

NINETY-FIRST SESSION

In re Lunianga

Judgment No. 2048

The Administrative Tribunal,

Considering the complaint filed by Mr Dieudonne Ali Lunianga against the Food and Agriculture Organization of the United Nations (FAO) on 19 June 2000 and corrected on 31 July, the FAO's reply of 10 November 2000, the complainant's rejoinder of 26 February 2001 and the Organization's surrejoinder of 17 April 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant was born in 1955 in Zaire and has Canadian nationality. On 9 November 1992 he joined the World Food Programme (WFP) which is an autonomous joint subsidiary programme of both the United Nations and the FAO. He was assigned to the Programme's Sub-Office at Mazar-e-Sharif in Afghanistan as an emergency officer at grade P.3 on a fixed-term appointment which was renewed several times. On the departure of the Head of the Sub-Office, he acted as Officer-in-charge there from 20 May to 29 July 1996. He was transferred to Mozambique with effect from 1 August 1996 and his appointment was extended to 31 July 1997.

On 25 August 1996 a new Head was appointed at the Sub-Office. That official wrote to the Country Office for Afghanistan reporting on certain aspects of the complainant's management while he had been in charge, particularly regarding the "food for work" projects for which the complainant had been responsible. He considered that the complainant had approved an excessive number of such projects. Rumours of the allegations being made against him reached the complainant in Mozambique. Holding the Head of the Sub-Office in Mazar-e-Sharif responsible, he sent him a strongly-worded letter dated 7 October 1996. The letter was perceived to have a threatening tone and led to an official investigation into the complainant's conduct by the Office of Investigation and Inspection (hereinafter "OEDI"). As a result, the complainant was summoned to a meeting at the end of January 1997 in the Afghanistan Country Office. He was questioned by the Director of the OEDI and two other officials over a two-day period, from 26 to 27 January 1997. Their discussion was recorded and transcribed. The investigators concluded that the allegations against the complainant had not been proved. The letter of 7 October was discussed during the interview and the complainant subsequently sent letters of apology to the officials concerned.

On 22 February 1997 a British daily newspaper published an article about problems with food-aid projects in Afghanistan. It was entitled "Food aid goes astray" and reported on the way a WFP employee had allegedly mismanaged "food-for-work" programmes. Although the article did not name the complainant, he was identifiable from the way it was worded.

The Director of Human Resources of the WFP wrote to the complainant on 14 April 1997. He referred to the letter of 7 October sent by the complainant to the Head of the Sub-Office, at Mazar-e-Sharif and said that he considered "the writing of a threatening letter to a colleague [to be] unacceptable conduct by an International Civil Servant"; consequently his contract, which was due to expire at the end of July 1997, would not be renewed.

In a letter of 2 June 1997 the complainant appealed to the Executive Director of the WFP against the non-renewal of his contract. In his appeal he referred to the publication of the newspaper article and said he was "intentionally defamed" by a senior WFP official. By a letter of 28 July 1997 the Executive Director rejected his appeal. She also mentioned that the newspaper article was not based on information supplied by WFP officials and that the Programme had protested to the newspaper concerned.

On 1 December 1997 the complainant lodged an appeal with the FAO Appeals Committee. In its report of 16 December 1999 the Committee found that, in view of the type of appointment he had, it was not necessary to give reasons for non-renewal. Although it noted that the reason given - unacceptable conduct - was not substantiated, it nevertheless recommended rejecting his appeal as unfounded. In a letter of 1 March 2000 the Director-General of the FAO endorsed that recommendation, which is the decision the complainant impugns.

B. Citing the Tribunal's case law, the complainant argues that the Organization is required to give reasons for the non-renewal of his contract. The burden of proof for establishing the reasons is on the Organization. The sole reason given was his "unacceptable conduct" in writing the "threatening" letter to the official in Afghanistan, and yet the Appeals Committee had found that that reason was not substantiated. In his view the Organization wrongly interpreted the letter: he did not threaten physical harm therein, he merely threatened that he would take legal action. Moreover, the OEDI investigation team found that there was no substantiation of misconduct. Therefore, he sees no justification for not renewing his contract.

The article in the newspaper was a source of embarrassment to him and constituted defamation. He was identifiable in the article and it is clear that the information was leaked to the newspaper by a "knowledgeable person" with a view to placing him in an "embarrassing light". The WFP has to "bear the consequences" of the actions of those responsible. Citing Judgment 361 (*in re* Schofield) he contends that the Administration has a duty of care towards officials with regard to "their dignity and reputation and shall not cause them unnecessarily personal distress". In allowing the information to reach the newspaper, the WFP failed in its duty of care towards him.

He seeks the quashing of the impugned decision, reinstatement, interest on back pay due to him, moral damages in an amount of 100,000 United States dollars and costs.

C. In its reply the Organization submits that the complainant was separated from service upon the expiry of his fixed-term appointment in accordance with Staff Rule 302.907 and paragraph 305.5123 of the FAO's Administrative Manual. Under both those provisions, fixed-term appointments expire automatically and no notice is necessary; they were incorporated into the terms and conditions governing his appointment, and he accepted them by signing his letter of appointment. Even so, the complainant was given three months' notice and he was informed of the Organization's valid reasons for not renewing his contract. The complainant had "fallen below" the standards applicable to an international civil servant, and had proved himself to be unsuitable for further service with the Programme. He was given the opportunity to be heard before the impugned decision was taken.

In finding that there was not satisfactory proof of the allegations against the complainant, the investigation team was only referring to the allegations in relation to his work. The team's conclusion was not referring to the letter that the complainant had written to the official in Afghanistan. It is an undisputed fact that he wrote it. A "reasonable reading" of the letter leads to the conclusion that there was a menacing tone throughout it.

The Organization considers his claim for moral damages "for defamation and embarrassment" irreceivable; the complainant has not challenged an administrative decision on this matter and therefore has failed to exhaust the internal means of redress in a timely manner. The non-renewal of his contract is in no way related to the publication of the newspaper article. Furthermore, the Organization cannot be held responsible for its publication. The complainant has not demonstrated that the personal distress he suffered arose from any administrative decision taken by an official of the Programme or indeed by any person linked to his case or to the matters discussed in the article. The article appeared in the press at a time when the Organization had cleared the complainant of charges of misconduct and therefore it would not have supplied the information to which he objects.

D. In his rejoinder the complainant contends that his claim to moral damages for defamation is receivable. He submits that it follows from the case law that, if the impugned decision is held to be illegal, then the surrounding circumstances can "influence the remedy". He notes that no written communication between the WFP and the newspaper office has been produced, and concludes that the WFP defended him in an informal and inadequate way.

He takes issue with the Appeals Committee's view that reasons for non-renewal do not have to be given. That is, he says, clearly contrary to the case law of the Tribunal, which is based on general principles of law and therefore overrules the provisions of the staff regulations.

He believes that in clearing him of "misconduct" the investigation team was also clearing him of misconduct with

respect to his letter to the new Head of the Sub-Office. It is clear from the transcript of the investigation interview that the letter was an integral part of the discussion.

E. In its surrejoinder the Organization insists that it was clear from the overall tone of the letter that it contained far more than threats of legal action and invites the Tribunal to consider the letter in its entirety. It points out that non-renewal of the complainant's contract did not constitute a disciplinary measure within the meaning of the Administrative Manual. It chose not to renew his contract for reasons of unsuitability for service and put its decision into effect with due regard for relevant rules and the case law of the Tribunal.

It rebuts the complainant's allegations about the way it dealt with the newspaper article and reiterates that there is no causal link between the decision of non-renewal of his contract and the fact that the article appeared in the press.

CONSIDERATIONS

1. The complainant was recruited by the World Food Programme on 9 November 1992 as an emergency officer at grade P.3 at Mazar-e-Sharif in Afghanistan. Before a transfer to Mozambique, which took effect in August 1996 he acted as Officer-in-charge of the Sub-Office at Mazar-e-Sharif from 20 May to 29 July 1996.

2. On 25 August 1996 a new Head of the Sub-Office at Mazar-e-Sharif was appointed. He subsequently wrote a report to the Country Office for Afghanistan on the management of the Sub-Office by the complainant. He reported that an excessive number of "food for work" projects had been approved by the complainant and that projects were poorly managed.

3. On 7 October 1996 the complainant wrote to the Head of the Sub-Office (whom he had never met) in the following terms:

"Dear colleague,

I heard that you are on a campaign against my reputation and my career. If this is true, I wonder why would you wish to create a powerful enemy like me. You must be ill-advised as you are underestimating my ability to counter-react.

You should ask yourself: Why do you need to antagonize Ali? What will you gain by bad-mouthing Ali? Who are you to judge Ali's work? What could be the result of a confrontation with someone you had never met and who can be a very good or a very bad person? By your vicious allegations against me, how many personal friends you could annoy in a dangerous place such as Afghanistan?

I am still awaiting the conclusive evidences of your investigative report. Probably, I will not respond to it but be certain that if you are not careful I will sue you for misrepresentation and defamation. Further, if you do not stop your innuendoes right away, more unpleasant confrontations may have to follow. I am warning you as I do not want an unnecessary bloody contest. Please advise also [X] to refrain from unfounded insinuations.

You could build your own kingdom without questioning my integrity. You could reduce or change the orientation of the programme without insulting me. Please concentrate on doing your job rather than criticizing someone who has already left the Afghan Programme.

Kindly please be wise and don't start a devastating war you can never win. And if you are of those who think that anyone from the Third World must be corrupted then you are wrong and you should quickly readjust your thinking.

I hope you can avoid this nasty struggle.

Truly,"

4. When WFP headquarters received a copy of this letter, the Head of the Sub-Office at Mazar-e-Sharif was ordered to leave his duty station in mid-November 1996 for his own safety and he was then sent to another duty station on 31 January 1997. The Organization considers security a major problem in Mazar-e-Sharif and that it is extremely difficult for local authorities to provide a secure environment for United Nations personnel. In that region

militia and citizens are heavily armed.

5. The Office of Investigation and Inspection (OEDI) carried out an investigation into the allegations against the complainant and the letter of 7 October 1996. An enquiry was held over two days, on 26 and 27 January 1997. It took the form of an interview with the complainant; present at the interview were the Director of OEDI and two other officials. Prior to commencement, the complainant was given an opportunity to reply in writing to a series of questions. The complainant denied all the allegations.

6. In summing up the interview the Director of OEDI said it had been primarily concerned with ascertaining whether the complainant obtained personal benefit from any of his work with the WFP in terms of receiving bribes or selling food and receiving money. He said none of the allegations had been proved to their satisfaction and they accepted the complainant's total denial of them. He said there would not be a lengthy report and no disciplinary action would be taken against the complainant.

7. Referring to the letter, the Director said it was not the professional behaviour expected of an international civil servant. More specifically, he stated: "We do not expect you to be writing threatening letters to people, particularly when they're in a war zone, and ... you've been there for a long time and you claim to have a lot of friends who can be very dangerous, and you claim to be a very dangerous person yourself. ... I think all of us thought it was pretty threatening when we saw it".

8. On 28 January 1997 the complainant wrote letters of apology to the Head of the Sub-Office at Mazar-e-Sharif and the other person mentioned in the letter.

9. The substance of the interview was reviewed at WFP headquarters and on 14 April 1997 the WFP's Director of Human Resources wrote to the complainant to say that writing a threatening letter to a colleague constituted unacceptable conduct by an international civil servant and that his fixed-term appointment, due to expire on 31 July 1997, would not be renewed.

10. On 2 June 1997 the complainant lodged an appeal with the Executive Director of the WFP against the non-renewal of his contract. He also mentioned an article published in a British daily newspaper on 22 February 1997 which he alleged defamed him. His appeal was rejected as unfounded by the Executive Director on 28 July 1997. The complainant then appealed to the FAO's Appeals Committee on 1 December 1997 and the Committee reported on 16 December 1999. It too recommended that the appeal be rejected as unfounded.

11. By letter dated 1 March 2000 the Director-General of the FAO, concurred with the recommendation and dismissed the appeal. This is the decision impugned.

12. In this case the complainant received three months' notice in advance that his contract would not be renewed. The reason given was that the writing of a threatening letter to a colleague was unacceptable conduct by an international civil servant.

13. The decision not to renew a contract is a discretionary one reviewable only on limited grounds. The complainant argues that the Organization must give reasons for non-renewal and the burden of proof lies with the Organization. The complainant claims the letter was not physically threatening; it only threatened a lawsuit. He analysed the letter line by line seeking to prove that it was not threatening.

14. The letter has been reproduced in full in consideration 3. In the opinion of the Tribunal, the letter speaks for itself. To send such a letter to what was in reality a war zone, where the complainant had spent nearly four years and made many contacts, could be interpreted as threatening and the Organization was justified in so treating it. Even if the complainant wrote it in the grip of emotion, this still did not excuse his behaviour.

15. In the opinion of the Tribunal the reason given for not renewing the complainant's contract stands up to examination. There are no grounds for quashing the decision. Since the decision not to renew the contract stands, any claim for consequential relief fails.

16. The allegations of defamation by the complainant in connection with publication of the newspaper article were not directed against an administrative decision challenged by way of a letter of appeal to the Executive Director in compliance with Staff Regulation 301.111 and Staff Rule 303.1311. Nor was there a claim for moral damages. The claims of the complaint are irreceivable on that score on the grounds that the complainant failed to exhaust the

internal means of redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Catherine Comtet