

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

FORTY-EIGHTH ORDINARY SESSION

In re HOEFNAGELS

Judgment No. 506

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Miss Gerdy Hoefnagels and dated 16 April 1981, the FAO's reply of 16 July, the complainant's rejoinder of 31 August and the FAO's surrejoinder of 9 November 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.136, FAO Staff Rules 302.01, 302.4061, 302.40612, 302.40631 and 302.7111, FAO Staff Rules 302.40611 and 302.40621 as in force up to 31 January 1975, and FAO Manual section 316;

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. The complainant, a citizen of Australia, was employed by the FAO on short-term appointments as a clerk typist from 29 October to 29 November 1974 and as a G.3 stenographer from 2 to 31 December 1974 and from 15 January to 28 November 1975. With effect from 29 October 1975 she was granted a fixed-term appointment until 31 December 1976. On 1 January 1977 she obtained a "continuing" appointment. On 2 August 1979 she submitted an appeal to the Director-General claiming "non-local status" on the grounds that she had been recruited before the policy of giving all new General Service category staff local status had been put into effect, that there were no provisions in the rules for recruiting her as local, and that she had been the victim of discrimination, other staff members having been given non-local status retroactively. By a letter dated 24 September 1979 the Assistant Director-General for Administration and Finance rejected her appeal, and on 12 October she appealed to the Appeals Committee. In its report dated 1 September 1980 the Committee held that she had had legitimate expectation of non-local status and it recommended granting it to her from 29 October 1975, when she had obtained a fixed-term appointment for a period exceeding one year. By a letter of 19 January 1981 the Deputy Director-General informed her that the Director-General had refused to grant her non-local status. That is the decision she now impugns.

B. The complainant observes that in accordance with former Staff Rules 302.40611 and 302.40621, up to 31 January 1975 nationality was the sole criterion of the status of General Service category staff, all non-Italian staff being entitled to non-local status and the accompanying benefits, such as payment of travel and transport expenses on appointment, installation allowance and non-resident's allowance, and entitlement to home leave. The FAO Council decided in November 1974 that a new policy of making all General Service category staff local should take effect after 31 January 1975, but it applied the policy before that date, from the end of October 1974, after the Finance Committee of the Council had recommended introducing it. The complainant objects that others in a position similar to her own have obtained the benefits of non-local status. Mrs. Borradaile-Cicconi, recruited as a short-term official in September 1974, won her appeal to the Appeals Committee and had her status converted from local to non-local with effect from June 1975 when she obtained a fixed-term contract. Several others got non-local status at the same time. The same rules and policy should have been applied to the complainant, who was excluded because of a time limit artificially set at the end of October 1974. The decisions have been taken arbitrarily and in breach of the principle of equality of treatment. Other staff members - Miss Hertz, Miss Warren and Mr. Goolamallee - have been granted some of the international entitlements since 1 February 1975, as well as secretarial staff recruited from China and the Near East and by recruiting missions. The complainant accordingly invites the Tribunal to order the FAO to grant her nonlocal status with effect from 29 October 1975 - the anniversary date of her first short-term appointment, or 14 January 1976, when she completed 12 months' continuous service; together with the accompanying entitlements, viz. the reimbursement of the expenses of her

travel from the Netherlands on appointment and the cost of transporting her personal effects from Australia; installation allowance and non-resident's allowance; home leave, with retroactive effect; repatriation travel expenses and grant; and any other entitlements which may accrue.

C. In its reply the FAO observes that non-local status is not granted under the Staff Rules now in force. Until 31 January 1975 all non-Italian General Service category staff recruited under the Staff Rules, wherever recruited, had non-local status in accordance with former Staff Rules 302.40611 and 40621. These rules were repealed with effect from 1 February 1975 to carry out a decision taken by the FAO Council in November 1974. In accordance with the new rule, 302.40631, only those recognised at 31 January 1975 as non-local and in continuous service since then are treated as such and receive the entitlements. The complainant joined the FAO on a short-term appointment granted by the Director-General in exercise of his authority under Staff Regulation 301.136, and the terms of her appointment were governed by Manual section 316. Manual section 316.12 describes as "locally recruited" those "who, at the time of their appointment, were residing within commuting distance of the duty station", nationality being irrelevant. This afforded a legal basis for local recruitment of non-Italians before 1 February 1975. The FAO's former policy was to tell short-term officials on appointment that if they completed 12 months continuous service or were given a fixed-term or continuing appointment they would be classified as local or non-local in accordance with the Staff Rules in force. That was the policy which in November 1974 the Council decided to alter, and from the end of October 1974 after the Finance Committee had recommended the change short-term staff were no longer told on appointment that they might qualify for non-local status. By 29 October 1975, when the complainant obtained a fixed-term appointment and thus came under the Staff Rules, the rules prescribed non-local status only for those who held it on 31 January, which she had not. She had been given no expectation of non-local status, the practice of offering such prospects to short-term staff during their briefing on appointment having been discontinued - and quite reasonably so in view of the Council's decision. There was therefore no inequality of treatment: for reasons which the FAO explains in detail she was not in the same position as Mrs. Borradaile-Cicconi, Miss Martí, Mrs. El Kharboutly and others who have been granted non-local status. Whatever may have been said at the complainant's briefing, the FAO was under no duty to tell her that she would not be given non-local status; all she could expect was the treatment prescribed by the Staff Rules in force at the time, and that is what she got. Moreover, she is not in the same position as General Service category staff recruited since 1 February 1975, who in any case have never been granted non-local status. Her allegations of inequality of treatment are therefore unfounded. The FAO invites the Tribunal to dismiss her claims.

D. In her rejoinder the complainant contends that, under the practice prevailing at the time of her original appointment, she was entitled to expect non-local status if she completed 12 months' continuous service or was granted a fixed-term appointment of 12 months or more. The date on which the Finance Committee adopted its recommendation was 29 October 1974, which also happened to be the starting date of her first appointment. She cannot therefore have been told at her briefing that she ought not to expect conversion to nonlocal status. She expected to be treated in the same way as other General Service category staff recruited at the same time. Miss Martí, for example, was appointed on 4 November 1974, and the FAO argues that the process of recruiting her began well before that date. But that is no justification for drawing a distinction since the complainant herself actually joined the staff before Miss Martí and the Process of recruiting her began in mid-October. She repeats her contention that her own situation is so similar to that of many others as to warrant the same treatment and she accordingly presses her claims for relief.

E. In its surrejoinder the FAO observes that, although the complainant may conceivably have had expectations of nonlocal status at the time of her original briefing, they depended on her completion of 12 months' continuous service. She had not completed this period by the end of either her first or her second short-term contract, and so her claim could be based only on her 12 months' continuous service from 15 January 1975 to 14 January 1976. By the time of her reappointment in January 1975, however, there was no doubt that the briefing policy had changed, staff being no longer told that they might qualify for non-local status some day. The complainant could not therefore have had any reasonable expectation of non-local status at the time, and indeed she does not allege that any hopes were held out to her on reappointment. The FAO gives further explanations of the reasons why the cases of other staff who did get non-local status were different from the complainant's, and it refers again in particular to Mrs. Borradaile-Cicconi, Miss Martí and Mrs. El Kharboutly. As to the last, it points out that, although her period of service was not continuous, she was unnecessarily removed from the staff for a period equal to that of her accrued leave, whereas the complainant had no annual leave accruing from her first two short-term appointments to bridge the gap between 1 and 14 January 1975. The FAO again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

The issues

1. The impugned decision is based on Staff Rule 302.40631. Under this rule 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. The Tribunal will comment on the origin and the application of this rule.

The origin of Staff Rule 302.40631

2. Former Staff Rules 302.40611 and 302.40621 determined local and non-local staff members by the criterion of nationality. Non-local staff members had various entitlements which local staff members did not.

Staff members who joined the General Service category under short-term contracts, i.e. those appointed for less than 12 months, were not subject to former Rules 302.40611 and 302.40621. Under Staff Regulation 301.136 their conditions of employment were determined by the Director-General. Moreover, Staff Rule 302.01 provided that the Staff Rules should apply to them only to the extent indicated in the FAO Manual or their terms of appointment.

The practice was, however, to give short-term staff the possibility of fuller access to the benefits of the Staff Rules. Those who inquired were told at their briefing that they would come under the Staff Rules if they completed 12 months' continuous satisfactory service through extensions of their short-term appointment or were granted a fixed-term or continuing appointment. If one of the conditions was fulfilled, they would be classified as local or non-local in accordance with the Staff Rules applicable to other staff.

3. At its 63rd Session, in July 1974, the FAO Council asked its Finance Committee to consider amending the Staff Rules to provide that anyone recruited in Italy for the General Service category at headquarters should be a local staff member, regardless of nationality.

The Finance Committee met from 7 to 21 October 1974. After considering several expedients which it did not find wholly satisfactory it recommended regarding all General Service category staff as local, whatever their nationality or the place of their recruitment, but preserving the entitlements of those who already held non-local status.

At its 64th Session, in November 1974, the Council endorsed the Finance Committee's recommendation and decided:

(a) that the new policy would be to regard as local all General Service category staff -recruited after 31 January 1975, whatever their nationality or the place of their recruitment;

(b) that the Finance Committee would look into the consequences of that policy at its 34th Session; and

(c) that those with non-local status on 31 January 1975 would preserve their entitlements as long as they remained in continuous service.

