

SIXTY-FOURTH SESSION

In re CAVA

Judgment 900

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Remo Cava against the Food and Agriculture Organization of the United Nations (FAO) on 2 October 1987 and corrected on 30 November, the FAO's reply of 2 February 1988, the complainant's rejoinder of 11 March and the FAO's surrejoinder of 15 April 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.021 and 301.095, FAO Staff Rules 302.3081 and .3082 and FAO Manual paragraph 311.211;

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. In 1954 the staff of the FAO set up a savings and loan society known as the Credit Union. Its employees were not staff of the Organization. The complainant, an Italian born in 1924, was an employee from June 1969 and clause 13 of his contract provided for his affiliation to a Provident Fund. He was paid a grade P.2 salary.

In November 1975 the FAO Conference decided to make the Union part of the Organization and authorised the Director-General to make arrangements for that purpose. The complainant and all other Union employees were accordingly given three months' notice on 30 September 1975 and on 18 December an offer of appointment with the FAO. The offer said account would be taken of his service with the Union in determining his grade and step but not "for any other purpose". He accepted on 24 December. On the termination of his appointment with the Union the Provident Fund paid him off and after a few weeks' sick leave he took up duty with the Organization on 2 February 1976 as an accountant at grade P.2.

On 9 December 1985, several months before he reached the retirement age of 62, and again on 15 April 1986, he asked for three years' extension of appointment. The Assistant Director-General for Administration and Finance refused on 6 June 1986, he appealed on 27 June, and a letter dated 25 July from the Deputy Director-General confirmed the refusal. On 30 July he lodged an appeal with the Appeals Committee objecting to the failure to validate with the United Nations Joint Staff Pension Fund the period of his service from 1969 to 1975 and he asked for another three years' contributory service or redress. He also claimed financial compensation for having been underpaid at the Union. He left the Organization on 30 June 1986. In its report of 18 March 1987 the Committee recommended rejecting his appeal and by a letter of 26 June 1987, which he received on 6 July, the Deputy Director-General told him that the Director-General had done so. That is the decision he is challenging.

B. The complainant points out that he was acting manager of the Union for nearly three years all told. He describes the expansion of the Union and of his own responsibilities over the years. Though his work was good and widely appreciated, he was not properly paid but kept at P.2 while others less deserving fared better. Besides underpaying him the FAO fobbed him off with excuses for not validating his service with the Union up to 1975 for the purpose of his pension entitlements. At recruitment he was assured he would get a decent pension but none of the managers of the Union would help. His pension is too small.

He asks the Tribunal to make declarations about his status and the FAO's behaviour. He claims (1) retroactive promotion to P.4 or P.5 as from 2 February 1976 and payment of the consequent arrears in salary plus interest; (2) payment to the Pension Fund of contributions for the period from 1969 to 1976 corresponding to P.4 or P.5 "taking into account currency depreciation" or, failing that, (3) payment of the difference between his actual pension and the one he would have got had the FAO made those contributions; and (4) such other relief as the Tribunal deems fit for loss of income and reduction in his and his family's standard of living.

C. In its reply the FAO observes that the complainant's claims are inconsistent: though he claims promotion only from 2 February 1976 he wants pension contributions corresponding to a higher grade from 1969 up to that date.

Any claim relating to his employment from 1969 to 1976 is irreceivable: he filed no appeal at the time and may not do so now.

Besides, his claims are devoid of merit. He is not entitled to retroactive promotion since he neither moved to a post with a higher grade nor had his duties upgraded, the only two methods of promotion provided for in Manual paragraph 311.211. When the Union became part of the FAO, though his post was formally graded P.1, he was granted P.2, the grade that matched the salary he had had for years. A grading body of the FAO, the Establishments Group, found in 1983 that his post description merited only P.1, but again the FAO let him keep the higher grade. However commendably he did his work, he never performed the duties of manager and indeed was not qualified for the post. In keeping with Staff Rules 302.3081 and .3082 he was required to act as officer-in-charge early in 1984, but refused to do so.

He may not be a Fund member as from 1969 to 1976 because he was not then on the FAO staff, the Union being an independent body. Besides, he got as much from the Provident Fund on the expiry of that contract as any ordinary pension fund would have paid him. The assurances he says he was given on appointment to the FAO cannot have meant immediate coverage let alone validation of his prior service with the Union; nor did the FAO's offer promise such validation.

His subsidiary claim (3) is unsound for the same reasons. Besides, there is no reason why he should fare better than other former employees of the Union. No damages are due because he was treated by the FAO rules and fairly.

Though he does not repeat his request for extension of appointment after the age of retirement laid down in Staff Regulation 301.095, the FAO explains why it refused: it did not believe extension to be in its own interests.

D. In his rejoinder the complainant points out what he sees as inconsistencies or misrepresentations in the FAO's version. The offer it made him in 1975 was intended to evade making proper provision for his pension. He never agreed that his prior service should not count "for any other purpose", an assertion that did not form part of the terms of his appointment. Much of the payment from the Provident Fund was the refund of his own contributions. The FAO obstructed his attempts in 1986 to find a common-sense solution to his problems.

The Union was not an independent body: had it been it would have been subject to Italian law, which plainly it was not. The FAO's case rests on misconstruction of the Union's status and of his own. The Provident Fund was not tantamount to a pension fund. As the FAO does not deny, he did not get assurances about his pension, and the reason why he did not insist on them at the time is that he believed something would be done. It would have been only fair to keep him on - no other former Union employee was in his plight - and the reasons the FAO gives for its refusal are mistaken.

E. In its surrejoinder the Organization submits that the complainant's account is mistaken or tendentious and that his pleas are mostly immaterial or misconceived. It enlarges on the arguments in its reply and again invites the Tribunal to dismiss the claims in their entirety as either irreceivable or devoid of merit, or both.

CONSIDERATIONS:

1. The FAO Credit Union was formed by FAO staff members as a co-operative savings and loan society in 1954. It operated with the Director-General's consent as a staff welfare institution within the FAO. After negotiation the FAO Conference decided by a resolution it adopted on 26 November 1975 that the Union should become part of the Organization and it authorised the Director-General to make detailed arrangements for that purpose.

2. The complainant was employed by the Union from 16 June 1969 under a contract signed by the Treasurer of the Union and him on 28 May 1969. The contract states:

"It is hereby agreed as follows:

Mr. R. Cava hereby accepts employment with the FAO Credit Union in the capacity of Office Manager, effective 16 June 1969, at a salary equal to the FAO Professional salary scale in the grade of P 1-3. To this sum shall be added a factor of 5% thereof, representing final compensation for the absence of certain fringe benefits available to FAO staff."

The terms of appointment include the following:

"13. Provident Fund. There shall be established on the books of the Credit Union, in respect of each employee, a Provident Fund, to which the employee shall contribute 5% of his base salary, excluding compensation factor and family allowance, and to which the Credit Union shall contribute 10% of the employee's base salary, excluding compensation factor and family allowance. The said Fund shall be intangible by the employee during his period of service. The entire amount of the Fund shall be paid to the employee on his termination, resignation or retirement or to the employee's duly designated beneficiaries on his death; provided, however, that if the employee's contract is terminated for grave financial irregularity the Board of Directors, acting unanimously and with the approval of the Supervisory Committee, declare forfeit to the Credit Union the sum corresponding to the Credit Union's contribution to the Fund, with the interest accrued on such contribution."

3. When the integration of the Union with the FAO was agreed on, the complainant's contract with the Union was terminated by three months' notice expiring on 31 December 1975. By a letter dated 18 December 1975 he was offered employment by the FAO at the grade and step he would have held on 1 January 1976 under his contract with the Union. He was told he would be eligible for within-grade salary increments if his services proved satisfactory. The letter then stated:

"It is my duty in this connection to draw your attention to the fact that the Organization will not recognize your past services with the Credit Union for any other purpose."

The complainant accepted the terms of employment and took up duty on 2 February 1976.

4. Before the termination of his contract with the FAO the complainant stated that his prior service with the Union ought to have been validated under the Regulations of the United Nations Joint Staff Pension Fund. He asked for a three-year extension of appointment beyond the compulsory retirement age or else payment of a lump sum of 105,816 United States dollars to make up for the reduction he alleged in his future pension due to the non-validation of service. He also asked for the sum of \$62,527 as a reward for having carried out additional duties in the absence of the manager of the Union. The Appeals Committee recommended that his appeal be rejected and the Director-General accepted the recommendation.

5. In his letter of 26 June 1987, which is the decision impugned, the Deputy Director-General said:

"A review of the circumstances of your case shows that, upon receiving an offer of appointment as a P.2 Accountant with the Organization, you accepted the offer without reservations even though the offer clearly stated that your past services with the independent Credit Union would not be recognized for any purposes. In 1983 the grade level of your post was reviewed by the Establishments Group and found to be appropriate. Lastly, since there was no further need for your services after you reached the mandatory retirement age, it was unnecessary to extend your appointment."

6. The complainant's claims as stated in B above depend on the following findings: (a) that he was employed by the FAO from 1969, not from 1976; (b) that the FAO was under an obligation to contribute to a pension for him from June 1969 to February 1976 and (c) that his post was wrongly graded from 1976.

7. It is obvious from the evidence that the complainant was employed by the Union until the end of December 1975 and became an employee of the FAO for the first time on reporting for duty on 2 February 1976. He was told in clear terms that his prior service with the Union would not count except for within-grade increments. The Union was not a member of the United Nations Joint Staff Pension Fund and he had no entitlement to revalidation of his past service with the Union. He was in fact a member of the Provident Fund set up by the Union for its employees and received a large sum from the Fund on termination of his employment with the Union. That sum could have been used to buy privately additional pension benefits independently of the UN Fund or invested for future income.

8. There are no grounds on which the Organization can be held (a) to have employed the complainant from 1969 or (b) to be under any obligation to provide for an increased pension on the strength of prior service with the Union. In any event any claim against the FAO related to the complainant's prior employment with the Union should have been made under the normal FAO appeals procedure immediately after his recruitment in 1976. This claim is therefore irreceivable as well.

9. As to his contention that his post was wrongly graded, the complainant refers to various periods when there was no Union manager and he had to take on the duties himself. He also cites two advertisements which he alleges are

for the appointment of his successor and in which the grades are P.4 and P.5.

10. The Organization denies that the complainant was in charge when there was no Union manager and states that, during the periods when there was no manager, either the treasurer assumed some of the manager's responsibilities rather than delegate them to the complainant or the Board of Directors appointed someone else to take over the management under the treasurer's supervision. The complainant does not deny that the persons named were in the office of the Union but he says that they either did no work or knew nothing.

11. The complainant's post was reviewed at his request

in February 1983. It had been graded at P.1 at the time of integration, but he was employed at grade P.2, the level of his salary until then. The Board of Directors of the Union sent the job description prepared by the complainant to the Establishments Group, which reviewed it and confirmed that it was well within the grade P.1.

The classification of posts is a matter for the Director- General to decide on under Staff Regulation 301.021. There is no evidence to suggest that the classification made in the exercise of his authority is tainted with any flaw.

12. The advertisements cited by the complainant refer to the post of Union manager. Since the post he held was that of an accountant reporting to the manager, they are not relevant.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner