

SIXTY-THIRD SESSION

In re FIRESTONE

Judgment 858

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Walter Firestone against the Food and Agriculture Organization of the United Nations (FAO) on 20 October 1986 and corrected on 24 November 1986, the FAO's reply of 29 January 1987, the complainant's rejoinder of 24 April and the FAO's surrejoinder of 19 June 1987;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulations 301.111 and 301.112, FAO Staff Rules 302.6214, 302.622 and 303.13 and FAO Manual provisions 331.51, 342.213(i), 342.524, 342.531, 342.543 and 342.7;

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

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

A. The complainant, a citizen of the United States who was born in 1924, is an agronomist. In 1979 he took up a one-year appointment with the FAO in Rome as a grade P.5 agricultural officer. His contract was extended to 4 August 1982. On 17 February 1981, while on mission in Botswana, he fell on the staircase of an office building and suffered arm, shoulder and hand injuries, which he reported to the FAO on his return to Rome, on 2 March. He suffered further injury to his right hand in a second fall while on leave in the United States on 11 May 1981. He claimed medical expenses and compensation for injury and loss of earning capacity caused by the fall in Botswana. In a memorandum of 22 February 1982 the secretary of the Advisory Committee on Compensation Claims reported "loss of sensory function of the hand" and of "strength in the arm and movement of the shoulder" and recommended treating his injuries as service-incurred under Manual provision 342.213(i), awarding him 22,352 United States dollars under Manual provision 342.543 for 22 per cent permanent loss of function, and meeting reasonable medical expenses. The Deputy Director-General approved the recommendations on 25 February and the complainant was accordingly paid the \$22,352.

He was put on sick leave on 8 July 1982 and underwent medical treatment and surgery in Italy and the United States. Because his sick leave was extended so was his appointment, and both eventually ended on 30 April 1983.

On 10 May 1983 he wrote to the Director-General to say that since his fingers had lost the feeling he needed to test soil he could no longer do the field work his livelihood depended on. He had neither recovered from his injuries nor used up his entitlement to sick leave under Staff Rule 302.6214, and he objected to the ending of his appointment. He applied for referral to a medical board under Staff Rule 302.622. The board met and in its report of 16 November 1983 found "mild abnormality of sensation in the median nerve territory in his right hand" which would "undoubtedly affect his ability" to test soil, but he had been fit for work by 30 April 1983. The Administration and Finance Department confirmed the ending of his appointment on that date by a letter of 9 March 1984. On 25 July 1984 he wrote to the Director-General objecting to the board's findings, asking for a new board and saying he wanted to file an appeal. In a letter of 27 September the Director of Personnel said that his letter of 25 July might be treated as an appeal to the Appeals Committee. In a letter of 4 December to the Director he said his earlier one was inadequate as an appeal but he would "comply".

On 18 March 1986 the complainant's lawyer wrote to the secretary of the Advisory Committee on Compensation Claims claiming compensation for permanent impairment of earning capacity and help with vocational rehabilitation. By a letter of 21 July 1986, which was notified on 10 August and is the impugned decision, the secretary answered that the Committee had recommended rejecting his claims and the Director-General had done so.

B. The complainant narrates the facts of his case. He contends that it was unlawful to end his appointment before he had used up his sick leave entitlements. The medical board's examination of him and his records was utterly inadequate and its findings were unfounded. He had great difficulty in finding out from the FAO how to appeal. He gives an account of recent medical evaluation of his injuries. He objects to the conclusions of the Advisory

Committee on Compensation Claims, whose members he regards as incompetent to assess his condition, and whose full report he has not even seen. He maintains that because of his injuries he cannot get or hold down the sort of work he was trained for and his recent earnings have been low. He asks the Tribunal to quash the decision to terminate his appointment on 30 April 1983 and the decision of 21 July 1986. He seeks compensation under Manual provision 342.524 for permanent impairment of earning capacity, an annuity as from 30 April 1983 under Manual provision 342.531, help in paying for vocational rehabilitation in accordance with Manual provision 342.543, and costs.

C. The FAO retorts that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress.

(1) As to his appeal against separation, on 27 September 1984 the Director of Personnel told him that his letter of 25 July to the Director-General might be treated as an appeal to the FAO Appeals Committee, but he withdrew it in a letter of 4 December 1984 to the Director, which said that the letter of 25 July did not contain "sufficient data". There is therefore no final decision by the Director-General within the meaning of Manual provision 331.51.