4. Staff Rules 302.40611 and 302.40621 were accordingly repealed with effect from 1 February 1975. The new rule, 302.40631, which appears in 1 above, set the conditions under which General Service category staff might in future claim nonlocal status.

The practice of informing short-term staff that they might in time qualify for non-local status did not fit the new rules. Indeed it had been discontinued after the Finance Committee made its recommendation, at some date which the Tribunal discusses in 5 and 6 below.

The application of Staff Rule 302.40631

5. Staff Rule 302.40631 came into force, and to begin with the FAO applied it literally. Thus it regarded as nonlocal only the General Service category staff who had held non-local status on 31 January 1975 and had since remained in continuous service. All the others were local.

But after the Appeals Committee reported on the case of Mrs. Borradaile-Cicconi there was a more flexible approach. Those appointed before the Finance Committee made its recommendation, who before had been

informed of the possibility of qualifying for non-local status, or might have been, were still able to obtain such status despite the wording of the rule. There was strict application only to those appointed after the recommendation. The distinction between those appointed before and those appointed after rested on the fact that the former, unlike the latter, had or might have had the expectation of qualifying for non-local status some day.

The date of the recommendation is therefore critical in applying the rule. It is not clear on the written evidence. Paragraph 15 of the FAO's reply says that the session at which the Committee made the recommendation was held from 7 to 21 October 1974. In a letter of 29 November 1978 Mr. Skoufis, the Assistant Director-General, declares that recommendation to have been made by 29 October 1974, and paragraph 43 of the FAO's reply gives the same date. Paragraph 18 of its reply to Mrs. Clegg-Bernardi's complaint, however, says that the practice was discontinued after the end of October 1974, or at least two days after the 29th of that month. The date is therefore moot, and the Tribunal will come back to it later.

6. The FAO refused the complainant non-local status, and she alleges unequal treatment on the grounds that others did obtain it. For the plea to succeed the complainant should have been in the same factual position as those she believes to have fared better. The FAO submits that she was not, but neither of its arguments succeeds.

It submits that, unlike those who got non-local status, the complainant was appointed after the Finance Committee's recommendation, on 29 October 1974. Its case is that the decisive date is that of the recommendation. As the Tribunal said in 5, however, there is doubt about the date. Was the recommendation passed during the session from 7 to 21 October 1974; or on 29 October; or on one of the last two days of the month? The Tribunal cannot decide for certain on the evidence filed in this case or in Mrs. Clegg-Bernardi's. It will give the complainant the benefit of the doubt and assume that all those appointed up to the end of October 1974 continued to have the possibility of qualifying for non-local status. The assumption is a valid one because only the FAO could have dispelled doubt over the date and it may therefore be held to blame. The complainant was appointed on 29 October 1974, and it was contrary to the principle of equality not to put her on a par with all those who preserved the possibility of qualifying for non-local status. Whether or not she was actually informed of the possibility is immaterial. The point was never raised by the FAO in the case of the others and it should therefore be given no importance in the complainant's.

The FAO's other argument is that unlike those who were granted non-local status the complainant had not been in continuous service since appointment, not being a staff member during periods before Staff Rule 302.40631 came into force, namely on 30 November and 1 December 1974 and from 1 to 14 January 1975. In fact her position should be treated as similar to that of another staff member who did obtain nonlocal status. Mrs. El Kharboutly was appointed on 1 April 1974, but was not on the staff from 21 December 1974 to 12 January 1975. The FAO contends that, unlike the complainant, she was unnecessarily removed from the staff for a period equal to that of her accrued leave. But even if the facts of the two cases were shown to differ, the difference would not warrant any distinction in law. The material point is that Mrs. El Kharboutly, like the complainant, was not on the staff during a period which fell between the date of the Finance Committee's recommendation and the date on which Staff Rule 302.40631 came into force. The principle of equality therefore requires that they should both have the same status.

7. Since the plea of breach of equality succeeds, the Tribunal need not consider the other pleas.

The Tribunal's decision

8. It appears from the foregoing that the complainant is entitled to be put on a par with those who had the chance to qualify for non-local status, either after 12 months' short-term appointments or on obtaining a fixed-term or continuing appointment. The complainant qualified on 29 October 1975, when she was given a fixed-term appointment. She is therefore entitled to the benefits of non-local status from that date.

The case is an important one, and the Tribunal awards the complainant costs even though she has not expressly claimed them.

DECISION:

For the above reasons,

1. The complainant shall have non-local status from 29 October 1975.

2. The FAO shall grant her the benefits of non-local status from 29 October 1975.

3. The FAO shall pay her US\$2,000 as costs.

4. Her other claims are 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