

FORTY-SEVENTH ORDINARY SESSION

***In re* BORSODY**

Judgment No. 476

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. Lajos Borsody on 30 December 1980, the FAO's reply of 23 March 1981, the complainant's rejoinder of 22 June 1981 and the FAO's surrejoinder of 28 July 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Rules 301.012 and 301.042 and FAO Manual provisions 303.134, 311.422, 330.141 and 601.52;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant, a citizen of the United States, has been working for the FAO since 1961. In 1971 he became leader of the Meat Team of the Basic Foodstuffs Service. In September 1976 the Acting Director of the Division to which the Service belonged and the chief of the Service informed him of their intention of transferring him to another post. He objected. After an exchange of minutes and a discussion with him the Division Director informed him in January 1977 that the transfer was postponed by six months. He repeated his objections. On 1 June the Director confirmed his original proposal and the complainant confirmed his objections on 13 June. On 1 July he was transferred to the post of P.4 economist in the Trade and Commodity Policy Group in the same Division. He appealed to the Director-General and applied for referral to an investigatory committee. The Assistant Director-General for Administration and Finance confirmed the decision on 26 August 1977 and stated that there was no call for an investigation. The complainant filed an appeal with the Appeals Committee on 30 August 1977. After very lengthy proceedings the Committee reported on 19 August 1980, and the Director-General, on its recommendation, rejected the appeal on 3 October 1980. That is the decision impugned.

B. The complainant does not deny that transfer is at the Director-General's discretion. He contends, however, that in his case the decision was in breach of the rules of form and procedure. His transfer was disciplinary in character. According to FAO Manual provision 330.141 such a decision should not have been notified to him, as it was, merely by the Director of the Personnel Division. The Staff Rules provide for an investigatory committee; yet the Director-General refused to refer the case to such a committee. The appeal proceedings were extraordinarily lengthy since they began in August 1977 and the Director-General did not take his final decision until 3 October 1980. Some of the time limits for filing statements were not observed. True, the memorandum of appeal was not filed until August 1978, but that was because the complainant had sought in vain the disclosure of certain files, and the FAO took nine months over its reply, which it did not file until May 1979. The Appeals Committee at last reported in August 1980, but even then the Director-General did not take his decision until 3 October 1980. The complainant was improperly refused access to unconfidential files, and the Appeals Committee declined to order their disclosure. He was thus prevented from making use of documents material to his appeal, and his right to a hearing was not respected. The Appeals Committee was in no position to form a sound opinion since there was material evidence it failed to obtain. It was also in breach of the procedural rules in taking expert evidence from an official in the absence of the parties. The complainant does not agree that he was transferred to a post which in status and responsibility is on a par with his former one. It is true that both posts are graded P.4, but in his former post he served for several years as, among other things, a technical secretary to an intergovernmental group and FAO spokesman at international meetings; he was answerable to a D.1 official and himself supervised several other officials. In his new post he has only clerical staff as subordinates and has hitherto been answerable to a P.5 official. He is no longer given any opportunity of attending international meetings nor of performing duties matching his experience and seniority. His status has therefore suffered and so have his career prospects in the FAO and elsewhere. Indeed the Appeals Committee acknowledged that he is now performing duties which give him lesser professional satisfaction and it recommended that the Director-General find him if possible a more satisfying post. The reasons given for his transfer were his behaviour at a meeting of a working party of the Organisation for Economic Co-operation and Development (OECD) in April 1976 and an incident over a world

meat congress in Buenos Aires in August 1976, which the FAO alleges caused it "embarrassment". This he denies. He left the OECD meeting, where he was representing the FAO, because "insulting comments" had been made about the FAO and its staff. He was later offered an apology. As for the congress in Buenos Aires, where he was to deliver a paper, he decided at the last moment not to attend. His absence was not interpreted as an unfriendly act either by the Argentine Government or by the sponsors of the congress. The complainant denies that the incidents caused the embarrassment alleged by the FAO, and he invites the Tribunal to hear witnesses on this point. The FAO also gave medical reasons for the transfer. From a medical check-up he underwent on 14 September 1976 he was found to be "fit for sedentary work at Headquarters". The FAO interpreted this finding as precluding any mission, whereas the examining doctor told the complainant that it meant that he was not fit for assignment to posts or extended field trips in tropical areas where medical care was inadequate. His professional competence has always been acknowledged and he has been devoted in service to the FAO. The reasons given for his transfer are therefore not objective. The FAO has failed to respect his dignity and reputation. His professional competence is now in doubt and his prospects of advancement in the FAO and outside it are destroyed. In particular, his transfer was announced by his supervisors in humiliating terms. The FAO sought to put pressure on his wife and connected his own appeal with one she had brought by dismissing both on the same day. He sees that as an attempt to humiliate him and his wife. He accordingly invites the Tribunal to quash the decision to transfer him and order his reinstatement in his former post; alternatively, to order his transfer to a truly equivalent post; in addition, to award him 10,000 United States dollars as compensation for the prejudice he has suffered since his transfer; subsidiarily, to award him \$100,000 plus 10 per cent interest from 1 July 1977 as compensation for the prejudice suffered; in any event to order the deletion from FAO records of any unfavourable mention of his performance or conduct; to order the removal of any restrictions imposed on him; and, lastly, to award him costs.

C. In its reply the FAO states that the transfer was not disciplinary in character and did not constitute a sanction. The procedure for the application of disciplinary sanctions was therefore not applicable. The duration of the appeal proceedings was due mainly to the complainant's own wilfully dilatory tactics. He was at no disadvantage in the appeal proceedings for being refused access to certain files. The files contain confidential information about other staff members and that was why he could not be allowed to see them. The hearing of a witness in the absence of the parties had no effect on the Committee's unanimous recommendation or on the Director-General's decision. Neither in level nor in importance are the complainant's responsibilities in his new post inferior to his former ones. His status in the hierarchy is the same as before. In his new post he plays a leading part in writing and editing the FAO review known as Commodity Review and Outlook. His career prospects are in no way diminished. In the circumstances the FAO felt that its interests would be better served if he were transferred to a post where his skills could be made use of but he would not be subject to stress. It had become common knowledge that he was often agitated and anxious when working under stress, especially at international meetings. The decision was not based on a mistake of fact or on a misinterpretation. The FAO explains how the incidents referred to by the complainant might have caused it embarrassment and cites them as evidence of his unpredictable behaviour under stress. Considerations of health were discounted and had nothing to do with the final decision. The mere fact that he is no longer appointed to represent the FAO does not mean that his dignity or reputation has suffered, and in any case has caused him no serious prejudice entitling him to legal redress. He had opportunities to discuss the transfer with his supervisors and it was postponed so as to spare him distress. The way it was carried out caused him no humiliation or unnecessary anxiety. It is mere coincidence that his wife's appeal was dismissed on the same day as his own. The rejection of the two appeals reflects no intention of humiliation or harassment. The FAO invites the Tribunal to dismiss the complaint.

D. In his rejoinder the complainant observes that the Appeals Committee's report is ambiguous since it recommended dismissing his appeal but invited the Director-General to consider transferring him to a more satisfying post. He gives further explanations about the incidents mentioned above. He believes that his new post is not as important as the Organization makes out; indeed in 1976 there was word of abolishing it.

E. In its surrejoinder the FAO gives examples of the anxiety betrayed by the complainant in the performance of his duties. As to whether his new post is equivalent to his former one, only the grade should count, different posts naturally having different duties attached to them. The FAO repeats and elaborates its other arguments.

CONSIDERATIONS:

The receivability of the complainant's pleas

1. The decision which the complainant impugns confirmed his transfer from one post to another. It is based on

Staff Rule 301.012 and on Manual provision 311.422, which confer wide discretion on the Director-General. The Tribunal may therefore set it aside only if it was taken without authority, or is tainted with a formal or procedural flaw, or rests on a mistake of law or of fact, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts. Moreover, even where it has no reason to set a decision aside, the Tribunal may award moral damages to a complainant who, on account of injury to his dignity and reputation, has suffered serious prejudice such as to hamper his career.

In this case the complainant is alleging procedural irregularities, mistakes of fact, mistaken conclusions from the facts, abuse of authority and injury to his dignity and reputation. These are pleas of a kind which the Tribunal will hear and are therefore receivable. The Tribunal will take them in the order in which the complainant has presented them.

Procedural irregularities

2. In the first place the complainant accuses the Director-General of failing to comply with the rules on disciplinary sanctions and to consult the body from which he may seek advice on such matters.

This plea would succeed only if the transfer were in fact a concealed disciplinary sanction. As appears below, however, it is not.

3. Secondly, the complainant objects to the dilatoriness of the appeal proceedings, which he introduced in August 1977 and which were not completed until 3 October 1980, when the decision he is challenging was taken.

His grievance, though justified, is without effect. The Tribunal cannot but deplore any undue protraction of the appeal proceedings, which is to the prejudice of the Organization as well as of the complainant. But it cannot criticise the actual transfer without due regard to the lawfulness of the decision.

Besides, the complainant's plea carries the less weight in that he himself was partly to blame for the delay. It is true that the Appeals Committee could have helped to hasten the proceedings, for example by ensuring that the time limits were respected, and that the Organization tarried for nine months over its reply, which it took only a few days to draft. But the complainant himself was remiss; indeed he took a year to file his memorandum of appeal, and during that year he sought unsuccessfully the disclosure of files which, as appears in 4 below, he was not entitled to consult. Moreover, he took five months over his rejoinder, and then filed a supplementary memorandum of which the purpose is difficult to discern.

4. The complainant further objects to the Organization's refusal to disclose the dossiers and to the Appeals Committee's refusal to order their disclosure. Under the material rules and general principles this plea also fails.

First, there was no breach of the Manual provisions. In accordance with Manual provision 303.134 the complainant had access to his personal file and to the evidence considered by the Appeals Committee. Moreover, since he was acting in his own interests he could not properly rely on Manual provision 601.52, which grants staff members access to the files they need in performing their duties.

Secondly, there was no breach of his right to a hearing as prescribed by a general principle of law. Any official in dispute with the Organization should, by virtue of that right, be allowed access to evidence which may serve in defending their interests and are not confidential. In this instance, however, the complainant has not established or even suggested it as likely that the files he wished to have disclosed would have supported his claims. It is therefore immaterial whether those files, in so far as they related to officials other than the complainant, were confidential and therefore could not be disclosed in this case. Besides, even if there had been a breach of his right to a hearing and the impugned decision had thereby been flawed, he could have removed the flaw in the present proceedings by applying to the Tribunal for an order to disclose the files withheld. He has made no such application.

5. Another plea advanced by the complainant is that the Appeals Committee failed to hear certain witnesses and was therefore unable to form a proper opinion.

In fact the Committee was properly informed by the great amount of written evidence submitted to it. The question it had to determine was whether or not the Director-General kept within the limits of his discretionary authority in confirming the complainant's transfer. In answering that question it had before it in writing the views of several of

the complainant's supervisors, who were the most familiar with his work. He therefore had no cogent reason to seek the views of other, less well informed, officials.

6. The complainant also contends that the Appeals Committee infringed a procedural rule by questioning an official as an expert witness in the parties' absence.

According to a general principle of law one element of the right to a hearing is an opportunity to take part in the deposition of evidence, for example by attending the hearing of witnesses, putting questions to them or having counsel put questions to them, and commenting on the replies. To respect the parties' right to a hearing in this case the Appeals Committee ought to have summoned the complainant and a representative of the Organization to attend when the expert witness gave evidence. Whether or not this requirement is expressly laid down does not matter.

This flaw in the internal appeal proceedings had no effect, however. The official who was called as an expert witness expressed views solely on the nature of the complainant's former and new posts. As is indicated in 7 below, that is a point which has been fully elucidated in the proceedings before the Tribunal. Accordingly, neither the statements of the expert witness nor the conclusions which the Appeals Committee drew therefrom can have any effect on the Tribunal's decision.

Mistakes of fact

7. The complainant's former post and his new one carry the same grade. However, whereas the incumbent of the former post comes under a D.1 official, supervises several other officials and occasionally attends international meetings, the holder of the latter post has hitherto come under a P.5 official, has only clerical staff as subordinates and has no duties whatsoever outside the Organization. Those are the facts which appear on the written evidence submitted to the Tribunal and on which its judgment will rest. It need not therefore consider the complainant's contention that the Appeals Committee and the Organization were mistaken in treating the two posts as equivalent.

8. In April 1976 the complainant left a meeting which was being held by the Organisation for Economic Co-operation and Development (OECD) and at which he was representing the FAO. In August 1976 he suddenly resolved not to attend a congress in Buenos Aires at which he was invited to deliver a paper.

Both parties admit these facts. The only difference between them is in qualifying the complainant's behaviour. The Tribunal will revert to this point when it reviews the conclusions which were drawn from the facts.

9. On 14 September 1976 the complainant was, at the FAO's request, given a check-up by a doctor who found him "fit for sedentary work at Headquarters". He argues that this simply means that he is not fit to go on mission to tropical climes, but it implies that he is indeed fit to attend international meetings in countries with adequate medical services. As appears from the discussions held before the transfer, the FAO put a different interpretation on the doctor's opinion. But the Tribunal need not settle in favour of one interpretation or another, since the FAO has expressly agreed not to rely on the doctor's opinion in this case.

The drawing of mistaken conclusions from the facts

10. In determining whether the complainant's transfer was justified under Manual provision 311.422 the Director-General had to consider contradictory evidence.

The complainant's supervisors are all agreed that for some years he has been suffering from an increasingly serious state of tension brought about by the duties of his former post and especially aggravated by his having to represent the FAO and discuss policy matters at international meetings. They go on to say that, however revealing may be the incidents connected with the OECD meeting and the congress in Buenos Aires, those incidents are merely signs of a condition which they had discerned much earlier. They therefore believe it wise, and in the FAO's interests as well as the complainant's, to transfer him to a post where he is not under nervous strain.

The complainant Points out that his abilities have always been recognised, that his enthusiasm has never waned, that his health has not altered in the last twenty years, that the FAO's interests were in no way harmed by the incidents and that there are therefore no objective grounds for confirming the transfer.

The complainant's reasoning cannot be entirely rejected. The FAO itself does not deny his professional abilities.

Nor is it certain that the complainant's behaviour in the incidents mentioned above was in fact injurious to the Organization. In view of his supervisors' categorical and unanimous opinion, however, the Director-General did not exceed the limits of his discretion in concluding that the transfer was in the FAO's interests and therefore in accordance with Manual provision 311.422. The conclusions he drew from the evidence may have been arguable, but they were not clearly mistaken, and the complainant is wrong in maintaining that they were. Nor would it make any difference to hear the witnesses he wishes to call, whose testimony cannot prevail over the views of his own supervisors. The Tribunal has no reason, any more than did the Appeals Committee, to require further evidence.

Abuse of authority

11. It is not established that the complainant's supervisors committed any abuse of authority, i.e. that they acted on considerations extraneous to the Organization's interests. Their probable intention in asking him to undergo a medical examination was to obtain confirmation of what they had observed. It does not follow, however, that their observations were tainted with personal prejudice. Moreover, there is no evidence of prejudice in the fact that the Organization, after relying on the doctor's findings, decided to discount them since they were open to different interpretations.

Injury to dignity and reputation

12. The complainant believes that he has been humiliated, that doubt has been cast on his professional competence and that he can no longer look forward to any promotion within or outside the FAO. In fact, although his transfer has seriously affected him, it has not the decision having been taken and put into effect as it was injured his dignity or reputation. It therefore does not warrant the award of compensation when it is not in itself unlawful.

First, the complainant has failed to establish that he is humiliated. In fact his supervisors agreed to many interviews with him and let him have copies of the letters about his case, and indeed showed laudable candour. Moreover, he was given time to prepare for his new position, which he was to have taken up at the end of 1976 but did not actually take up until 1 July 1977. Nor does there appear to be any malicious intent underlying the coincidence whereby the Director, on one and the same day, confirmed the complainant's transfer and rejected an appeal by his wife.

It is true that the transfer must have aroused doubts about his abilities in the minds of those who had dealings with him. But that was because of the nature of the decision, not because of the behaviour of FAO officials. His supervisors could not have avoided making his transfer public. But the words they used do not seem to be open to serious criticism. In particular one official, while expressing the hope that the change would serve the FAO's interests, described the work done by the complainant as excellent.

Lastly, the complainant's prospects of advancement depend mainly on himself. Some of those who have held his present post have been promoted, and so may he.

The Tribunal's decision

13. In the light of the foregoing the complaint must be dismissed in its entirety. Since the impugned decision suffers from no flaw, he is entitled neither to reinstatement nor to assignment to a post similar to his former one.

He is not entitled to the compensation he claims: either on the same grounds or because there was no injury to his dignity or reputation.

His application for the removal of items from the records can succeed only if they were found to be mistaken. In fact they are not.

For the reasons given above his application for the hearing of witnesses is disallowed.

Since his complaint is dismissed, he will not be awarded costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner