

Registry's translation, the French text alone being authoritative.

## FORTY-EIGHTH ORDINARY SESSION

In re YOUNG

Judgment No. 485

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Miss Jean Barbara Young on 14 February 1981, the FAO's reply of 21 May, the complainant's rejoinder of 11 August and the FAO's surrejoinder of 16 September 1981;

Considering Article II, paragraphs 1 and 5, of the Statute of the Tribunal, FAO former Staff Regulations 302.40611 and 40621, and Staff Regulation 301.1 and FAO Staff Rules 302.3091, 302.405, 302.40631, 302.7111 and 303.28 and Appendix A;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Early in 1979 the complainant, who is a British subject, sent an application for an appointment from her home in London to FAO headquarters in Rome. She travelled to Rome in May at her own expense to take a typing test and was given an appointment as a grade G.2 typist from 20 June to 20 August 1979. On 1 July she was appointed a G.3 stenographer and on 21 August was given a "continuing" appointment. She resigned and left the FAO on 15 May 1980. On 12 August and again on 8 November 1979, however, she had written to the Director of Personnel objecting to the reference in her contract of employment to her classification as a "local" employee and to her residence in Rome. On 21 November the Director replied that "the terms of employment of General Service staff recruited at Headquarters no longer include non-local status". On 21 February 1980 the complainant appealed to the Director-General under Staff Regulation 301.11 claiming non-local status and the benefits thereof and the repayment of travel and related expenses. By a letter of 19 March the Assistant Director-General for Administration and Finance rejected the appeal on the Director-General's behalf on the grounds that since 1 February 1975 the rules had made no provision for granting non-local status to General Service staff and that under Staff Rule 302.7111(i)(b) travel and related expenses were repaid only when required in order to recruit staff. On 27 March the complainant appealed to the Appeals Committee. In its report dated 19 August 1980 the Committee found that, in contrast to other staff who had been recruited before 1 February 1975, there was no question of any legitimate expectation of non-local status, that the complainant's entitlements should be determined by the rules in force at appointment and that under those rules she did not qualify. Moreover, circumstances which had justified granting non-local status to other non-Italian General Service staff were absent in her case. By a letter of 3 November, which she states she received in Saudi Arabia on 10 December 1980, the Deputy Director-General informed her that, on the Committee's recommendation, the Director-General had rejected her appeal. That is the decision she now impugns.

B. The complainant submits that she was recruited, not in Rome, but in London. In answer to her inquiry about employment she received in London from the FAO an application form and a letter saying that if she came to Rome she might take a typing test. She had no residence in Rome at the time of recruitment: she went there only to take the test and seek employment. Hers was in reality a case of international recruitment, and she should therefore be granted the benefits of non-local status in accordance with Staff Rule 302.7111. Other non-Italian General Service staff members, whom the complainant names, and who travelled to Rome at their own expense, obtained satisfaction of their claims for the benefits of non-local status and for repayment of their travel and related expenses. There was therefore also breach of the principle of equality of treatment. In her claims for relief she invites the Tribunal to order the FAO to pay her the travel and transport costs she incurred in travelling from the United Kingdom to Rome and to pay her the installation allowance at the rate in force when she joined the staff, with interest, or at the rate in force when she left the staff; and to pay her repatriation travel expenses and grant on

her return to the United Kingdom. She further invites the Tribunal, if it considers that the policy of not granting non-local status and accompanying entitlements to expatriate non-Italian staff recruited after 1 February 1975 creates inequality of treatment, to order the FAO to grant her non-local status with all the accompanying entitlements.

C. In its reply the FAO invites the Tribunal to dismiss the complaint as unfounded. Until 31 January 1975 all non-Italian General Service category staff other than short-term staff, wherever recruited, had non-local status under former Staff Rules 302.40611 and 40621. Those rules were repealed with effect from 1 February 1975 and further to a decision taken by the FAO Council in November 1974 that all General Service category staff, whatever their nationality and wherever recruited, should be "local". Under the new rule, 302.40631, only those recognised at 31 January 1975 as non-local and in continuous service since then should be treated as such and receive the entitlements set out in Appendix A to the Staff Rules, which include non-resident's allowance, home leave, repatriation grant and travel expenses upon separation. The policy of engaging as local staff those who come from abroad has therefore been written into the rules, which plainly disqualify the complainant for non-local status since she did not join the staff until 1979. Nor is there any breach of the principle of equality of treatment in a difference in status between those recruited before and those recruited after 1 February 1975. The latter are not in the same legal position. Another new rule, 302.7111(i) provides that staff may get travel expenses on appointment either (a) if they are "internationally recruited" and "not residing within commuting distance of the duty station" or (b) "when, in the view of the Director, Personnel Division, such payment is required in order to recruit them". If they qualify under that rule, they are also entitled to installation allowance under Staff Rule 302.3091, travel expenses upon separation under Staff Rule 302.7111(vi) and repatriation grant under Staff Regulation 301.16. But the term "internationally recruited", as applied to the General Service category, refers solely to those with non-local status on 31 January 1975, and there is no basis for contending that Staff Rule 302.7111(i)(a) could apply to the complainant. The reply to her application stated that even if a candidate came from outside the commuting area the FAO granted only local status. No offer of appointment was sent to her home in London, and that reply merely stated the FAO's

recruitment policy. The induction form, which she signed, indicated Rome as her residence for administrative purposes. Her allegations of inequality are also unfounded. Her situation is different from that of staff members recognised as non-local on 31 January 1975 and of those recruited since then and granted travel and related expenses. As the Tribunal has held, while like circumstances call for like treatment, different ones justify different treatment.

D. In her rejoinder the complainant presses her claims and enlarges on her arguments. The policy approved by the FAO Council has never been properly introduced into the rules. She submits that there was no difference between her own position and that of others who were paid travel and related expenses. Certainly a Miss Hertz and a Miss Warren did not have to be paid those expenses in order to recruit them, as Staff Rule 302.7111(i)(b) requires, since they had paid their own way to Rome two years before their expenses were repaid. Moreover, that rule does not confer discretion on the Organization. The FAO's application of the rules was therefore arbitrary and unfair. Staff Rule 302.7111(i)(a) applies to her own case since in fact she was "internationally recruited", and she is therefore entitled to installation allowance and repatriation travel and grant as well as to travel expenses on appointment. The reply she received to her application was designed to entice her, like other candidates, to Rome. She never stated Rome as her residence for administrative purposes and indeed contested that statement in her induction form. The FAO had to request a non-Italian identity card for her from the Ministry of Foreign Affairs precisely because she was not resident in Italy and had no permit to live or work there. The rules do not state that all General Service category staff recruited after 31 January 1975 shall be treated as local staff, and there is in fact only one natural definition of a non-local staff member, that is, someone who is not resident in Rome at the time of recruitment.

E. In its surrejoinder the FAO again invites the Tribunal to dismiss the complaint as unfounded. The fundamental difference between the complainant's position and that of the other General Service category staff who were paid travel expenses is that she was not recruited from outside Rome. The benefits have been granted to staff recruited on recruiting missions abroad or for some special type of work or with particular language qualifications. Five General Service category staff members, including Miss Hertz and Miss Warren, who travelled to Rome after receiving an offer of appointment abroad were granted the benefits on an exceptional basis and on grounds of equity. The absence of any provision in the rules for granting non-local status to staff recruited after 31 January 1975 gives due effect to the FAO Council's decision to abolish non-local status. The term "internationally recruited" must be interpreted in the context of the rules to apply only to Professional and higher category staff and to General Service category staff recognised as non-local under Staff Rule 302.40631. Staff Rule

302.7111(i)(b) does confer discretion over payment of travel expenses on the Director of Personnel. Besides, the FAO is not saying that the payments to Miss Hertz and Miss Warren were required "in order to recruit them"; the letters granting their claims stated that an exception was being made to Staff Rule 302.7111(i)(b). Lastly the argument relating to the complainant's identity card is irrelevant: the possession of such a card has no bearing on her status or entitlements under her contract.

#### CONSIDERATIONS:

The claim for repayment of travel and transport expenses, installation allowance and repatriation grant

1. The complainant cites Staff Rule 302.7111(i)(a) in support of her claim. The Tribunal will therefore first consider her submissions in the light of that rule. But it will also take account proprio motu of Staff Rule 302.7111(i)(b) and comment on the question of its applicability.

(a) According to Staff Rule 302.7111(i)(a) the FAO shall pay the travel expenses incurred on initial appointment by "internationally recruited staff members who at the time of appointment were not residing within commuting distance of the duty station. Staff Rule 303.28 defines "commuting distance" as the distance within which a staff member can conveniently travel each day between the place of residence and the place of work. But the Tribunal need not consider whether at the time of her appointment the complainant was resident within commuting distance. The plea will fail if she was not "internationally recruited" within the meaning of Staff Rule 302.7111(i)(a).

She argues that the words should be given their normal and natural meaning: since she was resident outside Italy at the time of appointment she had to change residence from one country to another to take up her duties in Rome, and her recruitment was therefore "international".

The FAO submits that she was not "internationally recruited". Its argument runs: the words denote only Professional and higher category staff and General Service category staff with non-local status; under Staff Rule 302.40631 a General Service category staff member is non-local only if recognised as such on 31 January 1975 and in continuous service since; the complainant became a General Service category member after 31 January 1975 and has never held nonlocal status; and she was therefore not "internationally recruited".

