

**111th Session**

**Judgment No. 3023**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss N. C. against the Food and Agriculture Organization of the United Nations (FAO) on 29 June 2009 and corrected on 16 September, the FAO's reply of 14 December 2009, the complainant's rejoinder of 30 January 2010 and the Organization's surrejoinder of 29 April 2010;

Considering Articles II, paragraph 5, and VII 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 national of the Democratic Republic of the Congo, born in 1972, joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in April 1995. After having served under various contracts, on 18 May 2006 she was granted a one-year fixed-term contract as an

Administrative and Finance Officer, grade P-1, in the Finance Division in Rome, Italy. The appointment was subject to a one-year probationary period.

During her probationary period, the complainant was offered a six-month temporary duty assignment in the Sudan Regional Bureau beginning on 1 March 2007, which she accepted. In April 2007 she was informed that she had successfully completed her probationary period and that her contract was extended to 31 August, to coincide with her temporary duty assignment. She subsequently applied for the position of Administrative Officer, at grade P-2, in Sudan. The vacancy announcement for this post indicated that it was to be filled through reassignment of serving international staff who held continuing or indefinite appointments. On 22 June she received a memorandum dated 8 June 2007 by which the Director of the Human Resources Division informed her that her contract would not be renewed beyond its expiry date of 31 August. The Director explained that her position in Rome was designed as a one-year pilot programme in order to allow her to acquire extensive training and enhance her expertise in administration and finance. It was budgeted for only one year and, although Regional Bureau funds had enabled it to be extended, no additional funding was available.

On 27 August the complainant wrote to the Administration of the WFP requesting that her application for the position in Sudan be reconsidered, as she understood that it had been rejected because she had mistakenly been considered as an external candidate. By an e-mail of 30 August the Deputy Director of the Human Resources Division informed her that her application had been reviewed but that no decision had yet been taken concerning the filling of that position. He added that she had little chance of being selected, considering the number of staff who held continuing or indefinite appointments and who had priority over her with regard to reassignment.

On 19 November 2007 she lodged an appeal contesting the decision not to renew her contract. The Executive Director of the WFP

replied in a letter dated 22 January 2008 that, having considered various documents and in particular a memorandum written by the Director of the Division of Legal Services, she considered that the contested decision had been taken in accordance with the applicable rules and that the appeal was therefore rejected; she appended the relevant documents. On 22 February 2008 the complainant filed an appeal with the Appeals Committee of the FAO seeking the quashing of the decision not to renew her contract on the grounds that it was not justified, and that, if there were real budgetary constraints, she should have been given priority with regard to reassignment.

In its report the Committee noted that the appeal had been filed nearly two months after the 90-day period set out in the Staff Rules, but that the complainant, who acknowledged that it was lodged out of time, relied on WFP Manual paragraph 331.3.31, according to which an appeal is deemed receivable if the failure to observe the time limit was for reasons beyond the person's control. However, the Committee observed that, as from 23 June 2007, the complainant had communicated with staff at headquarters concerning the contested decision and that in September 2007 she had travelled to headquarters. Thus, she could have lodged her appeal at that time. It therefore held that the delay in filing the appeal was not for reasons beyond her control and recommended that the appeal be rejected as irreceivable.

By a letter of 27 March 2009, which is the impugned decision, the Director-General of the FAO endorsed the Committee's recommendation and rejected the appeal as irreceivable.

B. The complainant contends that she took steps within the prescribed time limit to challenge the decision not to renew her contract. In her view, the appeal she lodged on 19 November 2007 was receivable because it was filed within 90 days from the receipt of the e-mail of 30 August 2007, which modified the initial non-renewal decision of 8 June in that the Deputy Director of the Human Resources Division indicated that she could be considered for the post

in Sudan for which she had applied. That e-mail was a reply to her request of 27 August 2007 for reconsideration of the decision not to appoint her to that post. Up to that date she was in discussions with the WFP and was led to believe that she would be offered a position. She adds that the Executive Director, in her letter of 22 January 2008, did not raise any objection to receivability and that, according to the Tribunal's case law, failure to observe a time limit is not an irregularity which can be pleaded at a later stage in the procedure.

The complainant further alleges that the internal appeal proceedings were flawed in that her request for an oral hearing was denied. Referring to Manual paragraph 331.2.2.2 (*recte* 331.2.21) and Staff Rule 303.1.21(b) she contends that the Appeals Committee was improperly constituted. She also accuses the Organization of causing undue delay in the treatment of her internal appeal.

She submits that she should have been reassigned to a vacant position because she held a fixed-term contract and such a contract is renewed if a suitable vacant position is identified. She asserts that there were no staff holding her grade who had continuing or indefinite appointments and who had to be reassigned. She maintains that she was not selected for the position of Administrative Officer in Sudan because she was mistakenly considered as an external candidate and contends that her applications for other vacant positions were not considered seriously.

