

## NINETY-SEVENTH SESSION

Judgment No. 2333

The Administrative Tribunal,

Considering the complaint filed by Mr M. R. H. against the Food and Agriculture Organization of the United Nations (FAO) on 13 August 2003 and corrected on 22 August, the FAO's reply of 1 December, the complainant's rejoinder of 15 December 2003 and the Organization's surrejoinder of 9 February 2004;

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

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

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

A. The complainant is a British national and was born in 1938. He started working for the FAO as a consultant in 1983, and thereafter was employed by the FAO on a number of occasions as a consultant or team leader on various missions. He reached the age of 62 in June 2000. From 1 to 26 October 2000 he worked on an assignment in Uzbekistan, but the honorarium paid to him by the FAO was lower than for previous assignments.

Paragraph 12(b)(i) of the provisions of the "Programme for the Use of Retirees" (also referred to as the guidelines of the Retirees Programme) provides:

"The national provisions on retirement age applicable to retired [...] experts [...] will determine whether a national expert should be employed under the Programme or not. [...] However any proposal to employ an expert over the age of 62 outside the Programme should be submitted to [the Office of the Director General] for approval."

On 2 October 2000 the complainant wrote to the Director General, challenging the level of his honorarium for Uzbekistan. In November 2000 he made further enquiries regarding the daily rate applicable to his assignment. At that time he was told that, being over 62, he was considered as a retired expert and retirees were paid at a lower rate. On 22 January 2001 the Director of the Personnel Division replied to the complainant on the Director General's behalf. She informed him that there had been a misunderstanding of the guidelines of the Retirees Programme, and that until such time as he retired under the national provisions of the United Kingdom the FAO would not consider him as a retiree and would pay his assignment in Uzbekistan at the normal rate. By way of conclusion the letter said: "We [...] look forward to your continued collaboration with the Organization."

The complainant wrote to the same Director on 8 May 2001 stating that since the FAO had not offered him any further consultancy work he felt he had been victimised. In a reply of 31 October 2001 the Chief of Personnel Policy and Planning confirmed the Organization's position, reiterating that the complainant would not yet be considered as a retiree to be employed under the Retirees Programme. Not having been offered any further assignments, on 28 March 2002 the complainant lodged an appeal with the Director-General, contending that he was entitled to compensation for loss of earnings. Following the rejection of that appeal, on 18 June 2002 he filed an appeal with the Appeals Committee. Noting that there was no specific administrative decision that adversely affected the complainant, in its report of 14 March 2003 the Committee recommended dismissing his appeal as not receivable, and unfounded on the merits. By a decision of 8 May 2003, which the complainant received on 20 May, the Director-General endorsed the Committee's recommendation and rejected the complainant's appeal. That is the impugned decision.

B. The complainant argues that his appeal of 28 March 2002 could not be considered as time-barred, given that he had to wait a reasonable period of time to ascertain that he was not being employed.

He has two main pleas. First, he submits that he has been victimised for challenging the FAO's decision to pay him at a lower rate for his assignment in October 2000. That led to him being blacklisted and he has been offered no consultancy work since November 2000; potential assignments that were mentioned to him ultimately failed to materialise. He submits that his right to work has been violated.

Secondly, he assumes that by not employing him the FAO is exploiting the procedural rule in paragraph 12(b)(i) of the document headed "Programme for the Use of Retirees", whereby approval has to be sought from the Office of the Director General if it is intended to employ experts aged 62 or over. Because of the necessity of obtaining prior approval, he assumes that the FAO is reluctant to employ experts above that age and bypasses them in favour of younger consultants. He considers the rule to be both arbitrary and discriminatory on the basis of age, contending that it has caused him financial loss and prematurely deprived him of his livelihood because under existing FAO rules he could have worked until 65 – his national retirement age.

The complainant seeks the quashing of the rule contained in paragraph 12(b)(i) and compensation for loss of earnings between 1 November 2000 and 15 June 2003 (when he reached 65).

C. In its reply the Organization contends that the complaint is irreceivable since it does not challenge a specific decision within the meaning of the Tribunal's Statute, nor does the complainant allege non-observance of the terms of any consultancy contract. By waiting a "reasonable period of time" before submitting an appeal, he would appear to be establishing his own time limits. The last administrative decision of any relevance was communicated to him by letter of 22 January 2001, but that decision gave him satisfaction and the present complaint has stemmed from an appeal he filed with the Director-General on a separate issue, some 14 months later. In its view the complaint is based on the mistaken notion that the Organization is at fault for not recruiting him, and that that is a decision which he can challenge. Nonetheless, any such decision not to recruit the complainant would lie outside the scope of the Tribunal's competence.

The FAO also considers the complaint to be devoid of merit. It refutes the allegation of victimisation, pointing out that it had given the complainant no categorical assurances that he would be employed; besides which a consultancy agreement is a bilateral agreement requiring the consent of both parties.

It denies that the rules governing the Retirees Programme are either arbitrary or discriminatory, contending that the complainant's allegations stem from a misunderstanding of the nature of the programme. Firstly, in order to participate therein, a person has to be in receipt of a pension in accordance with national provisions, so in the complainant's case he would not have been able to be employed under the programme until the age of 65. Secondly, as set out in Staff Rule 302.4.11, age 62 is the mandatory retirement age for all FAO officials; however, the rules provide scope for the recruitment of persons beyond 62 following the procedure outlined in paragraph 12(b)(i) of the "Programme for the Use of Retirees". As is clear from that paragraph, exceptions to that age limit can be made by the Director-General.

D. In his rejoinder the complainant presses his pleas. He holds to his belief that the mandatory retirement age of 62 set by the FAO does not apply to national consultants; for them it is their national retirement age that applies, and any attempt on the part of the FAO to pick and choose consultants once they have attained 62 is discriminatory.

E. In its surrejoinder the Organization reiterates that the age limit for all appointments is 62. Paragraph 12(b)(i) embodies that principle by requiring the approval of the Office of the Director-General for hiring any person beyond that age.

## CONSIDERATIONS

1. The complainant was recruited as a consultant by the FAO for a large number of its projects between 1983 and 2000. His last consultancy came to an end on 26 October 2000. There was a dispute as to the honorarium payable to him for that consultancy because he had then reached the age of 62 and special rules apply to the appointment of consultants who have reached that age. In the end, the dispute was resolved in the complainant's favour. However, he has not since been offered work as a consultant with the FAO even though there is reason to believe that he has been proposed for such work from time to time.

2. On 28 March 2002 the complainant appealed to the Director General seeking the annulment of the rule relating to the employment of consultants who have reached the age of 62 but who have not retired. He also sought compensation for the failure to provide him with consultancy work after his assignment in October 2000. His appeal was rejected as irreceivable. He then appealed to the Appeals Committee. The Committee recommended that his appeal be rejected as not receivable and, on 8 May 2003, the Director-General informed the complainant that he had decided to accept that recommendation. The complainant challenges that decision.

3. It is contended in the complaint that the failure of the FAO to offer the complainant consultancy work since November 2000 is the result of victimisation and that paragraph 12(b)(i) of the document headed “Programme for the Use of Retirees” is discriminatory. The complainant requests the Tribunal to urge the FAO to quash that rule and to compensate him for loss of earnings over the period from 1 November 2000 to 15 June 2003 when he reached 65 – his national retirement age.

4. The FAO submits that the complaint is irreceivable because it “does not impugn any specific administrative decision” which the complainant seeks to have set aside. Moreover, it refutes the allegation that the rules applying to the appointment of persons over the age of 62 are discriminatory.

5. Before turning to the question of receivability, it is convenient to note the rules which impact on the appointment of consultants who have reached the age of 62. The first is Staff Rule 302.4.11 which provides, without distinction between staff members and outside consultants, that:

“Appointments shall not be granted to persons under 18 years of age or over the mandatory retirement age of 62.”

Pursuant to Rule 303.2.22, the Director-General may make exceptions to the Staff Rules and has done so, in relation to Rule 302.4.11, in the “Programme for the Use of Retirees”.

6. The Retirees Programme allows for consultancy and other contracts to be offered to “retirees between 55 and 70 years of age” at an honorarium not exceeding 100 United States dollars per day. Paragraph 12(b)(i) of the document headed “Programme for the Use of Retirees” provides:

“The national provisions on retirement age applicable to retired civil servants or retired experts from the private sector will determine whether a national expert should be employed under the Programme or not. [...] However any proposal to employ an expert over the age of 62 outside the Programme should be submitted to [the Office of the Director General] for approval.”

The requirement of approval for the appointment of experts over the age of 62 “outside the Programme” is clearly based on Rule 302.4.11.

7. For his last consultancy, the complainant was initially paid an honorarium of 100 dollars per day on the assumption that he had been appointed under the Retirees Programme. Subsequently, the Organization informed him that he was outside the programme because the retirement age for him in the United Kingdom, of which he is a national and where he resides, is 65. He was then paid his normal honorarium but, as earlier noted, the FAO has not since offered him any work as a consultant.

8. The Tribunal is relevantly confined by Article II of its Statute to hearing complaints by officials and former officials “alleging non-observance, in substance or in form, of the terms of appointment [...] and of provisions of the Staff Regulations of [the FAO]”. This complaint does not relate to the non observance of the terms of appointment of the complainant or of the Staff Regulations applicable to him during any period during which he was employed as a consultant by the FAO. On the contrary, it relates to a period during which he was not employed as a consultant and, thus, a period during which there were no relevant terms of appointment or applicable regulations which could or could not be observed. Accordingly, the complaint is not receivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.