If these words stood by themselves, the complainant's argument might well be preferred to the FAO's, but they must be interpreted in their context in the Staff Rules. There are two reasons why the FAO's view is preferable. First, it is based on Staff Rule 302.405, which states that all Professional and higher category staff are "internationally recruited, and on Appendix A to the Staff Rules, which describes as "internationally recruited" the non-local staff in the General Service category. Secondly, only the FAO's view will square with Staff Rule 302.40631, the effect of which is that, not having held non-local status on 31 January 1975, the complainant is a local staff member. It would be inconsistent to treat a staff member as both local and "internationally recruited". Staff Rule 302.7111(i)(a) therefore does not apply.

(b) Staff Rule 302.7111(i)(b) says that the FAO shall also pay the travel expenses of other staff when, in the view of the Director of Personnel, such payment is required in order to recruit them. The complainant's claims fail under this head as well.

She volunteered her services. By her own account she wrote two letters to that effect from London, one on 12 February and the other on 6 March 1979. On 11 April the FAO answered that she was unlikely to be appointed and that successful candidates from outside commuting distance of Rome would be given local status. She nevertheless went to Rome, took tests there and on 20 June 1979 was appointed at grade G.2.

Thus not only did the complainant offer her services, but she took the tests of her own accord, knowing full well that she would not get non-local status. Nor did she make repayment of any of her expenses a condition of her acceptance of appointment. Thus it cannot be said that the payment she is now claiming was required in order to recruit her, and Staff Rule 302.7111(i)(b) is also inapplicable.

The complainant argues that in so far as the application of the rule depends on the view taken by the Director of Personnel it is arbitrary. The point need not be settled, but in fact it is mistaken. The Director of Personnel does enjoy some discretion under the rule, but he cannot exercise it as he pleases: he has to consider in each case whether or not payment was required in order to recruit, and the exercise of his discretion is subject to review by an administrative as well as by a judicial body.

2. The complainant's second objection is that she was not given the same treatment as other staff members who received under Rule 302.7111(i)(b) the benefits she was refused. The FAO answers that the circumstances in which the others were appointed warranted applying the rule in their favour.

As the Tribunal finds below, although the complainant was treated differently, the facts of her case were different, and there was therefore no breach of the principle of equality.

(a) The FAO granted the benefits provided for in Staff Rule 302.7111 and other rules to staff members who had special skills such as a knowledge of Chinese or Arabic, or who - for example Mr. Goolamallee - were to do specialised work. There is keen demand for such staff, and they would probably not have gone to Rome had they not been led to expect the benefits they received. Moreover, Mr. Goolamallee was given a formal promise of repayment, and that made his claim even stronger. The staff whom the complainant regards as privileged were needed to provide special services, and since they were not in the same position there were grounds for different treatment.

(b) From 1977 the FAO sent missions abroad to recruit staff whom it could not find in Italy. Unlike the complainant, they were invited to join the staff and had not already volunteered their services. It was therefore only reasonable for them to expect the benefits the complainant was refused.

(c) Lastly, staff members such as Miss Warren and Miss Hertz received offers of employment from the FAO while they were resident abroad. They had a reasonable expectation of repayment of their travel expenses and of other benefits. They were therefore in a position which was similar to that of staff recruited by missions and which was therefore different from the complainant's. Miss Warren and Miss Hertz were granted the benefits, not on appointment, but only after claiming them. But the complainant is mistaken in inferring that it was wrong to grant them. The text of the correspondence submitted in evidence shows that there was delay over paying the benefits because of ambiguity in the offer of appointment.

The grant of non-local status

3. Should the Tribunal hold that the FAO's recruitment policy is contrary to the principle of equality, the complainant claims non-local status and related entitlements. Contrary to what she contends, the Director-General kept within the bounds of his authority in adopting the policy, which is, moreover, embodied in Staff Rule 302.40631. The rule says that a non-local staff member is a staff member in the General Service category who was recognised at 31 January 1975 as a non-local staff member under the Staff Rules then in force and has since remained in continuous service. A contrario, a General Service category staff member who does not fulfil the conditions in Staff Rule 302.40631 has local status.

It is mistaken to argue that the FAO's recruiting policy violates the principle of equality. Staff Rule 302.40631 does, by implication, prescribe local status for all General Service category staff appointed on or after 1 February 1975, and so puts them on a par. But it is to be read together with Staff Rules 302.7111(i) and (vi) and 302.3091 and Staff Regulation 301.16, which allow for the grant of special benefits to such staff when required in order to recruit them. Thus the Staff Rules make a distinction between groups of General Service category staff members. The desirability of the distinction may be open to question, but it is enough to defeat any allegation of inequality.

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 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.