According to the complainant, the impugned decision is tainted with mistakes of fact and of law insofar as it is based on the report of the Appeals Committee, which itself contains errors. She also contends that the reasons for not renewing her contract were not clear and that her terms of employment did not specify that she was participating in a training programme.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement. She seeks the payment of salary and allowances for the period from 1 September 2007 until the date of her reinstatement, compensation for the treatment she suffered

from the Organization and for the delay in considering her appeal, as well as costs. Lastly, she claims reimbursement of the amount she paid into the pension fund between February 1996 and November 2002, as well as the contributions paid by the Organization.

C. In its reply the FAO submits that the complaint is irreceivable given that the internal appeal was filed almost 60 days after the time limit of 90 days from the date of notification of the contested decision, in breach of Staff Rule 303.1.311. It argues that there were no reasons beyond the complainant's control that would have justified waiving the requirements of Staff Rule 303.1.311. It points out that in June, July and August 2007 she communicated extensively with several staff members, including at headquarters, to discuss her employment situation and that she even travelled to headquarters in September 2007. It contends that the e-mail of 30 August 2007 cannot be considered as a new administrative decision setting off a new time limit, and that she misread it: the Deputy Director of the Human Resources Division merely informed her that no staffing decision had been taken concerning the post in Sudan and that she had little chance of being selected. It further indicates that no objection to receivability was raised in the letter of 22 January 2008 because it was merely an informative letter providing explanations as to why her appointment had not been renewed.

The Organization denies any breach of due process in the internal appeal proceedings. In its view, the complainant has produced no evidence showing that the Appeals Committee improperly exercised its discretion in deciding not to order a hearing. It adds that the Committee was properly constituted and that the complainant has misunderstood Manual paragraph 331.2.21. Concerning the alleged delay in the internal appeal proceedings, it indicates that no specific time frame is laid down in the Staff Rules and asserts that the appeal was fairly and timely considered.

The defendant points out that the complainant held a fixed-term contract, which expired on the date specified in the letter of

appointment, and that, according to the applicable rules, such appointment does not carry any expectation of extension or conversion to any other type of employment. The complainant's terms of employment, which she had accepted, expressly stated these conditions. In addition, it contends that the decision not to renew a fixed-term contract is discretionary and hence subject to only limited review by the Tribunal. It explains that the contested decision was taken bearing in mind the WFP's interest and its budgetary constraints. In June and July 2007 the complainant was given reasons as to why her appointment was not being renewed. It stresses that, according to the Tribunal's case law, it is not required to provide the reason for not renewing a contract in the text that gives notice of the non-renewal.

The FAO explains that the post of Administrative Officer in Sudan for which the complainant had applied was kept open for staff holding continuing or indefinite appointments and whose positions may be abolished pursuant to the financial restrictions faced by the WFP. Since she did not hold that type of appointment, she did not qualify for priority reassignment. She was nevertheless offered a service contract for a G-6 position but refused it.

D. In her rejoinder the complainant indicates that she was on mission in Sudan when her contract expired on 31 August 2007 and that the Organization did not take the necessary measures to organise her return to Italy, which was her duty station according to her terms of employment. She argues that due to its inaction she had to stay in Sudan until 5 September, and that she had to fly economy instead of business class, in breach of applicable rules, which provide that an official is entitled to travel business class for a journey of more than nine hours. She considers that she should be compensated for the Organization's failure to treat her with respect.

E. In its surrejoinder the Organization maintains its position. It submits that the complainant's new claim for compensation is irreceivable for failure to exhaust internal remedies.

## CONSIDERATIONS

1. The complainant was under a one-year fixed-term contract with the WFP due to end on 17 May 2007. During her one-year probationary period, the complainant accepted a six-month temporary duty assignment commencing on 1 March 2007. In June 2007 the Director of the Human Resources Division notified the complainant that her contract would not be renewed beyond 31 August 2007. The Director explained that the position she occupied in Rome was designed as a one-year pilot programme with funding for only one year, which could have been extended to the end of August only due to the availability of funds for the temporary duty assignment.

2. Over the next five months, the complainant exchanged correspondence with the Human Resources Division and with the President of the Professional Staff Association seeking clarification and pursuing her future prospects with the WFP. As these efforts were not successful, the complainant was advised to complete her separation formalities.

3. On 19 November 2007 the complainant appealed the decision not to renew her contract to the Executive Director of the WFP. On 22 January 2008 the Executive Director advised the complainant that her appeal was denied and that she could appeal this decision to the FAO Appeals Committee, which she did on 22 February 2008. The Committee found that the appeal had not been filed within the prescribed time limit and thus recommended that it be rejected as irreceivable.

4. On 27 March 2009 the Director-General of the FAO informed the complainant of his decision to accept the recommendation of the Appeals Committee and dismiss her appeal as not receivable. This is the decision impugned before the Tribunal.

5. The complainant advances three arguments: the Director-General erred in determining that her appeal was time-barred; the Appeals Committee breached her due process rights; and the WFP

breached its duty of care towards her by not renewing her contract and by failing to reassign her to an adequate post. Only the first two arguments require consideration.

6. In her submissions the complainant acknowledges that her formal appeal was not filed until 19 November 2007. However, she points out that, within a few days of receiving the notice of her non-renewal, she began corresponding with the WFP regarding her employment status. She adds that she applied for a position in Sudan. She also states that she thought she would be reappointed and, therefore, did not launch her appeal until it was clear that a suitable reassignment would not be made. The complainant takes the position that she was entitled to wait for a response regarding the Sudan post before launching her appeal, which was received on 30 August 2007. She characterises this latter decision as being the ultimate decision leading to her non-employment and claims that her appeal was filed in a timely manner within the 90-day period set out in the Staff Rules. In her view, the WFP's delay in making a decision regarding the post in Sudan contravened paragraph 6.2.1 of the WFP Human Resources Policy Document on Reassignment, Rotation and Mobility of International Professional and Higher Category Staff. Thus, she claims, it was the WFP's breach of its rules that forced her to file her appeal out of time.

7. The complainant also submits that, since the WFP did not plead irreceivability in its reply to her appeal, it is precluded from doing so in later proceedings. She cites Judgment 181 for the proposition that: “[f]ailure to observe a time limit [...] is not an irregularity which can be pleaded at a later stage in the procedure” and Judgment 1655 for the proposition that if an organisation accepts a claim and judges it on its merits, it is estopped from pleading irreceivability at a later stage of appeal. The complainant points out that, according to Manual paragraph 331.3.3, the non-observance of time limits is not fatal to the claim, if the delay was for reasons beyond the person's control. In addition, she states that she worked in difficult

conditions, through war and emergency operations in Sudan. Consequently, the Tribunal is asked to decide the case on its merits.

8. As already indicated, the complainant argues that, because the Executive Director raised no issue as to the timeliness of her appeal in her letter of 22 January 2008, that issue could not later be raised against her. That argument must be rejected. Although the merits of the appeal were dealt with in that letter and its annexes, it is clear that that was done only to clarify the prior decision not to renew her contract. Certainly, there is nothing in the letter or annexes to indicate that the Executive Director intended to waive or extend the time requirements, a power that is expressly granted to the Appeals Committee in the circumstances set out in Staff Rule 303.1.322. Nor is the complainant's argument advanced by reference to Judgments 181 and 1655. In Judgment 181, the rules there considered provided for the making of a protest to the Director-General within a set time limit with respect to a decision by a lower authority and for the Director-General to give a ruling on that decision which could then be appealed. In that case the Director-General had given a ruling and later argued that the appeal was irreceivable because the protest was not lodged within the specified time. That is very different from the present case. As to Judgment 1655, the organisation in that case was estopped from disputing receivability because it had taken the specific action requested by the staff member in her claim for relief. In the present case, the Appeals Committee was correct to consider, as it was required to do by Staff Rule 303.1.322, whether the requirements of Staff Rule 303.1.31 had been met. In reaching its conclusion that the appeal was irreceivable, the Appeals Committee noted the complainant's acknowledgement that her appeal was filed out of time and went on to consider, as contemplated by Staff Rule 303.1.322 and Manual paragraph 331.3.31, whether the late filing of the appeal was for reasons beyond the complainant's control.

9. The Appeals Committee rejected the complainant's explanation that she was working in an emergency environment and was overwhelmed with work. It observed that even though the

complainant was hoping for a solution to her employment problem, in light of the absence of a positive response in July and August 2007, she should have acted on her appeal.

10. The Tribunal concludes that the Appeals Committee's finding on receivability and in turn the Director-General's endorsement of the finding did not involve an error of law, an erroneous finding of fact or a failure to take into account a relevant fact.

11. Moreover, the complainant alleges that a number of procedural irregularities tainted the Director-General's decision. She contends that she was entitled to an oral hearing by the Appeals Committee. The Tribunal rejects this contention. Staff Rule 303.1.341 gives the Appeals Committee the discretion to hear the evidence that it considers necessary to arrive at the truth of a matter. In this case, the Committee considered the complainant's request for an oral hearing and found that, after examining all the material submitted by the parties, there was no need for her to be heard. As the Tribunal stated in Judgment 2893, under 5, in relevant part:

"Neither the legal provisions governing [the Appeals Committee] nor the general principles applicable to such an appeal body require that a complainant be given an opportunity to present oral submissions in person or through a representative. As the Tribunal has already had occasion to state in Judgment 623, all that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities."

12. The complainant further submits that the composition of the Appeals Committee contravened Staff Rule 303.1.21(b) and Manual paragraph 331.2.21 as two of the five alternates were staff members of the WFP. The complainant has misinterpreted the provisions, which stipulate that the Appeals Committee is to be comprised of five members and 12 alternates, with five of the alternates to be nominated by the Director-General. Manual paragraph 331.2.21 concerns the Appeals Committee alternates and not the composition of an Appeals Committee panel.

13. Lastly, the complainant claims that she has suffered injury due to the delay in the internal appeals proceedings. The Tribunal notes that the internal appeal took approximately 17 months. Given that the only issue considered in the appeal process was receivability, the Tribunal agrees that there has been undue delay for which the complainant is entitled to moral damages in the amount of 1,000 euros. However, this is not an appropriate case for an award of costs.

#### DECISION

For the above reasons,

1. The FAO shall pay the complainant moral damages in the amount of 1,000 euros.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet