

SIXTY-EIGHTH SESSION

***In re* TRESALTI MENGHI**

Judgment 1009

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Diana Tresalti Menghi against the Food and Agriculture Organization of the United Nations (FAO) on 8 February 1989, the FAO's reply of 19 April, the complainant's rejoinder of 10 July and the FAO's surrejoinder of 28 September 1989;

Considering Articles II, paragraph 5, VII, paragraphs 1 and 2, and VIII of the Statute of the Tribunal and FAO Manual paragraphs 114.211, 308.411, 311.211, 441 and .442 and 315.321, .323, .324 and .325;

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, an Italian citizen, joined the FAO at headquarters in Rome in 1970 as a clerk at grade G.3 in the Translation Service (GIPT) of the Publications Division (GIP). She was promoted to grade G.4 and granted a permanent appointment in 1974, promoted to G.5 in 1980, and promoted to G.6 in 1983, still in GIPT, as an assistant in the terminology and reference section (GIPTT).

In a memorandum of 26 May 1987 the Chief of GIPT, who was her second-level supervisor, told her that she was neither working nor behaving well; she must mend her ways before 1 October, when her next within-grade salary increment would fall due. The head of GIPTT wrote to the Director of GIP on 31 July describing her work as "marginal". The same day the Director told her that he was recommending to the Director of the Personnel Division (AFP) the suspension of her increment under Manual paragraph 315.325. She had been unwell since 24 June and did not go back to work until 7 August. On 13 August she informed the Director of GIP that she took exception to the evaluation of her. She set out her objections in a memorandum to the head of GIPTT, who was her first-level supervisor: she had not seen or discussed the evaluation beforehand and she found it unfair. The head of GIPTT answered on 25 August. In a minute to her of 18 September the Director of GIP said that he saw no reason to withdraw his recommendation; but her increment would be restored as from 1 October 1987 if the "recent improvement" in her work continued. Her increment was suspended.

Early in June 1987 she had applied for a transfer on grounds of health and on 26 June the Chief of GIPT had told her that she would be transferred to the Library (GILB) on 1 September 1987 for three months. The Director of GIP confirmed that on 31 July. On 13 August, however, she wrote to him to say that she wanted to stay on in GIPTT to show that the criticisms of her were unfounded. The Director dismissed her objections in a memorandum of 25 August, and the acting Assistant Director-General in charge of the Department of General Affairs and Information (GI) confirmed the transfer, but as from 7 instead of 1 September, in memoranda of 31 August and 4 September. She started work in the Library on 7 September.

On 20 November the Chief of GILB wrote a minute praising her attitude and work, and on 23 November the Director of GIP wrote to the Director of AFP recommending the grant of her increment as from 1 October. On 2 December the Director of AFP agreed. On 8 December the Assistant Director-General in charge of Administration and Finance informed her by letter that her salary increment was granted with retroactive effect from the due date. On 2 November, however, she had appealed to the Director-General against the suspension. That appeal being rejected, she lodged an appeal with the Appeals Committee on 23 December.

On 30 November the Assistant Director-General extended her transfer to the Library to 30 May 1988, and indeed she was still in GILB in 1989. On 3 December she appealed to the Director-General against the transfer; her appeal being rejected on 8 February 1988, she filed a second appeal with the Appeals Committee on 4 March.

In its report of 26 August the Committee recommended rejecting both appeals and by a letter of 10 November 1988, the decision she impugns, the Director-General informed her that he did so.

B. The complaint is about the suspension of the complainant's salary increment and her transfer to the Library.

(1) As to the increment, she cites Manual paragraphs 315.323 and .324, which are about the procedure for withholding increments, and 315.325, which is about the suspension of them. She contends that whereas it is the Director of AFP who withholds, on grounds of unsatisfactory performance, it is the supervisor who suspends, for the purpose of "further information or investigation". In this case there was suspension under 315.325, but the grounds were the complainant's poor performance. The charges against her were not the grounds that 315.325 requires and were mistaken and harmful to her career.

Her subsidiary objection is that by opting for suspension the Director of GIP could act himself, whereas it would have been for the Director of AFP to withhold the increment.

(2) As to her transfer to GILB, she alleges breach of the rule in the Manual - she cites paragraphs 311.441 and .442 - which says that it is the Director of AFP who is competent to order a transfer from one division to another without change of grade. It was not he who ordered her transfer, and the procedural flaw was the more serious in that her supervisors were at the time asking her to refute the criticisms of her. Since annulment of her transfer would serve no purpose now, she claims such redress as the Tribunal sees fit.

She seeks the quashing of the impugned decision; a declaration that the suspension of the increment could not properly be based on the charges of unsatisfactory performance; such redress as the Tribunal sees fit to grant under Article VIII of its Statute; and an award of costs.

C. In its reply the FAO points out, as to the suspension of the complainant's increment, that according to Manual paragraph 308.411 an increment is granted "on the basis of satisfactory service during a qualifying period". For her to qualify for the increment on 1 October 1987 it was necessary for the director of her division to declare her service "satisfactory". In the light of the Chief of GIPT's memorandum of 26 May he was unable to do so, especially since she was on sick leave; he needed "further information" within the meaning of 315.325, and he correctly acted under that provision. When he had the information he needed he duly lifted the suspension.

As for the complainant's move to the Library, it was not a transfer in the true sense, just a temporary assignment. Heads of department have authority under Manual paragraph 114.211 to run their departments and therefore to assign staff as they see fit. It was in the exercise of that authority that the acting Assistant Director-General in charge of GI assigned her for some months, within the department, to GILB. Her new duties were much as before, and she had asked for the move anyway.

The Organization invites the Tribunal to dismiss her claims.

D. In her rejoinder the complainant presses her contention that the criticisms of her were unfounded and unfair: the Chief of GIPT had been appointed only a few months before and so did not have the full facts, and GIPTT was overworked and understaffed. She performed all her duties as well as her health and other circumstances allowed. The FAO is inconsistent: it accused her of shortcomings at the time, yet now it says that it could not assess her properly. The Director of GIP recommended the so-called "suspension" on 31 July 1987, two months before the increment was even due.

She had no choice but to ask for her transfer to GILB because her position in GIPTT was unbearable: though she held grade G.6, she was performing the duties of a lower grade and was subordinate to a G.5 official. Her new duties were quite different. The transfer took no account of her skills, her interests or her health, which the treatment of her had damaged. She provides medical evidence. There was breach of the Manual paragraphs that require that transfers be ordered by the Director-General or by the Director of AFP.

She restates her claims: she seeks the quashing of the decisions to suspend her increment and to transfer her to the Library and an award of damages for the injury shown by the medical evidence.

E. In its surrejoinder the Organization enlarges on its earlier pleas as to the suspension of the increment and the temporary transfer. It submits that her claim to damages for the alleged injury to her health is irreceivable because it did not form part of any internal appeal. It invites the Tribunal to reject the complaint, insofar as it is receivable,

as devoid of merit.

CONSIDERATIONS:

1. What the complainant is impugning is a decision which the Director-General took on 10 November 1988 to reject two internal appeals which she had filed on 23 December 1987 and 4 March 1988.
2. Her complaint is receivable. As paragraphs 1 and 2 of Article VII of the Tribunal's Statute require, she has duly impugned, within the time limit, a final decision taken after exhaustion of the internal remedies provided for in the FAO Staff Regulations.
3. Since the appeals which the challenged decision rejected raise different issues, the Tribunal will take up each of them separately.

The salary increment

4. The first appeal challenged a decision dated 31 July 1987 to suspend the complainant's within-grade salary increment.

The grant of such increments is governed by Manual paragraph 308.411:

"A [within-grade salary increment] is an increase in pay from one step to the next higher step within an established grade, on the basis of satisfactory service during the qualifying period."

The possibility of suspending the grant of the increment is provided for in Manual paragraph 315.325, and paragraph 315.321 sets out the procedure to be followed for that purpose.

5. A prior condition for granting the complainant the increment was that the Director of the Publications Division (GIP), to which her unit, the Translation Service (GIPT), belonged, describe her performance in the relevant period as "satisfactory". For want of means of assessing her work performance he did not do so. In a memorandum of 26 May 1987 the Chief of GIPT described her work as "marginal" and said that she must do better. The Director was therefore in need of further information, as provided for in paragraph 315.325.

6. The further information was not forthcoming because the complainant was on sick leave from the end of June 1987, and on the strength of 315.325, which provides against cases in which there is insufficient information, the Director sent her a memorandum dated 31 July 1987 notifying the decision to suspend the grant of her increment.

7. Once the information required had been obtained, however, the Assistant Director-General in charge of Administration and Finance informed her, in accordance with the material provisions of the Manual, by a letter of 8 December 1987 that, the suspension being cancelled, she would be granted the increment as from the date at which it would ordinarily have fallen due.

8. The conclusion is that as to the matter of the increment there was no breach of the Manual provisions. Besides, even though the complainant had lodged her appeal on 2 November 1987, she ceased to have any cause of action after the Assistant Director-General's letter of 8 December 1987 restored the increment with retroactive effect.

The temporary assignment

9. The complainant's other internal appeal laid claim to compensation for her temporary assignment to the Library, which the acting Assistant Director-General in charge of the Department of General Affairs and Information (GI) confirmed in a memorandum to her of 31 August 1987.

10. Her assignment for three months to the Library was merely a departmental arrangement which that Assistant Director-General ordered in the discharge of his responsibility for administration and in accordance with Manual paragraph 114.211(iv).

It was neither transfer nor reassignment to another department, but a temporary move within GI which the head of department was free to order in exercise of the general authority the Director-General has delegated for that purpose to such senior staff.

11. Besides, it was the complainant herself who in June 1987 had applied for transfer, and her request was granted even though she later told the director of GIP, in August 1987, that she did not want to go to the Library after all.

12. There being no evidence to suggest that the temporary assignment she is objecting to was ordered on discriminatory grounds or by way of harassment the decision is sound and does not constitute breach of any of the Organization's rules.

The further claim

13. In her rejoinder the complainant makes a further claim to damages for injury to her health which she alleges was service-incurred. The Organization rejects the claim in its surrejoinder.

The further claim did not form the subject of any internal appeal, there is no final decision on it, and since it is irreceivable the Tribunal will not entertain it.

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. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990

(Signed)

Jacques Ducoux
Mella Carroll
H. Gros Espiell
A.B. Gardner