(2) The claim to compensation and rehabilitation is also irreceivable because of failure to follow the internal appeal procedure. The letter of 21 July 1986 to the complainant's lawyer informed him of the appeals procedures in Manual provision 342.7, but again he failed to act, and there is no final decision.

As to the merits, the FAO contends that the separation on 30 April 1983 was not in breach of any rule or usage. His criticisms of the medical board are mistaken. He fails to show that the injury to his hand is wholly due to the service-incurred accident or has much impaired his earning capacity. His narrative is tendentious. Having paid him salary, after expiry of his contract, from 5 August 1982 to 30 April 1983 and \$22,352 in compensation, the FAO believes it owes him no further legal or moral duty.

D. In his rejoinder the complainant points out what he sees as many mistakes of fact in the FAO's account.

(1) As to his termination, he submits that the FAO constantly thwarted him in lodging an appeal and that time was lost largely because they were so slow to answer his inquiries. Living in California, he had no-one to help him in construing the rules and drafting an appeal. He did not withdraw the appeal in his letter of 25 July 1984: he simply asked that it be held in abeyance so that he could draw up a proper appeal. He actually wrote on 4 December 1984 to the Director of Personnel and to the Secretary of the Appeals Committee to explain why his appeal had been held up, and his explanation was accepted. He wrote to the Director on 4 March 1984 reaffirming his wish to appeal once he had essential information which he asked for but was never given. It is unfair to say he failed to follow the internal procedure when his constant requests for help were ignored.

(2) As to his other claim, he submits it was not made clear to him that appeal to the Appeals Committee was compulsory if he was to go to the Tribunal. Besides, he had no reason to suppose that the FAO would ever change its mind.

As to the merits, he enlarges on his contentions that termination was contrary to Staff Rule 302.6214, that the permanent injuries to his hand were due to the service-incurred accident and have reduced his earning capacity and that he is entitled to an annuity in compensation.

He asks the Tribunal not to admit as evidence a letter written on 16 November 1983 by one member of the medical board to another.

E. In its surrejoinder the FAO submits that the complainant has failed to rebut its reply; that his letters show no intention to start internal appeal proceedings or to keep them in abeyance; that he may not abandon the internal procedure just because he thinks it pointless; and that he and his lawyer got clear information on how to pursue his claims.

As for the merits, his account of his separation is inaccurate and his interpretation of events tendentious. He got all he was entitled to under the terms of his employment.

The FAO submits that the letter of 16 November 1983 is relevant: it states the impartial view of a member of the medical board.

CONSIDERATIONS:

1. The complainant was employed by the Organization on 5 August 1979 on a one-year contract which was extended for a further two years and was therefore due to expire on 4 August 1982.
2. He fell on 17 February 1981 while on mission in Botswana and injured his right shoulder, arm and hand.
3. On 11 May 1981 he fell a second time while on leave and broke a bone in his hand. He was in plaster for several weeks.
4. The injury he suffered in Botswana was recognised on 22 February 1982 as service-incurred and he was subsequently paid 22,352 United States dollars for permanent impairment of his shoulder, in addition to various medical expenses.
5. On 8 July 1982 he began a period of sick leave for medical and surgical treatment related to his injuries. He was therefore not separated on 4 August 1982. After several extensions of sick leave the chief of the medical service considered that his sick leave should not be approved beyond 30 April 1983 and he was separated on that date.
6. The complainant requested that a medical board be convened under Staff Rule 302.622 to consider his case.
7. The medical board, which had met on 11 November 1983, held in its report of 16 November 1983, that the complainant had been fit to resume work by 30 April 1983.
8. The Director-General's decision that he be separated on that date was confirmed and he was so informed by a letter dated 9 March 1984 from the Administration and Finance Department.
9. On 25 July 1984 he wrote to the Director-General expressing dissatisfaction with the medical board's findings and requesting that a new board be convened. He stated that he wished "to file an appeal of the decision of the November 11, 1983 review board".
10. On 7 September 1984 the Secretary of the Appeals Committee wrote to him to say that, although his letter of 25 July was not in the usual form of an appeal, it had been agreed to treat it as such.
11. By a letter dated 27 September 1984 the Director of Personnel informed the complainant that an appeal against the Director-General's decision conveyed to him on 9 March 1984 was in principle open to appeal in accordance with Manual section 331, a copy of which was appended. The Director also referred to the letter dated 7 September 1984 from the Secretary of the Appeals Committee accepting his letter of 25 July as an appeal.
12. On 4 December 1984 the complainant wrote to the Director-General stating:

"Also my letter of July 25 1984 addressed to the Director- General is not to be considered as a formal document for consideration by the Appeals Committee. That letter does not contain sufficient data and medical documents for a proper presentation to the Appeals Committee of my detailed medical situation. I am aware of the proper format to follow for a formal appeal statement and will comply."
13. The complainant pursued no further an appeal against the Director-General's decision confirming his separation on 30 April 1983 and never obtained a final decision by the Director-General.
14. The relevant Staff Regulations and Rules may be summed up as follows:
 - (a) Staff Regulation 301.111 provides that the Director- General shall establish an Appeals Committee to advise him in cases of appeal but may give a final decision without recourse to the Committee if he is so requested by the staff member.
 - (b) The procedure of the Appeals Committee is set out in Staff Rule 303.13. 303.1311 provides for a request by a staff member for a final decision from the Director-General alone. 303.1313 provides for an appeal to the Appeals Committee. The Committee reports to the Director-General (303.137) and the Director-General takes a final decision after considering the report (303.138).
 - (c) Staff Regulation 301.112 provides for appeal by a staff member to the Tribunal under the conditions prescribed in its Statute.

(d) Manual provision 331.51 provides that an appellant who is not satisfied with a final decision of the Director-General made pursuant to 303.1311 or 303.138 may lodge a complaint with the Tribunal in accordance with Staff Regulation 301.11.

15. After about one year, by a letter dated 18 November 1986, the complainant submitted through his attorney to the Advisory Committee on Compensation Claims a new claim for annual compensation under Manual provision 342.524 and for help in paying for a course of vocational rehabilitation under Manual provision 342.543 on the grounds that his earning capacity had been adversely affected by his service-incurred injury.

16. The Advisory Committee on Compensation Claims reported on 8 May 1986 that it found no causal relationship between the service-incurred impairment and the alleged incapacity for work.

17. A letter dated 21 July 1986 to the complainant's attorney informed him that the Director-General had endorsed the Committee's recommendation and rejected his claims. That is the decision identified by the complainant as the one impugned.

18. The complainant never appealed against that decision in accordance with the Staff Regulations and Rules and never obtained a final decision. He explains his failure to appeal by saying that he and his attorney found in Manual provision 342.7 (reconsideration and appeals) no specific statement that it was mandatory for him to appeal or that failure to do so precluded appeal to the Tribunal. He contends that the social security officer should have warned him it was mandatory for him to complete certain procedures to preserve his right of appeal. He says that he and his attorney made careful review of the letter dated 21 July 1986, of the entire Manual section 331, on appeals, of Manual provision 342.7 and of any other available Staff Rules and Regulations that might be applicable. They concluded that the language used did not indicate that an appeal was mandatory and decided that to appeal to the Organization again would serve no purpose.

19. The complainant further states that his opinion, which legal advice supported, is that because the Advisory Committee recommended rejecting his claim and the Director-

General did so, and in view of the Organization's past responses, that, to all intents and purposes, was the final decision and therefore any further appeal by him to the Organization would be fruitless.

20. In his claims for relief the complainant seeks:

- (1) the rescission of his illegal termination;
- (2) compensation for permanent disability in the form of a annuity;
- (3) the cost of an appropriate course of vocational rehabilitation.

21. The first relief claimed is unrelated to the decision in the letter of 21 July 1986. The decision on the date of termination is contained in the letter of 9 March 1984 based on the medical board's report of 16 November 1983.

22. The complainant did not pursue any appeal against the decision on the date of termination. His argument that the appeal is in abeyance is immaterial: the Tribunal is concerned with whether there has actually been a final decision because the receivability of the complaint depends on the existence of such a decision.

23. The complainant's claim to relief for illegal termination of contract is primarily not receivable because he has not identified that decision as the one he impugns. But even if the decision had been identified, his claim is still not receivable because he never obtained a final decision.

24. The decision which the complainant identifies as the impugned decision is that of 21 July 1986. He decided that it was not necessary to appeal in accordance with the rules and get a final decision. His arguments justifying his inaction are not well founded. His decision not to pursue an appeal was made deliberately and on legal advice, and he was not misled by the Organization: the appropriate rules were supplied to him. His explanation is without merit and unacceptable.

25. Article VII(1) of the Statute of the Tribunal states that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to

him under the applicable Staff Regulations. The complaint is therefore irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner