SIXTY-NINTH SESSION

In re AMEZKETA

Judgment 1034

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Angel Amezketa against the Food and Agriculture Organization of the United Nations (FAO) on 28 October 1989 and corrected on 12 December, the FAO's reply of 21 February 1990, the complainant's rejoinder of 29 March and the Organization's surrejoinder of 3 May 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Regulations 301.151 and 301.0912 and FAO Manual section 319;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The FAO employed the complainant, a Spaniard who was born in 1941, as a teacher in Spanish under what are known as "special services agreements" (SSA) from 1970 to 1979. Such employees are neither staff members of the Organization nor subject to its Staff Regulations and Staff Rules; Manual section 319 sets out their conditions of service. Though the terms of their appointment are otherwise much like those of FAO staff they are not members of the United Nations Joint Staff Pension Fund.

In August 1979 the complainant was granted a fixed-term appointment as a language-training officer at grade P.1. He thus became both a staff member and a member of the Fund. He had his appointment extended to 1982, to 1984 and to 26 August 1988. He was promoted to P.2 in 1984. For want of funds the FAO had to suspend language training. It abolished his post and by a letter of 25 March 1988 ended his appointment on 30 June 1988. On the strength of some nine years' service as a staff member he was granted just over seven months' salary, or 18,467 United States dollars, in termination indemnity under Staff Regulation 301.151.

On 22 June 1988 he appealed to the Director-General claiming a one-year appointment from 1 July. That appeal having failed, he went on 5 August to the Appeals Committee claiming "reinstatement or adequate compensation". In a later statement to the Committee he claimed larger pension benefits as part of such compensation.

In its report of 5 May 1989 the Committee recommended rejecting his appeal and by a letter of 24 July 1989, which he says he got on 5 August and which he impugns, the Director-General informed him of the rejection of his appeal.

B. The complainant explains that while employed under SSAs he and other language teachers tried in vain to get the periods of their service validated for the purpose of Fund membership. He continued to seek validation after becoming a staff member in 1979, but still to no avail. In the end he dropped the matter because of advice that he should not "bite the hand that fed him" and because he believed that, the language training being well-entrenched, his future was safe. Had the FAO kept him on until the age of retirement he would have got a reasonably good pension.

The amount of compensation he got assumed only nine years' service though he had been in the Organization's employ since 1970.

He is claiming compensation for the full period of his employment in the form of termination indemnity, repatriation grant and pension entitlements. Though he is willing to pay pension contributions to the Fund for the period of his service from 1970 to 1979 the FAO will not let him. He invites the Tribunal to "review his career" in the FAO from the outset, recognise its "continuing nature" and compensate him "for all monies of which [he] was deprived upon separation because of the 9 years worked on Special Service Agreements".

C. In its reply the FAO submits that the complaint is irreceivable insofar as it claims further pension entitlements.

The complainant's last special service agreement expired in 1979, the latest correspondence with him about the validation of his service under such agreements dates back to 1983, and he could and should have appealed against the Organization's refusal at that time. He has failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

The complaint is further irreceivable under that Article insofar as it differs in thrust from his internal appeal. Whereas the subject of that appeal was the termination of his appointment and its purpose was "reinstatement or adequate compensation", what his complaint claims is full review of his status and the grant of pension entitlements for the earlier period of his employment.

The Organization further submits that the termination procedure was correctly followed. The reason for ending the complainant's appointment - the need to save money - was objective and valid, and he has never challenged it. A memorandum of 22 February 1988 warned him and the letter of 25 March gave him due notice. The Organization looked for a suitable post for him but his knowledge of English was not good enough for the one translator's post it found. It paid him the termination indemnity prescribed in Staff Regulation 301.151 and he was entitled to no greater amount because the termination complied with the provisions of Regulation 301.0912 on abolition of post. Had it allowed his appointment to expire he would not have got the indemnity at all.

Special service agreements were the most suitable form of employing the complainant as a language teacher, and when he subscribed to them he knew full well he would not have the same conditions of service as a staff member. In particular he could not under Manual paragraph 319.84 be a member of the Fund nor under 319.85 later validate service under such agreements. His pension rights as a staff member are as determined under the Fund Regulations and the Director-General may not change them.

D. In his rejoinder the complainant submits as to receivability that he thought it injudicious to lodge an appeal against refusal of validation at a time when his future was at stake. It is no fault of his if the internal means of redress are not exhausted. It is unfair to plead irreceivability when the material issue is plainly the review of his whole career, including the nine years in which he was denied pension rights. What he sought in his appeal of 22 June 1988 to the Director-General was the reversal of the termination, but by the time he went to the Appeals Committee what he wanted was "adequate compensation" in respect of his whole career: it was only reasonable that as he realised his plight the emphasis, though not the substance, of his claims should shift. It is absurd to make out that his pension was not at the core of his appeal, and the Committee's failure to discuss the issue does not make it the less material.

As to the merits he contends that it was wrong in the first place to employ him under special service agreements, which, according to Manual paragraph 319.21, should be used only when employment is not to be regular. The difference between staff and other employees is a legal fiction he cannot be expected to have understood. Other redundant language-

training officers were found employment whereas he was thrown out on the flimsy pretext of poor English. The shortage of funds was not as bad as the FAO makes out. He knows French well and could have been given training. The material and moral hardship he has suffered is grievous: after 18 years with the FAO and because of its "mindless indifference" he has only nine years' pensionable service, no medical insurance and grim prospects.

E. In its surrejoinder the FAO enlarges on its pleas as to receivability and the merits. It maintains that the complaint is irreceivable: for the complainant to say that it was injudicious to appeal against refusal of validation is an unsound argument in law: he failed to act in time. The Organization also explains why there was nothing improper about employing him under special service agreements and observes that he accepted such employment in full knowledge of the disadvantages, including the lack of pension coverage.

There were valid and sufficient reasons for the non-

renewal of his contract. The Organization no longer needed his services in language training and was unable to find him other suitable employment.

The circumstances of his departure were unpredictable and were indeed unfortunate for both sides, but the FAO cannot be held liable. It did its utmost to mitigate the conseqences to him.

CONSIDERATIONS:

1. The FAO employed the complainant as a Spanish-

language teacher under successive special services agreements from 28 September 1970 up to 26 August 1979. He was then given fixed-term appointments as a training officer up to 26 August 1988, when his last appointment was due to expire. In fact the Organization terminated that appointment earlier, on 30 June 1988, so that he would be entitled to the payment of a termination indemnity. He is asking the Tribunal to "review my career in FAO since my first contract in 1970 recognizing its continuing nature and compensating me for all monies of which I was deprived upon separation because of the 9 years worked on Special Service Agreements".

2. The complainant did up to 1982 seek validation of his period of service under special service agreements for the purposes of the United Nations Joint Staff Pension Fund. But his request was denied on 15 April 1983. He lodged no internal appeal, and that decision is now beyond challenge.

3. The decision he now impugns is the Director-General's rejection of the internal appeal he lodged on 5 August 1988 seeking reinstatement or adequate compensation: the Director-General endorsed the FAO Appeals Committee's view that the termination of his appointment had been justified and that the termination indemnity paid to him had been what the Staff Regulations and Staff Rules required.

Though he admits that his pension rights are governed by the Regulations of the United Nations Joint Staff Pension Fund and that the kind of contract he held determines his rights, his objection is that the special services agreements he was employed under from 1970 to 1979 were unsuited to the functions he was performing.

Under the provisions of Section 319 of the FAO Administrative Manual the holder of a special services agreement is referred to as a "subscriber". A subscriber is not considered to be a staff member, and the Staff Regulations and Staff Rules do not apply to him: his rights and obligations as such are strictly limited to the terms and conditions set out in the agreement and any dispute that may arise is to be settled by arbitration.

The complainant may not now challenge the appropriateness of agreements he entered into from ten to twenty years ago, any claim he bases thereon being time-barred and irreceivable.

4. Since his other claims depend on the success of his claims in respect of the special services agreements, they too must fail.

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 the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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