*Registry's translation,
the French text alone
being authoritative.*

111th Session **Judgment No. 3033**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. H. against the Food and Agriculture Organization of the United Nations (FAO) on 30 June 2009 and corrected on 24 July, the Organization's reply of 9 November, the complainant's rejoinder of 18 December, amended on 22 December 2009, and the FAO's surrejoinder of 12 March 2010;

Considering Article II, paragraph 5, 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, a national of Burundi born in 1963, joined the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations (UN) and the FAO, on 1 August 2003. He received a service contract which was extended on several occasions, ultimately until 31 October 2006. From 1 November of that year he was employed on a six-month consultancy contract, his duty station being N'Djamena (Chad). On 25 November, when the United Nations Department of Safety and Security declared a

Phase III security situation in N'Djamena, a group of internationally recruited staff members, including the complainant, were identified as non-essential staff and were evacuated to Cameroon, with the exception of the complainant, who was repatriated to Bujumbura (Burundi) on 1 December 2006. Having learned that these colleagues had returned to work in N'Djamena, on 3 January 2007 the complainant enquired when he would return to his own post. That same day he received a reply by e-mail to the effect that his appointment had ended on 15 December 2006.

By an e-mail of 16 March 2007 the complainant asked to be reinstated and, on 10 May, he made a written complaint to the Office of the WFP Ombudsman. In his internal appeal, lodged on 30 July, he repeated his request. On 10 August he filed his first complaint with the Tribunal, which he withdrew on 10 December 2007. On 4 February 2008 he rejected the offer of an amicable settlement of the case. By a letter of 19 February 2008 the Executive Director of the WFP informed him that she was dismissing his appeal, although she had decided to extend his contract until 17 January 2007, in view of the fact that he had only received the two weeks' written notice of termination provided for in his contract on 3 January 2007. She explained that for the period from 16 December 2006 to 17 January 2007 he would receive his honorarium and the security evacuation allowance, but neither the daily subsistence allowance nor hazard pay. The complainant then lodged an appeal with the Appeals Committee of the FAO. In its report of 22 December 2008 the Committee recommended that the appeal be dismissed as unfounded. By a letter of 26 March 2009 the Director-General of the FAO informed the complainant that he had decided to endorse that recommendation. That is the impugned decision.

B. The complainant points out that the Phase III security situation involves temporarily bringing together all internationally recruited staff and/or their spouses and dependants at one or more concentration points, and argues that the initiation of Phase III cannot be a valid reason for terminating a contract. He states that the WFP is unable, in

support of its decision, to point to any serious breach on his part of his professional duties, nor can it argue that his post was abolished, because when he left he was immediately replaced. In these circumstances, he is surprised to have been identified as among the non-essential staff. He is also surprised that he was the only staff member in that category not to have been evacuated to Cameroon, and given that he was also the only one whose appointment was terminated, he complains that his treatment was unfair and discriminatory.

The complainant emphasises, that before he was repatriated, his supervisors had assured him that he would return to his post as soon as the situation in N'Djamena improved. Since he did not receive any official notice, when being evacuated from Chad, that his appointment was being terminated, he considers that no such termination took place.

He requests the setting aside of the impugned decision, "immediate and unconditional reinstatement" and payment of 420,464 United States dollars as arrears of remuneration (honorarium, daily subsistence allowance and hazard pay), together with the security evacuation allowance due to him for the period from 1 December 2006 to 31 May 2007, as well as moral and material damages. He also claims costs.

C. In its reply the Organization contends that the decision to terminate the complainant's appointment was taken in accordance with the United Nations Field Security Handbook and the FAO Administrative Manual. It states that the purpose of declaring a Phase III security situation is to deal with a situation of *force majeure,* and that this is a "reasonable ground" for terminating a consultancy contract. At the time, the complainant was told orally – as he has himself admitted at various stages in the proceedings – that as he could not perform his functions away from his duty station, and as it was impossible to predict how long the crisis would last, his appointment would be terminated and he would be repatriated. In

view of the degree of insecurity prevailing in N'Djamena and its own obligation to ensure the safety of its staff, it considers that it acted in good faith towards the complainant. The defendant admits that, because of the emergency situation, he was not given any "written notice of termination" when he was repatriated, contrary to the terms of his contract. However, by deciding to extend his contract until 17 January 2007, the Executive Director of the WFP had corrected that error.

The FAO also denies the allegations of discriminatory treatment, on the grounds that five of the six colleagues of the complainant who were evacuated to Cameroon were in a contractual situation different from his, and although the sixth, also a consultant, did not have his contract terminated, that was because, unlike the complainant, it was possible for him to perform his functions away from his duty station.

The Organization states that the termination of an appointment, like the choice of an evacuation site, is a discretionary decision, and in this case the decision at issue has none of the flaws which would invite the Tribunal's censure. At no time was the complainant given any promise that he would be able to resume his functions in N'Djamena. As for the person who had supposedly replaced him, that person had been recruited in November 2006 to take over the functions of his former immediate supervisor.

The defendant points out that the request made to the complainant by the Executive Director, in her letter of 19 February 2008, for him to furnish his bank details so that the sums due to him could be paid, remained unanswered, so it could not be accused of failing to pay them. In that connection, it explains that the extension of the complainant's contract does not entitle him to payment of the daily subsistence allowance or to hazard pay, since those payments are due only to staff who are physically present at the duty station.

D. In his rejoinder the complainant reiterates his pleas. After reviewing his career and the "uninterrupted contractual links" which existed between himself and the WFP since 1 August 2003, he maintains that no valid reason was given by the latter for its decision to

terminate his appointment. In his view, the e-mail of 3 January 2007 cannot replace "official notification of termination", and in failing to produce such notification the defendant disregarded the requirements of General Administration Circular ADM95/002. He asserts that the provisions of the United Nations Field Security Handbook were infringed as regards the policies and procedures to be followed in the event of evacuation and relocation.

The complainant states that he did not refuse to supply his bank details, but because he was disputing the amount owed to him, he preferred not to accept part payment.

E. In its surrejoinder the FAO maintains its position. In its view, the e-mail of 3 January 2007 was indeed an "official written administrative document" conveying the decision to terminate the complainant's appointment.

CONSIDERATIONS

1. The complainant, a national of Burundi, was employed by the WFP from 1 August 2003 under a service contract which was extended several times until 31 October 2006. On 30 October 2006 he accepted a consultancy contract for six months, to run from 1 November 2006 to 30 April 2007, the duty station being N'Djamena (Chad).

2. On 25 November 2006 a Phase III United Nations security situation was declared in Chad and the complainant, who was classified as non-essential staff, was repatriated to Burundi on 1 December 2006.

On 3 January 2007, having enquired when he would return to duty in N'Djamena, he received an e-mail informing him that he had been repatriated because of the crisis in Chad and because he was considered to be non-essential staff. He was also informed that, as already explained, his contract had been maintained between the date on which he had left N'Djamena and 15 December 2006, and that

consequently the latter date had been treated as the date on which his contract had come to an end.

3. On 19 February 2008 the Executive Director of the WFP dismissed the appeal lodged by the complainant on 30 July 2007 against the decision to terminate his contract. However, admitting that it was not until 3 January that the complainant had been served with the two weeks' written notice of termination required under the terms of his contract, she informed him that his contract had been extended until 17 January 2007 and that he would be paid his honorarium, as well as the security evacuation allowance.

4. On 19 March 2008 the complainant lodged an appeal with the FAO Appeals Committee, challenging the decisions to classify him as non-essential staff, to evacuate him to his country of permanent residence and to terminate his contract for no valid reason, inter alia.

In its report of 22 December 2008 the Committee recommended dismissal of the appeal as groundless. It took the view that the decision to evacuate the complainant to his country of residence was justified and non-discriminatory; that the termination of his contract was justified because of the uncertainty as to the duration of the crisis and the fact that he could not perform his functions outside of his duty station; that the notice of termination was "unambiguous", although procedures had not been followed either in a formal sense or as to the notice period; and that the WFP had "retrospectively admitted its error and taken action to comply with the notice period".

5. The complainant is asking the Tribunal to set aside the decision of 26 March 2009 by which the Director-General of the FAO dismissed his appeal as groundless, and to order his "immediate and unconditional reinstatement" and payment of the sum of 420,464 United States dollars, comprising remuneration arrears, the security evacuation allowance for the period between 1 December 2006 and 31 May 2007, and moral and material damages. He is also claiming costs.

He contends that the declaration of a United Nations Phase III security situation could not possibly be a valid reason for ending his contract, and that he should have been evacuated to Cameroon like his colleagues, without discrimination, and should have resumed his functions from January 2007 when the security situation in Chad passed from Phase III to Phase II. He submits that his contract was never terminated because, prior to his evacuation from Chad, he was not given notice of any such decision.

6. The defendant argues that the complaint should be dismissed as unfounded. In its view, its decision was fully justified. Since the duration of the United Nations Phase III security situation could not be foreseen and the complainant's services were not indispensable, there were reasonable grounds for putting an end prematurely to his consultancy contract and evacuating him to his country of origin.

7. In his last written pleadings submitted to the Tribunal, the complainant reviews his professional career in order, specifically, to show that he has had "uninterrupted contractual links" with the WFP since 1 August 2003.

The Tribunal however considers that this information has no bearing on the outcome of the case before it. It will therefore confine itself to examining the dispute which arose from the termination of the consultancy contract which had been signed, without reservation, by the complainant on 30 October 2006.

8. The Tribunal will first consider the plea that the termination of the contract was unlawful because the complainant never received lawful official notice of the termination when he was repatriated to Burundi.

9. The defendant admits that the complainant was evacuated from Chad on 1 December 2006 because a Phase III security situation had been declared, on a decision taken on 25 November 2006 by the head of the United Nations Department of Safety and Security in

New York, that he was formally told "*a posteriori*, on 3 January 2007 [of the termination of his contract] and that he had not received any written notice of [his] dismissal before he left his duty station, which is contrary to the conditions of [employment]".

It contends, however, that these facts were taken into account by the Executive Director of the WFP in her decision of 19 February 2008, in which the complainant was informed of the extension of his contract until 17 January 2007, and that there is no doubt that the date on which his employment formally came to an end was 18 January 2007.

10. The Tribunal emphasises that any decision to terminate an employee's contract must be clear and precise and must comply with the applicable formal requirements. Moreover, like any decision unfavourable to an official, it cannot take effect before the date on which he or she is notified of it (see Judgment 1531, under 8).

It is clear from the file that, as far as the Organization was concerned, the complainant's appointment came to an end on 15 December 2006, the date of expiration of the notice period which had commenced on the date of the complainant's repatriation to Bujumbura.

However, the e-mail of 3 January 2007 addressed to the complainant in reply to a request concerning the date on which he would resume his functions cannot be regarded as official notification of the decision to end his appointment. The FAO Appeals Committee correctly pointed out that the communication of 3 January 2007 was of an informal nature and did not follow the practices laid down in General Administration Circular ADM95/002, which stipulates that "All contracts formed through e-mail offer and acceptance messages, as well as other legal and financial documents, must be formalized and confirmed via paper documents within two weeks".

11. The defendant did in fact attempt to "reorganise" this unlawful decision through the Executive Director's decision of 19 February 2008, but as that decision could not legally have

retroactive effect, it was itself unlawful inasmuch as it set the date for the termination of the contract at 18 January 2007.

12. The impugned decision must, therefore, be set aside, without the need for the Tribunal to rule on any other plea. The complainant must be regarded as having been in the employ of the defendant until the prescribed end of his consultancy contract, which was 30 April 2007. He will therefore be entitled to receive his honorarium for the whole of that period, as well as his arrears of security evacuation allowance.

13. The complainant is requesting immediate reinstatement.

The Tribunal cannot accept this request, as the complainant was recruited to perform consultancy tasks for a period defined in his contract of employment.

14. The file shows that the complainant was unlawfully kept in his place of permanent residence even when his colleagues who had been evacuated had resumed working in Chad once the security situation in the country made this possible. As a result, he suffered moral injury which should be compensated through an indemnity payment of 8,000 United States dollars.

15. Before the FAO Appeals Committee, the complainant challenged the fact of having been classified as non-essential staff and evacuated to his country of permanent residence, whereas his colleagues had been evacuated to Cameroon. However, paragraph 5.47(c) of the United Nations Field Security Handbook provides that "[t]he determination of essential staff members for security purposes will be made by the Designated Official, and the Security Management Team; however, any staff member who is unable to effectively carry out his/her assigned tasks due to the deteriorating security situation should be considered non-essential". The Tribunal considers that the decisions taken in the matter are within the discretion of the Organization and are therefore subject to only limited review. The

same applies to the choice of the evacuation site. In this case, the complainant has not produced any evidence to persuade the Tribunal that there are grounds to set these decisions aside.

16. As he succeeds in part, the complainant is entitled to the sum of 2,000 dollars for costs.

DECISION

For the above reasons,

1. The impugned decision as well as the decision of 19 February 2008 are set aside.
2. The FAO shall pay the complainant his honorarium and arrears of security evacuation allowance, as stated under 12, above.
3. It shall pay the complainant compensation for moral injury in the sum of 8,000 United States dollars.
4. It shall also pay him 2,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 May 2011, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet