by the defendant, the careless way the Organization advertised the complainant's post before he had even had a chance to comment on the termination of his contract, and the way it admitted the unlawfulness of the termination notified on 29 August 2001 – that is, the day after he submitted his comments on his probationary reports – only in a decision of 28 June 2003 notified to the complainant on 17 July 2003, severely harmed the complainant's legitimate interests and impaired his dignity. Every international civil servant has the right to respect for his or her dignity. Even though there is no doubt that the complainant was taken on for only two years and that the difficulties he has encountered in resuming employment in Switzerland cannot be blamed on the Organization, the damage he has incurred has not been compensated by the payment of the emoluments to which he was entitled up to the normal expiry date of his contract. In fair compensation for the financial and moral damage incurred by the complainant, the Tribunal orders the Organization to pay him the sum of 10,000 Swiss francs.

9. Since he partially succeeds, the complainant is entitled to costs, which he may claim directly before the Tribunal, contrary to the defendant's plea, and which the Tribunal sets at 2,000 francs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant compensation of 10,000 Swiss francs.
2. It shall also pay him the sum of 2,000 francs in costs.
3. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

