FORTIETH ORDINARY SESSION

In re KENNEDY

Judgment No. 339

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Food and Agriculture Organization (FAO) by Mr. Bruce Francis Kennedy on 13 March 1977, the FAO's reply of 7 June, the complainant's rejoinder of 1 September and the FAO's surrejoinder of 7 December 1977;

Considering Article II, paragraphs 5, 6 and 7, and Article VII, paragraph 1, of the Statute of the Tribunal, Article VIII.1 of the FAO Constitution, the FAO Staff Regulations, particularly 301.111 and 301.12, the FAO Staff Rules, particularly 303.114 and 303.138, the FAO Manual, particularly sections 317.6 and 331, and the General Rules of the Organization, particularly Rule XXXIX.1;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a United States citizen, applied in August 1975 for a "consultancy" in the Department of Fisheries of the FAO in Rome. In October Mr. Benz of the Liaison Office for North America told him that the FAO was considering appointing him. On 12 November Mr. Benz wrote on the FAO's behalf offering him a six-month consultancy and asking him to undergo the required medical cheek-up and get the "loyalty clearance" required by the United States Government. The complainant accepted the offer and did what was required. On 11 December Mr. Benz sent him two copies of his "terms of employment" and asked him, if he accepted, to sign and return one copy. He did so. That document said that the appointment would be confirmed only after satisfactory medical clearance and after Government and "other internal clearances". It appears that the FAO received the loyalty clearance and later the medical clearance.

B. The project for which the complainant was to work was a United Nations Development Programme (UNDP) project. The UNDP ran into financial difficulties and had to suspend or cancel credits. The credits for the complainant's consultancy were out off. In February 1976 the FAO therefore told him that it cancelled the offer of appointment. He protested at once against what he saw and still sees as a unilateral breach of a contract between two parties - himself and the only entity he had been in correspondence with, the FAO. In March 1976 he was told that the reason for the withdrawal of the offer was the lack of the "other internal clearances" mentioned at the end of paragraph A above. The complainant then wrote to the FAO claiming compensation for the prejudice he had suffered and in a letter of 14 December 1976 the FAO replied that it was "not in a position to assist [him] any further in this particular case" and that it would consider any appeal irreceivable because he had never become a member of the FAO staff. The complainant took the view that he had exhausted any means of resisting the decision as were "open to [him] under the applicable Staff Regulations" and lodged the present complaint.

C. In his claims for relief, as amended in his rejoinder, the complainant asks the Tribunal (a) to quash the Director-General's decision of 14 December 1976 firming cancellation of the offer of appointment to the complainant and refusing to consider further his claims for compensation for injury sustained by him because of such cancellation; (b) to fix the amount of compensation to be paid for the injury sustained by him at the full amount of the salary and allowances which he would have received over the period of his contract, and to award further compensation for the expenses which he is entitled to have reimbursed; (c) to fix at twice the amount claimed in (b) above compensation for the moral injury sustained by him owing to the FAO's sudden and unexpected cancellation of its offer of appointment; (d) to order the FAO to pay him $1,000 as costs; (e) to order the FAO to pay interest at the rate of 8 per cent a year on the amounts claimed in (b) and (c) above from 17 February 1976, the date on which the FAO repudiated the contract; and (f) to order such further relief as the Tribunal deems proper.

D. The FAO contends, first, that the complaint is irreceivable on the grounds that the complainant did not go before the Appeals Committee and has so failed to exhaust the internal means of redress. Secondly, the Tribunal is not competent: according to Article II, paragraph 6, of its Statute it may hear only complaints by a staff member or a

former staff member, and the complainant is neither. Thirdly, a mere offer of appointment cannot be treated as a firm contract and so the FAO is not bound to pay any compensation, beyond repayment of medical and similar expenses, for failing, for reasons beyond its control, to confirm the appointment. Accordingly the FAO asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

On the jurisdiction:

1. The Organization objects that the Tribunal's jurisdiction is limited to complaints by its officials and that the complainant, never having received his appointment, never became an official. Article II, paragraph 5, of the Tribunal's Statute provides that "the Tribunal shall also be competent to hear complaints, alleging non-observance, in substance or in form, of the terms of appointment of officials". In the opinion of the Tribunal the significant words in this provision are "terms of appointment". The appointment is not imposed upon the official on such terms as the Organization alone thinks fit; it is the result of a contract which contains the terms agreed between the Organization and the person to be appointed. One of the terms of the contract is that the person in question will in due course, perhaps forthwith or perhaps on some future date, and subject to the fulfilment of any conditions precedent to appointment which the contract may prescribe, be appointed as an official. If the Organization does not observe this term, the non-observance falls within paragraph 5. It is true that for jurisdiction to be conferred on the Tribunal the complainant must establish that there was a binding contract of appointment; but if, as here, there is a dispute about that, it is a dispute which under paragraph 7 the Tribunal is competent to determine.

2. The Organization, assuming against itself that the correct interpretation of Article II is that stated in the above paragraph, further objects that the interpretation is not that put upon the article in the Resolution of the FAO Conference which accepted the jurisdiction of the Tribunal. The English text of the Resolution refers to "complaints of alleged non-observance of the terms and conditions of appointment of FAO staff members" and the French to "les plaintes présentées par des membres du personnel". The Tribunal will not discuss whether there is any substantial difference between this wording and the wording of Article II, paragraph 5, nor whether, if there is a difference, an organisation which is acceding to the Tribunal can by appropriate words exclude a part of the jurisdiction conferred upon it by its Statute. It is unnecessary to discuss this because the Resolution does not show any intention of making a reservation or exclusion. The Statute is the document which is known to define the jurisdiction; the Resolution is an instruction to the Director-General to arrange for the Organization to accept that jurisdiction. If the Resolution does not use exactly the same words as the Statute, nothing is to be inferred from that.

3. Moreover, the Resolution does not show any intention of excluding this particular type of case, which must of its nature be very rare. It is not to be supposed that the Organization would deliberately break a concontract of appointment. It is only in the unusual situation when there is a genuine dispute about whether or not a contract has been made that the exact wording of the Statute can be of any importance. It is unrealistic to think that when the Conference passed the Resolution it had this rare situation in mind. Neither can it be assumed that, if it had it in mind it would have wished to leave without a remedy a person whose contract with the Organization had been broken. For these reasons the objection to the jurisdiction fails.

On receivability:

4. The Organization objects that the complainant has not, as required by Article VII of the Statute, exhausted such means of resisting the decision impugned as are open to him under the Staff Regulations. Under Staff Regulation 301.111 the Director-General has established a committee within the Organization to advise him in cases of appeal by individual staff members regarding a grievance arising out of disciplinary action or arising out of an administrative decision which the staff member alleges to be in conflict, either in substance or in form, with the terms of his appointment or with any pertinent staff regulation, staff rule or administrative directive. It is not necessary that the jurisdiction of this advisory committee should be precisely the same as the jurisdiction of the Tribunal. It would be neither irrational nor inconvenient if the question whether a contract of appointment had or had not been concluded was left outside the jurisdiction of a committee designed to deal with staff grievances rather than with questions of law. The question whether the present case is within the Staff Regulation depends upon whether a person whom the Organization has agreed to appoint formally as a staff member is to be deemed to be de facto a staff member within the meaning of the Regulation. Having regard to the correspondence summarised in the next paragraph the Tribunal will not decide this question.

