

SIXTY-THIRD SESSION

In re HILL

Judgment 869

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Paula Elizabeth Hill against the Food and Agriculture Organization of the United Nations (FAO) on 21 March 1987 and corrected on 2 May, the FAO's reply of 18 June, the complainant's rejoinder of 29 September and the FAO's surrejoinder of 20 October 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Manual provisions 308.131, 308.41 and 315.32 and Rule 14(j) of the General Regulations for the operation of the World Food Programme;

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

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

A. The complainant, a British subject, has worked for the FAO in Rome off and on since 1971. The World Food Programme (WFP) is a venture established some years ago under resolutions of the FAO Conference and the General Assembly of the United Nations. On 15 March 1985 the complainant was assigned to the Programme at grade 3, step 8, as a bilingual typist. By a memorandum of 14 October 1985 Mr. Holder, the director of her division (WPDE), told her that, though good at typing, she had shown insufficient "commitment and interest", "boredom and impatience with the typing of reports", and sometimes inability to get on with others. He recommended withholding the within-

grade step increment which fell due to her on 1 December 1985. The Director of External Relations and General Services (WPX), who was in charge of personnel matters for the Programme, sent a copy of that memorandum to the Director of Personnel (AFP) of the FAO. The complainant objected in a memorandum of 29 October to Mr. Simkin, the chief of the Staffing, Training and Inspection Branch (WPXS) of WPX, and sought to refute the criticisms, but her division director held to his view and she had the increment withheld. On 20 December she wrote to the Director of WPX asking to have it restored. In his reply of 9 January 1986 the Director of WPX said she would be rated again in six months' time and would then get the increment if her work had come up to standard. On 3 April she lodged an appeal with the Director-General; the Assistant Director-General in charge of Administration and Finance rejected it on 30 April; and she appealed to the Appeals Committee on 29 May on the grounds that it was the Director of AFP (Personnel), not the Director of WPX, who ought to have acted. In their report of 29 October 1986 the majority of the Committee recommended rejecting her appeal, and by a letter of 15 December, the impugned decision, the Deputy Director-General informed her that the Director-General had done so.

B. The complainant alleges that the withholding of her increment was in breach of FAO Manual provision 315.324 (recte 323), which requires that a division director who recommends that a staff member's within-grade salary increment should be withheld notify him in writing and send a copy of his memorandum to the Director of AFP who decides whether the withholding of the increment is justified and notifies the staff member accordingly. The complainant observes that since the Director of AFP never wrote to her there was a fundamental flaw in the procedure. The provisions of the Manual must be strictly complied with unless and until duly amended. That is the sole basis of her complaint. She seeks reinstatement of her increment as from 1 December 1985.

C. In their reply the FAO submit that, though the Director of AFP did not tell the complainant her increment was being withheld, Manual provision 315.323 no longer applied at the material time to staff of the World Food Programme. In May 1985 the Secretary-General of the United Nations and the Director-General of the FAO delegated further authority to the Executive Director of the Programme in administrative and staff matters. Thus the Director of WPX acted much as had till then the Director of Personnel of the FAO, and the Programme got its own personnel office in November 1986. All WFP staff were informed by a memorandum of 17 March 1986 from the Executive Director of the increase in his authority. That the complainant too knew of it is plain from her correspondence in the present dispute, which shows that she was expecting a decision from someone in the

Programme, not from the Director of AFP.

To insist on the literal application of Manual provisions is misguided. Institutional changes may affect the way in which they are to be applied and they did so in this case. Besides, the shift in authority from a senior official of the FAO to a senior official of the WFP caused the complainant no injury. Indeed she alleges none, her whole grievance resting on a "technicality". The purposes of the rule are to inform the staff member of the intention of withholding his increment and give him a chance to answer. In this instance they were fully respected.

D. In her rejoinder the complainant develops her original pleas. She observes that since the Director of WPX was not appointed until November 1986 it was the Director of AFP who was competent until then to withhold her increment. The Director-General was bound to comply with the rules in force until he amended or repealed them and so announced publicly. She suffered injury in that she was denied protection under those rules. She presses her original claims and further seeks an award of 2,300 United States dollars in costs.

E. In their surrejoinder the FAO maintain that they have already amply answered the complainant's case and again invite the Tribunal to reject it, including the claim to costs. At the time when her increment was withheld the functions of the director of personnel for the Programme were, as the complainant knew full well, being performed by the Director of WPX. The essence of the material rule, 315.323, continued to apply and her rights were not impaired by the replacement of the FAO official specified in the rule by a WFP official.

CONSIDERATIONS:

1. The complainant bases her claim on non-observance of FAO Manual provision 315.323, which relates to the withholding of within-grade salary increments and reads:

"If the division director wishes to recommend that the [salary increment] of a listed staff member should be withheld, he/she notifies the staff member in writing accordingly before the first of the month prior to that in which the increment is due, explaining the reason. A copy of this memorandum with a covering note is sent to the Director, AFP who decides whether the withholding of the increment is justified and notifies the staff member accordingly by memorandum, copied to the division director."

The complainant claims reinstatement of her increment as from 1 December 1985.

2. The Organization do not deny that the Director of AFP did not decide whether the withholding of her increment was justified and did not notify the complainant, but submit that the provision was no longer applicable at that time to a staff member such as the complainant.

3. The World Food Programme (WFP) is an organ established by resolutions adopted by the General Assembly of the United Nations and the FAO Conference. Rule 14(j) of the General Regulations for the operation of the WFP provides:

"The Executive Director [of the WFP] shall administer the staff of the programme in accordance with FAO staff regulations and rules and such special rules proposed by the Executive Director as may be approved by the Secretary-General of the United Nations and the Director-General of FAO."

4. On the basis of the deliberations of a UN/FAO joint taskforce the Secretary-General of the United Nations and the Director-General of the FAO decided in May 1985 to delegate additional authority to the Executive Director of the WFP in administrative and staff matters.

5. The Organization say that from May 1985 the WFP exercised gradually more authority in personnel matters and that the Director of WPX performed functions equivalent to those of the Director of Personnel of the FAO until a distinct office of personnel was established by the Executive Director in November 1986. The scope of the authority delegated and the timing of its exercise are not identified. Nor is the basis for the exercise of authority by the Director of WPX.

6. The text of Manual provision 315.323 was not amended until February 1987.

7. The Organization contend that the staff, including the complainant, were made aware of the changes. In particular they were informed of the proposed changes in March 1986 - or after the withholding of the

complainant's increment - by formal memorandum from the Executive Director of the WFP.

8. Nevertheless that memorandum stated that the WFP would continue to apply FAO Staff Regulations and Staff Rules in administering its staff but would develop its own staff manual, based largely on the appropriate parts of the FAO Manual and taking into account the WFP's special needs. The memorandum gave details of various matters which were being changed. It did not state that the function of the Director of AFP under any provisions in the Manual would be exercised by the Director of WPX.

9. The Organization contend that the changes were known to the complainant as evidenced from her correspondence and state that she plainly expected a decision on the withholding of her increment to be taken within the WFP rather than by the Director of AFP.

10. An examination of the correspondence does not bear out the contention.

Following the memorandum of 14 October 1985 to the complainant from Mr. Holder, the Director of WPDE, about withholding the increment, provision 315.323 was applied when the acting Director of WPX sent the memorandum to the Director of AFP with a covering note of 22 October 1985 asking him to take the necessary action. A copy of the note was sent to the complainant by Mr. Simkin, the chief of WPXS, on 20 November 1985 with a further, more detailed, report from Mr. Holder. The complainant wrote to the Director of WPX on 20 December 1985 referring to the memorandum of 22 October 1985 to the Director of AFP. After making several points about the withholding of the increment, she concludes by asking the Director of WPX "for his kind intervention with the Director AFP in order that my [salary increment] be given to me in full as from the 1st December 1985". The Director of WPX replied on 9 January 1986 referring to the request for intervention; he said it seemed reasonable to wait for six months and his advice was to wait until a further assessment had been made of her work.

11. This correspondence does not show that a decision from the Director of AFP was never contemplated. The WFP itself invoked the decision of the Director of AFP and the complainant was so informed and asked for intervention with the Director of AFP.

12. The Organization refer to a letter of 4 December 1985 to Mr. Simkin as showing she was aware of the changes. This letter shows that she was not clear about the next stage in the staff conciliation procedure. But the procedure does not arise in this matter and the letter does not support the Organization's contention that she knew that the Director of AFP was not involved in the application of provision 315.323, since by then she had already been given the copy of the note of 22 October 1985 to the Director of AFP asking for the necessary action.

13. Since the complainant has made out a prima facie case, the onus is on the Organization to prove that the provision did not apply.

14. The Organization say that to insist on the literal application of the Manual is misguided as institutional changes may affect the way in which they are to be applied; that the shift in authority from a senior official of the FAO to a senior official of the WFP caused no injury to the complain-

ant; and that the purpose of the provision is to inform the staff member of the intention of withholding the increment and give a chance to answer, which was done in the complainant's case.

15. In this case the question is whether non-observance of the provision vitiates the decision to withhold the increment. The purpose of the provision is to ensure that a recommendation to withhold an increment is considered by a named senior official at a particular level in the Organization - the Director of AFP - whether representations are made or not. He then decides whether the withholding is justified. The safeguard provided by the rule is an important one as it ensures that the decision to justify is undertaken by a senior official with all the expertise and experience his job demands. It is particularly important as two consecutive withholdings may result in transfer, demotion or separation (Manual provision 308.416). It is therefore no answer for the Organization to say that one senior official is the same as another in this respect. If there has been disregard of this important safeguard, the complainant's rights have suffered prejudice.

16. The Organization have not proved that the additional authority delegated by the Secretary-General of the United Nations and the Director-General of the FAO in May 1985 to the Executive Director of the WFP in administrative and staff matters, insofar as it related to provision 315.323), was validly exercised by the Director of WPX in lieu of the Director of AFP.

17. Manual provision 308.131 reads:

"Except as otherwise provided authority to make determinations on entitlements and levels of payments under this Manual Section is delegated to the Director, Personnel Division (AFP)."

The entitlement to increments is dealt with in Manual provision 308.41. The Director of WPX himself did not purport to be acting in lieu of the Director of AFP when he wrote the letter of 9 January 1986. If he had been fulfilling the functions of the Director of AFP under provision 315.323 he would be expected to have told the complainant that her request for his intervention with the Director of AFP was inappropriate as he no longer exercised any function in relation to that provision. Furthermore, the increment was stopped anyway at the end of December 1985 in respect of that month's salary, i.e. before the letter of 9 January 1986. It would therefore appear that no decision justifying the recommendation under provision 315.323 was taken before the increment was stopped.

18. Since the memorandum of the division director was actually sent to the Director of AFP, it is reasonable to assume that the procedure for the payment of the complainant's increment had already been initiated in the personnel division. As to the processing of increments, Manual section 315.32 provides that the personnel division forwards to each division director at least three months in advance of the incremental date a check-list of staff members whose increments are due (315.321). If the division director approves the increment he says so on a copy of the list and returns it to the personnel division (315.322). If he wants to recommend that the increment be withheld the staff member is notified before the increment is due and a copy of the memorandum is sent to the Director of AFP to decide whether the withholding is justified (315.323). So the sending of the memorandum to the Director of AFP was probably a step in a procedure which had already begun in the personnel division.

19. To sum up, the Organization have failed for the following reasons to discharge the onus of proving that 315.323 does not apply in its literal sense to the complainant:

(a) It is by no means clear that the Director of WPX was purporting to act in lieu of the Director of AFP in relation to 315.323. If he was not, there was no decision on the recommendation to withhold the increment as provided by the provision. The decision by the Director of AFP is not an empty formula but an important safeguard for an employee whose increment is threatened.

(b) If the Director of WPX was acting in place of the Director of AFP, (i) the Organization have not proved that the power was validly delegated to him and (ii) he did not exercise it before the increment was withheld.

(c) The Organization have failed to prove that the complainant knew or ought to have known of the change in the operation of the provision.

20. The Director-General also refers to the Appeals Committee's view that the procedure had been overtaken by the agreement between the FAO and the WFP, that the complainant knew of the changes and that the Director of AFP was not in a position to act under 315.323. For the reasons given earlier, the Appeals Committee were not justified in so holding.

21. It follows that the Director-General's decision should be set aside.

DECISION:

For the above reasons,

1. The impugned decision is quashed.

2. The Organization shall pay the complainant her salary increment from 1 December 1985 until the date of separation, in July 1986.

3. She shall receive 500 United States dollars in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Héctor Gros Espiell, Deputy 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
Mella Carroll
H. Gros Espiell
A.B. Gardner

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