

## TWENTY-SIXTH ORDINARY SESSION

### *In re* CHIARAPPA

#### Judgment No. 174

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Luigi Chiarappa on 20 May 1970, the Organisation's reply dated 31 August 1970, the complainant's rejoinder dated 8 October 1970 and the Organisation's surrejoinder dated 18 December 1970;

Considering also the observations made by Mr. Whittemore, who was notified of the complaint on the decision of the President of the Tribunal;

Considering Article II, paragraph 5, of the Statute of the Administrative Tribunal, Article VIII of the FAO Constitution, Rule XXXVI-1 of the General Rules, FAO Staff Regulations 301.041, 301.042 and 301.043, Manual section 306.6 and the Director-General's Bulletin No. 68/30 of 20 December 1968;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Chiarappa held a grade P.4 post in the Crop Protection Branch of the Plant Production and Protection Division in the FAO from November 1962 until June 1968, when the post of Branch Chief fell vacant. On several occasions he had to run the Branch in his Chief's absence, and the Division Director reported that he had shown a high sense of responsibility and great capability as leader of the Branch during those periods.

B. The procedure then in force for appointments to P.5 posts such as that of Branch Chief provided that Division Directors should submit the names of candidates and their own recommendations to the Director-General. (P.4 and lower posts were filled on the advice of a body called the Appointments and Promotions Advisory Committee.) On 12 November 1968 the Division Director submitted to the Director-General a recommendation in which he listed three candidates, including the complainant and Mr. Whittemore, both of whom were United States nationals and held 2.4 posts. Although in his view each of these two candidates was qualified for the appointment, he gave his recommendation in favour of Mr. Whittemore, mentioning in particular his seniority in age and longer experience in international work. On 10 January 1969 the Director-General decided to appoint Mr. Whittemore with effect from 1 February 1969 and the Division staff were so informed on 5 February 1969.

C. In the meantime, by Bulletin No. 68/30 of 20 December 1968 the Director-General had officially informed the FAO staff of a new procedure for appointment to P.5 posts which would come into force on 1 January 1969. Appointments were in future to be made not by direct selection on the recommendation of the Division Director but on the advice of a "Senior Professional Staff Selection Committee". (For P.4 and lower Professional posts similar but differently constituted committees were set up by virtue of the same Bulletin to replace the Appointments and Promotions Advisory Committee.) Such a committee would in future be established to fill each vacancy and would consist of a chairman, namely the Assistant Director-General (Administration and Finance) or the officer acting for him, two members drawn in rotation from a panel designated by the Director-General and two other members drawn in rotation from a panel designated by the Staff Council. In a memorandum dated as early as 24 October 1968 and addressed to the Division Director Mr. Chiarappa asked that the new procedure should be followed in filling the vacancy for which he had applied since the FAO Council had already approved it in principle. He repeated his request on 6 February 1969, pointing out that the new procedure had by then come into force. The Director of the Personnel Division replied that Mr. Whittemore had been appointed under the old procedure; the staff selection committees had been set up only with effect from 1 January 1969; and the applicants for the post had been considered well in advance of that date. Mr. Chiarappa thereupon invited the Director-General on 14 February, 17 March and 3 April 1969 to hold the post vacant and submit the applications to a staff selection committee. The Director-General having refused to do so, Mr. Chiarappa appealed to the FAO Appeals Committee. In its report of 27 February 1970 the Appeals Committee held that the procedure followed in filling the post of Branch Chief constituted no violation of the Staff Rules and Regulations and recommended the Director-

General to reject the appeal. The Director-General did so by a decision notified to the complainant on 17 March 1970 and now impugned before the Tribunal.

D. Mr. Chiarappa requests the Tribunal:

(a) to quash the Director-General's decision as given in the Assistant Director-General's letter of 18 April 1969 and the subsequent decision made on 17 March 1970 by the Director-General on the recommendation of the Appeals Committee;

(b) to declare the appointment to the post of Chief of the Crop Protection Branch (Post No. 6193-22), made on 1 February 1969, to be tainted with procedural irregularity and invalid;

(c) to request the Director-General to proceed to a new appointment according to the procedure and applicable rules existing as of 1 January 1969; or

(d) to make such other order as the Tribunal may deem fit in the interests of justice. In support of his claim he contends among other things that:

(1) the procedure followed in filling the post was irregular in that the Director-General's Bulletin No. 68/30 contains no provision regulating the transition from the old to the new procedure and that accordingly the new procedure should have applied to any decision taken after 1 January 1969. In exercising his constitutional power to appoint staff the Director-General must abide by the proper procedure. The FAO Council had approved the new procedure as early as October 1968; knowing that that procedure was to be introduced the Director-General should immediately have considered applying it in filling the post. Finally, the decision of 10 January 1969 was not the only step taken in that month: the prior consultations too had taken place early in January, by which time the new procedure had come into force;

(2) he was discriminated against in that the examination of applications for other posts submitted at the end of 1968 under the old procedure was interrupted and resumed in 1969 under the new one;

(3) he was the victim of prejudice and unfairness in the Branch. The Appeals Committee failed to hear witnesses who could have shed light on this point;

(4) the Director-General's decision is based on incorrect facts: Mr. Whittemore did not have longer experience since, even if account is taken of his period of service with the WHO before joining the FAO, he had worked in international organisations for only a few weeks more than the complainant; moreover, he was a specialist in medical entomology (including rodent control) and had no experience in the main branches of crop protection, namely agricultural entomology, nematology, plant pathology and weed science, which were the complainant's own fields of specialisation.

E. The Organisation replies that under Article VIII of the FAO Constitution and General Rule XXXVI-1 the Director-General is empowered to make appointments and that he exercised this power in making the appointment on 10 January 1969 under the prescribed procedure. Both the old and the new procedures comprise two stages, consultation and decision. The new procedure affects only the consultation stage. In the present case the consultations took place during the last quarter of 1968, when the old procedure was still in force. The Director-General's Bulletin No. 68/30 contains no transitional clause and does not stipulate that any decision to appoint taken in 1969 must be preceded by consultations according to the new procedure. The FAO Council's approval of the new procedure in principle in October 1968 is immaterial since it was for the Director-General to decide when the procedure should come into force. The Organisation states that, contrary to what the complainant asserts, there is no case of examination of similar applications under the old procedure being suspended and resumed at the beginning of January under the new one. The complainant has, in its view, utterly failed to establish that he suffered from prejudice or unfairness - an allegation which it rejects. The Appeals Committee declined to hear witnesses on that point simply because in its discretion it deemed the calling of such witnesses unnecessary.

F. The Organisation therefore prays that the complaint be dismissed.

CONSIDERATIONS:

As to the applicability of the Director-General's Bulletin No. 68/30 of 20 December 1968:

1. It is clear that the decision of the Director-General to make an appointment within the Organisation has never, whether before or after 31 December 1968, been one that he has made simply upon his own unaided evaluation; it has been the concluding act in an advisory process, formal or informal, whereunder the merits of the various candidates have been considered by some subordinate official or body and a report or recommendation made to the Director-General thereon. Under the old procedure, i.e. that in force until 31 December 1968, this process in relation to appointments of the rank of P.4 and below was formal, being that regulated by Manual section 306.6. In relation to appointments of the rank of P.5, it was under the old procedure informal consisting of an appreciation made by the Division Director and a recommendation by him, such as that made in the present case on 12 November 1968.

2. When the new procedure was introduced to take effect from 1 January 1969, it contained no transitional provisions to cover cases already in process. It is therefore necessary to decide whether such cases should be covered by the old procedure or by the new. Who is to make this decision? One answer is that it is the duty of the Tribunal to decide the matter as a question of law. Another answer is that the Director-General, who undoubtedly had power to decide when the new procedure should be brought into force, has also the power to decide whether or not it should apply to cases in process. If it be for him to take the decision, as he himself thought it was, then he has decided that the new procedure should not apply to such cases. The decision of the Tribunal, if it be a question of law for its determination, would be to the same effect.

3. The decision given in this case on 10 January 1969 must be regarded as the conclusion of a process initiated on or before 12 November 1968 and accordingly is governed by the old procedure. The Tribunal considers that the decision was given within a reasonable time after the recommendation of 12 November. Any undue delay might well have been regarded by the Tribunal as disconnecting the decision from the earlier process with the result that the old procedure would not have been applicable.

As to the allegations:

- (a) that some cases in process were dealt with under the old procedure and others under the new and that thereby discrimination was exercised against the complainant;
- (b) that the complainant was the victim of prejudice and unfairness; and
- (c) that the decision of 10 January 1969 was based on incorrect facts.

The Tribunal finds no sufficient evidence in support of any of these allegations.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 May 1971.

M. Letourneur  
André Grisel  
Devlin

Bernard Spy