5. It is open to an organisation, if it wishes, to dispense with the requirement in Article VII and organisations do not in practice always insist upon it in cases where they are satisfied that the disadvantages of an appeal under the Staff Regulations, i.e. the delay and expense, would be greater than the advantages of the process in a particular case. The complainant's first step after he was notified by the Director of Personnel that his "recruitment" would not be finalised was to inform the Director that he would like to present his claim for an indemnity "to the next level of administrative review"; he asked for procedural information about filing an appeal. The Director replied that no procedure existed for an appeal by a person not belonging to the staff of the Organization. The complainant then brought this to the attention of the Director-General. His letter was referred to the Director of Personnel, who sent the complainant a copy of the Staff Regulations and the Statute of the Tribunal, saying that these procedures applied to staff members, that the Organization would consider any appeal lodged by the complainant as irreceivable, but that the Tribunal would determine receivability for itself. The complainant replied that he concluded that this letter was a final decision and that he had exhausted any means of resisting it as were open to him under the Staff Regulations; accordingly, he proposed to file a complaint with the Tribunal. The Organization did not reply to this letter. In these circumstances the complainant was led by the Organization to believe that an appeal under the Staff Regulations would be pointless and the Organization cannot now be heard to object that it was not made.

On the merits:

6. In August 1975 the complainant applied to the Organization for a position as a consultant and after some correspondence the Organization sent him on 11 December 1975 a document headed "Terms of Employment" and requested him, if the terms were acceptable, to sign and return the document, which the complainant did on 23 December. Under these terms the consultancy was for a period of six months during which the complainant, who is a lawyer, was to prepare a study on "Public Corporations and Fisheries". The date when the consultancy was to commence is not stated on the form, but the earlier correspondence makes it clear that it was to be as soon as possible, which would mean immediately upon the fulfilment of the conditions mentioned in the next paragraph.

7. The following clauses (with the exception of a typed insertion referring to United States loyalty clearance) are all printed on the form. Clause 14 provided that appointment was subject to the satisfactory passing of a prescribed medical examination. Clause 15 provided that the offer of appointment was furthermore subject to United States loyalty clearance. Clause 16 is headed "Confirmation of Offer of Appointment" and reads as follows:

"Appointment is confirmed only after satisfactory medical clearance. Therefore, do not commence travel to the Duty Station nor take any other action which may result in the financial loss or personal inconvenience until you have received from us the confirmation of this offer of appointment."

8. The complainant's case is that this document constituted a binding contract under which the Organization was to make the appointment (or to confirm a provisional appointment, which comes to the same thing) if and when the stated conditions were fulfilled. The Organization's case is that there was no contract at all and that either party was at liberty to change its mind: the Organization could for any reason or none refuse to make or confirm the appointment and the complainant could likewise refuse to accept the appointment when it was made.

9. The Organization relies strongly on the second sentence of Clause 16 which repeats a warning already given in the correspondence. In the opinion of the Tribunal this sentence is consistent with either view. There is always a danger that a new recruit may take his health and loyalty for granted. By giving a warning (the sentence is not worded as a term of the employment; there is no breach of contract if a recruit disregards it) the Organization saves both him and itself embarrassment.

10. While the language of the document makes it possible to argue that the Organization is not bound to firm, it does not provide any basis at all for an argument that, if the appointment is confirmed, the complainant is not bound to accept it. His written acceptance is unqualified and on the Organization's argument appears to be meaningless. The alternative argument that the complainant is bound while the Organization is not is one which the Organization declines to advance. It would mean that the Organization would be acquiring for nothing an option for an undefined time on the complainant's services and would manifestly be difficult to sustain.

11. The Tribunal considers that the language and form of the document and the circumstances in which it was executed support the view that the Organization intended to make a commitment, albeit one that was subject to conditions. Owing to its failure to distinguish between a contract to appoint and the fact of appointment itself, the

Organization erroneously believed that it would not be legally bound until the appointment was actually made. This is the contention advanced in law. But on the facts there is nothing to suggest that the Organization did not at the time of the contract intend to commit itself. When the Director of Personnel announced the cancellation, his letter did not suggest that there had never been any commitment. The reason given was the financial situation of another international body, the UNDP; this was said either to cause "a lack of internal clearances" as required under Clause 16 or else to be a circumstance beyond the Organization's control. The latter point has not been pursued.

12. Accordingly, the document constituted a binding contact for a conditional appointment and the only question is whether the conditions were fulfilled. It is not disputed that the conditions in Clauses 14 and 15 either were fulfilled or would have been fulfilled by the complainant if the Organization had not terminated the contract. There remains to be considered the condition relating to "Government and other internal clearances". There is no explanation in the dossier of what this phrase is supposed to mean and since it occurs in a document composed and proffered by the Organization it is for the Organization in the first place to attribute a meaning to it. Without this elucidation the Tribunal cannot hold that the condition has not been fulfilled, especially since it cannot conceivably over the action of the UNDP, which is an organisation external to the FAO. Furthermore, while it was the duty of the complainant to initiate the procedures for obtaining the medical and loyalty clearances, it would clearly be the duty of the Organization to initiate the like procedures in respect of the internal clearances and, if they were unsuccessful, to explain why they had failed. The Organization has produced no evidence on this.

On the indemnity:

13. It is not disputed that if there was a binding contract and if the appointment would have lasted for the whole six months of the proposed consultancy, the complainant is entitled to the indemnity he claims, amounting to $11,632.50 and based on the salary and other benefits which he would have received. The Organization, however, relies on Clause 17 of the contract which provides that the employment may be terminated by either party upon written notice of two weeks. A similar provision with the addition of a clause to provide that on such a termination consultants are not entitled to any indemnity, is contained in Manual section 317, which is also part of the contract. The Organization contends that if the appointment had been made, it could and would have terminated it by giving a fortnight's notice and accordingly that the indemnity payable to the complainant should be calculated on the loss of two weeks' employment.

14. In the opinion of the Tribunal good faith would forbid the use of a clause of this type simply for the purpose of destroying the contract. There must be reasonable grounds to justify a premature termination. The complainant, as the Organization knew, was to travel from California and to arrange his own accommodation in Rome; it cannot have been intended that he was to make all his arrangements terminable at any time within a fortnight. If on the other hand the complainant gave notice when his study was unfinished, the Organization would derive little or no benefit from the contract. In the circumstances Clause 17 must be read as permitting termination only on reasonable grounds.

15. It is possible that an event such as the withdrawal of the UNDP finance might be shown as having such a crippling effect on the Organization's ability to continue with the contract as to constitute reasonable grounds for its termination. But there is no material in the dossier which would enable the Tribunal to reach any conclusion about the effect of the withdrawal. There is no reference to the UNDP in the contract. Presumably it was to pay the complainant's salary in whole or in part, but there is no adequate statement anywhere in the dossier of what the financial arrangements were with the FAO or of how they affected the Organization's ability to finance its contracts. The only communications disclosed from the UNDP are two cables. The first dated 22 January 1976 states that the UNDP is "unable to authorise" three months of the proposed consultancy and suggests another source. The second dated 29 January approves one proposed consultancy but is "unable to approve" the remaining three months of the complainant's consultancy. There is nothing in this to connect the disapprovals with any financial situation. The FAO's decision to cancel its arrangements with the complainant was not taken until 17 February; the delay suggests that there may have been other factors to consider. Finally, there is a great difference between stopping recruitments and terminating prematurely contracts which have already been concluded. Presumably on the information given to it by the Organization the UNDP believed that in the complainant's case all it was doing was to stop additional recruitment; it does not follow that it would have acted in the same way in the case of a concluded contract.

DECISION:

For the above reasons,

The Tribunal quashes the Director-General's decision of 14 December 1976 and orders the Organization to pay to the complainant:

1. an indemnity of 11,632.50 United States dollars together with interest at 8 per cent per annum running from 1 July 1976, and

2. 1,000 United States dollars for legal costs.

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

Delivered in public sitting in Geneva on 8 May 1978.

M. Letourneur
André Grisel
Devlin

Roland Morellet

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