

SIXTY-SECOND ORDINARY SESSION

In re LAVENDER

Judgment 817

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Patrick Lavender against the Food and Agriculture Organization of the United Nations (FAO) on 28 June 1986 and corrected on 28 July, the FAO's reply of 29 October as supplemented on 20 November 1986, the complainant's rejoinder of 12 January 1987, the further material filed by the FAO on 13 January and the complainant's letter of 27 January informing the Registrar of the Tribunal that he did not wish to comment on that material, and the FAO's surrejoinder of 10 March 1987;

Considering the FAO's preliminary objection of 29 October 1986 to the admissibility of transcripts of tape-recordings appended to the complaint, the complainant's observations of 12 January 1987 on that objection and the FAO's further observations of 12 February 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.103 and FAO Manual paragraphs 304, 317.62 and 331.311;

Having examined the written evidence and disallowed the complainant's application for oral proceedings, as confirmed in submissions of 15 January 1987, on which the FAO commented on 5 February 1987;

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

A. The complainant, an Australian born in 1945, joined the FAO on 1 February 1982 under a one-year appointment at grade P.4. He went out to Panama as a legal adviser to countries in the Caribbean and Central America under the Inter-regional Fisheries Law Advisory Programme. He had his appointment extended to 31 December 1983 and from August 1983 was stationed in Barbados. He got a further extension to 31 December 1984. It was the Fisheries Department of the Organization that was in charge of the programme and offered the appointments but the Legislation Branch of the Legal Office that gave technical support, and the complainant's supervisor was Mr. Moore, who headed the fisheries section of that Branch. By a telex of 16 October 1984 the Department informed him that for lack of money no extension was possible but offered him a few months' contract as a consultant from the beginning of 1985 to prepare for a "workshop" scheduled for mid-February. In fact the Department offered instead a three-month extension but he rejected it. By a telex of 22 November Rome offered him a three-month consultancy and by a telegram of 29 November he accepted. Back came a telex from Rome dated 30 November offering him a seven-month extension after all. In a telex of 4 December and a letter of 6 December he said he would take it if he were promised extensions to February 1987. A few days later he got telexes calling him back to Rome for "debriefing". There he met, on 19 December, the head of Fisheries Operations, Mr. Kojima, who said he could not offer more than the seven months. The complainant preferred consultancy and Mr. Kojima replied that a decision would come soon. As it turned out the FAO held over the workshop and the consultancy fell through. From Barbados the complainant wrote to Mr. Kojima on 21 January objecting to the "shoddy" treatment of him.

There had been word in December 1984 of a consultancy contract for the reform of fishery legislation in Guyana, but in the end it went to someone else. Talk of a consultancy in Papua New Guinea also came to nothing.

On 26 March 1985 he wrote a letter of appeal to the Director-General under Manual paragraph 331.311. The Assistant Director-General in charge of Administration and Finance wrote on 24 May rejecting it and on 7 June 1985 he went to the Appeals Committee. In its report of 3 March 1986 the Committee found that no contract had been concluded between the complainant and the FAO but he had been given to expect an extension for at least the first three months of 1985 and it recommended compensation on that account. It recommended rejecting his claims to compensation for injury to professional reputation and prospects, though it felt that headquarters had handled the matter poorly. By a letter of 28 May 1986 the Deputy Director-General offered him 9,900 United States dollars as compensation for loss of a three-month consultancy contract, \$1,055 against his expenses, and interest, making a total of \$11,638. That is the decision impugned.

B. The complainant points to differences between his own recollection or interpretation of the facts, which he

recounts in full, and the Administration's. He files transcripts of tape recordings he made of many telephone conversations with FAO officers and seeks the disclosure of several papers. He cites a report by Mr. Moore on his work in the year ending January 1984, which praised his "high level of technical knowledge and skill, great resourcefulness, initiative and drive" and output, though strictures added by the Assistant Director-General in charge of the Department, Mr. Carroz, show that the Department and the Legislation Branch were at odds over policy.

(1) When he left Rome in December 1984 he had a contract with the FAO to do consultancy work in the West Indies from 7 January to 6 April 1985. He alleges, among other things, an agreement concluded between him and Mr. Moore on the telephone on 12 October 1984 and cites the Department's telexes of 16 October and 22 November, his own of 29 November and the FAO's of 30 November proposing a seven-month extension "instead". Statements several FAO officers made to him in the last quarter of 1984 and his own behaviour bear out the existence of the contract, which was specific: he was to get \$234 a day and be stationed in Barbados and the duties were agreed on. Manual paragraph 317.62 says that "The Organization may terminate consultant appointments by giving written notice", the period being two weeks for contracts of two months or more. He never got written or due notice. He details his losses and reckons them at \$23,851. He adds interest at 15 per cent a year from 1 April 1985 to 1 July 1986 to give a total of \$28,920.

(2) The complainant alleges damage to his professional standing. In calling off the workshop the FAO suggested to the countries that were to come that he was to blame and had no professional conscience. Some even suspected he had been dismissed. He was blacklisted, as the loss of the consultancy in Papua New Guinea shows. Over the years he had gained an international reputation and high-earning capacity in the area of fisheries. Those who used to esteem him now shun him, and he has found no employment in his preferred subject.

(3) Towards the end of December 1984 Mr. Carroz and other FAO officers decided to shut him out of the Department. That was an abuse of authority. It was also a hidden disciplinary sanction, and the procedure prescribed in Regulation 301.103 was ignored in that he was neither told of the charges against him nor given his say. Reckless of the harm it was doing him, the FAO's action was harsh, intimidatory and in breach of proper standards of conduct in the international civil service and general principles that are binding on the Organization.

(4) The Government of Guyana applied for his services. The way in which the FAO turned down the request was such as to cast a slur on his professional capacity and impute to him misconduct in its employ. That, too, was an abuse of authority and a breach of the standards and principles mentioned in (3) above.

For loss of income and reputation he claims \$150,000, with interest, as from 28 May 1986. For loss of career prospects he claims \$112,000, or two years' pensionable remuneration. He claims such other redress as the Tribunal deems fit and his costs.

C. The FAO objects to the admissibility of the transcripts of tape recordings. The complainant obtained them insidiously and acted in breach of his duty of loyalty towards friends and colleagues, and they cannot be checked anyway. The FAO does not refer to them or answer any passages he quotes therefrom.

It discloses papers he asks for.

It gives its own version of the facts and contends that his is distorted or irrelevant in many ways.

In its submission the conditions for the conclusion of a contract were not met: there was no unqualified offer, no agreement on the essential terms and no unqualified acceptance. The alternatives were a three-month assignment and a seven-month extension, and neither formed the subject of an express contract. Nor was there an implied one, since the complainant knew he could not rely on anything said to him in informal talks about his prospects. There was no oral offer of appointment from Mr. Moore and therefore no oral agreement. The FAO's telexes of 16 October and 22 November 1984 merely said it would be "prepared" to offer him a consultancy, the later one also that there was "no commitment at this stage". He repeatedly alleges offers that were never made. He would not take no for an answer, himself caused confusion and constantly sought to draw FAO officers into making what he could pass off as commitments.

It is mistaken to say he fell victim to differences of opinion over policy in the Department. His business was legislation, not policy at large, and in fact he failed in his duty under Manual section 304, which reproduces the

approved Standards of Conduct in the International Civil Service, to carry out his supervisors' decisions whether or not he agreed with them. Mr. Moore told him more than once to keep to matters of law.

The FAO may employ him or not: that it did not does not mean he is on any "blacklist". It has neither barred him from employment in future nor sought to deter anyone else from taking him on. He made his own position worse by writing about it to all and sundry. The only reason why he did not get the consultancy in Papua New Guinea was that the Government did not clear his candidacy. The choice of someone else for Guyana was unobjectionable.

The FAO compares the Director-General's offer of compensation with the complainant's demands, pointing out that the offer includes the main amount he wants - \$9,900 in consultancy fees - and explaining why his incidental claims are unwarranted.

He has failed to show that the impugned decision was in breach of any term of his appointment, of the rules or of any general principle of law. Moreover, what he challenges under B(3) and (4) above is not a decision at all, and in any event his allegations are groundless. Staff Regulation 301.103 applies only to staff who are terminated, demoted or suspended, whereas his appointment simply expired.

His claims to damages for loss of income, reputation and career prospects are unsound. He never had any promise of continued employment at the FAO, what he holds out as legal expectations were mere hopes, and he fails to show that any loss of reputation he may have suffered was due to FAO action intended to harm him.

D. In his observations on the FAO's objections to the admissibility of the transcripts of the tape recordings the complainant denies that he took unfair advantage and observes that he was no longer a colleague, let alone a friend of any of those whose voices he recorded. He explains why he believes that none of the FAO's arguments is cogent and observes that the evidence is essential to the allegations in his complaint.

In his rejoinder he discusses in detail what he sees as the material facts, which he accuses the FAO of failing to address. He enlarges on his pleas and seeks to refute the Organization's reply which, in his submission, fails to explain why and when his three-month consultancy was dropped or why someone else was brought from Australia to Guyana when he was available in Barbados, or to answer satisfactorily his charge of blacklisting. He answers what he takes to be criticisms of his professional conduct, which he says are new to him. He alleges that in January 1986 he was offered some 18 months' contract in consideration of waiver of his internal appeal.

E. The FAO enlarges on its objections to admitting the transcripts as evidence.

In its surrejoinder it develops the main pleas in its reply. There was, in its submission, no express or implied contract with the complainant, though much confusion may have arisen out of the exchange of many communications between him and FAO officers and it recognises it was partly to blame. It explains that it is not accusing him of professional misconduct, but simply of failing to carry out his duties in strict conformity with FAO policy, something he was told about several times. His claims to indirect damages rest on speculation and are not substantiated by any facts adduced in his rejoinder. The FAO comments on several new points raised in the rejoinder. It reaffirms that the choice of consultants is at its own discretion. It says that he mentions the offer made to him in January 1986 out of context and presents it in a false light and without regard to the circumstances in which it was made. It formed part of a proposal for settlement which the FAO submits was wholly honourable. The FAO abides by its offer of 28 May 1986, which it submits is fair and adequate compensation.

CONSIDERATIONS:

Preliminary matters

The complainant's applications for oral proceedings and for the disclosure of items of evidence

1. The Tribunal disallows the complainant's application for oral proceedings and the hearing of witnesses because no purpose would be served thereby: the detailed submissions and the many items of evidence, which include several disclosed by the Organization on the complainant's own application, are quite adequate to enable the Tribunal to rule on all the material issues.

Transcripts of tape recordings

2. A more difficult preliminary question is whether to admit as evidence transcripts of tape recordings which the complainant made of telephone conversations with FAO officers.

The FAO objects to admitting the transcripts on the grounds that the taping was done without the knowledge of those he was talking to and was thus in breach of a duty of loyalty towards his friends and colleagues. Besides, says the Organization, there is no means of checking them.

The complainant denies that he took any unfair advantage and observes that he was no longer a colleague or friend of any of those whose voices he recorded.

The Tribunal has examined the transcripts and finds that they do not add anything material to the rest of the evidence before it on his allegations. There is therefore in point of fact no need to rule on their admissibility in the particular circumstances of the case.

The complainant's claims

There are four heads of claim.

3. Claim (1) is that in December 1984, when the complainant left Rome, he had a three-month contract with the FAO to do consultancy work in Barbados from 7 January to 6 April 1985, but that on or about 27 December 1984 the Organization decided to cancel the contract.

His argument is that from representations made to him by the FAO between September and December 1984 he had every reason to understand that the Organization would send him back to Barbados. As it failed to inform him before 7 January 1985 of the decision to cancel the consultancy he sustained financial loss for which he claims damages.

4. Claim (2) is to damages for injury to the complainant's professional standing. In calling off a workshop that had been planned in Barbados the FAO suggested to the countries that were to take part that he was to blame and was lacking in professional conscience. Some even suspected that he had been dismissed. He was blacklisted, as the loss of another consultancy in Papua New Guinea showed.

5. Claim (3) is that towards the end of December 1984 Mr. Carroz, the Assistant Director-General in charge of the Fisheries Department, and other FAO officers decided to keep him out of the Department. That was an abuse of authority and a hidden disciplinary sanction; the procedure prescribed in Regulation 301.103 was ignored in that he was neither told of the charges against him nor given the right to reply; and the Organization's action was in breach of proper standards of conduct in the international civil service and general principles that are binding on it.

6. Claim (4) is that the way in which the FAO turned down a request for his services from the Government of Guyana cast a slur on his professional capacity and implied that he had committed some sort of misconduct while in its service. That too amounted to an abuse of authority and a breach of the standards and principles mentioned under the third head.

Claim (1)

7. The complainant was granted an appointment by the Organization for a fixed term, from 1 February 1982 to 31 January 1983, as a regional adviser on the law of fisheries. He had it extended to 31 December 1983 and then to 31 December 1984.

The appointments were made by the Fisheries Department, not by the Legislation Branch of the Legal Office, and financed from funds that the Norwegian Government made available each year to the Fisheries Department under a trust-fund agreement. Thus two factors the Fisheries Department had to bear in mind in determining whether to offer or extend appointments were whether there would be enough money forthcoming in the year ahead and what the priorities of the advisory programme should be.

The complainant's supervisor, Mr. Moore, who was in charge of the fisheries section of the Legislation Branch, informed him in September 1984 that the intention was to extend his appointment, but on 12 October that, funds for the programme having been reduced, there could after all be no extension beyond 31 December 1984. That was confirmed by the Department in a telex of 16 October which said that the Organization was "prepared to offer" two

or three months' consultancy from 1 January 1985.

On 22 November 1984 the Department sent the complainant a telex saying it was "prepared to offer" him three months' consultancy and setting out the rate of pay. The telex indicated that there was "no commitment at this stage" but asked him to cable his acceptance or refusal by 1 December.

Yet in a further telex, of 30 November 1984, the Department informed him that what it was now "prepared to offer" - the phrase appeared once again - was a seven-month extension of his contract "instead of three-month consultancy".

By a telex of 4 December and a letter of 6 December to Mr. Kojima, the head of Fisheries Operations, the complainant stated that he would accept the seven-month extension if the Organization guaranteed further extensions until February 1987.

By a telex despatched on 7 December, or 24 days before his appointment was to expire, Mr. Kojima informed the complainant that an airline ticket had been made out for his repatriation, and another telex from Mr. Kojima on 11 December told him of the "closing down" of his post in Barbados and instructed him to report to Rome for debriefing from 18 to 21 December.

In a telephone conversation with Mr. Moore following these cables the complainant sought assurances that the consultancy would go ahead. He was told that the telex of 11 December was a mere formality and that he would be going back to Barbados either under an extension of appointment or else on a consultancy.

With the FAO's consent he had his airline ticket rerouted to allow him to go to London after the debriefing in Rome.

At a meeting in Rome on 19 December Mr. Kojima told him that a seven-month extension was possible; he said that he would rather have the consultancy; and the upshot was that a decision was to be made on 27 December.

On 7 January 1985, while the complainant was in London, he got word from Mr. Moore in Rome that the workshop he was to have helped to organise in the Caribbean in February had been postponed and that consequently neither consultancy nor extension could be offered him. That was confirmed by the Fisheries Department in a later telephone conversation.

After making his own arrangements in London to reroute his ticket, the complainant flew back to Barbados on 16 January.

8. No contract of employment will come into being unless there are an unqualified offer by the employer, agreement between the parties on the essential terms, and unqualified acceptance by the employee.

9. In the light of the facts as set out above the Tribunal finds that there was no unqualified offer by the FAO; that there was no agreement on the essential terms; and that, even if there had been such offer and such agreement, there was still no unqualified acceptance by the complainant. Even supposing the FAO did make him a firm offer in its many communications with him he did not accept it; instead he asked the FAO for better terms, which it refused.

The conclusion is that no contract for consultancy in Barbados after 31 December 1984 was ever concluded, and so there cannot have been cancellation of any such contract.

Nor was there any implied contract since the complainant knew that he could not rely on anything said to him in the informal talks he held with FAO officers about his prospects. In particular, there was no oral offer of appointment from Mr. Moore and therefore no oral agreement, while the FAO's telexes of 16 October and 22 November 1984 merely said that it was "prepared" to make him offers, the later one actually adding that there was "no commitment at this stage".

Contrary to the complainant's contention, Manual paragraph 317.62 is immaterial because it applies only to the termination of consultancy appointments. What he held was not a consultancy appointment but a fixed-term one which simply expired on 31 December 1984.

10. The first claim is therefore dismissed.

Claims (2), (3) and (4)

11. The Tribunal will take the remaining three claims together because some of the allegations on which they are founded relate to all three.

12. In December 1984 the complainant heard of the possibility of a consultancy in 1985 for the reform of the law on fisheries in Guyana. The FAO's Representative in Guyana, Mr. Owusu, telephoned him on 18 January 1985 to ask whether he would be available, the workshop having been postponed, and he answered that he would. But in March 1985 he learned that the consultancy had gone to someone else.

The complainant submits that the Fisheries Department gave the Government of Guyana to understand that he was not the right man to do the work and that the Organization would be loth to take him on as a consultant for the purpose.

In fact the request from the Government of Guyana was not for the services of the complainant but for assistance from the Organization. Besides, by January 1985 it looked as if he might be getting a consultancy in Papua New Guinea, it was therefore not certain that he would be free for Guyana, and Mr. Owusu felt it prudent to look elsewhere. As things turned out, the consultancy in Guyana went to Mr. Edeson, the complainant's predecessor in the post of adviser on the law of fisheries in the Caribbean and a well-known and respected expert in the subject.

13. The Tribunal has no reason to suppose that there was anything improper about the decision not to give the complainant the consultancy in Guyana. The Organization was free to decide at its discretion who was best suited for the consultancy, and even then the Government had the right to make the final choice.

14. As a matter of fact the exercise of that right put paid to his prospects of another consultancy in Papua New Guinea.

The proposal was that he help in the reform of forestry legislation in that country and after consulting him the FAO duly put his name to the Government. He was well suited for the job since he had done several years' legal work in the country and was familiar with central and provincial government structure and the system of land tenure. The FAO proposed his name in good faith and would have appointed him, and it cannot be held liable for the Government's failure to consent to his appointment.

Blacklisting

15. The complainant alleges that there is blacklisting in the FAO and that he fell victim to the practice.

The Organization firmly denies the charge: it neither practises nor condones blacklisting.

16. "Blacklisting" commonly denotes that the employer not only bars someone from its own employ but seeks to prevent him from obtaining employment elsewhere.

The Tribunal does not find any evidence whatever to support the complainant's charge of blacklisting in that sense. The evidence suggests rather that he himself gave a great deal of publicity to his own situation in communications with government officials which drew undue attention to it. Indeed it is his own behaviour that may have made potential employers he approached reluctant to take him on. In letters to various governments and organisations he made much of his separation from the FAO, whereas the Organization, for its part, remained discreet and did not publicise his departure.

The FAO may employ him or not, and the Tribunal will not infer from the fact that it did not that he is on any blacklist. There are no grounds for supposing either that it has decided to bar him from employment in future or that it is anxious to deter anyone else from employing him.

17. Nor does the Tribunal accept his allegation that he fell foul of differences of opinion over policy in the Department. His business as adviser to the countries in the region was legislation, not policy at large, as Mr. Moore had occasion to say in a letter he wrote to the complainant on 31 August 1982: he was to "concentrate on the more strictly legal aspects of fisheries and in particular on assistance to individual countries in the revision of national

legislation ...".

18. Lastly, the complainant pleads breach of Regulation 301.103 on the grounds that he suffered a disciplinary sanction and the disciplinary procedure prescribed in that regulation was not observed.

But the plea is mistaken because he was not disciplined: his fixed-term appointment simply expired on 31 December 1984 and was not renewed. There was therefore plainly no need for the Organization to bring charges against him.

19. The Tribunal concludes that there was no breach of any term of the complainant's appointment or of any provision of the rules applicable to him.

The Organization's offer to the complainant

20. While holding that no formal contract had been concluded between the parties beyond 31 December 1984, the FAO Appeals Committee found that the communications between them prior to that date had led the complainant to expect his contractual status with the FAO to continue for at least three months after 31 December 1984 and he had therefore not sought alternative employment nor sorted out his personal affairs in Barbados before his departure. The Committee accordingly felt that he should be compensated for the financial loss he had sustained.

As stated in his letter of 28 May 1986 the Director-

General accordingly decided, on the grounds that the complainant might have been "led inadvertently to believe" he would get an appointment, to offer him compensation in the amount of 11,638 dollars.

21. The offer stands, and it is up to the complainant to decide whether or not to accept it.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

André Grisel
Jacques Ducoux
Mohamed Suffian
A.B. Gardner